

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

7:00 P.M.

CITY COUNCIL CHAMBERS

**APRIL 27, 2004
(Reconvened from
April 20, 2004**

MEMBERS PRESENT: Chairman Charles Le Blanc, Vice-Chairman James Horrigan; Alain
Jousse, Nate Holloway; David Witham, Arthur Parrott, Alternate Steven
Berg and Alternate Duncan MacCallum

MEMBERS EXCUSED: Bob Marchewka,

ALSO PRESENT: Lucy Tillman, Planner

The Portsmouth Board of Adjustment for April 27, 2004 reconvened. Petitions 7 and 12 have asked to be tabled until next month. Petition 7 is 91 South Street, and Petition 12 is 2454 Lafayette Road. Petition 11 for property at 141 Banfield Road has asked to be withdrawn.

NEW BUSINESS

6) Petition of **Susan Henderson, owner**, for property located at **227 Cass Street** wherein the following were requested: 1) Variances from Article III, Section 10-302(A) and Article IV, Section, 10-401(A)(2)(c) to allow a 16’ x 28’ two story addition with a 2’ left side yard where 10’ is the minimum required, and 2) a Variance from Article II, Section 10-206(2) to allow a single family dwelling with a new addition to be converted into a two family dwelling on a lot having 4,190 sf of area where 7,000 sf of area is required for two dwelling units (3,500 sf per dwelling unit). Said property is shown on Assessor Plan 147 as Lot 3 and lies within the Apartment district. Case # 4-6

Susan Henderson, owner of the property, spoke on behalf of her petition. She said a survey was done of the property and is attached to the packet. The house has a 2-foot set back on the left side,. With the proposed 2-foot side yard and the removal of the 12-foot garage which also directly abuts that property line, the sidewalk would be opened up to allow open space and for better snow removal and walking area. This would not be contrary to public use. Three new parking places would be added on the property thus opening up three additional spaces on the street for parking and thus making more space available for the neighbors. When the survey was done, a sewer line was discovered running through the property. In a meeting with Peter Rice of the Water and Sewer Department, Dave Holden of the Planning Department, and herself, they came up with a plan that satisfies all parties concerning the sewer line. A PVC pipe would replace the current clay sewer pipe that would run underneath and the storm sewer would be changed to run into the main sewer line on Cass Street. Water levels during high rains have been a constant problem on Cass Street. The City did some drain work two years ago which improved the situation. There is also a plan to separate the water and sewer systems which would also improve the water problem. She said the expansion of her home by 16 feet would not have a detrimental impact on the water situation. In fact, it would be trading space for space. A 12’ by 20’

garage would no longer be there. There have been other significant additions, adding to another home across the street, and that did not seem to concern the owner there. It does not seem that there would be a problem in regard to the water situation. The home as it currently exists right now meets lot area requirements for a two-family dwelling with a minimum of interior space of 750 square feet with a lot requirement of 1,000 square feet. However, in order to achieve the most effective renovation of the property by adding a bath and small second bedroom on the first floor and a kitchen and living area for the second floor apartment, she would like to extend the rear of the home by 16 feet. By expanding the original footprint of the existing home, she is thrown into another category that requires 3,500 square feet of lot for dwelling unit. The amount of open lot space required is still conforming. The lot itself would not be dramatically overcrowded.

Mr. Jousse inquired about the three new parking spaces. He said right now there is a curb cut to get into the garage. Will the curb cut be expanded? She said no, that it would go in at an angle. He then asked her to clarify whether the new sewer pipe would go under the new addition or around it. She said it would go under the addition. She further stated that the Water and Sewer Department would be on site to supervise the replacement of the pipe. There would be a clearance over the pipe so that there would be no weight on the pipe itself.

Vice-Chairman Horrigan asked her to speak to renovation constraints that she referred to in regard to hardship. The existing home has no real space for a bathroom on the first floor. In the renovation process it would be more efficient to be able to put a bath on the first floor and a kitchen on the second floor in the addition.

Chairman LeBlanc commented that when he went to the site he noticed that rods had been set by the surveyor 2 ½" from the property line. Ms. Henderson said it was 6 to 8 inches, and it would be extended further by another 2 feet.

SPEAKING IN FAVOR

Michael Moore, previous owner, said that Ms. Henderson actually bought the property in question from him. He said he looked over the plans, and they seem to take into consideration all of the property lines and all the survey marks. There was some question about water. He said in all the time he lived there, 2 ½ years, he never had any water in the basement. There were two sump pumps and a French drain. He never experienced any water problems at all. There was never any standing water. .

SPEAKING IN OPPOSITION

Lauren Greenwald, who lives directly across the street from the property, said that they had put an addition on their property, respecting the setback requirements and not needing any variances. Secondly, it is an awkward situation for their neighborhood as they have a new neighbor and don't wish to create any bad feelings, but there are issues that need to be addressed. One question she has is in regard to the criteria; i.e., Fisher v. Dover. Can the Board reconsider a proposed variance that has already been rejected. It was noted that the current proposal is somewhat similar but the requested setback was 2 feet, not 0, and the owner did have a survey done.

The survey raised points that actually made the plan less attractive than it was in December. In view of the sewer line problems experienced by neighbors on Lovell, she feels having the PVC pipes buried under the new addition to be in a difficult location if there are any further problems. She further noted that her former neighbor stated there had been no water problems in the basement. However, she said that house was constantly pumping out year round onto Cass Street. Someone had a bike accident

there a few years ago when the water being pumped out caused an icing problem. They may not have water in their basement, but there is a water problem in the neighborhood. Her concern about this particular project is that there will be three driving-age residents, but there is nothing to prevent future residents from having more drivers there, more parking, and more traffic. She also did not like the way they are parking as laid out. They will have to back out onto Lovell Street. She could not see that there is enough turning radius. She said the analysis for variance is pretty clear. She sees the proposal as having an impact on the neighborhood, not just the house in question. If this is approved, then there should be no reason why every other house on Cass Street could not make the same variance request. Traffic issues are hitting Cass Street from all sides. Chairman LeBlanc asked her if her house was a single family? She said that it was.

