

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**January 22, 2014,  
to be Reconvened  
January 28, 2014**

**7:00 p.m.**

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

**ALSO PRESENT:** Juliet Walker, Planner

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**I. ELECTION OF OFFICERS**

*Mr. Moretti made a motion to re-elect David Witham as Chairman and Arthur Parrott as Vice-Chairman until the next election of officers. The motion was seconded by Mr. LeMay and passed by unanimous voice vote..*

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**II. PUBLIC HEARINGS - OLD BUSINESS**

A) Case # 12-3

Petitioner: GTY MA/NH Leasing, Inc., owner & Nouria Energy Corporation, applicant

Property: 786 Route One By-Pass

Assessor Plan 161, Lot 42

Zoning District: General Residence A

Description: Revise existing free-standing sign to add logo and LED display.

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

1. A Variance from Section 10.1281 to allow a nonconforming sign to be altered or reconstructed without bringing the sign into conformity with the Zoning Ordinance.
2. A Variance from Section 10.1241 and Section 10.1251.20 to allow a free-standing sign with an area of 168± s.f. in a district where a free-standing sign is not permitted.
3. A Variance from Section 10.1253.10 to allow a sign height of 50'± where 7' is the maximum allowed and a front yard setback of 0'± where 5' is the minimum required.

4. A Variance from Section 10.1261.10 to allow direct illumination where sign illumination is not allowed.

*(This petition was tabled at the December 17, 2013 meeting)*

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

Chairman Witham said the hearing was tabled at last month's meeting to allow the applicant to meet with abutters for a better understanding of the request.

Attorney Peter Loughlin stated that he was there with Mr. Bob Richards, Project Manager for applicant, Nouria Energy, Mr. Joseph Buchholz with Kay Gee Sign, and Mr. Bob Messier with Daktronics, noting that they had appeared before the Board last month. He said their request was for a change in the sign from 168 s.f. to 146 s.f. and six panels to fours. He said the sign was in a residential zone, but they were asking for multiple variances because the sign was nonconforming in a number of ways, and would still be nonconforming if it were in a commercial zone.

Attorney Loughlin said they understood before they came before the Board that there was some concern with light, but they did not have graphics last time so the neighbors could not see what they were proposing. They had set up two meetings due to snowstorms and had met with 3, 2014 so they set up another meeting on January 10, 2014 and there was another snowstorm, but they did meet with Ms. Ramona Dow, who spoke at the previous public hearing, and Mr. Jerry Dion, as well as Mr. Rich Solito and Ms. Myrinda Williams of 2 Stark Street who were present at the meeting in his office. He said all the neighbors who came to the meeting said they were fine with the sign. He said the Dolloffs who were at the public hearing, did not attend the meeting in his office, but he met them at their house and they were also fine with the sign.

Attorney Loughlin said the sign panels were grandfathered, and Ms. Walker from the Planning Department indicated that the message could change, but scrolling would be an alteration and would not be permitted. He said they were proposing digital signs, which were crisp and could be seen from a distance, but didn't have the light spillage that flat panel signs had. He said Mr. LeMay had asked if there were any identical signs in the area, but there were not. The local sign they referenced was at the Citgo station on 800 Lafayette Road. He said the sign would have a black background, with numbers and letters in green and red to reduce the amount of light cast.

Attorney Loughlin said he hand delivered a note to the neighbors not to come to the January 3, 2014 meeting during the snowstorm. He said at that time Mr. Bob Shouse, an abutter on Dennett Street showed him the red band around the yellow canopy surface that was burned out for a few days, and said he wouldn't have a problem with the proposal if that wasn't lit. Attorney Loughlin said he stipulated in his letter that Nouria Energy who was updating their signs would not light the red banding on the canopy facing the backside of Dennett Street. He said they also stipulated that banding on the back of the current canopy would not be lit either. Attorney Loughlin said he reviewed the criteria written out in his letter at the last hearing. He said it was an unusual request because it was a request for a smaller sign with less impact.

Mr. Rheame asked if the current sign illuminated in both directions and if the new sign would illuminate in both directions. Joseph Buchholz from Kay Gee Sign said it would.

**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**

Chairman Witham reminded the Board that the applicant offered a stipulation for approval.

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised with the following stipulations:*

- The lighting on the canopy banding that faces Dennett Street will be permanently turned off.
- There will be no moving, blinking or scrolling lights or any change to the sign except as necessary to change the pricing.

Ms. Chamberlin seconded the motion.

Vice-Chair Parrott said they were assured that the new sign would cast less light and all the technical data talked about auto output based on daylight. He said the focused light should cast less light into the neighborhood, especially on Dennett Street.

Vice-Chair Parrott presented the criteria for granting the request, noting that granting the variance would not be contrary to the public interest since the applicant met with adjacent neighbors and made improvements specific to the band lighting on the canopy, which was clearly defined by the adjacent residents. He said granting the variance would observe the spirit of the Ordinance by allowing the business to upgrade signage for the traveling public and for the neighbors as well. He said the balance test for observing substantial justice tipped in favor of the revised proposal to allow a long time business to upgrade its signage. He said the value of surroundings properties would not be diminished and their value might even increase if the light was less intrusive.

With regard to the unnecessary hardship test, Vice-Chair Parrott stated that the sign was located where it had been and there would be only a slight modification. The special conditions were the zoning, which a previous court order had pointed out was odd for the location. These were not change nor would the property's location adjacent to a long established neighborhood so the best that could be done was to modify the lighting as proposed.

Ms. Chamberlin said the proposal met the concerns of the neighbors and the Board when they tabled the previous hearing. She said the neighbors have since had a chance to review the new technology, and improvements have been made with the stipulation to remove the band lighting in the back.

Mr. Rheume said although the applicants talked to the neighbors and got the neighbors on board, he still would vote against the request because it reminded him of signs he would see on a super highway in New Jersey or on I-5 in Seattle. He said Attorney Loughlin referred to the Route One By-Pass as a superhighway, but he thought it was a relic of the past, and the sign didn't belong there. Mr. Rheume said the sign was 1½ times larger than most signs in the business district. He said he understood the applicant's interest in improving their business recognition with a new sign,

but the sign would not be visible until a traveler was upon them and he doubted they would be influenced by a sign enough to turn around at the traffic circle.

Chairman Witham said he shared Mr. Rheume's concerns, but would still support the motion because one of the purposes of the Zoning Ordinance was to protect the public and abutters, and he felt a conforming sign would better serve the existing business. He said the greatest concern to the public was light spillage, but once the neighbors found out what it was about, they were in support of the improvements.

*The motion to grant the petition, with the stipulations, **passed** by a vote of 6-1 with Mr. Rheume opposing.*

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Mr. Parrott recused himself from the following petition and Mr. Moretti assumed a voting seat.

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### **III. PUBLIC HEARINGS – NEW BUSINESS**

1) Case # 1-1

Petitioners: Zoe Copenhaver Daboul & Michael Edward Daboul

Property: 53 Humphreys Court

Assessor Plan 101, Lot 39

Zoning District: General Residence B

Description: Construct a rear addition and new front porch. Replace existing garage with an attached garage.

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 building to be extended or reconstructed without conforming to the requirements of the Ordinance.
2. Variances from Section 10.521 to allow the following:
  - a) Building coverage of 42.8% where 30% is the maximum allowed.
  - b) A front yard setback of 4'9" ± where 5' is the minimum required.
  - c) A rear yard setback of 2'9" ± where 25' is the minimum required.
  - d) A right side yard setback of 3'1.5" and a left side yard setback of 4'3" ± where 10' is the minimum required for both.

