

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

REQUEST FOR REHEARING

TO: Portsmouth Zoning Board of Adjustment (“ZBA”)
FROM: R. Timothy Phoenix, Esquire
DATE: November 16, 2023
RE: Request for Rehearing
The Francis E. Mouflouze Revocable
Trust of 2015, Owner/Applicant
Property Location: 550 Sagamore Avenue
Tax Map 222, Lot 11, Single Residence (SRB) District

Dear Chair Eldridge and Zoning Board Members:

Now come Francis E. Mouflouze, Ted W. Alex and Patricia Cameron, Trustees of The Francis E. Mouflouze Revocable Trust of 2015 (“Mouflouze” or “Applicant”) and request that the Zoning Board of Adjustment (“ZBA”) rehear and reverse its October 17, 2023 decision denying two (2) requests for variance relief. Applicants’ submission dated September 26, 2023 and oral presentation on October 17, 2023 are incorporated herein by reference.

I. EXHIBITS

1. 10/24/23 Notice of Decision/Findings of Fact- 10/17/23 Hearing.
2. Draft Minutes of 10/17/23 ZBA Meeting.
3. Tax Maps 222 and 223.
4. Zoning Map of 550 Sagamore Ave and vicinity.

II. RELIEF REQUESTED

1. **PZO§10.513-** To permit two (2) dwelling buildings (4 units) on a 1.44 acre lot where one dwelling is permitted; and
2. **PZO§10.440 Table of Uses-** To permit two (2) duplexes where duplexes are prohibited.

III. STANDARD OF REVIEW

Within 30 days after any... decision of the Zoning Board of Adjustment... any party to the action or proceedings... may apply for rehearing in respect to any matter determined in the action specifying in the motion for rehearing the grounds therefor; and the Board of Adjustment may grant such rehearing if in its opinion good reason therefor is stated in the motion. RSA 677:2.

DANIEL C. HOEFLE

R. PETER TAYLOR

GREGORY D. ROBBINS

OF COUNSEL:

R. TIMOTHY PHOENIX

ALEC L. MCEACHERN

PETER V. DOYLE

SAMUEL R. REID

LAWRENCE B. GORMLEY

KEVIN M. BAUM

MONICA F. KIESER

JOHN AHLGREN

STEPHEN H. ROBERTS

JACOB J.B. MARVELLEY

STEPHANIE J. JOHNSON

A motion for rehearing. Shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. RSA 677:3, I.

The purpose of the statutory scheme is to allow the ZBA to have the first opportunity to pass upon any alleged errors in its decision so that the court may have the benefit of the board's judgment in hearing the appeal. Town of Bartlett Board of Selectmen v. Town of Bartlett Zoning Board of Adjustment, 164 NH 757 (2013). Rehearing is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the courts. Fisher v. Boscawen, 121 NH 438 (1981).

IV. RELEVANT PROJECT FACTS

550 Sagamore Ave. is a 1.44 acre (62,754 s.f.) lot in the SRB zoning district (“zone” or “district”) with 139.8 feet of frontage, upon which is a circa 1960 single-family home with the front steps slightly encroaching into the front setback. Mouflouze proposes to raze the existing dated building and other improvements in favor of two (2) duplex buildings with four (4) total units.

Two duplex units on 1.44 acres or 62,726 s.f. equals 2.78 units per acre, thus meeting the underlying purpose of the SRB zone to provide dwellings “at low to medium densities (approximately 1 to 3 dwellings per acre),” PZO§10.410, as well as the SRB lot size requirement of 15,000 sf per dwelling unit.” PZO§10.521. The subject lot is in an area of Sagamore Avenue where several different zoning districts meet or are in very close proximity. Directly across the street are the Sagamore Court Apartments in the GA/MH District with 144 units on 15.01 acres. Density is 9.6 units per acre, far exceeding GA/MH purpose to provide for garden apartments at moderate densities of up to 4 dwellings per acre PZO §10.410, as only 65 units would be permitted pursuant to the PZO §10.521 requirement of 10,000 sf per dwelling unit (15.01 acres x 43560sf/acre= 653,836sf/10000sf= 65.38). Also, across the street, one lot south of Sagamore Court, is the Tidewatch condominium complex in the SRA District, the purpose of which is to provide areas for single family dwellings at low to medium densities, approximately 1 to 3 dwellings per acre. With 117 units on 53.59 acres, density is compliant at 2.18 units per acre, PZO sec. 10.10410, but meets neither the current zoning ordinance SRA purpose of single-

family dwelling units, Id, nor the maximum of 53 units which could be placed on the lot given the 1 acre minimum lot size per dwelling unit. PZO sec, 10.521.¹

Examination of the lots closest to the subject lot on the same side of Sagamore Avenue reveals a number of homes meeting the 15,000 square-foot per dwelling requirement; however, lot 10 immediately to the left is and lot 8 three to the left, are pursuant to the Tax Map, on 11,250 s.f. lots, while lot 13 is, an 11,805 s.f. lot two lots to the right of the subject lot. **Exhibit 3**. Six of the 14 lots on the same side of Sagamore as the subject lot, from Little Harbor Road to Cliff Road appear to not meet the PZO 100 foot frontage requirement. Id

Approximately 2/10 of a mile north of 550 Sagamore in the area of Verdun Avenue between Marne Ave. and Sagamore Ave. are approximately 16 house lots in the GRA District, **Exhibit 4**, the purpose of which is to provide for “single-family two-family and multifamily dwellings at moderate to high densities, ranging from approximately 5 to 12 dwelling units per acre.” PZO§10.410. The GRA district requires 7500 s.f. per lot. While a number of the homes in that area meet the general purpose of 5 (8712 s.f.) to 12 (3630 s.f.) dwelling units per acre, half of those lots including two on Sagamore Avenue do not meet the 7500 s.f. minimum lot size requirement. Five of those lots do not meet minimum frontage requirements.

