

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC

ATTORNEYS AT LAW

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December 22, 2020

HAND DELIVERED

Peter Stith, Planner
Izak Gilbo, Administrative Clerk
Portsmouth Zoning Board of Adjustment
City Hall
1 Junkins Avenue
Portsmouth, NH 03801

Re: Zoning Relief
Karona, LLC, Owner/Applicant
36 Artwill Avenue
Tax Map 229/Lot 4
SRB Zone

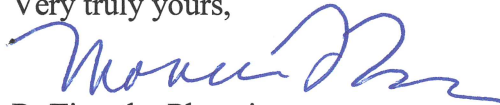
Dear Mr. Stith, Mr. Gilbo & Zoning Board Members:

On behalf of Karona, LLC, enclosed please find the following:

- Land Use Application (submitted online December 22, 2020)
- Owner's Authorization
- Memorandum in Support of Variance (original and 11 copies)

We look forward to presenting this the Zoning Board of Adjustment at its January 19, 2021 meeting.

Very truly yours,



R. Timothy Phoenix
Monica F. Kieser

Encl.

cc: Karona, LLC
Thomas House
James Verra & Associates, Inc.

DANIEL C. HOEFLE	R. PETER TAYLOR	GREGORY D. ROBBINS	DUNCAN A. EDGAR
R. TIMOTHY PHOENIX	JOHN AHLGREN	MONICA F. KIESER	OF COUNSEL:
LAWRENCE B. GORMLEY	KIMBERLY J.H. MEMMESHEIMER	SAMUEL HARKINSON	SAMUEL R. REID
STEPHEN H. ROBERTS	KEVIN M. BAUM	JACOB J.B. MARVELLEY	

On behalf of Karona LLC, owner of property located at 36 Artwill Ave, Portsmouth, NH, the firm of Hoefle Phoenix Gormley and Roberts P.A. is authorized to represent us before any and all City of Portsmouth Boards, Commissions and staff with respect to any permitting required for our development of the property.


Butch Ricci, Member/Manager.

MEMORANDUM

TO: Portsmouth Zoning Board of Adjustment (“ZBA”)
FROM: R. Timothy Phoenix, Esquire
DATE: December 22, 2020
RE: Karona, LLC, Owner/Applicant
Project Location: 36 Artwill Avenue
Tax Map 229/Lot 4
SRB Zone

Dear Chairman Rheume and Zoning Board Members:

On behalf of Karona, LLC (“Karona”), we are pleased to submit this memorandum and attached exhibits in support of Zoning Relief to be considered by the Zoning Board of Adjustment (“ZBA”) at its January 19, 2021 meeting.

I. Exhibits

1. 8/3/17 Site Plans 36 Artwill Avenue – issued by James Verra & Associates, Inc.
2. Architectural Plan Set, 36 Artwill Avenue – issued by THA Architects, LLC.
 - Page A1 – Floor Plans
 - Page A2 – Elevations
3. A-G Site Photographs.
4. Tax Map 229.
5. 1958 recorded RCRD Plan 02637.
6. 2017 ZBA Notice of Decision & Minutes.

II. Property/Project

36 Artwill Avenue is a 26,737 sq. ft. lot on a private street upon which exists a single-family dwelling and a not yet completed garage with a begun but not completed second floor apartment. (**Exhibits 1,3**). The primary dwelling has long existed, with the detached garage erected in 2013 pursuant to a building permit for a 32’ by 30’ accessory structure. That permit was issued in error due to the frontage requirement. Karona purchased the property in 2017, intending to complete the garage and apartment for use as a detached accessory dwelling unit (“DADU”) in compliance with the Portsmouth Zoning Ordinance (“PZO”) §10.814. Karona received a frontage variance on July 25, 2017 (**Exhibit 6**) but its subsequent request for a Conditional Use Permit for the DADU was denied because the majority members of the LLC did not reside at the property. The frontage Variance subsequently expired.

Karona, LLC is now comprised of Robert Ricci and his wife Katherine, both of whom reside at 36 Artwill Avenue. Applicant intends to complete the DADU as previously designed,

but because the variance has expired, Karona again seeks a variance from the frontage requirement of Portsmouth Zoning Ordinance (“PZO”) §10.521 to permit DADU in the existing garage. The footprint of the building, thus the dimensions of the ADU is 1,096 sq. ft. Construction of the DADU is incomplete, having been halted by the inspection department due to prior owner actions. Complete are interior wall framing and delivery without installation of appliances.

III. Relief Required

After conferring with the City Planning Department staff, it has been determined that the following is required:

1. PZO Section 10.521 – Table of Dimensional Standards- To permit the accessory structure on a lot on a private street with no frontage on a public street where 100’ is required.

The former owner received building permits to erect a 32’x 30’ accessory structure however, built it slightly larger (32x32 +/-) than approved. Apparently, the building permit was issued in error due to the frontage requirement. As a result, the situation may well be the rightful subject of a request for equitable waiver; however, since the structure is now existing and the relief rather slight, built by a former owner, zoning relief is here sought.

IV. Variance Requirements

1. The variances will not be contrary to the public interest.
2. The spirit of the ordinance is observed.

The first step in the ZBA’s analysis is to determine whether granting a variance is not contrary to the public interest and is consistent with the spirit and intent of the ordinance, considered together pursuant to Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007) and its progeny. Upon examination, it must be determined whether granting a variance “would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives”. Id. “Mere conflict with the zoning ordinance is not enough”. Id.

In considering whether variances “in a marked degree conflict with the ordinance such that they violate the ordinance’s basic zoning objectives”. Malachy Glen, *supra*, also held:

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the

essential character of the locality.... . Another approach to [determine] whether granting the variance violates basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare. (emphasis added)

Here, the accessory structure was built by a former owner after a permit was received from the Building Department. It is unclear why the variance requirement was not learned during the permit approval process. In any event, the structure was an existing condition when Karona purchased the property. Since: the building will be used for a garage, a positive feature compared to existing uncovered parking only; and will if issued a CUP by the Planning Board provide a DADU as is permitted under the Portsmouth Zoning Ordinance and mandated by State statute NH RSA 674:72; is on a lot that was permitted (“no jurisdiction”) by the Planning Board in 1958 (Exhibit 5); has frontage on the private Artwill Avenue which is built to public street specifications, where a home already exists, it is reasonable to allow the accessory building to remain via this minimal zoning relief. The building, on a large lot, is the last on a short, private dead-end street, providing covered parking in a neighborhood of homes, public swimming pool, high school and other nearby commercial and residential uses. (**Exhibit 3**, Satellite Photo) The lack of frontage on a public street will neither “alter the essential character of the locality nor threaten the public health, safety or welfare.”

