

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

SEPTEMBER 18, 2007

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Carol Eaton, Alain Jousse, Charles LeMay, Arthur Parrott, Alternates: Derek Durbin, Thomas Grasso

EXCUSED: Henry Sanders

ALSO PRESENT: Lucy Tillman, Chief Planner

I. OLD BUSINESS

A) Approval of Minutes

August 21, 2007
August 28, 2007

After brief corrections to the August 21, 2007 Minutes, a motion was made, seconded and passed by unanimous voice vote to accept the August 21, 2007 Minutes as corrected and the August 28, 2007 Minutes as presented.

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B) Request for an Additional One-Year Extension of Variance, granted September 20, 2005 and subsequently extended through September 20, 2007, for property located at **Off Falkland Place and Off Ranger Way**.

Mr. Parrott made a motion to deny the request, which was seconded by Mr. Jousse.

Mr. Parrott stated that the City ordinance requires that, after a one-year extension, further ones not be granted. He noted that there had been a considerable change in the Board since the variance was originally granted and it was fair and proper for the new members to hear the petition.

Mr. Jousse stated that, with the neighborhood changes in two years, the petition should be considered at a new hearing, if the petitioners go forward with a new application.

The motion to deny the request was passed by a unanimous vote of 7 to 0.

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II. PUBLIC HEARINGS

1) Petition of **Laurie Hersey, owner**, for property located at **159 Austin Street Unit 2** wherein a Variance from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) was requested to allow a 5' x 8' addition to an existing nonconforming deck with: a) 0' right side yard where 10' is the minimum required, b) a 13'± rear yard where 20' is the minimum required; and, c) 59.6% building coverage where 35% is the maximum allowed. Said property is shown on Assessor Plan 145 as Lot 93 and lies within the Apartment district.

SPEAKING IN FAVOR OF THE PETITION

Ms. Laurie Hersey stated that she would like to extend the length of the porch with the first step of the staircase being at the end of the home. The porch would follow the line of the staircase, so it would be no more nonconforming than the existing structure. In response to a question from Chairman LeBlanc, she confirmed her unit was on the Winter Street side.

Mr. Grasso asked where the property line was from the building.

Ms. Hersey submitted an engineers plan for him to review.

Mr. Witham noted that, on the previously submitted plan, the deck addition was shown and the word, “stairs” with the words hashed out.

Ms. Hersey stated that was where the stairs would be.

Chairman LeBlanc noted that was at the end of the deck.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Grasso stated that the proposed deck was going into a lot that was very well developed, with current coverage at 59%. He felt the variance would be contrary to the public interest and didn't see any zoning restrictions that would interfere with the reasonable use of the property.

Mr. Jousse stated that the lot was overbuilt and there was no hardship presented as to the nature or the circumstances applicable to this property.

Mr. Witham stated he had no problems with the expansion of the deck, roughly the size of a piece of plywood. His objection was that, the way he looked at the engineers plan, the survey showed a slight encroachment into the right-of-way, which he couldn't approve.

The motion to deny the petition was passed by a unanimous vote of 7 to 0.

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2) Petition of **Portal Realty Partnership, owner, Edward Benway, applicant**, for property located at **303 Islington Street** wherein the following were requested: 1) a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) to allow the E. H. Benway Financial office (2,166 sf) and The Hall Law office (150 sf) in space used by a dental office, 2) a Variance from Article XII, Section 10-1204 to allow 5 existing parking spaces to be provided where 10 parking spaces are required. Said property is shown on Assessor Plan 144 as Lot 11 and lies within the Apartment district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Edward Benway stated that the existing property has been a dental office with 5 parking spaces. The office was moving out and they were not looking to make any structural changes. He read a section from Article IV of the Zoning Ordinance dealing with changing from one nonconforming use to another provided the new use was less intense. He stated they probably have 10 or 12 people coming in on a weekly basis while a dental office might have had that amount per day. He believed this use would have much less impact on the area.

In response to questions from the Board, Mr. Benway stated that the law office would be on the first floor and would have one employee. Their main office was in Newburyport and this would be a place to meet with area clients.

**SPEAKING IN OPPOSITION TO THE PETITION**

Robert Padian stated he lived at 312 Cabot Street. He had looked into the property and there were really 10 spaces that could be, or have been, available, with 5 on leased land. He was concerned that reducing the number of parking spaces would set a precedent for others. He hoped that, if the variance were granted, there would be some way to restrict it so it could not be inherited or shared as a precedent. As to the other uses, he found them reasonable.

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

Mr. James Beal stated he lived at 286 Cabot Street and asked if Mr. Benway would know the number of employees at the dental office.

Mr. Benway stated he wasn't yet the owner so didn't know the number.

Mr. Beal stated the lot was overused, with many cars parking on the sidewalk, which could be seen on the photographs he was passing out. Two cars were parked on the side walk and, during the winter, there was also a problem for public works and snow removal. If the petition was passed, he asked that designated lines be made so that there would be a definition between the parking and the sidewalk.

**DECISION OF THE BOARD**

Ms. Eaton asked what else was in the building and Ms. Tillman responded that there were a dental lab and a residential unit upstairs, which was confirmed by Mr. Benway. In response to further

questions from the Board, Mr. Benway stated there were one or two bedrooms in the apartment and it was a one person lab.

Ms. Eaton asked if the ten parking spaces were for the two proposed needs or the whole building.

