

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**June 15, 2010**

**MEMBERS PRESENT:** Chairman Charles LeBlanc, Vice Chairman David Witham, Thomas Grasso, Alain Jousse, Arthur Parrott, Alternates: Derek Durbin, Robin Rousseau

**EXCUSED:** Carol Eaton, Charles LeMay

**ALSO PRESENT:** Principal Planner, Lee Jay Feldman

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Chairman LeBlanc announced that the local newspaper had incorrectly reported that the petition regarding the Meadowbrook would be heard that evening. It would be heard the following week.

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**I. OLD BUSINESS**

A. Request for Rehearing for property located at 290 Miller Avenue.

Ms. Rousseau made a motion to grant the Request for Rehearing, which was seconded by Mr. Grasso for discussion.

Ms. Rousseau referenced item no. 14 on Mr. Pelech's request which stated that the applicant had no opportunity to address the Board and explain the changes between the petitions submitted for the March 23, 2010 and May 18, 2010 meetings. She had also looked at the changes and it appeared that along with reducing the volume by more than 50%, they had reduced the coverage from 38% to 35%. She had to agree with Mr. Pelech's position that it was materially changed. They had had many discussions about Fisher v. Dover and she believed they needed to allow the applicant to make a case prior to voting on its invocation, or leave it a closed hearing and let the Board decide on the materials. In fairness to the applicant, they needed to be consistent, whether or not represented by an attorney with whom they did business all the time. She felt there should be a rehearing.

Mr. Grasso stated that he had seconded for discussion and was open to the others' thoughts.

Mr. Witham stated that he wouldn't support the motion. The main argument was based on the fact that the coverage was reduced, but it was still 40% over what was allowed and their

concern was scale and density. The attorney had talked about the roofline coming down and made reference to a project on Bartlett Street, but that was pure vertical expansion. This one had additions as well. He believed the Bartlett Street project was something like an 8' setback where 10' was required where here they were dealing with some setbacks which were just 0' and a poor site plan also. He felt that, for the same reasons as in March, he would have voted to again deny the application. He did agree about coming up with a consistent procedure for dealing with cases that came back before them and invoking Fisher v. Dover. Maybe the Planning Department could take a look at that and try to set some guidelines, but the way they had operated on this, they had not gone against any rules and regulations. He didn't feel they had erred in their judgment.

Mr. Jousse stated he would not be supporting the motion. Historically, the Board had acted on the rehearing request without any input from the applicant and that had served the City well. Until they heard from the Legal Department, they should keep on the same path. He stated that the reasons for granting a rehearing were that there was new information not available at the original hearing or the law had been misapplied. In this case, the attorney was making reference to as Bartlett Street property, which was going up vertically with no change in footprint and this was not the same. Every application was acted upon on its own merits and one had no effect on the other in making a decision.

Mr. Parrott stated that the suggestion was that the Board did not have information on the changes and he disagreed. There had been a memorandum from the applicant's attorney spelling out the changes in height and the reduction in expansion of the footprint. If there were something more there had been the opportunity to include it there rather than implying that the Board didn't know. With respect to the heart of the matter, the lot was way overdeveloped by the standards and that was not going to change. The Board had correctly followed the process and came to a logical conclusion and, he believed, a unanimous vote. He had read Morgenstern v. The Town of Rye, the case referenced by the applicant's attorney, and felt it was not a good parallel. That was a vacant, undeveloped lot rather than a lot with a long-standing building on it. He concluded that everyone had been treated fairly.

Mr. Jousse stated that, in this type of case, he studied the previous application and the new application and compared the two as to differences and similarities and then made his decision.

Ms. Rousseau outlined her views on the motion for rehearing, which was that they were looking for whether there was an error or a material change. It had nothing to do with whether they would vote for the application or not, which Mr. Witham and Mr. Parrott had stated. She stated they had had several cases where the applicant had a chance to speak and even one where the City's own attorney and Mr. Witham spoke. She reiterated that they were being inconsistent and stated that was an error.

