

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**July 26, 2011, Reconvened  
From July 19, 2011**

**MEMBERS PRESENT:** Chairman David Witham, Vice-Chairman Arthur Parrott, Derek Durbin, Carol Eaton, Thomas Grasso, Alain Jousse, Charles LeMay

**EXCUSED:** Alternate: Robin Rousseau

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**I. PUBLIC HEARINGS**

Chairman Witham informed those in attendance that Petition 12 for Harding Road was withdrawn and would not be heard.

- 8) Case # 7-8  
Petitioner: Two Hundred Ten West Road Condominium Association, Owner, Cross Fit Portsmouth LLC, Applicant  
Property: 210 West Road Assessor Plan 267, Lot 21  
Zoning district: Industrial  
Description: Convert vacant space in a warehouse building to a health club/fitness center.  
Requests: The variances and/or special exceptions required for the proposed work.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech spoke on behalf of Cross Fit Portsmouth, LLC and introduced Mr. Jason Goulemas as the principal of Cross Fit Portsmouth. He indicated that Cross Fit Portsmouth is presently located on Islington Street across from Spinney Road and Thaxter Roads and has been there for several years. He indicated they are currently looking for a larger space which prompted the application presented. Attorney Pelech stated that historically these types of uses fit very well into industrial areas. Cross Fit has classes starting at 5:00 a.m. and going until 9:00 a.m. with typical attendance of 10 people. He indicated that classes pick up again 5:00 p.m., so they do not conflict with the business day of the industrial building at West Road.

Attorney Pelech addressed the special exception criteria as follows: First, he stated that the use is allowed by special exception. Second, the use does not create any hazard to the public or adjacent property on account of potential fire, explosion, or release of toxic materials. Basically, this is a fitness center with barbells and exercise equipment. Third, it does not create a detriment to property values in the vicinity or change the essential characteristics of the area on account of the location and scale of the buildings. There are over 100 existing parking spaces and the business will not generate odor, smoke, gas, dust, other pollutants, noise, glare, heat, vibration or unsightly

outdoor storage of equipment, vehicles or other materials. Fourth, there would be no creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity. The maximum would be 10 participants per hour. Fifth, it will not create an excessive demand on municipal services, as there are no shower facilities. There is a mens room and a ladies room. There is no excessive waste that would have to be picked up by Public Works. In addition, it won't create a need for the police, fire department or schools. Finally, it will not create a significant increase of storm water runoff onto adjacent properties or streets as it is going into a vacant space in an existing building.

Attorney Pelech concluded by stating that the petition meets the six criteria required and commented that Mr. Goulemas was there to answer any questions regarding the operation of Cross Fit. He further indicated that there is a letter of support from Clear Advantage, which would share a wall with Cross Fit, as well as testimonials from satisfied customers of Cross Fit.

In response to questions from Mr. Jousse, Mr. Goulemas confirmed that the men's and ladies bathroom facilities just included toilets and sinks, no showers.

### **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 petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Durbin stated that the application is pretty straightforward. It's for a gym in a warehouse which is seen quite often in Portsmouth and surrounding areas. The use is permitted under a special exception of the zoning ordinance. There is no hazard to the public on account of fire, explosion or the release of toxic materials. There would be no detriment to the property values in the vicinity. In fact, there is a letter from the abutting unit that supports the project. In addition, there is no creation of a traffic hazard or substantial increase in the level of traffic congestion in the vicinity. It was presented that there will only be around 10 visitors per hour and the lot is sufficient to handle that. There would be no excessive demand on municipal services, including, but not limited to, water, sewer, waste disposal, police and fire protection and schools. As indicated before, it's a light use for the area with 10 participants per hour. Finally, there would be no significant increase of storm water runoff onto adjacent properties or streets. They are not changing the exterior of the building, so whatever runoff is there was already there.

Mr. Parrott agreed with Mr. Durbin's comments that the petition meets all the criteria in regards to adverse effects on the neighborhood and stated that there shouldn't be any with this particular use.

The motion to grant the petition as presented and advertised passed by a unanimous vote of 7 to 0.

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## 9) Case # 7-9

Petitioner: Bethel Assembly of God.

Property: 200 Chase Drive

Assessor Plan 210, Lot 2

Zoning district: Single Residence B

Description: Construct 5 residential dormitory type studios for students and establish a post secondary Bible Study School within the existing Church structure.

Requests: The variances and/or special exceptions required for the proposed work.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Pelech spoke on behalf of the Bethel Assembly of God. He indicated a site plan on display of 200 Chase Drive. Attorney Pelech stated that Bethel Assembly of God is one of the religious institutions most adversely affected by the closing of Pease Air Force Base. At one time the congregation numbered around 800 and at present it's around 500. He stated that there are currently 800 seats in the present building. The request is to remove 300+ seats from the existing second floor of the church, which is the octagonal area indicated on the site map, and construct dormitory type studios for age 18 and over congregants who wish to do outreach programs in the area. Attorney Pelech referred to the floor plan, which shows the shared kitchen in orange, the studios in blue and the bathroom/shower facilities in pink. He stated that a variance is needed because this is a single residence and the church itself is not an allowed use I the district. He further indicated that the use is compatible with the neighborhood and that everything would be within the existing building. There is more than adequate parking with 132-136 spaces on the site. Also, 300 seats would be removed from the church to allow the space to be reconfigured into the studios. Finally, the other variance requested is to allow post-secondary education. He indicated that this education is currently being provided. The individuals are high school graduates and members of the church who want to further their ministry in the church and community. Attorney Pelech referred to information included in the packets regarding projects done in the past. The program is on-going and the only difference is that the students currently reside outside of the church and come to the church for their classes.

