

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE**

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**October 15, 2013**

**MEMBERS PRESENT:** Chairman David Witham, Vice-Chairman Arthur Parrott, Derek Durbin\*, Charles LeMay, Christopher Mulligan, David Rheaume, Alternate Patrick Moretti

\*Arrived after Case #10-1

**EXCUSED:** Susan Chamberlin

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

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**I. APPROVAL OF MINUTES**

A) July 17, 2012

It was moved, seconded and passed by unanimous voice vote to approve the Minutes with one minor correction.

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Chairman Witham noted that under Public Hearings/Old Business, the petitioners for Case 8-3, Marjorie Street had requested to be continued. He wanted to take A and B out of order and deal with the Gross-Santos petition first.

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**II. PUBLIC HEARINGS - OLD BUSINESS**

B) Case # 8-3

Petitioners: Beth L. & Marco A. Gross-Santos

Property: Marjorie Street (number not yet assigned)

Assessor Plan 232, Lot 14 (rev.)

Zoning District: Single Residence B

Description: Construct a single family home.

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 of 9,596 s.f. ± per dwelling unit where 15,000 s.f. per dwelling unit is required.
2. A Variance from Section 10.521 to allow a 26.1'± rear yard setback where 30' is the minimum allowed.

*(This petition was postponed for additional information at the August 20 and September 17, 2013 meetings.)*

The Board voted to **continue** the petition to the November 19, 2013 meeting as requested by the applicant. The applicants have a pending Conditional Use Permit application and are working with the Conservation Commission to determine an appropriate location for the proposed home.

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A) Case # 7-2

Petitioners: 4 Amigos, LLC

Property: 1390 & 1400 Lafayette Road

Assessor Plan 252, Lots 9 & 7

Zoning District: Gateway

Description: Install free-standing signs

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

1. A Variance from Section 10.1243 to allow multiple free-standing signs on a lot where only one free-standing sign per lot is allowed.
2. A Variance from Section 10.1251.20 to allow a free-standing sign to exceed 100 s.f. in area.
3. A Variance from Section 10.1253.10 to allow a sign 22' in height where the maximum allowed height for a free-standing sign in this district is 20'.

*(This petition was postponed at the July 16, August 20, and September 17, 2013 meetings.)*

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

Attorney Richard Uchida of Hinckley, Allen and Snyder stated that he was representing The 4 Amigos LLC. Also present to speak to the application were Mr. Scott Mitchell from The 4 Amigos LLC, Mr. Mark MacBurnie, Executive V.P. of Newburyport Savings Bank, and Mr. Kevin MacLeod, former owner of Yoken's Restaurant.

Attorney Uchida stated to the Board that he had previously been before them for relief for the same site to allow expanded drive-through facilities for what ended up being Newburyport Savings Bank, and he was before the Board again for signage. He stated that the packet included the site plan, and he pointed out the back side of the sign itself that they were seeking relief for. The petition was to refurbish the Yoken's sign that used to be on the property and also to have two small signs underneath it for the Newburyport Savings Bank and the Five Guys Burgers and Fries Restaurant.

Attorney Uchida stated that the sign was too high at 22' high because the Ordinance required 20'. It was also too large. The total sign area had 204 s.f. of space devoted to the Yoken's sign that they were hoping to refurbish, and then another 40 s.f. for the small signs underneath the Yoken's sign. Attorney Uchida stated that the sign was an additional freestanding sign in a location where ordinarily they would not be permitted to have one. They were proposing to place the sign on Lafayette Road, just north of the corner of the Pevery Hill Road and Lafayette Road intersection, and the location of the sign itself would be sited across the corner of the Newburyport Savings Bank building where people could see it and recognize its significance.

Attorney Uchida stated that Rite Aid was on the site adjacent to Lafayette Road, and the bank and restaurant were there. There was also a large parcel of about 2-1/2 acres to the rear of the site that was not yet developed and was under the control of The 4 Amigos. The total site was five acres with extraordinary frontage on both roads, 550' on Peverly Hill Road and 550' on Lafayette Road. It was a very deep site when compared to both roads. The site itself had multiple limited accesses and one full access, and it served not only the applicant's site but also the Comfort Inn site to the north of Rite Aid. Without the proposed sign, the nearest freestanding sign for the bank and Five Guys was all the way to the end of the site on Peverly Hill Road. It was important to have the sign for the bank and restaurant because it would provide assistance for motorists going northbound or southbound on Lafayette Road.

Attorney Uchida stated that the sign had two components. One component was the Yoken's sign, an iconic landmark for many folks over many years that was historically and culturally significant. It comprised 204 s.f. of the size of the sign they were seeking approval for. The bank and The 4 Amigos felt strongly enough about the sign and its significance at the site that they were willing to invest a substantial amount of money to restore the sign. The applicant would not be seeking a variance for a sign that size if it were created from whole cloth, but they wanted to restore the original sign that was sitting in a warehouse waiting to be reconditioned. The size would not be altered or made smaller or larger, but would be restored in terms of its artwork and significance.

The second component of the sign consisted of the two small signs underneath the Yoken's sign for Five Guys and the bank. In an ideal world, they would separate the big Yoken's sign from a different sign for the restaurant and the bank, but that would be a fourth sign, and they were encouraged to not put a sign on the corner of Peverly Hill Road and Lafayette Road in order to reduce the number of freestanding signs. Attorney Uchida stated that it had taken some time to negotiate with the tenants and owners about the reconditioning of the Yoken's sign, and he appreciated the Board's patience in continuing the petition for a few months.

The sign was important for northbound traffic because the traffic had to turn left onto Peverly Hill Road to get into the site, and getting across Lafayette Road was awkward. They felt that the sign would help direct traffic to turn left onto Peverly Hill Road and ultimately into the right turn in/right turn out driveway. He also hoped that the sign at the end of Peverly Hill Road would direct traffic coming from Route 95 to get onto the site before they got to Lafayette Road. Southbound traffic would see the sign from a distance and could get onto the site either before Rite Aid or at the right turn in front of Rite Aid.

In terms of justification for the sign, Attorney Uchida stated that the parcel had two very significant frontages. In many municipalities, the second significant frontage would give rise to an increased number of signs as well as increased sign sizes. It was significant that the applicant's parcel was not like the typical strip mall parcel that had long frontage along the main road but very little or no frontage on another road. The site was as deep as it was wide. Not only did it access frontage that gave rise to bigger and more signs, but it was also a unique feature of the parcel.

The only reason they were asking for a variance for the size of the Yoken's sign was because they were seeking to restore what was previously there. They had significant tenants deserving of signage. In terms of the height and size of the Yoken's sign, the property was unique because there was no other property in Portsmouth that could boast that Yoken's Restaurant had been there. Hopefully, the Board would consider that they were restoring a sign rather than building a

new sign. Most people would love to see the sign restored, and it would not hurt property values. There would be no harm to the public in restoring the sign and putting it in that particular location. They thought it would be a fun art-like sign and would be in keeping with Portsmouth historically. It met the spirit for the Ordinance in terms of providing for reasonable signage, given the size of the parcel, the nature of the tenancies, and the historic and cultural significance of the site. If the Ordinance was strictly applied, the Yoken's sign would not go on the site, and they were hoping that the Board would grant the relief to allow the freestanding sign with Yoken's, the bank and Five Guys.

Mr. Rheume asked the applicant if the intent was to restore the sign so that it was also illuminated because, at one time, it had the capability of lighting up. Attorney Uchida stated that he would ask Mr. Scott Mitchell from The 4 Amigos to address the question. Mr. Mitchell stated that they intended to keep the sign exactly as it was when he was a kid and his parents took him to Yoken's. He was the one who initiated getting the sign back, and someone from California had called him when the property was under agreement and had tried to buy the sign from him for substantial money, but he had convinced the bank and his other partners to restore the sign with him. He felt that it was an icon of Portsmouth and they wanted it restored exactly the way it used to be. He mentioned that the representative from Portsmouth Sign Company was in the audience and could answer questions because his father had been instrumental in designing the sign.

