

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

JANUARY 20, 2009

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

EXCUSED: Alternate: Robin Rousseau

ALSO PRESENT: Lucy Tillman, Chief Planner

I. NEW BUSINESS

A) Election of Officers

It was moved, seconded and passed by unanimous voice vote to re-elect Mr. Charles LeBlanc as Chairman and Mr. David Witham as Vice-Chairman for the calendar year 2009.

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**II. OLD BUSINESS**

A) Approval of Minutes – November 18, 2008

It was moved, seconded and approved by unanimous voice vote to approve the Minutes as presented.

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B) Settlement proposal for Docket # 08-E-0540 Rockingham County Superior Court concerning property owned by **Aquila Chase and Marcia N. Chase**, located at **71 Baycliff Road**. Said property is shown on Assessor Plan 207 as Lot 46 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE SETTLEMENT

City Attorney Robert Sullivan identified himself and stated that he was there concerning litigation involving the City. The case that evening partially involved the Board of Adjustment and partially was a land title issue. As one element of it concerned the Board of Adjustment, it was his view that the Board controlled this case. He was going to outline and recommend a settlement of the matter to them and hoped that they would approve that settlement.

Referencing the plan on display, Attorney Sullivan noted that the property involved was shown in green and was a piece of land connecting the end of Baycliff Road, shown in orange, with the body of water called Little Harbor, Salter Creek, etc. He stated that the case arose when the City administration became aware that a previously graveled driveway and parking area owned by Mr. and Mrs. Chase, had been paved with stones. The administration believed that this violated a provision of the zoning ordinance regarding a 100 setback from that body of water. He acknowledged that there was a legitimate dispute about this determination because the driveway had been pre-existing, etc. but stated that he felt the more important issue became the fact that this pavement, in significant part, was over land claimed by the City of Portsmouth.

Attorney Sullivan stated that this was the most recent example of a number of paper streets in the City where the street as shown on city maps runs to the water, but the actual pavement on the ground does not. Numerous City Councils, continuing to the present, have given a clear instruction to his office regarding those situations - the City administration should do whatever it can to preserve the City interest in the paper portion of those streets going to the water for public access to the water. The administration approached the property owners and the determination was made that, a) the zoning ordinance had been violated and, b) we thought they had paved land claimed by the City.

In response, Mr. and Mrs. Chase produced a title opinion from a title examiner and a lawyer disputing the City's claim to that paper street on a very technical basis concerning how the street was created and whether or not it was ever accepted. Attorney Sullivan noted that the Board had been over some of those issues. Another issue arose as to whether or not the City's interpretation of its own zoning ordinance was correct as concerned whether or not the placing of these cobblestones violated the provision of the ordinance, the Chase's position being that it wasn't actually a structure.

Attorney Sullivan stated that the City allowed Mr. and Mrs. Chase to come before them on the zoning question because, if the Board had chosen to grant them relief on the zoning issue, then that would reduce the disputes to one, the title question. A lawsuit concerning the zoning issue followed after Mr. and Mrs. Chase were denied relief, leaving the title issue – the concern of the City Council about protecting public access to the water – unresolved. He proposed a concept to settle both issues and resolve the lawsuit. The City would withdraw its enforcement action which would take the zoning issue from the table, if Mr. and Mrs. Chase would take the title issue from the table by conveying by deed to the City any right, title and interest which they might have to the area shown in green. This would preserve that area in perpetuity for public access to the water at that location. That, in a nutshell, was the settlement proposal they were asking the Board to approve. While there were some minor details to be worked out, nothing was at great variance from what he had presented and he asked that someone on the Board move to approve the settlement of the case in accordance with his presentation.

Mr. Witham asked about the colored line on the plan close to the waters edge and Attorney Sullivan indicated that was intended to show the mean low water mark.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Grasso made a motion to accept the settlement as presented by City Attorney Sullivan. Mr. LeMay seconded the motion.

Mr. Grasso stated that this was a well thought out solution to the problem involving Mr. and Mrs. Chase and he felt it was an agreement they could accept.

Mr. LeMay stated that the settlement appears to balance the interests of all parties including this Board.

Mr. Parrott made note of their previous action which was to deny approval of the pavers which had been put in the way and stated that the agreement didn't specifically address the particular work that had been done. He took the reference in section 5c to "improvement of the right-of-way" to relate solely to the pavers and that nothing else was approved, nor would anything be allowed in the future that would not otherwise be approved.

Attorney Sullivan responded that paragraph 5c refers back to paragraph 1 which describes the improvements at issue as the placement of the pavers. Therefore the only approved improvement was the placement of the pavers. He didn't feel that was a need to be more specific.

The motion to approve the settlement as presented by the City Attorney was passed by a unanimous vote of 7 to 0.

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C) Administrative Appeal of the decisions of the City of Portsmouth Building Inspector, Legal Department and Planning Department by **Jill A. Tapscott, Trustee of the Jill A Tapscott Revocable Trust, Sara L. Schmidt and Kimberly A. Geraci, Trustees of the Geraci Family Revocable Trust of 2008 and William D. Mortimer, Trustee of the William D. Mortimer Revocable Trust of 1997**, concerning property owned by **150 Greenleaf Avenue Realty Trust, James G. Boyle, Trustee** located at **150 Greenleaf Avenue**, that an illuminated portal is a wall and not a sign and as a result that any signage located on this wall would not be located above the building roofline and, thus, a permitted use and does not require a Variance from Article IX, Section 10-901(E). Said property is shown on Assessor Plan 243 as Lot 67 and lies within the General Business district.

Chairman LeBlanc advised that this petition was removed.

