

**MINUTES OF THE RECONVENED  
BOARD OF ADJUSTMENT MEETING  
EILEEN DONDERO FOLEY COUNCIL CHAMBERS  
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE  
PORTSMOUTH, NEW HAMPSHIRE**

**7:00 P.M.**

**JUNE 28, 2016  
RECONVENED FROM  
JUNE 21, 2016**

**MEMBERS PRESENT:** Chairman David Rheume, Vice-Chairman Charles LeMay, Arthur Parrott, Jeremiah Johnson, Patrick Moretti, Christopher Mulligan, James Lee, Peter McDonell

**MEMBERS EXCUSED:** None

**ALSO PRESENT:** Jane Ferrini, Planning Department

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**I. OLD BUSINESS**

A) 56 Lois Street

Chairman Rheume stated that the Board extended the variance on April 19, but it was later discovered that there had been an earlier settlement by the Superior Court that negated the Board's original approval, making the extension unnecessary.

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**II PUBLIC HEARINGS – NEW BUSINESS**

12) Case #6-12

Petitioner: Beth P. Griffin Revocable Trust of 2011, Beth P. Griffin, Trustee

Property: 250 Broad Street

Assessor Plan Map 131, Lot 10

Zoning District: General Residence A

Description: Second floor addition and relocation of barn/office/rec. room.

Requests: The Variances and/or Special Exceptions necessary to grant the

required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, enlarged or structurally altered except in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a right side yard setback of 3.09'± for the barn/office and 4.05'± for the second story addition where 10' is required.

**DECISION OF THE BOARD**

*Mr. Mulligan moved to **postpone** the application, and Mr. LeMay seconded.*

Mr. Mulligan stated that it was the applicant’s first requested postponement, which the Board always granted. Mr. LeMay said the request for postponement was reasonable.

*The motion **passed** with all in favor, 7-0.*

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13) Case #6-13

Petitioners: CSS Realty Trust, Christopher D. McInnis, Trustee, owner, White Acquisitions, applicant

Property: 200 McDonough Street

Assessor Plan Map 144, Lot 29

Zoning District: General Residence C

Description: Single family home on pre-existing nonconforming lot.

Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a nonconforming building or structure to be reconstructed except in conformity with the Ordinance.
2. A Variance from Section 10.516.30 to allow a structure obstructing visibility to be erected on a corner lot between the heights of 2.5’ and 10’ above the edge of pavement grades within the area outlined in the Ordinance.

Mr. Mulligan recused himself from the petition. Mr. McDonnell assumed his voting seat.

**SPEAKING IN FAVOR OF THE PETITION**

Chairman Rheume said the Board previously denied a similar application from the same applicant, and after discussion, the Board agreed that Fisher vs. Dover would not be invoked.

Attorney John Bosen representing the applicant was present to speak to the application. He said he submitted a letter from an abutter to the Board and stated that the applicant had come up with a different plan to address the Board’s previous concerns with size, scale, mass and height. He reviewed his petition and said the criteria were met.

Chairman Rheume asked Attorney Bosen whether the difference in design was the absence of the garage and the use of exterior parking instead. Attorney Bosen agreed, saying that the elimination of the garage allowed the applicant to shrink the interior and observe the setbacks.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

**DECISION OF THE BOARD**

Mr. Johnson said he wasn't at the previous meeting and asked whether there were other concerns besides the size and siting of the building. Chairman Rheume replied that more relief was asked for and the height was a concern, but he felt that the loss of the garage was helpful to the overall appearance of the building and eliminated the huge request for relief. Mr. Parrott said he thought the changes were significant, especially in a congested area with very small lots. Mr. Moretti agreed, noting that the applicant listened to the Board's concerns.

*Vice-Chairman LeMay moved to **grant** the variances for the petition, and Mr. Parrott seconded the motion.*

Vice-Chairman LeMay said he agreed that the applicant had addressed the Board's concerns and that the remaining relief requested was small. He stated that granting the variances would not change the nature of the neighborhood in any significant way, and if it did, it would be for the better. Substantial justice would be done because there was no benefit to the public in preserving the existing home, and the neighborhood would not be negatively impacted and may even be improved. The lot was a pre-existing nonconforming one, and denial would prevent the property from being developed and would be an unnecessary hardship on the owner.

Mr. Parrott said he concurred with Vice-Chairman LeMay and had nothing to add. .

*The motion **passed** with all in favor, 7-0.*

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14) Case #6-14

Petitioner: Eleanor C. Bradshaw

Property: 21 Humphreys Court

Assessor Plan Map 101, Lot 42

Zoning District: General Residence B

Description: Add left side bay window.

Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, enlarged or structurally altered except in conformity with the Ordinance.
2. A Variance from Section 10.516.40 to allow a bay window to project more than 2'± into the required left side yard.

Mr. Mulligan resumed his voting seat.

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

Charles White representing the owner Eleanor Bradshaw was present to speak to the petition. He reviewed the criteria and noted that the neighborhood did not oppose the petition.

Mr. Mulligan asked how deep the bay window would be, and Mr. White said it would be 10 inches wall to wall with an overhang of 1.2", resulting in an 8.2" variance. He said the applicant had received approval from the Historic District Commission (HDC).

Mr. Lee asked whether the bay window opened, and Mr. White said the middle window did.

Mr. Moretti asked what the distance was from the applicant's house to the one next to it. Mr. White stated that it was 3 feet to the property line and that it was the west side of the house.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

**DECISION OF THE BOARD**

*Mr. Mulligan moved to **grant** the variances for the petition, and Mr. Lee seconded.*

Mr. Mulligan stated that it was a minimal request for a small addition to the existing dwelling, and that it would be quite an improvement over the existing blank wall. He said the HDC didn't have a problem with how it would look, and it wouldn't project far from the existing structure.

