

City of Keene  
New Hampshire

**ZONING BOARD OF ADJUSTMENT**  
**MEETING MINUTES**

**Monday, October 7, 2019**

**6:30 PM**

**Council Chambers**

**Members Present:**

Joshua Gorman, Chair  
Jane Taylor, Vice Chair  
Joseph Hoppock  
Michael Welsh  
Joshua Greenwald (Arrived at 6:48 PM)

**Staff Present:**

John Rogers, Zoning Administrator  
Corinne Marcou, Zoning Clerk

**Members Not Present:**

Louise Zerba, Alternate  
Michael Remy, Alternate

**I. Call to Order**

Chair Gorman called the meeting to order at 6:30 PM, welcomed the public, explained the rules of procedure, and introduced the Board members.

**II. Minutes of the Previous Meeting – September 3, 2019**

Mr. Welsh moved to approve the minutes of September 3, 2019, which Mr. Hoppock seconded and the Zoning Board of Adjustment carried unanimously.

**III. Unfinished Business**

Vice Chair Taylor noted that the ZBA Handbook included in Board members' binders was published in December 2017 and has since been updated in December 2018. She requested the most updated copy, though if another will be published in December 2019, she suggested waiting to print new copies until then. Staff will investigate the newest draft and provide that to the Board.

Mr. Hoppock initiated a discussion of the rules of procedure, said he had no questions about what was presented, and asked if it was a final version for approval. Mr. Rogers replied in the affirmative, saying this was to give the Board more time to review. Mr. Hoppock moved to adopt the rules of procedure revised last on September 3, 2019, which Vice Chair Taylor seconded and the Zoning Board of Adjustment carried unanimously.

**IV. Hearings:**

- a. ZBA 19-13:/ Petitioner, Tim and Christine Symonds of 8 Leahy Rd., Keene, requests a Variance for property located at 334 Chapman Rd., Keene, Tax Map #241-048-000-000, which is in the Rural District. The Petitioner requests a Variance to permit an extension of a five-year approval from ZBA 14-30; a sub-standard lot size of 1.03 acres where five acres is required per Section 102-791, Basic Zone Dimensional Requirements of the Zoning Ordinance.**

Chair Gorman opened the public hearing and offered the applicants the option to await the fifth Board member's arrival, to ensure they had the best chance at three votes in favor of their application. The applicants agreed to proceed with the hearing absent a fifth Board member.

The Chairman requested staff comments. Mr. Rogers used an aerial map to demonstrate the location of this currently vacant lot at 334 Chapman Road, in the Rural Zone. When the applicants purchased the property, they removed a mobile home and several accessory buildings. Five acres are required per the Rural Zone dimensional requirements, and therefore this 1.03-acre lot is substandard. Mr. Rogers used another map to highlight that many of the surrounding properties are also substandard, as they were subdivided before the five-acre zone requirement was established. Mr. Rogers displayed a street view of the lot in question to demonstrate that it is currently vacant. He said the applicants first received a Variance for this property in 2000 and that NH RSA states that Variances can be good for five years. The applicants have returned several times for a Variance extension or a new Variance for more than 20 years, which previous generations of this Board have granted. He said the applicants seek that Variance extension again for this lot.

Mr. Welsh asked if there is a limit to the number of Variances or extensions that an applicant can apply for. Mr. Rogers said there is no limit to extension requests if the Variance was initially approved; there might be a limit if the Variance or extension was at one point denied. The Board has granted extensions to this Variance in the past and Mr. Rogers was unaware of any limitation.