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

Ms. Zoe Daboul, with designer and builder, Chris Redman came before the Board to present their proposal to replace the existing two-car detached garage with a one-car garage attached to the first floor of the house, and extend their front steps so they could open their door without pushing people off the short front steps. Ms. Daboul said they would like to create more livable space on the first floor for their growing family and aging parents. She had thought about connecting and utilizing the existing garage, but the upper level was not a full second story and only had 6' of headroom at the peak so that was not possible.

Ms. Daboul stated that their variance request was not contrary to the public interest because they were not bringing the addition forward and were not taking any parking space away from the existing driveway. She said the spirit of the Ordinance would be observed and would be more in line with the historic design and architecture of the neighborhood, whereas the current garage didn't fit in. She said substantial justice would occur because the architect was conscientious with the design to avoid impacting neighbors. She told the Board that they talked to the neighbor and he didn't want the structure to come out any further than it already was so they designed the new garage to be lower to allow more open space for the neighbor. She said the surrounding property values would not be diminished, and their property values would probably be increased. Ms. Daboul explained that the current ingress was through the back porch and directly faced the rear neighbors who were in the South School Street neighbors. She went on to say the new design would allow them to come in from the driveway which would take noise away from the abutting neighbors and create more privacy and space if enclosed. She said the literal enforcement of the ordinance would create a hardship by prohibiting the reasonable use of their property. In summary, she said they invested in their home and the proposal would allow them to continue living in the neighborhood and City that they loved.

Mr. Rheume said it appeared there was an extension to the old school building at the rear and asked if that would be the property most impacted. Ms. Daboul said there were condominiums at the rear, but she said the windows were fairly covered by the garage so neither of them could see into one another's windows. Mr. Rheume asked if they were elevated off the ground. Ms. Daboul said they were and it appeared that they were nearly a story high as viewed from the upper level of the garage.

Mr. Mulligan said a two-car garage was unusual for the neighborhood and asked when it was built. Ms. Daboul said she didn't know. She said the home was built in 1900, but the garage had a different design and materials. Mr. Mulligan asked if she was requesting relief from the front yard setback because she was pushing the porch out and Ms. Daboul said that was correct.

### **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. Mulligan made a motion to **grant** the petition as presented and advertised and Mr. Moretti seconded the motion.*

Mr. Mulligan said it appeared that there were several variances, but there were not as many as it seemed at first glance. He said there was an existing two-car garage that was probably not built in the same period as the rest of the home and agreed that the new garage would be more in keeping with the rest of the home.

Mr. Mulligan reviewed the criteria for granting the petition, noting that it would not be contrary to the public interest to add a reasonable addition to the main structure. The essential character of the neighborhood would not be changed nor the health safety and welfare of the public threatened. He pointed out that a two-car garage was unusual for the neighborhood and building an addition

between the main dwelling and a smaller garage would be a reasonable use of the property. He said granting the variance would not be contrary to the spirit of the Ordinance in the General Residence B zone as it would be in keeping with its purpose to promote single family dwellings with accessory uses of moderate to density. He said denying the variance would result in substantial injustice to the applicant because the loss to the applicant would outweigh any potential gain to the general public in maintaining the status quo. He said the existing structure would be replaced by something that was more appropriate. He said granting the variance would not diminish the value of surrounding properties because it was a much more attractive design. He added that it was already a nonconforming lot and the porch as it was configured was probably a health and safety hazard that created a hardship. In conclusion, he said there was no fair and substantial relationship between the purpose of the setbacks and lot coverage requirements and their application to this property.

Mr. Moretti agreed with Mr. Mulligan’s assessment and said the design was in good taste and the applicant did a great job to bring the height of the garage down so the neighbors could see over the house.

*The motion passed by a vote of 7-0.*

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

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2) Case # 1-2

Petitioner: Wylie E. Brewster, Jr., owner, Jason & Trisha Brewster, applicants

Property: 121 Mechanic Street

Assessor Plan 103, Lot 31

Zoning District: Waterfront Business

Description: Construct an addition over the rear porch on an existing residential structure.

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 building to be extended or enlarged without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.531 to allow a right side yard setback of 7’10” ± where 30’ is the minimum required.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Jason Brewster stated that he and his wife had met with the Historic District Commission and the DES and they designed the least impactful addition that they could while still making it work for the family. He said it was a 13% or 14% addition on top of the existing structure facing the river water in the back. He said the pumping station was to one side and the other was the water. He said they were staying on the existing footprint and the impact was minimal. He said they would have a final work session with the HDC next month.

Mr. Brewster provided the Board with written testimony and covered the criteria for granting his request so Chairman Witham opened the discussion to questions from the Board.

Mr. Rheume noted that the application said the house was built around 1900 and asked when the addition with the kitchen and a bathroom was added. Mr. Brewster said it was built between 1969 or 1971. He said the new addition would square off the building.

Ms. Chamberlin asked if the new configuration would add to the parking and Mr. Brewster said it would not.

Ms. Francesca Marconi of 177 Mechanic Street and a business owner said she was on the other side of the water and the only one that would be impacted by the view. She said they had been neighbors for nearly 50 years and said it would be great to have a fourth generation in the family house. She said it was a mixed-use district and most people on the street lived and worked in their waterfront business there. She said she had no objections to the proposal.

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

With no rising to speak, Chairman Witham closed the public hearing.

### **DECISION OF THE BOARD**

*Mr. Rheume made a motion to **grant** the petition as presented and advertised and Mr. Parrott seconded the motion.*

Mr. Rheume said it was a modest and reasonable addition and it was in essence one variance request for a setback.

Mr. Rheume said the variance would not be contrary to the public interest because it was not out of character for the neighborhood. He noted that many of the older homes in the neighborhood had additions as this one did a couple of decades before. He added that the lot was surrounded by water. He said the lot did not intrude on the neighboring properties except for one neighbor's view and that neighbor had no objections. Mr. Rheume stated that the spirit of the Ordinance would be observed. Although it was just under 8' for the right yard setback where 30' was required, this was where house was currently sited and the property was otherwise large enough to fully accommodate the building, and the applicant was not asking to encroach on that any further. He said substantial justice would be done by allowing the applicant to make full use of their property by adding another bedroom and more open space on the first floor without impacting the public's interest. He said the proposed addition would add to the value of this house and would most likely improve the value of surrounding properties, not diminish their value. He explained that the hardship was due to the special conditions of the property that distinguished it from others in the area. He said there was no fair and substantial relationship between the general public purposes of the Ordinance and their specific application to this property. Setbacks were to keep a distance between homes so they didn't intrude upon one another and this applicant's home was surrounded by water on three sides so there was little impact to the neighbor that was some distance down the road. Lastly, he said the proposed use to build a modest addition to this home was a reasonable one.

Vice-Chair Parrott concurred, added that it was a minor addition within the existing footprint, and would probably be a better-looking structure that would be a benefit to the neighborhood aesthetically and perhaps in terms of value.

*The motion to grant the petition was **passed** by a unanimous vote of 7-0.*

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Mr. Rheume recused himself from the following petition and Mr. Moretti assumed a voting seat.

