

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

7:00 P.M.

**OCTOBER 25, 2016
RECONVENED FROM
OCTOBER 18, 2016**

MEMBERS PRESENT: Vice-Chairman Charles LeMay, Arthur Parrott, Christopher Mulligan, Jeremiah Johnson, James Lee, Peter McDonell, John Formella

MEMBERS EXCUSED: Chairman David Rheume, Patrick Moretti

ALSO PRESENT: Jane Ferrini, Planning Department

Vice-Chairman Charles LeMay was Acting Chairman since Chairman Rheume was absent. He stated that the two alternates, Mr. McDonell and Mr. Formella, would vote on all applications.

I. OTHER BUSINESS

A Board of Adjustment Rules and Regulations

Acting Chair LeMay stated that the BOA Rules and Regulations discussion would be postponed to the November 15, 2016 meeting because two prime members were absent.

*It was moved, seconded, and **passed** unanimously (7-0) to postpone the BOA Rules and Regulations discussion to the November 15, 2016 meeting.*

II. APPROVAL OF MINUTES

B September 27, 2016

*It was moved, seconded, and **passed** unanimously (7-0) to **approve** the September 27, 2016 minutes.*

III. PUBLIC HEARINGS – OLD BUSINESS

(The following two petitions were postponed from the October 18, 2016 meeting).

A) Case #10-7

Petitioner: Cross Roads House

Property: 600 Lafayette Road

Assessor Plan 243, Lot 2

Zoning District: Gateway

Description: Erect a 12'± x 16'± shed.

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

1. A Variance from Section 10.573.20 to allow a 5'9" right side yard setback where 10' is required for an accessory structure.

SPEAKING IN FAVOR OF THE PETITION

Director of Operations at Crossroads Dan Mitchell was present to speak to the petition and said he needed to build a tool shed.

Acting Chair LeMay asked when the shed was constructed. Mr. Mitchell said it was in process. Mr. Mitchell then reviewed the criteria briefly and said they would be met.

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

No one rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

*Mr. Parrott moved to **grant** the variance for the application as presented and advertised, and Mr. Lee seconded.*

Mr. Parrott stated that the land was not being put into any other productive use and that, more importantly, part of the yard was well buffered from the two neighbors, with fencing on the back and a few small trees. He said that the shed would have no adverse effect on either adjacent property and would fit in nicely and serve a useful purpose. Mr. Parrott stated that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance because the spirit was to allow people to improve their property and make provisions for useful additions to their property. He said that he could not see any public interest that would be involved because the shed would be back from public land, so granting the variance would do substantial justice and it would also substantially benefit the Crossroads House. It would not diminish the value of surrounding properties because the shed would be fenced off on both sides and would be a utilitarian structure with no effect on adjacent properties. As for the unnecessary hardship test, he said the property was pretty well built out and it wouldn't make sense to

put such a structure on the front of it but would be logical to put the shed in the back. He said it met all the criteria.

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

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

B) Case #10-8

Petitioner: Charles A. Corlin

Property: 736 Middle Street

Assessor Plan 148, Lot 24

Zoning District: Single Residence B

Description: Construct a 24'± x 24'± detached garage and 8'± x 16'± shed.

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

1. Variances from 10.573.20 to allow a 3'± right side yard setback for a shed where 10' is required and a 6'± rear yard setback for a garage where 15' is required.

Acting Chair LeMay recused himself from the vote.

*It was moved, seconded and **passed** unanimously (6-0) to elect Mr. Parrott as Acting Chair for the petition.*

SPEAKING IN FAVOR OF THE PETITION

The owners Charles and Patty Corlin were present to speak to the petition. Mr. Corlin reviewed his petition and noted that the parking area was accessed by a shared driveway. He reviewed the criteria and said they were met.

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

No one rose to speak, and Acting Chair Parrott closed the public hearing.

DECISION OF THE COMMISSION

*Mr. Mulligan moved to **grant** the variance for the application as presented and advertised. Mr. McDonnell seconded the motion.*

Mr. Mulligan stated that what was proposed were two new accessory structures, a garage and a shed, on an unusually-shaped lot with access to two different streets. He said it was a complicated lot primarily because its vehicular access was along Aldrich Road and, due to the unusual shape of the lot, there was no good place to site a garage that would be in compliance with the setback requirements.

