

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

7:00 p.m.

CITY COUNCIL CHAMBERS

April 19, 2005

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Alain Jousse, Nate Holloway, Bob Marchewka, Alternate Steven Berg and Alternate Duncan MacCallum

MEMBERS EXCUSED: Arthur Parrott

ALSO PRESENT: Lucy Tillman

I. OLD BUSINESS

- A) Approval of Minutes:
- Excerpt of Minutes for the January 18, 2005 meeting (120 Spaulding Turnpike)
 - Minutes of the March 15, 2005 meeting
 - Minutes of the February 15, 2005 meeting

The Minutes presented were approved with minor corrections to the March 15, 2005 minutes.

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B) Request for a One-Year Extension of Variance Approval, by counsel for the applicant, for property located at **85 Middle Street**. Said property is shown on Assessor Plan 116 as Lot 16 and lies within the Central Business B district.

Mr. Berg stepped down.

Mr. Holloway moved to approve the petition as presented, which was seconded by Mr. Witham.

Mr. MacCallum indicated that he would not vote for the motion as he had opposed the original variance request.

Mr. Jousse questioned why the extension was needed.

Attorney Chris Mulligan stated he represented the applicant and they had been marketing the properties for the past year and needed additional time. The variance had been granted with stipulations and it was important to obtain the appropriate tenant. The Board voted to grant the request for a One-Year Extension by a vote of 5 to 1, with Mr. MacCallum voting against the motion.

Chairman Charles LeBlanc announced that for the next four items of business, Items C) through F), Mr. Alain Jousse and Mr. Duncan MacCallum would be stepping down. He indicated there would be five members voting, with four votes needed to grant any of the requests.

C) Motion to Vacate the Variance Granted Pursuant to RSA 673:14, by Tylene A. Jousse, of the petition of **The Childrens Museum of Portsmouth LLC**, owner, for property located at **295 Woodbury Avenue, abutting lot on Woodbury Avenue, 677 and 659 Dennett Street** wherein a Variance from Article II, Section 10-206 was requested to allow the Childrens Museum and 1,000 sf of office space for the Hyder Children’s Foundation to be located in a district where such uses are not allowed. Said property is shown on Assessor Plan 161 as Lots 31 & 32 and Assessor Plan 175 as Lots 6 & 6A and lies within the General Residence A district.

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

In response to a question from Mr. Berg, Chairman LeBlanc clarified that they must interpret this as a request for a rehearing as that was the way to vacate a decision made by the Board. The criteria for granting a rehearing would still have to be met.

Mr. Berg then made a motion to deny the request, which was seconded by Mr. David Witham.

Mr. Berg referenced a sentence, in the motion to vacate the variance, where a question posed to the Board by a Diane Ruger was quoted – that being, “Do any of the Board members have any association or affiliation, or any type of connection with the Children’s Museum that have not recused themselves?” He noted that the applicant’s attorney, in response to the issue, cited the governing law which states that a question of this type should be raised at the beginning of the meeting. That is, if someone felt Mr. Marchewka had a conflict, they should have brought it up at the beginning and not waited for later. If the attorney is correct on procedure, on that basis the Board should say “no,” Mr. Berg maintained. As far as the content of the request – that being whether Mr. Marchewka has a conflict and if he made an error in not disclosing it – Mr. Berg believed they needed to look at who they were talking about. Mr. Marchewka asked if he could read the letter he had written to the Board and Mr. Berg yielded to Mr. Marchewka.

Mr. Marchewka read his letter of April 19, 2005, which had been provided to all the Board members and the record. In this, he stated that his wife was employed by a television station and was asked to host two Children’s Museum fundraisers, this type of activity being a part of her then contract. He wrote that these were “isolated occurrences” which he had not even remembered and stated “...unequivocally that my vote for the Children’s Museum zoning variance was not compromised by any involvement my wife or I may have had with the organization.” Mr. Marchewka concluded that he didn’t feel he had any conflict of interest.

Chairman LeBlanc interjected that he had built a display in the Children’s Museum when it first opened. He also noted that on the page of volunteers provided in the Museum’s packet his daughter’s name appears from work done two or three years ago. He feels his vote is unbiased and based on the zoning facts and not any other considerations.

Mr. Berg stated that, as a local personality, Mrs. Marchewka was asked to do these sorts of things all the time and probably agrees to do so most of the time. He also addressed the point in the requester’s paperwork that her name appeared as a volunteer two times in a row and submitted that, as a volunteer for various groups himself, he knows people can be thanked for several years even if they were only involved once. Mrs. Marchewka does not have a fiduciary obligation to the Museum so the point is irrelevant. Also because the Museum is a public facility, a great number of people could say they had some sort of connection to it, but as Chairman LeBlanc pointed out, this is not a museum issue, but a zoning one. Lastly, he discounted the premise that because they are married, the assumption must be

made that the Marchewka's would have discussed this issue and that she would have tried to influence his vote in favor.

Mr. David Witham stated that to say there's a conflict is a real stretch. It had been stated that since Board Member MacCallum had recused himself, then Mr. Marchewka should also. He wanted to remind the requesters that, initially, Mr. MacCallum decided to sit in because this Board voted that they didn't think there was a conflict for him. To use that as a basis doesn't help the argument and he indicated he will support the motion.

Chairman LeBlanc added that he did not see any new information brought forth that was not available at the meeting in question.

The motion to deny the motion to vacate the variance passed by unanimous vote of 5 to 0.

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D) Request for Rehearing, by William Eley, of the petition of The Children's Museum of Portsmouth LLC as detailed in item C).

