

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

7:00 P.M.

CITY COUNCIL CHAMBERS

OCTOBER 21, 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 MINUTES**

Minutes from September 16, 2003 meeting were approved unanimously.

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II. OLD BUSINESS

A) Petition of **John W. Gray Revocable Trust and Bradford A. Gray Revocable Trust, owners, Redlon & Johnson, applicant**, for property located at **126 Bridge Street** wherein a Variance from Article II, Section 10-208 is requested to allow the outdoor storage of materials and products at the rear of the existing building. Said property is shown on Assessor Plan 125 as Lot 16 and lies within the Central Business B and Historic A districts. Case # 8-12

The applicant requested that this matter be withdrawn.

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B) **Request for Re-Hearing for 21 Blossom Street**, requested by Sharon Cuddy Somers on behalf of Katheen Beauchamp. Said property is shown on Assessor Plan 110, Lot 3 and lies within the General Residence B and Historic A Districts.

**DECISION OF THE BOARD:**

Mr. Witham made a motion to grant the Request for Re-Hearing. Mr. Parrott seconded. Mr. Witham felt that this met the criteria for a re-hearing based on new information submitted. There was some evidence of a medical condition that necessitated the variance request. The Board also had concerns with shadows on a garden next door and how that may effect the value of their property. The applicant submitted a shadow diagram for the different times of the year. Mr. Witham felt that showed the minimal impact that this would have and that with those two pieces of information they should be allowed the right to a new hearing.

Mr. Parrott indicated that his reading of the submission was that the applicant took the concerns of their neighbors and the Board members into account and addressed each one of them in detail so therefore he felt it would be appropriate for the Board to reconsider the variance request.

Mr. Jousse indicated he would not be supporting the motion. He stated that the applicant was requesting a re-hearing on the grounds of disability which was not a condition that exists at this time. The disabled person in question does not reside in that dwelling but may possibly reside in that dwelling in the future. If that was the criteria for granting a re-hearing then almost every house in the City of Portsmouth would be granted such a request.

Mr. Witham stated that it was his understanding that the individual has been diagnosed with this condition and it is one that generates over the years to the point where he may require a wheelchair. This person is also engaged to be married to the applicant so Mr. Witham felt it was pretty clear that the individual will be moving into the house. He did not feel that they were trying to "pull a fast one" but were trying to make the house liveable for the very near future.

Vice-Chairman Horrgian indicated that he would be voting for the motion although he did vote against the original petition. He was unaware of the extent of the issue of the petitioner's fiance being handicapped. He went back and checked the minutes and determined that it was mentioned but they were not given this detail. It was mentioned almost in passing so he freely admitted that he did not have this information at the time that he made his decision and he would like to re-hear it again under those circumstances.

Chairman LeBlanc indicated that he would not be supporting the motion. He felt that the information was available, or should have been available, at the last hearing in August. As far as the plan that shows the shadow on the Zarbarsky's yard, the Zarbarsky's were concerned with light and air movement and were not particularly concerned with the way the shadows go. He believed they knew where the sun rises and sets and that it doesn't come in over this particular property. He did not think this was a motion that they could re-hear as they had the fact that one of the people that was going to live in this house was handicapped and that this was going to be done to accommodate that particular disability. He felt it was just that the applicant did not present the detail that was available to them at that time and he would not support the motion.

The motion to grant a re-hearing passed with a 4-3 vote, with Mr. Jousse, Mr. Rogers, and Chairman Le Blanc voting in the negative.

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III. PUBLIC HEARINGS

- 1) Petition of **Robert C. & Debi L. Pekousky, owners**, for property located at **121 Aldrich Road** wherein a Variance from Article III, Section 10-302(A) is requested to allow the existing 98 sf irregular deck to be repaired and rebuilt and construct an additional 8' x 8' section both with an 6' right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 153 as Lot 36 and lies within the Single Residence B district. Case # 9-2

SPEAKING TO THE PETITION:

Bob and Debi Pekousky appeared before the Board. Mr. Pekousky stated that they were requesting a variance to allow their existing deck be repaired with an 8' extension added that would be nearer to the lot line than the original deck, which had been in existence for over 18 years. Their hardship has to do with the lot itself and their utilization of the lot. Their lot is 47' wide, their house is 90 years old and the

existing deck is the current method for entering and exiting the house. The 8' x 8' extension gives them just enough space to have a small table on their deck. Their bulkhead entrance is on the back of the house and that would have to be moved to put the deck on the back of the house rather than the side. Mr. Pekousky felt that his photographs reflected that the deck would not injure the rights of others. The neighbors across the street can just barely see their deck or can't see it at all. It is a tight neighborhood with close boundaries. This is important to them as it increases the value of their property and gives them a great deal of pleasure. Debi Pekousky read a letter of support written by Patricia Martine, an abutting neighbor.

Chairman Le Blanc asked exactly where the bulkhead was located. Mr. Pekousky indicated that it was to the left of the existing deck.

Mr. Jousse confirmed that they were replacing the old deck because it was rotten? Mr. Pekousky indicated that the actual support framing and posts were all sound so just the cross beams and the boards themselves needed replacing.

SPEAKING IN OPPOSITION:

Joan Clark, of 101 Aldrich Road, addressed the Board in opposition. She presented signatures from abutters who were also in opposition. She did not feel there was any need for a variance. It may cost them more money to place the deck in another location but that was no excuse. The deck can be seen from the street and she presented photos of the deck as it could be seen from the street. They have a privacy fence between the lots but the deck is so high that the fence doesn't serve any purpose. She felt it was too much, too close and would not help with the resale value of her property. She will not have any privacy.

Chairman Le Blanc asked how high her fence was. Ms. Clark indicated it was 6' high.

DECISION OF THE BOARD:

Mr. Parrott asked the exact height of the deck and Mr. Pekousky indicated it was between 36" to 43", because the ground slopes.

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Holloway seconded. Mr. Rogers felt that this was difficult because the variance contained two different elements. He felt that to repair the existing deck was a safety factor and would allow them to utilize the deck that is already there and that is a hardship. It shouldn't be contrary to the public interest to make something safe to be used. An 8' x 8' deck is pretty small and they are only expanding the deck out to the side so it would not be detrimental. Special conditions exist as the old deck exists and it is a very small lot. If they are to keep the deck they will require approval to rebuild. The restrictions that apply to this specific property interferes with a reasonable use when you look at it in that light. He did not feel that there was any relationship to the purpose of the Zoning Ordinance and their use of the existing deck. He did not feel that repairing the existing deck would injure the public or private rights of any individual and it would be substantial justice to grant that particular portion of the variance. As far as the 8' x 8' addition, he felt that was within the spirit of the Zoning Ordinance as it was a very small addition to the deck. It was still the same setback, even though it was a little higher in the back. He did not believe they should consider how high the railing was in relation to the fence because it's where you are standing on the deck that is

the view over the fence. Therefore, he did not believe it would diminish the value of the surrounding properties.

Mr. Holloway seconded for discussion and agreed with Mr. Rogers. Because of the size and shape of the lot, whatever they do will effect someone, one way or the other. That is why he supports the motion.

Mr. Witham struggled with this one. He took Ms. Clark's opposition into consideration. The side setback isn't the major concern but rather the height of the deck. They could make the applicants move the deck over 3 1/2' and they wouldn't need a variance but the view over the fence would be the same so he didn't see any need to force them to do so. His concern was with the value of the abutter's property but he did not believe it would diminish the value at all.

Mr. Marchewka felt that this was a reasonable request however the abutter who is effected the most provided photos reflecting how this would effect her property and he felt it illustrated that a platform was being built fairly close to her property which was elevated. He felt it would have an effect on her privacy and that would effect her private rights and decrease her privacy. He would not support the motion.

The motion to grant passed with a 5-2 vote, with Mr. Marchewka and Chairman Le Blanc voting in the negative.



2) Petition of **Roni and Gilbert Hudson, owners**, for property located at **1641 Lafayette Road** wherein Variances from Article III, Section 10-301(A)(8) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 16' x 30' one story addition with a roof deck and an 8' x 46' L-shaped porch with stairs 40' 10" from the front property line where 105' is the minimum front yard required. Said property is shown on Assessor Plan 251 as Lot 128 and lies within the Single Residence B district. Case # 10-1

SPEAKING TO THE PETITION:

Roni Hudson addressed the Board. She indicated that she had resided at 1641 Lafayette Road for 20 years and was not going beyond the farthest perimeters of the home. The main addition will face Wilson Road. The front faces Lafayette Road but they will not be going any closer to the road. They are replacing a structure that was not sound and needed to be replaced.

Mr. Holloway asked if it was a single deck with anything underneath? Ms. Hudson indicated that the upper deck would be on the new addition roof.

