MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **December 17, 2013**

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Charles LeMay, Christopher Mulligan, David Rheaume, Alternate Patrick Moretti

EXCUSED: Derek Durbin

ALSO PRESENT: Juliet T. H. Walker, Transportation Planner

Chairman Witham advised that Mr. Moretti would be sitting in as a voting member for the meeting.

I. APPROVAL OF MINUTES

A) September 18, 2012

B) September 25, 2012

C) September 17, 2013

It was moved, seconded and passed by unanimous voice vote to approve all sets of Minutes as presented, with a one-word change to the September 25, 2012 Minutes.

II. PUBLIC HEARINGS - OLD BUSINESS

A) Case # 11-8
Petitioner: Ghamami Revocable Trust, Sheila Grant, Trustee
Property: 405 Deer Street #7-6
Assessor Plan 118, Lot 26-7
Zoning Districts: Central Business B & Downtown Overlay
Description: Appeal from Administrative Decision
Requests: Appeal from Administrative Decision to issue a violation notice for removal of a center chimney.
This petition was postponed at the November 19, 2013 meeting.

Chairman Witham noted that City Attorney Robert Sullivan was there that evening and available to answer any questions that the Board might have.

SPEAKING IN FAVOR OF THE PETITION

Mr. Thomas Neve stated that he represented Sheila Grant, the owner of 405 Deer Street. They were there because a chimney had blown off her property in a sleet and wind storm. He described the sequence of events leading to their Appeal. They had filed applications, appeared before the Historic District Commission and had correspondence with the Planning Department. Most recently, they had been issued a Notice of Violation by the Legal Department on September 24, 2013. They were appealing that administrative order. He noted that they had received a memorandum from Mr. Cracknell the day of the meeting and had provided the Board with his response to that memorandum.

Mr. Neve provided a brief history of Ms. Grant's family history in Portsmouth and her ownership of the property on Deer Street. He stated that, with her long history, she wanted to preserve the integrity of the property, which was in the historic district on a special piece of land. He described what happened when the chimney blew off, stating that the entire structure fell off including the metal components within it. It blew right onto the sidewalk and the walkways between the buildings. He stated that Ms. Grant had reacted quickly and referenced a letter from the Condominium Association President commending her for the quick action she had taken to stabilize the situation, which involved capping the building with cedar shingles and making it safe. He stated that, as it was the middle of the winter, not much work could be done.

Mr. Neve stated that, on April 12, 2013, the Planning Department contacted her and asked her to complete a building permit application after the fact for the work that had been done. They felt it was an important thing to have in the file and, once that was done, apparently the Historic District Commission received a copy of it. He wasn't sure how it worked but they were contacted and found themselves in a situation where they had to appear before the Commission, although they weren't entirely sure why. At the meeting, the Commissioners asked why they were there and he had stated that he guessed it was to allow the building to remain as it was without a chimney. After a long discussion, the Commissioners indicated that, under their charge, they were empowered to review historic buildings and details of applications and make decisions based on preserving the integrity of the district. They felt that the chimney should be rebuilt which Mr. Neve felt changed the tenor of the meeting into a meeting to review a project that they hadn't submitted. It ended with them getting a denial from the Commission and an order from the Legal Department to rebuild the chimney.

Mr. Neve stated that it seemed confusing, but he felt it was simple and asked the Board to look at the facts of the case. He reiterated that this was a basic Appeal of an Administrative Decision regarding the Notice of Violation issued on September 24, 2013. He stated that there was no provision in the Zoning By-Laws [1] that required a building owner to rebuild any component of a building that was removed or destroyed by an act of god or an involuntary act. He stated that the owner was aware that, if she desired to reinstall a new chimney at that old location or make any other alterations to the building, she would have to submit an application for review before the

[1] The presenter's term "By-Laws" appears to refer to the Zoning Ordinance and its provisions.

HDC. This case was not to argue the provisions of the By-Laws and what provisions she must comply with if she were to apply for a building permit. This case was whether the City had the right to force a building owner to rebuild a component of the building that had been demolished or removed by an involuntary act and they could find nothing in the By-Laws that gave the City that right.

Mr. Neve stated that they hadn't appealed the decision of the Historic District Commission as that decision was irrelevant to the question asked by them, which was whether they could keep the building "as is." They were not asking for permission to rebuild the chimney. He maintained that the Historic District Commission made a decision that they had to rebuild the chimney and never made a decision as to whether or not they could leave the building as it was. Mr. Neve stated that, if there were a provision in the By-Laws to force an owner to rebuild something on a historic building just because it fell off, or apart or was demolished by some natural act, there would be violations in the files for any building that fell into disrepair.

Mr. Neve stated that they had done due diligence on the chimney issue with the respect to the District. While he felt it was irrelevant to why they were there that evening, they had walked around the top of The Hill and found forty buildings with no chimneys. He mentioned other historic buildings in the City with no chimneys, noting that they had photographs of all of them. While he initially thought they could ask for relief on the basis of this particular provision of the By-Laws not being enforced in a way that was generally accepted, he decided, as previously stated, that there was nothing in the By-Laws that actually required somebody to do that. Prior to the Legal Department writing the September 24, 2013 letter, they had contacted him and, in a long conversation, he raised that issue with the Legal Department. He told them he was having difficulty in finding a provision that would require this type of notice and asked them to help him find it. He stated they he and the owner hadn't received any help or indication of where it did exist. They simply received the notice which was why they were now there.

Mr. Rheaume asked if Mr. Neve had anything that would document that the chimney had been in good condition before what he was terming an act of god. Mr. Neve stated that he didn't other than that the buildings were rented. Ms. Grant was local and frequently visited the property and there was also a handyman who worked on the building who was very diligent and around all the time. The buildings dated from the 1700's and needed frequent work. The condominium association was also active and, if there had been any indication that this was going to happen, repairs would have been made. He maintained that this was a catastrophic event that no one expected.

Mr. Rheaume asked if there had been any other damage to the building or surrounding buildings when this act of god took place. Mr. Neve responded that there were only some shingles that had to be repaired or replaced as they were damaged when the chimney slid off. Mr. Rheaume asked if any other portion of the roof or windows were damaged. Mr. Neve stated, "no," adding that it had to be framed and refixed to get the entire structure weather tight. The chimney was lowered below the rafters and then a cap placed on the roof and the same cedar shakes and shingles were used to make the repair.

Mr. Rheaume noted that Mr. Neve had indicated that his client recognized the importance of the Hill and the historic buildings there. He was trying to understand why she was not interested in

rebuilding the chimney and restoring the historic character of the building as perceived by the Historic District Commission. Mr. Neve responded that they had not gone into that question yet. He didn't know if her intent was, in years to come, to make that happen. They just did an assessment of the existing structure and the physical and structural properties of that chimney were quite deteriorated within the building itself so it wouldn't be an easy repair to make. He stated that it would be substantial, tens of thousands of dollars worth of expense. She would have to consider her budget and, if that was what she wanted to do, then they knew that they needed to go before the HDC to make sure that, if it was built, it was built in kind and its original likeness.

Mr. Moretti asked how far down the chimney went and Mr. Neve stated it was to the ground. When Mr. Moretti asked if they had taken it all the way down to the ground, he stated that they had not. The foundation was in the basement and it went all the way through the roof. They had taken it down two feet below the roofline.

Mr. Moretti noted that, typically when there was an act of god, you would contact the insurance company and asked if they had done so and if they had documentation of that contact. Mr. Neve stated that he never asked his client that question. Mr. Moretti stated that, if there were substantial damage, typically that would be something that would be done to have it documented. Mr. Neve stated he didn't know and maybe it was not too late to do that. Mr. Moretti stated that the insurance company would have wanted to inspect it prior to the removal to assess the damage. He asked if there were any pictures of the chimney after it fell off the roof. Mr. Neve stated that he didn't know but they had pictures of what it looked like and it was pretty obvious what it looked like now. If someone wanted to get up into the attic space, they would be able to see what was left.

Mr. Parrott referred to Mr. Neve's letter of April 9, 2013 and quoted a sentence from the middle of the paragraph, "Upon inspection (*of the chimney)* it was found that the chimney mortar had deteriorated to such an extent resulting in the compromise of the structural integrity of the chimney and the ultimate failure of the structure leading to its ultimate collapse onto the pedestrian walkways around the building." Mr. Parrott stated that mortar deterioration occurred over a period of time and the way to prevent something like this from happening was to inspect it and remove the damaged mortar called repointing it and he thought Mr. Neve had told them that the owner of the building relied on a handyman making that assessment from the ground. He asked Mr. Neve in his judgment as a professional engineer if that was an adequate inspection or would he want a mason to get up and look at the chimney. Mr. Neve stated that he might have been misunderstood. He stated that the questioner asked whether or not the buildings were well maintained and he stated that his response was that the owner understood that these were old buildings which required maintenance. If something went wrong, they called Ms. Grant and she would send a handyman over right away to fix what was wrong. He stated that she did not live there and see it every day and he wasn't sure he would notice a chimney in disrepair 40' to 50' from where he was standing if he didn't have a trained eye. He did know that, after the fact, it was obvious that the chimney blew off because of its structural integrity and the failure of the mortar around it. Certainly if it was inspected, and he didn't know how often a chimney had to be inspected, someone may have found out that it had to be repointed and that probably would have prevented it from happening.

Mr. Parrott asked if it was fair to say that the neglect of the integrity of the chimney led in fact to its being susceptible to blowing off where all the other chimneys in the neighborhood didn't. Mr.

Neve stated that he hadn't asked the building inspector to see if there were others but he would be surprised if this was the only one.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Rick Beksted stated that he lived at 1395 Islington Street and was not speaking for or against the petition. He had some knowledge of the HDC and stated that, if the chimney was existing, it needed to be preserved which was the job of the HDC, even with an act of god. He was a building contractor and felt that the inside of the structure most likely had a good solid foundation. They were old houses and had been moved but could be preserved back in place. Regarding filling it in due to the wintertime where it was tough to do masonry, he recalled a building on Court Street a few years ago which underwent a substantial renovation and the structure was capped and roofed over and then in good weather, the chimney was put back up. He felt that should be taken into consideration.

Chairman Witham opened the hearing to discussion or motion by the Board, reiterating that Attorney Sullivan was available for any questions.

Mr. Mulligan noted that the decision of the Historic District Commission denying the request to authorize the prior removal of the chimney was printed on a document entitled the "Certificate of Approval" and asked either the Planning Department or Attorney Sullivan if it was the City's practice to have the HDC issue denials on documents called certificates of approval. Following a brief discussion of the issue, Ms. Walker stated that, while she didn't staff the HDC, she believed it was their practice to issue denials.

Chairman Witham stated that he had reviewed the Zoning Ordinance and could not find anything that said that, if something blew off you had to rebuild it. However, Section 10.631.30 stated that, "Within the Historic District, demolition, new construction or addition, some signs and most alterations are all subject to review by the Commission or Code Official." He felt that, under this section, any kind of demolition fell under the purview of the Historic District Commission. There was a section that blew off and a section remaining but they didn't have pictures to know the extent. The rest was demolished and it was roofed over. From his experience with the Historic District Commission, he felt they had taken a stance with saving chimneys and for good reason. He believed to be in the historic district was almost a privilege and there should be some sense of stewardship in owning a property there. Being in the district added value to a property which came with a cost, a part of which was to maintain the historic character of the home.

