

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

7:00 p.m.

CITY COUNCIL CHAMBERS

November 15, 2005

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

MEMBERS EXCUSED: Nate Holloway

ALSO PRESENT: Lucy Tillman, Chief Planner

Chairman LeBlanc called the meeting of the Board of Adjustment to order at 7:00 p.m.

I. OLD BUSINESS

A) Approval of Minutes

August 23, 2005
September 20, 2005
October 18, 2005

The motion was made, seconded and passed that the Minutes of the August 23, 2005 meeting be accepted as presented.

Minor corrections were made and the motion was made, seconded and passed that the Minutes of the September 20, 2005 and the October 18, 2005 meetings be accepted as amended.

II. PUBLIC HEARINGS

1) Petition of **Jeffrey F. and Deborah S. Purtell, owners**, for property located at **72 Willard Avenue** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 14' x 20' one story sunroom addition creating 35.2% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 150 as Lot 29 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Jeff Purtell passed out photographs of the property, describing the features and dimensions and noting that they would need a 50% larger lot to meet the minimum lot size requirement. The

Approved February 21, 2006.

existing window porch attachment on the back of the house is 12' x 20' and is in poor condition. Their proposal is to remove the dilapidated structure and put in an 18' x 20' foundation plus a 14' x 20' new sunroom.

Citing the fact that the direct abutters are in support, Mr. Purtell stated the request would not be contrary to the public interest, but would enhance the neighborhood. The abutting houses have the same size foundation and structures at the back so this is in keeping. The special conditions are that, if they had the 7,500 s.f. lot now required in the General Residence A zone, their coverage would be less than what was allowed – the lot is not as big as the standard required.

He believes the request is minimal. The first 6 or 8 feet on the left is the entryway into the house and the actual use area is roughly 14' x 14'. They also need enough room for two sets of 6' french doors. He maintained there is no other way to have an adequate sunroom or other place to put it. There would not be much visual change as there is already a structure covering 50% of the area requested. He believes it would be in the spirit of the ordinance to grant his proposal as their home would have less square footage proportionately than others in the area if they had a 7,500 s.f. lot. Substantial justice would be in improving the lot and enhancing property values.

In response to a question from Mr. Berg, Mr. Purtell said there was not going to be a deck. There would be three sets of doors on the 20' side, two sets of doors on the right-hand side and, on the left hand side a couple of awning windows.

Chairman LeBlanc asked if they were down at grade or were there stairs coming off.

Mr. Purtell stated there would be granite steps leading up to the left of the three on the back facing. There's no other way to get in or out and to get into the actual kitchen, they would be using that portion of the proposed structure.

Mr. Berg stated that his understanding was that the reason the applicant gave for needing to expand the existing footprint was to accommodate double french doors, but they don't go anywhere.

Mr. Purtell replied it would be a four season room so they would be open to provide ventilation, but there would be no access.

Mr. Marchewka asked how far back the new structure came and Mr. Purtell stated it would not be as far back as the steps going down and their garage is behind that, so the nearest neighbor on that side couldn't see it because the garage would be in the way.

Ms. Tillman noted as clarification that the applicant stated it would not go back as far as stairs. She asked if it was correct that the new foundation comes off house 18' and Mr. Purtell said, "yes." Ms. Tillman added that 18' off the existing house is the back corner of the new sunporch and behind that would be a landing and steps to grade. She indicated where the applicants showed it on the site plan as "steps to ground level" and stated it would be at the back of the 18' foundation albeit some of the foundation would be under the area covered by the existing structure. Mr. Purtell confirmed 18' comes to where the existing steps end.

Mr. Jousse called attention to the last plan where it says “optional covered breezeway to existing garage” and asked if that was part of the package.

Mr. Purtell stated that, there would be maybe 6’ or so separating the existing garage and the proposed addition and they might like to put a cover over it, not on the sides, to protect from the rain.

Ms. Tillman noted that would also need Board of Adjustment approval.

**SPEAKING IN OPPOSITION TO THE PETITION, AND
SPEAKING TO, FOR, OR AGAINST THE PETITION**

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. MacCallum moved to deny the petition, which was seconded by Mr. Jousse. Mr. MacCallum stated the petition fails to meet the hardship and spirit of the ordinance standards. The lot is small and the applicant is seeking to increase coverage when it is already over the limit. While he understands the applicant’s argument regarding lot size, the fact is that the zoning ordinance specifies coverage in terms of percentage to prevent overcrowding. He pointed out that the applicant can build in the same footprint. He cited Bacon vs. Enfield where there may not be any harm in and of itself but, if granted, you have to grant for everyone causing overall build-up and overcrowding.

In seconding, Mr. Jousse stated that there was no special condition about this property that sets it apart from others in the neighborhood and he felt no hardship had been demonstrated.

Mr. Parrott noted that the one of the plans has a notation regarding steps to the ground level, but they were not depicted nor dimensioned so the Board would be approving something that probably adds to the lot coverage.

Mr. Berg agreed that no hardship had been shown or reasons why the existing porch had to be replaced with a larger structure. The applicant also had not demonstrated that there was no other way to achieve what they wanted.