Mr. Benway replied there were 5 spaces for the lot. The small sliver in the back, with another 5 spaces, was owned by Olde Port Traders.

Chairman LeBlanc stated that the property had 10 spaces according to the August 15, 1978 grant that was made and now they only want five because that's on their lot.

Ms. Tillman stated that, in the 1978 plan, the parking was shown all on this lot. The house, which came down later, was probably on that back lot. It really wasn't defined well and certainly wouldn't meet today's requirements.

Mr. LeMay made a motion for discussion to grant the petition as presented and advertised, which was seconded for discussion by Mr. Grasso.

Mr. LeMay stated that the applicant had demonstrated that his use is less intense than the dental office and looking through the various criteria, seemed to be well met. He saw no hazard to the public or adjacent properties from fire, explosion or hazardous materials, no detriment to property values, smoke, noise and so forth. While it was not clear that there was no creation of a traffic or safety hazard, there probably would be a decrease in traffic due to the less intense use. There would be no intensive demand on services or storm water runoff.

He stated he was on the fence as to the Variance section.

Chairman LeBlanc asked if he would like to split the items and Mr. LeMay stated he would.

Chairman LeBlanc asked if it would be acceptable to Mr. Grasso to take the Special Exception first.

Mr. Grasso stated it would. On the Special Exception, he agreed with Mr. LeMay's comments. The proposed use would be less intense than a dental office.

The motion to grant the Special Exception was passed by a unanimous vote of 7 to 0.

Chairman LeBlanc stated they then had the Variance to allow 5 parking spaces where 10 spaces were required.

Ms. Eaton made a motion to grant the Variance as presented and advertised, which was seconded by Mr. Witham.

Ms. Eaton stated that the proposed use which is less intense is probably confined by the fact that there are less spaces.

Mr. Witham stated that there was definitely room for 5 spaces. The building and lot are what they are and a variance request would be needed no matter what operation moved in as they will always

need more parking than they have. This use was probably one of the least intensive and the way it will be used, 5 cars on any given day will be a maximum.

Mr. Parrott stated he was concerned about voting when he didn't know how many are there currently. He would like to know the basis used when a variance was granted in 1978. Without clarification, he can't support the motion.

There was a brief discussion of the parking spaces in 1978 and the travel aisle. Chairman LeBlanc stated that 5 spaces was all that could reasonably fit in and allow maneuvering.

Mr. LeMay stated that he would like a reasonable stipulation that the sidewalk be delineated and protected and not used as a parking area. He had noted in the pictures that parking continues to the edge of the sidewalk. This should be prevented by at least some visual indication.

Ms. Tillman stated that this could be worked out with the Department of Public Works.

The motion to grant the Variance, with the stipulation that the Department of Public Works will define the delineation between the parking lot and the sidewalk, was passed by a vote of 4 to 3.

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3) Petition of **Terry Bennett, owner, Union Lofts LLC, applicant**, for property located at **211 Union Street** wherein the following were requested to construct a 13 unit three story apartment building with 20 parking spaces on the ground level: 1) Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) to allow a 6,965± sf footprint three story addition (after demolition of a portion of the existing building) with: a) 6.9' rear yard for the building and 3.1' rear yard for the stairs where 20' is the minimum required, b) 66% building coverage where 35% is the maximum allowed; and, c) 1,219 sf per dwelling unit where 3,500 sf per dwelling unit is the minimum required, and 2) a Variance from Article XII, Section 10-1201(A)(3)(a)(3) to allowed stacked parking in an indoor garage where stacked parking is not allowed. Said property is shown on Assessor Plan 135 as Lot 70 and lies within the Apartment and Historic A districts.

Ms. Eaton stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech introduced the managing director for the applicant, stating he would comment later.

Mr. Scott Broughton stated that he also lived around the corner from this property and had met with the neighbors the previous week. He outlined his financial arrangement with the current owner to build some condominiums. Noting that they had used the master plan as a roadmap to come up with the concept of Union Lofts, he stated they would like to build 13, fairly small, condominium units. These would be modern structures with parking underneath. While there were a lot of expensive condominiums in the area, these would be affordable for middle incomes, ranging from the low to mid-200's to the mid-300's. He outlined some bullet points from the master plan and how their project would tie in with them.

Mr. Eric Weinrieb stated he was from Altus Engineering and wanted to cover the engineering aspects. They would be eliminating 11 head-in spaces in the front and there would be no backing into Union Street, providing a benefit to traffic. Closing off the entry area will add three parking spaces. With eliminating the head-in spaces, which had been partially in the right of way, they will now have straight through access at the front of the building. There would also be significant green space enhancement. With regard to open space, he indicated on the exhibited plan the portions of the building that would be taken down and where they would be increasing the landscape buffer. Presently the storm water runoff discharges through poorly functioning downspouts and water accumulates. What they are proposing, through reducing the impervious area, will allow more absorption. The design would also mitigate runoff. He noted that, currently, the municipal sanitary collection system runs underneath the building and into Cabot Street. There was no written easement on this sewer and they were working with the Department of Public Works to look at alternatives. The system would be upgraded to standard and maintained.

Mr. Steve McHenry stated he was the architect for the project and that his associate would review the packet of exhibits that had been provided to the Board.

Mr. Brandon Holben identified the exhibits in the packet that had been provided and related them to the exhibits on display. He identified features on each plan, including the proposed parking.