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D) Petition of **Brina Lampert Revocable Trust, owner, Brina Lampert Trustee, and Aaron Jones d/b/a MoJo's BBQ Shack, applicant**, for property located at **212 Islington Street** wherein a Variance from Article IX, Section 10-908 was requested to allow: a) 121.58 sf of attached signage where 60 sf is the maximum allowed, b) 50 sf of projecting signage where 15 sf is the maximum allowed; and, c) 171.6 sf of aggregate signage where 75 sf is the maximum allowed. Said property is shown on Assessor Plan 137 as Lot 21 and lies within the Central Business B and Historic A districts.

SPEAKING IN FAVOR OF THE PETITION

Mr. Aaron Jones stated that he was the owner of Mojo's and, after leasing the property last year, had hired a sign person to do all the signs. This individual did not get the proper permits and he had been contacted by the City and told they were over square footage. He stated there were two businesses on this property, theirs and one other whose sign had been up since the 80's. They felt it was important to have signage on both businesses.

Arlene Scampini stated she was with Seacoast Auto Parts and distributed pictures of the signs of her portion of the property which had been there since 1972.

Mr. Witham noted that the Board had a number of criteria and that the applicant was supposed to convey how he met them. He wondered if there might be a compromise with the window signs since a sign was proposed for each and the three in the middle contain the same information as the upper sign. There was really only one of the five panes with new information. He asked what, in a compromise, the applicant was willing to give up.

Mr. Jones stated that he was willing to give up all the window signs in order to keep the rectangular sign above.

Ms. Danielle Graveline of 82 Fleet Street stated that she had seen the signs and felt they were tasteful. It was imperative for the business to have the signs.

**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. Parrott stated that he would have liked more discussion as to why the signs were needed. The ordinance allows 75 s.f. and they were asking for 171 s.f. of aggregate signage. They were asking for double the allowed amount of attached signage. There had also been no claim of hardship and there was duplication of information.

He made a motion to deny the petition, which was seconded by Mr. Jousse for discussion.

Mr. Parrott stated that a variance would be contrary to the public interest because the signs were distracting. If there were more than needed, it clutters the cityscape or street. There had been no claim of special conditions result in a hardship and he was not convinced that enforcement of the ordinance was an unnecessary hardship because the square footage could be cut down. He felt that the property was in use so that people knew where it was. Regarding the benefit not being obtained by some other method, there was no need to repeat the same information twice. He stated that the spirit of the ordinance was to not provide unnecessary clutter and he felt that the justice test tipped toward the public interest in not having excessive signage. Regarding the value of surrounding properties, it was not a positive to have every window covered with the same message. The signage could be redesigned to be more attractive and closer to city ordinance.

Mr. Jousse asked Ms. Tillman if the sign over the windows showing as 42 s.f. was grandfathered although it didn't appear in the history.

Ms. Tillman stated that a permit was issued to a previous tenant of the property to have the sign. The owners daughter had stated that the property had moved through several zones with different requirements, with this one being the most restrictive. Ms. Tillman did not know when the permit was issued, but it had not gone to the Board of Adjustment.

Mr. Jousse asked if, then, they recommended disapproval, he would still not lose the sign.

Ms. Tillman stated that he would lose them all. She noted that the Board could always grant part of the request.

Mr. Jousse asked if the maker of the motion would agree to reduce the motion. When Chairman LeBlanc pointed out that it was a motion to deny, Mr. Jousse withdrew his second. Hearing no new second for the motion to deny, Chairman LeBlanc called for a motion to grant.

Mr. Parrott moved that the petition be approved, modified so that the proposed sign 6, which was the large sign mounted above the windows be approved but that the remaining signs, namely the proposed signs 1 through 5, not be approved. And also the proposed sign 7.

There followed a brief discussion among Chairman LeBlanc, Mr. Parrott, Mr. Witham and Ms. Tillman about the need to retain the existing signs for the auto parts business, which were included in the square footage.

Mr. Parrott restated his motion to grant sign #6 and all of the automotive signage as it currently existed. His motion was seconded by Mr. Jousse.

Mr. Parrott stated that this was a small building in a commercial area so the large top sign was needed and appropriate. Not having the other signs would not hurt the business because they conveyed the same information as the approved sign #6. A hardship existed to the extent that this business needs to compete with other businesses. A balance would be struck by granting sign #6 and not approving the others with the duplicate information. The automotive service signs were longstanding and should be retained.

Mr. Jousse stated that he had nothing to add.

The motion to grant the proposed sign #6 and all of the automotive signs currently on the building was passed by a unanimous vote of 7 to 0. _____

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E) Petition of **Noble's Island Condominium Association, owner**, for property located at **500 Market Street** wherein a Variance from Article IX, Section 10-908 was requested to allow: a) 100.19 sf of attached signage where 60 sf is the maximum allowed, b) 26.18 sf of freestanding signage where 10 sf is the maximum allowed; and, c) 126.37 sf of aggregate signage wherein 75 sf is the maximum allowed. Said property is shown on Assessor Plan 120 as Lot 2 and lies within the Central Business A and Historic A districts.

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

Mr. David Choate stated that he was on the executive board of the Noble's Island Association and also owned a unit. They had appeared before the Board last year presenting an application to redo the signage for Nobles Island which was denied because it was stated that the amount of relief was excessive. Since that time, they had worked with city staff, the architect and the association and were there that evening to request aggregate signage of 126.37 s.f. Mr. Choate read the introduction from the packet he had provided and mentioned some of the changes from the previous application, noting that the biggest change was the sign on Market Street. It had been determined that the sign was in the state right-of-way which would require Department of Transportation approval, but not that of the City of Portsmouth, so this was deleted from the application. Of the primary identification sign, which he had on display, 18.75 s.f. was included in the signage and the rest was deemed to be an address. The tenant directory sign was also re-measured to only identify commercial units, reducing this to 5.63 s.f. If the Board wished, he would read through the submitted criteria, but this was virtually identical to the last application

Mr. Jousse asked who had deemed some of the signs to be out of their jurisdiction and Mr. Choate stated it was the City Attorney. Ms. Tillman clarified that during meetings with the City Attorney and the building inspectors, who are the ones that actually issue permits, it was determined that some of the signs included in the previous application should never have been included.