Chairman Witham stated that he had some trouble with the fact that the presenter handed them a long letter that evening saying that the basis for the administrative appeal fell on the fact that the chimney was destroyed by an act of God. Yet, as Mr. Parrott pointed out, when the writer was hired to do an inspection of the property in April nowhere did he mention an act of God but instead mortar deterioration was mentioned as the ultimate failure of the structure. He didn't think you could have it both ways. He also didn't find a snowstorm in New England to be an act of God. He felt this was more a mortar issue and a maintenance issue than an act of god issue. He reiterated that, under the Zoning Ordinance, any demolition fell within the purview of the HDC. If they felt strongly that the chimney needed to be rebuilt, he tended to have to agree.

Ms. Chamberlin stated that she was struggling with making somebody replace a structure assuming in good faith that it did fall off, they capped it and would now like to leave it as it was. She stated that they ran into this all the time with barns and parts of buildings where it was too expensive to replace. This was a grey area and she wasn't certain that she felt comfortable with ordering someone to spend a huge amount of money to replace the chimney when she didn't think there was any intent to have it fall off.

Mr. LeMay stated that he understood that rebuilding a chimney could be a substantial expense but there were alternatives that were cosmetic and much cheaper that they could explore. There were homes where the chimney had just deteriorated. It didn't fall off but something had to be done and the homeowners weren't using the chimney any more but just needed a cosmetic fix. There were synthetic chimneys that he felt the HDC would consider.

Chairman Witham stated that he had designed three faux chimneys with a brick veneer in the past two years that had been approved by the HDC and he felt you could not tell the difference. It was relatively cost effective so he felt there were alternatives to rebuilding a historically functioning chimney.

Mr. Rheaume noted that this was the second month in which someone had come before them and indicated what could be a loophole in the Zoning Ordinance . Last month it was adding upper levels and still remaining within what had been approved by the Board. This month, it was whether or not a rebuild would be required after an act of god. He felt they might need to challenge the Planning Department and Planning Board to clarify those issues in the Zoning Ordinance.

Mr. Rheaume stated that among the things he found disturbing about what was being presented was that the property owner was actually appealing the administrative notice of violation which occurred sometime after they had previously received a decision from the Historic District Commission. There was an opportunity there and that was really the right opportunity to appeal what had occurred and not wait for the Planning Department to send out a notice of violation or appeal that notice of violation after the Planning Department was forced to send it out.

Mr. Rheaume stated that, as some of the other Board Members had indicated, he found it hard to believe that a windstorm that didn't cause any damage to any other buildings would result in this chimney toppling over if it had been in good condition. If it had been maintained in good condition and the owner had done preventative maintenance on it, she would have been spared the expense now of having to go and replace it. He stated that he found it hard to believe this was in fact truly an act of God – he would be more amenable to an earthquake – but a windstorm he found hard to believe.

Chairman Witham stated that this was a valuable discussion but the point of the matter was that what they were voting on that evening was an appeal from an administrative decision of the Code Enforcement Officer to issue a violation notice. The Code Enforcement Officer had been apprised of a violation situation and had done his job in issuing the notice of violation so it was hard to say where he erred. That was what they were voting on. While it was valuable in terms of the HDC to discuss the chimney and the failure, the motion should be in regard to the administrative decision to issue a violation notice.
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SPEAKING IN OPPOSITION TO THE PETITION, OR SPEAKING TO, FOR, OR AGAINST THE PETITION

There was no one else to speak to the petition, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Mr. Parrott made a motion to **deny** the Appeal which, in essence, maintained that the Code Enforcement Officer had been in error to issue the violation notice. Mr. LeMay seconded the motion.*

Mr. Parrott stated that the crux of the matter was administrative but he thought the demolition was clearly, under the Ordinance, within the jurisdiction of the Historic District Commission. Secondly, there was no qualification in the Ordinance as to the cause or method of demolition. It was simply a demolition whether caused by a blast of wind or other cause. It was the job of the HDC to look at the building exterior and to maintain it in some degree of integrity with respect to the original style of the house. In this case, the house had a chimney which served an important function in earlier days. Finally, he thought that the memorandum that the HDC sent out was to the point and provided good rationale for the decision that they took. This all led up to the issuance of a denial and then the failure to appeal in a timely fashion. Mr. Parrott acknowledged Chairman Witham's clarification of what was before the Board and stated that he found that the administrative notice was issued properly and without any reservation or ulterior motive and this Board could and should uphold the issuance of that order.

Mr. LeMay stated that he agreed with Mr. Parrott's comments and had nothing to add.

Mr. Mulligan stated that he thought it was important that the applicant's representative had noted that he was in touch with the Legal Department prior to the notice of violation being issued so it was not as though it was a surprise that it was coming. On the other hand, he thought Ms. Chamberlin made a very good point. They had often granted relief in other circumstances for properties that had been the subject of benign if not outright neglect. He felt it would be a harsh result if the motion were carried and was struggling with it. He thought there might be some kind of relief that could be granted. They could grant the appeal with the stipulation that no building permits would be issued until this was rectified or addressed but again that was a lot of relief and it was not what had been requested.

Chairman Witham stated that this was a highly unusual case but he considered the fact that the Ordinance gave the Historic District Commission purview over demolition. There had been a partial collapse of a chimney followed by the demolition or the removal of the remaining section of it and then a roofing over, all of which fell under their purview. There was also in the State Regulations a provision that, if there was an act of god, a property owner was allowed to rebuild without going through all the approval process. The appellants were saying this was an act of god and they didn't want to rebuild the chimney. Again, from his reading of the Ordinance this fell under the purview of the HDC and he thought they acted accordingly.

Mr. Rheaume stated regarding the hardship that this was the Hill, which was a particularly sensitive area for the City. These homes had been relocated to this area because of their historical and architectural significance so he felt this added an emphasis. He thought, as Mr. Moretti

pointed out, that the applicant had an opportunity to contact their insurance company. Mr. Rheaume added that he had suffered damage to my home from a windstorm and his insurance covered everything. Had the homeowner initially contacted their insurance company, replacement would not be that big a burden on her so he was struggling with that aspect of it.

*The motion to deny the Appeal **passed** by a vote of 5 to 2, with Ms. Chamberlin and Mr. Mulligan voting against the motion.*

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Mr. Rheaume recused himself from the following petition.

B) Case # 11-9
Petitioner: M.A. Boccia & V.H.T. Luong Joint Liv. Tr., M.A. Boccia & V.H.T. Luong, Trustees
Property: 30 Brewster Street (26-28)
Assessor Plan 138, Lot 35
Zoning District: General Residence C
Description: Expand third floors of two existing structures, adding one dwelling unit.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.324 to allow a lawful nonconforming building or structure to be added to or enlarged in a manner that does not conform to the requirements of the district.
2. A Variance from Section 10.521 to allow a lot area per dwelling unit of 1,221 ±s.f. where 1,831± s.f. exists and 3,500 s.f. is the minimum required.
3. A Variance from Section 10.521 to allow a right side yard setback of 5'± where 5' exists and 10' is required.
4. A Variance from Section 10.521 to allow a rear yard setback of 0'± where 0' exists and 20' is required.
5. A Variance from Section 10.521 to allow 41.4%± building coverage where 41.6%± exists and 35% is the maximum allowed.
6. A Variance from Section 10.1112.30 to allow 4 parking spaces to be provided where 6 parking spaces are required.

This petition was postponed at the November 19, 2013 meeting

SPEAKING IN FAVOR OF THE PETITION

Mr. Chris Meyers stated that he was under agreement to purchase this property with the contingency that this proposal be approved. He stated that the property currently contained two single family homes that were being used as rooming style homes. Their proposal was to expand the two homes and provide three condominium units on that lot, which was located in an area that was in transition. He stated that they had done their due diligence and met with people in the neighborhood, twelve of whom had signed off in support. They had outlined their proposal at a meeting on December 10th and also received a letter of support from the Association that represented some of the homeowners in the area.

Chairman Witham asked if he wished to address any of the criteria necessary to grant a variance. Mr. Meyers stated that the first component was parking and maintained that it was a misconception that removing two single family homes and putting in three would burden parking. He felt that the current parking issue was aggravated due to the current two homes having a rooming house feel with eleven or twelve individuals going in and out plus visitors. He felt their project would reduce the parking issue, which was the biggest concern of the neighbors, by half. Noting that he had to kick beer bottles out in order to park his car, Mr. Meyers stated that they would be replacing what was there now with upscale units which would help the neighborhood. He felt the property would be a showplace and fit in nicely with the neighborhood. It was an investment and he acknowledged that he would have put in four units if he could have and had compromised by going down to three.

Mr. Rick Beksted of 1395 Islington Street stated that he felt this would be an asset to the neighborhood and decrease the cars that were there.

Chairman Witham stated that he had struggled with this petition and was surprised that the neighborhood association had gotten on board after their first reaction. He felt it was based on what was happening on the property now rather than looking at the basis for a variance. Chairman Witham noted that some projects were being undertaken with two story homes built up to what was essentially three stories disguised as dormers. The Board ran into this a lot with garages with a request that involved enormous amounts of living space inside. He stated that it was commendable to want to improve properties and maybe the applicants felt they needed this amount of space to make it work but the proposal represented too much density and scale up against property lines. He also had some concern with the parking, although he understood that it could overall be better than what existed. He stated that his major concern was density and volume being added to this property with a 0' rear yard setback and a 5' side yard setback.

Ms. Chamberlin stated that, in looking at density, she considered the number of people in the building and if it was changing from ten to 12 rooming house dwellers to single-family dwellers that was an improvement in her view. She appreciated that they were looking at building up to that third floor and turning two units into three. While this was a big building on a small lot, she felt that the overall neighborhood would be improved.

Chairman Witham stated that he could not support the volume and the impact of a third level on surrounding properties. He felt that, if there were currently two nice families in those homes and someone wanted to buy the property and turn it into three units with this volume, it would not be supported. Because there were ten to twelve students in there now was not enough reason to grant a variance.

Mr. Parrott stated that he had a question with respect to the ridge height of the present building. Looking at the proposed elevations, the height of the rear building a little beyond the ridge was 34½ feet. The front building grade to ridge looked like 33'3". Mr. Parrott then referred to other drawings in the packet and found a current elevation of 30'4" on the rear building and 31' for the front which represented a 4' increase to the ridge for the rear building and an increase for the front building from 31' to 33'3". Chairman Witham stated that the rear building had a 31' long wall up against the property line, which was a full three stories high. Mr. Parrott stated that was his concern. Chairman Witham added that the setback requirement was 20'. He understood the

building was there now and couldn't be moved but he hadn't heard a hardship issue were they not able to add to the height.