Helen Parnham, who lives at 239 Cass Street, said she had numerous issues. In regard to the sewer problem, she said that there is a manhole on her property. All the sewage from Middle Street comes down through the manhole and down through under the garage at 227 Cass. During severe storms there is a severe backup, and the manhole cover can be seen rising up and down. How is the PVC pipe going to affect the manhole on her property? As for there being no water in the basement, those pumps are put in so deep that as soon as the water table gets a little bit high, it begins to pump. The hoses are always out in the street. If someone were to go out at night, it could be very dangerous as someone could easily trip over hose.

Another concern Mrs. Parnham has is how three cars are going to get into this area without coming almost into her chain link fence. Also, when the garage is taken down, there will no doubt be some leveling of land and fill required as well as paving. The property slopes from Middle Street down on to Lovell Street to the water basin/sewer. The raised up property will not be able to drain properly and water will back up on her property and her neighbors. Last month there was 5" of rain. Water was ankle deep in her back yard and several inches in the basement. That was a mild storm compared to some. This is of great concern to her and her neighbors. Looking at the plan, she does not see how all of this is going to be done in such a limited space. Chairman LeBlanc asked Mrs. Parnham if she had noticed the manhole cover bobbing up and down since the sewer line had changes. She replied yes.

Mrs. Kierstad of 50 Lovell Street addressed the Board. She stated that most of the houses in the area were single family. At the other end there are duplexes. In regard to the broken sewer line, the two houses on Lowell owned by Griswold and Young experienced cellars full of sewage. Mrs. Young spent over \$300 to have Rotor Rooter come in. No blockage was found there. The sewer line break was on Cass Street and ran through all the single family homes. Six years ago two families living in the area had to install huge sump pumps to deal with the water problems. They pump constantly, and the sidewalk is often slippery and icy.

Sally Strubble of 23 Friend Street, a small dead-end street off of Cass, addressed the Board. She said she formerly lived at 222 Cass Street, across from 227 Street for two years. As long as she has lived in this area there has been a hose coming out of 227 Street. It is always out, and to say that there is no water problem is not completely accurate. It is a fact that all of the houses on the side of Cass Street toward Madison, all the houses are smaller, one-family homes. There are a few large duplexes, including the one she lives in. The duplexes have several single people and students, all owning cars. There is a huge parking problem on Cass Street, on Lovell Street, and Friend Street. Parking is so tight on Friend Street that if one person who does not live there parks in one of the few on-street spots, it messes up the whole strategy that the residents have worked out among themselves. Lovell Street and Cass Street are much like Friend Street, and the parking situation can only get worse. She has serious concerns about the parking and traffic flow situations. She is also concerned about the granting of this

proposal will open the door to every other house that wishes to do the same thing. This is a largely a single-family neighborhood, and that is part of the charm. What if every other house decided to do the same. Also, the current occupants are one situation, but in the future, it could be two people in each unit with more cars and more parking issues. She added that there is supposed to be 7,000 square feet for a 2-dwelling unit. This is a huge difference. This is a small lot in a built-up area. This is a parking nightmare. She strongly urged the Board not to grant the variance.

Ms. Henderson was given a two-minute rebuttal.

Ms. Henderson said that obviously this is a very emotional issue for everyone. Unfortunately, people are caught in the emotions of water and sewage problems which have been in the past and the City has planned to correct in the future. Basically, the only reason she is seeking a variance is that by adding even a foot to her existing foundation, it throws her into another category of 3,500 square feet per dwelling unit. If she had left the house the way it was, she would need only 1,000 square feet. So, she said, she is not overcrowding the lot. The open space available on the lot is to code. The only reason she needs the variance is because of the 3,500 square foot rule because she wants to add just a small amount. The sewage line is not going to be an issue because she is taking herself off the old clay sewer line that is running off the back. That is why Peter Rice came up with the solution that he did, because eventually the City is going to tie all the houses on Cass Street into the main sewer line that runs along Cass Street. Right now her sewer runs behind it tied to the manhole cover that they were talking about. With this agreement that she made with Peter, she took herself off that old line and put herself on the new line. This would mean one less person on that old line that runs through the back. She knows that traffic is a problem. She said her plan will be freeing up parking by parking on her land.

Mr. Holloway asked if she had any idea when this major project will be started? She said that Peter Rice indicated it was in the two-year plan.

The public hearing was closed.

Mr. Horrigan stated that in the Planning Department notes, the City indicates concerns about the sewer. He asked if this has been resolved? Ms. Tillman said in the agreement made with Peter Rice, Dave Holden, and Ms. Henderson, there were certain stipulations that would be put into effect in the event the petition was granted. The four stipulations were: 1) replace existing sewer line with PVC pipe; 2) submit foundation plan to DPW review and approval; 3) on-site installation of PVC be allowed; and 4) sewer to be tied into Cass Street line.

Mr. MacCallum inquired as to why this petition had been denied previously. Chairman LeBlanc said that a strong reason for denying it was that it was unknown where the property line was. We asked that a survey be done because there was a possibility that the foundation would actually be on City property. Mr. MacCallum said he would like to make a comment. He cited Bacon v. Enfield in regard to the case of overdevelopment of a neighborhood and loss of its character and charm as referenced in Mrs. Greenwald's comments.

DECISION OF THE BOARD

Mr. Parrott moved that the petition be denied. Mr. Holloway seconded.

Mr. Parrott stated that particular neighborhood is extremely congested. As a former owner, he said he had some first-hand knowledge. Everything that these folks have presented in regard to the parking situation is accurate. It is unfortunate that the larger houses were situated as they were not providing for parking. As far as multiple cars, that is the norm these days. Turning a property into a duplex obviously will increase the number of cars over time, obviously a detriment. This is not a tiny house. It is a good-sized house and has been used in its present configuration for quite some time. It is consistent with the other houses in the neighborhood. As nice as it would be to put a big addition on it, it would be a detriment to the neighborhood as a whole. He did not see the public benefit aspect. More specifically, he could not find unnecessary hardship because the present owner clearly is understanding of the situation with respect to the property. It has served as a family home for many years. To say that all of a sudden it is a hardship, he would find it hard to agree with that claim. He said he would not even touch on sewer problems as the City has already resolved to fix that one way or another. The traffic situation and particularly the parking situation are reasons enough to deny the petition.