Vice Chair Taylor asked for further explanation of this lot being subdivided before Zoning changed. Mr. Rogers said he was unable to find if and when this lot was subdivided to 1.03 acres. The previous Zoning Ordinance allowed for two-acre lots in the Rural Zone, at which time this was still a substandard lot. Vice Chair Taylor asked when the mobile home was removed from the property and Mr. Rogers replied that the applicant would speak to that. Vice Chair Taylor noted that the law changed since the most recent Variance was created, and now says that a Variance "shall be valid if exercised within two years from the date of final approval, or as further extended by local Ordinance or by the Zoning Board of Adjustment for good cause." She asked if this change in law means that if this Variance were granted for the two years, then the applicants would need to come back to just show good cause, as opposed to the entire Variance procedure again. Mr. Rogers said his interpretation was that this was the time to determine if there is good cause for a five versus two-year Variance deadline. Vice Chair Taylor questioned if the applicants would have to apply for a Variance again under the new law. Mr. Rogers said that they would have to apply for a new Variance in either case, and referred to the application, where the Variance questions are answered to be treated as a new Variance. Mr. Rogers stated

again that this was a good time to determine if there is good cause for a five versus two-year Variance deadline.

The Chairman welcomed the applicants, Tim and Christine Symonds (of 8 Leahy Road, Keene) and Mr. Symonds provided history of the property. The Symonds purchased the property in 2000, when it contained a mobile home and several outbuildings. They removed all of the structures in an effort to clean-up and improve the property, which has remained vacant until now. In hindsight, he said it would have been easier to leave the structures on the property, which would have negated the need for this Variance. Mr. Symonds sought clarification; he thought he was applying for a two-year Variance at this meeting because he was told he could not ask for five years. He clarified that he was requesting at least two years. Since applying for the Variance in September, the Symonds entered into a purchase and sale agreement with a buyer, contingent upon this Variance's approval. The property has been on the market for 18 months; Mr. Symonds offered to provide the Board a copy of the sale agreement. Ms. Symonds continued by responding to the criteria for a Variance and she said the responses had not changed since the first Variance was granted in 2000.

*1. Granting the Variance would not be contrary to the public interest:*

Ms. Symonds said granting the Variance would improve the general surroundings of the neighborhood.

*2. If the Variance were granted, the spirit of the Ordinance would be observed:*

Ms. Symonds said this lot has been and should continue to be a building lot. The proposed use of the lot would be consistent with the area.

*3. Granting the Variance would do substantial justice:*

Ms. Symonds said granting this Variance would do substantial justice by allowing a single-family dwelling on the lot, comparable to others in the area, and thus create taxable income for the City of Keene.

*4. If the Variance were granted, the values of the surrounding properties would not be diminished:*

Ms. Symonds said granting this Variance would allow a single-family dwelling consistent with other homes in the area to be built on this currently vacant lot.

*5. Unnecessary Hardship:*

*A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:*

*i. No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property:*

Ms. Symonds said that this pre-existing 1.03-acre lot originally had a mobile home and several other outbuildings (some in disrepair) that the applicants removed, thereby improving the overall property and neighborhood. Additionally, she said there are many other lots on Chapman Road under two acres, including some with homes on them currently, which are building lots with the lot size Variance approved. She said that preserving this preexisting lot would not defeat the general public purpose of the Ordinance.

*ii. The proposed use is a reasonable one because:*

Ms. Symonds said that this lot had a single-family structure on it previously, and has been grandfathered as a building lot. She said denying this Variance would render the lot unusable.

*B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the Ordinance, and a Variance is therefore necessary to enable a reasonable use of it:*

Ms. Symonds said that the property has always only been 1.03 acres and can have no reasonable use other than a building lot. She said that renewing this Variance would maintain the lot as such.

The Board declined a need to review the purchase and sale agreement. Vice Chair Taylor asked if the potential buyer intended to use the property as a residential building lot. Mr. Symonds said that was the representation made to him. [*Mr. Greenwald arrived*]

Chair Gorman asked staff if this was a request for a two-year Variance. Mr. Rogers said he thought there was a mistake on staff's part because all past Variances for the property were requested and approved for five years, so he assumed the same with this application. Because this application was advertised as a five-year request, he suggested it was okay for the Board to move forward either way. The Chairman requested the applicants' preference. Mr. Symonds requested to continue with the standard two-year extension, which he thinks will satisfy the sale contingencies, because the purchaser was told it would be a two-year Variance per the Symonds' understanding.

