REQUEST FOR REHEARING

TO: Portsmouth Zoning Board of Adjustment ("ZBA")
FROM: R. Timothy Phoenix, Esquire
DATE: March 22, 2024
RE: Request for Rehearing
The Francis E. Mouflouze Revocable
Trust of 2015, Owner/Applicant
Property Location: 550 Sagamore Avenue
Tax Map 222, Lot 11, Single Residence (SRB) District

Dear Chair Eldridge and Zoning Board Members:

Now come Francis E. Mouflouze, Ted W. Alex and Patricia Cameron, Trustees of The Francis E. Mouflouze Revocable Trust of 2015 ("Mouflouze" or "Applicant") and request that the Zoning Board of Adjustment ("ZBA") rehear and reverse its February, 2024 decision denying two (2) requests for variance relief. Applicants' submission dated January 31 and February 2, 2024 and oral presentation on February 21, 2024 are incorporated herein by reference.

I. EXHIBITS

1. 2/26/23 Notice of Decision/Findings of Fact – 2/21/2024 Hearing.
2. Draft Minutes of 2/21/2024 ZBA Meeting.

II. RELIEF REQUESTED

1) **PZO §10.440 Table of Uses** – to permit a multifamily dwelling unit where multifamily dwelling units are prohibited.

III. STANDARD OF REVIEW

> Within 30 days after any… decision of the Zoning Board of Adjustment… any party to the action or proceedings… may apply for rehearing in respect to any matter determined in the action specifying in the motion for rehearing the grounds therefor; and the Board of Adjustment may grant such rehearing if in its opinion good reason therefor is stated in the motion. RSA 677:2.
>
> A motion for rehearing. Shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. RSA 677:3, I.

The purpose of the statutory scheme is to allow the ZBA to have the first opportunity to pass upon any alleged errors in its decision so that the court may have the benefit of the board's judgment in hearing the appeal. Town of Bartlett Board of Selectmen v. Town of Bartlett

Zoning Board of Adjustment, 164 NH 757 (2013). Rehearing is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the courts. Fisher v. Boscawen, 121 NH 438 (1981).

IV. FACTS & PROCEDURAL HISTORY

550 Sagamore Avenue is a 1.44 acre (62,754 sq. ft.) lot in the SRB zoning district ("SRB") with 139.8 feet of frontage, which contains a 1960-era single-family home with the front steps slightly encroaching into the front setback ("the Property"). The 62,754 sq. ft. lot area is over four times the SRB Zone's required 15,000 sq. ft. lot area and lot area per dwelling unit. The Property's lot depth (434 ft.) is more than three times its width.

On October 17, 2023, Mouflouze requested two variances to construct two garage-under duplex structures on the Property in a district permitting one single-family dwelling per lot. The ZBA denied that application and denied rehearing. Mouflouze sought review by the Housing Appeals Board ("HAB") and stayed the appeal to present a new proposal responsive to the concerns raised by abutters and ZBA members at the October 17th hearing.

On February 21, 2024, Mouflouze appeared before the ZBA with an application for a single variance to replace the existing single-family home with a colonial-style home/barn design containing three units ("the Revised Project"). **(1/31/2024 Submission revised 2/2/2024, Exhibits A & B)**. The Revised Project proposed a single, dimensionally-compliant structure maintaining:

- The appearance of a single-family home.
- A 283 ft. wooded buffer to the Walker Bungalow properties;
- A 65' left side yard;
- Compliant density[1];
- Open space of 80.6%, double the minimum required 40%;
- Building coverage of 5,647 sq. ft. or 9.0%, less than half the 20% limit.

The Revised Project's architectural design is inspired by a typical New England Farmstead, which develops over time, typically beginning with a single family farmhouse near the street with several additions towards the rear of the property followed by the Barn. Reflecting the growth of the Farmstead in an architectural form is significantly more attractive and compatible with the neighborhood than the previous duplex structures.

[1] One 3-unit on 1.44 acres or 62,754 sq.ft. (20,918 sq.ft./unit) meets the SRB density requirements (15,000 sq.ft./lot) and equals a density of 2.08 units per acre, thus meeting the underlying purpose of the SRB zone to provide dwellings "at low to medium densities (approximately 1 to 3 dwellings per acre)," See PZO §10.521 and §10.410.

On February 21, five regular ZBA members and two alternate members were present at the meeting. Member Rossi recused himself from Mouflouze's application leaving a 6 member board. After determining that the application did not constitute a second application "before the Board" barred by its Rules of Procedure VII.4, the ZBA declined to invoke Fisher v. Dover, 120 N.H. 187 (1980) and considered the merits of the Revised Project.

The Property sits in an eclectic and transitional section of the surrounding area, which includes single-family homes on much smaller lots, a recently approved development of 4 single family homes on a 1.95 acre lot across the street in the more restrictive SRA Zone, and waterfront businesses toward the Sagamore Creek Bridge. **(See Mouflouze Submission dated 1/31/2024, revised 2/2/2024 Exhibits F, I)**. Other multi-family dwellings exist north toward the cemetery and south toward Cliff Road. Importantly, across the street is a densely developed apartment complex and condominium development[2,3]. The context of the busy Sagamore Avenue, confluence of four zones and surrounding multi-unit development, coupled with the dimensionally compliant architectural design evoking the New England Farmstead, provide an opportunity to create sorely needed housing in a manner that preserves the character of the neighborhood.

