

A VIDEO RECORDING OF THE MEETING IN ITS ENTIRETY IS AVAILABLE THROUGH VERMONTCAM.ORG. THE WRITTEN MINUTES ARE A SYNOPSIS OF DISCUSSION AT THE MEETING. MOTIONS ARE AS STATED BY THE MOTION MAKER. MINUTES SUBJECT TO CORRECTION BY THE SHELBURNE DEVELOPMENT REVIEW BOARD. CHANGES, IF ANY, WILL BE RECORDED IN THE MINUTES OF THE NEXT MEETING OF THE BOARD.

**TOWN OF SHELBURNE  
DEVELOPMENT REVIEW BOARD  
MINUTES OF MEETING  
February 15, 2017**

**MEMBERS PRESENT:** Mary Kehoe (Chair); Mark Sammut, Jeff Pauza, Joanna Watts, Jeff Hodgson, Ian McCray. (Judy Christensen, Ellery Harkness, and Ty Parker were absent.)

**STAFF PRESENT:** Kaitlin Mitchell, DRB Administrator; Dean Pierce, Planning Director; Joe Colangelo, Town Manager.

**OTHERS PRESENT:** Mary Griswold, Katherine Helm, Bruce Hartshorn, Scott Jaunich, Jeff Jackson, Willard Jackson, Stephen Vock, Mark Sperry, Erin Miller Heins, Russell Fox, Ken Phillips, Ellen Arapakos.

**AGENDA:**

1. Call to Order and Announcements
2. Public Comment
3. Approval of Minutes (2/1/17 & 2/4/17)
4. Applications
  - Design Review, Exterior Changes, 541 Falls Road, Hebert (DR17-02)
  - Variance, Nonconforming Porch, 259 Marsett Road, Arapakos (V17-02)
  - Appeal, Notice of Violation, Shelburne Shipyard, Inc. (A16-09)
  - Variance, Dimensional Standards, Shelburne Shipyard, Inc. (V17-01)
5. Other Business/Correspondence
6. Adjournment and/or Deliberative Session

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**1. CALL TO ORDER and ANNOUNCEMENTS**

Mary Kehoe called the meeting to order at 7 PM.

**2. PUBLIC COMMENT**

None.

**3. APPROVAL OF MINUTES**

*February 1, 17 & February 4, 2017*

**MOTION by Mary Kehoe SECOND by Joanna Watts, to postpone the minutes until 3/1/17. VOTING: unanimous (6-0); motion carried.**

**4. APPLICATIONS**

The function of the Development Review Board as a quasi-judicial board and the hearing procedure were explained. Individuals to give testimony before the Board were sworn in.

**DR17-02: Design Review for new vinyl siding, windows, and front door replacement at 541 Falls Road by Lucien and Claire Hebert**

No one appeared on behalf of the application.

## Submittals:

- Village Design Review application
- Letter from Lucien, Claire, Collette and Annette Hebert
- Site Plan
- Exterior photographs of house and window sills
- Photograph of proposed front door (same as existing back door)
- Catalog Cut Sheet for proposed windows
- Sample of proposed vinyl siding
- Job estimate by Beagle Builders, LLC
- Town of Shelburne Staff Report, dated 2/15/17

## STAFF REPORT

The DRB received a written staff report on the application, dated 2/15/17. Kate Mitchell showed a sample of the vinyl siding.

## APPLICANT COMMENTS

None.

## PUBLIC COMMENT

None.

## DELIBERATION/DECISION

Design Review, Exterior Changes, 541 Falls Road, Hebert (DR17-02)

**MOTION by Mary Kehoe, SECOND by Jeff Hodgson, to grant design review approval to Lucien, Claire, Collette and Annette Hebert for new vinyl siding, replacement windows, and a new front door as submitted for 541 Falls Road with the condition a zoning permit shall be obtained. VOTING: unanimous (6-0); motion carried.**

**V17-02: Variance for reconstruction and extension of a pre-existing nonconforming front porch to increase the degree of nonconformity at 259 Marsett Road in the Village Residential District, Village Design Review, and Stormwater Overlay District by Ellen Arapakos**

Ellen Arapakos appeared on behalf of the application.

## Submittals:

- Variance Request Application received 01/24/17
- Site Plan prepared by Ellen Arapakos received 01/24/17
- Building Permit 8687-99 included by staff

- Building Permit 8889-05 included by staff
- Town of Shelburne Staff Report, dated 2/15/17

#### STAFF REPORT

The DRB received a written staff report on the application, dated 2/15/17. Kate Mitchell noted it has not been determined how far into the setback the existing deck sits. All variance criteria must be met in order to grant a variance. Many of the houses on Marsett Road near the applicant's house are nonconforming.

#### APPLICANT COMMENTS

Ellen Arapakos explained the existing porch with one step is only three feet deep and opening the storm door requires stepping off the stoop. The existing deck is already over the setback. A map of the homes on Marsett Road show they are in the setback as well.

Jeff Pauza asked if extending the deck will create a safer situation. The applicant said it would.

It was confirmed the stoop is not part of the house structure and is not anchored to the ground and therefore not a permanent structure.

#### PUBLIC COMMENT

None.

#### DELIBERATION/DECISION

Variance, Nonconforming Porch, 259 Marsett Road, Ellen Arapakos (V17-02)

#### FINDINGS OF FACT:

1. There are unique physical circumstances including irregularity and narrowness of the lot size or shape that warrant a review or variance.
2. Because of these physical conditions there is no possibility the property can be developed in strict conformity with existing bylaws.
3. The hardship has not been created by the appellant.
4. The variance will not alter the essential character of the neighborhood or district in which the property is located or substantially or permanently impair appropriate use or development of any adjacent property or decrease access to renewable energy resources or be detrimental to public welfare.
5. If the variance is authorized it will be a minimum variance that will afford relief and will represent the least deviation possible from the bylaw and from the plan (the applicant is not seeking a substantial change in existing circumstances and eight inches is not substantial in this circumstance).

**MOTION by Joanna Watts, SECOND by Jeff Pauza, to adopt the Findings of Fact with the addition of a Finding that authorization of the variance is therefore necessary to enable reasonable use of the property. VOTING: 5 ayes, one nay (Joanna Watts); motion carried.**

**MOTION by Mary Kehoe, SECOND by Jeff Pauza, to finalize the record and close the hearing and approve variance application V17-02 for 259 Marsett Road by Ellen Arapakos for the minimum front yard setback variance necessary to afford relief. VOTING: 5 ayes, one nay (Joanna Watts); motion carried.**

**A16-09: Appeal of Notice of Violation dated 11/7/16 for development not in compliance with site plan approval SP16-04, zoning permit B16-097, and setback standards at 4584 Harbor Road (Shelburne Shipyard) in the Rural Zoning District, Lakeshore Overlay District, and Floodplain and Watercourse Overlay District by Shelburne Shipyard, Inc.**

Testimony continued on the appeal by Shelburne Shipyard of the Notice of Violation, dated 11/7/16.

*TESTIMONY*

Individuals to give testimony were sworn in.

Bruce Hartshorn

Attorney Jaunich asked Mr. Hartshorn to state his role at the shipyard and length of service. Bruce Hartshorn said he is Director of Operations at the shipyard for the past 12 years.

Attorney Jaunich asked Mr. Hartshorn if he is involved in permitting efforts and to describe his experience in Vermont permitting. Mr. Hartshorn said he is not involved with building permits at the shipyard, but was involving in permitting for his house in Jericho and in Maine and New Hampshire.

Attorney Jaunich asked how long the Carew building has been at the shipyard and the building's use. Mr. Hartshorn said the Carew building has been in existence since the 1950s and is used for cold boat storage. The building is not heated. Boats are stored all year long.

Attorney Jaunich asked when the decision was made to replace the Carew building and who was involved in the discussion at the shipyard. Bruce Hartshorn said the decision to replace the building started over a year ago. Discussion was ongoing with a final decision in May 2016. Mary Griswold, the owner, Ken Phillips, the builder, and Bruce Hartshorn

were involved in the discussion. Mary Griswold may have talked to people in the storage department as well. Attorney Jaunich asked when Mr. Phillips was first involved in the discussions. Mr. Hartshorn said he believed Mr. Phillips spoke to Mary Griswold well over a year ago about the building.