3. Granting the variance will not diminish surrounding property values.

The accessory building already exists. The lot and existing home have long existed. The accessory building was granted a permit to a prior property owner, and it was not realized or discovered via City review that zoning relief was needed until after the building was constructed. The new building is on the far side of the existing home on a private dead-end street. To the casual observer, the lack of public street frontage is not readily ascertainable. Given that the area is a mixture of homes, public swimming pool, high school, churches and other nearby residential and commercial uses, it is clear that granting this slight “frontage” variance will not diminish surrounding property values.

4. Denial of the variances results in an unnecessary hardship.

a. Special conditions distinguish the property/project from others in the area.

Financial hardship alone does not justify a variance; however, when considered in the overall picture, it is one of the considerations. Karona purchased the property with the existing

accessory building and without knowledge that there was a technical violation of the frontage requirement. The lot and home were long ago permitted on the private Artwill Avenue. It is not possible to create frontage on the public Lafayette Road. Creation of the lot and construction of any structure would require identical relief. Since it is impossible to create frontage on a public street, special conditions exist.

- b. No fair and substantial relationship exists between the general public purposes of the ordinance and its specific application in this instance.

The frontage requirement is designed to maintain access, adequate air, light, space, and visual perspective. The private Artwill Avenue fully provides these requirements. Given that: this is the last property on a dead-end private street, so will be seen by almost no one; the lot was created with Planning Board review in 1958 (**Exhibit 5**); the long existing single-family home; the existing frontage on the private Artwill Avenue; the purpose of frontage requirement is met, so there is no reason to apply the strict frontage requirements of the zoning ordinance.

- c. The proposed use is reasonable.

If the use is permitted, it is deemed reasonable. Vigeant v. Hudson, 151 N.H. 747 (2005). This is a residential use in a residential area with the accessory building being the last on a dead-end street that no one else will see. Accordingly, the use is reasonable.

5. Substantial justice will be done by granting the variance.

If “there is no benefit to the public that would outweigh the hardship to the applicant” this factor is satisfied. Harborside Associates, L.P. v. Parade Residence Hotel, L.L.C., 162 N.H. 508 (2011). That is, “any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice”. Malachy Glen, supra at 109. While arguably technically noncompliant, the ordinance violation is impossible to avoid. Any structure on the lot would require the same relief. Together with facts that: the building already exists, apparently permitted through the inspection process; was built by a former owner; has frontage on Artwill Avenue which appears to be a public way; frontage relief was previously granted by the ZBA in 2017; and the structure will be seen by virtually no one since it is the last structure on the dead-end Artwill Avenue, there is no benefit to the public from denying the frontage variance. In comparison, the owner will suffer great harm as it would be required to remove an existing building it has paid for, and is otherwise entirely and reasonably usable. Its removal after being permitted by the City would diminish the

value of the property, add unnecessary costs of removal, deny a possible DADU, and leave an uncovered-only parking situation.

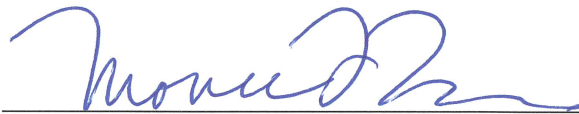
It is clear that there is no benefit to public outweighing the hardship to the applicant if the variances are denied.

V. Conclusion

For all of the reasons stated, Karona respectfully requests that the Portsmouth Zoning Board of Adjustment grant the submitted variance requests.

Respectfully submitted,

Karona, LLC



By: R. Timothy Phoenix
Monica F. Kieser

ABUTTERS LIST

MAP-LOT	OWNER OF RECORD	DEED REF.
229-1	HARLON P. WILLIS, TRUSTEE JEAN P. WILLIS, TRUSTEE	3537/1327
229-2	ST. NICHOLAS GREEK ORTHODOX CHURCH	1840/128
229-3	CITY OF PORTSMOUTH	1985/379
229-5	KRISTIN M. & CHRISTOPHER M. CHASE	5599/453
229-6	DOMER REALTY, LLC	4231/1881
229-6A	ST. NICHOLAS GREEK ORTHODOX CHURCH	2410/505