Mr. Welsh asked if the new property owner could request an extension granted administratively at the end of the two-year Variance. Mr. Rogers said no, the owner would have to come back to the Board. He clarified, however, that if the property owner receives a Building Permit during the two-year Variance period, then the Variance would not expire if the Building Permit were active. If the Building Permit then expired (applicants are usually given six months), and no work was visible on the property, the owner would need to reapply for a Variance.

Mr. Hoppock stated that this property and Chapman Road are a lot like Hurricane Road, where there are many undersized lots, which he considers a special condition of the property. He saw a few similar undersized lots surrounding the one in question and said if those lots have structures on them, then that means they were approved at some point by the City. He said it seems

appropriate to him not to get lost in the topic of unnecessary hardship. He thinks using this lot for a single-family residence is reasonable.

Mr. Symonds requested confirmation that if approved, this Variance would be transferable to the new owner. The Chairman replied in the affirmative stating that all Variances stay with the property, not the owners.

With no comments, Chair Gorman closed the public hearing.

Vice Chair Taylor referred to Mr. Hoppock's question of other substandard lots in the area, which she said was not necessarily relevant in this case. She recalled a case from 1990, in which retired Justice Souter said that the remedy for substandard lots is to change Zoning, not to issue Variances for every lot. She thought the first question in this case was to what extent this is a pre-existing nonconforming lot. She agreed that removing the mobile home triggered the need for this Variance. While the Board does not encounter these cases often, she said that under the question of unnecessary hardship, the focus should be on subsection 5.B. She thought there was a fair case that there is no other reasonable use for the property other than as a building lot.

Mr. Greenwald asked if granting this Variance would set any precedent for subdivision applications in the future. Mr. Rogers said that no subdivision would be allowed through the Planning Board if it did not meet current Zoning standards.

Mr. Welsh said that this property was granted a Variance by four prior Zoning Boards, and he heard no compelling circumstances warranting an argument that those past judgements were in error and should be changed. For that reason, he was inclined to follow prior Boards' approvals; Mr. Hoppock agreed. The Chairman also agreed, adding that the owners made an effort to improve the property unbeknownst that they were creating a future problem. He thanked the applicants for making that effort.

Mr. Hoppock moved to approve ZBA 19-13 for a period of two years beginning October 7, 2019, which Mr. Welsh seconded. The Board reviewed the findings of fact.

*1. Granting the Variance would not be contrary to the public interest:*

Vice Chair Taylor did not think granting this Variance would be contrary to the public interest because it is a residential area and the intention of the Variance is to use the property as a residential building lot. She said the owners clearly did their best to maintain the property for a residential use and would sell it hopefully for the same purpose. Mr. Hoppock said granting this Variance would not alter the essential character of the neighborhood or threaten public health, safety, or welfare. Mr. Greenwald agreed that granting this Variance is in the public interest by developing the property and generating tax income for the City. The first finding of fact was granted with a vote of 5-0.

*2. If the Variance were granted, the spirit of the Ordinance would be observed:*

Vice Chair Taylor said the intent of the Ordinance is to encourage residential structures, which is also the intent of this application, so she said this is appropriate. The second finding of fact was granted with a vote of 5-0.

3. *Granting the Variance would do substantial justice:*

Mr. Hoppock said that the loss to the individual if this request were denied would be to cause them to lose their property, which he said is a constitutional dimension he could not support. He said the gain to the public by denying this Variance would be minimal, so he thought substantial justice would be done by approving the Variance. The third finding of fact was granted with a vote of 5-0.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished:*

The Chairman said that there are several other lots similar in nature directly surrounding the property in question. He said this vacant lot likely has more adverse property values currently than it would when occupied with a nice home. He and Mr. Greenwald agreed it is a fair assumption that the home would be nice. The fourth finding of fact was granted with a vote of 5-0.