Mr. Rheume stated that the trees referenced in the plan would clearly block some of the sight lines, and he asked Attorney Uchida to address the plan for the trees. Attorney Uchida stated that there were two honey locusts that would sit right in front of the proposed sign which they proposed to remove. They would work with the Planning Department on that as the landscaping was part of the plan that was approved by the Planning Board.

Mr. Rheume asked if the sight line was sufficient for people to be able to see the sign from the northbound and southbound angles of traffic, seeing that they were adding the business sign underneath it. If their intent was to get the attention of customers who would have to turn left on Peverly Hill Road to access the site, he wondered if the customers would see the sign in time to turn onto Peverly Hill Road. Attorney Uchida stated that the angle into the sign was better for traffic going northbound than southbound. The other thing about the honey locusts was that they could be cut up a bit higher as they got bigger so that the signs for the bank and Five Guys could be seen underneath them. There would be some infringement on the sign, especially from folks coming southbound from Portsmouth on Lafayette Road toward the site, but they thought that it was a reasonable compromise in terms of the landscaping that the City required in that area.

Mr. Rheume stated that, at one point, the proposal was to put a sign right on the corner of Peverly Hill Road and Lafayette Road. The original proposal had been submitted to the Board, giving the Board the option of approving something that had nothing that would change the characterization of the original old sign but would leave it completely intact. Since that approach had been changed a bit, he asked Attorney Uchida if he had considered moving the sign closer to the other Rite Aid sign, perhaps on the traffic island or a little past it for the lot layout. Attorney Uchida stated that the spot seemed to be the optimal location for both northbound and southbound traffic. If they went for a fourth sign on that corner, they might have moved it a little bit further to the north as Mr. Rheume had suggested. Given everything that was happening on that corner and the improvements that had been made, both as far as the State and the City were concerned, they felt discouraged from putting a sign on that corner and pulled that part out.

Mr. Rheume noted that there were presently two blank locations on the Rite Aid sign and he asked if it was to allow businesses to be developed in the back lot. Attorney Uchida agreed and stated that there were a few panels on the Rite Aid sign and a few on the corner of the lot near Peverly Hill Road, and both signs would accommodate the future occupant of the rear parcel.

Addressing Ms. Walker, the Transportation Planner for the City, Mr. Rheume noted that the 22' sign appeared high, and the Ordinance had mentioned that a height exemption would be required, but it did not seem to be on the application. Ms. Walker asked Mr. Rheume if he meant that the applicant needed an additional variance. Mr. Rheume stated that he did and cited Section 10.1253.10, noting that they were in Sign District 5 where the maximum height was 20' and the Yoken's sign was 22' high. Attorney Uchida suggested that he could pull the height down two'.

Ms. Walker stated that the Board could make the adjustment and would need the additional variance for clarity. She stated that, because it was a shopping center sign, Section 10.1243 should be added to the variance requirements because it referenced freestanding signs on a shopping center lot as opposed to a non-shopping center lot. Attorney Uchida stated that, technically under the shopping center provision, the applicant was allowed two freestanding signs, so the sign in question would be the so-called 'extra' sign.

Chairman Witham noted that the applicant had stated that he needed to work with the Planning Department on the landscaping, but he actually needed to work with the Planning Board because that body had approved the site plan with the trees and worked hard on the landscaping plan. If there were a positive motion he would strongly recommend a stipulation that the applicant work with the Planning Board as he didn't want to put the Board of Adjustment in the position of allowing the removal of trees which might be counter to a previous decision of the Planning Board. He thought they could approve the sign location as long as they had the stipulation that it would go back to the Planning Board to get them to amend their prior approval. Attorney Uchida agreed.

Chairman Witham added that his position was similar to that of Mr. Rheume regarding the removal of the trees, and he was 100% on board for preserving the Yoken's sign. He had not grown up in Portsmouth, but his childhood friends used to tell him that their parents went to Yoken's every Sunday, and he had finally seen the Yoken's sign one day and it had all clicked. He stated that the Board often got wonderful site plans with trees and greenery and a sign location, but five years later the grown trees were mysteriously cut down during the night. He mentioned an example of it at CVS on Islington Street. His concern was that the applicant might have a beautiful site plan, but he wondered if the sign would really be visible. The applicant had mentioned pruning the trees, but they would have to prune up 20'. The trees would take a long time to grow that height, and he was not convinced that the applicant would get a sign that could be seen in five years by removing two trees. He asked what would happen after that. He thought the applicant could state that they would remove two trees and let the others grow. Attorney Uchida replied that perhaps they would have more latitude when they discussed it with the Planning Board. The pruning up that he had referred to was for the two sign boards under the Yoken's sign. Honey locusts were significant trees, so they would see if the Planning Board could give them some latitude on the landscaping.

Mr. Rheume asked if the sign setback was indeed set 10' back from the road. Attorney Uchida told him that they were not asking for any relief from the setback.

Mr. MacBurnie, the Executive V.P. of Newburyport Savings Bank, thanked the Board for hearing their petition and giving it consideration. He stated that they were one of three tenants. Newburyport Savings Bank currently had six banking locations in the greater Newburyport area and had decided to expand to the Portsmouth area. Their commitment to Portsmouth was quite significant because they had opened a location on State Street in June and would soon open their second location on Lafayette Road. In February 2012, The 4 Amigos developers contacted him and said they had just the site for his bank. When they told him the street address, he hadn't known where it was, but as soon as they mentioned the old Yoken's restaurant, he immediately knew because he had childhood memories of it. Mr. MacBurnie had told the developers that it was critical to their lease as well as a caveat that they save and restore the Yoken's sign, so they had negotiated with that in mind. It would be a \$40,000 investment to refurbish the sign and the bank had been willing to share the tab with the development team. They had also started an information community support of the sign by creating a Facebook page, and so far they had 373 likes and no dislikes. Plus, they had a petition to save the sign with 143 signatures. The sign was iconic and also a landmark, and they wanted to save it as a legacy to not only Portsmouth but also to the MacLeod family.

Mr. MacLeod introduced himself as the former owner of Yoken's Restaurant and said that he would give a little history of the sign and Yoken's. Harry Yoken had come to Portsmouth in 1945 and bought a parcel of land in the middle of nowhere. He opened the restaurant in 1947, and that was when the sign was created. Before signing the paperwork to sell Yoken's they had several meetings with the Planning Board regarding future plans for the property, and there were sentimental ideas of what to do with the sign. Mr. MacLeod said he had received a \$10,000 offer from someone in Massachusetts, but he put it on hold because the City had wanted the sign. Since those days, the sentiments about the sign had waned a little, but he felt that it was in the City's interest to keep that sign in place. The sign would be refurbished and called Yoken's Corner, and that would be just the sign. If they put the sign back, the City would give them credit for sign usage as far as the square footage for signage on the site because they would call it a piece of art, so it would be exempt from the signage rules.

Mr. Rheume asked Mr. MacLeod whether he felt that, based on his history with the sign and his opinions, the applicant's proposal to add their signage underneath the original Yoken's sign was congruous with some of the discussions he had about the possible re-uses of the sign. Mr. MacLeod stated that they were originally going to put up the Yoken's sign by itself, but he had told Mr. Mitchell from The 4 Amigos that it could confuse people who might think that Yoken's Restaurant was back. However, he also felt it would be confusing if they did not put panels underneath the sign. Mr. Mitchell from The 4 Amigos clarified that when they removed the Yoken's sign, it had a Triple A sign directly below it and also a 5-line reader board, so they would be putting back less signage than what previously existed.

Mr. Rheume asked if the sign would be animated because he remembered that the whale would move and the spout would come up. Mr. MacLeod stated that he was a big proponent of it and wanted to restore it to its exact condition by putting back the neon and relay mechanism. There was no other sign like it for 100 miles, except for the Weirs Beach sign, so it had tremendous value to Portsmouth.