After Mouflouze's presentation, members of the public addressed the ZBA. Two community members, Gerald Duffy (previous Sagamore Avenue resident) and Byron Matto spoke in support of the Revised Project and emphasized Portsmouth's housing shortage. They specifically noted that Mouflouze's three-unit structure was the type of middle-level housing opportunities needed in Portsmouth based on the findings in the upcoming report from one of the City's Housing Initiatives, *Portsmouth Listens: Places to Live Study Circle*. (See Link: https://www.cityofportsmouth.com/sites/default/files/2024-03/Places%20to%20Live_Report-

[2] The Sagamore Court Apartment Complex in the GA/MH District across the street contains 144 units on 15.01 acres. Density is 9.6 units per acre, far exceeding GA/MH purpose to provide for garden apartments at moderate densities of up to 4 dwellings per acre PZO §10.410, as only 65 units would be permitted pursuant to the Ordinance requirement of 10,000 sf per dwelling unit (15.01 acres x 43560sf/acre= 653,836sf/10000sf= 65.38). PZO §10.521 Also, across the street, one lot south of Sagamore Court, is the Tidewatch condominium complex in the SRA District, the purpose of which is to provide areas for single family dwellings at low to medium densities, approximately 1 to 3 dwellings per acre. With 117 units on 53.59 acres, density is compliant at 2.18 units per acre, PZO §10.10410, but meets neither the current zoning ordinance SRA purpose of single-family dwelling units, Id, nor the maximum of 53 units which could be placed on the lot given the 1 acre minimum lot size per dwelling unit. PZO §10.521.

[3] If developed as a Planned Unit Development today, Tidewatch's density would be determined by the number of lots that could be developed in a conventional subdivision, likely less than 53 Units. PZO §10.723.1, §10.725.2.

Out_2024-02-22_Final_Reduced%20Size.pdf). The ZBA erroneously did not refer to written public comment submitted by Robert McElwain, which was not in the Board Packet[4]. (https://files.cityofportsmouth.com/agendas/2024/BOA/02-21-2024+Meeting/2-21-2024+Public+Comment_rev.pdf).

Three nearby residents opposed the Revised Project with one raising concerns regarding traffic, another claiming a negative effect on her desired single-family neighborhood[5]. Mr. Lee claimed the Revised Project did not meet the variance criteria and opined, without supporting analysis or valuations, that the Revised Project would diminish the value of surrounding properties. Local attorney MacCallum and three former City Council Members, none of whom reside in the neighborhood and would be directly affected, rounded out the opposition, claiming the Revised Project did not meet the hardship prong of the variance criteria.

The ZBA commenced deliberation with substantive discussion by three of the six sitting members. Member Rheaume discussed the improved proposal, which had resolved his previous concerns related to whether granting the variance would be contrary to the public interest and observe the spirit of the ordinance; he further opined that there were special conditions of the Property, noting it was large enough to accommodate the proposed three units. **(ZBA 2/21/2024 Minutes, p. 10.)** Member Mattson concurred and elaborated on the Property's special conditions which included size, but also its depth relative to the width/frontage. He noted both factors prevented a traditional subdivision. **(Id.)** He also opined that there was no fair and substantial relationship between the purposes of the Ordinance where the Revised Project complies with dimensional requirements. Lastly, he opined that the proposed use is reasonable. **(Id.)**

Vice Chair Margeson stated she could not support the application due to the absence of any hardship, because the Mouflouze had not demonstrated an inability to construct a single-family home in conformity with the Ordinance. **(ZBA 2/21/2024 Minutes, p. 10.)** She noted that the convergence of zones was intentionally created by the city with the densely developed projects located on larger lots across the street while the smaller lots on the east side of Sagamore were more appropriately designated SRB. **(Id.)** She added that the abutter purchased in reliance believing the Property would remain single-family absent exceptional circumstances.

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[4] The Applicant and Gary Cameron submitted written comment and addressed the Board at the meeting. Mr. Elwain did not speak at the meeting and it appears his favorable comment was not considered.

[5] The Revised Project sites the structure 65 feet from the lot line shared with 546 Sagamore Avenue and proposes dense landscaping along the north lot line.

Vice Chair Margeson did not believe that the Revised Project constituted "exceptional circumstances." **(ZBA 2/21/2024 Minutes, p. 10.)**

Remaining ZBA Members offered no comment. Member Mattson moved to approve the application and summarized how it met the five variance criteria, building on his earlier comments. **(ZBA 2/21/2024 Minutes, p. 11.)** Member Mattson ticked through the variance criteria, applying the Malachy Glen test for the first two prongs of the criteria. He noted the three units on the large lot satisfied the purposes of the Ordinance and the architectural design ensured the Revised Project would not alter the essential character of the neighborhood. He noted that the three units did not threaten the public safety and improved it by eliminating cars backing out into busy Sagamore Avenue. (Id.) Member Mattson cited the professional appraisal from Mouflouze's expert, Brian White, which had determined that the Initial Project's two duplexes/four units would not diminish surrounding property values. He concluded by repeating his earlier comments on hardship: size, shape, and depth as well as location among more densely developed properties created special conditions. **(ZBA 2/21/2024 Minutes, p. 11.)** He continued by noting the absence of any fair and reasonable relationship between the purpose of the regulation given the dimensionally compliant structure. Lastly, he noted that the proposed use was reasonable because it fit in with the surrounding residential uses. **(ZBA 2/21/2024 Minutes, p. 11.)**

Member Rheaume suggested a condition that no building permit issue until the Initial Application's appeal was resolved and Mr. Mattson agreed. Member Rheaume also observed that the barn-structure in back, while large, complied with yard setbacks for the SRB Zone, which are less restrictive than the SRA Zone across the street. **(ZBA 2/21/2024 Minutes, p. 11.)** Member Rheaume also noted that the location toward the front of the lot preserved the wooded buffer and provided a benefit to abutters, particularly those on Walker Bungalow as compared to a compliant subdivision with a road and three house lots, which would eliminate much of the wooded buffer. **(ZBA 2/21/2024 Minutes, p. 12.)**

With no further comments, Member Mattson restated his Motion, which resulted in a 3-3 tie vote. Reviewing the language in the Board's Rules of Procedure, VI.6. Vice Chair Margeson requested a motion to deny to see if it garnered a fourth vote. Member Mannle then moved to deny the Revised Project, stating that while he appreciated the improved design, he was "bound by the rules" and did not see the hardship. While large, he said at 140 feet, it was not narrow.

