

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
EILEEN DONDERO FOLEY COUNCIL CHAMBERS  
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE  
PORTSMOUTH, NEW HAMPSHIRE**

**7:00 P.M.**

**MAY 19, 2015**

**MEMBERS PRESENT:** Chairman David Witham; Vice-Chairman Arthur Parrott; Christopher Mulligan, David Rheame, Charles LeMay, Patrick Moretti, Derek Durbin, and Jeremiah Johnson.

**MEMBERS EXCUSED:** None

**ALSO PRESENT:** Juliet Walker, Planning Department

**I. APPROVAL OF MINUTES**

A) April 21, 2015

*Mr. Rheame made a motion to **approve** the April 21, 2015 minutes with minor corrections. Mr. Moretti seconded the motion. The motion **passed** with all in favor, 7-0.*

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**II. OLD BUSINESS**

A) Case # 4-2

Petitioner: 233 Vaughan Street LLC

Property: 233 Vaughan Street

Assessor Plan 124, Lot 14

Zoning District: Central Business A

Description: Install a bathroom in space designated for mechanical equipment.

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

1. A Variance from Section 10.531 to allow a structure height of 59'9"± for the habitable space of the building where 50' is the maximum allowed.  
*This petition was postponed from the April meeting and the request has been amended by a revision to the proposed height.*

Mr. Mulligan recused himself from the petition and Mr. Johnson assumed a voting seat.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney John Bosen on behalf of 233 Vaughan Street LLC stated to the Board that the appearance or the height of the building would not be changed in any way. He explained that when the building was originally approved, it permitted a roof appurtenance of 10 feet that was designed for a mechanical space. They wanted to install a bathroom in its place. The property had nine condominium units and a rooftop pool, and it was recommended in January 2015 by the New Hampshire Department of Environmental Services (NHDES) that an adjacent toilet and shower be provided for the rooftop pool. The Planning Department required them to seek the variance because the bathroom was considered habitable space, whereas the mechanical space was not. The change created a habitable area that exceeded the maximum building height, so the variance was required. Attorney Bosen said that all five criteria were met, and he went through each one. He noted that the building was newly constructed and of mixed use, and the only concerns to the abutters were imbedded and had been taken into consideration. The property had special conditions because the building was unique and was on an irregular-shaped lot bounded by railroad tracks. It was the only property in Portsmouth with a rooftop pool, so the shower and toilet were a reasonable use.

Mr. LeMay confirmed that Attorney Bosen was not asking for an increase in height and that no mechanical equipment in the area had been displaced. Attorney Bosen agreed. Mr. Rheume said that he noted two doors to the mechanical room and a window on the drawings and asked Attorney Bosen whether he was adding a door or window that wasn't there before, and Attorney Bosen stated that he was not. Mr. Rheume asked if there was a plan showing where the pool was relative to the bathroom, and Attorney Bosen pointed out a sliver of blue on the plan.

### **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. Durbin made a motion to **grant** the variance as presented and advertised. Mr. Rheume seconded the motion.*

Mr. Durbin stated that granting the variance would not be contrary to the public interest and would be in keeping with the spirit of the Ordinance because the relief was the conversion of the structure and the building that were already in existence and would be in keeping with the character of the building and the neighborhood. Granting the variance would allow justice to be done because the NHDES required that the applicant provide a facility such as the one presented, so the applicant had to find a place to put it, and the location chosen was the most logical one. The value of surrounding properties would not be diminished because no one would notice, so there would be no impact on property values. Not granting the variance would be an unnecessary hardship due to the property's unique conditions of the building height that already existed and the infill within it. The property use was a reasonable one. There would be no fair and substantial relationship between the general purpose of the Ordinance and the application for the property for reasons already stated.

The height already existed and the applicant was not asking for anything different other than functional use of the space.

Mr. Rheume stated that it was an unusual case because a statewide Board had provided some information relating to the public interest. He said he wouldn't want the owners of a million-dollar condominium suffering the heartache of cryptosporidium infection. Within that, there was plenty of public interest trying to ensure that the health code was kept up to par. Relating to the hardship criteria, he thought the lot was bound to have a large building upon it because it was a prime real estate location, and it was the first property to have a rooftop pool in Portsmouth, so it had unique properties that required a consequential need for a bathroom. Also, the applicants indicated they were making no other changes to the property, and even the window and door currently existed.

*The motion passed with all in favor, 7-0.*

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Mr. Mulligan resumed his seat and Mr. Johnson returned to alternate status.