Mr. Mulligan stated that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because the essential characteristics of the neighborhood would not be changed, and the health, safety and welfare of the public would not be affected. Substantial justice would be done because the loss to the applicant would outweigh any gain to the public if the request was denied. He said it was a minimal increase to the nonconformity and that the value of surrounding properties would be enhanced because it would make the property look a lot better. Mr. Mulligan said the unnecessary hardship was due to the number of special conditions, including that the lot was half the required size and had a very small building on it. The property was designed long before there was any zoning, so it already had a number of non-conformances and setback encroachments, and there would be no fair and substantial relationship between the purpose of the requirement and its application to the property. He said that the use was a reasonable one for a residential use in a residential zone and that the application met all the criteria.

Mr. Lee said he concurred with Mr. Mulligan and noted that the existing windows probably encroached on the yard when they were open, so the new window would improve the condition.

*The motion **passed** with all in favor, 7-0.*

5) Case #6-15

Petitioners: Brian J. Bednarek & Sophie Bednarek

Property: 10 Humphreys Court

Assessor Plan Map 101, Lot 43

Zoning District: General Residence B

Description: Construct connector between existing house and garage.

Requests: The Variances and/or Special Exceptions necessary to grant the

required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, enlarged or structurally altered except in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a rear yard setback of 9'± where 25' is required and a 6' right side yard setback where 10' is required.
3. A Variance from Section 10.521 to allow 32.0%± building coverage where 30% is the maximum allowed. (Note: The required relief was amended to include the right side yard encroachment for the upward expansion of the existing garage.)

Mr. Parrott recused himself from the petition. Mr. McDonell assumed a voting seat.

It was noted that, in addition to the advertised requests, a variance was needed for a 6' right side yard setback for the upward expansion of the garage.

**SPEAKING IN FAVOR OF THE PETITION**

Jennifer Ramsey of SOMMA Studios representing the owners was present to speak to the petition. She reviewed the petition and the criteria and said the criteria were met. She also noted that the neighbors had all submitted letters in support of the application.

In answer to Mr. Moretti's questions, Ms. Ramsey said the bulkhead would not be relocated, the structural engineers would ensure that the foundation of the existing garage would handle what was placed on top of it, and the side elevation windows were egress-sized.

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

No one rose to speak, and Chairman Rheume closed the public session.

**DECISION OF THE BOARD**

*Mr. Johnson moved to **grant** the variances for the petition as presented, and Mr. Moretti seconded the motion.*

Mr. Johnson stated that it was a reasonable infill project and that the three variances required were minimal. The rear setback was not a further encroachment than what existed, and the space between the garage and home was already being utilized and would be a better use of that space.

Mr. Johnson stated that granting the variances would not be contrary to the public interest because there was no public interest and there were similar examples in the neighborhood, so esthetically it wouldn't be out of character with adjacent properties. It would observe the spirit of the Ordinance because there would be no further encroachment on light and air than what currently existed. Granting the variances would do substantial justice. He said he didn't see any benefit to the public being outweighed and felt that the owner's use to have a more modern addition connecting the garage and the home was justified. The upgrade would at least maintain or increase the values of surrounding properties. As far as hardship, he said it was an existing significant nonconformance use because the lot size was smaller than needed and already encroached on multiple setbacks.

Mr. Moretti said he concurred with Mr. Johnson and thought it was pretty much in the same footprint, with the exception of raising the roof on the garage side.

*The motion **passed** with all in favor, 7-0.*

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Mr. Parrott resumed his seat and Mr. McDonell returned to alternate status.

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## 16) Case #6-16

Petitioners: Stephen M. & Bridget M. Viens

Property: 78 Marne Avenue

Assessor Plan Map 222, Lot 40

Zoning District: General Residence A

Description: Single story right side addition.

Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, enlarged or structurally altered except in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a rear yard setback of 15.9'± where 20' is required.

**SPEAKING IN FAVOR OF THE PETITION**

The owner Stephen Viens was present to speak to the petition and reviewed the criteria, explaining how they were met. He distributed to the Board letters of approval from the abutters and also said he had approval signatures from the owners of homes on surrounding streets.

Vice-Chairman LeMay asked what was on the side yard, and Mr. Viens said it was the neighbor's house. He asked whether there was a window on that side as well as buffering. Mr. Viens said there was a window and that they would build a patio behind the structure to block off the neighbor's window to allow them more privacy.

Mr. Lee asked whether there was a treehouse on the side of the house as shown in the photo. Mr. Viens said it was a freestanding structure that would be removed.

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

No one rose to speak, and Chairman Rheaume closed the public session.

**DECISION OF THE BOARD**

*Vice-Chairman LeMay moved to **grant** the variances for the petition as presented, and Mr. Parrott seconded the motion.*

Vice-Chairman LeMay said it was a straightforward application to expand the property into the rear yard setback, which was a wooded area and opposite an area where there was no use of the property by the neighbors. He stated that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because it would not alter the character of the neighborhood. He said the house was in proportion to the neighborhood, the setbacks were observed, and there was a small encroachment on the rear of the house where there was already an encroachment. Substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the public. Granting the variances would not diminish the value of surrounding properties, especially with all the neighbors in favor, and literal enforcement of the Ordinance would do unnecessary hardship.

Mr. Parrot said he concurred with Vice-Chairman LeMay and noted that it was a modest improvement and the only logical place to expand, the neighbors were in support, and it would fit in fine with the house and the neighborhood.

