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August 26, 2021

HAND DELIVERED

Peter Stith, Principal Planner
Portsmouth City Hall
1 Junkins Avenue
Portsmouth, NH 03801

Re: Todd E. Hedges Revocable Trust, Owner/Applicant
139 Cass Street
Tax Map 146/Lot 6
GRC Zone

Dear Mr. Stith & Zoning Board Members:

On behalf of the Todd E. Hedges Revocable Trust, enclosed please find the following in support of a request for zoning relief:

- Uploaded to existing Land Use Application, LU-21-89.
- 08/26/2021 – Memorandum and exhibits in support of Variance Application (original and 11 copies).

The Zoning Board of Adjustment granted essentially the same relief to build a garage 10 feet from the rear lot line where 20 feet is required pursuant to Portsmouth Zoning Ordinance §10.521. The corner was set at 10 feet, and through inadvertence, a portion of the rear is 9.3 feet. The cause was the unknown fact that the rear line is not straight, and instead angles in very slightly from both corners. The purpose of this application is to submit an updated request for variance, as well as a request for equitable waiver.

We look forward to presenting this application to the Zoning Board at its September 21, 2021 meeting.

Very truly yours,



R. Timothy Phoenix

Encl.

cc: Todd E. Hedges
Butch Ricci
James Verra & Associates, Inc.
Altus Engineering, Inc.

DANIEL C. HOEFLE	R. PETER TAYLOR	GREGORY D. ROBBINS	DUNCAN A. EDGAR
R. TIMOTHY PHOENIX	JOHN AHLGREN	MONICA F. KIESER	OF COUNSEL:
LAWRENCE B. GORMLEY	KIMBERLY J.H. MEMMESHEIMER	SAMUEL HARKINSON	SAMUEL R. REID
STEPHEN H. ROBERTS	KEVIN M. BAUM	JACOB J.B. MARVELLEY	

MEMORANDUM

TO: Portsmouth Zoning Board of Adjustment (“ZBA”)
FROM: R. Timothy Phoenix, Esquire
Monica F. Kieser, Esquire
DATE: August 26, 2021
RE: Todd E. Hedges Revocable Trust, Owner/Applicant
Project Location: 139 Cass Street
Tax Map 146/Lot 6
GRC Zone

Dear Chairman Rheame and Zoning Board Members:

On behalf of the Todd E. Hedges Revocable Trust (“Hedges”), we are pleased to submit this memorandum and attached exhibits in support of Zoning Relief to be considered by the Zoning Board of Adjustment (“ZBA”) at its September 21, 2021 meeting.

I. EXHIBITS Mayor

- A. 6/1/21 ZBA Notice of Decision -approving garage 10 feet from rear lot line where 20 feet is required pursuant to PZO§10.521 Table of Dimensional Standards
- B. 8/11/21 Foundation Location Plan-new garage (As-built)-by James Verra and Associates, Inc. 3/19/2021 Site Plan – issued by Altus Engineering, Inc.
- C. Site Photos.
- D. Tax Map 146.

II. PROPERTY/PROJECT

139 Cass Street is a 7,650 sq. ft. lot upon which exists a single-family home with a detached garage/apartment currently under construction (the “Property”). The property has 48 ft. of frontage on Cass Street and is in a neighborhood comprised of single-family homes, two-family homes, and apartment/condo complexes. It has a deep rear yard abutting the Madison Group Apartments parking lot and Portsmouth Housing Authority property. On one side is a two-family home and on the other, a single-family home with a garden cottage ADU.

On 6/1/21. The ZBA granted relief from Portsmouth Zoning Ordinance (“PZO”) §10.521-Table of Dimensional standards-to construct a garage 10 feet from the rear lot line where 20 feet is required. (**Exhibit A**). The southeasterly rear corner of the garage foundation was built 10 feet from the rear lot line. The contractor did not realize, however, that the rear lot line slants inward slightly from its corners, resulting in a portion of the rear foundation wall placed at 9.3-9.7 feet from the rear lot line.

III. RELIEF REQUIRED

After conferring with the City Planning Department staff, it has been determined that the following is required:

1. Equitable Waiver pursuant to RSA 674:33-a; or, in the alternative
2. Portsmouth Zoning Ordinance §10.521 – Table of Dimensional Standards – To permit construction of a garage 9.3-9.7 feet from the rear lot line where 20 ft. is required.