5. *Unnecessary Hardship:*

*A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:*

*i. No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property:*

*ii. The proposed use is a reasonable one because:*

Vice Chair Taylor expressed concern that the parcel in question did not meet the standard of provision 5.A. She agreed that there is a hardship because this parcel can only be used as a building lot. While she thought the use was a reasonable one, she recalled that if this provision cannot be met fully, which she did not believe it could, the law allows consideration of provision 5.B instead.

*B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the Ordinance, and a Variance is therefore necessary to enable a reasonable use of it:*

The Chairman agreed with the Vice Chair that it is easier to conclude that provision 5.B. provides the hardship in this case. Mr. Hoppock said there is an unnecessary hardship, but said the owners should not be waiting for the City to change the Zoning Ordinance before they can sell the property as a building lot. He was in favor of provision 5.B., without which he said there

is no reasonable use of the property. The fifth finding of fact, provision B, was granted with a vote of 5-0.

With a vote of 5-0, the Zoning Board of Adjustment approved ZBA 19-13 for a period of two years beginning October 7, 2019.

- b. ZBA 19-14:/ Petitioner, Theodore J. Grussing of 585 Old Walpole Rd., Surry, requests an Enlargement of a Non-Conforming Use for property located at 28 Park Ave., Keene, Tax Map #564-034-000-000, which is in the High Density District. The Petitioner requests an Enlargement of a Non-Conforming Use to increase the amount of storage space to include a 40 ft x 50 ft storage garage in a two-phase project.**

Chair Gorman opened the public hearing and requested staff comments. Mr. Rogers said this application was to enlarge a nonconforming use. Many years ago, he said the property in question was zoned as business use, and the property now has a few mixed uses occurring on it. He used a map to demonstrate that it is a bit deceiving because the front of the property houses the Park Avenue Deli, which is actually a separate lot from the one in question. This lot is tied to the larger building in the back with the Elegant Settings office, a hair salon, and he believed two dwelling units. He used the map to show where storage was currently outdoors at the back and side of the building, which is where the applicant seeks to build additions to enclose that storage. He recalled the three criteria for expansion of nonconforming uses that the Board would have to consider in this case.

Chair Gorman referred to the math in the application, which struck him as more square feet than the applicant was actually seeking. Mr. Rogers agreed that staff noted the same and said the applicant would likely want to clarify that the square footage listed in the application might actually be more than they are seeking to add.

Vice Chair Taylor questioned and Mr. Rogers confirmed that this property has always been zoned as High Density, as it is today. The Vice Chair noted there was no background on the property provided in the meeting packet as is typical. Mr. Rogers was regretful the Board did not receive that but said this second building on the property did receive an enlargement of nonconforming use when it was constructed. Vice Chair Taylor requested confirmation that there were no setback issues, because she could not tell from the application drawings. Mr. Rogers confirmed he looked at a few setbacks, including surface waters because there are wetlands and Tannery Brook nearby, and the applicant met those setbacks from a Zoning perspective. Vice Chair Taylor said that she could not understand the chart on lot coverage. Mr. Rogers said he asked the applicant to provide additional information, including lot coverage, which they meet for the High Density Zone, even with the addition. Mr. Rogers said the applicant also provided parking calculations for the site and while there was an error with one number in those calculations, the applicant still meets the parking requirements with the correction. Vice Chair Taylor noted confusion using the chart in the Zoning Ordinance with what was in the application. Mr. Rogers said that he looked and the applicant is within the allowance for both building coverage and impermeable surface coverage.