Chairman LeBlanc asked if he could quickly review the criteria.

Mr. Choate stated that Nobles Island was the largest complex in the Central Business B district, comprised of 25 each of residential and commercial units scattered on 2.5 acres. The 75 s.f. allowed in the ordinance was intended to be for a single building, not multiple buildings with multiple tenants. The configuration of the land and the buildings thereon constituted a hardship and it was critical to better organize the signage to direct visitors around site. He noted that Mr. Doug Bates from the Chamber and Ms. Lisa DeStefano could speak to the confusion of visitors. Without adequate signage, people don't know which is the entrance and the sheer size and variety in the complex dictate more signage.

Mr. Choate stated that surrounding property values would not be affected as they were surrounded by water on all sides except for Market Street and one building, with the Port Authority across the street. Most of the proposed new signage was interior to the property and not visible from the street. He felt that it would improve values to have a professionally prepared graphic program, coupled with the other planned improvements. A complex like Nobles Island was not considered when the 75 s.f. maximum was conceived so the proposed signage, which will provide purpose and a cohesive feel to the complex, would not be contrary to the spirit of the ordinance. Mr. Choate stated that the public interest would be served by making it easier to get around and find a destination, including the Chamber of Commerce. In the justice test, if the variance were not granted, the current "hodge podge" would be perpetuated and the owners and public would suffer from incomplete and contradictory signage. Granting the variance will ensure a better way-finding system which would tie in nicely with the city's Market Street improvement projects.

Mr. Parrott asked if there had been any physical change compared to the previous application. Mr. Choate replied that there was no physical change to the signs themselves and these were the same drawings. It was a function of eliminating some, primarily the one out on Market Street and what was counted toward measurement within the signs they had proposed.

#### **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. LeMay.

Mr. Witham stated that, overall, the main elements of this application were the size of the development and the number of buildings. Of the 5 signs requested, three were interior signs. He felt that the speed of the road in front played a factor and it was very difficult to read the Chamber sign as it was currently located. There were 25 businesses and 25 residences, creating almost a campus setting, rather than a line-up of individual buildings bombarded with signage.

He stated that it would be in the public interest to identify buildings in a safe manner. One of the reasons for limits is to avoid clutter along the roadside and distractions for drivers. With three of

the signs on the interior, there would be no jeopardy. The special conditions are the size of the property, with over 2 acres of mixed uses in a number of buildings. This was not a single structure in a downtown setting with passing cars at a lower speed. The only other method to pursue would be to make the signs smaller and he felt that asking them to cut down their needs by 40% would not meet their objective nor serve the public interest. It would be in the spirit of the ordinance to allow businesses to survive and identify themselves without resulting in road clutter. He didn't see any justice to the public in denying this modest proposal and surrounding property values would not be diminished.

Mr. LeMay stated that he would like to reinforce the fact that this was a cluster of buildings, isolated from any other premises, which does require more signs. It was hard to locate destinations in the complex now and these signs would be appropriate to the property and the street.

Mr. LeBlanc stated that the overriding factor was the size of the project. It had been in existence for some time and better direction and cohesiveness was probably a good thing.

The motion to grant the petition as presented and advertised was passed by a vote of 6 to 1 with Chairman LeBlanc voting against the motion.

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F) Petition of **William Genimatas Revocable Trust of 1990, owner, Nicholas Genimatas, Trustee**, for property located at **599 Lafayette Road** wherein a Variance from Article IX, Section 10-907 was requested to allow a 28'3" high 182 sf free-standing entrance sign on existing base where 20' is the maximum height and 150 sf is the maximum square footage allowed for a free-standing entrance sign. Said property is shown on Assessor Plan 229 as Lot 8 and lies within the General Business district.

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

Attorney Bernard W. Pelech stated that the Board was familiar with the Bowl-A-Rama and the 1960's sign which they were hoping to replace which was 33' high and 225 s.f. The owner wanted to replace the sign, which predated the zoning ordinance, with a more appropriate, modern version. They intended to use the existing metal standards and base and clad them in aluminum. He stated that part of the special conditions was that, in the Route One Bypass plan implemented by the state, the roadway, currently one-way, was going to move away from the Bowl-A-Rama. The green strip between the plaza and the new two-way road would be moved toward the Crossroads House. Attorney Pelech read from a letter from the owner to the Chief Building Inspector outlining the basis for replacing the sign which included the effects of weather conditions and the need for maintenance. An updated sign would meet retail standards and identify the merchants while remaining in the same footprint. The wiring and lighting would be updated and the sign area reduced in height and size to make it more conforming. He noted that this was the only free-standing sign on the property which has 900' to 1100' of frontage. When the City enacted a new ordinance in '95, a new category was presented for signage. The signage allowed for a multi-use shopping center was a maximum height of 20' where the existing sign is 33', and 150 s.f. where the existing was 225 s.f., which was why they were before the Board.

Attorney Pelech stated that it would be in the public interest to have a sign which was energy efficient and less dangerous than the old neon sign, which was frequently not entirely lit. The

height and size of the sign would be reduced, making it less nonconforming, which would be in keeping with the spirit of the ordinance. They would be replacing a large sign with something more appropriate and in keeping with today's market. Attorney Pelech stated that the special conditions were the length and shape of this property which would eventually be further away from the road. It would be difficult to reduce the height any further as a substantial portion was the reader board which identified the many tenants in the long, narrow building. Reducing the height any further would push it down and they need to keep 5' at the bottom for visibility. He felt that an attractive sign in a commercial district would not negatively impact the value of surrounding properties. The sign was close to the center of the plaza and not near abutting owners.