Attorney Pelech stated that the required criteria have been met, as follows: First and foremost, it will not alter the essential characteristics of the neighborhood. The individuals would live, sleep and take classes there, but most of the time they would be out in the community doing volunteer work. Everything is in the existing building. They are not constructing anything new, so granting the variance would not be contrary to the spirit of the ordinance nor would it be contrary to the public interest. In fact, the proposed use would probably be beneficial to the public interest as they have already done a great deal in the City of Portsmouth and surrounding areas. There would be no detriment to surrounding property values as neighbors will probably not even notice a change. He further stated that the property has special conditions. It is a large lot with a large church in a single residence district. In addition, the fact that it's a religious use property, coupled with the surrounding properties and the fact that it is located on the Market Street Extension, creates special conditions and therefore create a hardship. He stated that the Board allowed the church many years ago, so it would not be out of the question to allow a post-secondary religious education center as it has been ongoing on the site. Further, Attorney Pelech stated that when they made the application for the studios they were told they would need a variance for the post-secondary education as well. He noted that most churches have similar programs and this is not a change from what is going on at the site at the present time. There are special conditions which

create a hardship and there is no fair and substantial relationship between the purposes of the ordinance and this request. They are not seeking to put a more intense use in a Business district. It is a compatible use and is not out of character with what has been going on at the site for many years. Finally, the fifth criterion is that granting the criteria would result in substantial justice being done. He stated that it requires a balancing test to weigh the hardship upon the church if the variances are denied against some benefit to the public in denying the variances. He commented that there would be no benefit to the public in denying the variances. These are energetic young people who wish to come and work within the community and receive training at the church, which they currently do. However, they live in various accommodations throughout the community and the pastor would like to bring them all under one roof. The church has unused space on the second floor. Finally, Attorney Pelech concluded by stating that he hopes the Board will consider this application favorably. The request is reasonable and it will not adversely impact the neighborhood.

In response to questions from Mr. LeMay, Attorney Pelech confirmed that there are two homes on the property that the pastor and youth pastor reside in. He stated that the proposal is to house approximately 40 young people.

Mr. Chad Mannax, the director of the school stated that the program ran from September to May and 42 students are the most they have had. Chairman Witham asked if the students have their own transportation. The director stated that most students do not have vehicles, and the dormitories would solve that problem. As the students are required to be debt free, having a vehicle can be difficult.

In response to questions from Mr. Jousse and Ms. Eaton, the director indicated that the rooms would be dormitory style with two bunk beds per room, for a total of 40 students. Attorney Pelech confirmed that dwelling units are considered a unit with a kitchen. Through discussions with the Planning Commission it was determined that there are currently two dwelling units on site and the proposal is for six studios with only one kitchen so the 5-8 category would be appropriate for this request. He reiterated that there is one shared kitchen and dining room for all of the students.

Further, Attorney Pelech responded to questions from Mr. Parrott by confirming that previously they had been granted permission by the City for five students to live in a unit on the first floor. All required permits were obtained and building codes were met.

Mr. David Hornblow who lives at 181 Echo Avenue spoke in favor of the application. He stated that in July 2006 he and some neighbors formed a neighborhood assisted home living program to help seniors and other people in their area remain in their homes instead of having to move to assisted-living facilities. Mr. Hornblow described how the program developed. He further stated that in August 2006, the director of the adopt-a-block program joined in the program. Since then, the neighborhood is a scene of much activity. Under the direction of the adopt-a-block program these young people, working under the auspices of the Bethel Assembly of God church, spend several hours on Saturdays visiting residents in the Frank Jones neighborhood and raking leaves, cutting lawns, sweeping driveways and in the wintertime, shoveling snow. In addition, they perform various chores such as painting, running errands, house chores and many other projects for the elderly. Local residents are amazed and express their gratitude for the work done. It is a god send to see the cheerful spirit of these young adults doing these tasks for these people. He

recalled a particular incident and further commented that the adopt-a-block program is a highlight for the neighborhood and he expressed his gratitude to the director, the pastor and all the young adults that had done this work.

### **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. Grasso made a motion to grant the petition as presented and advertised, which was seconded by Mr. LeMay.

Mr. Grasso stated that the applicant is in front of them requesting to convert part of a church, with no external visible change, to some dormitory units to allow a bible type school to go on. This property although zoned single residence stands out as being improperly zoned. He touched on the criteria as follows. Granting the variance would not be contrary to the public interest. The changes will be internal and there is already religious education going on there, so that would not change. The spirit of the Ordinance would be observed. He stated that this piece of property covers over three acres, with a large part of it being a parking lot, so there would be not substantial change to the neighborhood. Mr. Grasso stated that substantial justice would be done as there is no benefit in denying the petition. He stated that no external changes are being made to the building, so there would be no change to the value of the surrounding properties. Finally, he stated that this piece of land appears to be zoned improperly and to allow what is proposed goes with other churches in the community and thinks they should fully support the motion.

Mr. LeMay agreed with Mr. Grasso's comments and that the big concern is the impact on the neighbors. He doesn't see that this would have any impact and fully supports the motion.

Mr. Jousse stated that he supports the motion. He believed the church has been a good neighbor and he is glad to see that the neighbors support the petition.

Chairman Witham stated that he will also support the motion. He commented that at first, when he heard 40 students, he was not expecting such a large group. The lot itself can handle that many as can the building. There is quick and easy access to Market Street and even with that many people, it won't cause undue traffic to the neighborhood. He commented that when he goes by the church, not at service times, that there doesn't seem to be any life at the church and it would be nice to give some life to the church and have them be an active part of the neighborhood. For those reasons and the others expressed, he supported the motion.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 7 to 0.