Mr. McHenry stated they were attempting to show that, while the building seems large, it is mitigated by the layers of architectural elements and enhanced by the landscape features. He stated that the design had much to do with adherence to the master plan and listed the five elements for sustainable design, one of which was to reuse/recycle urban structures. Parking capacity was also important and stacked parking helps to reduce pollution.

Attorney Pelech outlined some of the history of the property and past uses, one of which was a heavy industrial use with a large number of employees and demand on traffic. At roughly 16,000 s.f., the lot was twice the size required in the district and twice that of most of the surrounding lots. 75% of the lot, however, was covered by this massive structure in need of repair. There were nonconforming parking spaces for a number of vehicles which have to back out. The building doesn't meet the side and rear setbacks and the use is nonconforming. He stated that their proposed use was allowed in the Apartment District. 13 units is not a lot when you consider the ordinance allows conversion into 5 or more units provided that you have 1,000 s.f. of lot per unit. They could convert the building to 13 units with only a Special Exception. The problem was that the back was not to code and was in such poor shape that it would not be reasonably feasible to add extra floors. The necessity to demolish the back of the building results in the requirement for 3,500 s.f. of lot area per unit. If they complied with the ordinance, they would be limited to 5 or 6 units, which was not economically feasible.

Attorney Pelech stated the rear yard setback was 2½' now and would go to 7' for most of the structure. The side yards would become compliant and lot coverage would go from 73% to 66%, still requiring a variance, but complying with the open space requirement. A variance would be needed to allow their proposed 1,219 s.f. per dwelling unit. Noting that one of the variances requested was for stacked parking, he stated that the 20 spaces in the basement were designed so that the stacked spaces were assigned to the 6 largest units, whose occupants will switch their cars. Removing the front back-out spaces and putting in a sidewalk would be an aesthetic improvement.

Included in the packet he submitted that evening was the housing section of the new master plan. He outlined the ways in which this project would meet the four goals in that section.

Addressing the criteria, Attorney Pelech stated that the project would benefit the public interest as it would comply with the master plan and provide more tax income, sustainable units and affordable housing in a building that would benefit the neighborhood. The spirit and intent of the ordinance would be met. The ordinance says you can convert to 5 or more units as long as there are 1,000 s. f. of lot area per unit, but this could not be a conversion due to the condition of the back of the building. He stated the property was unique in size, surrounded by multi-family dwellings on much smaller lots. It was also unique because of the juncture of sewer lines under building. The lot's special condition is that it is presently occupied by a nonconforming structure covering 73% of its area. Regarding the question of the Planning Department staff as to why there could not be less units, he stated it was due to the cost of the site and relocation of the sewer line while they were proposing affordable housing. 13 units would allow a small profit. Citing the Boccia and Malachy Glen cases, he stated a financial burden can be a big element in deciding whether there are reasonably feasible alternatives and the Board needs to consider if the applicant can meet financial burdens with no variance.

With regard to the balancing test of whether justice would be done, Attorney Pelech submitted that the hardship imposed on the applicants would not be outweighed by some imaginary benefit to the general public in denying. Denial would take away 13 units of middle income housing and allow an eyesore to remain in the middle of a residential district. With regard to property values, nobody would prefer the structure that is there now to that depicted in the elevations. They will be taking parking off the streets and, if anything, surrounding property values would be enhanced.

In response to questions from Mr. Jousse and Chairman LeBlanc, Attorney Pelech confirmed that the heavy dotted lines on his exhibit were the setbacks and stated that the 3' rear setback was for a set of stairs required as a second means of egress from the upper units.

When Chairman LeBlanc asked the elevation of the proposed new structure, Mr. Holben stated the existing roof was slanted and they propose a flat one. The ridge of the existing gable is 24' and the fascia of the proposed would be just below that, roughly 24' to the top of the roof. Some of the abutting structures have 2½ stories and go to a maximum of 35'.

Ms. Amy Richard stated she had been a renter in the area for over five years. She and her husband were young professionals and this project would be of interest to them.

Mr. Robin Lechner stated he lived on Union Street and felt that, conditional on the bugs being knocked out of the project, this would be a vast improvement.

Ms. Tammy Byron stated she lived at 633 Dennett Street and lived next to an abandoned lot which could have been the Children's Museum if she and the neighbors had not all focused on negatives. She cautioned against missing the chance to have a positive neighbor like this.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Robert Petty stated he lived on Cabot Street. He questioned whether a \$250,000 condo was for middle income and whether 13 units were needed. He noted that the applicants want units that are

only 35% of the required size and double the density. If the ordinance was unreasonable, it should be changed, not just this lot. He stated that the claim that the ordinance interferes with the reasonable use of the property would only be the case if this was the only reasonable use. He felt that the rest of what the applicants addressed was irrelevant to granting a variance.

Mr. Patrick Malloy stated he was a direct abutter at 233-235 Union and submitted a letter from John Ragonese and Lynda Schmidt of 74 Cabot Street. He reviewed the past history of the property, noting violations that had occurred. He started to read the letter, but at the request of Chairman LeBlanc, summarized it as the writers realizing that a lot of work had gone into the project, but asking the Board to review the variance from a cumulative perspective.

Ms. Cindy Smith, a direct abutter on Coffins Court, passed out some photographs, taken in 1997. Her concerns included the following: that the new proposal would have glass panels and patios facing her back yard, impacting the resale value of her home; that lighting would shine into her backyard; that the stacked parking will still result in people parking on the street rather than juggling cars; that there had been flooding in the past and would be again; that the property was in poor repair because the owner left it like that and had previously been in violation; that the owner had been refused 7 units in the past and, instead of working with that, went up to 13; that more expensive condominiums would not be out of place for the neighborhood.