Chairman Rheume said he would also support the petition, and he thanked the applicant for having such a complete application that included the abutter's approval.

*The motion **passed** with all in favor, 7-0.*

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17) Case #6-17

Petitioners: Eric & Joan Landis

Property: 540 Marcy Street

Assessor Plan Map 101, Lot 79

Zoning District: General Residence B

Description: Replace existing shed with two-car, one story garage.

Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.521 to allow a 3'± rear yard setback where 25' is required.

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

Attorney Peter Loughlin representing the applicant stated that he submitted a letter containing a lot of information about the property. He said that every home was on the front property line except for the Landis property, which was stepped back due to the 50-ft primary setback on the shoreland. He also noted that the owner had a curved front yard that was the largest in the neighborhood, and that the curve in the road would not allow the home to be centered. Attorney Loughlin said the abutters had signed a letter in support of the project, and that the most affected abutter behind the property was enthusiastic because the shed would be replaced. The placement of the garage directly behind the home would not affect the water views of the neighbors.

Chairman Rheume noted that the Staff Memorandum indicated the building coverage at around 25% with the addition, and Attorney Loughlin said it was backward. Chairman Rheume said it was a lot of relief in a relatively new home that already was in full compliance. He said the request for a 3-ft rear yard setback was substantial and asked if the client had considered a single-car garage. Attorney Loughlin said that the clients were approaching retirement age and each wanted an enclosed parking spot.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

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

*Mr. Lee moved to **grant** the variance for the petition as presented, and Mr. Johnson seconded the motion.*

Mr. Lee said it was fair to allow the owners to have an inside garage and he didn't see any diminution to the surrounding properties or anything contrary to the public interest. He said

granting the variance would do substantial justice, and the literal enforcement of the Ordinance would result in an unnecessary hardship to the applicant.

Mr. Johnson stated that he was torn because it was a more modern house on a reasonably-sized lot and the current house was in the center of the lot. He said he agreed with the applicant, however, that the shoreland setback controlled the fact that the structure had to be further set back, he thought the hardscape of the existing driveway already took up a fair amount of coverage. He said the garage sited behind the house was as low impact as a moderately impactful addition could be. The rear setback request was pretty great. The siting of the garage in relation to the property behind it was reasonable, and it was a reasonable distance as well. Vice-Chairman LeMay said the issue was the 3-ft setback, and the variance was forced by the fact that the lot was oddly shaped, so the building had to be situated far enough back to meet that setback requirement.

Chairman Rheume said he would support the variance, although he had some reservations because a lot of relief was requested. He understood the push back, but felt that it was a new home built on a lot that was carved out for it. He said the support of the neighbors helped tremendously and felt the change would be in keeping with the neighborhood because the garage wouldn't be seen except by the rear neighbor.

*The motion passed with all in favor, 7-0.*

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18) Case #6-18

Petitioners: Seacoast Trust, LLP, Stonegate Construction, LLC, applicant

Property: 150 US Route One By-Pass

Assessor Plan Map 231, Lot 58

Zoning District: Single Residence B

Description: Construct three-story, 30 unit, multi-family building.

Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Special Exception under Sections 10.440 and 10.335 to allow a lawful nonconforming use to be changed to another nonconforming use.  
*If the Special Exception for the proposed use is not granted, the following are requested:*
2. A Variance under Section 10.440 to allow a multi-family dwelling in a district where the use is not permitted.
3. A Variance from Section 10.521 to allow a lot area per dwelling unit of 4,339.17± s.f. where 15,000 s.f. is required.
4. A Variance from Section 10.522 to allow a multi-family dwelling with a building length of 246'± where 160' is the maximum allowed.

Chairman Rheume read the petition, noting that there were two sets of requests. The first was for a Special Exception to allow a lawful nonconforming use to be changed to another nonconforming use. If that was not granted, then the Variance listed in Item 2 was requested to be considered. In both cases, consideration was needed of the Variances listed in Items 3 and 4.



**SPEAKING IN FAVOR OF THE PETITION**

Chairman Rheume asked the Board whether Fisher vs. Dover applied. Mr. Mulligan said he wasn't at the previous Request for Rehearing, and he asked how many units were proposed. Chairman Rheume stated that the original proposal was 40 units and had been decreased to 36 units, and then further reduced by six units. He said the units also appeared shorter.

Attorney Robert Ciandella representing the applicant told Chairman Rheume that they were not seeking the height variance because the building would conform to the height. Chairman Rheume agreed that the height issue was resolved and would move forward with the petition.

Attorney Ciandella confirmed that they were withdrawing Case 4-12 filed in April and would present the evidence they had on the special exception and the two variances as well as an alternative use variance. He introduced the site engineer Eric Weinrieb and the developer Eric Katz. He said three abutters wrote to express their support of the project, and he confirmed that Chairman Rheume received the letters. Chairman Rheume said he wasn't sure if they had all three letters, so Attorney Ciandella gave him the letter from the Hansens. Attorney Ciandella also introduced the landscaper Robbie Woodburn.

Attorney Ciandella reviewed the petition, noting that the existing nonconforming use was a medical office, and said they proposed a multi-family building that was also not conforming, thereby replacing a nonconforming use by another nonconforming use. He stated that the special exception was a better approach to the nonconforming uses and compared the variances and the special exception in detail. Attorney Ciandella emphasized that their proposal had a different kind of use but was in the family of residential uses and was more appropriate than the existing medical use as well as less adverse to adjacent properties.