IV. EQUITABLE WAIVER CRITERIA

RSA 674:33-a.

I. When a lot or other division of land, or structure there upon, is discovered to be violation of a physical layout or dimensional requirement imposed by the zoning ordinance enacted pursuant to RSA 674:16, the Zoning Board of Adjustment shall, upon application by and with burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the Board makes all of the following findings:

(a) that the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation has been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value.

Response: the contractor was aware of the 10 foot setback requirement as approved by the zoning board. One corner was set at 10 feet. The contractor did not realize that the rear line was slanted slightly inward and was not a straight line. This resulted in a portion of the rear foundation wall being built between 9.3 feet and 9.7 feet from the rear lot line. This was only discovered when the surveyor completed the foundation location plan.

(b) the violation was not an outcome of the ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement, or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.

Response: the violation is a result of the contractor being unaware that the rear lot line was not straight, but instead was slanted slightly inward.

(c) that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, or interfere with or adversely affect any present or permissible future uses of any property.

Response: the error resulting in a violation moves a portion of the rear foundation wall between approximately 3.6 and approximately 8.4 inches closer to the rear lot line than approved by the ZBA. The violation does not constitute a public or private nuisance, does not diminish the value of other properties, and does not interfere with or adversely affect any future, present or future uses of any property. (See Exhibit C)

(d) that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

Response: the garage foundation is complete. To remedy the issue, the rear wall of the foundation would have to be removed and then replaced at 10 feet. The error and resultant violation will not even be noticed by a casual observer. The foundation wall is abutted by a parking lot and fence. Clearly, the cost of correction far outweighs any public benefit to be gained via correction, thus it is inequitable to require the violation to be corrected.

V. VARIANCE CRITERIA

1. The variances will not be contrary to the public interest.
2. The spirit of the ordinance is observed.

The first step in the ZBA's analysis is to determine whether granting a variance is not contrary to the public interest and is consistent with the spirit and intent of the ordinance, considered together pursuant to Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007) and its progeny. Upon examination, it must be determined whether granting a variance "would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives". Id. "Mere conflict with the zoning ordinance is not enough". Id.

The general purposes of the ordinance pursuant to PZO§10.121 is "to promote the health, safety and the general welfare of Portsmouth and its region in accordance with the city's Master Plan...by regulating:

1. The use of land, buildings and structures for business, industrial, residential and other purposes – It is widely known that home prices in Portsmouth are quite high. Relatively modestly priced homes are difficult to find, leaving many young people and/or moderate income earners to live in other communities. In addition, parking is at a premium along Cass Street which acts as overflow parking for Islington Street. The addition of 2-bay garage with an apartment above defrays housing expenses for Hedges, provides another apartment in sought-after downtown, and frees up the driveway for guest parking.
2. The intensity of land use, including lot sizes, building coverage, building height and bulk, yards and open space – The 7,650 s.f. lot meets the GRC density requirements of 3,500 s.f./dwelling unit. Building coverage and open space requirements are met. The proposed garage with apartment above will comply with both side setbacks while still affording sufficient space for vehicular circulation, avoiding the need to back out into well-traveled Cass Street.
3. The design of facilities for vehicular access, circulation, parking and loading – The existing driveway is not changing, placement of the garage/apartment at the rear of the lot permits sufficient circulation of cars behind the home.
4. The impact on properties of outdoor lighting, noise, vibration, stormwater runoff and flooding – This property abuts the Madison Group Apartments Parking Lot which is dotted with trees and a fence that will screen the proposed garage and apartment. Side setbacks are met and the reduced rear setback still provides ample space for

- stormwater treatment. In addition, building coverage, and open space requirements are all met. Accordingly, there will be no negative impact on surrounding properties.
5. The preservation and enhancement of the visual environment – The appearance of the existing home from the street will be unaffected. The two-car garage fits in with the neighborhood as several nearby properties have detached accessory buildings.
 6. The preservation of historic districts and buildings and structures of historic or architectural interest – The proposal does not undermine these purposes of the Ordinance.
 7. The protection of natural resources, including groundwater, surface water, wetlands, wildlife habitat and air quality – Building coverage and open space requirements are met by the project.