### **III. PUBLIC HEARINGS – NEW BUSINESS**

1) Case # 5-1

Petitioner: Strawberry Banke Inc.

Property: 14 Hancock Street (Strawberry Banke)

Assessor Plan 104, Lot 7

Zoning District: Mixed Residential Office

Description: Keep up to twelve chickens.

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

1. A Variance from Section 10.440, Use #17.20 to allow the keeping of farm animals in a district where it is not allowed.

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

Mr. Larry Yeardon, CEO of Strawberry Banke, was present to speak to the petition. He distributed updated information to the Board and stated that Strawberry Banke was seeking a variance relief to install and manage an historical poultry exhibit that would enhance visitors' understanding of and appreciation for the historic Puddle Duck neighborhood and its residents and to expand the museum's popular domestic industries program. The exhibit would have a maximum of a dozen live hens. The exhibit would be seasonal and would have a minimum amount of noise. Chicken manure would be incorporated into the compost of the museum's horticultural program and managed on a daily basis by members of the horticultural department who were experienced in caring for chickens. There would also be a consulting veterinarian. Mr. Yeardon stated that the application met all the criteria, and he went through them, noting that the chickens would not be visible or heard by surrounding neighborhood residents.

Mr. Rheume noted that Mr. Yeardon's description mentioned that the exhibit would only be from April through December, and he asked whether the chickens would remain on the

property during the off-season. Mr. Yeardon replied that they would not. Mr. Rheume asked whether the small shed on the property was the chicken coop, and Mr. Yeardon replied that it was and also noted that it replicated what had been there historically. Mr. Mulligan asked whether there would be roosters, and Mr. Yeardon replied that there would not. Mr. LeMay asked Mr. Yeardon why he was introducing chickens at that point in time, and Mr. Yeardon replied that one would have to say that about any of their programs. He said it was just an additional program that would be an elaboration of telling the story of Strawberry Banke.

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

With no one rising, the public hearing was closed.

Chairman Witham noted that the Board received one letter in opposition from Mr. Charles Griffin who objected to the chickens. Chairman Witham said it seemed to be related to the number of variances and special exceptions that Strawberry Banke had received over the years, and it suggested a stipulation that a member of the trustees chop off the head of a chicken and cook it every Saturday night so that the neighborhood could understand what it was like to raise chickens.

### **DECISION OF THE BOARD**

*Mr. Rheume made a motion to **grant** the variance as presented and advertised, with the following stipulation:*

- 1) that there be no more than 12 chickens and no roosters.*

*Vice-Chair Parrott seconded the motion.*

Mr. Rheume stated that the letter writer had a sincere intent in talking about the number of variances that Strawberry Banke received from the Board, and he found it disconcerting as well but thought there were reasons for it. It was a museum located in a residential neighborhood, so by the nature of its existence and business, it would have different requirements than the surrounding properties in order to fulfill its mission both as a museum and a cultural resource for Portsmouth. It was zoned in a residential-type area and was a big property in an area of with lots of small properties, which drove unique characteristics that it had that other properties might not. Mr. Rheume said that the Board had granted a few other chicken coop requests before, and the location for the coop would be placed in the middle of Strawberry Banke and was unlikely to affect any of their neighbors.

Mr. Rheume stated that granting the variance would not be contrary to the public interest but would be a balancing test for what the positive aspects of it for the public and the museum were in terms of providing its benefits to the public versus concerns about surrounding abutters or changes to the surrounding neighborhood. The coop would be centrally located and invisible to the neighbors and general public and observed only by the museum's visitors. The spirit of the Ordinance would be observed because the real concern was having people with a large number of farm animals including chickens located in a residential neighborhood. The property had unique characteristics because it was a large

property, and a small number of chickens without a rooster would minimize the overall nature of the farm-type experience. Granting the variance would do substantial justice because it would allow the museum to continue its mission of providing information to visitors. There was a context for it and no overriding balance for the surrounding neighbors that would say it was not worthwhile. The value of surrounding properties would not be diminished because the coop would add to the characteristics of the properties and it would be centrally located. As for the hardship criteria, Strawberry Banke was a large property in an area with smaller ones and everything would be done to keep the noise minimized. What Strawberry Banke was proposing was relatively reasonable and he recommended approval.

