

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

DATE: APRIL 15, 2015

CASE NO.: 4/15/2015-1

APPLICANT: M + M A SMITH PROPERTIES, LP
31 NASHUA ROAD
LONDONDERRY, NH 03053

LOCATION: 31 NASHUA ROAD, 7-73-2, C-I

BOARD MEMBERS PRESENT: JIM SMITH, CHAIRMAN
JACKIE BENARD, VOTING MEMBER
JIM TIRABASSI, VOTING MEMBER
ANNETTE STOLLER, VOTING ALTERNATE
BILL BERNADINO, NON-VOTING ALTERNATE
NEIL DUNN, ACTING CLERK

ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/ZONING
ADMINISTRATOR/HEALTH OFFICER

REQUEST: VARIANCE TO ALLOW A FREESTANDING SIGN OF 19 FEET, 8 INCHES IN
HEIGHT WHERE A MAXIMUM HEIGHT OF 10 FEET IS ALLOWED BY
SECTION 3.11.5.C.1 [Formerly Section 3.11.5.3.1].

PRESENTATION: Case No. 4/15/2015-1 was read into the record with 18 previous cases
listed.

JAMES SMITH: Who will be presenting?

MORGAN HOLLIS: Mr. Chairman, members of the Board, my name is Morgan Hollis. I'm an attorney with
Gottesman and Hollis in Nashua, New Hampshire and I'm here this evening representing the owners of the
property, Michael and Mary Ann Smith Properties, LP, and the applicant, Town Fair Tire Centers. And with me
this evening is Mike Patenaude of Poyant Signage. And he's here to answer questions or provide further
information to the Board that I might not have with regard to the sign. We are here on an application for a
variance for a sign. Currently, the property is developed as a gas station and repair shop, automotive repair
shop. Town Fair Tire is going to go before the Planning Board next month asking for approval of the site plan
to allow a Town Fair Tire facility, which is a retail operation. If you haven't seen one or been near one, they
are regional all throughout the northeast and their buildings are essentially the same design and same
signage. And it is a destination, not a drive by. That is, you make appointments to have your tires fixed. You
don't just drive by and decide to have your tire fixed. These are tire replacement centers, not repair centers
necessarily. Currently on the property there is a standalone, freestanding pedestal sign. That pedestal sign is

46 shown in a picture which was attached to the application at the time of the application. I think it's the last
47 picture, maybe, in your application, but it's the sign showing the Gulf sign with the price on it. That sign is in
48 excess of twenty five (25) feet in height. As was just read into the record, that sign was constructed per a
49 variance granted by the Board in 1989 when the restriction allowed signs up to twenty (20) feet and they
50 requested a variance in excess of twenty (20) feet and it was granted with restrictions. The redevelopment of
51 the site will require redevelopment of the sign. That sign is no longer appropriate, either in size, scale, shape
52 or design, for the proposed use. Unfortunately, the Town's ordinance mandates that all signs throughout the
53 town be no greater than ten (10) feet, except in the Airport District. That means all the way up and down, and
54 this property is on Nashua Road, as was read in to the record, all the way up and down 102, Nashua Road, all
55 of those signs that exist that are in excess of ten (10) feet are not conforming signs. When you redevelop the
56 site, you have to address the non-conformity, which would require us to install a ten (10) foot height sign,
57 maximum ten (10) feet high. So if you drive down that road and you remember that sign, our sign would have
58 to be less than half the height of that sign. We're proposing and requesting a variance to allow us nineteen
59 feet, six inches (19' 6"). Essentially a twenty (20) feet tall sign. If you look in the back of the variance
60 application, what we submitted with the application is the proposed sign showing the height dimensions and
61 we have a board here, if you can help out, Mike.

62
63 MICHAEL PATENAUDE: Sure.