Mr. Mulligan stated that granting the variance would not be contrary to the public interest or to the spirit of the Ordinance because the essentially residential character of the neighborhood would not change. The health, safety and welfare of the public would not be negatively affected if the setbacks were violated. Granting the variance would result in substantial justice because the loss to the applicant if denied would far outweigh any gain to the public if the applicant was required to comply with the setbacks Ordinance. Granting the variance would not diminish the value of surrounding properties because the garage's proposed site was the appropriate and natural place for it, adjacent to the neighbor's garage, and would enhance surrounding property values. As for the literal enforcement of the Ordinance, the special conditions of the property were that the lot was a very odd shape and had road access from Aldrich Road and frontage on Middle Street, which distinguished it from other properties in the area. He said the property had plenty of light and air, and the public had not said otherwise. It was a residential use in a residential zone.

Mr. McDonnell said he concurred with Mr. Mulligan and noted that the structure was a duplex and was required to have four parking spaces on the lot.

Acting Chair Parrott said he echoed the comments, noting that it was an odd-shaped lot and also had a shared driveway with another property, which made it more useful to place the garage where it was intended to go.

The motion passed with all in favor, 6-0.

IV. PUBLIC HEARINGS – NEW BUSINESS

- 9) Case #10-9
Petitioner: Elizabeth Pickford
Property: 1 Sheridan Avenue (1 & 3)
Assessor Plan 168, Lot 7
Zoning District: General Residence A
Description: Reconstruct and expand front porch.
Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed, enlarged or structurally altered except in conformity with the Ordinance.
 2. A Variance from 10.521 to allow a 0'± front yard setback where 15' is required.

Acting Chair LeMay resumed his seat. Mr. Parrot resumed his regular voting seat.

SPEAKING IN FAVOR OF THE PETITION

The owner Elizabeth Pickford and her brother John Craig were present to speak to the petition. Ms. Pickford reviewed the reasons why the porch had to be reconstructed and expanded. She noted that she wanted to increase the depth by two feet. She reviewed the criteria and said they were met.

Mr. Mulligan said that Ms. Pickford had the only house on the street and asked if she was the only resident to access the property from Sheridan Avenue. Ms. Pickford agreed.

Mr. Johnson said the floor plan of the porch showed that the proposed deck would be eight feet from the house and 10 feet to the lot line and noted that Ms. Pickford was asking for a zero foot setback but it seemed to be two feet. Mr. Craig said if they used the end of Sheridan Avenue, the house would not be compliant, so they wanted to extend the porch by two feet and get rid of the stairs, making the net difference two feet. Mr. Johnson clarified that Ms. Pickford was asking for a zero foot setback but might need to ask for less. Mr. Craig said they were trying to be more compliant.

Ms. Ferrini noted that the applicant had spoken with Planning Department personnel and had gone for the worst-case scenario.

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

No one rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

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

Mr. Johnson stated that he found the request to be reasonable because it would increase the size of the porch and trade one non-conformity for another. He stated that granting the variances would not be contrary to the public interest or to the public's health, safety or welfare because there was nothing injurious to public rights. The spirit of the Ordinance would be observed. Substantial justice would be done because there was no benefit to the public that would be outweighed by any benefit to the applicant. He said the applicant made the case that the front porch had a lot of deterioration, and adding a tasteful roof to the deck may help the longevity of the new structure. He said a new deck and roof added to the front of the property would increase surrounding property values. Mr. Johnson said there were a few hardships, including the siting of the house already on the property, making anything that would occur at the face of the house require setback relief. The property was at the end of a dead-end street, and the setback was in reference to the street and not to the light and air of the neighbors. He said the applicant was the only one who would access the property, so he was less concerned about it than if the house were on a busier road.

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

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

10) Case #10-10

Petitioners: Blueberry Lafayette Investors LLC & Edward Walsh, owners, Rose Steel, Inc., applicant

Property: 3605 Lafayette Road (3607)

Assessor Plan 298, Lot 2

Zoning District: Gateway

Description: Light manufacturing with related office.