Mr. Kevin Behen, of 199 Union Street appreciated what the applicants were trying to do, but stated parking on the street was worse each year. He was also concerned about the sewer issue and water coming up through the ground onto the patios.

Mr. Russell Grazier stated he had a chiropractic practice around the corner for the past ten years. He felt the density of traffic and number of accidents were increasing. With even 1 or 2 parties a year for each of the 13 owners, he could see the accidents doubling. He wondered how the Board determined the financial hardship mentioned by Mr. Pelech without seeing their contracts and finances. He felt that, if the purchase price were brought down, then maybe a decent profit could be made with five units.

SPEAKING IN FAVOR OF THE PETITION

Mr. Ned Raynolds stated he lived at 211 Union Street and asked permission to speak in favor of the petition, which was granted by Chairman LeBlanc.

Mr. Raynolds stated that, while it probably was unusual for a sitting Councilor to speak in support of a project, the Council has no role in this approval process and, as this was a public setting, he had decided to speak. He felt he had a certain current perspective on traffic and other issues from renting there for the past 16 months. His second perspective was that he had a similar vision of what should happen with this building. He further outlined his interest in the project, stating they didn't need more luxury condominiums.

Chairman LeBlanc asked how this related to the project.

Mr. Raynolds stated he wanted to explain why he supported the project, how he found out about it and what his association was. He cited how this project met the master plan's objectives. He stated that this was a dense neighborhood, but the traffic load was not very great. There were rarely two

cars ahead of him on Union Street. The parking would all be under the building, which was an improvement. More units of affordable housing were needed and this was a good prototype.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Megan Fabriga, of Coffins Court, read a letter she had submitted that morning.

Ms. Birgit Christiansen stated she lived at 235 Union Street, right next to the property. There are no cars parking on Mr. Bennett's properties because they get notes threatening that they will be towed so everyone parks on the street. Her visitors have to park several streets up.

SPEAKING, TO, FOR, OR AGAINST THE PETITION

Mr. Broughton stated that he was not the previous owner. These were not apartments but condominiums and the owners will take care of them. This was a reasonable way to fix up a building that could help the neighborhood. In terms of density and traffic, everybody has to pull over at times in a busy area with narrow streets. He didn't feel there would be an impact on parking, with cars inside and a location where people can walk to town. He was surprised at the negative feedback as they were trying to solve a problem, not create one. This was a modern, energy efficient structure, sustainable and forward thinking.

Mr. Eric Weinrieb stated the City has been actively working doing sewer separations and fixing drainage in this area, which was why the flooding from 1997 hadn't happened again. They would be enhancing the drainage system even more and the property would be above existing grade. It would be a betterment to the neighbors.

Attorney Pelech stated that there was no gallery, as mentioned in one of the letters, only a lobby with an elevator. 850 s.f. was the size of the inside of the units and the 1,219 s.f. was the lot area per dwelling. If the variances were granted, the project also has to go to the Historic District Commission for the demolition and then Site Review where lighting, drainage, underground utilities and parking would be addressed. There will be assurances to protect neighbors from light and noise.

Ms. Smith stated they should not discount the flooding as it happens every year.

A neighbor stated that there will be no public benefit by creating housing for folks in jobs downtown. The stated range of \$250,000 to \$350,000 was not something anyone in a retail shop could afford. She supported the comments of the person who said that those in stacked parking will not move their cars.

Mr. Broughton reiterated that the stacked parking would be within the unit. He stated they were targeting the middle income market, not affordable housing.

Ms. Richard stated that, with two incomes, she could afford the condominiums.

DECISION OF THE BOARD

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

Mr. Jousse stated that, while the presentation was well thought out, there were several bothersome things. The project was violating the building coverage requirements and, while he believed it could be built within the setbacks, particularly the rear yard, there seemed to be no attempt to do so. He had no problem with the emergency egress into the setback. He stated that the fact that the property had been troublesome to the neighborhood for a long time did not put it into the hardship category. Those situations were created by past owners and were not particular to the property. While he supported the applicant’s efforts to build affordable housing and make the building green, that had nothing to do with granting a variance. He noted that the parking seemed to be one of the points for neighbors and stacked parking was a potential problem.

Mr. Jousse stated that the lot coverage was a slight improvement over the existing, but within the setbacks would be even less. While it was commendable to try and fill the vision of the master plan, they were there to adhere to the Zoning Ordinance as it exists. He felt that the variance being consistent with the public interest was debatable and nothing had been mentioned as to the effect of the project on surrounding property values.

Mr. LeMay stated that there was a lot of testimony regarding motivations, green construction, etc., but not a lot as justification for variances. With a dilapidated building, the hardship was due to the owners. He found it interesting that there had been an application in 2004 for a 7-unit condominium development so he presumed it was economically feasible. The hardship argument that 13 units were needed to make it economically feasible did not make a lot of sense. With respect to the public interest, there was testimony to the contrary with respect to parking, the direct impact on the abutters and so forth.