A motion to deny the petition was passed by a vote of 6 to 1, with Mr. Marchewka voting against the motion.



2) **Petition of Ana Maria Ferro and Ferdinand T. Preller, owners**, for property located at **514 Middle Street** wherein a Variance from Article III, Section 10-303(A) is requested to allow a 14’ x 14’ 10” deck as part of the building egress system with a 5’6”± right side yard where 10’ setback is the minimum required. Said property is shown on Assessor Plan 135 as Lot 19 and lies within the Mixed Residential Office district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Preller stated that his contractor was supposed to be there but declined an offer to table until the next month. He stated the Board has a picture of the current deck, which is 10' x 14'. The proposed deck is 14' x 14'. The reason for replacing is the pitch on the stairs is not up to code and the structure is not as sound as they would like. Replacement would result in structural improvement and provide a better landing on the second floor and a safer pitch to the stairs to the third floor.

Chairman LeBlanc noted that the side of the house is currently 5'6" from the property line and asked if this deck would continue on the same plane and Mr. Preller answered "correct".

SPEAKING IN OPPOSITION TO THE PETITION, AND SPEAKING TO, FOR OR AGAINST THE PETITION

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Berg stated this was a good example of why a variance should be granted. The applicants want to make their egress comply with the Code. This sets in motion a chain of events resulting in the deck pushed out 4'. He stated the variance should be granted for the following reasons:

- There is no other way to rebuild the existing deck and bring it into compliance with the building codes without extending the deck to the rear.
- The expansion will not increase the non-conformity of the deck with regard to the side yard setback.
- Expanding the deck will allow the stairs to also be brought up to code and built at a safer angle.

Mr. Jousse, in seconding, noted this was also a question of safety and why codes are written. The steps from the second to third floors are at about an unsafe 45 degree angle. The new deck will not encroach any more into the setback.

A motion to grant the petition passed by a unanimous vote of 7 to 0.



3) Petition of **Raymond A. Ramsey, owner**, for property located **off Kearsage Way** where clarification is requested concerning the dimensions of the proposed hotel to be 63' x 310' as drawn to scale on the plan submitted and approved and which the setback relief was granted, as opposed to the written dimensions on the application of 63' x 231'. Said property is shown on Assessor Plan 218 as Lots 22, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 38, and 39 (as combined) and lies within the General Business district.

Chairman LeBlanc announced that Mr. MacCallum and Mr. Berg would be stepping down for this petition.

Mr. Jousse asked if the applicant was aware there would only be five voting members and Ms. Tillman said, “yes”.

SPEAKING IN FAVOR OF THE PETITION

Attorney Charles Griffin stated that when the Board granted Mr. Ramsey a series of setback variances in 2002 to build a hotel on Kearsarge Way, the information in the Board’s letter of decision and in the application listed a dimension of 63’ x 231’. Exhibit 3 in the packet is the plan prepared by Ambit Engineering and submitted with the application. It did not show the dimensions of the hotel building, but based on the scale on the plan, the dimensions as designed were 63’ x 310’. Similarly, the variances granted by the Board were based on setbacks calculated as shown on the Ambit Engineering plan and based on a design which was 63’ x 310’.

He stated the Ambit Engineering plan also said it was based in part on a layout by Bowden & Associates, the architect for the project. Exhibit #4 in the packet is an affidavit from Mr. Bowden stating that he indicated to Attorney Griffin, in error, that the dimensions of the hotel were 63’ x 231’ when they were actually 63’ x 310’. His plan, the basis for the Ambit Engineering plan, is exhibit 5 in the packet and also does not contain exact measurements. Scaled out, it shows a hotel 63’ x 310’ in the same shape as that on the Ambit plan. Ambit Engineering referenced this plan on the submittal to the Board and presented for consideration a hotel which was 63’ x 310’.

Attorney Griffin referenced exhibit 6 in the packet which is a letter from John Chagnon stating what he had just told the Board. Mr. Chagnon also states that the project was before Site Review in 2001 and 2002. Reviewing the sequence of events, he stated the variances were granted in July of 2001, the case was appealed to Superior Court who remanded it. In the meantime, it had gone to Site Review and come back to the Board in December of 2002 and the Board granted again the same variances granted in 2001. The plan which went to Site Review did show a hotel with dimensions of 62’ x 310’ and the Planning Board had that plan in front of it when it granted site review approval.

Chairman LeBlanc questioned the first dimension asking if Attorney Griffin meant to say 63’ and Attorney Griffin clarified that was the number when they initially received the variances. By the time it went to site review, Mr. Chagnon had taken 1’ off and it was reduced to 62’.

Exhibit 8 in the packet are the Minutes are the December 17, 2002 meeting of the Board of Adjustment and the Board that night discussed the fact that the hotel would have a proposed 100 rooms but it doesn’t appear that anyone really focused on the dimensions that night.

