

March 14, 2023

NICOLE M. BODOH
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VIA EMAIL AND HAND DELIVERY

Zoning Board of Adjustment (the "Board")
City of Portsmouth
Planning Department
1 Junkins Avenue
Portsmouth, NH 03801
planning@cityofportsmouth.com

Peter Britz
Director of Planning and Sustainability
City of Portsmouth
Planning Department
1 Junkins Avenue
Portsmouth, NH 03801
plbritz@cityofportsmouth.com

Re: Appeal of Decision of an Administrative Official Pursuant to RSA 676:5

Appellants: 729-733 Middle Street Condominium Association, Nicole M. Bodoh, and Craig Crowell, abutters at Portsmouth Tax Map 148-36.

Decision: Decision of the Director of Planning and Sustainability not to present to the Board the Motion for Rehearing of Variance Application of David Sinclair & Nicole Giusto (the "Applicants") for the property at 765 Middle Street, Tax Map 148-37, Portsmouth, NH 03801 to allow construction of a new detached garage with dwelling unit above (the "Application").

Greetings Board Members:

The purpose of this correspondence is to appeal the decision of Peter Britz, as the Director of Planning and Sustainability of the City of Portsmouth (the "Planning Director") rendered on February 16, 2023, and to provide notice thereof as required under RSA 676:5. A copy of the decision not to present to the Board the Appellants' Motion for Rehearing is included herewith as Exhibit A (the "Decision"). The Planning Director acted unreasonably and improperly in issuing the Decision, which contains errors of fact and law as set forth in greater detail below. **The Appellants provide this notice of appeal to exhaust their administrative remedies before pursuing relief from a court of competent jurisdiction (to the extent required by law), and hereby reserve each and every right and remedy available to the Appellants under applicable laws.**

Zoning Board of Adjustment, City of Portsmouth
March 14, 2023
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Appellants are aware that the Motion for Rehearing filed on January 17, 2023, a copy of which is attached hereto as Exhibit B (the "Motion"), was filed more than thirty (30) days after the decision by the Board of Adjustment to grant the variances requested in the Application. However, as described in the Motion:

- The Appellants did not receive notice of the Application or Board meeting held on October 18, 2022, as required by New Hampshire law; and
- It is well settled law that notice is a pre-requisite to the Board having jurisdiction to hear or decide a variance request. RSA 676:7; Hussey v. Barrington, 135 N.H. 227 (1992).

The above grounds, among others, are described in further detail in the attached Motion. On behalf of the Appellants, I thank you for your consideration of our appeal of the Decision and our request for a rehearing of the Application. The Appellants respectfully request that you render your decision and grant the Motion as required by RSA 677:2. Thank you.

Very truly yours,



Nicole M. Bodoh, Esq.

cc: Christopher Swiniarski, Esq.

Enclosures

EXHIBIT A



CITY OF PORTSMOUTH

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

February 16, 2023

Attorney Christopher Swiniarski
Devine, Millimet & Branch
111 Amherst Street
Manchester, NH 03105

RE: Motion for Rehearing – Variance Application for property at 765 Middle Street, Tax Map 148-37,
Portsmouth, NH 03801

Dear Attorney Swiniarski:

The City of Portsmouth is in receipt of your communication regarding the request for rehearing of the Board of Adjustment decision for the project at 765 Middle Street. After discussion with the City Legal department and in accordance with New Hampshire RSA 677:2, your motion submitted on Tuesday, January 17, 2023 will not be presented to Board of Adjustment as the proper procedure requires a motion for rehearing within thirty (30) days of the Board of Adjustment decision. The appeal deadline for the decision made on Tuesday, October 18, 2022 was Thursday, November 17, 2022. Therefore your request was untimely.

This decision may be appealed up to thirty (30) days after the issue date of this letter. Please contact the Planning Department for more details about the appeals process.

Sincerely,

Peter Britz, Director of Planning and Sustainability

CC: Susan G. Morell, City Attorney
R. Timothy Phoenix, Attorney to David A. Sinclair and Nicole J. Giusto

EXHIBIT B



CHRISTOPHER A. SWINIARSKI
Admitted in NH and MA

Devine, Millimet & Branch
111 Amherst Street
Manchester, NH 03105

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January 17, 2022

VIA HAND DELIVERY AND
BY EMAIL TO PLANNING@CITYOFPORTSMOUTH.COM

Zoning Board of Adjustment (the "Board")
City of Portsmouth
Planning Department
1 Junkins Avenue
Portsmouth, New Hampshire 03801

RE: Motion for Rehearing – Variance Application (the "Application") of David Sinclair & Nicole Giusto (the "Applicants") for property at 765 Middle Street, Tax Map 148-37, Portsmouth, NH 03801 (the "Property")

Greetings Board Members:

The purpose of this correspondence is for 729-733 Middle Street Condominium Association, Nicole M. Bodoh and Craig Crowell, owners of property at Portsmouth Tax Map 148-36 and direct abutters to the Property (collectively, the "Appellants") to move for a rehearing by the Board of its decision rendered on October 18, 2022 with respect to the above-referenced Application. Pursuant to RSA 677:2, the Board has authority to grant this motion for rehearing in order to correct errors prior to any party appealing the Board's decision to the Superior Court. Rochester City Council v. Rochester Zoning Board of Adjustment. 171 N.H. 271, 278. (2018).

Introduction

The Appellants are the owners of Tax Map 148-36 and the two (2) condominium units it comprises, and are direct abutters to the Property. The Applicants filed the Application to allow construction of a new detached garage with dwelling unit above which requires the following variances: 1) a variance from Section 10.513 of the Portsmouth Zoning Ordinance (the “Ordinance”) to allow three (3) principal dwellings on a lot where only one (1) is allowed per lot; (2) a variance from Section 10.521 to allow a lot area per dwelling of 5,376 square feet where 7,500 is required and (3) a variance from Section 10.521 to allow a 10 foot rear yard setback where 20 feet is required. The Property is shown on the Assessor’s Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts.

At its October 18, 2022 meeting, the Board made findings relative to the five (5) criteria for Variance set forth in RSA 674:33 I. (2), which findings are attached hereto as Exhibit A (the “Decision”). The Appellants hereby move for a rehearing on the Decision and allege that the Board made factual and legal errors in issuing the Decision as particularly set forth below.

As a final introductory note, the Appellants are of course aware that this motion for rehearing is filed more than thirty (30) days after the Decision.

However, as described in greater detail below, the Appellants never received notice of the Application as required by New Hampshire law. It is well settled law that notice is a pre-requisite to the Board having jurisdiction to hear or decide the variance request, as detailed further below. This motion for rehearing is therefore timely and proper since the Board did not have proper jurisdiction over the Application at the time of the Decision.

Grounds for Rehearing

I. Due Process Violations of RSA 676:7. None of the Appellants received notice by verified mail as required under RSA 676:7.

RSA 676:7 provides: *“Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows: (a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by verified mail, as defined in RSA 21:53, stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal.”* [emphasis supplied]

Verified mail, as defined in RSA 21:53 means *“any method of mailing that is offered by the United States Postal Service or any other carrier, and which*

provides evidence of mailing”. ***None of the Appellants received notice by verified mail*** as required under RSA 676:7.

A. Abutter Nicole M. Bodoh did not Receive Notice of the ZBA Meeting.

Nicole Bodoh, the owner of 733 Middle Street, did not receive any notice of the Zoning Board of Adjustment hearing on October 18, 2022 (“ZBA Meeting”) and as a result did not attend the meeting and was unable to express her vigorous objection to the planned project.

As further evidence that proves the faulty notice procedures by the USPS that ultimately led to Ms. Bodoh not receiving notice of the ZBA Meeting, later, in December 2022, Ms. Bodoh received notice by unverified mail of the Historic District Commission Work Session (“HDC Meeting”) held on December 14, 2022. That notice was simply left in her mailbox, though the City sent that notice by certified mail in the same manner as it sent notice of the ZBA Meeting. It was at this HDC Meeting that Ms. Bodoh first became aware that the Decision had been rendered. Following the December 14, 2022 meeting, Ms. Bodoh again received notice by unverified mail of the Technical Advisory Committee meeting on January 3, 2023 (the “TAC Meeting”), which she attended. Again, the notice of the TAC Meeting was simply left in her mailbox, though the City sent that notice by certified mail as well, just like the ZBA Meeting.

It is true that the failure of notice to Ms. Bodoh for both the HDC Meeting and the TAC Meeting are not dispositive for this Motion for Rehearing. However, those failures evidence a course of conduct on the part of the USPS that supports the fact that Ms. Bodoh never received notice of the ZBA Meeting. The City of Portsmouth sent notices of all of the meetings to Nicole Bodoh by USPS Certified Mail. However the United States Postal Service did not deliver the certified mail in accordance with U.S. Postal Service regulations which provide that “the USPS maintains a record of delivery (*which includes the recipient’s signature*).” [emphasis supplied] United States Postal Service Domestic Mail Manual 500 – 3.1.1. See attached Exhibit B.

The record of delivery provided by the Post Office does not include Ms. Bodoh’s signature. The tracking and signature records for the notices sent to Ms. Bodoh of the ZBA Meeting, the HDC Meeting and the TAC Meeting are attached hereto as Exhibits C-1, C-2, and C-3. A specimen of Ms. Bodoh’s signature is attached hereto as Exhibit C-4. It is immediately apparent when comparing the records of the notices to Ms. Bodoh’s specimen signature that she did not sign the certified mail receipt upon delivery, as required under the Postal Regulations and State law. Further details are found in Ms. Bodoh’s affidavit, attached as Exhibit D. These facts make it plainly clear that Ms. Bodoh never received notice of the ZBA Meeting as required by New Hampshire law.

B. Abutter Craig S. Crowell did not Receive Notice of the ZBA Meeting in accordance with US Postal Regulations or State Law.

Similarly, Craig S. Crowell, the owner of 729 Middle Street, did not receive notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting in accordance with the Postal Regulations or State law. The notices for the ZBA Meeting and TAC Meeting were sent to Mr. Crowell's former address at 37 Allen Farm Road, Greenland NH 03840 and then forwarded on through automatic mail forwarding to his address at 729 Middle Street. The notice for the HDC Meeting has to date not been delivered, according to the US Postal Service's records. Again, while the notices for the HDC Meeting and TAC Meeting are not dispositive for this Motion for Rehearing, those failures evidence a course of conduct on the part of the USPS which evidences the fact that Mr. Crowell never received notice of the ZBA Meeting. The HDC Notice and TAC Notice were sent by the City in the same manner as the ZBA Notice.

It is unknown why the notices for the ZBA Meeting, HDC Meeting and the TAC Meeting were addressed to Mr. Crowell's former address in Greenland, NH. Mr. Crowell purchased his home at 729 Middle Street on May 16, 2022 and moved in a few days later. He provided his current and correct address of 729 Middle Street to the City of Portsmouth when he registered his vehicle with the City of Portsmouth and the State of New Hampshire on September 19, 2022. He also updated his New Hampshire driver's license on June 15, 2022 with his 729

Middle Street address. Further, Mr. Crowell is registered to vote in the City of Portsmouth. Mr. Crowell has never provided his Greenland, NH address to the City of Portsmouth for any purpose. See attached Affidavit of Craig S. Crowell, Exhibit E.

According to the tracking records for the notices sent to Mr. Crowell, the notice of the ZBA Meeting was “delivered to an individual at the address at 12:07 pm on October 12, 2022 in Portsmouth, NH 03801”. See Exhibit F-1. That record is plainly false. The notice of the ZBA Meeting was originally sent to Mr. Crowell’s former Greenland, NH address; it only arrived in Portsmouth via automatic mail forwarding to the 729 Middle Street address, not by any individual delivery.

As in the case with notice to Ms. Bodoh above, the record for the notice of the HDC Meeting to Mr. Crowell tells a similar tale. The official USPS record states that the item is “awaiting a delivery scan” and that “the delivery status of your item has not been updated as of December 6, 2022, 12:35 am. We apologize that it may arrive later than expected”. See Exhibit F-2. To date this notice has not been delivered, even though the USPS reports that it was expected back on December 6, 2022. Again, while the faulty HDC Meeting Notice is not dispositive in this matter, it demonstrates the USPS’s course of conduct that proves the ultimate unreliability of the USPS as a means of providing actual notice. The USPS did not provide the in-hand, signed-for notice that they assure senders is provided for by certified mail.

Similarly again, Mr. Crowell did not receive notice of the TAC Meeting in conformity with US Postal Regulations and State Law. Tracking information available on the Post Office's website indicates that the notice was "delivered to front desk, reception or mailroom" at 11:13 am on January 3, 2023. See Exhibit F-3. There is no front desk, reception or mailroom at Mr. Crowell's former address in Greenland, NH or at his current address at 729 Middle Street. See Mr. Crowell's Affidavit attached hereto as Exhibit E at paragraph 9. Even if Mr. Crowell had received this notice, January 3, 2023 was the date the TAC Meeting was held and therefore the requirement of delivery at least 5 days prior to the meeting was not met (in addition to not meeting the signature requirement under U.S. Postal regulations for certified mail).

The supposed "record of delivery" for the notices does not bear Mr. Crowell's signature. The signature records for the ZBA Meeting and the TAC Meeting are included in Exhibits F-1 and F-3. The US Postal Service does not have any record for Mr. Crowell's signature for delivery of the HDC Meeting notice. A specimen of Mr. Crowell's signature is attached hereto as Exhibit F-4. When comparing Mr. Crowell's specimen signature to the signatures on record with the U.S. Postal Service, it is immediately apparent that those signatures are not the signature of Mr. Crowell.

C. 729-733 Middle Street Condominiums did not Receive Notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting.

In addition, the Applicants, on the site plans in their Application identified the owner of the Appellants' property as "729-733 Middle Street Condominiums" rather than Craig C. Crowell and Nicole M. Bodoh, as individuals, who were not mentioned anywhere in the Application. In spite of the Applicant's emphasis on the ownership of the Appellants' property by a condominium association, no notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting was ever sent to 729-733 Middle Street Condominiums, according to the City's records.

The definition of "Abutter" in the New Hampshire Revised Statutes Annotated indicates that, under State law, notice should have been sent and addressed to an officer of 729-733 Middle Street Condominiums.

RSA 672:3 states: "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use Board. [...] For purposes of receipt of notification by a municipality of a local land use Board hearing, in the case of an abutting property being under a condominium or other collective

form of ownership, the term abutter means the officers of the collective or association, as defined in [RSA 356-B:3, XXIII.](#)” [emphasis supplied]

RSA 356-B:3, XXIII provides that “*Officer*” means any member of the Board of directors or official of the unit owners’ association.

Because the Applicants specifically identified 729-733 Middle Street Condominiums as an abutter, and because the New Hampshire statutes provides specific notice provisions relative to condominiums, notices of the ZBA Meeting, HDC Meeting and TAC Meeting should have been sent and addressed to “Officer” or “Official” of the 729-733 Middle Street Condominiums. The Applicants did not send any such notice by verified mail or otherwise for any of the Meetings in connection with the Application. It is not necessary to identify any particular individual as an officer when sending notices to a condominium association. All that is required to meet the New Hampshire statutory requirement is to send the notice to an “Official” or an “Officer”.

None of the three Appellants received the notice under RSA 676:7. That notice is a necessary pre-requisite to the Board’s jurisdiction to hear the Application. Hussey v. Barrington, 135 N.H. 227 (1992). ***When that notice is lacking or deficient, the variance purportedly granted by the Board “is void from the very date on which it was issued.”*** Id. at 232.

As a matter of law, *all* of the Appellants had to receive notice of the Application in compliance with New Hampshire law not less than 5 days before the date fixed for the hearing of the Application by “verified mail”. Since that did not happen, the Board had no jurisdiction to hear or grant the Applicants’ requested variances. The only remedy is for the Board to issue new notices that are received by the Appellants and all other abutters and conduct a re-hearing giving the Applicant adequate notice and opportunity to comment as required by RSA 676:7.

II. The Applicant Provided Incomplete, Insufficient and Inaccurate Information to the Board.

The information submitted by the Applicants to the City of Portsmouth with their Application is incomplete, insufficient and inaccurate. The photo renderings of Ms. Bodoh’s property at 733 Middle Street, which is adjacent to the proposed project, are either absent or presented in a misleading fashion, with the presumed intention of concealing the proximity of the proposed project to 733 Middle Street and the fact that the front of 733 Middle St. faces the location of the project.

Although small portions of the home at 733 Middle Street were included with the photo renderings supplied by the Applicant, not included in the application were any photo renderings including the entire front of 729-733

Middle Street, which is shown on Exhibit G-1 attached hereto. The applicants did not include a photo of the entire house presumably in order to mislead the Board into thinking that the 729-733 Middle Street Condominiums consists of apartment-style condominiums. To the contrary, this historic property was originally built as a duplex in 1820. The right side of the house that is 733 Middle Street represents one of the earliest examples still in existence in this country of what today is known as an “in-law suite.” It does not conform at all to what is commonly understood as a “condominium”. It is more similar to an attached, single-family, early Victorian residence.

Comparisons of the photo renderings submitted by the Applicants to photos of the actual locations are attached hereto as Exhibits G-2 through G-4. The photo rendering to the left on Exhibit G-2 when compared to the actual photo of the location to the right, shows that the Applicants used digital photography editing to delete the front of 733 Middle Street from the photo, substituting in its place artificial greenery. The photo rendering to the left on Exhibit G-3, when compared to the actual photo on the right, shows the magnitude of the additional density this project will create. In addition, the photo rendering depicts the project as set back further from 733 Middle Street than its actual location based upon the site plans that were submitted. The plans indicate that the Applicant’s proposed deck and garden room will extend to the intersection of the gate on Ms. Bodoh’s property and the fence between the two properties as shown on Exhibit G-4 attached hereto. This will completely block Ms. Bodoh’s dining room

windows that are facing the proposed project. Contrary to the presentation on the photo rendering on Exhibit G-3, direct sunlight will be blocked from Ms. Bodoh's dining room windows. The proposed project is located as close to the property line at 733 Middle Street as possible without violating the ten foot (10') setback. This means that the deck and garden room of the proposed project will be located **less than fifteen feet (15')** from Ms. Bodoh's dining room windows at 733 Middle Street. The 733 Middle Street lot is a permitted nonconforming lot, as the property was built long before zoning ordinances came into existence. The actual property line for 733 Middle Street (which does not conform to the fence) is just a few feet from the house in the vicinity adjacent to the proposed project. This is wholly new information that the Board did not have, as a result of Applicant's misleading materials.

The third comparison on Exhibit G-5 again demonstrates that the Applicants apparently attempted to mislead the Board as to the proximity of the proposed project to 733 Middle Street, and the fact that the front of 733 Middle Street will be blocked by the proposed project. It appears that the Applicant purposely added a tree to the plans and photo rendering on Exhibit G-5 (next to the mud room of 765 Middle Street) in order to disguise the manner in which the proposed project blocks the front of 733 Middle Street. This state of facts is, once again, additional new information that the Board did not have as a result of Applicant's misleading materials.

III. The Board was unreasonable and unlawful in making its purported findings as to the first and second variance criteria RSA 674:33 I. (2) (A) and (B). Granting the variance would be contrary to the public interest, and would not observe the spirit of the Ordinance.

The New Hampshire Supreme Court has noted that a determination of whether the spirit of the Ordinance is observed is largely similar to determining whether the variance is contrary to the public interest. Chester Rod & Gun Club v. Town of Chester, 152 NH 577 (2005). It is well settled that a variance will be contrary to the public interest and will not observe the spirit of the Ordinance if it conflicts with or violates the ordinance's basic zoning objectives. Id. at 581 (2005).

In the case at hand, the Board unreasonably and unlawfully found that granting the variances sought in the Application would not be contrary to the public interest or violate the Ordinance's basic zoning objectives. In its written Decision attached hereto as Exhibit A, the Board stated "*since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project.*" [emphasis supplied] It is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the test set forth in Chester Rod & Gun Club. Further, the Appellants at 729 and 733 Middle Street *do* have

something to say about the proposed project, but because they did not receive notice of the ZBA Meeting in conformity with State law and US Postal requirements, they did not have an opportunity to be heard at the ZBA Meeting to inform the Board of the specific, numerous impacts this project would have on abutting properties that directly conflict with the specific zoning objectives set forth in Section 10.121 of the Ordinance. The fact that the Board grounded its purported findings upon the absence of the Appellants indicates that it could not reasonably make the findings it purported to make if the Appellants had received the notice required under applicable law.

**IV. The Board was unreasonable and unlawful in making its
purported findings as to the third variance criteria under RSA 674:33 I. (2)
(C). Substantial justice *would not* be done.**

The guiding rule on determining substantial justice is weighing the loss to the applicant versus the gain to the general public. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 515 (2011). The Appellants have carefully reviewed the video recording of the ZBA Meeting on October 18, 2022. There, Tim Phoenix, the attorney for the Applicants, discussed the primary reason the proposed project will be located in close proximity (less than fifteen feet (15')) to 733 Middle Street. He stated that creating a “courtyard effect” is “the primary reason we are asking for setback relief.” If there is in fact such a

“courtyard effect” created by this project, it will be enjoyed solely by the Applicants. Based upon the site plans submitted to the Board, neither the tenants of the newly built residence, nor the owner of 733 Middle Street will have views of the courtyard.

To the contrary, as shown in the Application, the majority of the windows of the new residence have been situated so that they do not face the Applicants’ residence, presumably in order to maintain the Applicants’ privacy. To that end, the majority of the windows of the new residence are directly opposite 733 Middle Streets’ windows, so that the occupants of both dwellings will have forced views into each other’s homes. The Applicants may be able to maintain their privacy by designing the project this way, but they do so by destroying any meaningful semblance of privacy for their tenants and the owner of 733 Middle Street. The impact on Ms. Bodoh’s quality of life will be substantial due to this complete lack of privacy. Thus, granting the variances results in a substantial injustice. It is unreasonable and unlawful for the Board to dismiss the uncontroverted facts of the case that clearly demonstrate a tremendous benefit to the Appellants in continuing to require compliance with the Ordinance. The Applicants’ three (3) requested variances from the Ordinance only serve singularly to allow the Applicants to squeeze every last pecuniary drop from what would be a fourth single family residence on one (1) lot, where only one (1) principal dwelling is lawfully allowed by the Ordinance. There is no reasonable

or lawful way, on the facts in this case, that the Board can find this criteria of RSA 674:33 I. (2) (C) to have been met.

V. The Board was unreasonable and unlawful in making its purported findings as to the fourth variance criteria RSA 674:33 I. (2) (D). The values of the surrounding properties would so obviously be diminished.

The Board unreasonably and unlawfully found that granting the variances sought in the Application would not negatively impact the values of surrounding properties, specifically the property of the Appellants. Specifically, the Board found that *“the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.”* [emphasis supplied] As stated above, it is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the criteria for determining whether or not the values of surrounding properties would be diminished. Had the Appellants received notice of the ZBA Meeting in conformity with State law and US Postal requirements, they would have informed the Board at the ZBA Meeting that the proposed project would significantly and obviously diminish the values of the homes at 729 and 733 Middle Street. The Board’s findings state as much, relying solely on the Appellants’ absence in making their determination.

Further, the letter attached hereto as Exhibit H from Jeffrey Mountjoy, the realtor who assisted with the sale of 733 Middle Street to Ms. Bodoh, explains in detail how the values of both residences will be adversely impacted by the overall size of the project, the lack of privacy and increased noise and traffic level that will result from its construction, and the blocking of several windows of 733 Middle Street by a distance of less than fifteen feet (15'). These factors will obviously make the property at 733 Middle Street significantly less valuable to prospective buyers, as stated in Mr. Mountjoy's letter. Further, if this project is constructed, there will be a complete loss of air, light and space available to Ms. Bodoh at 733 Middle Street. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably affect the value of 729 Middle Street.

Mr. Mountjoy notes in his letter to the Board a unique feature of the home at 733 Middle Street. The tall dining room windows and window seat are in particular an attractive feature of the home to prospective buyers. If the project is built, the view from the dining room windows will be completely blocked by the Applicants' deck and garden room that will be situated less than fifteen feet (15') away. As such, it is unlawful and unreasonable for the Board to have concluded that the criteria set forth in RSA 674:33 I. (2) (D) were satisfied by the Applicant.

VI. The Board was unreasonable and unlawful in making its purported findings as to the fifth variance criteria under RSA 674:33 I. (2) (E). Literal enforcement of the provisions of the Ordinance would not result in an unnecessary (or any) hardship to the Applicant.

The fifth prong of the variance criteria requires the Board to determine whether an unnecessary hardship results from literal enforcement of the Ordinance. RSA 674:33, I (2) (E)(b)(1) provides that:

“Unnecessary hardship” means that, 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.

If these criteria are not established, an unnecessary hardship will be deemed to exist “if, and only if, 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.” In the case at hand, the Board did not find the Property of the Applicants to be unique such that it is distinguished from other properties in the area.

Further, the Board cannot find that the Property could not reasonably be used. According to the Applicant, based upon the zoning history of 765 Middle

Street, two (2) lots were “forcibly combined into one lot and if that hadn’t been done, there would be no issue with adding a dwelling unit in that spot.” However, this reference to the involuntary merger of two (2) lots ignores the fact that variances relative to the reasonable use of the property had already previously been granted to the Applicants. The Property is currently in use for two (2) primary dwelling units consisting of three (3) residences (two (2) of which already generate rental income) where the Ordinance allows for only **one (1) primary dwelling unit**. The Property does currently enjoy a use well in excess of that which is reasonable under the Ordinance, a use that far exceeds the rest of the neighborhood which generally adheres to the one (1) house per lot scheme of the Ordinance. There is simply no possible way to state that the Property cannot be used in strict conformance with the Ordinance without causing an “unnecessary hardship” to the Applicants; the Property is already currently enjoying a windfall income from its current rental use despite the spirit of the Ordinance.

The hardship reason given by Tim Phoenix on behalf of the Applicants at the ZBA Meeting is “this lot is larger than most, so that suggests you should be able to do more with it.” Not being able to “do more” with your property is not a hardship. This conjured hardship cannot be construed in any way to satisfy the criteria of RSA 674:33, I (2) (E). As stated above, RSA 674:33, I (2) (E), requires the Applicants to conclusively demonstrate that they have an “unnecessary

hardship” resulting from a condition of their Property, not that they have a hardship because they could make more money with the variances.

Summary

The notice to abutters required by RSA 676:7 is a prerequisite to the Board having jurisdiction to hear any variance request. That notice is a two-step process, requiring (1) the City to transmit the notice, and (2) the United States Postal Service to deliver that notice in-hand to a resident and obtain his or her signature. In the present case, the United States Postal Service clearly failed to complete the notice required by RSA 676:7. Because of this failure, the Board inadvertently and mistakenly relied upon the absence of abutters to indicate the Appellants’ acquiescence and approval of the Application. The Board’s written findings of fact clearly indicate this mistaken reliance, which renders the Board’s Decision unreasonable and unlawful as a matter of law.

For the reasons discussed above, the Appellants respectfully requests that the Board

- (1) grant this motion to rehear the Application;
- (2) provide notice to all Abutters, including the Appellants as required by RSA 676:7;
- (3) Review additional facts and information regarding the Application submitted herein; and

(4) deny the Applicant's requested variances in the Application.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to be 'CS', written over a light blue horizontal line.

Christopher Swiniarski, Attorney for Appellants

CITY OF PORTSMOUTH



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

ZONING BOARD OF ADJUSTMENT

October 24, 2022

David Sinclair & Nicole Giusto
765 Middle Street
Portsmouth, New Hampshire 03801

RE: Board of Adjustment request for property located at 765 Middle Street (LU-22-196)

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, October 18, 2022**, considered your application for the construction of a new detached garage with dwelling unit above which requires the following: 1) A Variance from Section 10.513 to allow 3 principal dwellings on a lot where only 1 is allowed per lot. 2) Variances from Section 10.521 to allow a) a lot area per dwelling of 5,376 square feet where 7,500 is required per dwelling unit; and b) a 10 foot rear yard where 20 feet is required. Said property is shown on Assessor Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts. As a result of said consideration, the Board voted to **grant** the request as presented with the enclosed Findings of Fact and stipulation below:

1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.

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,



Jim Lee, Vice Chairman of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

Eric Weinrieb, Altus Engineering, Inc.

R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, PLLC

Findings of Fact | Variance

City of Portsmouth Zoning Board of Adjustment

Date: October 18, 2022

Property Address: 765 Middle Street

Application #: LU-22-196

Decision: **Grant with stipulations**

Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, I 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 the 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.	Yes	The proposed building was a beautiful structure on a beautiful lot and would be a nice property in that location. It would not be detrimental to the public good. Since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project. It resonated with the intention of the zone in terms of density of housing.
10.233.22 Granting the variance would observe the spirit of the Ordinance.	Yes	
10.233.23 Granting the variance would do substantial justice.	Yes	There would not be any loss to the public by allowing this to proceed and the loss to the applicant would not be outweighed by any potential loss to the public.
10.233.24 Granting the variance would not diminish the values of surrounding properties.	Yes	There were a lot of abutters who said they were comfortable with the project and the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.

<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(a)The property has special Conditions that distinguish it from other properties in the area. AND (b)Owing to these special conditions, a fair 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.</p>	<p>Yes</p>	<p>The special condition of the property was that it was forcibly combined into one lot and if that hadn't been done, there would be no issue with adding a dwelling unit in that spot.</p>
--	-------------------	---

<p>Stipulations</p>
<p>1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.</p>
<p>2.</p>
<p>3.</p>
<p>4.</p>

Exhibit B

3.1 Basic Standards

3.1.1 Description

Certified Mail is subject to the basic standards in [1.0](#); see [1.4](#) for eligibility. Certified Mail provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made. Customers can retrieve the delivery status as provided in [1.8](#). Certified Mail is dispatched and handled in transit as ordinary mail. Except for Priority Mail pieces with included insurance, no insurance coverage is provided when purchasing Certified Mail. USPS maintains a record of delivery (which includes the recipient's signature). Customers may obtain a delivery record by purchasing a return receipt ([6.0](#)) at the time of mailing. Customers may direct delivery of Certified Mail only to the addressee (or addressee's authorized agent) using Certified Mail Restricted Delivery ([3.2.2](#)); or to an adult using Certified Mail Adult Signature Required or Certified Mail Adult Signature Restricted Delivery when meeting the applicable standards for Adult Signature under [8.1.3](#).

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October 8, 2022, 6:55 am

Arrived at Post Office

PORTSMOUTH, NH 03801

October 8, 2022, 6:44 am

Departed USPS Facility

MANCHESTER, NH 03103

October 7, 2022, 3:00 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

October 6, 2022, 7:03 pm



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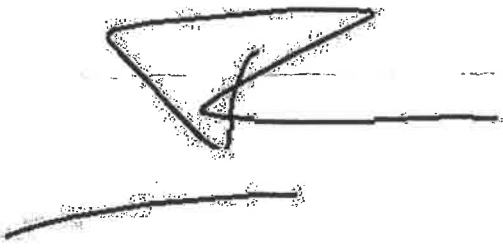

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December 1, 2022, 12:02 pm

Out for Delivery

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December 1, 2022, 6:52 am

Arrived at Post Office

PORTSMOUTH, NH 03801

December 1, 2022, 6:41 am

Departed USPS Facility

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm



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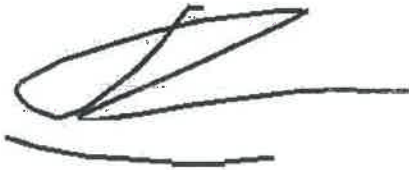
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<p>Signature</p> <p>Deliv</p> <p>Tracki</p> <p>This it</p>	
<p>Address</p>	<p>733 MIDDLE ST PORTSMOUTH, NH 03801</p>

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December 24, 2022, 11:58 am

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PORTSMOUTH, NH 03801

December 24, 2022, 8:00 am

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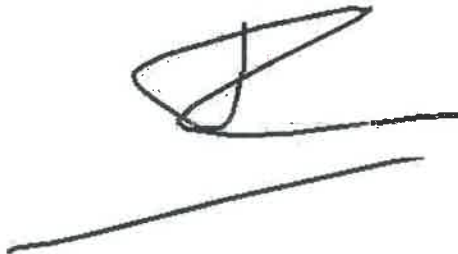

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Exhibit C-4

Signature of Nicole M. Bodoh:

Nicole M. Bodoh

Exhibit D

Affidavit of Nicole M. Bodoh

I, Nicole M. Bodoh, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 733 Middle Street, Portsmouth, N.H. That property is a condominium of “729-733 Middle Street Condominiums.”
2. I purchased this property on or about July 23, 2018 and have lived there since as my primary residence.
3. I am an attorney in good standing licensed to practice law in Pennsylvania since December 15, 2005, New Hampshire since April 9, 2013, Massachusetts since April 9, 2013 and Vermont since May 7, 2014. I have never been the subject of complaint concerning my conduct as an attorney or the subject of any judicial investigation or sanctions. I take my responsibility as an officer of the court to act truthfully with the utmost seriousness.
4. I never received any Notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (“ZBA”) on the Application submitted by David Sinclair and Nicole Giusto.
5. It was not until I was at a meeting of the Portsmouth Historic District Commission (“HDC”) on December 14, 2022 that I learned that the Applicants had already been granted their requested variances at the October 18, 2022 ZBA meeting.
6. The only notice I received of the December 14, 2022 HDC meeting was a letter from the City of Portsmouth, bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.

7. The only notice I received of the January 3, 2023 Site Plan Review Technical Advisory Committee meeting was a letter from the City of Portsmouth bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.
8. I am the only individual residing at 733 Middle Street, Portsmouth, NH.
9. In investigating why I never received the required certified mail Notice of the ZBA hearing which is required to be given to me in hand and signed for, I have determined the following.
 - a) As shown on Exhibit C-2 to the Motion for Rehearing, the tracking information from the US Postal Service for the HDC Meeting indicates the notice was “delivered to an individual” at the address at 12:02 p.m. on December 1, 2022. This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On December 1, 2022 I was at a business luncheon with my colleague, Katherine Battles at the River House at 53 Bow Street, Portsmouth, NH. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-2 and C-4 to the Motion for Rehearing.
 - b) As shown on Exhibit C-3 to the Motion for Rehearing, the tracking information from the US Postal Service for the TAC Meeting indicates “delivered to an individual” at the address at 11:58 am on December 24, 2022.” This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On Saturday December 24, 2022, between the hours of 11:00 am and approximately 2:00 pm I was running errands at multiple locations in the City of Portsmouth in preparation for the holiday weekend which included picking up food orders at Ceres Bakery and

Saunder's Fish Market. I missed a call from Cassandra LaRae-Perez at 1:54 as I was driving home. I returned her call at 2:39 p.m. after I returned home. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-3 and C-4 to the Motion for Rehearing.

- c) As shown on Exhibit C-1 to the Motion for Rehearing, the records of the US Postal Service of the notice of the ZBA meeting indicate that the notice was "left with individual at the address at 12:08 pm on October 8, 2022." I do not have a record of where I was at 12:08 pm on October 8, 2022 however my calendar indicates that my at-home piano lesson ordinarily between 10:00 and 10:30 am was cancelled due to a conflict on the part of my instructor, Kathy Fink, and that I sent an email to a client from my work email account at 10:26 am that day. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-1 and C-4 to the Motion for Rehearing.

Dated: January 17, 2023



Nicole M. Bodoh, Esq.

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 17th day of January, 2023.



Notary Public/Justice of the Peace

My Commission Expires: _____

JULIE A. McLEAN
Notary Public - New Hampshire
My Commission Expires February 3, 2026

Exhibit E

Affidavit of Craig S. Crowell

I, Craig S. Crowell, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 729 Middle Street, Portsmouth, NH. That property is a condominium of "729-733 Middle Street Condominiums."
2. I purchased this property on or about May 16, 2022 and have lived there ever since as my primary residence.
3. I registered my vehicle under my current address at 729 Middle Street, Portsmouth, NH with the City of Portsmouth and the State of New Hampshire on September 19, 2022.
4. I updated my New Hampshire driver's license with my current address at 729 Middle Street, Portsmouth, NH on June 15, 2022.
5. I am registered to vote in the City of Portsmouth.
6. I have never provided my former address in Greenland, NH address to the City of Portsmouth for any purpose.
7. The notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (the "ZBA") on the Application submitted by David Sinclair and Nicole Giusto was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.
8. The notice of the January 3, 2023 hearing held by the Site Plan Review Technical Advisory Committee was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.

9. There is no front desk, reception or mailroom at my former address at 37 Allen Farm Road, Greenland, NH or at my current address at 729 Middle Street, Portsmouth, NH.
10. I did not sign any certified mail receipt for the notice of the October 18, 2022 hearing held by the ZBA. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.
11. I did not sign any certified mail receipt for the notice of the Technical Advisory Committee Meeting held on January 3, 2023. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.

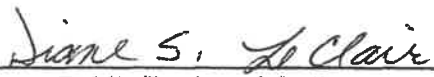
Dated: January 16, 2023


Craig S. Crowell

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 16th day of January, 2023.




Notary Public/Justice of the Peace

My Commission Expires: July 12, 2027

Tracking Number:

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October 12, 2022, 12:07 pm

Out for Delivery

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October 12, 2022, 6:10 am

Arrived at Post Office

PORTSMOUTH, NH 03801
October 12, 2022, 5:03 am

Departed USPS Facility

MANCHESTER, NH 03103
October 11, 2022, 2:26 pm

Arrived at USPS Facility

MANCHESTER, NH 03103
October 11, 2022, 11:19 am

In Transit to Next Facility

October 10, 2022

Arrived at USPS Regional Facility

SHREWSBURY MA DISTRIBUTION CENTER

October 9, 2022, 12:17 pm

Departed USPS Facility

MANCHESTER, NH 03103

October 7, 2022, 3:00 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

October 6, 2022, 7:03 pm

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Signature:	
Deliver	Signature
Track	07
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Address	
Deliver	Signature
Track	07

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Craig Crowell

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Alert

Awaiting Delivery Scan

December 6, 2022, 12:35 am

Out for Delivery

PORTSMOUTH, NH 03801
December 5, 2022, 6:35 am

Arrived at Post Office

PORTSMOUTH, NH 03801
December 5, 2022, 6:24 am

Departed USPS Facility

MANCHESTER, NH 03103
December 4, 2022, 3:29 pm

Arrived at USPS Facility

MANCHESTER, NH 03103
December 4, 2022, 8:09 am

Arrived at USPS Regional Facility

Feedback

SHREWSBURY MA DISTRIBUTION CENTER

December 3, 2022, 9:42 am

In Transit to Next Facility

December 2, 2022

Departed USPS Facility

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm

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Delivered

Delivered, Front Desk/Reception/Mail Room

PORTSMOUTH, NH 03801

January 3, 2023, 11:13 am

Redelivery Scheduled for Next Business Day

PORTSMOUTH, NH 03801

December 31, 2022, 7:16 am

Out for Delivery

PORTSMOUTH, NH 03801

December 31, 2022, 6:27 am

Arrived at Post Office

PORTSMOUTH, NH 03801

December 31, 2022, 6:16 am

Departed USPS Facility

MANCHESTER, NH 03103

December 30, 2022, 3:12 pm

Arrived at USPS Facility

MANCHESTER, NH 03103
December 30, 2022, 11:20 am

Arrived at USPS Regional Facility
SHREWSBURY MA DISTRIBUTION CENTER
December 29, 2022, 1:39 pm

Forwarded
PORTSMOUTH, NH
December 24, 2022, 9:53 am

Forwarded
PORTSMOUTH, NH
December 24, 2022, 9:47 am

Arrived at Post Office
PORTSMOUTH, NH 03801
December 24, 2022, 8:00 am

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Exhibit F-4

Signature of Craig S. Crowell:

A handwritten signature in black ink, reading "Craig S. Crowell". The signature is written in a cursive style with a large initial "C" and a distinct "S" in the middle.

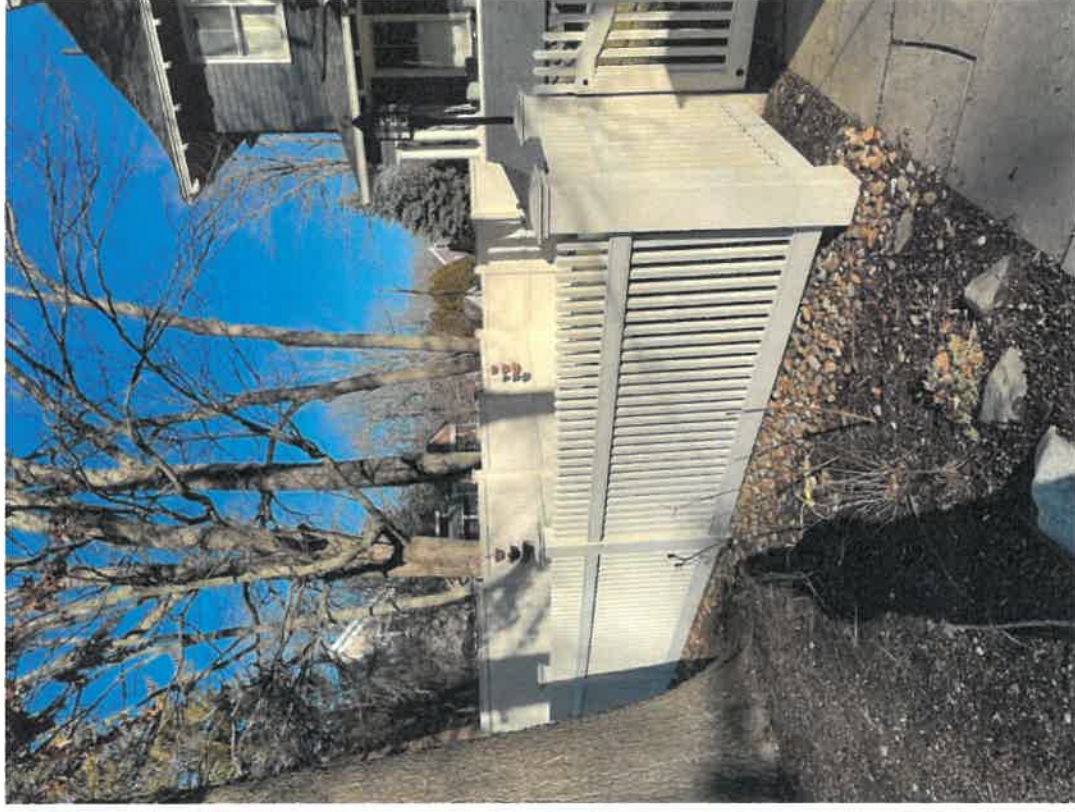
Exhibit G-1



729-733 Middle Street Condominiums



Rendering submitted by David Sinclair & Nicole Giusto
(765 Middle Street)



Actual Photo of 765 Middle Street
with 733 Middle Street to the left of the Property

Exhibit G-3



**Rendering submitted by David Sinclair & Nicole Giusto
(733 Middle Street)**



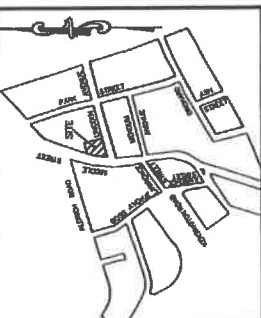
Actual photo of 733 Middle Street



NOT FOR CONSTRUCTION
ISSUED DATE: TAC WORK SESSION
ISSUE DATE: NOVEMBER 1, 2022
DESIGNED BY: DATE
NO. DESCRIPTION: BY DATE
0 RETAIL SUBMISSION: 081-012159 11/19/22

DOWN BY: USE: P/L
APPROVED BY: DATE
DRAWING FILE: 081-012159
SCALE: (22'x34') 1" = 20'
(11'x17') 1" = 40'
OWNER/ARCHITECT: NICKOLE J. CRISTO & DAVID A. SINCLAIR
785 MIDDLE STREET PORTSMOUTH, NH 02801 TAX MAP 148 PARCEL 37

PROJECT: RESIDENTIAL DEVELOPMENT EXPANSION
TAX MAP 148, LOT 37
785 MIDDLE STREET PORTSMOUTH, NH
TITLE: PRELIMINARY OVERALL SITE PLAN
SHEET NUMBER: C-1

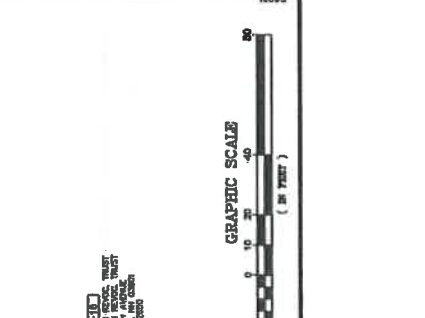
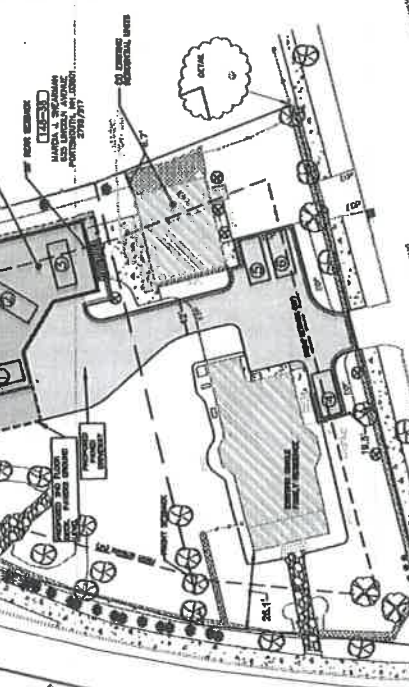
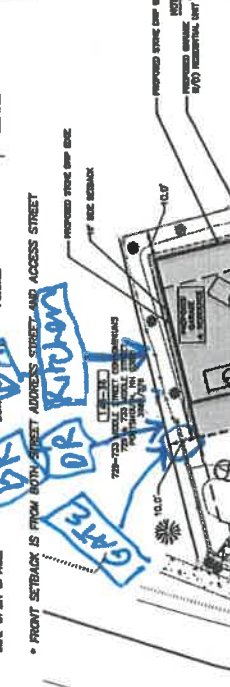


CHAIRMAN	DATE

1. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
2. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
3. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
4. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
5. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.

ZONING SUMMARY
ZONE: CRA (GENERAL RESIDENCE A)
EXISTING LOT AREA: 0.49 ACRES

DIMENSIONAL REQUIREMENTS	EXISTING	REQUIRED	PROPOSED
MIN. LOT AREA PER DWELLING UNIT:	21,504 S.F. 7,500 S.F.	7,500 S.F. 7,500 S.F.	21,504 S.F. 7,500 S.F.
MIN. STREET FRONTAGE:	150'	100'	150'
MIN. LOT DEPTH:	15'	15'	15'
MIN. FRONT SETBACK:	18.5' (EX) (MIDDLE ST.) 74.5' (EX) (LINCOLN ST.)	15'	18.5' (EX) (MIDDLE ST.) 74.5' (EX) (LINCOLN ST.)
MIN. SIDE SETBACK:	10'	10'	10'
MIN. REAR SETBACK:	10'	20'	10'
MIN. MAX HEIGHT:	<15' (EX)	35'	<15' (EX)
MIN. MAX BUILDING CORNER:	12.75% (INCL. DECK)	25%	12.75% (INCL. DECK)
MIN. MIN. OPEN SPACE:	70.0%	30%	70.0%



- SITE NOTES**
- EXISTING - THIS PLAN SET IS INTENDED TO PERMIT A CONSTRUCTION OF A SECOND FLOOR AND A DWELLING UNIT ON THE SECOND FLOOR.
 - APPROXIMATE LOT AREA: 21,504 SF
 - ZONE: CRA
 - ON OCTOBER 18, 2022, THE ZONING BOARD OF ADJUSTMENT APPROVED THE FOLLOWING VARIANCES:
 - MINIMUM FRONT SETBACK VARIANCE: 10' TO 15'
 - MINIMUM SIDE SETBACK VARIANCE: 10' TO 15'
 - MINIMUM REAR SETBACK VARIANCE: 10' TO 20'
 - MINIMUM HEIGHT VARIANCE: 35' TO 15'
 - MINIMUM BUILDING CORNER VARIANCE: 25% TO 12.75%
 - MINIMUM OPEN SPACE VARIANCE: 30% TO 70%
 - EXISTING BUILDINGS:
 - 1 DWELLING UNIT
 - 3 SPACES PROVIDED
 - EXISTING WETLANDS BUFFER ANALYSIS - NO WETLANDS ON THE PROPERTY OR WITHIN 75'-FEET OF THE SITE.
 - AREA OF DISTURBANCE UNDER ASBESTOS INSULATION (AISI) ANALYSIS: PHASE 1 CONTINGENCY: NEGATIVE RESULT NOT REQUIRED.
 - NOISE ANALYSIS: CONDUCTED BY THE ENGINEER. RESULTS: NOISE LEVELS ARE WITHIN PERMITTED LIMITS. NOISE MITIGATION MEASURES ARE NOT REQUIRED.
 - PROPOSED WETLANDS - RESIDENTIAL USE - STOPPING NOT REQUIRED.
 - ALL CONSTRUCTION SHALL BE IN ACCORDANCE WITH THE CITY OF PORTSMOUTH ZONING ORDINANCE, LATEST EDITION.
 - CLEAR AND GRANT VERTICAL FACE OF EXISTING FOUNDATION AT EXISTING LINES WITH 15'-1" IMMEDIATELY PRIOR TO PLACING NEW EXTERIOR CONCRETE CONSTRUCTION.
 - ALL BILLS AND FEES SHALL BE PAID/POSTED PRIOR TO BEGINNING CONSTRUCTION.
 - THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
 - THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
 - ALL DIMENSIONS AND TOPOGRAPHY SHALL BE VERIFIED BY THE ARCHITECT AND ENGINEER FOR RESIDENTIAL.
 - BLINDING AREA SHALL BE BASED ON FOOTING MEASUREMENT TO THE EDGE OF FOUNDATION AND/OR CURB. ACTUAL FINISHED GRADE SHALL BE VERIFIED TO THE UNIVERSITY WITHIN THE CITY RIGHT-OF-WAY IS REQUIRED.

- LEGAL NOTES**
- OWNER: NICKOLE J. CRISTO & DAVID A. SINCLAIR
 - ADDRESS: 785 MIDDLE STREET, PORTSMOUTH, NH 02801
 - TAX MAP: 148, PARCEL 37
 - DATE: 11/19/22
 - SCALE: 1" = 20'
 - SCALE: 1" = 40'
 - PROJECT: RESIDENTIAL DEVELOPMENT EXPANSION
 - TITLE: PRELIMINARY OVERALL SITE PLAN
 - SHEET NUMBER: C-1

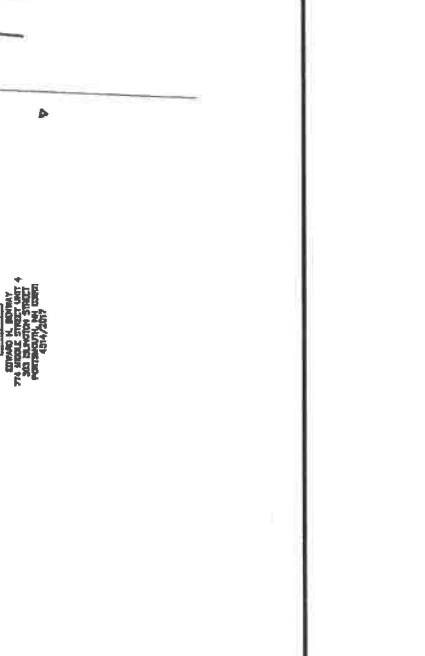
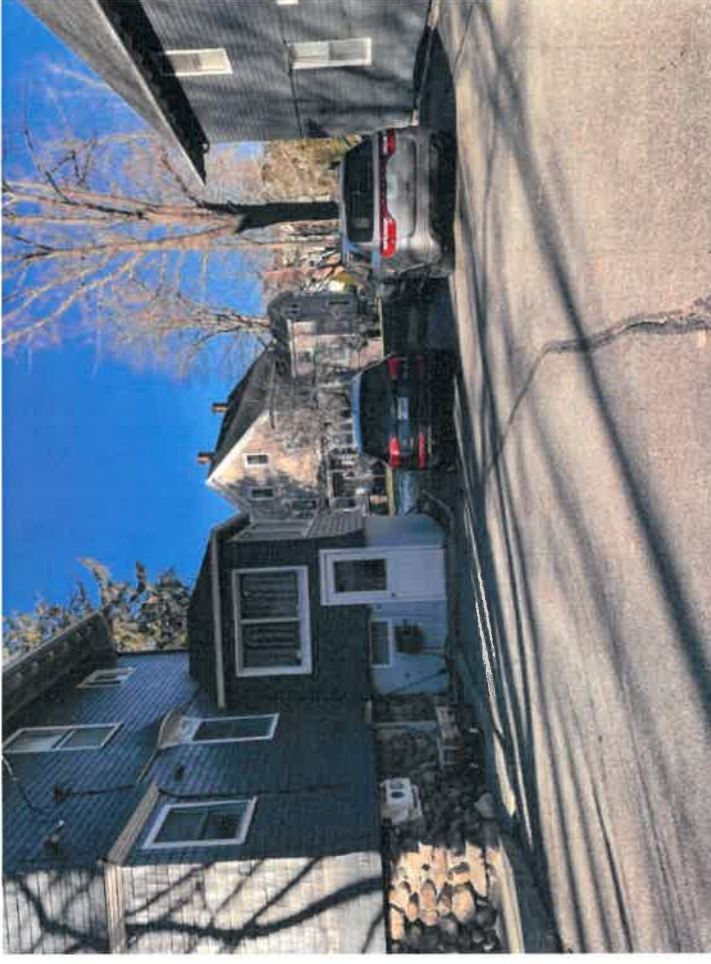


Exhibit G-5



**Rendering submitted by David Sinclair & Nicole Giusto
(765 Middle Street)**



**Actual Photo of 765 Middle Street
with the front of 733 Middle Street in the background**

Exhibit H

Zoning Board of Adjustment
City of Portsmouth
Planning Department
1 Junkins Avenue
Portsmouth, New Hampshire 03801

January 11, 2023

Re: Proposed Project at 765 Middle Street and Impact on Property Values at 733 and 729 Middle Street

Dear Madam or Sir:

I am the realtor who originally sold the property at 733 Middle Street to Nicole Bodoh, and as such I am very familiar with its value. Based upon my review of the project plans submitted by the applicant at 765 Middle Street, I can confirm that there will be a significant diminution in the value of 733 Middle Street based upon the overall size of the structure and the lack of privacy resulting from its proximity to the home at 733 Middle Street. In addition, the fact that the front of 733 Middle Street will face the proposed garage with residence, and that this structure would completely block several of 733 Middle Street's windows, including, but not limited to, the house's feature dining room windows, I can confirm the proposed structure will adversely affect the value of the home owned by Ms. Bodoh.


The plans submitted by the applicant at 765 Middle Street indicate that the proposed garage with residence would be located less than 15 feet from the windows of 733 Middle Street. Because the house was built long before contemporary zoning ordinances, 733 Middle Street sits on a permitted, non-conforming lot where the property line is just within a few feet from the side of the house.

The tenants of this new building would have forced, direct views into Ms. Bodoh's dining room, kitchen, bedroom and bathroom windows. Conversely, Ms. Bodoh's view of the outside world from her dining room would be limited to the proposed deck and garden room wall, and her views from most of her other windows would be limited to the siding and windows of this proposed structure. The additional traffic and noise resulting from the tenancy at this new structure will also make Ms. Bodoh's home significantly less valuable to prospective buyers.

Although not as immediate as the impact on 733 Middle Street, the value of the property located at 729 Middle Street (the other side of the duplex), owned by Craig Crowell, will also be negatively affected by the proposed structure. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably impact 729 Middle Street. If, after the project is built, 733 Middle Street is sold before 729 Middle Street, that sale price will be a comparable price for potential buyers of 729 Middle Street.

Thank you for your attention to this matter.

Sincerely,

DocuSigned by:

247D3160331149D...
Jeff Mountjoy

Aland Realty



CITY OF PORTSMOUTH

Community Development Department
(603) 610-7281

Planning Department
(603) 610-7216

April 26, 2023

City of Portsmouth
Board of Adjustment

Dear Chair Eldridge and Members of the Board of Adjustment:

On March 14, 2023 the Planning Department received a letter requesting an appeal of an Administrative Official by the abutters from 729-733 Middle Street. The administrative decision made by the Director of Planning and Sustainability was to withhold the Motion for Rehearing of the application for 765 Middle Street reviewed and decided by the BoA at their October 18, 2022 meeting. The reason the request for rehearing was withheld is that it was untimely. The rehearing request was received on January 17, 2023 when the appeal deadline was November 17, 2022.

In their letter, the abutters from 729-733 Middle Street state that while the request did not meet the required deadline for a rehearing, they had not been notified as abutters of the hearing before the Board of Adjustment. In fact, the Planning and Sustainability Department had notified the abutters at 729-733 Middle Street by certified mail as shown on the copy of the Certified mail receipt shown as Attachment 1. You will see on the Certified mail receipt that Craig Crowell from 729 Middle Street had a notice mailed to his address as listed in the assessing records and Nicole Bodoh also had a notice mailed to her at her listed address.

In an appeal of an administrative official, the BoA may make any decision the Administrative Official had the power to make. Therefore, the BoA may either determine the request for rehearing should be placed on the next BoA agenda or that it should not be placed on any BoA agenda because the request was untimely. If the BoA grants this appeal, the result would be that the Request for Rehearing would be placed on the next BoA meeting agenda. If the BoA denies this appeal, the abutters may appeal that decision to the Superior Court or the Housing Appeals Board.

Sincerely,

Peter Britz
Director of Planning and Sustainability



Attachment 1

Firm Mailing Book For Accountable Mail

V1712

Name and Address of Sender

Planning Department
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Check type of mail or service

- Adult Signature Required
- Adult Signature Restricted Delivery
- Certified Mail
- Certified Mail Restricted Delivery
- Collect on Delivery (COD)
- Insured Mail
- Priority Mail
- Priority Mail Express
- Registered Mail
- Return Receipt for Merchandise
- Signature Confirmation
- Signature Confirmation Restricted Delivery

Affix Stamp Here
(for additional copies of this receipt).
Postmark with Date of Receipt.

D: \$59.41
I: \$26.79
PH: \$102.84

\$189.04

USPS Tracking/Article Number

Addressee (Name, Street, City, State, & ZIP Code™)

Postage	(Extra Scales)	Handling Charge	Actual Value if Restricted	Insured Value	Due	ASR Fee	ASRD Fee	RD Fee	RR Fee	SC Fee	SCRD Fee	SH Fee
7276												
7276												
7283												
7290												
7252												
7269												

1. SINCLAIR DAVID A
GIUSTO NICOLE J
765 MIDDLE ST
PORTSMOUTH, NH 03801
7022 0410 0001 3868 7177
2. DAWSON PETER P REVOC TRUST (1/2 INT)
DAWSON KAREN G REVOC TRUST (1/2 INT)
648 LINCOLN AVE
PORTSMOUTH, NH 03801
7022 7184
3. GRAHAM ROBERT M REVOC TRUST
GRAHAM KAREN J REVOC TRUST
664 LINCOLN AVE
PORTSMOUTH, NH 03801
7022 7191
4. THIBEAULT JOEL ANN
670 LINCOLN AVE
PORTSMOUTH, NH 03801
7022 7207
5. VESSELS COREY T & SHELLEY A
795 MIDDLE ST
PORTSMOUTH, NH 03801
7022 7214

1. SHAFER ELTON L
RAIS PAULA M
748 MIDDLE STREET
PORTSMOUTH, NH 03801
7022 7221
2. CROWELL CRAIG S
37 ALLEN FARM RD
GREENLAND, NH 03840
7022 7238
3. BODOH NICOLE M
733 MIDDLE ST #2
PORTSMOUTH, NH 03801
7022 7245
4. SHEARMAN MARCIA J REV TRUST
SHEARMAN JOHN M REV TRUST
635 LINCOLN AVE
PORTSMOUTH, NH 03801
7022 7252
5. SIMONOFF STACEY CARLA
774 MIDDLE ST #2
PORTSMOUTH, NH 03801
7022 7269

1. JORGENSEN FAMILY TRUST
JORGENSEN NATHAN H & KRISTIE L TRUSTEES
774 MIDDLE ST UNIT 1
PORTSMOUTH, NH 03801
7022 7276
2. MAGUIRE BRIAN T
MAGUIRE MELISSA J
774 MIDDLE ST #3
PORTSMOUTH, NH 03801
7022 7283
3. PYOTT ALISON L
PYOTT CHRISTOPHER J
774 MIDDLE ST #4
PORTSMOUTH, NH 03801
7022 7290

Total Number of Pieces Listed by Sender

Total Number of Pieces Received at Post Office

Postmaster, Per (Name of receiving employee)

13

15

[Signature]

Complete in Ink

Privacy Notice: For more information on USPS privacy policies, visit usps.com/privacypolicy.

Mailer's Approval for Privately Printed Facsimile PS Form 3877

For three or more pieces with extra services presented for mailing at one time, the mailer may use PS Form 3877 (firm sheet) or privately printed firm sheets in lieu of the receipt portion of the individual form.

The Postal Service allows mailers to use privately printed or computer-generated firm sheets that contain the same information and that are nearly identical to the USPS-provided PS Form 3877, *Firm Mailing Book For Accountable Mail*. For the locations where you are presenting your mailings, the local postmaster or manager of Business Mail Entry provides approval of the form in writing. On the mailer's approved form, you may omit columns that are not applicable to the extra service requested. For additional information, see DMM 503.1.10.

Mailers must retain their original written approvals by the postmaster or manager of Business Mail Entry, as evidence that their privately prepared facsimile of PS Form 3877 was approved by the Postal Service. The Postal Service does not retain documentation of the facsimile approval. Mailers using privately printed forms must periodically verify them against the USPS-provided versions, make routine updates, and obtain approval of the updated facsimile form.

When using an approved, privately prepared form, a mailer who wants the form sheets postmarked by the Postal Service must present the books with the articles to be mailed at a Post Office. The sheets of the books become the mailer's only receipt; the Postal Service does not retain a copy.

For Registered Mail and COD, the mailer submits the forms in duplicate and receives one copy as the mailer's receipt after the USPS employee accepting the mailing has verified the entries.

For Certificates of Mailing with domestic or international mailings, the mailer must use either PS Form 3665, *Certificate of Mailing - Firm*, or PS Form 3817, *Certificate of Mailing*. For Certificates of Bulk Mailing, the mailer must use either PS Form 3606-D, *Certificate of Bulk Mailing - Domestic*, or PS Form 3606, *Certificate of Bulk Mailing - International*.

765 Middle Street
Page 1 of 1
LU-22-196
BOA: 10/18/2022

Tracking Number:

Remove X

70220410000138687238

[Copy](#)

[Add to Informed Delivery \(https://informedelivery.usps.com/\)](https://informedelivery.usps.com/)

Latest Update

Your item was delivered to an individual at the address at 12:07 pm on October 12, 2022 in PORTSMOUTH, NH 03801.

Get More Out of USPS Tracking:

USPS Tracking Plus[®]

Feedback

Delivered

Delivered, Left with Individual

PORTSMOUTH, NH 03801

October 12, 2022, 12:07 pm

[See All Tracking History](#)

Text & Email Updates



USPS Tracking Plus[®]



Product Information



See Less

Track Another Package

Enter tracking or barcode numbers

Tracking Number:

Remove X

70220410000138687245

[Copy](#)

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Latest Update

Your item was delivered to an individual at the address at 12:08 pm on October 8, 2022 in PORTSMOUTH, NH 03801.

Get More Out of USPS Tracking:

[USPS Tracking Plus[®]](#)

Feedback

Delivered

Delivered, Left with Individual

PORTSMOUTH, NH 03801

October 8, 2022, 12:08 pm

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[USPS Tracking Plus[®]](#)



[Product Information](#)



[See Less](#) ^

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January 17, 2022

VIA HAND DELIVERY AND
BY EMAIL TO PLANNING@CITYOFPORTSMOUTH.COM

Zoning Board of Adjustment (the "Board")
City of Portsmouth
Planning Department
1 Junkins Avenue
Portsmouth, New Hampshire 03801

RE: Motion for Rehearing – Variance Application (the "Application") of David Sinclair & Nicole Giusto (the "Applicants") for property at 765 Middle Street, Tax Map 148-37, Portsmouth, NH 03801 (the "Property")

Greetings Board Members:

The purpose of this correspondence is for 729-733 Middle Street Condominium Association, Nicole M. Bodoh and Craig Crowell, owners of property at Portsmouth Tax Map 148-36 and direct abutters to the Property (collectively, the "Appellants") to move for a rehearing by the Board of its decision rendered on October 18, 2022 with respect to the above-referenced Application. Pursuant to RSA 677:2, the Board has authority to grant this motion for rehearing in order to correct errors prior to any party appealing the Board's decision to the Superior Court. Rochester City Council v. Rochester Zoning Board of Adjustment. 171 N.H. 271, 278. (2018).

Introduction

The Appellants are the owners of Tax Map 148-36 and the two (2) condominium units it comprises, and are direct abutters to the Property. The Applicants filed the Application to allow construction of a new detached garage with dwelling unit above which requires the following variances: 1) a variance from Section 10.513 of the Portsmouth Zoning Ordinance (the “Ordinance”) to allow three (3) principal dwellings on a lot where only one (1) is allowed per lot; (2) a variance from Section 10.521 to allow a lot area per dwelling of 5,376 square feet where 7,500 is required and (3) a variance from Section 10.521 to allow a 10 foot rear yard setback where 20 feet is required. The Property is shown on the Assessor’s Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts.

At its October 18, 2022 meeting, the Board made findings relative to the five (5) criteria for Variance set forth in RSA 674:33 I. (2), which findings are attached hereto as Exhibit A (the “Decision”). The Appellants hereby move for a rehearing on the Decision and allege that the Board made factual and legal errors in issuing the Decision as particularly set forth below.

As a final introductory note, the Appellants are of course aware that this motion for rehearing is filed more than thirty (30) days after the Decision.

However, as described in greater detail below, the Appellants never received notice of the Application as required by New Hampshire law. It is well settled law that notice is a pre-requisite to the Board having jurisdiction to hear or decide the variance request, as detailed further below. This motion for rehearing is therefore timely and proper since the Board did not have proper jurisdiction over the Application at the time of the Decision.

Grounds for Rehearing

I. Due Process Violations of RSA 676:7. None of the Appellants received notice by verified mail as required under RSA 676:7.

RSA 676:7 provides: *“Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows: (a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by verified mail, as defined in RSA 21:53, stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal.”* [emphasis supplied]

Verified mail, as defined in RSA 21:53 means *“any method of mailing that is offered by the United States Postal Service or any other carrier, and which*

provides evidence of mailing". ***None of the Appellants received notice by verified mail*** as required under RSA 676:7.

A. Abutter Nicole M. Bodoh did not Receive Notice of the ZBA Meeting.

Nicole Bodoh, the owner of 733 Middle Street, did not receive any notice of the Zoning Board of Adjustment hearing on October 18, 2022 ("ZBA Meeting") and as a result did not attend the meeting and was unable to express her vigorous objection to the planned project.

As further evidence that proves the faulty notice procedures by the USPS that ultimately led to Ms. Bodoh not receiving notice of the ZBA Meeting, later, in December 2022, Ms. Bodoh received notice by unverified mail of the Historic District Commission Work Session ("HDC Meeting") held on December 14, 2022. That notice was simply left in her mailbox, though the City sent that notice by certified mail in the same manner as it sent notice of the ZBA Meeting. It was at this HDC Meeting that Ms. Bodoh first became aware that the Decision had been rendered. Following the December 14, 2022 meeting, Ms. Bodoh again received notice by unverified mail of the Technical Advisory Committee meeting on January 3, 2023 (the "TAC Meeting"), which she attended. Again, the notice of the TAC Meeting was simply left in her mailbox, though the City sent that notice by certified mail as well, just like the ZBA Meeting.

It is true that the failure of notice to Ms. Bodoh for both the HDC Meeting and the TAC Meeting are not dispositive for this Motion for Rehearing. However, those failures evidence a course of conduct on the part of the USPS that supports the fact that Ms. Bodoh never received notice of the ZBA Meeting. The City of Portsmouth sent notices of all of the meetings to Nicole Bodoh by USPS Certified Mail. However the United States Postal Service did not deliver the certified mail in accordance with U.S. Postal Service regulations which provide that “the USPS maintains a record of delivery (*which includes the recipient’s signature*).” [emphasis supplied] United States Postal Service Domestic Mail Manual 500 – 3.1.1. See attached Exhibit B.

The record of delivery provided by the Post Office does not include Ms. Bodoh’s signature. The tracking and signature records for the notices sent to Ms. Bodoh of the ZBA Meeting, the HDC Meeting and the TAC Meeting are attached hereto as Exhibits C-1, C-2, and C-3. A specimen of Ms. Bodoh’s signature is attached hereto as Exhibit C-4. It is immediately apparent when comparing the records of the notices to Ms. Bodoh’s specimen signature that she did not sign the certified mail receipt upon delivery, as required under the Postal Regulations and State law. Further details are found in Ms. Bodoh’s affidavit, attached as Exhibit D. These facts make it plainly clear that Ms. Bodoh never received notice of the ZBA Meeting as required by New Hampshire law.

B. Abutter Craig S. Crowell did not Receive Notice of the ZBA Meeting in accordance with US Postal Regulations or State Law.

Similarly, Craig S. Crowell, the owner of 729 Middle Street, did not receive notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting in accordance with the Postal Regulations or State law. The notices for the ZBA Meeting and TAC Meeting were sent to Mr. Crowell's former address at 37 Allen Farm Road, Greenland NH 03840 and then forwarded on through automatic mail forwarding to his address at 729 Middle Street. The notice for the HDC Meeting has to date not been delivered, according to the US Postal Service's records. Again, while the notices for the HDC Meeting and TAC Meeting are not dispositive for this Motion for Rehearing, those failures evidence a course of conduct on the part of the USPS which evidences the fact that Mr. Crowell never received notice of the ZBA Meeting. The HDC Notice and TAC Notice were sent by the City in the same manner as the ZBA Notice.

It is unknown why the notices for the ZBA Meeting, HDC Meeting and the TAC Meeting were addressed to Mr. Crowell's former address in Greenland, NH. Mr. Crowell purchased his home at 729 Middle Street on May 16, 2022 and moved in a few days later. He provided his current and correct address of 729 Middle Street to the City of Portsmouth when he registered his vehicle with the City of Portsmouth and the State of New Hampshire on September 19, 2022. He also updated his New Hampshire driver's license on June 15, 2022 with his 729

Middle Street address. Further, Mr. Crowell is registered to vote in the City of Portsmouth. Mr. Crowell has never provided his Greenland, NH address to the City of Portsmouth for any purpose. See attached Affidavit of Craig S. Crowell, Exhibit E.

According to the tracking records for the notices sent to Mr. Crowell, the notice of the ZBA Meeting was “delivered to an individual at the address at 12:07 pm on October 12, 2022 in Portsmouth, NH 03801”. See Exhibit F-1. That record is plainly false. The notice of the ZBA Meeting was originally sent to Mr. Crowell’s former Greenland, NH address; it only arrived in Portsmouth via automatic mail forwarding to the 729 Middle Street address, not by any individual delivery.

As in the case with notice to Ms. Bodoh above, the record for the notice of the HDC Meeting to Mr. Crowell tells a similar tale. The official USPS record states that the item is “awaiting a delivery scan” and that “the delivery status of your item has not been updated as of December 6, 2022, 12:35 am. We apologize that it may arrive later than expected”. See Exhibit F-2. To date this notice has not been delivered, even though the USPS reports that it was expected back on December 6, 2022. Again, while the faulty HDC Meeting Notice is not dispositive in this matter, it demonstrates the USPS’s course of conduct that proves the ultimate unreliability of the USPS as a means of providing actual notice. The USPS did not provide the in-hand, signed-for notice that they assure senders is provided for by certified mail.

Similarly again, Mr. Crowell did not receive notice of the TAC Meeting in conformity with US Postal Regulations and State Law. Tracking information available on the Post Office's website indicates that the notice was "delivered to front desk, reception or mailroom" at 11:13 am on January 3, 2023. See Exhibit F-3. There is no front desk, reception or mailroom at Mr. Crowell's former address in Greenland, NH or at his current address at 729 Middle Street. See Mr. Crowell's Affidavit attached hereto as Exhibit E at paragraph 9. Even if Mr. Crowell had received this notice, January 3, 2023 was the date the TAC Meeting was held and therefore the requirement of delivery at least 5 days prior to the meeting was not met (in addition to not meeting the signature requirement under U.S. Postal regulations for certified mail).

The supposed "record of delivery" for the notices does not bear Mr. Crowell's signature. The signature records for the ZBA Meeting and the TAC Meeting are included in Exhibits F-1 and F-3. The US Postal Service does not have any record for Mr. Crowell's signature for delivery of the HDC Meeting notice. A specimen of Mr. Crowell's signature is attached hereto as Exhibit F-4. When comparing Mr. Crowell's specimen signature to the signatures on record with the U.S. Postal Service, it is immediately apparent that those signatures are not the signature of Mr. Crowell.

C. 729-733 Middle Street Condominiums did not Receive Notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting.

In addition, the Applicants, on the site plans in their Application identified the owner of the Appellants' property as "729-733 Middle Street Condominiums" rather than Craig C. Crowell and Nicole M. Bodoh, as individuals, who were not mentioned anywhere in the Application. In spite of the Applicant's emphasis on the ownership of the Appellants' property by a condominium association, no notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting was ever sent to 729-733 Middle Street Condominiums, according to the City's records.

The definition of "Abutter" in the New Hampshire Revised Statutes Annotated indicates that, under State law, notice should have been sent and addressed to an officer of 729-733 Middle Street Condominiums.

RSA 672:3 states: "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use Board. [...] For purposes of receipt of notification by a municipality of a local land use Board hearing, in the case of an abutting property being under a condominium or other collective

form of ownership, the term abutter means the officers of the collective or association, as defined in [RSA 356-B:3, XXIII.](#)” [emphasis supplied]

RSA 356-B:3, XXIII provides that “*Officer*” means any member of the Board of directors or official of the unit owners’ association.

Because the Applicants specifically identified 729-733 Middle Street Condominiums as an abutter, and because the New Hampshire statutes provides specific notice provisions relative to condominiums, notices of the ZBA Meeting, HDC Meeting and TAC Meeting should have been sent and addressed to “Officer” or “Official” of the 729-733 Middle Street Condominiums. The Applicants did not send any such notice by verified mail or otherwise for any of the Meetings in connection with the Application. It is not necessary to identify any particular individual as an officer when sending notices to a condominium association. All that is required to meet the New Hampshire statutory requirement is to send the notice to an “Official” or an “Officer”.

None of the three Appellants received the notice under RSA 676:7. That notice is a necessary pre-requisite to the Board’s jurisdiction to hear the Application. Hussey v. Barrington, 135 N.H. 227 (1992). *When that notice is lacking or deficient, the variance purportedly granted by the Board “is void from the very date on which it was issued.”* Id. at 232.

As a matter of law, *all* of the Appellants had to receive notice of the Application in compliance with New Hampshire law not less than 5 days before the date fixed for the hearing of the Application by “verified mail”. Since that did not happen, the Board had no jurisdiction to hear or grant the Applicants’ requested variances. The only remedy is for the Board to issue new notices that are received by the Appellants and all other abutters and conduct a re-hearing giving the Applicant adequate notice and opportunity to comment as required by RSA 676:7.

II. The Applicant Provided Incomplete, Insufficient and Inaccurate Information to the Board.

The information submitted by the Applicants to the City of Portsmouth with their Application is incomplete, insufficient and inaccurate. The photo renderings of Ms. Bodoh’s property at 733 Middle Street, which is adjacent to the proposed project, are either absent or presented in a misleading fashion, with the presumed intention of concealing the proximity of the proposed project to 733 Middle Street and the fact that the front of 733 Middle St. faces the location of the project.

Although small portions of the home at 733 Middle Street were included with the photo renderings supplied by the Applicant, not included in the application were any photo renderings including the entire front of 729-733

Middle Street, which is shown on Exhibit G-1 attached hereto. The applicants did not include a photo of the entire house presumably in order to mislead the Board into thinking that the 729-733 Middle Street Condominiums consists of apartment-style condominiums. To the contrary, this historic property was originally built as a duplex in 1820. The right side of the house that is 733 Middle Street represents one of the earliest examples still in existence in this country of what today is known as an “in-law suite.” It does not conform at all to what is commonly understood as a “condominium”. It is more similar to an attached, single-family, early Victorian residence.

Comparisons of the photo renderings submitted by the Applicants to photos of the actual locations are attached hereto as Exhibits G-2 through G-4. The photo rendering to the left on Exhibit G-2 when compared to the actual photo of the location to the right, shows that the Applicants used digital photography editing to delete the front of 733 Middle Street from the photo, substituting in its place artificial greenery. The photo rendering to the left on Exhibit G-3, when compared to the actual photo on the right, shows the magnitude of the additional density this project will create. In addition, the photo rendering depicts the project as set back further from 733 Middle Street than its actual location based upon the site plans that were submitted. The plans indicate that the Applicant’s proposed deck and garden room will extend to the intersection of the gate on Ms. Bodoh’s property and the fence between the two properties as shown on Exhibit G-4 attached hereto. This will completely block Ms. Bodoh’s dining room

windows that are facing the proposed project. Contrary to the presentation on the photo rendering on Exhibit G-3, direct sunlight will be blocked from Ms. Bodoh's dining room windows. The proposed project is located as close to the property line at 733 Middle Street as possible without violating the ten foot (10') setback. This means that the deck and garden room of the proposed project will be located **less than fifteen feet (15')** from Ms. Bodoh's dining room windows at 733 Middle Street. The 733 Middle Street lot is a permitted nonconforming lot, as the property was built long before zoning ordinances came into existence. The actual property line for 733 Middle Street (which does not conform to the fence) is just a few feet from the house in the vicinity adjacent to the proposed project. This is wholly new information that the Board did not have, as a result of Applicant's misleading materials.

The third comparison on Exhibit G-5 again demonstrates that the Applicants apparently attempted to mislead the Board as to the proximity of the proposed project to 733 Middle Street, and the fact that the front of 733 Middle Street will be blocked by the proposed project. It appears that the Applicant purposely added a tree to the plans and photo rendering on Exhibit G-5 (next to the mud room of 765 Middle Street) in order to disguise the manner in which the proposed project blocks the front of 733 Middle Street. This state of facts is, once again, additional new information that the Board did not have as a result of Applicant's misleading materials.

III. The Board was unreasonable and unlawful in making its purported findings as to the first and second variance criteria RSA 674:33 I. (2) (A) and (B). Granting the variance would be contrary to the public interest, and would not observe the spirit of the Ordinance.

The New Hampshire Supreme Court has noted that a determination of whether the spirit of the Ordinance is observed is largely similar to determining whether the variance is contrary to the public interest. Chester Rod & Gun Club v. Town of Chester, 152 NH 577 (2005). It is well settled that a variance will be contrary to the public interest and will not observe the spirit of the Ordinance if it conflicts with or violates the ordinance's basic zoning objectives. Id. at 581 (2005).

In the case at hand, the Board unreasonably and unlawfully found that granting the variances sought in the Application would not be contrary to the public interest or violate the Ordinance's basic zoning objectives. In its written Decision attached hereto as Exhibit A, the Board stated "*since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project.*" [emphasis supplied] It is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the test set forth in Chester Rod & Gun Club. Further, the Appellants at 729 and 733 Middle Street *do* have

something to say about the proposed project, but because they did not receive notice of the ZBA Meeting in conformity with State law and US Postal requirements, they did not have an opportunity to be heard at the ZBA Meeting to inform the Board of the specific, numerous impacts this project would have on abutting properties that directly conflict with the specific zoning objectives set forth in Section 10.121 of the Ordinance. The fact that the Board grounded its purported findings upon the absence of the Appellants indicates that it could not reasonably make the findings it purported to make if the Appellants had received the notice required under applicable law.

IV. The Board was unreasonable and unlawful in making its purported findings as to the third variance criteria under RSA 674:33 I. (2)(C). Substantial justice *would not* be done.

The guiding rule on determining substantial justice is weighing the loss to the applicant versus the gain to the general public. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 515 (2011). The Appellants have carefully reviewed the video recording of the ZBA Meeting on October 18, 2022. There, Tim Phoenix, the attorney for the Applicants, discussed the primary reason the proposed project will be located in close proximity (less than fifteen feet (15')) to 733 Middle Street. He stated that creating a “courtyard effect” is “the primary reason we are asking for setback relief.” If there is in fact such a

“courtyard effect” created by this project, it will be enjoyed solely by the Applicants. Based upon the site plans submitted to the Board, neither the tenants of the newly built residence, nor the owner of 733 Middle Street will have views of the courtyard.

To the contrary, as shown in the Application, the majority of the windows of the new residence have been situated so that they do not face the Applicants’ residence, presumably in order to maintain the Applicants’ privacy. To that end, the majority of the windows of the new residence are directly opposite 733 Middle Streets’ windows, so that the occupants of both dwellings will have forced views into each other’s homes. The Applicants may be able to maintain their privacy by designing the project this way, but they do so by destroying any meaningful semblance of privacy for their tenants and the owner of 733 Middle Street. The impact on Ms. Bodoh’s quality of life will be substantial due to this complete lack of privacy. Thus, granting the variances results in a substantial injustice. It is unreasonable and unlawful for the Board to dismiss the uncontroverted facts of the case that clearly demonstrate a tremendous benefit to the Appellants in continuing to require compliance with the Ordinance. The Applicants’ three (3) requested variances from the Ordinance only serve singularly to allow the Applicants to squeeze every last pecuniary drop from what would be a fourth single family residence on one (1) lot, where only one (1) principal dwelling is lawfully allowed by the Ordinance. There is no reasonable

or lawful way, on the facts in this case, that the Board can find this criteria of RSA 674:33 I. (2) (C) to have been met.

V. The Board was unreasonable and unlawful in making its purported findings as to the fourth variance criteria RSA 674:33 I. (2) (D). The values of the surrounding properties would so obviously be diminished.

The Board unreasonably and unlawfully found that granting the variances sought in the Application would not negatively impact the values of surrounding properties, specifically the property of the Appellants. Specifically, the Board found that *“the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.”* [emphasis supplied] As stated above, it is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the criteria for determining whether or not the values of surrounding properties would be diminished. Had the Appellants received notice of the ZBA Meeting in conformity with State law and US Postal requirements, they would have informed the Board at the ZBA Meeting that the proposed project would significantly and obviously diminish the values of the homes at 729 and 733 Middle Street. The Board’s findings state as much, relying solely on the Appellants’ absence in making their determination.

Further, the letter attached hereto as Exhibit H from Jeffrey Mountjoy, the realtor who assisted with the sale of 733 Middle Street to Ms. Bodoh, explains in detail how the values of both residences will be adversely impacted by the overall size of the project, the lack of privacy and increased noise and traffic level that will result from its construction, and the blocking of several windows of 733 Middle Street by a distance of less than fifteen feet (15'). These factors will obviously make the property at 733 Middle Street significantly less valuable to prospective buyers, as stated in Mr. Mountjoy's letter. Further, if this project is constructed, there will be a complete loss of air, light and space available to Ms. Bodoh at 733 Middle Street. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably affect the value of 729 Middle Street.

Mr. Mountjoy notes in his letter to the Board a unique feature of the home at 733 Middle Street. The tall dining room windows and window seat are in particular an attractive feature of the home to prospective buyers. If the project is built, the view from the dining room windows will be completely blocked by the Applicants' deck and garden room that will be situated less than fifteen feet (15') away. As such, it is unlawful and unreasonable for the Board to have concluded that the criteria set forth in RSA 674:33 I. (2) (D) were satisfied by the Applicant.

VI. The Board was unreasonable and unlawful in making its purported findings as to the fifth variance criteria under RSA 674:33 I. (2) (E). Literal enforcement of the provisions of the Ordinance would not result in an unnecessary (or any) hardship to the Applicant.

The fifth prong of the variance criteria requires the Board to determine whether an unnecessary hardship results from literal enforcement of the Ordinance. RSA 674:33, I (2) (E)(b)(1) provides that:

“Unnecessary hardship” means that, 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.

If these criteria are not established, an unnecessary hardship will be deemed to exist “if, and only if, 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.” In the case at hand, the Board did not find the Property of the Applicants to be unique such that it is distinguished from other properties in the area.

Further, the Board cannot find that the Property could not reasonably be used. According to the Applicant, based upon the zoning history of 765 Middle

Street, two (2) lots were “forcibly combined into one lot and if that hadn’t been done, there would be no issue with adding a dwelling unit in that spot.” However, this reference to the involuntary merger of two (2) lots ignores the fact that variances relative to the reasonable use of the property had already previously been granted to the Applicants. The Property is currently in use for two (2) primary dwelling units consisting of three (3) residences (two (2) of which already generate rental income) where the Ordinance allows for only **one (1) primary dwelling unit**. The Property does currently enjoy a use well in excess of that which is reasonable under the Ordinance, a use that far exceeds the rest of the neighborhood which generally adheres to the one (1) house per lot scheme of the Ordinance. There is simply no possible way to state that the Property cannot be used in strict conformance with the Ordinance without causing an “unnecessary hardship” to the Applicants; the Property is already currently enjoying a windfall income from its current rental use despite the spirit of the Ordinance.

The hardship reason given by Tim Phoenix on behalf of the Applicants at the ZBA Meeting is “this lot is larger than most, so that suggests you should be able to do more with it.” Not being able to “do more” with your property is not a hardship. This conjured hardship cannot be construed in any way to satisfy the criteria of RSA 674:33, I (2) (E). As stated above, RSA 674:33, I (2) (E), requires the Applicants to conclusively demonstrate that they have an “unnecessary

hardship” resulting from a condition of their Property, not that they have a hardship because they could make more money with the variances.

Summary

The notice to abutters required by RSA 676:7 is a prerequisite to the Board having jurisdiction to hear any variance request. That notice is a two-step process, requiring (1) the City to transmit the notice, and (2) the United States Postal Service to deliver that notice in-hand to a resident and obtain his or her signature. In the present case, the United States Postal Service clearly failed to complete the notice required by RSA 676:7. Because of this failure, the Board inadvertently and mistakenly relied upon the absence of abutters to indicate the Appellants’ acquiescence and approval of the Application. The Board’s written findings of fact clearly indicate this mistaken reliance, which renders the Board’s Decision unreasonable and unlawful as a matter of law.

For the reasons discussed above, the Appellants respectfully requests that the Board

- (1) grant this motion to rehear the Application;
- (2) provide notice to all Abutters, including the Appellants as required by RSA 676:7;
- (3) Review additional facts and information regarding the Application submitted herein; and

(4) deny the Applicant's requested variances in the Application.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to be 'CS', written over a light blue horizontal line.

Christopher Swiniarski, Attorney for Appellants

CITY OF PORTSMOUTH



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

ZONING BOARD OF ADJUSTMENT

October 24, 2022

David Sinclair & Nicole Giusto
765 Middle Street
Portsmouth, New Hampshire 03801

RE: Board of Adjustment request for property located at 765 Middle Street (LU-22-196)

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, October 18, 2022**, considered your application for the construction of a new detached garage with dwelling unit above which requires the following: 1) A Variance from Section 10.513 to allow 3 principal dwellings on a lot where only 1 is allowed per lot. 2) Variances from Section 10.521 to allow a) a lot area per dwelling of 5,376 square feet where 7,500 is required per dwelling unit; and b) a 10 foot rear yard where 20 feet is required. Said property is shown on Assessor Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts. As a result of said consideration, the Board voted to **grant** the request as presented with the enclosed Findings of Fact and stipulation below:

1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.

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,



Jim Lee, Vice Chairman of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

Eric Weinrieb, Altus Engineering, Inc.

R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, PLLC

Findings of Fact | Variance

City of Portsmouth Zoning Board of Adjustment

Date: October 18, 2022

Property Address: 765 Middle Street

Application #: LU-22-196

Decision: **Grant with stipulations**

Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, I 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 the 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.	Yes	The proposed building was a beautiful structure on a beautiful lot and would be a nice property in that location. It would not be detrimental to the public good. Since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project. It resonated with the intention of the zone in terms of density of housing.
10.233.22 Granting the variance would observe the spirit of the Ordinance.	Yes	
10.233.23 Granting the variance would do substantial justice.	Yes	There would not be any loss to the public by allowing this to proceed and the loss to the applicant would not be outweighed by any potential loss to the public.
10.233.24 Granting the variance would not diminish the values of surrounding properties.	Yes	There were a lot of abutters who said they were comfortable with the project and the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.

<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(a)The property has special Conditions that distinguish it from other properties in the area. AND (b)Owing to these special conditions, a fair 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.</p>	<p>Yes</p>	<p>The special condition of the property was that it was forcibly combined into one lot and if that hadn't been done, there would be no issue with adding a dwelling unit in that spot.</p>
--	-------------------	---

Stipulations
1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.
2.
3.
4.

Exhibit B

3.1 Basic Standards

3.1.1 Description

Certified Mail is subject to the basic standards in [1.0](#); see [1.4](#) for eligibility. Certified Mail provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made. Customers can retrieve the delivery status as provided in [1.8](#). Certified Mail is dispatched and handled in transit as ordinary mail. Except for Priority Mail pieces with included insurance, no insurance coverage is provided when purchasing Certified Mail. USPS maintains a record of delivery (which includes the recipient's signature). Customers may obtain a delivery record by purchasing a return receipt ([6.0](#)) at the time of mailing. Customers may direct delivery of Certified Mail only to the addressee (or addressee's authorized agent) using Certified Mail Restricted Delivery ([3.2.2](#)); or to an adult using Certified Mail Adult Signature Required or Certified Mail Adult Signature Restricted Delivery when meeting the applicable standards for Adult Signature under [8.1.3](#).

Tracking Number:

Remove X

70220410000138687245

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Latest Update

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Delivered

Delivered, Left with Individual

PORTSMOUTH, NH 03801
October 8, 2022, 12:08 pm

Out for Delivery

PORTSMOUTH, NH 03801
October 8, 2022, 6:55 am

Arrived at Post Office

PORTSMOUTH, NH 03801
October 8, 2022, 6:44 am

Departed USPS Facility

MANCHESTER, NH 03103
October 7, 2022, 3:00 pm

Arrived at USPS Facility

MANCHESTER, NH 03103
October 6, 2022, 7:03 pm

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January 09, 2023

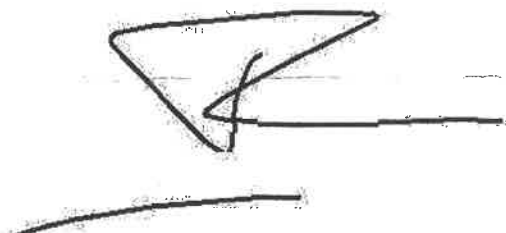

USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7022 0410 0001 3868 7245

This item was delivered on 10/08/2022 at 12:08:00

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Delivered

Delivered, Left with Individual

PORTSMOUTH, NH 03801

December 1, 2022, 12:02 pm

Out for Delivery

PORTSMOUTH, NH 03801

December 1, 2022, 6:52 am

Arrived at Post Office

PORTSMOUTH, NH 03801

December 1, 2022, 6:41 am

Departed USPS Facility

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm

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January 10, 2023

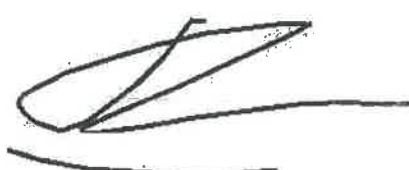
USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: **7022 2410 0002 7036 5760**

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Address	<p>733 MIDDLE ST PORTSMOUTH, NH 03801</p>

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Delivered

Delivered, Left with Individual

PORTSMOUTH, NH 03801

December 24, 2022, 11:58 am

Arrived at Post Office

PORTSMOUTH, NH 03801

December 24, 2022, 8:00 am

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January 10, 2023

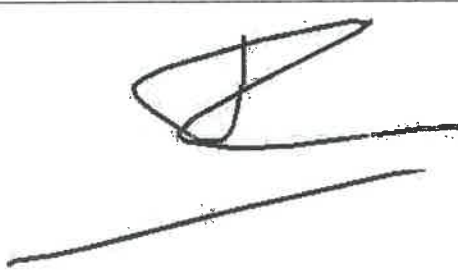
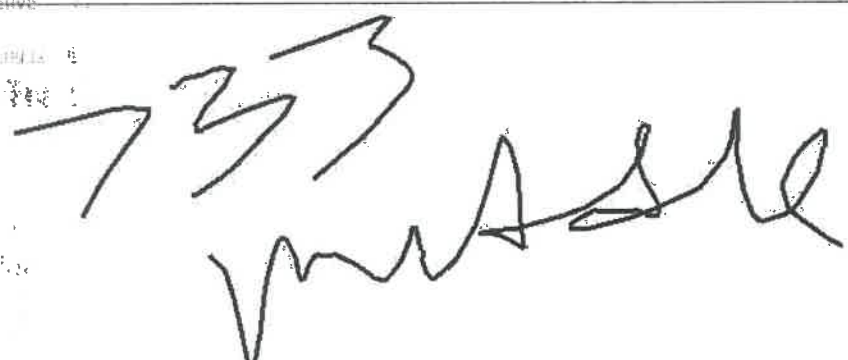
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Delivery Signature and Address

Tracking Number: 7022 2410 0002 7036 6682

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<p>Address</p>	

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Version: 23.1.1.0.72

Signature of Nicole M. Bodoh:

Nicole M. Bodoh

Exhibit D

Affidavit of Nicole M. Bodoh

I, Nicole M. Bodoh, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 733 Middle Street, Portsmouth, N.H. That property is a condominium of “729-733 Middle Street Condominiums.”
2. I purchased this property on or about July 23, 2018 and have lived there since as my primary residence.
3. I am an attorney in good standing licensed to practice law in Pennsylvania since December 15, 2005, New Hampshire since April 9, 2013, Massachusetts since April 9, 2013 and Vermont since May 7, 2014. I have never been the subject of complaint concerning my conduct as an attorney or the subject of any judicial investigation or sanctions. I take my responsibility as an officer of the court to act truthfully with the utmost seriousness.
4. I never received any Notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (“ZBA”) on the Application submitted by David Sinclair and Nicole Giusto.
5. It was not until I was at a meeting of the Portsmouth Historic District Commission (“HDC”) on December 14, 2022 that I learned that the Applicants had already been granted their requested variances at the October 18, 2022 ZBA meeting.
6. The only notice I received of the December 14, 2022 HDC meeting was a letter from the City of Portsmouth, bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.

7. The only notice I received of the January 3, 2023 Site Plan Review Technical Advisory Committee meeting was a letter from the City of Portsmouth bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.
8. I am the only individual residing at 733 Middle Street, Portsmouth, NH.
9. In investigating why I never received the required certified mail Notice of the ZBA hearing which is required to be given to me in hand and signed for, I have determined the following.
 - a) As shown on Exhibit C-2 to the Motion for Rehearing, the tracking information from the US Postal Service for the HDC Meeting indicates the notice was “delivered to an individual” at the address at 12:02 p.m. on December 1, 2022. This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On December 1, 2022 I was at a business luncheon with my colleague, Katherine Battles at the River House at 53 Bow Street, Portsmouth, NH. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-2 and C-4 to the Motion for Rehearing.
 - b) As shown on Exhibit C-3 to the Motion for Rehearing, the tracking information from the US Postal Service for the TAC Meeting indicates “delivered to an individual” at the address at 11:58 am on December 24, 2022.” This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On Saturday December 24, 2022, between the hours of 11:00 am and approximately 2:00 pm I was running errands at multiple locations in the City of Portsmouth in preparation for the holiday weekend which included picking up food orders at Ceres Bakery and

Saunders's Fish Market. I missed a call from Cassandra LaRae-Perez at 1:54 as I was driving home. I returned her call at 2:39 p.m. after I returned home. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-3 and C-4 to the Motion for Rehearing.

- c) As shown on Exhibit C-1 to the Motion for Rehearing, the records of the US Postal Service of the notice of the ZBA meeting indicate that the notice was "left with individual at the address at 12:08 pm on October 8, 2022." I do not have a record of where I was at 12:08 pm on October 8, 2022 however my calendar indicates that my at-home piano lesson ordinarily between 10:00 and 10:30 am was cancelled due to a conflict on the part of my instructor, Kathy Fink, and that I sent an email to a client from my work email account at 10:26 am that day. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-1 and C-4 to the Motion for Rehearing.

Dated: January 17, 2023



Nicole M. Bodoh, Esq.

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 17th day of January, 2023.



Notary Public/Justice of the Peace

My Commission Expires: _____

Exhibit E


Affidavit of Craig S. Crowell

I, Craig S. Crowell, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 729 Middle Street, Portsmouth, NH. That property is a condominium of "729-733 Middle Street Condominiums."
2. I purchased this property on or about May 16, 2022 and have lived there ever since as my primary residence.
3. I registered my vehicle under my current address at 729 Middle Street, Portsmouth, NH with the City of Portsmouth and the State of New Hampshire on September 19, 2022.
4. I updated my New Hampshire driver's license with my current address at 729 Middle Street, Portsmouth, NH on June 15, 2022.
5. I am registered to vote in the City of Portsmouth.
6. I have never provided my former address in Greenland, NH address to the City of Portsmouth for any purpose.
7. The notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (the "ZBA") on the Application submitted by David Sinclair and Nicole Giusto was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.
8. The notice of the January 3, 2023 hearing held by the Site Plan Review Technical Advisory Committee was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.

9. There is no front desk, reception or mailroom at my former address at 37 Allen Farm Road, Greenland, NH or at my current address at 729 Middle Street, Portsmouth, NH.
10. I did not sign any certified mail receipt for the notice of the October 18, 2022 hearing held by the ZBA. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.
11. I did not sign any certified mail receipt for the notice of the Technical Advisory Committee Meeting held on January 3, 2023. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.


Dated: January 16, 2023


Craig S. Crowell

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 16th day of January, 2023.




Notary Public/Justice of the Peace
My Commission Expires: July 12, 2027

Tracking Number:

70220410000138687238

Remove X

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Add to Informed Delivery (<https://informedelivery.usps.com/>)

Latest Update

Your item was delivered to an individual at the address at 12:07 pm on October 12, 2022 in PORTSMOUTH, NH 03801.

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Delivered

Delivered, Left with Individual

PORTSMOUTH, NH 03801
October 12, 2022, 12:07 pm

Out for Delivery

PORTSMOUTH, NH 03801
October 12, 2022, 6:10 am

Arrived at Post Office

PORTSMOUTH, NH 03801
October 12, 2022, 5:03 am

Departed USPS Facility

MANCHESTER, NH 03103
October 11, 2022, 2:26 pm

Arrived at USPS Facility

MANCHESTER, NH 03103
October 11, 2022, 11:19 am

In Transit to Next Facility

Feedback

October 10, 2022

Arrived at USPS Regional Facility

SHREWSBURY MA DISTRIBUTION CENTER

October 9, 2022, 12:17 pm

Departed USPS Facility

MANCHESTER, NH 03103

October 7, 2022, 3:00 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

October 6, 2022, 7:03 pm

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USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7022 0410 0001 3868 7238

This item was delivered on 10/12/2022 at 12:07:00

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Signature	
Address	

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Select Search Type: Quick Search

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Craig Crowell

Tracking Number:

Remove X

70222410000270365777

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Latest Update

The delivery status of your item has not been updated as of December 6, 2022, 12:35 am. We apologize that it may arrive later than expected.

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Feedback

Alert

Awaiting Delivery Scan

December 6, 2022, 12:35 am

Out for Delivery

PORTSMOUTH, NH 03801

December 5, 2022, 6:35 am

Arrived at Post Office

PORTSMOUTH, NH 03801

December 5, 2022, 6:24 am

Departed USPS Facility

MANCHESTER, NH 03103

December 4, 2022, 3:29 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

December 4, 2022, 8:09 am

Arrived at USPS Regional Facility

SHREWSBURY MA DISTRIBUTION CENTER

December 3, 2022, 9:42 am

In Transit to Next Facility

December 2, 2022

Departed USPS Facility

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

Arrived at USPS Facility

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm

Hide Tracking History

Text & Email Updates



USPS Tracking Plus®



Product Information



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Tracking Number:

Remove X

70222410000270366675

Copy

Add to Informed Delivery (<https://informedelivery.usps.com/>)

Latest Update

Your item was delivered to the front desk, reception area, or mail room at 11:13 am on January 3, 2023 in PORTSMOUTH, NH 03801.

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USPS Tracking Plus®

Feedback

Delivered

Delivered, Front Desk/Reception/Mail Room

PORTSMOUTH, NH 03801
January 3, 2023, 11:13 am

Redelivery Scheduled for Next Business Day

PORTSMOUTH, NH 03801
December 31, 2022, 7:16 am

Out for Delivery

PORTSMOUTH, NH 03801
December 31, 2022, 6:27 am

Arrived at Post Office

PORTSMOUTH, NH 03801
December 31, 2022, 6:16 am

Departed USPS Facility

MANCHESTER, NH 03103
December 30, 2022, 3:12 pm

Arrived at USPS Facility

MANCHESTER, NH 03103
December 30, 2022, 11:20 am

Arrived at USPS Regional Facility
SHREWSBURY MA DISTRIBUTION CENTER
December 29, 2022, 1:39 pm

Forwarded
PORTSMOUTH, NH
December 24, 2022, 9:53 am

Forwarded
PORTSMOUTH, NH
December 24, 2022, 9:47 am

Arrived at Post Office
PORTSMOUTH, NH 03801
December 24, 2022, 8:00 am

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Text & Email Updates



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Product Information



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January 12, 2023

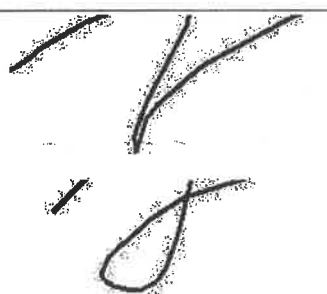

USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7022 2410 0002 7036 6675

This item was delivered on 01/03/2023 at 11:13:00

[< Return to Tracking Number View](#)

Pro	Signature	
Del	Track	
< Return	Pro	
Address	Del	
Track		

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Exhibit F-4

Signature of Craig S. Crowell:

A handwritten signature in black ink, reading "Craig S. Crowell". The signature is written in a cursive style with a large initial "C" and a distinct "S" in the middle.

Exhibit G-1

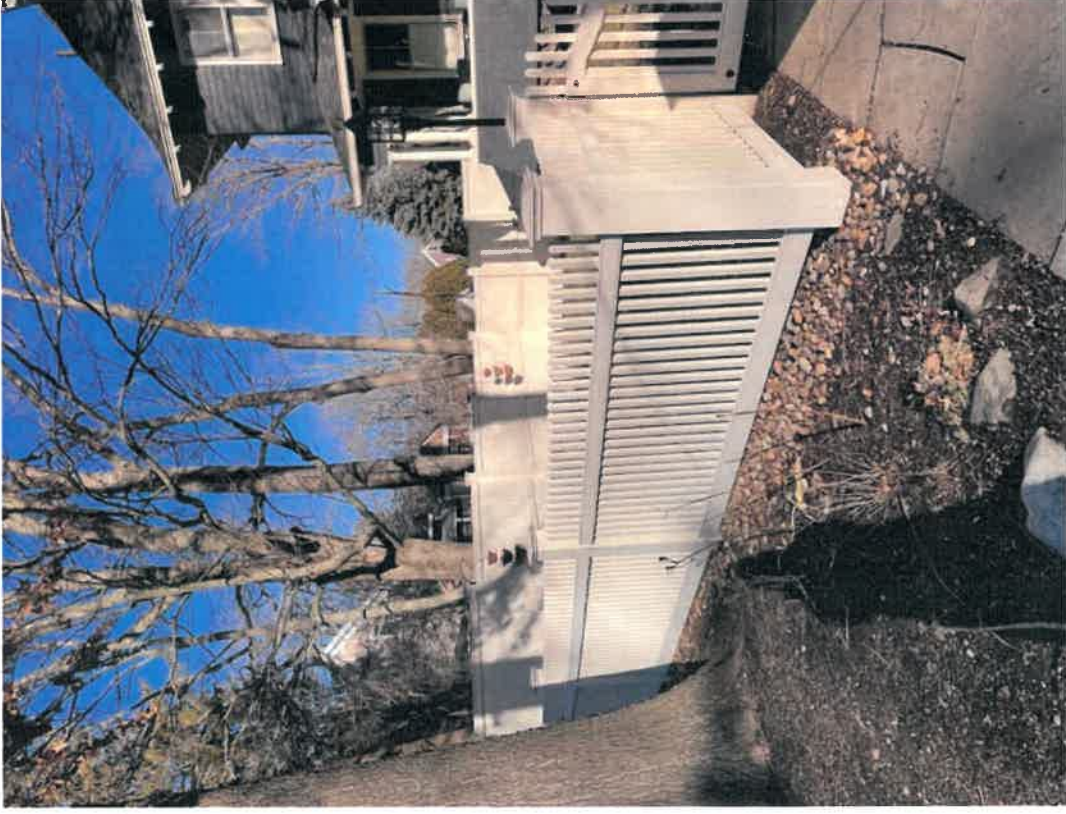


729-733 Middle Street Condominiums

Exhibit G-2



Rendering submitted by David Sinclair & Nicole Giusto
(765 Middle Street)



Actual Photo of 765 Middle Street
with 733 Middle Street to the left of the Property

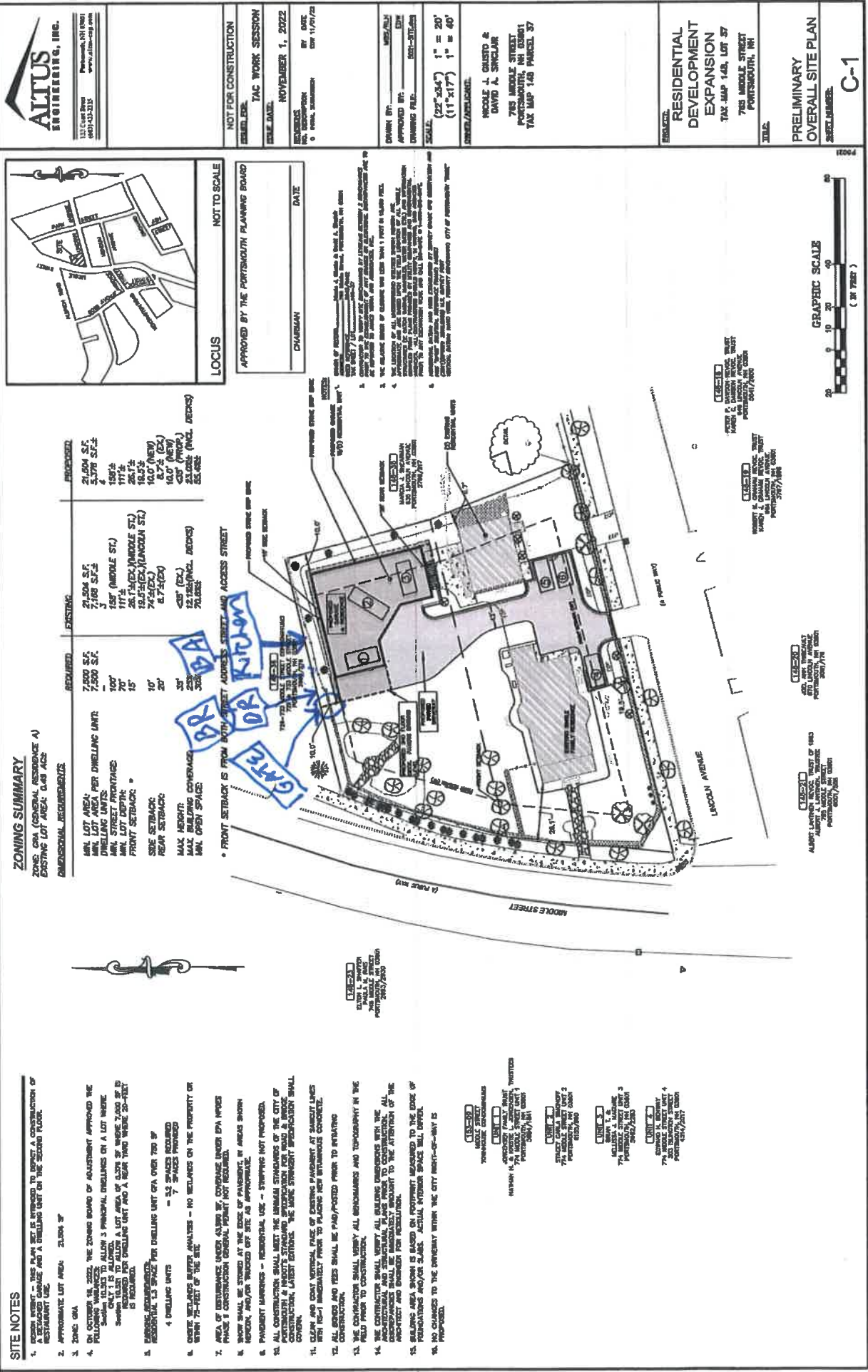


Rendering submitted by David Sinclair & Nicole Giusto
(733 Middle Street)



Actual photo of 733 Middle Street

Exhibit G-4



ZONING SUMMARY
 ZONE: CRA (GENERAL RESIDENCE A)
 EXISTING LOT AREA: 0.48 ACRES

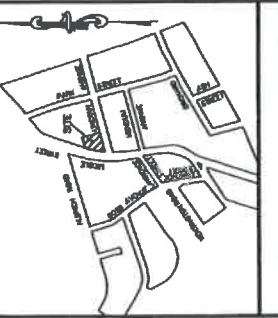
DIMENSIONAL REQUIREMENTS	EXISTING	PROPOSED
MIN. LOT AREA:	21,004 S.F.	21,004 S.F.
MIN. LOT DEPTH:	117' 2"	117' 2"
MIN. STREET FRONTAGE:	158' (MIDDLE ST.)	158' (MIDDLE ST.)
MIN. LOT DEPTH:	117' 2"	117' 2"
FRONT SETBACK:	26.1'-5.625' (MIDDLE ST.)	26.1'-5.625' (MIDDLE ST.)
REAR SETBACK:	19.5'-5.625' (LINCOLN ST.)	19.5'-5.625' (LINCOLN ST.)
SIDE SETBACK:	10' (EX.)	10' (EX.)
MAX. BUILDING COVERAGE:	<35' (EX.)	<35' (EX.)
MAX. OPEN SPACE:	23.000% (INCL. DECKS)	23.000% (INCL. DECKS)

* FRONT SETBACK IS FROM BOTH STREET ADDRESS STREET AND ACCESS STREET

SITE NOTES

- DESIGN EVENT - THIS PLAN SET IS INTENDED TO REFLECT A CONSTRUCTION OF A SECOND FLOOR AND A DRILLING UNIT ON THE SECOND FLOOR.
- APPROXIMATE LOT AREA: 21,004 SF
- ZONE: CRA
- ON OCTOBER 18, 2022, THE ZONING BOARD OF ADJUSTMENT APPROVED THE FOLLOWING: TO ALLOW 3 PRINCIPAL DWELLINGS ON A LOT WHERE ONLY 1 IS ALLOWED. A LOT AREA OF 0.48 ACRES WHERE 2.48 ACRES IS REQUIRED FOR DRILLING UNIT AND A REAR YARD WHERE 20-25 FT IS REQUIRED.
- PERMITS REQUIRED: 4 DWELLING UNITS - 32 SPACES REQUIRED - 7 SPACES REQUIRED
- EXISTING BELLWAS BUFFER ANALYSIS - NO BELTWAYS ON THE PROPERTY OR WITHIN 75-FOOT OF THE SITE
- AREA OF DISTURBANCE UNDER ASBESTOS COVERAGE UNDER EPA RULES PHASE 1 CONSTRUCTION GENERAL PERMIT NOT REQUIRED.
- NO SWAP SHALL BE STAGED AT THE EDGE OF PARCEL, IN AREAS SHOWN HEREON, AND/OR TRACKED OFF SITE AS APPROPRIATE.
- PERMITS REQUIRED - RESIDENTIAL USE - SHIPPING NOT PROVIDED.
- ALL CONSTRUCTION SHALL MEET THE MANUAL STANDARDS OF THE CITY OF PORTSMOUTH AND INDUSTRY STANDARD SPECIFICATION FOR ROAD & BRIDGE CONSTRUCTION, LATEST EDITIONS. THE MORE STRINGENT SPECIFICATION SHALL GOVERN.
- NO CONSTRUCTION SHALL BE PERMITTED UNTIL ALL NECESSARY PERMITS HAVE BEEN OBTAINED FROM THE CITY OF PORTSMOUTH.
- ALL AREAS AND YARDS SHALL BE MAINTAINED PRIOR TO REMOVAL OF CONSTRUCTION.
- THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOLERANCES IN THE FIELD PRIOR TO CONSTRUCTION.
- THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOLERANCES WITH THE ARCHITECTURAL AND STRUCTURAL PLANS PRIOR TO CONSTRUCTION. ALL DIMENSIONS SHALL BE MEASURED TO THE CENTERLINE OF THE STRUCTURE UNLESS OTHERWISE NOTED.
- BUILDING AREA SHOWN IS BASED ON FOOTPRINT MEASURED TO THE EDGE OF PATENTATIONS AND/OR SLABS. ACTUAL MEASUREMENT SHALL BE PERMITTED.
- NO CHANGES TO THE DIMENSIONS WITHIN THE CITY RIGHT-OF-WAY IS PERMITTED.

- 13-C-2-1 MIDDLE STREET
- 13-C-2-2 MIDDLE STREET
- 13-C-2-3 MIDDLE STREET
- 13-C-2-4 MIDDLE STREET
- 13-C-2-5 MIDDLE STREET
- 13-C-2-6 MIDDLE STREET
- 13-C-2-7 MIDDLE STREET
- 13-C-2-8 MIDDLE STREET
- 13-C-2-9 MIDDLE STREET
- 13-C-2-10 MIDDLE STREET
- 13-C-2-11 MIDDLE STREET
- 13-C-2-12 MIDDLE STREET
- 13-C-2-13 MIDDLE STREET
- 13-C-2-14 MIDDLE STREET
- 13-C-2-15 MIDDLE STREET
- 13-C-2-16 MIDDLE STREET
- 13-C-2-17 MIDDLE STREET
- 13-C-2-18 MIDDLE STREET
- 13-C-2-19 MIDDLE STREET
- 13-C-2-20 MIDDLE STREET



LOCUS
 NOT TO SCALE
 APPROVED BY THE PORTSMOUTH PLANNING BOARD
 CHAIRMAN _____ DATE _____

NOT FOR CONSTRUCTION
 REMOVED
 TAC WORK SESSION
 DATE: NOVEMBER 1, 2022
 BY: _____
 DATE: _____
 FOR: _____
 DATE: _____

SCALE:
 1" = 20'
 (11" X 17") 1" = 40'

DESIGNED BY:
 MICHAEL J. CRISTO &
 DAVID A. SINGLAR
 785 MIDDLE STREET
 PORTSMOUTH, NH 03801
 TAX MAP 148 PARCEL 37

PROJECT:
 RESIDENTIAL
 DEVELOPMENT
 EXPANSION
 785 MIDDLE STREET
 PORTSMOUTH, NH

**PRELIMINARY
 OVERALL SITE PLAN**
 SHEET NUMBER:
C-1

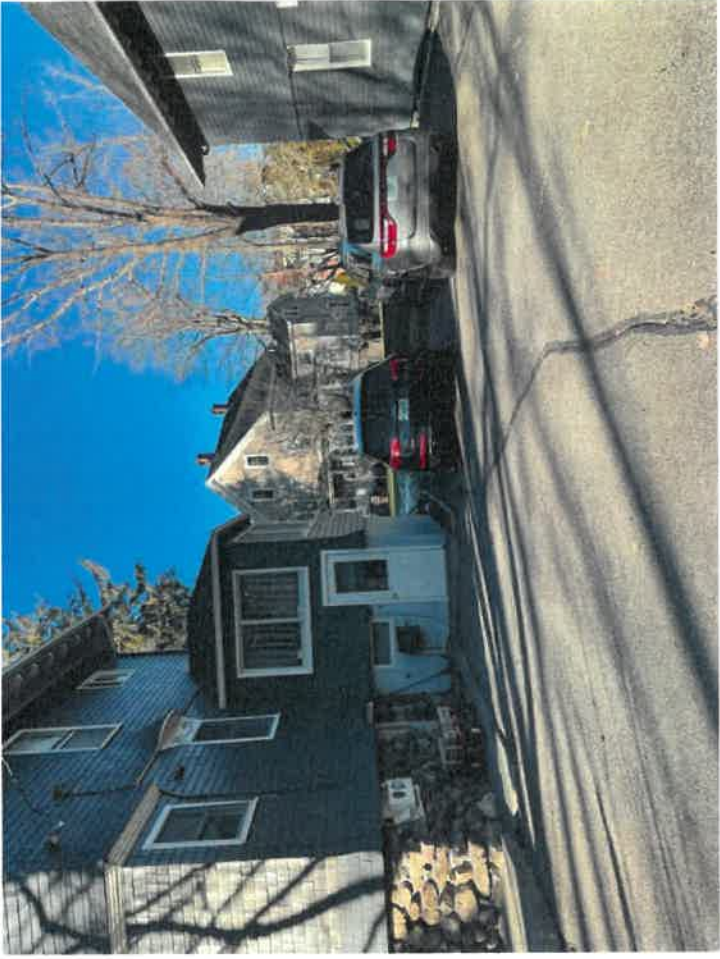


REG-4

Exhibit G-5



Rendering submitted by David Sinclair & Nicole Giusto
(765 Middle Street)



Actual Photo of 765 Middle Street
with the front of 733 Middle Street in the background

Exhibit H

Zoning Board of Adjustment
City of Portsmouth
Planning Department
1 Junkins Avenue
Portsmouth, New Hampshire 03801

January 11, 2023

Re: Proposed Project at 765 Middle Street and Impact on Property Values at 733 and 729 Middle Street

Dear Madam or Sir:

I am the realtor who originally sold the property at 733 Middle Street to Nicole Bodoh, and as such I am very familiar with its value. Based upon my review of the project plans submitted by the applicant at 765 Middle Street, I can confirm that there will be a significant diminution in the value of 733 Middle Street based upon the overall size of the structure and the lack of privacy resulting from its proximity to the home at 733 Middle Street. In addition, the fact that the front of 733 Middle Street will face the proposed garage with residence, and that this structure would completely block several of 733 Middle Street's windows, including, but not limited to, the house's feature dining room windows, I can confirm the proposed structure will adversely affect the value of the home owned by Ms. Bodoh.

The plans submitted by the applicant at 765 Middle Street indicate that the proposed garage with residence would be located less than 15 feet from the windows of 733 Middle Street. Because the house was built long before contemporary zoning ordinances, 733 Middle Street sits on a permitted, non-conforming lot where the property line is just within a few feet from the side of the house.

The tenants of this new building would have forced, direct views into Ms. Bodoh's dining room, kitchen, bedroom and bathroom windows. Conversely, Ms. Bodoh's view of the outside world from her dining room would be limited to the proposed deck and garden room wall, and her views from most of her other windows would be limited to the siding and windows of this proposed structure. The additional traffic and noise resulting from the tenancy at this new structure will also make Ms. Bodoh's home significantly less valuable to prospective buyers.

Although not as immediate as the impact on 733 Middle Street, the value of the property located at 729 Middle Street (the other side of the duplex), owned by Craig Crowell, will also be negatively affected by the proposed structure. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably impact 729 Middle Street. If, after the project is built, 733 Middle Street is sold before 729 Middle Street, that sale price will be a comparable price for potential buyers of 729 Middle Street.

Thank you for your attention to this matter.

Sincerely,

DocuSigned by:

247D3160331149D...

Jeff Mountjoy

Aland Realty

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC
ATTORNEYS AT LAW

127 Parrott Avenue | Portsmouth, NH, 03801
Telephone: 603.436.0666 | Facsimile: 603.431.0879 | www.hpgrlaw.com

April 18, 2023

HAND DELIVERED

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

Re: Nicole Giusto, David Sinclair Owners/ Applicants
Project location: 765 Middle St., Tax Map 148, Lot 37
General Residence A (GRA) Zone

Dear Ms. Casella, Mr. Stith & Zoning Board Members:

On behalf of Nicole Giusto and David Sinclair, enclosed please find an Objection to Administrative Appeal for consideration by the Zoning Board of Adjustment on April 25, 2023.

Very truly yours,



R. Timothy Phoenix
Monica F. Kieser

Enclosure

cc: Nicole Guisto & David Sinclair
Eric Weinrieb, Altus Engineering
Jennifer Ramsey, Somma Studios
Robbi Woodburn, Woodburn & Company
Christopher Swiniarski, Esq.

DANIEL C. HOEFLE	R. PETER TAYLOR	GREGORY D. ROBBINS	STEPHANIE J. JOHNSON
R. TIMOTHY PHOENIX	ALEC L. MCEACHERN	PETER V. DOYLE	OF COUNSEL:
LAWRENCE B. GORMLEY	KEVIN M. BAUM	MONICA F. KIESER	SAMUEL R. REID
STEPHEN H. ROBERTS	JACOB J.B. MARVELLEY	DUNCAN A. EDGAR	JOHN AHLGREN

PORTSMOUTH ZONING BOARD OF ADJUSTMENT
DAVID SINCLAIR & NICOLE GIUSTO, OWNERS/APPLICANTS
765 Middle Road, Tax Map 148, Lot 37
Case #LU-22-196

OBJECTION TO ADMINISTRATIVE APPEAL

NOW COME, David Sinclair & Nicole Giusto (“Sinclair”), by and through their attorneys, Hoefle, Phoenix, Gormley & Roberts, PLLC, and respectfully request that the Portsmouth Zoning Board of Adjustment deny the Administrative Appeal filed by Nicole Bodoh and Craig Crowell (“Petitioners”) with respect to the October 18, 2022 decision of the Portsmouth Zoning Board of Adjustment (“ZBA”) granting Sinclair’s variances from the Portsmouth Zoning Ordinance (“PZO” or the “Ordinance”) to permit the following at 765 Middle Street (the “Property”): three principal dwellings on a lot; lot area of 5,376 s.f./unit where 7,500/unit is required; and a 10 ft. rear yard setback where 20 ft. is required.

I. EXHIBITS¹

- A. Abutter Support Letters.
- B. Correspondence between Sinclair and Bodoh

II. STANDARD OF REVIEW

Pursuant to RSA 676:5, I, “[a]ppeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved...by any decision of the administrative officer.” In hearing appeals of administrative decisions, a zoning board has “all the powers of the administrative official from whom the appeal is taken” but not more. RSA 674:33, II; 15 Loughlin, New Hampshire Practice, Land Use Planning and Zoning §22.02, at 351. A “decision of the administrative officer” includes any decision made by an official or board involving the construction, interpretation, or application of the terms of a zoning ordinance. RSA 676:5, III.

III. INTRODUCTION

Petitioners’ Request for Rehearing was untimely and was properly denied by Peter Britz, thus their Administrative Appeal is without merit and must be denied. Abutters were duly noticed in accordance with RSA 672:3 which, in conjunction with RSA 21:53, requires

¹ Sinclair’s initial submission is on file and available at:
https://files.cityofportsmouth.com/files/planning/apps/MiddleSt_765/MiddleSt_765_boa_10182022.pdf

verification of *mailing*, not verification of *receipt* by the addressee. Each Petitioners was sent a notice at the addresses on file with the Portsmouth City Assessor's Office. Furthermore, on more than one occasion as early as May 2022, Sinclair approached Ms. Bodoh to discuss the Project, so Ms. Bodoh had actual notice of their intentions well before the October 18, 2022 ZBA hearing on the matter. Assuming *arguendo*, that Ms. Bodoh did not receive notice of the variances until December 14, 2022, her January 17, 2023 was still not filed within 30 days. Accordingly, her appeal is untimely and must be denied.

IV. RESPONSE TO PETIONER'S CLAIMS

- A. The Administrative Appeal must be denied where Petitioners received their statutory notification in compliance with RSA 672:3 and RSA 21:53.

The plain language of RSA 676:7 requires public notice as follows:

- I. Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows:
 - (a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by *verified mail, as defined in RSA 21:53*, stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal. The board shall hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony and all nonabutters who can demonstrate that they are affected directly by the proposal under consideration. The board may hear such other persons as it deems appropriate.
 - (b) A public notice of the hearing shall be placed in a newspaper of general circulation in the area not less than 5 days before the date fixed for the hearing of the appeal. *(emphasis added)*

Verified Mail is a term of art defined by RSA 21:53 as "any method of mailing that is offered by the United States Postal Service or any other carrier, and which provides *evidence of mailing*." Additionally, in the case of Condominium Ownership, an abutter for purposes of notification by a municipality means the officer of the association, defined as any member of the board of directors or official of the unit owners' association. RSA 672:3, 356-B:3, XXIII. Thus, notification to every member of an association is not required by the statute.

Interpretation of a statute begins with its plain language of the statute. Words and phrases are given their common meanings and the plain language of the ordinance controls absent an ambiguity in need of resolution. Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743, 754 (2017) (citing Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 494 (2007)). “The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.” Garand v. Town of Exeter, 159 N.H. 136, 141, 977 A.2d 540 (2009) (quotation omitted). Principals of statutory interpretation avoid construction of a statute or ordinance in a manner that results in an absurd result that the legislative body could not have intended. See Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019); Hogan v. Pat’s Peak Skiing, LLC, 168 N.H. 71, 75 (2015).

In arguing that they have failed to receive notice and pointing to the alleged false signature, Petitioners erroneously look beyond the plain language of the statute, which merely requires evidence of *mailing*. Looking to its common meaning, the Webster’s definition of mailing is “the act of sending by mail.” Webster’s Third New International Dictionary, Merriam-Webster, 1993. Evidence of mailing is established by the documentation provided by the City. Notably, past versions of the statute required the certified mail Petitioners seek, but in 2017, the term “certified mail” was replaced with the term “verified mail” which lacks any requirement of a return receipt. See The Board of Adjustment in New Hampshire: A Handbook for Local Officials, NH Department of Business and Economic Affairs, p. III-5. As a result of this amendment, guidance to municipal officials now recommends sending notification by certified mail, *without return receipt requested*. NH Land Use Meeting Mechanics, 2021 Webinar, p.2, NH Office of Strategic Initiatives (emphasis added). Vesting of jurisdiction to grant the requested relief occurred in accordance with RSA 676:7 and 21:53 when the City initiated the notice not less than 5 days before the ZBA meeting. Notably the RSA 676:7 states, “such notice shall be given not less than five days...” it does not require receipt of said notice five days before the meeting. The City complied with its obligation under RSA 676:7, RSA 21:53, RSA 672:3 and 356-B:3, XXIII 356. Accordingly, Petitioners Administrative Appeal is entirely without merit and must be denied.

B. Ms. Bodoh had ample knowledge of the Project.

Beginning in May of 2022, Sinclair made every effort to meet with each of his 10

abutters to the Project, including Ms. Bodoh (Mr. Crowell did not yet reside at 729 Middle Street). These efforts are demonstrated by Exhibit 10 to his original submission: seven abutter letters of support ranging in dates from May through September. These and additional letters received since the ZBA decision are attached. **(Exhibit A)**. Sinclair first attempted to speak with Ms. Bodoh in early May. She was too busy with a handyman to speak with him, but said she did not oppose the Project, as long as it was not “here”, gesturing toward the northwest corner of the Property where a curb cut exists at Middle Street. A week later, Sinclair tried again, hoping to show her the site plan, Ms. Bodoh again stated she was “too busy”. They did, however, exchange phone numbers, so that Ms. Bodoh could reach out at her convenience. **(Exhibit B)**. However, she failed to contact him until December 4, 2022, at which point she reiterated that she did not oppose the Project as long as it did not block her windows; only then did she request plans, which were timely sent with receipt confirmed by Ms. Bodoh. **(Id)**.

We note that the final plans submitted to the ZBA garage that complies with the side yard setback to the Bodoh lot line. The garage was located further back on the lot, requiring rear yard relief, which satisfying Ms. Bodoh’s preference that the garage not be sited in the northwest corner. Contrary to statements in the appeal, Ms. Bodoh was clearly aware of the Project well before receipt of the HDC Notice. **(Id)**. Assuming *arguendo* that she received notice on December 4, 2022, or even December 14, 2022, she still failed to take any timely action to review the matter and failed to file an appeal within 30 days of the date she claims she learned relief was granted. Under these circumstances, it is clear that the Request for Rehearing was untimely filed and Britz correctly declined to docket it.

It is not clear from Mr. Crowell’s affidavit when he received notice, only that he received notice forwarded from his Greenland address. It is reasonable to infer that he received notice of the ZBA meeting well before Ms. Bodoh attended the Historic District Commission meeting on December 14, 2022, yet he neither investigated the matter nor timely appealed the decision of the ZBA, waiting until January 17, 2023, well after he was notified about the Project. Notably, Sinclair is not responsible for providing addresses to the City Planning Department, which relies on the City Assessor records for address information. The tax card and tax bill related to Crowell’s property both list his Greenland address, which was likely on paperwork provided to the Assessor by the closing agent used when he purchased the property.

In summary, contrary to Petitioners' argument, as a matter of law, the official of the 729-733 Middle Street Condominium Association is entitled to notification by verified mail, which requires evidence of mailing only. Said notice shall be given (not received) not less than 5 days before the ZBA meeting. RSA 676:7, 672:3, 356-B:3, XXIII. As this obligation was met by sending mail through USPS tracking enabled mail well before October 18, 2022, Petitioners received the notification to which they are entitled. Even if we take the latest possible date Petitioners learned of the Project, December 4th or 14th, their Appeal was untimely submitted on January 17, 2023. Accordingly, Peter Britz did not err in and Petitioners Administrative Appeal must be denied.

C. The merits of Petitioners Request for Rehearing should not be addressed unless and until the ZBA grants Petitioners Administrative Appeal.

While we reject Petitioners claims that the ZBA erred in finding that the Sinclair Project met all five variance criteria, their substantive claims of error are not before the ZBA unless their Administrative Appeal is granted. Petitioners appeal the decision of Peter Britz rejecting as untimely, their request for rehearing of the ZBA's October 18, 2022 decision. The sole issue is whether Mr. Britz properly interpreted the Portsmouth Zoning Ordinance, specifically PZO §10.635.30, which requires notification to abutters in accordance with State Law. As Mr. Britz is not empowered to consider any of Petitioners claims regarding the merits of Petitioners' arguments regarding the five variance criteria, the ZBA also may not, at this time, address the merits of Petitioners' claims regarding the variance criteria, unless and until it determines that Mr. Britz improperly interpreted the Ordinance. We reserve the right to submit an objection to Petitioners' Request for Rehearing should the ZBA grant Petitioners' Administrative Appeal.

V. CONCLUSION

In summary, Petitioners are unable to demonstrate that Peter Britz erred determining their Request for Rehearing was untimely. Accordingly, the Administrative Appeal must be denied.

Respectfully submitted,

David Sinclair & Nicole Giusto

By their attorneys

Hoefle, Phoenix, Gormley & Roberts, PLLC



R. Timothy Phoenix

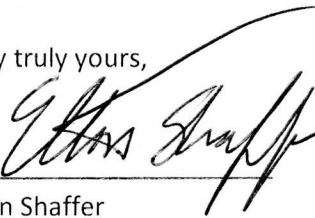
Monica F. Kieser

May 27th, 2022

To Whom it May Concern:

We Elton Shaffer and Paula Rais, own a property at 748 Middle St, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Elton Shaffer



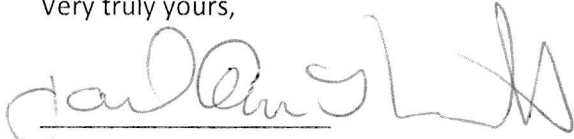
Paula Rais

September 9th, 2022

To Whom it May Concern:

I Joel Ann Thibeault, own a property at 670 Lincoln Ave, Portsmouth, New Hampshire. I am abutter to/ neighbor of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that I have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joel Ann Thibeault", written over a horizontal line.

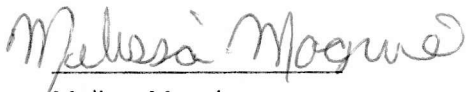
Joel Ann Thibeault

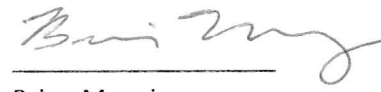
September 8th, 2022

To Whom it May Concern:

We Melissa & Brian Maguire, own a property at 774 Middle St #3, Portsmouth, New Hampshire. I am abutter to/ neighbor of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that I have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,


Melissa Maguire

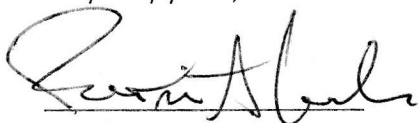

Brian Maguire

September 9th, 2022

To Whom it May Concern:

We Patricia and Charles Corlin, own a property at 736 Middle St, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Patricia Corlin



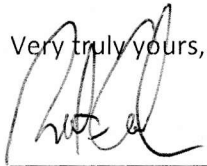
Charles Corlin

September 8th, 2022


To Whom it May Concern:

We Robert Graham and Karen Graham, own a property at 664 Lincoln Avenue, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Robert Graham



Karen Graham

Sept 8th, 2022

To Whom it May Concern:

We Peter Dawson and Karen Dawson, own a property at 648 Lincoln Ave, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Peter Dawson



Karen Dawson

Follow up re variance 765 Middle Street

Kristie Jorgensen <knejorg@gmail.com>
cc: sleddiver@gmail.com
cc: "Nathan H. Jorgensen" <nhjorgensen@mac.com>

Tue, Sep 20, 2022 at 10:22 AM

Dear David and Nicole,

We received your packet in our mailbox last week after returning from our trip traveling abroad. It was addressed to a "Carla" but we are the current owners across the street, located at 774 Middle Street, Unit 1, Portsmouth, NH.

My apologies for a delayed response but I am still ill with a Covid infection from our trip back home. I hope we are not too late in offering our support for your variance request. I just wanted to let you know that we, as abutters to the subject property at 765 Middle Street, Portsmouth, NH support your variance request and feel that it will be a very pleasant addition to the neighborhood. It does not impact parking or impact abutting structures and conforms nicely with the area and for the historic district.

Please feel free to reach out to us in the near future if you need further support in any way. As abutters and good neighbors, we are here to help.

All the best to you and your plans.

Kristie and Nathan Jorgensen
774 Middle Street, Unit 1
Portsmouth, NH 03801
Kristie's Cell: 603-767-7182
Email: knejorg@gmail.com

KRISTIE JORGENSEN

Vice President, Associate Broker, Realtor
Licensed in ME & NH

Legacy Properties Sotheby's International Realty

141 Maine Street, Brunswick, ME 04011

cc 603-767-7182 | ME 207-200-5082

kjorgensen@legacysir.com

MyProfile | LegacySIR | SothebysRealty

January 9th, 2023

To Whom it May Concern:

We Shelley Vessels and Corey Vessels, own a property at ^{795 Middle St}~~635 Lincoln Ave~~, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,

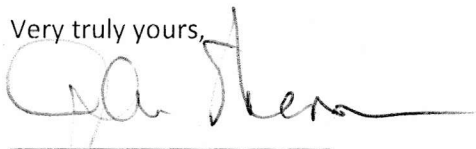

Corey & Shelly Vessels

January 9th, 2023

To Whom it May Concern:

We Marcia ~~Shearman~~^{Shearman} and John ~~Shearman~~^{Shearman}, own a property at 635 Lincoln Ave, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



John & Marcia Shearman

<  **Nicole Neighbor** ▾



Friday, May 27, 2022

Hi David 17:35

17:37 Got it.
David & Nicole Sinclair

Sunday, December 4, 2022

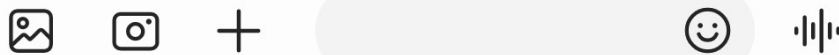
Hi David and Nicole , it's Nicole at 733 Middle Street. I received the abutter notice from the town in regards to the garage and the hearing on 12/14. As I mentioned I am not opposed to the garage so long as it is not blocking my windows. could you please email me the plans so I can see where the ga

View all > 11:23

Monday, December 5, 2022

19:27 Nicole, let me know that you received the plan via email when convenient. Thanks!

I received it --thank you! I'll take a look 19:57



 **Nicole Neighbor**

11:23, Dec 4

Hi David and Nicole , it's Nicole at 733 Middle Street. I received the abutter notice from the town in regards to the garage and the hearing on 12/14. As I mentioned I am not opposed to the garage so long as it is not blocking my windows. could you please email me the plans so I can see where the garage will be located. My email is nmb3000@hotmail.com. Thanks!



Copy text



Share



More





David Sinclair <sleddiver@gmail.com>

Garage

1 message

David Sinclair <sleddiver@gmail.com>
To: nmb3000@hotmail.com

Mon, Dec 5, 2022 at 10:00 AM

Hi Nicole, I received your text last night. Attached is what has been submitted to the City.

David Sinclair

4 attachments



765 Middle St rendering 3.jpg
2043K



765 Middle St, Lincoln Ave rendering 2.jpg
1321K

 **Site plan Altus.pdf**
551K

 **2022-09-23 765 Middle Landscape Plan.pdf**
1140K