Approximately 2/10 of a mile to the south near the Sagamore Avenue/ Cliff Road intersection are four (4) homes in the SRB zone, two of which meet neither the 15,000 s.f. minimum lot size requirement; nor the 150' frontage requirement. One of those lots, at the northerly corner of the Sagamore Avenue/Cliff Road intersection is a three unit building in the SRB zone on a 14,723 square-foot lot, **Exhibit 2, Map 223**. Across Sagamore Avenue and three lots south of the subject are five lots depicted on Tax Map 222 in the SRA zone, four of which meet neither the SRA one acre minimum lot area per dwelling unit, nor 150 foot minimum frontage.

The importance of the above is that although it is in the SRB zone, 550 Sagamore is located in a transition/mixed zoning district and home style area, including:

¹ It was suggested at the October 17, 2023 Hearing that Tidewatch was approved as an open space Planned Unit Development, the density of which today is determined by the number of lots that could be developed in a conventional subdivision, which here appears to somewhere south of 53 Units. PZO §10.723.1, §10.725.2.

- i) Four different zoning districts in close proximity (GRA, GA/MH,SRA,SRB). (**Exhibit 4**)
- ii) Several Lots in the immediate vicinity of the subject in the SRB zone that do not meet the 15,000 s.f. per lot and/or frontage requirements. (**Exhibit 3**)
- ii) Various housing styles ranging from single-family on zoning compliant lots, single-family on small non-zoning compliant lots, garden style apartments, and townhouse style condominium units.

Given that several different zoning districts and several different styles of residential living exist abutting or in close proximity to the subject lot, with a number nonconforming with respect to lot size/density and/or frontage the requested relief must be viewed through the lens of the visible lots along Sagamore from Jones Avenue/Verdun Avenue to Cliff Road area, rather than limited to the SRB zone nearest the subject, the majority of which are not immediately visible among the varied residential uses and housing size along Sagamore Avenue.

V. THE ZBA ERRED, REQUIRING REHEARING, IN FINDING THAT THE APPLICANTS TWO VARIANCE REQUESTS DID NOT OBSERVE THE SPIRIT OF THE ORDINANCE OR HARDSHIP REQUIREMENTS².

A. The 10/24/23 notice of decision/findings of fact and erroneously applied the “spirit of the ordinance” and “hardship” requirements.

1. PZO sec. 10.233.22-granting the variance would observe the spirit of the ordinance.

The reasoning offered by the ZBA in the findings of fact is that “the property is presently in conformity with the zoning ordinance and granting the variance would make it out of conformity.” Respectfully such a finding is an improper, thus unlawful, basis for finding that the spirit of the ordinance is not met. The law is clear that a variance cannot be denied simply because the request does not comply with the requirements of the zoning ordinance. ZBA findings that a variance is contrary to the public interest and inconsistent with the spirit of the Ordinance require more than mere conflict. Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005); (See also Malachy Glen Associates, Inc. v. Town of Chichester, 152

² The notice of decision and findings of fact each provide that the applicant did not meet the requirements for spirit of the ordinance and hardship. There is no comment in either document with respect to public interest, the value of surrounding properties, and substantial justice. It is thus concluded that the application met the requirements for public interest, value of surrounding properties and substantial justice, or in the alternative, the ZBA’s failure to address these requirements is itself a basis for rehearing.

N.H. 102, 107 (2007) (“The mere fact that the project encroaches on the buffer, which is the reason for the variance request, *cannot* be used by the ZBA to deny the variance.”). Indeed, the very reason that zoning ordinances, thus zoning boards of adjustment, exist is to provide a relief valve from the strict requirements of an ordinance. Loughlin, 15 New Hampshire Practice, Land Use Planning and Zoning, §24.02.

The New Hampshire Supreme Court has found that the spirit of the ordinance test is closely related to the public interest test, the overarching consideration of which is, pursuant to Malachy Glen, supra and its progeny, whether granting a variance “would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” The purpose of establishing different zoning districts with respect to uses, lot sizes, and other dimensional requirements is to keep similar uses together, and provide consistency with respect to uses and dimensional requirements in different districts. Here, however, there are four different zoning districts touching or in close proximity to each other, each permitting different uses, lot sizes, overall intended density, and type/style of housing. As discussed in Section 4 *supra*, these differences include: garden style apartments permitted in the GA/MH zone though violating present density requirements; townhouse style condominium units that meet density requirements but do not meet the current requirements for single-family homes in the SRA District; single-family homes in the GRA zone near Verdun Avenue, only about half of which meet lot size and/or frontage requirements; and homes in the subject’s SRB zone, a number of which do not meet current lot size and/or frontage requirements, including at least three in very close proximity to the subject, and a number of others in the SRB district on Sagamore Avenue in the vicinity of Cliff Road.. Because of the eclectic mix of differing zones with differing dimensional requirements, and relatively consistent nonconformance of properties in each zone with the requirements for density, lot size and/or frontage, it follows that permitting four units in two duplexes in such varied area “fits”, thus does not violate the ordinance’s basic zoning objectives.

The Malachy Glen court found that the spirit of the ordinance is similar to and is therefore considered with the public interest test, concluding that whether the variance violates basic zoning objectives requires a determination that it would “alter the essential character of the locality” or “threaten the public health safety or welfare.” *Id.* Because the locality is defined by four different zones within a relatively small and discrete area, each permitting different uses, lot

sizes and other dimensional requirements, where there are numerous lots in the various districts that do not meet, dimensional requirements, the locality's "essential character" is varied, consisting of several transition areas and housing types from one zone to another. Permitting two duplexes/four units on a lot meeting density and frontage requirements in an area where there are garden style apartment complexes, townhouse style condominiums, four permitted single-family homes on a single lot across the street, and numerous homes in the residential zones that do not meet density/lot size and/or frontage requirements, the proposed density compliant two duplexes/four units does not alter the varied essential character of the locality. Moreover, two duplexes/four units will be much less impactful than would a standard subdivision with three stand-alone single-family homes that would require vastly more pavement, and would eliminate the wooded area to the rear of a lot, preserved in the current plan. As such, and since the new homes would be completely code compliant, granting the variances does not threaten the public health, safety or welfare.