Mr. LeMay asked if the difference was the dormer on the third floor in the back and Chairman Witham stated it was for the rear building. He didn't have a problem with the dormers in the front which were three small gable dormers but the building that was up along the street was, volume-wise, considerably larger. It also needed relief for a 5' setback where 10' was required. They were also dealing with an increase in lot coverage. He stated that he was for improvement of this property but it seemed as if they were trying to maximize the gain by getting as much volume as possible. Ms. Walker interjected that the building coverage was going slightly down and Chairman Witham stated that it was still over what was allowed.

SPEAKING TO, FOR, OR AGAINST THE PETITION

With no one else rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Ms. Chamberlin made a motion to **approve** the petition as presented and advertised, which was seconded by Mr. Parrott for discussion.*

Ms. Chamberlin stated that an improvement to the neighborhood would not be contrary to the public interest and noted that the neighborhood association was in support due to the reduced pressure on parking in the area. She stated that the spirit of the Ordinance would be observed as the nonconforming aspects would remain the same. While the proposal was to increase the volume, that was balanced by reducing the number of people living there. She felt that substantial justice would be served by allowing the property to be improved. She stated that the hardship criterion was difficult. There were special conditions as to parking in that granting the variance would relieve parking pressures rather than making it worse. In terms of density of the property, she agreed that it could be used as it was currently but perhaps not improved without allowing for three units rather than the current boarding house arrangement which would be the special condition. She also appreciated their intent to improve the condition and aesthetics of the property.

Mr. Parrott stated that he had seconded the motion but would not support it. He felt they were asking for a great deal of relief although it would make the property more attractive and help with parking on the street. He felt that they had to be careful with a zero property line and could not support the motion but would like to see the project redesigned.

Chairman Witham stated that a "no" vote would not be a slap in the face. There were currently two homes on the property which had a historic character. It could be a great project to restore the homes and sell them as two homes or condominium units. He had not heard a case for hardship or that the owners could not have a reasonable use of the property without the variance as there was a current reasonable use which could be renovated. He stated that this was too much to ask for in terms of the impact on abutting properties and the project needed redesign.

*The motion to grant the petition as presented and advertised **failed** to pass by a vote of 2 to 4, so that the petition was **denied**. Messrs. LeMay, Moretti, Parrott and Witham voted against the motion.*

III. PUBLIC HEARINGS – NEW BUSINESS

Mr. Rheaume resumed his seat.

1) Case # 12-1
Petitioner: 10 State Street , LLC
Property: 10 State Street
Assessor Plan 105, Lot 4
Zoning District: Central Business A
Description: Appeal.
Request: Appeal from an Administrative Decision.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated that he was there that evening with Ms. Susan Conway of 10 State Street LLC and Mr. Dana Adams, the Director of Operations for the project contractor. They were there with an Administrative Appeal on a question of whether the valid building permit issued for the property at 10 State Street should have been extended or, in fact, whether it ever expired. He paraphrased Section 104.10 of the Portsmouth Building Code as providing that where there were practical difficulties associated with the construction or where there were special individual reasons that would make strict adherence to the letter of the Code impractical, the Building Inspector was granted flexibility in administering the Code. Attorney stated that the question before them that evening was whether considering the totality of the circumstances, there were practical difficulties associated with the status of the building permit for 10 State Street which justified its extension or special individual reasons that would make adherence to the strict letter of the Code impractical. Also whether allowing the extension of a building permit would lessen health, accessibility, life and fire safety or structural requirements.

Attorney Loughlin stated that their position was that given very unique circumstances associated with the 10 State Street property, the building permit issued by the City either never expired, because the work was not suspended or abandoned or, if it could have been determined that it expired, it should have been extended by the Building Inspector. He reminded the Board that throughout 2012 all of the roadway in front of 10 State Street was completely blocked with construction equipment and stockpiled materials. In May of 2012, Mr. Adams detailed in a letter which was provided in the packet all of the reasons the construction could not go forward and a May 30 letter from Assistant Chief Building Inspector Roger Clum indicated that the City had concluded that the Memorial Bridge construction had essentially made it impossible for the 10 State Street project to proceed at that time. Attorney Loughlin quoted from the letter that they "believed this is a unique and extraordinary situation." Moreover, they found that the building permit extension was in compliance with the intended purposes of the International Building Code. He continued that Mr. Clum stated that such an extension did not lessen health,

accessibility, life and fire safety or structural requirements related to the project. Attorney Loughlin stated that Mr. Clum advised that, pursuant to the International Building Code, he was granting the one-year extension to their building permit which they requested, noting that the permit would now expire on October 18, 2013.

Attorney Loughlin stated that, paraphrasing Mr. Clum's letter, the Memorial Bridge construction made it impossible for the 10 State Street project to proceed until July of this year. On July 9, a representative of Archer Weston and the Department of Transportation advised Mr. Adams that they could be given limited shared access to the Scott Avenue Bridge, that little connector under the bridge approach, as long as the activity of construction on 10 State Street was coordinated with Archer Western. At the point when Mr. Adams got the go-ahead to begin construction, just short of 9 months out of a 12-month extension had already elapsed. Attorney Loughlin stated that, under the terms of the extension, Mr. Adams had 97 days to get construction underway to preserve the permit, which began what Attorney Loughlin termed a 97 day comedy of errors, or really a tragedy. He stated it was a 97 day building permit death match during which Ms. Susan Conway, Mr. Adams and De Niro Construction did everything in their power to be able to proceed with the already approved project.

Attorney Loughlin posed a question as to whether a municipality had an obligation to work in good faith with landowners who were trying to exercise their constitutionally protected property rights. He then read from the second page of one of his handouts which cited the Supreme Court case of Kelsey v. the Town of Hanover , which he felt laid out a constitutional obligation of a municipality to provide assistance to all their citizens and prevented municipalities from ignoring an application or using other tactics to delay a project. Reasonableness was used to determine whether a municipality had fulfilled that constitutional obligation to provide assistance.

Attorney Loughlin detailed a long list of events and communications during the 97 days leading up to October 17, 2013 that had been provided to the Board. These included e-mails to and from the Legal Department and the Planning Director, as well as meeting requests, submittal of a revised Construction Management Master Plan and discussions of the project needing to get on the City Council Agenda for license to use the City right-of-way and whether a license would be needed to use the sidewalk as the area was blocked off. He specified several instances where the appellants were waiting for a response from the City, as well as issues which included fees for parking spaces for Archer Western workers and a green area where the construction trailer was proposed.

All the events and communications that Attorney Loughlin detailed led to October 15 when Mr. Adams sent another e-mail to the Legal Department requesting the status of the CMMP. Attorney Loughlin read the letter which noted that they were awaiting comments on submitted revisions and had also spoken to the Assistant Bulding Inspector regarding updating the extension letter. He indicated the matter had been forwarded to the Legal Department. Mr. Adams requested answers and updates so they could make plans.

Attorney Loughlin stated that on October 17 Mr. Adams received a response from Ms. Ferrini concerning the request for an extension of the building permit. This response was in the packet of material that he submitted to the City with the application. In paragraph 1, there was the history of the permit that was discussed and it was noted that the second extension of the permit for an additional year was granted due to extraordinary circumstances related to the Memorial Bridge

construction. Those circumstances existed until the middle of July. Attorney Loughlin stated that there were equally extraordinary circumstances to justify another year's extension of the permit due to what had happened with the property. For nine months, access was blocked by the bridge construction, and for the last five months, he maintained, access was blocked by the City's inaction.

The second paragraph of the letter concluded: "It was determined that the City lacks authority to grant an additional extension." Attorney Loughlin stated that he had asked about it and was told that, per Section 105, a permit could not be extended. He stated that was simply not the case.

Attorney Loughlin raised the question, "What was the public policy for having an expiration provision?" No doubt, it was to eliminate the half-finished building, the abandoned construction site, the inconvenience it caused to the public when the sidewalks were blocked for long periods, the dangerous conditions from blowing construction debris, and the nuisance created by attracting kids and causing danger. Attorney Loughlin asked if any of those factors applied to their project. Ms. Conway spent over a million dollars to put in the foundation before the bridge construction started. Attorney Loughlin posed the following questions: Was the site in any way dangerous? Was there any question since July 2013 that the developer had voluntarily suspended the work or voluntarily abandoned the site in those final 97 days? The Ordinance stated that the Building Inspector may grant a one-year extension. It did not state that the Building Inspector could grant only a one-year extension.

Attorney Loughlin read the third paragraph from the City: "Contrary to what is stated in the letter, which says: as you know, the principal issue that prevented the finalization of the CMMP was the use of public rights of way for construction purposes." Attorney Loughlin stated that it was the first time the project was notified that it was the primary purpose. The property owner was never told that was the issue and never told that he could proceed as long as the construction was entirely on its own site. Otherwise it would have, in spite of its being a ridiculous requirement. Rather than lose more time, they would have used barges and done the construction on their own property. The property owner was never advised in September, two months after the request was begun, that the City was beginning to reevaluate its long term use of such public rights of way.

Attorney Loughlin stated that the major question was, what more could the property owner possibly have done from July 11 to October 7 to demonstrate that the work at 10 State Street was not suspended or abandoned? There were not many times when a Municipal Board had the opportunity to right a wrong of the magnitude that had been suffered by Ms. Conway and 10 State Street. The building permit should never have been considered to have expired, and if considered, should have been extended. Attorney Loughlin respectfully requested that the Administrative Appeal be granted and that 10 State Street, LLC be allowed to proceed with construction.

Chairman Witham stated that he had a question for Attorney Sullivan. Attorney Loughlin had made a good point because in 2012, the project was granted a one-year extension based on the International Building Code that allowed the Planning Department to issue the extension. It was Attorney Loughlin's interpretation that the code didn't say he was only allowed one extension. Chairman Witham asked Attorney Sullivan what his interpretation of the code was, whether the Building Inspector was only allowed to issue one a one-year extension or if he could issue more than one. City Attorney Robert Sullivan stated that when the applicant had completed their presentation, the Chief Building Inspector Mr. Hopley, who had made the decision, was prepared

to offer testimony and explain his rationale. He said that the Inspection Department had already granted two extensions, and the one granted in May of 2012 was the second extension, so if they hadn't had that authority, they exercised it. Therefore, they had the authority. Maybe they hadn't thought they did, but that wasn't what the Ordinance said. Attorney Loughlin stated that the applicant hadn't wanted to be there that night, and if the Board looked at his letter to Attorney Sullivan, it asked him to 'not to make them come in and say these things." It made the City look bad. Attorney Loughlin stated that he didn't enjoy doing those things because he was amongst friends, but they had been left with no alternative and that was why they were asking the Board for relief.

Mr. LeMay asked Attorney Loughlin whether, given that the property had been blocked by a State project for almost two years, there had been any compensation paid by DOT or by the City for not having been able to access their property. Attorney Loughlin stated that there had not. Ms. Conway had meetings with people from the State and the contractor, and they would never have said that they could not get to their property, but the message had been loud and clear not to really try it. The bridge was important to all of them, and he thought that Mr. Adams' letter listed all the problems. The bridge contractors had been lifting material over the site, barges had been banging into piers, and all sorts of things would have interfered with the construction. From the 10 State Street point of view, they were going to do masonry work knowing that there would be construction 15' from them that would impact the masonry. Ms. Conway had not complained and was not complaining then. However, he felt they should get a building permit because they should not have lost it and it had been an ordeal for the last five months. It had been made very clear that they both the State and the contractor could not survive down there.