Attorney Griffin referenced the Boccia case, which he had given the Board that night, Exhibit 9, there are two provisions that are helpful. The court said at one point that all of the variances sought by the intervenor, which is Mr. Ramsey, were based on the dimensions of the 100-room

hotel as designed. Farther down it says, “The record thus supports a finding that the variances were needed in this case to enable the proposed use of the property as a 100-room hotel as designed.” He indicated that put the issue squarely in front of the Board. His conclusions were that in granting the variances in 2002, the Board intended to approve the hotel as designed and as shown on the plans that had been submitted, this represents a building that is 63’ x 310’. He is asking the Board to clarify a decision to that effect.

As further background, Attorney Griffin stated this came to light about a month ago as they were preparing to come back to the Board on the second mandate of Boccia – whether there were reasonably feasible alternatives to what had been previously approved in 2002. In the course of the preparation, the dimensional error came to light. They met with the City Attorney who indicated that coming to the Board for clarification was the proper way to proceed.

Mr. Parrott noted that the 231’ dimension is noted in several places and asked where it specifically came from.

Attorney Griffin stated that the architect indicates in his affidavit that he was looking at a plan that had been considered but not accepted and that’s where it came from.

Mr. Parrott stated that it wasn’t clear from the architect’s letter but he was working on two different designs for the project at different times? Attorney Griffin replied, “yes”.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Samuel Beam stated he is an abutter who has lived at 220 Kearsarge Way since 2004. They believe that the variances granted in 2002 should not have been granted because the diminishing in value of abutters property was not properly considered. He doesn’t agree that Mr. Ramsey showed hardship and the request for variances was extreme.

Regarding the expansion of the footprint, Mr. Beam stated that this miscalculation by engineers and architects was not the Board’s job to correct. According to the original site plan by Bowden & Associates, and approved by the Board on December 17, 2002, the written dimensions were 63’ x 231’. The 231’ should stand as it was written in the notices.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Griffin stated that the issues of diminishing value were addressed and the case appealed to Superior Court who found that there would be no diminution in value. They are not seeking to expand the footprint as shown in the plan – this was the same footprint as shown in the plan. The mistake was by the architect and the wrong information was passed on in the application.

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

DECISION OF THE BOARD

Mr. David Witham moved to grant the clarification that the approved length of the building is 310', which was seconded by Mr. Marchewka. He stated that this was simply human error and the plans were consistent. The dimensional error does not change his opinion on the project. Looking at the setback, it would be the same variance request whether the dimension was 231' or 310'. The plans spoke to scale and the relationship to abutters and property lines. Nothing changed and there is no benefit to not accepting the corrected dimension.

Mr. Marchewka agreed. The Board voted on setbacks and the issue is simply a mistake in advertising. The setbacks have not changed and building has not changed. They are simply clarifying what the actual dimensions are. They went through an exhaustive process of looking at setbacks the evening of the approval and he sees no reason to deny this request.

Mr. Jousse stated that his concentration in previous meetings was on the effect on surrounding properties and the setback, not the numerical dimensions of the building. This is simply correcting a clerical error.

Chairman LeBlanc stated that, in looking over the stipulations when granted, they all have to do with the flow of traffic within the area as they were interested in protecting the neighborhood from encroaching business. None are discussing the size of the building.

A motion to grant the clarification that the approved length of the building is 310' was passed by unanimous vote of 5 to 0.

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3) Petition of **James C. Lucy, owner**, for property located at **139 Dennett Street** wherein the following are requested: 1) a Variance from Article IV, Section 10-402(B) to allow a 16' x 20' one story garage with: a) a 3'± rear yard where 10' is the minimum required, and b) a 5'± right side yard where 10' is the minimum required, and 2) a Variance from Article III, Section 10-302(A) to allow 33.8 % building coverage where 25 % is the maximum allowed. Said property is shown on Assessor Plan 142 as Lot 24 and lies within the General Residence A district.

Mr. Jousse advised that he would be stepping down for this petition.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. James Lucy stated he was the owner and recalled that he had been in front of the Board about a month before. They have now modified their proposal, trying to address concerns of the Board. He stated their goals are to improve the aesthetics of the property and the garage is the last piece.

One concern was that the existing footprint was already in violation, with the rear of the garage about 1' from the back property line. They propose to move the garage from a 1' setback to a 3' setback to address another concern regarding access for maintenance. The footprint in relationship to the abutter to the side, tax map 142, lot 26, will remain as it was previously. He mentioned that, as presented previously, all of the abutters are in support.

Due to concerns about the future use of the garage for other purposes, they have eliminated the dormer and proposed windows.

A third issue was lot coverage. If the Board refers to the map of the proposal, they can see that when they purchased the property, it had a front porch which has since been removed. They are basically proposing to relocate that area of approximately 90 s.f. to the back. With the front porch, they had 32.2% lot coverage and now they would have 33.8%, a net difference of 1.6%.

Regarding hardship, Mr. Lucy stated that with the existing footprint a modern size vehicle doesn't fit. Consistent with improving aesthetics, they would like to also upgrade. Having multiple cars parked there also presents a problem, which is why they propose to move the garage back to accommodate a parking space. As final points, Mr. Lucy stated that the net difference considering taking off the front porch is only about 32 s.f. and they believe the new garage would help neighborhood values.