Vice-Chair Parrot said that he concurred with Mr. Rheume and added that the basic activity requested was a benign use of the property, which covered the first two criteria, and it was consistent with the museum's mission because it replicated what was there in past years. For those neighbors in three directions, the facility would be buffered by other buildings, and the most direct one on Marcy Street was not occupied by residential structures anyway, so the chances of it having an adverse effect on any of the neighbors was small to none. It easily passed the five criteria, and most important, it was consistent with the mission that observed the spirit of the Ordinance and would be a historically accurate addition in terms of its size and location.

Chairman Witham noted that the meat of Mr. Griffin's letter hinted that the Board bowed down to Strawberry Banke and gave them special exceptions, and he said that was not necessarily true. They took each case individually, and no one got special treatment. If Strawberry Banke had asked for one rooster or six cows, the Board would not have approved. He felt that the Board wanted to protect the neighborhood and uphold the Zoning Ordinance and did not feel that Strawberry Banke got special treatment just because of who they were.

*The motion passed with all in favor, 7-0.*

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2) Case # 5-2

Petitioners: John K. & Joan F. Burnap

Property: 50 South School Street #2

Assessor Plan 101, Lot 60-2

Zoning District: General Residence B

Description: Replace an 18'± x 12'± deck in existing footprint.

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 structure to be reconstructed or structurally altered without conforming to the requirements of the Ordinance.
2. Variances from Section 10.521 to allow the following:
  - a) A rear yard setback of 11'± where 25' is required.
  - b) 43.5% building coverage where 30% is the maximum allowed.

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

The owners Mr. John Burnap and Ms. Joan Burnap were present to speak to the petition. Ms. Burnap told the Board that when they purchased the home, they had an inspection done, and the inspector had told them that the deck was unsafe because it had insufficient support. He recommended that they replace the whole deck, along with the railings. Ms. Burnap noted that the hardship was because the deck was in close proximity to the back fence of the building and also that the building itself was built on a piece of property that was not much larger. She had a letter of recommendation from the condominium association and approval from the Historic District Commission (HDC). Another hardship was that no one could go out on the deck because it was 7 feet off the ground and had no access from the outside.

Mr. Rheume said he was concerned because he didn't know whether the Burnaps had records of when the deck was built, and the inspection report said it was built out of amateur construction and workmanship. He asked whether the deck was originally put up with a building permit, and Ms. Burnap said that she and the condominium association could not find any backup materials on the deck. Mr. Rheume asked if she had the only unit in the building with a deck, and Ms. Burnap said she did.

### **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 variance as presented and advertised. Mr. LeMay seconded the motion.*

Mr. Mulligan stated that it was a straightforward application where the applicant was seeking to replace and rebuild within the existing footprint of what appeared to be a longtime pre-existing nonconforming structure. He felt that the applicant made a strong showing of the way the unit was configured within the property and how the exterior doors opened onto the deck, and it would be a hardship if the applicant could not use those doors for anything useful like retaining access to a porch balcony.

Mr. Mulligan went through the criteria, stating that granting the variance would not be contrary to the public interest or contrary to the spirit of the Ordinance because what was proposed was rebuilding within the same footprint. The project required HDC approval, which ensured that the character of the neighborhood would not be altered or the public health, safety and welfare threatened. Granting the variance would do substantial justice because there would be no gain to the public that would offset the loss to the applicant if denied. The deck itself was in the rear of the property and had no visible access to School Street, so the public at large would not be affected by the rebuilding on site. The rear abutter had voiced no opposition and the other members of the condominium association were in approval. Granting the variance would not diminish the values of surrounding properties because the deck would not be visible to anyone on School Street, and the most

affected neighbors were the members of the condominium association, who had given no indication that they opposed. The photos showed the deck as dilapidated, so replacing it would enhance the value of the property. The special conditions were that the large property for that particular neighborhood was broken up into condominiums, and the deck itself was already in existing nonconformity. The unit had double doors to accommodate the use and enjoyment of the deck, and it was the only unit to do so. There was no fair and substantial relationship between the purpose of the setback and the lot coverage Ordinance as it applied to the property. The use was a reasonable one for a condominium unit with double doors that opened up and should have a place to go to.

Mr. LeMay stated that he concurred with Mr. Mulligan and had nothing to add.

Chairman Witham stated that a good point was made by the fact that projects that went through the HDC helped with the Board's criteria review and reinforced that the granting of the variance would not change the nature of the neighborhood.

