THOMAS W. HILDRETH
Direct Dial: 603.628.1177
Email: thomas.hildreth@mclane.com
Admitted in NH, MA, and ME
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
T 603.625.6464
F 603.625.5650

MCLANE MIDDLETON

September 9, 2024

City of Portsmouth
Planning Board
1 Junkins Ave.
Portsmouth, NH 03801

***Via USPS Express Mail***

**Re: 252 Wibird St. (LU-24-137) – ADU Conditional Use Application**

Dear Ladies and Gentlemen:

## INTRODUCTION

We have been retained by David and Melody Gray, the owners of 244 Wibird Street, to assist them in their opposition to an application by the new owners of 252 Wibird Street seeking a conditional use permit for a detached accessory dwelling unit. In short, the application proposes to cram too much density, on too small a lot, too close to neighbors.

The Grays submitted a letter to the Board dated August 15, 2024, in which they eloquently touched on many aspects of the proposal that should cause the Planning Board to deny the application. Briefly stated, these include: incompatibility with the neighborhood; invasion of privacy by the elevated windows and increased traffic; overburdening of the access easement; and a lack of evidence on which the Board could consider a finding comparing the architectural character of the proposed DADU with the applicant's single-family home.

We try not to duplicate the arguments made by the Grays; although we may reinforce some of their points in passing. And we advance additional grounds for the Planning Board to decline jurisdiction and to deny the application on substantive grounds.

## CHARACTERISTICS OF THE APPLICANT'S LOT

The applicant does a fair job of describing the history of the property; however, the applicant glosses over a number of key considerations that should cause the Board to decline jurisdiction and to deny the application.

Most of these have to do with the non-conforming nature of the lot. The applicant's lot does not comply with the minimum area for lots in the GRA zone. The applicant's lot does not comply with the minimum frontage requirements applicable to the GRA zone. Both the existing single-family home and the existing detached garage are substantially encroaching withing the required front, side, and rear yard setbacks. The lot only has 4,791 square feet where 7,500 square feet are required. The lot has zero feet of frontage where the zoning ordinance requires a minimum of 100 feet. The

existing conditions plan submitted by the applicant show the substantial encroachment of the existing building within the required setbacks.

## THE PLANNING BOARD SHOULD DECLINE JURISDICTION BASED ON THE ZONING ORDINANCE AND THE ZONING HISTORY OF THIS LOT

1. ***CUP Not Possible for this Application***. The argument can be made that this applicant is not entitled to a conditional use permit at all because its proposal suffers from **both** alternative deficiencies noted in Section 1.223, and not merely **one or the other**. Section 1.223 offers a conditional use permit for a detached ADU of up to 600 square feet in an existing accessory building if one of two alternative circumstances exists. The first pertains to an existing accessory building that ***"does not conform with the dimensional requirements of this ordinance."*** The second pertains to an existing accessory building that ***"includes the expansion of the existing accessory building."*** In this case, the applicant's proposal involves **both**. To be entitled to a CUP under Section 1.223, the word "or" in that section would have to be the word "and;" it is not.

   There is a sound substantive basis for this treatment by the ordinance concerning the conversion of an existing accessory building into a DADU. When a proposal involves both deficiencies, the nature of such proposal suggests too much deviation from the ordinance to permit the ADU to proceed. The values which the ordinance seeks to protect – for example, privacy of the neighbors, character of the neighborhood, impact on parking – are too severely burdened and compromised by an application which suffers from both infirmities – non-conforming dimensional coupled with a proposed expansion of the building. You cannot have both with merely a CUP.

2. **Zoning Relief Required**. The rationale set forth above finds further support in Article 3 of the zoning ordinance. Given the attributes of the property described above, the lot is a nonconforming lot under Section 10.311 of the zoning ordinance: ***"Any lot that has less than the minimum lot area for street frontage required by the ordinance shall be considered to be non-conforming and no use or structure shall be established on such lot unless the Board of Adjustment has granted a variance from the applicable requirements of this ordinance."*** .

3. ***Existing Variance Would Require Amendment***. The existing detached garage itself required a variance from the Board of Adjustment in 2001. At that time, the zoning board granted a variance from the setbacks with a specific use in mind - namely, a two-car garage with cold storage above. The impacts of an occupied structure are considerably different from those of an unoccupied structure in the very dimensions central to the zoning board's evaluation of a variance request – the impact on abutting properties and the potential alteration of the character of the neighborhood. In addition to the requirements of Section 10.311 noted above, the existing variance would require amendment/expansion from the board of adjustment to reconsider its decision based on the change in use proposed by the application. Unless and until that relief is obtained, the Planning Board should decline jurisdiction.