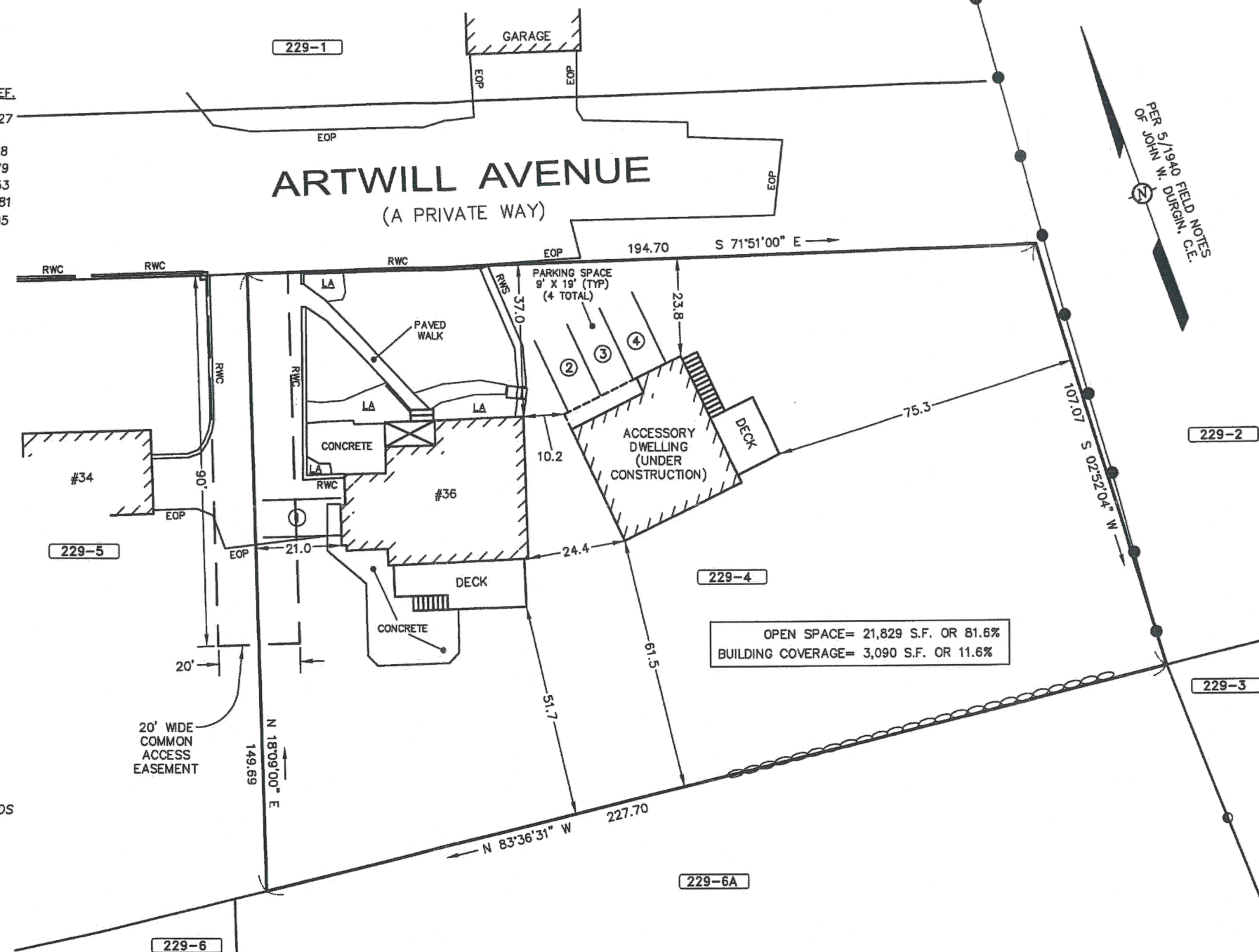
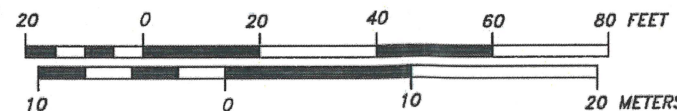
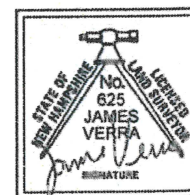
LEGEND:	
	STONE WALL
	IRON ROD
	IRON PIPE
	CHAIN LINK FENCE
	TAX SHEET - LOT NUMBER
	ROCKINGHAM COUNTY REGISTRY OF DEEDS
	EDGE OF PAVEMENT
	CONCRETE RETAINING WALL
	STONE RETAINING WALL
	LANDSCAPED AREA

NOTES:

- OWNER OF RECORD.....KARONA, LLC
ADDRESS.....25 PARK AVE, GREENLAND, NH 03840
DEED REFERENCE.....5821/1630
TAX SHEET / LOT.....229-4
PARCEL AREA26,739 S.F.
- THIS PLAN IS BASED ON A FIELD SURVEY 7/28/2017 BY
JAMES VERRA AND ASSOC., INC.
- ZONED:.....SRB
MINIMUM LOT AREA 15,000 S.F.
FRONTAGE.....100'
MINIMUM OPEN SPACE40%
MAXIMUM BUILDING COVERAGE20%
FRONT YARD SETBACK.....30'
SIDE YARD SETBACK.....10'
REAR YARD SETBACK.....30'
- THE LOCATION OF ALL UNDERGROUND UTILITIES SHOWN HEREON ARE
APPROXIMATE AND ARE BASED UPON THE FIELD LOCATION OF ALL VISIBLE
STRUCTURES (IE CATCH BASINS, MANHOLES, WATER GATES ETC.) AND INFORMATION
COMPILED FROM PLANS PROVIDED BY UTILITY COMPANIES AND GOVERNMENTAL
AGENCIES. ALL CONTRACTORS SHOULD NOTIFY, IN WRITING, SAID AGENCIES
PRIOR TO ANY EXCAVATION WORK AND CALL DIG-SAFE @ 1-888-DIG-SAFE.

REFERENCE PLANS:

- PLAN OF LOTS OWNED BY BEATRICE L. HOPLEY, LAFAYETTE ROAD,
PORTSMOUTH, N.H., REVISED TO 2/1957, RCRD PLAN 02637.