*The motion passed with all in favor, 7-0.*

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3) Case # 5-3

Petitioners: Richard T. and Jennifer J. Mathes

Property: 69 Sunset Road

Assessor Plan 153, Lot 15

Zoning District: Single Residence B

Description: Replace existing shed with an 8'± x 10'± structure in same location.

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 25.9%± building coverage where 20% is the maximum allowed.

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

The owner Mr. Richard Mathes stated that he wanted to replace the existing shed because the current one was falling apart. He had a lot of equipment that needed to be stored in the shed. He stated that his application met the Board's criteria because the increase in size was modest and reflective of the neighborhood, and the immediate neighbor wouldn't see the shed because it was hidden by a garage. He also noted that a large fence shielded the shed from the lot behind them. All his neighbors did not object to his plan. The spirit of the Ordinance would be observed because setbacks would be maintained and there would be no encroachment. Granting the variance would do substantial justice because it would allow them to have improved storage and less items sitting outside the shed.

There were no questions from the Board.

### **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 variance as presented and advertised, and Mr. Moretti seconded the motion.*

Mr. LeMay stated that the application was straightforward. Granting the variance would not be contrary to the public interest because it would not change the neighborhood substantially. The property sat on a hill and was well shielded from the neighbors. Substantial justice would be done because granting the variance would be a great benefit to the applicant and would do no harm to the general public or the abutters. It would not affect the value of surrounding properties. Literal enforcement would result in unnecessary hardship because nothing would be gained by the public benefit in terms of density.

Mr. Moretti stated that he concurred with Mr. LeMay and had nothing to add.

Chairman Witham stated that, considering where the shed was situated on the property, he saw no adverse impact at all.

*The motion **passed** with all in favor, 7-0.*

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4) Case # 5-4

Petitioners: Stephen P. Brady & David Schmoyer

Property: 51 Richards Avenue

Assessor Plan 128, Lot 4

Zoning District: General Residence A

Description: Enclose existing 9'8" ± x 18'6" ± deck,

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 structure to be extended, reconstructed, or structurally altered without conforming to the requirements of the Ordinance.
2. Variances from Section 10.521 to allow a 6'± right side yard setback where 10' is required.

## SPEAKING IN FAVOR OF THE PETITION

Ms. Arilda Dench on behalf of the petitioners stated that the property was an undersized lot of about 5,009 square feet in General Residence A, where the minimum lot requirement was 7500 feet. They currently covered 41% of their lot, where the allowed coverage was 25%. Their home encroached on the 10-foot side setback on the right-hand side, so they were 5 feet from the property line, and the existing deck sat 6 feet from the side property line. The owners wanted to enclose the deck and make it into a screened porch. Their only neighbor that could see it was a fair distance away. She noted that a big tree towered over the house and rained a constant shower of natural debris on the deck, which was a nuisance, but they did not want to cut the tree down. The screened porch would protect the deck and make it possible for them to enjoy the backyard. She showed photographs of the property and went through the criteria, saying that the porch would enhance the house and not be a detriment to



anyone else. The porch would be partially hidden from the street and sports field by existing fencing and shrubbery, and the noise level would remain the same. The values of surrounding properties would not be diminished because the screened porch would enhance the neighborhood. Literal enforcement would be an unnecessary hardship because of the historic lot's size, and the tree created another hardship.

### **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**

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

Vice-Chair Parrott stated that it was a small lot with limited potential, and what the applicant was proposing was basically an infill project that would have little or no effect on anyone else's property. The neighbors were close by and had narrow lots, and the footprint would remain the same. He went through the criteria, stating that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance because there would be no adverse effect to anyone else. It was in the public interest and part of the spirit of the Ordinance for people to upgrade their properties and make them more useful for themselves and future owners. The change would enhance the property and the adjacent properties. Granting the variance would do substantial justice because there was no overriding public interest that would argue that the application should be disapproved, therefore the tip went to the property owner. It wouldn't diminish the value of surrounding properties because it was an upgrade of a modest nature near the center of the property, so the effect if any on surrounding properties would be positive. Granting the variance would have no adverse effect on the general public because the specific application, the position of the property, and the proposed use were reasonable. The special conditions of the property were the compact size of the lot, which limited the size of the addition, and what was being asked for was a modest proposal to upgrade part of their lot.