Mr. Parrott stated that one of the most important factors, based on well established case law, is that the hardship must be inherent in the land, not the desire of the owner to sell the property and turn an honest profit. If that was addressed in any meaningful way that evening, he had missed it. With respect to the size of the variances allowed, 66% proposed coverage is a huge way from the allowed 35%. Because much of this was new construction, there was an opportunity to come a lot closer to compliance. The fact that the existing coverage was over was irrelevant. If other properties were similarly way over, they were not built right to the property line. There was also not a good faith effort to comply with the setbacks. The other factor made clear by abutters was traffic and parking. Stacked parking may be a little bit better but would not solve the problem of people parking on the street when you have 13 units. He felt it was an over-intensification when the requirement is 3,500 s.f. per dwelling unit and 1,219 is provided. While, in some respects it is an attractive project, the totality is just too much.

Chairman LeBlanc noted that demolishing the back three quarters of the building brings the project up against current criteria. Just because the building can’t be used for what they are proposing is not justification to go down to less than half the per-dwelling-unit requirement.

The motion to deny the petition was passed by a unanimous vote of 6 to 0.

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The motion was made, seconded and passed by unanimous voice vote to suspend the 10 o'clock rule and continue the meeting.

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4) The Portsmouth Board of Adjustment, acting pursuant to NH RSA 12-G:13 and Chapter 300 of the Pease Development Authority Zoning Requirements, will review and make a recommendation to the Board of Directors of the Pease Development Authority regarding the following petition of **Two International Group, applicant**, for property located at **75 New Hampshire Avenue** wherein a Variance from the Pease Development Authority Zoning Ordinance Section 307.02(b) was requested to allow two 12' x 20' loading berths to be provided where one 12' x 20' and eight 12' x 45' loading berths are required. Said property is shown on Assessor Plan 306 as Lot 4 and lies within the Airport Business and Commercial district.

SPEAKING IN FAVOR OF THE PETITION

Ms. Jennifer Viarengo stated she was the engineer for the project and referenced the exhibit on display showing the building with associated parking and landscaping. The footprint of the proposed building would be about 29,900 s.f. and under the regulations would require eight 12' x 45' loading berths. As an office building, they only get deliveries from small trucks and the need for large loading berths was excessive for this type of use. A 72' x 10' impervious area would be created that could be a landscaped area. They were presenting two smaller areas and would move the parking needed to meet zoning to the unneeded loading area. She referenced a plan in the packet which showed the parking which would be moved. There are also some large standing trees indicated on the handout she had just passed around. The idea would be to try to save them and then relocate the 7 spaces that would be in that area. The recommendation they would like to the Pease Development Authority would be to allow them to eliminate 8 required large berths and provide 2 smaller loading berths.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Witham made a motion to recommend the granting of the petition to the Board of Directors of the Pease Development Authority, with the stipulation that best management practice be followed to retain the four trees noted on the plan presented at the meeting. The motion was seconded by Mr. Parrott.

Chairman LeBlanc stated that the plan that was passed out at the meeting would replace that presented in the packet.

Mr. Witham stated that, with an office building of this type, what they are proposing should be adequate. This was not a warehouse and the number of berths was appropriate to the use of the building.

The motion to recommend the granting of the petition, with the stipulation, was passed by a unanimous vote of 7 to 0.

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5) Petition of **Tain Properties LLC, owner, In Town Veterinary Group, Inc., applicant**, for property located at **215 Commerce Way** wherein a Variance from Article II, Section 10-209 was requested to allow a veterinary hospital in a district where such use is not allowed. Said property is shown on Assessor Plan 216 as Lot 1-8A and lies within the Office Research district.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Malcolm MacNeill cited several sections of the Planning Department memorandum, in one of which it was noted that the activity would be entirely within the building. He stated there were differences between types of veterinary uses, which were not distinguished in the ordinance. The uses within the building would be entirely analogous to medical facilities doing testing for humans. If the services were for people, he would not be standing there. He stated it was important to note where this use was in the Office Research zone and referred to the aerial photograph that Dr. Ames Prentiss had handed out. The area circled in yellow was approximately 15,000 s.f. at 215 Commerce Way, which included a wide variety of office uses. He noted locations on the photograph and the relationship to other zones and uses. This was a well developed area for office uses, with the closest residential property no closer than 750'. Veterinary Hospitals were not permitted in the Office Research district, but only required a Special Exception in the Business zone. He read definitions of a veterinary hospital from two places in the Ordinance. There was no distinction between the types and sizes of animals, although they had a different impact. In the table of definitions, it referenced a veterinary hospital including an animal crematory, which was not proposed, the sale and boarding of animals, none proposed, kennels, none here. There would only be cages for animals being treated and no exterior runs. He stated that the end of the lot was at least 200' from residential or mixed residential areas so there would be no impact on residential properties.

Attorney McNeill referenced the information and photographs they had submitted of other operations conducted by this owner. Distinguishing them from a hospital for humans, which could have 100 beds and still be a permitted use, he stated there would be no ambulances or other adverse effects of a permitted use. The practice would be 24 hours, 7 days a week and 6 days a week for specialty vet services. The practitioners all had advanced training. All the patients would be dogs and cats. Surgical waste disposal would be consistent with hospital practice.

He outlined why a facility in this location would be useful and why this location was appropriate. The surrounding uses are normal business hours. With regard to sound generation, the patients are treated 24 hours a day and sound would be objectionable to the healing process.

Dr. John Prentiss outlined the unique aspects of their practice and why they want to place it in this location. He covered their training and how they would work in conjunction with all local practices, providing services and expertise they could not provide.