Mr. Witham asked if the abutter's garage crossed over onto the Lucy's property and Mr. Lucy stated it did.

Mr. MacCallum stated he had a question for the Planning Department which was that in the departmental memorandum, it states that the proposed garage has the same footprint as the previous request. Making a side-by-side comparison of what the applicant submitted last time and this time, the applicant represents that this proposal is 3' away from the property line instead of 1'.

Ms. Tillman stated that she was referring to the footprint being 16' x 20'. Mr. MacCallum noted it was moved 3' closer to the street. Ms. Tillman acknowledged this, but stated the footprint was the same – 16' x 20'.

### **SPEAKING IN OPPOSITION TO THE PETITION AND SPEAKING TO, FOR, OR AGAINST THE PETITION**

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Mr. MacCallum made a motion that the petition be denied, which was seconded by Mr. Parrott.

In making his motion, Mr. MacCallum cited Fisher v. Dover which maintained that applicants should not keep coming back with essentially the same proposal. He stated the same reasons for denying the first submittal hold true for this proposal. A garage is not a necessity. The building coverage is already exceeded and this would propose to increase it. This would be overcrowding which the ordinance seeks to prevent. If the applicants wanted to rebuild in the same footprint, he would approve, but he can't support any expansion.



Mr. Parrott added that another of the zoning principles is requesting the minimum amount of relief. They could have dimensioned the garage differently or built in the same footprint and he did not feel the proposal was at the stage where it could be approved.

Mr. Witham stated that he disagreed strongly with the maker of the motion. He felt the applicant had paid attention to the previous recommendations and addressed the maintenance access issue. There's no reasonably feasible way to achieve the sought benefit of having a place to park a car. He felt the proposal was as modest as it could be and still meet objectives.

While he doesn't usually cite court cases, there was one recently, Chester Rod and Gun Club v. the Town of Chester, which basically says the consideration should be whether a proposal is in conflict with basic zoning objectives. He stated he did not feel this proposal was. With the wooded, steep area to the rear and the abutter's garage on the right, there would be no negative impact on surrounding properties.

Mr. Marchewka agreed. 90 s.f. were removed where the old porch was, coupled with the fact that the garage is reasonable in size. The neighborhood is crowded, but he didn't feel the proposal was going to affect the light and air protected by the ordinance.

Mr. Berg commented that, over time, what wasn't technically necessary becomes so and noted that 92% of all houses are built with a garage, which increases the property's value. He added that it was reasonable to build a more functional and safer structure.

Chairman LeBlanc stated that, looking at the 32 s.f. difference between what was on the property and what is proposed, with the porch removed, this more than meets the definition of a minimal request. He agreed that the positioning of the garage would not impinge on light and air.

A motion to deny the proposal failed by a vote of 2 to 4, with Messrs. Witham, Marchewka, Berg and LeBlanc voting against the proposal.

Mr. Witham made a motion to grant the petition as presented and advertised, which was seconded by Mr. Berg. He asked that his reasons for opposition to the previous motion be carried over as reasons to grant.

In seconding, Mr. Berg asked that his previous comments be carried over to support the motion to grant.

The motion to grant the petition passed by a vote of 4 to 2, with Messrs. MacCallum and Parrott voting against the motion.

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5) Petition of **Harbour Place Group LLC, owner**, for property located at **1 Harbour Place** wherein a Variance from Article III, Section 10-304(A) is requested to allow the following roof top additions: a) seven 16'± x 16'± rooms, b) one 27' x 34' community room, c) one 6' x 76'6" hall, d) one 1,323 sf irregular shaped common deck; and, e) seven 16' x 8'± decks all creating a 81' 3/8" building height where 50' is the maximum allowed. Said property is shown on Assessor Plan 105 as Lot 2 and lies within the Central Business A and Historic A districts.

Mr. Berg stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech identified the photographs he had just distributed, indicating current and proposed perspectives. He stated the property had special conditions, one of which was the grade changes which, from the river and Daniel Street to the opposite corner of the building is approximately 20'. The measured height when it was converted in the mid-80's using the old measurement standards, was 58' 10" high. A new measurement taken as directed in the new ordinance averages is over 71' high due to the drastic changes in grade. The proposed structures are 9'+ above the flat surface of the roof. The mechanical room is 9' plus above. They feel they are improving aesthetics while height is only a few inches above what exists now.

The only variance sought is a height variance. The applicant is proposing to convert the offices on the existing fifth floor to 9 residential units. The parking requirements for that floor now become 14 instead of 80, a gain of 66 available spaces. One of the current problems is the extreme shortage of parking and one of the reasons for the conversion is to reduce the demand for parking. There is no reasonably feasible alternative to achieve what is being requested. Another reason for the conversion is to have some outdoor space and the fifth floor can't be expanded outward to add rooftop space. Because of the ordinance changes the maximum height is 50' and the method of measurement is different. This is the only way to achieve what is being requested. The footprint can't be expanded because the proposed uses are not allowed on the ground floor.

