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October 1, 2020

Zoning Board of Appeals
Municipal Complex
1 Junkins Ave.
Portsmouth, NH 03801

Re: Appeal of Decision of Official

Dear Mr. Chairman and Members of the Board

Please be advised that I represent James G Boyle, Trustee of the 150 Greenleaf Avenue Realty Trust. This letter constitutes an appeal of the decision of the Planning Director, Juliet Walker, contained in a letter dated August 18, 2020. As background, in 2009, Mr. Boyle submitted a site plan application for the addition of a second automobile dealership on his site. Due to litigation concerning the City's sewer line which was built on his property without an easement, review of the application was suspended. Ultimately, the Supreme Court affirmed the Trial Court's decision that the sewer line was illegally trespassing. With determination of this issue, Mr. Boyle sought to reactivate review of his proposed site plan. Some changes were made to the plan over the years. Accordingly, he submitted the new plans for informal feedback from the Planning Director prior to formally reactivating the application. The Planning Director provided the requested in her July 21 letter. Thereafter, Mr. Boyle submitted a new land use application to revive the earlier 2009 discussions and also to modify those plans.

Three issues raised in the letter are being appealed: (1) a determination that the plan would require a variance because it expanded an automotive use into a 200' buffer from a residential zone, (2) a determination that the plan would require a variance because it showed cars displayed within a 100' buffer from a residential zone, and (3) a determination that a conditional use permit would be required. All three issues raise discrete questions of law, and, as will be demonstrated below, must be resolved in Mr. Boyle's favor.

The August 18 letter also addresses the completeness of the application. The Planning Director has informed the applicant that these are not appealable issues. Mr. Boyle will not

actively address them in this appeal other than to raise the issue solely to preserve his rights should these later be characterized as appealable.

Finally, the August 18 letter addresses Mr Boyle's request that the third building of the development be disregarded. He did this to save time and effort but when advised new plans and drainage calculations would be needed, he now withdraws that request and asked the plans be reviewed as submitted. This is identified in this letter solely so there will be a clear record.

1. The Planning Director Erred In Determining That A 200' Buffer From Residential For Automotive Use Would Apply.

There are several reasons why the 200' Buffer does not apply. First, the Planning Director uses the wrong version of the ordinance. In 2006 and 2009, the ordinance was amended. However, these amendments were ineffective as they were not validly adopted. The City Charter which must be strictly followed when enacting an ordinance provides that the public is to be notified of the availability of a copy of the proposed amendment at no charge. This was never done so that the purported amendments never became effective. Failure to give notice as required by a statute, in this case the City Charter is grounds for invalidating an amendment to a zoning ordinance. *V.M. Stevens, Inc., v. Town of South Hampton*, 114 N.H. 118 (1974).

Thus, the version of the ordinance used by Mr. Boyle in his analysis applies. The Planning Director did not analyze the 200 foot buffer in Section 10-208 Table 4, use 35. Clearly the use of automobile sales is permitted. There is a single proviso separated from the permitted use by a semicolon and then a comma. It reads "...; provided, outdoor storage areas are located at least forty feet from the street right-of-way and two hundred feet from any Residential or Mixed Residential district;..." Grammatically, by use of the separator punctuation and there being no comma after right-of-way establishes that the 200 foot limit applies only to outdoor storage areas. It does not apply to the entirety of the use. There will be no outdoor storage within 200 feet of Residential. While the current version of the ordinance clarifies that the limit applies to the use, that version of the ordinance does not apply to the area in question as it was shown on the plan and the Board has determined it is governed by the pre-2010 ordinance.

The proposed third building meets the 200 foot limit. Moreover, in the original site plan approval for the dealership, no conditions were placed on the use which limited to the buildings and paved areas. The entire site was approved for automotive use. In fact, on many occasions and for varying length of time Mr. Boyle stored vehicles on unpaved portions of the site. In particular he regularly used the area where the third building is proposed for automotive use. He is not changing a use but rather continuing the same approved use but in a building. Thus, the location of the building is permissible even if it otherwise might violate the 200 foot buffer.

