

ZONING BOARD OF ADJUSTMENT  
268B MAMMOTH ROAD  
LONDONDERRY, NH 03053

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5 DATE: DECEMBER 16, 2015  
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7 CASE NO.: CASE NO. 11/18/2015-1 [CONTINUED from November 18, 2015]  
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10 APPLICANT: GTY MA/NH LEASING, INC  
11 TWO JERICHO PLAZA, WING C, STE. 110  
12 JERICHO, NY 11753  
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14 PROPERTY LOCATION: 12-14 NASHUA ROAD, 10-138-2, C-II  
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16 BOARD MEMBERS PRESENT: JIM SMITH, CHAIRMAN  
17 JIM TIRABASSI, FULL MEMBER  
18 NEIL DUNN, ACTING CLERK  
19 BILL BERARDINO, ACTING VOTING MEMBER  
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21 ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/ZONING  
22 ADMINISTRATOR/HEALTH OFFICER  
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24 REQUEST: GTY MA/NH Leasing, Incorporated requests a Relief of  
25 Administrative Decision of the Zoning Administrator regarding  
26 electronic signage. In accordance with Section 3.11.7.E.3 of the  
27 ordinance; animated, moving or flashing signs are prohibited, and  
28 changeable electronic message board signs are prohibited in all  
29 zoning districts. 12 Nashua Road; 10-138-2; C-  
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31 PRESENTATION: NEIL DUNN READ THE CASE INTO THE RECORD. FOURTEEN PREVIOUS  
32 CASES WERE PREVIOUSLY READ INTO THERECORD AT THE 11/18/2015  
33 HEARING. NO LETTERS.  
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35 JIM SMITH: Called the meeting to order. We are short staffed so we are playing it by ear tonight. Kirby is our  
36 secretary and she is normally not here. I will have everyone else introduce themselves:  
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38 JIM SMITH: OK, now before we start it. It appears like we only have four members, generally we give  
39 whoever is applying the opportunity to wait for next month when hopefully we will have five people. The  
40 implication of four is you still need to get three positive votes out of the four. Do you want to approach the  
41 mic and identify yourself for the record?  
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43 PETER MARCH: Mr. Chairman, my name is Peter March, NH Signs, We have not seen the opinion from the  
44 attorney. Would it be possible to see the opinion so that we can....

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JIM SMITH: That is the opinion between the attorney and the Board.

PETER MARCH: Ok.

JIM SMITH: So that is actually not public.

PETER MARCH: Ok...I was not sure....don't worry about it...

JIM SMITH: It is actually privileged. It is just his legal advice to us.

PETER MARCH: Ok.

JIM SMITH: It is not something that would be publicized shall we say...

PETER MARCH: OK...would you mind if I consult my colleagues....

JIM SMITH: No, go ahead.

PETER MARCH: Thank you....we would like to opt to continue with the meeting today, Mr. Chairman.

JIM SMITH: Continue today?

PETER MARCH: Yes.

JIM SMITH: Ok. We are back into the applicant. You can approach the board and do you have anything additional that is new that has not been presented before?

PETER MARCH: I do not believe so, Mr. Chairman. My name is Peter March, NH Signs, 60 Old Derry Road, Londonderry. I do not think I do. If there are any questions, I can happily answer.

JIM SMITH: Ok. Anybody on the board...again what we are deciding tonight just so everybody is clear is an appeal of a decision made by the Zoning Administrator and what we have to decide is whether or not his decision based upon the zoning record...regulations was a correct decision and that is all we are deciding tonight....just that one point. Having said that...does anyone on the board have anything else that they would like to bring up or talk about? Or ask questions about?

NEIL DUNN: I guess my only thought is to your point is...it is strictly about Richard's decision and Richard is the expert among all of here and a lot of times we need to...and the ordinance...seems to be pretty clear in that in my eyes when it is written and codified it is about the intent and a lot of it is about the character and aesthetics of the community which I think the Town has a pretty good record of being able to uphold these kinds of ordinances in the courts so, in my point of view Richard was right and that is about all I have to say.

88 RICHARD CANUEL: Can I interject before you go any further? Did the board make a decision to allow the  
89 applicant to continue the case based on the number of board members?  
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91 JIM SMITH: Yes. Yes we had three out of five.  
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93 RICHARD CANUEL: Ok, then we should hold all further discussions to the hearing.  
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95 NEIL DUNN: He wanted to continue tonight he said.  
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97 RICHARD CANUEL: You want to continue tonight or continue to next month?  
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99 PETER MARCH: I think we are ok – he told me about it tonight.  
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101 JIM SMITH: OK, he should he would continue with tonight.  
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103 RICHARD CANUEL: I was unclear – he said he wanted it continued...  
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105 JIM SMITH: What I think he was saying...to continue the hearing...  
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107 RICHARD CANUEL: I just wanted to make sure that was clear because it was not clear to me.  
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109 JIM SMITH: Ok, I got what he meant or at least I thought I did.  
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111 RICHARD CANUEL: I was ready to go.  
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113 [Overlapping Comments)  
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115 RICHARD CANUEL: Sorry for the interruption.  
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117 PETER MARCH: Mr. Chairman, could I maybe make a...of my...the case I presented before...maybe one  
118 minute...  
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120 JIM SMITH: Sure, go ahead...  
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122 PETER MARCH: Maybe, our argument boils down to the fact that we are making a code decision, the code  
123 enforcement officer should understand the totality of the law as it relates to it. In this particular case, the  
124 sign was once conforming, the code then changed and the sign is no longer conforming. As such it falls into  
125 the class of preexisting non-conforming signs...structure...it is thus protected by RSA 674:18. RDA 674:18  
126 creates a totally different set of criteria for the sign and that test arises from the New London case that  
127 is...there in the Zoning Administrator's handbook...and the facts that is...the test that are allowed or created  
128 for this say firstly does the proposed change arise naturally through evolution such as newer and better  
129 technology out of the ground for the use. That is A. B – is it required for the purpose of making the existing  
130 use more available to the owner or does it constitute a new and different use? (C) Will the change or  
131 expansion render the premises proportionately less adequate for the use in the terms of the requirement of