The purpose of the GRC District is "to provide for areas of single-family, two-family and multifamily dwellings with appropriate accessory uses, at moderate to high densities (ranging from approximately 5 to 12 dwelling units per acre), together with appropriate accessory uses and limited services. " PZO§10.440 Residential District Purposes. A garage/apartment is a reasonable accessory structure to the principal dwelling unit and the 7,650 s.f. lot size meets the GRC density requirements (3,500 s.f./unit). The narrow lot dictates placement of the garage centered on the lot behind the single-family home. Siting the garage at the rear of the lot affords sufficient space for vehicular circulation and privacy to both occupants as well as a modest back yard between the main home and the driveway.

In considering whether variances "in a marked degree conflict with the ordinance such that they violate the ordinance's basic zoning objectives". Malachy Glen, supra, also held:

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality.... . Another approach to [determine] whether granting the variance violates basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare. (emphasis added)

Here, the existing neighborhood includes homes and/or accessory buildings located very close to side or rear lot lines. (**Exhibit C, D**). Given that: the building will be used for a garage, a positive feature compared to the existing uncovered parking; the lot size supports a second dwelling unit; the structure meets side setbacks and is well screened by Madison Group Apartment trees and fencing, siting the garage/apartment 9.3-10 ft. from the rear lot line will neither "alter the essential character of the locality nor threaten the public health, safety or welfare."

3. Granting the variance will not diminish surrounding property values.

A single-family home presently exists. The proposed garage to serve the single family home is a reasonable addition to the lot, which also supports the density for a second dwelling. Surrounding homes include various accessory structures with the neighboring lot containing a garden cottage very close to the side lot line. Side setbacks are met and the rear of the property abuts an apartment complex parking lot, screened by a fence and trees on abutting properties. In addition, space exists between the proposed garage apartment and the rear abutters. Clearly, granting the variances to permit the garage with apartment above will not diminish surrounding property values.

4. Denial of the variances results in an unnecessary hardship.

a. Special conditions distinguish the property/project from others in the area.

The large lot is deep, but narrow at 48 ft. wide, and contains a home actually over the front lot line, resulting in an underutilized back yard. To comply with side setbacks, the garage must be centered on the lot behind the existing home, but must also accommodate vehicular circulation so drivers can avoid backing out onto well-traveled Cass Street. These factors combine to create special conditions.

b. No fair and substantial relationship exists between the general public purposes of the ordinance and its specific application in this instance.

Setback requirements exist to preserve adequate access, sightlines, air, light, and space. This large lot supports a second dwelling and the Project complies with side setbacks, building coverage and open space requirements. Because the lot abuts a large parking area for Madison Group Apartments and is well screened by trees on abutting properties, siting the garage/apartment 9.3-10 ft. from the rear lot line will not negatively affect abutters access to air, light, and space. Accordingly, there is no reason to apply the strict requirements of the zoning ordinance.

c. The proposed use is reasonable.

A garage for storage and covered parking is a reasonable accessory use to a permitted single-family home, but this large lot also supports a permitted second dwelling in an area where other two family and multi-family homes exist. Proposed is a garage structure that meets side setback, building coverage and open space requirements setbacks and does not negatively affect rear abutters. The result is a permitted second density-compliant residential unit in a residential

zone containing similar outbuildings. Accordingly, the use is reasonable. Vigeant v. Town of Hudson, 151 N.H. 747 (2005).

5. Substantial justice will be done by granting the variance.

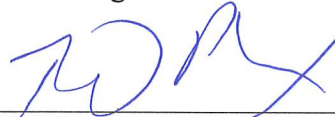
If “there is no benefit to the public that would outweigh the hardship to the applicant” this factor is satisfied. Harborside Associates, L.P. v. Parade Residence Hotel, L.L.C., 162 N.H. 508 (2011). That is, “any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice”. Malachy Glen, *supra* at 109. Because a garage is a permitted accessory use to the single-family home, the large lot accommodates a second dwelling unit in a detached structure meeting side setback, building coverage and open space requirements, there is no benefit to the public from denying the variances, and no harm to the public in granting the variances. In comparison, Hedges will be harmed by denial as he will be unable to construct an otherwise permitted accessory building with an apartment on a lot which supports a second dwelling. Accordingly, there is no benefit to public outweighing the hardship to Hedges if the variances are denied.