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3) Case # 1-3

Petitioners: M.A. Boccia & V.H.T. Luong Joint Liv. Tr., M.A. Boccia & V.H.T. Luong, Trustees, owner, Chris Meyer, applicant

Property: 30 Brewster Street (26-30)

Assessor Plan 138, Lot 35

Zoning District: General Residence C

Description: Add third floor dormers to two existing structures, adding one dwelling unit for a total of three dwelling units on one lot.

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

1. A Variance from Section 10.324 to allow a lawful nonconforming building or structure to be added to or enlarged in a manner that does not conform to the requirements of the district.
2. Variances from Section 10.521 to allow the following:
  - a) A lot area per dwelling unit of 1,220 ±s.f. where 1,831± s.f. exists and 3,500 s.f. is the minimum required.
  - b) A front yard setback of 0'± where 0' exists and 5' is the minimum required.
  - c) A left side yard setback of 0'± where 0' exists and a right side yard setback of 5'± where 5' exists and 10' is the minimum required for both.
  - d) A rear yard setback of 0'± where 0' exists and 20' is required
  - e) 41.3%± building coverage where 41.5%± exists and 35% is the maximum allowed.
3. A Variance from Section 10.1112.30 to allow 4 parking spaces to be provided where 6 parking spaces are required.

**DISCUSSION AND DECISION OF THE BOARD**

Chairman Witham suggested the Board consider a discussion on Fisher vs. Dover. He announced that they had received a memo from Attorney Elizabeth Moreau, the applicant’s attorney. He said he went through the attorney’s memo stating the merits of why the case was different and should be heard. Reading from her second paragraph, she said the design was “...changed to lower the proposed height of both buildings by several feet to moderate an increase of 16” for one building and 18” for the other.” Chairman Witham said he was slightly confused by how the design changed the proposed height by several feet when it stated it was only inches. He continued to read that the dormers on the back were changed from three to two that were wider. He said he was previously concerned that the rear dormer was the full width of the building which was now



stepped in by 12” on three sides, but he was not sure that could be justified as substantially changed. He understood the goal was to get three units where there were two, but he felt they were asking too much out of the buildings and he didn’t see a significant change and in conclusion thought Fisher vs. Dover applied to this situation.

Mr. LeMay asked if the concern was that there would be intensification on a structure that was for two single families.

Chairman Witham said he was originally concerned with the volume from the addition of a third level that would create a three-story wall straight up with the large dormer along the back property line. He said they now stepped the third floor back 12”, but that did not seem substantially different. He said the three-unit variance was also driving another variance for more parking. He said he understood the Islington Street Association was in support, but he thought that was because it was better than what was there now. He said they granted variances for the best project they could get and did not think that was sufficient reason to grant a variance. Chairman Witham said he reviewed the application looking for differences, but couldn’t find sufficient reason to consider the variance.

Ms. Chamberlin agreed that they should invoke Fisher vs. Dover. She said she didn’t think it was enough to tinker with the plan. She said she thought the changes needed to be substantially different to respond to the concerns of the Board’s previous review and not just move a few inches or a foot here or there.

Mr. LeMay asked how much the proposed variance request changed. Ms. Walker said the description hadn’t changed. Chairman Witham said the only thing that appeared tweaked was what went up on the upper levels with one decimal point changed.

*Mr. Durbin made a motion to invoke Fisher vs. Dover and decline to hear the petition. Ms. Chamberlin seconded the motion. ,*

Mr. Durbin said the key provision in Fisher vs. Dover was that the proposal was not materially different from the previous application. He said small “tweaks” as Chairman Witham stated were not enough to meet the definition the court used and he therefore moved to decline to hear the application.

Ms. Chamberlin agreed and said differences should be material and obvious and they shouldn’t have to dig through an application to find tiny differences.

*The motion to invoke Fisher vs. Dover was passed by a unanimous vote of 7-0.*

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Mr. Rheume resumed his seat and Mr. Moretti returned to alternate status.

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- 4) Case # 1-4
- Petitioner: 1000 Islington Street LLC c/o Carolyn Chase DMD

Property: 1000 Islington Street

Assessor Plan 171, Lot 10

Zoning District: Single Residence B

Description: Install a 7' x 3' attached wall sign

Requests: 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 21 s.f. attached wall sign where 4 s.f. is the maximum sign area allowed for an individual wall sign.

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

Ms. Carolyn Chase said she had been a dentist in town for 29 years and recently hired another associate. She appeared before the Board to request a variance for better signage on her business. She said she recently hired another associate. She said her building was very plain facing Islington Street so she said the sign she was proposing was more aesthetic and more in keeping with other signs in the neighborhood. She said if she were to adhere to the Ordinance, she would be allowed to have several 4' square signs, but she thought would be more unattractive and difficult to see and it could be dangerous for drivers who would need to squint to see a smaller sign. She said she was zoned Single Residence B, but her building had always been a business. Ms. Chase showed a photo of signage for the businesses across the street.

Ms. Chase said granting the variance would not be contrary to the public interest and would actually be in the public interest because it would be more aesthetic. She said the proposal would not devalue the neighboring properties. She said if denied, she would need a smaller sign which would not be aesthetic and in keeping with the size of the building or other businesses across the street. She said the property was unique and bordered two streets with more frontage that allowed her to have more accumulative square feet of smaller signs. She said the sign would be well designed and fit the building, make the building look better and increase business for her new associate.

Mr. LeMay asked if the sign in the window was the only sign she currently had and Ms. Chase said it was, but it was difficult to see from the road especially if the sunlight was bright. Mr. LeMay asked if she would keep that sign and Ms. Chase said she would like it to remain.

Mr. Rheume asked Ms. Walker for clarification where the 117' of store width linear frontage dimensions on the sign permit application came from and Ms. Walker said that was the actual building frontage. Mr. Rheume asked if that number was made up from three sides and Ms. Walker said it was an odd shape and a bit challenging, but the Inspection Department did the first review and she believed that was correct.

Mr. Rheume asked the applicant about illumination and Ms. Chase said she currently had safety lights that came on at dark.

### **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. Rheume made a motion to **grant** the petition as presented and advertised. Mr. Mulligan seconded the motion.*

Mr. Rheume said the applicant made a good case for an unusual situation and the basis of the hardship was that it was a commercial building stuck on a peninsula in a residential neighborhood, but it was more closely associated with the businesses across the street that were actually in the business zone. He said some of the signs on the businesses across the street were much larger. He said the Zoning Ordinance showed they would be allowed to have 200 s.f. of signage if the building was actually in the business district. This use in this building use was more what would be seen in a mixed residential or mixed office district, which would allow a 16-s.f. sign. He said the applicant was asking for 21 s.f., which was in keeping with the overall expectation if this business was in a more logical zoning area, and therefore the request was reasonable and should be approved.

Mr. Rheume presented the criteria for granting the petition, saying the variance would not be contrary to the public interest which was to avoid a large amount of sign clutter in a true residential neighborhood while, in this case, most of the residents were fairly removed from the main activity of this business. For that reason, he said the spirit of the Ordinance would be observed and 21 s.f. would be in accordance with a more logical zoning area. He went on to say substantial justice would be done by allowing the owner to make full use of the property, and provide better identification to assist people in finding the business. Mr. Rheume said the value of surrounding properties would not be diminished by this relatively modest sign which would not be illuminated. He said the special condition distinguishing this property from others in the area and creating a hardship was that the property was in a zoning area that didn't reflect the use as well as it might. He concluded by saying the use was a reasonable one because the applicant was asking for something that would be in line with more accurate zoning.