Mr. Rheume concurred with Vice-Chair Parrott, adding that granting the variance would meet the spirit of the Ordinance because of the light and air issues of the surrounding properties. The applicant was proposing a small one-story addition that would be quite a distance from the next neighboring house. The hardship criteria included the fact that the property was unique because it backed up into a municipal lot on one side, and the nearest neighbor's house was shifted a distance on the far side of the property, so there were unique aspects of the property where the light and air considerations were almost not existent.

*The motion **passed** with all in favor, 7-0.*

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## 5) Case # 5-5

Petitioner: Gerald R., Dolores A., & Gerald R., Jr. Irrevocable Trust, Brown, Gerald, Dolores, Gerald Jr., Trustees

Property: 174 Leslie Drive

Assessor Plan 209, Lot 57

Zoning District: Single Residence B

Description: Construct a 15'± x 22'± attached garage.

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

1. Variances from Section 10.521 to allow the following:
  - a) A 5.5'± right side yard setback where 10' is required.
  - b) 21.8%± building coverage where 20% is the maximum allowed.

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

The owner Ms. Dolores Brown stated that she wanted a variance to add a small single-car garage. She said the side lot setback was 10 feet and that garage was 15 feet wide, which reduced the side setback to 5'6". All the homes in the neighborhood except for one were ranch homes and had attached garages or carports that extended into the 10' setback, so granting her request would not be out of character or threaten the public health, safety or welfare. Having a garage would ease the burdens of winter because she lived alone and had trouble cleaning snow off her car due to surgery. Ms. Brown said that the benefit to her would outweigh any benefit to the public, and to deny the variance would be unfair because her neighbors had received variances. She said granting the variance would all value to her home as well as enhance other homes.

Mr. Mulligan noted that the photos showed a 4-foot bump-out with a screen door on it attached to the side of the house where the garage would be added, and he asked what the purpose of it was. Ms. Brown replied that it was the entrance to the kitchen, and the basement stairs went down through the small addition.

### **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. Rheume made a motion to **grant** the variance as presented and advertised. Mr. Mulligan seconded the motion.*

Mr. Rheume stated that the garage was a modest request that could perhaps have a foot shaved off, but would then be narrow and confining. A 22-foot length was common for a single garage, and a 15-foot width was reasonable. The 4-foot bump-out would be the access point to the basement, and there would be little opportunity to use up the extra space and bring the garage closer to the main portion of the house.

Mr. Rheume stated that granting the variance would not be contrary to the public interest because the applicant had indicated that many homes had garages that were add-ons or part of the original structure and tended to be fairly close to property lines, including most of the direct abutters. It would not change the neighborhood. Granting the variance would observe the spirit of the Ordinance. The Board was primarily concerned with light and air issues, and although the garage would have some impingement on neighboring properties, it wouldn't be that bad. There were no negative opinions heard from the neighbors regarding light and air issues. Granting the variance would do substantial justice because it would allow a warm place for Ms. Brown to store her vehicle, free from the harsh winter effects of snow and ice, and make it easier for her to access her vehicle. Therefore, the applicant's needs were greater than the public interest. Granting the variance would not diminish the value of surrounding properties because the modest addition would probably add to the value of surrounding homes as well as the home itself. The property had special conditions because it was a ranch like the other homes and took up more land area, and it was typical of the neighborhood's layout to have a 70' cross front property line. The house would take up a good portion of that and adding a garage would bring the house to the edges of the property, so the use would be reasonable. What was proposed for the garage size was consistent with the neighborhood and with what the applicant was requesting.

Mr. Mulligan said he concurred with Mr. Rheume and had nothing to add.

*The motion passed with all in favor, 7-0.*

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6) Case # 5-6

Petitioners: James A. & Elizabeth E. Hewitt

Property: 726 Middle Road

Assessor Plan 232, Lot 47

Zoning District: Single Residence B

Description: Reconstruct 20' x 30' barn in existing footprint.

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' where 10' is required.

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

Attorney Scott Hogan on behalf of the owners Mr. James Hewitt and Ms. Elizabeth Hewitt stated that when the Hewitts purchased their home, there was a dilapidated barn structure, and they began removing the barn debris. They wanted to build a new barn in the same footprint. The photos showed a 20'x30' foundation from the old barn. There was a 24-foot wide easement that ran parallel to the property line, making the situation unique because there was a paved driveway in the easement, so the 3-foot setback to the property line was in addition to a 24-foot easement that would prohibit building any structures in that corridor. Attorney Hogan stated that the barn was in a wooded area far removed from residential structures, and the proposal was to rebuild the barn in place. If the barn were centered instead, it would require substantial fill and excavation because the property was 50 feet wide and there was a large foundation hole for the barn already. It would also require a new

