MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **June 18, 2013**

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

MEMBERS EXCUSED: Derek Durbin, Alternate: Robin Rousseau

Chairman Witham announced that Mr. Patrick Moretti would be sitting in as a voting member for the entire meeting.

I. APPROVAL OF MINUTES

A. Minutes of Meeting – February 26, 2013

*Vice-Chair Parrott made a motion to **approve** the Minutes as presented. Mr. Rheaume seconded, and the motion passed by a unanimous voice vote.*

II. PUBLIC HEARINGS - OLD BUSINESS

A) Case #5-10
Petitioners: Mark E. & Janet Greenwood
Property: 480 Dennett Street
Assessor Plan: 160, Lot 26
Zoning District: General Residence A
Description: Add second dwelling unit in existing structure. Replace existing garage with 20'± x 20'± structure.
Requests: 1. A Special Exception under Section 10.440, Use #1.51 and Section 10.812 to convert a building existing on January 1, 1980, with less than the required minimum lot area per dwelling unit to 2 dwelling units.
2. A Variance from Section 10.521 to allow a lot area per dwelling unit of 3,825± s.f. where 7,500 s.f. is required.
3. A Variance from Section 10.521 to allow a right side yard setback for an accessory structure of 3'± where 10' is required.
(This petition was postponed from the May 28, 2013 reconvened meeting.)

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham announced that the initial application advertised replacing the garage, but that was withdrawn and they were only dealing with a second dwelling unit so the variances were not required.

The applicant, Mr. Mark Greenwood of 480 Dennett Street, told the Board that he was requesting a Special Exception to convert the existing residence to a 2-family dwelling. He reiterated that the variances requested were not required.

Mr. Greenwood reviewed the Standards for granting the Special Exception, stating that there would be no hazard to adjacent properties or change in the essential character of the neighborhood or property values in the area. He said they would be adding an egress door and four off-street parking spaces. He added that there would be no pollutants generated or additional demands on municipal services or increase in storm water runoff.

Mr. Greenwood told the Board that he intended to remove the single car garage and create a 20' x 40' area at the rear. He said there was a stockade fence and spruce trees that would provide light and sound reduction. Mr. Greenwood pointed out that zoning in the GRA District allowed high density and multi-dwelling housing. He indicated that there were approximately eighty houses on Dennett Street, of which thirty or more were two-family or multi-family dwelling units.

Mr. Rheaume asked Ms. Walker why it was no longer necessary to obtain a variance to allow a certain lot area per dwelling unit. Ms. Walker replied that as long as the building was constructed prior to 1980, they only needed a Special Exception for 3,000 s.f. per dwelling unit.

Chairman Witham asked if the first unit labeled lower level was essentially the basement level. Mr. Greenwood said the house sat high and the basement was 3½' below grade. He said the house was up high because it was originally built in a heavy clay area when there were water issues, but the two bedrooms in the basement were remodeled under a building permit from the City with legal egress windows.

SPEAKING IN OPPOSITION OF THE PETITION

Mr. Bob Shouse of 555 Dennett said he lived five houses up on the opposite side of the street. Mr. Shouse said he opposed granting the Special Exception because he thought it would be an over intensification in the use of the property. He said it had five bedrooms and there could be five to six cars in a narrow driveway if occupied by adults, adding to the existing traffic issues.

Mr. Shouse pointed out that there were two basement windows hidden by a deck and latticework. He said even if the basement level unit had two egress windows, it was a very small space and he thought there should be a better way out of the building in case of a fire in the basement level unit. Mr. Shouse said he felt that adding another dwelling unit would be a detriment to the character of the neighborhood, increasing people and car lights, as well as creating a traffic safety hazard with more cars moving back and forth.

Mr. Rheaume asked Mr. Shouse to confirm whether there were other multi-dwelling houses in the neighborhood. Mr. Shouse replied that there were other duplexes down the street on bigger lots, but this was a small house on a small lot with inadequate egress and no significant storage area. He said the house functioned as it was and there was no hardship in denying the request.

Ms. Sally Struble of 24 Burkitt Street said her backyard abutted the applicant's property. She recalled that Mr. Greenwood requested a variance for two dwelling units in February of 2013, and it was found to be too small, but now he was returning with a request for a Special Exception to grant two dwelling units. Ms. Struble cited NH Supreme Court cases, including Fisher vs. Dover that addressed this issue if someone's application was denied and they returned with a request for essentially the same purpose. She said the Supreme Court determined there had to be a material change in circumstance that affected the merits of the application or they couldn't come back. She said the Board was required to deny the application without reviewing the merits if there were no changes. Ms. Struble's maintained that the applicant wanted two dwelling units on a lot that was too small and there was no substantial change in case law, circumstances or materials in the proposed use of the property. She asked the Board to address that first, but if they reviewed the merits of the petition, they should consider that it would change the character of the immediate neighborhood, which was mostly populated with small, single-family dwellings that were close to one another with only one multi-unit house in the immediate area.

Chairman Witham responded that the Board invoked the Fisher vs. Dover ruling occasionally and someone on the Board could discuss it and make a motion if they wished, but he felt this situation was materially different because the applicant asked to convert a garage and was now asking to covert a basement. He explained that the applicant needed variances last time and this time he needed a Special Exception, which had vastly different criteria with lower standards.

Ms. Struble replied that the parties in the case of Fisher vs. Dover acknowledged that there was no change in the case and it was conceded that there were no material changes, whereas in the Brandt case it was a similar situation to this proposal. She said in the Brandt case the first application was to put additional dwelling units in the barn, but then fifteen years later they submitted a new request to put some of the dwellings in the barn and some in the house. She said the Supreme Court decided that there was a change in circumstances in that the case law had changed substantially, but didn't find that the change in the location of the dwellings was a material change so she respectfully disagreed. Chairman Witham asked if those applicants requested a variance the first time and then a Special Exception the second time. Ms. Struble said she could not say that. Chairman Witham concluded that he couldn't see invoking Fisher vs. Dover where the standards were completely different.

Ms. Cynthia Smith of 466 Dennett Street said she too walked Dennett Street and only counted eight multi-dwelling houses, not thirty. She said there were not a lot of multi-dwelling houses in the neighborhood and thought five bedrooms could bring ten cars and would be detrimental to the character of the neighborhood and property values.

Mr. Lenny Cushing of 30 Burkitt Street whose backyard abutted the applicant's property said he bought his property as an investment and if the Board granted this request, he would expect them to reciprocate with others. Mr. Cushing said many of the homes in the neighborhood were raised up. He said his house had a walkout basement like Mr. Greenwood's house and his house was larger and could become a revenue-generating asset as well, but the applicant's house was a small

cape and five bedrooms seemed excessive and unsafe. He pointed out that the one multi-dwelling house in the neighborhood was a much larger house on a larger lot with a bigger footprint. He commented that if someone needed a multi-dwelling home, that there were many multi-dwelling houses in Portsmouth and they could find one and sell their house.

Mr. Dave Wieland said he and his wife, Cynthia Smith lived at 466 Dennett and he commented that rental populations were transient and would change the character of the neighborhood. He said there was an elementary school up the street, the sidewalks were heavily traveled with children every day, and the increased traffic could affect their safety. He also questioned the road frontage.

Chairman Witham informed members of the public that they didn't need to repeat what someone else had already said and they could just say they agreed.

Ms. Marianne Janik of 21 Burkitt Street, Mr. David Adams of 29 Burkitt, Ms. Tanya Babineau of 140 Thornton, and Ms. Kathy Marden Anderson, speaking for herself and her sister, Cheryl Marden of 500 Dennett Street, said they agreed with the previous speakers that parking and traffic would be an issue. They also said they were concerned with diminished property values, and felt that denying the application would not create a hardship for the owner.

SPEAKING TO, FOR OR AGAINST THE PETITION

In response, Mr. Greenwood said he appreciated the concern for the safety of his family and home. He described the house as 24'x 40' with an ell at the rear and an ell on the front and with no parking problems with the five bedrooms. He said the bedrooms were occupied with members of his family. He explained that the criteria he used to identify two-family homes in the neighborhood was having two entranceways and two electric service meters, cable boxes or two gas services. He said a few of them were smaller than his house.

Mr. Greenwood pointed out that the neighbors' concerns that his request would set a precedent for others to follow others did not apply. He said he was not required to meet the criteria for a variance as described in Zoning Ordinance Sections 22350 & 22360, portions of which he read. Mr. Greenwood noted that they lived in the GRA district, a single, two-family and multi-family district with moderate to high density. He said they had a great neighborhood with families and adults, owners and renters. He said the objection to having tenants was unfounded considering his next-door neighbor had a tenant, and another person who spoke was an absentee landlord. He said he had great luck with tenants, and he was disappointed that this had become a polarizing issue.

Mr. Greenwood said he invested in the neighborhood, operated a business, and had a home and another property that increased surrounding values. He said his grandchildren walked to and from school. He said there was a yard with a swing and toys in the yard. He said it appeared they might be the only home in the neighborhood with small children. He said it might be nicer if they were quieter sometimes, but that was what children did. He stated that there were six people living in the house and they had no intention of moving. He said he had the space, met the criteria and would be willing to consider special conditions of approval.

Mr. Rheaume asked for clarification on the tenants and proposal for a second unit. Mr. Greenwood replied that his wife, daughter and his three grandchildren lived in the home, and they wanted to

create a separate kitchen and living space for his daughter and her children. He said he had no intention to take on tenants. Mr. Rheaume noted that he was eliminating a set of stairs and creating another bedroom. Mr. Greenwood replied that the other bedroom would be an office or guest room for two other grandchildren that did not live with them.