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

Mr. David Witham made a motion to deny the request for rehearing, which was seconded by Mr. Steven Berg.

In making his motion, Mr. Witham said he would like, for the minutes, to move forward his previous comments and also add that this one goes into a little additional detail in terms of issues that the Board failed to address. He stated that he doesn't agree with any of the items listed in the request for rehearing. As an example, he cited the requester's contention that the Board failed to understand the significant traffic and safety problems. He stated that the Board had that presented to them for about an hour and a half and there was no mystery about what was going on out there. It was carefully weighed, along with the expert testimony, and it is inaccurate to state that they didn't understand it. Mr. Witham indicated that the requesters did pick up some comments of various Board members, but in a four and a half hour meeting, a lot of things are said and it's pretty easy to pick up a phrase here and there. Overall, he felt the Board came in with open minds and listened to all the discussion. He didn't feel that anybody erred in their decision and he hadn't seen any new information to make him feel otherwise.

Mr. Berg, in seconding, wanted to mention for the record what the issues were. Hardship had been discussed, with the majority of the Board agreeing that there was a hardship. The conflict had just been addressed that evening. The matter of the easement was addressed by the applicant's attorney. Regarding the point that the Board erroneously considered this a transitional argument, he stated that, if this were a permitted use, it would be a Mixed Residential Office Zone and that is a transitional zone, if he was using the term correctly. Mixed Residential Office and Mixed Residential Business are distinctly transitional zones and that is what they are talking about here – that type of rationale. Regarding the parking capacity, the Board was given a site plan showing 43 spaces and he did not see how that was being misinformed.

Addressing the contention that the Board misunderstood property values for the Museum location, Mr. Berg stated that is not relevant as it's a Mixed Residential Office district and, as mentioned in, he believed, the letter granting the variance from which they were given excerpts, if they were to apply the ratios required in the MRO zone to this property, they are building a substantially smaller building than would otherwise be permitted. Traffic issues had been addressed by Mr. Witham and this is not a spot zoning matter. The charitable status of the applicant isn't relevant. It only has relevance in that a stipulation put on the variance specifies that the space be used for non-profit purposes ensuring that whatever the continued status of the Hyder Trusts, the stipulation on the variance provides protection.

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The motion to deny the request passed by unanimous vote of 5 to 0.

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E) Request for Rehearing, by Peter P. Bresciano, of the petition of The Children’s Museum of Portsmouth LLC as detailed in item c).

**DECISION OF THE BOARD:**

Mr. Steven Berg moved that the request for rehearing be denied, which was seconded by Mr. David Witham.

Mr. Berg requested that his comments on the previous requests be brought forward as this is virtually word-for-word with the request put forth by Mr. Eley.

Mr. Witham stated he would also like to move his comments forward as this is the same exact document with a different name – not to make light of the democratic process, but, again this was a four hour plus meeting so the Board digested a lot of information. They did due diligence.

The motion to deny the request for rehearing passed by unanimous vote of 5 to 0.

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F) Request for Rehearing, by Lenore Weiss Bronson, of the petition of The Children’s Museum of Portsmouth LLC as detailed in item C).

**DECISION OF THE BOARD:**

Mr. Nate Holloway moved that the request for rehearing be denied, which was seconded by Mr. Steven Berg.

In making the motion, Mr. Holloway indicated that he agreed with, and wanted to apply, the comments that had been made for the previous requests.

Mr. Berg pointed out that, while this was not as similar to Mr. Eley’s request as Mr. Bresciano’s, it has the same outline and a great deal of the same text. He felt his previous comments also applied here.

The motion to deny the request passed by unanimous vote of 5 to 0.

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II. PUBLIC HEARINGS.

1) Petition of **Malthouse Exchange Realty Trust, owner, and S J Torres, d/b/a Brewery Lane Tavern applicant**, for property located at **95 Brewery Lane Unit 2** wherein a Variance from Article II, Section 10-208(19) is requested to allow 450 sf to be used for outside dining with liquor from May to October on a lot that directly abuts both Residential and Mixed Residential property where such use

is not allowed. Said property is shown on Assessor Plan 146 as Lot 27 and lies within the Business district.

Mr. Marchewka stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech stated that he was there on behalf of the Malthouse Exchange Realty Trust. What is being requested is to allow 450 sf to be used for outside dining with liquor from May to October. This will be open the same hours as the inside restaurant, and will be used mainly for breakfast and lunch. The owners are willing to close the outside dining area when they stop serving food at 10 p.m. This property does have special conditions such as the nonconforming use of the Brewery Lane Tavern. This has been in place since before the ordinance. There will be no outdoor music, and there would only be five tables with four patrons each. The area would be segregated per requirements of the state liquor commission, and is a considerable distance from neighboring residence. This would not add dust or pollution into the neighborhood. He has read the correspondence from Ms. Cindy Matthews, and this will not exacerbate her concerns.

He stated that this business has existed for about 3 years. During that time they have had very few complaints from the Portsmouth Police, and have many letters of recommendation from the Portsmouth Police Department regarding their alcohol service and employee training and conduct. There has never been a problem that would lead them to have their liquor license jeopardized. They do not claim any knowledge of the things that Ms. Matthews lists in the letter. They believe their clientele are of good manner and repute. This is not a place that caters to a problem element. The criteria needed for the Board to grant the variance is fulfilled in this application. This restaurant preexists the zoning ordinance, and seeks to have a popular standard – the outdoor dining area. This will not result in any diminution in value of surrounding properties. They believe that it will be aesthetically pleasing and will not result in an increase in noise or traffic. It is surrounded by the parking lot, and is quite a distance from any of the residents. This will not hinder the operation of the restaurant, nor will it create any additional strain on municipal services. Substantial justice will be done if the Board grants the variance, and it would be serving the public interest to grant it. This is a popular restaurant with a large clientele, and they would be providing a service that is in demand. The property does have special conditions, given this location which is in a business district that abuts the residential district. This is a reasonable use, and is allowed in the district by special exception. He doesn't believe that any public or private rights of anyone will be violated. They had no problem with the Board stipulating hours of operation, no live entertainment, and no speaker system.