Chairman LeBlanc stated he would not support the motion because there was nothing new before them. He noted that he had been on the Board for 22 years and, on Fisher v. Dover, they had excluded the applicant from speaking. They could change that that evening if they wished, however they had plenty in their packet and could draw proper conclusions. He felt that there was nothing erroneous and no new evidence had been presented, which were the reasons for granting a rehearing.

The motion to grant the request for rehearing failed to pass by a vote of 1 to 6 with Messrs. Durbin, Grasso, Jousse, LeBlanc, Parrott and Witham voting against the motion.

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Chairman LeBlanc announced that Petitions 5) and 6) for 653 Islington Street had been requested to be postponed to the following month.

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## **II. PUBLIC HEARINGS**

- 1) Case # 6-1  
Petitioner: Dovev Leung Levine & Jannell Leung Levine  
Property: 96 Woodlawn Circle, Assessor Plan 237, Lot 7  
Zoning district: Single Residence B  
Requests: Variance: 10.321 To allow the expansion of a nonconforming structure  
Variance: 10.521 Table of Dimensional Standards to allow a second floor addition with:
  - 1) A front yard setback of 19.6' where 30' is required
  - 2) A rear yard setback of 25.9' where 30' is required

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

Brian Swift stated that he was the contractor for the applicant. He referenced the certified plot plan they had submitted and supplied photographs of the house which had been there since 1958. This would be a straight up vertical addition with no bump-outs.

In response to a question from Mr. Jousse, he clarified that they would be lifting the roof, adding a second floor and replacing with a newer roof.

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

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

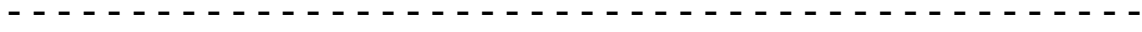
Mr. Grasso made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Grasso stated that they had in front of them a request to put a second story on a one story ranch. This would be strictly a vertical expansion with no change in the footprint, allowing plenty of distance between neighbors on a corner lot so this would not be contrary to the public interest. This would also allow light and air, observing the spirit of the ordinance. He noted that, when the house was built, it met the then front yard setback of 15' and subsequent zoning changes made it illegal. He agreed that there would be no diminution in the value of

surrounding properties and no benefit to the public if the variance were denied. Literal enforcement of the ordinance would result in a hardship as they could not expand without relief from the Board.

Mr. Parrott agreed and had nothing to add. Mr. Jousse stated that he never knew this street existed and thought he was in the countryside. Chairman LeBlanc observed that it was nice to see a surveyed plot plan.

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



- 2) Case # 6 -2
  - Petitioners: Daphne L. Chiavaras & Mary M. Mcgrady
  - Property: 40 Parker Street Assessor Plan 126, Lot 28
  - Zoning district: Mixed Residential Office
  - Request: Variance: 10.321 To allow the expansion of a nonconforming structure
  - Variance: 10.521 Table of Dimensional Standards to allow a 10' x 4' single story addition with:
  - 1) A side yard setback of 8'10" where 10' is required.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Daphne Chiavaras stated that she was being represented by Mr. Richard D'Andreas. Mr. D'Andreas stated that the house had been there since 1895 on a small lot and they just wanted to put a small addition off the one side. Unfortunately, they were 14" too close. When Mr. Jousse asked if there was any other place where the bathroom could be added onto without requesting a variance, Mr. D'Andreas responded that the back door was on the other side of the kitchen and they couldn't put it there because there would be no back entrance, so the proposed was the only place.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

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

Mr. Jousse stated that this was a pretty straightforward request and he didn't see how it would be contrary to the public interest. It was one of the small lots in downtown Portsmouth and built when they didn't waste a lot of real estate with vacant space so the houses were all relatively close. He felt that granting the variance would then be in the spirit of the ordinance and substantial justice would be done as there was no benefit to the general public if the petition

were denied. Nothing had been presented as to the effect on the surrounding property values and literal enforcement of the ordinance would result in unnecessary hardship to the applicant who had shown that this was the only feasible place to place the addition.

Mr. Durbin agreed, adding that the addition appeared to be in line with what seemed to be the rear of the house that was being built there so the impact, if any, would be diminished.