Mr. Mulligan wanted to clarify the timeline. The original CMMP had been finalized in June 2009, and then the bridge opened in July. A new CMMP was put together to carry the project through construction. He asked if the applicant ever got feedback from the City that the new CMMP was inadequate or insufficient. Attorney Loughlin stated that he would have Mr. Adams speak because he was the contractor who would have dealt with the City personnel. Mr. Adams stated that there had been comments. The meetings had been held in August and September. They had not discussed a lot of specifics at the August meeting because they had been told it was an old format and since the time that it had been approved, the City had implemented a completely new format. They had given him an example of some formats that were in place and had offered a few suggestions. Mr. Mulligan asked if there had been any showstoppers for him. Mr. Adams stated that they had put together what they thought made sense because the road had been completely blocked. They felt it would be better to have one lane than the two-lane road and intermittently stop traffic, so that was why they had set it up that way. However, the DPW Director Mr. Rice had said it wasn't acceptable because it had to be two lanes, so they had revised the plans and sent them back with everything the City had asked for. Nothing had been a showstopper, including the licenses. They had submitted the drawings in the manner they thought the City had asked for, and if they had told them not to do it, they would have submitted the original drawings.

Mr. Parrott stated that he was not familiar with the CMMP documents, but one thing that struck him was paragraph one, where it stated that the Municipal Contact was Roger Clum. He asked Mr. Adams if, in his experience, Mr. Clum was the usual contact for someone in the Inspection Department in Portsmouth or other communities. Mr. Parrott added that, reading from the CMMP, it said the contacts and representatives were set forth in Appendix A and the Municipal Contact was Roger Clum. Mr. Adams believed that it was the same format as the sample format

that had come from the City, that it was either Mr. Clum or Mr. Hopley. Mr. Parrott said he was leading to the point in the timeline where Mr. Clum was hardly mentioned again. There were two attorneys involved, and they were not technical people. The Director of Public Works had been on vacation, and that had been the reason cited that he couldn't do anything. Most of it was from the Legal Department, yet there was no further mention of Mr. Clum, who was cited as the City Contact. So, Mr. Parrott wondered who typically had been the contact because he knew that Mr. Adams had experience with other agreements. Mr. Adams told Mr. Parrott that it varied. Mr. Clum had been the one he spoke to initially in July, and he had informed Mr. Adams to update the CMMP because the people had changed. When Mr. Adams had called Mr. Clum to tell him it was updated, he was told to submit it to Ms. Woodland because it was handled through the Legal Department.

Mr. Parrott asked Mr. Adams whether or not someone had asked him who the No. 1 contact was in the City, and what his answer would have been in late July or August. Mr. Adams stated that typically the contact would be the Building Department instead of the Legal Department. Mr. Parrott stated that Mr. Adams had been talking to, and receiving e-mails from, one or two attorneys, so he had three players involved on the City's side and he had to figure out who had the lead. Mr. Adams replied that he had figured it out a little bit but had been instructed to go to Legal. Mr. Parrott asked who had instructed him. Mr. Adams said that Mr. Clum had referred him to Ms. Woodland. Mr. Parrott stated that even though the agreement said that Mr. Clum was the contact, he was confused about it and was trying to figure out from Mr. Adams' perspective, and not the City's perspective, the person who had been in charge. Mr. Adams stated that when Mr. Clum told him to contact Ms. Woodland, she had been in charge until the CMMP was approved. Mr. Parrott said that Mr. Adams had gone back and forth with another attorney, Ms. Ferrini, so it hadn't been just Ms. Woodland. Mr. Adams stated that initially, it had been Ms. Woodland, and as they approached the September meeting, Ms. Woodland had told them that Ms. Ferrini would take over.

Mr. Rheaume asked Attorney Loughlin if his client would have continued the construction and if the structure would have been built if the bridge construction had not taken place. He wondered whether there had been other circumstances such as financial or market ones. Attorney Loughlin stated that there had been no financial problems whatsoever. The foundation had been put in during October 2010, and that was when the meetings were going on in Concord. They had known that the bridge would be renovated at some point, and then the funding had come together, and suddenly the contract had been ready to be let, but there had been issues on Ms. Woodland's end.

Ms. Ruth Griffin of Richards Avenue stated that if there had been a comedy of errors besides Scott Avenue, Richards Avenue was pretty close. She said that she would really like to see activity at 10 State Street. She had been watching the property for a long time in hopes that there would be condos or buildings put up that would emulate the wonderful City that they had. There were all kinds of roadblocks on the part of the City. She asked that the Board grant the request and appeal from the administrative decision, and she hoped that she would live long enough to see the condos built.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak in opposition.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Richard Hopley introduced himself as the Chief Building Inspector and stated that he wanted to straighten out the confusion. Every CMMP had contacts from both sides of the project, and the intent was to know who to contact during construction if something went afoul. Typically, it was either Mr. Clum or himself, depending on whoever was following the project, and Mr. Clum had started to follow it early on, so that was why his name was on it. The creation of the document was handled in the Legal Department, and that was why all the communication heard earlier in the meeting had been between the Legal staff and the applicant. Once the CMMP was executed and the project started, they tried to have a one- point person, either himself or Mr. Clum.

Chairman Witham noted that the Building Inspection office had granted two extensions during the bridge construction period. Mr. Hopley stated that they had, and it had been unusual because they had issued a second extension due to the extraordinary circumstances of the bridge reconstruction. He could not see how the two projects could have safely co-existed in that proximity, so that was why they had done it. Chairman Witham asked what had prevented granting a third extension, considering the extraordinary circumstances and the proximity of the two projects. Mr. Hopley stated that his interpretation of the Ordinance did not allow for more than one extension, and he had felt that the department had already violated it in essence once. He hadn't felt that a third extension was right, but he had felt that there was always room for an appeal. Chairman Witham asked if, hypothetically, there were a court case in which the Building Inspector could grant more than one extension under extreme circumstances, would Mr. Hopley have thought that the project would fall into that category. Mr. Hopley stated that he thought it had. Chairman Witham asked Mr. Hopley if he thought anything had changed between the second and third extensions in regard to the circumstances. Mr. Hopley said that the site had opened up at least partially during the summer.

Mr. LeMay indicated that he had a concern regarding the testimony that had just gone back and forth. The circumstances were materially unchanged from the past year. The only thing that had stopped the Inspection Department was the concern over the wording of the statute as to the granting of only one extension.

Mr. Rheaume noted that Mr. Hopley had indicated that he thought it would be extraordinary to grant a third extension. The attorney for the applicant had indicated that there had been a three-month process with a lot of conversations. It sounded as if the applicant had been made to think they were going to get an extension permit granted, yet on the day before it expired, the answer had been 'no' and they could not move forward with the CMMP. He asked Attorney Sullivan for an explanation of the City's perspective of what had gone on because the attorney for the applicant had painted a picture of a bumbling process, and he wanted to know why it took three months before Mr. Hopley's interpretation finally came out to the applicant.

Attorney Sullivan stated that the City gave the developers a building permit on June 18, 2009, and the building could have been built the next day or anytime from that date until it expired in October of 2013. It was not the City's fault that nothing happened during those years. In fact, rather than obstructing the developer, the City had granted not just one but two extensions so that the developer could build the building. It had been clear at the outset that the City had not attempted to obstruct the project but rather had gone to extraordinary lengths to help get the

project built. Yet, for reasons of their own, the developer, from 2009 until October of 2013, had not built the building. In the last 90 days or so, there had been discussions with the City about changing the CMMP, and Attorney Loughlin's recitation of facts was essentially correct. There were negotiations during that period that did not come to fruition. There were a couple of troublesome issues, one of which was that the traffic pattern in the project's area had been complicated by the Memorial Bridge project, and also that the Memorial Bridge project was not completed at that time. Therefore, the issue of how to deal with the Memorial Bridge while the project was getting built had been a big construction mitigation issue.

Attorney Sullivan stated that another issue was that the developer had been unable to build on its own property. Had he been able to build it, the CMMP would have been simpler to approve. However, the developer wanted to use adjacent City property while constructing its building. No one on the City staff had the authority to allow City property to be used for a purpose like that. Only the City Council could authorize the use of City property in that way. As a result, the process of coming up with a CMMP in the last 90 days had been a complicated one, involving a number of officials up to and including elected officials. For those reasons, the plan never got agreed upon within the time period required by those last few days because the City Council had to grant permission to use City land and it had been impossible for the CMMP to be approved to meet the deadline. Attorney Sullivan did not dispute Attorney Loughlin's recitation of facts. The bottom line was that the CMMP was not agreed upon in a timely manner, and therefore the time period that the developer had to work on their project and to keep their permit alive expired, and the Chief Building Inspector indicated why he had not wanted to offer further extensions. There yet was no CMMP agreed upon by the City and the developer, so even if the Board granted the appeal, the developer would not be starting the project the next day because they still needed to negotiate a CMMP that provided terms and conditions for which they might use City property for staging and other purposes.

Mr. Rheaume stated that the attorney for the applicant indicated that, had they been aware that City property could not be made available, they would have made other provisions. The attorney maintained that at no point had it been communicated to them that using City property would be difficult and they might have to go through the City Council or look at alternatives. He asked Attorney Sullivan if the applicant had been informed as such. Attorney Sullivan stated that he was not able to answer that question. Mr. Rheaume asked, if it had been possible to work through the CMMP and have some agreement, would the applicant have been able to move forward to construction, or had there been another obstacle they had to overcome. Attorney Sullivan stated that he was not aware of any other obstacle. Mr. Rheaume stated then if Attorney Sullivan had been able to come to an agreement, he could have told the applicant to go ahead, and they would have had the authorized building permit and could have begun construction. Attorney Sullivan stated that there may have been some minor details.

Chairman Witham asked Attorney Sullivan whether he had been at all involved in the CMMP negotiations. Attorney Sullivan stated that he had been aware of them but not involved. Chairman Witham told Attorney Sullivan that he must have been aware of the October 17 deadline or whenever the issue had been made of the permit expiration. From looking at the e-mails, there seemed to be no sense of urgency on the part of the City to help get something resolved to meet the deadline. He asked what the negotiation period of a typical project was with the City, and whether they took six months or a year to do a CMMP. Attorney Sullivan stated that the negotiations were over the terms and conditions, and he cited the example of Portwalk being able

to use City sidewalks and private streets. Aspects of that arrangement between the City and the developer had taken place over the years, but the actual CMMP typically took about 90 days. Chairman Witham stated that when the applicant got a building permit in 2009, there was a CMMP in place that was accepted, and then the applicant was informed in July that it needed to be edited. Chairman Witham's sense was that an applicant would be 90% there if they had a plan that was accepted and then had to fit it into a new template. He did not understand why it took three months to fit in a new template and tweak it. He was trying to follow the timeline.