Mr. Holloway said he agreed with Mr. Parrott to vote to deny.

Mr. Witham said he struggled with this. He feels that the intent of the ordinance is to keep these houses intact and preserve the character of the neighborhood. Mr. Jousse said he also struggled with this. He said he could see how it could be a duplex, but by adding to the footprint of the building, that would not allow it to be a duplex. The square footage relief requested is almost one third, and that is really a lot. He did not see parking as a problem. However, parking in the city of Portsmouth is a problem and has been for thirty some years and probably will get worse.

Mr. Berg came to the conclusion that if zoning permits a two-family, then this building could in all likelihood be expanded roughly the same as what is being proposed now. He said it could in its current state be a duplex, but if it was made larger and into a duplex, then different rules would apply. If this were a suburban area, he could see this happening, but not in an urban area like this. He saw the request as reasonable.

Chairman LeBlanc looked at the same criteria of lot size and house. He said he also could see the potential for this being a duplex as were others in the area. However, once the expansion size is factored in, it changes all the rules and puts the request into another category. He said he thinks that is very reasonable because one of the intents of the ordinance is to promote general health such as air, space and all those other considerations. Keeping the house as is, two families can live there. However, they are constrained by the particular space. That would be a detriment to putting two families in this house because it is too small. He will also support the motion.

Chairman LeBlanc called for the vote. The motion to deny was approved 6-1 with Mr. Berg voting in the negative.

7) Petition of **Barry and Carol L. Shore, owners**, for property located at **91 South Street** wherein the following were requested: 1) a Variance from Article IV, Section 10-402(B) and Section 10-401(A)(2)(c) to allow a 3'10" x 15' - 1 ½ story addition to the left side of the existing garage with an 8.1' left side yard and an 11' rear yard where 12.3' is the minimum required for both, and 2) a Variance from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) to allow a 13'3" x 18'5" - 1 ½ story addition to the rear of the existing dwelling with a 6" right side yard where 10' is the minimum required and b) a total of 355.25 sf of new building footprint creating 42.4% building

coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 102 as Lot 46 and lies within the General Residence B and Historic A districts. Case # 4-7

Upon motion made and seconded, it was voted to table Petition 7 until next month.

8) Petition of **Timothy Griffin, owner**, for property located at **172 Elwyn Avenue** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 9' x 13'8" deck and a 14'6" x 11'4" sunroom creating 32.7% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 112 as Lot 39 and lies within the General Residence A district. Case # 4-8

Timothy Griffin said he was here with Carol Kelly, and they own and reside at 172 Elwyn Avenue. They are seeking a variance to add a one-story addition to their property. The house and barn are highlighted in blue on the handout. This house, as well as most, was built before there was zoning. He highlighted in yellow some of the properties that are obviously over 25% coverage, ranging from 28% to 42%, so he does not feel his request is out of line. A very large percent of his lot is covered by a 20' by 30' barn. The barn is not being used as living space. It is not insulated. There is no electricity, water or heat. They are not considering doing anything to the barn in view of what it would cost. Although the barn is attached to the house, it does not flow directly from the house. In essence to reach barn it is necessary to go through a tunnel. Having grown up in this neighborhood, it is the only property with a barn such as this. He loves the character of the barn and does not want to change it any way. The addition itself is a single story sun room. The building is not toward anyone's property. It is toward a street. It would maintain the same setback as the existing house. Hopefully the addition would give better access to the kitchen, It would also provide additional living space to a small house. Entry now is through a side door which opens into the kitchen. It is cold in the winter. The front door is not used as an entrance. Creation of this addition would create a new entrance and buffer area and an area for boots, etc. He presented a letter from neighbors giving their approval. Their houses are outlined in pink on the hand out.

Mr. Jousse asked if instead of building a new deck, did he consider building a patio which probably could be more useful than a deck? By having a patio, the coverage would be reduced. Mr. Griffin said they did consider that. It would push into the driveway where the vehicles would be.

Mr. Horrigan asked if the nameless street would be the main entrance. Mr. Griffin said yes, as the main door on Elwyn is not used, and if they used that, parking would be on the street. There is some slope on the property, an old concrete walkway. It is all broken up. The new deck would cover over the old concrete. Mr. Horrigan asked what the current lot coverage is. It is 30.5%.

The public hearing was closed.

DECISION OF THE BOARD

Mr. Berg moved the application be granted as submitted and advertised. Mr. Horrigan seconded.

The only difference between the existing coverage and the proposed coverage is the deck, which could be excluded from the calculation if it were lower. A great number of the houses around him are similarly afflicted by the coverage exceeding requirement. He did not see this being a conflict of

public interest. There is no detriment whatsoever. Similarly, there is no impact on surrounding values. The use is the same. Coverage is in harmony with everything else that is out there. The nature of the neighborhood is small lots. The proposal that the owner put forth is quite in keeping with contemporary expectations such as buffer from the cold and new front door. The intent of zoning was not to stop people from putting on small 14' by 11' rooms. Zoning is in place to prevent overpowering the neighborhood.

Mr. Horrigan agreed with Mr. Berg. The renovation as proposed by the owner will enhance the value of the house and abutters' properties. He also agreed that preserving the barn is certainly in the public interest. Improving a current entrance and sunroom is adding a very small relief of 2% to 3%.

Mr. Jousse supports the motion but would prefer a patio to a deck. He felt patio would go better with the barn. He would hate to see barn become living space.

Any other comment from the Board? Hearing none, a vote was called to grant as advertised and presented. Petition was granted unanimously.