driveway to access the barn, so they felt that that barn's location was an appropriate spot. Having the 24-foot easement gave more than the 10-foot setback required by the Ordinance in terms of light and air. Attorney Hogan stated that the application met all five criteria, noting that the objectives of the setback ordinance were met due to the existence of the 24-foot perpetual driveway easement that ran beyond the barn's location and extended to the back of the property. He emphasized that they would be providing 27 feet of distance to the other side of the easement in which no other structure could be built, so it would not interfere with any other property next to it. Granting the variance would do substantial justice because the barn would provide parking and storage. It would be an amenity and would have no impact to the general public. The value of surrounding properties would not be diminished. Attorney Hogan stated that he had a letter from a realtor who said the property would be improved by restoring the historic structure. He also read an email from a neighbor Mr. Randy Tyler, who fully supported the petition.

Mr. Rheaume noted that the tax map indicated that the easement ran across Lot 46 and a portion of the Chase home property, Lot 45. Attorney Hogan agreed. Mr. Rheaume asked whether Attorney Hogan knew when the barn was torn down, and Attorney Hogan said that it wasn't torn down but had deteriorated over the past 20 years or so. Mr. Rheaume asked when the debris was removed and whether the foundation or the hole would be used for the new barn. Attorney Hogan replied that the Hewitts removed the debris after buying the property and that the contractor would determine whether the foundation or the hole would be used. Mr. LeMay asked Attorney Hogan to elaborate on the intended use of the barn. Attorney Hogan replied that the barn would potentially be used for parking and equipment storage, and not living space. It would just be an accessory outbuilding barn.

Mr. Chris Blaudschun of 768 Middle Road stated that he was in support of the project and could see the value of having a barn in that particular location. He wasn't an abutter but would be able to see the barn from his property and was in full support.

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

Attorney Kyle Griffin representing the neighbor Mr. Robert Sevigny of 710 Middle Road stated that Mr. Sevigny was a direct abutter and opposed the granting of the variance. He said that Mr. Sevigny bought his property in 1999 and the barn was dilapidated then. In 2011, it collapsed and a lot of the debris fell on his property, leaving a crumbling foundation. Attorney Griffin discussed how there was no hardship for the Hewitts, saying they had enough space on their property to build within the Ordinance and that allowing them to construct it so close to Mr. Sevigny's property would not be in keeping with the Ordinance. The barn would diminish Mr. Sevigny's historic property value and would have no benefit for the public but would only benefit the Hewitts.

Mr. Mulligan asked Attorney Griffin what the purpose of the 24-foot easement was and why it ran the entire length of the Hewitt property. Attorney Griffin stated that the easement was passed in 1911 for the passage of vehicles, animals and persons on foot. Mr. Mulligan asked what property the easement was meant to benefit and why it ran all the way to the end of the property. Attorney Griffin replied that it was the applicant's property. At that point, Mr. Sevigny rose to speak and stated that the original owner built his barn in 1911 and allowed animals. Mr. Mulligan said the easement area extended beyond his property all along the

435 feet of the applicant's property back to the property owned by the Chase home, and he was trying to understand the purpose of the easement and who it was intended to benefit. Mr. Sevigny replied that he knew that it was not an easement but a 24-foot right to pass.

Mr. Mulligan asked Mr. Sevigny his opinion of the revocation clause, and Mr. Sevigny replied that it was a long-standing issue that he never pursued, but he had enough evidence of negligence, abandoned vehicles, and debris. He said he had complained to the City in the past about the abandoned and uninspected vehicles and debris and he thought he could have had the right of passage revoked, but he wasn't a vindictive person, so he had not gone that route. He stated that he had documentation and photos dating back to 1999.

Mr. Mulligan stated that the applicant provided the Board with a diagram showing that the nearest corner of the proposed barn should it be rebuilt on that foundation would be about 125 feet from the nearest corner of Mr. Sevigny's structure, and he asked whether that was accurate. Mr. Sevigny replied that he was not sure if it was quite that much. He wanted people to understand what he had endured over the last five years. The barn collapsed in January 2011 and he filed a complaint with the City, saying it was a public hazard, and he asked the City to force the owners to remove the debris from his property but was told no. He filed two more complaints but received no action.