Ms. Struble said Mr. Greenwood had told neighbors that he would move to his house in Maine upon retirement and would turn the second unit in the basement into a rental unit for income for his daughter who would live in the house with her kids. She said there were six people were currently living in the house, but half of them were small children without vehicles. She commented that the children didn't have friends, partners or spouses with vehicles at this time, but a rental unit would bring a negative impact on their neighborhood.

Ms. Wendy Cushing of 30 Burkitt Street said she had no problem with Mr. Greenwood's family or grandkids, but if the Board granted a two unit dwelling, they could convert the building into two condominiums. She said they shared backyards and removing the garage would create parking spaces in view of her backyard. She said removing the garage would also remove storage and would create litter that would decrease their property values. Mr. Greenwood responded by saying they were looking at an 8'x12' shed and fencing that would meet the setback requirements.

Mr. Cushing said many homes had the same situation, but this was not about pulling at heartstrings because of Mr. Greenwood's personal situation, because this property would eventually be sold under the conditions allowed.

DECISION OF THE BOARD

Chairman Witham reminded the Board that the applicant withdrew the variance requests and the Special Exception was under consideration.

*Mr. LeMay made a motion to **grant** the special exception, with the stipulation that occupancy of the lower level would be limited to two individuals. Mr. Rheaume seconded.*

Mr. LeMay reviewed how the applicant met the standards for granting a special exception, noting that the use was permitted by the ordinance. He said that there would be no hazard to the public or adjacent properties from fire, explosion or release of toxic materials. He added that there would be no detriment to property values or change to the essential character of the neighborhood due to the location, scale, parking area, access ways, odor, smoke, gas, dust or other pollutants, glare, heat, vibration or unsightly storage of outdoor equipment, vehicles or other materials. He said there would be a little intensification of parking, but they would prevent two couples sharing two bedrooms in the basement unit by limiting the occupancy. There would be no reation of a traffic safety hazard or increase in traffic congestion with just one or two more cars in the yard, considering the existing traffic conditions. Lastly, he said there would be no excessive demand on municipal services and no significant increase in storm water runoff. Mr. LeMay concluded that the applicant met the criteria they were given.

Mr. Rheaume said he struggled with the proposal. He mentioned that he lived in a multi-family neighborhood himself and it could be an additional challenge when a single family home had renters. Despite going back and forth with the issue, he said it still met the criteria for a permitted Special Exception in this zoning district. One of the toughest standards he struggled with was whether there was a detriment to surrounding property values. He said neighbors came up with

reasons why, but this was the same house, with the existing square footage, so he didn't believe that turning it into a different use with no height increase or change to the appearance of the house would negatively affect the surrounding property values or change the essential characteristics of the neighborhood. He recalled that he opposed a separate dwelling in the garage in February, but this application met the basic requirements of the Special Exception standards. Mr. Rheaume also concurred with Mr. LeMay's points that there would only be a low impact to traffic with a single or double unit.

Chairman Witham stated that he had seen similar projects granted over the last 10-15 years and there had been issues turning nice backyards into parking areas. He said it was considered more acceptable to have one vehicle in a garage and another in a driveway, but different when there were four cars in the backyard. He concluded that although there were no issues with the other criteria, he would not support the motion because he was not comfortable that there was no detriment to surrounding property values to abutters.

*The motion to grant the petition **failed** and the petition was **denied** by a vote of 3-4, with Mr. Moretti, Vice-Chair Parrott, Mr. Mulligan, and Chairman Witham voting against the motion.*

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The following was approved as an Except of Minutes at the August 20, 2013 meeting of the Board of Adjustment.

B) Case #5-12
Petitioner: Strawbery Banke Inc.
Property: Off Washington Street
Assessor Plan: 104, Lot 7
Zoning District: Mixed Residential Office
Description: Construct an 85'± x 120'.± oval and adjacent 60'± (in diameter) circular skating area with supporting structures.

Requests: 1. A Variance from Section 10.440, Use #4.50 to allow an outdoor recreational use in a district where such use is not allowed.
2. A Variance from Section 10.592.10.450 to allow an outdoor recreational use within 500' of a Residential or Mixed Residential district.
(This petition was postponed from the May 28, 2013 reconvened meeting.)

Chairman Witham noted that there was a high degree of neighborhood interest in this petition. He asked that members of the public hold any applause and that speakers supporting or opposing the petition make their points but be concise. If a previous speaker had expressed similar thoughts, he requested that, in the interest of completing the testimony, the new speaker just note that they agreed with the views that had been expressed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated that he was representing Strawbery Banke and before this meeting, presentations had been made on two occasions to the Friends of the South End and to the City Council where there were speakers for and against. This was the first time before this Board and he wanted to provide details of what was, and was not, being proposed. He also understood that

approximately 20 or 22 letters had been submitted. There had been some letters of opposition in their packet and he referred to the additional letters which were in front of them and might not have been received in advance and which he requested they review at some point.

Attorney Loughlin stated that Strawbery Banke was proposing a skating pond, with equipment to preserve ice, for a 90-day season from December 1st to February 28th. It would be located in the open space east of Washington Street and northeast of the exhibitors' center. He listed the distances from various streets and noted that the 12, 500 s.f. pond was 25% smaller than the average hockey rink. As context, he referred to the skating rink shown in the submitted photographs from the City's 1957 & 1969 Annual Reports. Located on Greenland Road, it was now a park-n-ride accommodating 50 cars. When the rink was open, it had less capacity but still accommodated the demands of the skaters. Attorney Loughlin stated that the hours of operation would be 9:00 a.m. to 9:00 p.m. There would be no hockey boards but an enclosure for making the ice shown in the submitted illustration, which was on display. He pointed out the locations of the chiller and transformer, enclosed to buffer sound, between the Jones House and the blacksmith shop, 350' to the south of the Hancock Street right-of-way.

Attorney Loughlin stated that the ice facility was manufactured. There was a question raised about the materials used, which would include polyglycol in the pipes. He stated that there would be a "'zamboni'" to refurbish the ice surface, which he felt would generate about the same noise as an automobile. He noted that during the nighttime, there was traffic on the roads, Hancock Street being one of the principal access ways to the commercial fish pier for trucks. He agreed that, if there was going to be any consistency, a system was needed to maintain the ice, particularly in an area that would be exposed to sun. Recreation officials had advised that flooding without any type of refrigeration would generate maybe 30 days of ice in the course of a winter. He stated that all the materials used in the processing and keeping the operation going would be employed using best management practices. He said they had information regarding the polyglycol, which they would be happy to supply, but which would more properly come up at Site Review.

He stated that the general sounds of people enjoying themselves would be sound generated from the pond prior to 8 or 9 p.m. but that was not the standard for limiting what a property owner could do with their property. He addressed the submitted views of Attorney Jonathan Springer regarding the noise potential which sounded threatening but he believed were fanciful. There would be music but no large PA system blaring announcements. Strawbery Banke would take measures to ensure that the operation would not cause any problem. He felt they had been a good neighbor for 50 years and there was no reason to believe they would ignore City regulations.

Regarding another submitted concern, Attorney Loughlin stated that he had submitted a spec sheet for lighting, which he described as akin to a holiday or decorative light, as opposed to the halogen lighting used for hockey. They would comply with the detailed City regulations concerning light trespass and glare. Overall, in terms of lighting and sound, he felt it was important to keep in mind that Strawbery Banke had made the decision to nestle this proposed skating pond well inside the campus and he indicated on the exhibit the four structures, which would limit the view corridor toward the pond as well as the noise. As seen in the photographs, there was also a stand of large white pines, which would screen the area in the winter.

Addressing traffic and parking, Attorney Loughlin referenced the Prescott Park Arts Festival taking place for the last 35 years. That could draw 10,000 people and had occasionally caused an

issue, but this was a skating rink used most heavily in the early evenings and weekends. They would expect 100 to 200 skaters generating approximately 50 to 100 vehicles. There was parking on site for 112 vehicles with 92 spaces in the section along Hancock Street and 20 more between Hancock Street and the restaurant. He stated there was plenty of on-street parking on the nights and weekends and with the Strawbery Banke campus closed in winter, additional spaces would be freed. Attorney Loughlin stated that there had been misleading statements characterizing the operation as a commercial venture. He referred to a letter in which Attorney Springer had maintained that the loss to Strawbery Banke in the substantial justice test would be monetary. While there would be a charge, Attorney Loughlin stated that this operation was not designed to make money but serve as an amenity provided by Strawbery Banke. It was not appropriate to consider this the same as a rink, which was open all year round. He stated that the suggestion of placing the operation out at Pease missed the point of creating a neighborhood skating area, which would not require families to drive to an outlying location.

Attorney Loughlin stated that he had laid out the requirements for a variance in his letter. He noted that granting a variance did not change the zoning as had been alleged. There had been statements that this was a prohibited use and he maintained that every use for which the Board granted a variance was a prohibited. Unless the use was specifically spelled out, it was not permitted and applicants needed to present the facts before the Board who could determine that, with that set of facts, the applicant should be allowed the use. That was why they were there that evening.