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

1. A Variance from Section 10.440 to allow a light manufacturing with accessory use in a district where the use is not allowed.
2. A Variance from the parking requirements as outlined in Section 10.1111 to allow a change of use that does not meet the requirements for design and location of off-street parking.

SPEAKING IN FAVOR OF THE PETITION

Attorney Derek Durbin on behalf of the applicant Rose Steel was present to speak to the petition. He distributed a few letters of support to the Board.

Attorney Durbin stated that the property was a 16-acre parcel and located in the Rural and Gateway Zoning Districts, noting that the building itself was only in the Gateway District. He said that no residential uses would be made on the site and that it would be surrounded by other businesses, which he named. He noted that the building had been vacant since February 2016. He said that Rose Steel would produce small items, would employ 4-5 employees, and would be open from 7 a.m. to 3:30 p.m. He emphasized that there would be minimal vehicular traffic and no hazardous waste.

Mr. Mulligan asked Attorney Durbin to explain the variance for the parking requirements. Attorney Durbin replied that the Planning Department asked that they include variance relief from the parking requirements because the parking spots were not delineated. He said there was ample parking on the site for 50 or more vehicles, where 20 spaces were required, and that he thought the parking was not an issue.

Attorney Durbin reviewed the criteria and said they were met. He stated that the building was configured for industrial type use and that the surrounding businesses were supportive. He noted that if the application was denied, it would be a mandate to stripe the parking lot but would not stop the proposed use of the site. He said there had never been any striping on the site and thought the parking would be decreased.

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

No one rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

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

Mr. Mulligan stated that it was a use variance but the property was uniquely situated so that it could accept the use being proposed, so it was a reasonable request. He said that granting the variance would not be contrary to the public interest or to the spirit of the Ordinance, and the public's health, safety and welfare would not be threatened. It would not create an inordinate amount of odor, noise, hazardous materials and traffic and would be consistent with the commercial nature of the existing built environment and the surrounding properties. Granting the variances would do substantial justice because, given what was already built on the site and the lack of industrial space available, the loss to the applicant would be substantial if the variances were denied and there would be no gain to the public. Surrounding properties would not be diminished because it would not be expected that the change in use would have any adverse effect on surrounding properties. The existing built environment would stay the same. As for the literal enforcement resulting in unnecessary hardship, specific conditions of the property were the current built environment of an existing industrial building. There was ample parking that lent itself properly to the use, so there was no fair and substantial relationship between the purpose of the allowable uses in that particular zone and their application to the property. He said the use was a reasonable one and fit the existing building nicely.

Mr. Parrott said he concurred with Mr. Mulligan and added that the proposed use was very logical for that section of Lafayette Road, a commercial section of business and light industry, as well as logical for that type of building. He said it was the type of structure that could be used for many purposes, and the fact that the Ordinance didn't allow for it was simply a case that the Ordinance didn't fit very well with that particular property or stretch of road, so he felt that the variance was very appropriate.

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

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- 11) Case #10-11
Petitioners: Sherwood Rollins III Revocable Trust & Denise C. Rollins Revocable Trust
Property: 149 Cass Street
Assessor Plan 146, Lot 7
Zoning District: General Residence C
Description: Convert an accessory structure to a dwelling unit.
Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.521 to allow a right side yard setback of 3.6'± where 10' is required.

Mr. Mulligan recused himself from the vote.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen on behalf of the owner was present to speak to the petition. He introduced the owner and the contractor and stated that the renovations would include adding a kitchen. The property was in the GRC Zone, where two dwelling units were permitted by right. He reviewed the criteria and said they would be met.

SPEAKING IN OPPOSITION TO THE PETITION

Brian and Marie Kiely of 169 Cass Street said they were against the variance because the garage would be turned into a dwelling unit 3-1/2 feet from their property, creating noise and lack of privacy and diminishing their property's value.