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

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

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

**DECISION OF THE BOARD**

Chairman Witham told the Board that they had a request to restore the Yoken's sign and to add a small sign underneath it. If a positive motion were reached, there should be a stipulation that the petition would return to the Planning Board with regard to the tree removal and any landscaping plan revision.

Mr. Parrott noted that the Yoken's sign said 'Good Things to Eat', but there was nothing on the property that was named Yoken's, so he questioned whether or not it was a misleading sign. In addition, one of the important aspects of Yoken's Restaurant when it was open had been the conference center used by politicians and the Rotary Club, which had been a premier feature of Yoken's that provided a tremendous service. It was no longer there but was associated with the name, and it wasn't coming back. There were new businesses that had nothing to do with what Yoken's used to be. With respect to sign ordinances, he thought the basic rule of one freestanding sign per lot was well founded and directed at keeping sign clutter to a minimum. He lived less than a mile from the site and drove by it frequently, so he knew what it used to look like and what it presently looked like. He thought the two new signs were tasteful and presented a nice look, and he thought that was sufficient. The modern trend in signs in Portsmouth was to try and cut down clutter so as not to see one sign after another' otherwise, the request would be to make the next sign bigger so the applicant would not be blocked out by the previous sign. He felt that it was a real concern going southbound with one sign shadowing the other in terms of visibility. In terms of needing a large freestanding sign on the edge of the road, the neighbor Market Basket had no freestanding signs on the road and it had been prospering for years, with nice, maintained shrubbery. For those reasons, he might have a different viewpoint from others.

Mr. Rheume knew that some of the signage ordinances in place were important, but it was a unique circumstance where the Board had a chance to retain a piece of Portsmouth history, albeit a 'kitschier' piece than brick historic buildings. As a visitor to Portsmouth many years ago and a resident for many years, he felt that the Yoken's sign was part of Portsmouth's fabric, and the opportunity to restore it outweighed some of the concerns about visual clutter. He thought that Mr. Parrott had a good point, but they were talking about a unique opportunity to preserve something special in Portsmouth, and they were the only Board that could do it, as opposed to the Historic District Commission who did not deal with that type of issue. Therefore, he would be in favor of the motion to grant the petitioner's request.

Mr. LeMay respected that many people felt the sign was an icon, but he was on the fence because 'one man's icon was another man's eyesore'. His biggest concern was that the variance went with the property, and how would the Board ensure that in five years, people wouldn't get a change of heart, or a change in ownership, and want to put in another big sign. He wanted a stipulation that, due to the nature of what the sign, it had to remain that way.

Chairman Witham stated that he fell into the category of the icon camp and thought it was worth preserving. A past Planning Director had been willing to regard the sign as art, and he tended to view it that way as well. He did not feel that the Yoken's sign was being put up to direct people to

a certain business but, rather, was there to pay respect to its recent past history, so he was supportive of restoring it. He said that he appreciated the extra effort and expense that the new owners and tenants were taking on to restore it. He would support a motion to grant, but his only concern was that the Planning Board be fully on board with it and that they revise the landscaping plan to make it work with their goals so that the applicant could still have the sign be visible. He stated that if there were no further comments, he would entertain a motion.

Mr. MacBurnie wanted to address one of the Board's concerns relative to the loss of the Yoken's conference/function room. His bank had a 300 s.f. community room that was available to the public after hours and on weekends, and he wanted to make the Board aware that it was a further sign of the bank's commitment to the community.

Chairman Witham asked for a motion.

*Mr. Rheume made a motion to **grant** the petition as presented and advertised with stipulations that 1) they also grant a variance from Section 10.1253.10 to allow a 22' high sign where 20' was the maximum allowed, and 2) that the exception be solely for the installation of the iconic sign with additional small business placards beneath the iconic sign.*

Chairman Witham asked about the Planning Board issue. Mr. Rheume stated that he would also stipulate that the applicant return to the Planning Board to resolve the issues of trees and green space on the front side of the property.

Chairman Witham stated that he thought it should be clear that the Board say that the Planning Board had final approval over any amendments to the site plan. Mr. Rheume agreed and thanked him for the wording help. Chairman Witham did not feel that he was in a position to grant an exception for the height because it would be granting a height variance that was not advertised. Ms. Walker stated that the way legal notices were currently presented, they said "that include the following", so she felt it was up to the Board, but if they needed to amend the request, they would have the ability to do so because the legal notice would allow it.

*Mr. Mulligan seconded the motion..*

Mr. Rheume stated that the Board had some basic discussion on the positive nature of the proposal. He originally had some concerns about the signage underneath the Yoken's sign and whether it would affect the outcome, but the discussion with the previous owner had made him realize that there was a historical precedent for having the additional signage and he felt better about that aspect of the project, so he accepted the proposal. The variance would not be contrary to the public interest because there was a unique public interest in a sign that could be viewed as an icon for Portsmouth and had a long history of being at the same location and serving as a waymark for many people. In the past, he had often given directions and identified the Yoken's sign as a waypoint, so he felt that it was indeed a waymark. The spirit of the Ordinance would be observed by allowing one additional sign on the property. The Board wanted to minimize the sign, but the vast majority of the sign was mainly for iconic purposes of retaining something that was old. The new signage would be much smaller and would not present as much of an impediment to the visual sight line or the amount of visual clutter that people would be looking at in trying to determine where they were. The height change was 2' instead of 20', so it would be about a 10% increase, driven in part that it was a large sign that was being restored, so the top of



the sign could extend a few feet with just the added features of the spout coming out and the whale's tail. He thought that the spirit was captured.

Mr. Rheume continued that substantial justice would be done because it would allow the property owners to restore something for the community. The applicant had shown an interest in being a good partner with the community in what they perceived was something that the community would like to have, so it would represent a benefit to the community. The value of surrounding properties would not be diminished. It was generally a commercial area with an allowed use within the area to have signage. It was one extra sign on a large lot, so he did not see the property values being diminished. Owing to the special conditions of the property that distinguished it from other properties, there was no fair and substantial relationship between the purposes of the Ordinance provisions and their application to the property. They had a public interest in preserving the sign, and the proposed use was a reasonable one, all of which was needed for the variances. He believed there was a hardship and the motion should be granted with the stipulations as discussed.

Mr. Mulligan concurred with Mr. Rheume. Granting the variance request would be within the public interest because it was a commercial zone, and granting the variances to add an additional sign would not affect or alter the essential characteristics of the neighborhood. An argument had been made that paying homage to an iconic and culturally-significant artifact would actually enhance the characteristics of the neighborhood. The spirit of the Ordinance and the public interest tests were met. Granting the variance would result in substantial justice in weighing the loss to the applicant against any gain to the public by preventing the variance. He thought there was a gain to the public in preserving the sign because of its cultural and iconic significance, and they had not heard any opposition from the public. There would be no diminution in the values of surrounding properties. There seemed to be considerable community support for the preservation of the sign, which was located within a commercial zone. There was an issue of landscaping and some trees that could potentially be lost, but the Planning Board could deal with that. It was not old growth forest. It was landscaping along a major commercial thoroughfare, and the loss of the two trees was perhaps lamentable but should not tip the scales in that case. As for unnecessary hardship, there were special conditions with the property that distinguished it from others in the area. As Attorney Uchida had stated, it was a corner lot with significant frontage on both Lafayette Road and Peverly Hill Road, and it was designed with a number of different access points that required appropriate signage so that motorists could determine access. Therefore, to the extent that the sign ordinance was in place to prevent visual clutter, the Board should not be too concerned with it. What they had seen thus far was a nice development with tasteful signage that had been designed very well, and he thought it would fit right in with it. For those reasons, he agreed that they should grant the variance with the stipulations.