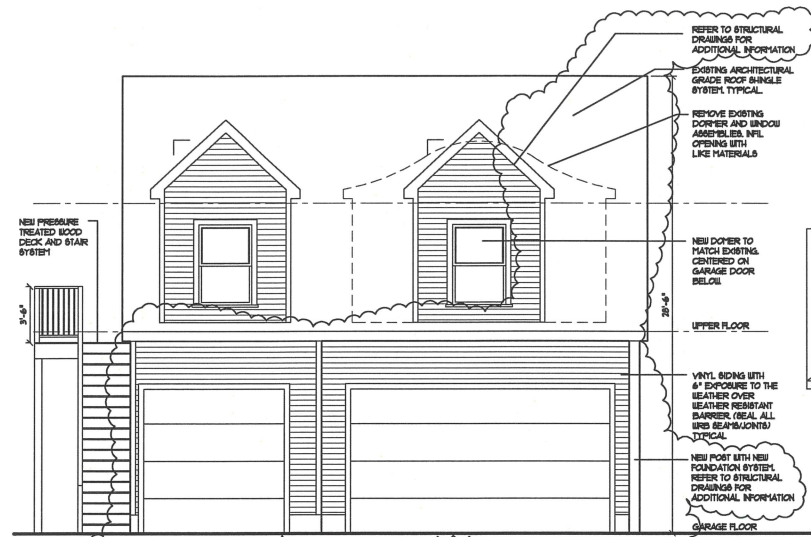


OPEN SPACE= 21,829 S.F. OR 81.6%
BUILDING COVERAGE= 3,090 S.F. OR 11.6%

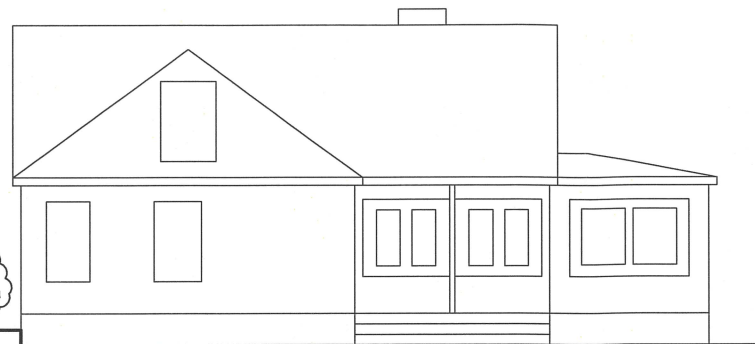
REV. NO.	DATE	DESCRIPTION	APPR'D
SITE PLAN 36 ARTWILL AVENUE PORTSMOUTH, NEW HAMPSHIRE ASSESSOR'S PARCEL 229-4 for KARONA, LLC			
JAMES VERRA and ASSOCIATES, INC. 101 SHATTUCK WAY SUITE B NEWINGTON, N.H. 03801-7876 603-436-3557			DATE: 8/3/2017 JOB NO: 23723 SCALE: 1" = 20' DWG NAME: 23723 PLAN NO: 23723-2 SHEET: 1 of 1
JV PROJECT MGR JCS DRAWN BY COPYRIGHT © 2017 by JAMES VERRA and ASSOCIATES, INC.			

1. The intent of these drawings is to give the tradesperson enough information to perform a complete job. The General Contractor and subcontractors are responsible for providing all labor, materials, and equipment to perform the full work in a complete and craftsman like manner. If additional clarification is required to describe the scope of work, it is the responsibility of the General Contractor to contact the architect or owner prior to submitting bids.
2. Should local codes and/or ordinances differ from these plans, a determination shall be made by the general contractor and/or local building official as to which is the most stringent. The most stringent requirement shall rule. Should a change in these plans be necessary or desired which will alter the design the architect or record must verify all changes.
3. All interior full height walls are to be 3 1/2" wood studs at 16" o.c. with one layer of 1/2" GWB each side unless otherwise noted. Interior walls shown are existing except as noted.
4. All exterior walls are to be 5 1/2" wood studs at 16" o.c. with one layer of 1/2" GWB each side, R-21 glass fiber batt insulation, vapor barrier on inside stud surface and weather resistant barrier on outside face of sheathing surface unless noted otherwise. Exterior walls shown are existing.
5. Bathroom walls are to include 3" sound batts.
6. If required, all water lines located within exterior walls or adjacent to unheated spaces are to be insulated.
7. All exposed finished surfaces, including insulation materials, facings, vapor barriers and breather papers shall have a flame spread of not more than 200 and a smoke density of not more than 450.
8. Provide draft stopping in all concealed spaces of walls, at cove, overhangs, soffited ceilings, dropped ceilings and all penetrations of ducts, pipes, conduits, etc. through exterior walls, floor/ceiling assembly and roof/ceiling assembly.
9. Provide smoke detectors in sufficient quantities and locations to meet requirements of the Building Code.
10. Fire stop all penetrations through fire rated assemblies per a UL listed assembly.
11. All plumbing fixtures shall be sealed to adjacent materials with appropriate sealant.
12. Blocking installation by contractor to be provided where blocking is required.
13. General Contractor to verify and provide for a weather tight building including but not limited to exterior wall system, roof system, flashing and counterflashing.
14. Patch all areas which have been disturbed to match existing adjacent construction.
15. It is the responsibility of the contractors to familiarize themselves with the site existing condition prior to construction.
16. Coordinate the removal of all hazardous material per State and local codes.
17. Verify and coordinate power requirements with Owner.
18. Provide new lighting as shown. Coordinate with Owner.
19. Coordinate plumbing requirements with tenant.
20. Provide galvanized flashing, hangers and fasteners when installing the exterior pressure treated wood decking and stair system. Fasteners to be G-185 hot dipped coating.
21. Contractor is responsible to field verify all dimensions and conditions and report any and all discrepancies to the Owner and architect.
22. Substrate for under slab shall be a minimum of 6" below finished floor and a maximum of 8" below finished floor and shall be free of large rocks and debris.
23. Concrete floor to consist of 3000 psi 4" (minimum) concrete slab on grade with polypropylene fibers or galvanized 6x6 w2.9x2.9 welded wire fabric reinforced level slab with flatness equivalent to FF50, or 1/8" over 10 feet over 15 mil Stego vapor barrier over compacted fill with all penetrations sealed per manufacturer's specifications prior to installation of slab.
24. Contractor to provide access panels as required for servicing utilities. Contractor to coordinate locations with Owner.
25. Contractor to coordinate with Owner the installation of hose bibbs.
26. Contractor to provide shop submittals to Owner for all kitchen appliances/equipment. Shop submittal shall address any and all details, electrical requirements, etc.
27. Unless otherwise noted, all dimensions are to face or centerline of the wall studs, not the wall assembly.
28. MR gypsum board shall be used throughout bathroom and similar damp locations except where backer board is required.
29. Provide R-21 glass fiber batt unfaced insulation at exterior walls. Tape all vapor barrier seams and adhere to wood studs as required. Provide one layer of 1/2" GWB. Provide expansion joints as recommended by manufacturer.
30. Mechanical/plumbing system design is to be provided by Contractor.
31. Electrical system, including security, design is to be provided by Contractor.