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

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3) Case # 6-3

Petitioners: Joseph C. Kennerson

Property: 6 Raleigh Way Assessor Plan 212, Lot 23

Zoning district: General Residence B

Request: Variance: 10.572.10 To allow a shed with a 0' rear yard setback where 5' is required

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Joe Kennerson stated that he lived at 6 Raleigh Way. These were small lots of land and they were trying to take advantage of each bit. He pointed out on his exhibit where he wanted to place a shed and referenced a letter of support from an abutter. In the future, he had plans to put up a deck, which would take up more room but help property values. Having the shed in its current location helped future plans.

Mr. Jousse asked if the abutter, Mrs. Donlan, was the abutter to the rear and he confirmed she was. Mr. Jousse stated that he was looking at the property sketch in the packet and it appeared that the shed on her property was onto his property. Mr. Kennerson stated that Mr. Feldman could probably explain it better. Mr. Feldman stated that the GIS information, which was the material they provided, was accurate but not 100%. He had been out to the property and actually the sheds were on the appropriate parcels. There was a pin for the property line right behind the current location of the shed so that could clearly be identified. He confirmed they were physically where they ought to be, not as indicated on the plan.

Ms. Rousseau asked why they wanted this variance to be right on the property line and why they did not pull back. Mr. Kennerson stated that he had less than a tenth of an acre and was right up against another shed. If it were pulled out, it would be awkward and there was not a large back yard. If they put in a deck, they would be right on top of each other. This was just a perfect location.

Ms. Rousseau stated that she didn't see the hardship situation where they couldn't put it anywhere else on the property. Actually they could put it 5' away, but it would not be pretty for the deck. Mr. Kennerson stated it would be a hardship to physically do it as well as money wise. Ms. Rousseau stated that the problem was it was already there and stated, "I know."

Mr. Jousse stated that the Heights had been a sore spot with zoning. It had been proposed to the City Council several times that a special zoning ordinance be developed for the Heights because the lots were so small and property lines go down the middle of some dwellings, with square footage at a premium. He felt this looked like a lot on paper but when you visited the site, the backyard was a postage stamp and he sympathized with them in trying to make the best use of the square footage that they could.

Mr. Feldman stated that, taking up Mr. Jousse's comments, the Planning Department was in fact looking at the issues for the Heights as well as some other areas to try and address some of these concerns.

Ms. Rousseau stated that she had an issue with the hardship and the variance went with the land. It was up on the property line and the next owners might not be all right with that. To her, if you bought a small lot, you had a small lot and couldn't keep piling stuff on. Mr. Kennerson stated that he didn't see the shed going anywhere even with a new owner next door. They had to see the yard and the position of the shed to understand.

Mr. Witham asked if he had a sense of what it would cost to move the shed and Mr. Kennerson stated probably half the cost of the shed, roughly \$500.

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

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Mr. Parrott made a motion to grant the petition as presented and advertised, which was seconded by Mr. Witham.

Mr. Parrott asked for a point of clarification. He referenced the submitted plan which had a note saying the variance would allow the shed to be 1' off the property line but the text said zero. Mr. Feldman stated this was the first time he had seen that as it was in the packet and not the information he had provided. If they were to go out and measure where the shed was located in relation to the property pin, you would be within a foot.

Mr. Parrott stated that it was fair to say that a small shed in one backyard adjacent to another small shed was not going to invoke any public interest. The spirit of the ordinance would be observed by allowing enjoyment of the property as long as there was no infringement on neighbors. Substantial justice would be done and there was no benefit to the public in denying the variance that would override the gain to the owner if it were granted. The value of surrounding properties would not be diminished. These were all small yards and their very size determined what you could and couldn't do. The shed being requested was 8' x 8', which was about as small as you could get. If they had gone for something larger, he might have a different point of view but this was minimal for a useful shed. He stated that literal enforcement of the ordinance would result in a hardship. Again, there were limited things that

could be done with the property and the small shed was proportional to the lot. To say that it could not even be allowed would be a hardship to the owner.