Further, the Supreme Court has already held that by displaying cars, Mr. Boyle is not engaging in outdoor storage. *Boyle, Trustee, 150 Greenleaf Avenue Realty Trust v. City of*

Portsmouth, 154 N.H. 390; 910 A.2d 1229 (2006). A copy is attached for your convenience. This ruling applies to the entire property as it did not distinguish any physical areas. Thus, the 200 foot exclusion cannot apply as a matter of law.

Second, the proposed amendments cannot be enforced against Mr. Boyle. The amendments related to a lawsuit in which Mr. Boyle's interpretation of the ordinance prevailed. These amendments were retaliation for the lawsuit and designed so that Mr. Boyle would have difficulty in developing his property. This type of amendment in bad faith cannot be enforced. *PMC Realty Trust v. Town of Derry*, 125 N.H. 126 (1984).

Finally, the Planning Director mischaracterizes the proposed development as expansion of a use. The entire site was used for automotive including the unpaved areas. Cars for repairs or processing due to recall were routinely stored on unpaved areas. Adding pavement does not change the use. Likewise adding a building does not change the use, even though there may be more volume of automobiles associated with it. Moreover the City is estopped from claiming the proposed development is a change of use for the undeveloped portions of the property. In the sewer line lawsuit between Mr. Boyle and the City, the City strenuously argued that Toyota of Portsmouth was using all of the property. For all of the above reasons, there is no 200' setback for displaying cars.

2. The Planning Director Erred In Determining That A 100' Buffer From Residential For Parking Would Apply.

Section 10-1201 of the 2009 ordinance prohibits parking within 100 feet of a residential zone. However, the vehicles within this buffer, as a matter of law, are not parked. Any vehicles in that area will be either inventory or display vehicles. It will not be "parking" as the term is commonly used. *Galinsky Family Real Estate, LLC v. City of Des Moines Zoning Bd. of Adjustment*, 797 N.W.2d 622 (Iowa App. 2011) ("Galinsky II") which held display lots do not constitute as off-street parking under a zoning ordinance. But see: *Galinsky Family Real Estate, LLC v. City of Des Moines Zoning Bd. of Adjustment*, 797 N.W.2d 621 (Iowa App. 2011). (Dissent agreeing with Galinsky II.) Since Galinsky II is the later published opinion, it controls. The concept of parking versus storage or display was extensively treated and discussed in *Incorporated Village v. Green*, 8 Misc.2d 356, 166 N.Y.S.2d 219 (1957). The Court stated:

'When automobiles are left for months on end¹ at a given place, there is no doubt that they are stored and not parked. Parking is of short duration and measured by hours or at most a day or two. It has in it the element of an automobile in use, being temporarily placed until it is about to be again put into service and use. The cars which have been on the lot and about which the complaint is concerned are not cars ready for the road. They

¹ The average time for a new car at Mr. Boyle's dealership being on the lot is 160 days; used cars, 39 days.

are not licensed for the road, they are not cleaned greased and oiled for the road. The use of the lot for these cars is not parking but storage, storage awaiting the time when they will be withdrawn for sale and delivery. There is a substantial distinction, clearly cognizable, between the meaning 'storage' and 'parking'. One has a certain degree of permanency, while the other denotes transience. At 166 N.Y.S.2d 221.

In this case, customers can walk around the vehicles and look at different colors and configurations. The Supreme Court has already determined that they are permissible display vehicles and not storage. Clearly, they are not parked in the ordinary use of the word.

Parking is not defined in the ordinance. When terms are not defined, they are ascribed their ordinary and common meaning. *Boyle v. City of Portsmouth*, 154 N.H. 390 (2006). In this instance the 2009 ordinance shed light on its meaning. Reading the totality of Chapter XII of the Ordinance, and in particular how required parking is contemplated, it is clear that the term "parking" encompasses employees coming to work and leaving their car as well as customers and third parties who have business at the facility. The cars are registered and actively being used until they are stopped and an individual performs whatever tasks he or she needs to perform on site. In contrast, the cars displayed in this area are not in active use. They are rarely moved. - certainly not on a daily basis. Thus, they do not create the kind of noise, traffic and other impacts that might occur in a normal parking lot, thus obviating any concerns of cars in the area. Thus, the cars are not violating any parking setback.