Attorney Pelech stated the proposed use is allowed in the ordinance so it is reasonable. Special conditions in the property result from the drastically changing grade and the fact that this is an existing structure. There are also substantial existing roof structures which do not require a variance and are not included in the height calculation. These are unattractive and, if the variance were granted, the proposed addition would surround them on three sides and improve aesthetics. Considering the appurtenances, the overall height would remain virtually unchanged.

Attorney Pelech stated the variance would not be contrary to the public interest as the downtown parking problem would be partially eased. The proposed rooftop addition would be the only part of the project not going forward if the variance were not granted. There is no benefit to the public in not granting as the tax base would be enhanced with no additional demand for city services.

No views are blocked and another floor is not being added. There will be no diminution in value of surrounding properties. Looking at the building from other properties, the rooftop appurtenances can't be seen, as depicted in the photographs, except from across the river. The project also has to be reviewed by the Historic District Commission and the Planning Board.

Mr. Dann Batting, the architect, showed a photograph taken from the municipal parking lot which indicates that the rooftop appurtenances can't be seen from ground level.

Chairman LeBlanc asked if the residential units were to be condominiums or apartments to be rented and Attorney Pelech stated the decision had not yet been made.

Mr. MacCallum said he had trouble understanding one point. In the oral presentation, it was stated that the height had not changed, but the exhibit indicates a 10' increase.

Attorney Pelech stated the proposed structures, which are not an accessory and which are measured, would be a few inches above the existing accessory structures on the roof, which are not measured. From a zoning perspective, the accessory structures are not included in the height of the building, which is 71' measured by today's ordinance guidelines. From a practical standpoint, the height only goes up inches. From a zoning perspective, it would go up some 10'.

In response to a question from Chairman LeBlanc, Attorney Pelech indicated the height of the building is measured to the parapet, which is a foot and a half to two foot high.

Mr. Parrott asked about the dimensions of the new windows and Mr. Batting stated they were roughly equivalent to a sliding glass door, about 6'8". The design is not detailed yet.

Mr. Parrott if the whole height of the new structures was 9' with a 6'8" window.

Mr. Batting stated, "yes," to the median height of the pitched roof as defined in the ordinance. As another clarification point, with measurements taken around the building as prescribed by the new ordinance, the average height added by the penthouse is about 4-1/2'. They're not adding a whole story, only elements.

Mr. Parrott stated that their position, then, was that the height point to the midpoint of the new roof is 9' and Mr. Pelech says it's 9' to the ridge of the new roof.

Mr. Batting said that may be what he said, but the dimension they deal with is to the median point of the pitched roof.

Mr. Parrott said so the new structures, in fact, are not 9' high. After Mr. Batting explained how they were measuring, Mr. Parrott stated he would work with what he had.

Mr. MacCallum asked if, among the written submissions, there was anything that constitutes a before and after set of drawings to compare what was there now to what was being proposed. Attorney Pelech indicated the blow-ups which were displayed on the easels and which indicate the before and after renderings, noting they were the same as the photographs submitted.

Mr. Jousse asked for clarification that the measurement they were using is to the midpoint of the roof and not to the ridge line of the roof.

Attorney Pelech stated that the ordinance dictates that the height is measured to the midpoint of the pitched roof. That is the some 9' that he has been talking about. The other measurement he talked about was the fact that the peak of these roofs were some 3"-4" above the existing accessory rooftop structures.

Mr. Jousse stated that means that the pitch of the roof, which they have not been given, makes a tremendous amount of difference to the actual height of those structures, adding that a 3/12 pitch is very different from a 12/12, with the ridgeline much higher on the 12/12. Attorney Pelech stated the pitch of the roof was shown on the architectural drawings submitted with the packet.

Mr. MacCallum asked Ms. Tillman what the philosophical purpose was of the 50' height requirement.

Ms. Tillman stated that, in 1995, when the ordinance was redone, they broke out Central Business to two districts. Central Business A runs along the waterfront and down into the northern tier and the idea was to keep the building height slightly lower on those properties along the water and then 60' in the Central Business B District.

In response to a question from Mr. Marchewka, Attorney Pelech stated the reason for building the additional rooms was to allow the residents on the fifth floor to have an enclosed area where they can look out over the water.

Mr. Marchewka stated that, considering the Boccia analysis, they were saying the proposed use wouldn't be possible without a variance, but they could use it.

Attorney Pelech said that was pre-Simplex where, if there was no reasonable use of the property, it was a hardship, but that was changed in the Boccia where an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.

Mr. Marchewka stated he meant the proposed use is residential.

Attorney Pelech replied that the proposed use is to have rooftop structures, which is allowed.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Martha Fuller Clark stated she lives at 152 Middle Street and believes that no special conditions exist as a basis for granting a variance. The top floor can be converted into residences without this extension above the current building. She stated the proposal was contrary to the ordinance, particularly to the issue of 50' height limitation, and contrary to the public interest by limiting access to light and air. The limitation was set in 1995 after considerable input from the community and its intent was to ensure that a physical barrier would not be created between the waterfront and downtown. If the Board is going to allow the owner's justification for raising the height based on existing mechanical equipment, it will create a situation where, using that same argument, all buildings can be allowed to expand an additional story if the mechanicals could be encompassed within that expansion.