Tim Parker of 183 Cass Street said he felt that the detached living unit would change the character of the neighborhood because it would be the only detached unit.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen stated that the use was permitted and that they had no plans to put a window on the side of the carriage house that would affect the abutter. He said they would create a buffer and place proper screening. He noted that the purposes of the setback requirement included promoting light and air, and because the structure already existed, the purposes would not be compromised.

Mr. Parrott noted that the application checklist provided by the Planning Department required dimensional variances, including the dimension size and height of structure and dimensions and locations of parking spaces. He said the application was incomplete without them. Attorney Bosen agreed and asked that the petition be tabled. Mr. Parrott said he was prepared to vote on the application but pointed out that it was an omission on the plan and was important information, as determined by the Planning Department.

Acting Chair LeMay agreed with Mr. Parrott and pointed out that it was a scale drawing. Mr. Parrott and a few other Board members said they would move forward.

No one else rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

Acting Chair LeMay stated that it was a dimensional variance and not a use variance and that it wasn't about permission as to whether the building could be used the way it was proposed, but the fact that the building was 3-1/2 feet from the line. He said the question was whether allowing that variance caused problems or exacerbated substantially the problems heard from the public, and he suggested a stipulation that the side of the building that faced the abutter remain completely blank.

Mr. Parrott noted that the applicant's property and the adjacent one were generous-sized properties and that there was plenty of room on the applicant's property for a second structure to be constructed or moved to another location where the setbacks could be easily met. He said he did not find a hardship because there was plenty of area and frontage, and the Board would not take something away from someone. He noted that a redesign and some additional expense could bring the property fully into compliance.

Mr. Formella said he agreed with Mr. Parrott but also felt that a dwelling unit only 3-12 feet from the property line could affect the neighboring property, and the burden was on the applicant to show that would not be the case. He also said there were no other detached dwelling units in the neighborhood and felt it was a change in character. Mr. Johnson said he agreed with Mr. Formella but felt that the applicant could just move the structure over 6-1/2 feet if the Board denied the application, and he wouldn't see how that would make much of a difference. He said 3-1/2 feet was a pretty low number.

Acting Chair LeMay said the variance would enable a change in use. Mr. McDonell said he agreed that the applicant could move the structure 6-1/2 feet and didn't see how 3-1/2 feet would make much difference to the neighbors. He said he found special conditions and hardship and would not support a motion to deny.

*Mr. McDonell moved to **grant** the variance for the application as presented and advertised. Mr. Johnson seconded the motion.*

Mr. McDonell stated that it wasn't a change in use but was a conversion of an accessory existing structure into a dwelling unit and would remain in the existing location. He said it was relatively close to the side line of the lot, but the side setback required 10 feet, which wasn't that large to begin with. He said granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance. He understood the neighbor who felt that the essential characteristics of the neighborhood would be changed, but he thought it was an allowed use and didn't know for sure whether there were any other detached structures in the area. It was an existing structure, and he didn't think it would make a substantial change if it became a dwelling unit. Granting the variance would pose no threat to the public's health, safety or welfare and would do substantial justice because the benefit to the applicant would not be outweighed by the harm to the general public. He said the Board would be forcing a teardown or reconstruction if the application were denied. He pointed out that the side of the structure that was closest to the neighboring house did not have windows and that the Board could stipulate that no windows on that side of the house be constructed. Granting the variance would not diminish the value of surrounding properties, noting that there was testimony that there would be diminution of values, but he wasn't sure because the applicant could just move the building 6-1/2 feet over, so he didn't see where it would make a substantial difference. As for the hardship test, due to special conditions of the property, literal enforcement of the Ordinance would result in unnecessary hardship. The existing structure did violate the setbacks if it was used as a dwelling unit, and he felt that was a special condition. Owing to the special conditions, Mr. McDonell said that a fair and substantial relationship did not exist between the general public purpose of the Ordinance

and the specific application of that provision to the property. He felt that the proposed use was a reasonable one, two dwelling units allowed by right in the neighborhood, and he was in support for all those reasons, with the stipulation included.