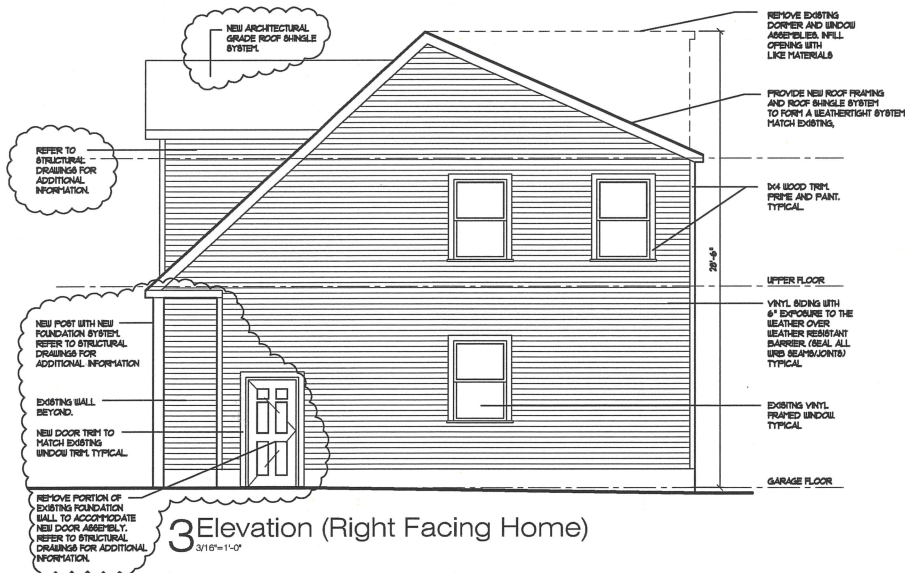




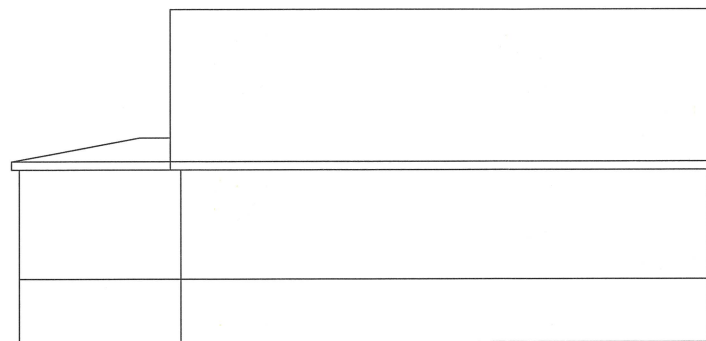
1 Elevation (Front)
3/16"=1'-0"



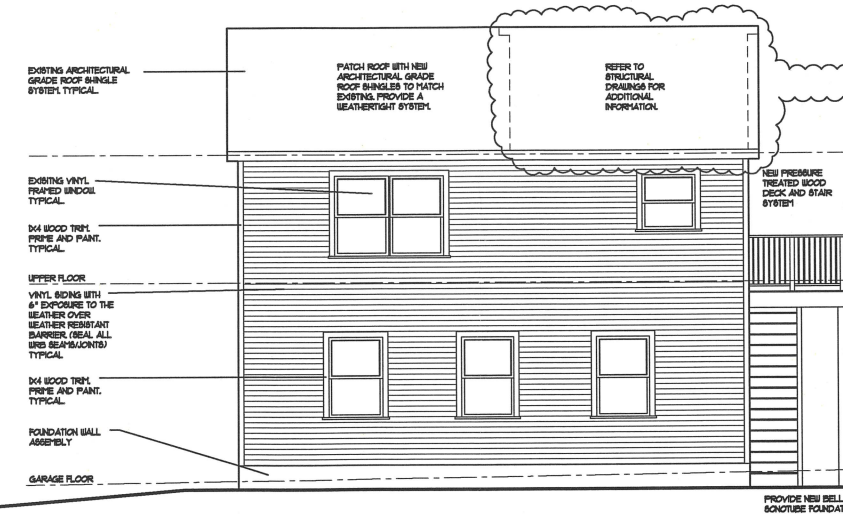
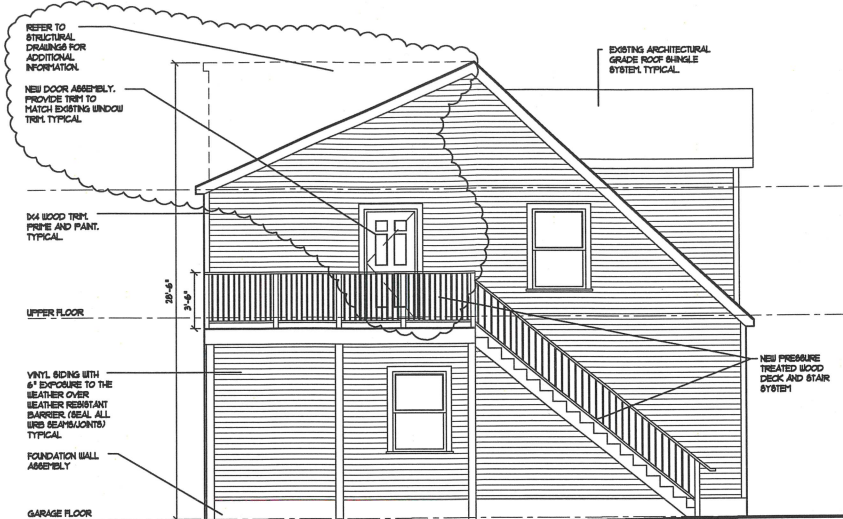
2 Elevation (Left Facing School)
3/16"=1'-0"



3 Elevation (Right Facing Home)
3/16"=1'-0"



4 Elevation (Rear) Existing Home
3/16"=1'-0"

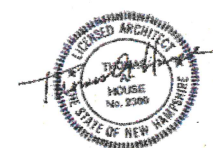


THA
ARCHITECTS, LLC

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105 WILLOW BROOK AVENUE
STRATHAM, NEW HAMPSHIRE 03885

Tel: (603) 770-2491 Fax: (603) 773-0238
www.thaarc.com

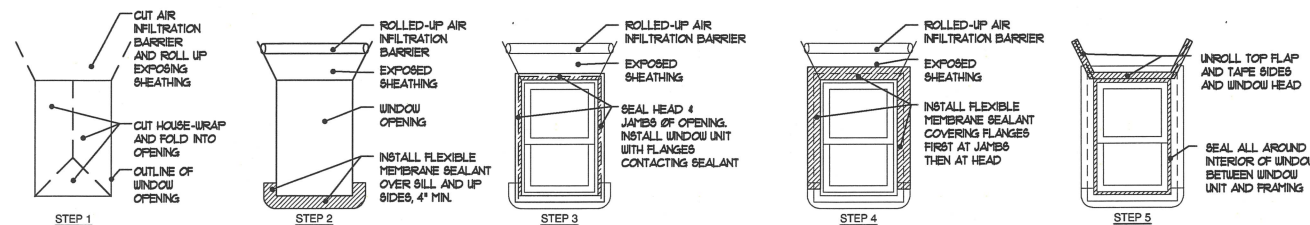
These drawings and specifications were prepared for use at the location indicated. Publication and use is expressly limited to the identified location. Reuse or reproduction by any method, in whole or in part, is prohibited without the written permission of THA Architects, LLC.
© 2017 THA Architects, LLC.