Addressing the criteria, Attorney Loughlin stated that there would be no diminution in the value of surrounding properties and he didn't believe there would be a property owner in the area that would have to sell their property for one dollar less because of the rink. He cited the Residence Hotel court case, which said that one way to determine the public interest was to examine whether the essential character of the neighborhood would be altered or whether the public health, safety and welfare would be threatened. There would be a change in the neighborhood as there would be activity on that particular site where now there was none, but that would not alter the essential character of the neighborhood. The substantial justice test balanced the benefit to the public versus the harm to the applicant if the variance were denied. Attorney Loughlin reiterated that this was not a money issue. It was something that Strawbery Banke felt would advance their mission and be helpful to the community and there was no evidence that the public at large would be affected. He recognized that there were those who did not agree with the proposal but stated that granting the request would promote substantial justice. He stated that literal enforcement of the provisions of the Ordinance would create an unnecessary hardship. He had outlined some of the special conditions of the property. He quoted from the Office of Energy and Planning Handbook as defining this test as balancing the public good resulting from the application of the Ordinance against the potential harm to a private landowner and going to the question of whether it created a necessary or unnecessary hardship. Attorney Loughlin stated that he did not believe it was a necessary hardship to say that there could not be a skating rink, tennis court or golf course within 500' of a residence. He stated that some of the highest end homes in Rye were on and around a golf course. He conceded that, if this were a massive, loud commercial operation, it might be appropriate to have a longer setback but, for this proposal, he stated that the 500' distance was an unnecessary hardship. He stated that he would be happy to answer any questions that the Board might have.

Mr. Rheaume referenced the provided illustrations, asking if the lighting was yet to be determined. Attorney Loughlin responded that they had compiled a chart, which would show the lumens, noting that this aspect would have to go through Site Review. They were aware of, and would comply with, the requirements regarding glare and light trespass and they envisioned lights similar to Christmas lights. When Mr. Rheaume asked if the lights would be on poles, Attorney Loughlin referred to the graphic showing something like Christmas lights strung over the ice. They weren't making a firm representation as there were a number of requirements to be met and the lights had to have full cut-offs. They felt what had been indicated in the graphic would meet the requirements but had to consider the possibility of having to place the lights on a pole, directed down onto the ice. This would not be ideal but would comply. Mr. Rheaume asked for details of the concession stand and Attorney Loughlin responded that Mr. Yerdon would speak to that. While it was part of the proposal, it did not require variance relief. Mr. Rheaume added that he would like to have addressed what the lighting plan would be for the concession pavilion. He asked, as a final question, about the proposed numbers, location and arrangement of loudspeakers. Attorney Loughlin stated it had not yet been worked out but he felt it would be simple and the Board could put a condition on it if they wished, but it was not going to be a series of loudspeakers blasting music or announcements throughout the neighborhood.

Mr. Mulligan noted that it had been indicated that this would be a seasonal operation and asked if they should understand that this would be disassembled during the warm months and stored. If so, how would the area look after the cold season? Attorney Loughlin stated that he understood the structure had a 6-mil base with tubing over that which would be laid down in November and be taken up in March. What would remain would look just like it did now, a green field. Mr. Mulligan asked if he would elaborate on his assertion when discussing the substantial justice test that granting the variance would help Strawbery Banke's mission. Attorney Loughlin stated this would probably be a better question for Mr. Yerdon, but he felt that it would bring people into Strawbery Banke to see what a neat place it could be in the wintertime, showing an eighteenth to twentieth century village in a different season. He answered, "Yes" when Mr. Mulligan asked if the museum itself was dormant at that time of year.

Mr. Larry Yerdon stated that he was the President of Strawbery Banke Museum and lived on the Strawbery Banke property at 372 Court Street. Regarding the issue of the pavilion, he stated that was the center for skate rental and sharpening. They couldn't serve food out of a temporary structure. The major food would be in the café in the visitor center with maybe hot chocolate in the pavilion. They were researching the lighting with their goal to have a bucolic pond with the minimal amount of lighting, which would also guarantee safety. They had discussed how the space would look when the rink was pulled up and it would be maintained as it was now. Their mission was to have Strawbery Banke as a place to learn and gather while remaining a sustainable organization. He confirmed for Mr. Rheaume that the pavilion would also be removed after the skating season.

Mr. Yerdon quoted from a letter submitted in 1959 from someone who then opposed the founding of Strawbery Banke. He maintained that the Board would hear a lot of similar rhetoric that night. He stated that they had heard remarks that were intended to misrepresent the reality and listed some of the claims, which he stated, were simply incorrect. This had gone on for months despite the Museum's efforts to provide accurate information and answer the questions of the neighborhood. They felt that the Museum had been a good neighbor, providing meeting space and emergency snow parking free of charge. They were part of the neighborhood "fairy house tour,"

their major fundraiser, which cost the Museum money. He noted that the facility would offer some free skating time and lessons and some pond hockey. He quoted from a letter of support, which stated it would be a wonderful wintertime activity. He concluded that the mission of Strawbery Banke was to serve the public. It was not to make money and they would have to raise money for this effort. He believed there was support in the community for this project but respected the right of some neighbors to have differing opinions.

In response to questions from Messrs. Moretti, Rheaume and Parrott, Mr. Yerdon stated that there were public restrooms throughout the facility; that they arranged for snow removal with adequate area for snow storage and additional parking; and that the hours of operation were chosen by volunteers who researched similar operations. Mr. Parrott asked what the maximum comfortable number of skaters would be at any one time. Mr. Jeff Keefe identified himself as affiliated with Strawbery Banke and indicated that experience would ultimately determine but he anticipated somewhere between 175 and 200 as a maximum.

Chairman Witham called for others speaking in favor of the petition. He noted the large number of attendees and asked that the speakers form a line and identify themselves once they came to the podium. Their opinion would be heard but he asked that they try to be concise and not be repetitive. He noted that well over 30 letters had been received, both for and against the petition. While occasionally a letter might be read at a meeting, the volume of response precluded that as a practical matter in this case.

The following attendees, in order, spoke in favor of the petition: Ms. Lee Roberts of 40 Howard Street, Mr. Jeff Bolster of 44 Gardner Street, Ms. Bryce Morales of 33 Johnson Court, Ms. Elaine Whitaker of 33 Miller Avenue, Ms. Tracy Kozak of 28 Walden Street, Mr. Doug Bates, President of the Chamber of Commerce, Ms. Nancy Pollard of 294 Marcy Street, Ms. Emory Nelson of 87 Richards Avenue, Ms. Kathleen Boduc in the process of moving to Hunking Street, Ms. Natalie Boisvert, a new resident, Ms. Chelsea Levering, a new resident, Mr. Mike Kennedy of 267 Marcy Street, Mr. and Mrs. Mike & Hannah Marchand and daughter of 44 Lawrence Street, Mr. Brian Murphy of 334 Lincoln Street, Ms. Karen Kenney of 66 South Street, Ms. Ruth Griffin, at the corner of South Street and Richards Avenue, Mr. Dyke Shaw of 27 Gardner Street, Ms. Catherine Williams Kane, a Trustee of Strawbery Banke Museum and living at 337 Pleasant Street, Ms. Amanda Colby, of 19 Atkinson Street, Mr. Joe Capobianco of 199 Gates Street, Mr. Rob Keefe of 126 State Street, Mr. Brian Johnson of 126 State Street, Ms. Judy Nerbonne of 189 Gates Street, Ms. Nancy Pearson of Little Harbor neighborhood and President of Art Speak, Ms. Stephany Shaheen of 77 South Street, and Ms. Valerie Fagin of 75 Gates Street.

Their views and issues included the following:

- That the pond would be a charming addition in the winter season and provide a sense of community.
- That this was an urban neighborhood where people bought property fully understanding the public access and programs at Strawbery Banke.
- That this rink would be self-sustaining and not rely on the taxpayers as did a similar rink in another community.
- That the noise ordinances and parking requirements would be met. One abutter noted that the compressors at the rink in Exeter could not be heard and, in the winter, windows were closed which would minimize any impact.

- That thought had gone into locating the rink where light and noise concerns would be minimized.
- That Strawbery Banke was a good neighbor offering off-street parking during snow emergencies.
- That the skating pond was appropriate to the spirit of the south end and offered a family winter activity in a city with few skating rinks.
- Concern that an opportunity might be missed if fear of change prevailed over understanding that neighborhoods were organic.

Mr. Douglas Webster stated that he was working with Strawbery Banke on the project. He outlined his background choreographing skating shows. Their idea was for this to be a social gathering place and they would also participate in programs for underprivileged children. He noted that there was a rink in New York in a residential community, which always met the noise ordinance requirements.

SPEAKING IN OPPOSITION TO THE PETITION

The following attendees, in order, spoke in opposition to the petition: Ms. Jane Kilcoyne of Street, Mr. Bob Shouse of 555 Dennett street, Attorney Jonathan Springer, Ms. Mary Krempels of 111 Gates Street, Mr. Rick Horowitz of 127 Gates Street, Mr. James Dinulos of 3 Hancock Street, Mr. Richard Tombs of 138 Gates Street, Ms. Gloria Guyette of 7 Hancock Street, Ms. Marya Danihel of 55 Gates Street, Mr. Dan Corcoran of 168 Marcy Street, and Mr. David Krempels of 111 Gates Street.

Their views and issues included the following:

- That a flyer for Strawbery Banke had already contained an announcement about the opening of the rink.
- That the rink would be open 12 hours a day for 7 days during a 90-day period.
- That lights and sound would be more intense in the winter without leaves on the trees to provide a buffer.
- That Christmas tree types of lights were not safety lights and safety lights could not just be directed downward.
- That the character of the neighborhood would be changed and reduce the value of surrounding properties.
- That the winter was a breather from events at Strawbery Banke. If granted, consideration should be given to the hours, noise issue and number of people.
- That the issue was not the popularity of Strawbery banke and skating rinks but zoning regulations.
- That the size and scale of the rink was too large.
- That traffic would be increased and present a hazard particularly after snow storms when the snow was not removed promptly from the sidewalks so that pedestrians had to walk in the street, including young children.
- That not enough details had been provided and there was no proof that the compressor and ‘zamboni’ would not present noise problems.
- That granting these variances would set a precedent for Strawbery Banke to request more and set a “de facto” precedent for other applicants.