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10) Case # 7-10

Petitioner: Industrial Rents NH, LLC

Property: 124 Bartlett Street

Assessor Plan 163, Lot 2

Zoning district: Office Research

Description: Convert existing vacant space to retail and wholesale uses including storage of material for wholesale distribution in up to 35% of the gross floor area of the building.

Requests: The variances and/or special exceptions required for the proposed work.

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

Mr. Chris Franklin stated that they are taking over the old dry cleaning plant and the way it is set up now people can't even have showrooms according to the Planning Board. They have parking, but they are up against a residential area. They are looking for something for small business trades, like a woodworker displaying their wares. The trades are allowed, but cannot display their wares with the current zoning.

Chairman Witham asked what was meant by "displaying their wares"; would it be a typical layout with a counter and cash register?

Mr. Franklin cited the example of a person looking to lease a space for appliance repair. They do some retail sales, but that is ancillary to their repair business. For example, they repair something and the person they repaired it for decides they don't want it. The owner of the repair shop would like to be able to display the item and sell it. Another example is that some people import items in and resell them. It's basically a sales office but they can't store there. They are not looking to retail out the back door, over a counter. They basically import, repackage and send out. Currently, they can't store their items there. However, the zoning allows a sales office with two or three people working out of the office. His petition is to open up the zoning a little more so that he won't have to come before the Board every time a potential lessee wants to lease the space for an ancillary sales office for retail or distribution.

Mr. Jousse didn't understand exactly what it would be. Would it be multiple small showrooms like a cooperative?

Mr. Franklin stated that they plan to divide the space into smaller units. So somebody that wants to repair appliances would take approximately 3,500 s.f. of the building, where they would have a 600 s.f. showroom with the balance of the space being used for the repairs. Currently, the repair is allowed, the showroom is not. The showroom would be for a used dishwasher or a used refrigerator that the owner wants to sell, which would be a minor amount of retail sales from the location. Another example would be someone importing products bio-medical products from Germany. It's a sales office because he has 2-3 sales people and needs a chest freezer to store the product. The chest freezer is not allowed under the current zoning. Also, they may have a plumber who mainly does repairs, but if someone wants to come in and buy a product from a counter, that's not allowed. Those are the types of uses they are getting interest in. Currently, having a retail counter is not allowed. They are only looking for 35% of the gross floor area to be retail or wholesale.

In response to questions from Mr. Grasso, Mr. Franklin stated that to market the building as office research, he would have to knock it all down and start over. There is an environmental issue that is being cleaned up and he is deed restricted from the previous owners, G&K Services/Alltex. The building has to stay the way it is. He can't disturb the floor as there is ongoing remediation on the site. In addition, the building was previously used as a commercial dry cleaner. He can't change the general nature of the building. He can't put apartments, can't offer food service or those kinds of things. He noted that they do have a clean bill of health to be in the building and using it. However, due to the location, it's not a place that could service a lot of retail; it wouldn't be a good spot for a pizza parlor or for something like that.

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

Mr. Jonathan Sandberg lives on 160 Bartlett and is an abutter. He stated that he doesn't fully understand the proposal. He is opposed to anything that would increase the truck traffic, particularly on Morning Street. There is already a lot of truck traffic on Bartlett Street going to Ricci Lumber and Morning Street is not a good place for trucks. Having wholesalers delivering to a warehouse would not be good for the neighborhood. It's a residential neighborhood with a lot of families and small children and the road itself is narrow and in poor shape. He reiterated that he is against anything that would increase the likelihood of UPS and larger trucks driving up the street, as that would be detrimental to the neighborhood.

Mr. Sandberg responded to Chairman Witham's question by saying that he has only lived in the area for a year while the Alltex building was being used. He knew that had restrictions, such as they could only come early in the morning and couldn't idle. He said it was bearable, but fears that since the road condition has gotten worse, the impact on the neighborhood would be worse. He further commented that he knows business has to take place and they can't have a vacant building forever. However, it's been nice having it calm.

Mr. Les Gove owns 51 Morning Street and 39 Morning Street. He stated that he agrees with his neighbors that the proposal is vague. He has been in the neighborhood for 16 years and stated that he is aware of what took place before and that he has come to the City a number of times asking for relief from Alltex that he didn't get because Alltex was grandfathered. The use at one point was industrial use, but when looking on-line at the zoning table, it is zoned as office research and indicates no to all retail trade. It doesn't say wholesale or warehouse either. Mr. Gove indicated that apparently someone saw it as encroaching on the neighborhood due to parking issues, etc. and the zoning was changed. Trucks cannot even turn around in the street, so that would be a problem. Mr. Gove concluded that it's a little more than he is willing to let go because he feels it would diminish the value of his property. The building has been vacant for three years and he understands the environmental issues. There are too many variables for him to support this petition.

Mr. Franklin stated that if there were any tractor trailer trucks at all, it would be few. Morning Street has a hard turn and a low bridge and people that have looked at the property have said they wouldn't be able to get a trailer in the area. There is an apartment building on the corner and he has been allowing people to park in his lot because of the narrowness of Morning Street. He reiterated that when he talked with the Planning Board, they advised him to file his request this

way. The building is not really conducive to what you would think of as an office. It was a 1950's commercial laundry. The general nature of it is not first class; it's not A, B, or C space. It's probably more of a D space if you wanted to look at it that way. Basically, they are looking for a space for contractors that need a place to store their materials inside; a trade like appliance repair.

In response to questions from Chairman Witham, the hours would generally be 9-5 or 7-3. They have not had anyone saying they want to run a 24-hour laundry. They are looking for plumbers, the HVAC person, woodworkers, that kind of clientele.

Seeing no additional speakers, the public hearing was closed.