Attorney Jaunich recalled Mary Griswold testified she did not participate in any discussions with the town with respect to filing an application for the building and Mr. Hartshorn's pre-file testimony indicates discussion with the town. Mr. Hartshorn confirmed this, adding the first contact was approximately April 2016 after Mary Griswold said to see what was needed to put up the building (this was before the final decision was made about the building).

Attorney Jaunich asked Mr. Hartshorn what information he had when he talked to the town about the permitting process. Mr. Hartshorn said he had the concept of taking down the failed building and replacing it with a new building. Kate Mitchell was told it is believed the building is nonconforming now. Ms. Mitchell was asked about the process for a variance for a replacement building.

Attorney Jaunich recalled Mary Griswold testified on 2/1/17 that she did not know at the time the building was nonconforming. Attorney Jaunich asked Mr. Hartshorn if he had knowledge independently about the building being nonconforming. Attorney Heins objected to the question by Attorney Jaunich. Attorney Jaunich then asked Mr. Hartshorn if he had independent knowledge there was a nonconforming structure on the property. Mary Kehoe overruled the objection and asked Mr. Hartshorn if he had knowledge that the Carew building was nonconforming at the time. Mr. Hartshorn said he had a belief, not knowledge because he was never sure where the property line was located and had never seen a survey of the property.

Attorney Jaunich asked Mr. Hartshorn if he knew the setback distance. Mr. Hartshorn said he did not because he had not seen a survey of the property, but had been told the building was in the setback and was nonconforming so he asked what needed to be done to get a variance for the nonconforming replacement building.

Attorney Jaunich asked Mr. Hartshorn who told him the building was nonconforming. Mr. Hartshorn said he could not recall.

Attorney Jaunich asked Mr. Hartshorn if he looked at the zoning ordinance for the required setback. Mr. Hartshorn said he did not, but came to the town to ask who to speak to and was told Kaitlyn Mitchell is the person. Ms. Mitchell was asked what is needed to

get a variance for a replacement building that more than likely would be in the setback and nonconforming.

Attorney Jaunich asked Mr. Hartshorn what he was told with regard to the permitting process and requirements. Mr. Hartshorn said he explained the building and the plan and Kate Mitchell said a variance would not be needed because the existing building is nonconforming and will be replaced with another nonconforming building, and as long as the building is the same square footage it will not any more adversely impact the property than before. Mr. Hartshorn said he was floored by what Ms. Mitchell said because he thought he would have a raft of applications to fill out.

Attorney Jaunich asked if there was discussion with Kate Mitchell about the specifics of any zoning variance under the ordinance. Mr. Hartshorn said no, just the same square footage and not needing a variance. This information was communicated to Mary Griswold. Attorney Jaunich asked Mr. Hartshorn if he and Ms. Mitchell reviewed the zoning ordinance requirements at that time. Mr. Hartshorn said no.

Attorney Jaunich asked Mr. Hartshorn his understanding of what was required after reporting to Mary Griswold in April 2016 that a variance is not necessary. Mr. Hartshorn said Kaitlyn Mitchell gave him applications for site plan review and a second application that goes with that and a building permit application for the future (the shipyard was not prepared to fill out the application at that point in April).

Attorney Jaunich asked about the next steps after taking the forms. Mr. Hartshorn said originally it was envisioned to have a building that was 60' x 130', but after measuring with Mr. Phillips it was discovered there was not enough property to relocate off to the side because the building would be in the ditch in the back of the property. Attorney Jaunich noted at that point it was realized the building would be even closer to the boundary than when first discussed with Mr. Phillips. Mr. Hartshorn said correct.

Attorney Jaunich asked Mr. Hartshorn if he discussed adjustment of the building with Kate Mitchell. Mr. Hartshorn said he did not talk to Kate Mitchell again until July, but he discussed with Mr. Phillips the size of the building to accommodate the property. The back property line angles in so the building could not be the same size as the Carew building that is there. The building had to be reconfigured, repriced and recalculated. The ending dimensions were 78' x 100' on the new location site.

Attorney Jaunich asked why the new location site was chosen. Mr. Hartshorn said because the old building failed. The site is wet and the concrete was heaving. It made no sense to put a new building where the old one failed.

Attorney Jaunich asked if using a different type of foundation was discussed with Mr. Phillips or any consideration given to removing the Carew building and building on the same site. Mr. Hartshorn said no. The site was proven wet with frost heaves that destroyed the previous building.

Attorney Jaunich asked about the next steps taken. Mr. Hartshorn said had to find out if they could get a permit for the changed configuration of the building. In late July Kate Mitchell said there could be a different sized building provided it is still 7,800 s.f. total. Ms. Mitchell wanted to know the elevation and height. An aerial map of the property was reviewed. (Attorney Jaunich referred to Exhibit SSY-1 which is a setback worksheet by CEA. Mr. Hartshorn said the document they viewed was by Hamlin Engineering. Attorney Jaunich noted the Hamlin exhibit is part of Exhibit JJ-3.) Mr. Hartshorn said he told Kate Mitchell they had changed the size of the building because they could not fit the site. The building will be 78'x 100' and will come 20' from the Carew building and place the new building beside it. The new building will be put up and then the old building taken down. Mr. Hartshorn said he and Kate Mitchell went over the applications. There is a cross out on the second page done in conjunction with Kate Mitchell's input as the various buildings were identified.

Attorney Jaunich noted the General Application Form as part of Exhibit JJ-4, page 2, cross outs are being referenced and the square footage of the primary was changed from 60,098 s.f. to 52,290 s.f. and the square footage of access was increased. Mr. Hartshorn confirmed this, adding Kate Mitchell said the buildings were identified incorrectly so the calculations were redone there. Ms. Mitchell said a new form was not needed. Attorney Jaunich asked what the calculations were based upon. Mr. Hartshorn said the insurance form that identified the square footage per building.

Attorney Jaunich asked if the number of primary structures and number of accessory structures were changed. Mr. Hartshorn said the change was made in conjunction with Kate Mitchell identifying the accessory and primary buildings. Attorney Jaunich asked if the Carew building was determined to be a primary building. Mr. Hartshorn said he did not recall, but followed what Ms. Mitchell identified for each building and the purpose served.

Attorney Jaunich asked if the application includes identification of new structures. Mr. Hartshorn said it was thought a new (replacement) building would be put up. Attorney Jaunich asked if the application was reviewed with Kate Mitchell. Mr. Hartshorn said no, but Kate Mitchell was asked if anything else was needed and she said no and would let the shipyard know what the review board said.

Attorney Jaunich asked if Mary Griswold reviewed the application prior to changes being made. Mr. Hartshorn said she had not seen the strike outs showing the change in the primary/secondary buildings and change in square footage.

Attorney Jaunich asked if Mary Griswold signed the application attesting the information was true and correct and then the application was submitted to the town. Mr. Hartshorn said the building permit request was submitted after receiving the email from Kate Mitchell saying the site plan review was approved. Kate Mitchell said it would be a couple of weeks before the board acted on the building permit required after the site plan review.

Attorney Jaunich asked if the General Application Form and Administrative Review Site Plan Review Application were submitted. Mr. Hartshorn said he believed they were done first and the building permit application followed.

Attorney Jaunich asked if there was discussion with Kate Mitchell of the timing of removing the Carew building after the new building was constructed. Mr. Hartshorn said there was no discussion of putting the new building up and then taking the old building down and there was a one year time period with the building permit to demolish the old building and build the new building. It was believed the permit covered both.

Attorney Jaunich asked what the one year period was based upon. Attorney Heins objected to the questions that do not go to the alleged violations by the town. The Notice of Violation is between the town and the applicant. Attorney Jaunich countered the questions go to credibility of the witness who is the shipyard representative and processed the application so his understanding and basis for the application needs to be known.

Attorney Jaunich asked Mr. Hartshorn if he discussed the new building being built prior to removal of the Carew building. Mr. Hartshorn testified he discussed installing one building and taken the other down. The basis for the one year time period was Ken Phillips saying there is a year to deal with the building permit. This was not discussed with Kate Mitchell.