- That this would be a commercial use in a residential zone, where the residents should not have to deal with crowds, light, noise and traffic.
- That a number of individuals volunteered for, and supported, Strawbery Banke but could not support this project.
- One abutter outlined why the variance criteria were not met and noted that all had to be met in order to grant a variance.

As one of those speaking in opposition, Mr. Rick Horowitz of 127 Gates Street voiced many of the same concerns. He quoted several statements he attributed to Attorney Loughlin, stating that he had made claims rather than putting forth facts. He questioned whether the Board would exercise their fiduciary responsibility, do the right thing, and adhere to the regulations under which, he maintained, it was clear that the project was not allowed. He stated that the Board's responsibility was to enforce the Zoning Ordinance, not to "selectively alter it for projects that you may personally support or for which there may be political pressure to support." He quoted a phrase from the 'Board of Adjustment in New Hampshire Handbook for Local Officials, October 2012', which said "The Board does not have the discretion to grant the variance because they like the applicant or because they believe the project is a good idea." He stated this was the law in New Hampshire and "If you do not adhere to this, and you grant this variance, you are breaking the law."

There was a brief exchange between Mr. Horowitz and Chairman Witham with Mr. Horowitz stating that he hadn't wanted to be there that evening but he felt he had a lot to lose. He apologized if it sounded like he felt he knew more than the Board and hoped they would do the right thing. Noting his 12 years on the Board, Chairman Witham stated that he could guarantee that the Board did not grant variances based on what they personally liked. He felt it was a strong Board and everything was well thought out.

As one of the speakers, Attorney Jonathan Springer stated that he represented Ms. Cathy Baker of 127 Gates Street. He referred to his submitted letter for their position. He stated that the time to make the arguments about what a great organization Strawbery Banke was or what a great wintertime activity skating was or that a skating rink should be allowed in this area of the City, and with what setbacks, was before the Ordinance was drafted. They had to work with the Ordinance as it was. While Mr. Loughlin had not addressed this point in the application or his presentation, he cited Section 10.821 of the Ordinance, which stated exactly what accessory uses, could be done with a historic preservation building or museum. He listed the uses, maintaining that none applied in this instance. He referred to Section 10:821:20 which described the periodic events that would be allowed as an accessory use, "provided that in a Mixed Residential District such events shall not constitute a business or commercial use." He listed the parts of their proposal which constituted what he believed were commercial uses. He felt that, if anybody else came in front of them and said they were going to do all that he had described while maintaining it was not a commercial use, the Board would rightfully not give them the time of day. Because the applicant was Strawbery Banke and a great community partner didn't change that. He felt a variance from that Section 10:821:20 was also needed but had not been requested. As a threshold issue, he felt the Board had to decide whether they had asked for the relief they needed and he didn't believe they had. He stated that the applicant had the burden of proof.

Attorney Springer addressed the criteria stating that the noise and lights would affect property values and the applicants should have come with exact information about these issues. He felt the

chemicals used by the chiller would be hazardous materials. In consideration of the public interest, he stated that the essential character of the neighborhood, now a quiet area in winter months, would be changed by the noise, parking and lights. In the substantial justice test, if the variances were not granted, Strawbery Banke's mission would not be impacted as the rink had nothing to do with history and there were other skating rinks around. On the other hand, if granted, the neighbors would be negatively affected. Attorney Springer stated that the spirit of the Ordinance was to protect residential neighborhoods from an outdoor recreational use with the noise and athletic lighting, etc. With that being clear, allowing this rink was going to be contrary to the spirit and the intent of the Ordinance.

Attorney Springer stated that literal enforcement would not result in an unnecessary hardship. The application didn't spend a lot of time on this issue but talked only about the special conditions of the property. He submitted that, looking at the downtown area alone, as done in the application, you could say there were special conditions in terms of the size, etc. because you were not talking about a restaurant or a retail shop but an outdoor athletic use of which there were only going to be several of any kind in a city the size of Portsmouth. He maintained that they couldn't just look at the downtown area but the City as a whole. Addressing the comments about not wanting to travel to an activity, he stated that whether it was one of a number of types of outdoor recreational facilities that he listed, most people had to travel to get there. This city, with its Ordinance, made the decision to allow these rinks in three areas of the city by right and two others by Special Exception. He maintained that, when you looked at the City as a whole and included the permitted zones, there were no special conditions of the property. Attorney Springer stated that there was a fair and substantial relationship between the general public purposes of the Ordinance provision and its specific application to this property. The Ordinance said in effect that outdoor facilities were not going to be allowed in these neighborhoods, presumably because of the intrusion of noise, lights and traffic. Finally, the proposed use was not a reasonable one given the fact that the property was already being well used by the Strawbery Banke Museum.

Mr. Mulligan asked him if his client had a position on sufficient parking issues and Attorney Springer stated that the parking was ok as it stood but he was surprised at 175 to 200 people. Their real concern for his client was the traffic in and out. In response to a further question re. size putting a natural damper on numbers of people, he agreed only so many people could get on the rink but he shared the concern of one of the speakers about creeping growth and expansion. He added that the chiller was large and not quiet. Mr. Rheaume asked in what zones, this use would be permitted and Attorney Springer said he would have to look. Mr. Parrott stated that he also could not find the other zones in which this use was permitted. Regarding Attorney Springer's assertion that property values would go down, he asked if he had special expertise or what was the basis for his opinion. Attorney Springer stated his expertise would be the same as Mr. Loughlins which was 27 years of practicing law including a lot of land use work. He felt if there was a quiet residential neighborhood with a sudden influx of the impacts of light and noise, etc., they would be affected. When Mr. Parrott stated that, then, this was his personal opinion and not based on a study, he agreed but stated neither was the applicant's. Mr. Parrott stated he was not asking about the applicant.

After all the speakers were finished, Attorney Springer returned to the question of the zones in which the proposed use was permitted. They had to look at two different sections. In Section 10.440, the Table of Uses, Use 4.50 allowed an outdoor recreational use by Special Exception in the Gateway and General Business Districts. In a separate Table of Uses for Pease, Use #4.40

allowed an outdoor recreational use in the Airport Industrial, Pease Industrial and Airport Business Districts.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Peter Stanhope stated that he was a general appraiser and former resident in the south end who had chaired the Historic District Commission in Durham. He outlined his professional qualifications, noting that it was a fact based process to determine diminution in value. He had come late to the question having recently been contacted by Attorney Loughlin to speak to that issue specifically. He was asked to investigate the influence of the proposal on property values in the surrounding neighborhoods. He stated that one question he had to ask was whether this proposed use would exceed any existing uses that impact property values in the neighborhood. They had heard a calculation that there could be 12 hours a day and 175 people on the ice. If you did the math, that was 2,100 people who potentially could skate every day. That was less than 25% of an evening event held at the Arts Festival at Prescott Park. Regarding the amount of noise this would generate, based on the operation of the compressor and a 'zamboni', neither would exceed the amount of noise that the annual play and concerts that impact the same sphere of properties. He stated that, in the Board's judgment, they had to have a finding that this use would generate an impact greater to change the characteristics of the neighborhood in terms of what was already there in terms of sound, sight and traffic.

Mr. Stanhope stated that he had reviewed the application and then interviewed a series of certified appraisers who had appraised properties in the immediate area in the past. He had personally appraised properties on Hancock and Mechanic Streets and, as a former south end resident, he felt he knew the characteristics of the neighborhood. He had lived there for the same reason as many – the energy of the neighborhood and its proximity to the restaurants, the downtown area, the park and the Bank that drew people there historically. He randomly selected five area appraisals done by his firm to determine what the historical observations were. These were that , in spite of what Prescott Park generated for noise – and it was always noted – and the traffic, even with the winter traffic to Strawbery Banke at their seasonal celebrations, when you compared sale prices for properties in the immediate neighborhood, which were exposed to those externalities, to those outside the neighborhood, which were removed from the externalities, there was no variance in sale prices. He looked at surrounding municipalities which had skating rinks and the likelihood would be that you were going to attract tourists. When he interviewed the people involved in these types of rinks, he received the same answer, that these were neighborhood/community types of facilities.

He had also looked at the numbers of people skating and interviewed the Public Works Director regarding the Churchill Rink in Durham regarding attendance. He said they typically had less than 50 people attend. He noted that some individuals had mentioned the rinks in New York City that evening. He had interviewed the managers at Baird Park and Central Park that day. In Central Park, on the average week, they had 500 skaters in a 12 hour period, principally people from the neighborhood. He felt that the expectation that this would draw a substantial number of people to it was contrary to the experience of other communities, including New York City. He concluded that he found no factual data, in interviewing appraisers, examining appraisals, or looking at the characteristics of the existing subject neighborhood that would suggest to him that, from what he heard in the testimony that evening, for and against, there would be an externality that would exceed the influences that existed currently from the Bank and Prescott Park.

Attorney Springer stated that he felt a little disadvantaged in only hearing this opinion now. He noted that he had skated all the rinks named by Mr. Stanhope except for those in New York City and they were not located in neighborhood areas. They were all in commercial areas. He added that you couldn't compare the effect of activity in Prescott Park in the summer with that of the rink in winter with regard to property values. You had to find a rink in a residential neighborhood and look at what was there now during the winter, not the summer.

Mr. Jeff Keefe stated that he had been planning this rink for a year and a half. Regarding the hours, they had given careful consideration to the programming and he described a typical day. He didn't believe they would come close to 200 people, the maximum capacity of the rink. In terms of traffic, he stated he had a business at the corner of Hancock and Marcy Streets and was familiar with patterns in the winter. He noted that he had taken the photo in their packet this past winter with one car on Hancock Street. Regarding the sand and how removed after the season, they might use sand in the first year but the plan was to level off the ground and plane it away so it would be self draining and they wouldn't need sand in subsequent years. He addressed the use of coolant represented as being hazardous. They would be using propylene glycol noting that was used to spray down aircraft, wash car windows and used for frozen foods. Regarding the chiller, he stated they could build a barrier with a top baffle and eliminate 95% of the noise. He stated that he had worked with Brian Murphy to design the rendering in the packet that some people had mentioned. He had taken the photograph of Puddle Dock and the rink on there was a model taken out of the site plan which was also in the packet, so that was in fact what they were planning to bring. Regarding the 'zamboni', Mr. Keefe stated that it would take about five minutes to clear this ice, not twenty minutes.