Chairman LeBlanc asked what the hours of operation were.

Attorney Pelech stated that they were open 10 a.m. to 10 p.m. on the weekends, and 11 a.m. to 10 p.m. on weekdays. The weekend is the only time they serve breakfast.

Mr. Witham asked if the last meals were served at 10 p.m., does that mean that they could be open at times until 11 p.m.

Mr. Scott Massey, Vice President of Brewery Lane Tavern, stated that they stop serving the dinner menu at 10 p.m. They are open to any suggestions as to how late they should stay open or what restrictions to put on the outdoor dining area.

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Mr. Jousse asked if they were only going to be serving breakfast and lunch.

Attorney Pelech stated that they would be serving lunch and dinner all the time, but only breakfast on weekends.

Mr. Massey stated that they could make it so that the outdoor dining section would close at 10 p.m. if they wished. He respectfully requests that the Board grant their request for a 450 sf outdoor dining area and patio at the restaurant. Their focus will be on weekend brunch and weeknight dinner (ending at 10 p.m.). They require no outdoor speakers and stress that no excess noise will be tolerated. They have an excellent record with the provision of liquor.

Mr. Holloway asked if the outdoor dining area would be alcohol free.

Mr. Massey stated that alcohol would be served with food.

Mr. Ben Barlett, of 69 Albany Street, stated that he was a member of the Seacoast Rugby Club. He considers this restaurant to be his home tavern, as it is the base of operations for any charity work that they do. They have held multiple fundraisers, and the generosity of the Brewery Tavern has allowed them to be able to do much of it. Any improvements to the Tavern will be a great improvement to the community and the charity work that they do will benefit from this. He thoroughly supports this.

Mr. Massey stated that he had a correction to make. The breakfast time starts at 9 a.m. on the weekends.

Mr. Daosith, of American Express Financial Advisors, stated that he used the Brewery Tavern as a place to bring clients to lunch and dinner. He appreciates them allowing him to entertain clients and he likes the atmosphere, the quality of the food and the service of the waitstaff.

Mr. Kim Bridge, of 127 Cass Street, stated that he supported this. The tavern is a nice place to visit and has his support. He hasn't heard of any neighbors saying anything bad until recently. He is in favor.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Denise Rollins, of 149 Cass Street, stated that she owns the property abutting the tavern. While she appreciates the fact that the restaurant is there, she opposed exterior expansion. Although the owner says that the excessive noise and gatherings of people are not from his business, they are coming from somewhere. Anywhere from 12:30 a.m. to 3 a.m., they have had people loitering and creating excessive noise. They've had problems with noise, trash and the police coming at odd hours. If the owner wants to expand, as a direct abutter, only 50' away, they request a separate meeting for them to show how it will be constructed, what it will look like, how it will affect traffic patterns and what they will do about the blind alley. She claimed they only received a notice four days ago, and since then they haven't seen anything. For those reasons, she asked the Board to deny the petition until there is more information about what will happen. Once they grant the variance, it can be expanded and they prefer that that not happen at this time. Where is the 450 sf going to be? There isn't a lot of space there.

Chairman LeBlanc stated that they have a proposed space for the outdoor expansion, which is from the beginning of Unit 1 and goes until Unit 4.

Ms. Rollins stated that there was a blind edge there, but it is unsafe for traffic. The neighborhood doesn't really want this – it abuts directly to residential property. There really isn't a strict sound buffer zone between the business district and the residential district. This will directly affect her tenants.

Mr. Charles Goudette, abutter, stated that he has a concern in the change of service at the Brewery Lane Tavern. He has been a resident in the neighborhood for 17 years, and it does directly abut the Brewery parking lot. His opposition to the variance is due to the increased noise on the residential neighborhood which would impede their right to an enjoyable use of their property. The present zoning ordinance prohibits the serving of alcohol in an outdoor setting near a residential area. He made reference to a former nightclub that was located at the same address in the past that they had problems with. He asked the Board to consider the neighbors when making a decision on the requested variance.

Mr. Berg asked if there could be any change in the proposal that would make him amenable to this. He gave examples such as limits on outdoor dining hours, restriction or ban of alcohol sales outside, etc.

Mr. Goudette stated that it was more an issue of the noise. The noise will bother the residents at any time that it is open.

Ms. Adriana Scott, a tenant of Ms. Rollins, stated that this is her first spring in the area and the noise is definitely a problem. She has woken up to cars racing, people outside her bedroom window, etc. She feels that it provides an unsafe environment for her three children. She is happy that the restaurant is expanding, but right now, there seems to be a lack of control after hours.

Mr. Berg asked if she specifically knew if the problems were coming from the Malthouse.

Ms. Scott stated that she hasn't seen anyone coming out of any other places. It is a party-like atmosphere, and it lasts till almost 2 a.m.

Mr. MacCallum asked exactly where she lived.

Ms. Scott stated that she lived at 16-3 Chevrolet, but technically it is on Albany Street, across from the Malthouse Exchange.

Chairman LeBlanc asked if it was the gray corner house.

Ms. Scott stated that it was the white ranch.

Mr. MacCallum asked where she was in relation to the Portsmouth Music Academy.