Mr. Johnson said he concurred with Mr. McDonell and also with the stipulation. He said he agreed with Attorney Bosen regarding the light, air, space and safety issues that the setbacks addressed were already considered an issue since the building was in an existing location. By changing the use to a habitable space, it was an intensification of the use, but the counterpoint was that the owner could simply tear it down and move it and build it three times the size, which would have more detriment to light, air and space.

Acting Chair LeMay said he was on the fence because all the criteria had to be met, and he felt that, regarding the substantial justice test, there was the owner versus the neighbor. The Board was saying that it would be inconvenient for the owner to not let him turn it into a residential space, but the neighbor would be damaged. So the question was, did the Board damage the neighbor or not, and he said that, for him, that test didn't make it. The unnecessary hardship was the land, and he did not think that anyone would go to the trouble of moving the structure six feet into the middle of the driveway. He said he would not support the variance.

*The motion **failed** by a vote of 3-3, with Acting Chair LeMay, Mr. Parrott, and Mr. Formella voting in opposition.*

12) Case #10-12

Petitioners: Melanie R. Burger & Xavier H. Asbridge

Property: Crescent Way (also Falkland Place)

Assessor Plan 212, Lot 111

Zoning District: General Residence B

Description: Construct a two-story residence.

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

1. Variances from Section 10.521 to allow the following:
 - a) Minimum lot area and minimum lot area per dwelling unit of 4,336 s.f.±. where 5,000 s.f. is required for each;
 - b) A 37.8'± lot depth where a minimum lot depth of 60' is required;
 - c) A rear yard setback of 15'± where 25' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix on behalf of the applicant was present to speak to the petition. He also introduced one of the owners, Melanie Burger, and the engineer Corrie Caldwell. Attorney Phoenix reviewed the petition, noting that the streets created a triangular lot, which was why the variance was needed. He said the design of the house was consistent with the area. He reviewed the criteria and said they were met.

Mr. Lee asked about the building permit application related to the construction of a single-family residence. Attorney Phoenix said there were different building application forms for different purposes and agreed that the form should have been the new construction one. He asked that it not hold up the application's approval.

Melanie Burger of 259 Raleigh Way said she was one of the owners and felt that the lot was an eyesore, and developing it would add character to the neighborhood.

Mr. Mulligan noted that Ms. Burger's 259 Raleigh Way property abutted the lot. He asked if she lived on the corner of Raleigh Way. She said she lived at the corner of Raleigh Way and Crescent Way.

SPEAKING IN OPPOSITION TO THE PETITION

Ronald Poulin of 20B Albacore Way said he had many concerns, one of which was that the area was completely ledge and that parking would be an issue.

Dorothy and George Courtovich of 13A Albacore Way said they were against the petition because it was a tiny piece of property that had never been a buildable lot. Ms. Courtovich noted that 14 other residents were in opposition.

Brook Atlay of 44A Albacore Way said his condominium was the end unit and would experience the highest result of noise and demolition. In response to Mr. Parrott's request, Mr. Atlay pointed out where his unit was located on the site plan.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Phoenix stated that Albacore Way was a 50-foot right-of-way and Crescent Way was 40 feet. He said the condominiums were new. He noted that the applicant met the parking requirements and that the slight curve was not dangerous. He said the lot was a separate lot and that he had not heard the opponents say how the applicant did not meet the variance requirements. He did not see how a single-family home would affect any of the surrounding property values. He said the Board had to weigh a property owner's right to develop his property, noting that the property was a legal lot of record.

Mr. Caldwell said he was an MSC civil engineer. He said that half of the paper street known as Falkland Way went to the condominiums and the other half went to the other owners. Attorney Phoenix said that only a portion of the lot was added to it recently.

Dorothy Courtovich of 13A Albacore Way asked whether the land was a legal lot because it was under 5,000 square feet. Acting Chair LeMay said the lot was definitely a separate parcel. Mr. Mulligan said the variance was requested because the lot was a lot of record but did not meet the current zoning requirement of 5,000 square feet.