### **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 grant the petition as presented and advertised, which was seconded by Mr. Witham.

Mr. Grasso stated that the applicant would be replacing a sign dating back some forty years. His initial concern about height was answered by the explanation about the number of tenants and the sight line needed under the sign. The sign had to be this height to identify tenants and maintain business. He stated that it would be in the public interest for a business to advertise and identify its location, especially in a multi-use facility. The hardship presented was that the sign was designed to list all tenants and having it smaller would make it harder to read. There was no other method to pursue, again due to size and the number of tenants. The spirit of the ordinance would be served by allowing a sign which would identify tenants without being overly cumbersome. Justice would be done and there would be no diminution in the value of surrounding properties.

Mr. Witham stated that a variance is required when someone replaces a nonconforming sign because it gives the city an opportunity to bring it into greater conformance. Without a variance, there would be no incentive for the owner to replace existing sign with a safer structure. Looking at what was existing and allowed, the applicants had come down in the middle of the two figures. While not in full conformance, it was greater conformity and a direction that the city likes to see.

Mr. Jousse stated that he would not support the motion. He felt that the sign could be lowered by 3' to 4'. The street was one-way and the proposed two-way may not come to fruition. He also took issue with the presenter's claim that the height was needed for visibility for vehicles leaving the parking lot.

Mr. Witham maintained that, if the sign were any lower, it was not going to function well. It needed to be above the height of the cars in this high traffic area.

The motion to grant the petition as presented and advertised was passed by a vote of 5 to 2, with Messrs Jousse and LeBlanc voting against the motion.



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G) Petition of **Homayoun L. Daneschvar and Leslami Nasim Segnato, owners**, for property located at **566 Broad Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a second floor 28' x 36' addition with a 7'± left side setback where 10' is the minimum required. Said property is shown on Assessor Plan 221 as Lot 58 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mr. David Cassavaugh stated that the owners would like to add a second story to the home built in 1954 without changing the footprint. To the left hand side was an easement which inhibits expansion on that side. Most of the homes in the neighborhood were two stories and, to stay with the neighborhood look, it was best to build up. He passed out a letter from the neighbors on the closer right hand side and they had no objection to the second floor addition. He stated that it would be within the spirit of the ordinance as they would be maintaining the property with the same footprint and not extending it. They would be increasing the value of the property to match that of the surrounding neighbors and bringing a 1954 house up to today's standards.

Mr. Parrott stated he was confused by the markings on sheet 3. What was there now where it showed the proposed 6'x12' deck.

Mr. Cassavaugh stated there was an existing 11' x 16' room addition. The balcony would extend over that. In response to further questions, he stated that the second story would just be over the 28' x 36' main house. The flat roof would remain the same except the balcony would extend over it. The one story addition, which was built over a foundation, would be retained.

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. Jousse made a motion to grant the petition as presented and advertised, which was seconded by Ms. Eaton.

Mr. Jousse stated that the applicant was proposing a vertical expansion of a nonconforming property which, up until a couple of years ago, would have simply been an administrative decision but now requires a variance. He felt they were proposing the least intrusive way of expanding living space. The hardship was that the existing dwelling was nonconforming so there was no other way to expand without a variance. This would be no closer to the property line so it would be consistent with the spirit of the ordinance. Justice would be done and the value of surrounding properties would not be diminished.

Ms. Eaton stated that a single story house was a little out of place in the neighborhood and adding a second floor was a reasonable expansion and should improve the value of surrounding properties.

Chairman LeBlanc noted that this was the minimum amount of relief that the applicant could look for and accomplish what they were seeking.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 7 to 0. _____

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H) Petition of **Gary Michaels (McIntosh Condominium Association), owner, Kristen Gauthier and Daniele Graveline d/b/a The Pink Sapphire, applicants**, for property located at **82 Fleet Street** wherein a Variance from Article IX, Section 10-908 was requested to allow 34.75 ±sf of projecting signage where 15 sf of projecting signage is the maximum allowed. Said property is shown on Assessor Plan 117 as Lot 41 and lies within the Central Business B, Downtown Overlay and Historic A districts.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Daniele Graveline stated that they were requesting a projecting sign over their door. Ms. Gauthier stated that where they were located was very detrimental because, when you looked down the street, you could only see the bank.

Chairman LeBlanc asked if she was stating that their hardship was the location on Fleet Street. Ms. Graveline stated that it was visibility. People were always calling and saying they couldn't find them. The awning into the building hides their little section and they never get any walk-ins

Mr. LeMay asked if the area of the proposed sign was the same as that of the two abutters and Ms. Graveline responded that it was the same as Edible Arrangements, but was rectangular.

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

Mr. LeMay stated that the business was sandwiched between other businesses with signs of this type and it was reasonable to allow a similar type sign so that one unit can be distinguished from another. The hardship was the visibility from Congress and State Streets, which was adequate justification in his mind. He felt it was also in the public interest to allow them to find the shop and consistent with the spirit of the ordinance. There was no benefit to the public in not granting the petition and the value of surrounding properties would not be diminished

Mr. Grasso stated that part of the hardship which this applicant inherited was that the other signs on the building took up the allowed signage. Their 2' x 3' sign was not excessive.

Mr. Witham stated that this building fills that end of the block and there are streets on three sides. The signs seem to be tastefully done and this sign would be helpful. To limit a building of this size to 15 s.f. was restrictive.

Mr. Jousse stated he would not support the motion. When he went someplace, he looked for the street address, not the sign.

The motion to grant the petition as presented and advertised was passed by a vote of 5 to 2, with Messrs. Jousse and LeBlanc voting against the motion.