132 the ordinance? And (D) will the change or expansion have a substantially different effect or impact on  
133 abutting property in the neighborhood? So those are the four criteria that relate in our opinion to this  
134 preexisting nonconforming structure which is protected by 674:18. The other discussion that arose last time  
135 is where does town law, city law stand in relation to state law and clearly state law trumps town law to that  
136 effect, The Town of Hampton Vs. Brewster is one of many cases that says Zoning ordinance is derived...the  
137 power that the Town has is derived from the RSA, not particularly this RSA but all RSAs...in other words, all  
138 town law is subservient to all state law so that was the discussion that came up last time so it allowed  
139 you...whatever the town law says the state law trumps town law. The other discussion we had was that the  
140 fact that the town law tries to amortize non-conformities out of existence...in other words, it tries to reduce  
141 nonconformities and it is fairly clear to me on the reading of the newest books on the subject that  
142 amortization in general is not going to stand legally and I believe I handed you a sheet of paper that was  
143 written last time to that effect so the amortization clause in the town code is generally not legally sound. So  
144 that really is the basis of what I said last time.

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146 JIM SMITH: Jim, do you have any comments?

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148 BILL BERARDINO: No

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150 NEIL DUNN: I know we looked at that newer better technology that was not in the book that was published.  
151 Though again you say that it is not documented anywhere. Unfortunately that is all we have. I guess you said  
152 it was under somebody's middle. By the books that are printed by the state.

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154 PETER MARCH: It is part of the judgment on the New London land use association for the New London  
155 ZBA...what I read is verbatim from that judgment.

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157 NEIL DUNN: Ok, last time, it wasn't clear. It is not in the reference here so you would suggest that we would  
158 have to go out and read every judgment, I guess.

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160 PETER MARCH: I mean...

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162 JIM SMITH: Part of what we are faced with is you brought up a set of case law and so forth. We requested  
163 the Town attorney to review what you had and he gave us advice and some references to other case which  
164 countered your argument. So I think what we are basically back to the fact that we are just looking at the  
165 simple question of whether or not the Zoning Administrator, based on our ordinance was correct. One of the  
166 things that the Town attorney did allude to... that some of your arguments did have merit, it might be well  
167 based – use to base a variance request from this section. I guess in his opinion that would be a stronger case  
168 based on that type of approach based on a simple appeal. See, the problem with the appeal is that it is either  
169 yes or no. There is no middle ground. All we are looking at at this point is based upon on ordinance and the  
170 way it is read. Did he make a correct interpretation? We are not trying to go through a whole bunch of  
171 different case law and counter case law and such and trying to weigh those different arguments at this point.  
172 If you wish at a later date to apply for a variance on this issue then those arguments would make more sense  
173 and would be more applicable to that type of approach. So having said that, if nobody else has any  
174 comments...you have nothing further...we will close the public hearing at this point unless Richard, do you  
175 have any comments that you want to make?

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RICHARD CANUEL: Like you said, these are issues that should be discussed in an application for a variance. I could talk more on those issues.

JIM SMITH: Right.

RICHARD CANUEL: I am assuming that if the board's decision is to uphold my decision then I am assuming that the applicant would file an application for a variance. I think that is what you would follow. I think I would reserve further discussion to then.

JIM SMITH: Ok...I think we got the issues that we can deal with on the table at this moment and if there are no further comments that you have to make at this point...

PETER MARCH: Without the benefit of the attorney's letter, we would be happy to file for a variance.

JIM SMITH: Ok, in that case, the public hearing portion of this case is now closed. We are in deliberative session.

**DELIBERATIONS:**

JIM SMITH: Any discussion? Does somebody want to make a motion?

NEIL DUNN: Mr. Chairman, I would like to make a motion to deny Case No. 11/18/2015-1 based on the fact that Richard's decision was sound.

JIM SMITH: Okay.

BILL BERARDINO: Second.

JIM SMITH: Seconded. Ok, all those in favor?

ALL: Aye.

**RESULTS:**

**THE MOTION TO DENY CASE NO. 11/18/2015-1 WAS APPROVED, 4-0-0.**

JIM SMITH: So, that concludes this.

PETER MARCH: Thank you very much for hearing me. Have a wonderful Christmas and hopefully we will see you in the new year. Thank you very much.

JIM SMITH: This is probably the shortest meeting on record. I will entertain a motion to adjourn.

220 JIM TIRABASSI: I would like to make a motion to adjourn.

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222 JIM SMITH: Do I have a second?

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224 BILL BERARDINO: I second

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226 JIM SMITH: All those in favor?

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228 ALL: Aye.

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230 Meeting is adjourned.

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232 RESPECTFULLY SUBMITTED,



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236 NEIL DUNN, ACTING CLERK

237 TYPED AND TRANSCRIBED BY, PLANNING & ECONOMIC DEVELOPMENT DEPARTMENT SECRETARY.

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239 APPROVED (FEBRUARY 17, 2016); N. DUNN MADE A MOTION AND J. BENARD SECONDED. THE MOTION TO  
240 APPROVE 5-0-0.