64
65 MORGAN HOLLIS: This is the one that's proposed [see Exhibit "A"] and as you can see, the height dimensions
66 go up to twenty (20) feet tall and that's what we're looking for. Seventeen (17) to here, two (2) feet, six (6)
67 inches to the top. That's above the pedestal. That's going to be shorter than what's out there now, to give
68 you perspective. If you turn to the next page [see Exhibit "B"], we've prepared a diagram of what's allowed
69 and ten (10) feet maximum height is what's allowed, so the way you did it is to simply compress the pole.
70 Make it a shorter pole. You still have the same size sign, it's just that much closer. What's important about
71 the diagram is the height differential from the ground up to the bottom of the sign. It would be...

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73 MICHAEL PATENAUDE: Forty (40) inches.

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75 MORGAN HOLLIS: ...forty (40) inches high. So there'd be clearance from the ground to the bottom of the sign
76 of forty (40) inches. That becomes somewhat relevant when you come up to a corner, which this is on, and
77 you try to look through sign and you're sitting up in a car fifty (50) inches high and you're looking at a sign
78 that's down forty (40). If you were to put a sign ten (10) feet in height and you want to have clearance, and
79 I'm gonna introduce and exhibit from the National Sign Foundation [see Exhibit "C"], that suggests clearance
80 of ground to bottom of sign should be seven (7) feet so that you can look under it, it doesn't obstruct views.
81 You'd end up with a three (3) foot sign. That's all. That's all you would have for signage on a ten (10) foot
82 height. Maximum ten (10) foot height and seven (7) feet off the ground, according to safety standards. So
83 that's the reason we need it up higher. We need to give ground clearance. We need it up higher to have
84 visibility. When you're driving down that road, you're looking for a destination of Town Fair Tire. You're not
85 going to see it by looking at a sign on the road on that road. One of the pictures I guess I would like to start
86 with, to sort of introduce the site, is I happen to travel out there during the winter because I just wanted to
87 see relative to snow conditions this winter, and my trip out was earlier in the snow period, so the banks never
88 got as high as they did later in the snow period, but I think these pictures speak a thousand words. As you
89 look at the site, coming...the first picture is, if you're coming from the highway, so you're going westbound
90 and looking at the sign [see Exhibit "D"], right at the intersection, and the other picture is going eastbound as

91 you approach the site [see Exhibit "E"]. And you will see how the snow comes near the bottom of the existing
92 sign, which at this point, is in excess of ten (10) feet above ground. So if you had a sign ten (10) feet, in this
93 winter, that sign would be under the snow bank. Mr. Chairman, may I?
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95 JAMES SMITH: Yeah, please.
96

97 [M. Hollis distributes the aforementioned exhibits to the Board and Staff].
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99 MORGAN HOLLIS: I believe both of these exhibits merely give a better expression to what I've described as the
100 current situation with the existing sign and set the stage for why we're asking for a higher sign than what's
101 permitted under the ordinance. We...in order to obtain a variance, as you know, we must meet five points,
102 and I'm just going to go through each of the five points. The first is not to be contrary to the public interest.
103 Signs are here for a purpose. They are to locate a use. They're to advertise and to identify sites. This
104 particular use of this property is a destination and not a drive by. It is not an impulse stop. It is one you plan
105 and you might be driving from as far away as twenty (20) to twenty five (25) miles, depending on the closest
106 Town Fair Tire or other major tire center. You might be coming east of Derry, you might be coming from
107 Hudson, south from Massachusetts, and you're gonna get off and you're gonna be looking for the sign. And as
108 you know, the GPS gives you an address, but you're looking for a sign. The height affects the visibility of a
109 sign. Others up and down the street have a certain height. That's where your eye is drawn. If this is the only
110 one at ten (10) feet, you're gonna be looking for it and you're not going to see it. Snow has an impact on the
111 visibility of the sign, as indicated on the pictures we've handed out. The Signage Foundation has a published
112 certain safety criteria and has suggested in its criteria [see Exhibit "C"], and I'm gonna pass this out as an
113 exhibit, that it says "Table 5 sets out generally accepted sign height guidelines," and you'll see them, and the
114 guidelines for thirty five (35) mile an hour traffic, four lanes, is twenty (20) feet. It also goes on to say that
115 "the height from the ground to the bottom of the [sign] should always measure a minimum of seven (7) feet
116 so the sign is not blocked from view by passing or parked vehicles." Would you mind?
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118 MICHAEL PATENAUDE: Absolutely.
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120 MORGAN HOLLIS: While Mike's passing that out, I'll just continue. Accordingly, to meet the public safety
121 requirement and to be in the public interest, the sign really has to be high enough so that if you're parked or if
122 you're moving, either way, as you're looking for this sign, you have visibility under the sign and you have
123 visibility to the sign. Vehicles will not block them from view. If you grant the variance, all of these elements
124 should be considered and granting the variance will result in a sign that is not contrary to the public interest.
125 As you know, the two legal criteria which the Court has set down for this public interest standard is it will not
126 change the character of the existing neighborhood and it will not affect health, safety or welfare. If you were
127 to grant the variance and allow a sign twenty (20) feet in height, as proposed, with the upper elevation, more
128 than adequate clearance, you're not going to change the character of the neighborhood, the existing signs up
129 and down that street, and you're not going to affect the health, safety or welfare. It's the same height as
130 others and it won't be blocking views. Mike, if you would pass out...we took a number of pictures of signs up
131 and down the street [see Exhibit "F"]. These are again, just to refresh your memories, which I'm sure are
132 better than mine, but sometimes when you're driving that corridor or you're not looking for signs or at signs,
133 you're just going where you're going and I think it's important to remember what we're asking for and what
134 the neighborhood is. The second requirement of the law is that the spirit of the ordinance will be observed if
135 you grant the variance. The ordinance says that the purpose of the sign ordinance in Londonderry is "to