Mr. Parrott said that the CMMP in their packet had been signed by Cindy Hayden, Deputy City Manager, and Suzanne Conway in mid-June of 2009. He didn't see anything that tied it to a building permit and wondered why it was not still valid except for verbal comments that they wanted to change it. It was not a complicated document. He was astounded as he went through the timeline and had never seen anything like the exchange of e-mails back and forth citing excuses like vacations, inconvenience, and getting back to the person. He asked if there had been agreements behind the scenes that did not show up in the record that made the situation seem so odd. Attorney Sullivan stated that he did not know. Mr. Parrott asked why the CMMP was not valid, even though it was signed and did not state that anything had terminated it. Attorney Sullivan stated that it was because the contractor who made the agreement had changed, the architect had changed, and the highway pattern and the vicinity had changed due to changes in the Memorial Bridge. Mr. Parrott stated that it was not between any contractors but was between Ms. Conway and the City because those were the only two signatures on it. Attorney Sullivan said that it listed the contractors. Mr. Parrott said that he didn't see it but would take Attorney Sullivan's word for it.

Attorney Loughlin stated that, as Mr. Parrott had just explored, the changes to the CMMP were due to the contractor and architect being replaced. Attorney Sullivan had stated that the pattern of traffic under the Memorial Bridge had changed. Attorney Loughlin thought the traffic pattern was the same as it was in 2009 and 2010. He stated that Mr. Adams had asked the City a number of times to tell him what they needed to finish the CMMP. He cited all the business about 'if they had known', or 'they couldn't work on the project on their own property'. When Ms. Conway had heard about it, she had said that no one had ever suggested they could do it on their own property, so then they would do it. Consequently, Mr. Adams obtained quotes to secure a barge for materials so that they could do it entirely on their own property. As for the new City policy that City roadways could not be used, what was going to be used was a sidewalk, and how many people used the sidewalk under the Memorial Bridge when the new sidewalk went right across. However, if the new policy was that no landowner in the downtown area could build anything if they had to put something on the sidewalk, nothing could be done, not even scaffolding. Attorney Loughlin's neighbor could not paint the top of his house without putting a ladder on his property. In the City 'of the open door', he asked if it meant that one couldn't use public property on a temporary basis. Ms. Conway had called him in October, which was when he got involved, to tell him the facts, and his reaction had been, 'It can't be that bad'. He had told her that he'd look at the situation and would try to work with the City and with her, but she might have to go to the Concord litigator. If someone were to step back and see what happened over that 90-day period, they would say it was crazy, yet it continued to go on.

Mr. Rheaume brought up the permit issued in 2009 that the City Attorney had just mentioned. It was four years later, and it seemed like they had suspended construction because of the bridge project around the spring of 2011. He asked Attorney Loughlin if there had been active

construction going on at that time. Attorney Loughlin stated that the permit had been issued in June of 2009 and they had spent over a million dollars to put in the foundation, tear down the existing building, and put in concrete pilings in the water, and it had all been certified as complete in October of 2010. By then, there were meetings going on in Concord that Ms. Conway was involved in. The funding for the bridge project and the preliminary drawings were underway, so it became clear that the construction would be going forward, and that was when the first request for the extension had been made in 2011. It would not have been appropriate to build their project while the bridge was underway. Mr. Rheaume understood that there was active construction going on in that year prior to the bridge construction, and Attorney Loughlin agreed. Mr. Rheaume asked him whether he needed a separate building permit to be able to continue on, or if the original building permit from 2009 would have carried through the project. Attorney Loughlin stated that the building permit was for a three-story condominium commercial residential building with a fee of $607,000.

There was no on else to speak to the petition, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Mr. Mulligan made a motion to ***grant*** *the applicant's appeal. Mr. LeMay seconded the motion.*

Mr. Mulligan stated that they did not have to belabor the situation because it had been hashed out for quite some time that evening. The applicant at all times appeared to be working in good faith with the City and had been ready to proceed. The City had granted more than one extension of the building permit and their explanation of why they wouldn't do it a third time was inadequate. He didn't think that anything would be gained by penalizing the applicant and making them go back to the beginning. It would be bad for everyone involved, including the taxpayers. This was a situation where the Board needed to address the issue of whether or not an extension was appropriate, and in that case, he thought it was, for the same reasons that it was appropriate the two previous times.

Mr. LeMay concurred with Mr. Mulligan and agreed that the situation had not changed during the past year. There was certainly substantial justification developed by the City as to why the extension was granted in 2012, and those conditions existed for the current year. He had seen the feeble defense of what went on for 90 days at City Hall with respect to negotiations. He hadn't even realized there had been negotiations until Attorney Sullivan mentioned them. He felt the applicant had not been treated fairly, not just because of the decision but because of the manner in which the City had dragged its feet.

Chairman Witham stated that he would also support the motion. He hoped that there was no ill will and that the new CMMP could be worked out in a timely manner so that the project could get going on a path that most other projects were able to follow.

The motion to grant the appeal as presented and advertised was ***passed*** *by a unanimous vote of 7-0.*

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2) Case # 12-2

Petitioners: Smith, Smith & Ward, LLC, owner & Paul Mercier, applicant
Property: 1338 Woodbury Avenue
Assessor Plan 237, Lot 70
Zoning District: Mixed Residential B
Description: Allow a recreational vehicle (RV) to be used as a residence.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.331 to allow a lawful nonconforming use to be enlarged or changed without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.440 to allow a recreational vehicle (RV) to be used as a permanent dwelling.

SPEAKING IN FAVOR OF THE PETITION

Mr. Mercier, stated to the Board that he bought an RV that was in good shape. He met with Mr. Smith from Smith, Smith & Ward, who owned the trailer property, and they rented him a spot to put his RV on. It was a trailer park with trailers/manufactured homes, and when they looked at the paperwork to see if there was a difference between an RV and a manufactured home, the only difference between his RV and a typical manufactured home was that a manufactured home was 8' x 40'. Mr. Mercier's RV was 8' x 31'. He placed his RV in the park and then proceeded to get his electricity hooked up but was told that he needed a permit. He was also told he may not be able to get a permit because his RV didn't conform exactly to the measurements stated in the book and therefore could be non-conforming. The park owner had previously been granted a permit to put a manufactured home on the lot that was 60' x 12, and Mr. Mercier's RV was much smaller that that, so he didn't see anything contrary to the public interest because it was just a trailer being put in a trailer park. He talked to other residents in the park and they told him that they had no issues and thought his home looked better than most of the homes in the park because it was newer and in better shape. Mr. Mercier believed that granting the variance would do substantial justice because he had rented the spot and had to go through the process of getting a permit and a variance. He took photos of everything. He stated that the City had approved an RV-type trailer in the park five or six years before. He submitted a photo the trailer to the Board, and stated that it was smaller and older than his RV.

Chairman Witham told Mr. Mercier that if his RV were 9' longer, he wouldn't be in front of them. Mr. LeMay asked if the trailer was powered. Mr. Mercier stated that it was a pull-behind RV, like a mobile home, and not drivable. Chairman Witham stated that he had researched the definition of an RV, and every definition he found stated that an RV was motorized. The Portsmouth Ordinance definition was an expanded one that said it could be a tow-behind. However, the standard definition was that an RV was something one could get into and actually drive.

Mr. Parrott saw that there were photos of various structures and asked Mr. Mercier which one was his. Mr. Mercier told him that it was the white Dutchman, and it didn't look any different from the three blue trailers next to it except that it was a bit shorter. Mr. Parrott asked if the trailer could be driven away. Mr. Mercier said it could be towed but not driven. Mr. Parrott asked if it had a fifth wheel, and Mr. Mercier stated that it did not. Mr. Parrott verified that it was 8' x 31', and Mr. Mercier said it was, and he also said that a section came out to about 4' wider in the middle to make it 12 feet. Mr. Parrott asked whether the water and sewer hookups were similar to the other units in the park. Mr. Mercier said they were very similar. He had to do a small external

change that would involve taking out a valve and linking it up, but otherwise, he just had to hook the pipe up to the utilities.

Mr. Rheaume said that Mr. Mercier had mentioned another nonconforming trailer that the City had approved and asked if it was the one behind the dumpster as shown in the photo. Mr. Mercier agreed and said there was another photo of it on the permit application. Mr. Rheaume said there was something in the application about his long-term hope to replace it with a larger model. Mr. Mercier said he wanted to eventually put in a larger manufactured home. Mr. Rheaume asked if he would do it the following year, and Mr. Mercier said that his goal was to do it within the next year, depending on the economy.

Mr. Rheaume asked Ms. Walker whether the approval Mr. Mercier had mentioned was noted in the staff report as a 2004 action that granted a variance request of a pre-existing nonconforming trailer. Ms. Walker said a permit had been granted so that an existing mobile home could be demolished and replaced with another mobile home. Mr. Rheaume asked if there was anything in the staff report about the other RV. Mr. Mercier spoke up and said that he knew of an approval for a permit to put a trailer on his lot, but because his RV was considered nonconforming, he had to go through the process.

Mr. Rheaume stated that they knew the size was a concern but asked if there were other concerns with an RV such as fire and safety as opposed to a manufactured home. Ms. Walker thought that the situation could be resolved because she had discussed it with the Inspection Department, and the nuances were the classifications of RV versus a mobile home. She assumed it had to do with how they were set up code-wise, but the Inspection Department had agreed to work through it with the Zoning Board. Mr. Rheaume asked if the use of an RV would be safe if the variance were granted. Ms. Walker said that it would and stated that they would not issue an occupancy permit unless they felt strongly that they could resolve the differences.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Tom Heany told the Board that he was one of the abutters and asked what the hardship was that would permit the variance to be approved. Mr. Mercier responded that he didn't know what Mr. Heany was looking for related to a hardship. He had rented the spot in good faith to place his home there and had not known that it would not conform to the existing description of a manufactured home. He had moved into a hotel during the process, and his son had been staying with a friend because he didn't have a place to stay. He rented the spot because there had been a previous permit issued and he had idea that his RV wouldn't meet the requirements.

Mr. John Guarneri stated that he was also an abutter and was trying to understand the variance. It talked about a recreational vehicle, and to him, a recreational vehicle was a mobile vehicle, which was something that could be moved, yet he was reading a description of a permanent dwelling, which meant something stable. He wanted to know if they were talking about something movable or stable because manufactured homes were residences that were stable as opposed to mobile vehicles. He asked at what point the vehicle became mobile and was no longer there. Were they going to start a Jellystone Park where vehicles would be coming in that were permanent yet mobile?

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Mercier stated that there was no difference between his RV and a typical manufactured home except for size. Any mobile home could be moved from one place to another, but once his was in the park, it would be locked in and he would work on getting it replaced with a larger home.

Mr. Moretti asked Mr. Mercier if he intended to put his RV on blocks and make it permanent. Mr. Mercier stated that his intent was to do whatever the City required. If the other homes were on blocks and the wheels were removed, then that was what he would do. Mr. Moretti said that when manufactured homes were installed, they were usually blocked up and the wheels jacked up off the ground. Mr. Mercier said it was fine with him because the RV had the capability of being raised and having its wheels pulled off.