(ZBA 2/21/2024 Minutes, p. 12.) Member Record agreed stating, without detail, that she did not see any "conditions which would influence" the Revised Project and found no hardship. **(Id.)** The motion to deny also failed 3-3.

Member Mattson then raised the special conditions of the Property with Mr. Mannle, pointed out the 434 foot depth of the Property as compared to its 140 foot width, but Mr. Mannle appeared unconvinced, claiming incorrectly that the Property is a 140 feet by 280 feet rectangle[6]. Ultimately the discussion ended with Acting Chair Margeson suggesting the applicant could "take whatever comments they wanted to use for an appeal if necessary." (**ZBA 2/21/2024 Minutes, p. 12.)**

Mouflouze timely requests rehearing of the ZBA's denial of the Revised Project.

V. CLAIMS OF ERROR

A. Rehearing is required where two tie votes leave the Applicant without a clear decision and its sole finding is based on misapprehension of fact.

A ZBA's failure to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval. RSA 676:3 I. See also Alcorn v. Rochester, 114 N.H. 491 (1974). (noting the absence of a clear decision deprived applicant the specificity needed for judicial review). The ZBA Findings of Fact list only the lack of special conditions of the Property, but do not complete the hardship analysis nor make findings on the other four criteria, though Member Margeson stated, without elaboration, that the application also suffered from a "spirit and intent problem." The absence of findings of facts on the remaining four elements of the variance criteria fail to provide meaningful guidance to Mouflouze, particularly in the context of the two tie votes. Accordingly, rehearing is justified.

The language of RSA 674:33, III is also problematic as applied to Portsmouth's 7 Member Board, which benefits from special legislation. Laws 1953, Ch. 342:12:

[6] The Property has more than one distance noted on each side property line: 152.34 feet plus 282.33 totaling 434.67 feet on the left (north) side. On the right (south) side lot line, the distance is 247.20 feet plus 200.00 feet totaling 447.20 feet. Calculating the lot depth as required by the Ordinance by averaging the length of the two side lot lines, the resulting depth of 434 feet is over three times the lot width and over four times the depth of a conforming SRB lot. **(Exhibit A to Mouflouze submittal dated January 31, 2024 and revised February 2, 2024)**

> The concurring vote of any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.

Portsmouth's Rules of Procedure require 4 votes to approve an application; if acting on a Request for Rehearing for a variance or special exception, a majority vote is required, or if there is a tie, three affirmative votes will grant the rehearing. See Rules of Procedure, VI. However, there is no failsafe provision when the ZBA acts on an application in the first instance. The Rules simply state that if a motion to approve results in a tie, "the resulting decision is denial, unless a subsequent motion receives 4 affirmative votes". See Rules of Procedure, VI[7].

This rule conflicts with State guidance to 5 member ZBAs with a 3 member quorum, which strongly advises applicants be afforded an opportunity to continue until a full board is present given the requirement of three concurring votes. As applied to Portsmouth's 7 member board and requirement of 4 affirmative votes, the same guidance weighs in favor of a continuance. See <u>The Board of Adjustment in New Hampshire: A Handbook for Municipal Officials</u>, NH Office of Planning and Development (2023) at III-17:

> Failure of a motion does not mean that the opposite prevails.
>
> The legislature codified this principle in 2018 with revisions to RSA 674:33, III. Whereas the prior version of the statute required three votes to reverse an administrative action or to approve an application, it was silent on denials. As now drafted, three concurring votes are required "to take any action on any matter on which it is required to pass."
>
> In other words, if a motion to grant a variance fails by a 2 in favor, 3 opposed margin, <u>that does not mean that the variance is automatically disapproved</u>. In such a case, one of the three members who disapproved the motion should now propose their own new motion to disapprove the application stating the reasons for denial. The board should then vote on that motion which would likely pass, 3-2. <u>This is especially important when there are fewer than 5 board members present since motions could result in a tie. Alternate motions should be put forward but if the board truly cannot find something at least 3 members can agree on, the meeting should be continued until a fifth member can be present. Since three votes are necessary to take any action, if there is not a full board, even with alternates serving, the chair should give the applicant the option of postponing the hearing until five members</u>

[7] It appears that this language was last reviewed in 2018 based upon a review of the ZBA Minutes for September and October 2018.

> are present and available to vote. If the applicant chooses to proceed with the hearing, he/she should be advised that a hearing before a 3- or 4-member board will not be grounds for a rehearing in the event the application is denied. (Emphasis added.)

Applying the State's guidance to Portsmouth's 7 member (4 member quorum) ZBA, if a motion to grant a variance fails by a tie 3-3 vote, the decision should not automatically be denial. Similarly, if a motion to deny fails by a tie 3-3 vote, the decision should not be considered an approval. Instead, Mouflouze's application should have been continued until a full board was present and available to vote and failure to do so constitutes procedural error. To the extent Portsmouth ZBA Rules conflict, it appears they do not reflect the latest statutory revisions. Given the tie vote, the ZBA should grant rehearing as a matter of fundamental fairness.