136 protect and improve livability and quality of life” through uniform regulation of signage. That’s a quote from
137 the sign ordinance. That’s okay if you have the practical zones in which to apply that ordinance. I’m going to
138 suggest that where a portion of a zoning district has all existing signs that do not conform, that trying to force
139 all of those signs down to ten (10) feet in an area where snow banks, at least this winter, were in excess of ten
140 (10) feet, probably is not [indistinct; interference from microphone]. I’ll get to that later when I’m arguing ‘fair
141 and substantial.’ While it’s an admirable goal for this town to have all signs be under ten (10) feet, I think this
142 district speaks out that maybe there have to be exceptions and that’s why we’re here asking for that relief
143 from the ordinance. The case of Belanger versus Nashua, which was a case years and years ago in Nashua
144 where South Main Street had developed into...turned from residential into converted residences into office
145 and retail, a variance was denied because the spirit and intent of the ordinance hadn’t been met. And in that
146 case, the Zoning Board argued the spirit and intent of the ordinance is we want it to remain residential. And
147 the Court said that’s fine, that’s what you want it to remain but there are residents there and therefore, you
148 should give relief to the person who needs to have the property be like everyone else. Very similar to this
149 case. We’re asking for relief, make the sign visible, and to be like others. The legal criteria for this particular
150 standard is the same. There will be no change to the character if you grant the variance, character of the
151 neighborhood. There will be threat to health, safety and welfare and I’ve covered those already. The third
152 requirement that you have to consider is will substantial justice be done if you grant the variance? As I
153 indicated, this is a destination user who needs a visible sign. Clearly, if you deny the variance, there is no real
154 benefit to the public in that you’re going to have a sign that’s ten (10) feet, that’s going to be occasionally
155 under the snow bank, it’s going to probably block some view. In fact, you could argue it’s a detriment to the
156 public if you deny it. If you deny it, there’s a serious harm to the applicant. If you grant it, it allows the project
157 to work. It allows a sign which is still gonna be shorter than what’s out there today to give direction and there
158 really will be no harm to the public in this particular location and in this instance. So your job is to balance the
159 competing harms and in this case, the balance falls to grant the variance. There will be substantial justice if
160 you grant it. Number four, the values of surrounding properties will not be diminished. There’s no real
161 change going on out here if you grant this sign. It’ll be shorter than the other one, it will be a more modern,
162 updated sign, more visible. Aside from that, it’s gonna be a sign on a commercial piece of property. It’s gonna
163 be a sign similar to other signs on that street. It won’t impact anyone’s value. To that end, though, I did ask
164 Mr. Ralph Valentine, who is the owner of the Valentine Group in Derry...I’m sorry, in Londonderry. He also has
165 an office in Derry. I asked him if he would take a look at the site and the proposal and offer an independent
166 opinion. He’s not a broker of record on this property. He’s not involved at all. In fact, I’ve never used him for
167 any of my opinions, but I knew he knew the area because I’d seen his signs up and down the street. He has
168 written a letter [see Exhibit “G”], a very short letter, which I’ll read, but I want to submit. It’s addressed to the
169 Zoning Board of Adjustment. “[It is] my professional opinion that the values of surrounding properties will not
170 be diminished by the granting of this variance. The sign height requested by the applicant is common and
171 typical for the area. In the immediate vicinity of the subject property, there are at least fifteen (15) signs
172 fronting on Route 102 or on adjacent roadways. Almost all, if not all of the signs exceed the ten (10) limit.
173 Many of them are twenty (20) plus or minus in height. I cannot find one plausible argument to support any
174 diminution should this variance be granted. A stronger argument can be made [that] by granting the variance,
175 surrounding values will be reinforced. It is my personal experience as a commercial real estate consultant
176 with 35 years working in the southern New Hampshire market that both buyers and tenants prefer higher,
177 more visible signage and therefore surrounding property values will not be diminished by [the] granting of this
178 variance.” The final point that we have to satisfy before this Board is commonly known as the hardship
179 argument. That is, given the uniqueness of the property, enforcement imposes a hardship on the property
180 owner where no fair and substantial relationship exists between the general public purpose of the ordinance