Ms. Scott stated that she was closer to Chevrolet Avenue. The traffic coming across is definitely a problem, because there is a blind spot. She moved in last summer.

Ms. Catherine Wayland, of 660 Middle Street, stated that she is in complete opposition to the variance. She stated that the Board should be aware of the inappropriate occurrences that have taken place at the Malthouse in the past. Noise problems have resulted in frequent disasters for the neighborhood and the City Council. Please do not make them go down that path again. They are a residentially zoned neighborhood, and they are not in the Central Business District. They must be protected from the businesses that are in direct conflict with the rights and needs of its residents. The Malthouse is an L shaped structure that acts essentially as an amphitheater, which makes the noise carry. All the sounds are projected into the neighborhood till 3 a.m. She is asking the Board to deny the variance.

Mr. Berg asked if there could be any change in the proposal that would make her amenable to this. He gave examples such as limits on outdoor dining hours, restriction or ban of alcohol sales outside, etc.

Ms. Wayland stated that they, not only hear fighting and arguing, but also conversations. If there is a crowd of people outside, the noise will project up into the neighborhood.

Mr. Vince Lombardi, of 75 Aldrich Road, stated that his road backs up to the Malthouse Exchange. He has some questions. Ms. Matthew's letter has repeatedly been brought up, yet they have no idea what it is or what it says. He also wondered what the hardship would be. Attorney Pelech stated that denial would create a hardship, yet as he understands it, there must be a hardship that needs to be corrected in order to be granted the variance. The Malthouse Exchange has had a history that has been difficult for the neighborhood and has persisted in attempting to acquire variances to the zoning ordinance, which is designed to protect the residential neighborhood. He thinks that it is the fear of the residents that this would open the door to a continued escalation of granting variances that create more businesses. He appreciates that the restaurant caters to non-profits. That is a wonderful thing to do, but he is not sure how that is relevant to having an outdoor seating area. He emphatically hopes that the Board denies the request.

Chairman LeBlanc asked if he could hear normal conversations taking place outside the restaurant.

Mr. Lombardi stated that in his location he cannot hear normal conversations, but he can hear higher volume noise.

Mr. MacCallum asked what time period he was speaking of.

Mr. Lombardi stated that the noise happened in the evening mostly, but its been winter so his windows have been closed up.

Chairman LeBlanc asked where his property was.

Mr. Lombardi stated that his property was directly behind the Malthouse Exchange, but he is down a hill slightly.

Ms. Tamera Leibowitz, of 30 Aldrich Court, stated that she lived directly across from the Exchange. She strongly urges the Board to deny the variance. The fact that the owners previously stated that they had no problems is a testament to how this is not working. She has two young children, and she hears loud noises and people during the summer. She is asking to leave the area as it is, and to not allow outside dining or drinking of alcohol.

Mr. MacCallum asked what time of the day she usually heard the noise.

Mr. Leibowitz stated that it was during the evening, late, from about midnight to 2 a.m.

Ms. Elizabeth Larson, of 668 Middle Street, stated that her property goes back till Chevrolet Drive, and her rear entrance is directly across from the Malthouse Exchange. She does hear noise, which is especially bad when her windows are open. She is often awakened by people yelling in the parking lot. People drive motorcycles and peel out of the parking lot. She has often considered calling the police.

Chairman LeBlanc asked how many days a week this happens.

Ms. Larson stated that it was mostly weekends. It is usually Thursday through Saturday.

Ms. Amanda Donovan, of 68 Cass Street, stated that they have had a lot of problems in the past. In the summer, they open their back door, which allows the music and the noise to escape. Even though they say that they are not using amplification or playing music, music can be heard from the open door. The Board needs to take a closer look at this. The traffic is a real consideration, because it is heavy at times. There are no sidewalks and very little lighting – it is very dangerous. That whole road area is poorly lit and maintained, and there is a lot that the City needs to do to upgrade it. The whole area has problems that need to be considered before allowing them to expand on their business.

Mr. James Green, of 82 Cass Street, stated that he was not sure what this was about. He has seen the plan, but is confused. He just got the notice, and he doesn't know anything about it. He has his window open at night, and he can hear conversation from his house. He can hear the cooks' conversation when they come outside. As far as breakfast goes, that is fine. Around 10 p.m., that place is large enough and very noisy, and they do not stop selling alcohol at 10. What is going to stop someone from ordering a couple beers at 9:55 p.m.? He doesn't care about the outside tables, but he does not think that they should have night hours. Breakfast and brunch is alright, but there is no reason to stay open till 10 p.m. Why would anyone want to sit in the dark anyway? There's no reason for it to be there.

SPEAKING TO, FOR, OR AGAINST THE PETITION

An employee of the Malthouse Exchange stated that she was in favor of the variance. She wanted to urge the opposition to take a look at the plan. At 10 p.m., they will stop selling liquor and the outside area will close, so their comments about excessive noise have no relevance to the dining area. Also, they are a totally different business with totally different management. When people came up to speak in opposition, they noted past experiences when the Malthouse was under different ownership. They are not affiliated with the past problems, and they have had many recommendations from the Portsmouth Police that commend them on the successful turnaround of the Exchange. They propose putting the outdoor dining area surrounded by bushes. There will be no additional traffic problems. Many of the issues that were brought up do not have any relevance to the dining area.

Mr. Jay Hunter stated that he lived on 222 Cass Street. He stated that he cannot hear noise, even with the benefit of the tree line. He doesn't have any concerns about the noise. There is a greater traffic concern dealing with the cars racing up and down Cass Street.

Mr. MacCallum asked how long the Brewery Lane Tavern had been under its current management.