With no one else rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Chairman Witham stated that the hardship issue had been raised, and he felt that it was an issue of a fair and substantial relationship between the purpose of the Ordinance and the specific provision. The purpose of the Ordinance in that situation was to allow dwelling structures made of metal and measuring 8' x 40' to be backed into a spot and have people live in them. The application had a structure that was 8' x 31' and had all the characteristics of what was allowed by the Zoning Ordinance, so it seemed like a reasonable use of the property. He would look upon it differently if it were a mobile home that one drove in and then drove off on weekends to go to national parks. However, in regard to the hardship issue brought up by the abutter, Chairman Witham stated that it was a fair and substantial relationship and it was very close to what was allowed, and he felt that it was a reasonable use of the property. One could argue that it could be adverse effect if it was a 8' x 40' mobile home because then it would be a 2-3 bedroom home versus the one-bedroom home that Mr. Mercier had.

Mr. Parrott read part of the definition of a manufactured home in a manufactured housing park, which was the existing use of the land. The Ordinance stated the definition as "a structure that is transportable in one or more sections that's built on a permanent chassis and is designed for use with or without a permanent foundation when connected to the required utilities including park trailers, travel trailers, and other similar vehicles placed on it for greater than 180 days'. He felt that the definition in the Ordinance was pretty broad. Ms. Walker noted that the definition was slightly outdated and stated that the current one defined the length as 8' x 40' and 320 square feet and referenced the manufactured housing that was built in conformance with the U.S. Department of Housing and Urban Development. Mr. Parrott said that he wasn't referring to the size of it and the definition that he cited had been around for a long time. He was trying to illustrate that it was a pretty broad definition.

*Mr. Rheaume made a motion to **approve** the variance application as presented and advertised, with the stipulation that it be for a period of one year. Mr. Parrott seconded the motion.*

Mr. Rheaume stated that he was a bit torn on the issue. He recognized that the application was in good faith and that the applicant had bought the RV thinking that he could use it, and there had also been a previous RV permit granted. However, he was concerned that the Board could be a

setting a precedent because they had previously made it clear that they wanted minimum standards for manufactured housing. That was the reason he had added the one-year stipulation. The applicant had said it was his goal to move toward at that point. The Planning Department had indicated that they could bring a manufactured home up to a standard similar to that of a manufactured house. He was more comfortable putting in the stipulation to make sure that they were not creating a division with the Ordinance and manufactured housing locations in the City. He believed that what the applicant put in for the short term seemed safe, and he had done it in good faith, so it was incumbent on the Board to grant the variance for at least one year. Granting the variance would not be contrary to the public interest because the park was designed for manufactured housing, and the RV was in as good or better condition than the surrounding trailers, so it fit in with the park. It would observe the spirit of the Ordinance because the main criterion was size, and the RV was smaller and they could exempt it for a one-year period. Substantial justice would be done because the applicant had thought he was doing something in good faith that was legal and proper. It would allow him to make full use of the space that he rented with the trailer that he had now, and it would point him toward fulfilling his plan in the future of bringing it up to fully meet the Ordinance. Granting the variance would not diminish the value of surrounding properties because the trailer park had been there for quite some time, and the number of trailers would not affect property values. The fact that the applicant's trailer was slightly shorter than the others should not be a major consideration for values. As far as the hardship test and special conditions,no fair and substantial relationship existed between the general public and the purposes of the Ordinance and their application to the property due to special conditions. The proposed use was a reasonable one, particularly with the stipulation adding a timeframe. There was a hardship because the applicant had moved forward with the belief that what he had was adequate. Based on that, Mr. Rheaume felt that he had met the criteria and recommended granting approval for a period of one year.

Mr. Parrott concurred with Mr. Rheaume and said he had nothing to add.

The motion to grant the petition as presented and advertised ***passed*** *by a unanimous vote of 7-0, with the following stipulation:*

- *The variances are granted for a one-year period from the date of themeeting. If the recreational vehicle is not replaced by a manufactured housing structure within that time, the variances will lapse.*

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3) Case # 12-3
Petitioner: GTY MA/NH Leasing, Inc., owner & Nouria Energy Corporation, applicant
Property: 786 Route One By-Pass
Assessor Plan 161, Lot 42
Zoning District: General Residence A
Description: Revise existing free-standing sign to add logo and LED display.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1281 to allow a nonconforming sign to be altered or reconstructed without bringing the sign into conformity with the Zoning Ordinance.

2. A Variance from Section 10.1241 and Section 10.1251.20 to allow a free-standing sign with an area of 168± s.f. in a district where a free-standing sign is not permitted.
3. A Variance from Section 10.1253.10 to allow a sign height of 50'± where 7' is the maximum allowed and a front yard setback of 0'± where 5' is the minimum required.
4. A Variance from Section 10.1261.10 to allow direct illumination where sign illumination is not allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated that he was there that evening with Mr. Bob Richard, Project Manager, Mr. Joe Buchholz from Kay Gee Sign, and Mr. Bob Messier from Deltronic. Attorney Loughlin stated that their request was to update a sign at the Shell station. The present sign was 168 square feet and had six separate panels, five of which had the Shell logo , and the other panel was designed but did not have the logo. The existing sign could stay forever, but the Ordinance stated that the graphics and lettering could change, so any message put on the six panels could change. However, the shell and the size had to remain, and they wanted to take the sign down and put up a different arrangement. They could use the six panels and have the Shell logo on one panel and use another panel to display fuel prices and advertise the market. They were proposing to reduce the number of panels from six to four and reduce the size from 168 square feet to 146 square feet. Of the four panels, two would have the Shell logo and two would have LED displays.

Section 10.1281 of the Ordinance stated that 'a nonconforming sign or structure shall be brought into conformity if it is altered, reconstructed, replaced or relocated'. A change in text or graphics was not considered an alteration or replacement, but because they would alter it, it triggered the fact that altering needed to be taken into consideration. Attorney Loughlin stated that he had submitted a letter to the Board in which he had mentioned the Gelinas case. The Gelinas case had involved the Shell gas station in the 1950s when the Gelinas family had received approval from the Board to put a gas station on their lot on the Route 1 Bypass, and it was a case that was always cited because it was the first time that the Supreme Court outlined five conditions where previously there had been only four. Ms. Walker had brought to his attention was the fact that the Gelinas family had received the change to a commercial use by way of a variance, but the zoning had never changed. Consequently, the gas station had been approved by the Board, but then the Board had re-zoned both sides of the rest of the Route 1 Bypass, so that part of Route 1 called "Gasoline Alley" was zoned for business and the Shell lot was left in its residential zoning. It was significant because it was in Sign District 1, which was residential, so basically one could do practically nothing. In Sign District 5, where all the other businesses were, there could be pylon signs. Consequently, instead of needing only one variance, which they had originally applied for, they needed multiple variances because the sign in that zone was too high and too close to the road. It triggered the need for the additional variances but it still came down to meeting the five criteria for the granting the variance. He stated that he had spoken to a neighbor and had looked at the sign, and he knew there was a concern with the light emanating from the existing sign. The proposed sign was somewhat smaller than existing at 146 square feet, but the big difference was that the LED signs would have a more focused light and the background on the Shell pectens would reduce substantially the amount of light generated.

Attorney Loughlin stated that they met the five criteria for the granting of variance relief. Regarding diminishing the value of surrounding properties, it would improve the situation that caused the concern about the emanating light. It would not affect business in terms of any impact on the neighborhood. It was not contrary to the public interest. The Board had set the law in the Harborside sign case as to whether it violated the basic zoning objectives, and the court had ruled that one way to examine it was whether the granting of the variance would alter the essential character of the neighborhood. It would not. The neighborhood would remain a nice residential neighborhood adjacent to a commercial use. It would not threaten the health, safety or welfare of the public and would produce substantial justice. The benefit to the applicant if the petition were granted would not be overridden by some damage to the public. If it were an application for a new sign, it would be different, but he thought it was an improvement and would benefit the public if granted. Attorney Loughlin stated that it would not be contrary to the spirit of the Ordinance as Sign District 1 necessitated all the variances. The literal enforcement of the Ordinance would result in unnecessary hardship. Due to the uniqueness of the property, there were very special conditions that applied to the property because it was the only service station in that area that was in a residential zone. So, it triggered all the additional requirements and the proposed use was a reasonable one.
Ms. Chamberlin asked if the current sign was illuminated. Attorney Loughlin stated that it was. There were fluorescent bulbs inside each of the panels. The Ordinance permitted the sign to be illuminated as long as the station was open, which was 24 hours a day.

Mr. Rheaume stated that, if the business were in a more properly-zoned business area like Sign District 5, the current Ordinance would still limit the applicant to a free-standing sign with a 100 square feet and a maximum height of 20'. What the applicant proposed would still be 2-1/2 times higher than what was allowed in the district and about 1-1/2 times greater in area. He asked Attorney Loughlin to review the spirit of the Ordinance criteria and give him more explanation of to how he thought it would be appropriate. Attorney Loughlin conceded that it was a good point, that even if the sign were in Sign District 5, it would not comply. If they had come before the Board for a new sign, they wouldn't have approved it, but when looking at the purpose of each condition like the height, the alternative that the applicant proposed would not have a negative impact. The principal objection from the neighbors was the light issue. The sign could stay there, and they could show that it would cause less impact relating to the light issue. It was magnified because they were in Sign District 1, and they were still above the height, but the sign had been there since the 60s and continued to be a permitted use. They could change the panels, but they had to stay the same size and shape, and it would be an improvement.

Mr. Rheaume noted that the application outlined the importance of having the price up at that location, and it also had verbiage about influencing people, changing lanes, and seeing it from far away to help people change lanes sooner. He said that he was a little confused about some of the narrative and asked Attorney Loughlin to elaborate a bit. Attorney Loughlin said that Mr. Buchholz or Mr. Messier could give more details, but as he understood it, if a person were coming down the bypass at the speed limit, the goal of the service station was to have the person see what the station was selling and for how much, and if the driver could see the price at a distance, the driver would be more apt to put the turn indicator on and move over in preparation for entering the gas station site. Attorney Loughlin saw it as a win/win situation to the extent that the service station would benefit by people seeing the price from an appropriate distance and being encouraged to enter the site, and the applicant hoped that the reduction in light would be seen as a benefit by the neighborhood residents. Mr. Rheaume thought that the applicant would need lower

prices to encourage people to pull in. Attorney Loughlin said that he didn't know what people expected, but if they had gotten off Route 95 to see what the prices were, and if the prices were attractive, he assumed that they would pull in.

Mr. Parrott asked if the applicant knew the dimensions of each panel. Mr. Buchholz stated that the existing panels were 63" tall x 60" wide. Mr. Parrott asked what the proposed new ones would be. Mr. Buchholz said that the new panels were the same size. The two panels that they proposed to use as well as the two LED signs that would replace the existing four panels were 60" x 96". Mr. Parrott asked if there would be a net increase in the panel heights. Mr. Buchholz said they would be a bit smaller, a little wider, and less tall. The overall square footage would be reduced because Portsmouth measured by a box method, so the furthest element out in height and width was how they measured the signs. Therefore, the square footage would be reduced because they would pull them together to reduce the square footage and show the neighbors that they were acting in good faith. Mr. Parrott asked if there was any modification to the structure because it looked like it was steel. Mr. Buchholz said there was not, but they would clean it up and paint it in the spring. Mr. Parrott noted that it said 'blank replacement face' and asked what it meant. Mr. Buchholz stated that the revision the Board had was an initial revision, and he wanted to show them the latest revision that showed the correct graphics. Mr. Parrott stated that the Board would like to see what they were approving.