The Chairman welcomed the applicant Theodore J. Grussing (of 585 Old Walpole Road, Surry), who sought a Variance for a 16'x40' addition to the back of an existing 40'x50' building with construction beginning fall 2019, which he called phase one of the project. In the second phase of the project, he wants to extend the existing overhang along the side of the building, which would be a 12'x46' addition. Ultimately, he wants to build around the entire outside to create space for storage. He said the additions would not be heated and would only include lights and electrical outlets. They would only be used for storage to take from view things outside currently, like cement blocks visible in the photos. Mr. Grussing continued responding to the conditions for enlargement of a nonconforming use.

1. *Such approval would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious, or offensive to the neighborhood:*

Mr. Grussing said the locations of the additions about the woods and are minimally visible to the public. The additions would be finished to match the rest of the building.

2. *There will be no nuisance or serious hazard to vehicles or pedestrians:*

Mr. Grussing said the additions would not add any new access points and traffic patterns would not be altered.

3. *Adequate and appropriate facilities (i.e., water, sewer, streets, parking, etc.) will be provided for the proper operation of the proposed use:*

Mr. Grussing said the building additions are for storage and would have no water or sewer. They would have electricity for lighting and several electrical outlets. He recalled many questions about parking when a hair salon was established on the property last year. The property calls for 24 spaces with the addition and currently has 23 designated/marked parking spaces and 10 spaces shared with Park Avenue Deli, as detailed in the property deed. He cited the incorrect number in the application: where it says "Elegant Settings Warehouse Space (8226 sf)—2 spaces," he believed it should be three spaces instead of two.

Mr. Hoppock asked if the applicant plans to lease any of the newly added storage to the building tenants listed in the application. Mr. Grussing said no, all of the storage is for Elegant Settings, which he owns.

Vice Chair Taylor asked from where this extension would be accessed. Mr. Grussing said that there is a current addition with a garage door at the back of the property, which would open into the new addition. He would access the new addition from the inside of the warehouse through that existing garage door; there would be no outside exit from the new addition. Vice Chair Taylor asked if there would be access from the side of the building. Mr. Grussing said he would add a third garage door to the front of that wing similar to the existing two; the side addition would not be accessed from the inside. Vice Chair Taylor asked the permanence of the addition and Mr. Grussing confirmed it would be a concrete slab with a stick addition and a metal roof, like the existing building.



With no comments, the Chairman closed the public hearing, and the Board reviewed the criteria.

Mr. Hoppock said that there were no issues with setbacks, the lot coverage requirements were met, and the parking requirements were met. Thus, he said there was no fair conclusion that granting this expansion would present a serious hazard or nuisance. The applicant mentioned no impact on water, sewer, or streets. For these reasons, Mr. Hoppock said the applicant met the criteria in his view. Mr. Greenwald agreed with Mr. Hoppock and said the additions would not be visible from the road, would not impede traffic or access, would pose no obnoxious hazard, and the only facilities would be electrical. For these reasons, Mr. Greenwald also supported approval. Mr. Welsh agreed stating that he drives by the location often and never knew the building existed.

Vice Chair Taylor recalled difficulty in these instances because the common law reasons go beyond what the Zoning Ordinance has. Her question with expansion of nonconforming uses is whether they are what the courts call a “natural expansion.” For example, if the expansion would allow for more trailers and office space on the property, that would not be a natural expansion in her view. Because the applicant is trying to get what is currently outside under cover, she thought the additions made sense as a natural expansion of the use as it is today. For the reasons listed, she thought she could support the application.

Mr. Hoppock moved to approve ZBA 19-14, which Mr. Greenwald seconded. The Board reviewed the findings of fact.

1. *Such approval would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious, or offensive to the neighborhood:* Granted 5-0
2. *There will be no nuisance or serious hazard to vehicles or pedestrians:* Granted 5-0
3. *Adequate and appropriate facilities (i.e., water, sewer, streets, parking, etc.) will be provided for the proper operation of the proposed use:* Granted 5-0

On a vote of 5-0, the Zoning Board of Adjustment approved ZBA 19-14.