Mr. LeMay referred to the picture that had been presented and asked if the concession building was what looked like a little barn on the left. Mr. Keefe pointed out what looked like a little shed and then 50' away the edge of another mirroring shed. In between would be a roof. Ultimately it was designed so that the back would be closed off to protect the neighborhood from any light that would generate. Mr. LeMay asked the total footprint of the rink and Mr. Keefe responded that it was 50' long by 20' wide. When someone from the audience called out that it was 65' on the application, he said that it was 65' if that was on the application.

A previous speaker stated that there were more in support than could be there and many southenders were in support, more, he felt, than were in opposition.

Ms. Kilcoyne stated that the reason they didn't feel the rendering was an accurate representation was that they didn't see any lighting fixtures or poles. Also, the seating wasn't shown. She had skated in New York and the rink in Bryant Park was not surrounded by a single house so they were talking apples and oranges.

Mr. Horowitz apologized for getting a little heated previously. With regard to the real estate appraisal comments, he stated that where they lived on Gates Street was 200' from the skating rink while Prescott Park was several blocks away.

Attorney Loughlin clarified that there was no seating at this venue and they were bound by every representation that they had made that evening.

Mr. LeMay addressed the integration of this use within the context of the museum. There had been concerns that this was a commercial use and he asked if this use was incidental to the use as a museum and how it fit in. Mr. Yerdon stated that it was part of what they did, which was to recreate life in the past and he listed historic activities on the grounds with which it would fit. When Mr. LeMay asked if a member could get in free, he responded that members got in free. Mr. Yerdon added that the museum was not closed in the wintertime and he listed the various activities that took place. There were buses and cars every day and the neighbors hadn't noticed.

A previous speaker stated that the mission of Strawbery Banke had to do with history and she felt there was a special, Puddle Dock Pond, mission for this skating rink which was to bring people together.

DECISION OF THE BOARD

Mr. Rheaume noted, first, that virtually all the speakers acknowledged the wonderful things Strawbery Banke did for the community influencing much of what the south end was today. He concurred, whatever the Board decided that evening. He found it interesting that virtually everyone who came before them had as a hardship that the property was too small for zoning or similar reasons. It seemed the hardship here was the property was too big for the neighborhood. One of the questions was that the use was not allowed. While there had been some questioning, calling this an outdoor recreational use, he felt that was the right call. That was the type of use, particularly with the noise elements, the lights and a concession stand with some food consumption, more than just a local frozen pond. They had to consider the variance criteria and the crux of the applicant's argument, he felt, was that they were a big space and the use was centered in that space and so some of the issues in the zoning shoudn't apply to them in that big space. He hoped for some input from other members of the Board. They were trying to look at the original thinking behind the Ordinance and interpret whether the size of the lot would have any effect on that thinking about the use, or were there other factors that needed to be considered in a decision to grant a variance or not.

Mr. Le May stated that he was sensitive to issues with immediate abutters regarding light and music playing all day and perhaps the hours of operation. There were some issues that he felt they should at least address, such as were any team sports allowed and should they restrict events in some way. What was the practical method of restricting the music. Those were the things in his mind while he was not as concerned with the equipment noise as he felt they were in an area where they could be contained.

Chairman Witham stated that there were the obvious issues with light and noise, noting that the Ordinance was specific as to decibel levels and direction of lighting, all of which would be handled on a micro level if this went to the Planning Board. Regarding diminution in property values, he noted that an expert witness had said there would not be any. He stated that there were physical buffers just within Strawbery Banke and he wasn't convinced that there would be diminished values. Regarding the numbers of people, he was surprised by the estimated figure as he didn't see this as a tourist draw. At the rink they occasionally attended, there were rarely above 50 people. Chairman Witham stated that he appreciated that overall the speakers were very respectful and made good points. He was, however, disappointed with some of the letters in opposition. He felt there was some sensationalism and, at times, a little disrespectful to what his duties were. He stated that this reminded him of the former Children's Museum application and

recalled the process which ultimately resulted in the Museum moving to Dover and a substantial asset lost.

Mr. Rheaume stated that he was struggling with the notion that this was not permitted for this district and he was trying to sense how the spirit of the Ordinance would be observed and perhaps the hardship criteria. He wondered what was put into the zoning that would make him think that this 500' buffer really didn't apply in this case or that this property was so unique relative to the other properties – what was the thinking in restricting it to those two more wide open types of zoning areas and what could they extrapolate from the thinking.

Chairman Witham felt this was one of those situations similar to the daycare centers starting and the Zoning Ordinance hadn't caught up to that. He stated that the Ordinance didn't specifically say outdoor skating area – that fell under temporary structure because it was less than 180 days. Referring again to daycare centers, he stated they had to go to daycare centers in industrial zones and asked if that was the purpose of the Ordinance. It just hadn't caught up and he felt this was one of those unique situations where something fell into a category as a temporary structure. He felt that the Ordinance couldn't capture every idea people might come up with and it was up to the Board to decide where it fell. He understood the struggle with that falling under the category of outdoor recreational use.

Mr. Rheaume stated that and the 500' buffer which was also part of the Ordinance.

Chairman Witham stated that an argument could be made that Strawbery Banke was unique maybe than some other lot. He recalled the City flooding Lafayette School Park for skating and that was in a neighborhood setting and the neighbors welcomed it.

Ms. Chamberlin stated that it was obvious that Strawbery Banke had been operating very well without a skating rink so how could the hardship test be met. What had been testified to was that it was open and full and busy in the summer and essentially shut down in the wintertime as they couldn't do the same outdoor activities. Having an ice skating rink would allow continued activity through the winter, more or less full time if the student tours were included. To her it went to the nature of being an outdoor museum. You couldn't operate in the winter unless you did an outdoor wintertime activity. While she was also worried about the noise and light and music, there were ordinances that had to be upheld through the Planning Board process. Chairman Witham confirmed they would consider all the details. Ms. Chamberlin concluded that it was unique in that aspect and that skating did fit its mission in that it was a traditional activity that could be done in the winter by everyone.

Mr. Mulligan stated that, while he liked this project and agreed that everyone loved Strawbery Banke, he was struggling with having to find that the essential character of the neighborhood would not be altered in order to grant the variance. There was representation from the applicant that currently in winter, this neighborhood was a ghost town and they were proposing an activity that would extend into the early evening and would be ongoing during the weekends. There would be lighting and amplification of sound, as well as a café. The represented number of skaters was from 175 to 200 which all seemed like a strong intensification of use. He was struggling with how they could find that it would not affect the public interest to go from a ghost town to continuous activity including nights and weekends. Regarding the hardship, he felt Ms. Chamberlin had made a good point but he felt it was a hardship that wasn't necessarily a hardship

that was a condition of the property, but a condition of the ownership. This was a beloved non-profit organization. If it were owned by anyone else, he wasn't sure that the Board would look at it the same way.

Chairman Witham stated that the tricky part was the fact that everyone would acknowledge that there were times of the year that this wasn't a quiet quaint little neighborhood. There was a lot going on down there and it was a destination for tens of thousands of people on any given week and he wasn't sure if that the routine of everyone taking off for the winter should be locked in. What if they wanted to have a maple sugar shack or whatever Strawbery Banke might want to do and they were told they only had these specified months to have your museum activities. It would be like freezing their calendar and saying they couldn't expand on their mission. He wasn't comfortable with that. He felt it worked and they had located it well with a buffer. He felt that in the end, if it happened, it would end up being one of those things that were welcomed by mostly all.

Mr. Parrott stated that one reason the Board was having a difficult time with this, and taking so much time to consider it, was that it was unique. People liked to say their project was unique and this one really was for a lot of obvious reasons. That meant that they were dealing in speculation because there was no precedent to follow. On other kinds of projects, there were many examples over the years and they could see what did or didn't work out. They had a lot of on-the-job learning guidelines and they had none with this. He was also wondering if the number of people who showed up and stayed would be somewhat self-regulating similar to a swimming pool. If there were already a good number of people participating, a potential skater might wait until there was more room or decide that another time was better to come. It might not have occurred to Strawbery Banke to limit the number of tickets outstanding in any given time but he offered that as a consideration.

With no further discussion, Chairman Witham called for a motion. With no response, he passed the gavel to Vice Chairman Parrott and made a motion to grant the petition as presented and advertised, which was seconded by Ms. Chamberlin.

Mr. Witham stated that there had been a lot of facts, emotions and speculation. In determining how this met the five criteria, he was looking at the big picture in terms of the Zoning Ordinance and its intent. The first requirement was that the variance would not be contrary to the public interest and that the spirit of the Ordinance would be observed. To meet these two requirements, the proposed use must not conflict with the explicit or implicit purposes of the Ordinance. The purpose of the Ordinance was to protect neighbors and abutters and their property but it was also to foster the general good of the community as a whole. In this situation, he felt that granting the variances would not conflict with that purpose of the Ordinance. He felt the proposed project would serve the community as a whole. When there were abutters wholeheartedly for and wholeheartedly against a proposal on the same street, then he he had to try and look at this as best he could and think how it would affect him if he lived there. He felt in this situation that this use, again, would not be in conflict with the general purposes of the Ordinance in terms of the welfare of the community as a whole and protecting individuals' rights.