Similarly, public comment in favor was not read into the record and some members appear to have overlooked the dimensions of the lot in a manner which directly impacts the ZBA's only finding, "Special conditions exist because it is a bigger lot, but it is not narrow considering it had a 140 foot width.". As noted on page 6, the Property depth is three times the width and four times the depth of an average SRB lot. There is no factual basis for an assertion that the lot depth is 280 feet, supporting the ZBA conclusion that the lot is not particularly narrow. **(Exhibit A to Mouflouze submittal dated 1/31/2024 and revised 2/2/2024).** Where this is the only finding relied upon by the ZBA, rehearing is required.

B. Rehearing is required because the ZBA's hardship analysis is marred by its misapprehension of evidence demonstrating: special conditions, the absence of a fair and substantial relationship between the Ordinance and its application, and the reasonableness of the proposal given the surrounding area.

The reasoning offered by the ZBA in the findings of fact is that "Special conditions exist because it is a bigger lot, but it is not narrow considering it had a 140 foot width." Respectfully, this finding lacks support in the record and is therefore an unlawful basis for finding that no hardship exists. The flawed reasoning is demonstrated by the ZBA member inaccurate statements and erroneous analysis of unnecessary hardship. Specifically, Member Mannle opined that the Property's size *was* a special condition, but incorrectly judged it to be a 140 foot by 280 foot rectangle, so determined it was not narrow. Member Record agreed and indicated that she did not see conditions supporting the Revised Project, whether she meant special conditions related to the parcel or the conditions in the surrounding area is not clear from the

context. What is clear, respectfully, is that these statements preceding a motion to deny for want of hardship demonstrate factual and legal errors requiring rehearing.

Acting Chair Margeson said she could not support the application because, "there had been no demonstration that the Applicant couldn't use the property for a single-family residence." She also asserted that "the abutter had bought into the neighborhood relying on the zoning ordinance and that [the Property] wouldn't change except for exceptional circumstances and… the application did not meet that exceptional circumstance." Respectfully, this sentiment, while in the context of a hardship discussion, is tantamount to advocating for denial because the request conflicts with the Ordinance. The law is clear that a variance cannot be denied simply because the request does not comply. Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005); (See also Malachy Glen Associates, Inc. v. Town of Chichester, 152 N.H. 102, 107 (2007) ("The mere fact that the project encroaches on the buffer, which is the reason for the variance request, *cannot* be used by the ZBA to deny the variance.").

Requiring a demonstration that the applicant cannot use the Property for a single-family home is also not the hardship test to be applied post Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727, 731 (2001). The standard to evaluate the hardship criteria is also not "exceptional circumstances." The three part test of Simplex, codified in an amended RSA 674:33 begins with whether: special conditions exist, there is fair and substantial relationship between the purposes of the Ordinance and its application, and the proposed use is reasonable. The Revised Project soundly satisfies this test.

The first prong of the hardship test is whether special conditions distinguish this property from others in the area. Though the ZBA appeared to find the large size of the Property to be a special condition, it determined the Property was not narrow so there were no special conditions. The record demonstrates that the Property is four times the required minimum lot size and three times the depth, yet its width and frontage preclude a traditional subdivision.

Beyond its physical characteristics, its vicinity also support a finding of special conditions. **(See Mouflouze Memorandum dated 1/31/2024 and revised 2/2/2024 and in particular, Exhibits E, F, H, and I)**. The immediate northerly lot, another lot three doors away, and a southerly lot two doors away are very small and no not meet SRB lot size and frontage requirements. In both directions near Cliff Road and Verdun Avenue are other homes on much smaller lots. Across the street are two very large lots with a multi-apartment complex containing

multiple large buildings and a large multi-building townhouse style condominium complex. Only a handful of lots in the SRB zone are within the immediate proximity to the large apartment complex and condominium complex. In order to find special conditions, it is not necessary for the Property to be the only burdened property, but only that it be burdened distinctly. Garrison v. Town of Henniker, 154 N.H. 26, 32-33 (2006).

The ZBA mistakenly discounted the effect of the surrounding area in its hardship analysis. A municipality's ordinance must reflect the current character of the neighborhood, See Belanger v. City of Nashua, 121 N.H. 389, 393 (1981) (NH Supreme Court upheld Superior Court's reversal of ZBA decision to deny use variance, agreeing that the current character of neighborhood had evolved since its original classification as single-family residential.) Here, the vast majority of conforming lots and uses are unseen by the general public as they are located behind the Sagamore Avenue lots, i.e., on Walker Bungalow Road. The New Hampshire Supreme Court case Walker v. City of Manchester, 107 NH 382 (1966) held that a hardship may be found where similar nonconforming uses exist within the neighborhood and the proposed use will have no adverse effect upon the neighborhood.

In Walker, an applicant sought to convert the use of a large building to a dwelling and funeral home in a residential zone. Denied by the Manchester Zoning Board of Adjustment, the Trial Court and Supreme Court found that a hardship existed, thus the variances should have been granted, where numerous other large dwellings in the area had been converted to office or other business use, and numerous funeral homes existed in an otherwise residential district via the issuance of variances. Here, the density, frontage, and lot configuration resulting from the requested variances fit in with the eclectic conditions in the surrounding area. The variances also permit this lot to be developed with far less pavement than a three lot subdivision while preserving a wooded buffer to the lots behind it. Accordingly, granting the variances has no adverse effect on the neighborhood. Walker, supra.

Consider also Rancourt v. City of Manchester, 149 N.H. 51 (2003) (Hardship also exists if special conditions of the land render the use for which the variance is sought is reasonable and special conditions include the property's unique setting in its environment). Given: the several different zoning districts in close proximity; various sized lots and lot size requirements in the area; large residential buildings across the street; many nearby lots noncompliant with the density, lot size and/or frontage requirements of the zone in which they are located, and where

the proposed project is less impactful than a standard subdivision, the Property has special conditions. Likewise, the nature of the area, and the negative effects of a standard subdivision demonstrate that there is no rational basis for applying the strict requirements of the zoning ordinance by prohibiting a single three-unit structure designed as a New England Farmstead on an oversized lot.