2. PZO sec. 10.233.25- literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

In its findings of fact, the ZBA found that the hardship test was not met because:

- The applicant's lot is bigger than some lots and smaller than others and the 140 foot width is plenty of room for the applicant to put a 3 house subdivision and not even move the original house.
- The applicants lot can be reasonably used in the way it is zoned and there is currently a single-family home on it now. **(Exhibit 1)**

Respectfully, the ZBA has misapplied the hardship requirements. The first prong of the hardship test is whether special conditions distinguish this property from others in the area. The answer to that question is yes. The subject lot is four times the required minimum lot size. The immediate northerly lot, another three lots doors away, and a southerly lot two lots doors away do not meet the minimum lot size and frontage requirements. In both directions near Cliff Road and Verdun Avenue are homes that are on much smaller lots than the subject lot. Almost directly across the street are two very large lots with a multi-apartment complex containing multiple large buildings and a large multi-building townhouse style condominium complex. Only a small handful of lots in the SRB zone are within the immediate proximity to the large apartment complex and condominium complex.

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

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

Consider also Rancourt v. City of Manchester, 149 N.H. 51 (2003) (Hardship also exists if special conditions of the land render the use for which the variance is sought is reasonable and special conditions include the property's unique setting in its environment). Given: the several different zoning districts in close proximity; various sized lots and lot size requirements in the area; large residential buildings across the street; many nearby lots noncompliant with the density, lot size and/or frontage requirements of the zone in which they are located, and where the proposed project is less impactful than a standard subdivision, the subject location is unique, Id. thus has special conditions. See Walker, supra. Likewise, the nature of the area, and the negative effects of a standard subdivision demonstrate that there is no rational basis for applying the strict requirements of the zoning ordinance by prohibiting duplexes and two dwelling structures on one lot.

B. A review of the October 17, 2023 ZBA hearing video reveals error, requiring rehearing based upon the deliberations of the ZBA.

A review of the video of the 10/17/23 ZBA meeting, which can be found at <https://www.youtube.com/watch?v=d6pKNXlbC-k> reveals the following time stamped paraphrased comments of ZBA members:

1:02:35 Ms. Margeson- notes that the subject lot it is larger than some and smaller than some. **Response:** The comparative size of lots, lot area per dwelling unit, frontage and the general area regardless of zone is the proper consideration.

1:04:20 Notes that all of the SRB homes are single-family. **Response:** there is at least one lot along Sagamore Avenue, at Cliff Road in the SRB zone that is a three unit. As referenced above, numerous parcels in all four nearby zones do not meet current lot size and/or frontage requirements of their respective zones. The overall area should be considered, not the SRB zone alone, given the transitional area.

1:05:35 Mr. Rheume notes that relief for multiple units is possible if the lot is large enough. **Response:** Agreed.

1:05:55 Notes that there is a basis for hardship. **Response:** Agreed.

1:06:20 Notes the relationship of public interest and spirit of the ordinance tests. Identifies the structures as significant. **Response:** The structures are larger than some residential structures in the area and smaller than others including the Sagamore Court apartments and the Tidewatch townhouse condominiums.

1:08:02 Notes the possibility of three units one behind the other

1:10:01 Mr. Mandle-moved to deny, finds no special conditions thus no hardship. **Response:** As set forth above, there are clearly special conditions given the subject lot's transitional location.

1:10:39 Notes that new single-family homes could be built behind the existing home without moving it. **Response:** A subdivision would be more impactful upon the neighborhood as it would require significantly more pavement and clearing the entire lot where the proposal saves a large wooded area to the rear

1:12:08 Ms. Margeson-Comments that there is no hardship. Lot can be built upon in conformity with the ordinance. **Response:** As outlined above, the fact that a variance is required is not a reason for denial. Similarly, the fact that the lot is four times the minimum lot size located in an area of varied zoning districts, lot sizes and housing type is a special condition.

1:13:22 Chair Eldridge- Notes that denial is a benefit to the public. **Response:** The ZBA did not find enter a finding with respect to substantial justice. Further, the general public is in no way harmed by two duplexes and four units in an area of four nearby or adjoining zoning districts with differing lots ranging from single-family homes on compliant lots, single-family homes on noncompliant lots, large apartment buildings and townhouse condominiums.

In summary, the “spirit of the ordinance” comments of the zoning board members during deliberations, as embodied in the Notice of Decision and Findings of Fact, essentially that the property is in conformance with the ordinance and a variance would take it out of conformity is not a valid basis for denial, as it results in a denial simply because the variance is requested. Similarly, the ZBA incorrectly applied the requirements for hardship. The test is not only whether the lot is larger or smaller than others, nor whether a three-lot subdivision could be approved. It is whether the property has special conditions that distinguish it from other properties in the area. The “area” is not just the SRB area but the larger area from Jones Avenue to Cliff Road. Compared to that larger area which includes four different zones and multiple different housing sizes and styles, with a number of lots not meeting dimensional requirements, the subject lot has special conditions. That the lot can be used the way it is today with a single-family home again results in the denial simply because relief was sought. The test is whether due to the special conditions there is a fair and substantial relationship between the general purposes of the ordinance and its application in this instance. Given the multiple zones, multiple sizes of lots, differing sizes and styles of homes, and numerous nonconformities within the area, the project fits in with the varied nature of the area, so there is no fair and substantial relationship between the purposes of the ordinance and its application to this property.

Finally, while the Notice of Decision and Findings of Fact provide only that the “spirit of the ordinance” and “hardship” requirements were not met, the minutes reveal commentary that “other” requirements were not met (**Exhibit 3, p.10, 11** comments of member, Rheume). Absent findings of fact *thereupon* as required by RSA§676:3, rehearing is justified.