Attorney Jaunich noted on the General Application Form with a change in the number of primary and accessory structure square footage there is an entry that asked if the structure complies with setbacks. Pre-filed testimony by Mr. Hartshorn was that it was known the setbacks were being violated. Mr. Hartshorn said it was his belief the setbacks were being violated because the Carew building did this. Attorney Jaunich said on the application

the reply was “not sure”. Mr. Hartshorn said he was not sure because he did not see a survey until October or November. Attorney Jaunich said Mr. Hartshorn did not know the degree of nonconformity, but knew the building was nonconforming. Mr. Hartshorn repeated he believed the building was nonconforming, but had not seen a survey.

Attorney Jaunich referred to pre-filed testimony, Question 12, 8<sup>th</sup> line, where Mr. Hartshorn said Kate Mitchel was keenly aware the Carew building does not meet current setback requirements and asked Mr. Hartshorn the basis for that understanding. Mr. Hartshorn said Kate Mitchell said the building was nonconforming, but did not know what Ms. Mitchell was basing this on. Mr. Hartshorn said in April he told Ms. Mitchell he believed the building was nonconforming and what they wanted to do, and Ms. Mitchell confirmed the building was nonconforming when they met.

Attorney Jaunich asked how Ms. Mitchell confirmed the building was nonconforming. Attorney Heins objected to the question as speculation. Mary Kehoe asked if Kate Mitchell looked at any information to determine the building was nonconforming. Mr. Hartshorn said she did. Attorney Jaunich said Mr. Hartshorn is saying Kate Mitchell agreed with him that the building was nonconforming. Attorney Heins objected to the question. Mary Kehoe sustained the objection.

Attorney Jaunich asked Mr. Hartshorn what happened after submitting the site plan amendment General Application to the town. Mr. Hartshorn said an email from Kate Mitchell was received in late July/early August with the subject of site plan review approval. Mr. Hartshorn said he did not read the email because it said site plan approval which is what was expected. The email was one of hundreds of emails received per week that time of year, the busiest time of the year.

Attorney Jaunich confirmed Exhibit JJ-2 is the email memorandum from Kate Mitchell, dated August 11, 2016, and cc'd to Bruce Hartshorn and asked Mr. Hartshorn to read the third line in the memo regarding building dimensions being slightly different to stay out of the rear yard setback. Mr. Hartshorn read the text, but said this was nothing he told Ms. Mitchell. Attorney Jaunich asked if Kate Mitchell's understanding of the permit was that the building was outside the setback and that is what was communicated to Mr. Hartshorn on August 11, 2016. Mr. Hartshorn confirmed this. Attorney Jaunich asked if the decision was appealed. Mr. Hartshorn said it was not, reiterating the email was not read until October/November 2016.

Attorney Jaunich asked if the building foundation in the ground now is within the setback not only of the Jeff Jackson lot, but of the Lake Champlain Transportation Company (LCT) lot. Mr. Hartshorn said it is based on the survey.

Attorney Jaunich asked if the zoning permit was received after the 8/11/16 email was received indicating the building was to be outside the setbacks. Attorney Jaunich referred to Exhibit JJ-6. Mr. Hartshorn said Kate Mitchell called and said the zoning permit was ready to be picked up.

Attorney Jaunich asked Mr. Hartshorn if he reviewed the permit. Mr. Hartshorn said he did not and simply put the permit in the window of the shipyard's main office to be visible from the public right-of-way. Attorney Jaunich noted Exhibit JJ-5 is a picture of the sign in the window and a picture from the gate. Mr. Hartshorn said the picture looks to be taken from a place farther back from the gate. Mr. Jaunich asked if the sign in the window could be seen from the gate. Mr. Hartshorn pointed this out, noting this was the nearest right-of-way.

Attorney Jaunich stated the zoning permit in Exhibit JJ-6 says approval of the permit is based on the information being true and correct. Mr. Hartshorn said correct. Attorney Jaunich asked if the information was true and correct in the application. Mr. Hartshorn said to the best of his knowledge it was. There was no attempt on the shipyard's part or Kate Mitchell's part to obfuscate anything or be duplicitous about anything. Attorney Jaunich said the issue is what the permit approves and asked if the application asks permission to build within the setback. Mr. Hartshorn said the application does not because he did not believe there was ever a question due to Kate Mitchell's statement in April that as long as the building is 7,800 s.f. it will no more adversely impact the use of the property than what was there before.

Attorney Jaunich asked if the zoning permit authorizes construction within the setback. Mr. Hartshorn said the permit does not say anything about that. Attorney Jaunich said the permit says the construction shall comply with the bylaws and ordinances, and asked Mr. Hartshorn knowing what is known now whether the structure complies with the zoning ordinance. Mr. Hartshorn said the zoning allows for building within the setback because there was a pre-existing condition that was into the setback. When the town staff (Kate Mitchell, Joe Colangelo, Dean Pierce) visited the site in October 2016 they asked if the shipyard was aware the building was in the setback and the answer was of course and Kate Mitchell knew as well. There was never an attempt to hide anything. Attorney Jaunich said whether the attempt was to hide anything or not the shipyard was unsure at the time of the application where the setback was located. Mr. Hartshorn said when the application was made a survey had not been seen and it was believed the building was going to be in the setback.

Attorney Jaunich asked Mr. Hartshorn if he reviewed Section 1920 of the Shelburne zoning bylaws. Mr. Hartshorn said the shipyard's attorneys provided the information in October/November 2016 which was the first time seeing the material. Kate Mitchell did not provide the information.

Section 1920 of the Shelburne zoning bylaws – nonconformities was marked Exhibit JJ-11 and submitted, and the complete version of the Shelburne zoning bylaws, dated May 18, 2016, was marked Exhibit JJ-12 and submitted into the record.

Attorney Jaunich read Section 1920.G and asked if the section allows for locating the building where it is. Attorney Heins objected to the question and having the witness interpret the bylaw. Mary Kehoe sustained the objection.

Attorney Jaunich asked Mr. Hartshorn if the replacement building, the foundation presently in the ground conforms to the zoning bylaws. Attorney Heins objected to the question on grounds of interpretation. Mary Kehoe sustained the objection.

Attorney Jaunich asked Mr. Hartshorn after accepting the permit which required compliance with the zoning bylaws if he and Mr. Phillips determined where to place the building. Mr. Hartshorn said they knew the building had to be approximately 20' from the side of the existing building. Attorney Jaunich asked where it was said the building had to be 20' from the existing building. Mr. Hartshorn said the discussion with Kate Mitchell was about the building being 20' over to where the new building started. This was not included in the application or the permit.

Attorney Jaunich asked with the understanding the building had to be 20' away how was the location of the corner of the foundation was determined. Mr. Hartshorn said a tape was run for 20'. The back of the building is 20' away. The front of the building had to be angled to accommodate the sway of the road. This was not a concern because of the discussion with Kate Mitchell about the 20'.

Attorney Jaunich asked if it is accurate to say the building was placed consistent with the understanding of the discussion with Kate Mitchell. Mr. Hartshorn said correct. Attorney Jaunich asked if Mr. Hartshorn would admit the understanding may be inconsistent with what the permit says. Attorney Heins objected to the question. Mary Kehoe overruled. Mr. Hartshorn said given the benefit of hindsight it appears the building does not comply, but at the time the shipyard was doing what it said would be done and what was approved.

Attorney Jaunich said in pre-filed testimony, Answer #11, Mr. Hartshorn testified the proposed project was described to Kate Mitchell in detail. Mr. Hartshorn said correct.

Attorney Jaunich asked if ground water was discussed with Ken Phillips. Mr. Hartshorn said that ground water as the cause of the damage to the Carew building was discussed and for that reason a new building was being built and moved approximately 20' away from the failed building to better ground. That is why a permit was sought (to put up the replacement building).

Attorney Jaunich asked if Mr. Phillips said it was ground water, not surface water, causing the problem. Mr. Hartshorn said summer 2016 had no rain or surface water. All of the ground heaving was from water that was down under the foundation as everyone saw on the site visit. Attorney Jaunich asked if the damage happened last summer (2016). Mr. Hartshorn said the damage has been years and years in coming.

Attorney Jaunich asked if a soils engineer reviewed the water condition. Mr. Hartshorn said there was no need to have a soils engineer. It was known the area was wet.