VI. CONCLUSION

For all of the reasons stated, Hedges respectfully requests that the Portsmouth Zoning Board of Adjustment grant the requested equitable waiver, in the alternative, grant the requested variance.

Respectfully submitted,

Todd E. Hedges Revocable Trust



By: R. Timothy Phoenix
Monica F. Kieser



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

ZONING BOARD OF ADJUSTMENT

June 1, 2021

Todd E. Hedges Revocable Trust
139 Cass Street
Portsmouth, New Hampshire 03801

RE: Board of Adjustment request for property located at 139 Cass Street

Dear Todd E. Hedges Revocable Trust:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **May 25, 2021**, considered your application for constructing a two-car garage with apartment above which requires the following: 1) A Variance from Section 10.521 to allow a 10' rear yard where 20' is required. Said property is shown on Assessor Map 146 Lot 6 and lies within the General Residence C (GRC) District. As a result of said consideration, the Board voted to grant the request for the application as presented and advertised.

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 Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

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

Very truly yours,

David Rheume, Chairman of the Zoning Board of Adjustment

cc: Robert Marsilia, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

6/2/2021

Todd E. Hedges, Trustee
R. Timothy Phoenix, ,Hoefle, Phoenix et al

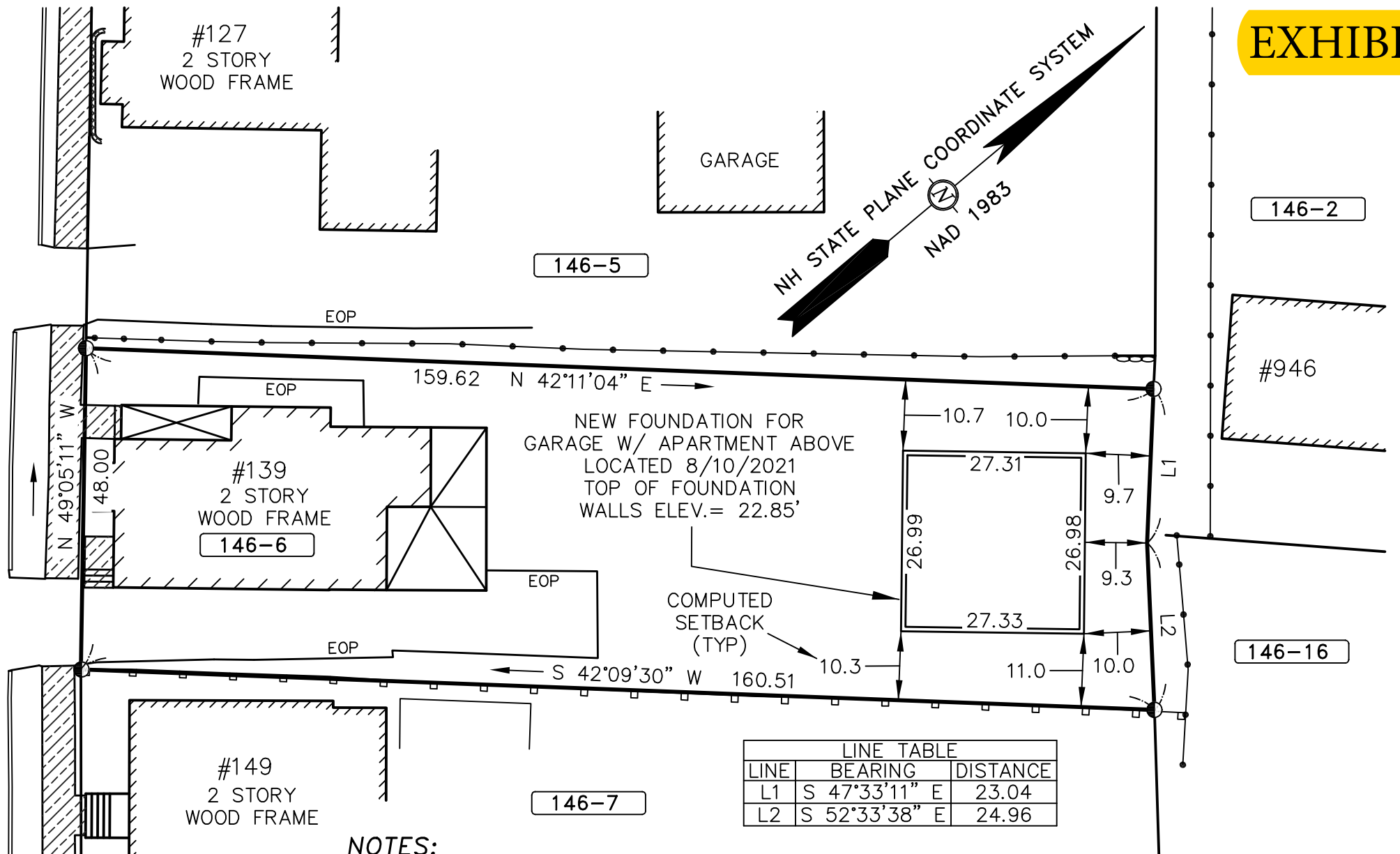
CASS STREET
(A PUBLIC WAY)