181 and the specific application to this property. So the first criteria is what makes the property unique? And
182 therefore, why should this ordinance not apply? It really doesn't go any distance to the purpose behind the
183 ordinance. It's unique because this property actually has three (3) roads on it. It's not just a corner lot, but it's
184 a fairly small lot. Small in frontage, small in depth and it has Palmer Drive on one side, Hampton Drive on the
185 other and it fronts on Nashua Road. I've been before this Board for this property for the rear of the property
186 and I think I explained to everybody how unique it is when you look at the topography, but in this case, the
187 uniqueness of it is exactly where it sits at that stoplight, where the road is the widest, where all these
188 commercial uses come together and it has two roads on either side and Nashua Road on the front. It's unique
189 and requiring that a ten (10) foot sign under the ordinance be placed here where this property is pinched in
190 and at that light makes no sense. That's the best way I can say there's no fair and substantial relationship.
191 Putting a ten (10) foot sign here makes no sense, regardless of the purpose of the ordinance. It does not help
192 advance the goals of the ordinance and therefore, I would argue there is no fair and substantial relationship
193 between the purpose of the ordinance and its application on this site. The last question is, is it a reasonable
194 use? A sign clearly is a reasonable use and a sign twenty (20) feet in height as proposed, having the clearance
195 underneath the sign, is a reasonable use. Happy to answer any questions and if you have any questions about
196 the design of the sign, Mike is here to answer. The specific location of the sign is approximately the same as it
197 is now. That's subject to the Planning Board's final review, of course, where they want to put it, but that's the
198 logical spot.

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200 NEIL DUNN: Isn't it already...I'm sorry, Mr. Chairman.

201
202 [Laughter]

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204 NEIL DUNN: Regarding the placement, wasn't that already decided in a previous variance?

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206 MORGAN HOLLIS: The previous variance allows us to be where it is, yes. We could be farther inside, but there
207 isn't much room on that property to put it.

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209 NEIL DUNN: Okay, well, you were saying the Planning Board, I thought there might be some...

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211 MORGAN HOLLIS: Yeah, no, the Planning Board, if they say 'we don't want it there,' we have a problem. But,
212 as a general rule, the Planning Board identifies where is a good spot to put the sign and that's where we've
213 asked for it to be.

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215 NEIL DUNN: And the square footage is within spec and you're not here for that at all?

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217 MORGAN HOLLIS: That's correct.