3. The Planning Director Erred In Determining That A Conditional Use Permit Is Needed.

Mr. Boyle's proposed work involves dredging and filling manmade drainage structures and in the area of nuisance created by the City. Normally, a conditional use permit would be required. Under fairly unique circumstances, a conditional use permit for filling the manmade ditch is not required here because one if it was denied, Mr. Boyle could still proceed with his development project. In 2013, Mr. Boyle and NHDES entered into a Consent Decree concerning the property, which was approved by the Rockingham Superior Court and entered as an order of the Court. A copy is attached to this appeal. The Consent Decree required development of the property as shown on Mr. Boyle's plans and further required NHDES to issue both the AoT and wetlands 44 permits which were required. NHDES has issued those permits. A remedial consent decree entered as a court order trumps municipal permits. *Metro. Housing Development Corp. v. Village of Arlington Heights*, 496 F. Supp. 836 (N.D. Ill. 1979). Thus, the permitting process would be a waste of City resources and time.

Moreover, Mr. Boyle's experts have extensively studied the site. Their conclusion is that leaving the site as is constitutes an environmental hazard as well as a safety hazard. NHDES agrees and concluded Mr. Boyle's development is the best solution to all the concerns being raised about the site. It would be irrational for the Planning Board to go against the great weight of the evidence and anything but approval would get reversed. Thus, in the interest saving time

and money for all involved, the Board should determine under the unique circumstances here, that a permit is not needed.

Nevertheless, despite the waste, Mr. Boyle is willing to seek a conditional use permit as long as the Board postpones decision on the merits of this issue until after the decision on the conditional use permit so that's right to appeal it is preserved. If the permit is granted, it will make the relief sought here moot. If it is not granted, then the Board would have to decide the issue.

Accordingly, on behalf of Mr. Boyle, I ask that the Board reverse the decision of the Planning Director on the two buffer issues and that it take no action on the conditional use permit pending a determination by the Conservation Commission. Thank you.

Sincerely,

/s/ John Kuzinevich

John Kuzinevich

Copy to: client



CITY OF PORTSMOUTH

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September 18, 2020

RE: Application for Amended Site Plan Review for 150 Greenleaf Ave

Dear Attorney Kuzinevich:

I have reviewed the updated site plan review application that you submitted on September 11, 2020 on behalf of your client for a proposed expansion of your client's automobile dealership at 150 Greenleaf Avenue. As we have previously confirmed, an application for amended site plan review approval was originally submitted to the Planning Department in October of 2009 (along with an application fee of \$2,500). While those plans received preliminary review by both the Site Plan Review Technical Advisory Committee (TAC) and the Planning Board, the project did not complete the site plan review and approval process. In order to receive final approvals, the updated application will need to complete the public hearing and approval process with both TAC and the Planning Board.

As decided by the Board of Adjustment in July 2010, the original application that was filed in October 2009 is subject to the Zoning Ordinance in effect in 2009. The original application included expansion of the parking area and the addition of one new building located to the north of the existing building. As such, we would apply the 2009 Zoning Ordinance for that portion of the project unless the current Zoning Ordinance is more permissive or would otherwise benefit the project.

The addition of a proposed third building to the west (rear) of the existing building was not on the original plans submitted to the Planning Board, and therefore would be subject to the requirements of the current Zoning Ordinance. You have explained in your cover letter that, although a third building is shown on the revised plan set submitted with your updated application, your client is not intending to proceed with approvals for the third building at this time. We have reviewed this application with that understanding. However, in order for the project to proceed through the land use review process, we require an updated plan set that does not show the third building and the supporting drainage analysis should be updated accordingly.