Mr. Witham stated that, on the whole, he didn't advocate zero setbacks but he felt the Heights was a unique scenario and he would not ask the applicant to spend \$500 to move it a few inches. He stressed, however, that he reviewed petitions on a case by case basis and didn't intend to plant a seed that someone could put in a shed and come back after to ask for approval. He didn't feel that this shed would change the essential character of the neighborhood and the abutter most affected was on the same page. The applicant had submitted to the Planning Department that it wasn't his intention to put it right at zero but the contractor had done it. It would be great if there were another 12" and if another abutter came in and wanted to put up a fence, he might have to move it, but for now, Mr. Witham was comfortable that this would work. He added that he didn't feel that the shed would diminish any surrounding property values or interfere with the neighbors' enjoyment of their properties.

Ms. Rousseau stated that she had heard comments about Atlantic Heights that evening about people wanting them to have special privileges. She didn't feel Atlantic Heights was any different from any place in the city where people owned property and the ordinances needed to be applied fairly to any neighborhood in the city. If they wouldn't grant a variance somewhere else in the city for this, why would they do it at Atlantic Heights? No matter where they lived, every property owner deserved the rules to apply the same.

Mr. Grasso stated that he would not support the motion. He felt that the applicant had intended to put this 7' off the property line on the building permit so the hardship test was a difficult one for him because he felt there was an alternative solution which did not involve a variance.

Mr. Durbin stated that he tended to agree with Mr. Grasso. It was represented in the building permit that it would be 7' off the property line and it seemed to him that that information would have been relayed to the contractor.

The motion to grant the petition as presented and advertised was passed by a vote of 4 to 3, with Ms. Rousseau and Messrs. Durbin and Grasso voting against the motion.

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- 4) Case # 6-4
  - Petitioners: Elizabeth M. Mackey
  - Property: 214 Aldrich Road Assessor Plan 153, Lot 27
  - Zoning district: Single Residence B
  - Request: Variance: 10.521 Table of Dimensional Standards to allow:
    - 1) Construction of a 20' x 20' freestanding garage with a building coverage of 21.4% where 20% is the maximum coverage allowed
    - 2) A 5' left side setback for the garage where 10' is required
    - 3) A 5' rear yard setback where 30' is required

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Jousse stated that he would like to invoke Fisher v. Dover.

Chairman LeBlanc stated that he thought the conundrum over Fisher v. Dover could be easily solved if they allowed the applicant to speak to that issue and nothing else and then the Board would vote on that issue and either proceed or that was the end of it. As far as he knew, having been on the Board for 22 years, they had never allowed the applicant to speak to Fisher v. Dover, but having read the court case again, he felt they should in fact allow the applicant to speak to that issue. He asked if there were any objections.

Ms. Rousseau stated that she objected.

Chairman LeBlanc stated he couldn't believe that when she had been hounding them that they should be consistent and what he was proposing was consistent. Addressing the applicant, he stated that what was before them was that Fisher v. Dover had been invoked. What that meant was that if she had essentially the same plan as was submitted before, the Board could not deal with the new application. If she could show them that there was sufficient change to the plan so that it was in fact a new application then they would deal with the rest of the variance request.

Ms. Elizabeth Mackey stated that she lived at 214 Aldrich Road and had submitted...

Ms. Rousseau interrupted to ask if they were looking at the application or Fisher v. Dover and Chairman LeBlanc stated Fisher v. Dover. Ms. Rousseau stated that this was probably her argument for the new petition so they had materials in the file to determine whether or not it was materially different or there was an error on their part. Chairman LeBlanc stated there was no error. With Ms. Rousseau speaking in the background, He continued that it was whether the application was materially different. Ms. Rousseau continued that she was speaking to whether or not it was materially different.

Ms. Mackey stated that was right. The old plan was requesting a garage of 24' x 24' and the new plan called for 20' x 20'. The old plan had a 3' setback and the new had 5'. When Chairman LeBlanc asked if she believed it was sufficiently different and not the same plan, she stated it was much different.