9) Petition of **Kimberley S. Andrews, owner**, for property located at **202 Dennett Street** wherein Variances from Article III, Section 10-302(A) and Section 10-401(A)(2)(c) were requested to allow a 462 sf deck with a 15' rear yard where 20' is the minimum required. Said property is shown on Assessor Planl 143 as Lot 4 and lies within the General Residence A district. Case # 4-9

Let the record reflect that Mr. Jousse stepped down.

SPEAKING TO THE PETITION

Kimberley Andrews, owner of the property, addressed the Board. She asked for a variance to her to expand her existing deck by 62 square feet. The tax map shows the site of the home. The map does not show the existing deck at the time she purchased the home six years ago. The map shows her home with dimensions of the existing deck and dimensions of the proposed deck. There is an error in the old tax map in that it shows the front of her house pointing toward Manson Way when in fact the front faces toward Dennett Street. The back property line falls within 15 feet, not the 20 feet required. The new deck will have an elevation over 18 inches.

The public hearing was closed.

DECISION OF THE BOARD

Mr. Berg moved that the application be granted as submitted and advertised. Mr. Parrott seconded the motion.

Mr. Berg said that pretty much everything he said before applied. If the deck had been just a fraction lower, there would be no need to be here today. The applicant is not encroaching on anyone. The deck is not going any closer to property line. It is a very innocuous application. The intent of the ordinance is not to stop people from putting in decks, establishing recreational space, or enhancing the livability of their home. There is a hardship in that the house is built in such a way that the rear line is 5 feet too close to the property line. There is no injury to the private rights of others.

Mr. Parrott agreed with Mr. Berg. It is a very simple and straightforward application.

Mr. Horrigan said he would like to add a stipulation that the deck remain open to the sky. His only concern was it is a large deck and that it not be turned into a porch or sun room in the future.

As a result of this consideration, the Board voted unanimously to grant the request as advertised and presented with the stipulation that the deck shall remain clear and open to the sky.

10) Petition of **Elizabeth B. Larson, owner**, for property located at **668 Middle Street** wherein the following were requested: 1) a Variance from Article III, Section 10-301(A)(2) to allow the conversion of the existing freestanding carriage house with new additions into a dwelling unit in a district where all dwellings are to be located in the same building, and 2) Variances from Article III, Section 10-302(A) and Section 10-401(A)(2)(c) to allow a 22' x22' one story attached garage with a 4' right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 147 as Lot 18 and lies within the General Residence A district. Case # 4-10

Mr. Witham is sitting out this application so Mr. MacCallum will be sitting in.

SPEAKING TO THE PETITION

Peter Loughlin, representing Elizabeth Boynton Larson, addressed the Board. He said he was pleased to represent the project and Betty Larson, who is the daughter of Wyman Boynton. He stated that the architect for the project is David Witham. What Mrs. Larson would like to do is move back to Portsmouth from the Boston area and convert the carriage house into a dwelling unit. Presently she has the living quarters that belonged to her mother and father on the first floor of the main home. There are two apartments in the home which have been there for years. If they wanted to connect the carriage house to the main house, there would be no need to be here for relief. She is seeking relief to allow four units on the property, which is permitted. Relief is needed to have one of the four units in a separate structure, which is a carriage house. Tax maps and zoning maps have been passed around. There are also pictures illustrating the special circumstances.

There will be no diminution. The changes that will be made are very small. They will not be visible from any street. The neighbors to the east are the only ones to see any changes, and they are in favor. The upgrade of the quality of this carriage house will only increase the value of the property. The upgrade will not diminish the purpose of the ordinance. Substantial justice will be done. This use of the carriage house is a very reasonable use of the property. This is not a request for a new structure. It is saving and upgrading an existing structure.

The subject property and the property to the east are together three acres. The size of the land distinguishes it from most others. It is a very attractive carriage house which over the years has not received the care it did during Wyman's time.

Mr. Jousse looked at one of the maps. He asked if the proposed driveway going from carriage house to Chevrolet Avenue is an actual paved street. Yes, it goes by Pic 'N Pay. The adjacent property is Portsmouth Athletic. The fence in the photo is the back of the property.

The public hearing is closed.

Mr. Jousse made a motion to grant the variances as advertised and presented. Motion was seconded by Mr. Parrott.

Mr. Jousse said the building is there already. It would be shameful to demand that the applicant move the building to meet the side yard requirement. Therefore, the zoning restriction as applies to this

specific property does interfere with the reasonable use of the property. This is a very large property where a housing project could go in very easily with no problem at all so adding one unattached dwelling on this piece of property is not contrary to the zoning ordinance or the spirit of the ordinance. Substantial justice would be done by granting this variance. Granting this variance would not diminish the value of the surrounding properties. More than likely this dwelling would not be seen from either one of the two streets that bound this property. It is adjacent to another very large piece of land. This variance should be granted.

Mr. Parrott said the most significant aspect of this property is clearly its large size. Given the size of the lot, the number of units allowed will not infringe upon the rights of others. The adjacent property owners have no objection. In fact, the building is not even visible from the street. It is a very good reuse of that building, and it should be approved.

Mr. Horrigan commented on the public interest criteria. Another factor to be considered in this case is historically carriage houses were usually built to accommodate servants or other people working at the property. It is worth preserving for both architectural and historical reasons. It is already there. It is in the public interest to make it available for housing since this was its original purpose. The access to the property currently is off a fairly busy road. The driveway appears to be shared with the house next door. The driveway through the rear will also be helpful as it will relieve some of the traffic coming off this property into Middle Street. There are some very good reasons for approving this proposal.

The motion to grant as presented and advertised was unanimously voted.

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11) Petition of **T-Beyar LLC, owner, and Hisham El Sayed, applicant**, for property located at 141 Banfield Road wherein a Variance from Article II, Section 10-209(13) is requested to allow the retail and wholesale of used and new vehicles with no outside display of “For Sale” vehicles within 500’ of a residential district. Said property is shown on Assessor Plan 254 as Lot 2 and lies within the Industrial district. Case # 4-11

Petition 11 has been withdrawn.

