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June 3, 2022

VIA HAND DELIVERY

Historic District Commission  
City of Portsmouth  
1 Junkins Avenue  
Portsmouth, NH 03801

**Re: Application for Rehearing  
Petition of Nerbonne Family Revocable Trust  
189 Gates Street (Tax Map 103, Lot 6)**

Dear Members of the Historic District Commission:

I represent Devan Quinn and James Butler, who reside at and own the property located at 199 Gates Street (Tax Map 103, Lot 7) (the "Butler/Quinn Property"), which is the property to the immediate east of 189 Gates Street (Tax Map 103, Lot 6) (the "Nerbonne Property"), which is owned by the petitioners, Judy and Patrick Nerbonne ("the Nerbonnes"). Pursuant to Article 6, Section 10.636.40 of the City of Portsmouth ("City") Zoning Ordinance, I hereby submit this Application for Rehearing on behalf of Mr. Butler and Ms. Quinn regarding the Historic District Commission's ("Commission") May 4, 2022 approval of the Nerbonnes' application for a Certificate of Approval related to the Nerbonne Property.

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

The Nerbonnes applied for variance relief from the dimensional restrictions set forth in Section 10.520 and Table 10.521 of the Zoning Ordinance, establishing a 10' side setback and a 30% building coverage limitation, and Section 10.320 of the Zoning Ordinance, prohibiting the expansion of a pre-existing, non-conforming structure. At a hearing held on March 15, 2022, the ZBA granted the Nerbonnes' variance requests.

The Nerbonnes subsequently applied to this Commission in accordance with Article 6, Section 10.634 of the Zoning Ordinance to obtain a Certificate of Approval ("the Nerbonnes' Application"). At a meeting conducted on May 4, 2022, the Commission voted to approve the Nerbonnes' Application for a Certificate of Approval.

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In so doing, the Commission did not accurately apply the Review Criteria set forth in Article 6, Section 10.635.70 of the Zoning Ordinance and the Design Guidelines previously established by the Commission. As a result, the Commission's decision to grant the Nerbonnes' Application was both unreasonable and unlawful, and it should therefore be reversed.

Additionally, it should be noted that the ZBA's decision is not yet final. Due to the concerns of Ms. Quinn and Mr. Butler regarding the ZBA's decision, Mr. Butler and Ms. Quinn have filed an appeal in Rockingham County Superior Court, docketed as John James Butler, et al. v. City of Portsmouth, et al., No. 218-2022-CV-00426. I write to inform the Historic District Commission of this development as the relief necessary from the provisions of the Zoning Ordinance is not yet final and may be subject to reversal, which may in turn render this Commission's decision moot.

The remainder of this letter is organized into two main sections. The first provides an overview of the Nerbonnes Property and the Quinn/Butler Property, with a description of the Nerbonnes' proposal and its relationship to the Quinn/Butler Property. The second provides a discussion of why the Nerbonnes' proposal fails to satisfy either Section 10.635.70 of the Zoning Ordinance or the Historic District Commission's Design Criteria.

## **II. THE PROPERTY, THE NEIGHBORHOOD, AND THE PROPOSAL**

The Nerbonne Property and the Quinn/Butler Property are located in the South End on Gates Street, which is located in the General Residence B Zone. Gates Street has been identified as being "highly sensitive." Like other neighborhoods in the South End, Gates Street is a tightly built residential area, consisting largely of wooden houses, with many structures from the 18<sup>th</sup> and 19<sup>th</sup> centuries. The structures in the neighborhood share a distinct character of height, scale, design, and materials reflective of the historical development of the City of Portsmouth and its maritime history. The lots on Gates Street are small, with few lots exceeding .15 acres in size and with none (to our knowledge) exceeding .20 acres.

There are few detached accessory dwelling units or garden cottages located in the neighborhood. However, for each of the limited properties with detached accessory dwelling units or garden cottages, those structures are all located to the rear of the lot and are not in close proximity to residences on neighboring parcels. This placement of detached accessory dwelling units is consistent with the City's most recent Master Plan, which recognizes that the "large lot depth on many parcels could accommodate additional dwelling units." Master Plan at 141.

The Nerbonne Property is a .12-acre lot and has a single-family residence which was constructed circa 1860s. The architectural style of the Nerbonne residence is Greek Revival and its historical significance has been identified as contributing, meaning that the structures add to the historical integrity and architectural qualities that make the South End distinct.

