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NICHOLAS R. AESCHLIMAN

November 27, 2019

Board of Adjustment  
City of Portsmouth  
1 Junkins Avenue  
Portsmouth, NH 03801

Re: 452 Richards Avenue  
Application for Variance



Dear Board Members:

Enclosed please find the supporting materials for an Application for Variance which has been completed via the City's online land use permitting system. The Applicant seeks formal recognition of the second dwelling unit which exists in the condominium unit which was purchased by the Applicant in April 2018 for which the Applicant understood that they had legal authority to use. Information in the City's assessing records indicate the property is being taxed as a two family dwelling.

We respectfully request that this matter be placed on the Board's December 17, 2019 meeting agenda. In the meantime, if you have any questions or require further information do not hesitate to contact me.

Very truly yours,  
DONAHUE, TUCKER & CIANDELLA, PLLC

Sharon Cuddy Somers  
SCS/sac  
Enclosures

cc: Richard & Annelise Hartley

S:\HA-HD\Hartley, Richard & Annelise\Portsmouth Board\2019\11-27-19 Letter.docx

16 Acadia Lane, P.O. Box 630, Exeter, NH 03833

111 Maplewood Avenue, Suite D, Portsmouth, NH 03801

Towle House, Unit 2, 164 NH Route 25, Meredith, NH 03253

83 Clinton Street, Concord, NH 03301

## Introduction

Richard and Annelise Hartley purchased the property at 452 Richards Avenue, Portsmouth ("Property") on April 11, 2018 from ASRT, LLC. The Property consists of one unit in a four-unit condominium which is comprised of three stand-alone structures. The Property was submitted to a condominium form of ownership on March 16, 2018; the name of the condominium is the 452, 454, 460 Richards Avenue Condominium. The condominium declaration indicates that Unit 1, which is the unit owned by the Hartleys, consists of five bedrooms and a kitchen on the first and second floors and a one-bedroom apartment with kitchen on the third floor. A fire exit stairway serves the third floor apartment. The condominium declaration further indicates that the Property contains a one story detached garage which contains two parking spaces; two additional parking spaces are provided for the Property on the pavement outside of the garage.

Documents relating to this Property in the City of Portsmouth Building, Planning and Assessing Departments indicate that the Property is taxed as a two dwelling unit. Permission was granted by the Board of Adjustment in 1995 to construct the fire exit stairway described above, but no evidence exists to show that permits were granted to allow an apartment on the third floor of the Property. The applicants understand that the apartment was constructed in 1995 and has been rented since that time without incident. They now seek a variance from lot area per dwelling requirements in order to continue the use of the apartment with proper legal authority. The variance relief requested is 2,585 sq. ft. per dwelling unit where 7,500 sq. ft. is required under Article 5, Section 10.521. The calculation of relief required is based on the 12,927 sq. ft. of the condominium divided by five units.

### **1. No decrease in value of surrounding properties will be suffered because:**

The Property has been in use as a two dwelling structure for many years. It is our understanding that it is being taxed as a two dwelling structure and abutters have not raised any concerns about the structure being used for two dwellings or the potential impact which the use may have on the value of their homes. The applicants do not seek to make the apartment larger or to expand the impact of the apartment in any way. They merely seek to formalize the legal status of the apartment so

that they can, in the future, use the Property as a rental unit, refinance or convey the Property without any hindrance. Formalizing the status of an operation that already exists will not decrease the value of surrounding properties.

**2. Granting the variance would not be contrary to the public interest because:**

**The grant of the requested variance will not unduly and to a marked degree violate the basic objective of the zoning ordinance. Nor will the grant of the variance alter the essential character of the locality, or threaten the public health, safety, or welfare.**

The basic objective of requirements for a certain size lot area for each dwelling is to avoid a sense of overcrowding. Here, granting relief will not create any perceived or actual overcrowding, as it will merely create a formal recognition of a second dwelling in the unit which has been utilized for many years. The dwelling in question is completely contained within the existing structure, and ancillary needs such as parking are addressed through the parking spaces allocated under the condominium declaration for this particular unit. Additionally, granting the variance will not alter the essential character of the locality which contains single family dwellings and some apartments, nor will it threaten the public health, safety or welfare.

**3. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in an unnecessary hardship because:**

The Property contains special conditions which distinguish it from other properties in the area. The Property is part of a condominium project of 12,927 square feet with several stand-alone structures each containing one or two dwellings. Neighboring properties are generally single family dwellings, and those which do contain more than one dwelling are not configured in a compound arrangement such as that found on the Property. Further, while the condominium in which the Property exists is not as large as the Griffin Property located across the street on Richards Ave, it is certainly one of the largest in the vicinity and has approximately 145' of frontage and this amount is much greater than that which neighboring properties have.