Ms. Clark noted that, if the building had been built after 1995, it would have had to be even lower. The building is grandfathered, but they are coming before the Board to justify expansion that would take to a minimum of 81'+. She finds the aesthetic argument weak in relationship to all of the other positions put forward that are contrary to the ordinance. The Board has an

obligation to adhere to building height and, only in the most special of circumstances where no other reasonable use is possible, should the ordinance be violated.

Mr. Calvin Peterka stated he lived at 121 Bow Street and wanted to respond to the point that the overall height is only up a few inches. The appurtenances are only allowed to be so high as a factor of roof coverage. With the additional roof structures, he believes the percentage would be exceeded. With regard to property values, the view from their top floor window would be obstructed. He also referenced the applicant's request for reasonable use of their property, stating that the building was used as office space and could continue to be so used. The floor could be converted without a roof structure. He stated it is contrary to the public interest to raise the structure over 81' at the Memorial Bridge approach and noted that the builders at Eagle Photo and the Parade Mall did not ask for a height variance.

Mr. John Grossman stated he lives at 171 Mechanic Street and opposes the variance because he foresees others coming before the Board and it would set a precedent and affect the mood of the city. He felt that viewer's eyes are trained to see the building and not the existing appurtenances. He cited a number of locations from which these light-emitting structures could be seen.

Attorney John Anthony Simmons, Sr. stated he was appearing on behalf of 10 State Street LLC and, as a former Chairman of a ZBA, he appreciates brevity and will not duplicate the points which had already been made.

Before going through the five criteria, he stated that it was ironic that in the city where Boccia came through, the applicant is running head on into what Boccia says not to do. The project violates several aspects that applicants must meet.

He stated the project is contrary to the public interest. There is a roughly 33% overage on height on this project which interferes with the symmetry of the waterfront and scenic sight lines. He believed, in answer to a board member, Attorney Pelech said it was not going to be any higher than what everybody sees already, but in another part, he stated they won't be able to see the additions. Attorney Simmons stated that, if what is there now can be seen, the additions will be seen.

Addressing hardship, Attorney Simmons stated there are no special conditions justifying a hardship. The property is not unique in having grade changes in Portsmouth. The applicant's attorney stated that if a use is allowed it is reasonable, but just because a residential use is allowed doesn't mean the Board has to permit what the applicant wants to do. The dimensional requirements need to be considered and the applicant does have to meet the five criteria on why this allowed use is expanded to such a degree. There are reasonable alternatives, one of which would be to renovate the fourth floor for residential and use the fifth floor for the skybox. This would not mean as high a yield for the applicant but is still a reasonable alternative. If the residents want light and air, they have windows, or can take a walk along the water.

Regarding substantial justice, Attorney Simmons stated the buyer bought with knowledge of what they could and couldn't do. They're asking to be allowed to go over the height requirement

so they can alleviate some of the need for parking, which is already reduced. He stated he does not follow that reasoning and notes the history for the building includes getting a variance for the parking spaces so at some point one of the owners of the property made a decision that they wanted to convert it to a use where there were less parking spaces and they received relief for that.

He also noted that the waterfront area is a sensitive one for height issues. At some point, you start to get a skyscraper effect which devalues surrounding properties.

Mr. David Kearns stated he resides at 121 Bow Street and has already submitted a letter for the record so he won't repeat his comments, but would simply state he feels the project is completely inappropriate.

Ms. Joan Jones, the owner of the Bow Street Inn, stated that a precedent would be set and that views and property values should be considered in making a decision. Another abutter on Bow Street felt with the growth in Portsmouth, it is important to retain height restrictions.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Pelech stated that the case which sets forth that if a use is allowed by the ordinance, it has a *prima facie* presumption of being reasonable was Vigeant v. the Town of Hudson, which was decided after Boccia.

In response to a question from Mr. MacCallum, Attorney Pelech advised his client purchased the property in April of this year.

Attorney Simmons stated that what he was trying to say is that the fact that it is an allowed use does not give you carte blanche. There remain all of the rest of the arguments to go through. He apologized if that was not clear.

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

DECISION OF THE BOARD

Mr. MacCallum made a motion to deny the variance, which was seconded by Mr. Parrott, stating that, if granted, variances would also have to be granted to every applicant with similar circumstances and the character of the city could be destroyed. He did not see any hardship. He thought the slope might be somewhat unique but didn't see why that creates a hardship. The applicant's building is already over the maximum height and they want to increase it even more. There is a 50' height limitation and the proposal would bring the height at least 10' over the limit, which is not just raising it a few inches. The proposal would also increase the density on the roof. Any number of buildings would have the same justification to expand height – nothing distinguishes this situation. He noted that Attorney Pelech is always coming in and citing what others in the district have done and what this Board has granted as justification for what he is then requesting. He felt the proposal would adversely impact others, noting some of the abutters' comments. He stated the zoning ordinance was supposed to be the rule and a variance

the exception. The fact that the owner would make more money is not a reason to grant a variance.