The Quinn/Butler Property is .10 acres. is similarly a Greek Revival residence that similarly contributes to the South End's historic integrity. Ms. Quinn and Mr. Butler are newlyweds that purchased their property in May of 2020 with the intent to have children and to start and raise our family in Portsmouth. They specifically purchased their property because the property has a large, deep backyard, with open space and light that would be ideal for small children to play in and to raise a family. If it were not for this backyard and the light and air that it offers, Ms. Quinn and Mr. Butler would not have made the considerable investment that we did in purchasing it and moving to Portsmouth.

When Ms. Quinn and Mr. Butler purchased their property, they immediately made improvements to their home to make it more suitable for a young family. They put a patio in the backyard with pervious pavers, installed a French drain to address previous drainage issues, and sodded the line. The cost associated with these improvements was approximately \$35,000.00.

The detached garage that the Nerbonnes propose to convert to a garden cottage is located on the property line between the Quinn/Butler Property and the Nerbonne Property. The 2008 survey of 199 Gates Street submitted by the Nerbonnes with their application shows just how close the garage is to the Quinn/Butler Property and shows that the existing garage to be converted is on the property line – not close to, but actually on the line. Due to the small lot sizes, the garage is located within ten feet of the Ms. Quinn and Mr. Butler's residence. The existing garage is 19' 8" long by 18' wide and is 354 square feet in size. The existing garage is approximately 22.5' high at its peak.

The topography of the Nerbonnes Property gradually slopes downhill from the front to the property's rear, such that the floor of the entry of the Nerbonnes garage is at grade, but the floor to the garage's rear is approximately 4' above grade. The topography further slopes downhill moving from the Nerbonne Property to the Quinn/Butler Property such that floor to the garage's rear is approximately 2' higher than the grade on the Quinn/Butler Property.

The Nerbonnes seek to add an addition (the plans for which were revised on or about March 14, 2022) onto the existing garage that is 10.5' long and 14.5' wide, which would expand the existing garage by approximately 60%. The addition would add approximately 152.25 square feet to the existing garage, which per the plans submitted to the HDC would be associated with the addition of a living room to the "garden cottage" capable of sitting a sectional couch and two chairs.

The addition's roof would be approximately 18.5' high at its peak and would be similarly pitched toward the Quinn/Butler Property. The easterly façade of the addition would align with the existing easterly façade of the garage, making the addition set slightly further back from the property line than the existing garage by approximately 4.5'. The Nerbonnes no longer seek to install the deck previously proposed on the rear of the addition.

As a result of the Planning Board's April 21, 2022 decision, the Nerbonnes are required to install a gutter system and drywall to catch roof runoff and to construct a fence between the Nerbonne and Butler/Quinn Properties in accordance with the City's Zoning Ordinance. That decision, however, is also being challenged by and through the above-referenced Superior Court action.

### III. LEGAL ARGUMENT

Section 6, Article 10.636.40 of the Zoning Ordinance governs applications for rehearing. It provides that "[a]ny party may apply to the Commission for a rehearing in respect to any matter determined, covered or included in its decision or order . . . and the Commission may grant such rehearing if in its opinion good reason therefor is stated in the application." *City of Portsmouth Zoning Ordinance* Art. 6, § 10.636.41. "An application for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." *Id.* § 10.636.42. Applications for rehearing "shall be made within 30 days after the decision of the Commission." *Id.* § 10.636.43.

- (A) *The Commission's Decision was unlawful and unreasonable because the Nerbonnes' Application does not comport with Section 10.635.70 of the Zoning Ordinance.*

Section 10.635.70 governs the Review Criteria to be applied by the Commission when determining whether to grant or deny a Certificate of Approval. It provides as follows:

The Commission shall review an application for a Certificate of Approval and determine whether the application is consistent with and furthers the purpose and objectives set forth in Section 10.631. In making this determination, the Commission shall make Findings of Fact by referring to the following criteria:

- (1) The special and defining character of surrounding properties, including architectural details, design, height, scale, mass, width of surrounding structures, street frontages, types of roofs, façades and openings.
- (2) The significant historical or architectural value of an existing structure for which a Certificate is sought, including its setting, scale and mass; and the general size of new construction with consideration of such factors as height, width, materials and architectural details.
- (3) The extent to which a proposed project's exterior design, scale, arrangement, texture, detailing and materials complement or enhance the existing structure and are compatible with surrounding properties and the Commission's adopted Design Guidelines.