## ADDITIONAL REASONS WHY THE PLANNING BOARD SHOULD DENY THE APPLICATION

1. The applicant's proposal violates Section 10.814.421 by proposing the vertical expansion of the building.

3. The applicant's proposal violates Section 10.814.422 by proposing that every window within the ADU be located higher than 8 feet above grade facing adjacent properties.

4. The applicant's proposal violates Section 10.814.50 in that the proposed design of the expanded garage/DADU is not architecturally consistent with or similar in appearance to the principal building. The existing detached garage, as it was constructed in 2001, is simpatico with the existing single-family home and certainly has become one of the characteristics to define the neighborhood by its standing for nearly 20 years. The proposed reconstructed taller building, by comparison, looks more like an oversized commercial garage retrofitted to include an apartment above.

5. The application should be denied because it does not comply with all of the applicable standard of Section 10.814.62 Most importantly to the Grays is the proposed increased height of the building, the substantial invasion of privacy caused by the second story windows, and the increased utilization of the access easement which crosses their property.

6. The application should be denied because it does not comply with the requirements of Section 10.814.622. The exterior design of the ADU is architecturally inconsistent with the appearance of the existing principal dwelling.

7. The application should be denied because it does not comply with Section 10.814.623 because it fails to provide adequate open space for both the DADU and the principal dwelling unit. The principal dwelling unit, which includes the detached garage, sits on a lot that is already 40% smaller than the minimum lot required. Accordingly, the open space which remains on the existing 4,791 square foot lot is already deficient for the one single family home it serves. The deficiency would be exacerbated by the addition of another dwelling unit on the same small lot.

8. The application should be denied because it does not comply with Section 10.814.624 in that it will not maintain a compatible relationship with the character of adjacent neighborhood properties and, most importantly to the Grays, it will significantly reduce the privacy of their property.

## THE PARAMOUNT IMPORTANCE OF PRIVACY

The applicant's property is landlocked. Access is afforded only by virtue of a 12-foot-wide access easement extending along the westerly edge of the Grays' property. The Grays maintain the driveway, repair it, grade it, plow it, and resurface it as necessary because it is their property it also serves their detached garage. But you will note in the pictures of existing conditions that the Grays have installed a fence to create a small courtyard between their house and the edge of the driveway. The fence, in effect, creates the appearance that the driveway belongs to 252 Wibird and not 242

Wibird. The Grays have already sacrificed significantly the utility of their property by installation of the fence. Even with the fence, however, they are aware every time cars are entering and exiting the driveway to serve 252 Wibird. The 252 lot is so small that cars cannot turn around on that property. Every car must back out the full length of the driveway to the street. The applicants are proposing to designate one of the four parking spaces to the proposed DADU which means that one of the two cars which are stacked one behind the other will belong to a different household which will increase the amount of times that car jockeying is required to make way for the car which is hemmed in when it wants to leave.

The easement in favor of lot 252 was granted at a time when that lot supported only the single-family residence. Those were the conditions on the ground at the time the easement was granted. The proposed DADU would represent an impermissible overburdening of the easement. The Grays understand that that is a private contractual matter between them and the owners of the dominant estate (252 Wibird), but we note it here because it is one more factor that adds to the weight of the factors which should cause this Board to deny the application as it represents too much density on too small a lot in too close proximity to its neighbors.

## CONCLUSION

As noted above, there are numerous reasons why the Board should vote to deny the application. But even before getting to a substantive discussion on the application, the Board should determine that: (i) it does not have the power to grant a conditional use permit in the case of an application which presents both an existing building that does not conform with the dimensional requirements of the ordinance and includes the expansion of the building; and (ii) it lacks jurisdiction to hear the case unless and until the applicant secures a variance to add this new use to its non-conforming lot.[1]

Thank you for your attention and assistance with this matter.

Sincerely,

Thomas W. Hildreth

TWH/av1
ec: David M. Gray

[1] Theoretically, the applicant could modify its application to propose a DADU in the ground floor level of the garage sacrificing one or both parking spaces. This would eliminate three of the central substantive fouls which plague the current application, but it would still require zoning approval due to the nonconforming nature of the lot.