*The motion to approve the petition as presented and advertised **passed** with a vote of 5 to 1 (Mr. Parrott opposed), with the following stipulations:*

- *This approval applies to the sign and its location only. The applicant will need to apply to the Planning Board for a site plan amendment for the removal of trees and any other alterations to the approved site plan.*
- *The variances are approved for the specific sign as presented in this application. This sign incorporates the restored "Yokens" sign formerly installed on the site, plus a lower panel, represented on the submitted plan as 60" high x 96" wide. Any modifications to the*

*design and content, or replacement of all or portions of the sign, shall require a new variance.*

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### III. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 10-1

Petitioners: Michael & Denise Todd

Property: 262 - 264 South Street

Assessor Plan 111, Lot 5

Zoning district: Single Residence B

Description: Replace rear two-story stairs/landing with 4'± x 19'± two-story deck. Add 2'± x 8.5'± front dormer.

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

1. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a right side yard setback for a rear, 2-story deck and stairs of 3.5'± where 10' is the minimum required.
3. A Variance from Section 10.521 to allow building coverage of 26.3%± where 26.3% exists and 20% is the maximum allowed.

### SPEAKING IN FAVOR OF THE PETITION

Mr. Brendan McNamara was present on behalf of the property owners and stated that the house was a circa-1900 two-family dwelling that was in poor condition both inside and out. It was being purchased by the owners of 254 South Street, who were the neighbors to the immediate left. The intended approach was to fully remodel the interior and exterior aspects of the structure and reorganize the layout. The general appearance would reflect its original era and align to that of 254 South Street. The proposed front square bay window would enhance the street appearance. The restoration would involve new windows, siding, and exterior trim that would require HDC approval. Since the allowable lot coverage had already been exceeded, the intention was to remove the existing rear two-story stairway and reorganize the coverage to accommodate two rear two-story decks and the front bay window, which would make the structure more visually appealing and offer greater amenity to the occupants. The requirement for a second means of egress for the second-floor unit would be alleviated by the installation of a sprinkler system. There would also be other landscape work, but that was yet to be documented.

Mr. McNamara referred to various exhibits that showed the existing condition, the proposed changes assuring the redistribution after the stairs were demolished, and the bay window in the front. He showed the proposed floor plans, detailing each and pointing out features. He also pointed out the front yard setback analysis that came up to the surrounding properties with an average of a 15-1/2' setback. On the proposed site plan, the setback to the new bay window was plus or minus 18', so it was still greater.

Mr. McNamara stated that the public interest criteria would be met because the existing structure would be improved in keeping with the characteristics of the neighborhood. The spirit of the

Ordinance would be met because all metrics and nonconformities were improved or remained the same. Substantial justice would be done because the moderate redevelopment proposed was for an older building and would enhance its appeal and protect its future. The value of surrounding properties would not be diminished because the existing building was in very poor condition and the remodeled building would enhance the value of the surrounding dwellings. The literal enforcement of the Ordinance would result in unnecessary hardship because the nonconformity occurred through the overlay of the Ordinance to the fully developed structure. The proposal alleviated the nonconforming metrics while preserving the integrity of the original structure, and the property development would enhance the historical structure without increasing an existing nonconformity.

Mr. Rheume noted that there was an inconsistency in the plans. On the proposed site plan that showed the overall dimensions of the building, the first and second floor porches were large and would remain, but the floor plans indicated a small remaining porch on the first floor and no porch on the second floor. Mr. McNamara told him that there had been adjustments to the floor plan since the original proposal. Both porches were currently 3-season porches and were clothed with aluminum and so on, so they appeared as enclosed porches. A portion of the first floor would remain as a covered porch. The others were being included in the main part of the house, not as three-season porches but as full-season porches.

Mr. Rheume assumed that the floor plans were more representative of what would actually be done. Mr. McNamara stated that another anomaly was in the variance application and indicated that the deck was 19' x 4'. It was actually 17' because there was a portion for the stairs that consisted of the other 2'.

Mr. Moretti stated that he was concerned about the stairway and asked what the actual measurement was off the lot line from the bottom tread. Mr. McNamara stated that the bottom tread would be under 2', about 1'10". Mr. Moretti said that if a neighbor were to put a fence on the lot line, there would not be a lot of room to get around the stairway. Mr. McNamara agreed that it would be tight. The stairs were a secondary access but were not necessary. Mr. Moretti asked if the stairway could be turned to the backyard. Mr. McNamara replied that if they turned to the backyard, they would have a land issue and would increase the lot coverage. If they turned it the other way, they would only have a 2' setback on that side.

Chairman Witham asked why it would add lot coverage. Mr. McNamara stated that they couldn't have it contained and it was a continuation of the rear deck, so if they turned it the other way, it would run directly to the rear. Chairman Witham suggested that it just be taken off completely and put off the rear deck heading toward the backyard. Mr. McNamara replied that it was for aesthetic reasons. The stairs would become wider to rely on the porch posts, and at that point, they would also be going to a greater step-down from the deck to the ground, so the stairway would become longer and would need more treads. Therefore, the drawing showed the stairway itself as close to the ground as possible because it was the highest point of the lot.

Chairman Witham stated that his only real concern was that the Board would approve it, and then the neighbor could put up a fence. Consequently, the Board would have approved a plan of using the stairs as a second means of egress and being less than 2' from walking into the fence. They also needed to think about fire safety in case firemen had to get around the building. Therefore, it didn't seem insurmountable to flip the stairway a little bit. Mr. McNamara stated that they were a

bit confined by trying to stay within the metrics of the current lot coverage. It would be a nominal increase, but it would be beyond the 27' or so.

Mr. Parrott asked Mr. McNamara if he had elevations to show the Board because he was having a hard time envisioning it from the written and verbal descriptions, especially as to how the stairway would be oriented. Chairman Witham stated that he had no real problem with the design. There was just an obvious issue with the stairs and it was the appropriate time to discuss it. Mr. McNamara said that the idea was not to exceed the existing lot coverage. The stairs were a secondary stairway but were not required because of the sprinkling system, so they were not considered a necessary secondary means of egress but were simply functional. Mr. Rheaume asked if the stairs went off the other end. Mr. McNamara replied that the grade change was substantially higher and went from 3.3' to 5.6' on the other side. They had kept the new deck outside of the left side 10' setback, so there was no intrusion setback on that side and they could run it directly to the rear.

Mr. Parrott stated that the feature still bothered him because if the small area filled with snow and an elderly person was trying to get down the stairs, the person would be out of luck if there was a fence or some shrubbery there. He thought it was a poor design that could be made much better. Mr. McNamara said that he would be happy to stipulate that the stairway go the other way, as long as it was understood that it would be a slight related increase in lot coverage. Mr. Parrott stated that he didn't see a problem with that.

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

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

### **DECISION OF THE BOARD**

Chairman Witham stated that the Board had a request for a side setback and lot coverage, and he would entertain a motion. Ms. Walker stated that if they considered the building lot coverage, they would need a percentage increase figure so that the Board could consider it. Chairman Witham asked Mr. McNamara if he was thinking of two or three treads, and Mr. McNamara told him that it was about 4 square feet. Chairman Witham concluded that they were not even at half a percent and could round up to 27% to meet the requirements and make it work.

*Mr. Moretti made a motion to **approve** the petition as advertised and presented. Mr. Parrott seconded the motion.*

Mr. Moretti stated that he did not think it was contrary to the public interest because of the stipulation that the lot coverage be up to 27%. The spirit of the Ordinance would be observed by improving the property and bringing it up to code and making improvements to the neighborhood. Substantial justice would be done because it was a large improvement to the property, which was run down and needed help, and it would bring up the value of the property as well as the value of neighboring properties, which would not be diminished. The back porches were dilapidated, and the new porches would make the neighbors happier. The hardship was that the property was very old and beat up and needed to be taken care of.

Mr. Parrott stated that he would concur if the maker of the motion agreed to the additional stipulation to incorporate three drawings as presented, with the change of the stairway orientation to get it away from crowding the side yard. He had nothing else to add.