In response to questions from Mr. Grasso, Ms. Eaton and Chairman LeBlanc, he stated that medicine is stored in a locked area, with narcotics double locked. They need a federal license to dispense these and are monitored by the FDA .

In response to questions from Ms. Eaton and Chairman LeBlanc, Dr. Prentiss stated that rest and noise abatement were issues in controlling pain and he outlined the steps they have taken for noise abatement, including installing insulation throughout. There will be 25 veterinarians and 70-80 support employees over three shifts.

Attorney McNeill stated that, as could be seen in their photograph, parking would not be an issue and they will comply with site review requirements. Regarding the public interest, there would be no threat to public safety or welfare or disruption to the other uses in this building. The area to the rear is industrial and the other properties were controlled by the owners leasing to this applicant. They would actually be providing a valuable public service to people with sick animals. He stated that the restriction of the ordinance as applied there clearly interferes with the landowners' reasonable use of the property considering its unique setting. As outlined previously, this use is not readily distinguished from a permitted use and has no adverse effects different from the effects of the permitted medical or hospital uses so a unique hardship is imposed. Under the ordinance, veterinarians are not allowed to provide the same services, which he detailed, as physicians.

Attorney McNeill stated there was no fair and substantial relationship between the zoning ordinance, which includes allowing compatible uses in its general purposes, and the restriction on the property. When the definitions of veterinary hospitals were drafted in Portsmouth, broad generic definitions were used as opposed to the proposed type of use. This is, in effect, a medical office use for animals and, as such, in terms of the relationship between the restriction and the actual use, they believe the restriction is overly broad and not necessary under the circumstances of this case. He stated there would be no infringement on public or private rights with no ambulances and the building soundproofed. The majority of the surrounding uses will conduct operations during normal business hours and will be closed for a large part of this activity. The doctors have looked at 20 other locations where their operation could arguably be permitted, but those would be in retail areas and not compatible with this use. He stated that granting the petition would be in the spirit of ordinance by permitting reasonable uses of the land and allowing the same type of use as one that is allowed. Regarding the justice balancing, there is no public benefit that should deprive the owner of this valued use. For reasons noted previously, there would be no diminution to the value of surrounding properties. This will be a quality facility, with no noise or adverse toxic effects.

In response to questions from Mr. Witham and Chairman LeBlanc, Attorney McNeill confirmed that the owner owned the entire building. They would agree to the application of the term, "dogs and cats," or "companion animals," which they had put in their application.

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

With no one rising, the public hearing was closed

### **DECISION OF THE BOARD**

Minutes Approved 10-16-07

Mr. Parrott made a motion to grant the petition with the stipulations that all efforts be made to mitigate sound and that the services provided be limited to small companion animals, particularly dogs and cats. The motion was seconded by Mr. Grasso.

Noting that a use variance requires a higher standard, Mr. Parrott stated that granting the variance would not be contrary to the public interest. The need for the services is there and the public interest is limited because the operation will be located in a business zone. The hardship would be the peculiarity of the ordinance placing an unnecessary restriction on this reasonable use. Similarly, there was no fair and substantial relationship between the ordinance and the restriction on this particular use. He stated it was in the spirit of the ordinance to allow businesses to settle in Portsmouth and be located in zones that can provide service without disturbing neighbors. With regard to justice, they have been assured there would be no adverse effect on adjacent owners and that there will be technical fixes to eliminate any concern of noise emission. The operation will serve the public purpose and won't attract large numbers of people or noisy trucks or disturb other workers in the building, which should reflect well on surrounding property values.

Mr. Grasso agreed. He stated that the applicant claimed to have looked at 20 other sites and this would be the best he could imagine.

The motion to grant the petition with the stipulations that all efforts be made to mitigate any sound generated and that the services provided be limited to small companion animals, particularly dogs and cats, was passed by a unanimous vote of 7 to 0.

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6) Petition of **Port City Plumbing & Heating LLC, owner**, for property located at **968 Middle Road** wherein the following were requested: 1) a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) to allow a hair salon (Hair Fashions of Portsmouth) having 5 chairs for cutting, dying and drying, and one station for nails with hours of operation Monday thru Saturday 9AM to 8PM and Sunday 11AM to 5PM in space used as a Convenience Goods II store, and 2) a Variance from Article IX, Section 10-908 to allow two 4' x 7.5' flush attached signs (total 60 sf) in a district where such signs are not allowed. Said property is shown on Assessor Plan 232 as Lot 90 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech stated they were requesting a Special Exception for the use and a Variance for signage. He passed out photographs of the existing signage on the building at the corner of Peverly Hill and Middle Roads.

Speaking to the special exception, he read the section from the Zoning Ordinance dealing with changing an existing nonconforming use to another nonconforming use provided the new use has less of an adverse effect than the previous one. He noted that what existed was a convenience store that had been there for several years. He stated a special exception is allowed as a matter of right if the standards outlined in Article XII are met, which he read. He stated a hairdressing salon does not generate hazards from explosion, fire, or toxic materials. There would be no detriment to property values in the vicinity or changing the character of the neighborhood due to the location or scale of the building and the hours of operation would be somewhat less than the convenience store. There would be no changes to the building or changes to the parking area, except that 3 parking spaces

that now back out and have been problematic, will be removed. There will be no parking on the Middle Road side. The parking was adequate and the lanes are the necessary width. No dangerous situation will be created. He stated that the use will not generate noise, odor, pollution, or require outdoor storage. Regarding creation of a traffic or safety hazard or traffic congestion, this use would be less intense than a convenience store and generate less traffic. There would be no excessive demand on municipal services and increase in storm water runoff. The light that had concerned some of the neighbors will be removed or shielded.