Attorney Jaunich asked if there was discussion of encroachment on the LCT driveway when discussing the details of the project with Kate Mitchell. Mr. Hartshorn said no.

Attorney Jaunich asked if the presence of asbestos in the building was discussed. Mr. Hartshorn said the shipyard learned of asbestos after the discussion with Kate Mitchell in the April to August timeframe or possibly after the building permit application. Attorney Jaunich asked if the presence of asbestos caused delay of the removal of the Carew building. Mr. Hartshorn said it certainly did.

Attorney Heins referred to Exhibit SSY-3A and asked Mr. Hartshorn if he had the information that was filled in on Page 2 when the permit was submitted (i.e. were there any blanks when the application was submitted to the town). Mr. Hartshorn said there were a number of blanks such as the zoning district, the tax map number, the lot number, the overlay district, the name of the subdivision, the DRB approval date, estimated cost, building coverage, lot coverage. The information on the zoning district, tax map, overlay district was not known and Kate Mitchell said she would fill these in.

Attorney Heins asked who filled in the cost figure. Mr. Hartshorn said he did not know, but would guess it was Kate Mitchell because she called to say the line was blank and asked how much the cost would be. This was before the cost of the asbestos abatement was known so the amount was \$385,000 at that point. It is also believed Kate Mitchell wrote in the number on the permit to be helpful.

Attorney Heins asked where the copy of permit is from (Exhibit SSY-3A). Mr. Hartshorn said he thought the town's records.

Attorney Heins asked Mr. Hartshorn if he thinks the permit that was received was ambiguous. Mr. Hartshorn said he did not think so at the time because work proceeded with the foundation and the building was ordered, but now it appears the permit was very ambiguous due to all the issues that have come up since Mr. Jackson started his action and the town started asking questions. There was no ambiguity in the discussions with Kate Mitchell on what the shipyard believed it had and wanted to do.

Attorney Jaunich referred to Exhibit JJ-2 and asked if there is anything ambiguous about the statement to ensure the building stays outside the rear yard setback. Mr. Hartshorn said reading the statement now it is not ambiguous.

Mary Kehoe asked who wrote "plan provided with the Site Plan Review Application" on the building/zoning permit application (Exhibit SSY-3A). Mr. Hartshorn said he did in reference to the aerial view (Hamlin Engineering). Kate Mitchell said the aerial plan is fine. Mary Kehoe said Exhibit JJ-3 does not show any plan of the building. Mr. Hartshorn said he pointed out the location on the map to Kate Mitchell going to the right of the Carew building and putting in an entire building approximately to the south.

Jeff Pauza referred to Exhibit JJ-2 and asked Mr. Hartshorn if he read the email and to whom the email was addressed. Mr. Hartshorn said he did not read the email until October/November 2016. Attorney Jaunich said the email was addressed to the DRB from Kate Mitchell, DRB Coordinator and Assistant Zoning Enforcement Officer with a cc to Bruce Hartshorn, Director of Operations at Shelburne Shipyard. Jeff Pauza asked if anyone else in the shipyard had access to the email and might have read it. Mr. Hartshorn said the IT person would have access and could read the email.

Mark Sammut asked Mr. Hartshorn if he affirmed in his discussion with Kate Mitchell that the building was to be replaced. Mr. Hartshorn said yes.

#### Russell Fox

Attorney Heins asked Russell Fox where he works and his job. Mr. Fox said he is the Marine Superintendent at Lake Champlain Transportation Company. Attorney Heins asked Mr. Fox if he is representing LCT. Mr. Fox said yes.

Attorney Heins asked Mr. Fox if he understands Shelburne Shipyard is seeking a variance from the 50' setback from the LCT property for construction of a new building. Mr. Fox said yes.

Attorney Heins asked if LCT has any objection to Shelburne Shipyard's request for a variance from the 50' setback to the LCT property. Mr. Fox said no.

Attorney Heins asked Mr. Fox if he is authorized to speak on behalf of LCT. Mr. Fox said yes.

Kenneth Phillips

Attorney Heins asked Ken Phillips if he submitted pre-filed testimony on the appeal, Questions 1-25. Mr. Phillips said yes.

Attorney Heins asked the amount of money spent so far by the shipyard per the pre-filed testimony. Mr. Phillips said \$373,000 is the updated number.

Mark Sammut asked if the dollar amount includes the building and concrete foundation. Mr. Phillips said the concrete as it sits now has been paid for and the building to be constructed has been paid for as well. Mark Sammut asked the foundation cost. Mr. Phillips estimated \$80,000.

Attorney Heins asked if part of the figure covers demolition of the Carew building. Mr. Phillis said the amount was for the annex next to the Carew building which has been taken down to prepare for the new building.

Attorney Heins asked Mr. Phillips if he went to the town to talk about the project. Mr. Phillips said as a favor he picked up the names of the abutting property owners from the town and got the tax map from Kate Mitchell. Mr. Phillips said he did not talk to Kate Mitchell in any depth about the project, just confirmed that a variance was not needed.

Attorney Heins introduced Exhibits 4A through 4I from the site visit and asked Mr. Phillips if he took any pictures of the existing site. Mr. Phillips said he did.

Attorney Heins asked when the picture in SSY-4A was taken. Mr. Phillips said in the fall 2016 and pointed out the picture shows where the slab is cracked due to water heaving and freezing and where the support columns have raised up 18" from the slab in the Carew building from hydraulic freezing and thawing of underground water.

Mark Sammut asked if the pier is raised up 18” from the original position. Mr. Phillips said it is and not just that pier. The heaving starts 40’ back from the building and gradually works up to the back of the building. The back pier is up 18”. The next pier is up 12”. The picture shows the problem in one area of the building.

Attorney Heins asked how much of the Carew building has water damage. Mr. Phillips said 40%.

Attorney Heins asked Mr. Phillips how much experience and time he has with the Carew building. Mr. Phillips said he has watched the building gradually lift over years.

Attorney Heins asked if the cause is surface or ground water. Mr. Phillips said he believes it is ground water from a spring underneath the building.

Attorney Heins asked what Exhibit SSY-4D shows. Mr. Phillips said another column that is lifted in the same building and the siding of the building lifted up that should be at ground level.

Jeff Hodgson asked if the columns have heaved or the slab dropped. Mr. Phillips said both. The columns are not exposed underneath to air so they are constantly heaving. Water gets underneath the slab and heaves it up so there is constant action. Jeff Hodgson asked if the same condition exists under the new foundation. Mr. Phillips said the area is dry. It was drill tested down four feet six inches and no water was found.

Attorney Heins asked what Exhibit SSY-4H shows. Mr. Phillips said the back corner closest to the property line where the column is up 18” to 20” and sitting in air. The concrete is gone. A brace was put in for the winter.

Attorney Heins asked Mr. Phillips how long he has been a contractor in the State of Vermont and his experience with this kind of building. Mr. Phillips said 30 years.

Attorney Heins asked Mr. Phillips if he would put another building in the same location. Mr. Phillips said no because there may be a spring there so it would make no sense to put a building there.

Attorney Heins asked Mr. Phillips if he would be comfortable if a client wanted to put a building there. Mr. Phillips said he would not be comfortable because he would have to guarantee the building.

Attorney Jaunich asked Mr. Phillips if he has any ground water certifications or engineering degrees. Mr. Phillips said no.

Attorney Jaunich asked the basis for concluding there is a spring under the building. Mr. Phillips said there is nonstop water and it percolates out of the ground.

Attorney Jaunich asked Mr. Phillips if he was at the site visit. Mr. Phillips said no.

Attorney Jaunich asked Mr. Phillips to describe the topography around the building. Mr. Phillips said the land is flat and tapers up toward the back. Mr. Phillips said he is not sure where the spring is located, but Shelburne Point is like an island and is full of water underneath at some point. Attorney Jaunich asked if the land slopes behind the building so water off the roof will run into the building. Mr. Phillips said he is not sure where the water goes when it falls off the building. There is a drainage ditch around the building that will allow for capture and percolation.

Attorney Jaunich asked Mr. Phillips how much foundation experience he has. Mr. Phillips said extensive, both building and examining foundations.

