Applicant: Albert Carbonneau
14 Roby Jewell Lane

Members Present: John Dold, Neil Rowe, Kirk Scamman, David Short and Mike Smith

The Board of Adjustment held a Public Hearing on Tuesday, August 11, 2009 at 7:30PM in the Municipal Center to consider the Request of an Appeal from an Administrative Decision to the terms of Article 2.1.70 Section II of the Zoning Ordinance (Case # 539). Applicant asks to allow and clarify that the definition of a structure is not, a ñgreen tunnelò. Applicant also requests a Waiver Pursuant to RSA 674-32-c, II, of the Zoning Ordinance, to waive applicable building and site requirements to the extent necessary to reasonably permit an agricultural use, if the ñgreen tunnelò is found to be a structure (Case # 540).

Secretary Kirk Scamman read the notice, the applications, the letter dated June 5, 2009 from Terry Barnes, Code Enforcement Officer, to Albert Carbonneau, and the letter dated June 30, 2009 from Terry Barnes, Code Enforcement Officer, to Attorney Michael Donahue.

Chairman Dold stated Case #539 is an Appeal from an Administrative Decision of the Code Enforcement Officer. Chairman Dold said applications for an appeal of an order from the Building Inspector or Code Enforcement Officer must be filed within seven days of the order. The last letter from the Code Enforcement Officer was June 30, 2009 and Case #539 was received more than seven days after that letter. Attorney Michael Donahue, representing Albert Carbonneau, states the issue relates to when the notice was received, but thatôs irrelevant because they are prepared at this point to present on Case #540. Attorney Donahue requested that they be allowed to withdraw Case #539. David Short motioned to accept the applicantôs request to withdraw Case #539. Chairman Dold seconded the motion with all Board members voting in favor.

Albert Carbonneau stated that this spring he became interested in organic farming and decided to put up a high tunnel, which is an unheated structure. Mr. Carbonneau said it is possible to raise garden vegetables year-round in the tunnel without heat by timing the plantings and using row cover over the crops. He added he put it on that spot on his property because thatôs where the sun is. It looks like itôs on the front of his house, but his house doesnôt face the road. The tunnel is actually on the side and back of the house. Mr. Carbonneau said his house was built years before any of the subdivisions were there. He added the high tunnel is a demountable structure. For tax purposes, it is called agricultural equipment. Itôs not real estate because it is not taxable. Mr. Carbonneau stated it can be completely taken apart and moved anywhere. He stated he has other properties but it isnôt practical to put it anywhere else because heôs had problems with vandalism before and he wouldnôt be able to watch it at another location. Mr. Carbonneau said it is a temporary thing. Mr. Carbonneau stated the tunnel is 40ô long

and because the property is on the radius, 2ô on one side and 10ô on the other side are in the thirty-foot setback.

Attorney Donahue stated Mr. Carbonneau has about 204ô of frontage and the setback is thirty feet. He added the offending portion of the high tunnel totals approximately 102 square feet. Attorney Donahue stated the only reason they are here tonight is to allow 102 square feet of the high tunnel to be located within the thirty-foot front setback. They do not have to justify the whole tunnel since the rest of it is conforming. The only issue is that a portion of it intrudes into the front setback and there was a complaint about it.

Attorney Donahue stated the legislature has said that waivers shall be granted for these agricultural uses unless there is substantial demonstrated adverse effect on public health or safety, or the value of adjacent properties. Attorney Donahue added they have gone to the extent of having a real estate expert review the property and the neighborhood. Attorney Donahue distributed a letter from Aaron Brown, Real Estate Broker, which stated, in part, that the presence of the 2 to 10 feet in violation of the ordinance does not have an adverse impact on the value of adjacent properties. Attorney Donahue said this isnôt like a Variance application, itôs a reverse burden. The burden is on the people who are opposed to the granting of the waiver to show that there is a demonstrated adverse effect on public health or safety, or the value of adjacent properties.

Kirk Scamman asked if the 102 feet in question faces a roadway or a neighborôs house. Attorney Donahue responded it faces a roadway. Neil Rowe stated if Mr. Carbonneau divided the tunnel in half and put the two halves side by side he would still have 40 feet and it would be in a relatively sunny area. Mr. Carbonneau responded it is sunnier closer towards the street and the area by the house is restricted because of trees. Neil Rowe asked how many trees would have to be removed. Mr. Carbonneau responded it would be so many that you would be able to see Muirfield Drive.

Aaron Brown, Real Estate Broker, then read his letter submitted for the case file. Chairman Dold asked if granting this waiver demonstrated an adverse impact on the values of adjacent properties. Mr. Brown responded that this waiver will not affect the value of adjacent properties. Mr. Brown added he has stood in favor of and against these situations in his career, primarily based on impact of value which is where his expertise lies.