- (4) Encouraging the innovative use of technologies, materials and practices provided these are compatible with the character of surrounding properties.

*City of Portsmouth, New Hampshire Zoning Ordinance Art. 6, § 10.635.70 (2021).*

The Nerbonnes' Application does not comply with Section 10.635.70(1) because the proposed addition is inconsistent with the defining character of surrounding properties. As noted above, the proposed addition would extend from the existing garage by approximately 10.5', would be approximately 14.5' wide, and would expand the existing garage by approximately 60%. The grade of the Nerbonne Property slopes gradually downhill from the front toward the property's rear, meaning that whereas the front of the existing garage is at grade, the rear of the existing garage is already approximately 4' above grade. The roof of the proposed addition would be approximately 18.5' high and would slope toward the Quinn/Butler Property. The addition would also be located just 4.5' from the property line between the Quinn/Butler Property and the Nerbonne Property.

As a result, the Nerbonnes' proposal would significantly diminish the available open air and open space on the Quinn/Butler Property. The properties in question are located in the City's South End. The Quinn/Butler Property is unique and valuable – particularly to Ms. Quinn and Mr. Butler – because the Quinn/Butler Property has an above-average backyard when compared to other properties in the area. That backyard provides light, air, and privacy that enhance the value of the Quinn/Butler Property.

The Nerbonnes' proposal, however, will diminish that air, light, and privacy. At present, there is approximately 44' in length of back yard on the Quinn/Butler Property. Constructing a 10' addition on the Nerbonne Property will create an impediment to air and light along approximately 25% of that backyard. Indeed, the photographs appended to this memorandum reflect the shadow caused by the existing garage; the expansion of that garage by an additional 10' along the property line will all ensure that the patio installed on the Quinn/Butler Property and a significant portion of Ms. Quinn and Mr. Butler's backyard will be denied access to light and air. Indeed, in 2005, the ZBA denied a request for a proposal to construct an addition within 10 feet of the property line.

Further, the height of the proposed addition, when coupled with the downward sloping grade as one approaches the rear of the Nerbonne Property and the further decrease in grade going from the Nerbonne Property to the Quinn/Butler Property create further open-space related issues. While the proposed addition and the Nerbonnes' garage is expected to be approximately 18.5' high from the grade on the Nerbonne Property, the height from the grade of the Quinn/Butler Property, located just 4.5' from the proposed addition, will be domineering given its placement in such close proximity to the Quinn/Butler Property. The establishment of an additional dwelling unit in such close proximity to Ms. Quinn and Mr. Butler's residence also poses a significant risk to Ms. Quinn and Mr. Butler's privacy.

As a result, it is clear that the proposed addition is inconsistent with the defining character of surrounding properties, particularly in terms of height and mass. The Nerbonnes, therefore, cannot satisfy Section 10.635.70(1) of the City's Zoning Ordinance.

Similarly, the Nerbonnes' Application does not comply with Section 10.635.70(3) because the proposed addition is not compatible with the Quinn/Butler Property. The Nerbonnes' proposal, simply put, results in an expansion that is too close to the Quinn/Butler Property. It bears repeating that the existing garage that would be converted to a residential use is already on the property line shared with the Quinn/Butler Property and is located within 10' of Ms. Quinn and Mr. Butler's residence. Whereas, at present, there is a distance between the dwelling units on both sides of Ms. Quinn and Mr. Butler's residence, that buffer will be eliminated if the garage is converted to a dwelling unit, and so too will the privacy that is presently enjoyed by Ms. Quinn and Mr. Butler.

Further, the proposed expansion of the existing garage will not be comparable in terms of location and design with the Quinn/Butler Property. The location of the proposed expansion is within a mere 4.5' of the Quinn/Butler Property, and it will be 18.5' high (from the Nerbonnes' grade) and likely closer to 20' high when measured from the Quinn/Butler Property. The proposed expansion of the existing garage will also obstruct access to air and light along 25% of the backyard of the Quinn/Butler Property, which will undermine Ms. Quinn and Mr. Butler's efforts to improve the backyard, and will diminish the value of the Quinn/Butler Property (which derives considerable value from its unobstructed and private backyard).