As submitted, the site plan review application is missing some information that is required in order for the application to be considered complete according to the City's Site Plan Review regulations. We also require that one complete hard copy of all of the information submitted via the online permit be provided for the Planning Department files. Per Section 2.5.4 (4) the

applicant shall either submit the required information or request that the Planning Board grant a waiver from the requirements. The following information is missing from or is incomplete in the application package submitted on September 11, 2020:

- 2.5.3.1A Green building statement;
- 2.5.3.1B Gross floor area and dimensions of all buildings and a statement of uses and floor area for each floor;
- 2.5.3.1E Names and addresses of all direct abutting property owners and holders of existing conservation, preservation, or agricultural preservation restrictions affecting the subject property [NEEDS UPDATING];
- 2.5.3.1H List of names and contact information of all public or private utilities servicing the site;
- 2.5.4.1D Plans stamped by a NH licensed civil engineer;
- 2.5.4.1E Stamp verifying that wetlands have been delineated by a NH certified wetlands scientist;
- 2.5.4.3B Building elevations (height, massing, materials, lighting, façade treatments);
- 2.5.4.3C AASHTO truck turning templates;
- 2.5.4.3D Parking calculations (number required and number provided);
- 2.5.4.3J Outdoor lighting plan;
- 2.5.4.3K Landscaping plan;
- 2.5.4.3M Open space calculations;
- 2.5.4.3O Location of snow storage areas;
- 3.2.1-2 Traffic generation report or traffic impact study;
- 7.4.4.1 Stormwater Management and Erosion Control Plan.

Please note, the above list does not preclude the TAC or Planning Board requesting additional information based on further review of the application.

As referenced in Section 2.9 (1) of the Site Plan Review Regulations, in order to grant site plan review approval, the TAC and Planning Board must find that the application is in compliance with all City Ordinances and Codes. Therefore, if any project as proposed does not meet the City's Zoning Ordinance, such project cannot receive site plan review approval unless appropriate relief is granted by the Zoning Board of Adjustment thereby bringing the project into compliance.

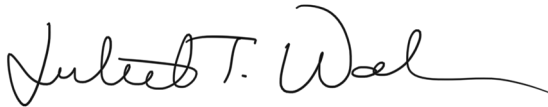
Upon review of the application, I have found that the following zoning relief will be required before this project can proceed to site plan review approval:

- 1) Setbacks from motor vehicle sales (Section 10-208 Table 4 – Uses in Business Districts in 2009 Ordinance, Section 10.592.20 in current Ordinance)
 - The site plan shows parking, display, and/or storage of vehicles within the required 200-foot setback from a Single Residence B (SRB) district. The ordinance requires such uses to be no closer than 200 feet from any adjoining Residential or Mixed Residential district.
- 2) Setbacks for Business Parking Areas (Section 10-1201 – Off-Street Parking in 2009 Ordinance and Section 10.1113.30 in current Ordinance)
 - The site plan shows parking spaces and accessways between 50 and 100 feet from the adjoining SRB district. The ordinance requires such uses to be no closer than 100 feet from any adjoining Residential or Mixed Residential district.

In addition to the zoning relief listed above, the application will also require a wetland conditional use permit for development within the Inland Wetlands Protection District. The proposed site plan shows extensive alterations to jurisdictional wetlands (labeled as manmade ditch). As defined by the Zoning Ordinance, man-made drainage structures are part of the Inland Wetlands Protection District, but until the 2010 Ordinance, did not require a buffer zone. A separate application will need to be submitted for this approval, which requires Conservation Commission review prior to the Planning Board. The Planning Board can consider an application for wetland conditional use permit approval at the same time as the site plan review application as long as all of the application requirements have been satisfied.

Please feel free to reach out to discuss any of these items further.

Sincerely,

A handwritten signature in black ink, appearing to read "Juliet T. Walker", with a long horizontal flourish extending to the right.

Juliet T.H. Walker, AICP
Planning Director

Cc: Robert P. Sullivan, City Attorney