### **DECISION OF THE BOARD**

Chairman Witham commented that this is a challenging site and building that is zoned for building research. The building has been for sale for quite a while and he commented that he believes the office research designation came about because of the development of Eldridge Park. It's tucked back but is high quality office space and he thinks they have been struggling to fill the space. There is quite a bit of land around that comes up for sale now and then that has not been developed for office research. The Board did allow a motorcycle repair shop in that neighborhood. It's a tricky one, a tough site, tough building. At some point the City would like to see something in there. Do you hold out and wait for office research. Finally, Chairman Witham stated that they need to balance the abutters concerns with the zoning ordinance and consider the history behind it.

Mr. Jousse made a motion to deny the petition as presented and advertised, which was seconded by Mr. LeMay.

Mr. Jousse stated that he is trying to understand what is being requested. He appreciates the abutters concerns because he is not clear about what is being asked. It's not specific enough. Its way too loose and he doesn't think it would be in the public's interest to give blanket permission for different business enterprises to go in there. He doesn't feel comfortable and feels granting the petition would not be in the spirit of the ordinance. There has been nothing presented as to how it would affect the values of the surrounding properties. He understands this piece of property has particular problems because of past ownership and in good conscience he cannot approve granting the petition.

Mr. LeMay stated that the petition is for a use variance that is specifically prohibited by the zoning table. He understands what the applicant is talking about as to the nature of the business, but he is uncomfortable with giving a generic, blanket approval. The application is not consistent with the zoning requirements.

Ms. Eaton agreed that the building is unique in its setting but she is hesitant to grant a variance against a zoning requirement, since it should really be rezoned. If they had a specific request for one of the spaces, that could be dealt with. However, without more details about specific use of the property, she cannot support the petition.



Mr. Parrott said the square footage is over 15,000 s.f., which would be over 5,000 s.f. retail or wholesale or a combination. Retail covers so much territory that without specifics, he shares the concerns already expressed. If it wasn't right up against a residential area, it might be different. To say you can put any type of retail that wants to rent there would be against the public interest. For those reasons, he feels it should not be granted.

Chairman Witham stated that he will not be supporting the petition. He sensed that the Board is asking for more specifics and stated that the applicant did a good job explaining what would be there, but without actual tenants he can only go so far. He further stated that he is respectful of the office research designation but feels it came about for the development of one building and anything else that has happened since is contrary to office research. Anyone in retail is not going to pay those types of rents to only use 35% of the space – it would be more for a repairman or a woodworker that had a few chairs to sell. He does not picture this as retail, such as a storefront. His concern is if the Board sticks to their guns regarding the office research designation, that the property will sit there for a long time and this building doesn't fit in. Maybe the applicant could come back with more specifics and details in regards to hours of operation, types of tenants, etc. maybe there would be an opening, but his sense is that the Board did not have enough information for a comfort level.

Mr. Franklin tried to speak but Chairman Witham informed him the public meeting was closed.

The motion to deny the petition as presented and advertised passed by a unanimous vote of 6 to 1.

11) Case # 7-11

Petitioner: Sean C. Evans & Hannah Shea

Property: 165 Dodge Avenue

Assessor Plan 258, Lot 41

Zoning district: Single Residence B

Description: Construct a 26'± x 38'± two story home with attached 24'± x 24'± garage

Requests: The variances and/or special exceptions required for the proposed work.

Chairman Witham commented that the case was listed as 10-11 on the memo, but the Agenda has it as 7-11.

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

Mr. Fred Attalla introduced himself as the broker and introduced Hannah Evans who will answer questions as needed. He further stated that Mr. Sean Evans was not able to attend as he is a police officer for the City of Portsmouth and was called to duty. Mr. Attalla referred to the information provided and indicated on the map where the Evans live at 145 Dodge Avenue. He stated that they also own the lot that abuts them, which is 165 Dodge and is a municipal use property. In addition, he pointed out Lot 43, Mr. Lee's property, directly across the street. Mr. Attalla indicated that this was an old subdivision on Dodge Street. The road work was never completed and therefore it's still intact as a paper street in front of their lot. Years ago Mr. Lee applied for a permit and received a response from the City Planner, Attorney Sullivan in reference to Mr. Lee's lot. One of the issues is the size of the lot. Currently the lot is 11,000 ± s.f., where 15,000 s.f. is

required by the zoning. In further research, after submitting the application, they discovered that in the file of Mr. Lee on Lot 43 there was supporting documentation from Attorney Sullivan that virtually made the paper street go away in the sense that he believed that since it had not been built upon and would not be built upon, the land belongs to the abutters. In essence, the Evans' have now picked up an additional 3300-3400 s.f. approximately, coming very close to the 15,000 s.f. requirement. In addition, it puts this lot in the 50% of the 14 lots, with 7 of the 14 lots similar in size, meaning precedence has been set.

Mr. Attalla further stated that part two of the variance request has to do with allowing the lot to be built upon with at least 100' of road frontage. This is where Mr. Lee's lot comes into play. Mr. Attalla showed on the map where the paved street ended and what was the paper street. He pointed out that Mr. Lee was allowed to run a driveway to his lot. Based on the findings of Mr. Sullivan, they believe that the applicants should be able to use the same easement, now part of their property, to enter this property with direct access to their driveway. He noted that the driveway parallels that of Mr. Lee. This street will never be built upon and will not be extended. Mr. Attalla stated that it is reasonable to request approval for the Evans' to build on and access the lot via the land they partially own. He pointed out that both deeds, as shown in the packets, reflect the prior easement and allows the Evans' to go over the unpaved section of the road to get to their respective properties. In summation, they are close to the 15,000 s.f. needed and precedence was set with Lot 43, the Lee property, to utilize the same driveway. It will require a septic system, state approval, local approval and town water is right at the end. The Evans' live right next door and their plan is to either sell or rent this home and build on this lot.

In response to questions from Chairman Witham, Mr. Attalla stated that he believed all the abutters had been notified of this hearing. He further stated that he has not spoken directly with Mr. Lee, but that the information provided was taken directly out of the public records. Also, since time has passed, the ownership of the roadway is further enhanced. Time has gone by and no one has developed this paper street and with the letter from Attorney Sullivan, he came to the conclusion that the matter of the paper street is between the two owners and not a City matter. However, they are here tonight because of the lot being undersized and the lack of paved frontage. In addition, Mr. Attalla confirmed that the lot had a separate tax and separate assessment all these years. It doesn't specify a building lot, but he would say it is for land only.

Mr. Grasso referred to the plan provided where a red dashed line was drawn where Dodge Avenue ends and goes over Mr. Lee's driveway. He also commented that this is the boundary line so Mr. Lee would be driving on their property to get to his house and the Evans' would be driving partially on Mr. Lee's property to get to their house.

Mr. Atalla stated that based on the letter in the packet, the property owners would now own additional property from the center line. The drawing is based on the letter and is an estimate to indicate they would be picking up additional square footage.

Mr. Grasso commented that he went up there this weekend and walked up the driveway and there is quite a drop off. He stated that the driveway would have to be widened on both sides which would impact Mr. Lee. Finally, Mr. Grasso commented that there is not enough information as to how this would be filled in.

In response, Mr. Atalla indicated that obviously the driveway needs to be enhanced and widened, but according to Attorney Sullivan's letter, those improvements should be negotiated between the property owners. He sees where Mr. Lee's driveway encroaches on the Evans' property and vice versa. He further stated that there was a plan previously, when Mr. Lee got his approval, which showed how the driveway would have to be. There is a drop off and they have already talked to people about resloping and they will be working to enter into an agreement with Mr. Lee and perhaps the owners of lot 44 as well.

Chairman Witham asked if Attorney Sullivan's position regarding paper streets being 50/50 referred specifically to this property or paper streets in general. He also asked if the tax maps have been adjusted.

Mr. Atalla stated that Attorney Sullivan's position was specific to the property and he referred to a letter from Attorney Sullivan that should be in the packet.

Mr. Grasso stated there was a letter dated July 20, 1987 and Chairman Witham stated that Attorney Sullivan essentially put the ball in the court of the two abutters. Chairman Witham further stated that based on the letter, the amount of lot area would be just barely shy of the 15,000 s.f. required. To this, Mr. Atalla commented that it would need to be surveyed, but that it is close to the 15,000 s.f.

Ms. Hannah Evans, who had been listed as Hannah Shea when they bought the property, stated that she agreed with Attorney Sullivan's opinion that it should be a shared ownership and should be a private matter versus a City matter. She further stated that she and her husband have spoken with most of the neighbors in the neighborhood and they have all expressed thumbs up for the project. They have been paying taxes on the lot all along and would prefer to be paying taxes on a lot with a house on it. She stated it is a wonderful opportunity for them to build a house for themselves and perhaps have the current property be a rental property. Finally, she stated that she and her husband would like to settle the issue of the shared paper street at the new address, privately and civilly with their neighbor.

In response to questions from Chairman Witham, Ms. Evans stated that she does not know Mr. Lee's position regarding the driveway. She confirmed that Mr. Lee does live in the house but that their hours are different, so they don't see much of each other, although she felt they had a good relationship. Chairman Witham commented that he had the most at stake with all of this and they don't have a voice from him. Ms. Evans stated that the home itself that would not be anything at all that would be offensive or cause issue for Mr. Lee. Sharing the roadway is what would have the most impact. They have consulted professionals in the area regarding the grading work and slope of the property and they plan on taking care of all that if they are granted the requested variances.

In response to a series of questions from Mr. Parrott, Ms. Evans stated the following. She is not aware of any efforts to continue Dodge Avenue and make it an official street. As far as she knows, it was never brought up in City Council. As for the house across directly across the street, 154 Dodge Avenue, (Lot 44), Ms. Evans stated that her neighbor, Ms. Eva Bowen is aware of the project and that the only traffic is she and her husband, Mr. Lee and Ms. Bowen. Basically,

adding another house would not increase traffic and it is her understanding that Ms. Bowen is 100% in favor of the project.

Mr. Attalla commented that Ms. Bowens' driveway comes right off the paved driveway so she would not need access to the proposed driveway.

Mr. Parrott stated that he understood, but in dividing up the property, she would end up with half.

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

Ms. Evans stated that she would like to make one more point. She and her husband do not want a bad relationship with their neighbors. They don't want to encroach on the privacy of their neighbors or create a problem for their neighbors, particularly Mr. Lee. If this truly, as a private matter, is something that Mr. Lee is 100% opposed to, they would respect that.

Seeing no further speakers, the public hearing was closed.

### **DECISION OF THE BOARD**

Chairman Witham stated that the request is to allow a home on a lot without 100' of frontage and with no access to a city street. He further commented for the record that this is one of those situations where he would have liked the powers that be, maybe the City Attorney, to provide some insight. He commented that he is sure there is precedent regarding all the paper streets in the area and how they have been dealt with and what has seemed to be an equitable way to deal with this, as opposed to a letter saying it's for the neighbors to figure out.

Ms. Eaton made a motion to deny the petition as presented and advertised, which was seconded by Mr. Grasso.

Ms. Eaton pointed out that they do not have a true legal opinion in this case. The letter stating that the abutters need to work this out is not sufficient. The argument is that the owners now own halfway up to the paper street, which means Lot 43, Mr. Lee now has a landlocked lot and without some type of legal definition of what he owns, he doesn't have access to his house anymore. She is puzzled that Mr. Lee is not represented tonight. She further stated that Ms. Bowen would own half the way up and so would the Evans' and then there is no access to Mr. Lee's home. Without seeing a plan that shows legal property lines, there is no evidence as to who owns the paper street. She stated that some more steps need to be taken to show who owns what and what kind of legal entity has access to the home before a variance can be considered. Ms. Eaton concluded by stating that there are too many issues that could put somebody out of use of their property without better evidence than what was presented. Consequently, she doesn't feel any of the criteria were met and cannot grant a variance at this time.

Mr. Grasso commented that his problem is with the first criteria, granting the variance would not be contrary to the public interest. As Ms. Eaton alluded to, Mr. Lee would be cut off. He reiterated that he has been out to the property and walked up and down the driveway trying to figure out how a home could be constructed without impacting Mr. Lee's lot and therefore it fails

that test as well as most of the others. As a result, he supports the motion to deny in its current form.

Mr. Parrott stated that the only legal opinion presented is dated 1987, which is a long time ago. He further commented that they have the great fortune of still having the same City Attorney. This should have been presented to him so that he could guide the Board; many of the things the Board does do not turn on a point of law, but this one does. Paper street proposals are not as simple as they may appear. In addition, Mr. Parrott voiced his concern that they have not heard from Mr. Lee in some form. The status of the roadway needs to be clarified as to whether it has reverted and if the deeds have been reflected to show that. The advice was that it's up to the neighbors to work on it and figure it out among themselves, which is pretty vague as well. Mr. Parrott concluded that by granting this now, they could create more problems than they would be solving. The legal status should be clarified so that the Board can operate from a basis of facts and not just opinion. For all those reasons it fails the tests, especially the public interest test, and he supports the motion to deny.

Mr. Durbin stated that he will support the motion to deny. Without a legal rights determination or legal opinion from the City, he doesn't see how this could move forward. If it turned out that part of what they are proposing is owned by Mr. Lee, the appropriate action would be for Mr. Lee to get an easement. At this point, he is unsure if Mr. Lee even knows what he owns. He commented that the appropriate action would be for the landowners to petition the City to determine the legal rights. For those reasons, with no survey of the property boundaries, he feels they would be creating more problems than they would be solving.

Mr. Jousse indicated that he is uncomfortable with the petition. It doesn't define how Mr. Lee would get to his property and it appears that part of his driveway as it stands right now is on the applicant's property and part of it is on the neighbor's property at 154. It appears he is infringing on their "newfound" property on their half of the paper street. It's not clear at all. In order for him to consider being in favor of the proposal, he would need to see a written agreement from Mr. Lee as to what he is agreeing to; a shared or separate driveway. .

Chairman Witham stated that he will not support the motion. There is a lot of concern about Mr. Lee, but that's not the issue tonight. In terms of taking away his driveway, the City Attorney has taken the position that a paper street gets split down the middle. It is an older decision, but it is a legal opinion nonetheless. He knows of Mr. Lee and feels that he is the type of person that would be here if he had an opinion on this. Maybe he knows that it's up to the abutters to work this out and he's comfortable with working it out. There are a few questions. This is a buildable lot; it was designed as a buildable lot and the street was never finished. There is one abutter that was granted a driveway to get to his lot and the applicant is asking for a driveway to get to theirs. It seems they own considerably more land than advertised and that the criteria have been met. Chairman Witham stated that he doesn't see how the Board would be creating more problems by granting the petition. If Mr. Lee has problems, they exist now and will not be created by any decision the Board makes. Maybe the applicant needs to get the driveway clearly spelled out, get Mr. Lee on board and get Mr. Sullivan back on board with some type of an opinion.

Mr. Jousse added that he is not adverse to the applicant coming before the Board again if some of the questions presented are answered.

Chairman Witham reiterated that the City Attorney has already taken a position that the abutters need to work this out. He is willing to go on good faith, but understands that the Board would like to see some type of agreement from Mr. Lee before approving the petition as proposed.

The motion to deny the petition as presented and advertised passed by a vote of 5 to 2, with Chairman Witham and Mr. LeMay voting against the motion.

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12) Case # 7-12

Petitioner: John T. Martin & Margaret Ronchi

Property: 13 Harding Road

Assessor Plan 247, Lot 40

Zoning district: Single Residence B

Description: Construct an accessory structure (wall) in the required front yard.

Requests: The variances and/or special exceptions required for the proposed work.

Chairman Witham reiterated that this petition had been withdrawn at the applicant's request.

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Mr. LeMay stepped down for the following petition.

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13) Case # 7-13

Petitioner: Matthew D. Burke

Property: 46 Aldrich Road

Assessor Plan 148, Lot 26

Zoning district: General Residence A

Description: Replace stairway, steps and roof over landing

Requests: The variances and/or special exceptions required for the proposed work.

Mr. LeMay stepped down for this petition as he is an abutter.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Matthew Burke, the owner of the property stated that they are seeking a variance to replace the stairway to the front door and to add an overhead roof. They are asking for a small increase over the original footprint, but the setback will remain the same. The new requirement is for a 15' setback, but the house itself is only setback 9'. He concluded that he hopes the request meets the requirements.

Mr. Burke responded to questions from Chairman Witham by confirming that the front setback is currently 20" and that there is not a roof currently over the stairs.

In response to a question from Mr. Grasso, Mr. Burke commented that the current steps are temporary. He didn't realize when the contractor pulled out the old stairs, which were brick and crumbling, that he would need a variance.

**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. Parrott made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso.

Mr. Parrott stated that this is straightforward and simple. Granting the variance would not be contrary to the public interest. It's hard to see any public interest in replacing the stairs essentially in the same position they are in. They are not even close to meeting the setback, which is impossible because the house itself doesn't meet the setback. Granting the variance would observe the spirit of the ordinance because it would allow the applicants to maintain and upgrade their property. If the stairs are falling down, it's in everyone's interest to repair or replace them. Granting the variance would do substantial justice. There is nothing in the public interest that would outweigh the advantages to the homeowner to replace the steps. Granting the variance would not diminish the value of surrounding properties. If anything, maintaining your property in good repair is a bonus to surrounding properties. Finally, the unnecessary hardship test is defined by the existing special conditions that the house is fairly close to the property line and by definition the steps and landing have to be as well. Therefore, the petition meets all the tests.

Mr. Grasso agreed with Mr. Parrott's comments and stated that the replacement is an in-kind replacement. Although it is close to the sidewalk, it existed that way for many years prior to this with no problems. Consequently, Mr. Grasso supports the application for a variance.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 6 to 0.

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Mr. LeMay resumed his seat.

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**14) Case # 7-14**

Petitioner: Walter G. Ziebarth & Michelle White

Property: 3 Marsh Lane

Assessor Plan 123, Lot 6

Zoning district: General Residence A

Description: Construct a two story garage on left side and connector addition.

Requests: The variances and/or special exceptions required for the proposed work.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. John Chagnon introduced himself as the engineer for the project and put a site plan on display. He stated that he prepared the survey and application materials for the Ziebarth's. In addition, he introduced Mr. Bob Gray as the contractor for the project. He noted that the applicants were available for last weeks meeting, but unfortunately because of the split in the agenda, they were unable to attend this meeting. The request is for a 5' side setback on the easterly side of the lot,

where 10' is required and 27.4% building coverage where 25% is the maximum allowed. This is an historic house build in 1934 that currently has a 1-car garage. The owners would like to expand the garage to a two-car garage and allow better second floor access. Currently, there is access in the middle of the structure by an old, narrow, non code complaint stairway. Part of the proposal would allow them to better serve the second floor with a code conforming stairway.

Mr. Chagnon further noted that the proposal would result in only a small reduction in the open space on the lot, from 45% to 42%, where 30% open space is required. In addition, Mr. Chagnon noted that two variances were granted by the Board in 2000; one for 33.8% building coverage where 25% was the maximum. They also granted a 14' rear setback where 20' was required. The application in 2000 was to construct a connector between the garage and the structure at the time, which Mr. Chagnon pointed out the connector on the site plan. He commented that you might wonder why the granted variance of 33.8% is now a proposal to add space to the lot and come up to 27.4% coverage. He stated that in 2001, after the variance was acquired, the Ziebarth's entered into a lot line agreement and acquired more property, which made the lot bigger than it was when they received the variances in 2000.

Mr. Chagnon commented that the new proposal would actually move the proposed structure forward, so that the rear setback would be brought into compliance and the only setback variance would be the left side next to a municipal pumping station. Beyond that is an area that is a public easement for the residents to walk and enjoy North Hill Pond. Mr. Chagnon submitted that there would be no reduction in light and air and no impact on the neighbors by allowing the structure to go closer to the lot line by 5' from what is allowed in the ordinance. Finally, Mr. Chagnon read and submitted a letter from the closest abutters, Lawrence and Jessica McGonagle, which is in support of the petition. He also commented that in the application package he went over the criteria and won't go over it again because of the late hour. He then turned the discussion over to Mr. Gray to review the need for the square footage and for pushing the structure over to the east.

Mr. Bob Gray from Gray Construction stated that he met with the owners and wanted to clarify a few points. The existing home is on a crawl space kind of area, so the mechanicals are in a small garage. The main concern was that in the center of the main house is an out-of-code, tight, winding stairway with a 9" tread and an 8 1/2" rise leading to the two bedrooms on the second story. Their main concern is to deal with the mechanicals in the breezeway section and to incorporate a code complaint stairway. The stairway would be between the kitchen and garage and would allow for space for a hot water heater and boiler. The house is small and with the proposed changes, they are also trying to achieve a small space off the kitchen, enough for a small table. Mr. Gray pointed out the kitchen area and stated it is basically a walkway.

In response to questions from Mr. Grasso, Mr. Gray stated that the main concern is to work the mechanicals into the space as well as to expand the kitchen slightly. They did not address the plan without the portion between the garage and the house. The stairs do come into the garage. The angle would go up, but can still pull a car under them. He further commented that they tried to scale the stairs down from the 24' width to downsize the two-car garage as best they could.

Mr. Parrott asked where exactly the stairs are now. Mr. Gray pointed out on the site plan and stated that if you look at the main house, to the right of the plan, as you enter the front door, you see the word "up".



Chairman Witham commented that it seems code complaint stairs within the house structure would make you lose the bathroom and entry on the first floor and bathroom on the second floor. Mr. Gray concurred that it would be quite disruptive to work anything within that footprint and you would lose the bathrooms in the house.

Ms. Eaton asked if there would be living space above the proposed two-car garage and Mr. Gray confirmed there would be.

In response to Mr. Parrott's questions, Mr. Gray stated that there are not intentions to make the living area above the garage into an apartment. It would be a great room without a kitchen. He further commented that on the first floor, to the right is a small family room. It's a small house and the owners wanted a little more breathing room and space and thought above the garage would work. He further commented that the dimensions of the main house are 18' x 32'.

Mr. Chagnon stated that the first floor plans show the door to the connector and the stairs going up. The other part shows that there is no change to the driveway, however it will access the garage the way it should be. The use is an allowed use. It is a single family and will stay a single family, which is in line with the character of the neighborhood. Mr. Chagnon concluded that the criteria are met, as outlined in his application and closed his presentation.

### **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 approve the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. LeMay stated that this is a straightforward variance. Granting the variance would not be contrary to the public interest. Where there is HDC oversight on development of the area, there is little public interest beyond that. Granting the variance would be in keeping with the spirit of the ordinance as the use is consistent with the zoning in the area. It remains a single family home and improving the lot size over the course of the years worked in their favor. The variance is just a small percent over the amount allowed. Granting the variance would do substantial justice. There is no harm to the public or individuals compared to harm to the owners by not allowing the variance. Granting the variance would not diminish the value of the surrounding properties. There has been no evidence presented to that effect and the abutter most affected has endorsed the project. In regards to unnecessary hardship, the location is next to a city lot and perhaps the age of the lot with the house on one side could be a wider lot, but it is not. Having the 5' setback on the side where the variance is sought is not particularly important as it will be open for quite a distance due to the undeveloped city pumping station next door.

Mr. Parrott concurred with Mr. LeMay's statements.

Mr. Grasso stated that he will not support the motion. He thinks the breezeway could be shortened and this could be built without a variance. He feels a variance should be a last resort. He stated that it is a large addition to a small lot and feels something smaller in scale could be presented.

Ms. Eaton and Mr. Jousse both agreed with Mr. Grasso and will not support the motion.

Chairman Witham stated that he will support the motion. He felt in this situation it was a well thought out and well designed project. He stated that usually his biggest concerns are the effect on the neighborhood and he doesn't think it will change the essential characteristics of the neighborhood. There is no adverse affect to the abutters and no change in property values and he supports the motion.

The motion to grant the petition as presented and advertised was passed by a vote of 4 to 3, with Ms. Eaton and Messrs. Grasso and Jousse voting against the motion.

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Ms. Eaton stepped down for this petition.

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15) Case # 7-15

Petitioner: Stephen & Karin Barndollar

Property: 120 Ridges Court

Assessor Plan 207, Lot 61

Zoning district: Single Residence B

Description: Install a ground mounted solar array.

Requests: The variances and/or special exceptions required for the proposed work.

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

Mr. Stephen Barndollar stated that he and his wife Karen were owners of 120 Ridges Court and were there with the engineer, Mr. John Chagnon. He distributed a letter from the abutters and an engineering firm.

Mr. Jousse asked if the Board should address Fisher v. Dover. Chairman Witham stated that if someone would like to bring it up, they can address it. Mr. Grasso stated that he would second it, if Mr. Jousse wanted to bring it up.

Mr. Jousse stated that he would like the applicant to make some comments as to what is essentially different from what was requested before. That way the Board will be applying the rule of Fisher v. Dover Fisher fairly to everyone.

Mr. Barndollar stated that the main difference is the location of the panels themselves, which he pointed out on the plan. He stated that on the previous application the panels were roughly 5' from the property line and now they are back just behind the garage, 15.6' from the front property line. The size and scope of the panels is the same, at 176 s.f. and the angle of 45° on a pedestal is the same as presented before.

Mr. Jousse stated that he feels there is enough of a difference from the present proposal to the past proposal so they can go ahead and hear the presentation. Mr. Grasso agreed.

Mr. Barndollar indicated the documents submitted. The first is a letter from JSN Engineering, the structural engineers that did the original structural work on the residence. He further indicated that one of the concerns of the Board regarding the prior proposal was the potential of securing the panels to the roof of this house. This concern has been addressed. Mr. Barndollar indicated that the second document is a document signed by the three abutters to the property that deal with support of the project and the fact that they do not want to see the panels on the flat roof of the property, relative to the abutters views, since all three properties are behind them, as they are on the water.

At this time, Mr. Barndollar stated that they looked at other places on the side of the house to install the panels so they could have electricity inside the house. The project is relatively small, providing about 25% to 28% of their current electrical use. The setback is 13.6'. Without going through the five criteria for the ordinance, he stated that the main concern is the special condition of their property and the lack of any suitable location, including the roof of the house, to site the panels. Behind the garage, where there is no living space, there are three windows that would be impacted. If the panels are moved out to the center of the site, next to the house are two maple trees and the bedrooms with two windows are located there, so that would be impacted by the panels. Anything further down the center of the property would be closer to the water and would have an impact as far as possible trenching and wetlands use. Consequently, the 11' x 16' structure behind the garage seems to be the best location for the panels.

Mr. Jousse asked what the setback was from the residence to the property line and Mr. Barndollar replied that it was basically the same and confirmed that the house would be the closest point to the setback.

### **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. Grasso made a motion to grant the petition as presented and advertised, which was seconded by Mr. Durbin.

Mr. Grasso commented that he was opposed to the first proposal, but this one seems to fit in better with the landscaping and how the house sits on the lot. Keeping the solar array framework in line with the house setback is a good idea and the other side of the house has large trees, so it wouldn't be efficient. The variance would not be contrary to the public interest. There is no real public interest as it abuts the water. The spirit of the ordinance is observed. The framework will be in line with the house and is no closer to the setback than the house. Substantial justice is done; the balancing test is that there is no real benefit to deny this in favor of the public. Values of the surrounding properties will not be diminished. The hardship test is that the use is allowed and this is about the only place on the property to put it. He further commented that when this project was

proposed earlier in the year, it was with a 5' setback, which was opposed by the Board. He will support the petition.

Mr. Durbin commented that the applicants made a conscious effort to place the panels in a less obtrusive, workable area of the property and listened to the recommendations of the Board and therefore he can support the motion as presented.

Mr. Jousse commented he will support the request for a variance for this. He further stated that last time the panels were 5' away, but this time they are more in compliance with the spirit of the Ordinance and therefore he will support the motion.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 6 to 0.

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#### **IV. ADJOURNMENT**

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:25 p.m.

Respectfully submitted,

Mary E. Koepenick  
Administrative Clerk