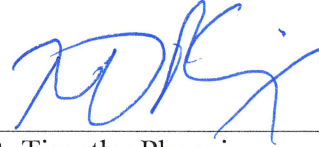
VI. CONCLUSION

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

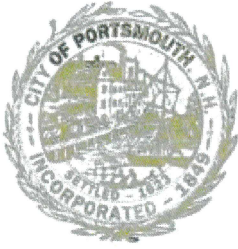
Respectfully submitted,

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

By: _____



R. Timothy Phoenix



CITY OF PORTSMOUTH

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

ZONING BOARD OF ADJUSTMENT

October 24, 2023

Frances E. Mouflouze Revoc Trust of 2015
936 South Street #1
Portsmouth, New Hampshire 03801

RE: Board of Adjustment request for property located at 550 Sagamore Avenue (LU-23-164)

Dear Property Owner:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, October 17, 2023**, considered your application for demolishing the existing structure and constructing two duplexes (creating a total of 4 living units) which requires the following: 1) Variance from Section 10.513 to allow more than one free-standing dwelling unit on a lot; and 2) Variance from Section 10.440 Use #1.30 to allow the construction of duplexes where they are not permitted. Said property is shown on Assessor Map 222 Lot 11 and lies within the Single Residence B (SRB) District. As a result of said consideration, the Board voted to to **deny** the request because it did not meet the spirit of the ordinance or hardship criteria as the lot is oversized and is presently conforming.

The Board's decision may be appealed up to thirty (30) days after the vote. Please contact the Planning Department for more details about the appeals process.

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

Very truly yours,

Phyllis Eldridge, Chair of the Zoning Board of Adjustment

cc:

R. Timothy Phoenix, Esq; Hoefle, Phoenix, Gormley & Roberts, PLLC
Eric D. Weinrieb, PE; Altus Engineering, Inc.

Findings of Fact | Variance

City of Portsmouth Zoning Board of Adjustment

Date: 10-17-2023

Property Address: 550 Sagamore Avenue

Application #: LU-23-164

Decision: **Deny**

Findings of Fact:

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

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

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.		
10.233.22 Granting the variance would observe the spirit of the Ordinance.	NO	<ul style="list-style-type: none"> The property is presently in conformity with the zoning ordinance and granting the variance would make it out of conformity.
10.233.23 Granting the variance would do substantial justice.		
10.233.24 Granting the variance would not diminish the values of surrounding properties.		
10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. (a)The property has special Conditions that distinguish it from other properties in the area. AND	NO	<ul style="list-style-type: none"> The applicants lot is bigger than some lots and smaller than others and the 140-ft width is plenty of room for the applicant to put a 3-house subdivision and not even move the original house. The applicants lot can be

<p>(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.</p> <p>OR</p> <p>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>reasonably used in the way it is zoned and there is currently a single-family home on it now.</p>
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**MINUTES OF THE
BOARD OF ADJUSTMENT MEETING
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

October 17, 2023

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

MEMBERS EXCUSED: ML Geffert, Alternate

ALSO PRESENT: Stefanie Casella, Planning Department

Note: The timestamp denotes the time of the recording. Chair Eldridge called the meeting to order at 7:00 p.m. Ms. Record was seated for voting on all items in the excused absence of Ms. Geffert.

~~I. APPROVAL OF MINUTES~~

A. Approval of the September 19, 2023 minutes.

*Mr. Mannle moved to **approve** the September 19 minutes as **amended**, seconded by Mr. Mattson. The motion **passed** by unanimous vote, 7-0.*

The following amendments were made:

On page 3, top of the page, the word “clarify” was changed to “clarity” and the word “postponed” was changed to “postponement”, so the sentence reads as follows: Mr. Rheaume said ... it was a complicated case and there was some lack of **clarity**, so the **postponement** was made to give the application the opportunity to get more information. On page 5, second to last line, unnecessary “change” was changed to “hardship”, so the sentence reads as follows: Mr. Mattson said there were more variances requested before and he had not seen an unnecessary hardship within the side yard setback, but since it was no longer asked for, the only thing left was whether the lot size was an unnecessary **hardship**. On page 10, last line, the word “district” was changed to “distract”, so the sentence reads as follows: He said the mural was a reasonably-sized piece of art work and in a parking lot that would not **distract** drivers.

B. Approval of the September 26, 2023 minutes.

*Mr. Mannle moved to **approve** the September 26 minutes as submitted, seconded by Vice-Chair Margeson. The motion **passed** by a unanimous vote of 7-0.*

~~Mr. Mannle moved to grant the variances as presented, seconded by Mr. Rossi.~~

Mr. Mannle referred to Sections 10.233.21 and .22 of the ordinance and said the project would not be contrary to the public interest and would observe the spirit of the ordinance. Referring to Section 10.233.23, he said granting the variances would do substantial justice because it was a mural and there was no ordinance for murals. He said the mural was clearly not a sign and was approved by the HDC, and the applicant just needed the setbacks for where the transformers would be covered up. Referring to Section 10.233.24, he said granting the variances would not diminish the values of surrounding properties. Referring to Section 233.25, he said literal enforcement of the provision of the ordinance would result in unnecessary hardship because the property has special conditions that distinguish it from others in the area and, owing to those special conditions, a fair and substantial relationship does not exist between the general public purposes of the ordinance's provision and the specific application of that provision to the property, and the proposed use is a reasonable one. He said the mural will cover up the transformer boxes and it was only before the Board because it was slightly closer to the sidewalk and was a mural, not a sign, which was a hardship. Mr. Rossi concurred and said there was published documentation of the historical significance of the woman presented on the mural, which was important because as the Board approved those types of murals, it would be important to be sure of the historical accuracy and relevance of the murals and the fact that the murals did not migrate into other territories of various things that could be on them.

Vice-Chair Margeson said she would not support the motion and wondered why the mural wouldn't face the pocket park so that people could actually read it. She said it would be distracting to drivers. She said if something was not in the zoning ordinance, which a mural wasn't, the Board was not supposed to be approving variances for it. She noted that the Board had a similar situation with an applicant who wanted to open an art studio in her home but there was no art studio in the ordinance, so the Board did not approve it. She said she would not support the motion for those reasons.