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### III. PUBLIC HEARINGS

1) Petition of **Merton Alan Investments, LLC, owner**, for property located at 30 Cate Street wherein the following were requested to construct a 5 story building with a 13,375 sf footprint (66,875 sf total) for a 60 unit residential apartment building containing affordable work force housing units and artist live/work space (16 artist live/work units, 34 two bedroom units, 10 one bedroom units) with accessory on-site laundry and workout rooms: 1) a Variance from Article II, Section 10-209 to allow a residential apartment use in an Industrial district where a residential use is not allowed, 2) a Variance from Article III, Section 10-305(A) to allow the proposed development site with a 130' depth where 200' is the minimum required, 3) a Variance from Article III, Section 10-305(A) to allow an 18' front setback where 70' is the minimum required, 4) a Variance from Article III, Section 10-305(A) to allow a 14' rear setback where 50' is the minimum required, 5) a Variance from Article III, Section 10-301(B)(3) to allow an 80' setback from residential uses where 100' is the minimum required; and, 6) a Variance from Article XII, Section 10-1201(A)(f)(2) to allow parking 10' from the front property line where a 50' setback back in the minimum required. Said property is shown on Assessor Plan 165 as Lot 1 and lies within the Industrial district.

Ms. Eaton stepped down for the petition and Mr. Durbin assumed a voting seat.

#### SPEAKING IN FAVOR OF THE PETITION

Ms. Lisa DeStefano stated that she was there with Attorney McNeill and Mr. Greg Mikolaities of Appledore. As history, she stated that she had worked with Mr. Philip Singer and received approval for a 48,000 s.f. office building, but Mr. Singer had not proceeded as planned due to the business environment. She stated that the current owner was looking for the highest and best use for the property considering the wishes of the city and the spirit of the ordinance for mixed use. Through her other interests, it came to her attention that bringing a project with artist/life/work space on the first floor and workforce housing on the second would meet current needs and benefit the community as a whole. She had also worked with the City's Blue Ribbon Committee on housing and she cited the introduction to their study which mentioned the need for the city to leverage private resources to create new housing for the middle income workforce. She quoted income and family size statistics from that study which determined what constituted workforce housing. The artist live/work spaces would be on the first floor, the two bedroom units on the second and third and the one bedroom units on the upper floors.

Ms. DeStefano stated that they had a property which was purchased for a reasonable price and which met the criteria in the study and master plan, while construction costs were at a current low. They were looking for the variances to allow this to go forward at this time as they cannot afford to wait for a potential zoning ordinance change. They need to pursue this quickly to keep construction costs at a minimum. Referring to the aerial map of the area, she noted the parcel at the corner of Cate and Bartlett Streets and pointed out the other areas of the industrial zone on the map which showed a number of containers and trucks. They felt an industrial use on this site would present a challenge with maneuverability and other needs of the industrial zone.

Ms. DeStefano stated that they had investigated other placement options in which the side and front yard variances might not be as intense, but this would put the parking in front and they would like to hide the parking and asphalt at the back. At the intersection would be more of a green space area, what they called their rain garden area. She indicated a view of the building coming up Cate Street and looking at Bartlett. This was a simply constructed 5-story building, for which costs would be kept to a minimum. She indicated various features of the building and rental units. She stated that all elements of the project would be sustainable. Residents could walk to shopping and leave their cars behind. She outlined the various local organizations with whom she met as well as a number of abutters. She distributed and read into the record letters of support from the Downtown Business Association and the Chamber of Commerce and presented a petition of support from abutters which stated that the site was currently a home for vagrants and a dump for trash. Ms. DeStefano noted that she had extensive background on various projects which had brought benefit to the community and she felt this project could benefit both business and housing needs.

Mr. Greg Mikolaities, from Appledore Engineering, put up a plan which, he stated, had been developed with the hope and anticipation that the Board would look favorably on it. They had given this a lot of thought, looking at drainage and landscaping and trying to maintain as much of a buffer along the railroad tracks and a green area at the intersection. If the Board gave approval, they would still have to pass the plans through the Planning Board, TAC and others.

Attorney McNeill commented that the problem facing the Board was meshing the obviously stated goals of this community in 2009 with traditional land use zoning and variance issues in a manner that was comfortable and consistent with the Board's usual practice. He stated that most any use of the property would require dimensional variances due to the configuration of the site. The issue was really a use variance. In 2001 when the Board approved an office project on the site, there were dimensional variances for the project which happened to have a permitted use. That project also had 49 more parking spaces than they were proposing and the main issues at the meeting were issues of traffic. This vacant lot was in what he called the panhandle section of the Industrial Zone. In the materials he had provided and the board on exhibit, they could see the relatively narrow area along Cate Street, which was vacant. It was a site with varying topography that found itself between business and residential properties on the other side of the tracks and some retail and contractor yard uses across the street. He noted that the owners of these properties across the street had provided written support for the project.

Attorney McNeill stated that this was clearly a piece of land in the center of town that wasn't being developed or used. The remainder of the industrial zone was suitable for industry, with broad areas to turn around trucks, significant buffering on its edges, and proximity to the Route One Bypass at its far point. The only conforming nature of their site was that it met the two acre requirement of Industrial Zone. He stated that this long and narrow site would be inappropriate to develop the types of uses industrial would expect and the zoning was unreasonable as applied. He pointed out the mix of uses across Cate Street, stating that their proposed mix of artist/live/work space and housing was compatible with those uses and made sense from the land use perspective the Board had to consider.

Attorney McNeill referred to the November 18, 2008 housing report and a longstanding discussion of providing live/work units for artists. This site was close to transportation and services and qualified as workforce housing. In the memorandum supplied by the Planning Department there

were recommendations to ensure long term work force eligibility, including annual reviews. He stated that the location works for those who want to walk to the store and, while the shielding of the parking on site drives some of the variances, it also drives some of the desirable components.