Mr. Mulligan said the existing window sign was not adequate and he thought the health, safety and welfare of the public would be promoted by having signs on both sides of the building as it fronted two ways on Islington Street.

Mr. Parrott said he had a problem with the application because it was in the Single Residence B District and the nearby buildings were residential. He said a shoe business on the corner of Spinney Road was the last commercial use that went out of business some time ago. He said people usually looked up the address of their dentist office for appointments so there was not sufficient reason to allow such a large sign to attract drive by business like a fast food restaurant. Ms. Chamberlin said she understood the applicant needed a visible sign, but agreed with Vice-Chair Parrott that it seemed like too large a sign for residential area.

Mr. LeMay asked how many smaller signs would be allowed on the property. Mr. Rheume said 58.5 s.f. of signage divided by signs 4 s.f. in size meant they could have fourteen signs. Ms. Chamberlin asked why so many and Ms. Walker said it was not intended, but was an anomaly because the property was on three street fronts.

Mr. LeMay said they could make a stipulation to allow only one wall sign allowed

*Mr. Rheaume **amended** the motion with the stipulation that only one wall sign would be permitted while allowing the window sign to remain. Mr. Mulligan agreed.*

Chairman Witham said he would be in support of the proposal. He said he realized it was the Single Residence B District, but the business had been there for a long time and the residents had learned to live with it. He said it was a peculiar lot sticking out at the end of a peninsula and the sign would face the businesses across the street and not have any impact on anyone’s back yard or change the character of the neighborhood.

*The motion to grant the petition with a stipulation **passed** by a vote of 5-2 with Ms. Chamberlin and Mr. Parrott voting against the motion..*

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- 5) Case # 1-5
  - Petitioner: Mary R. Hurlburt
  - Property: 220 Union Street
  - Assessor Plan 135, Lot 24
  - Zoning District: General Residence C
  - Description: Remove existing residence and construct a new two-story 878-s.f. ± single-family residence.
  - 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 building to be reconstructed without conforming to the requirements of the Ordinance.
    - 2. Variances from Section 10.521 to allow the following:
      - a) A left side yard setback of 6.5’± where 10’ is the minimum required.
      - b) A rear yard setback of 12.8’± where 20’ is the minimum required.
      - c) Continuous street frontage of 25.5’± where 70’ is the minimum required.

**SPEAKING IN FAVOR OF THE PETITION**

Chairman Witham said this was another case where the Board might want to discuss the appropriateness of applying Fisher vs. Dover. He said they had a letter from the applicant stating the differences. He said he felt this petition was materially different from the previous proposal and felt the Fisher vs. Dover ruling wouldn’t apply. Mr. Rheaume agreed because the first proposal was for a full two-story addition with an attic above and they were now proposing 1-1/2 stories with dormers. He said it went from a rectangle to an “L” shape with larger setbacks. Chairman Witham added that the peak would be 10’ lower not 18’ lower.

Mr. Peter Agrodnia, a surveyor representing the applicant, presented several changes they made in response to feedback received from the Board at the last hearing. If had also been brought to their attention that there were several neighbors that had concerns as well.

Mr. Agrodnia informed the Board that they were proposing a lower structure than before and it would be built on a slab. He said the architect told him the height was similar to other structures in the neighborhood with the exception of the small, rental unit that was a converted shed or garage. He explained that it was an “L” shaped lot and they were trying to fit the building to the lot better particularly to the area that was only 1.7’ off the property line, and they were decreasing the

square footage of building coverage as well. He said the building to the right was actually boarded up right now and this side of the street was not in great condition and they were trying to revitalize the neighborhood with a building that would be more attractive and conducive to the neighborhood. He stated that they were proposing the removal of the overgrown vegetation and put in lower profile planting as well.

Mr. Agrodnia reviewed the criteria for granting the request noting that it would not be contrary to the spirit of the Ordinance or contrary to the public interest. He said the proposal would substantially improve the neighborhood and would be in greater compliance with the dimensional requirements. He said the improvements would not threaten the public safety, health, or welfare. He said there currently was a 3' concrete walkway between the building which would improve public safety from the risk of fire. He also said the traffic flow should be improved because the proposed parking would be deeper into the lot. He went on to say substantial justice would be done by making the building more attractive and cutting down the overgrown vegetation. He acknowledged that the Madison Avenue side was quite nice, but his section of Union Street had older buildings that were in disrepair. He said the value of surrounding properties should not be diminished by this proposal. He said the improvements would increase the value of the property and should enhance the value of surrounding properties as well. He finished by saying the literal enforcement of the Ordinance would result in an unnecessary hardship because the size of a building in compliance on this lot could only be 15 s.f. with a bump out on one side.

#### **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. Mulligan made a motion to **grant** the petition as presented and advertised. Mr. LeMay seconded the motion.*

Mr. Mulligan said the proposal was on a smaller footprint than what currently existed and it respected setbacks in regards to the nearest structure so it was an improvement over what currently existed.

Mr. Mulligan reviewed the reasons for granting the variances, noting that it would not be contrary to the public interest nor the spirit or intent of the Ordinance as it would not alter the essential characteristics of this densely populated residential neighborhood. He went on to say the proposed changes would not threaten the health, safety and welfare of the public which should be enhanced by respecting the setbacks to 214 Union Street. Mr. Mulligan said granting the variance would result in substantial justice because substandard, vacant housing would be replaced with a new home that would be brought up code so there would be no gain to the public in keeping the status quo which would outweigh the loss to the applicant. Mr. Mulligan continued that it would not diminish the value of surrounding properties to replace a home in poor condition with a modern attractive structure. He stated that the unnecessary hardship was an "L" shaped lot with impossible setbacks. The proposal was to move the structure away from the closest small dwelling and make it more conforming than what was there. For that reason there were special conditions in the

property and there was no fair and substantial relationship between the lot requirements and setbacks and their application to this property.

Mr. LeMay said it was still a bit tight, but it was slightly more conforming and it made the best possible use of an awkward lot.

Mr. Rheume said he would support the motion. He mentioned that he used to live a few blocks away from the neighborhood and felt the proposal fit in well with the lot. He commended the applicant for putting in a lot of space in the floor plan with dormers on the second story, but it didn't feel overly large like the first proposal did with the full second story and large attic. He said it seemed more in keeping with the surrounding homes in the neighborhood. He thought it would help neighborhood overall with the full use of an odd lot.

Mr. Parrott said it was an improvement over the previous proposal, but he was still concerned that there was only 25' frontage on the street where the standard was 75'. He said it was a very congested lot. He said the standards were generally for rectangular lots, but this was an "L" shaped lot and the fact that it had been there a long time didn't make the argument for him that an awkward shaped lot should have an awkward shaped house. He also didn't think it was a very good design when you used what should be the front lawn to park cars. He said the house that abutted the back was extremely close to the property line so the whole area was congested, and although creating a new house would be an improvement, it still didn't pass the requirements for light and air so for that reason he couldn't support the motion.

Mr. Rheume said there was another lot developed in the same neighborhood on the corner of State and Union Streets where a larger house was put up on an equally small lot along with a garage beneath to meet the parking requirements. He said this applicant had created a more understated home, but because they were not putting a garage, the front yard was taken up with parking. He said it was similar to what was there and was tastefully done.