Attorney Pelech stated that it was March of 2003. Before that was a bar called Boomerangs, which stayed there for 5 years. The Malibu Beach Club was there before that. That is the past owners that most of the opposition is speaking of.

Mr. MacCallum asked if there was any connection at all to the previous owners.

Attorney Pelech stated that there was not.

Mr. Holloway asked what type of screening is around the outside of the bar.

Attorney Pelech stated that there was a fence. There is no problem with shrubbery or anything like that. If the Board requires a visible screening, they will do that as well.

Mr. Lombardi stated that a variance goes with the property and not with the business. Once is it in place, it can be applied to a business that is there. Maybe the current business is fine, but the change will then flow forward in the future.

Mr. MacCallum asked if they could recall Ms. Wayland. He asked her what time period, in terms of years, when she described the problems.

Ms. Wayland stated that she was speaking of the Malibu Beach House, which Mr. Pelech represented, and also the business before that that was never zoned in. They just appeared one day.

Mr. MacCallum asked what her experience has been in the past couple of years.

Ms. Wayland stated that it was similar to what others have recounted here today. Boomerang's had bungee jumping which was an ordeal. At night, during closing time, the noise is generated. There's a lot of fighting has gone on.

Mr. MacCallum asked if this has been going in on the recent years.

Ms. Wayland stated that it does happen. It's worse in the summer months because of the weather.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. MacCallum made a motion to deny the application, which was seconded by Mr. Witham.

Mr. MacCallum stated that he is aware of the problems with the police that the Tavern has had in the past. He appreciates that this is not the same business that had so many complaints, but it is still a bar and restaurant. It serves beer and liquor until the early hours of the morning, and it will have the same problems. Putting an outdoor restaurant there will just exacerbate those problems as he does not believe that everything will shut down at 10 p.m. He doesn't see any recognizable hardship. Also, they cannot tell what is going to happen in the future. What if they decide to sell this to another business that is less responsible? Once the variance is granted, they cannot control it. The primary

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reason for denying this variance is that it goes against the spirit and intent of the zoning ordinance. There are not supposed to be restaurants abutting residential property. The Planning Department has recommended against this, and he agreed with them.

Mr. Witham stated that he agreed with Mr. MacCallum. He is sure that is a well run operation, but they are not voting on the type of operation. His support of the motion to deny the variance has to do with the ordinance. This is a difficult thing to enforce, and it is unfair to ask it of City officials. A zoning officer cannot go there to make sure that service of drinks is stopped at 10, or the outside is shut down at 10. People could easily sit outside and drink until midnight. On a micro level, this would be contrary to the public interest. Part of the zoning ordinance was written to protect residents in situations like this. It could work well in some other area, but not where it is proposed.

Mr. Berg stated that he had been going to make a motion to grant with stipulations, such as just having breakfast and lunch, which would give the restaurant owners the ability to look closely at themselves and see if they are part of the problem. He is on the fence. He is sympathetic to the neighbors, but doesn't see the connection to the applicant. They do not know if they are the source of the problem, and all bars will have noise outside at closing. He thinks that that area is just a noisy place. He felt, however, that the big issue was the ordinance and he agrees with the makers of the motion that he doesn't see a hardship. There was no evidence presented as to why this change was necessary. For those reasons, he will support the motion.

The motion to deny the petition was passed by a vote of 5 to 1, with Mr. Holloway voting against the motion.

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2) Petition of **Malthouse Exchange Realty Trust, owner, and John Wyman, d/b/a Bounce, applicant**, for property located at **95 Brewery Lane Unit 7** wherein a Variance from Article II, Section 10-208(27) is requested to allow indoor recreation on a lot that directly abuts both Residential and Mixed Residential property where such use is not allowed. Said property is shown on Assessor Plan 146 as Lot 27 and lies within the Business district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. John Wyman stated that Bounce Fun and Fitness is a children's gym and educational program, targeted toward infants to age 8. The teacher-led class sizes will be 12 students, with a teacher to student ratio of 1 to 6. He outlined some of the programs and classes. He stated that the current zoning ordinance interferes with the acceptable use of the property. This is a children's educational gym and fun center. By issuing a variance, they would not be injuring the public's rights. There is adequate parking for this class size, and they think that this would be an excellent location for this business. Substantial justice will be done by allowing another children's facility to operate, which is not that much different from a school. This will not be destructive to the City and will not cause a significant increase in traffic. It will not create a diminution in value of the surrounding properties, and is not contrary to the public interest. It is a chance for parents to get their kids into a social activity, which actually helps the community.

In response to questions from Chairman LeBlanc, Mr. Wyman reiterated that the ages of the children would be infants through age 8. After that, they tend to lose interest and desire a larger, more active sports type program. They could have up to 4 teachers, maintaining the 6 to 1 ratio at all times.

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Regarding hours of operation, they would most likely end at 6:30 p.m. during the week and probably end at 7:30 p.m. during the weekend. This depends on if they have birthday parties scheduled or just classes.

Attorney Bernie Pelech stated that he advised Mr. Wyman that he didn't really need his representation. This is a justified use as it is nonintensive, and will not impact the residential neighborhood. The ordinance does not advise against this. Children are accompanied by their parents. This is a good proposal. This is not against the public interest of the neighborhood, nor does it decrease any of the surrounding property value. The dovetails nicely with the ballet school. These uses are consistent with one another.

Chairman LeBlanc asked if there would be loud music coming from this

Mr. Wyman stated that he does not anticipate it being very loud. There may be music, but it will not be excessive.