Mr. Berg asked if she felt the addition would have any impact on the neighbor's properties? Ms. Hudson felt it would increase the value of surrounding properties.

DECISION OF THE BOARD:

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Marchewka seconded. Vice-Chairman Horrigan indicated that the variance involved the setback from Lafayette Road where 105' is the minimum front yard requirement. This house, along with virtually every other house in the neighborhood is within that 105' setback so there is nothing unique about this property. He actually felt that this house was further back than most of the properties. It was difficult to

imagine that the whole row of houses would be taken down to allow for the future expansion of Lafayette Road so he did not see a serious public interest issue. Regarding the hardship, there was no other place to make additions to the site other than where they were proposing. Otherwise they would destroy very nice vegetation. The zoning restriction that would force them to put the addition to the rear was unreasonable. For the same reason, there is no fair and substantial relationship between the Zoning Ordinance and this particular restriction on the property. The Zoning Ordinance is not going to dictate that a whole row of houses be taken down because they are in the 105' setback. The variance would not injure the public or private rights of others. He could not see how any public rights were involved and as far as private rights, he did not believe the addition would have any effect at all on the surrounding properties. He felt what they were requesting was consistent with the Zoning Ordinance which was to allow people to enjoy the full use and enjoyment of their property. Substantial justice is done by granting the variance because, if the Board was to deny it, they would be denying the owners from any type of reasonable expansion of their homes. Finally, as the petitioner pointed out, the values of surrounding properties would probably be increased and he agreed with her.

Mr. Marchewka agreed with Vice-Chairman Horrigan and added that it is in the best interest of the community and the neighborhood to allow expansion of the residences along Lafayette Road as they are a buffer between commercial and residential and it is best to promote those as liveable residences. The fact that the Board was allowing her to improve her residence will be good for that neighborhood and will help retain the residential flavor which could be lost if people were not allowed to improve their homes along that strip of land.

Mr. Jousse asked if the maker and seconder of the motion would agree that the porch not be closed in? He felt it would be very easy for someone in the future to convert this addition to living space instead of an outdoor space. Vice-Chairman Horrigan and Mr. Marchewka did not have a problem with that happening and would not agree to the stipulation.

The motion to grant as presented and advertised passed unanimously.

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3) Petition of **Dean A. Outhouse, owner**, for property located at **133 Orchard Street** wherein a Variance from Article IV, Section 10-402(B) is requested to allow a 12' x 28' one story garage/workshop with 0' right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 149 as Lot 44 and lies within the General Residence A district. Case # 10-2

**SPEAKING TO THE PETITION:**

Attorney John Bosen addressed the Board on behalf of Dean and Jesse Outhouse. He indicated that this is a single family home, requesting to add a detached garage. The left corner of the garage will sit on the boundary line and the right rear corner about 4' from the boundary line. The ordinance requests a 10' setback. They feel the circumstances surrounding their request was justified.

The Outhouses do not believe this addition will have any impact on surrounding property values. In fact, if anything the presence of a new garage will enhance the values of the neighborhood. There currently is no garage on the property and the Outhouses are required to put all of their trash cans, garage items, tools, and their car outside. They are unable to use their basement because it takes on water. The lot will look much nicer with all of these items inside the new garage. There will be no impact on the general public or

neighboring property owners. It is their understanding that there are no objections from any abutters to this request. Attorney Bosen indicated that there was an unnecessary hardship on the Outhouses as there is ledge on the left side of the house as well as in the rear and the only location where they could put the garage was to the right of the home. The ledge creates a unique condition to the land and it is a classic hardship. Almost all of the homes in the neighborhood have garages and many of them are on their property lines. By granting the variance, substantial justice would be done. The loss to the Outhouses if the variance were denied far outweighs any benefit to the public. By granting the variance, the spirit and intent of the ordinance would not be compromised in any way. It was a very reasonable request. Attorney Bosen presented a letter from Jeffrey and Karen Mountjoy of 62 Orchard Street, indicating that they supported the petition.

Mr. Jousse asked about the yellow "X" in the driveway and what it represented. Mr. Outhouse indicated it was where they separate the retaining wall from the landscaping on the left hand side and it has nothing to do with the garage.

Chairman Le Blanc indicated that this lot line was not perpendicular to Orchard Street so it would require that his driveway be angled away. Mr. Outhouse indicated that the driveway was currently angled and 3-4 cars deep and it's a pretty steep driveway.

Mr. Witham asked about the ledge in the back of the proposed garage and what the grade of the ledge was in relation to the slab in the garage? Mr. Outhouse indicated that the slab would be below that by about 3'. Mr. Witham noticed abutters on lots 45, 46 & 47 all have out buildings/garages to the rear of their properties and he wondered why he wasn't able to put his in the rear. Mr. Outhouse indicated that the foundation of his house was actually carved out of ledge. The left side of the house is one big rock that goes up to the second story.

Chairman Le Blanc read a letter from Paul Bernier, of 115 Orchard Street, who did not oppose the addition.

#### **DECISION OF THE BOARD:**

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Holloway seconded. Vice-Chairman Horrigan agreed with Attorney Bosen that this was a classic case of hardship as there is a very large ledge to the left of the house that blocks any extension unless they start blasting the ledge. There is also ledge to the rear which also dictates that, if there is going to be a garage attached to the house, it must be where they are planning to put it. The public interest is the immediate neighborhood and, in particular, the owner of Lot #35, 115 Orchard Street, who is impacted the most. He has a very extensive garden on that side of the property. As far as the other neighbors, their interest would be the eventual landscaping concern. The petitioner currently has to store yard materials and equipment outside which may be considered unsightly so it would be in the neighbors interest to have a garage. There is a very general public interest to encourage homeowners to build garages and to take some of the parking of automobiles off of the street. The hardship and the zoning restrictions as applied to this property interfere with the petitioner's use. There is no other location to expand into because of the ledge. No fair and substantial relationship exists between the general purpose of the Zoning Ordinance and the restriction on the property. The Zoning Ordinance does encourage expansion of this type and encourages the indoor storage of equipment and automobiles. Vice-Chairman Horrigan did not feel this injured the public or private rights of others because there weren't any public rights and he already spoke to the private right of the neighbor, who wrote a letter indicating that he did not have a problem with the proposal. The

proposal is consistent with the general spirit of the ordinance which is to allow homeowners to enjoy their property as fully as possible and denying the variance would be an injustice to this property owner as he didn't create the ledge. The granting of the variance will not diminish the values of surrounding property values. The property owner will be improving the appearance of his house so it will enhance the value of the surrounding homes as well.

Mr. Holloway agreed with Vice-Chairman Horrigan.

Mr. Witham indicated that he was in support of the sideyard setback but he could not support it as it was presented. He had a very hard time with 0' setback. Mr. Witham understands that the current abutter doesn't have a problem with this addition, however, if the property ever changed hands and the new property owner wanted to put up a fence, he would have a garage and a fence touching. He would be digging up his neighbors property in order to construct this garage. Mr. Witham would be more comfortable with more of a 2' setback. There are other structures in the city that sit on property lines but those pre-date the Zoning Ordinance. He supports the garage but he feels its alittle bit too long and the 0' setback is just too tight for him.

Vice-Chairman Horrigan was also concerned about the length of the garage but pointed out that the garage is very narrow. Also, two other properties have garages on the property lines. He did not want to deny a petition on an "if, then" proposition.

Mr. Marchewka indicated that the petition was not out of character for the neighborhood.

The motion to grant passed with a 6-1 vote, with Mr. Witham voting in the negative.

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4) Petition of **Ellen S. Cohen, owner**, for property located at **124 Broad Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(1)(b) are requested to allow an 8' x 18' deck with: a) a 3' left side yard where 10' is the minimum required, and b) 36.5% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 134 as Lot 19 and lies within the General Residence A district. Case # 10-3

SPEAKING TO THE PETITION:

Ellen Cohn addressed the Board. She is desirous of having a deck on the back of her house where she can put a very small table and chairs. She has a very small lot and distributed pictures to the Board of her lot.

Vice Chairman Horrigan asked if there was a fence along the property line? Ms. Cohn indicated that there was and that there were trees. The fence was approximately 8' high.

DECISION OF THE BOARD:

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Marchewka seconded. Mr. Rogers stated that the lot itself was a hardship. Granting the variance would not be contrary to the public interest. The side yard starts at around 10' and dwindles down to 4'. The deck would eventually only be 3' from the property line because of how the property tapers in. He felt that was a hardship with respect to the property. Her reasonable use of the property was interfered with and there was no fair and

substantial relationship between the ordinance and the shape of the lot. The additional building coverage of 11.5% on a fairly small lot that is long and thin is not inappropriate to allow a small deck. Substantial justice would be done by granting the petition and it was in the spirit of the ordinance to grant the deck. It would not diminish the values of any surrounding properties.