There were no further comments, so Chairman Witham called for a vote. The motion was to grant with two stipulations, 1) that the lot coverage would not exceed 27% and 2) that the elevations as presented at the meeting be part of the approval and include the shifting of the stairway orientation 90 degrees out toward the backyard.

*The motion to grant the petition as advertised and presented passed with a unanimous vote of 6-0 with the following stipulations.*

- *The approved proposal includes the elevations presented at the meeting which will be revised to reflect a shift of the stair orientation toward the rear yard. The applicant will submit new plans indicating the revised orientation of the stairs.*
- *After allowing for the change in stair orientation, the lot coverage will not exceed 27%.*

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 Mr. Durbin assumed his seat.  
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- 2) Case #10-2  
 Petitioner: DSQ Holding LLC  
 Property: 1600 Woodbury Avenue  
 Assessor Plan: 238, Lot 16  
 Zoning District: General Business  
 Description: Remove existing 38± s.f. free-standing sign and install a 66± s.f. free-standing sign closer to the roadway.  
 Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.1243 to allow a 3rd free-standing sign on a lot where only one free-standing sign per lot is permitted.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech was present on behalf of the owner. He passed out new material and stated that the way the petition had been advertised was not correct, but Section 10.1243 stating that four freestanding signs were allowed on the lot was correct. Durgin Square was a shopping center and was allowed one freestanding sign per entry. It had four driveways, two of which were off Durgin Lane, one that was off Arthur Brady Drive, and one that was off Woodbury Avenue. He did not know how it got advertised as such, but there were four signs allowed on the site because it was a shopping center, and there were currently three signs.

Attorney Pelech passed out photos, and two of the photos showed the three existing freestanding signs. He showed the location of each sign. The smaller sign was located on Durgin Lane behind Federal Savings Bank on one of the driveways. The second and large one was located in the driveway off Woodbury Avenue across the street from Ruby Tuesday. The third sign was the white rectangular sign that they were proposing to relocate, and it was a freestanding sign

permitted under the old Ordinance because it was located in the middle of the parking lot and advertised a mattress shop that used to be in that location. They proposed replacing the sign with a 12' high sign that would be located to the left of the telephone pole. He mentioned that the Board had a copy of the tax map in their packet.

Chairman Witham wanted to clarify for the Board that the variance they were dealing with was to allow a freestanding sign that was not on a primary driveway, and he asked Attorney Pelech if he agreed. Attorney Pelech agreed and stated that it was what he had applied for, a freestanding sign that was not at a driveway. Ms. Walker noted that there was a little explanation in the Staff Report.

Attorney Pelech stated that there was a colored tax map in the Board's packet and he had placed three colored lines on it, two green ones and a red one. The green line adjacent to Durgin Lane was an existing freestanding sign, as shown in the photo. The large green line on Woodbury Avenue was the existing freestanding line. The small green dot adjacent to Woodbury Avenue was the sign being removed, and the red line was the proposed new sign adjacent to the Animal Medical Center building.

They did not have a sign or propose to have a sign at the Arthur Brady entrance. They did not have a freestanding sign and did not propose to have a sign at one of the Durgin Lane entrances. They currently had three freestanding signs and wished to continue having three freestanding signs. The white freestanding sign in front of the previous mattress shop was too high and ugly and not in keeping with current signage styles. The sign that they proposed would be in the same style as the two existing signs. The color schematic of that sign indicated that it was the same size, color, and configuration, and was much more appropriate and lower than the other sign and more visible to traffic along Woodbury Avenue.

He reminded the Board that the Durgin Square Shopping Center was unique. It had very little frontage and visibility on Woodbury Avenue, but the structure did. It would not substantially alter the characteristics of the neighborhood nor threaten public health, safety or welfare. It met those two tests and therefore was not contrary to the public interest or the spirit of the Ordinance. It would not diminish the value of surrounding properties. He noted that the owner of Ruby Tuesday's was present and he could not see how taking away the ugly sign that blocked a portion of Ruby Tuesday and replacing it with a much lower sign would diminish his property's value. Attorney Pelech stated that they might be enhanced. Substantial justice would be done by granting a variance. That test was a balancing test whereby the hardship upon the applicant was weighed against some perceived benefit to the general public in denying the variance. He didn't see any benefit to the general public in denying the variance. He thought that allowing the sign to be moved closer to Woodbury Avenue, which was not allowed when the old freestanding sign was put in place because they had a 44' setback then, would help the public in identifying the businesses that were located in that structure. It was much more attractive and in keeping with modern signage, it was less obtrusive and more appropriately designed, and it was in keeping with the common scheme of the shopping center

Attorney Pelech said that if the Board considered the five criteria and the reasons he had just cited, it was not as if he were asking for another sign. There was a third existing sign, and they just wanted to put something more appropriate and public-friendly in its place. The fact that the shopping center sat back from Woodbury Avenue created some unique characteristics that

differentiated the property from others similarly situated. Therefore, he did not believe that there was a fair and substantial relationship between the intent of the Ordinance as it related to that particular piece of property. He stated that when the Ordinance was amended in 2010, it allowed shopping centers to have freestanding signs of less than 100 s.f. at each driveway, in addition to the primary freestanding sign. There was no driveway from Woodbury Avenue to the lot, although there was an entryway adjacent to the lot. It was not contrary to what the Ordinance intended, and he did not believe that a strict interpretation of the Ordinance would have any fair and substantial relationship to the situation. He hoped that the Board would look favorably upon the request and grant the variance to allow the sign.

Chairman Witham mentioned the photo that Attorney Pelech had given them showing the excavator, and he asked if the sign would be behind it. Attorney Pelech said that the photo showed the proposed larger sign behind the arm of the backhoe to the right of the telephone pole. The sign was about 11' high, and he believed that the existing white sign was 20' high.

Mr. LeMay wanted it clarified whether or not Ruby Tuesday was beyond the tree. Ms. Walker referred him to the aerial map and stated that Ruby Tuesday could be seen to the right side of the driveway as well as the existing white square signage.

Mr. Rheume asked Attorney Pelech if he had stated that the intent as indicated on the site plan was to remove the existing sign. Attorney Pelech agreed that it would be the case if the variance were granted. The sign would be removed and replaced with the proposed sign. He showed a photo that was taken from Woodbury Avenue in front of Wendy's.

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

Attorney Doug MacDonald told the Board he was representing Mr. Richard Fusegni, owner of the land on which Ruby Tuesday was located, who was also present. He wanted it noted that he had provided the Board with a letter from Ruby Tuesday in opposition to the project, and he had also been asked to deliver a letter from the Animal Medical Center and have it read into the record on their behalf, and that letter was also in opposition to the petition.

Attorney MacDonald stated that it seemed that the actual provision of the Ordinance needed to be visited because the language of the Ordinance was paraphrased and missed an important aspect of it. The provision of Section 10.1243 indicated that one freestanding sign shall be permitted per lot except at a shopping center, which may have one freestanding sign at the primary driveway and one freestanding sign at each additional driveway, but (and that was the key part) not on the same street. Therefore, if they looked at the site and the existing signage, there was a sign at Durgin Lane, a similar sign on Woodbury Avenue between Rudy Tuesday and the proposed new businesses, and also a sign for The Vitamin Shoppe and the existing sign at the now defunct mattress shop that they proposed to move. When Durgin Square had first developed that area, Mr. Fusegni's lot was the last lot to be converted to a commercial lot. It had three residences on it and was wooded. The rationale for the sign at the mattress store was that it was due to the hardship created by the interceding residential-type lot with trees, so they had to get the sign higher up. It was already a subject of an approved variance, which was the sign that was proposed to be changed to another sign. They were going from a sign on a pole that was perhaps too high and thinking perhaps they could lower it, but the new sign was 8' wide and 12' high. Thinking in terms of a normal privacy fence panel, it was significant because they were typically 6' high and

6' wide. Therefore, it was a substantially smaller wall that they proposed putting several hundred feet down the road from the existing sign at the main Woodbury Avenue entrance. He had driven by and seen that the building itself was being built up right by the entrance.