The final prong of the hardship criteria is whether the proposed use is reasonable. The evidence clearly establishes that the structure is aesthetically pleasing and designed as a New England Farmstead with much of it unseen from the street. The Revised Project is also dimensionally compliant and the placement of the structure at the front of the Property matches other developed lots and preserves a significant wooded buffer. Denial of the Revised Project in favor of a compliant subdivision featuring a *cul de sac* that would decimate the wooded area elevates form over substance. Lastly, the Revised Project is a residential use in a residential zone and, based on the testimony of Gerald Duffy and Byron Matto, fulfills a need for middle level housing the community lacks.

VI. CONCLUSION

For all of the foregoing reasons, the subject property owners Francis E. Mouflouze, Ted W. Alex and Patricia Cameron, Trustees respectfully request that the Zoning Board of Adjustment grant a rehearing followed by approval for the single variance requested.

Respectfully submitted,

The Francis E. Mouflouze
Revocable Trust of 2015,
Ted W. Alex and Patricia Cameron, Trustees

By: _____
R. Timothy Phoenix
Monica F. Kieser

CITY OF PORTSMOUTH
Planning & Sustainability
Department
1 Junkins Avenue
Portsmouth, New Hampshire
03801
(603) 610-7216

EXHIBIT 1

ZONING BOARD OF ADJUSTMENT

February 26, 2024

Frances E. Mouflouze Revocable Trust of 2015
936 SOUTH ST #1
Portsmouth, New Hampshire 03801

RE: **Board of Adjustment request for property located at 550 Sagamore Avenue (LU-24-9)**

Dear Property Owner:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Wednesday, February 21, 2024**, considered your application for demolishing the existing structure and construct a three dwelling unit building which requires the following: 1) Variance from Section 10.440 Use #1.51 to allow a three dwelling unit structure where it is not permitted. Said property is shown on Assessor Map 222 Lot 11 and lies within the Single Residence B (SRB) District. As a result of said consideration, the Board voted to approve the request, but the motion to approve failed 3-3 resulting in a **denial** of the application. Subsequent motion to deny failed 3-3. Members who voted to deny provided comments that the hardship criteria was not met.

The Board's decision may be appealed up to thirty (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 & Sustainability Department for more details about the appeals process.

The minutes and audio recording of this meeting are available by contacting the Planning & Sustainability Department.

Very truly yours,

Beth L Margeson

Beth Margeson, Vice Chair of the Zoning Board of Adjustment

cc:

R. Timothy Phoenix, Attorney, Hoefle, Phoenix, Gormley and Roberts, PLLC
Eric Weinrieb, Engineer, Altus Engineering

Findings of Fact | Variance
City of Portsmouth Zoning Board of Adjustment

Date: 2-21-2024

Property Address: 550 Sagamore Avenue

Application #: LU-24-9

Decision: **Motion to approve failed 3-3 resulting in a denial of the application. Subsequent motion to deny failed 3-3. Comments provided for the record to document how the request failed to meet the hardship criteria.**

Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, It now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	**Finding** (Meets Criteria)	**Relevant Facts**
10.233.21 Granting the variance would not be contrary to the public interest.		
10.233.22 Granting the variance would observe the spirit of the Ordinance.		
10.233.23 Granting the variance would do substantial justice.		
10.233.24 Granting the variance would not diminish the values of surrounding properties.		
10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. (a)The property has special Conditions that distinguish it from other properties in the area. AND (b)Owing to these special conditions, a fair		• Special conditions do exist because it is a bigger lot, but it is not narrow, considering that it had a 140-ft width.

and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one. OR Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.		

EXHIBIT 2

MINUTES OF THE
BOARD OF ADJUSTMENT MEETING
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE

7:00 P.M. **February 21, 2024**

MEMBERS PRESENT: Beth Margeson, Vice Chair; David Rheaume; Paul Mannle; Thomas Rossi; Jeffrey Mattson; ML Geffert, Alternate; Jody Record, Alternate

MEMBERS EXCUSED: Phyllis Eldridge, Chair

ALSO PRESENT: Stefanie Casella, Planning Department

Vice-Chair Margeson was Acting Chair for the evening. She called the meeting to order at 7:00 p.m. Both alternates took voting seats.

I. APPROVAL OF MINUTES

A. Approval of the January 23, 2024 minutes.

*Ms. Geffert moved to **approve** the minutes, seconded by Mr. Mannle.*

There were a few recommended changes as follows:

On page 4, Vice-Chair Marge was changed to Margeson.

On page 5, the word 'surmised' was changed to 'observed' to read as follows: "Mr. Rossi observed that there was no quantitative analysis of any kind."

On page 7, the phrase 'of substantial increase' was changed to 'or substantial increase' so that the phrase now reads: "no creation of a traffic hazard or substantial increase in the level of traffic congestion".

On page 9, it was added to Mr. Rheaume's motion discussion that the hardship was his second criterion identified as the reason he thought the petition failed.

On page 11, Mr. Rheaume and not Mr. Rossi made the motion and amended motion, and Mr. Rossi seconded.