- a. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because:**

The general public purpose of the lot area per dwelling requirement is to prevent the creation of overcrowding on a lot which is too small for a dwelling. Here, there is no fair and substantial relationship between the purpose of the ordinance and the application in that no new dwelling is to be created. Rather, the dwelling in question already is in use, is fully contained within an existing structure housing another unit and is already provided with ancillary needs such as parking.

- b. The proposed use is a reasonable one because:**

It will not create any impacts from overcrowding and will provide formal legal recognition to a use which is already regarded as a second dwelling for tax purposes.

- 4. By granting the variance substantial justice would be done because:**

Balancing the interest of the applicant against the needs of the public or individuals, it is clear that on balance, the benefit to the applicant is not outweighed by any harm to the public or individuals and therefore the variance should be granted. The applicants were good faith purchasers of the condominium unit which they believed contained a legal "in law" apartment which could be used by them or rented. The grant of the variance will enable them to legally use the apartment and will aid in providing housing in the vicinity of the downtown. Conversely, there is no harm to the public by allowing the continued operation of an existing apartment, and we are unaware of any individuals who may be harmed. In fact, some abutters have expressed their support for the proposal and we have included their correspondence to that effect.

**5. The use will not be contrary to the spirit and intent of the ordinance because:**

Under New Hampshire law, the interpretation of this criteria is identical to that of the public interest criteria discussed above.

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F. "Land" shall refer to the legal description of the parcels which are the subject of this Condominium Declaration as described in Paragraph 4 below.

G. "Majority of Owners" means the owners of units to which more than fifty percent (50%) of the votes in the Association of owners appertain. Any specified percentage of the owners means the owners of units to which the specified percentage of the votes in the Unit Owners' Association appertain.

H. "Owners" means any natural person, corporation or other entity which holds fee simple title to a condominium unit.

I. "Percentage interest" refers to the interest of each unit in the common area.

J. "Property" means the land and the buildings and all other improvements heretofore or hereafter constructed thereon, and all easements, rights and appurtenances thereto; and all articles of personal property intended for common use in connection therewith.

K. "Site plan/floor plan" refers to the plan for the entire property as more particularly described herein which are recorded in the Rockingham County Registry of Deeds as Plan D-40692.

L. "Subdivision" means the division of any unit, previously created by Declarants, into one or more new units.

M. "Unit Owners' Association" or "Association" means all of the owners as defined in Paragraph F herein acting as a group in accordance with this Declaration and/or By-Laws.

2. NAME.

The name of the Condominium shall be the 452, 454, 460 RICHARDS AVENUE CONDOMINIUM.

3. LOCATION.

The Condominium is located at 452, 454, and 460 Richards Avenue, Portsmouth, County of Rockingham, State of New Hampshire.

4. LEGAL DESCRIPTION. See attached Exhibit A.

5. DESCRIPTION OF UNITS.

A. Building. The Condominium shall consist of one, two and a half, wood-framed building with an address of 452 Richards Avenue; a two story wood-framed building with an address of 454 Richards Avenue; and a one story wood-framed building with an address of 460 Richards Avenue. Said buildings are shown on site plans and floor plans to be recorded in the Rockingham County Registry of Deeds herewith.



- B. Units. The Condominium shall consist of four (4) units.
1. Unit 1 is a two and a half story five bedroom residence with a 1 bedroom apartment on the third floor and a one story detached garage containing 579 square feet. The residence and apartment contain 4,267 square feet.
  2. Unit 2 is located on the first floor of the two story building at 454 Richards Avenue. Unit 2 contains 1 bedroom and 587 square feet.
  3. Unit 3 is located on the second floor of the two story building at 454 Richards Avenue. Unit 3 contains 2 bedrooms and 650 square feet.
  4. Unit 4 is a one story residence located at 460 Richards Avenue containing 1,155 square feet and two bedrooms.

The four (4) units shall have percentages of common area as are more fully described in Paragraph F below.

C. Unit Boundaries. The boundaries of each unit with respect to the floors, ceilings, walls, doors and windows are as follows:

1. Horizontal Boundaries. The upper horizontal boundary of Units 1 and 4 shall be the upper surface of the roof. The lower horizontal boundary of Units 1 and 4 shall be the lower surface of the basement floor.
2. Vertical Boundaries. The vertical boundaries of Units 1 and 4 shall be the vertical plane of the exterior surface of all walls.
3. The upper horizontal boundary of Unit 2 shall be the upper surface of the ceiling board or plaster as it contacts the lower surface of the ceiling joists. The lower horizontal boundary of Unit 2 shall be the lower surface of the floor as it contacts the floor joists.
4. The upper horizontal boundary of Unit 3 shall be the upper surface of the ceiling board or plaster as it contacts the lower surface of the ceiling joists or roof rafters. The lower horizontal boundary of Unit 3 shall be the lower surface of the floor as it contacts the floor joists.
5. The vertical boundaries of Units 2 and 3 shall be the vertical plane of the interior stud surface of all walls as it contacts the exterior surface of the wallboard of plaster.
6. Doors and Windows. The unfinished exterior surfaces of all doors, windows, and skylights of all units.