- c. **ZBA 19-15:/ Petitioner, Tracy Diehl, of 6487 Hilliard Drive, Canal Winchester, OH, representing McDonald’s Corp. of Amherst, NH, for property located at 317 Winchester St., Keene, Tax Map #593-001-000-000, which is in the Commerce District. The Petitioner requests a Variance to permit four menu boards where one is allowed per Section 102-1311(3)a of the Zoning Ordinance.**

Chair Gorman opened the public hearing and requested staff comments. Mr. Rogers showed an aerial view of the property at 317 Winchester Street in Keene, which is occupied by a McDonald’s Corporation franchise. The existing two-lane drive-through approved several years ago, which is becoming more common in the fast food industry to expedite business, only has one menu board currently. The applicant seeks approval for four menu boards in total. Mr. Rogers said that the applicant sought a Variance from §102-1311(3)a of the Zoning Ordinance,

which states that only one menu board sign and one changeable copy sign shall be permitted per lot or site frontage.

The Chairman welcomed the applicant, Tracy Diehl (of Hackensack, New Jersey), representing the McDonald's Corporation location at 317 Winchester Street in Keene. She said this initiative is a nationwide corporate mandate. Currently, there is a tandem, two-lane drive-through. She visited the site and took a photo to demonstrate that from the second lane, one must read the menu board that is 12'-15' away. She said this is a safety hazard for those with impaired vision or those visitors not yet knowing what to order. She asked a worker if anyone complains about the situation and the worker said that all demographics do currently. Ms. Diehl said the new menu boards will be a system of three panels, with two connected as the main board and one additional preview board in advance, with a total area of 52 square feet compared to the current 45 square feet. She understood that the Variance request was not for area but for the number of signs. She said the single preview sign shows common items that can be made quickly to expedite business; they will not display advertisements or new menu items. The new signs will all be LED lit and therefore environmentally friendly; there will be an aesthetic improvement with signs no brighter than a Kindle. She said that paperless menus are better for the environment as well. She said the new signs would enhance the property for the community. She said the expedited business would reduce vehicle stacking and therefore emissions. Finally, she said the new three-panel system would present a cleaner image and reduce the overall total sign area. She shared photos with the Board demonstrating what the new signs would look like. Ms. Diehl responded to the criteria for Variance.

*1. Granting the Variance would not be contrary to the public interest:*

Ms. Diehl said that the proposed menu boards are essential to the nature of this approved use. This property currently has two drive-through lanes in use. The proposal is for one menu board and one pre-browse menu per drive-through lane. The existing menu board would be removed. She said the use of menu boards is not contrary to public interest, but said they are essential for the public use of drive-through lanes.

*2. If the Variance were granted, the spirit of the Ordinance would be observed:*

Ms. Diehl said that the purpose of the Ordinance is to regulate signage effectively to direct movement and inform the public, while protecting the safety and general welfare of the public, and to minimize visual clutter. This proposal is for a menu board system that would help patrons to move through the drive-through lanes quickly and reduce stacking, which can become a hazard to pedestrians and vehicles in the parking lot. She said the new menu board system is smaller than the standard and they are environmentally friendly, which has a positive impact on community welfare.

*3. Granting the Variance would do substantial justice:*

Ms. Diehl said the business could not continue to be used as a drive-through restaurant without the menu boards. The continued use of the menu boards requires the obsolete menu board to be replaced. The replacement is part of a national program that is using innovative technology in a

way that will benefit the environment and enhance the customer experience, while reducing waste and emissions. She said that substantial justice is done because the Variance approval allows continued use as a drive-through establishment.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished:*

Ms. Diehl said that this is an existing drive-through use, that the use would not change, and therefore the effect on surrounding properties would not change. The menu boards would have the potential to affect positively the surrounding uses by facilitating the movement of traffic through the restaurant in a timely manner.