Chairman Witham said it was a challenging lot with an existing home on it. He said what tipped his decision toward the side of granting the variances were the proposed changes compared to what existed. He said they were bringing a more glaring nonconformity into greater conformity.

*The motion passed by a vote of 6-1 with Mr. Parrott voting against the motion.*

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- 6) Case # 1-6
  - Petitioners: Hill-Hanover Group LLC, owner, Deer Street Associates LP, applicant
  - Property: 181 Hill Street and 317-339 Hanover Street
  - Assessor Plan 125, Lot 14 and Assessor Plan 138, Lot 62
  - Zoning District: Mixed Residential Office & Mixed Residential Business
  - Description: Parking and dimensional relief as a result of a proposed lot line adjustment.
  - Requests: The Special Exceptions and Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Special Exception under Section 10.1113.112 to allow required off-street parking spaces to be located on a lot separate from the principal use, which is under the same ownership and within 300' of the property in question.  
*If the Special Exception is not granted:*
2. A Variance from Section 10.1113.11 to allow ten of the required off-street parking spaces to be located on a lot separate from the principal use.  
*In addition, the following Variance requests:*
3. From Section 10.1111.20 to allow alterations to a nonconforming use without complying with off-street parking requirements.
4. From Section 10.1114.20 to allow off-street parking that does not comply with the minimum dimensions for stall layout and provision of bumper stops within 4 feet of a building or public street.
5. From Section 10.1114.32 to allow off-street parking areas that requires vehicles to enter or leave by crossing over another parking space or by backing into or from a public street or way.
6. From Section 10.311 to allow modification to an existing nonconforming lot.
7. From Section 10.521 to allow a lot area per dwelling unit of 1,344± s.f. where 5,000± s.f. per dwelling unit is required.
8. From Section 10.521 to allow building coverage of 51%± where 30% is the maximum allowed.
9. From Section 10.521 to allow open space of 9%± where 25% open space is the minimum required.

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

Chairman Witham said they would deal with the Special Exception request, and then they would move on to the variance requests if that was not granted.

Ms. Walker said the Legal Department felt the definition of ownership was not clear enough in the Ordinance so the City attorney left it up to the Board to make a determination on the applicant's argument that an easement should be considered the same as ownership. Chairman Witham said he was of the belief that we don't own property, we own rights and if we are deeded rights, it's close enough to owning to fall within the guidelines of the ordinance for ownership. Mr. Parrott said whoever paid the property tax would be his definition of ownership.

Ms. Walker said there were some variances that would apply whether the Special Exception was granted vs. the variances. She said some of the variances related to the lot and would still need to be voted on. She said variance requests #6 through #9 dealt with the nonconformities of the lot. Chairman Witham clarified that those would be the variance requests if the Board went along with the Special Exception. Ms. Walker said the Planning Department staff thought parking still had to conform to the Ordinance even if the Special Exception was granted but the applicant might have something to say that would support the granting of the Special Exception that would bring the parking into greater conformity. She said the challenge was to capture as many variance requests as possible in the legal notice because a new situation had been created. Ms. Walker said the Planning Department determined that the parking spaces used to meet the parking requirement had to comply with the dimensional standards.

Mr. Rheume asked if he was correct in understanding that if they granted the Special Exception, then they would still need to meet Items 4 and 5 in regard to parking, but not Items 2 and 3 because they would meet the off street parking requirements. Ms. Walker said that was correct.

Mr. Rheume said he would like to hear the applicant's idea of ownership.

Attorney Dennis Robinson with the firm of Pierce Attwood said he was representing a potential purchaser of the property and came before the Board with Holly Malloy and GL Rogers on the purchasing side, along with Mr. Jeff Sabin, the seller's property manager and Mr. John Chagnon with Ambit Engineering who had represented the applicants before the Planning Board the week before.

Attorney Robinson said he would first speak to the Special Exception and why the easement qualified as ownership. He said normally an easement was granted as a permanent right that ran with the property. He said there was very little distinction between parking spaces that were set aside for parking to benefit another property and the ownership of that land because from a practical perspective, nothing could be done with the land when there were parking spaces. He noted that Vice-Chair Parrott had said the ownership would go with whoever paid the taxes and in a certain sense it would be taxed against the owner of the easement because it would go with the owner of the property it benefited. He said that was the reason he felt the circumstances fell under the Special Exception because from a practical perspective there was very little different between owning the soil and the right to park on it.

Chairman Witham asked if his point was similar to saying someone owned a house across from an ocean side lot, and held an easement to that lot which provided waterfront views and made the value and taxation of the house greater. Attorney Robinson agreed and said in law school they compared ownership of property to having a bundle of sticks and a fee simple ownership owned the whole bundle, but removing different sticks for different property rights like an easement, would allow someone to own that portion without owning the rest.

Mr. Rheume said he was trying to understand how the particulars on this easement would relate back to this new property that they were creating. Attorney Robinson said they had a copy of a purchase and sale agreement that contemplated that an easement would be granted and transferred upon sale. He said they wouldn't necessarily create an easement in advance of a sale because they wanted to make sure it went through. Mr. Rheume asked Attorney Robinson to summarize and explain the terms a little further and Attorney Robinson read from the his exhibit.

Attorney Robinson explained the transaction in terms of what was under contract for purchase and what would be adjusted. He said there were two different tax lots with the first tax lot along Hanover and Autumn Streets. He said they were proposing a relocation of the property line. He said the lots were currently under the ownership of Hill Hanover, LLC with a common right of way known as Hill Street that extended 10' on either side of the proposed property line, which was where the Mixed Residential Business and Mixed Residential Office zoning lines were as well. Attorney Robinson said the parking ordinance required 19 off street parking spaces and there were only 10 on site parking spaces so they were proposing 9 more spaces in the garage.

Chairman Witham asked if something happened to that lot would that number of parking spaces be relocated or was the easement location specific. Attorney Robinson replied that there would be



9 spaces in the garage that would meet the Ordinance requirements initially, but the agreement between parties would be to provide 24 total spaces based on the seller's wishes and what the Board approved. The terms of the easement state there would be a one-time ability to relocate within the specific area.

Mr. Rheume asked what would force the parking spots to remain near the new parcel and what would prevent future parking from ending up in the further "arm" of the lot if they built a larger complex on the lot in the future. Attorney Robinson said the easement agreement was that parking would remain in parcel 1.

Mr. Rheume said he was also confused by the language that referred to leasing the 9 spaces in the garage to third parties. He said he thought it was available to lease to anyone living there. Attorney Robinson said there was an agreed upon payment tied to whatever the City charged for the lots so even though there was an easement, there was a monthly payment required. Mr. Rheume said he thought parking was currently free to residents of the units and asked if a fee would be charged later. Attorney Robinson said the individual tenants might not have to pay, but the owner agreed to pay a monthly charge for allocated parking spaces to defray the costs of maintaining the spots.

Mr. Rheume said the proposed easement talked about three parking spaces on Autumn Street, which he thought was a public right of way and any vehicle could park there. Attorney Robinson said that was true, but they didn't have the benefit of a survey when they negotiated the purchase and sale so they weren't sure if the parking spaces were located on Autumn Street or the property. Mr. Rheume said it appeared that those three spaces were not included in the calculation of the 19 spaces needed. Attorney said that was correct. He said there were 6 along Hill Street and 4 head in parking spaces between the buildings. Mr. Rheume said the head in parking spaces didn't conform dimensionally. Attorney Robinson said there were no dimensional nonconformities for parking.