Mr. Weinrieb reviewed the site plan and stated that the same design criteria would be used but that the building would be moved about 100 feet. He said the access was under DOT jurisdiction, the Existing Conditions survey was updated, and the two wetlands on the property had no jurisdiction on the City's wetland impact criteria. He reviewed the topography and setback variances as well as parking, lighting, and utility issues.

Mr. Parrott asked whether the designated parking spaces were dimensioned somewhere. Mr. Weinrieb said they were not on the plan but conformed to the City's standards. Mr. Parrott noted that the aisles were 24 feet, and Mr. Weinrieb said the site was one-way only.

Mr. Katz gave a brief history of his company and said the project was a multi-family housing project targeted to the 55+ demographic. He discussed how the building was reduced to a 3-story, 30-unit building, at a reduction of 25%. He noted that they had another letter of approval from the abutters, which they didn't have the previous time. Mr. Katz also addressed the traffic issue and using Hillside Drive as a cut-through. He said the project would reduce the traffic from the previous medical facility to an average of 118 cars a day.

Mr. Johnson asked if there would still be sub-grade parking and whether Mr. Katz was confident that three stories, underground parking, and a sloped roof could fit within 35 feet. Mr. Katz agreed and assured Mr. Johnson that they wouldn't return for a height variance.

Vice-Chairman LeMay asked whether there were restrictions or a covenant that would prevent someone from buying a unit and renting it out. Mr. Katz said he would be in control of the Owner's Association but that it would eventually be transferred to the homeowners, with a covenant that the units could be rented for a minimum of one year and the renter had to comply with all the rules and be approved by the Association. He added that a rental had never been an issue in all his other properties.

Chairman Rheume noted the 356 Middle Road property across the street and asked Mr. Katz whether he had any information on it. Mr. Katz replied that Meg Coren owned the property and was in support of the project.

The landscaper Robbie Woodburn stated that her job was to enhance the building and mitigate any impacts on abutters. She said the existing pin oaks would remain and that a 6-ft mixed shrub buffer border would be placed between the building and the bypass, and they would also place a berm along the Hillside Drive property line.

Attorney Ciandella then reviewed the evidence that applied to the four elements of relief, beginning with the special exception, and he reiterated that the proposed use was less adverse than the existing use as well as more appropriate to the zone because it would have less impact on adjacent properties in terms of traffic. He said the volume of cars would be less and that the nearby intersection permitted a U-turn that residents would use. He also said the project was less adverse in terms of lighting, setbacks, parking, noise, and impervious surfaces. He reviewed the special exception criteria and said they were met.

Attorney Ciandella then addressed the alternative relief for a use variance.

Bill and Linda Jones stated that they lived north of Middle Road (no address given) and didn't see an issue with the residential property use of the project. They said the lighting would be less obstructive and felt that Portsmouth needed an affordable 55+ residential building.

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

Shawn Craig of 135 Hillside Drive said he was a direct abutter and read a letter from another neighbor, Barbara McMillan of 84 Hillside Drive, noting that her letter reflected his thoughts as well. In the letter, Ms. McMillan stated that the reduced height, size and density of the building were still extensive and did not fit in with the surrounding neighborhood.

Matt Turk of 152 Hillside Drive read a letter from Kimberly and Michael Gass of 120 Hillside Drive, which stated that they opposed the project because it would negatively affect the neighborhood's character. They said the variances were excessive and that the building would dwarf the homes around it as well as increase traffic. Mr. Turk said he agreed.

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

Attorney Ciandella stated that the Route One Bypass was populated by existing businesses with various uses, and the nonconforming use provision was calibrated to have one nonconforming use turned into another one that met the standards. He also noted that it opened the door for a less nonconforming use than they were proposing. He said there would be less traffic and less of a problem with people turning because of the new intersection that permitted a U-turn. He also

emphasized that residents would live there as opposed to people driving around in an attempt to find the medical office.

Caroline Turk of 152 Hillside Drive said the issue was not that it was illegal to make a U-turn but that the frequency would increase because people would know they could do the quicker U-turn.

### **DECISION OF THE BOARD**

Chairman Rheume stated that the Board would first discuss the special exception. He said it had to be provided for by the Ordinance, and he felt that the provision was captured. He asked whether the multi-family use was allowed and met the requirements of Paragraph 10.335.

Mr. McDonell said he was inclined to support it because the scale issue had been addressed by decreasing the height. He understood the Hillside Drive residents' concern but believed there would be less traffic and that it could be addressed by the residents if it became a pervasive problem. Mr. Johnson said that the impact on adjacent properties was less adverse than existing and felt that the applicant made a strong case but that it was hard to judge apples to apples when swapping out a particular use for another use. He said the scale and the traffic were tough to compare and thought the current daytime use didn't cause as much traffic, and it would be swapped out to a more significant building with more of a traffic impact.

Vice-Chairman LeMay stated that his initial reaction was that a special exception by its nature was a bit vague and he was sympathetic to some of the applicant's points. After looking at the criteria for a special exception he thought the criteria went beyond the first 10.335 and raised issues that were germane to the discussion, such as no detriment to property value, which was similar to a variance, no hazard to the public or adjacent properties due to potential fire, explosions, and so on, which he felt was at least relevant. They had the traffic findings, the focus on demand for municipal services, and no significant storm water runoff, so he said he thought there were enough specific items to provide the opportunity to have a discussion or motion in a form that was structured to be meaningful in terms of granting.

Mr. Mulligan said the Board should run the proposal through the special exception standards and determine whether it had less impact or was more appropriate to the District than the existing use. Chairman Rheume agreed, noting that the City Council did the Board no favors by forcing them to compare two different nonconforming uses. After further discussion, he said the Board could live with the slightly better standard.

