

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

7:00 P.M.

AUGUST 18, 2015

MEMBERS PRESENT: Chairman David Witham, Charles LeMay, David Rheaume, Christopher Mulligan, Patrick Moretti, Jeremiah Johnson

MEMBERS EXCUSED: Vice-Chairman Arthur Parrott, Derek Durbin

ALSO PRESENT: Planning Department, Juliet Walker

Vice-Chairman Parrott and Mr. Durbin were excused, and Mr. Johnson assumed a voting seat for the meeting.

I. APPROVAL OF MINUTES

A) July 21, 2015

B) July 28, 2015

*The two sets of minutes were **approved** with minor corrections by unanimous vote.*

II. REQUEST FOR EXTENSION

A) Request for Extension for property located at 324 Parrott Avenue.

*Mr. Mulligan made a motion to **grant** the one-year extension, and Mr. LeMay seconded the motion. The motion **passed** with all in favor, 6-0.*

III. PUBLIC HEARINGS - OLD BUSINESS

A) Case # 7-13
Petitioner: Jillian Mirandi
Property: 19 Woodbury Avenue
Assessor Plan 162 Lot 65
Zoning District: General Residence A
Description: Replace front entry.

Minutes Approved 9-15-15

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 front yard setback of 2' 10" +/- where 15' is the minimum required and a building coverage of 29.6% where 25% is the maximum allowed.

A request for setback relief for a shed was heard and granted at the July 28, 2015 meeting. The above request was postponed to this meeting.

SPEAKING IN FAVOR OF THE PETITION

The owner Mr. Joseph Mirandi stated that the porch was slightly smaller than the previously proposed porch, and he addressed the criteria, saying that the petition met them.

Mr. Rheume noted that the front entryway had a small protruding roof and asked Mr. Mirandi whether he would rebuild it and if so, whether it would protrude further. Mr. Mirandi replied that he would rebuild it in the same size. Mr. Rheume asked whether the cantilevers would be reused, and if so, whether two support columns would be added. Mr. Mirandi said he would do so if he could, but he thought they were rotten, and the columns would depend on what was found. Mr. Rheume then asked Ms. Walker whether the new railing constituted an above 18" protrusion into the setback, and Ms. Walker replied that it would be included in the setback. Mr. Rheume stated that the required setback might have to be changed so that the applicant could put it in because he felt that 2' 10" was a bit wide.

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 asked for clarification on the dimensions. Mr. Rheume replied that the proposed front yard as indicated in the Public Notice was 2' 10" and the applicant showed a 27" dimension for the front step, which he thought would be okay. However, because of the railing, there would be a closer encroachment to the sidewalk than what the advertisement said, so the Board would need to grant the extra room for the 27 inches for the front steps. Mr. LeMay concluded that Mr. Rheume was in agreement with the drawing, and Mr. Rheume said he was, but his concern was that it was advertised as a 2' 10" setback, so if the Board said 'as advertised' in their motion and didn't change it, it could be an issue for the building permit.

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

Mr. LeMay stated that it appeared to be the minimal thing that could be done to achieve code-conforming steps, and it was in the public interest. The footprint of the property would be minimally impacted with the new layout. The general public and neighbors would be minimally affected, and he thought it would be a positive effect. Surrounding property values would not be diminished because they would not be affected in any negative way. As

for hardship, Mr. LeMay felt that it would be an unreasonable hardship to impose by not relaxing the zoning restriction on that particular dimension because they'd be stuck with a non-conforming set of steps.

Mr. Rheaume concurred with Mr. LeMay, stating that the main issue was the spirit of the Ordinance. Fifteen inches was the minimum required and less was asked for at 2'10". It was common in Portsmouth for homes to be built up close to the front of the lot with a stairway on them, and he felt that the rebuild was reasonable in size and scope for a front entryway. His one request was that the applicant try to preserve the unique cantilever because of the character of the neighborhood and several homes that had the cantilever-supported roof.

The motion passed with all in favor, 6-0.

B) Case # 7-7

Petitioner: Amba Realty, LLC

Property: 806 Route 1 By-Pass

Assessor Plan 161, Lot 43

Zoning District: Business

Description: Expand first floor to 5,150 sq. ft. of retail space and construct second floor for office space.

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

1. A Variance from Section 10.1113.20 to allow 9 parking spaces to be located within the required front yard and between the principal building and the street;
2. A Variance from Section 10.1112.30 to allow 26 fully available parking spaces and 2 restricted parking spaces where 28 are required and to allow parking 6.5' from a residential zone where 50' is required.
3. A Variance from Section 10.1113.41 to allow parking 0' from the front lot line where 20' is required;
4. A Variance from Section 10.1113.43 to not provide landscaping and screening within the front setback.

SPEAKING IN FAVOR OF THE PETITION

Mr. Mulligan recused himself from the petition.

Attorney John Bosen on behalf of the owners the Patels and Mr. John Lorden of MSC Engineers were present to speak to the petition. Attorney Bosen stated that they wanted to withdraw the request for a variance on Section 10.1112.30 because they did not need the 26 parking spaces and the two restricted ones. They already had 26 spaces and the other two were designated as temporary. He said that Gary's Beverage would replace the old Mama D's restaurant, and he went through the variances and criteria and referred to a 1970s plan from the City file that showed a similar parking configuration and traffic pattern. He stated that the property had special conditions because it was a small lot surrounded by asphalt and

gas stations on both sides, with nearby residences, and that the use would be compatible with surrounding commercial businesses.