~~The motion passed by a vote of 6-1, with Vice-Chair Margeson voting in opposition to the motion.~~

- C. The request of **Frances E. Mouflouze Revocable Trust of 2015 (Owner)**, for property located at **550 Sagamore Road** whereas relief is needed to demolish the existing structure and construct two duplexes (creating a total of 4 living units) which requires the following: 1) Variance from Section 10.513 to allow more than one free-standing dwelling unit on a lot; and 2) Variance from Section 10.440 Use #1.30 to allow the construction of duplexes where they are not permitted. Said property is located on Assessor Map 222 Lot 11 and lies within the Single Residence B (SRB) District. (LU-23-164)

Mr. Rossi recused himself from the following petition.

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant, along with project engineer Eric Weinrieb and Brian White, who prepared the Analysis Property Value Impact Report. Attorney Phoenix reviewed the petition and criteria in detail. [Timestamp 5:06]

Vice-Chair Margeson asked what the hardship was in not being able to building another single-family dwelling on the lot. Attorney Phoenix said it was due to the lot's special conditions of being the largest property in the area, four times the size of the minimum required lot size for a single family home. He said most of the lots in the vicinity were that large and noted that the Board granted multi-family units at the Luster King site. He said, given the lot's location compared to other lots and densities in the area and considering the area where the zoning areas met, the lot had special conditions. Mr. Mannle asked how the current house was nonconforming, noting that the Staff Report said everything about the existing house was conforming. Attorney Phoenix said the front porch and steps went over the front setback line slightly. Ms. Casella said the City went by the survey information. Mr. Rheaume said it was apparent from the existing home photos that the current home was elevated relative to the street level, and he asked if the intent was to have the new structures also elevated or if there would be excavation. Mr. Weinrieb said the grade went up substantially behind the house and the new structures would be up a bit higher than the street, with stormwater draining back toward the front. He said they would not overly excavate the site but would work with its natural contours, which he further explained.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Sue Harding of 594 Sagamore Avenue said she was an abutter and thought the zoning would not change when she bought her home in 1997. She said her property had a buffer where there was a lot of wildlife that had to be protected and that she couldn't see why the Board would want to change the privacy, land, and nature behind the abutters' homes that had been that way for decades. She said allowing four dwellings in a unit where only one was allowed was spot rezoning and that the project did not meet any of the criteria and might set a precedent if approved.

Rick Hayes of 40 Walker Bungalow said he was an abutter to 550 Sagamore Road. He said the area was zoned SRB for a reason and that the proposal violated the zoning. He said the applicant wanted to maximize profits and that it would accelerate the exit of longtime residents.

Linda Brown of 650 Sagamore Avenue said adding more dwellings than zoned for would be detrimental and would add more traffic to an already busy road as well as pose safety concerns. She said changing zoning for financial gain did not pose a hardship.

Richard Wilder of 58 Walker Bungalow Road said he had lived there for 54 years and was an abutter. He said the requested variances went against the character and nature of the community and

that the applicant's attempt to relate the zoning of areas across the street as justification for the project was irrelevant. He said the project did not meet any of the criteria and that the ordinance for single-residence zones was a covenant to protect the homeowners and their land.

Alden Sweet of 72 Walker Bungalow Road said he abutted the property in the back corner. He said the variance requests should be rejected because the SRB District zoning did not allow duplexes. He said the anticipated market values of the duplex units would be in the range of one million dollars or more each, which wasn't a hardship. He said Portsmouth had a shortage of workforce housing and the applicant's proposal was not affordable housing. He said it would not improve the surrounding area and noted that what went on in Dover and Durham had no bearing on Portsmouth.

Eric McKnight of 546 Sagamore Avenue said if the project was approved, the duplexes would look into his side of the house where the kitchen, bedrooms and living room were. He said he thought he and his family were moving into a single-family dwelling zone when he bought the house a few months ago, and the project would change his home and his investment. He said he would not have bought his home if there were four dwellings looking into a side of it.

Joan Christy of 576 Sagamore Avenue said she had lived in her home since the 1980s and that the development would affect her because instead of looking out at the land that had stayed the same for about 150 years, she would now look out at a wall. She said the proposal would pave the way for the condoization of the neighborhood. She said the Board's decision had important implications.

Jim Lee of 520 Sagamore Avenue said he was a real estate broker of 43 years and thought cramming four housing units on one lot would alter the character of the neighborhood and injure public rights. He said there was no hardship to allow the project to take place in a neighborhood of single-family homes. He said the project did not meet any of the criteria.

Tim McNamara of 575 Sagamore Avenue, Unit 19, said three of the criteria – the public interest, spirit of the ordinance, and hardship – were not met. He said the reference to other zones as well as a recent approval for 635 Sagamore Avenue wasn't relevant. He said the applicant wanted a permit for four dwellings where one was allowed and for two duplexes were none were allowed.

Paige Trace of 27 Hancock Street said there was no hardship with the land but there was a question with the zoning, otherwise the applicant wouldn't be there. She said the entire neighborhood was opposed to the project and that the only hardship was for the neighborhood and not the amount of money the applicant stood to make or not make.

Petra Huda of 280 South Street said the proposal did not meet the criteria and that the zoning across and down the street and what had been previously approved were irrelevant.

Esther Kennedy of 41 Pickering Avenue said the community members were all abutters and it was up to the Board to decide whether they agreed with the zoning set by their predecessors and whether the five criteria were met. She asked the Board to reflect upon what had happened to some of Portsmouth's neighborhoods and to think about what's right for Portsmouth's future.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Christana McKnight of 546 Sagamore Avenue (via Zoom) said she and her husband chose her home because it was in a Single Residence Home District and said she was against the proposal.