Mr. Mulligan asked for further discussion. He said that what was being proposed as a special exception, including no significant increase of storm water runoff to adjacent properties, would be an improvement due to the landscaping and reconfiguration of impervious surface and wouldn't result in excessive demand on municipal services. There would be no hazard to the public or adjacent properties on account of potential fire, explosions, etc. He said the real problem he was having was whether there would be the creation of a traffic hazard or substantial increase in traffic congestion. He said the Hillside Drive residents felt that their street was being used by people as a U-turn, which he thought could happen in the short term, but he felt the Board had compelling evidence that the traffic would be different and of a lesser quantity and quality than medical office traffic. Regarding the detriment to property values by changing the essential characteristics of the neighborhood, he said he thought it would be a positive change and didn't see any change due to the scale of the building, the parking, the access way, or storage and could support the special exception. He asked that a Board member strongly second the motion.

Mr. Parrott said he was familiar with the area and knew the traffic on the street, which he thought was very low. He said he couldn't help but compare the number of employees and patients in the medical facility to a residential structure consisting of 30 units and representing probably 60 cars. He said it was a lot more than what used to be there, and it would be 24/7, so he thought there was a real change for more of a traffic impact to Hillside Drive. He pointed out that Hillside Drive was U-shaped like a giant cul-de-sac, which was the reason traffic was low because there was no reason to go there unless one lived there or delivered something.

Vice-Chairman LeMay said he didn't think the Board should overemphasize the potential impact on Hillside Drive because he felt that people who lived at the new project would find an easier way to get to their property without making a U-turn on Hillside Drive. He said if there was a traffic problem, changes could be enforced. He said the problem would exist no matter what happened, and he thought it was dramatic to say it was 24/7 because people slept, so he didn't feel it was that big of a deal. Mr. Moretti said the Hillside Drive residents could meet with the complex association and address potential traffic issues, and he also felt that there were other routes to get to the complex. He pointed out that the medical building had over 100 patients a day, plus employees, and the complex would probably see 60 cars once or twice leaving the building daily, so he thought the traffic would eventually diminish in making the U-turn.

Chairman Rheume said he could support the motion for the special exception because it came down to traffic, and he felt that the complex residents would understand the impact on the neighbors and act accordingly. He also said the Planning Board and the State could make some traffic changes to alleviate the effect on Hillside Drive. As far as the detriment to property values, the medical building's uses were more imposing on the neighborhood than the residential building would be, especially with the reduction to three stories and the berm as a buffer. He added that the Planning Department would take a look at those issues as well.

*Mr. Mulligan moved to **grant** the special exception for the petition,, and Vice-Chairman LeMay seconded the motion.*

Mr. Mulligan said he would incorporate his previous comments and that he agreed that Hillside Drive would not be the preferred route to get to the development once it was built. He also agreed that the residents would figure out better ways to get home and that the traffic issue would less likely be a problem as time went on. He said the detriment to property values had to be a result of the location and scale of the building and other structures, including things such as pollutants, so he felt that those special characteristics would not create a detriment to property values. He said the existing nonconformance use and its physical characteristics were more of a detriment to the vicinity that what was proposed.

Vice-Chairman said he concurred with Mr. Mulligan and would incorporate his prior comments.

Mr. Parrott said he thought the project was a fundamental change in an area where all the adjacent properties were small, single-family structures. He agreed that the proposal was more compliant than the previous one, but in terms of essential characteristics, the surrounding area was all single-family homes and the change did not satisfy that aspect of the special exception.

*The motion **passed** by a vote of 5-2, with Mr. Parrott and Mr. Lee voting against the motion.*

Chairman Rheume advised that, as the Special Exception had been granted, the first of the variances to allow a multi-family dwelling in a district where the use was not permitted would not be needed. The remaining two variances were then considered. Mr. McDonnell stated that he was

in support of the variances because the property had special conditions of not being a small parcel that was set back but being substantially bigger than most of the parcels around it. Also, it was right on the Route One Bypass, making it difficult to have a use in strict conformance. He said he didn't see it as not meeting the requirements and noted that the Board had discussed the diminishment of the values of surrounding properties in the special exception.

*Vice-Chairman LeMay moved to **grant** the variances for the petition, and Mr. Mulligan seconded.*

Vice-Chairman LeMay said they were dimensional variances, and granting them would not be contrary to the public interest nor to the spirit of the Ordinance because it came down to changing the essential characteristics of the neighborhood, and he thought the essential characteristics of the immediate neighborhood had more to do with the uses across the street than they did with the Hillside Drive neighborhood since there was already a large building with a huge parking lot. He said he thought it would improve the neighborhood. Granting the variance would do substantial justice because the benefit to the applicant would not be outweighed by the general public. Strict compliance was required with the variances, given the lot's location and shape. The values of surrounding homes would not be diminished. Literal enforcement of the Ordinance would present a hardship to the property because of its shape, which was of a good size and had room for appropriate buffering. He said it would be nice to have four floors of units, but it wasn't realistic. There was a balance, and the applicant reduced the floors to three, so he felt the Board should approve the variances.

Mr. Mulligan stated that it was a unique property and really not appropriate to a single-family residential development. It was very large compared to the surrounding neighbors and had only one in-and-out access to the Route One Bypass. He said an owner of the property could get multiple cuts on the bypass, but it wouldn't be appropriate for single residents, so he thought it met the hardship. Granting the variance would have no fair and substantial relationship between the lot-area-per-dwelling unit requirement and the application to the particular property, nor the 160-ft building length to the particular property. He said the applicant was correct in stating that the restriction was borne out of a concern that huge buildings did not dominate small lots, but that wasn't the case. Both variances met the hardship criteria, and he agreed with the other elements that Vice-Chairman LeMay discussed.