Mr. Mulligan said he was confused by the easement concept of a buyer granting the seller a permanent easement that ran with the land forever for the purpose of parking, but the seller would be providing the buyer a fee for the easement. He asked if the buyer could cut off the rights if the seller stopped paying the fee. Attorney Robinson said they could after a lengthy period of time. Mr. Mulligan said it sounded more like a license than an easement. He said an easement ran with the land forever and could be conveyed with the property, but this seemed more like a relationship between abutting properties. Attorney Robinson said a license was revocable at will, but as long as these people made payments, there was nothing that could interfere with their property rights. Additional discussion ensued regarding the right to park on another piece of property that could evaporate if payment wasn't made. Mr. Parrott said he didn't see how they could have an easement to rent something and then take it back.

Vice-Chair Parrott said there were a lot of right-of-ways, but not common right-of-ways and asked what the legal status of the term was and who owned it. Attorney Robinson said in 1845 Hill Street connected to Hanover Street. He said that section was owned by Portsmouth Steam Company at the time and they wanted to expand so they petitioned the City Council to discontinue portions of the right of way including Hill Street. Their request was granted and the public right-of-way went away. Subsequent maps showed that the Portsmouth Steam Company never expanded so the right-of-ways stayed where they were and when the land was conveyed in 1906, the common right-of-way was declared in the deeds. Vice-Chair Parrott asked if that was a

recognized legal term and if anyone could claim ownership. Attorney Robinson said the oddity of the language was “common” whereas right-of-ways were usually linked to specific properties and uses, but common ways allowed others the right to use it even though it was not a public street. He said this declaration gave the public the right to use Hill Street, and those rights would have to be discontinued if they were to close it off.

Mr. Rheume asked if the DPW maintained that portion of Hill Street. Attorney Robinson said it was their official stance that they didn’t, but it was debatable because in practicality they did.

Chairman Witham said the Board needed to determine if a Special Exception was required or just the variances. Ms. Chamberlin said it sounded as if the Board needed to decide if it was more a license than an easement and then they needed to go the variance route.

Ms. Walker said the Board needed to decide first if an easement meant ownership. She said based on her discussions with the Planning Director, they interpreted ownership as whoever owned the lot not the easement, but the Legal Department was more open to the applicant’s interpretation and didn’t feel strongly one way or another. Ms. Chamberlin said she didn’t think they had a situation of common ownership if someone couldn’t use the lot if they stopped paying rent. Ms. Walker asked for clarification on the current ownership status of both lots and Attorney Robinson said both lots and the common right-of-way had the same owner, but they were proposing two owners in the future.

Chairman Witham said he was concerned that allowing a parking easement when there was subdivision potential could create a problem if there was future development and the parking rent wasn’t paid. Attorney Robinson said the buyer wanted an easement so the parking spaces would remain with the property and it would look more like a lien so there would have to be payment involved whenever the property was sold. He said the payment wasn’t about making a profit for the buyer, but it would be a reasonable rate tied to the average fee the City charged so there would be some money going back to buyer for those fee payments.

Mr. Mulligan said he was comfortable that an easement had property rights that were sufficient with going forward with a Special Exception so long as it was not terminable. He said if it was terminable because someone didn’t make payments then there weren’t sufficient property rights being conveyed. He said if there were a stipulation that the easement and the rights conveyed by the easement were permanent and would last into perpetuity to benefit the seller’s property, then the Board had no concern with how the financial compensation was structured. He said it was being called an easement, but it seemed more like some kind of commercial relationship that may or may not last, which didn’t sound like an easement.

Mr. LeMay said it seemed there was a certain amount of curb appeal for the rental units to offer parking spaces in the garage, but he wondered what impetus there would be in the easement to pay the monthly fee. Attorney Robinson said the owner would have to pay for spaces whether the tenant chose to reimburse them or not. Vice-Chair Parrott said he was familiar with the area and those four buildings were in that configuration for a long time and he asked what the driving force behind the proposal was. Attorney Robinson said the residential units could continue as they were, but it wouldn’t be the best use of the property and the lot would probably be redeveloped at some point, though he couldn’t say what the specific development plan would be. Vice-Chair Parrott said it was logical to conclude that someone would want to change something in a substantial way.

Mr. Rheaume said he felt the applicant muddied things up with the proposed language. He said the common ownership idea was not applicable because of the monetary application so he was uncomfortable with granting the Special Exception. Chairman Witham said he was in full agreement though he had no issue with charges for maintenance, but he was not sure if it could be terminated.

*Chairman Witham called for a vote on whether a Special Exception applied and should be granted. It was determined by a vote of 3-4 that a Special Exception did not apply and, thus, was not granted. Voting to apply and grant a Special Exception were Messrs. Durbin, Mulligan and Chairman Witham.*

Chairman Witham said the Board would then consider the requests for variances and he read them into the record. Ms. Walker said variance #4 was no longer required because the resubmission complied with the dimensional requirements.

Attorney Robinson said they went before the Technical Advisory Committee and the Planning Board on January 16, 2014. He said the Planning Board voted to approve the lot line adjustment subject to the BOA approving their variance requests.

Attorney Robinson said the main issue was that the Ordinance required 19 off-street parking spaces for the Hill/Hanover parcel located to the south side of Hill Street. He said there were currently 10 spaces that didn't require a variance with the exception of the two head in spaces on Hanover that didn't require any dimensional relief, but they did require backing into a public right-of-way, which was a separate variance request than what they were currently asking for.

Attorney Robinson said the property was unique because it was divided by a common right of way and it was already two lots for practical and functional purposes. The right-of-way was traveled as a destination street. The parking for residential tenants on Hanover Street was "ad hoc" wherever they could find a space because there were no assigned spaces. He said there were eight spaces that didn't require variance relief and two that did to allow specific, off street parking. He said nine additional on site spaces were required and the only solution would be to allow parking on the adjacent parcel by terms of an easement. He said there would be no problem with creating an easement that would not be subject to termination.

Attorney Robinson summarized the criteria by saying the proposal would not be contrary to the public interest because they were not proposing any changes except a lot line adjustment to the south and formalizing the parking arrangement. There would be no change to the character of the neighborhood. He said it was in accordance with the spirit of the Ordinance to provide off street parking in the best way possible given the divided lot. He said there would be substantial harm to the applicant if they were deprived of the ability to sell a portion of the property to someone interested in purchasing and developing it. It would benefit the public to organize and create formal parking. He said they were not changing anything in the neighborhood so it could not diminish property values. He said literal enforcement of the Ordinance would result in an unnecessary hardship to the applicant because it was a unique lot that was divided by the common right of way and half of it was in one zone and the other half in another.

Mr. Rheume asked if any of the nine parking spots in the garage were currently occupied by any tenants. Attorney Robinson said he didn't know, but he knew none of the tenants had assigned parking rights. Mr. Rheume asked if the nine parking spots would become available to the tenants once the variances were granted. Attorney Robinson said that would be correct. Mr. Rheume asked if anyone currently leasing those spaces would no longer have rights to those spots dedicated to the tenants. Attorney Robinson said the owner told him that there was no one renting the parking spaces and the spaces were available on a first come first serve basis.