Mr. Marchewka agreed with Mr. Rogers. He felt a deck was not out of character for the neighborhood and it was not an unreasonable size. Her property seems to be surrounded by garages so there wouldn't be any diminution of value to surrounding properties. It is a very odd shaped lot.

Vice-Chairman Horrigan indicated that the deck was 144 s.f. which was a 3.2% lot coverage increase so it was a very small increase.

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

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5) Petition of **Bethel Assembly of God, owner**, for property located at **200 Chase Drive** wherein Variances from Article II, Section 10-206(1) and Article IV, Section 10-401(A)(1)(b) are requested to allow a previously approved garage with a second floor apartment to be converted entirely to a single family dwelling by eliminating the garage on the first floor. Said property is shown on Assessor Plan 210 as Lot 2 and lies within the Single Residence B district. Case # 10-5

**SPEAKING TO THE PETITION:**

Attorney Bernard Pelech addressed the Board on behalf of the Bethel Assembly of God. The applicant was before the Board in March and was granted a variance to build a second parsonage on the site. That was to be a one-bedroom apartment over a two car garage. Unfortunately, that was not well thought out because the new Youth Pastor is married and has three children and the new apartment is not big enough for five people. Attorney Pelech indicated that they were back before the Board to get the same variance again or for an expansion of a non-conforming use because the variance was already granted. They were already given approval for a second dwelling unit and they still only want a second dwelling unit but they want to expand it by converting the first floor of the two car garage into two bedrooms and a family room. The kitchen will still be on the second floor and the second floor will remain the same.

Attorney Pelech indicated that this was a very large lot and was used as a church. The neighbors do not have any opposition to this request and the closest abutter spoke in favor last time. The renovations improved a run down garage so the overall appearance has improved and there will not be any diminution of property values. This will not be contrary to the public interest. As discussed back in March, it is in the public interest to have a new Youth Pastor to deal with troubled youth. Special conditions exists with respect to the property such that literal enforcement of the ordinance would result in a hardship. The minimal lot coverage in the single family district is 15,000 s.f. and this lot is ten times that size. Therefore, a second dwelling unit is not going to result in an over-intensification of the land nor is it going to result in inadequate light, air, etc. There will be about 1.5 acres of lot area per dwelling where the requirement is 7,500 s.f. They do not believe that there is any fair and substantial relationship between the general purpose of the ordinance as it applies to this particular piece of land. The granting of the variance would not result in any public or private rights of others being injured as there are no easements on the property, no over intensification of use and no traffic increase.



Attorney Pelech indicated that the granting of the variance was consistent with the spirit of the ordinance and would not detract from the general welfare of the public. The fact that the applicant is applying for the second dwelling unit, which was granted in March, and is asking to utilize the 1<sup>st</sup> floor as living space, was not contrary to the spirit or intent of the Zoning Ordinance. They would be willing to stipulate that the occupant must be an employee of the church. Substantial justice would be done by the granting of the variance. Attorney Pelech did not believe that the hardship upon the church was outweighed by some benefit to the general public if the variance was denied. If the variance was denied, the Young Pastor would have to move and live elsewhere which would not benefit the church.

In conclusion, Attorney Pelech felt that they met the five criteria to amend the previously granted variance. Representatives of the church were present to answer any questions.

Mr. Holloway asked if the second floor would remain the same? Attorney Pelech confirmed that there would be no changes.

Vice Chairman Horrigan did not agree that they were re-ratifying what they granted the last time, in March. At that point they were told that an old dilapidated garage was being replaced with a new garage and they were asked to allow an apartment above it. That is not the same thing at all. Vice-Chairman Horrigan felt that they were looking at an entirely new variance and certainly the previous variance makes reference to the proposed detached garage which was what originated that request. Attorney Pelech indicated that the relief that was requested was for a second dwelling unit and it would still be for a second dwelling unit.

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

Greg Bosselait, of 411 Cutts Avenue, spoke in favor of the petition. He has become a member of the church and he supports their plans to make the apartment bigger.

Vice-Chairman Horrigan indicated that he was the abutter that looked right at the structure. Would he mind if the cars were parked right there on the site rather than in the parking lot? Mr. Bosselait indicated that there were pretty good sized driveways for them to use so he did not see any problems.

#### **DECISION OF THE BOARD:**

Mr. Rogers made a motion to grant the petition as presented and advertised, with the stipulation that the dwelling unit be occupied by church personnel only. Mr. Jousse seconded.

Mr. Rogers indicated that this was not contrary to public interest as the Board had already approved a second floor dwelling for a pastor. It is a very large lot and will be used for church use. He felt that the hardship is that it was a very small apartment and the zoning restrictions interfere with the reasonable use of the property. It is a very large piece of property and the zoning restrictions seem to interfere with the property. Mr. Rogers did not believe there was any fair and substantial relationship existing between the purpose of the zoning and the specific use of the property. It will not injure the rights of any neighbors or abutters and it is in the spirit of the Zoning Ordinance to increase the unit from a 2<sup>nd</sup> floor single family apartment to a single family dwelling. Mr. Rogers did not believe that the granting of the variance would interfere with any of the surrounding properties.

Mr. Jousse agreed with Mr. Rogers and admitted that he was apprehensive when he saw the petition. He is always leery when they approve a variance for something and a few months later they see the same property come up with an expanded version of what the Board approved. Mr. Jousse indicated that the purpose of the dwelling was to attract a youth pastor and to have him live off the property is counter-productive. The youth pastor who happens to be lined up has children and granting the variance would be beneficial to the community and the City of Portsmouth.

Vice-Chairman Horrigan agreed with Mr. Jousse's opening remarks. He was also leery about altering a previous petition that was granted about 6 months ago and that changing a property from an apartment over a garage to a single detached home is a major change and requires the Board to go through the criteria required for any petition. He did not feel they were updating what they did six months ago. This was an entirely different proposition. However, having said that, Vice-Chairman Horrigan felt that this proposal is appropriate given all of the arguments that were made originally so he did not see any reason to oppose it.

The motion to grant passed unanimously with a vote of 7-0 with the stipulation that the dwelling be used by church personnel only.



6) Petition of **The Morley Company, owner, and Dogs & Peoples, applicant** for property located at **909 Islington Street** wherein Variances from Article II, Section 10-208 and Article XII, Section 10-104 Table 15 are requested to allow a dog day care facility with up to 40 dogs and associated grooming facility with 5 grooming stations in 5,980 sf of an existing building and associated parking in a district where such use is not allowed. Said property is shown on Assessor Plan 172 as Lot 7 and lies within the Business district. Case # 10-6

Christopher Rogers stepped down from this hearing, making Alternate Arthur Parrott a voting member.

**SPEAKING TO THE PETITION:**

Attorney Bernard Pelech addressed the Board on behalf of the owner and applicant. With him was Lisa Lang, one of the principals of Dogs & Peoples. He reminded the Board that this was the same location as Dow's new service station, which was approved earlier in the year. It is a large brick structure, a very solid building, set back by about 225' - 250' from Islington Street, directly behind the Ampet Service Station on Islington Street. There is access from Islington Street via a series of right-of-ways. Parking is on site and no parking variance is required. It was determined that one parking space would be required for every 4 dogs, based on the same formula as a child daycare center.

This location is surrounded by service businesses that make noise. Attorney Pelech spoke with Mr. Dow who had no concern about having the dog daycenter adjacent to his building but separated by an 18" masonry wall with steel fire doors. Behind the building is a grassy strip that abuts the Boston and Maine Railroad. On the other side is a transportation tractor trucking company. To the left is Dow's Service Station and another large brick building that has recently been purchased and is planned to have commercial tenants. There are no residential users in close proximity at all.

Attorney Pelech indicated that they were proposing a 5980 ± s.f. dog daycare center. The dogs would be indoor for the majority of the day and taken out twice a day to relieve themselves to the rear of the

property on the grass strip. The City was concerned about waste removal. Arrangements have been made to remove it immediately, store it in a plastic container and picked up by a private waste handler. The Planning Dept. was also concerned about the dogs urinating behind the building on a frequent basis. They will be using neutralizers to handle the effects of the urine on the earth. The area will be meticulously groomed and maintained. The Planning Department was also concerned about noise and Attorney Pelech indicated it was a very sound structure and the walls will be enhanced with sound deafening barriers.

Attorney Pelech addressed the five criteria. The requested variance will not result in any diminution in value of surrounding properties. This is an ideal location as there are no residences nearby. It is a thick walled masonry building surrounded entirely by commercial users. He did not believe that this would in any way diminish the values of surrounding properties. The applicants proposed use is entirely inside the building with the exception of the small outdoor area that will be used for relief.