Addressing the Simplex criteria, Attorney McNeill stated that the housing would be affordable and he had addressed workforce housing at some length in comments and exhibits. The location was unique and desirable for the proposed use. The special conditions of the property were its unique configuration and its inappropriateness to the allowed use. As to whether this should be a zoning matter, the length of time to effect a zoning change and the ability of the owners to construct the building while costs can be contained needed to be considered. There would be only 98 parking spaces, compared to the previously approved 147 spaces.

He stated that the variance would not be contrary to the public interest. He cited references from the master plan and the blue ribbon report including the importance of keeping the community accessible to all backgrounds and incomes. Housing affordability topped the list of key issues affecting the city's ability to remain diverse and retain its essential character. He noted that, although in 2005, one of the stated priorities was to create zoning and other regulatory incentives, there had been no zoning change. So, the Board that evening could serve as the regulatory incentive. He also cited from the report the limited developable land in the city.

Regarding enforcement of the ordinance resulting in unnecessary hardship, Attorney McNeill stated that the land was vacant. After the prior approval 8 years ago which had not been used, there had been no industrial advancement for the property. The proposed use would be thoroughly appropriate and consistent with the master plan and public planning documents. There was no relationship between the general purposes of the zoning ordinance and the restriction on the property. This was a long, narrow strip not appropriate for industrial use while the proposed use would provide a continuum between residential and business uses.

Attorney McNeill stated that the public or private rights of others would not be affected, including those of the residents on the other side of the tracks. The owners across the street support the project and this modest use with no industrial aspects or truck traffic would not affect the industrial uses. Any other issues would be addressed by the Planning Board. In the spirit of the ordinance, this use would be consistent with the master plan and the November workforce housing study. The parking would be buffered and compatible with other uses. Permitting a rebirth of the property with goals the community has embraced would result in substantial justice and enhance the value of surrounding properties.

Addressing the Boccia analysis, Attorney McNeill stated that they had asked the engineers to correlate the dimensional requests with numbers on the plan which they had received earlier that evening. The need for all the requests flows from the unique configuration of the site which did not have sufficient depth and was not conforming as it existed, although it complied with the height requirement and exceeded the open space requirement. One variance, #5 on the plan, relates to the 100' of separation required from this use and a residential zone, but that requirement presumed that the use would be industrial. Their proposed distance was 80' but both sets of properties would be residential. Clearly, the fact that the uses were compatible and not industrial uses constituted grounds for relief.

The front setback, #3 on the plan, being 18' instead of 70', resulted from the effort to place the building where it shields parking and had a reasonable alignment on the street. The 70' setback was appropriate for industrial use, not residential and they had to have a certain mass to make this an economically viable endeavor. The rear setback, #4, was 14' to the boundary line where 50' was required but, again, the ordinance clearly contemplated an industrial not a residential use. #6 indicated the 10' setback for parking where 50' was required. Attorney McNeill maintained that the parking was reasonably designed and buffered to have no adverse effect on neighbors and not affect property values. All decisions had been driven by the nature of the lot. He stated that property values would not be diminished and justice would be done by facilitating a use that the city wants and which was consistent with the spirit of the ordinance. He suggested that two things were at work, a commendable public purpose where the existing zoning was inappropriate and a uniquely shaped piece of land.

Mr. Jousse noted that that particular area of the city had problems with drainage and asked if any thought had been given to the impact on the sewage system.

Mr. Mikolaities stated that, regarding storm water, the outline of this pond or rain garden shown on the plan had actually been sized. We recognized the problem with the underpass and went through and did calculations. Regarding the sanitary system, they were aware of the city's work in that area and they would cooperate with the city. They would have to get a sewer discharge permit which the city has to sign before going to the state for review so all that's on the table. In response to further questions from Mr. Jousse, he stated that they would consider a parking lot with a permeable surface. There were new state rules on January 1 and they also had to work with the city on sustainable design. They would be making those presentations to the Planning Board. He confirmed the location of the dumpster on the plan.

Mr. Parrott stated that they had touched on the suggested stipulation in the memorandum regarding the long term enforceability of the affordability of the housing. Was there a good faith intent to retain local ownership of this project and would there be local ownership and management after it was built?

Attorney McNeill stated that they expected any threshold to be a condition of approval from the Board and with the Planning Board and that would move with the land. When Mr. Parrott stated that the further the owner was from a project, the less concerned with niceties, Attorney McNeill stated that the project had been advanced to the Board with regard to its components. The City Attorney had proposed annual reports so he didn't see how the owner was getting away from the project. He could promise the present plan, but 5 or 10 years in the future, he couldn't say.

Ms. DeStefano stated that the property owner was planning on keeping the property and the goal was a longterm investment. The management team from whom he has taken advice was local. Attorney McNeill commented that maintaining this would be easier than a restrictive covenant because the property was owned by one entity. In Exeter, where similar assurances were sought, the units were condominiums and yet they were able to work out a mechanism. Mr. Parrott stated that he had wanted it on record and termed as a good faith effort.

Chairman LeBlanc asked about the number of affordable units and Ms. DeStefano stated that all 60 met the blue ribbon study criteria. In response to further questions, she stated that included the

artists who would actually live there and she related her conversations with the Art Speak organization. She stated there would be no retail capability, but didn't want to preclude something similar to the Button Factory type of open house.

Mr. Grasso asked if the applicants could go over again why some of the industrial uses, such as a commercial laundry, motel, or medical office, could not be put there. Attorney McNeill stated that if there were a market for them, they would be there. He reiterated that there was a problem with maneuverability and, although permitted, many uses were not compatible with the other surrounding uses. When Mr. Grasso cited the lumber yard across the street, Attorney McNeill acknowledged that use but stated the others were retail and an office building which might not want an industrial use with noise or smoke or other issues. Mr. Grasso stated he was thinking more of a hotel or doctors' offices. Attorney McNeill stated that he believed this use was compatible and that a case could be made under Simplex.