12) Petition of **Lafayette Plaza LLC, owner**, for property located at **2454 Lafayette Road** wherein a Special Exception as allowed in Article II, Section 10-208(36) was requested to allow a bay car wash (with recycling water) in a 60’ x 40’ in a district where such use is allowed by Special Exception. Said property is shown on Assessor Plan 273 as Lot 3 and lies within the General Business district. Case # 4-12

Upon motion made and seconded, it was voted to table Petition 12 until next month.

13) Petition of **KWA, LLC, owner**, for property located at **85 Middle Street** wherein a Variance from Article II, Section 10-208(19)(a) was requested to allow the entire building to be used for a restaurant and associated bar area on a lot directly abutting a mixed residential district. Said property is shown on Assessor Plan 116 as Lot 16 and lies within the Central Business B district. Case # 4-13

Chairman LeBlanc noted that Mr. MacCallum was sitting in this petition as well.

SPEAKING TO THE PETITION

John Bosen, representing LBJ Properties, addressed the Board. LBJ Properties is under contract to purchase the property at 85 Middle Street. He introduced Larry Sarantos of LBJ Properties.

Also in attendance are partners from Arrows Restaurant and Steve McHenry, the architect for the project. He passed out some revised architectural drawings.

His client is proposing to buy the building at 85 Middle Street and lease it to Arrows Restaurant, which has operated very successfully for the past 17 years in Ogunquit, Maine. Arrows is one of the finest restaurants in the United States and has received many awards. It was recently voted by Gourmet Magazine to be one of the top 50 restaurants in America. The building at 85 Middle Street is 9,200 square feet. It is a brick building with an open concept interior. It was formerly the home of the Middle Street Baptist Church. It sold in 1999. Its use changed to business use when Trade Wings moved in. When that business moved to Pease several years ago, the building has been for sale and vacant since then. The application contains certain drawings showing an open concept kitchen. On the first floor there will be a bar area. The bar would serve the restaurant. It would not be a nightclub, it would not have live music, and it would not be a destination-type bar. There is a mezzanine area. Upstairs there would be a private dining room for special occasions and tables seating 12. Downstairs would be bathrooms, a storage area, and prep area. Most of the cooking and preparation would be in the open area. The last page of the application contains a photo copy of the tax map. The property is entirely in the CBB zone. Restaurants are permitted in the CBB zone. The property abuts the MRO zone. Granting a variance in this case will not cause diminution of value to the surrounding properties. The exterior of the building will look pretty much as it does now with a little enhanced landscaping. There would be no negative impact to the surrounding area. No additions or renovations are planned on the outside of the building.

This section of town is known as Haymarket Square. It is undergoing some very positive changes. This is a very attractive area of town, and this is an anchor tenant. This tenant will have a very positive impact on the downtown and a very positive impact on this property. If this permit is granted, it would not be contrary to the public interest. No private rights affected as there will be no change to exterior and no additions. It was very successful as a church, but it has been vacant for quite some time. It is an odd interior and does not lend itself to many other uses. It is well suited for restaurant use. This restaurant will only enhance the city.

The hardship restriction does not make sense considering the abutting properties. The neighbors most impacted are in the MRO include Flagg and State Farm. They are primarily commercial and not residential, which the ordinance seeks to protect. Across the street is a former gas station which is now under construction as a condominium development. The primary concern of this development would be the noise issue, but this is a quiet, high-class restaurant. The building will have central air conditioning and the windows will be shut and noise contained within. If you look at the neighborhood, it contains Sise Inn, various law firms, a church, the Library Restaurant, and a lot of commercial buildings. This restaurant is perfectly compatible with this area. The use of this building as Arrows Restaurant will have less intensive use than most commercial or business use. The CBB allows for this type of use. There was an informal meeting held with neighbors to explain the restaurant's plans. The biggest concern seemed to be parking. The city has numerous restaurants in the CBB. Arrows will offer free valet parking to its patrons. Arrows will also be paying heavy parking fees to the City.

Mr. Bosen said that there were positive comments and feedback. People were excited about Arrows coming into town. The abutters, State Farm and Attorney Flagg, expressed no concern about Arrows.

Mr. Jousse asked Mr. Bosen if presently KWA, LLC was the owner of the property. Mr. Bosen said yes. Mr. Jousse asked Mr. Bosen who he represented. Mr. Bosen said he represented LBJ Properties, who had a contract to purchase 85 Middle Street. Mr. Jousse asked why Arrows was not buying the property from KWA? Mr. Bosen said he could not answer that question, but he anticipated that it was a financial decision that it made more sense to lease than to purchase. Mr. Jousse said that perhaps he should ask the owners of Arrow that question. He said what he was trying to do was to protect the City and its citizens from a middle party using the reputation of Arrows Restaurant to get the variance granted for this particular piece of property and somehow the Arrows Restaurant gets pushed aside and some other outfit comes in that is less reputable. Mr. Bosen said he had investigated that question. He

said Arrows is very committed to this locale. The owner has investigated numerous locations for this restaurant, and with a restaurant like Arrows he had to be very careful to choose right location. Arrows is spending a substantial amount of money, \$200,000-\$300,000, to renovate the interior of the building. Mr. Bosen said he could appreciate Mr. Jousse's concern, but given the price of the building and the renovations, assuming the they left town, the only business that could afford to be financially responsible for this building would have to be a high caliber restaurant. No chain restaurants could come in as it is not their type of location. Mr. Bosen said that Mr. David Choate, a real estate broker, could testify that every restaurant that you would not want there has looked at the property and has concluded that it was not economically viable. Arrows is a different type of scale.

Mr. MacCallum asked about the open interior of the building and the fact that it was not suitable for most types of businesses. He asked why the interior couldn't be partitioned. Mr. Bosen replied that it could, but perhaps it was not economically feasible. The accoustics are very difficult with lots of echo.