Ricci
Addition

36 Artwill Avenue
Portsmouth, NH

Exterior
Elevations
Notes



5 Window Installation Notes
No Scale

NOTE:
ALL OPERABLE WINDOWS ARE TO BE EGRESS WINDOWS.
CONTRACTOR TO VERIFY WITH LOCAL AUTHORITY
HAVING JURISDICTION.

SCALE:	
ISSUED / DRAWN BY	
July 25, 2017	
© THA Architects, LLC	
REVISED / REVISED BY	
Aug. 21, 2017	
Nov. 29, 2017	

JOB NO: 17008

SHEET NUMBER
A-2



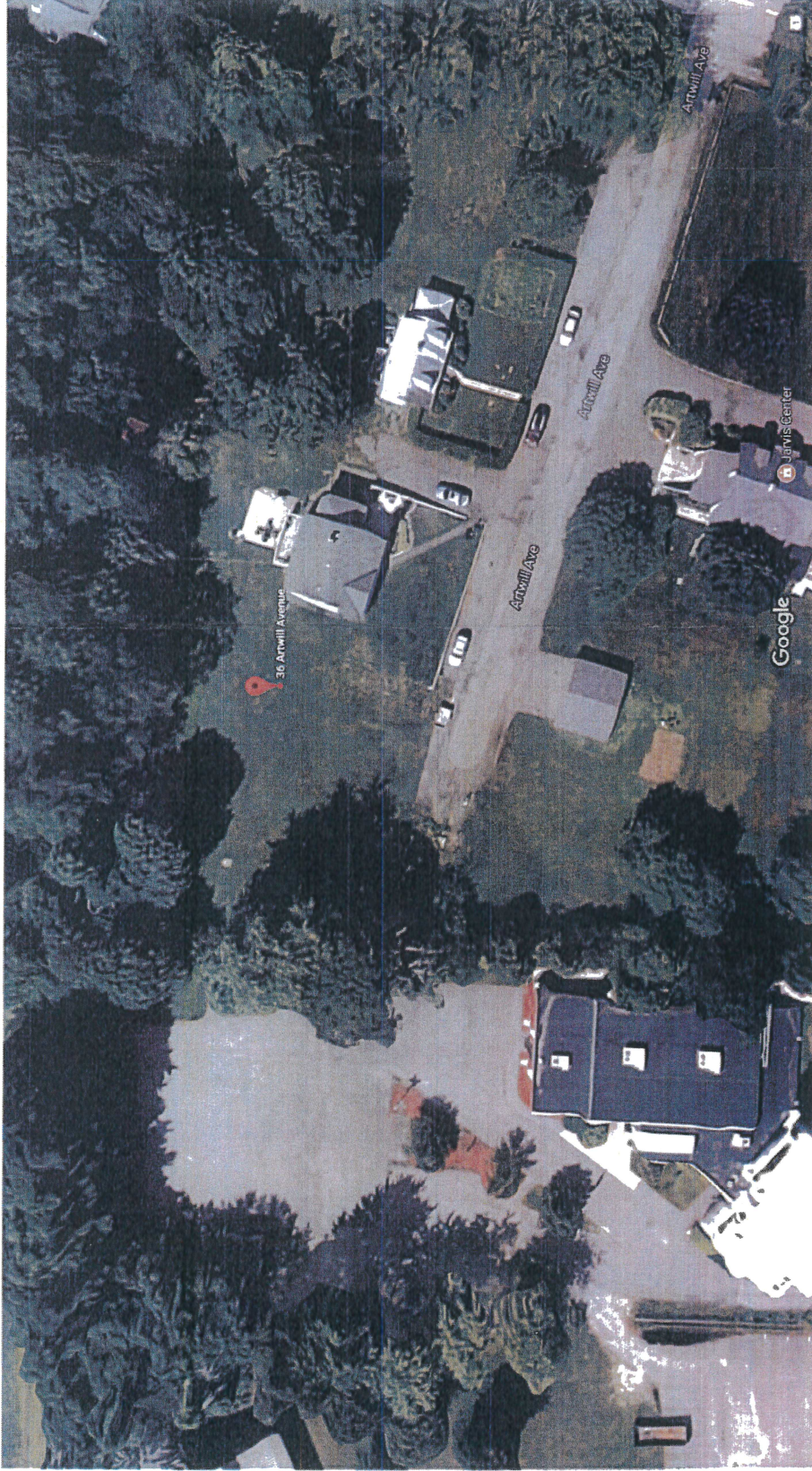
Google Maps -42 Artwill Ave



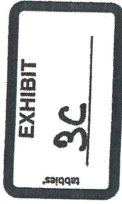
Image capture Sep 2011 © 2017 Google

Portsmouth, New Hampshire
Street View - Sep 2011

Google Maps 36 Artwill Ave



Imagery ©2017 Google, Map data ©2017 Google 20 ft



Google Maps 36 Artwill Ave



Imagery ©2017 Google, Map data ©2017 Google 100 ft





EXHIBIT
3F









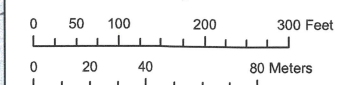


tabbies®
EXHIBIT
36

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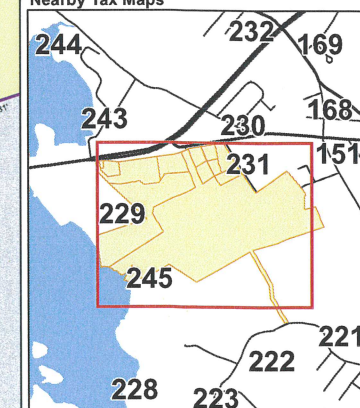
See the c

7-5A	Lot or lot-unit number
2.56 ac	Parcel area in acres (ac) or square feet (sf)
25	Address number
233-137	Parcel number from a neighboring map
68'	Parcel line dimension
SIMS AVE	Street name
	Parcel/Parcel boundary
	Parcel/ROW boundary
	Water boundary
	Structure (1994 data)
	Parcel covered by this map
	Parcel from a neighboring map (see other map for current status)

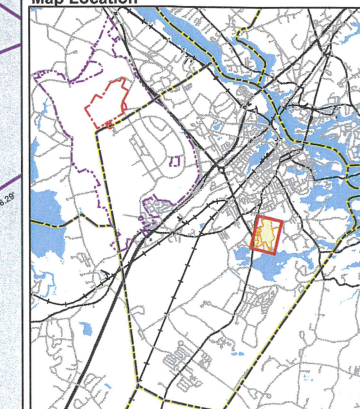


This map is for assessment purposes only. It is not intended for legal description or conveyance. Parcels are mapped as of April 1. Building footprints are 2006 data and may not represent current structures. Streets appearing on this map may be paper (unbuilt) streets. Lot numbers take precedence over address numbers. Address numbers shown on this map may not represent posted or legal addresses.