Mr. Witham stated that, as part of this also and acknowledging that there would be change, he didn't feel that the essential character of the neighborhood would be changed. He had a lot of faith in the Planning Board that they would address any noise issues and restrict hours if necessary.

They would ensure that the lighting and foot candles and light spread met all the requirements of the Zoning Ordinance. The second part of considering the first two criteria was that granting the variances could not threaten public health, safety or welfare or otherwise injure public rights. He didn't see that happening with this proposal. He didn't see that the welfare of individuals on sidewalks was in jeopardy because of increased traffic and it was up to the City to see that sidewalks were maintained. He stated that they did a good job of plowing and taking care of the sidewalks. When a previous speaker shouted from the public area about the sidewalks, Mr. Witham noted that the public hearing was closed.

Mr. Witham stated that the third test was whether substantial justice was done. In this situation the benefit to the applicant (if the petition were granted), would not be outweighed by any harm to the general public. He felt there was an obvious benefit to Strawbery Banke but also a benefit to the community as a whole. A number of abutters felt there was a benefit to them which the Board had to weigh against any harm to the general public or other individuals. He stated that, while there might be a little more noise and traffic, he didn't think that was an outweighing factor.

Mr. Witham stated that they had heard expert testimony that the value of surrounding properties would not be diminished while there were abutters who felt it would be. He felt this would be an asset to the community as a whole and to the neighborhood. He stated that, as much as the courts spelled out guidelines and they tried to take out as much subjectivity as they could, they still had to do the best they could with the facts they had. He had processed all the information and stated that he didn't have any evidence or reason to believe that property values would be diminished by having this operate three months out of the year.

Mr. Witham stated that the last criteria was whether literal enforcement of the Ordinance would result in unnecessary hardship and he felt this prong was met. An element of this was that there was no fair and substantial relationship between the general public purposes of the Ordinance provision and the specific application of that provision to the property. He stated that this part of the Ordinance was to protect residential areas in a 500' zone from outdoor recreation use. He felt this was a blanket terminology which could mean a wide variety of facilities, which he listed and in this situation, it was a skating rink. The reality for him was that there was nothing to prevent Strawbery Banke from digging out a hole and flooding it to make a pond two feet deep and offering skating, although they might have to come to the Board for lights. He didn't necessarily define an outdoor recreation use as some putting in a baseball field or soccer field or roller rink. He stated that this was three months out of the year and fell under the category of a temporary structure. For him, that carried weight in terms of its impact on the neighborhood.

Mr. Witham stated that the second part of the hardship test was that the proposed use was a reasonable one. He felt that having ice skating in the winter was a reasonable use. He would feel that overly bright lights and loud music was unreasonable but, again, he was depending on the Planning Board to make sure that all the necessary standards were met. He felt that Strawbery Banke had shown that they were a good neighbor and they were not going to turn their backs on the neighborhood in this respect. Acknowledging that this was probably one of the toughest petitions they had to consider in a few years, Mr. Witham stated that he supported the petition.

Ms. Chamberlin stated that she agreed. If it were in the law, she wished there could be a pilot program and see how it went. Where they had to vote up or down, she believed that the balance went in favor of granting the petition. She understood that people had real concerns but felt that

the worst of them were not going to come true. It was hard to know in advance because this was a fairly unique proposal. She wished they could dispense with the chiller and 'zamboni' but she had attended rinks without them and they weren't very good. If you were going to have a rink, you wanted to have a quality rink that people would want to use, although she still didn't think that a wintertime recreation would get the same crowds or traffic as one in the summer. Overall, she felt that substantial justice was done.

Mr. Rheaume stated that he wouldn't support the motion. While the Chairman and Ms. Chamberlin had made some very good points and in many ways he liked the project, he felt Mr. Parrott made an excellent point when he said that this was something that was completely different from anything they had that might have set a precedent. Under those circumstances, his instinct was to be a purist and say, well, here's what the Zoning Ordinance said. Without enough base to set the decision on, the Ordinance should stand. If the public felt strongly enough about what was being proposed, then there was a process to get zoning to recognize it. Nothing that he had heard had convinced him that zoning could be stretched to cover what was being proposed.

*The motion to **grant** the petition as presented and advertised was **passed** by a vote of 5 to 2, with Messrs. Mulligan and Rheaume voting against the motion.*

(End of Excerpt of Minutes submitted by Mary E. Koepenick, Administrative Clerk and approved by the Board on August 20, 2013.)

III. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 6-1
Petitioners: David P. and Nancy T. MacDonald
Property: 28 Ball Street
Assessor Plan 207, Lot 54
Zoning District: Single Residence B
Description: Construct attached 24' x 24' garage.
Requests: 1. A Variance from Section 10.521 to allow building coverage of 23%± where 20% is the maximum building coverage allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. David MacDonald and his wife, Ms. Nancy MacDonald appeared before the Board with their plans for approval. Mr. MacDonald stated that they believed they were compliant with the five criteria.

Chairman Witham asked the applicant if he had a sense of what the average lot coverage was for the neighborhood. Mr. MacDonald replied that the zoning map was in the packet and it gave a sense of the lot coverage although it was not to scale. Chairman Witham indicated that it was his sense that the lots were fairly dense. Mr. MacDonald said out of six to seven neighbors, three or more seemed to have coverage of 80% or more. Chairman Witham asked if the area where they were putting the garage was paved. Mr. MacDonald said there would be faux building block.

Chairman Witham noted that, while the applicant didn't speak to the criteria specifics, they had been included in his packet.

Mr. Rheaume said he was a bit confused with the numbers on lot coverage. He said the photos provided showed a back alcove to the existing home and it looked as if they were proposing to add on to that for access to the garage. He said he was trying to understand the square footage. Mr. MacDonald said he would have to recheck the math to be certain. Mr. Rheaume asked if the existing was smaller and if the proposed addition would be larger than what had been indicated. Mr. MacDonald showed where the house ended, and where they would fill in the corner. Mr. Rheaume said they wanted to be sure if they approved the lot coverage for 23% that they were properly representing the s.f. requested. Ms. Walker said the site plan reflected what was on the building permit. Mr. Rheaume said the math didn't seem to add up.

Mr. Rheaume asked why there was no setback variance for the rear 30' of the proposed garage. Ms. Walker said the existing was 10' and it was determined that the proposed garage didn't go any closer than the existing shed. Mr. Rheaume said it seemed like the new garage was much larger and attached to the primary structure, which would encroach into the rear setback zone. Mr. LeMay said it was supposed to be 30'. Vice-Chair Parrott said he saw Mr. Rheaume's point.

Mr. Rheaume said similarly he would want to validate that the proposed garage was 30' back from the front of the lot because there was no dimension on the plan that confirmed that. Chairman Witham said they would need to re-advertise for one more variance for the rear setback. Mr. MacDonald asked if they could accomplish it during this session and Chairman Witham said they could not because it would need to be advertised. Ms. Walker apologized and said the Planning Department was using the setback for the existing shed, but they would need a new variance to increase the nonconformity of the garage. Ms. Walker recommended that Mr. MacDonald call the office to review his options.

DECISION OF THE BOARD

The Board determined that an additional variance would be needed and the petition was postponed until it could be correctly advertised and posted in accordance with State Statute.

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2) Case # 6-2
Petitioners: Vernon Pearce and Virginie O. Raguenaud
Property: 5 Elwyn Road Extension
Assessor Plan 226, Lot 4
Zoning District: Single Residence A
Description: Construct an 8' x 10' shed in the right rear yard.
Requests: 1. A Variance from Section 10.521 to allow building coverage of 19%± where 17.6%± exists and 10% is the maximum building coverage allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. Vernon Pearce distributed some photographs showing where the proposed shed would be at the rear yard. He said there were four people living in the small, 900-s.f. house with no attic or

basement storage. He said they were proposing an 8' x 10' shed to store their bicycles, lawnmower, snow blower, and home maintenance tools. He said it would not be contrary to the public interest and would not hurt the public safety or welfare. He said it would not be unsightly and granting the request would be in keeping with the spirit of the Ordinance by allowing a tidy property that would be in harmony with other properties in the neighborhood with similar sheds and larger structures. He said it would sit on cinder blocks and would not affect their quality of life or property values. He said part of the property was surrounded by forestland and would not encroach, infringe or cause any hardship on neighboring properties. He said justice would be done by allowing them to keep their valuables locked inside the shed.

Mr. LeMay asked Mr. Pearce to describe the existing shed on the property. Mr. Pearce said it was 6' x 8' and only had enough room for a lawnmower and couple of lawn chairs. Mr. LeMay said asked how close the existing shed was to the property line and Mr. Pearce said it was five or six feet from either side. Mr. LeMay said they didn't know if the existing shed was legal and Mr. Pearce said it was there for as long as he lived there. Chairman Witham added that it was probably grandfathered.

Mr. Rheaume asked the applicant to validate the shed would be less than 10' in height and Mr. Pearce said it would be. Mr. Rheaume asked that it be confirmed that it would be 5' or more from the back property line as well and Mr. Pearce said it would be.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

*Mr. LeMay made a motion to **grant** the petition as presented and advertised and Vice-Chair Parrott seconded.*

Mr. LeMay said the hardship on the lot was very simple since it was adjacent to the forest and the setbacks were intended to protect the neighbors. He said in this case, the neighbor was the forest and it wouldn't care if the building was a few feet closer to a dividing line. He said the value of surrounding properties would not be diminished as the shed would not have any effect on them and substantial justice would be done. He said there was no benefit to the public in denying and no harm to the public would be outweighed by imposing this restriction on the applicant. He said the spirit of the Ordinance was observed. He said the application did not change the essential nature of the neighborhood, threaten public health, safety or welfare, or otherwise injure public rights.