Attorney Jaunich asked Mr. Phillips to describe the foundation and structure of the Carew building. Mr. Phillips said the columns are in the ground at least four feet which meets the requirements for frost. The area is wet all the time, winter and summer. Water in the ground provides the lift. The floor is a slab on grade poured against the piers. The base underneath the slab is aggregate of four inches which is typical. The foundation is reinforced with rebar. This was seen with the annex foundation. A reinforced foundation is very strong against movement. Attorney Jaunich asked why the edges of the foundation are buckling and the center of the slab is not. Mr. Phillips said he does not know.

Attorney Jaunich asked if the new foundation is a similar system. Mr. Phillips said the new foundation is up to code with footings, stone underneath, rebar in the footings and into the side walls.

Mark Sammut asked if the foundation was engineered. Mr. Phillips said he relied on his prior experience with similar structures.

Jeff Hodgson asked how far down the new footings are. Mr. Phillips said four feet six inches with stone underneath. The soil is mostly dry clay.

Jeff Pauza asked if the foundation can be modified (added to) and still maintain the appropriate support for the building on top. Mr. Phillips said an annex can be added to the

new foundation. Jeff Pauza asked is a wall could be built across the center of the foundation. Mr. Phillips said yes.

Mary Kehoe asked if the foundation will be modified. Mr. Phillips said no. The new building structure is premanufactured and the foundation was built to spec. The building plans are stamped by a Vermont engineer.

Jeff Pauza asked if the foundation can be modified to move a portion of the wall to avoid imposing on the setback and still have structural integrity in the foundation. Mr. Phillips said yes. A field modification of the building at the 20' increment would be necessary.

Mark Sammut asked if a permit was secured from the Vermont Department of Fire and Safety. Mr. Phillips said he does nothing with permits unless hired to do so.

Ian McCray asked if the piers in the old building are most severely heaved in the back. Mr. Phillips said the piers in front are fine, but going back the gradual lifting of the building in the last 40' can be seen. Failure of the back corner would pull down the entire building.

#### Willard Jackson

Willard Jackson, abutting property owner, said they bought their property 43 years ago and planted a row of cedar trees along the boundary with the shipyard. The trees are now about 50 years old and provide a beautiful screen. There is concern about drainage that might be affected by the new structure in the shipyard. In addition the shadow of the buildings do affect the growth of the trees. It is hoped with anything that is done that the health of the trees is kept in mind which means well drained and the farther back the building from the trees the more sunlight comes in. Mr. Jackson said they have always had good relations with the shipyard and is bothered there was no notice from the town or the shipyard on the plan for the building. The first it was known was when the footings were in. Being notified could have avoided what is happening now. Something could have been worked out. It seems there are violations and the rules were not followed. Mr. Jackson said he does not see why they should suffer because of this. All that is wanted is for the rules to be followed by everyone.

#### Kaitlin Mitchell

Attorney Jaunich asked Kaitlin Mitchell her profession. Ms. Mitchell said DRB Coordinator and Assistant Zoning Enforcement Officer for the Town of Shelburne.

Attorney Jaunich asked when the discussions with Bruce Hartshorn began. Ms. Mitchell said April 2016. Mr. Hartshorn thought he had a nonconforming building in disrepair and

wanted to replace it. Ms. Mitchell said she did not have an application before her at that time so she took Mr. Hartshorn's word that the building was nonconforming. The discussion with Mr. Hartshorn in April was brief.

Attorney Jaunich asked Ms. Mitchell if she provided Mr. Hartshorn with application materials and a variance application. Ms. Mitchell said she provided materials, but Mr. Hartshorn was under the misunderstanding that a nonconforming building needed a variance. If an existing nonconforming building is being replaced with the same and the nonconformance is not increasing, meaning encroaching more on the setback or more height, then a variance is not needed. The application is a conditional use and that is why Mr. Hartshorn was told he does not need a variance. Mr. Hartshorn was misinformed on what a variance would grant.

Attorney Jaunich asked Ms. Mitchell if she is familiar with Section 1920.G & H of the Shelburne bylaws (Exhibit JJ-11) pertaining to demolition and rebuilding a nonconforming structure with the condition the structure be no more nonconforming. Ms. Mitchell said yes.

Attorney Jaunich asked Ms. Mitchell when Mr. Hartshorn provided a complete application. Ms. Mitchell said early August 2016. Once the application was received Ms. Mitchell said she checked to see if the building was nonconforming so the applicant would not have to take an extra step if not necessary. An image overlay of all parcels from Google showed the building to be 56' away and an old survey of the shipyard showed the building at least 50' away so the stance was taken that the building was not nonconforming at that point, and that is the basis on which the permit was issued.

Mary Kehoe clarified the town took the position that the Carew building was not nonconforming because it was believed not to be in the setback. Ms. Mitchell said the two sources that were checked did not show the building in the setback, but being at least 50' away. Mary Kehoe asked if it was that understanding included in the memo to the DRB with a cc to Mr. Hartshorn that they change the shape of the building to stay outside the setback. Ms. Mitchell said yes.

Attorney Jaunich asked Ms. Mitchell if she considered the building also encroaching on the LCT property. Ms. Mitchell said she did not.

Attorney Jaunich asked how much time was spent with Mr. Hartshorn discussing the application. Ms. Mitchell said a decent amount of time. The conversation was over a long period of time going over the application. The Rural District dimensional standards and the administrative approval were reviewed and later the building permit.

Attorney Jaunich asked if it is usual to accept an application that does not show setbacks. Ms. Mitchell said it is not. Setback information should have been included in the application even though the application appeared straight forward. This was an oversight, but the application was straight forward so this was not overly concerning.

Attorney Jaunich asked Ms. Mitchell if she agrees with Mr. Hartshorn's testimony that she was keenly aware there were setback issues. Kate Mitchell said she checked two different sources that showed the same thing and oddly both sources happened to be incorrect.

Attorney Jaunich asked Ms. Mitchell if she was aware the application was requesting a building within the setback. Ms. Mitchell said no.

Attorney Jaunich asked Ms. Mitchell when she issued the permit on an administrative basis if she believed she was approving a building in the setback. Ms. Mitchell said no and she certainly did not believe she was approving a building that would encroach farther into the setback which was made abundantly clear. Mr. Hartshorn was aware of his neighbors and going farther toward the property line would make the building more nonconforming.

Attorney Jaunich asked Ms. Mitchell if she discussed timing of the new building relative to removal of the Carew building. Ms. Mitchell said it was her understanding the Carew building would be removed and replaced, but she did not realize she had to provide additional clarification that the demolition should be done first then the building of the new building.

Attorney Jaunich asked Ms. Mitchell based on all the applications submitted and the conversations if the understanding was the Carew building will come down and a new building would be placed essentially on the footprint, but 20' laterally. Kate Mitchell said yes and that there was a bit of a rush to get the building done before winter so boats could be stored.

Attorney Jaunich asked Ms. Mitchell when she learned the foundation was in the ground. Ms. Mitchell said in the fall of 2016 when a complaint was received that the foundation was in and close to the property line. Attorney Jaunich asked Ms. Mitchell if she was surprised the foundation and Carew building were in place. Ms. Mitchell said yes.

Attorney Jaunich said Joe Colangelo testified the permit was not ambiguous. Kate Mitchell said the permit could have had more supportive evidence, however the permit

references the administrative approval which was not ambiguous so the permit was not either.

Attorney Jaunich asked what the administrative approval approved. Ms. Mitchell said to push the building over 20', change the dimensions to not encroach further, and replace the building.

Attorney Jaunich asked Ms. Mitchell if she believes the structure as proposed conforms to the zoning bylaws. Ms. Mitchell said the building does not.

Attorney Heins asked Ms. Mitchell if she is responsible for providing applications to get authorization for projects and help applicants figure out what they need to know. Kate Mitchell said yes. Attorney Heins asked if it was correct that Mr. Hartshorn was directed to Ms. Mitchell for the project. Ms. Mitchell said yes.

Attorney Heins said Mr. Hartshorn thought he had a nonconforming building and Ms. Mitchell did research and determined the building was not nonconforming, but that was an error. Ms. Mitchell said both of the resources she checked were wrong, but at the time it was not believed to be in error. Mr. Hartshorn did not provide information that told absolutely the building was nonconforming. Attorney Heins said there was an error. Ms. Mitchell agreed there was an error.

