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March 23, 2020

Chair and Members of the Zoning Board of Adjustment Municipal Complex One Junkins Ave. Portsmouth, NH 03801

Re: 3210 Lafayette Rd, Portsmouth

Appeal of Decision of Code Official, Request for Special Exception, and

Request for Variances Tax Map 291, Lot 8

Dear Mr. Chairman and Members:

Please be advised that I represent 3210 Lafayette Rd., LLC, which is the appealing party and the applicant concerning a manufactured housing business at the above location. The parcel is approximately 6 acres in the Gateway Corridor, G1 zone. There is a significant amount of wetlands on the parcel none of which are impacted by these requests. It has approximately 561 feet of frontage on Route 1. Currently, it is used for a small office building housing medical offices. The proposed development would continue this office use and to the north of the office use and add a display of new manufactured housing for sale. One of the units will be used as an office and serviced by utilities. It will be staffed by one person with about 150 square feet devoted to an office. The other display units will not be connected to water or sewer. In addition, limited boat and RV storage behind the displayed manufactured homes would be available to residents of Hillcrest Estates which abuts the parcel. At issue in the appeal and the variances is the allowance of five parking spots 1 in front of the displayed model which will be used as an office. At issue in the special exception is the allowance of manufactured housing in the G1 zone.

Previously the site had been used as a display for manufactured housing dating back to the 1950's. An office building from the previous use still exists with two front parking spots. Thus, the proposed development is adding only three additional spaces.

I. The Appeal

Section 10.5B83.10 provides: "Required off-street parking shall not be located between a principal building and a street or within any required buffer area."

Section 10.1113.20 provides: "Required off-street parking shall not be located in any required front yard, or between a principal building and a street."

The applicant is seeking to add five parking spots in front of the office in one of the manufactured homes which places them between the principal building and Lafayette Road. The Planning Director and Staff contend that these sections preventing parking in front are applicable as they consider Lafayette Road to be a street. See the attached email trail which constitutes a decision of the code official. However, as a matter of law, that interpretation is incorrect; Lafayette Road is not a street as defined in the Ordinance; hence the above sections cannot apply and no variances are needed for the plan as presented.

Section 10.1511states: "Unless expressly stated the following words and terms shall have the meanings shown in the Article." "Street" is then defined to be "a thoroughfare or roadway which is either (a) formally accepted by the City or (b) shown on an approved subdivision plan constructed to City subdivision specifications or for which surety has been posted to guarantee construction of all improvements required by the Planning Board."

Definitions cannot be overlooked. Hannigan v. City of Concord, 144 N.H. 69 (1999).

Words which are defined in an ordinance must be given the meaning as defined. Batchelder v. Town of Plymouth, 160 N.H. 253 (2010), Healy v. New Durham, 140 N.H. 232 (1995). Put another way, the definition must be followed. Where an ordinance defines terms, the definition controls. Trottier v. City of Lebanon, 117 N.H. 148 (1997). This is reinforced by the Ordinance's use of the word "shall" in mandating that the words shall be given their defined meaning. Shall is a word of command or mandate and does not allow any discretion in its execution. Anderson v. Robitaille, 172 N.H. 20 (2019). It is beyond question that Lafayette Road does not meet the definition. As a state road, it was never, and can never, be accepted by the City. Nor was it built as a subdivision road. Since it is not a street, as a matter of law the sections concerning parking cannot apply.

The City may argue that the overall intent of the Ordinance is to regulate along Lafayette Road. However, when words are unambiguous, as here, the subjective intent of the drafter is irrelevant as the court will not go further than the words alone to determine legislative intent. Severance v. Town of Epsom, 159 N.H. 359 (2007). While the City may have wanted comprehensive regulation along Lafayette Road, it should not be allowed to enforce a position in conflict with the clear words of the ordinance. To do so would eliminate the definition section and its mandate. It would set a precedent that the definitions could be ignored at all times. This would rise to a level of unconstitutionality as a developer could never rely on the words of the Ordinance but would be subject to the whims of the staff and the Boards.

The decision of the code officials that Lafayette Road is a street must be reversed.

The Special Exception.

Manufactured housing is allowed in the G1 zone by special exception.² Ordinance 10.44011.30. Here the applicant proposes the siting of 6 unoccupied manufactured homes as a sales display. One of the homes will be used as an office, usually staffed during the day with one person. Only 5 homes will be visible from Lafayette Road. There will be five parking spots available for customers, although it is not anticipated there will be many times when all five are in use.

The criteria for granting a special exception are listed in the ordinance, Section 10.232.

No hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials;

No detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighborhoods or business and industrial districts on account of the location or scale of **buildings** and other **structures**, parking areas, **accessways**, odor, smoke, gas, dust, or other pollutant, noise, **glare**, heat, vibration, or unsightly **outdoor storage** of equipment, vehicles or other materials;

No creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity;

No excessive demand on municipal services, including, but not limited to, water, sewer, waste disposal, police and fire protection and schools; and

No significant increase of stormwater runoff onto adjacent property or streets.

The proposed manufactured homes readily meet all these criteria. They pose no hazard of any nature as they are new unoccupied factory built homes. Since they are not occupied and not connected to water or sewer, they will not even have a minimal amount of hazardous material usually found in occupied residences. There is no detriment to property values as this is a heavily commercial area of Lafayette Road so the character of the neighborhood is unchanged. The only residences are across Lafayette Road and already have adjacent commercial businesses. Thus, those homes will not be affected. There is no traffic hazard. The sale of new manufactured homes is a low volume business as established by the applicant seeking only five

² It is unclear if the exclusion applies to unoccupied manufactured homes displayed for sale. Presumably the Ordinance was designed to regulate manufactured homes which are occupied and being used by their residents. Since the proposed use so readily meets the criteria for a special exception, this point is not being argued.

parking spaces. Fewer than five occasional customers cannot be considered to create a traffic hazard on Lafayette Road. There will be virtually no demand for municipal service. Finally, as established by the drainage calculations, there is no increase in runoff, particularly in light of the wetlands to the east and the large distance from Lafayette Road to the west. Since the proposal meets all the criteria, a special exception should be made.

III. Variance Requests

Variances are requested from sections 10.5B83.10 and 10.1113.20. Since they have similar language and the same effect, they will be analyzed together. Initially, it is important to note, that if the Board grants the appeal as to the definition of street, argued above, then this request is rendered moot and need not be considered.

Section 10.233.20 of the ordinance sets out the standards for granting a variance. The variance will not be contrary to the public interest.

The spirit of the Ordinance will be observed.

Substantial justice will be done.

Values of surrounding properties will not be diminished.

Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.

Unnecessary hardship is further described in the ordinance.

Owing to special conditions of the property that distinguish it from other properties in the area, (a) no fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and (b) the proposed use is a reasonable one. (Under this provision, an unnecessary hardship shall be deemed to exist only if both elements of the condition are based on the special conditions of the property) or

Owing to special conditions of the property that distinguish it from other properties in the area, 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. (Under this provision, an unnecessary hardship shall not be deemed to exist if any reasonable use, including an existing use, is permitted under the Ordinance.)

As will be demonstrated below, the requests meet these standards. Not contrary to the public interest and the spirit of the Ordinance are correlated and can be discussed together. The intent of the ordinance is to limit large parking lots fronting on Lafayette Road. It appears about one-half of the business have this type of large grand-fathered parking lot. Five occasional use

parking spots on a large parcel will have no adverse visual impact and therefore are not contrary to the public interest and they are within the spirit of the ordinance. In fact, the plan includes demolishing a small run down building with two front parking spaces. This will notably improve the aesthetic. In addition, a vast amount of frontage with a green landscaped island is being preserved to provide the aesthetic sought by the Gateway Zone.

Substantial justice is done by allowing the use of a large parcel for display of manufactured housing, a use that has minimal impact on adjoining properties and no impact on City services. Further, there is an abutting manufactured housing park to the east of the property providing a special reason why the use is appropriate and substantial justice done.

Surrounding properties are not affected. This is a highly developed area with many commercial properties. There are a few homes across Lafayette Road but this addition of a minor impact use would not affect values as all of the commercial development in the area should have already had whatever commercial impacts would exist.

Finally, the property is a long narrow strip bisected by an office building. Since it is relatively narrow, it is impossible to configure parking in a manner which does not need a variance. Parking behind the display cannot be safely accomplished as customers would not have sufficient room to turn around and they would be forced to back out onto Desfosses Avenue which is a main entrance to Hillcrest Estates. Nor can more parking be placed around the office building as there is a steep grade change which would pose a hazard to customers, who tend to be elderly and unable safely cross this grade change. This distinguishes it from other properties in the area. In addition it is one of the few properties with development potential whereas there are many properties that have grand-fathered front parking. There is no reasonable relation between the purpose of the ordinance and its application here. The purpose of the ordinance is to prohibit large front parking lots. It allows residential parking in front of homes. Thus, manufactured homes should be treated like homes with front parking allowed. Further, since only five spots are proposed, they do not create the type of parking the Ordinance was addressing. A display area with limited parking is entirely reasonable for this commercial area.

Accordingly, the Applicant asks the Board to grant the appeal, or in the alternative grant the variances and to allow a special exemption to the extent needed.

John Kuzinevich

Sincerel

Copy to: client

From: Juliet T.H. Walker jthwalker@cityofportsmouth.com

Subject: RE: 3201 Lafayette

Date: March 12, 2020 at 2:52 PM

To: John Kuzinevich jjkuz@comcast.net

Cc: Glenn Gidley (glenn@salemmh.com) glenn@salemmh.com, J. Corey Colwell ccolwell@tfmoran.com, Peter M. Stith

pmstith@cityofportsmouth.com

John,

We do not agree with your interpretation of the zoning ordinance. When you read the Ordinance as a whole, it is clear the intent of Section 10.5B83.10 is to prohibit parking between a building and a public way in this district. If we were to read the definition of street to exclude Lafayette Road from this provision, we would intentionally construe the Ordinance to have a meaning other than the one intended by its drafters. The common meaning of a street clearly includes Lafayette Road, and any reading of this ordinance provision which does not include Lafayette Road frustrates the purpose of the ordinance. A variance is required in order to locate the parking as proposed per the requirements of Section 10.5B83.10. If you disagree with the Planning Department, you may appeal the decision per the procedures outlined in Section 10.234.

Best,

Juliet T. H. Walker, AICP
Planning Director
Planning Department
1 Junkins Ave
Portsmouth, NH 03801
(603) 610-7296
www.cityofportsmouth.com/planportsmouth
Twitter: @PlanPortsmouth

----Original Message----

From: John Kuzinevich [mailto:jjkuz@comcast.net]
Sent: Wednesday, March 11, 2020 12:29 PM
To: Peter M. Stith <pmstith@cityofportsmouth.com>

Cc: Glenn Gidley (glenn@salemmh.com) <glenn@salemmh.com>; J. Corey Colwell <ccolwell@tfmoran.com>; Juliet T.H. Walker

<jthwalker@cityofportsmouth.com>; Robert P. Sullivan <rpsullivan@cityofportsmouth.com>

Subject: 3201 Lafayette

Peter - Just checking in as I have not heard from you. Would you please confirm that Lafayette Rd does not meet the definition of street and therefore the sections you cited on parking do not apply. This is important in deterring the scope of relief needed and the preparation of the applications. If you have any question concerning our position I would be happy to have a conference call with you, Juliet and Bob Sullivan. If you do contend Lafayette Rd is a street as defined by the ordinance, please provide me the basis of your contention.

Thanks, John





Photo Exhibits for 3201 Lafayette Road, LLC

3201 Lafayette Road Portsmouth, NH



Photo 1: View of the property from the intersection of Lafayette Road and Desfosses Avenue.



Photo 2: View of the existing garage/former sales building and 2-story office building from Lafayette Road / Route 1.



Photo 3: View of the existing garage/former sales building and 2-story office building from Lafayette Road / Route 1.



Photo 4: View of the paved driveway. Existing office building at 3201 Lafayette Road is on the left.



Photo 5: View of vacant land and garage/former sales building, where new manufactured homes would be displayed.



Photo 6: View of vacant land where manufactured homes will be displayed. Boat/trailer parking is proposed behind displayed units.



Photo 7: View of the existing garage/former sales building and office building as seen from Lafayette Road.



Photo 8: View of the parking lot at the front of the office building.



Photo 9: View of the paved driveway at the front of the garage/former sales building and office building.



Photo 10: Vacant land on the property of 3201 Lafayette Road, LLC in the area adjacent to Desfosses Avenue.



Photo 11: Vacant land on the property of 3201 Lafayette Road, LLC in the area adjacent to Desfosses Avenue.



Photo 12: View of the property from Desfosses Avenue toward Lafayette Road where storage area is proposed.



Photo 13: View of Desfosses Avenue toward the intersection with Lafayette Road.

Proposed Model Home



Proposed Model Home





Proposed Model Home



Proposed Model Home



Proposed Model Home



Proposed Model Home



GENERAL INFORMATION

OWNER/APPLICANT

MAP 291 LOT 8 3201 LAFAYETTE ROAD, LLC 72 SOUTH BROADWAY SALEM, NH 03079

RESOURCE LIST

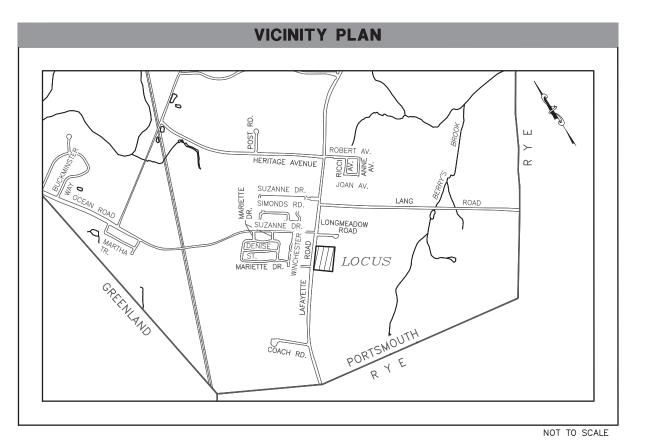
PLANNING DEPARTMENT
1 JUNKINS AVENUE
PORTSMOUTN, NH 03801
(603) 610-7216
JULIET WALKER, PLANNING DIRECTOR

ENVIRONMENTAL SERVICES
TES ENVIRONMENTAL CONSULTANTS, LLC
1494 ROUTE 3A, UNIT 1
BOW, NH 03304
(603) 856-9925
THOMAS E. SOKOLOSKI, WETLANDS SCIENTIST

ZONING RELIEF PLANS 3201 LAFAYETTE ROAD, LLC 3201 LAFAYETTE ROAD PORTSMOUTH, NEW HAMPSHIRE

FEBRUARY 20, 2020





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This plan is not effective unless signed by a duly authorized

FFT

INDEX OF SHEETS

SHEET SHEET TITLE

C-O COVER SHEET

C-1 ZONING RELIEF PLAN - EXISTING CONDITIONS

C-2 ZONING RELIEF PLAN - PROPOSED CONDITIONS

REQUIRED RELIEF

VARIANCES:

- SECTION 10.5B83.10 REQUIRED OFF-STREET PARKING SHALL NOT BE LOCATED BETWEEN A PRINCIPAL BUILDING AND A STREET OR WITHIN ANY REQUIRED BUFFER AREA.
- SECTION 10.113.20 REQUIRED OFF-STREET PARKING SHALL NOT BE LOCATED IN ANY REQUIRED FRONT YARD, OR BETWEEN A PRINCIPAL BUILDING AND A STREET.

SPECIAL EXCEPTION:

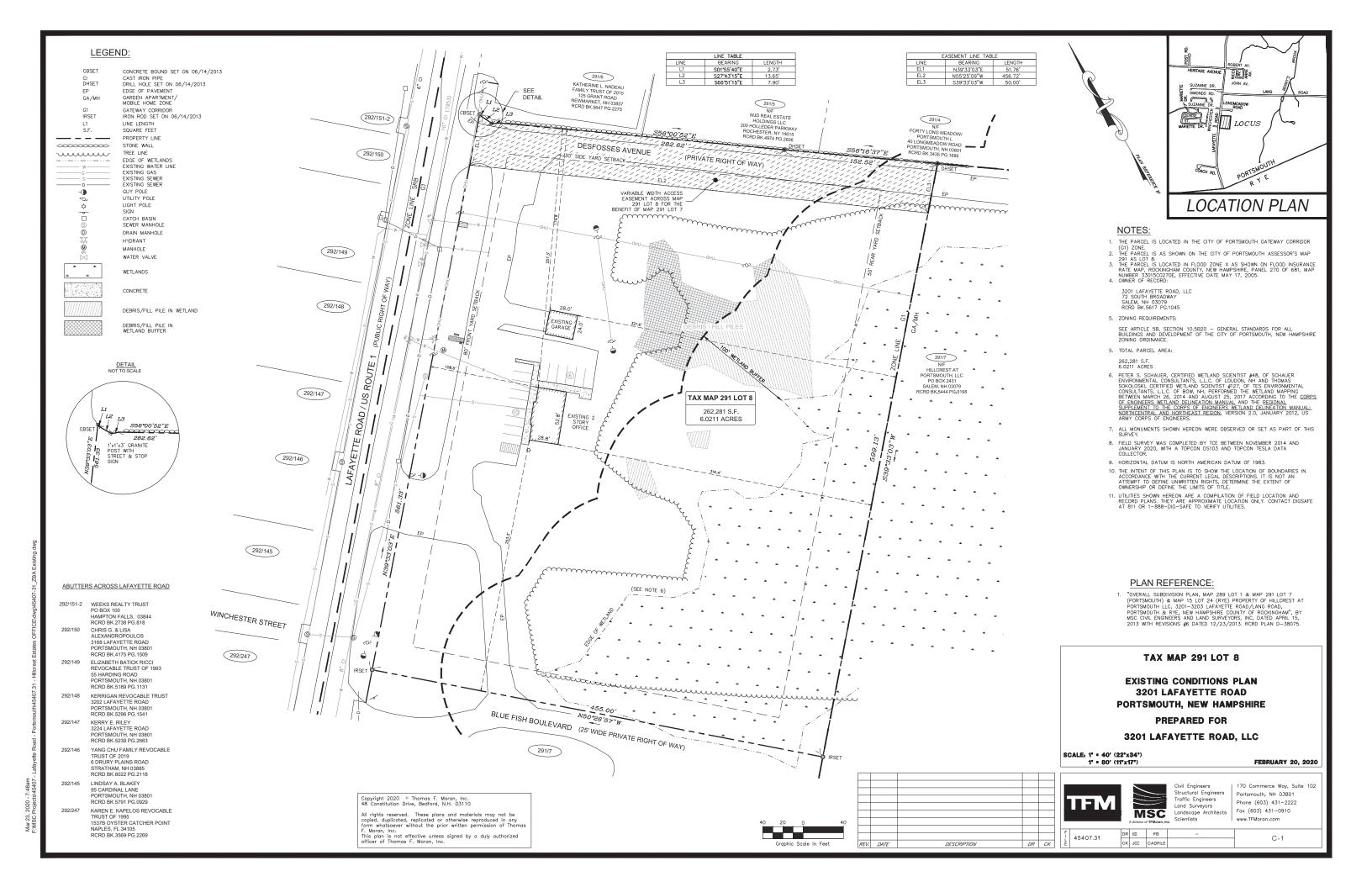
1. SECTION 10.44011.3 - TO ALLOW MOBILE HOMES IN THE G1 ZONE.



Civil Engineers
Structural Engineers
Traffic Engineers
Land Surveyors
Landscape Architects

170 Commerce Way, Suite 102 Portsmouth, NH 03801 Phone (603) 431–2222 Fax (603) 431–0910

45407.31 DR IID FB C—0



3201 LAFAYETTE RD, LLC PO BOX 54 SALEM, NH 03079

3/23/2020

To: Whom it May Concern

Re: Letter of Authorization

This letter hereby authorizes TF Moran and Atty. John Kuzinevich to represent 3201 Lafayette Rd LLC before any municipal land use boards as it pertains to obtaining permitting for 3201 Lafayette Rd Portsmouth, NH.

Sincerely,

Glenn Gidley

Manager