Attorney Phoenix said they would agree to a condition that the rear area would be left in its current condition. He said the Board, when looking at the consideration for variances, looks at the overall neighborhood and can't just look at the five or six house lots in that particular strip, one of which didn't meet the density requirements. He said the applicant tried to do something consistent with the area and the prices of the condos would be more affordable than three houses. He said they never said it was affordable housing and that there were no other examples in Portsmouth to draw from except in Dover and Durham. He said the duplexes made sense in that area.

Jim Lee said the proposal was contrary to the public interest, did not observe the spirit of the ordinance, and did not provide substantial justice. He said it would also diminish the values of surrounding properties and that the hardship had to be with the land and not anything else, so there was no hardship with that lot because it was the same as every lot on the street.

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

DECISION OF THE BOARD

[Timestamp 1:02:38] Vice-Chair Margeson said she would not support the application, noting that it was an eclectic mix of zoning but the Sagamore Court was garden apartment manufactured housing, the Tide Watch Condos was a planned unit development allowed by zoning because it was over ten acres, and the recent application for the Luster King site had more units on the lot than allowed but was a commercial use that brought the lot into compliance with surrounding areas. She said an argument for the hardship was that the lot was bigger than most of the surrounding lots but that it wasn't by much. She said in a sea of single-residence homes, it would be the only duplex and that it looked like a complex with a lot of parking. Mr. Rheume said there were arguments to be made that relief could be had for having multiple units on a single-family lot if it was large enough and that there was a potential for hardship because the lot was four times larger than required in the zoning ordinance, but he wasn't sure if that meant there could be four units on it. He said he saw the petition failing on two other criteria and perhaps a third. He said the applicant admitted that the proposed structures were out of character with the neighborhood so they wanted to put plenty of screening in front of them so that they would not be seen, which was the Board's first indication that the project was not in keeping with the spirit of the overall neighborhood. He said the property's shape drove a lot of that but wasn't sure that the Planning Board would accept the two structures at an angle to the street. He said it wasn't in keeping with the spirit of the ordinance because the structures were significantly big. He said there were significant hurdles when the applicant went before TAC and the Planning Board.

*Mr. Mannle moved to **deny** the petition, seconded by Vice-Chair Margeson.*

Mr. Mannle said he did not see the hardship or any special conditions to the lot relative to the other lots. He said it was bigger than some lots and smaller than others and thought that the 140-ft width was plenty of room for the applicant to put a 3-house subdivision and not even move the first house. He said there was a quirk in the zoning relating to the fact that any land use board approving an application request that requires demolition nixes any abutter's right to appeal that demolition, and that he would not support any application that involved demolishing a single-family home because of that. Vice-Chair Margeson said she didn't think the property had any hardship because it could be reasonably used in the way it was zoned and there was currently a single-family home on it now. She said it was presently in conformity with the zoning ordinance and granting the variance would make it out of conformity. She said it had a spirit and intent problem also.

Mr. Rheume said he would support the motion, although he disagreed with some of the arguments made. He said there was an argument for hardship and thought the proposal failed on other criteria. He pointed out that the Demolition Committee requirement was its own separate ordinance and not a part of the Board's ordinances, and he didn't know if the Board could tie their approval or disapproval to a completely separate ordinance. However, he thought the petition failed and did not meet other criteria. Chair Eldridge said she would also vote in favor of the motion because she thought a denial would provide a benefit to the general public. She said the way the proposed two-family homes sat on the lot would change the way the neighborhood feels.

The motion passed by a unanimous vote of 6-0, with Mr. Rossi recused.

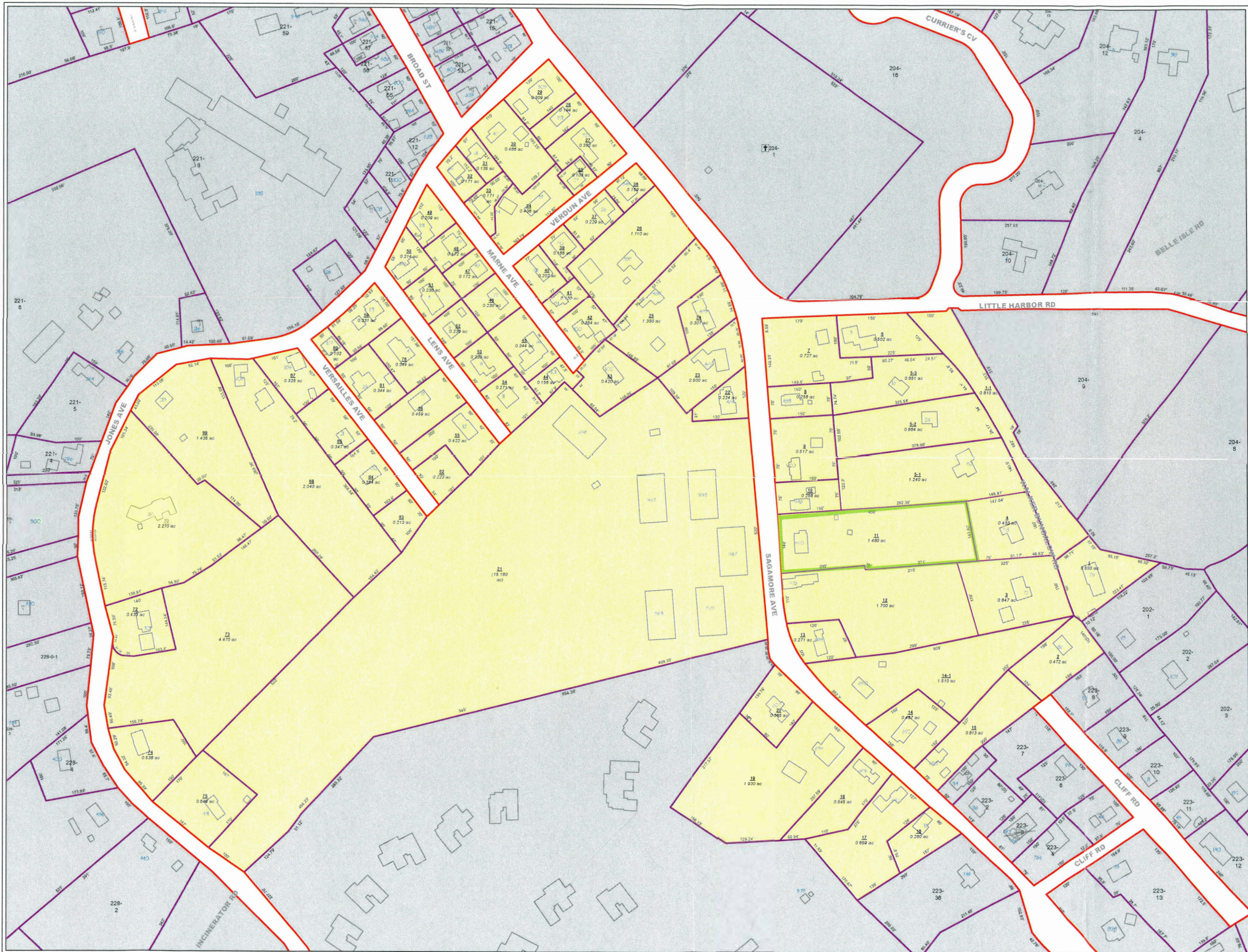
- ~~D. The request of **Portsmouth Submarine Memorial Association (Owner)**, for property located at **569 Submarine Way** whereas relief is needed to construct an addition to the existing building to substantially increase the use which requires the following: 1) Variance from Section 10.440 Use #3.40 to allow a museum where the use is not permitted. Said property is located on Assessor Map 209 Lot 87 and lies within the Single Residence B (SRB) District. (LU-23-165)~~