Mr. Vince Lombardi stated that he did not fully understand it, but it sounded like a wonderful place. He supports this type of activity. He asked the Board if there was a way to keep this tied to the business, so that if the business leaves, it is not open to the variance.

Chairman LeBlanc stated that this was an allowed use of the property. Recreational activities are not allowed in properties that abut residential properties, so it has to be there. Any subsequent user would have to be similar in kind.

Mr. Lombardi stated that then, he was for this.

Mr. MacCallum stated that he doesn't have a problem with the proposal, but is worried about what will happen in time. He is just worried about the variance being attached to the land. What if someone else comes in and wants to use it in a way that conforms to the variance but the characteristics are different. He asked if Attorney Pelech could address that.

Attorney Pelech stated that it was in the Board's purview to place conditions upon it. They can limit types of uses such as banning video games, age limiting and number limiting. They just have to make it so that a new business would have to come back to start a new business. With conditions placed upon it, it should take care of the concern.

Mr. Witham stated that, if a variance were granted, it would be "as presented and advertised". The applicant was very specific as to the type of equipment being used and the use of the area, which should alleviate concerns.

Mr. Berg stated that this is structured, physical fitness. This is educational, and is a gray area. He thinks that the use is educational, so that should keep someone like Jokers out of there.

With no one further rising, the public hearing was closed.

## **DECISION OF THE BOARD**

Draft for Approval

Mr. MacCallum asked Ms. Tillman if she recommended any stipulations to add to alleviate their concerns.

Ms. Tillman stated that Mr. Witham was correct, and the concerns would be covered by approving “as presented.”

Mr. Berg made a motion to grant the petition as presented and advertised, which was seconded by Mr. Witham.

Mr. Berg stated that the applicant hit all the points. This is not contrary to the public interest, as this benefits children. He felt this was less indoor recreation than physical fitness. The zoning restriction as applied interferes with the applicant’s reasonable use of the property. The zoning ordinance is intended to keep out commercial and recreation uses. This is educationally oriented. The strict interpretation of the ordinance creates a hardship here. There is no injury to the public or private rights of others, and is consistent with the spirit of the ordinance. This promotes cultural health of children and the value of surrounding properties will not be diminished.

In seconding, Mr. Witham noted that this is an allowed use in this zone, but not on the specific lot because it is within 200’ of a residential district. This space is set back within the building, so the activity would be farther than 200’ from a residential zone. He supports the other reasons outlined by Mr. Berg.

Mr. MacCallum stated that he will be voting in favor with some reluctance because he has a hard time seeing a true legal hardship. He also has a hard time seeing the harm. For that, he will support the motion.

The motion to grant the variance passed by unanimous vote of 6 to 0.

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3) Petition of **Barbara Jenny and Mathew Beebe, owners**, for property located at **54 McNabb Court** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow: a) an irregular shaped 124.37 sf addition connecting the dwelling to the garage with a 7’1” rear yard where 20’ is the minimum required and a 5’6 ½” left side yard where 10’ is the minimum required; b) the resulting attached garage will have a 12’ x 20’ 2nd story addition and maintain the existing 1’7” right side yard where 10’ is the minimum required and a 5’ rear yard where a 20’ rear yard is required; and, c) 35% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 112 as Lot 58 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Matthew Beebe stated that their petition is for a modest addition. They are asking for an extension to their existing mudroom and porch and garage. They will also add a small bathroom in the rear of the house. The increase of lot coverage with the new additions would total 124 sf. It is important to note that they are already over the 25% lot coverage before the addition. After the addition, the lot coverage would be increased by 4.5%, creating a lot coverage of 35%. The hardship on the property is self evident. They have a minimal amount of property, so without doing anything at all, they are still on a nonconforming lot. They only have 1/3 of the lot available. This will not create diminution in

value to surrounding properties. It is a modest proposal and will increase the value of surrounding properties. A couple of variances have been granted to neighbors in the past years. They do not believe that the requested variance is contrary to the spirit of the ordinance in any way. They aren't changing the use, just asking for a variance. He states that it would increase the tax value of the house, and would contribute to Portsmouth's affordable housing. They think that granting the variance would do substantial justice. They aren't harming the rights of their neighbors, and there is hardship tied to the size of the lot.

Mr. Jousse asked if they were tearing down the garage.

Mr. Beebe stated that they would be building on top of it.

Chairman LeBlanc asked how high the second story over the garage was going to be.

Mr. Beebe stated that it would be 19'6 1/2". The grade increases significantly. He showed the Board on the sketch. This additional 9.5' would not come to the ridge line of the homeowner behind them. They did that for privacy.

Mr. Berg asked if they were adding a bath to the first floor and if it would add to their quality of life to have one.

Mr. Beebe stated that they would. There is no bathroom currently there.

Mr. MacCallum stated that the Planning Department had stated that he could build an addition without violating any of the zoning requirements. Why isn't it possible to do that?

Mr. Beebe stated that the setback is 25'. That goes into the steps of their mudroom. Any extension would require a setback variance. The bathroom falls within the sideline on the left hand side. That is about 10' from the lot line.

Mr. Berg stated that there is a set of double doors under the stairs.

Mr. Beebe stated that he took it out. That will be light storage. He changed his mind about that on the plan.

Ms. Rose Sully, of 46 McNabb Court, stated that she was an abutter to the Beebes. They are in support of the variance. They have seen the plans for the addition, and it is a modest proposal. It is small, and will provide a better use of space. They appreciate it because they live in a similar house. The applicants have taken steps to protect their privacy by directing the focus of the addition to the backyard.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Witham made a motion to grant the petition as presented and advertised, which was seconded by Mr. Berg.