Mr. LeMay said he understood the screening but noted a green space in front of the property. Attorney Bosen said it was a concrete island. Mr. Lorden then corrected him and said the island was not concrete but looked like it was because it didn't have a lot of growth, and they had reached out to the Department of Transportation (DOT), who said they would allow them to plant there. He said it would be resolved during the Planning Board process. Mr. LeMay asked about signage for the multiple offices on the second floor, and Attorney Bosen replied that they would use existing signage. Mr. Johnson asked whether TAC had asked for a traffic study, and Mr. Lorden stated that TAC told them they would have to work with DOT and submit a new driveway application. Mr. Rheume asked whether the upstairs offices would be rented out to potential tenants, and Attorney Bosen said they would be used by Gary's Beverages. Mr. Rheume noted that Attorney Bosen had referenced the fact that Gary's Beverages was moving due to the need for a new parking garage, but the original plan indicated that the current building would be untouched. He asked if anything had changed since it was presented to the City Council. Attorney Bosen said he couldn't really answer the question but said there were six years left in the lease.

Ms. Patel, the manager of Gary's Beverages, then rose and stated that the parking garage would be put on the back side. She noted that the building, if left untouched, would affect her business. Mr. Rheume asked if the intent for the new Gary's Beverages would be the same as it currently was, primarily for beverages with a limited selection of other goods, and Ms. Patel agreed that it would be exactly the same kind of store.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. David Platt of 475 Dennett Street said he was there on behalf of the residential abutters, and that one thing that affected everyone was the 50 feet cut down to 6-1/2 feet, which everyone felt was there to protect the abutters. They were also concerned that there would be more traffic on Dennett and Burkitt Streets and that they would not be able to take a left to get into Gary's Beverages so they would park on Dennett Street and walk, taking up valuable parking spaces for residents and impacting the value of people's properties.

Attorney Ken Murphy of 429 Middle Street representing Mr. Richard Zofoli, the direct abutter, stated that their biggest concern was the proposed new traffic pattern because the 5,000' addition would change the ability of vehicles to come in and out in front of the building and would force them to go around the back. They were also concerned that the new entryway on the side would create a lot of parking relief due to the addition's size, which he felt was a self-created hardship. He questioned whether the applicant should get relief just because they agreed to move. He said they were against all the variances except the one for the screening. Mr. Rheume asked which abutting property belonged to his client, and Attorney Murphy said it was the vacant one on the bypass, which meant that vehicles would have to go on Mr. Zofoli's property to enter and exit. Mr. Rheume asked whether there was an easement understanding, and Attorney Murphy said it wasn't really an easement, and he read it.

Mr. Zofoli then stated that he had owned the property for 50 years and that his concerns were about his property being within 20 feet of Gary's Beverages, people parking in his yard, and traffic jams.

Mr. Brett Berger of 507 Dennett Street stated that he was an abutter and agreed that traffic would constantly go in and out, but he was more concerned about the gap in the fence, saying that people currently went through his property, and he thought it would get worse. Mr. Moretti asked him if he had concerns about the convenience store that would be next to him, and he agreed.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen stated that the biggest concern was traffic, yet there was no new traffic plan. He distributed a handout that showed the traffic plan for Mama D's restaurant, noting that it was the same traffic pattern and that there was parking in the front and showed where traffic entered in the front and exited in the rear. They were not proposing anything different, and he emphasized that the entrance was in the front and not on the side. Their addition was 20'x70', not 5,000 square feet, and there were long-standing easement rights on the property from the 1970s.

DECISION OF THE BOARD

Chairman Witham stated that the Committee should focus on the four requested variances and the allowed use as they related to parking and the land screen buffer and should not get into the easement legalities.

Mr. LeMay asked whether it was up for site plan review and if it would be the appropriate venue for the fencing and sound barrier discussions and was told that it would. The Committee discussed the pavement layout and the angled parking, noting that the new plan was different. Chairman Witham said he was sympathetic to the abutter regarding the traffic flow, but there was an easement in place and the Board didn't have a variance request for traffic. Mr. Rheume agreed, saying that he had no issue with the nine parking spaces in the front yard between the building and the street because the existing structure and all the Route One businesses had the same arrangement from earlier uses. They discussed the variance to allowing parking zero feet from the front line and the variance for landscaping and screening, and they felt that the real issue was the second variance because it asked for a lot of relief and might reinforce the need to keep a large barrier. Mr. Rheume noted that there would be some encroachment on the properties but not a massive one, and it would not change the essential character of the neighborhood. He felt that it would be a quick in-and-out. Mr. LeMay said he would feel better if he knew there would be a barrier or solid fencing in the 6-1/2 feet to screen oncoming headlights and sound, but Chairman Witham said the site plan noted that the existing fence would remain and that they could stipulate it.

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

- 1) that the applicant must work with the Planning Board, through the site plan review process, to improve the fencing along the southeast property line so that it will provide an effective buffer to mitigate the light and sound reaching*

surrounding properties, and to prevent pedestrian access through or along the fencing.

Mr. Moretti seconded the motion.

Mr. LeMay stated that the issue was the re-use of the property that had been used in the same way for decades. Granting the variance would not be contrary to the public interest because the proposed was a bit more intense than the previous restaurant's use but not substantially, and nearby businesses had similar transient traffic, so it would not conflict with the explicit purpose of the Ordinance that provided for the use of that zone, and it would not alter the essential character of the neighborhood. Substantial justice would be done because preventing the use of the property, not just for Gary's Beverages but for anyone else based on the fact that they wanted to modernize the parking or establish a buffer area by distance, would be an injustice to the applicant and would prevent practical use of a large building in that area. Granting the variance would not diminish the value of surrounding properties because it was obvious that the parcels along that way were used for commercial businesses, and that would not change. He saw no effect on surrounding property values and that it might be better to have it cleaned up. Literal enforcement of the Ordinance would result in unnecessary hardship to the applicant because of the special conditions, which he thought had to do with some of the grandfathered characteristics of the property and the fact that it was used that way for years. The intensification of the building on the site would not substantially increase the need for parking, so he thought that restricting it because of that parking, which had previously existed in the location, would be an unreasonable hardship.

Mr. Moretti concurred with Mr. LeMay and said he thought it would be the right use of the building. Even though it would get bigger and the parking would change slightly, the fact that it wouldn't be another restaurant would eliminate odors, rodents, and so on and would be a vast improvement. He realized there was concern from the neighbors about parking on Dennett and Burkitt Streets and any street leading up to it might increase, but he didn't think it would totally happen. He said he thought that the bridge in the very near future would close down and the traffic on Route One would diminish for a while, and that the number of non-residents parking in the neighborhood would probably be no different than when another store was down the street.

Mr. Rheume stated that he would support the motion and suggested that the stipulation state that "the fencing along the southeast property line be improved for sound and light and be subject to site plan approval by the Planning Board", and he asked the maker of the motion if he was amenable to that. Mr. LeMay agreed and emphasized that the fence be solid so that pedestrians couldn't get through it, and that it isolate the area from the residential area. Mr. Rheume said it could serve as a barrier or buffer from sound, light and pedestrian egress, subject to the site plan approval. Mr. LeMay added that it be subject to the discretion of judgment of the site plan review.

Mr. Rheume also stated that the concern about parking on Dennett Street with pedestrians was something else that could be brought up before the Planning Board and could be considered for the Site Plan review. He also noted that there was some concern about the addition of the second floor, and he wanted those who spoke about that issue to understand

that there was no variance required for it and that the applicant was not requesting approval for it. He said the applicant could do it regardless of anything else they wanted to just simply add on. The Board had no control over that aspect of the project.

Mr. Johnson stated that he would reluctantly support it but was not convinced that the use was appropriate for the site. However, he felt that the variances were reasonable. Chairman Witham said that his comments would be mostly directed to those who spoke in opposition. The Board looked to protect the neighbors and uphold the Zoning Ordinance because that was the spirit and intent of the Ordinance, and if the applicant wanted a variance to allow a traffic pattern behind the building where it was not allowed, or wanted to add a second floor where a second floor addition was not allowed, that would be different. But, the variance requests asked for were to re-use an existing parking lot in more or less the same configuration that may need to go from 90 degrees to 45 degrees angled. It was a minor change. The other request was for the front landscape buffer out front, which had never been there. It was on State of New Hampshire land and the applicant would work with the state to get some plantings, so they would work within the spirit. He said he might have concerns with it, but they were not related to the variance request, and the Board's job was to uphold the Ordinance and deal with the request before them, and he felt that the requests did meet all the criteria.

*The motion **passed** with all in favor, 5-0.*

Mr. Mulligan resumed his seat.

C) Case # 7-8

Petitioner: Moray, LLC and 215 Commerce Way, LLC

Property: 215 & 235 Commerce Way

Assessor Plan 216, Lots 1-8A & 1-8B

Zoning District: Office Research

Description: Provide parking, on a corner lot, located between the street and the building.

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

1. A Variance from Section 10.1113.20 to allow off-street parking spaces to be located in a front yard between a principal building and the street.

SPEAKING IN FAVOR OF THE PETITION

Attorney Sharon Somers on behalf of 215 and 235 Commerce Way stated that the merger of the two lots required parking, which would be between the building on Lot 215 and Portsmouth Boulevard, and that none of the parking they proposed would be in front of any of the buildings. She went through the criteria and stated that the petition met them.

Mr. Mulligan asked Attorney Somers why it was necessary to merge the two lots, and Attorney Somers said it was to maximize the design capabilities of Lot 235. He asked whether she needed additional acreage to get the sides of the buildings in, and Attorney

Somers said she didn't because there were two phases, and the two buildings on Lot 235 would be joined together, but the access would join the parking on Lot 215, enabling the traffic flow and access to work better. Mr. Mulligan stated that if there was another way other than merging the lots, the relief would not be needed, but Attorney Somers disagreed, saying that it was a corner lot and there were significant building setbacks, and they would still have to incorporate parking between the new construction on Lot 235 and Portsmouth Boulevard. Mr. Rheume asked whether all the landscaping would be completed in Phase 1 relative to Portsmouth Boulevard. Mr. Patrick Crimmins of Tigue and Bond rose to speak and stated that Mr. Rheume was correct. Mr. Rheume asked why the petition was before them, and Ms. Walker replied that the Legal Notice should have designated the parking between the principal building and the street, and that the second part was for the relief and the Board was concerned with 215 Congress Way.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Angela Lambert of 3 Osprey Drive stated that she believed the parking lot went against her family's well-being and would have a negative impact on her property's value. Traffic was currently directed left onto Commerce Way, and the proposal would direct traffic through the 4-way stop sign and pass her home. She said that four cars currently passed her home during two hours of peak morning traffic, and she believed that number would be increased to 100 after Phase 1 and 300 after Phase 2. She was concerned about noise and light pollution from the parking lot.

Ms. Gail Forest of 2 Osprey Drive said she agreed with Ms. Lambert and that her biggest concern was that the green zone would be infringed upon and their property values lowered.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Somers stated that the Landscape Site Plan had a substantial landscape buffer at the corner of Commerce Way and Portsmouth Boulevard and, if juxtaposed against the aerial plan, it would show that the landscaping fit nicely into the vacant and would address some of the abutters' concerns. Mr. Rheume asked whether the client had thought of increasing the landscaping on the lot to further shield it, and Mr. Crimmins said they had done a large landscape bern two years before.

DECISION OF THE BOARD

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

- 1) that appropriate screening must be put in place to ensure that light generated from the parking lot running along Portsmouth Boulevard will not spill over onto that street.*

Mr. Mulligan seconded the motion.

Mr. Rheume stated that a number of good points were brought up by the abutters but were not things that he thought impacted what the Board was being asked to do. However, he thought there were things that would be good to talk about in front of the Planning Board

during the site review process that the applicant would need to go through if receiving approval from the Board. What was being asked of the Board was almost more of a technicality, in some senses, of placing the parking between a principal building and a road. The idea in the Zoning Ordinance and what the spirit was trying to capture was that they overall wanted to try and see buildings being presented along a street front with parking to the rear. To a certain extent, the applicant had tried to do that but recognized the kind of unique configuration of the property, especially considering that the real issue was about parking that was relative to another structure upon a combined lot, which was the applicant's own doing because they were trying to combine their lots. It was something that was allowed overall by combining the lots, based on the questions that Mr. Mulligan asked, to make for the best plan overall, and it would allow them to probably create a better parking arrangement between two properties. He said he could understand why the applicant was doing it but asked whether it was really the public interest to say that the applicant could not create parking there when, if 215 Commerce Way wasn't there, they could continue to do it and have parking adjacent to Portsmouth Boulevard because it wouldn't be between the building and a street. Consequently, he felt that there was really very little public interest that was being violated by what the applicant was asking to do. There was some potential that, down the road, the Planning Board might ask them to move the parking back or something relative to Portsmouth Boulevard, but that was not the purview of the Board.

Mr. Rheume stated that granting the variance would not be contrary to the public interest. Again, the specific public interest they were worried about was whether the parking was a detriment because it was between a building and a street, and what the Board would look for there was not being violated. Granting the variance would observe the spirit of the Ordinance because the spirit was to try and have parking to the rear, but because of the new set of configurations, he thought that it really was in keeping with what they were trying to do. It just wasn't practical to be done with that particular application. Granting the variance would do substantial justice because it would allow the property owner to make full use of his property without being overbearing on any other aspect of what the public was looking for in the Ordinance. It would not diminish the value of surrounding properties. In terms of simply looking at it from site lines and having the parking in that location, as opposed to some building not being there, he thought that there would be no effect from that particular issue on the surrounding properties. As for the hardship test, the applicant had a unique configuration with the combined lot, a large corner lot, and to get the necessary parking, even if they built a garage to encompass all the parking, it would still essentially end up somewhere between a road and a building because of the sort of the ell-shape of the two buildings relative to the ell-shape of the two roads. Mr. Rheume stated that what was being asked for was reasonable, and he therefore recommended approval.

Mr. Mulligan concurred with Mr. Rheume, noting that it was a large project but did not request a lot of zoning relief. He thought it was important for the public to understand that the uses were permitted and there was no setback relief required. There would be some loss of existing green space, but he felt that the applicant was entitled to develop the property. There would be an opportunity to weigh in at the site review to raise some of the neighborhood concerns. He agreed that the application deserved a variance.

Chairman Witham suggested a stipulation that the parking lot lighting within the side yard setback along Portsmouth Boulevard not spill light on Portsmouth Boulevard, and Mr.

Rheaume said he was amenable to the stipulation because it was one specific aspect to the relief being asked for.

The motion passed with all in favor, 6-0.

D) Case # 7-9

Petitioner: Barbara R. Frankel

Property: 89 Brewery Lane

Assessor Plan 146, Lot 26

Zoning District: Mixed Residential Business

Description: Remove existing structure and construct 2-story assisted-living home with a 3,450 sq. ft. footprint.

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

1. A Special Exception from Section 10.440 to allow an assisted living home.
2. A Variance from Section 10.512 to allow 30' of street frontage where a minimum of 100' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix of Hoefle, Phoenix, Gormley and Roberts on behalf of Ms. Barbara Frankel of the Greengard Center for Autism was present to speak to the petition as well as Ms. Julie MacDonald of DeStefano Architects.

Attorney Phoenix stated that 89 Brewery Lane was presently a single-family home and that the lot would not change. The setbacks would all be met except for the frontage, which could not be changed. He stated that 330 feet of Brewery Lane was traveled by the public. They wanted to raze the home and put a 2-story assisted living home for four autistic residents, who would be cared for. He noted that the landscaping would also be cared for. Ms. MacDonald showed a diagram of the design and the parking.

Ms. Frankel stated that her son was an adult with autism and would be one of the residents. She purchased the home, hoping that it would provide a secure home for her son, who would need a home after she could no longer care for him. The home would provide specialized housing for the young autistic adults of three other families and would be fully supported 24/7. She also noted that the residents would do volunteer work in the community. Attorney Phoenix went through the reasons for the variances.

Mr. Rheaume noted that the client would pay property taxes on a public way and asked whether Attorney Phoenix had tried to get the City to take it on and re-subdivide the lot so that it would be fronted on that road. Attorney Phoenix replied that they had briefly discussed it at one their earlier meetings with Ms. Walker, and that Ms. Frankel was willing to explore it.

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

Minutes Approved 9-15-15

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, and Mr. Johnson seconded the motion.*

Mr. Mulligan took the Special Exception standards first and stated that to grant a special exception, the specific use had to be permitted by the Ordinance by special exception, and the application was. There would be no hazard to the public or adjacent properties on account of potential fire, explosion, release of toxic materials, and so on. None of those existed and it would be a residential use. There would be no detriment to property values in the vicinity as a result of the location, scale of buildings, structures, parking areas, access ways, odor, smoke, gas, and dust because it was essentially a residential type of use and none of those factors applied to it. There would be creation of traffic and safety hazards or a substantial increase in the level of traffic and congestion. He concurred with the applicant's attorney that, given the right-of-way and the strip mall across the street, traffic would not be a problem. There would be no excessive demand on municipal services because it was a residential use. There would be no significant increase on storm water runoff onto adjacent properties or streets because it was a similar development to other residential developments in the neighborhood, so there would be no undue impact. Therefore, he felt that all the criteria were met for special exception.

Mr. Mulligan stated that the variance was needed due to the way the lot was configured. It only had a small amount of frontage because it was an unusual lot in that the public right-of-way was actually part of the property for a substantial portion of Brewery Lane. Although it didn't have significant frontage on Albany Street, it did have *de facto* frontage on its own block. Granting the variance would not be contrary to the public interest or to the spirit of the Ordinance because the concern was whether it would alter the essential character of the neighborhood or threaten the health, safety and welfare of the public, and he didn't see either of those as possibilities. It looked like a single-family home, and there was a commercial mall across the street, so the character of the neighborhood would not be affected. It would result in substantial justice because the loss of the use by the applicant because of the frontage situation severely outweighed any gain to the public. It would not diminish the value of surrounding properties but would improve them because it would have tasteful new construction and a new residential use. There was a sprinkling of commercial uses in the immediate vicinity that would not be affected. Literal enforcement of the Ordinance would result in unnecessary hardship because the special conditions of the property included the way it was subdivided, and the small sliver of frontage was really a lot of roadway access, so that distinguished it from others in the area. There would be no fair and substantial relationship regarding the purpose of the Ordinance because the purpose was to make sure that there weren't houses on top of one another as well as improper congestion of uses. There was a road that provided sufficient access to the property that was reasonable use and permitted by special exception. Mr. Mulligan thought the application met all the criteria and should be granted.

Mr. Johnson said he concurred with Mr. Mulligan about the variance. As far as the special exception, typically he would be concerned about adding an assisted-living facility to

replace a residential single-family home, but he believed the scale of the building, the parking, and the amount of hardscape were tasteful and moderate, and the juxtaposition of the commercial lot and use across the street certainly helped.

Mr. Rheaume said he would support it and thought it was a unique and interesting use. He thought its importance to that general area and the usefulness to the folks living there would be improved as time went on, with a lot of further development that he hoped would take place, including results from the Design Charrette in that portion of the City, so in the long term, it would be a great location for it.

Chairman Witham commended the applicant for taking on the project and moving forward. He said he was godfather to an autistic niece and always wondered what was next. He thought it was uplifting and a win for autism and Portsmouth.

*The motion **passed** with all in favor, 6-0.*

E) Case # 7-10

Petitioner: Strawberry Banke Inc.

Property: 14 Hancock Street (Strawberry Banke)

Assessor Plan 104, Lot 7

Zoning District: Mixed Residential Office

Description: Clarification/modification of previous approval for operation of the skating pond.

Requests: Clarification/modification of the time period for use of the skating pond from November 1st to March 31st each year.

Chairman Witham noted that a member of the public had requested that he should recuse himself due to a previous comment he had made. The Board decided that Chairman Witham did not need to recuse himself.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin on behalf of Strawberry Banke and Mr. Larry Yeardon, the CEO of Strawberry Banke, were present to speak to the petition. Attorney Loughlin stated that he submitted a letter to the Board pointing out the Board's findings from June 2013. The Board had wrestled with issues about noise, traffic, and light, and he thought that none of those issues would be experienced because they had already been addressed. Strawberry Banke had a successful season the previous year and the use was appropriate. Referring to a letter from the public that indicated how disruptive the rink was, Attorney Loughlin said he lived almost diagonally across the street from where the construction took place and had not heard any noise at night. He referred to his statement about how he felt the modification met the five criteria and was appropriate. He also noted the public's concern about the rink being open 12 hours a day, saying that there was minimal activity during those 12 hours. He said Strawberry Banke would agree not to open before November 15 in order to get the ice ready and work out any issues.

Mr. Mulligan referred to a letter the Board received from the public suggesting that, because of the teardown of the temporary structures at the season's end, the Taste of the Nation celebration was pushed closer to the residential area and resulted in noise complaints. Attorney Loughlin replied that Strawberry Banke groomed the area to look better than it did before and that pushing the Taste of the Nation closer to Prescott Park was a temporary situation. Mr. Mulligan asked whether the tent would get closer to the residents in the spring. Mr. Yeardon replied that the tent was moved to the front of the property and that the lawn would be present the following year so they could move all their tents back. Mr. LeMay noted that the start date was originally December 1, which seemed reasonable, yet Strawberry Banke wanted to start on November 1. He asked Attorney Loughlin to elaborate on what would go on during that period. Attorney Loughlin replied that the real goal was to have the rink open by Thanksgiving weekend because it was pretty much winter by Thanksgiving and they wanted to add that flexibility. Chairman Witham stated that November 15 was the realistic date to start the rentals and so on, but yet they wanted to get the weekend before Thanksgiving, so he was a bit nervous about what day November 15 fell on. If they chose a certain date and it fell on a Saturday, the Board would not want them to keep coming back. Attorney Loughlin stated that it would be fine to agree on the Friday before Thanksgiving.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Beth Margeson of 24 Marcy Street said she was a direct abutter and disagreed with Attorney Loughlin's assertion, saying that it was true that the nuisance aspects were minimal but thought it was because the rink was not heavily used. She said the rink did not attract the 22,000 skaters that Strawberry Banke claimed, and she believed that it would change the character of the neighborhood eventually. She also thought that Strawberry Banke devoted a total of seven months to rink operations.

Ms. Kathy Baker of 127 Gates Street said she was concerned about the commercialization of the applicant's property, and since moving there 11 years before, felt that Strawberry Banke had effectively been re-zoned and added many function. She was also concerned about the Porta Pottys in residential areas and functions that violated noise ordinances and felt that the permitted functions were not consistent with the Zone. She requested that three stipulations be placed on the variance addressing the location, amplified music, and alcohol.

Ms. Gloria Goyette of 7 Hancock Street said she was an abutter and thought five months was unreasonable. She wanted it stipulated that the footprint of the rink would stay the same, that the Porta Pottys would be replaced, and that the overflow parking area would be kept clear of snow so that it was available when necessary.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Yeardon stated that Ms. Margeson had no grounds to say that Strawberry Banke was lying about the rink numbers, and he noted that attendance was actually 22,003 skaters the previous season. He also noted that the temporary structures were approved by the HDC and that the music could not be heard from the sidewalk because it had been checked periodically. He stated that the museum ran for seven months, from May through

December, and that they were a dedicated history museum that had to do other things to support it. He found it ironic that Ms. Baker and her family made frequent use of the rink.

Mr. Rheaume asked which restrooms supported the rink. Mr. Yeardon said they had two sets of restrooms and would get permission to use the Porta Pottys again. Mr. Rheaume asked Mr. Yeardon whether he had a long-term vision to expand the restrooms, and Mr. Yeardon said he was working on a long-term site plan and wanted to move some restrooms closer to the rink.

Mr. Vern Gardner of 2 Tucker Way, Kittery Point, ME stated that he was a realtor and passed out a tutorial on potential adverse influences on properties and their effect on market value. He discussed real estate analyses. Mr. Mulligan asked him whether he thought the request for increasing the amount of time Strawberry Banke wanted to run the rink would have an adverse effect, and Mr. Garner said he had not done an appraisal.

DECISION OF THE BOARD

Chairman Witham said he would be hesitant to add some of the suggested stipulations because they were not allowed by Zoning. Also, some of the situations were locked in and could not be changed. He said the Planning Board was aware of the Porta Pottys issue. Mr. LeMay said he understood the pressure and impact on the abutters and felt that the December-to-March time period was fine. He had lived in New Hampshire all his life and had never known the inclination to skate around Thanksgiving. He felt that four months was long enough. Mr. Moretti asked him whether he was referring to the time to be open or assemble, and Mr. LeMay said he meant the time open to the public and felt that the preparation time was fine.

Mr. Rheaume said he had concerns about the timeframes as well and felt that the Board would ask any other applicant whether or not they were incrementing it. He believed that the extra time asked for was a lot of extra relief based on one year's success, and if the time got pushed on either side, it would start to feel more like a business than the unique Strawberry Banke. He concurred with Mr. LeMay about the December 1 through March 30 timeframe, and he said he also could agree to Thanksgiving through March 15.

Mr. Mulligan said he didn't support it the first time and wouldn't support it again because he didn't think the applicant made a showing that there was unnecessary hardship the previous year, and he didn't think anything had changed. Chairman Witham said he had been supportive from the beginning and felt that it had passed the test and criteria, but he thought that the timeframe of November 1 to March 31 seemed a bit of a stretch. Mr. LeMay noted that the time period was three months at first and was now four months, and the Board was at the point of asking how long was too long and had to consider what the limit should be. Ms. Walker said the applicant was.

*Mr. LeMay made a **motion for discussion** to approve a variance to allow operation for a four-month period, and Mr. Mulligan seconded.*

Mr. LeMay said granting the variance would not be contrary to the public interest because the previous year was successful and he didn't believe the use would conflict with explicit or

implicit purposes of the Ordinance. It would not alter the essential character of the neighborhood, and substantial justice would be done. The Board had granted the three months previously, so the question was whether there was a big difference to the general public if Strawberry Banke had four months instead of three, and they were considering basically March. The benefit to the applicant if the variance was granted would not be outweighed by any harm to the general public. The value of surrounding properties would not be diminished, but they relied on their judgment and had had no expert testimony. He found it hard to believe that it would have a negative impact on home values, and he thought it would possibly have a positive impact. It posed a unique hardship because it was sort of the same balance of benefiting the applicant as opposed to harming the general public. Mr. Mulligan said he would not support the motion even though he seconded it for discussion because they were talking about special conditions of the applicant. He felt that if it were anything but a beloved local institution, they would not get the relief that they always received from the Board, and he thought it had not warranted a variance before and still didn't.

Mr. Johnson stated that he would support it and had no qualms with the extra time requested, that four months was fine. Chairman Witham said he would support it and felt that it passed the criteria the first time and would again. The Ordinance allowed opportunities with the variance process, and he felt that this was one of those reasons it did. He said his experience skating there was very quiet and that the lighting was low, and that Strawberry Banke was a reasonable neighbor who addressed concerns.

The motion passed by a vote of 5 to 1, with Mr. Mulligan opposed.

F) Case # 7-11

Petitioner: Merton Alan Investments, LLC

Property: 30 Cate Street

Assessor Plan 165, Lot 1

Zoning District: Industrial

Description: Clarification of previous approval for construction of an office building.

Requests: Clarification that the setback relief granted included the 15.4' front setback resulting from the City's future reconfiguration of Cate St.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin was present on behalf of the applicant and stated that it was a clarification. Ms. Walker explained that the Board voted for 30 feet but had also voted on the plan that would show the future realignment of the road, which would result in a 15-ft setback. The written description had been 30 feet.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Rheaume made a motion that the Board vote to clarify that when they granted the variances for the property at the February 3, 2015 meeting, they understood that the approval for the 30' front yard setback was to the then-existing property line, and potential changes to the City right-of-way, as indicated no the reconfigured roadway shown on the plant presented to the Board at that meeting, might result in a reduction in the front yard setback to 15.4'±.

Mr. Mulligan seconded the motion.

There were no criteria to go through. *The motion **passed** with all in favor, 6-0.*

G) Case # 7-12

Petitioner: New England Glory, LLC

Property: 525 Maplewood Avenue

Assessor Plan 209 Lot 85

Zoning District: General Residence A

Description: Creation of two lots where one currently exists.

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 lot area per dwelling unit of 3,755 sq. ft. where 7,500 sq. ft. is the minimum required.

*It was moved, seconded and unanimously approved to **postpone** the petition.*

IV. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 8-1

Petitioners: Cherry Ventures LLC, owner, Mary Louise Brozena & Cheryl Kenney, applicants

Property: 64 Pine Street

Assessor Plan 162, Lot 24

Zoning District: General Residence A

Description: Rebuild home on non-conforming foundation.

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

1. A Variance from Section 10.321 to allow a lawful nonconforming building or structure to be extended, reconstructed or structurally altered except in conformance with the Ordinance.
2. A Variance from 10.516.10 to allow a 0'± front yard setback where 6' is required.
3. A Variance from Section 10.521 to allow a 0'± left side yard setback where 10' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Moretti recused himself from the petition.

The builder Mr. Joseph Paquette on behalf of the owners went through the petition and criteria, noting that the wooden structure would be removed and recycled.

Mr. Mulligan asked how many square feet the new structure would have, and Mr. Paquette said it would have 2,472 square feet. Mr. Mulligan said the existing structure was estimated to be from the 1850s, and he asked whether Mr. Paquette was confident that the foundation would be re-usable for a modern dwelling. Mr. Paquette replied that he would work with an engineer but believed that a substantial portion of the foundation could be re-used. Mr. Rheaume asked him to explain the reason for the design choice of having the front portion of the house as a 2-car garage and asked if there were other nearby homes with that kind of arrangement. Mr. Paquette replied that the garage door would be perpendicular and the entrance parallel to Pine Street and said there were other garages on Pine Street.

Chairman Witham said he was concerned that the Board would approve it and then it would be discovered that the foundation could not be used. They didn't know the condition of the foundation except that it was brick, and he felt that was a lot of weight to put on it. The full basement under the proposed garage would have to be filled in. He wasn't comfortable with new construction at zero-foot setbacks, and he said he preferred to see an engineer's report saying that the foundation could be built on. He was also concerned about the scale because the back of the house would be a 4-story home and unusual on that street. Mr. Paquette replied that the design had been planned with the abutters and sloping lots in mind and would improve the parking congestion on the street. He said there were precedents, and he named the properties that were on the front property line. Chairman Witham said that the applicant would have to get on the neighbor's land just to paint the house.

Mr. Manny Chevitz said he lived two doors down and that his children also lived nearby, and they were tired of looking at the place for the last 30 years and wanted to see it changed.

The owner Ms. Mary Louise Brozena said she had two letters of approval from abutters.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Alan Brady of 123 Clinton Street stated that he was not opposed to renovating the house but was opposed to its proposed size. He noted that he gave the Board a letter and examples of current buildings and said the applicant was proposing a 250,000-s.f. building, so he would be looking at the back of the building and seeing 15 windows instead of two.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Paquette referred to the height issue and said that several homes in the area were substantial in size and had diverse architectural styles and sizes.

DECISION OF THE BOARD

Minutes Approved 9-15-15

Chairman Witham said that it felt that the design was being driven by a foundation that the Board wasn't sure could be re-used and that they would be granting a zero-foot setback for a foundation that might be replaced by a new one. He appreciated the effort that went into the cascading effect but thought the scale was daunting, especially from the rear of the house having the fourth-floor covered roof deck area overlooking the neighborhood.

Mr. LeMay agreed, noting that most of the homes on that street were 2-3/4 stories at the most, but the proposed house kept going and was also close to the road, which he thought that, even with the variance bringing it closer to the street, became more of an issue. He wasn't happy with the zero-foot setback but was sensitive to the fact that it was reasonable that it line up with the other homes on the street. He thought that the sheer mass of the home compared to the neighbors' homes would not pass the criteria of changing the nature of the neighborhood, and he felt that it would also be good to know about the foundation.

Mr. Rheume stated that he was disturbed by quite a bit of the petition. The only good thing was that the street front, with the garage, it was a lower presentation than the existing house, but not by a lot. A substantial portion of the zero-foot setback would be almost a full two stories along one side from the neighboring property, and putting the garage in front of it would create a cold, sterile approach toward the street front. The other houses facing the applicant's were close to the street but were inviting due to their entryways. The home was set back from the street except for the garage, and he didn't like the design at all. The huge mass of the center of the home was perfectly legal at 35 feet, plus the full height of the roof, but he felt that the lot could be redeveloped in a more appropriate manner and be respectful to the overall character of the neighborhood. He knew the abutters' frustration was more with doing anything to fix the house, but the Board had to look beyond that. He said it was sacrificing too much just to get a home rebuilt, and even though the applicant had said that he would recycle the foundation, he didn't see the foundation realistically being re-used.

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

Mr. Rheume stated that the application failed at least three criteria, if not four. Granting the variance would be contrary to the public interest because it should be something that kept the overall feeling of texture and spirit. He noted the garage in the front and the zero-foot setbacks and thought the public could demand something other than zero-foot setbacks as well as something warmer. Granting the variance would not observe the spirit of the Ordinance because the applicant was asking for substantially more than what the Board normally allowed. There were light and air concerns with the large house coming up close to a neighboring house. The only hardship presented by the applicant was that replacing the existing foundation would be a financial issue. The Board looked at what was unique to the property and found nothing special about the nature of its size, shape, of where the house was positioned. The value of surrounding factors might also be a factor, and he was confident that there could be a proposal that could meet what the Board was looking for.

Mr. LeMay stated that he would incorporate his earlier comments.

Mr. Johnson said he would support the motion of denial because he didn't have a problem with the setbacks and was willing to find out if the existing foundation could be re-used. Chairman Witham said he would support the denial as well because he felt that it was being driven by a 150-year old foundation of brick and mortar and that a more cost-effective house could be built by starting over and giving relief on the setbacks. It was a good effort, but a zero-foot setback was a zero-foot setback and he didn't think the hardship test was met.

*The motion to deny **passed** by a vote of 5-0.*

2) Case # 8-2

Petitioners: 2422 Lafayette Road Assoc LLC

Property: 2454 Lafayette Road

Assessor Plan 273, Lot 3

Zoning District: Gateway

Description: Allow a parking area between a principal building and a street.

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

1. A Variance from Section 10.1113.20 to allow required off-street parking spaces to be located in a required front yard or between a principal building and a street.
2. A Variance from Section 10.734.20 to allow a front yard setback of 151'± where 90' is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. Moretti resumed his seat.

Attorney Bernie Pelech on behalf of the applicant was present to speak to the petition. He stated that Southgate Plaza had existed since early 1980s and was built to the Zoning Ordinance that existed then, like almost every property on Lafayette Road. There was also a 105' setback from Lafayette Road then, so everyone put their parking in front of the building. Attorney Pelech said that every time the Zoning Ordinance changed, the property became non-conforming every time the owners wanted to add a building. He pointed out that the aerial map showed buildings surrounding the parking lot on four sides. He went through the criteria and said they would meet all of them.

Mr. Rheume asked Attorney Pelech to speak to the second variance concerning the front yard setback. Attorney Pelech replied that it was added by the Planning Department staff, but he said the front yard setback made it difficult to build the building any closer to the street and still maintain the access into the parking lot. The access was a divided strip, and the building would be 151' from Lafayette Road. If moved, the access way would dead-end at the new building. He felt that it was not conceivable to build the new building 90' from Lafayette Road and was simply a result of a total change in the Ordinance. Mr. Rheume said he did not see that argument and asked what in the entryway would run into the building. Attorney Pelech said he had not applied for that variance but assumed it meant a

particular building, which he pointed to. Mr. Rheume said one of his concerns was the second variance, and he was not sure of what was 151' away. Ms. Walker said it was based on what was written on the Site Plan. The front yard was 151' and the requirement was 90'. Attorney Pelech said the existing front yard was probably the 99 Restaurant. Mr. Rheume clarified that the applicant would create a new restaurant at the end of the entryway as well as two new retail locations, and Attorney Pelech agreed, noting that he also wanted to build 121 residential units behind Big Lots.

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. Moretti seconded the motion.*

Mr. Mulligan stated that the variances were necessitated by changes in the Ordinance and would not be contrary to the spirit of the Ordinance. They would allow the property to remain the same. Granting the variance would not alter the character of the neighborhood or threaten the health, safety or welfare of the general public. It would result in substantial justice because if the applicant were forced to comply with current standards, he would have to move the buildings into the front of the property, which was not realistic. Granting the variance would not diminish the value of surrounding properties because the same parking lot had been in place for many years and was now non-conforming. As for unnecessary hardship, special conditions of the property were that the present environment as proposed had existed for many years and the Ordinance had changed around it, there was no fair and substantial relationship between the purposes of eliminating the parking in the front yard and the maximum front yard setback that the Ordinance now held in its application to the property. For those reasons, he felt that the variances should be granted.

Mr. Moretti concurred with Mr. Mulligan.

Mr. Rheume said that he would support it because he felt that the reason driving the second variance was that the current access into the property could not be made any shorter, causing the driveway and restaurant to be put further back on the property, so it was okay.

*The motion **passed** with all in favor, 6-0.*

3) Case # 8-3

Petitioners: Thomas E., Marybeth B., James B. & Meegan C. Reis

Property: 305 Peverly Hill Road

Assessor Plan 255, Lot 5

Zoning District: Single Residence B & NRP

Description: Construct a second free-standing dwelling on a lot.

- Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.513 to allow a second free-standing dwelling on a lot where a second free-standing dwelling is not allowed in this district.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin on behalf of the applicants gave a brief history of the property and said the applicants wanted a second dwelling unit so that Mr. Jim Reis could live there. It would be in the existing original red barn. The applicants needed relief to have the second dwelling unit on the property and wanted to convert the attached red barn into a home.

Chairman Witham noted that the application was slightly different than the site plan, but Ms. Walker said that it just changed it to a use variance and did not change any dimensional requirements. Chairman Witham said that he felt the Board could always grant less, and it was granting less than what was asked for, so he could vote for it.

Mr. Mulligan asked Attorney Loughlin about the conservation easement in his write-up and said the term cartilage had a specific meaning. He was curious as to whether or not that term came from the easement itself or was Attorney Loughlin's own editorial. Attorney Loughlin replied that it was a sort of term and not exactly property in that case. The current use taxation legislation talked about the cartilage around the home and the barn, and in the area exempt from current use, he was using it a different sense. Mr. Mulligan said he was asking because the term cartilage suggested accessory uses pertinent to a particular dwelling, i.e., part of the property protected from unlawful searches or seizures. If the conservation easement excluded cartilage, then it implied that the intent was to maintain a single dwelling. Attorney Loughlin said the intent was to create a 2-acre area outside the purview and that it did not come from the terms of agreement.

The owner Ms. Jim Reis stated that maintaining the property involved a lot of labor, and they wanted to make it a working farm and part of the community.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

*Mr. Moretti made a motion to **grant** the variance as presented and advertised. Mr. Johnson seconded.*

Mr. Moretti said granting the variance would not be contrary to the public interest because the property was a working farm and the public was interested in keeping it as well as keeping the conservation effort going. It would observe the spirit of the Ordinance because the dwelling would be converted into a two-family home and would give the applicant the opportunity to keep the farm and make it a working farm for the community. Substantial

justice would be done because the farm was an icon in Portsmouth that needed to be sustained. Granting the variance would not diminish the values of surrounding properties because it was conservation land and a sizable property, and no one would know that the dwelling was a second one. As for the hardship test, the property was unique to Portsmouth, and the second dwelling would give the applicants the opportunity to continue to operate.

Mr. Johnson stated that living on a large farm used to be fairly common, and two people were less than people that used to live in that barn.

Mr. Rheaume said he would support it because the property was something that the Board needed to be careful about and he didn't want someone else who might want to maximize profits. Chairman Witham agreed, noting that it would be like a barn conversion and would keep the rural character.

*The motion **passed** with all in favor, 6-0.*

V. OTHER BUSINESS

There was no other business.

VI. ADJOURNMENT

*It was moved, seconded and **passed** by unanimous voice vote to adjourn the meeting at 11:20 p.m.*

Respectfully submitted,

Joann Breault
Recording Secretary