Attorney Pelech indicated that there are special conditions that exist with respect to the property. They are not seeking a variance for something that is prohibited in this zone but rather this is something that was not a use contemplated by the makers of the ordinance when it was drafted. In the 1950's, most ordinances didn't have any provisions for childcare centers because the concept just didn't exist. There are currently two dog care centers in surrounding towns and it is a very popular use. Many people who do not have children now have dogs and they would like to have a place to bring them during the day rather than leave them home alone. Attorney Pelech felt this was a reasonable use and that the ordinance interfered with the reasonable use of the property.

Attorney Pelech did not feel that there was a fair and substantial relationship between the general purpose of the zoning ordinance and the specific restriction. "The general purpose of the ordinance is to promote the health, safety and general welfare of the public in accordance with the Master Plan for the future development of the City. Furthermore the purpose of the zoning ordinance is designed to lessen congestion in the street, secure safety from fire, mechanic and other dangers and to promote general health and welfare of the public." Attorney Pelech did not believe a dog daycare was contrary to the purpose of the ordinance and in fact was consistent as it promotes the general welfare of the public. It provides a needed service to members of the public which is currently not available in the city.

Attorney Pelech did not feel that the granting of the variance would injure the public or private rights of others. There are no easements across the property which would adversely be effected. There are no public rights that would be interfered with.

Attorney Pelech believed the requested variance would be consistent with the spirit of the ordinance. As he stated previously, the ordinance speaks to the general welfare of the public. There is nothing that speaks to a dog daycare center that would be contrary to the purpose of the zoning ordinance. Therefore, he would assume that it was not contrary to the spirit of the ordinance.

Substantial justice would be done by granting the variance. Attorney Pelech used his balancing test – is the hardship on the applicant outweighed by some benefit to the general public by denying the variance? Attorney Pelech could not see any benefit to the general public resulting from a denial of a variance. To the contrary, if the variance were denied, the general public will not be benefited and their interest will be harmed as there are at least 50 people who would love to have their dog at the daycare center.

Attorney Pelech indicated that the dogcare center would have a screening process for each dog. If the dog was a barker, he would not be allowed. If the dog did not behave properly, he would be "expelled".

The granting of the variance would not be contrary to the public interest. The employees at the facility will be at-risk teenage girls. This is part of a program where these girls will be trained in animal care and will be employed by the daycare. The dogcare center will not be open on weekends but there will be five grooming stations and some of the employees will be able to groom dogs.

Attorney Pelech had various letters in support of the dogcare center which he presented to the Board for inclusion into the record. He also presented a petition in support of the Petition which had been posted at the Portsmouth Dog Park and was signed by various individuals.

Mr. Berg indicated that veterinarians or kennels were allowed by Special Exception.

Mr. Witham indicated that he didn't get around to the back of the building as he didn't know that was part of the proposal. He asked if the dogs would be leashed when they were outside. Attorney Pelech indicated there was a 20' area between the building and a chain link fence that runs along the Boston & Maine right-of-way. There are no fences on the right or the left so the dogs will be on leashes and taken out two or three at a time.

Lisa Lang, President of Dogs and Peoples, indicated that the dogs would be taken out one by one, on a leash, to take potty breaks, two or three times a day. The waste will be cleaned up immediately.

Mr. Witham asked how they were going to maintain their space in the winter with snow? Ms. Lang indicated that there are some cement blocks that could be used for snow storage. She could get a snowblower back to the area.

Vice-Chairman Horrigan asked if she intended to landscape the area? Ms. Lang indicated that she would be cleaning it up, mowing the grass, using chemical compounds to deal with the dog urine. They will be using a chemical called "Poo Be Gone".

Vice-Chairman Horrigan asked how she intended to deal with keeping the grass. Ms. Lang indicated that the dogs didn't need grass and she may just plant a couple of little trees.

Chairman LeBlanc asked if they would be open on Saturday or Sunday? Ms. Lang indicated that she would be open on Saturday but not for daycare. Saturday and Sunday she will be open for residents to use the rooms to wash and groom their dogs. The daycare area will be filled with equipment and toys that owners can come in and use with their dogs, on the idea of an indoor dog park. She wouldn't expect more than 10 dogs at a time. She would be open 10:00 a.m. – 6:00 p.m. on Saturday. Weekdays, 7:00 a.m. – 7:00 p.m.

Mr. Jousse asked Ms. Lang to elaborate on the instruction being given to the attendants. Ms. Lang indicated that there are no laws regulating dog daycares. The organization that has taken this on is the American Board and Kennel Association and they are trying to establish dog daycare guidelines. She will be using their guidelines to operate her facility. One guideline is that there should be one human for every ten dogs. All of her staff will be certified in dog CPR and will have rabies vaccinations. She is trying to teach teen age girls who are not going on to college a skill. She will also have doggie riki and doggie massage therapists available at her facility.

Vice Chairman Horrigan asked about the noise issue and the interior layout of the building. Ms. Lang indicated that the 6,000 s.f. has only one dividing wall.

**SPEAKING IN FAVOR OF THE PETITION:**

Joshua Cyr, of 159 Austin Street, owner of Harbourlight Productions, spoke in support of the Dog Daycare so that his employees will have adequate daycare for their dogs.

Suzanne Green, Board Member of Dog owners group of Portsmouth, who is instrumental in maintaining the dog park in Portsmouth. She wanted to comment on Vice Chairman Horrigan's remark about the lack of grass at the City dog park and she felt it was because of the fireworks and the chemicals and sand that the City uses for that function. She felt that this was a much needed facility in the City.

David Choate, of Grubb & Ellis, helped the applicant find this location for the daycare. He indicated it was very difficult finding a location within the city for this facility but felt this was as good of a location as they were going to find in the City.

Jeff Gray, of 67 Market Street, spoke in support and felt it would be especially beneficial in the winter for the grooming stations.

Greg Bean, of 185 Madison Street, indicated that he doesn't have a dog because he works out of town. It feels it is a useful and needed addition to the community.

**SPEAKING IN OPPOSITION TO THE PETITION:**

Stephen Hamblin, of 306 Aldrich Road, which is the fourth house on the right from Islington Street. He feels this would be too close to the residential neighborhood and there are much better places in the city for it. The dogs will be outside and will bark throughout the day, even Saturdays and Sundays. Those dogs will set off the dogs in their neighborhood also.

Carl Diemer, of 337 Aldrich Road, spoke in opposition. He felt this was a good idea at the right location. He does not believe the building is adequate as it is very old and outdated. The glass would not be soundproof. It would be extremely noisy during the day in the summertime. At night he can hear people talking at the Ampit Gas Station and the homeless people down by the button factory. He did not believe the surrounding businesses were conducive to live animals. He felt this sounded very similar to a dog kennel. There isn't enough green space to accommodate that many dogs. There would not be enough room for the dogs to run around. Would the variance stop the facility from overnight stays? Attorney Pelech provided a list of people in support of the dog daycare however none of them live right next to the facility. He felt that they did not meet the criteria necessary to grant the variance.

Mr. Jousse asked how far his house was from the site? Mr. Diemer indicated it was approximately 250 yards.

Attorney Pelech indicated that no overnight boarding was planned and they would stipulate to that fact. He indicated that Fleet Bank was between Mr. Diemer's property and Islington Street.

Mr. Marchewka asked if the facility would be air conditioned? Ms. Lang indicated that Jeff Green was her general contractor and was making extensive renovations in the building.

Mr. Green indicated that he spoke with John Lanoie and they are having engineering plans done. As it stands right now, they are getting an air purity exchanger with 5900 cubic feet per minute, which is the requirement for a kennel or this facility. Roger Clum and Scott Young came to the facility and inspected the premises. The windows will be kept closed and air conditioning will probably be added at some point.

### **DECISION OF THE BOARD:**

Mr. Parrott asked about enforcing noise violations. Mr. Tillman indicated that the Zoning Enforcement Officer would be responsible for that and she encouraged the Board to make stipulations regarding the noise levels to protect the residents.

Mr. Witham made a motion to grant the petition as presented and advertised, with the following stipulations:

- No noise to emanate over the property line to the residential neighbors;
- Portsmouth Animal Control Officer to inspect and approve the set up of the facility;
- Hours of operation to be 7:00 a.m. – 7:00 p.m. Monday through Friday; 10:00 a.m. – 6:00 p.m. Saturdays and Sundays; no dogsitting on weekends or holidays;
- Landscaping will not be degraded from its present condition.

Mr. Parrott seconded. Mr. Witham needed to be convinced that this would work and he felt that he had been. He is sympathetic to neighbor's concerns about noise but he feels the construction of the buildings and the distance from the residential homes is adequate. Overall he supports the application. It's a little tricky to cover the criteria as it is not specifically not allowed but rather its not mentioned as a use.