Chairman Dold asked if anyone would like to speak in favor of or against the applicant. Claude Peyrot, 22 Muirfield Drive, stated he lives across the street from Mr. Carbonneauôs property. Mr. Peyrot presented photos for the Board. Mr. Peyrot stated the applicant has already stated it is a structure and they did not obtain a building permit, which was confirmed by Terry Barnes. He added they are in violation of Stratham Zoning 60.2, which states that a permit is required before commencing work on the erection or alteration of any structure or building. Mr. Peyrot added there is also another misapplication in 674.33A, the Waiver of Dimensional Requirements, which states that

the Zoning Board of Adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from requirement if, and only if, the Board makes certain findings. One of which is that the physical or dimensional violation does not constitute a public or private nuisance nor diminish the value of property of others in the area, nor interfere with or adversely affect any present or permissible future uses of any such property. Mr. Peyrot stated it is his contention that we are not here discussing whether the property can be used for agriculture or waive that it can. The issue is the building of a structure that does not meet code requirements and also the fact that it does diminish the value of those houses around it. Mr. Peyrot added that Mr. Carbonneau owns a lot of property that has no trees, so his contention that that was the only location on the property he owns that he could put the structure on is totally incorrect. Mr. Peyrot displayed a plot plan that shows the tunnel encroaches over 10 feet on one corner and 28 feet on the other. He added the flowerbed goes further into the right of way. Mr. Peyrot stated there are two structures that are very similar to this structure in Stratham. One is at the Barker Farm and the other is at the Saltbox Farm which are both on Portsmouth Avenue. Mr. Peyrot stated he talked to both property owners. The owner of the Saltbox Farm said his temporary greenhouse structure has been there for fifteen or more years and at Barker Farm, it has been up close to twenty years. He added the idea that this is a temporary structure is misplaced. Mr. Peyrot stated this is not a simple structure, it is a frame structure similar to what you would have with a house, it has a door and it also has a granite sill at the front bottom and it has an aluminum frame. The contention that it can be easily moved is misplaced. Mr. Peyrot stated Mr. Carbonneau chose to put the green tunnel in a convenient location which is a house that has been vacant for about five years, adding that this new addition has been the only improvement on that property over the last five years. Speaking on behalf of Sprucewood Homeownerôs Association, Mr. Peyrot said the President and Board of the association agree that this structure is inappropriate for the area and there is no place for this structure in the midst of homes that are worth $300,000 to $500,000. Terry Barnes stated Mr. Peyrot is calling this a structure. Speaking with the previous planner, Charles Grassie, Mr. Barnes stated they did not consider this a structure, they considered it an agricultural use, in that it didnôt have a foundation, the building floor was earth and it was primarily for agricultural use only. Mr. Barnes added there is no definition in the zoning for this type of building. Neil Rowe read from Section 2.1.6, ñThe word farm means any land, building or structures on or in which agriculture and farming activities are carried out or conducted and shall include the residence or residences of owners, occupants or employees located on such land. Structures shall include all farm outbuildings used in the care of livestock and in the production and storage of fruit, vegetables or nursery stock, in the production of maple syrup, greenhouses for the production of annual or perennial plants, and any other structures used in operation of the farmò. Neil Rowe then read the definition of structure from Section 2.1.70, ñAnything constructed or erected, the use of which demands its permanent location on the land or anything attached to something permanently located on the landò. Neil Rowe stated when it involves farming, he thinks it is pretty apparent that a greenhouse is considered a structure. Neil Rowe then asked Mr. Barnes what someone does when they put up a pop-up garage. Mr. Barnes responded they do not see him. Paul Deschaine, Town Administrator, stated the Appeal from the Administrative Decision, is that it is, indeed, a structure. He added that Mr.

Barnesô conversation with Charles Grassie dealt with what type of structure it is and that it was an agricultural structure. Whether there is a distinction or not, the element is that being a structure, it still has to meet the setbacks.

Colin Robertson, 23 Muirfield Drive, stated he is directly across the street from the Carbonneau home. Mr. Robertson stated he can appreciate the history of agriculture in Stratham. In their development, people are spending $500,000 for a home and they have guidelines they have to follow to maintain the homes. If he wants to put an addition on his home, he has to get permits and follow guidelines. Mr. Robertson added he is here purposely because guidelines arenôt met and he wants to make sure both sides are heard.