Accordingly, Ms. Quinn and Mr. Butler submit that the Nerbonnes' Application does not satisfy the requirements of Section 10.635.70 of the Zoning Ordinance, and respectfully request that the Commission conduct a rehearing on the Nerbonnes' request for a Certificate of Approval to fully address the considerations set forth above.

(B) The Commission's Decision was unlawful and unreasonable because the Nerbonnes' proposal does not comport with the Commission's Design Guidelines.

Based on the foregoing considerations, the proposed addition also fails to comport with the Commission's Design Guidelines for Small Scale New Construction & Additions, as required by Section 10.635.70(3) of the Zoning Ordinance. The Commission's Guidelines provide, in part:

- "It is Generally Appropriate to . . . Construct a new building with similar form and massing to buildings on adjacent sites." *City of Portsmouth, New Hampshire – Guidelines for Small Scale New Construction & Additions* at 10-3.
- "It is Generally Appropriate to . . . Maintain[] the building-to-lot proportions found on adjacent lots." *Id.* at 10-4.
- "It is Generally Appropriate to . . . Adjust[] the massing to suggest building-to-lot proportions found on adjacent sites." *Id.*

- “It is Generally Appropriate to . . . Adapt functionally obsolete buildings for new uses such as converting a service building into additional living space, a play house or storage.” Id. at 10-9.

The Nerbonnes’ proposed addition does not comport with these Design Guidelines.

The proposed addition, for example, does not have a similar form or massing to buildings on adjacent sites. Specifically, as detailed above, the Quinn/Butler Property has a large, private backyard that is generally unobstructed by the buildings on the Quinn/Butler Property. By constructing the proposed addition at the back of their existing garage, the Nerbonnes’ will encroach significantly upon their own backyard, which is itself inconsistent with the form and massing of buildings on the Quinn/Butler Property, and it will have a significant, detrimental impact upon the air, light, and privacy of the Quinn/Butler Property.

Likewise, the proposed addition will not maintain the building-to-lot proportions found on adjacent lots. The backyard of the Quinn/Butler Property, which is directly adjacent to the Nerbonne Property and just 4.5’ from the location of the proposed addition, is large, unobstructed, and private, extending back approximately 44’ in length. The proposed addition, which will extend into the backyard of the Nerbonne Property, is clearly inconsistent with the building-to-lot proportions found on the Quinn/Butler Property and, as noted above, will have a considerable detrimental impact upon the Quinn/Butler Property as it would extend along approximately 25% of Ms. Quinn and Mr. Butler’s backyard.

The Nerbonnes’ proposal also does not adjust the massing on the Nerbonne Property to suggest building-to-lot proportions found on the Quinn/Butler Property. As noted above, there are a considerable number of improvements that the Nerbonnes could make to their property to achieve the same goals, *i.e.*, added living space, as the addition they propose. They could, for example, utilize the footprint of the existing garage without the need for an expansion, they could add an attached ADU to their existing residence, or they could utilize their existing deck space to build out new living area. Each of these alternatives would be consistent with adjusting the massing to suggest building-to-lot proportions found on abutting properties. Instead, the Nerbonnes seek to expand the existing garage into the backyard, reducing the building-to-lot proportions on the Nerbonne Property, particularly in comparison to the Quinn/Butler Property.

Indeed, the Design Guideline suggest that it would be more appropriate for the Nerbonnes to adapt the existing garage to accommodate the new living space they desire, rather than build out a new addition that is inconsistent with the height, scale, and massing of nearby properties. While Ms. Quinn and Mr. Butler are sensitive to the Nerbonnes’ position, the fact remains that the Nerbonnes could accomplish their goals without substantially interfering with Ms. Quinn and Mr. Butlers’ use and enjoyment of their own property.

Based on the foregoing, Ms. Quinn and Mr. Butler submit that the Nerbonnes' proposal does not comport with the Commission's Design Guidelines, and respectfully request that the Commission conduct a rehearing on the Nerbonnes' request for a Certificate of Approval to fully address the considerations set forth above.

**IV. CONCLUSION**

For the reasons set forth above, Ms. Quinn and Mr. Butler respectfully request that the Commission conduct a rehearing on the Nerbonnes' request for a Certificate of Approval. While Ms. Quinn and Mr. Butler are sensitive to the reasons that the Nerbonnes seek this approval, Ms. Quinn and Mr. Butler believe that viable alternatives exist that will have a far lesser impact on Ms. Quinn and Mr. Butler. Ms. Quinn and Mr. Butler remain committed to working with the Nerbonnes on a mutually agreeable alternative should the Nerbonnes wish to work with them.

