

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss.

CITY OF PORTSMOUTH

ZONING BOARD OF ADJUSTMENT

**In re Application of Lisa Paige Reyes and Chris Ward
regarding the property located at 238 Austin Street**

**REBUTTAL MEMORANDUM
IN SUPPPORT OF MOTION FOR REHEARING**

The citizen opponents of the above-referenced variance application have received and reviewed the applicants' objection to their motion for rehearing, and they make the following observations with respect thereto:

A. The Evidence Was "Available"

The applicants make the convenient and self-serving argument that the evidence which serves as the basis for the opponents' motion for rehearing was "available" to them at the time of the February 18, 2026 hearing before this Board and that therefore the opponents are procedurally barred from bringing that evidence forward now. However, the applicants' argument ignores the realities of land use board practice and ignores common sense. It may be safely assumed that the applicants spent weeks, if not months, on the preparation for their presentation to this Board on February 18th,¹ from the retention of their engineers, to the drafting of the construction

1. The site plans and subdivision plan themselves are dated 12/17/2025, giving the applicants at least a two-month head start.

drawings, site plans, and subdivision plan, to the retention of their other expert, LandVest,² to the legal research and drafting of the legal memorandum by their counsel, to the lining up of their speakers, and to the other preparation for the hearing. Early in the process, the applicants and their attorneys and engineers must surely have researched the zoning on the subject premises and realized that they needed several variances in order to carry out their ambitious project, and they planned accordingly and began marshaling the resources and information that they needed.

By contrast, the citizen opponents' first notice of the applicants' petition for the variances and of the hearing thereon consisted of the required five-day abutters' notices mandated by RSA 676:7, I(a), plus the contemporaneous public notice in a newspaper of general circulation. Such a timetable gives scant opportunity to parties opposing an application, such as the movants here, to locate, engage, and line up experts to contest and contradict the applicants' experts' findings and to otherwise prepare their opposition to the application. The e-mail message dated February 18, 2026 by the applicants' engineering expert, Alex Ross, opining that the barn was unsalvageable, was authored and submitted to the Board on the same day as the hearing itself, and so the complaining residents obviously had no chance to prepare and submit an expert's rebuttal to it by the time of the hearing. The letter dated March 6, 2026 by the historic preservationist, Drew Bedard, was submitted as a direct response to the Ross e-mail message, contradicting Ross's findings. It could not reasonably have been presented sooner.

2. The author of LandVest's report of December 18, 2025 asserted that in preparation for its drafting, he had reviewed the survey plans, the neighborhood building coverage exhibit prepared by Ross Engineers, and the architectural plans for the proposed subdivision, and that he had visited the subject property and toured the neighborhood. He had also inspected the barn and the existing single-family home. It is obvious that the applicants had been planning their presentation to this Board for quite some time and that plenty of advance preparation went into it.

In view of the foregoing circumstances, it comes with ill grace for the applicants to argue that this information was “available” to the movants at the time of the hearing. In these situations, the citizen opponents to not contest the applicants’ petition on a level playing field. To be sure, the evidence needed to oppose the application was indeed “available,” but it was available only after the investment of substantial time, effort, research, and investigation, and after adequate advance notice. The applicants’ makeweight argument that all of the evidence needed to oppose their application was “available” to the opponents at the time of the hearing is nonsense.

B. The Demolition Committee

It is undeniable that the question of whether this Board’s decision to grant the variances sought by the applicants forecloses the Demolition Committee from considering the issue of whether the applicants should be allowed to demolish the barn presents a new issue which was raised for the first time at the February 18, 2016 hearing but was neither fully aired nor ever resolved at that hearing. It merits a rehearing.

At the February 18, 2016 hearing, this Board simply refused to even consider the issue of whether the barn should be demolished. It punted the issue to the Demolition Committee. The discussion during the Board’s deliberations on the application was littered with comments by the board members to the effect that the citizen opponents are not foreclosed from contesting demolition of the barn, for the matter still has to go through the Demolition Committee. Board Member David Rheume observed, “The City has put in place a demolition ordinance; it establishes the Demolition Committee, and that is the process. . . . The demolition ordinance is the best tool for the City to use in matters like this.” (See video of the ZBA’s February 18, 2026 meeting, at 3:54:40 of the YouTube video timer.) Board Member Jeffrey Mattson said, “We have a Demolition Committee - the decision of the ZBA will be independent of this.” (YouTube video timer at

3:53:00.) Board Member Thom Rossi alluded to “when this project goes through the demolition review,” and he further remarked, “Demolition and approval of the demolition of structures is not the purview of this Board. . . . We also do not have purview over preservation.” (YouTube video timer at 3:50:33.)

But it remains unclear whether the Demolition Committee even has jurisdiction over that issue any more. Resident Barbara Ward, a longtime, well-known historic preservationist who is a member of Portsmouth Advocates and former director of the Moffat-Ladd House, and who is herself a former member of the Demolition Committee, specifically questioned whether the Board’s granting of a variance or variances would have the effect of giving permission to demolish the barn, without intervention by the Demolition Committee. (YouTube video timer at 3:44:39.) She never received an answer. Resident John Mayer, speaking to this Board during the hearing, said, “What I learned--tell me if this is true or not--as a land use board, your approval of this variance gives permission to the applicant to remove the barn and house. As a land use board your approval gives authorization to remove those two buildings.” (YouTube video timer at 3:18:40. He never received an answer, either.) In a telephone conversation which Mr. Mayer had with Assistant Planning Director Peter Stith on February 19, 2026 (the day after the hearing), he was told that this Board’s approval of the application indeed constituted approval of permission for the demolition of the two structures, *i.e.*, the barn and the dwelling, and that there would be no further review by the Demolition Committee. Further, in their motion Mr. Mayer and the other citizen opponents have already pointed out that they have received conflicting information between this Board and the Planning Department, which needs to be resolved, as to whether the granting of the requested variances would or would not have the effect of granting permission to demolish the barn. The Planning Department says it would. This Board says it wouldn’t.

If this Board erred in its conclusion that the project still had to go through the Demolition Committee before the barn could be demolished, it was not because the issue was not placed squarely before it. For his part, the applicants' counsel, R. Timothy Phoenix, Esquire, represented to the Board that "they [i.e., his clients] will have to go through a demolition process." Confusion reigned supreme.

For all of these reasons, a rehearing is called-for. This Board should never have granted the variances without knowing for certain whether its action would have the effect of foreclosing action by the Demolition Committee, and that issue should be resolved one way or another. If it is indeed true that the granting of the variances will have the effect of granting permission to demolish the historic barn, then this Board should entertain the application knowing that granting the variances will do so, and the Board should consider the substantive question of whether the barn should be demolished--inasmuch as it is the only land use board who will do so. Either way, a rehearing is necessary.

C. No Hardship

Nothing that the applicants have said in their objection to the citizen opponents' motion for rehearing changes the simple fact that no legally cognizable hardship exists which can properly be made the basis for a variance. There is no reason why the property cannot be utilized for the purpose for which it is zoned while complying with all of the zoning requirements. True, the property is irregularly shaped, but so are most of the other properties in its environs, and the subject property is perfectly typical of the others in that respect. In a neighborhood that is already overcrowded, the applicants seek to divide one lot into two and to erect dwellings on both, neither of which will comply with all of the zoning restrictions. Further, the two buildings are to

be massive, three- to four-bedroom residential buildings which will stick out like sore thumbs and will be totally inconsistent with the character of the neighborhood.

One of the grounds for the granting of a rehearing is a clear error on the part of the zoning board which needs to be corrected, and this Board committed clear error in granting the applicants the variances that they requested. Simply put, the applicants seek to erect two residential dwellings on a parcel that is only suitable for one.

For all of the reasons mentioned above, the Board should conduct a rehearing on the applicants' petition.

Dated: April 16, 2026

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