Attorney MacDonald stated that the sign would further clutter the area and would repeat a sign a few hundred feet up the road as well as block sight lines for Ruby Tuesday. The Animal Medical Center was also very concerned. It was not an attractive sign from the perspective of what it blocked out. It was not at an entry point for the shopping center. The shopping center sign on Woodbury Avenue currently had one vacancy on it which could be added to, and they could move the different store names around. The one at Durgin Square had two vacancies on it, so the applicant had room on their existing signs to do different things. Additionally, they were going from a sign that had been permitted for the mattress shop to a large shopping center sign with multiple tenants on it. Therefore, they were not simply asking for a minor state of relief but were asking for a 'whole world of relief' by proposing that particular sign.

The variance would be contrary to the public interest because the sign Ordinance stated that the City did not want hazardous or distracting displays. The sign was cluttering, distracting, and not at the point of entry but was a few hundred feet from another sign for the same shopping center. Therefore, it was contrary because it was offensive to have a sign every few hundred yards for the same shopping center. The spirit of the Ordinance would not be observed for same reasons, more so with respect to clutter and more signage. It would hurt the abutters, so substantial justice would not be done. With respect to unnecessary hardship, it didn't seem like there was any. There could be signage on the building itself, there were other signs located nearby, and the applicant had an existing freestanding sign that they could work with. There was no real hardship but just a request for a bigger and better sign. Attorney MacDonald respectfully requested that the Board take a real hard look at the criteria and deny the application.

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

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

### **DECISION OF THE BOARD**

Chairman Witham wanted it noted that the Board had received two letters in opposition, one from Ruby Tuesday in regards to a potential loss of earnings due to the loss of sight lines, and a letter from the Animal Medical Center citing their concern that the large trees that provided shade to the exterior dog area would be removed to erect the sign. Attorney Pelech asked if the Animal Medical Center had mentioned something about cutting down a tree, and Chairman Witham replied yes. Attorney Pelech stated that they were not proposing to cut down any trees.

Chairman Witham stated that he felt Attorney MacDonald's strongest point was that the spirit of the Ordinance allowed one freestanding sign along each street. He felt that it was a convincing argument that the second freestanding sign was 200' away from another one on the same street. Another concern was that there was no driveway where the sign was located, and usually that type of sign directed someone to a driveway. There was a sign a bit further away, where the larger sign was, but there was not one at a driveway. Shopping centers were built and set back far away from the road with the parking lot in front, and they needed that type of freestanding signage to let



people know what was back there. The building was along the street and it seemed like the previous building signage would function well, considering its location on Woodbury Avenue.

Mr. Parrott stated that the more he drove by the site and thought about it, the more the requirement that shopping center signs be at driveways made sense. Shopping centers by their very nature had a lot of tenants and businesses, and people wanted to know what the businesses were as they drove into the parking lot. With a combination of signs out on the road, it made sense to restrict signs to driveways for going in and out because if they were planted all between the roads or driveways, it would just add to the clutter. He realized that the applicant was not creating a new sign, but by lining the signs one after the other, they would shadow one another in getting the attention of drivers, and developers wanted their signs to be the closest to the road, at 10 feet. He didn't particularly like the existing tall sign, but at least it was off by itself and not in the sight lines of other signs. His point was that the applicant's sign was a sub-sign with dimensions of 11-1/2' x 9-1/3', and that type of sign should be at the driveway.

Mr. Rheume stated that he was a bit torn by the proposal because he was not a big fan of the existing freestanding sign. It had been stuck in the middle of nowhere, and it was pretty high. However, he thought that the applicant's proposal of the second sign being located further down from the original sign would still be confusing for potential customers who would see the sign but not see any entryway into the plaza. It seemed disconnected to the applicant's intent. There was an opportunity to rework the main sign on Woodbury Avenue and other signage to include the three new businesses, but the applicant had made the decision to change around the freestanding structure that used to feature one single business and would now have three businesses. He was more willing to entertain a variance to add more square footage to the main sign than he was to grant the opportunity for a second sign.

*Mr. LeMay made a motion to **deny** the application as presented and advertised. Mr. Parrott seconded the motion.*

Mr. LeMay stated that they had a good discussion and he did not believe it was in the public interest because it provided more clutter than direction. He agreed that it would be more useful at an entrance as compared to being just another sign. He saw no hardship because there was space on the other signs and there were other options to add the minor amount of signage needed, such as adding signage to the new buildings that were already visible from the road.

Mr. Parrott concurred with Mr. LeMay. He also had a problem with the hardship aspect because he just didn't see any. There were available alternatives. He gave an example of someone seeing the sign and driving into the lot. The driver would be in front of the Animal Medical Center and there would be no way to turn around, so the driver would have to go to the next intersection and circle back. It was an illogical place and presented no hardship.

*The motion to **deny** the application **passed** with a unanimous vote of 7 -0.*

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- 3) Case # 10-3  
Petitioner: 2422 Lafayette Road Assoc. LLC, owner, Cinemagic Cinemas, applicant  
Property: 2454 Lafayette Road  
Assessor Plan 273, Lot 3

Zoning district: Gateway

Description: Install 225 s.f. sign on cinema parapet.

Request: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1251.20 to allow a 225± s.f. parapet sign where 100 s.f. is the maximum sign area allowed for a parapet sign.

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

Attorney Bernie Pelech stated that he was before the Board on behalf of 2422 Lafayette Road Associates and Cinemagic. He distributed two photographs for the Board to circulate and stated that the cinema was under construction at Southgate Plaza. He noted that there were two other photos in the packets that the Board had in addition to the two photos he had just distributed. Attorney Pelech stated that when he took the two photos that were in the packet, the building was structural steel with no façade. As a result, he had gone out that day and had taken two new photos. The first photo was taken in close proximity to the proposed cinema, and it showed two signs, one in the foreground on the left and one on the building. Both signs were 4' x 8' in dimension. The second photo was taken from the First Colebrook Bank lawn looking back at the site, and it showed why the applicant was before the Board.

The façade of the cinema was 1,025' from Lafayette Road, so the amount of signage proposed was allowed. They were not asking for more signage than what was allowed but were asking that the sign be on the parapet rather than on the façade. Normally, the signage would have to be on the building's façade, but there was a large, dark, recessed rectangle that would be all glass when the cinema was completed. The parapet was the curved portion above the roof line. The Ordinance stated that there could only be 100 s.f. of signage on a parapet, and if the signage were moved down several feet, it would be allowed. The reason they had a parapet and were proposing signage on it was due to the distance between the structure and Lafayette Road and the fact that they needed to make the signage visible from Lafayette Road. Looking from Lafayette Road to the structure, the temporary 4' x 8' sign that said PM Construction on the parapet was not very visible. Because the amount of signage they were proposing was allowed and could be put elsewhere on the building, what they were asking for was not unreasonable. The parapet was constructed to allow the signage to be placed on the parapet. The schematic in the packet showed the location of the Cinemagic logo with a starburst on the parapet as well as the glass portion on the façade with the remaining portion a metallic finish.

Attorney Pelech stated the reasons they believed they met the criteria. Due to the location of the structure and its distance from Lafayette Road, the property had unique qualities and special conditions. They were not asking for more signage than was allowed, but were just asking that it be on the parapet rather than on the façade, which was necessary because the building was more than 1,000' from Lafayette Road. The location of the building on the lot and the distance from Lafayette Road created a hardship which made the variance necessary. Granting the variance would not result in any diminishment of surrounding properties. There had been no comments from abutters, and the project was part of the rejuvenation of the shopping center that had been ongoing for the last five years and would improve it tremendously. There would be no change in the essential characteristics of the neighborhood, nor would it threaten the public health, safety and welfare. Substantial justice would be done by granting the variance. He did not see any fair and substantial relationship between the purpose of the Ordinance and the property. He was not sure

why the Ordinance would allow 300+ s.f. of signage on the façade but only 100 s.f. on the parapet. The parapet and façade had the same plane, and there was no differentiation. It was just the front wall extended above the roofline for a portion of the frontage.