No one else rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

Mr. Johnson said he didn't have a problem in general with putting a house on the lot, but he would have liked to see something smaller and more customized to the site. He said he had no problem with the rear setback issue, but the lot depth could have been accommodated better. Mr. Mulligan said there were some challenges to the lot but thought they were not insurmountable. He said the lot would require a lot of care, and also noted that the plans that the Board were given were off-the-shelf ones and that more thought could have gone into them. He said he thought it could be a suitable building lot but wasn't sure that it was the right design because 1700 square feet was a big house for that part of Atlantic Heights and he thought it would dominate the lot.

Mr. Lee said the lot had a unique location and was oddly shaped and felt that a house could be built on it. Mr. Parrott said it was an odd-shaped lot and he didn't know how one would define the depth of it. He said the rules were written to define the dimensions of lots based on square or rectangular ones. He said the neighborhood was full of small lots and the Board had seen plenty of lots successfully built on in that kind of area. He felt that the relief asked for was not excessive, given where the lot was, and that proper engineering and architecture could fit a house there nicely, although he thought the proposed house was a bit ambitious and large for the lot.

*Mr. Parrott moved to **grant** the variances for the application as presented and advertised. Mr. Lee seconded the motion.*

Mr. Parrott stated that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance. He said there was some credit due because the lot had existed as a lot of record for a long time. There was a paper street at one time that complicated the issue, but it had been obliterated, so the spirit of the Ordinance was to allow folks to build on their property, which might not be perfect in all ways, and he felt that was why the Board existed. He said the first two variances were met. He said the relief requested for the lot was not excessive and noted that the Board had granted much bigger variances. He felt that 4,336 square feet was enough to construct a decent sized house. He said granting the variances would do substantial justice because the lot had existed in its present configuration for a long time, and the owners did have rights to develop a single-family house within the setbacks, so the tipping test went to the owner of the property. Granting the variance would not diminish the value of surrounding properties because no one had made an argument with facts to put forth that point. He said the property had been vacant for a long time, and the property owners had rights. He said he felt that the creation of a modest new property in that location would not adversely affect surrounding properties and noted that the Board had not heard expert or credible opinions to the contrary. He said there were special hardships with the lot, the most obvious being the odd shape, which determined how it could be developed as well as the size of the house. He said he thought the application satisfied all five criteria.

Mr. Lee said he concurred with Mr. Parrott.

The motion passed by a vote of 5-2, with Mr. Johnson and Mr. Mulligan voting in opposition.

13) Case #10-13

Petitioners: 2422 Lafayette Road Associates LLC c/o Waterstone Retail

Property: 2454 Lafayette Road

Assessor Plan 273, Lot 3

Zoning District: Gateway

Description: Install wall and directional signs, a menu board and reconstruct a free-standing sign.

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

1. A Variance from Section 10.1271.20 to allow a sign on a façade of a building that does not face a street and where no public entrance exists.
2. A Variance from Section 10.1222.20 to allow two directional signs each with a sign area of 7 s.f. where 4 s.f. is the maximum allowed per directional sign.
3. A Variance from Section 10.1243 to allow 2 free-standing pre-order menu boards to be erected which are not visible from a public right-of-way.
4. A Variance from 10.1281 to allow an existing non-conforming pylon sign to be modified without bringing it into conformance.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech on behalf of the applicant was present to speak to the petition. He said the problem was that the Sign Ordinance didn't mesh with take-out or drive-through restaurants, and he gave some examples. Attorney Pelech emphasized that the proposed sign directed people to the drive-through and that two of the directional signs would be on top of the building. He reviewed the criteria and said they would be met.

Mr. Lee asked whether there would actually be a few signs on the roof of the building. Attorney Pelech said the signs would be up high but not on top of the building.

Acting Chair LeMay asked which of the signs were not illuminated. Attorney Pelech said all the proposed signs were internally illuminated.

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

No one rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

Minutes Approved 11-15-16

*Mr. Mulligan moved to **grant** the variances for the application as presented and advertised. Mr. Lee seconded the motion.*

Mr. Mulligan stated that a lot of relief seemed to be requested, but the variances were driven by the unique location of the property within a fully developed shopping plaza. He agreed that the sign Ordinance didn't easily contemplate that kind of development.