David Choate of Grubb & Ellis Cold Stream Real Estate Advisors asked to speak to the Board. He said he could address this question as someone who has tried to market this building for going on two years. Office use was clearly the preference for the building. It would not require appearance before this Board. There would be no parking impact fee. You would have to go in the building to understand why it does not lend itself to office use. It is very problematic. People loved the building, but it would be a huge expenditure to construct private offices. It is open to the ceiling. If a second floor were added across it, you might as well be in any other office in downtown or Pease. The primary effort over the past two years has been to get an office tenant in the building. It has been totally unsuccessful. The reason why Trade Wings bought it was their particular type of operation was an open concept, which is a rarity. It worked for a short time, but it became apparent that it did not work, and they consolidated their warehouse and office space to Pease into 11,000 square feet. It has been vacant ever since. The owner of the building, KWA, would love to have had an office user in there. The other logical use of that building, which also would have had to come to this Board, is some sort of performing arts use. It is not totally out of the question as there is some available funding, but anything requiring public assembly abutting a residential or mixed residential zone would need to come before this Board. To see the interior of the building, it is not an office building. The building is currently not air conditioned. The reason it is not being leased as an office building is because of the physical configuration of the space. Someone is going to be paying rent on 9,088 square feet, but less than half of that can be functionally used.

Mr. Witham inquired about valet parking. Mr. Bosen said discussion was taking place with private parties, i.e., the Masonic Lodge. They have an agreement with the City. They don't meet again until the first of May so a decision was not available for this evening. However, there is serious discussion about using their lot.

Mr. Horrigan asked about the capacity of the restaurant. Mr. Bosen said if the mezzanine and second floor were maximized, it would hold 150 people. However, that is not the type of operation Arrows runs. They prefer a smaller crowd.

Mr. Horrigan said he was trying to get a feel for the impact on abutting neighbors. He asked where the kitchen would be. The kitchen would be in the rear of the building. As you walk in the front door, it would all be open concept.

Chairman LeBlanc said he had three issues he would like addressed: deliveries, hours of operation, and ADA compliance because there is a set of stairs going up into the building. How is that going to be addressed? The building will have to become ADA-compliant. There is a second door in an alleyway and a ramp could be installed there. The hours of operation would be to open for lunch from 11 to 2, dinner during the week from 5 to 9, and dinner for weekends a little bit later. There are a number of options for deliveries. Behind the building there is an alleyway. There is also a driveway on the right of the building which would be open enough.

Steve McHenry, architect for the property, addressed the Board. He said he wished to address the accessibility issue. He said it was still in a preliminary stage of design. Obviously, the building would need to be made accessible by current standards. There are a couple of options. There is the possibility of an elevator. Also, there is a doorway on State Street that could come into a lift or an elevator. There is a curb cut here which could also be used for deliveries.

SPEAKING TO THE PETITION

Chris Mulligan, an attorney in Mr. Bosen's law firm and a resident of 400 State Street, addressed the Board. The reason he lives downtown Portsmouth is the vitality and vibrance of living in a dense urban area with a multitude of various uses, businesses, offices, restaurants, shops. He has lived in this particular neighborhood since April of 2000. Since that time there have been a number of improvements on the western edge of what people consider to be downtown Portsmouth. In the last year or two several fine restaurants have come into the western side of Congress Street. The Gulf station is now becoming a very nice condominium project. He understood the City itself plans to do some improvements to the Haymarket Square section. People are not attracted to downtown Portsmouth because of a "natural abundance of on-site public parking available on the streets." People are attracted because you get to live in a vibrant and vital urban area. A restaurant of this caliber in such a property is really a signature property in this neighborhood. It will increase desirability in the entire neighborhood. It is not every day that one of the acknowledged best restaurants in the country wants to be your neighbor. He thinks it will be the perfect tenant for this property and for this neighborhood.

David Choate, real estate broker for the property, said he would like to address a few other points that he did not mention last time. Mr. Choate referred to Mr. Jousse's concern that Arrows was not buying the building. Mr. Choate stated that the variance goes with the property not to the user. The best protection that you have that this is going to be a high-end restaurant or some totally different use is the size of the building, that it is a single tenant building, and the economics involved in both occupying and operating that building. It is just not feasible for it to be anything but that. If Arrows is not successful in this location and decided to pull the plug after a few years, it would not be another restaurant. It would revert to either some type of office use, more likely a church, or public assembly type of use. They are not going to change the interior that much and it could remove the kitchen and turn it back into a church. The best protection that the City has is that it is not going to become an undesirable restaurant. It is going to be a high-end restaurant. It is in the public interest to grant this variance as an empty building is not a good neighbor. Unfortunately, this building has been vacant for two years. It is fortunate that this building has not been vandalized or suffered any graffiti during this time. It is in the public interest to have it vibrant and occupied again. The best evidence of the fact that there is no diminution of property value is the recent sale of the Granite Bank building to Attorney John Flagg and State Farm Insurance. It was at the top end of the market and there were many suitors for the building. He had no way of knowing what might eventually go into the vacant building next door, but he paid top dollar for it.

Steve Scott of Richards Avenue addressed the Board. He said he worked at the Granite Bank building when it was Granite Bank. In answer to the question as to how much room there was to get between the alleyway and the subject property, That used to be a drive-thru, and there is plenty of room to get vehicles in.

SPEAKING IN OPPOSITION

Louis Dow, Jr., owner of condos being constructed at 48 State Street, addressed the Board. He said he had no problem with Arrows Restaurant itself. He said he had a problem with the variance and what would be allowed if Arrows did not succeed in this location. From his understanding of the variance, the building could be a bar or a nightclub or a brewery. Ms. Tillman stated that it would have to be a restaurant with a bar. He sees parking as an issue. If the restaurant goes in, the parking spots along State Street used by residents will go away at night. The noise is also an issue at 1 am with his condos being 25 or 30 feet away.

Mr. Witham asked Mr. Dow what would his comfort level be if it were only Arrows and any other business would have to start over with the process. Mr. Dow said the valet parking and hours were both suitable.