He felt that this would not be contrary to the public interest to allow this use as there does seem to be a demand for it. He did not feel that the public interest would be injured. It is a reasonable use for the property. It is somewhat of a unique setting. Considering the uses that surround it, an automobile shop could be quite noisy and the Board didn't have any abutters in opposition to that when it came before the Board. He believes the noise can be handled. Regarding the relationship between the zoning ordinance and the restriction on the property, he did not believe it held because it doesn't say that you can't have it but rather you have to prove that you can and he feels that they have shown that it will not be detrimental to the surrounding area. He doesn't believe it will injure the private or public rights of others, especially the direct abutters who are all in favor of it. He feels it is consistent with the spirit of the ordinance, to allow a business that there is a public need for that has not been addressed by zoning. He believes that substantial justice will be done by granting the variance as it does allow a needed business to operate in the City. He does not believe it will diminish the values of surrounding properties. His only concern was that the noise might effect surrounding property but they will be walking the dogs as far away as they can from the residential area.

Vice Chairman Horrigan responded to the statement that this would be a good use for the industrial district. He disagrees strongly with that notion. Industrial sites are our best hope for good paying jobs for the residents of Portsmouth. This is not an industrial site but rather is zoned Business and this type of business could be an appropriate business for this site. If it was an industrial site he would be opposed to it. Secondly, he does not believe that dogs don't have any effect on landscape. They dig up yards and he

believes there is a problem relative to what may happen to the rear area and the stipulation regarding the maintenance of that area is very important.

The motion to grant passed with a 6-1 vote, with Mr. Holloway voting in the negative.

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7) Petition of **Paul Lane, owner**, for property located at **428 Hanover Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow an existing 12' x 22' garage to be rebuilt with a) a 4' front yard where 5' is the minimum required, and b) a 0' right side yard where 10' is the minimum required v. Said property is shown on Assessor Plan 138 as Lot 7 and lies within the Apartment district. Case # 10-7

Mr Holloway made a motion to table this petition until the next regularly scheduled meeting. The motion was seconded.

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

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8) Petition of **Michael J. LaCroix, owner**, for property located at **151 High Street** wherein a Variance from Article II, Section 10-208 is requested to allow 200 sf of an existing garage to be used for a pet grooming business in a district where such use is not allowed. Said property is shown on Assessor Plan 118 as Lot 18 and lies within the Central Business B and Historic A districts. Case # 10-8

**SPEAKING TO THE PETITION:**

Michael LaCroix and his daughter Danielle were present to address the Board. Danielle LaCroix would be operating the business at 151 High Street. There are 5 garages in the back of the lot and he chose the garage furthest on the right which puts it as far as possible from any residence. There is a parking lot behind the garage and a parking lot in front of the garage and a parking lot to the right of the garage. Their plans were to fully insulate the garage and install air conditioning. The use of the garage would not be for boarding the dogs during the day. Customers would come on 2-3 hour intervals to drop off their dogs and come back and pick them up. Ms. LaCroix is certified to run a grooming business.

Vice-Chairman Horrigan asked Ms. LaCroix if she would be grooming cats and dogs? Ms. LaCroix indicated that she would groom both. They would be coming in one at a time. They would have a drop off time in the morning and there would be 4-5 dogs maximum at any specific time at her business. Her hours of operation would be from 7:00 a.m. to 5:00 p.m.

Vice-Chairman Horrigan asked about off site parking. Mr. LaCroix indicated there were five garages and they would convert one for the business. There is also parking for 6-7 cars. All together on the property there are over 12 parking spots. There will be no employees as the business is a sole proprietorship.

Mr. Holloway asked if the building would be sound-proof? Mr. LaCroix indicated that the building would be fully insulated and closed windows with an air conditioning unit. Mr. Holloway asked if the animals are caged while on the property. Ms. LaCroix indicated that they are caged at all times that they are not being groomed.

Chairman Le Blanc asked about waste disposal. Ms. La Croix indicated that she did not see that as being a problem as they are only going to be there for 2-3 hours. They would be relieved before they come in and a dog can usually hold until they would be picked up.

Mr. Parrott asked about the adjacent residences and how close does someone live to the business? Mr. LaCroix indicated that the closest resident was probably 75'. Mr. Parrott asked for clarification on how long the dogs would be left at the business. Ms. LaCroix reviewed the schedule they would follow, re-confirming that no more than 4-5 dogs would be left on the premises at any given time.

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

Kathy Walsh, who owns property across the street, 411 The Hill, spoke in opposition. Her concerns were the parking issue on High Street. When you drive down High Street from Hanover Street and you come out at the entrance by the Parade Mall, High Street narrows substantially. The driveway to the subject property is the very next driveway. Her property has been hit twice now near the fire hydrant by cars. People will be pulling into this driveway and backing out and she felt this would cause more congestion on the street. The other thing that Ms. Walsh felt was important was that this section of High Street was residential except for 2 businesses. The Hill, in the past two years, has gone through a major change where is it both professional and residences. Of the 14 houses, 8 of them are used for homes. One of the things that the Condo Association realizes is that the area is very conducive to dog walking. She understands that the dogs may be able to hold themselves for three hours but when they are picked up their owners will walk them across the street for them to relieve themselves. There does not seem to be any plan for what will happen concerning dog waste.

Chairman LeBlanc asked if there were problems with cars getting into and out of the lot? Ms. Walsh responded that it was a narrow driveway and people were going to have to circle around the back and come back out onto High Street. She believes the City thinks the reason their building has been hit twice is due to the narrowness of the street.

Mr. LaCroix addressed the situation of the street. He indicated that both of those accidents were when the bars were letting out. High Street has not been a problem area and he has not had any complaints from his tenants about getting in or out of the driveway.

### **DECISION OF THE BOARD:**

Mr. Holloway made a motion to grant the petition as presented and advertised, with the stipulation that the hours of operation be from 7:00 a.m. – 5:00 p.m., Tuesdays through Saturdays, that only one groomer be employed by the business, no more than six animals to be on the premises at any given time, and a pet daycare business not be conducted on this site. Mr. Rogers seconded.

Mr. Holloway did not feel that there would be any diminution of value to surrounding properties and there were no complaints from the neighbors, except the one person from across the street. The two accidents were satisfactorily explained.

Mr. Rogers did not feel that this would be contrary to the public interest. He felt there were special conditions as the property has a lot of garage and parking space in the back and this is a good use for it. He would be concerned if it had more than one operator but it appears to be a very small operation with



one groomer and enough room for 4-5 dogs. The traffic during the evening would be a consideration. This road does taper down, as do quite a few of the streets in the City, so people just have to look as they enter and exit the driveway. His tenants have not had a problem in the past. He did not feel it would be a hinderance to any city services or the surrounding properties. He felt the granting of the variance was consistent with the ordinance and justice would be done by granting the variance.

Mr. Jousse discussed the fact that the green spaces across the street or near the area more than likely would not be effected by the animals being brought in to be groomed because more of them would be brought in and out by car. He felt very few of the clients would bring their animals in on a lease.

Mr. Rogers stated, as a dog owner, most people would let their dogs relieve themselves before they put them in their car and they would be able to last for 3-4 hours.

The motion to grant as presented and advertised, with the four stipulations, passed with a vote of 6-1, with Mr. Witham voting in the negative.

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9) Petition of **Andrea L. Rogers, owner**, for property located at **610 Elwyn Road** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 24' x 24' two story attached garage with a 10' right side yard where 20' is the minimum required. Said property is shown on Assessor Plan 225 as Lot 47 and lies within the Single Residence A district. Case # 10-9

SPEAKING TO THE PETITION:

Mr. Rogers stepped down from this hearing. Mr. Parrott voted on this hearing.

Andrea Rogers addressed the Board. She indicated that the setbacks have changed since the original site work started in 1977. She has parked the cars there since 1977. The property sits well back from her neighbors on both sides as it is approximately four times larger than her direct abutters. Her neighbors can't even see the side of the house.

Chairman Le Blanc asked if the foundation and platform were already in place? Ms. Rogers confirmed that they have been since 1977.

Vice-Chairman Horrigan asked why the left side of the house wasn't considered for the garage? Ms. Rogers indicated that there was ledge on the left side of the house.

DECISION OF THE BOARD:

Mr. Jousse made a motion to grant the petition as presented and advertised. Mr. Holloway seconded. Mr. Jousse did not believe that the variance was contrary to the public interest. The special condition that exists is that the foundation and the footings were poured in 1977. The zoning restriction that applies was not in existence at that time. No fair and substantial relationship exists between the zoning ordinance and the restriction on this particular piece of property. The variance would not injure the public or private rights of others as the nearest house to this garage is 10' from the property line and it is at least 150' from the nearest house. Substantial justice would be done by granting the variance and it would not diminish the value of surrounding properties.