Mr. Mulligan stated that granting the variances would not be contrary to the public interest or to the spirit of the Ordinance, and the essential characteristics of the neighborhood would not change as a result of the non-conforming signage. He said the health, safety and welfare of the public would not be implicated and would most likely be improved due to the directional signage because the idea of signage was to avoid visual clutter and help motorists get to their destination, and he felt that those issues would be promoted. Granting the variances would do substantial justice because the loss to the applicant would outweigh the gains to the public if the variances were denied. He said he could not see any benefit to the public because the amount of relief requested was not a large amount of relief. He said the largest sign was significantly greater in conformance with the Ordinance as it presently stood and would be positive for the public. Granting the variances would not diminish the value of surrounding properties. He said it was a fully developed corridor that could absorb additional signage. Literal enforcement of the Ordinance would result in unnecessary hardship because the special conditions of the property were its location that was distinguishable from properties in the area. He said the application would avoid visual clutter and help identify commercial properties to the general public, so there were no fair and substantial relationship between the purposes of the Ordinance and the application to the property. He said the use was a reasonable one, repurposing an existing vacant restaurant into something produce.

Mr. Lee said he concurred with Mr. Mulligan and added that the menu board would not be visible to the street because it would be on the back side of the building.

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

14) Case #10-14

Petitioners: Colman C. Garland, owner, R and D Resources 2, LLC, applicant

Property: 185 Cottage Street

Assessor Plan 174, Lot 14-A

Zoning District: General Residence A

Description: Construct a restaurant with a drive-through.

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

1. A Variance from Section 10.440 to allow a fast food restaurant in a district where the use is not allowed.
2. A Variance from Section 10.1112.30 to allow 23 parking spaces to be provided where 33 parking spaces are required.
3. A Variance from Section 10.1113.20 to allow off-street parking

spaces to be located in a required front yard or between a principal building and a street.

SPEAKING IN FAVOR OF THE PETITION

Attorney F.X. Bruton on behalf of the owner/ applicant was present to speak to the petition. He said the lot was located on the Route One Bypass and Cottage Street and was adjacent to the Portsmouth Traffic Circle. He said the lot was oddly shaped. He emphasized that the proposal would eventually go through the site plan review process and that the applicant wanted a variance to allow the use, which would be surrounded by other commercial uses. He reviewed the criteria and said they were met.

Mr. Mulligan noted that that the intent was to have the customers predominantly use the drive-through and asked whether that was the reason that the applicant didn't need all the required parking. Attorney Bruton agreed. In response to Mr. Mulligan's further questions, Mr. Mulligan said they had no traffic count as yet, and imposed within the plan were two existing dwellings, neither of which had a curb cut onto the Bypass.

Mr. Mulligan said that Cottage Street was a difficult area because it was used as a cut-through to get off the Bypass to the downtown area, and he asked Attorney Bruton why he felt that the proposed business would not exacerbate traffic. Attorney Bruton said the intent was not to provide any access in on the Bypass, so the fact that the business would be on the corner of that location would help by using a fairly small part of Cottage Street as an access point. He said all the activity would occur at the beginning of the road and that he didn't anticipate a significant increase in traffic.

Mr. Lee asked what the average number of employees at one time would be. Attorney Bruton said it would be around three employees and that they would take up some of the parking spaces, which was part of the allocation considered.

Mr. Parrott referred to the BOA application checklist, noting that parking was part of the proposal for relief and the fact that the checklist required that the lot be dimensioned, as well as the structure and locations of the parking spaces. He said he could not find dimensions for the parking spaces. Attorney Bruton said the location of the lot and parking spaces were on the plan. It was further discussed, and Mr. Parrott concluded that there were no lot or parking space dimensions given. He said the Board could not satisfy dimensions that did not exist.

In response to Mr. Johnson's questions, Attorney Bruton said the business would be open 24 hours and that the client had not reached out to the abutters or residents.