Eric Gustavson of 145-147 Middle Street addressed the Board. He said his building is diagonally across and 200 feet from Haymarket Square. He said he has owned his property since 1970 and lived there since 1978. He has seen a lot of parking problems over the years. In addition to his own residence, he has two rentals and two offices. He said he has a great deal of respect for Arrows, and he is speaking against the form of the variance without conditions. His concern echoes that of Mr. Dow in what comes after Arrows if for some reason there is a change in the economics or whatever. If this variance is granted without stipulations, bars, taverns, or nightclubs could be permitted uses. Some of these uses would interrupt the residential character of the neighborhood. Apparently the restaurant people at Arrows are aware of the concerns that people have about parking, noise, no entertainment, and they are addressing them. Other than those concerns, he is in favor of Arrows coming in. He said he really didn't have a problem with function.

Chairman LeBlanc stated that the application being asked for is for a restaurant with a bar so any other types of night places that were mentioned would not be allowed even if this place were to leave. They would have to come back to the Board for further permissions to do that. Arrows is asking for strictly a restaurant and bar, and the main reason they are here is because it abuts a mixed residential area. Even if Arrows left, the next people to come in could not put in a nightclub or a dance hall or a tavern, economics aside, because that is not allowed on that property. If this variance is granted tonight, it is for a restaurant with an associated bar in that property only.

Kenneth Brown of 68 Taft Road addressed the Board. He said he was representing the Middle Street Baptist Church and himself. He attended the informal meeting last night. As far as the concept, he thought the kitchen was going to be in the basement. It now appears that the kitchen will be on the first floor in an open concept with some tables. It was stated there would be some parking on the side with valet parking for the customers. The owner was not aware of where the property lines were. He left the meeting with the idea that not all the facts were being presented, and the owner's only concern was to make money. Secondly, he appreciated the reputation of Arrows Restaurant. However, it is the variance to the use of the property that he is addressing. The variance, once approved, will stay with the property no matter what happens to Arrows Restaurant in the future. The owners know the current restrictions and the City's requirements on this property. Since this is a new endeavor, there is no hardship condition to justify the variance. The owners only have to find the correct buyer or tenant. The property and building have been there for many years. The ordinance is fair and provides a buffer zone that protects the adjacent areas. The spirit of the ordinance protects the buffer zone. The variance if allowed could tax the character of the area. If the variance is denied, then a justice to the area and to the people will be allowed. A bar and the impact of parking is definitely a negative impact. There is already a problem with unknown people using the parking lot. Egress from parking is dangerous. This will become compounded when Haymarket Square is reconfigured. He asks that the Board deny this request as it will cause a great negative effect on the area and thus diminish the value of the surrounding property. He had in his possession a petition to deny with over 50 signatures.

Pastor Martindale of the Middle Street Baptist Church addressed the Board. He is also a resident of Middle Street and lives a short distance south of this property. He concurs with Mr. Brown's presentation on behalf of the congregation. He doesn't think it is the best place to have a restaurant in that area. He thinks it conflicts with the ordinance. He thinks it will create a hardship in regard to congestion in that particular area. It is also not about the fact that the exterior of the building will not be redesigned. The zoning laws talk use and those types of changes. This is what is buffering those two zones. This is why he respectfully asked that the Board of Adjustment deny this petition.

Jack Foster addressed the Board. He said he is a member of the Middle Street Baptist Church for more than 40 years. There have been many changes in Haymarket Square during that time. The Middle Street Baptist Church has been there since 1826. The concern that he has is that there is now a

considerable amount of traffic. It is very difficult to cross the street much less on State Street going toward Congress Street. To make a profit at a restaurant like that, it would seem that it would take a large number of people and additional cars.

Kim Bridge of Cass Street addressed the Board. He has been a resident of Portsmouth for 46.5 years. Restaurants' main business is at night. Residents and immediate neighbors need parking at night. He has a concern about free valet parking and where it is.

Chairman LeBlanc stated that the Board had received a letter from Attorney Charles Griffin to be read aloud and to become a part of these minutes.

Mr. Bosen spoke in response to some of the comments Attorney Griffin raised. The location could be used for retail. A retail operation would have a much greater intense impact. He said what he was hearing from the abutters was a concern about what happens after the fact. He thought their concern was misguided. What they should be concerned about is what happens to the property if the approval is not granted. Hard Rock Café or something may eventually come up and come forward. He said he thought everyone should be thankful that it was Arrows Restaurant that is being proposed. There is a lot of concern about parking. He wanted to stress the fact that parking is not a requirement in CBB. He will submit to this Board that the restriction in the ordinance that prevents a restaurant in the MRO is not relative to parking. It had to do with protecting against noise in the MRO. Mr. MacCallum inquired why it would not cover parking too. Mr. Bosen said there was nothing in the ordinance that the restriction had to do with parking.

There were some comments by Mr. Dow about parking. The statement was made that if the variance were granted, what would happen to the public spaces that would not be available for his tenants. There is nothing in place that gives his tenants the right to those spaces more than anyone else. Those metered spots belong to anyone who wants to put a quarter in.

Mr. Holloway had a question about parking. He said if the Middle Street Baptist Church is blocked now, what is guarantee Arrows would not create parking problems by using the church driveway for parking? Mr. Bosen said parking is not a concern as the intention is to take vehicles off site. There is municipal parking at the Worth lot and Parrott Avenue lot, and hopefully agreement can be reached with the Masonic Temple to use their lot.

Mr. MacCallum asked Mr. Bosen to explain what his client's current plan was for valet parking. Mr. Bosen showed a plot plan showing where patrons would be dropped off and picked up in an area on the right side of the building and "whisked away."

Chairman LeBlanc proclaimed the public hearing closed.

DECISION OF THE BOARD

Mr. Witham made a motion to grant the petition as advertised and presented with the stipulation that the size of the bar cannot be expanded any larger than presented on Scheme A and that there be no entertainment. Mr. Jousse seconded the motion.