Mr. Holloway agreed with Mr. Jousse and supports the motion.

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

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10) Petition of **W.F. Becksted and W.F. Becksted Jr., owners**, for property located at **158 Cabot Street** wherein a Variance from Article XII, Sections 10-1201(A)(2) and 10-1201(3)(a)(1) are requested to allow a 10'6" wide accessway to 6 parking spaces where 24' is the minimum width required for accessways. Said property is shown on Assessor Plan 145 as Lot 80 and lies within the Apartment district. Case # 10-10

**SPEAKING TO THE PETITION:**

Attorney Bernard Pelech addressed the Board on behalf of the Becksteds. This is an existing 3-unit structure that is presently being renovated. There are presently 3 units and 2 parking spaces, one behind the other, between 158 and 144/146 Cabot Street. There is a severe shortage of parking on Cabot Street. Mr. Becksted is proposing a definite improvement by creating six parking spaces to the rear of the property to provide each unit 2 parking spaces. Unfortunately there is only 10'6" between the house and the property line. Fortunately, the property adjacent to this property did the same thing that the Becksteds are proposing to do and have 10' between their property line and the edge of the house so there is an approximately 20' paved driveway between the two houses. The residences of both houses will be able to use the 20' driveway although there is no written easement. Mr. Becksted has reached an agreement with the abutters that when they repave the area, they will repave the entire area between the two houses.

Attorney Pelech felt this was a win-win situation. This will take a lot of vehicles off of Cabot Street and eases a well known parking problem in that area. There is a hardship as there is a 50' wide lot with a 40' wide house which leaves 10' between the property line. There is a big back yard that is available for parking. They believe that there is no fair and substantial relationship between the intent of the ordinance requiring a 24' wide driveway and this particular property where that would be impossible. No private rights of others would be interfered with. This would not result in any diminution of values to surrounding properties because it will help a very congested parking situation on Cabot Street. It is not contrary to the spirit and intent of the ordinance as the purpose of the ordinance is to promote the general public health and welfare, and lessen congestion in the streets. This will certainly do that. This will result in substantial justice being done and the public will benefit by having less vehicles on the street. The hardship on the owner should the variance be denied is not going to be outweighed by any benefit to the public in denying the variance.

Chairman Le Blanc asked if there would be a deeded right of way? Attorney Pelech stated that there would not be a deeded right of way but in reality they drive on the imaginary property line all of the time.

Attorney Pelech indicated that the building is currently 3 apartments but when the renovations are done it will be marketed as 3 condominium units. The property has been surveyed.

**DECISION OF THE BOARD:**

Vice Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Marchewka seconded. Vice Chairman Horrigan indicated that he would normally be uneasy about tearing up a backyard for parking spaces but the Board knows that parking is a very tight situation in this area. In the interest of creating peace and harmony in this neighborhood he felt this was a very good move to move six parking spaces to the rear of the property. Therefore, he felt it was in the public interest for the Board to grant it. The hardship was pretty obvious as the building was 40' wide and it was only a 50' wide lot. How in the world could they possibly get a 24' driveway without chopping up part of the building. Vice Chairman Horrigan did not believe that was the intent of the Zoning Ordinance. He could not see that anyone's public or private rights were being injured and it was just the opposite. The public would be well-served by putting parking to the rear. They were in the spirit of the ordinance in granting the ordinance. He did not see any substantial justice issue at all. He did not see how it would have any relative impact on the values of properties in the neighborhood as they are only approving an existing situation. The two buildings already use the driveway as a 20' driveway so the Board would just be ratifying that.

Mr. Marchewka agreed with Vice-Chairman Horrigan. He felt that the literal enforcement of the Zoning Ordinance would mean that they couldn't park in the rear of the building and would force all of the parking to the front on Cabot Street which is already overcrowded and causes a public hazard.

Mr. Witham stated that many times, in these situations, the 24' wide requirement is excessive. Mr. Witham felt that the width they are proposing would work for a driveway. His dilemma is that over the past few months they have had several similar applications and they are continuing to pave backyards and greenspace. Part of the ordinance is the preservation of greenspace. So, he felt there was a tradeoff. It would not diminish property values is it will help with parking on the street. However, any neighbors who enjoy their backyard and their greenspace are getting a parking lot. Mr. Witham indicated it was always a struggle for him. He felt the narrow driveway worked in this situation and maybe the weakness in the ordinance was that it doesn't ask for a certain percentage of greenspace. He has concerns about the continual granting of narrow driveways to get to backyards, adding a large amount of pavement and eliminating greenspace.

Vice Chairman Horrigan joined in with Mr. Witham's comments and has the same concerns with this petition.

Mr. Jousse felt it was unfortunate that they couldn't mandate the applicants to use a particular type of materials for their parking area.

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



11) Petition of **Granite Bank, owner, Haymarket Square, LLC, applicant**, for property located at **93 Middle Street** wherein a Variance from Article XII, Section 10-1204 Table 15 is requested to allow 11 parking spaces to be provided where 17 parking spaces are required for 1,904 sf of the existing building to be used for business office and the remaining 1,904 sf to be used for a professional office. Said property

is shown on Assessor Plan 116 as Lots 17 & 18 (to be combined) and lies within the Mixed Residential Office and Historic A districts. Case # 10-11

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

Attorney Mark Beliveau spoke on behalf of Granite Bank. The bank has plans to close this location and they hope to sell it to the applicant, Haymarket Square LLC. The applicants propose to use the property for a law office and a State Farm Insurance office. The building is 3,808 s.f. and each of the two offices will share a space equal to 1,904 s.f. each. As a result, 17 parking spaces are required under the Zoning Ordinance where the property only has 11 full size parking spaces. Attorney Beliveau distributed a copy of a previous site plan which was used when Granite Bank added their drive up window. The plan reflects area, outside of the easement area, where there would be room to add additional parking spaces. There is currently greenspace and some nice trees and they would like to preserve that.

Attorney Beliveau addressed the five criteria. He did not believe the proposed use would be contrary to the public interest. He felt it was consistent with the surrounding properties. The property provides more on site parking than most of the properties in the area. The public has an interest in off street parking. In addition to that, as reflected on the site plan, the property also abuts two metered spaces on the street. The literal enforcement of the parking ordinance as applied to this property results in an unnecessary hardship. They feel it interferes with the owners reasonable use of the property as these uses are permitted and consistent with the area. The second prong is that there is no fair and substantial relationship to the general purpose of the ordinance and the specific restrictions on this property. The general purpose of off street parking is to provide adequate parking and they believe that this site certainly meets that test. It does not require 17 parking spaces. The third prong of the hardship test is that the variance will not injure any public or private rights of others. This use is very similar to the current use and it will not interfere with any rights of surrounding properties. The variance is consistent with the spirit of the ordinance and a denial would exert a much greater hardship on the owner than it would on the general public. They feel that substantial justice would be done by granting the variance and without the variance this property will be denied any reasonable use of the property. Surrounding property values will not be reduced. The drive thru window will be eliminated which will enhance the city.

Chairman LeBlanc asked what was going to happen to the area in front of the drive thru window which is currently paved. Attorney Beliveau indicated that the applicant did not have any plans to tear up the pavement.

Mr. Marchewka asked if the drive thru driveway was actually on the property rather than part of the easement? Attorney Beliveau indicated that it was part of the property and a couple of cars could be parked there if necessary.

### **DECISION OF THE BOARD:**

Mr. Witham made a motion to grant the petition as presented and advertised. Mr. Marchewka seconded. Mr. Witham stated that the parking requirements were different when the bank opened. He felt these new businesses would be able to operate effectively with 11 parking spaces. Therefore, he felt the proposal would work well and did not feel that it would in any way be contrary to the public interest to grant the variance. It is a unique setting as the parking does already exist and there is very little way to gain 6 more parking spaces to meet the criteria. Mr. Witham did not believe any public or private rights would be injured and that it was well within the spirit of the ordinance. He felt substantial justice is done by

granting the variance because the alternative would be a substantial injustice. He did not see any diminution in surrounding property values. He did not anticipate any overflow parking problems that would effect others.

Mr. Marchewka agreed with Mr. Witham. Even though there is a change of use there really won't be too much of a change in terms of how the parking lot and building is used. There is a great deal of parking on the site with relation to the rest of the neighborhood. There are municipal lots nearby so parking is not an issue that is going to effect the neighborhood, the community or the abutters in a negative way. Therefore, he supports the motion.