Draft for Approval

Mr. Witham stated that quite a bit of relief was being sought. However, it is well thought out and fits well with the land. The placement is the best place in the lot, and the second floor over the garage is the most reasonable part of the request. The half bathroom and the connector will not be a detriment. As for the lot coverage, it is a tiny lot the way it is, so pushing it up to 35% would not add a great deal of density since it is in the center. The variance would not be contrary to the public interest, and this will not violate the light and air stipulation. There are special conditions related to the property which would be the location of the existing structure in regard to the property line. There really isn't another feasible method to approach this. This has a minimal impact, and is well thought out. He feels that the variance is consistent with the spirit of the ordinance, and substantial justice is done.

Chairman LeBlanc asked if he could amend the motion to include that the garage would have to be built on the footprint of the existing garage. If it were torn down, they would have to come back for additional relief.

Mr. Witham stated that he agreed to the stipulation. Mr. Berg concurred.

Mr. Berg stated that two parts of the variance relate to setbacks, but both of the additions are set back further than the existing property so this would be no more intense. There is really no other way to accomplish this. The first floor bath makes a lot of sense and the addition of living space without crowding works.

Mr. Jousse stated that the proposal is well thought out, but it is a small lot. There is nothing unique about it. The other lots are similar in size. He really cannot find anything that would make this a special case, so for those reasons he will not be supporting the motion.

Mr. MacCallum stated that he will not be supporting. It is a model example of a variance application that should not be granted. The Planning Department stated that the constant building on the lots would cause an overcrowding and block out light and air from surrounding abutters. That comment from the memo is a restatement from the NH Supreme Court's holding. They cannot just look at variances individually; they have to see the big picture. The cumulative effect of the variance will make the neighborhood crowded and too dense. The effect of all variance applications will be everyone asking for the same relief. If you grant relief for one person, you must grant it to all. For those reasons, he will not be supporting the motion. There is a typical property – there is nothing unique about it. It is already overburdened.

Mr. Witham stated that he has heard that “there is nothing unique” about this property. Those classifications have to do with Simplex, and this is not a Simplex case. This case requires the Boccia analysis. Under that, he must find special conditions – which he has. The shape and placement of the lot make it a special condition. Also, this Board has shown that they are capable of looking at cases in an individual basis. He thinks that the Board is responsible enough for that.

Mr. Berg stated that this lot would be greatly improved. The house and the garage create a situation where it is alright to permit something that is already permitted. The alternative would be the demolition of the garage and the complete reconstruction of the property, and even then it may not conform. That is not reasonable. There is no other method to achieve an otherwise permitted use. The hardship test is met.

Mr. Marchewka stated that this is a reasonable request in that the garage is existing. The majority of this plan already exists, and they are just tying the garage into the house, which is a reasonable request. For that reason, they should grant the variance.

Mr. MacCallum stated that was an insult to the lot coverage. They are increasing it, even though it is already in excess of the requirement.

Chairman LeBlanc stated that it would be 35%.

Mr. MacCallum stated that the uniqueness is a requirement before a variance can be granted. He cited court cases. There must be something unique about a property that justifies allowing the homeowner a special exception. He stated that there is a uniqueness requirement that must be found.

The motion to grant the petition passed by a vote of 4 to 3, with Messrs. MacCallum, Jousse, and LeBlanc voting against the motion.

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4) Petition of **Angela M. Zira, owner**, for property located at **46-48 Woodbury Avenue** wherein a Variance from Article II, Section 10-206(4) is requested to allow an existing single family dwelling to be converted into a two family dwelling on a lot: a) having 2,883 sf of lot area where 6,000 sf of lot area is the minimum required; and b) 28.3% open space where 30% is the minimum required. Said property is shown on Assessor Plan 163 as Lot 13 and lies within the General Residence A district.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Angela Zira stated that her father purchased this house from his mother in 1984. Throughout those years, the house has housed 2 families. In her research she has found that this property indeed is for two families and has two separate addresses. She purchased the house in 2004, and her intentions were to renovate this as a 2 family unit. She believes that she meets the criteria for the variances because the variance will not be contrary to the public interest, because it is providing housing in an area where it is needed. It will increase tax revenue as the property value increases. This house has two front and back doors and a separating wall. This is not conducive to single family living. The house exists in a neighborhood with many multifamily units. The variance will not injure the public or private rights of others as it does not encroach on any other properties and will continue in the same use as it has for the previous years. This variance is consistent with the spirit of the ordinance, because it will be used for housing two families. Substantial justice is done, because it is a lawful use of the property. The value of surrounding properties will not be diminished as per the plans that they have submitted. They are not adding to the structure, only fixing it within. She has spoken to her abutting neighbors, and she brought with her a signed petition giving their permission.

Chairman LeBlanc asked when it was converted to a single family home.

Ms. Zira stated that it was sometime after 1985. It is not necessarily single, because there is an opening to join the two dwellings. Some of the rooms aren't finished, and some are blocked off with plaster. This has never been really open.

Chairman LeBlanc asked if there were two families living there now.



Ms. Zira stated that it was herself, her mother and her boyfriend living in the house now.

Chairman LeBlanc asked if they resided in both sides of the house.

Ms. Zira stated that they live in different sections and share the kitchen.

Chairman LeBlanc stated that the plan shows 3 parking spaces to the left of the building.

Ms. Zira stated that there was parking in the past to the left that was used during the winter months.

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

Mr. Scott Young, of 6 Wallace Road, stated that he is a former neighbor. He stated that he had sent a letter that explained the situation. The parking on the side of the building is not safe. There is a curb and sidewalk there, and the car would have to pull out into traffic just to see if a car is coming.