SPEAKING TO THE PETITION

Attorney Kevin Baum was present on behalf of the applicant, along with project engineer John Chagnon. He noted that Albacore Park was originally approved by special exception and the Visitors Center was built in 1986. He said they proposed to place a 1,584-sf addition onto the Visitors Center to add more exhibit and meeting spaces, and because it was a significant addition it required a variance because it was a museum use in a residential zone. He said a Parking Demand Analysis was also provided. He reviewed the petition and criteria in detail.

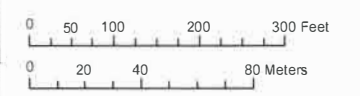
Mr. Rheume said the museum use was originally granted by special exception and asked if the zoning changed. Attorney Baum the ordinance no longer prohibited it. Ms. Casella said she thought it was probably a zoning change and it was further discussed.

~~Chair Eldridge opened the public hearing.~~

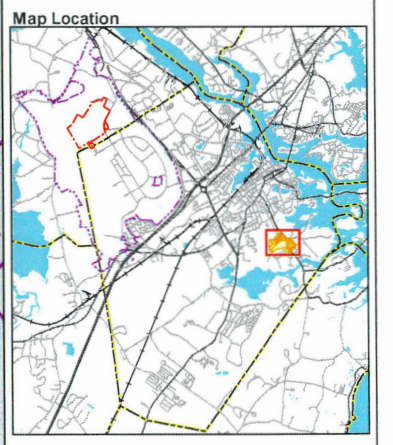
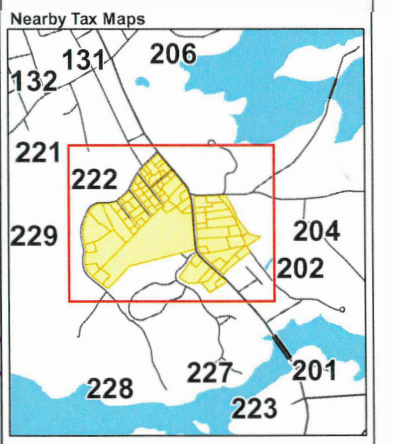


- Partial Legend**
See the cover sheet for the complete legend.
- 7-5A** Lot or lot-unit number
 - 2.56 ac Parcel area in acres (ac) or square feet (sf)
 - Address number
 - 333-137 Parcel number from a neighboring map
 - Parcel line dimension
- SIMS AVE** Street name
- Parcel/Parcel boundary
 - Parcel/ROW boundary
 - Water boundary
 - Structure (1994 data)
 - Parcel covered by this map
 - Parcel from a neighboring map (see other map for current status)

EXHIBIT 3

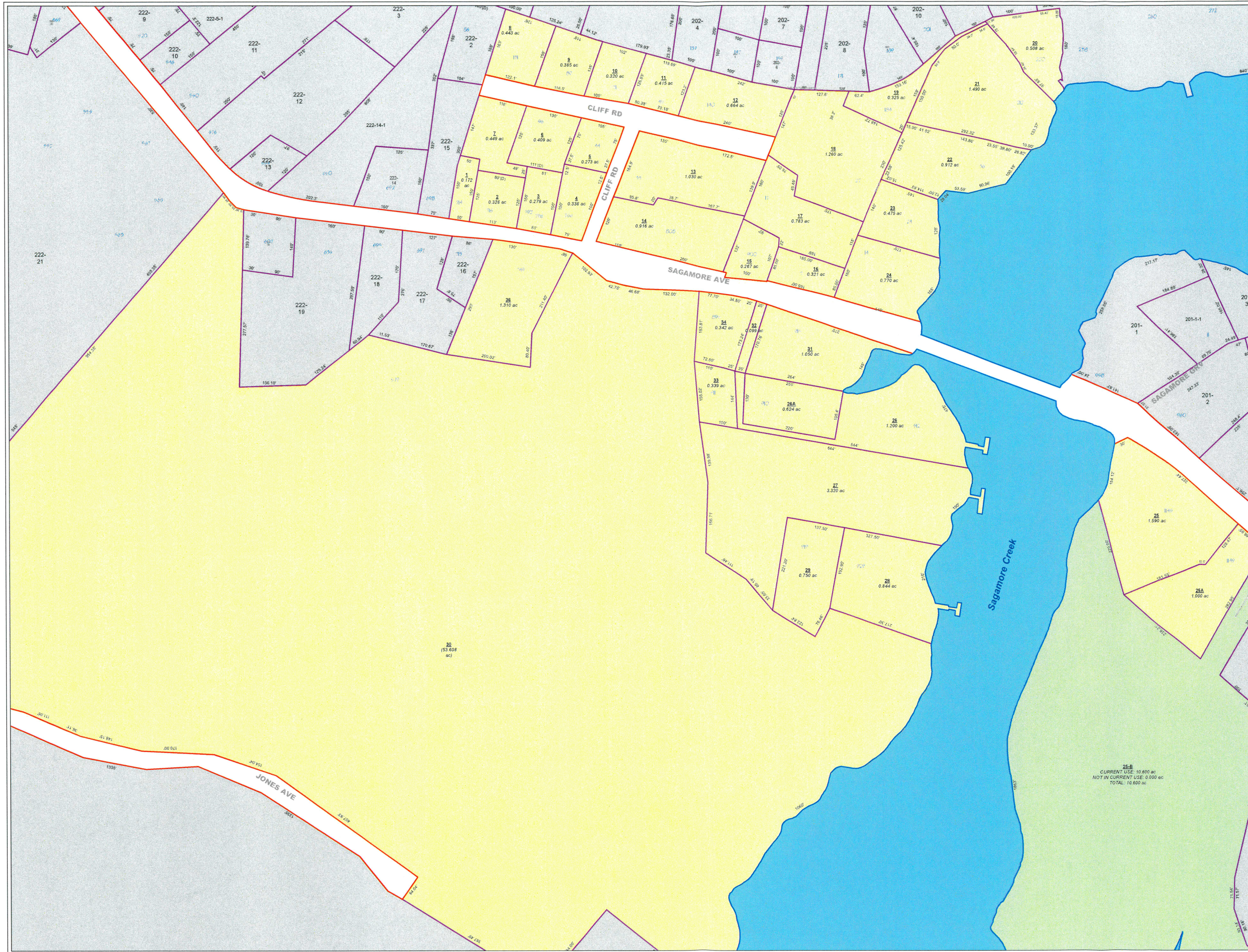


This map is for assessment purposes only. It is not intended for legal description or conveyance. Parcels are mapped as of April 1. Building footprints are 2006 data and may not represent current structures. Streets appearing on this map may be paper (unbuilt) streets. Lot numbers take precedence over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

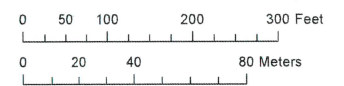


Portsmouth, New Hampshire
2022
Tax Map 222

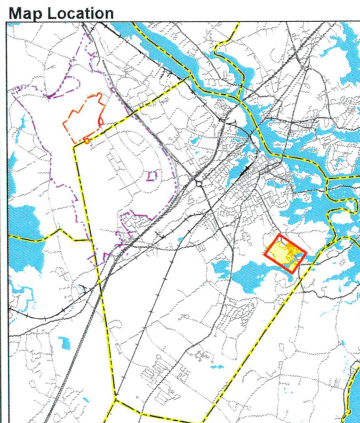
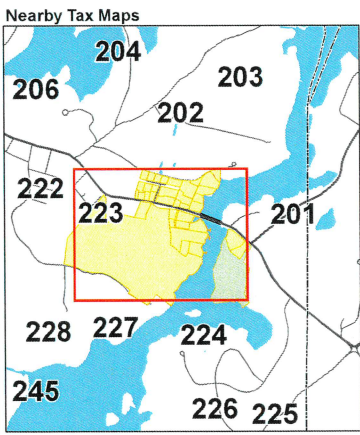
158



- Partial Legend**
 See the cover sheet for the complete legend.
- 7-5A** Lot or lot-unit number
 - 2.56 ac Parcel area in acres (ac) or square feet (sf)
 - 75 Address number
 - 233-137 Parcel number from a neighboring map
 - 68 Parcel line dimension
 - SIMS AVE** Street name
 - Parcel/Parcel boundary
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25-3
 CURRENT USE: 10.600 ac
 NOT IN CURRENT USE: 0.000 ac
 TOTAL: 10.600 ac

550 Sagamore in Context



Google AppGeo

1" = 276.6307153419158 ft



**MAP FOR REFERENCE ONLY
NOT A LEGAL DOCUMENT**

City of Portsmouth, NH makes no claims and no warranties, expressed or implied, concerning the validity or accuracy of the GIS data presented on this map.

Geometry updated 08/24/2023
Data updated 3/9/2022

Print map scale is approximate. Critical layout or measurement activities should not be done using this resource.

EXHIBIT 4

Map Theme Legends

Zoning

- Residential Districts**
 - R Rural
 - SRA Single Residence A
 - SRB Single Residence B
 - GRA General Residence A
 - GRB General Residence B
 - GRC General Residence C
 - GA/MH Garden Apartment/Mobile Home Park
- Mixed Residential Districts**
 - MRO Mixed Residential Office
 - MRB Mixed Residential Business
 - G1 Gateway Corridor
 - G2 Gateway Center
- Business Districts**
 - GB General Business
 - B Business
 - WB Waterfront Business
- Industrial Districts**
 - OR Office Research
 - I Industrial
 - WI Waterfront Industrial
- Airport Districts**
 - AIR Airport
 - AI Airport Industrial
 - PI Pease Industrial
 - ABC Airport Business Commercial
- Conservation Districts**
 - M Municipal
 - NRP Natural Resource Protection
- Character Districts**
 - CD5 Character District 5
 - CD4 Character District 4
 - CD4W Character District 4-W
 - CD4-L1 Character District 4-L1
 - CD4-L2 Character District 4-L2
- Civic District**
 - Civic District
- Municipal District**
 - Municipal District
- Overlay Districts**
 - OLOD Osprey Landing Overlay District
 - Downtown Overlay District
 - Historic District

City of Portsmouth