Thank you in advance for the Commission's consideration of Ms. Quinn and Mr. Butler's concerns and Application for Rehearing.

Very truly yours,

DONAHUE, TUCKER & CIANDELLA, PLLC



Eric A. Maher, Esq.

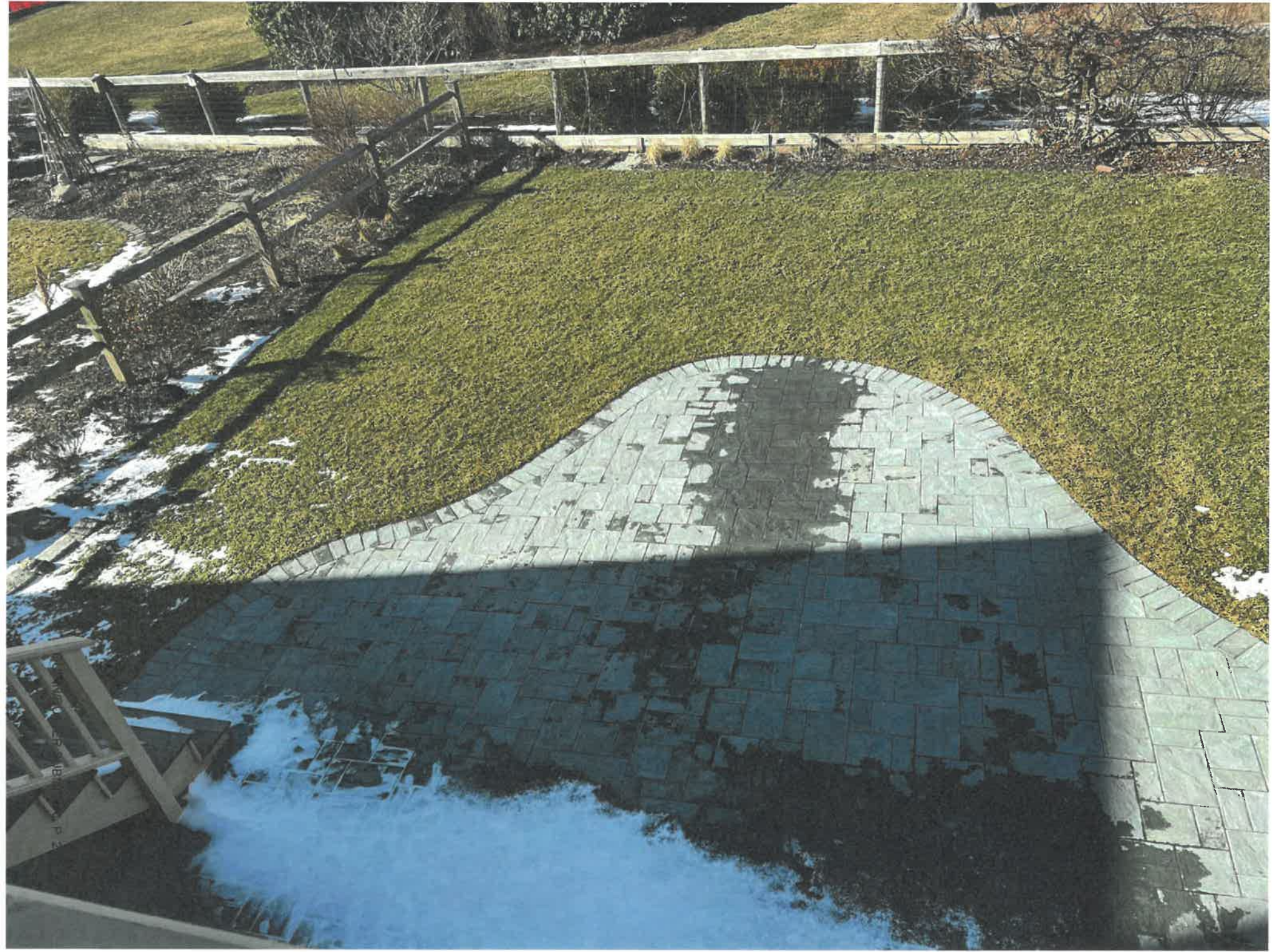
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