Mr. Grasso stated that with traffic already at the intersection of Cate and Bartlett, with 100 or more additional cars going in and out, the traffic would be backed all the way up the street. Attorney McNeill stated, if this Board in 2001 approved a use with 50 more cars, they felt it was reasonable to ask for less. They would have to satisfy the current burden at Planning Board.

Chairman LeBlanc stated that the occupants of the artist studios will not be driving to work. Mr. LeMay commented that there would be more pedestrian traffic as compared to a doctors office. With just the one tiny sidewalk under the bridge and the potential for a number of children in the two bedroom units, it could be dangerous. When Attorney McNeill stated that usually there were .4 children per 2-bedroom unit, Mr. LeMay stated that would still be children in the double digits with virtually no place to ride a bike or walk safely. The plan also lacked space to take a walk on site.

Stating that she was the Chair of Art Speak, Ms. Ellen Fineberg distributed, and read from, a statement to the Board in support of living/working space for artists and detailing how the project tied into the master plan and workforce housing.

Ms. Lisa Hedrickson, from the workforce housing coalition, noted the recent increase in rents and how his project would tie in with their aims and submitted a letter in support.

Ms. Jane James stated she was a member of Art Speak and also read a statement of support for the project.

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

Mr. Sean Rafferty stated he was a resident and homeowner. He felt that crowding more people into limited spaced was not the answer to regional housing problems and could diminish the quality of life for all of Portsmouth. Any changes in the zoning ordinance should have the effect of reducing congestion. He maintained that there was no unnecessary hardship to the applicants as, under current zoning a number of businesses could go into that spot. He felt the current congestion would be worsened by the traffic generated at the times of day the workforce would be travelling and he was concerned about a large number of children placed in danger by the traffic. His other concerns included excess cars parked on city streets, runoff to the mill pond and additional services required.

Ms. Nancy Johnson, of 81 Clinton Street stated she was in favor of more workforce housing, but felt the size of the building was disproportional to the size of the lot. She was also concerned about parking, the shortage of sidewalks, and runoff. Noise vibration caused by a building wall so close to the railroad tracks could also be a problem.

Attorney Jim Waring stated that he was appearing on behalf of Jask Realty, an abutter, and distributed a packet setting out his position. Noting that the applicant sought a use variance, he listed a number of other uses which would be allowed without a variance. He stated that the industrial zoning does not interfere with a reasonable use of the property and no hardship was demonstrated. There were no special conditions due to the uniqueness of the property as there were 7 other similarly sized properties in the district. The proposed use was the only basis for the dimensional requirements as the massive size, with 60 dwelling units, drove the request. He noted that, if this were in the Apartment District, zoning would only allow 8 dwelling units. The proposal would not be in the spirit of the ordinance as the building was much too large for the lot and the height also exceeded any other residential building. He stated that other reasonably feasible methods could be pursued, namely a smaller building.

Mr. Mike Thiel of 767 Islington Street stated he was not really in opposition and he was in favor of affordable housing, but he shared the concerns about the size and scale of the project and its impact on the area. He felt a fence was needed to prevent access across the railroad tracks and was concerned that insufficient parking would cause people to try and park in his lot.

Mr. David Gross, of 201/235 Cate Street agreed that traffic was the issue. He felt the city needed to straighten out its infrastructure and resolve the drainage issue before any major project.

Mr. Tom Cowgill stated he was an artist working in the same corridor. He felt that most of the artists he knew generated too much noise, such as grinding or hammering wood, for that concept. He felt the scope of the project was too big.

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

Ms. Lisa Hendrickson wanted to clarify regarding the number of school children that, as stated by a state housing finance authority study, multi-family units generate an average of .13 students per occupied unit.

Attorney McNeill addressed Attorney Waring's comments with regard to parking, stating that the parking was in compliance with regulations. The concerns expressed with regard to traffic had all been discussed at length at the time of the previous approval. Those were primarily Planning Board responsibilities. With regard to fencing, they believed that would be an appropriate consideration. They felt they had presented a balanced approach and, if not here, where could the project go. Concerning size, a certain amount of mass was required for it to be affordable for the developer.

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

### **DECISION OF THE BOARD**



Mr. Witham made a motion to grant as presented and advertised with two stipulations. The first would be that an agreement be made with the City Manager concerning the mechanisms by which these units would be kept affordable, using the paragraph stated in the overview or some form of that. Second, for the Planning Board to look at fencing schemes to prohibit occupants from crossing the railroad tracks to get to whatever services they may want to on the other side. He would leave the decision on how many sides up to them or traffic and safety, whoever was best suited. Mr. Jousse seconded the motion.

Mr. Witham stated that there was a balancing act in a project of this scope and it was easier to take a position of opposition. They also needed to look at the merits and the strong desire in the community for such a project. There were obvious concerns, some of which were valid and some of which were overblown. First, the applicants were not going to get any use on this property without dimensional relief for any type of structure. An argument had been made that this residential use was going to be detrimental to neighborhood but someone could come in with an allowed waste to energy plant which would be more detrimental. While there would be more cars, the potential for adverse effects would be far greater with another use. He expected the other Boards and Committees to put in safeguards to minimize the impact.

Regarding the issues of children and safety and overcrowding, the same people raising those issues were saying there could be other uses, but those uses would create more traffic and safety problems. Mr. Witham stated that the project met the parking requirements. He related this project to another similar one close to where he worked where there were barely any children and he never noticed any traffic issues. The city needs to address the issue of the current traffic issue at the intersection. He stated he was not going to deny progress as long as parking requirements were met, which was the case here. He stated that the traffic count at that intersection was probably 300 cars per half hour and the impact this project would make would not be as great or detrimental. The traffic and safety committee could look at those issues.