5. *Unnecessary Hardship:*

- A. *Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:*

- i. *No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property:*

Ms. Diehl said that the current menu board is obsolete and needs to be replaced.

- ii. *The proposed use is a reasonable one because:*

Ms. Diehl said that the proposed signs are only intended for viewing by the drive-through customer who is actually sitting in the drive-through lane. They are necessary for the drive-through use and will have a substantial positive impact on the carbon footprint. Reducing stacking reduces emissions, eliminating paper copies reduces waste, and changing the menus from ballasts and fluorescent lighting to LED saves energy and reduces landfill waste. Overall, Ms. Diehl said this proposal is a reasonable way to provide for the continued use, allowing citizens to make their choices at a faster pace and to reduce stacking, which will provide for increased safety and less vehicular congestion in the parking lot.

- B. *Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the Ordinance, and a Variance is therefore necessary to enable a reasonable use of it:*

Ms. Diehl said that menu boards are essential to the use of a drive-through restaurant. The proposed menu board system is designed to replace the obsolete menu board with a more environmentally friendly, energy efficient structure, while continuing the approved drive-through use.

The Chairman said that he favored the new menu board system but asked why four are needed, because a lot of the testimony was about the current board being obsolete. Ms. Diehl said the menu boards would work as a system, with two panels where one orders and an additional menu

in advance, so a customer can begin considering their order; thus, she said they have found it most effective to separate them and they are considered four menu boards just by the spacing.

Vice Chair Taylor said it is clear in the Sign Ordinance that these are menu boards, but asked Mr. Rogers why they are distinguished from freestanding signs. Mr. Rogers replied that if these were considered freestanding signs, only one would be allowed. By distinguishing them, the menu boards are allowed in addition to the one allowed freestanding sign under the arches on the street front. He noted though, that the size of these menu boards is included in their overall property signage area allowance. Vice Chair Taylor asked if the area of these signs was calculated by the Planning Department. Mr. Rogers referred to section 3.B. and said that staff must wait to determine overall sign square footage on this property until the applicant applies for a Sign Permit; if they did not meet the area requirements at that time, the permit would be denied.

With no public comments, the Chairman closed the public hearing. The Board discussed the application criteria.

Mr. Hoppock said he was honestly perplexed but said the applicant has gone out of their way to design the menu boards so that only people in line and almost immediately adjacent can see them. He said there would be no light pollution beyond the boundary of the property, which is positive in his view. He said his hang-up was on the question of unnecessary hardship.

The Chairman said that owing to the first criteria, he thought granting the Variance would increase safety. He said he had questions about the fifth criteria. Mr. Greenwald agreed that granting the Variance would increase safety and reduce frustration, and therefore road rage for some.

The Vice Chair said that unfortunately the Board could not consider their frustration. She cited concern with the fifth criteria also, saying that she understood the corporate need/program, though she was unsure that reason met the requirement of a special condition of the property. She supposed it was reasonable to have four signs displaying their menu, but questioned whether there is something unique or special about the property that creates the need for the system of signs in totality.

Mr. Welsh said that the applicant did well demonstrating why the spirit of the Ordinance would be observed. When he read the language in the application responses, it was clear that the applicant read the Ordinance to understand the purpose of the questions. Regarding a special condition of the property, Mr. Welsh said that the Planning Board approved two drive-through lanes in a prior decision, and with a track record of lived existence with those two lanes, the situation has proven suboptimal for stacking and sign access. He was unsure if that constituted a hardship, but said it is inconvenient and difficult to use; in that respect, he thought two additional well-designed and appropriately placed signs were a decent answer.

Mr. Greenwald agreed that the purpose of adding signs is to increase efficiency and traffic flow, which would be better for the City as a whole, and he thought denying them that goal would create a hardship. Vice Chair Taylor disagreed, saying that making a business more efficient does not make the grade for unreasonable hardship. Mr. Greenwald said he was not referring to

profitability but the entrance/exit of patrons safely, and with as much information as possible to keep moving.