Nearby Tax Maps

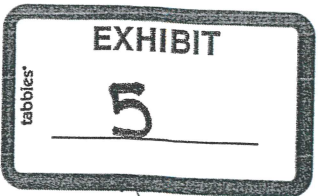


Map Location

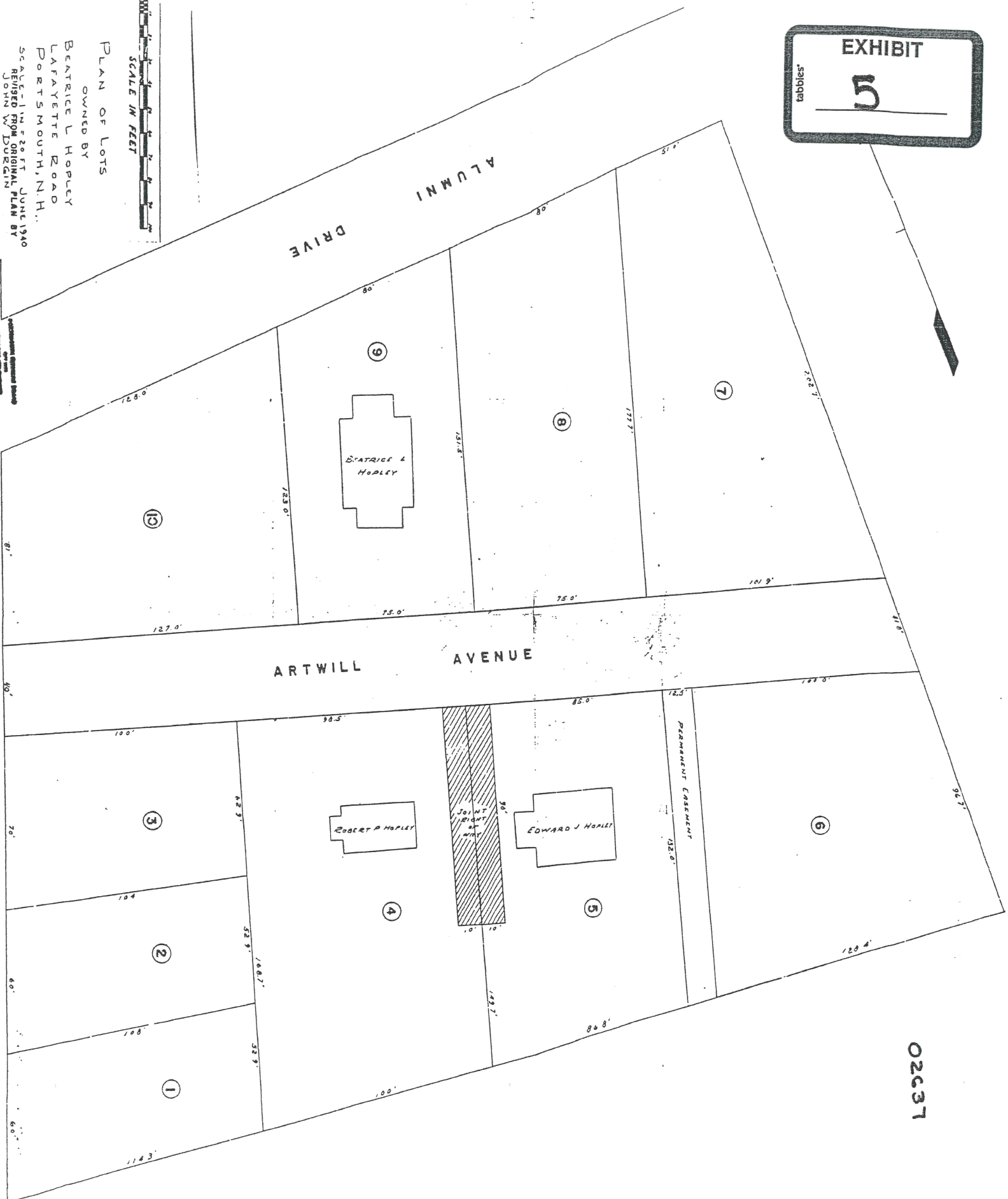


Portsmouth, New Hampshire
2019

Tax Map 229



02637



SCALE IN FEET

OWNED BY
BEATRICE L HOPLEY
LAFAYETTE ROAD
PORTSMOUTH, N.H.
SCALE 1" = 20 FT. JUNE 1940
REVISED FROM ORIGINAL PLAN BY
JOHN W. DURGIN
CIVIL ENGINEER
REVISED MAY, 1946
REVISED FEB 1957

*See Jurisdiction
File No 2249
Plan No 794
8/29/1958*

LAFAYETTE ROAD

FILE NO 2249
PLAN NO 794

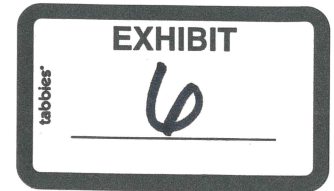


CITY OF PORTSMOUTH

Community Development Department
(603) 610-7232

Planning Department
(603) 610-7216

PLANNING DEPARTMENT



July 28, 2017

Karona, LLC
25 Park Street
Greenland, New Hampshire 03840

Re: Property at 36 Artwill Avenue, Permit #3037
Assessor Plan 229, Lot 4

Dear Applicant:

The Board of Adjustment at its reconvened meeting on July 25, 2017 completed its consideration of your application described as follows:

Application:

9) Case 7-9.

Petitioner: Karona LLC
Property: 36 Artwill Avenue
Assessor Plan: Map 229, Lot 4
Zoning District: Single Residence B District
Description: Detached accessory dwelling unit in an existing garage.
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:
1. A Variance from Section 10.521 for street frontage where 100' is required and 0'± exists.

Action:

The Board voted to **grant** the petition as presented, and re-advertised on July 18, 2017.