Chairman LeBlanc stated that testimony had been presented that the new application was a different plan and asked the opinion of the Board. Mr. Jousse stated that, even though the dimensions were slightly smaller, it was his opinion it was essentially the same request as that presented in May.

He made a motion to invoke Fisher v. Dover, which was seconded by Ms. Rousseau.

Mr. Jousse stated that there was no new information that was not available at the time of the first hearing. It was the same thing, just dressed differently. Ms. Rousseau stated that she agreed.

Mr. Witham stated that he would support the motion although he had been in favor of the first petition. He just didn't feel there was enough difference. The size and lot coverage were



somewhat smaller, but it was still 5’ in the rear and he felt it was essentially the same except for 2’ difference on the side. The size was a little smaller but that was to the interior and wouldn’t affect the abutters. He felt the applicant had tried to address the issue by making it a little smaller, but it was too similar.

The motion to invoke Fisher v. Dover and not hear the petition was passed by a vote of 6 to 1, with Mr. Grasso voting against the motion.

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- 5) Case #6 -5  
Petitioners: Houston Holdings, LLC, Daniel Houston, President  
Property: 653 Islington Street Assessor Plan 164, Lot 5  
Zoning district: Business  
Request: Variance: 10.440 Table of Uses 10.18.24 to allow two (2) temporary structures to remain on the premises for not more than 180 days, which is not allowed by ordinance.  
Variance: 10.531 Table of Dimensional Standards, to allow a 4’ right side setback where 15’ is required  
Variance: 10.531 Table of Dimensional Standards, to allow a 4’ left side setback where 15’ is required

In accordance with the earlier announcement of the Chairman, Mr. Parrott made a motion to postpone the petition to the July meeting, which was seconded by Mr. Grasso and approved by unanimous voice vote.

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- 6) Case #6 -6  
Petitioners: Houston Holdings, LLC, Daniel Houston, President  
Property: 653 Islington Street Assessor Plan 164, Lot 5  
Zoning district: Business  
Request: Variance: 10.321 to allow the expansion of a nonconforming structure.  
Variance: 10.531 Table of Dimensional Standards, to allow a 25’ x 20’ addition with a 4’ right side setback where 15’ is required  
Variance: 10.531 Table of Dimensional Standards, to allow a 4’ left side setback for the addition where 15’ is required

In accordance with the earlier announcement of the Chairman, Mr. Parrott made a motion to postpone the petition to the July meeting, which was seconded by Mr. Grasso and approved by unanimous voice vote.

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- 7) Case # 6-7  
Petitioner: Ramona M. Dow

Property: 571 Dennett Street Assessor Plan 161, Lot 38  
Zoning district: General Residence A  
Request: Variance: 10.321 To allow the expansion of a nonconforming structure.  
Variance: 10.521 to allow a 19' x 22' addition with a front yard setback of 13'1" where 15' is required.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Ramona Dow stated that she had lived at 571 Dennett Street for 36 years. They would like to achieve one floor living along with having ample storage space for items that should be stored in the basement. The addition would allow them to have a master suite with a bathroom. She had looked at the criteria and felt the request met them.

In response to questions from Mr. Jousse and Mr. Witham, she stated that she didn't believe the addition could be placed to the rear of the house instead of the side. There was a deck out back and the now living room would turn into the bedroom with the addition off that. Part of the house was going to be converted to a downstairs bedroom.

Mr. Kevin Folger stated that he was the general contractor. As they could see, this was an old-style cape with a ten pitch roof. They would drop the other roof down and extend it out. Ms. Dow would like upstairs storage and, by moving that back to a 15' setback knocks off the center line to the house so they couldn't get in a door to the upper area. What they were going to do was take the second floor and put a door so she had the whole upstairs storage. He stated that it was damp in the cellar so nothing could be stored and they would like everything on one floor. He had tried every way to make it work but just by moving the addition a couple of feet, you couldn't get a door in there above and there was no adequate place. He didn't want a pulldown because of the difficulty of access.