Mr. Jeff Sabin, Property Manager for the current owner, Hill/Hanover Group, said only one tenant currently used the parking garage space with four unoccupied garages so no one would be displaced. Mr. Rheume said that would account for five parking spaces, but asked what happened with the remaining four spots. Mr. Sabin said the garage was also used for storage currently, as well as parking. Mr. Rheume said availability of the nice spaces would be necessary to meet the parking requirement. He asked if they would be able to make that change immediately or if it would take time. Mr. Sabin said the spaces were month-to-month arrangements and were typically used more in the winter months, and then they turned over in summer months.

Attorney Robinson pointed out that Hanover Street was a one-way street that was not heavily traveled, which would be a help in regard to the variance request for two car spaces that would need to back out onto the street. Attorney Robinson went on to say that the lot line relocation to the south would increase the size and open space of the lot to north and shift the percentages for open space, lot size, and building coverage requirements. He said the shift didn't involve any changes to the actual property and very little could be done to the remaining lot that would enhance those aspects so they felt a variance was justified.

Attorney Robinson said that the third and sixth variances would not be necessary if the other variances were granted. Mr. Rheume pointed out that the general practice was to include them and grant the general variances along with the specific requests.

### **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**

Chairman Witham commented that he never thought a common right-of-way was a lot in that location so the lot line adjustment made sense. Mr. Rheume pointed out that there were "Residents Only" signs for the street parking which wouldn't be allowed on a normal street. Chairman Witham said the Ordinance did allow them to meet their parking requirements on another lot. He said he felt an easement fell under ownership and if they felt the other variance requests were acceptable, he would like to see a stipulation to prevent a termination of the easement for any reason.

Mr. Rheume said he walked through the neighborhood often and overall the parking in the area was quite congested so he felt the proposal would be an improvement in meeting the Ordinance. He went on to say he had some concerns, however with the parking located at the far reaches of the combined property, which meant people would have to go to quite a distance to get to their

parking spots. He said he was also concerned with the leasing language and spots costs so he would prefer to see it become more simplistic by saying there would always be nine parking spaces to meet the City requirements for legal parking spaces. They would need to include the cost in the easement when sold.

Chairman Witham said instead of the Board trying to come up with the language, would it be reasonable to have a stipulation that the easement be reviewed, modified or accepted by the Legal Department, Ms. Walker said she was not sure they could approve the request without seeing that legal language. Chairman Witham said he would be comfortable with the Legal Department clarifying the language so long as the stipulation stated the Board's intent.

*Mr. Rheume moved to **grant** the variances as presented and advertised for Items 2, 5, 6, 7, 8 and 9 with the following stipulations:*

- *That the nine off-street parking spaces that are approved to be located on a lot other than the principal use are located on a portion of land that was removed from the parcel designated as Map 124, Lot 14 and added to the parcel designated as Map 138, Lot 62 by a lot line relocation approved by the Planning Board. The use of the nine parking spots, presented as part of a proposed easement will continue to be available to current and future owners of the parcel designated as Map 124 Lot 14 by a permanent easement that runs with the land in perpetuity and is not terminable for any reason.*
- *That the easement language be reviewed by the City's Legal Department so that it fulfills the intent of the Board of Adjustment as indicated in these proceedings..*

*Mr. Parrott seconded the motion.*

Mr. Rheume presented the criteria for granting the requests, stating that the variances would not be contrary to the public interest because the requests were primarily centered on parking. He said parking was extremely tight so it was in the public interest to ensure that the parking spaces required to meet the zoning would be available to the residents of Lot 125 – 14. He felt the public also had an interest in preserving the general nature of the units that were there. He acknowledged that the lot coverage and open space was less than what was required, but no changes were proposed to the closely spaced buildings that were characteristic of the neighborhood and so there was nothing contrary to the public interest. He stated that the spirit of the Ordinance would be observed, although it was a little difficult on the face of it to state that. However, while there was a lot of relief requested, it was related to the fact that there were existing buildings that were not changing. The other aspect was that, in some ways, they were trying to improve the parking situation overall for the three units as well as looking to the future and allowing for some redevelopment in the area so they would meet the parking requirements fully. He stated that while the parking was on a separate property it was close enough, as long as granted by an easement, to meet the intent of the Ordinance to have ample parking within a reasonable distance from where people lived. This would allow occupants to park their cars there instead of burdening the streets.

Mr. Rheume stated that substantial justice would be done by allowing the property owner to make full use of both of two adjoining parcels in a more logical way for some future development while at the same point in time preserving the needs of the three current buildings on 125-14 to have adequate parking. He felt that overall that there was nothing here in the public interest that would outweigh the interest of the applicant in trying to have full and proper use of their property.

He stated that the value of surrounding properties would not be diminished. They were not talking about making any major changes to the buildings involved at this point in time and the parking was an arrangement in open areas that were already existing so in that sense he didn't see that anything that they were doing here would really alter the value of the properties one way or the other on either side.

Mr. Rheume stated that, owing to special conditions of the property that distinguished it from other properties in the area, it could not be used in strict conformance with the Ordinance and a variance was necessary to enable a reasonable use. Again, these were three existing buildings and the hardship was that they pre-existed on a relatively small lot. They were tenant buildings that were put up many years ago where this was a much more common practice not really reflective of the future development they were looking for in this area but they were not looking to change that. The other hardship for any development was that there was a sort of awkward arrangement of all these properties and in order to be able to fully utilize this very odd piece of property in the back that had this arm sticking out along the railroad area, you really needed to combine it with this other piece of property. At the same point in time, the applicants recognized the need of this new lot to have some parking and were providing for that. Mr. Rheume believed that granting the variances would allow them to make a reasonable use of the property which would not be case if the Ordinance were strictly enforced so he felt the hardship criteria was also met. With the protective stipulations he had outlined, he recommended approval.

Mr. Parrott stated that this was an unusual set of circumstances. The buildings were there and nothing was going to change. It would be in the public interest to get some of the cars off the street in terms of parking because it was a well known congested area. On balance, he thought it was in the public interest to approve this and he favored the concept that the easements must be made permanent because anything short of that would not satisfy the intent of the Ordinance or have a lasting effect. He was comfortable with the Legal Dept approving the language to ensure that the easements were as permanent as they could be short of some kind of court action. Mr. Parrott stated that he also thought they could make an argument for hardship because none of the three units on Hanover Street were even close to providing enough off-street parking. On balance, this was probably going to be a better situation.

Mr. Witham called for a vote with the stipulations which included allowing relocation of the 9 parking spots to occur once within the conveyed land. Mr. Rheume reiterated that an easement should be granted, that there were 9 parking spaces to be laid out in that area for the future and that there would be no payments from the tenants or the owner of Lot 125/14 to the owner of Lot 138/62. Ms. Walker asked if it was his intent to allow a one-time relocation. She understood the intent to be that the 9 parking spots be maintained in perpetuity according to the easement as long as they were in compliance with the dimensional regulations and she felt a one-time relocation could be problematic. A short discussion followed among Chairman Witham, Mr. Rheume and Mr. LeMay.