Mr. Witham said that attorneys have a job to do and tend to exaggerate to get their point across. However, he commended Mr. Bosen, He said there were no exaggerations, and he presented the facts in a concise and clear manner and made some good points. He said when he first looked at this proposal, he saw that a restaurant was an approved use in the CBB, but since it abutted MRO property, a variance was needed. He asked why does it need a variance, and how it will it affect this MRO zone. The reason a restaurant is asked to do that is because of the issue of bar, entertainment, night noise and things like that. It makes sense to move forward with this. He did not see parking as an issue. Parking will be a problem no matter what goes in there. The Gap could go in there, and they are open until 9 pm. Other than tearing down the building, whoever goes in there is going to add to the parking problem. The City has a formula for paying for parking. He said that, again, there was some

discussion about the buffer zone. He believed that this had to do with the noise issue and that issue had been addressed.

He also felt there were some difficulties with the structure as it is in terms of the layout of it. Trade Wings did use it, but they are having a hard time getting someone else in there. He said Arrows is a very good fit for this property. It is well constructed heavy masonry and will contain sound quite well. In addressing the five criteria, Mr. Witham said he thought the request would not be contrary to the public interest. The public interest would be to control things such as a Hooters or a Hard Rock Café from coming in. There are special conditions that exist. This is an allowed use. However, it needs strong review as the property abuts MRO. He felt that the stipulation about the size of the bar would prevent it from becoming a nightclub. Relative to the ordinance, the intent was to control the noise and the type of environment that happens around a nightclub. He cannot see that there would be any injury to the public or private rights of others. He thought it was in the spirit of the ordinance to allow the business in the CBB. The presentation was looked at thoroughly. By allowing this type of restaurant substantial justice is done by granting this variance. This property has been sitting empty for two years. Granting of this variance will not diminish the value of surrounding properties. Some people would see this as a plus living near such a nice restaurant. The traffic impact will be minimal. The Library and Jumpin' Jays seem to work. A lot of the strain on some of these parking areas is due to the number of people living in these houses. He understands the opposition's concern, but he thinks this is a very reasonable request and solid use for the building.

Ms. Tillman said she wanted to clarify the entertainment issue. No entertainment means no background music. Does this mean absolute silence, or some type of background recorded music is allowed? No live entertainment is allowed. Chairman LeBlanc said this should be interpreted as "any music played should not be audible at the street level." This goes far beyond what any noise ordinance allows, and it addresses any concern that any resident would have. If you cannot hear the music on the street next to the building, then it won't bother someone who lives on the other side of Middle Street. or further down the street.

Mr. Parrott said he appreciates the concerns of the Church and the others who spoke against the petition with regard to increasing congestion, noise, and traffic. However, he cannot help but reflect upon the fact that there was a very busy garage and filling station there for many years across the street from this location before the building of condos. There has already been a reduction in traffic in that particular intersection. When the circle is put in in Haymarket Square, it will further channel the traffic and slow it down and better the situation. In regard to parking, as Mr. Witham pointed out, all of the restaurants close by seem to operate successfully with no designated parking. With respect to general noise, he suspects it will be a very quiet operation. It is a very substantial building, and he doubts that the patrons of this restaurant would tolerate a noisy atmosphere. The time has passed when other tenants could have gone into this building, but no one did in over two years. He agrees that this should be allowed in the zone with stipulations.

Mr. Horrigan said he did not support the petition.

Mr. MacCallum also opposed the application for a variance. He did not see any hardship. He also felt the spirit of the ordinance would be offended. He did not see that this variance would be against the public interest. The problem as he sees it is that if this variance is granted, then it would have to be granted for everyone else seeking the same circumstances. He said the Board would be hard pressed in the future to turn down any applicant. The universal concern was expressed over what will happen to the property if Arrows leaves, and that is a valid question. He referred to Mr. Choate's comments that if Arrows left, then it might revert back to office or retail use. He rejected the argument that the building is not useful for anything other than a restaurant. Likewise, there are other sites in Portsmouth where a restaurant such as Arrows could go without needing a variance. He agreed with Mr. Jousse that there will always be a parking problem so that is a minor consideration at best. As Mr. Dow pointed out in his reference to the proposed valet parking, the alley way is a dead end street so it would require that cars back out onto Middle Street. This would create significant traffic problems.

He felt this variance would offend the spirit of the ordinance. He did not feel that the value of the surrounding properties would be diminished.

Mr. Witham commented on a statement made Mr. Horrigan about the need to protect the residents of the area. He said there were remarks from residents concerning parking. There were also comments made relative to businesses. He said he did not feel the need to have businesses protecting themselves from businesses. He also commented on the “what if future” issues. He said you do the best you can with stipulations, but you have to vote on what is in front of the Board.

Mr. Horrigan said the testimony indeed came from some residential property owners and business owners, but also from some church leaders. He said he wouldn’t classify church as a business. Mr. Witham agreed.

Chairman LeBlanc said the Board needed to look at the uniqueness of the property, but it was not supposed to set precedent although that happens on some occasions. It is a very large building that practically completely covers the lot it is on. The architecture is such that it cannot simply be used for other retail or office usage. The other factor to be considered is the fact that this building has been empty for over two years. There is an organization that is willing to spend some money and bring it up to a different standard. With the two stipulations that were put on here, the board has more than addressed the concerns of the neighbors. Chairman LeBlanc said he would vote in favor of this motion.

Any other comment from the Board? Hearing none, Chairman LeBlanc asked for a vote to grant the request as advertised and presented with the following stipulations:

- 1) That associated bar cannot be expanded larger than presented on the main floor plan that was submitted at the April 27, 2004 Board of Adjustment meeting.
- 2) That there shall be no live entertainment and any piped-in music shall not be audible at street level.

The motion to grant passed with a 4-3 vote. Mr. MacCallum, Mr. Horrigan, and Mr. Holloway voted in the negative.

ADJOURNMENT

Upon motion duly made and seconded, the meeting adjourned at 11:00 p.m.

Respectfully submitted,

Mary Ann Brown
Secretary

NOTE: These minutes were approved by the Board of Adjustment at the July 20, 2004 meeting.