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

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12) Petition of **Julianne M. and Ian D. Vogt, owners, Dr. Daniel P. Keenan applicant**, for property located at **545 Lafayette Road** wherein a Variance from Article II, Section 10-206 is requested to allow three dental operatories and associated dental offices for a dental practice in an existing 2,268 sf building with associated parking in a district where such use is not allowed. Said property is shown on Assessor Plan 229 as Lot 6 and lies within the Single Residence B district. Case # 10-13

Mr. Jousse stepped down from this hearing.

SPEAKING TO THE PETITION:

Daniel Keenan addressed the Board. He is a general dentist in Portsmouth and is interested in purchasing the building at 545 Lafayette Road. He submitted plans and there is plenty of parking for a dental office. His office is currently on State Street so he is hoping to move to a location with ample parking. He did not want to move his office out of town and he felt that this was the perfect location for his dental office. He distributed photos of the current site and the parking lot. There is also plenty of room for handicapped access. He feels that there would be a decrease in traffic from the current use.

Vice Chairman Horrigan asked what an operatory was? Dr. Keenan indicated that was just a fancy term for a room where the dentist or hygienist can perform the dental procedures.

David Choate of Grubb & Ellis spoke on behalf of the owners. They feel that this use will be less intense than past uses. In 1981 this building was home to four different businesses with a substantial amount of traffic coming and going. Julie Vogt bought the building for her business, Money Matters, and then became involved with a company called Integris, a telecommunications business. The building is now 100% occupied by Integris. There are approximately 10-12 people working out of the building on a full time basis.

DECISION OF THE BOARD:

Vice Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Vice-Chairman Horrigan stated that this site in a SRB zone but it is right on the edge of a business or commercial zone. It's essentially right next door to a very large shopping mall and it has been used for 40 years for various businesses. He did not feel there would be any public interest problem to allow another business to use the property and there is always a need for a dental office. He felt the

zoning restriction is unreasonable because it would be very difficult to commit someone to use it properly. There is no fair and substantial reason in the zoning ordinance to restrict this property to strictly residential. If there was any injury to public or private rights the city would have heard about it a long time ago. The dental business is less intensive and less intrusive than what is going on currently. Therefore, the requested variance is consistent with the spirit of the ordinance. The Board should encourage professional people, like dentists, to locate in Portsmouth. Vice-Chairman Horrigan did not see any substantial justice issue given the location of the property. Granting the variance will not diminish the values of surrounding properties and given the current use, this new use will definitely raise the value of this site and undoubtedly surrounding properties as well.

Mr. Parrott felt this was a less intensive use of the property and provides a buffer between the apartments and the shopping center and the residential areas which are adjacent to the church.

Mr. Marchewka felt that a doctor or dentist office being located near residential districts is good. That type of use is very appropriate to have on the edge of a residential district.

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

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13) Petition of **Michael R. Clark, owner**, for property located **off Little Harbor Road (Belle Isle)** wherein a Variance from Article III, Section 10-301(A)(7) is requested to allow the following construction: a) 159 sf of the proposed irregular shaped 4,930 sf 2 1/2 story single family dwelling 86' from mean high water/ salt marsh wetlands, b) an attached 40' x 50' indoor pool building with a deck on an existing school building footprint 73.35' from mean high water/ salt marsh wetlands; and, c) an attached 16' x 40' outdoor pool 40' from mean high water/ salt marsh wetlands where all buildings/structures shall be 100' from the mean high water/ salt marsh wetlands. Said property is shown on Assessor Plan 205 as Lot 2 and lies within the Rural district. Case # 10-12

Attorney Bernard Pelech represented Mr. & Mrs. Michael Clark, who were also present. Attorney Pelech stated that they heard what the Board said the last time they were here and they have made substantial changes to the plans in deference to the Board's concerns and those of the abutters. The new plans show the entire home, with the exception of 159 s.f., either outside of the buffer or on the footprint of an existing structure. They were talking about a much bigger footprint on virgin land the last time they were before the Board, which was the issue that concerned most of the Board members. The new plan will only disturb a very small area of wetland buffer. Abutters were concerned about disturbing wildlife which Mr. Clark will address. Attorney Pelech wanted to impress on the Board that the reason they are doing this is so that they do not have to build new roads or put in new utilities or cut trees. The proposal is to put the house, as much as possible, in the diamond shaped area on the extreme easterly end of the island, which is outside of the 100' buffer and to attach the house to the footprint of the existing schoolhouse building. The only area that is being disturbed within the 100' buffer is the small triangle of land. The outdoor pool is not attached and should not have been advertised as such. The pool will be created within the footprints of one of the cinderblock buildings that will be demolished. Other than that the garage that presently exists will remain and be repaired or reconstructed on its existing footprint.

Attorney Pelech believed this met the five criteria for the Board to grant the variance. Belle Isle is a unique parcel of land. It is 15 acres and is proposed to be used for a single family residence. Most of the easterly end of the island is encumbered by the 100' buffer zone. All of the existing structures are on the

easterly end of the island and they are attempting to construct the home on that end where is it most appropriate as that is the area that has already been disturbed and impacted already. This is where the roadways and utilities are so to build the house there means less trees being cut down, less blasting of ledge, less digging for utilities. It means not having to build new access ways to new structures. It results in much less impact on the environment. They are reducing the amount of paved surface as they are removing the paved basketball court. This will be a great improvement over what exists there now. They do not believe this will result in any diminution of values to surrounding properties.

Attorney Pelech did not believe that there was any fair and substantial relationship between the purpose of the Ordinance as it applies to this particular piece of property. They are talking about an area totaling 159 s.f. which is going to be separated by 82' from the mean high tide mark. There is no natural shoreline at this part of the island. There are retaining walls. Between the site and the retaining wall will be a large grassy site which will provide adequate treatment of stormwater off of the roof of the building. The buildings will also be constructed without any gutters to channel the stormwater runoff but rather will flow naturally off of the eaves.

Attorney Pelech did not believe the public or private rights of others would be interfered with. They did not know of any public or private rights that exist on the island that would be effected. Substantial justice would be done by granting the request. The hardship upon the owner, should the variance be denied, would not outweigh any benefit to the general public in denying the variance. The general public can only be benefited by a low intensity use on the island. There will be no adverse impact on the municipality. If the variance were denied, the hardship upon the owner would be substantial. The alternative would be to build new roadways and relocate the house to another area on the island. Trees would be cut down and wildlife habitat would be destroyed.

Granting the variance would not be contrary to the intent of the ordinance. Attorney Pelech continues to maintain that the intent of the ordinance is similar to that contained in the Inland Wetland Ordinance. They believed that by removing 3,500 s.f. of existing structures in the 100' setback, they would be creating a better situation. The structures will be modified so that there will not be any gutters on the structures and the areas surrounding the buildings will have crushed stone to serve as stormwater retention areas. Temporary sedimentation and erosion control structures will be constructed when and if necessary during the construction process. They do not believe the spirit and intent of the ordinance will be violated. There will be no impact by erosion or sedimentation into the wetland tidal buffer area.

Attorney Pelech did not believe the granting of the variance was contrary to the public interest. Not only will the island remain in its natural state, the aesthetics will improve by the removal of the dilapidated concrete block buildings.

In conclusion, Attorney Pelech stated that this proposal was better than their previous proposal and they have attempted to address the concerns of the Board members.

Mr. Witham asked about the pool. Attorney Pelech indicated the pool was an outdoor pool. They are not sure if they are going to have an indoor pool right now.

Michael Clark spoke on behalf of his petition. He indicated they they have owned the property for five years and they have spent considerable time on the land and considering where the house should go. They have been feeding the deer and watching the fox and blue herrings. They are very aware of their environmental and conservation obligations as stewards of the property. He felt their proposal addressed

a lot of wildlife issues. The animals tend to live in the undeveloped part of the island. Mr. Clark indicated that he spent a lot of time considering what the Board's concerns were last month. He also owns an 11 acre parcel of land in Portland which he is currently in negotiations with to put the land in conservation use. He is also looking into selling the rights of developing any further the island so that it would always be maintained as a single family residence.

Chairman Le Blanc asked if there was city sewer on the island? Mr. Clark indicated that there was not but rather a septic system and their leach field has been approved by the State.

Mr. Jousse asked what is to become of the manor house? Mr. Clark indicated that it is going to remain in its current state to be used as a storage facility or future office space.

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

Gail Clark indicated that there was a lot of lead paint in the manor house and it was not fit to live in. There is asbestos, no fire walls and it is not a safe place for children to live.