SPEAKING IN OPPOSITION TO THE PETITION

Kate Leith of 83Woodbury Avenue said she lived directly across Cottage Street and that the variance would affect Cottage Street and Woodbury Avenue because it would cause people to loop around. She said she sat in her car in front of the Cottage Street entrance

through two sets of lights and found that traffic was constantly backed up. She said the City had put a lot of effort in traffic calming in that area and felt that a 24-hour restaurant was not in keeping with the residential neighborhood. She said it would increase the existing gridlock at the 4-way stop. Mr. Mulligan asked Ms. Leith whether traffic had been backed up on Cottage Street that morning and if so, how far back. Ms. Leaf said it was backed up two car lengths from her.

Alec McEachern of 81 Cottage Street said he was concerned about litter from the proposed restaurant, nothing that he picked up a lot of litter from the nearby Dunkin Donuts. He also said he was concerned with traffic, safety and parking issues.

John Leith of 83 Woodbury Avenue said that the entire block had always been residential and felt that it should stay that way.

Fernando Oliveira of One Garden Street said he was an abutter and agreed with the traffic and safety issues and said the restaurant was not the right fit for the neighborhood.

Mark Ayotte of 9 Garden Street said he had lived in the area since 1959 and had never seen a residential property converted in that manner. He said it would diminish the surrounding residential properties and would pose safety concerns.

Acting Chair LeMay said he also received a letter in opposition from the Key Auto Group General Counsel and Mr. DiLorenzo, owner of the Meadowbrook Inn and Portsmouth Chevrolet, regarding traffic safety and other issues.

SPEAKING TO FOR, OR AGAINST THE PETITION

Attorney Bruton stated that the project would go for site plan approval and through the Technical Advisory Committee (TAC) process, where all the issues would be vetted. He noted that the property was surrounded by commercial uses.

No one else rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

Acting Chair LeMay stated that it wasn't TAC's usual procedure to discuss parking on the first hurdle and that the Board could consider that.

Mr. Lee noted that if the Cumberland Farms store was an example of solving an access issue, it failed. Mr. Johnson said he didn't think the customers would stay at the restaurant that long but agreed that there would be a lot of stop-and-go traffic. He said he thought the project might be more successful if people weren't able to access it from the Bypass, and his biggest concern was motorists having to go on Cottage Street. He said the light took a long time to turn over and the Bypass took precedence over Cottage Street. He also noted that the property was kitty-corner from a residence that was already inundated as a cut-through.

Acting Chair LeMay said he agreed with Mr. Johnson. He said a commercial use would make sense in that location but the use change was a high hurdle, and he had doubts as to whether it was the appropriate use. He said that even an office would be a complication in that area. Mr. Parrott said he thought it was unfortunate that the entrance was so close to the intersection and the light. He said he had been through many times when traffic was coming onto the Bypass and noted that it was very busy, especially during rush hour, and that people going northbound often went up Cottage Street and took a left on Woodbury Avenue. He thought it would only exaggerate the situation. He said the property was big enough but the location was tough. Mr. Parrott said the restaurant would be a high-volume type of operation, and every plus of the proposal worked against it due to the location, the traffic lights, and the traffic circle, which wasn't that far away and backed up as well.

*Mr. Johnson moved to **deny** the variances for the application as presented and advertised. Mr. Lee seconded the motion.*

Mr. Johnson stated that the Board had discussed most of the main points that he had a problem with, and he would enter those comments into the record. He said the petition passed on some of the criteria, but it came down to the first two criteria. Adding a fast food restaurant in that location would not change the essential characteristics of the neighborhood because it was surrounded by commercial and retail, but the application failed because it was potentially threatening to the public's health, safety and welfare as it applied to the abutters and people passing through. He said it just didn't pass the test as far as providing access to the site. The unusual shape and location of the site played against it because he didn't see any other viable way to access the site. He said he respected the applicant's representatives' comments about TAC and thought TAC was very capable of working out most of the problems, but thought the approval had to go through the Board, and when a change of use was put in front of the BOA, it was up to them to decide what they were willing to put in front of TAC.

Mr. Lee said he concurred with Mr. Johnson and had nothing to add. Acting Chair LeMay stated that Mr. Johnson's points also applied to substantial justice.

*The motion to **deny** the petition **passed** with all in favor, 7-0.*

V. ADJOURNMENT

*It was moved, seconded, and **passed** by unanimous vote to adjourn the meeting at 10:30 p.m.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary