

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE**

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**May 20, 2014, To Be  
Reconvened on May 29, 2014\***

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

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\*Chairman Witham announced that Cases #4-7 for 36 Artwill Avenue and Case #4-13 for 80 Hanover would be heard on May 29, 2014. He advised that Mr. LeMay would be slightly delayed. Mr. Moretti assigned a voting seat.

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**II. PUBLIC HEARINGS – NEW BUSINESS**

1) Case # 5-1

Petitioners: 335 Maplewood Ave LLC, owner, James Petersen, applicant

Property: 335 Maplewood Avenue

Assessor Plan 141, Lot 26

Zoning District: Mixed Residential Office

Description: Lot line adjustment reducing side setback for existing building.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.521 to allow a left side yard setback of 3.08'± where 4.35'± exists and 10' is the minimum required.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Pat MacNicholas from Concord appeared before the Board with owner, Mr. James Peterson and Ms. Holly Head, the owner of the property next door involved in the boundary adjustment. He said both parties thought the property lines were in place for years, but Mr. Peterson did a survey and found there were conflicts with a prior survey. He said it was a minor difference, but there was an elevation discrepancy between the two properties with a retaining wall for the stability of Ms. Head's uppermost property, and Mr. Peterson's property being the lower property on 335 Maplewood Avenue. He said the properties were tightly packed so there was not a lot of room to work and the change would only be a little over a foot.

Attorney Nicholas reviewed the criteria for granting the variance, noting that it would not be contrary to the public interest because the adjustment was minor and would recognize what

appeared to be the existing boundary. He said there would be no changes to the property that would affect the health, safety and welfare of the public. He said the two owners would sign a reciprocal maintenance easement to maintain the existing retaining wall so the spirit of the Ordinance would be observed. He said the variance only affected the property owners so that values of their properties and the surrounding properties would not be diminished. He said the literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship owing to the special conditions of the two properties and the prior existence and use of long standing structures that would not change.

Mr. Rheume said an opportunity for office use had been granted at one time and asked if the current use was office use or residential. Attorney said the use was mixed office and residential.

**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**

*Ms. Chamberlin made a motion to **grant** the petition as presented and advertised and Mr. Durbin seconded.*

Ms. Chamberlin reviewed the criteria, noting that granting the variance would not be contrary to the public interest because the lot line adjustment was for what appeared to be an existing boundary line and the public at large would be unaware of the change. She said the spirit of the Ordinance would be observed and substantial justice would be done as a result of a common sense resolution by the neighbors as it made no sense to move a major retaining wall.

Ms. Chamberlin said there was no indication that the values of surrounding properties would be diminished. She said literal enforcement of the Ordinance would result in an unnecessary hardship because of the nature of the two properties and the discrepancy in the first survey. She said the resolution worked for both parties and was a substantial reason for granting the request. She said the proposed change was reasonable considering long standing uses.

Mr. Durbin agreed and noted that there was no change in the use of the property.

*The motion **passed** by a vote of 7-0.*

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Chairman Witham recused himself from the following petition and Vice-Chair Parrott took the gavel. Mr. LeMay arrived and took his seat. Mr. Moretti remained as a voting member.

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- 2) Case # 5-2
  - Petitioners: Terrence H. and Andrea B. Allen
  - Property: 32 Baycliff Road
  - Assessor Plan 207, Lot 43
  - Zoning District: Single Residence B

Description: Replace front entry with 5'± x 8'± covered landing.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a lawful nonconforming building to be extended, enlarged or structurally altered without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.521 to allow a front yard setback of 16'± where 17' is required under the provisions of Section 10.516.10
3. A Variance under Section 10.521 to allow building coverage of 26.4%± where 25.8%± exists and 20% is the maximum allowed.

### **SPEAKING IN FAVOR OF THE PETITION**

Ms. Andrea B. Allen said they had to replace their front door twice in the past four years and the proposal for a covered front landing was to provide protection from the elements.

Ms. Allen said the covered landing was tastefully designed and would not alter the essential character of the neighborhood. She said she did not feel that the proposal would be contrary to the spirit of the Ordinance because the landing was open and would not affect their neighbors' light and air. She said they did not feel they were overdeveloping and the front setback was consistent with the neighborhood. She said their gain if the variances were granted would not be outweighed by any injustice to the public and their neighbors were in support of the proposal. She said they had no reason to believe the modest and attractive addition would detract from their neighbors' property values and they felt constructing a roof over a small landing was a reasonable use for protection from the elements and to protect their door.

Mr. Rheume asked Ms. Allen if she could point out similar entryways in the surrounding neighborhood. Ms. Allen said there were several larger front landings without coverings on their street and there were a number of porches with covered landings in the area.

LeMay asked how the change would affect her steps and Ms. Allen said the current brick landing had two steps that were crumbling so they intended to replace them with a wood landing.

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

Mr. Moretti reviewed the criteria noting that it was a small request to improve the property and bring the porch into compliance with the rest of the neighborhood. He said seeing no one speaking against the request it was clear that the public had no interest in the proposal and it was a small adjustment, which observed the spirit of the Ordinance. He said substantial justice would be done

with a tasteful front porch area, which would outweigh any injustice to the public and the neighbors shared their support. Mr. Moretti said the values of surrounding properties would not be diminished and would probably be improved by giving texture to the front of the house. He said not having a covered entrance for protection from the elements created a special condition and hardship.

Mr. LeMay added that the covered landing did not extend out very far, was not enclosed and would fit in with the other homes. He said substantial justice would be served by allowing the owner to cover their front steps.

Mr. Rheume said he was not sure if the proposal would solve the wind driven rain problems and help with preserving their front door, but he was in support of the minor change and was not sure why a similar proposal was turned down four years ago.

*The motion passed by a vote of 7-0.*

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Vice-Chair Parrott stepped down as Acting Chair and Chairman Witham returned to his seat.

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3) Case # 5-3

Petitioners: Richard C. Comtois and Katherine E. Bartko

Property: 324 Hanover Street

Assessor Plan 126, Lot 42

Zoning District: Mixed Residential Office

Description: Replace rear entry with 6'± x 8'± entry.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a lawful nonconforming building to be extended, enlarged, reconstructed or structurally altered without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.521 to allow a left side yard setback of 6'6" ± where 6'6" ± exists and 10' is the minimum required.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Tyler Jackson, builder for the owners, appeared before the Board. Mr. Jackson said they were proposing to improve the layout of the kitchen and remove and update the current entryway to allow for access with their small children from the back parking lot.

Mr. Rheume asked for clarification on the grade of the landing and shelving in the entryway. Mr. Jackson said the landing would be 18" above grade. He added that they were proposing a bench for shoe removal, a closet and cubbies for coats. Mr. Rheume asked if it would essentially be a mudroom and Mr. Jackson said that was correct.

**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 and Mr. Rheume seconded.*

Mr. Mulligan reviewed the criteria, noting that granting the variance would not be contrary to the public interest or the spirit of the Ordinance because it was a modest change to what was already existing. He said the essential characteristics of the neighborhood would remain unchanged, and the health, safety or welfare of the general public would not be negatively impacted by allowing a modest remodeling of the kitchen entry. He said substantial justice would be done and the loss to the applicant if the petition were denied would not be outweighed by any gain to the public since it was a modest change.

Mr. Mulligan stated that the values of surrounding properties would not be diminished because the encroachment would occur at the parking to the rear of the home abutting Tanner Street with parking space for the Islington Street Condominiums across the street and there was no indication that neighbors on either side had any problem with the proposal. He said literal enforcement of the Ordinance would result in an unnecessary hardship because there were special conditions with frontage on both Hanover Street and Tanner Court. He said it was already non-conforming so there was no fair and substantial relationship between the purposes of the setback Ordinance and their application to the property.

Mr. Rheume agreed and noted that the entryway was cramped and it was a logical entry expansion. He said ordinarily there was a concern for encroachment and effect on light and air, but there was a substantial hill behind the property so any increase would not affect abutting properties.

*The motion **passed** by a vote of 7-0.*

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4) Case # 5-4

Petitioners: Charles P. Allard II, owner, Elizabeth Levey-Pruyn and Bruce Erickson, applicants

Property: 35 Salter Street

Assessor Plan 102, Lot 29

Zoning District: Waterfront Business

Description: Convert two-family home to a single family home.

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

1. A Special Exception under Section 10.335 to allow a lawful nonconforming use to be changed to another nonconforming use.
2. A Variance from Section 10.321 to allow a lawful nonconforming building to be extended, enlarged, reconstructed or structurally altered without conforming to the requirements of the Ordinance.

3. Variances from Section 10.531 to allow a left side yard setback of 18'10" ± where 22'± exists and a right side yard setback of 1'6" ± where 10" exists and 30' is the minimum required for both.
4. A Variance from Section 10.531 to allow a front yard setback of 8'2" ± where 8'2" ± exists

### **SPEAKING IN FAVOR OF THE PETITION**

Mr. Bruce Erickson, co-applicant submitted two more letters of support to the original eight letters from abutters. He said the house that was under agreement to purchase was built in 1889 and had not been legally touched since that time. Mr. Erickson reviewed the setback requests and Special Exception to convert the non-conforming home from a two-family home to a single-family home. He pointed out that the property was non-conforming as the structure pre-dated the ordinance and said almost all the neighboring homes were single-family homes.

Mr. Erickson stated that the proposal would not be contrary to the public interest and would observe the spirit of the Ordinance. He said the proposal would not threaten the essential character of the neighborhood, threaten the health, safety or welfare of the neighborhood. He stated that the setbacks were more than adequate and were greater than most of surrounding properties.

Mr. Erickson said the conditions previously placed on the property that were not consistent with the spirit and intent of the Historic District and substantial justice would be done by granting the variance by refurbishing the outdated structure. He said the benefit to the applicant would not be outweighed by harm to the public, individuals or property owners as shown by the ten letters of support. He said the values of surrounding properties would not be diminished and the general public would be benefited by the improvement of the historic structure in a manner consistent with the goals of the HDC. Mr. Erickson said the property was built as a residence before the Waterfront District was established and literal enforcement of the ordinance would result in an unnecessary hardship because the current zoning restricted the use of the property that was more suited to a residence than a business. He said residential use was more consistent with other properties in the neighborhood and all properties on Salter Street.

Mr. Rheume asked if the two parking spaces required for the single-family residence could be accommodated in the front driveway and Mr. Erickson said there was space for four or more vehicles in the driveway.

Mr. Rheume asked if the dormer added to the third floor of the new addition closest to the neighbor at 41 Salter Street would be in line with the current wall face and Mr. Erickson said that was correct.

Mr. LeMay asked for confirmation that the new structure would have one chimney instead of two and Mr. Erickson said that was correct.

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

Ms. Marci MacCormack of 53 Salter Street said she was supportive of the project, but said she did not like the addition of dormers that would make the structure appear to be looming and perhaps

one of the tallest on Salter Street. Mr. Rheume asked if she thought they would be able to view her property from the dormer windows. Ms. MacCormack replied that they could and she did not like it because it was directly across from her bedroom, but her main concern was with the total height.

With no one else rising, the public hearing was closed.

## **DECISION OF THE BOARD**

Chairman Witham said he shared the last speaker's concerns regarding the dormer, which appeared to run nearly the full length of the house.

Ms. Walker informed the Board that they also needed to consider Section 10.335 along with the regular standard to determine that the non-conforming use was equally or more appropriate to the district.

Mr. Rheume said he was also concerned with the dormer. He said it was not the biggest he had seen, but it was substantial with a fair amount of window space. He said the conversion from a two-family home to a single-family home was actually creating more bedrooms, with one at the front and one on the attic level that was labeled as a studio. He wondered if they could live with less length and window space in the dormer and still provide a satisfactory home.

Chairman Witham agreed that the dormer appeared on the heavy side and thought the applicant might face battles with the HDC over it. He said it was up to the maker of the motion whether they would address the dormer or not.

Mr. LeMay said the dormer was on the side of the building where the variance was being requested, but he was not clear whether the Board should be too bogged down beyond the scope of the variance request. Mr. Rheume clarified that all the new construction proposals fell within the large 30' setbacks of the Waterfront District and was within the purview of the Board. He said the dormer added a lot of height, which would be an imposition to the closest neighboring property on one side especially. Chairman Witham acknowledged that the property to the left was larger than others on the street, but it was also on a larger lot and appeared to meet the setback requirements. He said it appeared that the proposed dormer would be heaviest against the house to the right.

Mr. Rheume asked if the Board should make a motion or give the applicant an opportunity to make changes. Chairman Witham said they could make a stipulation that the dormers were excluded from the approval if everything else was acceptable. He said they could always return with new plans for the dormers. Mr. Rheume said his concern was that the applicant could come back with a redesign and be denied based on Fisher vs. Dover. Chairman Witham said the Board could provide clear feedback on what they expected before they returned with a good faith effort so that it was less likely that the Board would evoke Fisher vs. Dover.

Vice-Chair Parrott said he had no problem with the dormer that was 4' on the horizontal because it was offset by the elimination of the unattractive stairway on that side of house.

Mr. Mulligan clarified that regardless of the Board's decision, the design had to go before the HDC and they could decide if the design was too imposing to other properties or for any other

reason. He said he agreed with Vice-Chair Parrott that the applicant was making an improvement and the nearest neighbor had not come forward with any objections. Mr. LeMay asked if the co-applicant, Elizabeth Levey-Pruyn's home was the other abutting property and Chairman Witham said that appeared to be correct.

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

In reviewing the standards for the special exception, Mr. Mulligan said changing the use from a two-family to a single-family use was permitted and he agreed with the applicant that it was another non-conforming use that was equally or more appropriate to the district. He said there would be no hazard to the public on account of fire, explosion or toxic materials. He said there would be no change in the essential character of the neighborhood as a result of the location or scale of the building structures, access, or parking area. He said there would be no resulting odors, smoke, gas, dust, etc. Lastly, he said going from two households down to one would have a less adverse impact than the existing use and there would be no significant increase in traffic, no excessive demand on services or increase in storm water runoff.

Mr. Mulligan said the variance was to reconstruct a lawful non-conforming building without conforming to the current requirements of the Ordinance. He said, as Mr. Rheume had pointed out, that it would be impossible to do anything to the property and comply with the setback requirements, which created an automatic hardship.

Mr. Mulligan reviewed the criteria, noting that granting the variance would not be contrary to the public interest or the spirit and intent of the Ordinance. He said the essential character of the neighborhood would not be changed by the modest upgrades to the property. He said they were also moving away from some significant existing nonconformity by removing the non-conforming stairway, shed and moving slightly away from the right-rear setback, which would not alter the character of the neighborhood. He agreed with the applicant that it was a unique and historic structure, which they intended to preserve and enhance, and substantial justice would be done by allowing them to do so and would outweigh any benefit to the public by adhering to the setback requirements as applied to this property.

Mr. Mulligan said the values of surrounding properties would not be diminished and most of the neighbors were in support of the proposal. Although one neighbor objected to the size of the proposed dormer, the closest abutting neighbor most affected did not object. He noted that there was also an opportunity for the HDC to modify the design if it was unworkable. He said literal enforcement of the existing or current setback requirements created an unnecessary hardship and special conditions hindered the ability to do anything with the property. He said the applicant was proposing to remove some significant non-conforming elements and bring the property into slightly greater conformance so there was no fair and substantial relationship between the purposes of the setbacks requirements in the Ordinance and their application to the property. He said the ultimate use was reasonable.

Vice-Chair Parrott concurred with Mr. Mulligan's comments and added that the significant additions were toward the back of the house and centered on the lot and the other on the left was at the wide side of the lot. He said it would be a nice upgrade with no adverse effects to the neighbors.



Mr. Rheume said he supported the requests despite concerns with the dormer because he believed it would be an improvement to the property and changing from a two-family to a single-family home would probably be a plus for the neighborhood. He said despite the fact that the property was in a section of the Waterfront Business District, this section was largely residential in character. He said the Single Residence B District was across the street and most of this project would meet that district’s 10’ setback if it was across the street and even the dormer would only be a couple of feet into the setback. Mr. Rheume recommended that any abutters with concerns over the dormer present their concerns to the HDC who had better mechanisms to work with the developer.

*The motion passed by a vote of 7-0.*

Chairman Witham said it was on the record for the HDC that although the dormer met the requirements for setbacks, there was some concern by some members of the Board over the size, shape and scale of the proposal.

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5) Case # 5-5

Petitioner: Northern New England Conference of Seventh Day Adventists, Inc.

Property: 861 Middle Road

Assessor Plan 232, Lot 120

Zoning District: Single Residence B

Description: Construct 18’ x 33’ front addition and a small ADA access lift on the side.

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

1. A Special Exception under Sections 10.440, Use #3.11 and 10.334 to allow a nonconforming use to be extended into any part of the remainder of a lot of land

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Chris Berry, President of Berry Surveying, representing the applicant, presented preliminary plans for their proposal for a front expansion and a small ADA access lift. He said there was no ADA access currently and handicapped individuals had to be lifted up the front stairs, which was not in the spirit of the ADA code. He said the request for an expansion had been denied previously and they were asked to look at better ways of using the existing structure. He said they reviewed the possibilities over the last couple of months and were now proposing an expansion for a front foyer so they could restructure the entire basement facility for common suppers and gatherings.

Mr. Berry said the last portion of the project would have to go before the Technical Advisory Committee and the Planning Board to review the site plan. He said while the project was underway they were also looking for approval from the Planning Board on reconfiguring some impervious surfaces for better access and parking around the building.

Mr. Berry stated that the church was not asking that the standards for meeting the Special Exception be modified in any way. He said the use of the structure would not be modified, but the

proposed changes would allow the church to expand the interior and make it more useable space. He said there would be no detriment to surrounding property values or change in the essential characteristics in the residential neighborhood on account of the location and scale of the structure, access or parking, vibrations, glare, heat, or unsightly storage of vehicles, equipment or other materials. He said there would be no dust, odors, pollutants, or smoke and no hazard to adjacent properties or the public from fire, explosion or release of toxins. He said the use of the site would continue as a church and the existing features would be improved by relocating and screening the trash further away from residential properties.

Mr. Berry stated there currently was no loud or obnoxious behavior in the church and that would not change as a result of the expansion. He said there would be no traffic hazard or increase in congestion. He said 100 seats were allowed and the occupancy would not be modified. He said there would be no excessive demand on municipal services, including water, sewer and waste disposal, schools, police or fire protection. He said there would be no significant increase in storm water runoff onto adjacent properties or streets. He said the water currently sheets from front to back to a low point in the center of the property and runoff would be mitigated further with low impact designs that would be reviewed through the TAC review process.

Chairman Witham asked Mr. Berry to describe the proposed site work, the parking areas and the removal of existing structures as shown on the aerial photo and the existing site plan. Mr. Berry said a house and another structure were removed ten years before.

Mr. Rheume asked for clarification on the number of parking spaces and Mr. Berry said there were currently 21 spaces and there would be 36 spaces after it was reconfigured.

Mr. Durbin said storm water runoff had been a concern that was expressed over their previous application and asked for further explanation on how the storm water would be mitigated. Mr. Berry said they originally proposed a structure at the rear of the lot and abutters expressed concern that would impede draining so the new proposal had no structure and there would be drains from front to rear. He said after they went through TAC review, they would determine whether pervious surfaces or rain gardens would be best to reduce the runoff flow to the lower area.

Vice-Chair Parrott pointed out that the dimensions of the front porch on the architect's rendering and the site plan did not match. Mr. Berry said it would be 6' front to back and 15' in width. Vice-Chair Parrott said 71' was listed from the new addition to the street and it was important to know what the setback would be. Mr. Berry said they would not know how many steps they would need until they finished grading.

Mr. Rheume asked if they would expand the basement area in an equal amount and Mr. Berry said that was correct. Mr. Rheume said their previous application indicated that the capacity of the basement was for 100 people and asked if that was the same and asked why they needed to expand. Mr. Berry said the basement was an old structure with an old foundation and they intended to removed the classrooms and expand the kitchen and communal area. He said the area under the new entrance would be used for storage with a separate entrance. Mr. Rheume asked what the new addition to the front would be used for and Mr. Barry said it would be a new foyer with a space for coats.

Head Elder of the church, Mr. Curt Amos of 21 Fremont Street, Somersworth said there were three, 12' x 11' classrooms and a 34' x 19' function area, which gave them accommodations for 43 people in the basement. He said they now had 63 people on a regular basis so they were proposing to remove the classrooms, then expand the kitchen and function area. He said they were proposing to add an 8' x 10' ADA compliant bathroom off the main lobby and two 10' x 10' classrooms on the main floor to replace the basement classrooms and allow the children to be on the same floor as their parents during Sunday school. He said the lobby was currently 11' x 13' and they would be extending it an additional 18' to allow sitting room for the elderly, a place to store coats, and a staging area for the entrance of wedding parties.

Mr. Rheume said the applicant stated they had 21 parking spaces and needed 25 spaces to meet the requirement for 100 members, but the site plan listed 36 spaces. He asked Ms. Walker if the applicant would have to return if the Planning Board did not approve the spaces. Ms. Walker said they did need 25 spaces, but they would have to return if it was determined that was not correct and they could not provide the correct number of spaces. Mr. Amos said 100 members were listed on their occupancy permit.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Avi Magidoff of 133 Pearson Street, Ms. Joanne Brawn of 121 Pearson Street, Ms. Katherine Wentworth of 126 Pearson Street, Mr. Roy of Riverbrook Condominiums on 777 Middle Road all expressed concerns with the appearance of the bump out for the ADA lift. They also expressed concern over an expanded parking lot that would serve parishioners from outside the neighborhood, creating more traffic, runoff, noise and the visibility of the bus and dumpster in their single-family residential district.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Mr. John Cronin of 860 Middle Road said he believed making the entrance ADA compliant would be an improvement for the use of the church and thought the proposal would also improve the appearance.

Chairman Witham asked Mr. Berry if there was a specific plan for where the bus would be parked since all the spaces were striped for cars. Mr. Berry said they didn't have a plan currently, but indicated the bus would probably park along the edge of the parking lot or near the dumpster during services because the pickups were few and far between. He said they were only reorganizing the parking area and it would not extending beyond where it already was.

Mr. LeMay asked what materials would be used for the parking lot and Mr. Berry said portions of the parking would need to be porous based on zoning requirements or other mitigation would be required.

Ms. Chamberlin asked if the applicant would need to return for finalization after the parking plan had been reviewed by TAC for site review. Ms. Walker said they would not unless the capacity changed or there was a miscalculation. She added that the basic intent of the presentation had to be upheld throughout the process and the plans couldn't change from what the Board of Adjustment had approved. She said TAC could address the nuances of the plan concerns during the site review process for issues such as storm water management, but the building size and overall

parking could not change significantly. Ms. Walker said the Special Exception did require that the Board consider storm water, however so it was acceptable to address those concerns.

Ms. Chamberlin said neighbors had expressed concerns regarding runoff and asked Mr. Berry if he had any further response to their concerns. Mr. Berry said he only wanted to clarify that the low-lying area would not be filled in. He said they could not add any more parking spaces before going to TAC and the storm water runoff from additional parking spaces would be mitigated by design elements of porous materials or other mitigation.

Vice-Chair Parrott said the last page of their memo said there was no significant runoff to adjacent properties or streets, yet it also said there would be mitigation with bioretention and porous materials for runoff as a result of reconfigured parking areas. He said that suggested there was some serious design work, but it wasn't shown on the plans. Mr. Berry said they came to the conclusion that porous materials were required in this zone, but they had not finalized the design or the treatment system. He said they were assured that the design process would be reviewed through TAC. He said they would be happy to prepare and present a full TR55 analysis of how the storm water would be handled if the Board wanted to see it because it had to be done anyhow. Vice-Chair Parrott said it wasn't a requirement, but they often sought those details based on elevations and the configuration of lot because they were helpful.

Mr. Rheame asked why they were proposing 36 parking spaces instead of the 25 that were required. Mr. Berry said the requirement was arrived at by dividing the occupancy of 100 by four, but many people don't travel in groups of four, so four was the minimum. He said they were trying to find a balance in between and they determined that 36 spaces would be appropriate for the site.

Mr. Amos said they were currently using the grassed area at the left side of the proposed parking area for additional parking year round so the reconfiguration would help the weekly overflow. He said they were proposing to replace impervious surfaces as a way of mitigating the existing runoff to the back.

Mr. Amos said they had consulted with Mr. Joshua Demarco of 58 Pearson Street and then received a letter from Mr. Magidoff of 133 Pearson Street that was dated April 2013. He read Mr. Magidoff's letter into the record saying he had spoken with neighbors about the expansion to the front of the church and said they had no objections if there was no impact to the back. Mr. Magidoff's letter said he had not talked with residents on Middle Road, however and suggested they send out a letter for full transparency. Mr. Amos said they worked with an architect and made plans for communications in good faith, but Mr. Berry had not been available until recently.

With no one else rising, the public hearing was closed.

## **DECISION OF THE BOARD**

*Ms. Chamberlin made a motion to **grant** the petition as presented and advertised and Mr. Durbin seconded.*

Ms. Chamberlin said she believed the presentation met the standards for a Special Exception. She said the proposal was much reduced from the original and incorporated the concerns of the

neighborhood by leaving the back undeveloped. Expanding the basement to accommodate their services better was a reasonable use.

Ms. Chamberlin reviewed the standards for permitting the Special Exception and said she could appreciate the concerns for flooding, but the applicant took the concerns into consideration using porous materials and the details of a rain garden or other runoff control would be reviewed further. She said it was difficult to analyze, but she didn't see a detriment to property values, because it was an overall improvement. She said the rendering was consistent with an attractive building. She said there was no appearance of a traffic safety hazard and they were attempting to improve the parking and traffic flow. She said there would be no excessive demand on municipal services. She said leaving an indentation in the back for water to pool would address the concern. She said it would be better if they had detailed information, but she was comfortable that they had enough information and the proposal was modest enough to meet the standard.

Mr. Durbin added that the main objections centered on storm water runoff into neighboring basements, but he didn't believe it would be significant and the applicant had represented that they would work out the details of porous pavement and a treatment system with TAC and the Planning Board.

Mr. Rheume said he had made the motion to deny the previous application, but would support this request to make improvements on a footprint that was 16% smaller than the previous application. He said he was concerned with an increase of storm water runoff onto adjacent properties and streets, but it appeared that the applicant was minimizing the impact.

*The motion passed by a vote of 7-0.*

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6) Case # 5-6

Petitioners: N E Marine and Industrial Inc., owner, Subaru of New England, Inc., applicant

Property: 200 Spaulding Turnpike

Assessor Plan 237, Lot 56

Zoning District: General Business and Single Residence B

Description: Construction and operation of an automobile dealership.

Requests: The Variances necessary to grant the required relief from the Zoning

Ordinance, including the following:

1. A Variance from Section 10.591 to allow a structure in a nonresidential district to be located within 100 feet of a property zoned residentially.
2. A Variance from Section 10.592.20 to permit an automotive use within 200 feet of a residential district.
3. A Variance from Section 10.1113.31 to permit off-street parking areas, access ways, maneuvering areas and traffic aisles serving uses in a Business District to be set back less than 100 feet from a residential district.
4. A Variance from Section 10.1124.20 to permit off-street loading or maneuvering areas to be located less than 100 feet from a residential district.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney John Kuzinevich, representing Subaru of New England appeared before the Board along with co-counsel, Attorney Tim Phoenix; the proposed dealers, Mr. Todd Berkowitz and his wife,

Maureen from Ocean Subaru in Manchester; representatives from Subaru of New England; Mr. John Lorden with MSC Engineers; Mr. Jim Gove of Gove Environmental; Mr. Steven Pernaw, traffic engineer; and Mr. Robert Laporte of Colliers International Real Estate.

Mr. John Lorden with MSC Engineers handed out the proposed variance plans and an aerial overview of the existing and proposed 21-acre lot. Mr. Lorden said the line between the General Business District and the Single Residence B District ran through the front of the site and it was a difficult lot for development with wetland buffers, sloping topography, a sewer easement and a utility easement for PSNH easement. Mr. Lorden said they would require a Conditional Use Permit and site plan approval from the Planning Board.

Mr. Jim Gove of Gove Environmental Services reviewed the wetlands and stated that there would be no significant impact to the wetlands and abutting neighborhood.

Mr. Bob Laporte, Managing Director of Collier's International Realtors said he was asked by Subaru of New England to develop an opinion on whether the proposed project would impact Woodlawn Circle. Mr. Laporte reviewed the existing conditions and the impact of the power lines, residential views of the Spaulding Turnpike and surrounding commercial activity. He said some of the property owners sought abatements, indicating there was a negative reaction to the Port City Nissan property. He said they could not measure a quantifiable impact on Woodlawn Circle from this project, however and he believed there would be a benefit from planting a natural screen of trees.

Attorney Kuzinevich addressed the criteria for the variances. He said the spirit of the Ordinance was to have a 100'-200' buffer between business operations and residents, but they had 300'. He said the zoning line cut the front of the property off and they wouldn't be able to build anything if the setbacks were observed so use of the property required variances. He said an automotive dealership would be consistent with the neighborhood, and they would have less traffic than other high volume businesses. He said the value of surrounding properties would improve from the screen plantings, creating a boundary for the neighborhood. He added that the use of pervious pavements would create less runoff contamination than a mall parking lot. He said the trees were under the Planning Board's purview, not the Board of Adjustment's purview, but they submitted an arborist's report that the existing trees were at the end of their lifespan and the new plantings would create a better noise and visibility screening. He added that the majority of trees were outside the buffer that prohibited cutting. He stated that the wetlands had been created by the City sewer line years ago and said they would do all they could to preserve the wetlands through pavement design, but asked that the Board recognize the hardship and special conditions that the wetlands created.

Mr. Rheume asked a series of questions to clarify the distance of the pavement from the closest abutter at 184 Echo Avenue and Mr. Lorden confirmed that it was 135' to the zone line and another 5' to the closest abutting property.

Mr. Rheume asked for clarification on the placement of the utility easement and how much room there would be for trees on their own property. Mr. Lorden said the PSNH easement went up to the edge of the property line. He said PSNH only allowed up to 12' high mature plantings. Mr. Rheume asked how long before the proposed plantings would be mature and Mr. Lorden said it would depend on the species and they had not finalized those plans.

Mr. Rheume asked what the restrictions on tree cutting were and Attorney Kuzinevich said he discussed the matter with the City's attorney and provided a memo confirming that the front of the property was not in the buffer and there were no restrictions there. He said they were allowed to cut 50% of mature trees in the wetlands buffer with notice to the Planning Director to allow him to verify the placement of the trees. He said they could cut between 2/3 and 75% without going through the Conservation Commission. He said the mature trees were tall with shallow roots, there had been some blow over already and arborists recommended thinning more because the remaining trees would be exposed and vulnerable to more blow over.

Mr. Rheume asked if there was any knowledge of why the residential zoning line had moved. Attorney Kuzinevich said the commercial zoning line had run along the Ford dealership and later a variance was granted to the Nissan dealership. He said he didn't know for certain why the line jogged forward, but he suspected it was spot zoning to preserve the trees, yet the Rockingham Court determined it was illegal so the City reverted the line back.

Mr. Mulligan asked if there would be direct access from the Spaulding Turnpike. Mr. Lorden said there would be an entrance on Echo Avenue and two-way traffic from Farm Lane. Mr. Mulligan asked how they would enforce their policy for no test driving through the residential neighborhoods over time and Attorney Kuzinevich said it was listed on the site plan, was enforceable through the City, but it would also be enforced through the leadership of the dealership.

Chairman Witham asked why they had to go before the Conservation Commission and Attorney Kuzinevich said they would need a Conditional Use Permit to cut trees and for construction within a wetlands buffer. He said the subject of the trees would be considered under site review and had nothing to do with the variance request. Chairman Witham said he understood the variance request, but wondered if the trees were in fact a consideration. Attorney Kuzinevich said not only were the trees not part of the Board's consideration, but the property owners could still cut the trees down if the proposal didn't go through, which showed the trees were on a distinct path.

Vice-Chair Parrott said they heard a lot about the easement, but very little about building in the wetlands buffer and it appeared that at least 40% of the building and all of the vehicle display and parking would be in the buffer. Mr. Lorden agreed that there would be a significant amount of wetlands buffer impact.

Vice-Chair Parrott said he read the report from the arborist that said the trees were old with shallow roots, ready to fall down, but the trees had actually survived decades of bad weather. He asked if it was the intent to cut and eventually clear cut every tree. Attorney Kuzinevich said that was correct and they would be replaced with other trees. Mr. Rheume asked Ms. Walker if she was aware of the clear cutting and Ms. Walker said the cutting would be reviewed by the Conservation Commission for recommendations and the issue would be up to the discretion of the Planning Director. Chairman Witham asked if the Conservation Commission could deny the Conditional Use Permit to remove trees and Ms. Walker said the Commission would make a recommendation, but the Planning Board would make additional decisions regarding the overall project.

## **SPEAKING IN OPPOSITION TO THE PETITION**

Ms. Lenore Bronson of 828 Woodbury Avenue, Mr. Tom Sweeney of 1126 Woodbury Avenue, Mr. Jeff Abrams of 165 Woodlawn Circle, Ms. Cindy Katz of 200 Woodland Circle, Ms. Ellen Moulton of 176 Woodlawn, Ms. Alex Smith of 108 Meadow Avenue, Ms. Susan Ford of 88 Farm Lane, Mr. David Cosgrove of 174 Echo Avenue, Ms. Kristy Ford of 171 Echo Avenue, Mr. Bruce Osborn of 2 Echo Avenue, Mr. David Palumbo of 181 Echo Avenue, Mr. Joe Calderola of 170 Dennett, and Mr. Bill Shirley of 45 Clover Lane all expressed concerns for increased traffic, speed and safety for children, bikers, walkers, and the 24 disabled wheelchair residents of Betty's Dream at 75 Longmeadow Lane who traveled along the side of the road where there were no sidewalks to avoid the gravel and mud along the roadsides. Mr. Palumbo submitted the signatures of all 24 residents and three employees in opposition of the proposal.

Ms. Sherry Brandsema of 865 Woodbury Avenue, Ms. Lenore Bronson of 828 Woodbury Avenue, Ms. Cindy Katz of 200 Woodland Circle, Ms. Kate Mallen of 140 Woodlawn Circle, Mr. Tom Sweeney of 1126 Woodbury Avenue, Mr. Jeff Abrams of 165 Woodlawn Circle, Ms. Alex Smith of 108 Longmeadow Avenue, Ms. Susan Ford of 88 Farm Lane, Ms. Catherine Cosgrove of 174 Echo Avenue Mr. Todd Ford of 171 Echo Avenue, Mr. David Palumbo of 181 Echo Avenue, and Mr. Joe Calderola of 170 Dennett all expressed concerns for the conservation of the historic trees, wetlands and wildlife.

Ms. Lenore Bronson of 828 Woodbury Avenue and Mr. Jeff Abrams of 165 Woodlawn Circle, Ms. Cindy Katz of 200 Woodland Circle, Ms. Susan Tarr of 231 Woodlawn and Mr. Joe Calderola of 170 Dennett also expressed concerns for the effects that the light and noise would have on their views and property values.

Mr. Paul Bellows of 155 Woodlawn Circle, Ms. Glynn Reed of 125 Echo Avenue, Roy Helsel of 777 Middle Road and Leon Hurt, Exeter and a student of Ms. Bronson's all said they agreed with the neighbors' concerns and opposed the proposal.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Traffic engineer, Mr. Steve Pernell presented his report addressing traffic issues in the area and stated that there would be ample sight distance for the driveways off Echo Avenue and Farm Lane. He added that there would be a net increase of 20 vehicles per hour on Saturdays based on standard practice estimates, which was significantly less than the nearby Nissan dealer's test drives. He said directing customer routes out of the neighborhood and onto the highway was part of the application so there would be no need to rely on police enforcement. He added that the vehicle delivery trucks would enter on Echo Avenue and exit on Farm Lane, not through residential areas.

Portsmouth resident, Attorney Duncan McCallum stated that the applicant's request was to do something the zoning Ordinance didn't allow in order to create a larger auto dealership than the surrounding dealerships, and they were asking for an exception based on their business and not on the property, which was not an actual hardship reason for granting.

With no one else rising, the public hearing was closed.

### **DECISION OF THE BOARD**



Chairman Witham informed the Board that the applicant would need to meet all five criteria for all four variances for the request to be granted but it could be denied if the petition failed to meet any one prong for any of the variances.

Mr. Rheume said the application appeared to be falling down in a couple of areas, however they did establish some hardship because a large portion of their lot was in a residential district, though no residences were or could be constructed in that area. He said they established that they would meet the parking requirement for a 100' buffer from the residential area. However, he said the property was within the 200' boundary of the abutting 184 Echo Avenue property. He said although the structure on the property was built more than 200' feet from the property line, it was still within the rights of that property owner to demolish that structure and rebuild closer to the 200' setback. He said another area in which the application fell short was in regard to the intent of the Ordinance at the entrance and exits that required a 100' buffer between the commercial district and the residential district, which would also be used as a point of off-loading tractor-trailers and the increase of general traffic.

Mr. LeMay commented that it would be a simpler decision if the primary access to the site was directly on and off the Spaulding Turnpike and they were able to install fences and trees for the noise and light. But due to the arrangements of the roads and the probable intention of the dealership to service regional customers, not just Portsmouth customers, many vehicles would not enter and exit to the highway, but would use Woodbury Avenue instead. He added that although the dealer could control test drives, they could not control independent customers from driving through the neighborhoods and he was concerned for the safety of residents on narrow roads with no sidewalks.

Mr. Durbin agreed with the comments and concerns that were shared. He added that the intent of the Ordinance and the buffers were designed to protect residents against light, noise and safety concerns, but safety was not part of the study presented and he was not convinced that the traffic impacts would not be adverse to the neighborhood. He said he also was not convinced that the study addressed the effect of the project on specific abutting properties. He said he did believe the applicant may have met the hardship test, but the other four were off.

Chairman Witham agreed with the concern over a diminution of the surrounding property values, which would largely result from the removal of the trees that served as a visual and sound buffer, but the variance was to allow an automotive dealership within 200' and did not pertain to trees per se. He also thought there would be a major battle with the Conservation Commission, but again, that was not within the Board's purview. Chairman Witham acknowledged that any business in that location would require relief; however, he felt the intent of the Ordinance regarding buffers was to have a layer of protection between the residential district and commercial uses. He said the building itself met that intent with the 300' PSNH easement in most areas, but he agreed with the concerns that the exits and entrances that were only 20' from abutting driveways and property lines would not be sufficient, especially for a car dealership.

Mr. Mulligan agreed with Mr. Durbin that the existence of the utility easement and the wetlands area limited the buildable area on the lot, and met the hardship criteria, and that they also provided a buffer. However, he also agreed that there was an issue with getting in and out of the lot through the residential area. Mr. Mulligan wondered what would prevent the Board from granting the first

two variances and leave the last two variances regarding access points up to the applicant to resolve.

Chairman Witham said another option would be to deny the last two variances, not address the first two and request that they return with a new application; however, it might be best to address all four if they were to end up ultimately in court.

Vice-Chair Parrott discussed the definitions and requirements of meeting the criteria further, commenting that the residents that spoke expressed the public interest best. He said the site was only accessible by two narrow, windy roads, which had the special condition that they were traveled by wheel-chair residents of Betty's Dream. He said the hardship criteria required the property to have special conditions that distinguished it from others in the area and he had a hard time distinguishing this property from other dealerships on the road that had similar constraints

*Mr. Rheume made a motion to deny the petition as presented and advertised and Vice-Chair Parrott seconded. The reasons cited for denial included the following:*

Mr. Rheume said the applicant needed to meet all five criteria and fell down in meeting the public interest and intent of the Ordinance concerning the large volume of traffic and tractor-trailer deliveries at the entries and exits within close proximity of the abutters in the residential areas. He said the spirit of the Ordinance was to keep the business and residential areas separate and they were not living up to the intent. He said an argument had also been made that the proposal could affect the property values of the closest abutting properties on Echo Avenue and Farm Lane.

Vice-Chair Parrott concurred with Mr. Rheume's comments.

Chairman Witham said he supported the motion and despite meeting the first two variances, the last two variances could not be supported and the applicant would still need to redesign the plan if they were separated. He commented that a redesign of the streets was a local and state issue.

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

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(Public Hearings – New Business to be continued at the Thurs, May 29, 2014 meeting)

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## **X. ADJOURNMENT**

*It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:55 p.m.*

Respectfully submitted,

Jane K. Kendall  
Acting Secretary