In seconding, Mr. Parrott agreed. He focused on the claim that the additions would be hardly noticeable, but noted that none of the views were taken from high ground on Chapel Street where the top of the roof can be seen. Secondly, the several dozen windows will reflect a lot of sunshine and at night there will be a great deal of light shining from those windows and he felt these structures would be very noticeable to a lot of people. Another point is that these structures will be closer to the edge of the roof and more visible to the onlooker than the existing mechanical equipment. Regarding height, he noted the reasoning seemed to be that the midpoint of these structures on top of the big structure is the correct way to measure. However, if we look at Article I of the ordinance, the examples are all shown for the main roof of a structure. His conclusion is that they should go to the highpoint of the structure, whether it's a little structure on top of a big structure or the main structure by itself. It's almost a twisting of the ordinance to say that you can go to the midpoint of the small structures that are proposed for the top of the main structure. If you do that, I think you come up with a greater increase in height than has been represented to us. He concluded the variance should not be granted. There was nothing unique about the property or hardship in the land to lend support to this proposal.

Mr. Marchewka stated the applicant's proposal looks better aesthetically but he can't find a legal reason to grant a variance. The property was used as an office building and can be used as residential without expanding onto roof. He felt it could look better by building a structure around the hvac – it wasn't necessary to add living rooms.

Mr. Witham stated Attorney Pelech had made a decent attempt to make some points on this proposal. He stated he had looked at the Boccia analysis and the benefit sought and what he could get from the application was that it was some outdoor space to enjoy the river. In looking at the plans, all of the units already have an exterior balcony. He felt the proposal failed on the Boccia analysis. He stated he did differ from the motion makers in one area, which is that, if we grant this, we have to grant to everyone. He felt many members, including himself, look at each proposal on a case-by-case basis.

Mr. Jousse stated this building was already non-conforming and it was not their business to aggravate the non-conformance. He agreed that the applicant had not proven hardship and would not support the variance.

Chairman LeBlanc agreed with the intent of the motion and would support it, but he does not agree with the maker's reason behind it. He did not believe they set precedent or that the mechanicals were used as justification for building height. They were simply used as an indication of where the height line would be for these new structures. There are four other parts in justifying a variance.

The first is the variance would not be contrary to the public interest. Chairman LeBlanc stated he believed it would be contrary by increasing a non-conforming use of a building and making it higher. The way the height of a building is measured is to the midpoint of the sloped roofs on the structure. That's what the ordinance says and that's the way the 81' and 3/8" came into play.

The public interest would be to keep the height down so the river can be more accessible and more visible. The height of the old power station is what it is, but they don't have to exacerbate the situation.

He didn't believe that the variance if granted would be consistent with the spirit of the ordinance, which is to diminish the non-conformance of the properties around the city, or that substantial justice would be done. He stated he will grant that property values will not be diminished and will grant that there is a uniqueness to this property. This is a rather large building on a large piece of property and it has some significant topographical features making it unique, which goes back to the idea of precedence. They are looking at the particular piece of property itself, not setting precedent. If lawyers or applicants are allowed to come in and try to bulldoze with their analysis of how many other properties in the area have the same condition, that's the Board's fault – it's not the attorneys. They have their job to do and the Board has theirs. For all those reasons, he stated he will support the motion and thinks it is just and appropriate. As a final note, he had looked at the pictures that were given by Attorney Pelech and didn't see any balconies on the fifth floor. They seem to be all windows.

A motion to deny the variance was passed by unanimous vote of 6 to 0.

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6) Petition of **Mark H. Wentworth Home for Chronic Invalids, owner**, for property located at **346 Pleasant Street** wherein Variances from Article II, Section 10-206(18), Article III, Section 10-302(A) and Article IV, Section 10-401(A)(1)(c) are requested to allow an expansion of the existing nursing home/assisted care facility as follows: a) the demolition of an exterior fire escape and replacement with an 11' x 18' fire stairs, b) demolition of existing glass side entrance portico and replacement with a 400 sf (13' x 26' plus 4' x 16'6") ADA compliant entranceway; and, c) construction of an 875 sf (8' x 75' plus 7'6" x 36'8") one story addition to the garden level nursing care area. Said property is shown on Assessor Plan 109 as Lot 10 and lies within the General Residence A and Historic A districts.

Chairman LeBlanc announced that the applicant had requested to table this petition to the December meeting.

Mr. Witham made a motion to table the petition to the December meeting, which was seconded by Mr. Parrott and unanimously approved.

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7) Petition of **Portsmouth Casey Home Association, owner**, for property located at **1950 Lafayette Road** wherein a Variance from Article XII, Section 10-1204 Table 15 is requested to allow 100 parking spaces to be provided for a 6,000 sf function hall having 4,500 sf of the building dedicated for function space. Said property is shown on Assessor Plan 267 as Lot 7 and lies within the Office Research district.

Attorney McEachern stated he is representing the Association who is seeking a variance to allow 100 parking spaces for a 6,000 s.f. function hall. The application was put in requesting 4500 s.f. Upon consultation with the project architect, who is here tonight, that number has been revised down so they are now seeking a function room of 3500 s.f. , with 100 parking spaces, for a maximum occupancy of 200 persons.