Turning to the variance, Attorney Pelech stated that 60 s.f. of signage existed and what they were proposing would be less. They were proposing to replicate this with more attractive signs, one each on the Peverly and Middle Road facades.

Mr. Peter Nelson stated he lived at 610 Middle Road and was in favor of this usage as the prior store was not attractive. This would be a positive change to the neighborhood.

Mr. Joseph Lavin stated he was the owner and lived in the neighborhood. They were trying to put in a lower impact use, which they felt would be in the best interest of the neighborhood. They want to make the structure attractive and have already worked on the front, with the removal of the front parking spaces to follow.

In response to questions from Mr. Grasso, Mr. Lavin confirmed that there is one occupied apartment on the second level. The underground gas tanks had been removed and the previous owners had the ground tested.

Chairman LeBlanc asked if the proposed signs could be made smaller.

Mr. Lavin stated they would like to get the same size as they need people to see them. They would not be lit. He added that they had checked with the Department of Public Works which would be redoing intersection. If he relinquished the parking spaces, they could put in a sidewalk which would benefit the neighborhood.

Mr. John Cronin stated he lived in the neighborhood and thought removing the parking spaces in front was a positive step.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. John Wood stated he had lived in the neighborhood for nearly years. While he acknowledged that the new owner was putting a lot of effort into the building, he felt that normal business hours were not 7 days a week. He wouldn't be able to use his property without business going on across the fence.

Ms. Thelma Ludwick stated she had lived at 921 middle road for 35 years and her husband had campaigned to get the traffic light at the intersection. She wondered why they could not put in a home or a couple of apartments so there would be less traffic.

Mr. Mike Roneker stated he had lived diagonally across from the property at 23 Leavitt Avenue for 32 years. His concerns included the following: that the lighting was a major concern, with the light on the side not shielded; that the owners should have known there was a problem with the lights as

he had filed a complaint with City Hall; that, if the request was passed, there should be some assurance the light problem would be fixed; that the previous signage was too much; that they want to be open on Saturday and Sunday when the park is the busiest; and that the remaining parking spaces should be marked.

Another neighbor stated that the signage was a little too much for a residential area.

SPEAKING, TO, FOR, OR AGAINST THE PETITION

Ms. Sherry Garrity stated she lived next to the property and had lived above the convenience store. The light was always there and never bothered her then or now. She felt it was great that the 3 parking spaces would be taken away. She stated the intersection was always a nightmare, particularly with kids coming across the street to the convenience store. The hours would be less than the store and she didn't see any negatives.

Attorney Pelech stated they will do whatever was necessary to make the lighting appropriate.

Mr. Lavin stated that he had ordered shields for the front lights. The back light was always there and he was approached when he first purchased the building. He had thought the neighbor was saying it was never there. He stated the parking lot does need light, but he will make sure it is correct. He felt it would be lit more with a convenience store.

DECISION OF THE BOARD

Chairman LeBlanc noted that the Board could take the two items separately.

In response to questions from Mr. Witham, Ms. Tillman stated that a change in use would not normally go to site review, but they could ask for a lighting plan showing that it would not spill over the property line or require that the lighting be dark sky friendly lighting. Putting this in a stipulation would ensure that before a building permit was issued, the lighting would be reviewed by Public Works, the same people who are involved with the site review process.

Mr. Grasso addressed Ms. Tillman noting this was advertised as 10-401(A)(1)(d) which covers an existing nonconforming use. He stated the store hadn't existed for some time.

Ms. Tillman stated that, actually, Mr. Lavin has an outstanding permit to renovate the store. He could complete this and open a store, however, he is choosing to change the use.

Mr. Parrott stated that 60 s.f. of signage was a lot and asked which of the city ordinances would be the best fit in determining how much was appropriate. Chairman LeBlanc noted they could grant less. Ms. Tillman stated it should be appropriate to the size of the building and the location.

Stating that he would like to take the Special Exception and Variance separately, Mr. Parrott made a motion to grant part 1) of the petition with the following stipulations: 1) that, as discussed, the Department of Public Works review the lighting before a Building Permit is issued to ensure that the fixtures are "dark sky friendly" and won't spill over onto adjacent properties; 2) that the parking spaces in front be eliminated and those shown in back be striped to city standards of 8½' x 19'; and

3) that the hours of operation will exclude any Sunday hours. Mr. Witham seconded the motion with stipulations.

Mr. Parrott stated that some limitations should be expected in a change in use. He noted that this lot was small and adjacent houses not that far away. The lights had been addressed somewhat, but not especially satisfactorily. Addressing the criteria, he stated that there had been testimony that the use would present no hazard to the public or adjacent properties from toxic materials or explosions. He stated that this would be a less intensive use, particularly in terms of the number of patrons per day, and they will be eliminating the front parking. He stated there would be no creation of a traffic hazard and traffic should decrease. There would be no excessive demand on municipal services and no change to the exterior that would affect storm water runoff. In summary, because the exterior and footprint had not changed, none of the other factors come into play. The hours of operation would be limited by the stipulation.

Mr. Witham stated the proposal met all the criteria for a special exception, with the only issue being the lighting which was resolved with the stipulation. He agreed with adding the stipulation about Sunday hours.