Vice-Chair Parrott asked Mr. Sevigny whether he had noticed anything physical that caused the barn to be built close to the property line rather than being more centered. Mr. Sevigny replied that he had not, but that the barn was built on a hill and that it was a convenience for the Hewitts to be built near his property. Vice-Chair Parrott asked if there were outcroppings of ledge, and Mr. Sevigny said there were not. He said the barn could be moved over 10 feet and that he wasn't opposed to the structure but to its location. Vice-Chair Parrott noted that the barn was under different ownership when it collapsed, and Mr. Sevigny replied that an appeal went with the property, not the owners.

Mr. Durbin asked Mr. Sevigny if he knew when the pavement that went over the easement area had gone in, and Mr. Sevigny said he did not. He noted that the owners did not maintain the driveway but that he did by plowing it and paying the expenses. Mr. Durbin asked when Mr. Sevigny bought his property and how the easement had been used since he bought it. Mr. Sevigny replied that he bought the property in 1999 and that the prior owner used the barn for extensive parking and at one time had 11 unregistered commercial vehicles parked on the side of the property.

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

Attorney Hogan stated that it wasn't true that there was no hardship and that the easement was not relevant because the easement was a special condition of the property that distinguished it from others and was certainly relevant. As far as the abutter's concern that the barn might collapse in the future and land on his property, the applicant was willing to offer a condition that if the barn collapsed on the abutter's property, it would be removed. He added that the applicants had not been the ones that had abandoned vehicles, and when they purchased the property, they immediately began to clean up the debris. Attorney Hogan stated that the easement was in perpetuity and that the reason it extended throughout the property was because at one time, the two properties were subdivided. As for the other

25 feet and specific linear differences, the applicant had made those measurements himself, and he was a licensed NH engineer. Attorney Hogan also believed that the location of the barn was due to ledge in the area between the barn and the middle of the property.

Mr. Mulligan stated that there was a comment about the right of way being revocable, and he asked whether or not it was the case. Attorney Hogan replied that the deed did have a revocation clause and that the only way it could be revoked was if the owner petitioned for a declaratory judgment action, and it could only be revoked if a court determined that the property had been abandoned or used contrary to the terms of the easement.

## **DECISION OF THE BOARD**

Chairman Witham noted that there was a lot of history to the structure and the easement, and the previous owners had misused the easement and the barn structure, so he could understand Mr. Sevigny's concerns, but either way, he thought the barn would get built, whether it was 10 feet or 3 feet away from the property line. He said he was trying to sense the adverse impact of the barn on Mr. Sevigny, considering that the structure was built and had stood 80 years before it caved in on itself. He thought it was important to note that the Planning Department and the City Council were discussing creating an Ordinance to govern dilapidated structures and enforcing their repair and removal. He thought it could become part of the BOA's Ordinance in a year or so. The issue to grapple with was whether 3 feet was a reasonable location for the barn, considering the location of the existing foundation and how the property had always been used. He felt that the applicant could probably move the barn over and meet the requirements of the Ordinance without a variance, but it had to outweigh the benefit to the applicant versus the harm to the public.

Mr. LeMay said it looked like the barn was ready to collapse the way it was, and he thought it might be possible to construct a new structure 7 feet away from the property line. The hardship on the applicant was not so much the location of the barn but whether or not they could salvage the foundation and whether or not denying the variance would cause them to take it down and move it. He believed it was a close balance between the neighbor not wanting it right on the line, even though there was an easement in effect, and the probability that the Hewitts might have to knock the foundation down and make a new one anyway.

Chairman Witham stated that the Board had no documentation that the existing foundation was surveyed and could support the load of a barn. Judging by the photographs, he said he would be reluctant to put a major investment on the foundation.

Mr. Rheume said it was a tipping balance and that he shared Mr. Sevigny's frustration with what went on in previous years. He could respect the request to try to move it back. There might be ledge, but that was something one could get around. However, he thought that the proposed barn was quite a distance from the actual residence, but the previous barn lasted after 80 years of neglect. He asked whether that was strong enough to make the Board force the applicant to move the barn. Chairman Witham said that the HDC might take a strong position for the historical aspect, but the Board of Adjustment wasn't the HDC, although maintaining architectural heritage was part of their Ordinance.

Vice-Chair Parrott thought that if there was something other than speculation about ledge, for example, if they moved the foundation and discovered that there was actual ledge, that would be new information that would justify a new hearing. Chairman Witham said it wouldn't be hard to get rid of existing ledge, but they would lose the mature tree near the setback if they moved the barn, and he asked whether that should be the tipping point.

Mr. Mulligan noted that in the recent past, the Subaru dealership argued that the utility corridor should be considered to site a use that otherwise would not be available within a residential setback, and they rebuked that. It wasn't apples to apples, but the existence of the easement created an extra buffer over and above the setback, and he didn't think it drove the analysis quite as strongly as the applicant hoped.

Chairman Witham asked what would happen if the barn collapsed again. Mr. Mulligan said he understood Mr. Sevigny's frustration but didn't think it was fair to the applicant to be saddled with the sins of their predecessors. Anyone planning to build a barn that large would spend a lot of money and would not do it if they felt that the barn would fall down. On the other hand, the use of the driveway had been a problem, and he understood why the abutter wanted to keep an eye on how things were going. Chairman Witham said that the Board was not there to enforce the easement or the deed but had to treat the issue separately and on whether or not it stood on its own merits.

*Mr. Rheume made a motion to **deny** the variance as presented and advertised. Mr. LeMay seconded the motion.*

Mr. Rheume stated that the decision was a tough one. There were a lot of things that the applicant requested that under other circumstances could be okay. He thought it came down to that and to the hardship criteria in terms of the easement, but it was still someone else's property and they had rights associated with the use and enjoyment of the property and had given up some rights already. Therefore, he thought the drivers to putting the barn up near the property line were the existing foundation and hole. He discussed the options of putting the barn back to the 10-foot line and the fact that the foundation was on a hill, so it would probably need infill. He thought that the concerns of the abutter had not really been met, and there been some encroachment, so it might require the property owner to demolish the structure and do infill, but he didn't see 5-10 feet as a huge difference for the owner. If the driveway had to move over 7 feet, he didn't think it would be a big imposition on the owners. If the owners discovered something like a huge ledge that would add enormous expense and asked to build the barn at another distance, he would say that was sufficient and would be happy to rehear the case at that point in time. However, he felt that it fell under the hardship and the substantial justice criteria of their desire to place the barn that much closer against the competing interest of the abutter and not meeting those two criteria, and he thought the petition should be denied.

Mr. LeMay thought it was curious that the Board was in the position of balancing a very small hardship of building the barn 7 feet away when they would probably have to rebuild the foundation anyway, against a very small encroachment on the part of the abutter, so it was likely that the Board had two diminuous issues that became the crux of the matter. He did not think that the Board had justification to grant the variance, barring some actual hardship in moving the barn location a few feet over.

Vice-Chair Parrott stated that he would have liked to hear a factual argument as to why the barn could not be built over a bit further. That was the basis of his previous question as to why it was where it was. He felt that there had to be some reason other than bringing supplies in because supplies have already been taken a long way and another few feet wouldn't make a difference. It was suggested that good engineering work could prove otherwise, and there could be many reasons. He thought it was a close call and said he'd be willing to rehear it, but would support the motion.

Chairman Witham said he felt that the applicant made a case for fill, but he didn't know how much fill they meant, and he didn't feel that it was a strong case of why they couldn't move the barn. It was a setback variance, and the Board was dealing with light, air and encroachment issues for the abutter. A barn had been there for 100 years and would be rebuilt in the same footprint, so he didn't feel it would impose a huge hardship on the abutter. He wasn't sure where the adverse impact was and the change in the character of the neighborhood. Mr. LeMay had stated that the question was whether or not it was justified, and not whether it did any harm, and he was looking for justification.

Chairman Witham asked for a vote.

*The motion to **deny** the variance **passed**, with 4 in favor of the denial and Mr. Durbin, Mr. Mulligan, and Chairman Witham voting against the motion.*

#### **IV. OTHER BUSINESS**

Chairman Witham stated that there had been discussion among all the City Boards about training, seminars and conferences, but he knew personally that it was hard for him to go to Concord on a Saturday. There was talk about bringing someone to Portsmouth, and he suggested a brief presentation rather than a standard presentation that went through all five criteria. They could then have a Question and Answer session about specific issues that arose with the BOA, e.g. Fisher vs. Dover. He said he would send out an email for people to generate questions and pull together 10-15 questions to present.

Chairman Witham congratulated Mr. Moretti on being elected as a full-time Board member.

#### **V. ADJOURNMENT**

*It was moved, seconded and **passed** by unanimous voice vote to adjourn the meeting at 9:05 p.m.*

Respectfully submitted,

Joann Breault  
Recording Secretary