Each unit shall include the portions of the building within said boundaries and the space enclosed by said boundaries, except any Common Area or Limited Common Area described in Section D and E of this Paragraph which may be located therein. The finished interior surfaces of the perimeter walls, door frames, all floor and ceiling components consisting of all paint, lath, wallboard, drywall, plasterboard, plaster, paneling, wallpaper, finished flooring, carpeting, tiling and any other materials constituting any part of the finished surfaces thereof all shall be deemed to be part of such a unit. In addition, the unit shall include all interior walls and partitions contained within that unit and the unit shall be deemed to include all window glass and glass vents, the entrance doors and window frames to the unfinished exterior surface thereof, any glass doors connecting the unit with the Limited Common Area or Common Area and plumbing and electrical facilities and appliances located within the unit and serving exclusively that unit. The unit shall not include pipes, wires, cables, chutes, flues, conduits or other public utility lines, ducts or structural portions of the entire building which happen to be running through said unit which are utilized for or serve more than one unit or any portion of the Common or Limited Common Areas, nor shall such boundaries include any balconies or patios, if any, serving more than one unit.

**D. Description of Limited Common Area.** The Limited Common Area appertaining to each unit is depicted on the Site and Floor Plans, and consists of but is not limited to exterior parking spaces and exterior yard areas appertaining to certain units; exterior porches, steps and entry ways which serve only one unit; the exterior walls, roof, and basement of 454 Richards Avenue which shall be Limited Common Area of Units 2 and 3; and the rooftop deck upon the Unit 1 garage which shall be Limited Common Area of Units 2 and 3. The Limited Common Areas described are for the use and benefit of the owners of the unit to which the Limited Common Area appertains. The responsibilities for insurance, maintenance and repair of said Limited Common Areas, shall be the responsibility of the Unit Owners to which the Limited Common Area appertains, provided, however, that the Limited Common Area parking spaces shall be insured and maintained by the Condominium Association.

**E. Description of Common Area.** The Common Area is depicted on the Site and Floor Plans to be recorded and consists of the entire property other than the units and Limited Common Area as described in Section 5D above, and includes, but is not limited to the water supply and piping, sewage disposal system, electrical and telephone systems to the extent that said systems serve more than one unit in the Condominium but not including those portions of the service which exclusively serve the individual units, the roofs, foundations, exterior walls, columns and supports of the structures located at 452 and 460 Richards Avenue.

The Common Areas as described above are for the use and benefit of all unit owners, their guests, invitees and licensees. The specific use, including responsibilities for maintenance and repair of the common Areas, shall be governed by the By-Laws and rules as adopted and amended from time to time by the Association.

**F. Ownership Interest in Common Area.** Pursuant to New Hampshire RSA 356-B:17, each unit owner shall have an undivided ownership interest in the Common Area, allocated in proportion to the unit size as determined by total square footage as described in the table below:





**Subject Front**



**Subject Rear**



**Subject Front**





## Stairs to Apartment

## Stephanie Carty

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**From:** Richard Hartley <[rhartley1972@gmail.com](mailto:rhartley1972@gmail.com)>  
**Sent:** Tuesday, October 29, 2019 11:09 AM  
**To:** Stephanie Carty; Sharon Cuddy Somers  
**Cc:** Annelise Hartley  
**Subject:** Fwd: Variance

Variance abutter email from Andrea and Adam Daly.

----- Forwarded message -----

**From:** Andrea Daly <[adaly@nhprobatelaw.com](mailto:adaly@nhprobatelaw.com)>  
**Date:** Sun, Oct 27, 2019 at 7:09 PM  
**Subject:** Variance  
**To:** Richard Hartley <[Rhartley1972@gmail.com](mailto:Rhartley1972@gmail.com)>

Hi Richard – We understand that you are seeking a variance with regard to the apartment behind your home. We have lived in this neighborhood, across the street from you, since 2002, and that space has always been an apartment. It has never created any disturbances or inconveniences. We are fully supportive of your request for a variance. If you need anything further, please let us know.