The motion to grant the Special Exception, with the stipulations that 1) the Department of Public Works review the lighting before a Building Permit is issued to ensure that the fixtures are “dark sky friendly” and won’t spill over onto adjacent properties; 2) that the parking spaces in front be eliminated and those shown in back be striped to City standards of 8½’ x 19’; and 3) that the hours of operation will exclude any Sunday hours, was passed by a unanimous vote of 7 to 0.

Mr. Parrott made a motion to grant part 2) of the petition with the stipulation that the signage be limited to two flush attached signs, each no larger than 2½’ x 4’, to be placed one on each of two designated sides of the building (Pevery Hill Road and Middle Road). The motion with stipulation was seconded by Mr. LeMay.

Mr. Parrott stated that there was no magic formula, but this was a destination location, visited by appointment. People were not driving down the street and going in on impulse. He felt this was a case where they have to find some sort of compromise without a whole lot of guidance.

Mr. Parrott stated it would be in the public interest to have this type of business in town and this seemed like a good location. The special condition creating a hardship was that the owner had to use the property and, if they were to apply the ordinance literally there would be no signs, which would not be reasonable. They were on a corner, visible from two sides and the traffic light will slow the speed of vehicles so that the signs can be seen. He stated that it was in the spirit of the ordinance to allow reasonable businesses. Justice would be done by balancing the needs of the residential neighborhood and the owners by stipulations on limited hours and signage that was not excessive. He felt the changes would make the property look better and have a slight positive effective on property values.

Mr. LeMay stated that the amount of signage was adequate for travelers in a 40 mph zone to see the business and then make appointments. Justice would be served by allowing signage that was large enough, but not too much.

The motion to grant part 2) of the petition, with the stipulation that the signage be limited to two flush attached signs, each no larger than 2½’ x 4’, to be placed one on each of two designated sides of the building (Pevery Hill Road and Middle Road), was passed by a vote of 6 to 1, with Mr. Witham voting against the motion.

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7) **Petition of T’Rouge LLC, owner**, for property located at **213 Gates Street** wherein the following were requested: 1) a Variance from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(d) to allow an 8’ x 24’9” deck with stairs (including two upper level decks) creating 35.7%± building coverage where 30% is the maximum allowed. and 2) a Variance from Article XII, Section 10-1201(A)(2) to allow the existing nonconforming parking to be relocated and not meeting the required 24’ maneuvering aisle. Said property is shown on Assessor Plan 103 as Lot 8 and lies within the General Residence B and Historic A districts.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Carla Goodnight stated that the property currently was covering 35.7% of the lot and has 5 parking spaces that back out onto the street. They would like to relocate an existing deck and stair configuration and also move it out of the side yard setback and into compliance. The second item was to improve the safety issue of the current parking, which required relocating 2 of the existing 5 spaces. She handed out some photographs of the current building and proposed deck.

She also passed around a map of the area, which spoke to the hardship. She stated the majority of lots in the area are in excess of the lot coverage requirement, some to as much as 50%.

Mr. Corey Colwell referred to the color copy on exhibit of their plan and identified the location of the 5 current spaces. These all have to back out onto the street. By relocating the two spaces nearest the garage on Mechanic Street to the northwest corner of the lot, the unsafe situation would be removed. This would allow cars to maneuver into and out of the spots and then go forward onto Mechanic Street. It would also allow the 2 cars now parked in the driveway to move forward. 4 of the 5 would go forward to a street. The only one left was in the garage which cannot change. He stated the proposed situation would allow about a 17’ maneuvering aisle where none exists today. It was an improvement, but could not meet the 24’ requirement.

Chairman LeBlanc asked what happens if, pulling in from Gates Street, the last car wants to go out. Mr. Colwell stated that space was assigned to unit two so, if one person wants to get out, they can pull forward and exit.

Ms. Goodnight referred to the pages in the handout and stated that it could be seen why the neighbors were in support. She noted that, while there was slightly more coverage, they were in compliance with the setbacks and were similar to neighboring properties.

Mr. Joe Capobianco stated he was a direct abutter and had no problem with the proposal.

Mr. Patrick Nerbonne stated that, previously, there were often 6 cars associated with the residences but 3 of the 5 spaces unusable, so 3 parked on the street. He also supported the project because it would improve the appearance of the property and make it more consistent with other houses in the neighborhood.

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

With no one 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. Grasso.

Mr. Witham stated that rebuilding the deck with a slight increase of about a percent and a half or so in coverage, but bringing the structure into conformance with the setbacks would be in the public interest. Having the parking not backing out would also be in the public interest. The special conditions were that this was a very small lot which was already over the coverage and any improvement would require a variance. He stated that the proposed decks were not overly ambitious and would be a nice addition to the rear of the property. There was no other method that would achieve their purpose. Making it smaller would take away any benefit of having a deck. In terms of the maneuvering aisle, he understood the purpose was for two cars to pass each other but, on such a small property, the chances of that happening are slim. He didn't see the necessity, the lot wouldn't account for it and whatever green space there was would be eaten up. He stated it was in the spirit of the ordinance to get parking off the street and eliminate back out parking. He didn't see that any benefit to the public outweighed the benefit to the applicant. There would be no diminution in the value of surrounding properties as attested to the support of abutters.

Mr. Grasso stated he agreed. Although the lot coverage was over, it was within the required setbacks. This would also get cars off the street.

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

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III. ADJOURNMENT.

The motion was made, seconded and passed to adjourn the meeting at 11:45 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary