



THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT  
OF THE CITY OF PORTSMOUTH

**In re Application of Evan Maloney and Jill Maloney  
relating to the property at 389 Lincoln Avenue**

APPLICANTS' MEMORANDUM  
IN SUPPORT OF PETITION FOR  
EQUITABLE WAIVER AND/OR A VARIANCE

This is an administrative appeal, coupled with an application for an equitable waiver and a variance. Evan and Jill Maloney, the owners of the residential property located at 389 Lincoln Avenue, have built a tree house for their 8-year-old son at the rear of the premises. (The "tree house" is actually more like a deck, for it has no walls, roof, or other enclosures, such as are probably the accoutrements most typically associated with the popular conception of tree houses. It merely has some wooden railings for safety. However, the structure's main support does, indeed, consist of two large trees, a feature which is probably enough to qualify it as a tree house.) The trees and, ergo, the tree house sit on the edge of the property line. The tree house has been adjudged by the Planning Department to be a "structure" within the meaning of the Zoning Ordinance and therefore subject to the ordinance's requirements and restrictions, including its setback requirements. Because the trees and the rear face of the tree house sit directly on the rear property line, the tree house is presently set at a setback of zero, whereas in this case an 8' setback is required at that location, based on the height of the structure.

As presently situated, the tree house also encroaches slightly into the side setback on the left (westerly) side. The western side of the tree house/deck is approximately 7' 5" from the

property line at one corner and approximately 5' 4" from it at the other. (The property line and the left side of the tree house run at a slight angle to one another, and therefore the distances from the tree house to the property line vary at different points along that side.)

Having now had more time to research and study the matter, the Maloneys no longer believe that the Planning Department was in error in determining that the tree house is presently in violation of the setback requirements. However, they seek an equitable waiver or, in the alternative, a variance allowing the tree house to remain where it is, based on the facts that a good faith mistake was made in placing it at that location, that it is doing no harm there, and that it is not violating the spirit of the Zoning Ordinance. Also of relevance is the fact that the Maloneys are only seeking relatively short-term relief: as their 8-year-old son grows older, he presumably will become more interested in cars and girls than in playing in tree houses. By the time that he heads off to college, if not sooner, the Maloneys will be dismantling and removing the tree house.

For all of these reasons, either an equitable waiver or a variance should be granted. Specifically, the Maloneys seek relief from the requirements of sections 10.573, 10.573.10, and 10.573.20 of the Zoning Ordinance, which require that a structure which has a height of more than 10 feet or an area of more than 100 sq. ft. be set back from the rear and side property lines at a distance that is at least the same as its height. The tree house is less than 10 feet in height, but it has a square footage of well over 100 sq. ft. (Specifically, it has a height of 8' at its highest point and an area of 168 sq. ft.) Therefore, an 8' setback is required, absent a variance or an equitable waiver.

#### Facts

Mr. & Mrs. Maloney purchased the property at 389 Lincoln Avenue in October 2020. After getting settled in, they began making plans in the late spring of 2021 to construct a recrea-

tional and play area for their 8-year-old son in the left rear corner of the property, where they had a significant amount of available space. They hired both a landscaper and an experienced professional designer, the latter of whom designed some small tee pees and other amusements for their son in the area in question. Noticing the two large trees sitting at the rear of the property, the designer proposed that a tree house be erected at that location. To the Maloneys it seemed like a quaint touch, as several other properties in the neighborhood have tree houses, and so the designer was able to sell the Maloneys on the idea and she designed the tree house on their behalf for an additional fee. The Maloneys then hired a contractor to do the actual construction of the tree house. The contractor in fact was recommended by the designer and was reputed to be a “specialist” in building tree houses. Reportedly, he had erected them all over Portsmouth and all over the Seacoast area.

In order to protect the privacy of their neighbors to the rear, the Maloneys also erected a wall, or wooden screen, between the tree house and their northerly neighbors’ back yard as part of the undertaking, in practical effect raising the height of the fence in the immediate vicinity of the tree house. The screen blocks the view of anyone standing on the tree house deck and prevents him or her from looking into the neighbors’ back yard or into the rear windows of their house. The same is true in reverse: the neighbors to the rear cannot see children playing or any other activity taking place on the tree house deck.

Privacy is not an issue for the neighbors to the two sides of the Maloneys’ property. The dwelling on the neighboring property on the left (westerly) side of the Maloneys’ parcel is situated far away from the property line, and that building is partially shielded by vegetation. On the right (easterly) side, the buildings are even farther away. In fact, the tree house cannot even be

seen by the neighbors on that side, for the tree house is situated at the other end of the Maloneys' property and there are trees and buildings blocking the view.

Prior to erecting the tree house, the Maloneys' contractor applied for a building permit with the Portsmouth Planning Department. In response, he was informed by one of the City's building inspectors, Paul Garand, that no permit was needed for this type of project. In an e-mail message dated September 16, 2021 and posted on the Planning Department's "ViewPoint Cloud" feature, Assistant Building Inspector Garand advised the Maloneys and their contractor that "[t]he tree house platform will be considered an exempt structure as per Section R105 of the International Residential Code. This permit will be revoked/stopped as it is not required." (A copy of Mr. Garand's message is appended hereto as Attachment A.) Significantly, no mention was made by Mr. Garand of the possibility that the new tree house might be in violation of the setback requirements or any other requirements of the Zoning Ordinance.

In light of Mr. Garand's words--and, in particular, his lack of any comment concerning the setback requirements--the Maloneys were surprised to receive a subsequent memorandum two months later, dated November 10, 2021, from Interim Planning Director Peter Britz, in which he advised them that the now-completed tree house was in violation of the setback requirements of the Zoning Ordinance and that either the tree house had to be moved or the Maloneys would have to obtain a variance. Perhaps attempting to reconcile the content of his present message with what the Maloneys had previously been told by Assistant Building Inspector Garand, Mr. Britz explained that although he was "aware that the City's Building Inspector reviewed this project and determined it was exempt from a building permit[,] . . . the Building Code analysis differs from the Zoning Ordinance analysis." (A copy of Mr. Britz's memorandum is appended hereto as Attachment B.)

Needless to say, the Maloneys had relied exclusively on the designer and the contractor to design and erect the tree house, and they presumed that it would be done in a manner which complied with all applicable laws and regulations. The Maloneys profess absolutely no expertise in the subjects of building construction, zoning, and land use law, and certainly they were not sufficiently schooled in those subjects to appreciate the distinction between the International Building Code and the local zoning ordinance. They were relying on the professionals to get it right.

For their own part, the designer and the contractor both expressed surprise at Mr. Britz's memorandum. The designer has been in business for herself for about five years, and the contractor has been in business for far longer and, as already noted above, he has built tree houses all over Portsmouth. Yet, both aver that they had never encountered this problem before.

Tree houses are commonplace in the Maloneys' neighborhood. Nearly a dozen exist just within a 150- or 200-yard radius of their home at 389 Lincoln Avenue alone. Further, most of those other tree houses are situated at or near the property lines of their respective properties, much like the Maloneys' tree house is. Presumably, therefore, those other tree houses are in violation of the same setback requirement. On a recent outing while walking their dog around the neighborhood, the Maloneys counted ten other tree houses, and most of them were situated at the edge of the owners' properties.

#### The Setback Requirements

In the zoning district in question, which is a GRA district, the required setback distances are a function of the height of the structure to be erected. Section 10.573.10 of the Zoning Ordinance provides that if the structure does not exceed 10 feet in height and does not have an area of more than 100 sq. ft., the setback distance is 5 feet, both to the rear and to the sides of the prop-

erty. If it exceeds 10 feet in height or 100 sq. ft. in area, then section 10.573.20 provides that the setback distance is to be the same distance as the structure's height.

Section 10.573 of the ordinance provides:

In a Residential or Mixed Residential district, an **accessory building** or **structure** may be located in a required **side yard** or **rear yard** subject to the following:

10.573.10      An **accessory building** or **structure** not more than 10 feet in height and not more than 100 square feet in area shall be set back at least 5 feet from any **lot line**.

10.573.20      An **accessory building** or **structure** more than 10 feet in height or more than 100 square feet in area shall be set back from any **lot line** at least the height of the **building** or the applicable **yard** requirement, whichever is less.

(Boldfacing in original.)

As already noted above, the subject tree house (or deck) is 8' at its highest point. (There is a slight downward slope of the ground from the rear fence toward the center of the property, such that the deck is higher off the ground at some points than at others.) Its surface area is more than 100 sq. ft. Therefore, the required rear and side setbacks are 8' each. The rear of the tree house presently sits almost directly on the property line. And, as already noted, earlier, there is a slight encroachment into the left side setback, as the westerly end of the deck comes as close as 5' 4" to the left side property line.

#### Equitable Waiver

The doctrine of equitable waiver might aptly be termed "the doctrine of honest mistake." It is intended to address the situation where an innocent property owner, in good faith, mistakenly sites a building structure at a location which violates the dimensional requirements of the zoning

ordinance, where the mistake is relatively minor, and where the cost of correction far outweighs any public benefit which might be gained by bringing it into compliance. Dietz v. Town of Tuftonborough, 171 N.H. 614, 201 A.3d 65 (2019); RSA 674:33-a, I. Attorney Peter Loughlin, the author of the definitive modern treatise on the subjects of New Hampshire land use law and zoning, describes the doctrine as follows:

A situation which often has created consternation for land-owners and land use boards is an “honest mistake” in the siting of a building. Prior to 1996, when a subsequent survey disclosed that a building was mistakenly located so that it transgressed a few inches or a few feet into a setback area, the only relief available was to seek a variance from the zoning board of adjustment. Although this relief was often granted because of a realization that there was no meaningful alternative for the landowner and no particular harm being done, in most cases there would be a serious question as to whether the requirements for a variance could be met.

To address the problem of the “honest mistake,” the Legislature has provided for an “equitable waiver of dimensional requirements.”

15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning and Zoning § 22.04 (4th ed. 2010) (footnote omitted).

The Board of Adjustment may grant an equitable waiver if four conditions are met:

- (a) Lack of Discovery: That the violation was not noticed or discovered until after the structure was substantially completed or until after the lot was subdivided and conveyed to a bona fide purchaser;
- (b) Honest Mistake: That the violation was not the result of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith, but was an honest mistake made in measurement or calculation or an error in interpretation by a municipal official in the process of issuing a permit that he or she had authority to issue;
- (c) No Diminution in Value: That the physical or dimensional violation does not constitute a nuisance, diminish property values or interfere with the permissible use of surrounding properties; and

(d) Balancing Test: That due to the degree of past construction or investment, the cost of correcting the mistake outweighs any public benefit that would be gained and that it would be inequitable to require the violation to be corrected.

Id. (footnotes omitted), citing RSA 674:33-a, I.

In this instance the Maloneys, professing no knowledge or expertise in the subject of zoning themselves, relied on skill and expertise of experienced professionals to design and construct the tree house in a proper manner which would comply with all laws and local rules and regulations. The contractor, in particular, was an experienced tradesman whose specialty was said to be tree houses and who had erected them all over Portsmouth in the past. Moreover, if there was error in the placement of the tree house at its present location, it is significant that that fact escaped the notice of the assistant building inspector himself. The Maloneys would have thought that if the tree house was not in compliance with the Zoning Ordinance's setback requirements or any other building requirements, the building inspector would have mentioned it at the time that the building permit application was filed.

To this it may be added that of the dozen or so tree houses that are located within a 200-yard radius of the Maloneys' house, most of them hug the property lines in the same manner that the Maloneys' tree house does, in apparent violation of the Zoning Ordinance, yet the Maloneys are unaware of any enforcement action that has ever been taken against any of them. For this reason, also, it is understandable that the Maloneys, their designer, and their contractor would have all been lulled into believing that the tree house in question complied with all applicable laws and regulations.

The tree house is doing no harm at its present location, and it does not constitute a nuisance and will not have any negative effect on property values. For these reasons, among others,



the cost of taking down the tree house and re-erecting it at a different location would far outweigh any public benefit which might be gained. In particular, given the existence and frequency of other tree houses in the neighborhood and the absence of any apparent enforcement action against them, it would be inequitable to require the Maloneys to remove and relocate theirs.

For all of these reasons, an equitable waiver is appropriate, and it should be granted.

#### Variance

As an alternative to an equitable waiver, or in addition thereto, the Maloneys also seek a variance, relieving them from the setback requirements imposed by Zoning Ordinance § 10.573. The criteria for the granting of a variance are settled and familiar, and the Maloneys' request for a variance meets all of them:

1. The variance will not be contrary to the public interest. It can hardly be argued that the variance, if granted, will be contrary to the public interest. As noted above, tree houses are commonplace in the Maloneys' neighborhood. There are at least ten of them within a 150- or 200-yard radius of the Maloneys' home at 389 Lincoln Avenue, and most of those tree houses are situated on or close to the property lines of their respective properties, just as the Maloneys' tree house is. For these reasons, it cannot reasonably be claimed that the variance requested by the Maloneys would be contrary to the public interest.

2. Granting the variance would observe the spirit of the Ordinance. For much the same reasons, the granting of the variance would not be contrary to the spirit of the Zoning Ordinance. The primary purpose of section 10.573 of the Zoning Ordinance, like virtually all other setback requirements, is to make sure that there is "elbow room" between properties: to create air, light, and space between the buildings and to ensure that there is not a massive structure on one property, hovering over a neighbor's back yard or looking into the neighbor's windows on the other

side of the property line. In this particular case, the tree house is essentially just a flat deck which extends only a foot or two above the level of the top of the rear fence, and an appropriately-sized, modest wooden screen protects the privacy of the rear neighbors at such times as the Maloneys' son and his playmates are using the tree house for its recreational purpose. Although on the left side of the Maloney's property the tree house slightly encroaches upon the 8' side setback, there is still plenty of room between the tree house and that property line. On the other side of that boundary, the neighbors' dwelling is not close to the property line but is quite a distance away, giving the westerly neighbors plenty of space, and moreover a fence separates the two properties. Therefore, there is plenty of air, light, and space between the properties, and the spirit of the ordinance is not offended.

3. Granting the variance will to substantial justice. The granting of the variance will do substantial justice in this case. In seeking their variance, the Maloneys are merely asking to be permitted to do what almost a dozen other known property owners in their immediate neighborhood are doing: having a tree house which is located adjacent to their property lines. Further, the Maloneys at all times acted in good faith and hired seemingly competent professionals to guide them, and they invested a considerable sum of money in designing and erecting the tree house. Having at all times acted in good faith, it would be most unjust to require them to remove it at this stage over a harmless violation of the setback requirements, especially in view of the lack of warning by the building inspector. It is also to be remembered that the Maloneys will be removing the tree house as soon as their son outgrows it.

4. Granting the variance would not diminish the values of the surrounding properties. There is no reason to think that allowing the tree house to remain at its current location will diminish the values of the surrounding properties, and there has been no evidence to that effect.

Insofar as the Maloneys are aware, there has been no claim that any of the other tree houses on the other properties in the neighborhood have diminished the values of their surrounding properties. Tree houses are simply part of the character of the neighborhood, and allowing one at 389 Lincoln Avenue will not have any negative effect.

5. The “unnecessary hardship” test. The Maloneys’ property at 389 Lincoln Avenue has special conditions; the use which they propose is a reasonable one; and there is no fair and substantial relationship between the general public purpose of section 10.573 and its application to the property in question. Additionally, because of those special conditions the property cannot be reasonably used in strict conformity with the ordinance, and a variance is necessary to enable the applicants to use it in the manner to which they wish to put it, viz., to erect a tree house thereon for their 8-year-old son.

a. Special conditions

The “special conditions” are the two trees and their location at the rear property line of the property. The trees have been standing there for decades, and they obviously cannot be moved. In order to comply with section 10.573 of the Zoning Ordinance, the Maloneys would have to move the tree house at least eight feet away from the rear fence, where it would be completely detached from the trees and would be several feet away from them. If the Maloneys were to do that, it would defeat the purpose of the tree house and would eliminate its essential charm and character: it’s hard to have a tree house with no tree.

b. The use is reasonable

The use to which the Maloneys propose to put the property is obviously reasonable. The Maloneys are able to identify at least ten other residential properties having tree houses just in their immediate neighborhood alone.

c. Can't be used in strict conformance

Because of the special conditions--the trees are where they are, and they can't be moved--the tree house cannot be erected and used in a spot which strictly conforms to the requirements of the Zoning Ordinance. If the setback requirements are strictly observed, the tree house will have to be moved at least 8' from the rear fence and will not be attached to any tree, in which case it will no longer be a tree house.

d. No fair and substantial relationship

There is no fair and substantial relationship between the general purposes of the zoning provision in question, § 10.573, and the specific application of that provision to the subject property. The general purpose of § 10.573, like all setback requirements, is to prevent overcrowding of properties; to promote and maintain light, space, and air between them; and to prevent domineering buildings sitting on one property from casting shadows over the neighboring property, cutting off the neighbors' view, and foisting an imposing presence on neighboring properties because of the buildings' size and closeness. Section 10.573 of the Zoning Ordinance primarily has full-fledged structures in mind--a garage, an addition, a shed, an accessory dwelling, a workshop--which will overcrowd a property and cut off the neighbors' light and air. In this case, the subject structure is merely a tree house which has no roof, sides, or walls, but has only some guardrails for safety. Its floor sits only a foot or two above the level of the top of the fence which separates the two properties, and privacy is maintained both by that fence and by a wooden screen. On the left (westerly) side there is ample space between the tree house and the buildings situated on the abutting property. Further, the tree house is not an imposing building which looms over the neighbors' properties; it is essentially just a flat deck with a smaller

mounting platform and walkway which are used to gain access to it. For all of these reasons, the general purpose of § 10.573 is not being compromised.

Ergo, the tree house meets all of the statutory criteria for the granting of a variance, and such a variance should be granted.

#### Conclusion

For all of the foregoing reasons, this Board should grant the applicants an equitable waiver from the Zoning Ordinance's dimensional requirements, or, in the alternative, should grant a variance relieving the applicants from the setback requirements of section 10.573 of the Zoning Ordinance.

Respectfully submitted,



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Duncan J. MacCallum  
536 State Street  
Portsmouth, New Hampshire 03801  
(603) 431-1230  
Attorney for Applicants

Dated: February 2, 2022

# **ATTACHMENT A**



portsmouthnh.viewpointcloud.com

50 Vegetarian Christmas Dinner...

Gmail Me.com Facebook | Home Bank of America CHASE | Schwab | Annex  
Patient Check | Center for Wildl... Center for Wildlife - Patient Che...

Permit Applications | City of Port...

Profile - Dashboard - ViewPort...

# City of Portsmouth, NH

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Paul Garand

Sep 16, 2021 at 12:42 pm

The tree house platform will be considered an exempt structure as per Section R105 of the International Residential Code. This permit will be revoked/stopped as it is not required.  
Thank you, Paul Garand  
Building Inspector Review - Building Permit Application BLDG-21-738



Paul Garand

Sep 16, 2021 at 12:42 pm

The tree house platform will be considered an exempt structure as per Section R105 of the International Residential Code. This permit will be revoked/stopped as it is not required.  
Thank you, Paul Garand  
the application complete? - Building Permit Application BLDG-21-738

Jill,

Can you provide the setbacks to the property lines on the site plan and upload some pictures? Thanks,



Peter Stith

Sep 9, 2021 at 9:36 am

Peter  
Land Use Code Review - Building Permit Application BLDG-21-738

View All

Permits & Documents

## **ATTACHMENT B**



## Memorandum

To: Evan Maloney  
From: Peter Britz, Interim Planning Director  
CC: Suzanne Woodland, Acting Deputy City Manager  
Peter Stith, Principal Planner  
Date: November 10, 2021  
Subject: 389 Lincoln Accessory Structure Review



It has come to my attention that a backyard structure has been constructed in your yard which the Planning Department must review for conformance with the City's Zoning Ordinance. I am aware that the City's Building Inspector reviewed this project and determined it was exempt from a building permit because the structure was classified as a one story detached accessory structure less than 200 square feet and/or could be classified as playground equipment.

However, the Building Code analysis differs from the Zoning Ordinance analysis. The City of Portsmouth Zoning Ordinance has separate requirements that must be reviewed to ensure compliance. When reviewing this project for zoning compliance, what was built clearly falls under the definition of a structure in Article 15 of the Zoning Ordinance:

*Any production or piece of work, artificially built up or composed of parts and joined together in some definite manner. Structures include, but are not limited to, buildings, fences over 4 feet in height, signs, and swimming pools. (See also: temporary structure.)*

The Zoning Ordinance section 10.570 covers Accessory Buildings, Structures and Uses where it states in section 10.573: *In a Residential or Mixed Residential district, an accessory building or structure may be located in a required side yard or rear yard subject to the following:*

*10.573.10 An accessory building or structure not more than 10 feet in height and not more than 100 square feet in area shall be set back at least 5 feet from any lot line.*

*10.573.20 An accessory building or structure more than 10 feet in height or more than 100 square feet in area shall be set back from any lot line at least the height of the building or the applicable yard requirement, whichever is less.*

According to these sections the structure in question would need to be located the appropriate distance from the side and rear yards (or from the side and rear property lines) to comply with section 10.573.10 or 10.573.20, which it does not do today. As it stands today, the structure in your yard is in

violation of the Zoning Ordinance. There is not adequate information in your building permit application to determine which section applies but to be in compliance with Zoning the structure in your yard must be at least 5 feet and as much as 20 feet from the side and rear property lines. In order to remedy the situation you have several options:

1. Remove the structure entirely from your yard;
2. Reconstruct the structure to comply with the Zoning Ordinance sections 10.573.10 or 10.573.20;
3. Apply for a variance from the Board of Adjustment to allow the structure to remain in its current location. A variance request would be subject to review and approval by the Board of Adjustment in conjunction with a public hearing.

Please let me know how you would like to proceed within 10 days from the date of this letter. If you have questions or would like to discuss further please do not hesitate to contact me by email at [plbritz@cityofportsmouth.com](mailto:plbritz@cityofportsmouth.com) or by phone at (603)610-7215.







neerly  
GHT REVOC. TR.  
ORDER REVOC. TR.  
CT 16  
5475 PG. 1975  
PLAN #C-28075

Tree platform with privacy  
wall erected at request of  
neighbors  
Ramp

5183/1791)  
416/441)  
14.48'

WOOD BOARD FENCE 6'± HIGH

1/2" IRON PIN  
FOUND FLUSH

TAX MAP 134

LOT 17

OLD LOT LINE PER  
1867 FRANK W. MILLER  
DEED BK. 416 PG. 461  
REMOVED FROM SUBJECT LOT  
DEED DESCRIPTION IN 1890  
BY DEED BK. 521 PG. 229.  
(LOT 10 & 11 PER HOYT PLAN)

86'14'50"W  
100.00'

LOT LINE  
(TYP.)

0.8'±  
CLEARANCE

CONCRETE SIDEWALK (TYP.)

GRANITE (TYP.)

GRANITE

DRILL HOLE SET IN  
GRANITE CURBING

21/2 ST.  
WD. HSE.  
#389

PAVED  
DRIVEWAY

506'40'15"E  
73.00' (416/461)

GAS METER  
PIPE GUARDS

now o  
JACOE  
KELLY  
MAP 1  
RCRD  
(THIS  
DEED  
LOTS

ABOVE  
1922 A  
DEED E

1923 RELOC. II  
DEED BK. 800

PIN (INSIDE PIPE)  
W/CAP FLUSH

HUB SET  
FLUSH  
(TYP.)

30'±  
PRIVACY FENCE  
ON EDGE OF DECK  
ENCROACHES OVER  
LOT LINE 1.9'±

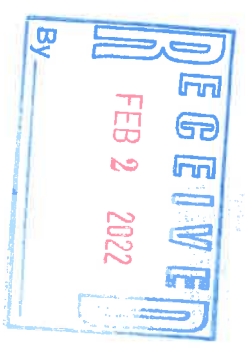
30'±  
DECK W/HOLD  
TUB &  
PRIVACY  
FENCE

1 STORY  
WD. GAR.

1 STORY  
WD. GAR.

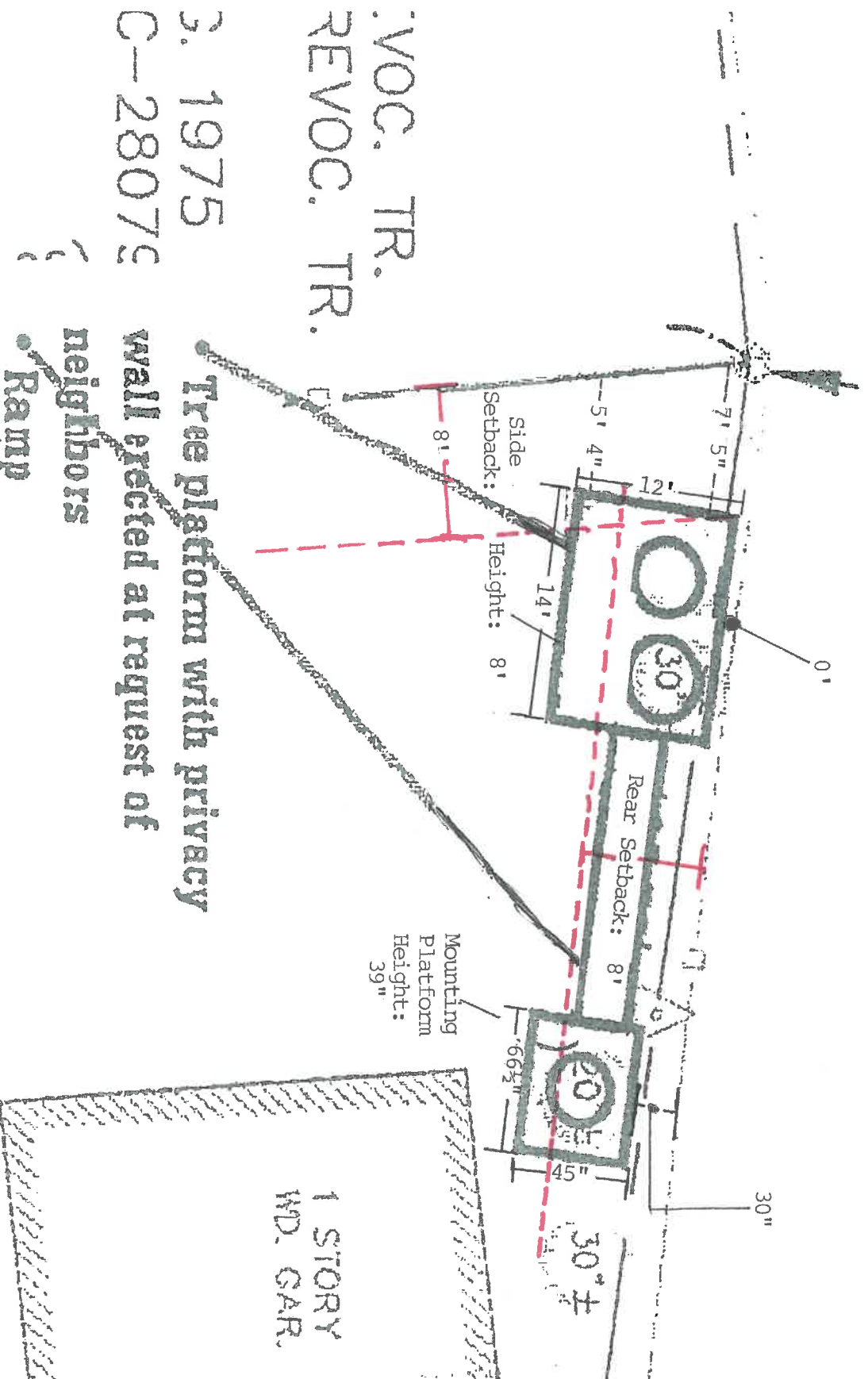
30'± DBL.  
CHERRY (TYP.) 6183/1791)  
S81°48'44"E

OLD STOCKADE FENCE 6'± HIGH



389 LINCOLN AVENUE

(Structures drawn not precisely to scale.)



5183  
416  
14.43  
54.3

TAX MAP 134