Vice-Chairman LeMay referred to the second criteria owing to special conditions of the property that couldn't be reasonably used in strict conformance to the Ordinance and said that no one would put a single residence on that lot, so he felt it was reasonable in those terms.

Mr. Parrott said it was a more of a technical requirement, so he could support the dimensional variances. Chairman Rheame said he would support the motion because it was the Single Residence B District and 30 units seemed like a fair amount of relief, but it was zoned in a district that didn't mesh well with what the Board had discussed. He said he didn't think the applicant was trying to crowd too much on a long but narrow lot and thought it was dictated by hardship.

*The motion **passed** with all in favor, 7-0.*

19) Case #6-19

Petitioner: GTY MA/NH Leasing Inc., c/o Nouria Energy Corporation

Property: 786 US Route One By-Pass

Assessor Plan Map 161, Lot 42

Zoning District: General Residence A

Description: Relocate existing free-standing sign and add changeable LED fuel

- price display.
- Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.1241 to allow a free-standing sign where a free-standing sign is not permitted.
  2. A Variance from Section 10.1243 to allow a second free-standing sign on a lot.
  3. A Variance from Section 10.1240 to allow a changeable sign where a changeable sign is not permitted.
  4. A Variance from Section 10.1253.10 to allow a free-standing sign with a height of 24'10.5" ± where 7' is the maximum height allowed.
  5. A Variance from Section 10.1253.10 to allow a free-standing sign with a right side yard setback of 2'± where 5' is required.
  6. A Variance from Section 10.1261.10 to allow a free-standing sign to be illuminated where it is not permitted.

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

Attorney Peter Loughlin representing the applicant was present to speak to the petition, and he introduced Bob Richard from Nouria. Attorney Loughlin said the reason for the relief requested was because the site was commercial and the City changed the zoning so that every other gas station was zoned commercial except for the applicant's because the zoning had not caught up with the use previously granted by the variance years before.

Chairman Rheume asked whether the applicant had considered pursuing having the zoning changed on his property. Attorney Loughlin said he viewed it as a full employment act.

Vice- Chairman LeMay for more detail on the sign. Mr. Richard replied that the same LED would be used and that only the numbers would be lit and would not emit a lot of light. Vice-Chairman LeMay asked whether there was feedback from the neighbors, and Mr. Richard said there was not, except for one neighbor who said he wasn't concerned with the brightness.

Chairman Rheume verified that Mr. Richard was asking for a changeable sign and not an animated one. Mr. Richard agreed, stating that the sign would not flash or scroll but would just post the prices, and he said it wouldn't change more than once a day.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

### **DECISION OF THE BOARD**

*Mr. Mulligan moved to **grant** the variances for the petition as presented and advertised, and Mr. Parrott seconded the motion.*

Mr. Mulligan stated that it was another situation of a property not properly zoned, and the applicant's desire to update and relocate it to be more conforming wasn't permitted because the property wasn't zoned correctly. He said it seemed like a lot of relief but was really just swapping out light for light and moving it over a little to upgrade what was there.

Mr. Mulligan stated that granting the variances would not be contrary to the public interest or to the spirit of the Ordinance. The essential characteristics of the neighborhood would not be changed because there was already a similar sign in the vicinity. The health, safety and welfare of the public would not be impacted. Granting the variances would do substantial justice because of the loss to the applicant if the sign restrictions in Sign District #1 were upheld. They would lose the sign entirely or be forced to maintain the sign in its deteriorated condition and would never have the opportunity to upgrade it, and there would be no gain to the public by requiring that situation. Mr. Mulligan said granting the variances would have no effect on surrounding properties and that literal enforcement of the Ordinance would result in unnecessary hardship. The special conditions of the property included that it was a pre-existing filling station in a GRA Zone that was not converted to commercial zoning like its neighbors on the bypass, so there would be no fair and substantial relationship between the purpose of the Sign Ordinance and restrictions that were intended to keep residential neighborhoods looking like residential neighborhoods and their application to the property, which was not a residential neighborhood.

Mr. Parrott said the request was straightforward. The change was to a new technology, which had been used in several other places without deleterious effects. The sign would be moved a small distance and would be the same size as the existing sign, so it wouldn't appear to be different to passing motorists. He stated that, for all those reasons, the Board could approve it.

Chairman Rheume said he would support the proposal. He said he checked the requirement for Sign District #1 and found that if it was a zoned business, it would be in Sign District #4 and allowed to have a significant area of 100 square feet with a height of 20 feet and setback requirements of 20 feet. He said what the applicant was asking for in area and height was well within what would be expected in nearby businesses.

*The motion **passed** with all in favor, 7-0.*

20) Case #6-20

Petitioners: Anthony DiLorenzo, c/o Portsmouth Chevrolet, owner, Portsmouth Used Car Superstore, Inc., applicant

Property: 2219 Lafayette Road

Assessor Plan Map 272, Lot 1

Zoning District: Gateway

Description: Appeal Administrative Decision.