Neil Rowe asked the applicant what is referred to on the plot plan where it states ñTo Be Removedò. Mr. Carbonneau responded the building would be removed once the subdivision is approved. Neil Rowe stated the subdivision is approved and asked if there was any time allotted for the date of removal. Mr. Carbonneau responded no, it would probably be up to the developer. Claude Peyrot asked the Board to note the date that was approved, adding that they are coming upon the three-year anniversary of it being done. To his knowledge, other than some preliminary roadwork being done, no property has changed hands and the only addition theyôve had to the area is the greenhouse. He added, in his opinion, it will not be torn down, it will stay as is.

Suzanne Wade, 19 Muirfield Drive, stated they are abutters of the Carbonneau property and have been for seventeen years. She added they are interested in co-existing in harmony in the neighborhood. Mrs. Wade stated they were not notified as abutters. She added they are not in opposition to farming or passive solar endeavors, but this property, as it is constructed on the front of this home, is in view of all of their homes. It is covered with plastic, unfinished wood and aluminum. She added it doesnôt appear to be a finished product, it doesnôt enhance the appearance of the front of that property, and it encroaches beyond what is acceptable according to the regulations. Mrs. Wade stated when someone has 40 acres of property, it would seem to her that there would be another location for it. Mrs. Wade added there are many issues and if there is a real estate professional here determining that that does not draw down the values of their properties, she thinks they need a real estate professional representing their interests as well.

Chairman Dold asked Attorney Donahue if the proper abutters were notified. Attorney Donahue responded the Town brought it to their attention that the Map and Lot number on the application was incorrect which caused additional notification to be issued so that Mr. Robertson was notified. He added the Wades are here tonight and they are able to participate, but they are not technical abutters. Attorney Donahue stated the Wadeôs property is pretty significantly screened from Mr. Carbonneauôs property by the very same trees they have been discussing. Attorney Donahue said Mr. Peyrot presents it as if he is directly across the street when he is on a different street and is not an abutter to this property. Attorney Donahue stated from a technical point of view they are not abutters and there has been no failure of notice here. Chairman Dold asked Attorney Donahue if he is stating that since this property was subdivided, the abutting property is owned by Mr. Carbonneau. Attorney Donahue responded that the green tunnel is not on

the next lot over, there is the width of another lot in between. Mrs. Wade stated with previous proceedings regarding the development of this property, they were notified as abutters, so perhaps there has been a change in how this lot that borders theirs is considered. She added the ownership of the property that Mr. Carbonneau occupies and the lot in between are still owned by him. Chairman Dold clarified Mrs. Wadeôs point as being the fact that because she wasnôt notified, she didnôt have the opportunity to seek a land value request. Mr. Peyrot stated the only reason that Colin and Denise Robertson received a notice was because he told the Town that they were abutters.

Mr. Peyrot stated he, Colin Robertson and George McIntyre are all part of the Sprucewood Homeownerôs Association. He asked if all the homeowners in the Association become abutters. If so, they were not notified.

Jeff Wade, 19 Muirfield Drive, stated that at the original hearings on the subdivision of the Carbonneau property in 2006, they not only received notification but the Muirfield Association received an abutterôs notification, so that they had representation from the Muirfield Association at that hearing. He thinks it is a legitimate concern that the Sprucewood subdivision should have been notified as an abutter. Attorney Donahue stated in 2006 the entire parcel was being subdivided and it included land that lies to the west of this area. One of the lots was owned by the Muirfield Homeownerôs Association, so they received a notice. That doesnôt mean that any notices tonight are defective. Chairman Dold read the definition of abutter from the Zoning Ordinance, ñAbutter means any person whose property adjoins or is directly across the street or stream from the land under consideration by the local land use board. For purposes of receiving testimony only and not for purposes of notification, the term abutter shall include any person who is able to demonstrate that his land will be directly affected by the proposal under considerationò. Attorney Donahue stated Mr. Robertson is directly across the street from Mr. Carbonneauôs home. He added this is not about a subdivision in 2006. All itôs about is the fact that this green tunnel extends 10ô on one end and 2ô on the other end into the setback. He added this isnôt about whether there can be a green tunnel or whether Mr. Carbonneau can move back into his house that he didnôt live in for a while. Attorney Donahue said these issues shouldnôt guide the Boardôs decision.

Chairman Dold stated what he hears from one of the neighbors is whether Mr. Carbonneau would give that neighbor the opportunity to seek another appraisal before the Board makes a decision. Neil Rowe asked if the appraisal presented tonight states that the green tunnel in its entirety does not diminish the values of the adjacent properties or does it state that 85% of the green tunnel is within the boundaries and is not the problem; therefore, the 15% of the tunnel in question doesnôt devalue adjoining properties. Aaron Brown clarified that he is a licensed real estate broker, not a licensed appraiser. He has been practicing actively since 1993 and he has sold over one thousand properties in the immediate seacoast area. The question he was asked to address was does this green tunnel, as it currently exists, have a negative impact on the abutting properties today and if it were brought into compliance would that have a different impact on the abutters. Mr. Brownôs answer is the difference is not even perceivable from any of the abutting

properties or from the street, in his opinion. He added that he is of the opinion that Mr. Carbonneau would be well within his rights to erect an additional green tunnel at a proximity that is closer to his abutters and may have more impact on them. Mr. Brown stated the tunnel doesnôt have a perceivable value effect on the abutters. It is a pretty rural area for a development and there are no protective covenants that this property has to adhere to.