Vice-Chair Parrott concurred and had nothing further to add.

Mr. Rheaume said the reason he asked the questions he did was he wanted to be sure that the applicant was in full compliance with Section 10.573.10 regarding accessory buildings no greater than 10' in height being set back 5' from the lot line, which was not entirely clear in the presentation.

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

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3) Case # 6-3
Petitioners: Peter Cass & Mara Witzling
Property: 33 Hunking Street
Assessor Plan 103, Lot 38
Zoning District: General Residence B
Description: Replace existing front porch with 5' x 7' structure and construct rear addition, retaining wall in front yard and bulkhead to the left rear of the existing building.
Requests: 1. A Variance from Section 10.321 to allow a non-conforming structure to be enlarged, reconstructed or structurally altered in a manner that is not in conformity with the Zoning Ordinance.
2. A Variance from Section 10.521 to allow a rear yard setback of 19'± where 25' is the minimum required. .
3. A Variance from Section 10.521 to allow a left side yard setback of 6'± where 10' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Peter Cass said he and his wife lived in Durham, bought the Hunking Street three years ago, which they rented out, but were now retired and planning to move to Portsmouth.

Mr. Cass pointed out that there was a dilapidated porch with dangerous concrete steps on the street side that they wanted to remove. He said the existing structure was within the street setback. He said the existing porch was already in non-conformance. He explained that after they removed the existing structure, they would need to build up the grade to reach the front door elevation where the foundation was 4' above grade. He said they would make some steps though landscaping and then a 5' x 7' landing with a roof, which required a variance from the side setback.

Mr. Cass said the renovation would be in the public interest because they would take a large unsightly structure and replace it with something more attractive. He added that it was in the spirit of the Ordinance to provide a better visual from the street and create less encroachment to the front by removing the porch. Mr. Cass said justice would be done because they would be removing the sun porch, which blocked sun from the house, and it would increase the value and attractiveness of the neighborhood. He said the hardship was that the front door could not be moved and without a proper entrance, they couldn't get into the house.

Mr. Cass said the second thing that required a variance was relocating the existing bulkhead on the north side and replacing it on the west side of the house. He acknowledged that the bulkhead would be non-conforming, but none of it extended beyond the existing building so it would be out of the neighbor's view, and less encroachment would be in the spirit of the Ordinance. He noted that he spoke to the neighbors and none of them came to speak in opposition. He said he considered the change an enhancement to the neighborhood, and denying the request would prevent them from making best use of their property.

Mr. Cass said they were also proposing a single-story screen porch at the back of the proposed addition and there was a 25' setback at the rear of the lot. He said the screen porch would encroach 6' onto the rear setback. He said there was a lot of open space and they were trying to preserve a

large maple tree that served as a buffer between their lot and the neighbor. He said their proposal was in the public interest with minimal visual impact because the addition was tucked behind the house. He said there was a non-conforming, two-story garage that shielded the neighbors' view of this addition. He said the hardship was that they needed a screened porch to enjoy their yard and this addition provided the fewest detrimental effects on the lot. He said they believed the plan struck a balance between the spirit of the Ordinance, the best use of the property and the least impact on the neighbors. Mr. Cass said they tried to do due diligence and contacted with all the direct abutters and invited them to come.

Mr. Jeff Bolster of 44 Gardner said he was the abutter with the garage tucked up against the back property line. He said he reviewed the Cass' plans and although there was some encroachment into setbacks, in general the renovations would increase the value of the property and would not be detrimental to the neighborhood. He said he spoke on their behalf as an abutter that was most closely affected.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Hugh Jenks of 25 Hunking Street addressed the Board as a direct abutter to the west of the property. He stated that he objected to the second variance for a rear setback because it would increase the nonconformity of the property. He said granting the variance would allow an outsized Victorian style addition complete with a screened in gazebo and bay windows to be shoehorned into one of the south end's historic streets, which boasted a collection of many intact Colonial and Federal era homes, including the Tobias Lear House Museum, which was on the National Register of Historic Places.

Mr. Jenks said that his family moved to Hunkings Street in 1996 and every house on Hunkings Street had changed hands since that time. He and his wife presented the Board with a printout of the tax map showing the layout of the nine houses on Hunking Street. He described everyone on the street as sharing their reverence for the scale and integrity of the neighborhood. He said they invested greatly in their houses, keeping within the confines of the original structures and paying scrupulous attention to the architectural styles of their homes. He said the previous owners of the applicants' property at 33 Hunking Street lived there for 56 years, raising children within the same walls that were there when it was built in 1902.

Mr. Jenks felt there was an unspoken compact of the Hunking Street property owners to respect the scope and scale of their architectural heritage. He said the City also had a public interest in protecting air and light in the neighborhood and to prevent crowding of the land through enforcement of the City's zoning Ordinance. He pointed out that the south end was one of the City's most densely built areas and Hunkings Street with a zero setback right of way was one of the most charming and most claustrophobic streets. He said it was in the public interest to maintain open space in such a closely built neighborhood and the spirit of the Ordinance would be violated by granting relief from a law and set a precedent that others would seek. He expressed concern that granting the variance would allow the applicant to nearly double the mass of the building, destroying the historic fabric of a street lined with smaller structures and diminishing their value. He said no special conditions distinguished it from other properties in the area would result in hardship. He said the property was being used within the setback regulations so no hardship could be claimed to exist. He added that the ordinance said that any conditions in the area that were similar to the proposed non-conformity should not be the basis for granting the variance.

Mr. Jenks went on to say the City Planning Department was drafting Form Based zoning regulations that would emphasize the coordination of size and surrounding properties instead of zoning based on properties with similar uses. He explained that form based zoning would emphasize size, design and placement of buildings and it would no longer suffice in a residential zone to say an owner could build whatever they wanted no matter what other houses in neighborhood looked like, as would be the case with this house next to houses on the National Historic Registry. Mr. Jenks referenced the Master Plan that said historic resources should be preserved by raising awareness of their value and meaning and to integrate them into everyday life. In conclusion, he said the surviving streetscapes of the south end were one of the most unique historic resources that drew people to Portsmouth. He asked that the Board deny the petition.

Mr. Rheaume asked Mr. Jenks how the variance to build a one-story porch at the back 20' from their back yard would affect the light and air of his property. Mr. Jenks replied that the general purpose of the Ordinance was to make sure properties were not overbuilt so air and sunlight were not diminished. He said he felt setbacks should be honored, especially in the south end that was so congested.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. Mara Witzling said the back structure was a one-story porch only violating the rear, not the side setback. She agreed that most of the buildings on the street were built in the 18th century, but said their house was built in 1902 and there was nothing they could do turn this into an 18th century house. She said it had a different architectural style with a foundation that raised the entrance four feet off the ground and a 7'-9' tall cellar that could be walked around in. Ms. Witzling said she was an art historian that studied architectural history and the features that Mr. Jenks described like bay windows and a gazebo were features commonly seen on homes on Marcy Street, Gardner Street, Pickering Street and other houses built around 1902.

Mr. Cass responded further by saying the suggestion that they were overbuilding was an exaggeration. He said they had a rendering of what they were going to present to the HDC and at 23% coverage, they were well within the allowed coverage. He said a former owner had a larger plan approved by the HDC than the plan they were proposing. He said they were trying to keep within the scale of the neighborhood and respect the architectural style of adjoining buildings.

Vice-Chair Parrott said they were asking for a 19' setback, but he was trying to determine what the present rear setback was and if there currently was a structure off the rear wall of the main house. Mr. Cass said the statutory setback was 25' and the existing porch was probably 36' to the property line. Vice-Chair Parrott said the present setback was well within the 25' setback requirement.

DECISION OF THE BOARD

Chairman Witham said the abutters spoke in opposition more to the architectural style because many of their homes were on their original footprint, though he noted that additions were put on several of the homes over the years. He pointed out that this house was a 1902 New Englander that was somewhat of out of place on the street, but they were trying to improve the deteriorating front. He said they were adding an addition with bay windows and it was subjective whether anyone

thought they were appropriate or not. He concluded by saying it was fortunate that the HDC would take a hard look to be sure it was historically correct before anything was built.

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised. Mr. Mulligan seconded.*

Vice-Chair Parrott said it was reasonable that someone would want put an addition on such a small house that was 613 s.f. at 21½' across and 28½' deep. He said the removal of the front porch and replacement of smaller stairs closer to the house created a larger setback that was in compliance. He said the addition was toward center of the lot and the new bulkhead was no closer to the sideline than the main structure. He said the only significant variance besides lot coverage was the reduction of the rear setback to 19' and it didn't appear that would interfere with the neighboring property, which faced out to the adjacent street.

Vice-Chair Parrott said it would not be contrary to the public interest and would observe the spirit of the Ordinance because it would allow the applicants to make the house more useful. He said the public interest was difficult to discern because the age and architecture of this house was quite different from the surrounding houses. He said the justice test tipped toward the property owner and there would be no overriding benefit to the public if the petition were denied. He said there would be no diminution to the value of surrounding properties and there would be an overall improvement in the appearance of the house to the front in a substantial way and the review of the house by the Historic District Commission would work toward improving the appearance. He said the small lot size created a hardship in the positioning of the house close to the lot line, and the placement of the addition made sense and it was only 3% over the allowance.

Mr. Mulligan agreed with Vice-Chair Parrott's assessment of the criteria.