Attorney Heins said the application was approved, but a depiction showing the setbacks or where the building would be located was not requested. Kate Mitchell said she did not receive the information, but verified the setbacks and reviewed with the applicant where the building was to be located. Attorney Heins said Mr. Hartshorn pointed on a map where the building would be going, but asked if it is normal practice to actually have the applicant submit information showing the building location. Kate Mitchell said typically it is, but that was not done.

Attorney Heins asked if Ms. Mitchell agrees the permit is not ambiguous because it does not tell where the building is supposed to go. Ms. Mitchell said the permit is lacking in information. It was thought the application was straight forward. The administrative approval very clearly states what was asked. Mr. Hartshorn had the administrative approval well in advance of the building permit so there was ample time to get answers to questions.

Attorney Heins said there was no site plan showing where the building was to go. Ms. Mitchell said correct.

Attorney Heins said the 20' lateral relocation on the Google map was put there by Ms. Mitchell. Kate Mitchell said she did this and wrote in the \$385,000 in Mr. Hartshorn's presence. Ms. Mitchell said she was willing to say this during Ms. Griswold's testimony, but did not want to interject.

Attorney Heins asked if the permit should have been approved administratively. Ms. Mitchell said now having all the information and knowing the building was nonconforming the application should have been reviewed as a conditional use and site plan approval by the DRB.

Attorney Heins asked Ms. Mitchell if she agrees under Vermont Planning and Zoning Act that the DRB Administrative Officer cannot approve permits that do not comply with the zoning bylaws. Ms. Mitchell agreed.

Jeff Hodgson asked for Ms. Mitchell's understanding of the 20' move. Kate Mitchell said each wall would be 20' over.

Mark Sammut asked if the Administrative Site Plan Review Application and the General Application Form were submitted to the town at the same time. Ms. Mitchell said yes.

Mark Sammut referred to JJ-4/SSY-3A that gives a concise description of the project to move the existing 7,800 s.f. cold storage building and replace with a 7,800 s.f. cold storage building. Mr. Sammut asked Ms. Mitchell's interpretation of the description. Kate Mitchell said a building is being removed first and replaced with a same sized building.

Mark Sammut noted the administrative memo to the DRB mentions that Mr. Hartshorn subsequent to the application planned to alter the size of the proposed building. The memo says the building will be moved southeast approximately 20' from the location and the proposed building dimensions will be slightly different to ensure the building stays outside the rear yard setback. Mr. Sammut asked Ms. Mitchell if the statement was generated based on the building being removed and a replacement built. Ms. Mitchell said correct. (Attorney Jaunich said the dimensions do not reflect a change in the square footage.)

Mark Sammut said per the memo to the DRB, dated 8/11/16, the language of the permit says remove the existing 7,800 s.f. storage building and replace with a new 7,800 s.f. building per site plan review 16-04. The permit generated is based on the assumption the building is to be removed and replaced in generally the same footprint, slightly adjusted due to constraints on the property, and of the same square footage. Kate Mitchell said the

memo references the administration approval as part of the permit application (Exhibits JJ-6 and SSY-3A).

Mary Kehoe asked where the building permit references the email to the DRB. Kate Mitchell said the last page of the permit application (Exhibit SSY-3A) is the reference. Mary Kehoe said page 4 of the building and zoning permit application has an office use only box that is not checked. The DRB hearing line reads “Administrative approval August 17, 2016” and this is the indication that bootstraps the application to the email to the DRB on August 4<sup>th</sup> and makes the application clear the new building cannot further encroach on the setback. Ms. Mitchell said this is the indicator and there was also the conversation where the applicant was told administrative approval would be needed before getting a building permit. Mr. Hartshorn was cc’d on the administrative approval.

Mary Kehoe asked Ms. Mitchell if she had a conversation with Mr. Hartshorn after the email was sent. Ms. Mitchell said the next time there was conversation was with the building permit. Mr. Hartshorn asked when the approval would be coming. The email was sent with the approval. Mr. Hartshorn did not respond to the email or ask for an explanation.

Mary Kehoe noted the email, dated 8/11/16 (Exhibits JJ-2, SSY-3A) says part of the application was a brief cover letter and description and a map that does not show where the new building is located. Kate Mitchell said the map only shows the direction the building is moving.

Mary Kehoe said the letter from Mr. Hartshorn to Kate Mitchell, dated 8/9/16, says the current building that is being removed is 60’ wide and 130’ long for total square footage of 7,800 s.f. The replacement building is 78’ wide and 100’ long for total square footage of 7,800 s.f. The replacement building will be 34.5 feet tall at the highest point. There is a drawing and map that does not show where the new building will be. Mary Kehoe asked if this is the information referred to in the email to the DRB with a cc to Bruce Hartshorn, dated 8/11/16. Ms. Mitchell said yes.

Mary Kehoe asked Ms. Mitchell what she understood about the 20’ lateral move of the building, noting the application says the building will not be the same configuration. Kate Mitchell said the shift would be 20’ over and the dimensions modified to not encroach further because the property angles. This is what the administrative approval says.

Mary Kehoe asked the need for the 20’ shift to comply with the setback requirements. Kate Mitchell said she does not recall the need for the shift and does not recollect any conversation about the exiting site not being suitable. The applicant presented that the

building was falling apart and needed to be replaced. Mary Kehoe asked if Mr. Hartshorn was asked why the building was not replaced in the same location. Ms. Mitchell said she did not ask this. Mary Kehoe asked if the need or desire for a shift of the building came up in conversations with the applicant. Ms. Mitchell said the only information on the existing building was that it was old and falling into disrepair and the applicant wanted to replace it.

Mary Kehoe asked why the building was reconfigured. Kate Mitchell said because of the diagonal property line. Something had to be done when the building was shifted or there would be further encroachment.

Mark Sammut noted there is language on the zoning permit relative to incorrect information being submitted resulting in the permit being revoked. Mr. Sammut asked Ms. Mitchell if the permit would be revoked if she knew the foundation was in place and saw the site today. Ms. Mitchell said yes because the building would not be in compliance with the permit.

Mark Sammut referred to the checklist on page 2 of the application and asked if Ms. Mitchell wrote “plans provided with the Site Plan Review Application”. Ms. Mitchell said she did not.

Jeff Pauza asked Ms. Mitchell if she told Mr. Hartshorn in April that the existing structure is nonconforming. Ms. Mitchell said she did not say anything about conformity. Mr. Hartshorn presented that the building was a nonconforming structure and he wanted to replace it. Ms. Mitchell said she did not make an assertion either way because she did not have an application before her. Mr. Hartshorn was told he needed to complete and submit the permit applications.

Jeff Pauza asked if anyone else was present for the conversations with Mr. Hartshorn. Kate Mitchell said there could have been other staff members in the room, but the conversation was between her and Mr. Hartshorn.

Attorney Heins stated Exhibit JJ-2 is incorrect in and of itself because in Ms. Mitchell’s memo to the board she failed to tell them the structure was nonconforming. Kate Mitchell said she already established she did not think the structure was nonconforming. Attorney Heins said looking at what the permit is supposed to be the memo was an incorrect statement to the board because it did not tell the board the building was nonconforming. Kate Mitchell agreed the statement was not accurate.

**V17-01: Variance for relief from zoning dimensional standards for side/rear yard setback at 4584 Harbor Road in the Rural Zoning District, Lakeshore overlay District, and Floodplain and Watercourse Overlay District by Shelburne Shipyard**

Testimony was heard on the variance application by Shelburne Shipyard.

Mary Griswold

Attorney Heins asked Mary Griswold if her pre-filed testimony as it relates to the variance is true and accurate. Mary Griswold said yes.

Attorney Heins submitted Exhibits SSY-5 and SSY-6 and asked if the shipyard has received variances for buildings on the property. Mary Griswold said yes. Attorney Jaunich objected to the question as not relevant. Attorney Heins said the question is relevant due to the Supreme Court ruling. Attorney Heins will forward the case studies: MTP 156VT494 and Korbet 178VT159.

Mary Kehoe said Exhibits SSY-5 and SSY-6 will be accepted with reservation.

Attorney Heins asked Mary Griswold if the shipyard received a variance on the same property line under discussion. Mary Griswold said yes for the Miller rack storage building. Attorney Heins referred to Exhibit SSY-9 and Mary Griswold pointed out the property line and the building.