Chairman Dold asked Mr. Carbonneau if he would be willing to continue this hearing to give the neighbors the opportunity to hire an appraiser to get another opinion. Mr. Carbonneau responded it wouldnôt be in his favor because they are not going to hire a realtor who will be on his side. Mr. Carbonneau stated eventually the property will be sold, and at one point it was sold but with the drop in the market the buyers backed out. He added his is keeping one lot for himself, which is at the other end of the property. Mike Smith asked him if he resides in the house now. Mr. Carbonneau responded he maintains that as his residence and has for over thirty years. He added that due to work he is away a lot.

Mr. Peyrot stated he has a letter from Chris Geier, who is one of the officers of the Sprucewood Homeownerôs Association, that states he has talked to all the homeowners and that Mr. Peyrot can talk on their behalf. Mr. Peyrot said all 53 lots in the neighborhood are in total opposition to what has been going on at that property. He added that he is of the opinion that some of the abutters have not been notified correctly.

Paul Deschaine, Town Administrator, clarified the legal abutters who required notices. Beyond that, certainly anyone in the approximate neighborhood could claim to be abutters but they donôt meet the legal definition; therefore, by case law they have to show some manifestation that the use will somehow directly affect their property. If they can actively prove that, then they could be considered to be an abutter. Mr. Deschaine stated they donôt meet the legal definition so the burden is on them to make the argument that they are abutters because they have a manifest effect by the use.

Mr. Deschaine stated the history of these lots is in a confluence of three separate subdivisions. The first one was the Muirfield subdivision. Mr. Carbonneauôs lot was not part of that subdivision but his driveway did access that subdivision mainly because his residence was closer to the hammerhead on Muirfield Drive than the original driveway was on Winnicutt Road. Mr. Deschaine added then the Sprucewood subdivision came into the southwest and that included most of the land that was the Sewall property. Again that was not impacted by the Carbonneau property because it was an adjacent lot and probably got notified like all the other abutters did because he was a legal abutter at that point. He added that Sprucewood and Muirfield came in with their own approvals, conditions, covenants and deed restrictions, etc. Then Mr. Carbonneau came in with his own subdivision and hence the multiple lots along Roby Jewell Lane. Mr. Deschaine stated his approval was separate, had different conditions and had the benefit or non-benefit of covenants or deed restrictions, etc. Mr. Deschaine stated because this happens to be a collection of three subdivisions, just because one lot might be restricted by a deed restriction or a covenant, that does not automatically make your neighbor bound by those

types of restrictions. He added that the Town of Stratham, as a governmental entity, is not entitled to enforce any of those restrictions. Those restrictions are self-imposed by the developer and the eventual lot owners agree to those restrictions and they are self-enforced. Chairman Dold stated, based on that, that the appropriate abutters were notified.

Attorney Donahue wanted to respond to the burden of proof. He stated they are not seeking an equitable waiver, that would be in a situation where a building permit has been issued in error. In this case, there was no building permit because the applicant wasnôt aware that he was required to get a building permit based on the discussions he had with the building department. Attorney Donahue stated that they would gladly stipulate that as a condition of any favorable action on this waiver request regarding the 102 square feet that are at issue, they would obtain a building permit for the entire structure. Attorney Donahue stated under RSA 674-32.c.II, the standard is that the Board shall grant a waiver from such a requirement to the extent necessary to reasonably permit the agricultural use, unless such waiver would have a demonstrated adverse effect on public health or safety or the value of adjacent property.

Suzanne Wade, 19 Muirfield Drive, stated they didnôt have a bank appraiser here who expressed an opinion. There was one real estate professional who expressed an opinion based on his experience. She added whatôs fair, if you are talking about property values and impact, is that you should have an impartial bank appraiser saying whether this particular structure on the front of a property affects value.

Kirk Scamman motioned to accept the Waiver for Case # 540 as presented. David Short seconded the motion. Neil Rowe, David Short, Mike Smith and Kirk Scamman voted in favor of the motion, while Chairman Dold voted against the motion. Chairman Dold advised the applicant of the thirty-day appeal period and called Case # 540 closed.

Respectfully,

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Norma Corrow, ZBA Clerk

The tape of the meeting is available at the Town Office Building for review during regular business hours.