Mr. Mulligan concluded that they were over thinking the cost aspect of the parking spaces that would be benefiting one lot while being provided on another. The applicant was apparently acceptable to a stipulation that there would be a permanent non-terminable easement that ran with the land in perpetuity for the benefit of the property that needed to be benefited. He felt the buyer and seller could structure the financial arrangement. He felt the City's Legal Department could put together an easement. He felt they needed to keep this simple and let the easement be

permanent and approved by the Legal Department and not terminable for any reason and leave it at that that. Mr. Rheume stated that his concern with the concept was that somehow the owner would be making money off the deal. If Mr. Mulligan felt that would be adequately addressed by what he was proposing, Mr. Rheume would defer to his legal sense. Chairman Witham asked if Mr. Parrott was comfortable with leaving with the Board not trying to control the fee structure of the spaces and leaving it up to the Legal Department to address the easement language. Mr. Parrott questioned Mr. Mulligan about the fee aspect. Mr. Mulligan stated that however the parties structured the purchase price of the property was up to them. It would be up to the Board to inform the Legal Department that the approval was for an easement that was not terminable for non-payment. When Mr. Parrott said “or for any reason,” Mr. Mulligan stated that it should run in perpetuity and leave it at that. The parties could adjust the purchase price however they agreed. Mr. Parrott felt that Mr. Mulligan and Mr. Rheume were saying the same thing in different terms and Mr. Rheume reiterated that he would defer to his esteemed colleague’s legal mindset.

*The motion to grant Items 2, 5, 6, 7, 8 and 9 of the petition with the proposed stipulations was passed by a vote of 6 to 1, with Mr. LeMay voting against the motion.*

*The motion **passed** by a vote of 6-1 with Mr. LeMay voting against the motion.*

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**IV. PLANNING STAFF REPORT**

- A) Proposed Revisions to Board of Adjustment Application Form and Rules and Regulations.

Chairman Witham announced that Ms. Walker had distributed proposed revisions to the Application Form and the Rules and Regulations.

Ms. Walker said one set of revisions was to the Board of Adjustment Rules and Regulations, one was the changes to the application form, and the other related to an amendment concerning Fisher vs. Dover. Chairman Witham said there was nothing in the Rules and Regulations about Fisher vs. Dover, but he thought applicants should be aware of the case and there would be an opportunity to respond to it in writing with their applications.

A voice vote was unanimously passed to postpone further discussion and decisions on the Rules and Regulations to the next Board meeting.

**V. OTHER BUSINESS**

- A) Proposed Ground Rules for Appeals Hearings – Historic District Commission.

Chairman Witham said he would like to adopt the proposed rules and regulations in relation to the upcoming HDC appeals. Ms. Walker they were just guidelines for ground rules for HDC appeals that were coming before them.

Chairman Witham discussed time guidelines for speakers to respond during the appeal hearings. It was agreed upon that Ms. Walker would be the timekeeper.

Chairman Witham said once the public hearing was closed, the Board would have their discussion before making their motion followed by a reading of the criteria. He said he didn't think they needed to scrutinize all the minor details. Mr. LeMay agreed that even though it was a *de novo* hearing, he thought there was no reason to discard all the work that had already been done, especially in terms of what was agreed upon, so the Board could limit their discussion to areas of discontent. Ms. Walker said based on conversations with the Legal Department, which was summarized in a previous *de novo* memorandum, they advised the Board to consider the application, the letter of decision and the final approval by the HDC, including the stipulations. She went on to say, however, that the Legal Department advised that the Board address each criteria for the whole application and not treat the appeal as if it were a rehearing request that only addressed areas of controversy or disagreement. Mr. LeMay said he hoped they didn't need to review the whole application that covered all the areas that they agreed upon, and Ms. Walker said that would be fine. Chairman Witham interpreted *de novo* as the request for rehearing not the meeting before where approval was granted for the whole project, but apparently the Legal Department interpreted that differently, that they had to listen to the case as if they were hearing it for the first time.

Mr. Rheume said the legal case didn't refer to the HDC's actions, but that the Board of Adjustment did no wrong in ignoring what the HDC had to say, a subtlety that would allow them to overlook various agreed upon aspects of the application. Ms. Chamberlin said *de novo* meant looking at everything. Mr. Rheume agreed, but didn't think they had to discuss everything. Ms. Chamberlin said they had to wait to see what was presented. Mr. LeMay said he thought the concept of *de novo* meant that the deciding board made the decision without questioning what another board had done.

Ms. Walker said the applicants for both appeals expressed concern that the allotted 30 minutes would be a challenge. She said the applicant for 173 Market Street added that they were addressing both the HDC Certificate of Approval and the Conditional Use Permit, which were two different situations so they were asking for an hour and wanted to be the final presenter of the evening so they could respond to issues that were brought up.

Vice-Chair Parrott asked what guidelines on time limits were used in courts that would be useful to the Board. Mr. Durbin said time limits were always in the hearing notice.

Vice-Chair Parrott said people can only concentrate so long and it would be helpful for the presenters to organize their material and cut out the fluff to keep people's attention for 30 minutes. Mr. Rheume agreed that it would be in the interest of the parties to keep comments as short as possible. Mr. LeMay said they could give ten more minutes if someone needed to elaborate. Vice-Chair Parrott agreed that they wouldn't cut people off, but it was important to agree in advance and inform everyone.

Mr. Mulligan said Attorney Loughlin went on for 45 minutes during an appeal during the last month. He said he was all for short and sweet meetings, but he thought these were important issues, and he didn't think people should feel the Board was arbitrarily limiting the presenters' time to speak. He thought half an hour was a bit light. He said the Board also had the ability to ask questions and provide an opportunity for additional comments after the initial presentation. He said he would rather err on the side of allowing people to express themselves. Ms. Walker said Section B was the area where Attorney Sullivan was the most concerned that everyone be treated



fairly. Ms. Chamberlin suggested restricting people from coming up repeatedly, responding back and forth to one another, or rehashing what had already been said. Mr. LeMay said people also go off on irrelevant tangent, and wondered how they could prevent people from going into the deep woods. Mr. Mulligan said they would only have three minutes for public comment so if they wanted to go into the deep woods for three minutes, there was no way around it.

Chairman Witham said if someone had their name on an appeal with legal representation, their voice would be heard when their attorney did the half hour presentation followed by another half hour in closing, but he wondered how manageable it would be if each appellant on a large list spoke. Ms. Walker said the Planning Board adopted a similar procedures for their public hearings without setting a limit for public comment and they had quite a few people speak, but that was the nature of a public hearing. Discussion continued whether to limit presenter's time to 30 or 45 minutes with an additional ten minutes to conclude. Ms. Walker said there was no time frame in which appeal had to be heard, but they had to be reasonable with what the Board could handle on a monthly basis. Chairman Witham took a poll of the Board to see what their preferences were and a majority of the members said they would accept a limit of 45 minutes for the presenters to speak.

A brief discussion regarding consideration of HDC decisions ensued. Chairman Witham said the Board would not be discussing the HDC, but would be discussing the application as presented upon review of the ten criteria. Mr. Rheume asked where they stood in regard to the application being vested prior to the zoning that changed in the past couple of months. Ms. Walker said her impression was that vesting occurred when the application was submitted and the hearing was posted prior to the zoning change. Mr. Rheume asked if the Planning Department could provide the Board with a summary and Ms. Walker said she would get confirmation. Mr. Rheume asked for clarification if a Conditional Use Permit was granted as well and Ms. Walker said her impression was that it had been discussed, but it was determined that it was not necessary. Chairman Witham said he was not comfortable allowing presenters to speak for 45 minutes for both the HDC Certificate of Approval and the Conditional Use Permit separately and the Board members agreed.

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## **VI. ADJOURNMENT**

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 10:39 p.m.

Respectfully submitted,

Jane K. Kendall  
Acting Secretary