Attorney Heins asked how far the Miller building is from the Jackson property line. Mary Griswold said 10'. Attorney Heins observed this is closer than the proposal. Mary Griswold agreed.

Attorney Heins asked if there is another building close to the property line that received a variance. Mary Griswold said the Barrett building.

Attorney Heins said Exhibit SSY-6 is the variance for the Miller rack storage, but there was also a variance from the water setback for the restroom.

Attorney Heins asked Mary Griswold how many buildings at the shipyard are within the setback. Mary Griswold said all of them.

Attorney Heins asked if it is the unique configuration of the property that requires buildings to be near the property lines. Mary Griswold said because of the unique shape of the property there are only certain places where buildings can be located. The lake setback of 110' limits where buildings can be so variances are needed.

Attorney Heins asked Mary Griswold what she uses the rest of the site for. Mary Griswold said storing boats. Attorney Heins asked if storing boats is the major use of the property. Mary Griswold said absolutely. Attorney Heins asked if there is outside storage. Mary Griswold said yes.

Attorney Heins said the variance plan submitted to the board with the variance application is Exhibit SSY-1/JJ-1. Attorney Heins asked Mary Griswold if since submitting the application an alternative plan that would work has been submitted. Mary Griswold said yes. Attorney Heins marked Exhibit SSY-11 and noted the proposal is to shorten the building to get out of the setback and not encroach more than the existing building. The corners of the encroachment of the two structures are in the same location.

Attorney Heins asked Mary Griswold if square footage of storage will be lost with the alternative proposal. Mary Griswold said about 1,500 s.f. will be lost which will impact six boat owners who will not have space to store their boat under cover.

Attorney Heins asked how the modification can be done with the pre-ordered building. Mary Griswold said the last 20' panel and the diameter of the building will be changed.

Attorney Heins asked if the encroachment is no more than the prior Carew building. Mary Griswold said yes.

Mary Kehoe asked if this is the proposal for the variance. Attorney Heins explained Exhibit SSY-1 is what is needed for storage. Exhibit SSY-11 is what could be done if necessary, but 1,500 s.f. of storage will be lost at substantial impact. Mary Kehoe asked about the line across the front of the building. Attorney Heins said the line is the 50' setback from the LCT property. Mr. Fox with LCT testified LCT has no objection to the building.

Mark Sammut asked if LCT has an easement to get to their property. Attorney Heins said there is a right-of-way. Attorney Jaunich said the shipyard has the right to relocate the right-of-way.

Attorney Heins asked Mary Griswold if she would accept a condition that the cedar trees will be replaced if they die due to the replacement building. Mary Griswold said yes.

Attorney Jaunich asked if a Variance Request Application for the town was completed. Mary Griswold said an application was completed which she signed. Attorney Jaunich noted the application is attached to correspondence from Langrock Sperry and Wool,

Attorney Erin Heins, dated January 4, 2017. Mary Kehoe said the DRB has the entire variance application and all attachments appended (Exhibits SSY-1 through SSY-7).

Attorney Jaunich referred to page 2 of the Variance Request Application regarding conformance to statutory criteria and evidence relative to unique physical circumstances or conditions peculiar to the property. The response on the application was to see the attached narrative. Page 2 of the narrative indicates there is a serious ground water condition as the basis for the hardship. Evidence is testimony by Mr. Phillips. Mary Griswold said the testimony and the way the building looks is the evidence. Attorney Jaunich asked if there are engineering reports or ground water studies or soil testings. Mary Griswold said no.

Attorney Jaunich referred to the criterion relative to not being able to develop in conformance with the bylaws and asked if it is possible to put a storage building on the property and conform to the setbacks. Mary Griswold said yes.

Attorney Jaunich referred to the criterion relative to reasonable use of the property, noting if the property is already being used then a variance cannot be granted. Mary Griswold said she did not see the stated language. Attorney Jaunich asked if the shipyard is being used and is an operating business. Mary Griswold said yes.

Attorney Jaunich asked if losing the Carew building is an economic hardship. Mary Griswold said this is correct because there will be up to 20 boats without shelter.

Attorney Jaunich asked the nearest facility to Shelburne Shipyard offering covered storage of boats. Mary Griswold said sites up toward Canada. Attorney Jaunich said if someone wants covered storage it is unlikely they will go elsewhere. Mary Griswold said people will go where they can find covered storage if that is what they want. The nearest site is across the lake in New York.

Attorney Jaunich referred to the criterion related to hardship not created by the appellant and asked how the issue with the setbacks was not created by the appellant. Attorney Heins said the information has been submitted in the application.

Attorney Jaunich asked Mary Griswold if she believes because she spent \$375,000 that is the hardship. Mary Griswold said no. Attorney Jaunich said the application says it is. Mary Griswold said it is a hardship to spend that kind of money, but the hardship is having to put up a building to replace the one that is there because people have signed contracts for inside storage and it is the shipyard's obligation to the customers to provide that.

Attorney Jaunich asked if a variance is needed to provide a service to the shipyard's customers. Mary Griswold said a variance is needed to put up a building to replace a building that is falling down.

Attorney Jaunich asked if it is possible to put the building somewhere else on the property. Mary Griswold said not without losing 40 to 100 boats and not staying within the setbacks. Attorney Jaunich mentioned not offering indoor storage. Mary Griswold said her customers would go elsewhere and she would lose more customers. Attorney Jaunich said this is an economic issue. Mary Griswold said it is an economic issue mostly to the town.

Attorney Jaunich referred to the criterion related to not altering the character of the neighborhood or district, noting earlier variances were granted with respect to boundaries and some variances were granted for boundary lines different than the current lines. Mary Griswold agreed. Attorney Jaunich asked Mary Griswold if Shelburne Point was developed as residential property when the previous variances were granted. Mary Griswold thought in 1994 there was a house on Shelburne Point.

Attorney Jaunich asked if the character of the neighborhood changed since the earlier variances. Mary Griswold said yes.

Attorney Jaunich asked if it is relevant the property has been a shipyard since 1826 and if indoor storage was offered then. Mary Griswold said she is doing the same business at the shipyard and there may have been indoor storage in 1826.

Attorney Jaunich asked if the variance may alter the development of adjacent property. Mary Griswold said no. Attorney Jaunich asked if the new building will have any impact on development of Mr. Jackson's property. Mary Griswold said no.

Attorney Jaunich referred to the criterion relative to a variance being the minimum to afford relief and reasonable use of the property, not the most economically beneficial variance. Attorney Jaunich asked if the variance necessary for the foundation in the ground today is the smallest variance necessary to provide reasonable use of the property. Mary Griswold said she does not know. Attorney Jaunich pointed out Exhibit SSY-11 suggests an alternative with lesser impact. Mary Griswold said the alternative puts the building in the same place.

Attorney Jaunich said the variance must represent the least deviation possible from the plan and Exhibit SSY-11 suggests there could be a lesser deviation. Mary Griswold agreed.

Attorney Jaunich asked Mary Griswold to read the answer to Question 45 of her pre-filed testimony. Mary Griswold read that the zoning board found the rack storage building did not have an impact.

Attorney Jaunich said Exhibit SSY-6 is the findings of fact on the conditional use application and are criteria for conditional use, not variance. Attorney Heins objected to the statement. Mary Kehoe said the DRB will decide this.

Attorney Jaunich asked Mary Griswold if she is aware of the criteria for a variance. Mary Griswold said no.

Jeff Hodgson asked the plan for the area where the existing building was located. Mary Griswold said the building will be removed and the concrete taken out. Fill will be brought in and boats will be stored there.

Mary Kehoe asked the number of boats that will be lost with the Exhibit SSY-11 plan. Mary Griswold said six to eight boats. Mary Kehoe said some area will be gained where the Carew building was albeit not inside space. Mary Griswold agreed, but said close to 25 boats were stored where the building is. Mary Kehoe asked if 25 boats can be stored in the area of the Carew building. Mary Griswold said she hopes so.

Mary Kehoe asked if the net loss with Exhibit SSY-11 is six to eight boats. Mary Griswold said yes. Attorney Jaunich urged looking at the scale of the boats because it does not look like 30 boats will fit into the building in Exhibit SSY-11. Mark Sammut said that will depend on how the boats are stored. Mary Griswold said the boats are in flat storage, not on racks.