There would be no benefit to the general public in denying the variance, but the hardship on the owner would be substantial. To require the applicant to lower the signage down to below the roof line would make the signage less visible and make for more confusion to the general public in trying to locate the property. As a result, the hardship on the owner would not be outweighed by some benefit to the general public. He reiterated that there were no special conditions that would result in the property having a hardship and there was no fair and substantial relationship between the purpose of the Ordinance and the specific property. Therefore, he felt that the project met the five criteria. They were simply asking to allow the primary signage to be on 225 s.f. of the parapet instead of down below on the façade. He mentioned that Mr. Mark Adams, the representative for Cinemagic, and Mr. Jeff Kwass of ViewPoint Sign and Awning were in the audience to answer any questions.

Mr. Rheume wanted to clarify that the information on the sign would be 225 square feet. Attorney Pelech said that the 225 s.f. was the Cinemagic logo and the starburst. There would also be ten LED poster cases at ground level where the movies would be advertised that would be 35” x 51” each, for a total of 120 square feet. Mr. Rheume verified that if the sign were a wall sign, it could be 225 square feet. Attorney Pelech stated that it could be 200 s.f. and another 100 s.f. on the parapet. Mr. Rheume thought it would be slightly oversized compared to what the Ordinance allowed. Attorney Pelech stated that if it were allocated partially on the parapet and partially on the façade, it could be.

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

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

### **DECISION OF THE BOARD**

Chairman Witham stated that the Board had a request for a parapet sign roughly 225 square feet. He had added a few numbers and found that the Cinemagic lettering was roughly 162 s.f. and the starburst was the remainder, about 62 square feet.

*Mr. Durbin made a motion to **approve** the petition as presented and advertised. Mr. Rheume seconded the motion.*

Mr. Durbin stated that the variance would not be contrary to the public interest. The public interest was more geared toward downtown buildings. The Cinemagic location was out of town and on the outskirts of Route One, and he did not see that the public interest would be harmed by the sign placement, which was consistent with the façade and the building design on the property. The spirit of the Ordinance would be observed because the criteria tied in with the public interest criteria. The same amount of signage could be built in conformance with the Ordinance. It was just being proposed in the fashion that it was rather than being on the façade, given the location of the building being the farthest back of all the buildings on the property. Due to the sightline perspective from Lafayette Road, it made sense to have a lightly larger amount of signage.

Substantial justice would be done. In the balancing test of the hardship to the applicant versus the hardship to the public, the hardship would be to the applicant who had a building design already in place and would outweigh any hardship to the public. The value to surrounding properties would not be diminished. If that were the case, he thought the Board would have heard from one or more businesses located at the plaza. His own experience made him doubt that there would be any diminishment of value to surrounding properties. He said he had already touched on hardship but would add that it did not appear there was a fair and substantial relationship between the Zoning Ordinance and the application because the cinema fell outside that scope. For those reasons, he moved to grant the variances presented.

Mr. Rheame concurred with Mr. Durbin, but with a slight modification. Sign District 5 was restricted to the Gateway and General Business Districts, so there was some intent for more wide-open spaces than downtown Portsmouth. The unique thing that sold him and was sort of a hardship was that the building was a substantial distance from any public roadway, and the places across the street from the roadway were businesses. Their concern might be that the sign was up so high and so large and might cast light out into neighboring areas where it would be objectionable, but in that particular case, it was a considerable distance from anyone that might be bothered by the sign being up higher and slightly larger than otherwise allowed. The owner had made a suitable point that they could take the same sign or a slightly smaller one and put it a few feet lower on the façade and be within the requirement of the Ordinance. Therefore, the applicant met the spirit of the Ordinance, and he recommended approval.

Chairman Witham stated that he would like to see if the maker of the motion and the second would be willing to add a stipulation that the sign would only be illuminated during normal hours of operation. He said he was trying to avoid previous issues with lighting at another commercial entity. Mr. Durbin asked what the normal operating hours would be.

Mr. Adams stood up and introduced himself as the President of Cinemagic Corporate Entertainment. He stated that they owned and operating Cinemagic. The normal hours of operation were noon to midnight. During certain seasons, they opened at 11 a.m., and on rare occasions they had midnight shows from midnight to the early morning hours. He stressed that those were limited events, and their normal hours were noon to midnight.

Mr. Rheame stated that he was willing to allow the signage to be illuminated until 12:30 p.m., even for a midnight show, because the customers would be in the theater by then, so it would not be a service provided from the signage at that point.

Chairman Witham suggested that Mr. Rheame might want to stipulate that it would be an additional variance because there was another item in Section 10.1362 regarding the hours of illumination, and he read the following excerpt: “It shall not be illuminated between 11 p.m. and 6 a.m.” Ms. Walker added “except during regular business operations.” Chairman Witham asked whether that would be considered regular business hours or if it would require another variance. Ms. Walker stated that it just stipulated ‘during the operation of user activity for not more than one hour after the activity ceased.’ Chairman Witham assumed that they were essentially covered and withdrew his stipulation request because it was covered as cited by Ms. Walker. He asked for further comments before calling for a vote.

*The motion to grant the petition as presented and advertised **passed** with a unanimous vote of 7-0.*

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- 4) Case # 10-4  
Petitioners: Kevin T. & Christina M. McKittrick  
Property: 116 Dennett Street  
Assessor Plan 140, Lot 17  
Zoning district: General Residence A  
Description: Construct a 10'± x 16'± x 10'11"± high shed in the right rear of the lot.  
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Sections 10.572 and 10.521 to allow a right side yard setback of 4'± where 10' is allowed.

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

The owner Mr. Kevin McKittrick stated to the Board that there was a small change to the request in their packet. It had indicated 4' from their property line, and he explained that the way the structure was set up, a neighbor's garage abutted their property line and was actually set 2' from their property line. Their goal was to mirror that exact garage in similar dimensions, so it would be a total of 4' from that parcel of property, which would be actually 2' or 2-1'2" from their property line.

Chairman Witham stated that they could grant 5' instead of 4', but could usually not grant a smaller setback than what was advertised. Ms. Walker said that she would defer to the Board but would feel more comfortable if they would grant less relief instead of more relief. She said that she had called the applicant to ask him that question. Mr. McKittrick agreed but said that the question had been misunderstood. Due to the unique and awkward property line they had, the additional distance would cause more of a challenge. They wanted the 2-1/2' from their property line, which would mirror the distance from the abutting garage. Chairman Witham questioned the new wording. Ms. Walker thought they were covered with the phrasing in the Legal Notice, so if the Board was comfortable with it, it would be fine.

Chairman Witham asked if the abutters were aware of the situation. Mr. McKittrick stated that they had alerted them and showed them the plan. Chairman Witham asked if the abutters knew that it was 4' from their shed and not 4' from the property line. Mr. McKittrick stated that they knew exactly where it was, and they felt it was better. Since Dennett Street was on a tidal pond, their views of the pond would not be impacted. The proposed site on the property was the only place to prevent that, so they were comfortable with it, especially since they would not even see it.

Chairman Witham deferred to the Board and said that, with the new language and the way the petition was advertised, they had been granted some flexibility. They could move forward, whereas in the past, it would be an automatic denial and the applicant would have to re-advertise. He stated that the abutter who was most impacted seemed to be aware of the correct situation, so they could have a straw vote, but he was comfortable moving forward.

Mr. Parrott stated that the property sketch showed the proposed 10' x 16' structure being right on the property line, and it was apparently not true or it was just a poor sketch. The Board members had studied the sketch prior to the meeting, so he wasn't sure that he understood what Chairman Witham meant. Mr. McKittrick apologized for the clerical errors and said that the sketch was not

quite drawn to scale. Looking at the location of the neighbor's garage and the fence at the property line, the proposed shed would be 2.5' from their property line, which was the exact distance from the neighbor's garage to the applicant's fence, or property line. It was more aesthetically correct because it was an exact replica of their garage but on a smaller scale and equally separated by the property line. If they went any further over the line, the shed would be directly behind their fence, and they could not readjust the fence to protect their dogs because it would bleed into the house line.