Ms. Dow added that she had sent a picture of the house, noting that the current upstairs window would turn into the door to the storage. Mr. Folger noted that on that street, her house was right out there. They were willing to build another way but would lose all that storage.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Witham made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Witham stated that the Board often asked if there was a reasonable alternative and usually got a host of reasons but that was probably the best explained reason. He stated that less than 24" of relief was required from the front setback, noting that the main part of the house was already well into it. Granting the petition would not be contrary to the public interest. The house matched the rhythm of the street and would not affect the public interest. He stated that

the spirit of the ordinance would be observed by allowing improvement without changing the essential character of the neighborhood. In the justice balance test, with less than 24” of relief there would be no harm to the general public in granting the variance. He felt that any detriment to property values usually occurred with rear and side setbacks and this was a front setback. Literal enforcement of the ordinance would result in a hardship which would be losing the use of valuable space. The proposed use was a reasonable one and asking them to slide the addition two feet on the surface seemed easy but, as explained, presented difficulties.

Mr. Parrott stated that the most prominent facts were the small size of the request and the fact that the tilt was toward the street and not encroaching on a neighbor so there would be no negative impact. The addition would be consistent with the style of the house and others in the neighborhood with respect to placement and appearance.

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

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- 8) Case # 6-8  
 Petitioner: The Vitamin Shoppe  
 Property: 1600 Woodbury Avenue Assessor Plan 238, Lot 16  
 Zoning district: General Business  
 Requests: Variance: 10.1271.20 to allow a wall mounted sign to be located on a portion of the building not facing a street.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech stated he was appearing on behalf of the applicant. He stated this was truly a unique situation. The Vitamin Shoppe, site of the former Boston Chicken, had an address on Woodbury Avenue but couldn’t be accessed from that street. The only way was to go onto Durgin Lane or any of the other streets going into the shopping center. Once the Vitamin Shoppe opened, they had received a variance for signage from this Board but then heard from people that they could not find it. Referencing the submitted photographs, he stated that the public was going into the shopping parking lot but the location was not identifiable. There was an access road and he disagreed with the determination of the City Attorney that it was not a private right of way. It was a striped access road which went behind all of the buildings. Basically there was Ruby Tuesday with signage on the side and rear and Verizon with signage on the rear and the bank with signage on the rear. Most had access from Woodbury Avenue. This had no signage on the rear and this was the only way to get to it. He stated that he had looked at the ordinance and outlined several portions relative to the signage that he thought would apply, including a provision that if you had frontage on two streets, you could count the front and the back or the front and the side. The City had determined this street behind the buildings he had previously listed was not a street, with which he disagreed. They could take that up later, but as a result, they were required to file an application for a variance to allow some type of signage on the back of the building.

Attorney Pelech began to address the criteria when Mr. Jousse stated that he had noted there was an omission of square footage on this request and he wondered if the Vitamin Shoppe was going to keep their dimensions within what they had allowed so far. Attorney Pelech stated, “no,” there was a sign application permit filed and a cut sheet showing the amount of square footage. He didn’t know why it didn’t get published.

Mr. Feldman stated, not to confuse the issues, but with the change in the zoning ordinance the signage no longer aggregates the way it did previously so that the property was allowed “x” square footage of signage. The way it was changed, each store or frontage was allowed so much signage per sign and, therefore, the aggregation issue has gone away. The signage they were seeking approval for was within...Mr. Jousse interjected, “what they were allowed?” and Mr. Feldman stated, “correct.”

Attorney Pelech stated that they had submitted a plan and it was basically the same as was on the front of the building. Turning to the hardship test, he stated that there were special conditions with regard to the property. The photographs told a story, as well as the customers not being able to find the store. Also, the fact that there was no access from Woodbury Avenue. The fact that you had to enter from Durgin Lane or go behind was where the problem arose and because the location was not identifiable from the rear gave rise to special conditions creating an unnecessary hardship. He stated that there was no fair and substantial relationship between the purposes of the ordinance as applied to this property. As Mr. Feldman had submitted in his memorandum, the purpose with regard to signage was to prevent proliferation of signage, which was not the case with this building. This was crying out for signage as there was nothing to tell you what it was from the lot providing access.