LEGEND:

- STONE WALL
- IRON ROD
- CHAIN LINK FENCE
- PRIVACY FENCE
- 110-5 TAX SHEET - LOT NUMBER
- RCRD ROCKINGHAM COUNTY REGISTRY OF DEEDS
- EOP EDGE OF PAVEMENT

REFERENCE PLANS:

- EXISTING CONDITIONS PLAN, SHEET 1 OF 1, PROPOSED SITE IMPROVEMENTS, TODD E. HEDGES, TRUSTEE, TODD E. HEDGES REV. TRUST, 139 CASS STREET, PORTSMOUTH, N.H., REVISED TO 1/28/2021, PREPARED BY JAMES VERRA AND ASSOC., INC., NOT RECORDED.

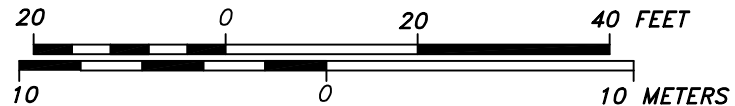


NOTES:

- OWNER OF RECORD TODD E. HEDGES, TRUSTEE
TODD E. HEDGES REV. TRUST
ADDRESS..... 139 CASS ST, PORTSMOUTH, NH 03801
DEED REFERENCE..... 6173/1392
TAX SHEET-LOT..... 146-6
PARCEL AREA..... 7,650 S.F.
- NEW FOUNDATION FIELD LOCATED 8/10/2021 BY JAMES VERRA AND ASSOC., INC.
- ZONED:..... GRC
MINIMUM LOT AREA 3,500 S.F.
FRONTAGE..... 70'

FRONT YARD SETBACK.... 5'
SIDE YARD SETBACK..... 10'
REAR YARD SETBACK..... 20'

LINE TABLE		
LINE	BEARING	DISTANCE
L1	S 47°33'11" E	23.04
L2	S 52°33'38" E	24.96











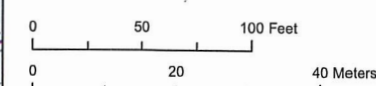






- Partial Legend**
See the cover sheet for the complete legend.
- 7-5A** Lot or lot-unit number
2.56 ac Parcel area in acres (ac) or square feet (sf)
25 Address number
233-137 Parcel number from a neighboring map
68 Parcel line dimension
- SIMS AVE** Street name
- Parcel/Parcel boundary
Parcel/ROW boundary
Water boundary
Structure (1994 data)
- Parcel covered by this map
Parcel from a neighboring map (see other map for current status)

EXHIBIT D



This map is for assessment purposes only. It is not intended for legal description or conveyance. Parcels are mapped as of April 1. Building footprints are 2006 data and may not represent current structures. Streets appearing on this map may be paper (unbuilt) streets. Lot numbers take precedence over address numbers. Address numbers shown on this map may not represent posted or legal addresses.