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219 NEIL DUNN: So to put a big...that sign down at ten (10) feet is problematic.

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221 MORGAN HOLLIS: It is problematic.

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223 NEIL DUNN: Okay. Thank you.

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225 JAMES SMITH: Okay, is...how does the square footage of the proposed sign compare to what's existing?

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MORGAN HOLLIS: I don't know that we have a measurement of the existing square footage. Just let me do a quick calculation here. It's...

MICHAEL PATENAUDE: But we don't have the...the existing sign...

MORGAN HOLLIS: Yeah.

MICHAEL PATENAUDE: ...we don't have that square footage.

MORGAN HOLLIS: Right, but we can give them one on what this is. It's...

MICHAEL PATENAUDE: Yeah, this one is sixty four point two (64.2) and sixty five (65), I think, was the allowable...

MORGAN HOLLIS: And if that one is roughly eight (8) feet off the ground and is twenty five (25) feet tall, it's seventeen (17) feet by...it's got to be eight (8) feet across. Seven (7) or eight (8) feet across. So it's...seventeen... forty nine...it's over a hundred (100) square feet of signage.

JAMES SMITH: Okay, the point I'm trying to get to is, this is in conformance with the signage...

MORGAN HOLLIS: It is. Yes.

JAMES SMITH: That one is...is non-conforming on [indistinct] size.

MORGAN HOLLIS: Non-conforming in all ways. Yes.

JAMES SMITH: Yup. Okay. So we're gaining on one and...

MORGAN HOLLIS: We are reducing the height from what it is and we're reducing the size from what it is. Correct.

JAMES SMITH: Any other questions? Comments?

MORGAN HOLLIS: Thank you.

JAMES SMITH: Seeing none, anyone in support of this? Anyone in opposition or having questions? I'll bring it back to you. Any further comments?

MORGAN HOLLIS: No, thank you, Mr. Chairman.

JAMES SMITH: At this point, we close this hearing and we'll go into deliberation.

DELIBERATIONS:

271 ANNETTE STOLLER: Mr. Chairman?
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273 JAMES SMITH: Yes?
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275 ANNETTE STOLLER: I think if they were forced to stay within that ten (10) foot recommendation, that it would
276 be pointless to put up the sign almost.
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278 JAMES SMITH: Almost. Again, this recommendation from the sign...what was it? The people who had; if you
279 have a thirty five (35) mile speed limit and a four lane highway, sign height should be at least twenty (20) feet
280 and the bottom should be at least seven (7) feet up. It makes a certain amount of sense. The ten (10) feet, I
281 think is...it doesn't make a lot of sense in that particular location, given the nature of so many other signs and
282 the nature of that piece of roadway. Shall we...do we have any other comments?
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284 NEIL DUNN: I think if we go through the five points...it was presented due to the unique...three roads on the
285 sides and the fact that the sign's already been...the lot's already been granted a variance for the location of
286 the sign, strict conformance, I do think is a safety concern, so...and that was brought up in 'contrary to public
287 interest.' The possibility to block, you know, traffic and exiting and entering that area. So granting the
288 variance would not be contrary to public interest because it's actually safer in this instance than what would
289 be required. My thought.
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291 JACKIE BENARD: I actually agree because if they conform to the current regulations, it will actually be...
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293 JAMES SMITH: It would create a hazard.
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295 JACKIE BENARD: It would create a public hazard, yeah.
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297 JAMES SMITH: Yup. So, on the first point...?
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299 JACKIE BENARD: The variance will not be contrary to the public interest.
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301 JAMES SMITH: Right.
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303 ANNETTE STOLLER: Shall we say it for...with their request?
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305 JAMES SMITH: Yeah. Okay. Number two, spirit of the ordinance is observed.
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307 NEIL DUNN: I think to his point, the applicant's point, that the essential character is obviously not threatened
308 where there are so many non-conforming signs. And again, to be into complete compliance, it would propose
309 a safety hazard and it doesn't change the character, so I feel they're fine with the spirit of it.
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311 JACKIE BENARD: The surrounding environment is...
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313 JAMES SMITH: Yeah. You can increase the size...make it a little easier to read. So...
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315 JACKIE BENARD: So the spirit of the ordinance is observed.