Vice Chair Taylor questioned if the nature and layout of the building itself creates a hardship. She said it is possible for buildings themselves to create hardship whether by size or design; she referenced the Harborside Hotel case out of Portsmouth as one example. She said this building is not an average layout and wondered if that alone creates a hardship.

The Chairman said that when he thinks of hardship, he considers the use to be a condition. He said there are other fast-food restaurants around this property and one was already granted a similar Variance. Because this is primarily a drive-through restaurant, he said that by not allowing the applicant to move forward into today's standards, that the Board would thus be creating a hardship for them specifically, by disallowing adequate use of the existing building. He did not think the property or structure had special features other than being a drive-through restaurant. He said the applicant concluded that the upgrades are needed to continue a successful drive-through restaurant and disallowing that would be a hardship.

Mr. Hoppock said he saw a special condition of the property in terms how the drive-through features are designed. He said the two lanes were approved for safety to prevent stacking, which helps patrons and the business. He said he could consider the two lanes as a special condition and then it would be reasonable to consider that four signs are needed, with two in each lane. He said he was not familiar with drive-through restaurants but did not think a change from two to four signs was an unreasonable. He thought the harm to the McDonald's Corporation would be greater than the public gain if the Variance was denied. He thanked the Chairman and Vice Chair for their helpful comments.

Vice Chair Taylor moved to approve ZBA 19-15 for the Variance to permit four menu boards where only one is allowed per §102-1311(3)a of the Zoning Ordinance, which Mr. Hoppock seconded. The Board reviewed the findings of fact.

*1. Granting the Variance would not be contrary to the public interest:*

Mr. Hoppock restated that approval would not contradict public interest and pose no danger to public safety or welfare. The first finding of fact was granted with a vote of 5-0.

*2. If the Variance were granted, the spirit of the Ordinance would be observed:*

Vice Chair Taylor said the purpose of the Ordinance is to regulate signs and buildings in some orderly fashion. She said the intent of this application is to be more streamlined and orderly, so she saw no conflict. The second finding of fact was granted with a vote of 5-0.

*3. Granting the Variance would do substantial justice:*

No comments. The third finding of fact was granted with a vote of 5-0.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished:*

Vice Chair Taylor stated that the surrounding property values would be unchanged because of this project and Mr. Greenwald agreed. The fourth finding of fact was granted with a vote of 5-0.

5. *Unnecessary Hardship:*

*A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:*

- i. No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property:*
- ii. The proposed use is a reasonable one because:*

The Board agreed to focus on provision 5.A, and sub-points i and ii together. Mr. Hoppock said the dual drive-through is a special condition necessitated by safety factors. He said the overall purpose of the Sign Ordinance is to reduce visual clutter. However, he said that specific general prohibition was not pertinent to this application, and so he thought that special condition created an unnecessary hardship. The Vice Chair said that the use is reasonable for all the reasons discussed regarding safety. She thought the special condition of the property was more than just the dual drive-through but also how the structures, parking, and traffic are all situated. All those things considered, she thought what has been developed there is a special condition not found elsewhere. The fifth finding of fact was granted with a vote of 5-0.

With a vote of 5-0, the Zoning Board of Adjustment approved ZBA 19-15 for the Variance to permit four menu boards where only one is allowed per §102-1311(3)a of the Zoning Ordinance.

**V. New Business:**

Vice Chair Taylor requested an updated roster of ZBA members; staff will provide.

**VI. Communications & Miscellaneous:**

**VII. Non Public Session: (if required)**

**VIII. Adjournment:**

Hearing no further business, Chair Gorman adjourned the meeting at 7:54 PM.

Respectfully submitted by,  
Katrnya Kibler, Minute Taker  
October 14, 2019  
Respectfully revised on October 24, 2019

Reviewed by Corinne Marcou.  
Reviewed and edited by Vice Chair Jane Taylor.