Mr. Buchholz passed out materials and stated that he had provided the rendition of the sign as proposed, a picture of the sign as it currently existed, a letter showing the calculations he had come up with showing the approximate lumens, the existing vs. new, as well as technical literature on the Deltronic product, and a rendition of what they were allowed by right. Ms. Walker stated that she had not seen any of it and was not aware that there would be submittals that night. Normally they asked the applicant to tell the Planning Department if they were going to have submittals. Ms. Chamberlain asked if the beer, food and bottles shown were part of the presentation. Mr. Buchholz stated that if the Board had denied their petition for the gas price changes, that was the rendition of what they would put in by right, i.e., new panels, new graphics, updating and getting the lights repaired properly. Currently, the sign was not lighting up properly, and part of the impetus was to improve the property, clean it up a little, and have the signs look better and more operational, so it was a solution to make it nicer and address the concerns of being able to advertise the price as a point-of-purchase sale.

Chairman Witham asked if they had shared their information with the neighbors. Mr. Buchholz stated that he had not spoken to the neighbors. Chairman Witham suggested that he pass around another set to the public to help his cause. Mr. Buchholz turned and showed the public the day and night renditions of the sign as proposed and stated that the LED lighting was significantly less bright and was a focused light so that motorists would not be blinded by it. Its focus was aimed on the road, and the background was blocked out to minimize the light spillage onto the neighborhood. He stated that they had done those things to show the neighbors that they understood their concerns. The sign showed the product and the product brand, which was important to the customer, and it sold the pricing and also advertised diesel gas which becoming more popular. By right, the applicant was allowed to replace the 'faces', and he showed a rendition of how they could do it. They would re-use the existing sign with its graphics and stationary price and re-lamp it. He showed the comparison between the two and said the new sign was substantially less of a light footprint that the existing one.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Ramona Dow of 571 Dennett St stated that she was an abutter speaking in opposition. She addressed the criteria and stated that the variance would be contrary to the public interest. From the neighbor's perspective, she believed that any lighting disturbed the natural scenic beauty, which was diminished with the addition of any signing, particularly with LED lighting because it was so bright. Regarding the spirit of the Ordinance being observed, substituting LED lighting on the existing signage would diminish the value of neighboring properties because brighter light would flood the backyards and homes. There was already a lot of light coming from the canopy. As to substantial justice being done, allowing the signage as proposed with LED lighting would be self-serving and not fair to homeowners in the immediate area who would then have more lights in their backyards. Their bedrooms were on the back side of the property and were lit at night due to the lights from the Shell station, so she did not think it was fair to the homeowners. The value of the surrounding properties would be diminished because the proposed sign made neighboring properties less attractive. As to the hardship criteria, the current station was well lit already. She bought her gas there because she liked Shell gas and believed that consumers went there for reasons other than price, like convenience, store amenities, cleanliness, but more importantly, the strong Shell brand. The sign as proposed with the gas prices suggested that price was the differentiator. She found Shell gas to be slightly more expensive, but so many consumers went out of their way to buy it. It did not appear that the applicant would be deprived if the variance was not granted.

Chairman Witham stated that he fully supported what Ms. Dow said about lighting going into the neighborhood and what she dealt with in terms of light coming into her house. The Board had just gotten the new renderings, and he was surprised see that the proposed sign seemed to emit much less light than what presently existed. He knew Ms. Dow had come with a prepared statement, and he asked if her feelings had changed by looking at the new sign. Ms. Dow said that sometimes one saw a picture and thought it wasn't so bad, but when it became reality, it was worse. When she thought of LED lighting, she thought of the Toyota dealership on the Bypass and how much light it created, and did not want something similar to it. The neighbors had enough light coming from Shell already without having more. Chairman Witham asked if she would support the new sign if it had less light than what currently existed. Ms. Dow said it would be good news if they got less light. Chairman Witham said that he had felt the same as she did, but when he looked at the drawings, it seemed pretty dark . He knew that LED was a different kind of light and he understood her concerns but wondered if the proposal would indeed cast less light into the neighborhood.

Mr. Buchholz wanted to address the lighting concerns in terms of the LED lighting. He said that he looked on the Internet for calculations and formulas for conversions. Most signs were fluorescent lamps, and LEDs were a little different. Their particular type of sign was different than a LED sign message center, which was solid LEDs on the whole board. The only lights would be on the actual part of each price element, and a lot of the background would not light. He did the calculations conservatively and found that the light output would be less than what he calculated, but he preferred to err on the side of the neighbors' concerns, so he redid the calculations and found that the candles and so on were measured by square meters. The current sign had 7,882 lumens per square meter, but because it was double-sided, it could be divided in half because the light went in both directions, so it was 3,941 plus or minus lumens, based on the calculation from the fluorescent bulb manufacturer. The proposed sign would be 4,100 lumens

during the day, and it was designed to go from 100% during the day to about 4% of its operation at night. He had wanted it to be 50%, and it came out to 2,056 lumens per square meter, so it was half the light per square meter, and the existing sign had 15 square meters of illumination. Therefore, it was very much less at night because of the photo sensors that detected the ambient light.

Mr. Rheaume stated that he was trying to understand the nighttime illumination for the new sign. The two logo signs each had four lamps at 4,900 lumens per lamp x 60% exposure to give a lower number, yet the other option had a similar sign where the 60% exposure wasn't used, so he asked Mr. Buchholz to explain the difference between the two. Mr. Buchholz said they were proposing to opaque the background so that no light came out except for the face area, which was 60% of the sign face that was actually illuminated. Mr. Rheaume asked if they could do something similar with the other sign. Mr. Buchholz said they didn't have to. Mr. Rheaume said he knew that, but asked if they could do it anyway.

Mr. Messier stated that he wanted to explain it a little better and showed the current sign that spelled out the word Shell and was internally lit. He said everyone knew what fluorescent light bulbs were, and if they looked at what was currently there and what could be done without any variances, the type of lights currently there could replace the old ones. Fluorescent lights would throw light everywhere, light up the ground, the leaves, and so on. The LED lighting had a black background with seven segments, and what was seen was the only thing that would ever light. The black background was just a flat black paint and the light had a targeted focus that went straight out and wouldn't shine on the ground or light up the whole area. Therefore, it would be less bright than what currently existed. It was mentioned that all of their displays had a photo cell that constantly needed ambient light outside and would dim to 4% of what they were during the day, which was important.

Mr. Dick Dolloff stated that he was an abutter and the next-door neighbor to Ms. Dow. If someone were to stand in the middle of the Route 1 Bypass and look at the gas station property, Mr. Dolloff's property was the one that received almost the direct line of the lights from the gas station. He and his wife had lived there for 41 years and had been around long enough to see what had happened along Route 1 and on Dennett Street. He had come before the Board with three points to follow up beyond what Ms. Dow had said. During the summers, he had been able to play with his grandchild in the backyard due to the ambient light. His second point was that the light went into their bedroom windows, and they had to put up heavy drapes to keep the light out so they could sleep. His third point was that the numbers up in the air were more of a distraction than the Shell sign itself. The sign itself was muted, but in addition to what happened on Dennett Street next to the Holiday Inn when the two ugly buildings had been built, he felt that the overall appeal of the neighborhood had gone downhill. The height of the proposed sign would definitely be an eyesore. The LED lighting might be an improvement. If he had to choose between the two proposals they had shown, he would choose the one with the LED lighting. They had planted maple trees when they first moved there, but their main concern was the noise, so they had put up a solid board fence that helped to cut down on the noise. As the trees grew, it helped with the ambient low light, but it was still wide open, particularly with the pine trees, so they got a great deal of light in their backyard. Mr. Mulligan asked if they could actually see the sign, and Mr. Doffoff said that they could.

Mr. Bob Shouse of 555 Dennett Street stated that he was speaking in opposition to the variance, and not just for the amount of light that would or would not be cast with the change of the technology because there was more to it than that. According to Section 10.233.20 of the Ordinance, in order to authorize the variance, the Board must find that the variance met all of the criteria. He felt that the variance would be contrary to the public interest, it would not be in the spirit of the Ordinance, and substantial justice would be done by denying the variance because the applicant already had signage, operated a major brand, and was easily located. The value of surrounding properties would be diminished. What the neighbors currently had was bad enough, and it would aggravate the situation by changing the technology and putting in vivid LED lights. The other issue that had not been addressed was the mega sign that they were seeking, the one on the ground up the street. Section 10.1241 did not allow a free-standing sign in an area where it was not permitted. The photos that they showed represented what they were trying to do, but the photos they should show were views of what was behind the gas station. There were at least three residents who had a good view of the gas station from a number of angles. He could see the Shell sign, and the canopy lit up his backyard so much that he had to pull the bedroom curtains shut because the light was on all night long, and now the applicant was seeking to add the small sign.

Chairman Witham interrupted Mr. Shouse and asked Ms. Walker to address the small sign. Ms. Walker stated that it was her understanding that the small sign was not part of the request because it was an existing sign. Mr. Buchholz agreed. Mr. Shouse asked what the small sign was meant for, in that case, and what the Ordinance section he had just referred to addressed. Ms. Walker said that it referred to the large sign. Mr. Shouse stated that they were not discussing the small sign at all and asked why there was a photo of it in the packet if it didn't need approval. Chairman Witham said that it was not up for approval, that the photo simply showed that it existed. Mr. Shouse said that the applicant should show the view they had of the neighbors or the view the neighbors had of the gas station because it impacted their quality of life. The first request was to allow a nonconforming sign to be altered or reconstructed without bringing the sign as conforming to the zoning. They could not bring the existing sign into conformity, so why should they be allowed to add another sign that was still nonconforming? The granting of the variance would be just the opposite of the five criteria. There was a diminishment of property values and it was not in the spirit of the Ordinance to allow a continuing nonconforming use. A change in text or graphics was not an alternation or replacement for the purposes of the Ordinance. They were changing the design, so it would be a violation of the zoning.

Chairman Witham stated that Mr. Shouse was making statements that had arguing points, which the Board was not arguing. The applicant was there for a reason and stating why they needed variances, so Chairman Witham was not sure what Mr. Shouse's point was. Mr. Shouse stated that his point was that the applicant was going beyond just the allowed change in text and graphics. Chairman Witham stated that everyone was in full agreement and that was why the Board was considering variances. Mr. Shouse argued that it was not just the illumination but the configuration of the sign and allowing more bad situations on top of bad situations. He felt that the zoning should preclude it, and if the applicant did not meet all five criteria, the request should be denied.

Chairman Witham said his position was to protect the abutters and the neighbors and the effects of signage. The neighbors had stated that the existing sign was a bad thing, with so much light and backyard flooding and heavy drapes being drawn. He first had serious concerns with it, but he then learned that the proposed sign would cast less light than the existing sign. He understood the

main issue to be the light. He also understood that the proposed sign was a little busier because of the price. He noted the abutters' issue with the existing sign was because of its 70' height and the fact that it should never have been built, but it did exist and was grandfathered. They now had a proposal for a new sign that would cast less light, but the abutters were indicating that the variance should be denied and the existing light kept, and that confused him.