Chairman LeBlanc asked if there was a 5' sidewalk.

Mr. Young stated that it was probably more of a 3' to 4' sidewalk. As far as the variance, it is not just "a small bending of the rules"; they are looking to throw the rules away. The current zoning requires 6,000 sf for a duplex and they have less than that right now. There is not enough parking, and if they were to install some it would overtake the lot coverage. A two family unit might mean kids, and sides of the structure are mere inches from the street. The house has been struck several times by vehicles. City records indicate that there was a violation notice sent in 1985 regarding work being done that included a remodel of stairs, bathrooms and kitchens. It shows that this has been used a single family unit since 1985. It would not serve the public interest, because he can't see anything other than a negative impact. More kids and more strain on municipal services is not good. The new owner purchased this home, knowing full well that this can only be used as a single family unit. This is just really asking for a large violation of zoning requirements. This would virtually be a new building when they would be done because it is so damaged. This is on a small lot and it is in a high traffic, high congestion area already.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Mr. Turner Bryant stated that he provided a photograph of the neighbor's parking area and the proposed parking that Mr. Young referred to. They are side by side, and the curb cuts are the same.

Chairman LeBlanc asked if there was a curb cut on Woodbury Avenue.

Mr. Bryant stated that there was asphalt covering what was there. The parking is identical.

With no one further rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Mr. Berg asked Ms. Tillman why there is no variance for the parking backing into traffic.

Ms. Tillman stated that two family residences can have cars park behind one another. There is an exception listed that requires that the families use the back.

Mr. Marchewka asked if this was a single family or duplex, because it lists a duplex on the tax map.

Ms. Tillman stated that those are for assessing purposes only, so they really don't have anything to do with the interior. It looks like someone just saw the outside and assumed. According to the owners in 1985, they removed the stairs making it a single residence.

Chairman LeBlanc asked if it had been assessed as a duplex.

Ms. Tillman stated that she did not know.

Mr. Berg read from the packet. It stated that the assessors attempted to enter the unit on three different occasions and could not. They sent a letter to the owner, but never heard back. The owners should have applied for abatement years ago, but did not.

Mr. MacCallum made a motion to deny the petition, which was seconded by Mr. Jousse.

Mr. MacCallum stated that the square footage will be less than half of the minimum requirement if this is passed. If converted to a duplex, this would be attached to the property forever. As the Planning Department observed, this area is densely developed, so another unit would only add to congestion and density. This is already crowded and congested, and the house is too large for the lot. The Planning Department has noted the parking problem. He is not satisfied that they can be satisfied. For those reasons, this conversion is not appropriate. It will only increase traffic problems.

Mr. Jousse stated that he had nothing to add. It would have been in the applicant's interest to have allowed the appraisers to come in and view the house. Does this unit have two kitchens to delineate the two families?

Ms. Zira stated that there were.

Mr. Jousse stated that they would then have grounds to maintain that the structure is a duplex. Without that, they cannot grant the variance.

Mr. Witham stated that he will not be supporting the motion. He feels as though this is a reasonable request, and does not see that there is a greater injustice to the homeowner than to the public. His biggest concern was the parking situation, but that is what they are allowed to do. In terms of the lot area, this is part of Portsmouth and this coverage is consistent with the area. They need to expect a certain amount of density in some area. This is a reasonable request.

Mr. Marchewka stated that he agreed with Mr. Witham. The property was built as a duplex; it has two addresses and is listed as a duplex. By and large, this has remained as it is built and it is reasonable to continue that use.

Chairman LeBlanc will support the motion. He bases his judgment on the fact that it was turned into a single family dwelling in 1986. To all extents and purposes, taking out the kitchen makes it a single

family dwelling. To vote in favor would be against the zoning ordinance. The lot is very small and the requirements just aren't met.

The motion to deny failed to pass by a vote of 3 to 4, with Messrs. Berg, Holloway, Marchewka and Witham voting against the motion.

Mr. Berg then made a motion to grant the petition as presented and advertised, which was seconded by Mr. Witham.

Mr. Berg stated that this was a permitted use providing that they meet certain criteria. This is a dense neighborhood, and was built that way. The site plan that was submitted shows something far denser than what is there now, which is unique. He recognizes that the zoning ordinance is to bring things to conformity, but also cannot force them. This is physically a duplex; it was built that way and looks to be a zero lot line with two separate parcels. On the surface, this appears to be contrary to zoning, but this building is a special condition. The zoning restriction is not reasonable, because he cannot find intent. It is consistent with the spirit of the ordinance as they are fostering housing. This should not cause a diminution of value, and the property will be improved. Substantial justice will be done.

Mr. Witham stated that he would like his previous comments carried forward.

Mr. MacCallum stated that he would be voting against the motion. Applying Simplex, the criteria must be met. The purpose of the zoning ordinance is to prevent overcrowding. They must also make sure the lot size is large enough to accommodate them. The ordinance should be the rule, not the exception to the rule. There should be at least 6,000 sf of space here. There is a fair and substantial relationship between the purposes of the zoning ordinance and the restrictions and that is to make sure there is sufficient lot area. The variance is not consistent to the ordinance. There needs to be sufficient light, space and air. This is not reasonable.

Mr. Berg stated that the applicants presented a petition signed by the four abutters, all of whom do not object to the conversion of the property back into a duplex.

The motion to grant the petition passed by a vote of 4 to 3, with Messrs. Jousse, LeBlanc and MacCallum voting against the motion.

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III. ADJOURNMENT

The motion was made, seconded and passed to adjourn the meeting at 10:05 p.m.

Respectfully submitted,

Danielle Auger
Acting BOA Secretary