Mark Sammut asked what is done in the buildings in the summer. Mary Griswold said the buildings continue to be used for storage and people work on their boats.

Mark Sammut asked if the contractor said how long it will take to build the building if there were no problems. Mary Griswold said about five months. Mark Sammut asked if it was contemplated to tear down the building and rebuild in the same location. Mary Griswold said no. It would take the same amount of time to tear down the building as to build another so a whole year of storage would be lost. The intent with moving the building while building the other building to continue storage of boats. Mark Sammut

asked if it is a 10 month cycle to tear down and rebuild. Mary Griswold said yes. The asbestos took two months to remove.

Attorney Heins asked if the indoor storage of boats is an established use of the property. Mary Griswold said yes. Attorney Heins asked how long indoor storage has been going on at the shipyard. Mary Griswold said since 1971.

Attorney Heins asked if it is possible to put a 7,800 s.f. cold storage building on the property and still maintain the setbacks. Mary Griswold said no.

Attorney Heins asked if the building cannot be built in the same place due to water. Mary Griswold said yes.

Attorney Heins asked if a less nonconforming solution is to put a 7,800 s.f. building on the property. Mary Griswold said no. Attorney Heins said Exhibit SSY-11 proposes a smaller building. Mary Griswold said correct.

Attorney Jaunich asked Mary Griswold if a variance is necessary with the Exhibit SSY-11 plan. Attorney Heins objected to the question. Attorney Jaunich said the question goes to the criterion relative to reasonable options. Mary Griswold said the board will determine if a variance is needed.

#### Steve Vock

Attorney Jaunich asked Steve Vock to state his profession and if he holds a license in the State of Vermont. Mr. Vock said he is a Vermont licensed professional civil engineer.

Attorney Jaunich asked Mr. Vock if he was at the site visit on 2/4/17. Mr. Vock said yes.

Attorney Jaunich asked Mr. Vock to describe the topography around the Carew building. Mr. Vock said there is a swale around the perimeter with very poor drainage which is the source of the heaving. The building does not have a foundation and is on a slab on grade so two different structures are being compared, one with a foundation and one with a slab on grade with piers for support of the structure.

Attorney Jaunich asked Mr. Vock if he agreed with the testimony by Mr. Phillips that it is customary to build on a slab. Mr. Vock said no.

Attorney Jaunich asked Mr. Vock to describe the level of the base material that could be seen under the slab. Mr. Vock said it appeared to be a mixture of different sized aggregate. The depth was difficult to determine without boring or excavation.

Attorney Jaunich asked if ground water is the cause of the buckling of the Carew building. Mr. Vock said it is a contributing factor. Attorney Jaunich asked if there are other factors. Mr. Vock said the design of the structure itself is a factor. The building does not have a perimeter foundation extended down into the ground and fully supported. There is much more exposed without a foundation that is susceptible to movement.

Attorney Jaunich asked if it is possible to put a real foundation in the location of the Carew building and put a replacement building on the site. Mr. Vock said yes.

Attorney Heins asked Mr. Vock if his opinion is based on the site visit on 2/4/17. Mr. Vock said that and what he has witnessed from the Jackson property. Portions of the building are visible from the Jackson property. The swale that goes around the perimeter is actually on the Jackson property. Mr. Vock said they were denied access to the shipyard facility. Attorney Heins reiterated Mr. Vock's observations were while on the grounds on 2/4/17 and his opinion is based on a 15 minute walk around the building. Mr. Vock said he has over 31 years of being involved with design for structures and site work. There are very few locations that are undevelopable.

Attorney Heins asked Mr. Vock if he did any ground water testing. Mr. Vock said he did not. Attorney Heins asked if the ground was frozen when Mr. Vock was there. Mr. Vock said it was.

Mark Sammut asked what the customary solution is to a site with poor soils. Mr. Vock said soil replacement or piers/piles for support if the sub-base condition is poor. Normally replacement of materials, elevating the building, dewatering. It is important to do geotechnical evaluation to provide information for proper design. Not to do so is irresponsible. Mark Sammut asked if there are techniques to deal with underground water or surface water that migrates under and around a structure. Mr. Vock said absolutely.

#### Jeffrey Jackson

Attorney Jaunich asked Jeff Jackson if he owns the property adjacent to the shipyard project. Mr. Jackson said yes.

Attorney Jaunich asked Mr. Jackson what his intention is with his property. Mr. Jackson said there is a building envelope which is a house site (area is residentially zoned).

Attorney Jaunich asked if encroachment into the setback affects utility of the property. Mr. Jackson said yes. Attorney Jaunich asked Mr. Jackson to describe the impact. Mr.

Jackson said looking at the back side of a 7,800 s.f. building that is 34.5 feet tall is more in the view area than the existing building.

Attorney Jaunich asked Mr. Jackson when he first learned of the building in the current proposed location. Mr. Jackson said at the end of October 2016 when the foundation was in. Attorney Jaunich asked Mr. Jackson what he did when he discovered the foundation. Mr. Jackson said he had a conversation with Bruce Hartshorn and tried to talk to Mary Griswold, but she was away, and then went to the town and talked to Kate Mitchell who provided the file for the shipyard. Mr. Jackson said he read the file to determine the permit.

Attorney Jaunich asked Mr. Jackson if he was at the site visit. Mr. Jackson said he was. Attorney Jaunich asked Mr. Jackson if he witnessed the cedar trees referred to by Mr. Jackson, Sr. separating the two properties. Jeff Jackson said he did. Attorney Jaunich asked Mr. Jackson if he believes the project building presents a threat to the trees. Attorney Heins objected to the question because Mr. Jackson is not qualified to talk about the health of the trees. Mary Kehoe overruled the objection based on Jeff Jackson being competent to testify about the trees on his property. Jeff Jackson said he believes the building placed as close as it is will create shade and have an adverse effect on the cedars.

Attorney Jaunich asked Mr. Jackson if there are other locations better suited for the building. Attorney Heins objected to the question.

Attorney Heins said there has been a 7,800 s.f. cold storage building within the setback closest to the property for the entire time Mr. Jackson owned his property. Mr. Jackson agreed.

Attorney Heins said there are other shipyard buildings within the setback closest to the Jackson property that are closer to the property line than the proposed building. Jeff Jackson agreed.

Attorney Heins asked if Lot E directly behind the shipyard is undeveloped. Mr. Jackson said yes. Attorney Heins said the waste water permit for the proposed house site is right behind the existing Carew building. Jeff Jackson disagreed. Attorney Heins submitted Exhibit SSY-8 showing the plans for the waste water permit with the state and the proposed house location directly behind the Carew building. Jeff Jackson said there is a building envelope and the house can be located anywhere within the envelope. Attorney Heins read a section of the permit that says no deviation from the building location is allowed without approval from the state waste water division so the site cannot be changed without approval from the state. Jeff Jackson said if a different location is

wanted then the engineering would have to be changed to tie into the community waste water system on the site.

Exhibit SSY-8 was submitted into evidence.

Attorney Heins asked Mr. Jackson if he would have objection if the replacement structure as proposed does not encroach on the Jackson property any more than the existing Carew building. Mr. Jackson said he would because the roof pitch is flatter than the existing Carew building with a steeper pitch. The new building is also 18' wider so the face of the new building along with the flatter roof creates a much larger area than the existing building and it is more in the view area from the lot.

Attorney Heins asked if the concern about the building being too close to the trees still exists with a smaller building that is not any closer than the existing 7,800 s.f. building. Mr. Jackson said the concern still exists, but moving the building back is helpful.

Attorney Heins said Exhibits SSY-12A & B are views from the Jackson property of the shipyard.

There was no further testimony or evidence presented. The hearing was closed. The DRB will deliberate the appeal and variance by Shelburne Shipyard at the next meeting.

##### **5. OTHER BUSINESS/CORRESPONDENCE**

None.

##### **6. ADJOURNMENT and/or DELIBERATIVE SESSION**

**MOTION by Mark Sammut, SECOND by Jeff Pauza, to adjourn the meeting.**

**VOTING: unanimous (6-0); motion carried.**

The meeting was adjourned at 10:20 PM.

*RScty: MERiordan*