Requests: The actions necessary to grant the required relief from the Ordinance, including the following:

1. Granting an Appeal of an Administrative Decision of a Code Official in the application of Section 10.1280 of the Ordinance.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Steve Roberts representing the applicant was present to speak to the petition and stated that they applied for a sign permit, and the denial boiled down to the fact that what they proposed would be a qualitative difference. They were proposing a changeable sign that was permitted in the Gateway Zone that was a pre-existing nonconforming sign by a 2003 court order. He said the nonconforming aspect was that changeable signs could change only once a day, and their sign could change every four seconds. He said they had permission to change it to every three seconds. Attorney Roberts emphasized that the sign would not distract drivers and that they were under a mandate to maintain it. He said the only thing that would change would be the

monochromatic bulk going to LED color. They would replace and repair the existing electronic equipment, and only the text and graphics would change. There would be no animation.

Mr. Mulligan said the Ordinance as written stated that a changeable sign that changed more than once a day was considered to be an animated sign. He said the applicant's sign would change every 3 or 4 seconds, and asked why the animated sign regulation did not apply. Attorney Roberts said the only thing that would change were the graphics. Mr. Mulligan asked whether it would be kept as text, and Attorney Roberts said that it mostly would, but it would show a picture of a car. Mr. Mulligan stated that Section 12.82 suggested that damaged parts could be replaced or repaired. Attorney Roberts said they couldn't replace existing parts because they didn't exist.

Mr. Lee noted that the picture of a car could change to another car in three seconds, so it would be like a slide show. Attorney Roberts disagreed, saying that it would be too close to animation. He said it would go black and then another image would appear.

Mr. Parrott said the memo stated that the applicant proposed to replace the existing outdated sign with a new, updated sign in the same location, with the same dimensions, and that the only difference between the existing and proposed would be including updated graphics and replacing outdated parts. He said the applicant couldn't have it both ways and pointed out that one sentence contradicted the other. Attorney Roberts said it was a question of degree. The parts within the box were changing. He said the language was loose, but the bottom line was that it would result in a change of text and graphics.

Mr. Parrott noted that the memo didn't indicate that replacement parts couldn't be found. He also quoted from Mayor Sullivan's May 6 memorandum, which said a part of the previous court order said that the terms applied only to the sign, which was the subject of the litigation. Mr. Parrott said he believed that, if the sign was demolished and replaced with a different sign, the new sign should be reviewed under the Zoning Ordinance that existed at the time of the application. He also said he didn't believe that the legal memorandum even touched on that point of contention from the Planning Director Rick Taintor that the agreement only applied to the sign that existed today. Attorney Roberts said they didn't agree with the City.

They further discussed it. Attorney Roberts stated that, under New Hampshire law, once you had the nonconforming use, that use was not limited to that particular model or make. He said they had a vested right in that use.

Mr. Parrott said that changing the existing sign with plain letters and numbers to one with pictures was a change in substance and a violation of the agreement. Attorney Roberts disagreed, stating that it fell within the scope of the nonconforming sign ordinance and that they were going from numbers and letters to numbers, letters, and pictures. He said it was just graphics. Mr. Parrott asked Attorney Roberts what would constitute a meaningful change in the graphics, and Attorney Roberts said it would be animation activities, like scrolling. He said it was just a graphics change because the visual was changing to LED with higher resolution. Mr. Parrott asked him whether he thought simple block letters and numbers were not any different from a car with the sun shining off of it, and Attorney Roberts said it was still graphics.

Vice-Chairman LeMay asked whether there were other aspects to the sign that were nonconforming. Attorney Roberts said the square footage was 128 square feet and was diminished a bit. Vice-Chairman LeMay said that what Attorney Roberts proposed was reconstruction or replacement and thought he was hung up on the fact that graphics were changing every few seconds, but if there were other aspects to it, it caused people to come back



and ask for a variance. He said he respected grandfathered rights but didn't think those rights had to do with the other aspects of the sign and allowed the applicants to do whatever they wanted forever and ever. He said when signs had to be replaced, they got reviewed for a variance, and he felt that when grandfathering applied, it should be discussed in a variance application with the Board. He said the applicant was changing the whole aspect of the sign and that the animation part was not the issue with the appeal.

Chairman Rheume said the current dimensions on the sign were vague and asked whether the 41" height as proposed created the new portion of the sign with improved graphics. Attorney Roberts agreed and said the new sign would be 135 inches wide, which was smaller than the existing sign. Chairman Rheume then concluded that the upper portion of the sign would be changed for the new logo and graphics. Attorney Roberts agreed.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

### **DECISION OF THE BOARD**

Chairman Rheume said the Board's motion would be in the form of either granting the appeal or denying it. He said the applicant's paperwork talked about the methodology, and he said a *de novo* review could be used and asked what the reasonable conclusion would be as a code official.

Mr. Mulligan said the intent of the settlement agreement was to permit a changeable sign with whatever frequency, but the sign that existed at the time only had text and not graphics. He said that what caused heartburn for the Planning Department was that the upgrade in technology came with the capability of inserting graphics, which he thought was a qualitative change from what was agreed to and approved in 2003. He said the applicant had vested rights in a changeable sign that changed every 3-4 seconds, but it had to be a sign similar in character to the one already there. Introducing graphics went beyond that. He said the section of the Ordinance that dealt with it stated that a change in text or graphics was not an alteration or replacement, but he thought it meant static graphics and not changing graphics. He said changing text or graphics more than once a day was considered an animated sign, which the Ordinance forbade. He believed that the applicant could replace whatever he needed to upgrade the sign as long as the upgrade was in text and not changeable graphics. He agreed that the applicant had constitutional rights, but only for the type of sign that existed in 2003, and that just because new technology allowed new things, he didn't think the applicant had the right to avail himself of that.