He noted the ordinance requires a function room with unfixed seating to have 1 parking space for every 2 occupants, with occupancy determined by the maximum BOCA load. BOCA, in this case, assumes one occupant for every 15 s.f. of floor area. A 3,000 s.f. function room is deemed to hold 200 occupants, for which the city's parking ordinance requires 100 parking spaces. Consequently, the applicant's 100 parking spaces are sufficient for 200 guests provided it does not put them into a room any bigger than 3,000 s.f..

Upon consultation with the design professional, the applicant has determined that placing 200 guests in a 3,000 s.f. room would present egress issues for the elderly and the disabled as well as general comfort issues. By receiving a variance to increase the function room to 3,500 s.f., while keeping the maximum occupancy at 200, the Casey Home Association will have adequate space without increasing the actual parking need which is met by the 100 parking spaces. The Casey Home Association will stipulate the maximum occupancy of 200 persons and post a sign stating the same.

Mr. Todd Hansen, of JSA Architects, stated they have laid out fixed banquet seating for 200 in a room, which is above the international building code. This is 17.5 s.f. per person, allowing for an aisle 5' wide to allow for accessibility. Of the 3,500 s.f., 615 s.f. is dedicated to egress and accessibility corridors.

When Chairman LeBlanc asked if the corridors could be marked in some way so that chairs would not be put into them, he agreed that could be done.

Attorney McEachern stated that the property is zoned Office Research, has frontage on Lafayette Road and access to a private drive to the rear of the lot. The abutting properties are zoned Office Research, Industrial and Single Residence B. The applicant currently has a use variance to allow construction of a 3,500 function hall facility in the Office Research district. They filed an application with site review to construct a function hall facility and separate office building as part of a 2-unit condominium. As proposed, the site will contain 143 parking spaces, which is the maximum. For purposes of complying with the parking ordinance, 100 spaces have been allocated to the function room and the rest to the office building. He indicated a site plan on the easel which shows Lafayette Road and at the front of the site is the professional office building and at the rear is the proposed function hall facility.

Once constructed, the primary use of the function hall will be in the evening and on weekends when the professional office building is closed, thereby allowing shared parking.

Attorney McEachern stated the reasons he felt the petition met the variance criteria, as outlined in his submittal to the Board. They feel surrounding property values will not be diminished as they are not seeking to enlarge the building, only the function area within the building, which change will not be visible to abutters. There will be no increase in intensity because the occupancy remains 200. Literal enforcement would result in a 3,000 s.f. function room that, while compliant, would pose accessibility issues due to lack of corridor space. This is a much needed facility for community gatherings which will benefit the City and not be contrary to the public interest.

He stated an area variance is needed since the number of required spaces is based on the room's square footage and not its actual occupancy. The property does contain 143 parking spaces which is more than the 117 spaces required by the ordinance and, while the ordinance does not recognize shared parking arrangements, virtually all will be available when larger functions are held as the offices will be closed.

The benefit sought is to provide a larger floor area for the comfort and safety of guests without having to provide additional parking spaces beyond 100. There is no additional parking area on site so the only way to increase the function room area is through a variance. Justice would be done and the spirit of the ordinance served by occupancy remaining at 200. There will be no net increase in parking demand while comfort and safety will be enhanced.

SPEAKING IN OPPOSITION TO THE PETITION, AND SPEAKING TO, FOR, OR AGAINST THE PETITION

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Parrott made a motion to grant the petition as presented and advertised, which was seconded by Mr. Witham. He stated that the zoning has not attracted the exact type of activity Office Research calls for and this was a reasonable use, for which the property is well suited. The public interest would be served by a function hall of that size.

Mr. Witham asked if the maker of the motion would agree to a stipulation that the occupancy not exceed 200 people in the function hall and Mr. Parrott agreed. Mr. Witham stated that it was a reasonable request adding that some of the parking requirements can be hard to meet. He believes one of the special conditions is that 43 parking spaces in the contiguous parking lot can be incorporated for overflow purposes.

Mr. Machewka agreed that the issue really is parking. The applicant could potentially fit more people into the building, but they are not trying to do that and don't need as much parking. Our zoning doesn't take that into account and that is why a variance is needed. It's not an excessive use of the property and very grantable.

Chairman LeBlanc asked if the maker of the motion wanted to amend his motion to include the stipulations as set out in the March 23, 2004 meeting, except deleting item five, which is no longer relevant and Mr. Parrott indicated he did. The stipulations incorporated in the motion were the following:

- That the occupant load in the function room be limited to 200 persons;
- That access from Lafayette Road be limited to "in" only;
- That the rear service road be extended to provide access to this site;
- That there be no outside dining/bar/entertainment area provided for the fraternal organization or its lessees;

- That the State Liquor Permit cannot be transferred to a new owner/entity if the property or shares in a holding entity are ever sold.
- That any and all approvals by this Board prior to the variance granted March 23, 2004 are void.

A motion to grant the petition with stipulations passed by unanimous vote of 7 to 0.

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**III. ADJOURNMENT**

A motion was made, seconded and passed to adjourn the meeting at 10:15 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary