

ZONING BOARD OF ADJUSTMENT  
268B MAMMOTH ROAD  
LONDONDERRY, NH 03053

DATE: MAY 21, 2014

CASE NO.: 5/21/2014-1

APPLICANT: HICKORY WOODS, LLC  
100 ANDOVER BYPASS, SUITE 203  
NORTH ANDOVER, MA 01845

LOCATION: 5 TAVERN HILL ROAD; 2-27, UNIT 7; C-II, WITHIN THE RTE. 102  
PERFORMANCE OVERLAY DISTRICT

BOARD MEMBERS PRESENT: JIM SMITH, CHAIR  
NEIL DUNN, VICE CHAIR  
JIM TIRABASSI, VOTING MEMBER  
JACQUELINE BENARD, VOTING MEMBER  
ANNETTE STOLLER, NON-VOTING ALTERNATE  
DAVID PAQUETTE, CLERK

REQUEST: EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS FOR AN ERROR IN THE  
LOCATION OF A STRUCTURE THAT RESULTS IN AN ENCROACHMENT ON THE FRONT  
SETBACK.

PRESENTATION: Case No. 5/21/2014-1 was read into the record with five previous cases listed for Map 2 Lot 27 and four previous cases for Map 2 Lot 27-1, which was consolidated into Lot 27 in 2013.

JIM SMITH: Who will be presenting?

JOE MEYNARD: Good evening, Joe Maynard with Benchmark Engineering. I am here on behalf of Hickory Woods LLC...Hickory Woods LLC is a big ninety eight unit senior housing development up off 102. Unit seven, which is the unit we are talking about, was one of the first foundations that they put in on this road. This unit in for relationship wise, is across the street from a proposed clubhouse...when we do these senior housing developments, the right away that we delineate on these is really more of an imaginary one because it is part of the association so it defines when the association limits are. In the case of this foundation, we go to the site three time for...for the stakeout for these things...so the first time we always go just for state, so they can cut trees and...and get in. a lot of the time we will put offsets in for them at that point in time. Subsequently we go back the second time and we establish baselines for them to...to install these...these...and a lot of the time what the baseline entails is...we set magnetic nails in the street, we paint them up, we label what the offset is on that. We also do the rear of it so we can get an established line that goes out there. at the same time there are other contractors in here...one of them being Continental Paving who did a lot of the initial...excavation and construction work. As part of Continentals work, they establish their own control system through the site

46 so they can do their own layout when they were doing the road. Similar to us they use a magnetic nail that is  
47 in the pavement. Theirs is older so it is not as apparent but it is still painted roughly orange but there is no  
48 offset painting marked next to it. In the case of this foundation, we went back for the third visit to do the  
49 actual as built of what was there and...and we noticed that there was discrepancy so...first thing is everyone  
50 starts pointing fingers and what it came down to was the foundation supervisor who was putting it in, held  
51 one of the other control points instead of sweeping off the street and...and locating the actual off set points  
52 and they actually went and installed the foundation based upon that information. Therefor we discovered  
53 it...about three days after the foundation was actually installed when we went into do the as built. That is  
54 pretty much the gist of...of how they occurrence happened. What actually ended up is the foundation ended  
55 up being 25.8 feet from the right away. The project has a thirty foot setback from the edge of the right away  
56 from a previous variance that was granted. The edge of pavement from that right away is still an additional six  
57 feet, which leaves that driveway length at about 31.8 feet so when you start looking at typical vehicles parked  
58 in the driveway, a typical car takes up about the nine by eighteen...I'm sorry...a nine by twenty area  
59 roughly...so the car is still well outside of the right away...it is not sticking out into the middle of the street...as  
60 part of this...this mistake so to say does not affect any of the other aspects of the design...for the unit. The  
61 septic, the grades, site distance...all of those things remain...proper in accordance with what the original  
62 approval was. Any questions?

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64 NEIL DUNN: How many units are...poured?

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66 JOE MEYNARD: At this point now...four, five, six, seven, eight, nine, ten...about twelve we are up to right now.

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68 NEIL DUNN: And all the rest are fine?

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70 JOE MEYNARD: Everything else is...is fine...yes.

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72 RICK WELCH: This particular foundation contractor has done about one hundred and thirty houses for us and  
73 has never made a mistake. He is very careful and it was just a...a human error so he...feel badly about it  
74 but...trying this route to avoid having to tear it out and do a new one.

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76 NEIL DUNN: And Richard do you do a footing...is that the right word...the footing inspection prior to...

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78 RICHARD CANUEL: No...we don't do a separate footing inspection. Our first visit to the site is when the  
79 foundations completed.

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81 JIM SMITH: Ok, I have a procedural question. At what point are the supposed to do the actual...is it the  
82 foundation or on the footings?

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84 RICHARD CANUEL: Well according to the way are...the way are local building regulations are written, it reads  
85 that the certified foundation plans shall be done after the footings are set, before the foundation walls are  
86 erected.

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88 JIM SMITH: Did you do it at that point?

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90 JOE MEYNARD: No, we did not...so...

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JIM SMITH: Were you aware of that?

JOE MEYNARD: That it was in the wrong spot or that it was...it was...the way it was written...so...I was unaware...I was...I...whenever possible we do footing but typically it is when the foundation wall is actually up that the crew will go do that...do that as built. If they're on site and there's a footing in, they will grab it while they're there at the same time but...in general we do wall...mostly because....

JIM SMITH: It effectively doesn't comply with the towns regulations.

JOE MEYNARD: And again, there is other parts of the regulation where you want top of wall elevation and things of that nature so that when you go back and do a septic inspection later...so that would almost make it a two prong approach than to doing a foundation as built you do a footing certification and then a wall certification I guess. But I don't think it is written in that...that way so...historically we...we typically just do wall...

RICK WELCH: What usually happens is that I have the footing pinned so they can put the wall in the exact spot especially if there is a tight area. At the Nevins we did it religiously at every house because they were always tight. We have some more room there so I think they use these...these points the first two times that he goes out there but...we have always...we've always certified the foundation at the foundation stage was pretty...pretty common practice I am actually surprised that the regulation says footing, I wouldn't mind going forward and doing it that way by any means but...like Joe said, there's some negatives to that as well.

NEIL DUNN: If I may...

JIM SMITH: Yup...

NEIL DUNN: In...in your submitted packet I don't see any discussion to points one, two, three, four...you jump right to six and go from page 1.7...let me check maybe it was...so page 1.7 has...you requested a bunch of labor and then page two jumps to item six...I am looking at the full paperwork and item two on the equitable waiver says explain how the violation was not due to ignorance of the law of ordinance which it sounds like we may have here.

JOE MEYNARD: Again...

NEIL DUNN: I am questioning why it wasn't the whole application...the whole application wasn't in the package I guess or unless you are working off a different sheet perhaps...

JOE MEYNARD: I am not clear on why that is...

DAVID PAQUETTE: I am missing that here too in the original.

JOE MEYNARD: But I...I have to say I have been working in town for almost thirty years now and historically we have always done foundation wall and not footing so...

136 NEIL DUNN: And I am hearing a point of law and I am trying to get past the ignorance and the  
137 ordinance...violation...I think the reason it obviously was in there is because you catch the footings a lot  
138 cheaper at this point. Ok...I just was wondering if we were missing something...thank you!  
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140 JIM SMITH: Yeah well...I think what we're...what he is diluting to...when you look at the requirements for an  
141 equitable waiver, there is a whole list of items that have to be addressed to the satisfaction of a board to grant  
142 it...not just what you addressed to this point, the other points have to be addressed. There are...read them  
143 real quickly. Explain the violation was not notice or discovered by the owner, former owner, owners agent or  
144 representative or a municipal official until after the structure in violation was substantially complete. I would  
145 take it that that means the whole building is built...at least that's how I would interpret it or until after law and  
146 another division of land and violation have been subdivide to a bonafide purchaser of that for value. Number  
147 two; explain how the violation was not the outcome of ignorance to the law or ordinance. Failure to inquire  
148 and I have a hard time with this next word...[SIC]...misrepresentation, bad faith are not a part of the owner.  
149 Owner's agent or representative but was instead caused by either a good faith error in measurement, or  
150 calculation made by the owner or owners agent or an error in the ordinance, interpretation of applicability  
151 made by the municipal official in the processes of issuing the permit which the official had authority.  
152 Three...explain how the physical or dimensional violation does not constitute a public or private nuisance nor  
153 diminish the value of other property in the area nor interfere with or adversely effects any present or  
154 permissible to use of any such property. Four, explain how due to the degree of vast construction, or  
155 investment made in ignorance to the facts constituting the violation, cause of construction so far outweighs  
156 any public benefit can be gained that would be inequitable to require the violation to be corrected.  
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158 NEIL DUNN: A...actually it looks to me like...the...the number starting with seven is our...is our one and two is  
159 your eight so I guess your...number eight in hand and what you turned in does say...explain how the violation  
160 was not an outcome of ignorance of the law or ordinance so it is misnumbered I guess apparently.  
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162 RICK WELCH: Can I ask a question on the...the foundation procedure...is it...should the footing be as built and  
163 the walls be as built after and...in two parts or is it just footing only that the town...requirement...I want to  
164 make sure we don't do it wrong in the future...  
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166 RICHARD CANUEL: Yeah well like I said, the way the building regulation reads is that the certified foundation  
167 plan be plotted at the time when the footings are done prior to erecting the walls. If your surveyor so chooses  
168 to do it twice than you know, all the better.  
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170 JOE MEYNARD: I think...I think we would have to do it twice to meet the intent to what that is saying.  
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172 RICK WELCH: Right because the potential for error still exists if you're putting a foundation on top of the  
173 footing and it doesn't line up you know exactly right...you know than it is not certified...  
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175 JOE MEYNARD: Right...and a footing can be in the setback as long as the wall is outside of it. So...  
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177 RICK WELCH: So in order to protect us from something like this happening...the...the pinning of the footing  
178 certainly does the same thing, it tells us if there's...you know if there is an issue, we would know before the  
179 walls go up. But...I guess I want to meet the requirements in the future and do the footing, if that's what we  
180 are supposed to do. In this particular case it was a...a good guy who made an honest mistake...the foundation

181 guy...he is ultimately responsible for it, we don't want to see him go through the cost and I guess honestly we  
182 would probably help him with it but...you know we want out project to look a certain way and if we thought it  
183 didn't look right too close to the road and it didn't line up properly with the other houses we would probably,  
184 you know...want to change it to but it actually seems to lay out pretty...pretty nicely and the driveway is still  
185 plenty long and it...it doesn't look out of place at all it's a four foot difference than what it was supposed to be.  
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187 NEIL DUNN: Richard do we have a minimum length for driveways?  
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189 RICHARD CANUEL: A minimum length? No...there actually isn't a minimum length...no.  
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191 NEIL DUNN: I know we have the setbacks so theoretically I guess but I...you can have it just sitting...  
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193 JOE MEYNARD: The Nevins is a twenty foot setback from the edge of the pavement...  
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195 RICK WELCH: So yeah our project at the Nevins had much shorter driveways on most of the homes...much  
196 shorter than this.  
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198 NEIL DUNN: SO...from...I guess nobody else has a questions...going forward we are going to be looking at the  
199 footings prior to the...  
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201 JOE MEYNARD: Correct...or twofold. You know if...if a footing is outside of setback, I have no issue giving a  
202 certification for that, but like we discussed, some of these are pretty tight and you know a footing can  
203 theoretically be in the setback as long as the wall is outside of it...so...  
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205 NEIL DUNN: Bu that's due to the width of the footing...  
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207 JOE MEYNARD: Well yeah it's a two foot footing and an eight inch wall so...  
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209 RICK WELCH: You can still make an error in the walls on top of the footing and you know, be in vio...  
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211 JOE MEYNARD: Well that's when we can do two certifications...  
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213 NEIL DUNN: So Richard, the footing needs to be outside the setback?  
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215 RICHARD CANUEL: No...no  
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217 NEIL DUNN: Ok...just to get you pictured in there, zeroed in so when you do the final pour, you're in good  
218 shape.  
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220 JIM SMITH: I think part of the logic was...a lot less costly to move the footings than moving the whole  
221 foundation. That was the logic behind the footings...  
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223 JOE MEYNARD: About fifteen thousand dollars of labor and concrete in that wall that is there now...  
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225 JIM SMITH: That's what I am saying...

226 JOE MEYNARD: Yeah  
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228 JIM SMITH: If...  
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230 JOE MEYNARD: Footings when have been a couple grand...  
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232 JIM SMITH: Exactly.  
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234 JOE MEYNARD: Yes...  
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236 JIM SMITH: Yeah...that being the difference...I mean you're...basically trying to pour this foundation right on  
237 the thirty foot...  
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239 JOE MEYNARD: No, we typically don't do that...actually when we drew the design, we gave an extra foot to  
240 front setback on every one and at least a foot to eighteen inches on side setback everyone at its closest  
241 location...nobody likes to put them right on the money...if you don't have to...you know site conditions  
242 sometimes...they wiggle these a little bit or if they're squaring it up or...or of some nature like that...I like to  
243 leave at least a foot around the whole thing which ultimately leaves about two feet around it. In the case of  
244 the front setback we are usually about a foot behind it so...  
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246 JIM SMITH: Ok...any further questions from the board?...at this point I would open it up to anybody in favor of  
247 this...anyone in opposition or have questions about this...seeing none, I'll bring it back to the board...any  
248 other...  
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250 DAVID PAQUETTE: No sir  
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252 JIM SMITH: Ok, so...Annette is going to vote on the first one  
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254 JACKIE BERNARD: Yeah...yup...  
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256 JIM SMITH:...because she knows what's going on...  
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258 JACKIE BERNARD: Yeah...  
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260 JIM SMITH: Ok...any further comments from the applicant?  
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262 JOE MEYNARD: No we just feel that it was...this was truly an honest mistake...from what they held and put in  
263 for place of it, you know we are just here at your mercy to try to move forward with this.  
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265 JIM SMITH: Ok, just for the record we got it on the application, could you address those other points?...just for  
266 the record...  
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268 JOE MEYNARD: Sure...[Shuffling of papers]...well under number one I guess, it demonstrates satisfaction of the  
269 board, it existed for ten years or more that's not applicable...  
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271 JIM SMITH: Right...

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273 JOE MEYNARD: Under two explain the violation was not noticed or discovered by any owner, former owners  
274 agent or representative or municipal official until after a structural violation had been substantially completed  
275 or until after a lot or other division of land in violation had been subdivided by conveyance by a bonafide  
276 purchase of value...like we explained earlier, the survey to place these units is a three step process. The field  
277 crew will first stake an area for excavation, second they place offsets in the road and at the rear of the lot to  
278 establish the...the buildings placement...for unit seven when we are talking about when the contract was  
279 placed on the foundation, they held the wrong control point in the street and placed the foundation too close  
280 to the front setback. The foundation is...is where it needs to be right in line left and right...but it is now too  
281 close to the front...this was not noticed until the third survey visit to the site to as built the of unit seven.  
282 Three...explain how the violation was not an outcome of ignorance of the law or ordinance failure to  
283 inquire...of...obfuscation...

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285 JIM SMITH: It's a good word...

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287 JOE MEYNARD: Yeah...[Chuckling]...that's a good one...misrepresentation or bad faith on any part of the  
288 owner, owners agent or representative but was instead caused by other good faith error in measurement or  
289 calculation made by the owner or owners agent or by error in ordinance interpretation or applicability made  
290 by a municipal official in the process of issuing a permit over which that official had authority...as we discussed  
291 it has always been our understanding...we do a foundation certification for the wall. In this case though...we  
292 did the initial layout and the subcontractor being the foundation crew, ended up using the wrong information  
293 and staked it and placed it in the wrong location. Four...explain how the physical or dimensional violation does  
294 not constitute a public or private nuisance nor diminish the value of the property and the area nor interfere  
295 with or adversely affect any present or permissible future uses of any such property...this project was actually  
296 a plan...was planned as a fifty five and older community. The road system in this development is actually a  
297 privately owned and maintained. The right away that exists is more of an easement to the community, even  
298 though unit seven is closer to the right away. The driveway is still thirty feet in length from the edge of the  
299 [pavement to the garage. This location does not affect any other aspects of the development, being the septic  
300 system remains the same, site distance remains the same...grading around the site will also remain unchanged  
301 from the original design. Five...explain how due to the degree of past construction or investment made in  
302 ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to  
303 be gained that it would be inequitable to require the violation to be corrected. So far the cost to actually  
304 prepare this foundation excavation was about nine thousand dollars...and blasting associated with that. The  
305 cost of the foundation labor for the work that's there was fifteen thousand...also when the field crew got  
306 there they were tarring the foundation with waterproof, which was an additional eight hundred and fifty  
307 dollars...since the excavation is kind of a wash and would've needed to be completed anyways, the cost out to  
308 the developer is roughly fifteen thousand, eight hundred and fifty dollars for what is there now. If the  
309 equitable waiver is not granted, than there would be a cost to rip out what is there and pour the wall in the  
310 correct location. Being that this is actually a private road and the driveway still exceeds more than the length  
311 of the car, it would be inequitable to have the developer rip out the existing foundation to correct this  
312 problem.

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314 JIM SMITH: Ok, thank you. Any other questions? In that case we will close the public hearing and we will  
315 deliberate and see what we can do with this.

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DELIBERATIONS:

DAVID PAQUETTE: Definitely contractor error and is it substantially completed as the first point says. We are talking...doubling their expense for this particular piece. I don't know if that weighs in but...

ANNETTE STOLLER: Mr. Chair...am I aloud to ask a question?

JIM SMITH: Sure...

ANNETTE STOLLER: Ok... my understanding was it was a subcontractor error...not...not the contractor himself...is that correct?

JOE MEYNARD: That's correct...

ANNETTE STOLLER: I guess I should have asked that before...which gives it a different light...you know they have to look at it a little differently.

NEIL DUNN: Well...the contractor, the applicants responsible for anything...

ANNETTE STOLLER: Correct...yeah...

JIM SMITH: Any other...

DAVID PAQUETTE: What...what's the difference between the...the written law and the actual...what the setback is actually supposed to be versus what it is built as?

NEIL DUNN: It was supposed to be thirty feet back...it is twenty five point eight, so it is off by four point two but they also have private roads and the applicants spoke to the...a little buffer so they are back to thirty feet but it is not the true setback from the property line or the right away and all that. But again it's private roads so there is some...

DAVID PAQUETTE: Yeah that...that was...it is a private road and private community...privately maintained.

JIM SMITH: Yeah...

DAVID PAQUETTE: I don't see there being an issue with this.

NEIL DUNN: If I may...the only thing that...according to RSA 67433, we could go through the whole beginning but it is burden of proof on the property owner, grant an equitable waiver from the requirement if and only if the board makes all the following finding. So I know we do have...[Chuckling]...a little bit latitude but I mean that is a pretty strong statement...I guess number one, it...it really isn't substantially completed if you look at the whole unit...yes the foundation component might be...so I mean they're really not in violation...I...I mean that's not...you know point one or eight or whatever you want to look at...it was not discovered by the owner until it was substantially completed. It is not really substantially completed...so I...



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JIM SMITH: That could be...how you look at it...is the foundation something that you completed...

NEIL DUNN: Yeah so...so I will give them that one...and number two, explain how the violation was an outcome of ignorance of law...misrepresentation or bad faith, I don't think it was bad faith...we can argue the ignorance of the law or the ordinance...in the big picture...if we...you know so that one I am still hemming on...number two I am not quite sure about. Number three, explain how the physical dimension by lights of public or private nuisance, I think they spoke to that. Again, it's private roads and it all looks pretty good. Number four, explain how the degree of the construction...past construction investment outweighs essentially the public benefit pain by making them rip it out...I don't really see much of a public benefit so I will give them that one. And the rest of them than apply so...so I guess we have assurance that going forward they are now aware of the ordinance and so there will no longer be an ignorance...option or whatever...so...

DAVID PAQUETTE: Which deems that we did not make all of the five points...

NEIL DUNN: Well...and...and that's only if you presume that when we call them substantially completed or ignorance of the law...you know...they have been doing a lot of work in town and they have typically done it the other way and have been fine so is that...I mean...it was good faith...

DAVID PAQUETTE: Right...

NEIL DUNN: It wasn't bad faith by any means so and...and the big picture, it is tough when we have such a clear mandate from the RSA, but again...we do have some...flexibility in and interpreting what all of this means so...I...I think number four is probably the sealer, where there is no big gain from it based on what has been invested at this point. Private roads, I am sure they will not be coming back for another...[Chuckling]...there is a lot more foundations to go in...

[Chuckling]

JIM SMITH: Any other comments? Seeing none, would someone care to make a motion?

NEIL DUNN: Mr. Chairman...I would like to make a motion to grant case number 5/21/14-1 base on that the...that investment in the past construction outweighs any public benefit to be gained and that the applicants have hit most of the points and they are aware now of when they should be doing the proper...diligence if you will.

DAVID PAQUETTE: Second it.

JIM SMITH: Ok...all those in favor?

DAVID PAQUETTE: Aye.

NEIL DUNN: Aye.

JIM SMITH: Aye.

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JACKIE BERNARD: Aye.

JIM TIRABASSI: Aye.

ANNETTE STOLLER: Aye.

JOE MEYNARD: Thank you.

RESULT: THE MOTION TO GRANT CASE NO. 5/21/2014-1 WAS APPROVED, 5-0-0.

RESPECTFULLY SUBMITTED,



DAVID PAQUETTE, CLERK

TYPED AND TRANSCRIBED BY KIRBY WADE, EXECUTIVE ASSISTANT

**APPROVED JUNE 18, 2014** WITH A MOTION MADE BY JACKIE BENARD, SECONDED BY DAVID PAQUETTE AND APPROVED 4-0-0.