Andrea and Adam Daly

[429 Richards Avenue](#)

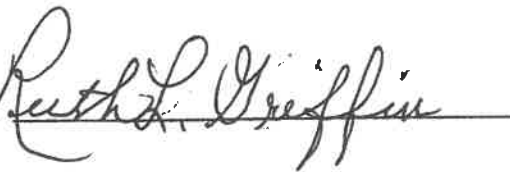
[Portsmouth, NH 03801](#)

October 28, 2019

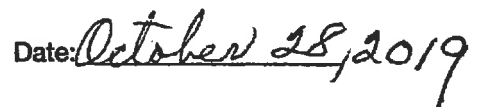
I, Ruth Griffin, of 429 Richards Avenue, am happy to offer my support to my neighbor Richard and Annelise Hartley on behalf of their 3rd floor apartment variance request. I have lived on Richards Avenue for over 50 years and have no issues with legalizing an apartment that has been in existence for 25 years. I do not perceive any changes to the neighborhood since nothing is actually changing, the Hartley's are simply legalizing the apartment.

Thank you for your time and consideration.

Signed:

A handwritten signature in cursive script that reads "Ruth L. Griffin". The signature is written in black ink and is positioned above a horizontal line.

Date:

A handwritten date in cursive script that reads "October 28, 2019". The date is written in black ink and is positioned to the right of the word "Date:".



## Stephanie Carty

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**From:** Richard Hartley <rhartley1972@gmail.com>  
**Sent:** Tuesday, October 29, 2019 11:10 AM  
**To:** Stephanie Carty; Sharon Cuddy Somers  
**Cc:** Annelise Hartley  
**Subject:** Fwd: Variance Request - 452 Richards Avenue

Variance abutter email from Tom Nies.

----- Forwarded message -----

**From:** Thomas Nies <[tnies@aol.com](mailto:tnies@aol.com)>  
**Date:** Sat, Oct 26, 2019 at 8:32 PM  
**Subject:** Variance Request - 452 Richards Avenue  
**To:** <[Rhartley1972@gmail.com](mailto:Rhartley1972@gmail.com)>

Hi Rich:

I understand you are asking the Zoning Board of Adjustment to allow an existing apartment in your house at 452 Richards Avenue. I support your request that will rectify an oversight by the property's previous owner.

Your request is consistent with my interpretation of the city's zoning ordinance. This property is located in GRA. In this area, a structure that existed in 1980 can be converted from a single family residence to up to four dwelling units if a Special Exception is granted (Zoning Ordinance Section 10.440). While I am uncertain whether the current apartment qualifies as an outstanding violation of the zoning ordinance, I note that Section 10.237 allows a variance or special exception if it will rectify all outstanding violations. That is the case in this instance.

I believe granting this request will not change the character of the neighborhood and will not adversely affect my property's value. There have been - and still are - similar multi-unit properties in this area. These have not adversely affected property values, as evidenced by the continuing rapid climb in value documented by the annual property revaluations. I have not observed any adverse effects from the existing apartment.

In summary, I support this request. I believe it is consistent with the essential character of the neighborhood. This request is not contrary to the public interest; indeed, from a policy perspective, allowing this apartment will, in a small way, help to address the problem of affordable housing in Portsmouth. The spirit of the ordinance will be observed since multi-dwelling structures are allowed in this area. Substantial justice will be done as the apartment will comply with the ordinance. I do not believe the value of surrounding properties will be diminished. Finally, it would be an unnecessary hardship to deny the request and force the current tenant to vacate. The Zoning Ordinance is not meant to be punitive.

Sincerely

Thomas A. Nies  
[419 Richards Avenue](#)  
[Portsmouth, NH](#)

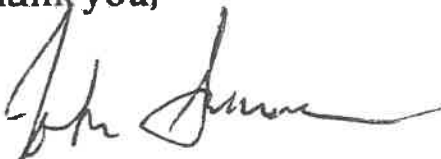
603-431-9387

October 28,2019

To Whom It May Concern,

We are owners of 454 and 460 Richards Avenue which abut the subject property at 452 Richards Avenue. We are not opposed to the variance request being proposed at 452 Richards Avenue as it has been rented out for several years. There has been no detrimental effect to the property or surrounding area as there is easy access and ample parking on site. We urge the Board to grant this variance.

Thank you,

A handwritten signature in black ink, appearing to read "John Samonas", written in a cursive style.

John Samonas

ASRT,LLC

454 and 460 Richards Ave  
Portsmouth, NH 03801

LETTER OF AUTHORIZATION

We, Richard Alexander Hartley and Annelise Connors Hartley, owners of property depicted on Tax Map 112, Lot 6-1, do hereby authorize Donahue, Tucker and Ciandella, PLLC, to execute any land use applications to the City of Portsmouth and to take any action necessary for the application and permitting process, including but not limited to, attendance and presentation at public hearings, of the said property.

Dated: 11/19/2019

 see text here  
Richard A. Hartley

  
Annelise C. Hartley