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

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4) Case # 6-4
Petitioners: Lawrence P. McManus, Jr., owner, Mary Beth Herbert, applicant
Property: 112 Gates Street
Assessor Plan 103, Lot 71
Zoning District: General Residence B
Description: Install two air conditioning compressor units to the right of the existing structure.
Requests: 1. A Variance from Sections 10.572 & 10.521 to allow a 3.6'± right side yard setback where 10' is required for an accessory structure.
2. A Variance from Sections 10.574 and 10.521 to allow building coverage of 52.1%± where 51.8% exists and 30% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

The applicant, Ms. Mary Beth Herbert of 112 Gate Street presented her request for variances for two condensers to be placed on the side of the house. Ms. Herbert included letters from each of the four abutters who had no objections. She provided specifications on the size and noise levels. She said she wanted to install the air conditioning to make the house more livable, and selected the

location that would impact the neighbors the least given the constraints of space available in a south end property.

Mr. LeMay expressed concern with the proximity between these units and the next-door neighbor's window 10' away. He said people often had their windows open during the warmer months when the unit would be running, and asked if she had looked into a physical barrier to suppress the noise. Ms. Herbert replied that most of her neighbor's living space was to the back. She said she currently had two A/C units in the windows and there were no objections, but she said she would put in plants at the neighbor's request to suppress the noise generated, which was represented as 73 or 74 decibels. Vice-Chair Parrott pointed out that 55 decibels was the accepted standard. Mr. LeMay said this condenser would be about three inches away. He asked why she didn't place the units elsewhere. Ms. Hebert replied that the neighbors on the other side objected so she looked at several options and this neighbor preferred this placement because other locations would be in her direct sight. Ms. Herbert presented letters from her neighbors.

Ms. Susan Trace of 27 Hancock Street said she was not an abutter, but a neighbor and spoke in support of the application. She said Ms. Hebert was a good neighbor and she trusted her to do whatever she said she would to be a good neighbor to others.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Rheaume described this application as being a little trickier than some of the air conditioner requests they had received. He said air conditioning condensers were more and more common and questions on decibel levels were always a concern. He noted that the applicant indicated they were currently using window units, which also presented their own noise problems.

Mr. Rheaume said he looked at the property as to where they could place the units and couldn't see a lot of options, especially as other abutters have objection to those locations. He said they made a decent choice for the least intrusive location in the public interest, with the abutters consent, away from bedrooms where noise might be more of a burden at night. He went on to review the criteria saying the spirit of the Ordinance would be observed because this additional increase over the allowed 30% would be negligible. He said the relief for the side setback for two small condensers would not have much of an impact compared to a large addition. He said substantial justice would be done by allowing the applicant the use of the home with an air conditioning unit instead of unsightly window units. Mr. Rheaume said there would be no diminution in the value of surrounding properties as removal of the existing A/C units in the windows would enhance the appearance of this property for the overall benefit of the neighborhood, and the abutter most affected supported the proposal. He said the special condition was that the house occupied almost all of a small lot, which created a hardship. He added there was no fair and substantial relationship between the general public purposes of the Ordinance and

their application to the property. In conclusion, he said the use was a reasonable one and the best alternative for placement of the units was selected.

Mr. Moretti agreed

*The motion **passed** by a vote of 6-1 with Mr. LeMay opposing.*

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5) Case # 6-5
Petitioners: Patrik & Eva Frisk
Property: 44 Pickering Street
Assessor Plan 102, Lot 19
Zoning District: General Residence B
Description: Remove attached garage and construct 20' x30' two-story addition with rear deck.
Requests: 1. A Variance from Section 10.321 to allow a non-conforming structure to be enlarged, reconstructed or structurally altered in a manner that is not in conformity with the Zoning Ordinance.
2. A Variance from Section 10.521 to allow a right side yard setback of 5.25'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Ms. Anne Whitney, architect for the applicant walked the Board through the packet and the photographs depicting the garage and addition they were proposing to remove. She said there was a view of the little alley at the back of the garage, which was .6' from the property line. Chairman Witham asked if the new structure would be 5.2' away from the property line and going into greater conformity. Ms. Whitney said that was correct. Mr. Rheaume clarified that she listed the garage as being .6' from the property line, but it was actually .06' or ¾". Ms. Whitney agreed.

Ms. Whitney said the site plan showed the existing residence and the adjacent property, which sat on the property line. She showed the structures that would be removed and identified the elevations. She said they would be creating more living space in a small house, improving the setback, allowing entry to the house at grade level, and replacing a nonconforming structure with one that was more conforming. Ms. Whitney said they spoke to most of the abutters who said they were happy about getting more light and air on that side.

Ms. Chamberlin asked what the request was in reference to the new garage proposed and Ms. Whitney said the detached garage could be within 10' of a side or rear lot line so no variances were needed and there was no need for a variance for the building coverage. She said the only variance needed was for the right side setback.

Mr. Glen Normandeau of 15 Pickering Avenue said his property paralleled this property on the opposite side. He said they previously owned this property for a decade or so and they probably would have considered the same scenario if they stayed there. He said the garage was on the property line, and the construction was not very strong. He said like many New Englanders, the

home was narrow and the interior was smaller than it looked. He said no one had a clearer view than he and his wife had and they were in support.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Mulligan said what this application had going for it was a movement away from a significant nonconformity to something less nonconforming, which was something they encouraged. He said there was no relief necessary for most of the other construction in terms of lot coverage and things of that nature. He said they were just replacing a structure that offended the setback requirement and replacing it with something that was less offensive.

Mr. Mulligan said granting the variance would not be contrary to the public interest and the spirit of the Ordinance would be observed. He said the essential character of the neighborhood would not be changed nor the health, safety and welfare of the general threatened by moving the property into greater conformity with the required side setback. Granting the variance would result in substantial justice because there would be no benefit to the public in denying the application. In fact, he said the public would benefit from granting the variance because they were going to move the property to a less nonconforming situation. He said granting the variance would not diminish the value of surrounding properties. He said they heard from one of the abutters who were totally in favor and the direct abutter would have less of an encroachment on their property. He said this was a unique corner lot with frontage on both Pickering Street and Pickering Avenue, which created a hardship. He said there was a significant nonconforming condition on the lot, as it existed. He said no additional relief for lot coverage or anything like that was necessary so he didn't think there was a fair and substantial relationship between the purpose of the setback requirement that was being violated here and the application to this particular property.

Mr. Rheaume agreed with Mr. Mulligan's review of the criteria and had nothing further to add.

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

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Ms. Chamberlin recused herself from the following petition.

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6) Case # 6-6
Petitioner: Public Service Company of NH
Property: 280 Gosling Road
Assessor Plan 214, Lot 2
Zoning District: Waterfront Industrial
Description: Expand existing sub-station by constructing a capacitor bank.

Requests: 1. A Special Exception under Section 10.440, Use #15.12 to allow the expansion of a transformer substation providing community-wide or regional service.

SPEAKING IN FAVOR OF THE PETITION

Ms. Laura Games, Siting and Permitting Specialist for PSNH, appeared before the Board to review their proposal for a minor expansion of their sub-station. Also in attendance were Messrs. Patrick Crimmins and Gregg Mikolaities from Tighe and Bond Engineering, Mr. Gary Okula, Project Manager for Transmission Projects, Mr. Dean Bacon, Senior Engineer for Transmission and Ms. Sandra Gagnon, Municipal Relations Specialist.

Ms. Games said the non-profit ISO that served New England deemed the expansion necessary to maintain the safety and reliability of the transmission infrastructure that served the NH Seacoast region, which included the Portsmouth, Dover and Rochester areas. She added that the non-profit recommended the addition of six capacitor banks to the Schiller Station to help mitigate any future issues with transmission reliability issues in the Seacoast.

Mr. Patrick Crimmins from Tighe and Bond Engineering pointed out an aerial view of the eight-acre site and adjacent properties owned by PSNH within the vicinity of the sub-station. He said the surrounding area was generally industrial, power and utility type use and their proposal was consistent. Mr. Crimmins showed another depiction of the expansion they were proposing with capacitor banks under the existing power lines. He said they would relocate the existing road that serviced the coal pile area and a fence would surround the area. He said they were relocating some support equipment.

Mr. Crimmins said they would have to go before site review for approval, but they met the standards for a Special Exception and were not seeking any other relief. He said they were expanding an existing sub-station in keeping with what was currently there and there would be no hazard to public or adjacent properties from fire or explosion. He said the use was consistent with the industrial use in the area and there would be no detriment to surrounding property values. He said there would be no traffic at the substation so no traffic increase or traffic hazards. He said the expansion to the existing substation would create no additional impact on municipal services, water, sewer, or police. He said there would be a gravel base with no impervious storm water runoff.

Mr. Rheaume asked if the public was allowed access to that part of Gosling Road or if there was a gate. Mr. Crimmins replied that it was a public road until Schiller Station. Mr. Rheaume asked if there would be any risk from fire, explosions or other hazards to anyone driving to that point. Mr. Crimmins replied that the area was fenced in. Mr. Rheaume asked if the setback from the road to the substation would be sufficient to prevent exposure to hazards. Mr. Crimmins said it would be inside the existing footprint and would not be any closer to the road.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Rheaume said the request met the standards as provided in the Ordinance for this use permitted by special exception. He said there would be no hazard to the public or adjacent properties as he had asked a specific question and the applicant indicated that the setback of the various components of the sub-station was such that there would be no such hazard.
He stated there would be no detriment to property values since the property owner in the whole area was Public Service with similar uses so there will be no impact to any abutters. He said it was obvious that there would be no creation of a traffic safety hazard or increase in traffic congestion. Mr. Rheaume pointed out that there would be no excessive demand on municipal services with an open structure. Lastly, he said there was no significant increase in storm water runoff considering the impervious nature of the soil.

Mr. LeMay said all the standards were covered and added that this was an appropriate place for capacitors.

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

IV. PLANNING DEPARTMENT REPORTS

No reports were presented.

V. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 1:00 a.m.

Respectfully submitted,

Jane K. Kendall
Acting Secretary