#### **SPEAKING IN OPPOSITION OF THE PETITION:**

Donald Green, a member of the Conservation Committee, had the letter from Alan Sturgis representing the position of the Conservation Committee, saying that 150 s.f. of the house constitutes 3% of the area of the high water, 100' setback. He felt that was a small amount and could concede that amount. He felt the primary issue was new construction within the 100' setback. New construction creates an impervious soil condition where less water will be able to get into the soil. He felt that the intrusions into the setback were incompatible with the public interest. He didn't see any great hardship in moving either the building or the pools. He suggested that the Board not approve the current application.

Mr. Rogers questioned Mr. Green about whether there were already building existing on the two sites for the pools. He confirmed that they were so the land was already impervious.

Vice-Chairman Horrigan indicated that last month the Board did not have much guidance from the Conservation Commission. He asked if Mr. Green could be more specific about what is being protected on this particular site.

Mr. Green indicated that they were protecting shoreline and wetlands. Those were very limited because of the rather steep area of the shore and was a very fragile ecological system of wetlands and grasses. They were concerned with water runoff and water replenishing the soil.

Mr. Berg indicated that there are approximately 54,000 s.f. within the 100' buffer and he is not advocating that they chip away at that but he asked how they were damaging the environment by allowing 159 s.f. to be encroached upon? Mr. Green indicated that 159 s.f. was chicken feed compared to putting an outdoor pool into the buffer zone. Mr. Berg indicated that the pool was going where something already exists. Mr. Green indicated that he would like to see the pool put somewhere else and return the pool area to permeable surface and he was not overly concerned with the 159 s.f. Mr. Green indicated that he was reiterating discussions that he had had with Alan Sturgis.

Mr. Marchewka indicated that the pool, as shown on the plan, was built on a current foundation, as was part of the single family residence. What Mr. Marchewka struggled with was what you gain by going into



the buffer and ripping out the pool area and that foundation. What does that entail? Digging out all of the concrete and putting it somewhere else on the island. That doesn't make sense to him as it would be a tremendous disturbance. He felt that the Board is very sensitive to the 100' setback and it doesn't seem like it would be a better situation to drive a backhoe in and dig out a bunch of concrete and then dig somewhere else on the island. Mr. Marchewka asked Mr. Green if he felt that would be worth it?

Mr. Green indicated that he felt it was due to the location of the permeable soil. If they have a structure that they are going to remove, in the long run it will improve the property a great deal. The purpose is for the regeneration of ground water and runoff in that area. If the pool were removed, the soil would have to be replaced to what was previously there.

Michael Clark indicated that the location of the pool is surrounded by a 6' retaining wall and there is no grass in that area. He has gone to the extent of determining the correct way to install the wall and has excavated the ground behind it and put a mesh material in so that when the water comes down from the land, it doesn't wash out behind the wall. It cost him four times the amount to do it this way rather than the old fashioned way and he has been working on this for 4-5 years. All runoff will go down into the ground and will not drain into the tidal area which is the most critical area.

Chairman Le Blanc asked where the mean high tide mark was? Mr. Clark indicated it was right at the wall.

Robin Najar, of 10 Martine Cottage Road, was glad to see that the plans are greatly improved from the last time. She was concerned about some issues and asked why they needed an indoor and outdoor pool and also what would happen to the existing manor house and the existing garage. She was concerned that this was an island and is 15 acres so she would think there was some wiggle room and it was not a hardship case. She was concerned about Mr. Clark's representation that he is in talks with the Trust for Public Lands. She is the President of the Seacoast Land Trust and they have contacted Mr. Clark several times about the possibility of purchasing or doing a conservation easement and they were told that he might be willing to sell it for an astronomical price. They work very closely with the Trusts for Public Lands and she has heard nothing about Mr. Clark working with them. She heard about one conversation where an offer was put out and that was the end of it. She believes the plan could be improved. She requested that the Board pull back and improve this plan one more time.

Mr. Berg asked if Ms. Najar was opposed to the 159 s.f. or just the pools? Ms. Najar indicated that she would prefer to have none of it.

Eva Powers, of 80 Currier's Cove, once again requested that the Board stand firm on the land use regulations on the island. She previously spoke about the wildlife on Belle Isle and the needed protection to the buffer zone so she did not repeat herself. The Zoning Ordinance in addressing the buffer zone specifically mentions Belle Island. The buffer, in addition to protecting wildlife, reduces the impact of pollutants and a value to the public by creating a scenic image for those who enjoy nature. Mr. Clark bought Belle Isle in 1998 and he understood the regulations that protected this island. The swimming pool, and the deck around it, acts as an impervious surface. She asked the Board to consider whether the request for an outdoor swimming pool 40' from the water is a sufficient hardship to grant a variance.

**SPEAKING IN REBUTTAL:**

Attorney Pelech submitted that a pool would be much better and more attractive than the cinder block structure that currently exists and which will continue to exist should the variance not be granted. He was amazed that most of the members of the Conservation Commission have not been on the site. A telephone pole was made and they are unfamiliar with the facts. They are not aware that they are removing a 60' x 40' basketball court of 2,400 s.f. and a 50' x 30' caretakers house of 1,500 s.f.

**DECISION OF THE BOARD:**

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Holloway seconded. Mr. Rogers indicated that the applicant has relocated the house. There is a very small section down the middle of the island to place a house and this is a big hardship. It is an island and not effecting any abutters so it is not contrary to public interest. Special conditions exist to this property. Most of the area that they are building on is already impervious covering. As Mr. Marchewka indicated, if they were to go in and dig up all of the concrete, foundations and cinderblock buildings and then turn around and place them somewhere outside the buffer zone, which would be difficult to do, they would be tearing up  $\frac{3}{4}$  of the island. He felt the restrictions that apply to this property interfere with the owners use of it and that is something that needs to be considered. It is better than putting in 21 condominiums which was approved a few years back. This is a single family residence with a swimming pool which is much lower and would be less obtrusive than the tall cinderblock buildings sitting there in disrepair. Mr. Rogers felt this was the best end of the island to build on as it is already covered with buildings that will be removed. This isn't pristine marsh grass but rather a retaining wall so there won't be a problem and it will be consistent with the spirit of the ordinance. Justice will be done by granting the variance. He did not see any diminution in value to any of the surrounding neighbors. He felt this was probably one of the best things that could be done with that particular island.

Mr. Holloway agreed with Mr. Rogers. After the Board denied the previous petition, they came back with changes and it was obvious that they tried to follow the Board's recommendations.

Mr. Witham stated that last month he was adamantly opposed to this and he felt there was a better solution to the problem. He was surprised to find them come back with something so agreeable. He hates to go against the Conservation Commission but he feels strongly about re-using existing foundation. This is very reasonable and very well thought out and a great improvement over the previous plans.

Vice-Chairman Horrigan voted in favor last time but he will not support the current proposal because he cannot support part C, the outdoor pool, which is new this time. Given the testimony of the Conservation Commission by Mr. Green, he feels there is some need for retention water run-off and it was his understanding that those two buildings would be removed. Now they are being told that they are being removed but they will the footprint for an outdoor swimming pool. He was a little unclear about where the indoor pool was going but the outdoor pool would be 40' from the mean high water mark. He felt that was a huge intrusion into the 100' buffer zone. He saw the hardship last month because of the very extreme shape of the area that they could develop and they certainly have provided a very good plan for the house. He does not see how it is a hardship to not be able to have an outdoor swimming pool within 40' of the salt marsh. He felt that was excessive.

Mr. Jousse voted against the petition last month and he is glad that somebody read his mind because the manor house is exactly where he felt it should go. He will be voting in favor of the variance. He did not see any salt marsh around this end of the property. It is mud flats all the way up to the granite wall. He did notice some seaweed from the granite steps that are next to the boathouse and that was the only vegetation that existed between the retaining wall and the water. Mr. Jousse believes it is common sense that, if you cannot put a new structure in the same place that you had the old structure, the ground is already disturbed and by putting a new structure in the very same footprint, it is the very least amount of impact that you can have. The easterly end of the island is the only end that has had extensive work done on it. There is an extensive amount of asphalt and driveways, there is very little area that is outside of the 100' buffer zone from the manor house eastward. The view from the house in the new location will be much nicer than the previous plan.

Chairman Le Blanc indicated that he agreed with Vice-Chairman Horrigan. He could support section A, he is ambivalent to section B but he really doesn't like section C. He felt it was a complete incursion into the 100' buffer. Even though it is being built on an existing footprint, to put a pool in you have to go in and disturb everything that is there. He would have liked to vote on each section separately. He cannot support all three parts as he feels the 100' buffer is there for a very good reason, to replenish ground water and to keep everything as pure and pristine as possible in this society.

The motion to grant passed with a vote of 5 -2, with Vice Chairman Horrigan and Chairman Le Blanc voting in the negative.

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IV. ADJOURNMENT

The Board voted to adjourn at 12:10 a.m.

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Respectfully submitted,

Jane M. Shouse  
Secretary

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