Mr. Shouse mentioned the previous applicant with the trailer issue who had asked the abutters to show him the hardship. Chairman Witham asked Mr. Shouse if he wanted him to deny the variance for the sake of denying it, or if he wanted less light in his backyard. Mr. Shouse said of course he wanted less light. Chairman Witham told him it seemed like he just wanted the variance denied. Mr. Shouse told Chairman Witham that he'd just like to see him follow the criteria of what was required to pass the variance, and if they accepted the first four criteria, they could not say there was a hardship in denying the variance. Chairman Witham stated that he wanted to do what was best for the neighbors, and the proposed sign may give off less light, and he wanted to know if the neighbors wanted it or not. If they said they did not want it but wanted the light with the fluorescent bulbs that shone everywhere, he would support them, but he was confused.

Ms. Dow stated that if the new sign gave off less light, it would be fine, but there were times when something was built and was the opposite of its rendering. Chairman Witham noted that Ms. Dow had referred to the Toyota dealership, and it had a big wall that was labeled with some name that no one had noticed until it was built, and then they had noticed and had complained. As a result, the Board was very careful with sign issues so that they could protect the neighbors. A sign variance was the most difficult thing to get from the Board.

Mr. Rheaume stated that it was starting to be more of a neighborhood meeting that they should have had before the meeting. Chairman Witham suggested to the Board that before they made a motion, they make sure that what was captured in the Legal Notice was what they wanted reflected in the variance because he thought they were different. Mr. Parrott agreed that they were different. Chairman Witham stated that they were to the point that the variance request was for 168 square feet and the applicant said it was 146 square feet. Attorney Loughlin said that if it was 146 square feet, it was not consistent.

Mr. Buchholz stated that it was 146.13 square feet. When they originally did the drawing and submitted it to the Building Inspector, they were going to replace the existing sign and keep the square footage, but then they reduced the square footage by moving everything closer together and reducing the light output as much as possible. They wanted to alleviate the concerns of the neighbors because they realized there was a lot of light, so by just illuminating the Shell logo alone, it was enough to identify the brand, and they blacked out as much as possible.

Chairman Witham stated that he was tempted to recommend tabling the application so that the applicant could meet with the neighbors to be sure they fully understood the situation. He felt that the neighbors did not understand what they were getting and that they should be clear on the impact it would have on them. Mr. Parrott said that he would support it because it was a very unusual application in that it directly affected a small number of long-term folks, and did not affect the rest of the residents in Portsmouth. The technical information that they had received that night deserved a good reading and should have been presented to the neighbors, the Board, and the Planning Department before the meeting. To just drop many pages of technical data on them when the terms were not commonly known was not feasible.

Chairman Witham asked the neighbors if they were interested in meeting with the sign company so that there would be no surprises. Ms. Dolloff spoke up and stated that she was an abutter. She felt that the gas station was bright and noisy and they had a horrible complex at the end of the street, so the aesthetic value of the neighborhood was not good, and she wondered if the new sign would be brighter. Chairman Witham stated that it was not up for approval, it was only what the applicant had said they could do if their variance was denied. Ms. Dolloff said it was the aesthetics because everyone could see the Shell sign, not just the abutters.

Mr. Mulligan noted that Ms. Dolloff had just mentioned the aesthetics and asked if she felt that the sign with the prices was less aesthetically pleasing to view than the existing sign. Ms. Dolloff said that neither one was gorgeous. She thought if the back was blacked out and gave out less light, it would make her happier. The noise from the station would be there no matter what.

Mr. LeMay asked if there was another site with LED lights within a reasonable distance that the abutters could go and see. Mr. Buchholz stated that they had done other price signs, but the proposed Shell sign was unique in that they were blocking out everything in the background to address the concerns of the neighbors. Typically the sign was not blacked out due to visibility reasons, but they had done it in good faith for the neighbors. It was unique because there weren't signs like it anywhere else in New England that he knew of.

Mr. Shouse thought that the Board could deny the variance that night, and while they reviewed the technical information and got the correct dimensions, the applicant could take that time to talk to the neighbors and show better examples. Chairman Witham asked Attorney Loughlin what he thought about it. Attorney Loughlin said that the applicant obviously would like to get it approved, but they had brought in some information that the Board had not previously seen. The sign was smaller and had been advertised as bigger, so the Board could grant less relief. He felt that the example Mr. Messier given about the digital lights would be an improvement. The application could be continued and they could meet with the neighbors and give them more examples to make them more comfortable.

SPEAKING TO, FOR, OR AGAINST THE PETITION

There was no else to speak to the petition, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Chairman Witham stated that the Board would have to take a vote and asked Attorney Loughlin if he would consider tabling it. Attorney Loughin stated that he would consider it.

Mr. Parrott made a motion that the application be tabled until the next meeting for the purpose of allowing a neighborhood informational meeting with the applicant and to allow an extensive review by the Planning Department of the material presented that evening including possible alternate designs. Mr. Moretti seconded the motion.

Mr. Parrott said that they did not need to discuss it further unless someone wanted to discuss the tabling motion. Chairman Witham told the Board that they had a motion to allow for the

neighborhood informational meeting and for the Planning Department to further review the new submitted information, and he called for a vote on the tabling motion.

*The motion to postpone the petition to the January 2014 meeting **passed** by a vote of 5 to 2, with Mr. Rheaume and Mr. LeMay voting against the motion.*

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Mr. Moretti recused himself from the following petition.

__4) Case # 12-4
Petitioners: Paul R. Frohn, Jr. and Susan C. Frohn
Property: Meadow Road (between 70 and 100 Meadow Road)
Assessor Plan 236, Lot 80
Zoning District: Single Residence B
Description: Allow construction of a single-family home on a nonconforming lot.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1 A Variance from Section 10.521 to allow a lot area and lot area per dwelling unit of 7,500± s.f. where 15,000 s.f. are required for each dimension.
2 A Variance from Section 10.521 to allow continuous street frontage of 75'± where 100' is required.

SPEAKING IN FAVOR OF THE PETITION

The owner Mr. Frohn stated to the Board that he wanted to build a home that met all the requirements except for the two items that he needed a variance for. Most of the homes currently in the Frank Jones subdivision had the lot size that he had. The home he would build would fit the neighborhood as to size and look. The lot was currently assessed for a home to be built in that area, and he felt his home would conform to the spirit of the neighborhood and would be the approximate size of the other houses in the neighborhood.

Mr. Parrott asked if the lot had formally been established as a separate lot. Mr. Frohn said that it had back in the 1930s, but on his deed he had two separate lots. He had met with the City Council the previous year about reestablishing his lot line and had been approved. He had been told that any lot that the City had previously ruled as one lot but was actually two lots could be brought back to two lots.

Mr. Parrott asked if it was recognized by the City Assessor's office and Mr. Frohn stated that it was. Chairman Witham noted that Mr. Frohn was being taxed for a buildable house lot but he had a non-buildable lot.

Mr. Rheaume wanted to make sure that the proposed house size of 30' x 50' gave the 1500 square feet for the size of the dwelling, which would then allow him to comply with the 20% building coverage. From looking at the sketch that was provided with the overall dimensions for the house, he saw an outside dimension showing 35' from a back dormer out to the front of the porch. Mr. Frohn said that he had not decided on the exact house he would build, but he would make sure that it met the inspection code and all the lot coverage sizes and other requirements. He was informed

the previous month that his lot had been appraised and he had to put something together for the Board.

Mr. Rheaume wanted to be sure that, no matter what Mr. Frohn did, it would be no larger than 1500 square feet. Mr. Frohn stated that it would be smaller. Mr. Rheaume said that it was one of the criteria he had to meet.

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

Ms. Walker mentioned that she had received a call from Ms. Lenore Bronson who couldn't be at the meeting who was an abutter and lived at 838 Woodbury Avenue. She had been concerned about the precedent that the application might set.

There was no else to speak to the petition, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Mr. Mulligan made a motion to **approve** the application as presented and advertised. Mr. Rheaume seconded the motion.*

Mr. Mulligan stated that it was a request to build a house on a nonconforming lot that had been recently unmerged from a larger lot by action of the City Council. Granting the variance request would not be contrary to the public interest. The essential character of the neighborhood would remain if a house were built on the lot. There were a number of small houses, and most of properties in the immediate vicinity appeared to have approximately 75' of frontage and similar lot sizes, so the health, safety and welfare of the surrounding neighborhood would not be affected. Granting the variance would not be contrary to the spirit of the Ordinance. The purpose of that particular zone was to encourage residential development, and this would be in keeping. Granting the variance would result in substantial justice, and the loss to the applicant if they denied the variance would outweigh any gain to the public. Granting the variance would not diminish the value of surrounding properties because most of the properties appeared to be similar sizes and frontage issues as the proposed building lot. As to unnecessary hardship, the special conditions of the property were that it was once an unusually large lot for the neighborhood that had now been unmerged by action of the City Council to create a smaller nonconforming lot but still a buildable lot of record, so for that reason he did not believe that any fair and substantial relationship existed between the purpose of the frontage requirement and the lot coverage requirement as they applied to the property. It was clearly a reasonable use in a residential district to build a home on a buildable lot, so he thought the literal enforcement of the Ordinance would be an unnecessary hardship. For those reasons, he felt that the variance should be granted.

Mr. Rheaume concurred with all of Mr. Mulligan's points and wanted to emphasize a few things. As far as the spirit of the Ordinance, from looking at the neighborhood, it didn't seem to like it should be in the SRB District but more like the General Residence A district, which would be a 7500 square-foot lot, and the only criteria it would not meet would be the 100' frontage, so from that standpoint and because of the nature of the whole neighborhood, it was in keeping with the spirit of the Ordinance. He also thought that the applicant had done a good job and was only looking for relief for lot size and frontage, not looking to build an overlarge home on a somewhat

smaller lot than what was required. From looking at the area, the proposed home was actually smaller than some of the other homes on similar-sized lots. The application was a good one.

Chairman Witham wanted to comment on the message that Ms. Walker received from Ms. Bronson. The Board was aware that none of the decisions they made were done with the thought that would set a precedent. They took each case on its own merit, and they did not fall into the trap of setting a precedent. One of the key criteria was that granting a variance would not change the essential character of the neighborhood. The lot and the proposed house would blend in perfectly well with the neighborhood and represent the scale and pattern of what currently existed.

*The motion to grant the application as presented and advertised **passed** unanimously with 6-0.*

IV. OTHER BUSINESS

Chairman Witham reminded the Board that they had a new experience coming up the following month due to a few HDC decisions going before them on a large scale. He was concerned about it and considered having a pre-meeting to give the staff an overview of what would be expected of them. It was a 10 million dollar project that someone went through 12 months of work on, and the Board would only have a few hours to render their decision. They had to figure out time limits for a project of that size.

V. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:15 p.m.

Respectfully submitted,

Joann Breault
Acting Secretary