*The motion to approve the **amended** minutes **passed** unanimously, 7-0.*

reconditioned and there was a new residential structure built as part of that; he said it was a good argument that that portion of Chapel St had no businesses on it. He said he thought that spoke to the first two criteria that look at the characteristics of the neighborhood. In terms of the lot area per dwelling unit, he said it was an existing structure and that the real change was in 1987 when it was condoized and broken up into five components that made the lot area per unit of the condo a fixed entity. He said although 3,000 sf was required, the current square footage was 968 sf and was being reduced to 806 sf, which wasn't that substantial of a change and in both cases went below what was required. He said it was a reasonable request and did reflect a hardship because the building was subdivided in 1987. Acting Chair Margeson said she would support the petition, noting that she had been vigilant in the past about the DOD being important for the economic vitality of the City and that it was a very intentional zoning provision. She said the ground floor in the DOD should consist entirely of non-residential but that Unit One was residential and was a preexisting nonconforming use, so she thought that was really the hardship.

The motion passed unanimously, 7-0.

C. The request of **Frances E. Mouflouze Revocable Trust of 2015 (Owner),** for property located at **550 Sagamore Avenue** whereas relief is needed to demolish the existing structure and construct a three dwelling unit building which requires the following: 1) Variance from Section 10.440 Use #1.51 to allow a three dwelling unit structure where it is not permitted. Said property is located on Assessor Map 222 Lot 11 and lies within the Single Residence B (SRB) District. (LU-24-9)

Mr. Rossi recused himself from the petition.

SPEAKING TO THE PETITION

[Timestamp 1:02:30] Attorney Tim Phoenix was present on behalf of the applicant and introduced the applicant's son Ted Alex, project engineer Eric Weinberg, the appraiser Brian White, and the architects Mark Gianniny and Richard Desjardins. He briefly presented the Fisher v. Dover issue. He said the previous application was denied and on appeal, which had to be done because if the Board found that Fisher v. Dover did apply, the applicant could not proceed and would have nothing. He said the applicant did a material change of having one structure instead of two and was only asking for one variance.

[Timestamp 1:09:55] The Board discussed whether Fisher v. Dover should be invoked and decided that it should not. Attorney Phoenix reviewed the petition and criteria. He noted that the applicant could do a 3-lot subdivision with a road and three standalone homes if he wanted to. He said the lot was four times the minimum lot size in the area and that the applicant could accomplish the same functionality by what they proposed. He said the extra units wouldn't be noticeable and that they were in an area that had a confluence of different zoning requirements, so the project would fit in.

[Timestamp 1:23:54] Mr. Rheaume asked what the thinking was in positioning the new structures, in particular the barn structure that was so close to the property line, and what options the project

team had. Attorney Phoenix said one of the issues was the closeness of the house near the lot line and that they wanted to give it some space. Mr. Weinberg said they tried to figure out where to put the driveway compared to the existing one. He said it almost met the setbacks on the other side. He said they wanted to balance the open space between the houses and the development area on each side instead of moving it closer north to the house on the opposite side. Mr. Rheaume said they were past the end of the existing house but not by much. Mr. Weinberg said they tried to push it as forward as possible. Mr. Rheaume said the parking requirement was only four spaces and that the applicant would provide a lot more than that. He asked if the applicant would provide parking space in front of the garage for Unit 3. Mr. Weinberg agreed and said there would be two spaces for each unit and additional parking behind the garage bays.

[Timestamp 1:29:20] Acting Chair Margeson said the lot's size was quite large and asked how much square footage of the lot was being built on. Mr. Weinberg said it was about 25,000 sf, which was about 40 percent of the lot. Acting Chair Margeson said it reduced the lot area per dwelling unit by 8,000 sf. Mr. Weinberg said it would be no different than having a 40-acre parcel with a single-family house on it because it was still one lot. Acting Chair Margeson said the size of the lot allowed for three dwellings to go on it when actually it was only 25,000 sf of the lot being built on. Mr. Weinberg said they could have proposed one giant building and used up all the forest area. Acting Chair Margeson asked why the applicant couldn't build a single residence home on the lot. Attorney Phoenix said the hardship was how large the lot was. He said they believed there were special conditions because the lot was four times the required lot size, and considering its overall envelope, he asked why the applicant would want a McMansion that would cover just as much area when he could provide more affordable housing. He noted that the depth of the property was three times its width. He said the primary issue was the lot area per dwelling unit to keep neighbors from being on top of each other and have light and air.

Acting Chair Margeson opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Gerald Duffy of 428 Pleasant Street said he lived on Sagamore Avenue for a few years. He said Portsmouth was experiencing a critical housing problem and that it was the City's role to enable housing construction for a wide variety of residents.

Byron Matto of 17 Field Road said the project was in line with the broader objectives of the City's housing policies and also adhered to the zoning criteria. He explained how the project met each criteria and said the project would alleviate the housing shortage and serve a critical public need.

SPEAKING IN OPPOSITION TO THE PETITION

Duncan MacCallum of 536 State Street said there had to be special conditions to constitute a hardship, and the kind of hardship that justified the granting of a variance wasn't the personal circumstances of the property owner but had to be in the land itself. He said there was no hardship.

Linda Brown of 650 Sagamore Avenue said the only thing that changed in the application was that one structure was decreased. She said the traffic would still be a concern and thought the variance request was pure greed to make more money using every inch of the property.

Christana Wille McKnight of 546 Sagamore Ave said the project would directly impact her family and that she would not have bought the house if the proposed three-family condo were there. Paige Trace of 27 Hancock Street said there was no hardship and that the City needed affordable housing for everyone.

Esther Kennedy of 41 Pickering Avenue said the City had zoning laws and she did not see a hardship. She asked that the Board support the people who lived in that area.

Petra Huda of 280 South Street said it was an SRB single-family residence, which meant one unit and not three. She said it would not be consistent with the neighborhood and the SRB District.

Jim Lee of 520 Sagamore Ave said he was a secondary abutter to the project and didn't think it was the right place for it. He said the ordinance said three or four dwelling units could not be built on that lot and a two-family unit could not be built. He explained why the criteria were not met.