Mr. Parrott asked from where the 2.5' was and suggested starting with the neighbor's garage. He asked if the garage was parallel to the property line. Mr. McKittrick told him that it was. Mr. Parrott asked how far it was off the property line. Mr. McKittrick stated that it was 30". Mr. Parrott asked if he was going to mirror that, and Mr. McKittrick stated that he was, that it would be 30" from their fence. Mr. Parrott asked if it was the same property line. Mr. McKittrick told him it was the exact distance, 30" on the other side of the property line. Mr. Parrott verified that Mr. McKittrick was proposing 5' between the buildings, and Mr. McKittrick agreed.

Mr. Rheume stated he was not comfortable with moving forward, especially without having the direct abutter present or a letter stating that the abutter was aware of the situation. He wasn't implying that the applicant was lying, but felt it was good to have the additional evidence that the abutter was on board. The sketches were confusing. They said the proposed variance was 4', although the actual dimensions were confusing. He wanted to see something more definitive showing exactly where the neighbor's garage was up to the property line and showing exactly the proposed structure's distance from the property line.

Chairman Witham stated that they had a letter from an abutter supporting the shed, and it specified that it was 30" from the property line. The Board agreed that the shed would add to the design and would complement the symmetry of the current structures on both properties. The neighbors were aware of the concept. The applicant had gotten everyone on board and then the site plan went away. Mr. McKittrick referenced the criteria of whether allowing the variance would be contrary to the public interest and stated that the abutting garage was approximately 30" from the property line and was larger than the proposed shed.

Chairman Witham stated that he would take a straw vote to see who was in favor of moving forward. He knew the site plan did not accurately convey the intention, but he felt that they had a clear understanding, and the party most affected had signed off on the conditions of what was to be built. He asked for all in favor and received a majority vote by a show of hands to continue the meeting.

Mr. McKittrick stated that Dennett Street was a tight community and the neighbors had felt that a lot of thought had gone into the proposal. He had tried to keep within the aesthetics of the neighborhood and add to its charm. The spirit of the Ordinance would be observed. He did not see the shed as infringing on anyone in the public or harming its welfare. In regards to substantial justice being done, he thought the public would benefit. He had a big family and a small house, and a lot of items were currently stored in the yard, like canoes and kayaks, so having the additional storage space to get the stuff out of the yard would benefit the public. He could not see the surrounding properties diminished in any way. The letter from the abutting neighbors demonstrated their commitment and understanding. As far as the necessary hardship criteria, they

had a small parcel with a unique layout and boundaries, so it was the only location to put the proposed shed.

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

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

**DECISION OF THE BOARD**

Chairman Witham stated that the Board had a request for a shed 30” from the right side yard property line.

*Mr. Mulligan made a motion that they **approve** the petition as presented and advertised. Mr. LeMay seconded the motion.*

Mr. Mulligan stated that an application was not an uncommon request from a residential property owner in Portsmouth to place a shed somewhere within a setback encroachment. Granting the variance would not be contrary to the public interest nor would it be contrary to the spirit of the Ordinance. Placing the shed in the proposed location would not alter the essential characteristics of the neighborhood. Again, a shed was very common in residential structures such as the applicant’s, and placing a shed within the setback was seen all over that particular neighborhood as well as in Portsmouth. Granting the variance would result in substantial justice because they had to balance the loss to the applicant if denied by any gain to the public. The gain to the public if the Board strictly enforced the setbacks would presumably increase air and light and the separation between the competing residential uses. However, the loss to the applicant far outweighed any possible benefit. If the applicant had to site the shed 10’ from his side yard, it would swallow up the entire backyard, which would be very unfortunate. The variance would not diminish the values of surrounding properties. By placing the shed in his backyard, the applicant would be decreasing the visible clutter in his yard that his neighbors and the public saw. He was challenged by the lack of storage space that he had. As far as an unnecessary hardship, literal enforcement of the Ordinance and of the 10’ setback would result in an unnecessary hardship. The property had a small lot and a house without significant storage space, and if the applicant were forced to obey the current setbacks, he’d be swallowing up a large portion of the usable backyard. The use was a reasonable one in a residential neighborhood, so he thought that the hardship criteria were also met. For those reasons, they should grant the variance.

Mr. LeMay concurred with Mr. Mulligan completely and had nothing to add.

Chairman Witham stated that he supported the motion. He remembered when the abutters had come in for a variance a few years before, and he said the abutters and the applicant were neighbors and had to get along because they shared a driveway and had to make it work. There were not a lot of options to locate the shed, considering the setback from a water line that they also had to meet. Overall, it worked and was worthy of a variance.

*The motion to grant the petition as presented and advertised with a right side yard setback of 2.5’± was **passed** with a unanimous vote of 7-0.*

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- 5) Case # 10-5  
Petitioner: Johanna Lyons  
Property: 18 Cutts Street  
Assessor Plan 209, Lot 14  
Zoning district: General Residence A  
Description: Replace 5' x 14' right rear porch with an 8'± x 20'± open deck.  
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance.
  2. A Variance from Section 10.521 to allow building coverage of 31.7%± where 25% is the maximum allowed.

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

The owner Ms. Johanna Lyons stated that she had owned the house for about 20 years and had been working on some of the deferred maintenance. The house was old, and it had a mudroom that was described in the application as a porch. It was falling to pieces and she had to do something, and she wanted to replace the mudroom with a back deck to provide a safe egress to the back. It sounded like a big addition but it wasn't. The house jogged in and had the bulkhead and mudroom, so adding the deck would not be a substantial increase. It was basically covered space, and she wanted a variance to build the deck in that general area.

Mr. Rheume asked if there were any steps to the mudroom. Ms. Lyons stated that there were three steps leading up to the first floor of the house. Mr. Rheume asked if the intent was to replicate those steps and inset them into the new deck but not extend them past the line of the house. Ms. Lyons agreed that it was her exact intention.

Mr. Mulligan asked if Ms. Lyons planned to follow the existing line of the house back toward the rear and close it off. Ms. Lyons said he did, and she had described it as 'squaring up' the house.

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

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

### **DECISION OF THE BOARD**

Chairman Witham stated that the Board had a motion for lot coverage to square off the home, and also stated that Ms. Lyons had mentioned in her note that the increase in lot coverage was less than 2%.

*Mr. Parrott made a motion to **approve** the petition as presented and advertised. Mr. Moretti seconded the motion.*

Mr. Parrott stated that the lot coverage went from 28.5' existing to 30.3', so it was just under the 2% increase. It was a very simple infill project with construction toward the center of the lot, so it



was hard to see that anyone would be affected by it. It would not be contrary to the public interest because it was hard to see any public interest in the application. It would observe the spirit of the Ordinance because it would not affect other properties and would make the owner's property better for her, providing more space and a different nature. It would do substantial justice because the balance was between the interest of the owner versus the interest of the public, and he didn't see any public interest in the change. It would not diminish the value of surrounding properties because it sounded like a nice upgrade to the property, and it would have a positive effect on surrounding properties. As far as unnecessary hardship, given the orientation of the house and the size of the lot, it was hard to see any other way to achieve the applicant's goal, which was to get a little more space, and it was the logical place to put it.

Mr. Moretti concurred with Mr. Parrott.

*The motion to grant the petition as presented and advertised **passed** with a unanimous vote of 7-0.*

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#### **IV. OTHER BUSINESS**

Chairman Witham stated that Ms. Rousseau had submitted her letter of resignation and it had been accepted. The Board of Adjustment had a vacancy, and interested folks could fill out an application.

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#### **V. ADJOURNMENT**

It was moved, seconded and passed to adjourn the meeting at 9:25 p.m.

Respectfully submitted,

Joann Breault, Acting Secretary