There was concern about the size and scale, but you could look at the other side of the street for Eldredge Park which was substantial in size and scale but has a nice presence in the area. He actually like the design, which echoed the feel of the mill buildings formerly in that area. Regarding zoning, he felt that the city, at some point, had to make a map and this property contained an industrial structure so it made sense to zone it industrial. The left side abuts an industrial zone, but the major properties on the other sides were a mix of residential, commercial and industrial, so he didn't see a residential use as a square peg in a round hole. He also put some weight on the master plan and the desire for affordable housing, which was not going to be created if limited to 8 units.

Addressing the use criteria, Mr. Witham stated that there was a public interest in this type of housing and it was not against the public interest to lose a piece of property in the industrial zone. A residential use was more appropriate than many of the industrial uses which would be allowed. He felt that the restriction on the property did interfere with reasonable use considering the unique setting, which was that it was sandwiched in between these other zones. They were usually concerned with imposing commercial and business uses on a residential area. This was the opposite. There was no substantial relationship between the zoning and the restriction on the property as it had not been used as industrial for a long time. He didn't see how there would be an interference with the public or private rights of others.

Using the Boccia analysis for the setbacks, Mr. Witham stated that it would be difficult to comply with the 200' depth required and the 130' depth was reasonable. The front and rear setbacks were to protect abutters from noise and pollutants and setbacks for residential use were nowhere near as restrictive. He felt that 10' was an adequate setback for parking with a railroad track on the other side. While he believed the spirit of the ordinance could be argued both ways, he believed that it wanted to look at the master plan for the future direction of the city and affordable housing was within that plan. The need was there but zoning had not yet caught up to it. He stated that justice would be done by granting the variance, especially with setback relief needed due to the unique shape of the lot and the buildable area. He had seen no indication that the value of surrounding properties would be diminished. The trees in the area are 60' tall and take away from the impact of the height. He also didn't see that shadows would be created or the sun blocked by the building. There were still some issues and other boards to go to, but on balance, he felt that the decision should tip in favor of approval.

Chairman LeBlanc asked if, in the first stipulation regarding the mechanism to keep the project affordable, they could insert the word "all units" (in the wording in the departmental memorandum were used) for "affordable workforce housing." Messrs. Witham and Jousse agreed to amend the motion.

Mr. Jousse stated that the lot currently was nothing but a breeding place for trouble and was not a positive thing for the city. The project had to be big enough to make money and 40 units might not even be the breakeven point. He felt that this was a large building but not overpowering. He noted that medical or business offices had been mentioned but there were spaces in Portsmouth looking for tenants and he didn't see a motel going in there. This was a good project that the city needed and, with people walking to work, the traffic situation could be improved.

Mr. LeMay stated that he had heard a great desire to have this project but a lot of public interest doesn't overwhelm the other four requirements and he didn't see that they were all satisfied. With the railroad track the way it is, it creates a barrier with residential on one side and industrial on the other. He felt that, if they allowed this to go forward, they would be creating an obligation on the part of the city to improve the situation for public safety at a time when budgets were strained. He stated that this was not a referendum on this type of housing, and something in that general area which could access the downtown would be wonderful, but he had some problems with the proposal and would not be supporting the motion.

Mr. Parrott outlined his reasons for not supporting the motion. He felt they were being asked to approve something in a zone which was not the intent of the Planning Board or City Council, and a residential use was very far away from an industrial one. He agreed with Mr. LeMay that, because of the railroad embankment, the few houses on the other side were irrelevant. He listed a number of industrial and commercial uses toward Route One and along Bartlett Street, which were hardly residential or conducive to residential. This was inappropriate and not a place for children. He also took issue with the assertions that the zoning was wrong. It was as the City Council had established it and the fact was that there were many allowed uses and he did not recall a request coming before the Council to rezone the parcel.

Mr. Parrott stated that the argument that the project was supposed to be income limited should not cause the Board to look at it differently than any other commercial market rate project. The building itself was large and right on the street and, he believed, there was nothing else of that magnitude in the city, which limits the units to 8 in apartment districts. He stated it was in a mixed use area, a tiny fraction of which was residential. This would be creating a little island of intense residential use in what was otherwise a commercial or industrial area, which he did not feel was appropriate. He felt the project was overreaching in terms of its scale and size for the proposed location. He felt that a smaller building situated differently on the lot would work better from a use point of view. He concluded that, much as the city could use so-called workforce housing, putting it in this area would not serve anybody's long-term purpose.

Mr. Witham stated he would like to clarify his position on zoning. He didn't remember someone saying the zoning was wrong. He didn't think a city planner sat down and designated this area industrial allowing for future growth. The property existed before zoning and someone saw what was out there and zoned it one way because of what was on it – not as part of a master plan. He noted that the property behind Hovey's Photo had railroad tracks along the back and a similar mix of uses around it and it was a successful project. He didn't see why this would not mirror that project.

Chairman LeBlanc stated that he was excited about workforce housing, but there were other aspects to be considered such as safety and impact on the area. He felt the intensification was too high to allow this to go forward as currently constituted.

The motion to grant the petition as presented and advertised with the stipulations that: a) an agreement be made with the City Manager concerning the mechanisms by which all units would be kept affordable, and b) that the Planning Board look at fencing schemes to prohibit occupants from crossing the railroad tracks, failed to pass by a vote of 3 to 4, with Messrs. Grasso, LeBlanc, LeMay and Parrott voting against the motion.

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#### **IV. ADJOURNMENT**

It was moved, seconded and passed to adjourn the meeting at 11:20 p.m. and continue the petition concerning 4 Sagamore Grove Road to the following week.

Respectfully submitted,

Mary E. Koepenick, Secretary