Suzan Harding of 594 Sagamore Ave said she didn't feel someone had to devour every little piece of property to build something on it. She said she bought her property to appreciate the peace and quiet and the land behind it and never imagined this project would be built there.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Phoenix said the point was made that the project would take the property out of compliance, which was what every variance did. He said the traffic would go through Planning Board approval. He said there would be fencing and screening to protect the neighbors to the north and south. He said the 3-building coverage was 1,882 sf per unit, including the garage. He said it wasn't about greed and that the zones across the street and their intense uses couldn't be ignored and there was much greater density up the street than what the applicant proposed.

The owner's son Ted Alex of 104 Locke Road, Rye, said the plan was reduced from four to three homes and would allow over half the lot to stay in its natural state. He said it had been about keeping his mother in an assisted living home. He noted that his mother died a few days ago.

Gary Cameron of 110 Field Road called in via Zoom and said there were inaccurate and inappropriate comments made. He said it was never about greed but about allowing his mother-in-law to self-finance her living in her few remaining years with dignity.

No one else spoke, and Acting Chair Margeson closed the public hearing.

DISCUSSION OF THE BOARD

[Timestamp 2:29:14] Mr. Rheaume said it wasn't about greed but was about the fact that people's properties were one of their major assets and everyone wanted to maximize the value of that asset. He said the Board existed to look at anything related to the ordinance and to look through the criteria to see if an ordinance is being correctly applied to a property. He said there were special conditions that said when zoning is applied to a particular parcel, it might not make as much sense as other parcels, but it came down to the criteria. He said he logically appreciated what the applicant tried to do in coming back before the Board. He said the applicant went back to the original characteristics of the neighborhood by trying to create the single-family home look in the front and putting the additional units in the rear to make it look like there could have been a building there previously. He said what the application came down to was the special conditions of the property and whether the lot was large enough to accommodate three single-family homes and was sufficient reason to allow the one structure being there. He said there was nothing in the previous decision about the Board saying that the present home could not be demolished, but he said it could be and that someone could put a new structure of indeterminate size on the lot. He said the key factor was hardship and the special conditions and whether the size of the proposed structure allowed the Board to conclude that it could be an acceptable use for the property.

Mr. Mattson agreed that the hardship criteria was the most important. He said the lot size in a single-family zone only had to be 15,000 sf and the lot was 62,000 sf, which could fit four single-family homes. Relating to hardship, he said it wasn't only the size of the property but also its shape that affected it and affected how easily it could be subdivided. He said the ordinance did not allow more than one freestanding dwelling on a property, which was partially why the previous project was denied. He said the applicant was only asking for one variance and the single structure resulted in a 94 percent open space, which had an effect of it looking like a single-family home from the street and fitting in with the neighborhood's existing character. He said one could also apply the big apartment buildings across the street that were part of the character of the neighborhood. He said the project had a fair and substantial relationship to the ordinance and preserved light, air, and privacy, it had the 94 percent open space, and the single structure was within the setbacks and met the density requirements. For those reasons, he said the hardship could be met.

Acting Chair Margeson said she could not support the application because it failed on hardship. She said there had been no demonstration by the applicant showing that the property couldn't be used for a single-family residence. She said the characteristics of the neighborhood was intentionally set out by the City, noting that Sagamore Court was the Garden Apartments/Mobile Home District, Tidewatch was a planned unit development, and there was the SRB zone across the street, and a lot of that was because most of the lots were smaller sizes. She said there was a spirit and intent problem but that the application mostly failed on hardship. She said an abutter bought into an area relying on the zoning ordinance and that it wouldn't change except for an exceptional circumstances, and she didn't think the application met that exceptional circumstance.

DECISION OF THE BOARD

*Mr. Mattson moved to **grant** the variance for the application as requested, seconded by Mr. Rheaume.*

Mr. Mattson said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance, and the proposed use would not conflict with the explicit or implicit purpose of the ordinance. He said the way the SRB District was defined, it was 1-3 dwellings per acre, and that was how the 15,000 sf per dwelling was arrived at. He said this project was almost 21,000 sf per dwelling. He said the project must not alter the essential characteristics of the neighborhood. He said in the current project, the structure from the street looked like a big farmhouse with a barn attached. He noted that there were other 3-unit dwellings within the property's proximity. He said the project would not threaten the public's health, welfare, or safety or injure public rights. He also noted that the new design allowed someone to drive forward instead of having to back out on Sagamore Ave, so public safety would be improved. He said granting the variance would do substantial justice because he did not see any harm to the general public outweighing the potential benefit to the applicant to make use of their property and that this type of proposal was much better than a subdivision approach. He said granting the variance would not diminish the values of surrounding properties, noting that the Board heard from a professional appraiser that the previously proposed 4-unit project would not do so, so it was fair to say that a single building with three units would not. He said literal enforcement of the ordinance would result in an unnecessary hardship, meaning that because of the special conditions of the property that distinguished it from other properties in the area, there was no fair and substantial relationship between the general public purposes of the ordinance's provision and the specific application of that provision to the property. He said the general public purposes of the ordinance were to preserve light, air and privacy, and in this situation, that would be maintained because it was entirely within the setbacks and met the density. He said the special conditions of the lot were that it was more than four times the size required in a single residence district and was relatively narrow and deep, and those factors, combined with the fact that it was also in proximity to other zones that allowed great density, created special conditions for the property. He said the proposed use was a reasonable one and that the proposed building would not alter the essential characteristics of the neighborhood and would fit in with the residential purposes of the zoning.

Mr. Rheaume suggested a **stipulation** stating that a building permit will not be issued until such time that the legal status of the BOA's action on October 17, 2023 is resolved. Mr. Mattson agreed.