Review Criteria:

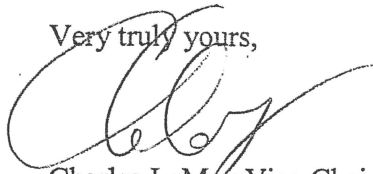
The petition was granted for the following reasons:

- The specific frontage request before the Board will not materially change the character of this residential neighborhood so that granting the variance will not be contrary to the public interest and the spirit of the ordinance will be observed.
- Granting the variance will result in substantial justice. The frontage is needed by the applicant for any improvements to the property so that the loss to the applicant by requiring strict compliance with the frontage requirement would not be outweighed by any gain to the public.
- This technical change and the specific relief required will have no effect on surrounding property values.
- There are special conditions of the property such that literal enforcement of the ordinance would result in unnecessary hardship. The City has determined that the property has no frontage, as defined in the ordinance, due to the fact that it fronts on a private right-of-way which distinguishes the property from others in the general area. While not considered a road, there is adequate access on Artwill Avenue so that there is no fair and substantial relationship between the purpose of the frontage requirement in the ordinance and its specific application to this property.

As provided for in NH RSA Chapter 677, the Board's decision may be appealed 30 days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process. Construction drawings or sketches must be reviewed and approved by the Building Inspector prior to the issuance of a building permit. Approvals by other land use boards may also be required prior to the issuance of a building permit.

The minutes and tape recording of the meeting may be reviewed in the Planning Department.

Very truly yours,



Charles LeMay Vice-Chairman
Board of Adjustment

mek

c: Robert Marsilia, Chief Building Inspector
Roseann Maurice-Lentz, City Assessor
R. Timothy Phoenix, Esq.

Mr. Moretti recused himself from the vote.

9) Case 7-9.

Petitioner: Karona LLC
Property: 36 Artwill Avenue
Assessor Plan: Map 229, Lot 4
Zoning District: Single Residence B District
Description: Detached accessory dwelling unit in an existing garage.
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:
1. A Variance from Section 10.521 for street frontage where 100' is required and 0'± exists.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant. He said the principal Butch Ricci was also present. Attorney Phoenix explained the background of the lot and showed photos of the house and the garage and an aerial context of the neighborhood. He noted that they had a Conditional Use Permit (CUP) from the Planning Board that was on hold until they got more plans. He explained that it was impossible to have frontage on the street because of a 1958 ruling that the Planning Board to not let it have frontage, so it was a nonconforming condition. He said the new building required relief because the overall lot had no frontage on a public street. He reviewed the criteria and said they would were met.

Mr. Mulligan said he had a hard time with whether the structure would qualify as a detached ADU, due to the square footage and it not being separated by the primary dwelling by at least 20 feet. Attorney Phoenix said even if the ADU were denied, the garage could still be put to good use. He said the distance and size could be waived by the Planning Board.

Mr. Mulligan said the project had a checkered history because the prior owner well exceeded the scope of the building permit that he was granted. He said the owner previously went before the Board before the ADU Ordinance to seek relief and was shut down, so he wanted to be careful about granting relief based on a preexisting condition that was sort of illegal. He said that the nonconforming condition of the garage was more than its position on a private road with no frontage. Attorney Phoenix said the garage was given the building permit and then inspected. He said the owner got into issues about the quality of the framing and so on. He said a variance was needed at the time for that type of use but wasn't needed any longer. He said Mr. Ricci bought the property subjective to a Cease and Desist order. He asked that that applicant not be penalized for the sins of a former owner.

Mr. Parrott asked whether the location and dimensions were defined, relative to the street. Attorney Phoenix said it was defined by the factual location of the pavement but the tax map was not. Mr. Parrott said the front setback was shown as 27.5 feet and was too little. He said he met with the Planning staff and filed a request for a setback variance but discovered that it wasn't a City street and there was no setback, so he pulled the variance and submitted the new request. Mr. Parrott said he found it odd logic.

Chairman Rheaume said that one of the things mentioned was access to emergency vehicles, and he pointed out that there was some disagreement between the neighboring properties before. He asked what the current status of agreement among the neighboring parties that now owned the access street was and whether there were plans to improve it.

Mr. Ricci said Jean Wilson owned the property as well as most of Artwill Avenue and that she would have to bring it up to City standards but couldn't afford it. Consequently, he said that Artwill Avenue would remain a private road, and the rest of the street residents would make it accessible. He said the City wanted to extend a water line, so the residents would have City water and a maintained line instead of a private line. He said he was working with the neighbors in accessing that road, and there were some signs of progress.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

Chairman Rheume noted that the law had changed because it related to ADUs. He said the Planning Department said that, because of the change in use, they wanted to ensure that the lot was fully compliant. He said the argument was whether or not it was a street and that the Planning Department decided that the street did not exist.

*Mr. Mulligan moved to **grant** the variance for the application as presented and advertised, and Mr. Parrott seconded.*

Mr. Mulligan stated that the specific relief was not that big a deal, but the checkered history could be. He said the Board was asked whether or not the applicant could make improvements to his property, and he would need the same relief if he just wanted to put an addition on the dormer. He said it would always be a private street, but big enough so that a lot of improvements could be made to the main dwelling and would require the same relief. He said he wasn't thrilled with the idea that the ADU was about as big as the primary dwelling, but the applicant was entitled to get the CUP from the Planning Board, so he thought it met all the criteria. Focusing on the specific frontage requirements, he said that granting the variance would not violate the spirit of the Ordinance and the public interest. He said the character of the neighborhood would still be residential. Granting the variance would result in substantial justice because the applicant couldn't get frontage any other way, so anything he could do to improve the property would require the same variance and therefore the loss to the applicant was not outweighed by any gain to the public. He said the value of surrounding properties would not be diminished because, specific to the frontage requirement, granting relief would not have any effect. He said the hardship involved special conditions because the property that the City deemed as having no frontage because it was on a private right-of-way distinguished it from others within the general area, so there was no fair and substantial relationship between the purpose of the frontage requirement and its application to the property. He said there was plenty of access on Artwill Avenue, but it just wasn't what the City considered a road. Mr. Mulligan said the use was a reasonable one, a residential use in a residential area, and met the criteria.

Mr. Parrott concurred with Mr. Mulligan, noting that it was a technical change, and thought it was proper for the Board to approve it.

Chairman Rheume said he would support the motion. He said he had thought of waiting until there was a better legal definition for Artwill Avenue due to previous problems and relationships, but it sounded like there was enough progress moving forward.

*The motion **passed** by unanimous vote, 6-0.*