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NEIL DUNN: Mm-hmm.

JAMES SMITH: Yeah, the...trying to keep the signage the appropriate size. I think one of the key things about this, this is, in fact, a four lane highway at this part, so you need a sign which is appropriate for a four lane highway.

NEIL DUNN: Well, I think that's something that maybe would be addressed more in the ordinance, however, because in our ordinance, the setback would be out of the hazard area.

JAMES SMITH: Well, in this particular lot, it's impossible.

NEIL DUNN: Right. No, exactly and they've already been granted that, so...

JAMES SMITH: Yeah.

NEIL DUNN: That's where I'm saying...you know, the essential character is not changed, given the existing lot and the property boundaries and the safety concerns. I think the spirit of the ordinance would be observed.

JAMES SMITH: Substantial justice is done.

[Pause]

JAMES SMITH: When he says 'the variance will allow a reasonable identification of the proposed use, which is...

BILL BERARDINO: Proper [indistinct].

JAMES SMITH: ...a destination use.' Which actually is changing the nature of how that piece of property is being used. Up until this point, it's really been a gas station/repair place. So as you drive up and down, you kind of pick the gas station you want to use, so in this case they're going there for a specific product.

NEIL DUNN: And I think typically, substantial justice is also the benefit to the public versus the...

JAMES SMITH: Yeah.

NEIL DUNN: ...hardship...not hardship, but the burden of the establishment and in this case, there's really no burden by allowing it. It's actually probably safer and less of a burden.

JACKIE BENARD: It's safer so they can actually find them.

NEIL DUNN: Yeah.

JAMES SMITH: Right.

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NEIL DUNN: So I'm good with that one.

JAMES SMITH: Okay.

JACKIE BENARD: And then the fourth one, the values of the surrounding properties...

JAMES SMITH: No effect.

JACKIE BENARD: ...are not diminished.

ANNETTE STOLLER: This is no change.

JAMES SMITH: Or little change.

NEIL DUNN: It's actually a smaller...

JACKIE BENARD: It's actually improved.

JAMES SMITH: Yeah, that's true. We'll actually be getting a slightly smaller size.

JACKIE BENARD: Correct.

JAMES SMITH: Actually, it's shorter, too. The ordinance doesn't...again, you come back to the hazard of having a lower sign would present in that location.

ANNETTE STOLLER: Well, the hazard and also the diminishment of the utility of the sign.

JACKIE BENARD: So the literal enforcement of this ordinance would actually cause public harm.

JAMES SMITH: Right.

ANNETTE STOLLER: Yeah.

NEIL DUNN: And the proposed use is reasonable as they have a variance for a sign at that location and signage is allowed.

JAMES SMITH: Okay. Who would want to make the motion?

JACKIE BENARD: Mr. Chairman, I'd like to make a motion to grant Case Number 4/15/2015-1, M + M A Smith Properties, LP, to allow the variance of a freestanding sign of nineteen (19) feet, eight (8) inches in height where a maximum height of ten (10) feet is allowed by Section 3.11.5.C.1 at 31 Nashua Road.

JAMES SMITH: Do I have a second?

405 JIM TIRABASSI: Second.

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407 JAMES SMITH: Jim seconds?

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409 JIM TIRABASSI: Yes.

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411 JAMES SMITH: Jim seconds. All those in favor?

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413 ALL: Aye.

414

415 RESULT: THE MOTION TO GRANT CASE NO. 4/15/2015-1 WAS APPROVED, 5-0-0.

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417 RESPECTFULLY SUBMITTED,

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419 NEIL DUNN, ACTING CLERK

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421 TYPED AND TRANSCRIBED BY JAYE TROTTIER, ASSOCIATE PLANNER

422

423 **APPROVED MAY 20, 2015** WITH A MOTION MADE BY NEIL DUNN, SECONDED BY JACKIE BENARD AND
424 APPROVED 5-0-0.