Mr. Rheaume said if the motion passed, the applicant would be bound on which way they chose to go. He said a concern he had with the barn structure was the open space in the back crowding the house to the front of the property, and he also had concerns with the 576 Sagamore Ave property, which was the most affected from a light and air standpoint. He said nothing that the applicant proposed fell within the required setback for the zone. He said the SRB zone was generous to the amount of buildable area and there was only a 10-ft setback on either side. He said the SRA zone on the other side of the street required bigger lots and was more restrictive on the setback, so in that sense the applicant was within his rights. From a light and air standpoint, he said the most imposing portion of the proposed structure was toward the back, so it came down to hardship. He said the

Board was not responsible to solve the City's housing crisis but was looking at what the property had for characteristics. He said the parcel's size and shape had the ability that if it were subdivided and continued to have the same number of proposed homes, it made more sense to create smaller units more clustered together that preserved the open area in the back of the property, which was a general benefit to property owners, especially Walker Bungalow. He said he knew it was more impactful to the people on the Sagamore Avenue end of the property, but that it made sense overall as a holistic solution. He said the issue of the micro neighborhood v. the macro neighborhood, and he asked if the Board was considering it against the adjacent properties or if it more broadly included a larger area around the property. He said there was no distinct requirement that the Board had to follow, but there was a fair amount of variety in the overall neighborhood. He said what was proposed would not feel out of character of that overall neighborhood, so in that more macro sense, he thought it met the criteria and recommended approval.

The **amended** motion was as follows:

*Mr. Mattson moved to **grant** the variance with the following **condition**:*

- *A building permit shall not be issued until such time that the legal status of the BOA's action on October 17, 2023 is resolved by the appeal to the Housing Appeals Board.*

*Mr. Rheaume seconded. The vote **failed** by a tie of 3-3, with Mr. Mannle, Ms. Record, and Acting Chair Margeson voting in opposition.*

[Timestamp 2:52:39] The Board discussed whether they should move to deny or move to approve with different criteria. Acting Chair asked for a motion to deny.

*Mr. Mannle moved to **deny** the variances on the grounds of hardship. Ms. Record seconded.*

Mr. Mannle said he appreciated what the applicant did to improve the project but was bound by the rules and that he didn't see the hardship in the property. He said a special condition did exist because it was a bigger lot, but he wouldn't say it was narrow, considering that it had a 140-ft width. Ms. Record agreed and said she didn't see what could be there to influence what the applicant was proposing to put there and that she didn't see the hardship.

*The motion **failed** by a tie vote of 3-3 with Ms. Geffert, Mr. Rheaume, and Mr. Mattson voting in opposition.*

Mr. Mattson said Mr. Mannle noted the special conditions of the property by addressing the narrowness of it. He said it was 434 feet deep, where a typical lot would only be 100 ft deep, so even if it was140 ft wide, it was more than four times as deep. He said if one considered a square v. a rectangle, it was an elongated narrow-shaped parcel. Mr. Mannle said it was a rectangle of 140 x 280 ft. Mr. Rheaume said he empathized with the makers of the motion and that he mostly struggled with the hardship as well, but within the context, he thought it made sense. Acting Chair Margeson said the applicant could take whatever comments they wanted to use for an appeal if necessary.

D. The request of **Cynthia J. Walker and Michael Walker (Owners),** for property located at **46 Willow Lane** whereas relief is needed to demolish the existing shed, construct an addition to the primary structure and construct a detached garage which requires the following: 1) Variance from Section 10.521 to allow: a) 6.5 foot right yard where 10 feet is required; b) a 2 foot front yard where 15 feet is required; and c) 28% building coverage where 25% is the maximum; 2) Variance from Section 10.571 to allow an accessory structure to be closer to the street than the primary structure; and 3) Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 133 Lot 18 and lies within the General Residence A (GRA) District. (LU-24-8)

SPEAKING TO THE PETITION

[Timestamp 3:02:20] Applicants Cynthia and Michael Walker were present to speak to the petition. Ms. Walker reviewed the reasons why they wanted to build a one-car garage and place it in the proposed location. She said they also wanted to extend the back of the house by six feet as part of the addition plan. Mr. Walker reviewed the criteria and said they would be met.

Mr. Rossi said the only part of the project that perplexed him was the placement of the garage. He agreed that there was a lot of open space around that corner of the property but was concerned that pushing the garage within two feet of the lot just because the owners of 50 Willow Lane had no plans to expand their structure's footprint felt like a race of who got there first. He said if there was a 2-ft setback allowed for the garage, the light and space issues would be more difficult for Willow Lane in the future if they wanted to build close to that lot line. Mr. Walker said there was an existing fence on the back that he was going to continue for 40 feet, so all that would be seen from the neighbor's lot would be the top of the garage. Mr. Rossi asked why the garage couldn't be moved back and attached to where the addition was being built. Mr. Walker said the original plan had it attached just on one corner, but they had to ensure that the turn could be made into the garage. He said the other option was to put it further down, but that even went closer to the other house to the left. Mr. Walker said it would preserve a private yard space and let more sun into the house. He said the neighbor couldn't add onto the space between the two houses, given the confines of the property. Ms. Clark said the owner of 50 Willow Lane had no objection and saw the logic of placing the garage there. She said it would also minimize the amount of pavement. Acting Chair Margeson said there wouldn't be a turning problem if the garage was placed next to the addition. Mr. Walker said they wanted to put a gate between the garage and the house to have a nice hardscape behind the house. He said if they pushed it back, they'd have to push it all the way back into the garage and the door would face the left, so the garage and door would have to be wider.

Acting Chair Margeson opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one spoke, and Acting Chair Margeson closed the public hearing.