Attorney Pelech stated that there would be no diminution in the value of surrounding properties as this was clearly a lot in a shopping center. All of the buildings had front and rear signage so this would not be out of character for the neighborhood nor lessen property values. It would not be visible from the properties across Woodbury Avenue. Granting the variance would not be contrary to the spirit of the ordinance which intent was to prevent the unattractive over-intensification of signage which was not the case here. Citing the Chester and Malachy Glen court cases, he noted that the essential character of the locale would not be changed and it wouldn’t damage the public health, safety and welfare. Substantial justice would be done by granting the variance as the business was doomed to fail as people couldn’t find it. The hardship on the applicant if the petition were denied would not be outweighed by any possible benefit to the general public. The public safety would actually benefit by people not driving around to find the business.

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

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

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

Mr. Witham stated that this was a very unique situation. The first thing that came to his mind was the newly created district on Route One where they were trying to bring buildings up to the streetscape with parking in back. This zoning was moving in a good direction and it ran into this situation where the people were parking in back. He stated that literal enforcement of the ordinance would result in unnecessary hardship because of the special conditions of the property. They were given a Woodbury Avenue address, but with no access from there so that visitors had to go into the shopping plaza. The only other reasonable alternative would be to have a driveway cut off Woodbury Avenue which he didn't believe the City would allow it and it would present a safety hazard. He didn't feel it was reasonable to have to access a property this way but not allow a sign. The intent of the ordinance in not having these signs was to protect abutters to the rear but this faced a shopping plaza. There was no detriment to the public because there was no one back there except the businesses sharing the access road.

Addressing the criteria, Mr. Witham stated that granting the variance would not be contrary to the public interest as there would be no sign clutter on the road as it could not be seen along the road, only when going into the shopping plaza. The spirit of the ordinance would be observed as the character of the neighborhood would not be changed. Unless you were in the shopping plaza, you would not even know a sign was erected and other businesses had similar rear signs. Justice would be done and there was no harm to the general public in granting this. Again, it was not along Woodbury Avenue. There was no reason to believe there would be any diminution in the value of surrounding properties and it probably helped surrounding businesses to have a flourishing business, rather than ones constantly turning over. While the Board was sensitive to signs, he felt this was reasonable.

Ms. Rousseau stated that she didn't feel additional signage at the rear and side would be excessive and it was therefore in keeping with the spirit and intent of the ordinance. There was no way their customers or anybody would know what was in the building at all so she felt this made that particular business whole and she wished them well and much success.

Mr. Parrott stated that he wished to address the issue of streets. The development plan they were provided that dated back to the establishment of the shopping center identified this roadway as an access easement and that did not equate to being a street in any sense. Secondly, he looked at the list of streets maintained by public works but with no name you couldn't look it up. He went further and looked at the city zoning map which had most street outlined although not all named and it was not on there either. He then looked at the tax map and that also did not show a street there. Lastly, there was no evidence presented to them, and he didn't think there was any, that the City Council had established or accepted this roadway or accessway as a street so his conclusion was the opposite of Attorney Pelech. It was not a street in the commonly accepted way because they had a process through which something was declared a street and Public Works was then directed to add it to the list and, in this case, none of that had happened. In case this issue came up again, he hoped just declaring something to be a street did not equate to being a street.

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

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Before the close of the meeting, Chairman LeBlanc stated that what he had meant to say when talking about Fisher v. Dover was that they did not have work sessions with their clients so when a Board member said something like “I would be happy if it were smaller,” that was a justification for not voting for it. It was not a directive to the applicant to go out and make it smaller and come back. The whole point of Fisher v. Dover was to stop a constant flow of revisions with little changes to them.

When Ms. Rousseau commented that she didn’t think the applicant realized that unless it was explained by the city, Mr. Feldman stated that he always explained that to the client and that they needed to prove that there was a material change to the application in order to get through the Fisher v. Dover issue. Mr. Jousse stated that he tried not to make comments but he didn’t want to paint himself into a corner or feel he was obligated to vote for it if they came back with something somewhat close to what had been suggested.

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### III. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 8:20 p.m.

Respectfully submitted,

Mary E. Koepenick  
Administrative Clerk