Mr. Parrott said he agreed with Mr. Mulligan and was convinced from reading the court order that it was written to apply to the sign as it existed that day. Making a huge change in it was stretching the interpretation of the court order. He said the sign Ordinance was meant to carefully control what the sign looked like, and he felt that the applicant's change would be a qualitative, quantitative, big change well beyond the intent of the court order. He said he felt that the Planning Department's interpretation was responsible and correct.

Mr. Moretti said he agreed with Mr. Mulligan and Mr. Parrott, noting that the technical was a tremendous upgrade from 2003 and that the Board had just addressed a similar application for a changeable sign and had determined that animation was anything that changed more than once a day. He said it would be no issue if the applicant stayed with character-based graphics, but

moving to a graphic picture had to be limited to a once-a-day changeable option, and he felt it was a completely different format than what the court order intended.

Mr. Mulligan asked whether an administrative appeal with conditions could be granted. Chairman Rheume said that if the Board went *de novo*, they would put themselves in the position of the code official, who would either give a permit or not. He further discussed it. Chairman Rheume then said that the intent of the Ordinance concerned what was happening to the upper portion of the sign, for example, if the sign was too large, it would not prevent the applicant from changing the graphics or inserting a new logo, which would be the intent of a change in text or graphics. However, he felt that the Ordinance considered adding new graphics a stretch. He also noted the difference between the intent to repair or to replace a whole assembly, which he felt was taking it beyond the technical aspect of maintaining the sign.

*Mr. Parrott moved to **deny** the appeal and uphold the decision of the Planning Director. Mr. Moretti seconded the motion.*

Mr. Parrott stated that he would incorporate all the previous things he said, and he added that he agreed with Chairman Rheume's comments that a replacement was very different from an upgrade. He said in an upgrade or repair, one got new parts that were very close if not identical and brought the item back to where it was. He felt that the application went way beyond that and thought for those reasons, the administrative appeal failed to pass. He said he endorsed the position taken by the Planning Director that the request was way beyond the intent of the court order and did not satisfy the Zoning Ordinance with respect to signs.

Mr. Moretti said he concurred with Mr. Parrott and would incorporate his earlier comments.

Chairman Rheume said he would support the motion because he had reached the same conclusion as the code official had.

*The motion to deny the appeal **passed** with all in favor, 70.*

21) Case #6-21

Petitioners: Ryan P. & Jennifer L. Smith

Property: 100 Peverly Hill Road

Assessor Plan Map 243, Lot 51

Zoning District: Single Residence B

Description: Construct a front porch and new second story.

Requests: The Variances and/or Special Exceptions necessary to grant the

required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, enlarged or structurally altered except in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a front yard setback of 0'± for the addition and 5'11" ± for the porch where 30' is required for each.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech representing the owners Ryan and Jennifer Smith stated that Mr. Smith had received approval in November for four variances for renovating the home, but at the time,

the building contained two residences and there was no record of it. He said the Board had granted two residences and several setback variances. Attorney Pelech said the Assistant Building Inspector told Mr. Smith that the roof had to be altered or replaced, so the roof was removed, and Mr. Smith wanted to put a second floor with a roof above it to be code compliant. They also wanted to add a porch. Attorney Pelech reviewed the criteria and said they were met.

Chairman Rheume noted the 19'7" deck to the front line and said it was 21 feet in the previous application. Attorney Pelech said it would be moved back to 21 feet.

Chairman Rheume asked what the motivation for the front porch was. Mr. Smith replied that the prior house had a mud room and they wanted to add a Farmer's porch for curb appeal. He said the new porch would conceal two doorways and make it look more like a single-residence home. Chairman Rheume asked whether the same thing could be accomplished with a less wide porch, and Mr. Smith said he could work on it.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

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

Mr. Parrott said the application made a lot of sense and was better than the previous design, and he thought it would result in a much better structure in terms of both appearance and use. Mr. Moretti asked whether there was a zero lot line before, and Chairman Rheume said there was.

*Mr. Johnson moved to **grant** the variances for the petition as presented, and Mr. Parrott seconded the motion.*

*Chairman Rheume asked whether the motion could be **amended** to state that the 21-ft setback to the deck structure would remain. Mr. Johnson and Mr. Parrott agreed.*

Mr. Johnson said he would incorporate his previous comments and that granting the variances would not be contrary to the public interest or to the spirit of the Ordinance because the proposed changes would not significantly alter the character of the neighborhood or threaten the public's health, safety or welfare. It would not change the essential characteristics of the neighborhood because the building was similar in height to others, and many buildings had additions and outbuildings, so it was consistent. Granting the variances would do substantial justice because there was no benefit to the public and the current condition of the property would be detrimental to the owner if the variances were not approved. The upgrade would increase the value of surrounding properties or keep them the same, and the homeowner would have a safer, more structurally sound building. Mr. Johnson said the biggest hardship was the siting of the building up against the front of the property line, as well as the building's appearance and intent of keeping it a single-family residence.

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

Chairman Rheume said he would support the motion but didn't like it when an applicant came before the Board a second time. He felt that the Board was generous the first time, but said he could live with the extenuating circumstances because it would be a better building and more

attractive for the neighborhood. He said the hardship was that the front of the building was right on the property line but the line was set back from the road, so it was a zero foot setback.

*The motion **passed** with all in favor, 7-0.*

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**III. OTHER BUSINESS**

No other business was presented.

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**IV. ADJOURNMENT**

*It was moved, seconded, and **passed** by unanimous vote to adjourn the meeting at 11:30 p.m.*

Respectfully submitted,

Joann Breault  
BOA Recording Secretary

These minutes were approved at the Board of Adjustment meeting on July 19, 2016.