

# HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC

ATTORNEYS AT LAW

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February 28, 2023

## HAND DELIVERED

Stephanie Casella, Planner  
Portsmouth City Hall  
1 Junkins Avenue  
Portsmouth, NH 03801

Re: Mary McDonald and John McDonald III, Owner/Applicant  
Property Location: 74 Sunset Road  
Tax Map 153, Lot 14  
Single Residence B ("SRB"), LU-22-182

Dear Ms. Casella & Zoning Board Members:

On behalf of Mary McDonald and John McDonald III, enclosed please find the following in support of a request for zoning relief:

- Digital Application submitted via Viewpoint earlier today.
- Owner's Authorization.
- 2/28/2023– Memorandum and exhibits in support of Variance Application

We look forward to presenting this application to the Zoning Board at its March 21, 2023 meeting.

Very truly yours,



R. Timothy Phoenix

Enclosure

cc: Mary McDonald & John McDonald III  
Eric Weinrieb, Altus Engineering (email)  
Butch Ricci, Ricci Construction (email)

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|                     |                      |                    |                      |
|---------------------|----------------------|--------------------|----------------------|
| 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         |

## MEMORANDUM

**TO:** Portsmouth Zoning Board of Adjustment ("ZBA")  
**FROM:** R. Timothy Phoenix, Esquire  
**DATE:** February 28, 2023  
**Re:** Mary McDonald and John McDonald III, Owner/Applicant  
Property Location: 74 Sunset Road  
Tax Map 153, Lot 14  
Single Residence B ("SRB")/LU-22-182

Dear Chairman Parrott and Zoning Board Members:

On behalf of Mary McDonald and John McDonald III ("McDonald") Owner/Applicant ("McDonald"), we are pleased to submit this memorandum and attached exhibits in support of zoning relief to slightly expand their existing home.

### **I. EXHIBITS**

- A. 8/30/22 Board of Adjustment Site Plan-by Altus Engineering, Inc.
- B. 8/18/22 Amended ZBA Site Plan depicting chimney.
- C. Site Photographs.
- D. Tax Map 153.
- E. 9/27/22 ZBA Minutes.
- F. 9/27/22 ZBA Notice of Decision.
- G. Abutter/Neighbor Support Letters
  - Mark and Julie Geller-73 Sunset Road
  - Jennifer and Rich Matthes, 69 Sunset Road
  - Scott Chaudoin, 76 Sunset Road

### **II. PROPERTY/PROJECT**

74 Sunset Rd. is an 8936 sq. ft. lot upon which was located a +/-1300 sf (footprint) 4-bedroom cape style home, detached one car garage with a shed attached to it. The home (right) and garage (left) each slightly violate the side setbacks. At 23.4% (2093 sq. ft.), the original building coverage slightly exceeded the SRB limit of 20%. The front of the house meets but is very close to the 24 foot front setback.

On September 27, 2022 the ZBA approved a reasonably modest project for a 240 sq. ft. entry porch with stairway access, front dormers to expand the 2<sup>nd</sup> floor (remaining 4-bedrooms), breezeway to attach the home to the detached garage, and the addition of a "doghouse" frame over the existing rear bulkhead. The right setback encroaching set of steps were removed. (**Exhibits A, E, F**). The dormer, breezeway and doghouse all met building setback requirements.

The McDonalds and their builder have since added a 2.25 x 5.5=12.375 s.f. chimney (**Exhibits B, C**) to the right side of the house . Relief is required because the existing house, thus the chimney are within the right side setback. The chimney also very slightly increases the building coverage by 12.375 s.f. from 26.5% to 26.6%.

### III. RELIEF REQUIRED

| <u>Variance Section</u>                   | <u>Required</u> | <u>Existing</u>                          | <u>Proposed</u>       |
|-------------------------------------------|-----------------|------------------------------------------|-----------------------|
| <u>PZO§10.521</u><br><u>Right Setback</u> | 10'             | 9'+/-                                    | 6.5'+/-               |
| <u>Building Coverage</u>                  | 20%             | 2368 s.f. (26.5%)<br>(Variance approval) | 2650.42 s.f. (26.6 %) |

### IV. VARIANCE REQUIREMENTS

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

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

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

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

The small 12.375 s.f. chimney in the side setback is more distant than the previous existing side steps (**Exhibit B**). The coverage increase is *de minimus*. The three closest neighbors

support the relief. Accordingly, granting the variance for the chimney neither alters the essential character of the locality, nor threatens the public health, safety or welfare.

**3. Granting the variances will not diminish surrounding property values.**

The chimney is very small. Sightlines will be maintained, with sufficient air and light considering that the chimney is no closer to the right side neighbor to than the former steps, and the neighbors support the relief. Thus, surrounding property values will in no way be diminished.

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

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

The subject lot is approximately 40% smaller than the 15,000 ft.<sup>2</sup> SRB requirement. The existing home is 9 feet to the right side. ZBA approved Building coverage is 26.5% increasing to 26.6%. These factors combine to create special conditions.

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

The purpose of side setback and lot coverage requirements is to avoid overbulking and overcrowding, allow for adequate air and light, provide sightlines and area for stormwater treatment. It is reasonable for the McDonald family to add a chimney, which cannot be located in a way that would avoid a variance. The setback relief and additional *de minimus* impervious increase is supported by the abutters. No one is affected in any negative way. Accordingly, there is no fair and substantial relationship between the purposes of the setback and building coverage requirements and its application in this instance.

c. The proposed use is reasonable.

If the use is permitted, it is deemed reasonable. Vigant v. Hudson, 151 N.H. 747 (2005). This is a permitted residential use proposing modest expansion.

**5. Substantial justice will be done by granting the variances.**

If “there is no benefit to the public that would outweigh the hardship to the applicant” this factor is satisfied. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). That is, “any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice.” Malachy Glen, supra at 109.

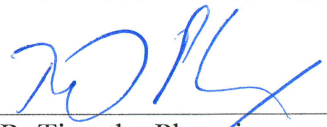
The McDonald family is generally constitutionally entitled to the use of the lot as they see fit. "The right to use and enjoy one's property is a fundamental right protected by both the State and Federal Constitutions." N.H. CONST. pt. I, arts. 2, 12; U.S. CONST. amends. V, XIV; Town of Chesterfield v. Brooks, 126 N.H. 64 (1985) at 68. Part I, Article 12 of the New Hampshire Constitution provides in part that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." Thus, our State Constitutional protections limit the police power of the State and its municipalities in their regulation of the use of property. L. Grossman & Sons, Inc. v. Town of Gilford, 118 N.H. 480, 482 (1978). "Property" in the constitutional sense has been interpreted to mean not the tangible property itself, *but rather the right to possess, use, enjoy and dispose of it*. Burrows v. City of Keene, 121 N.H. 590, 597 (1981) (emphasis added).

Because: the chimney is very small; more distant from the right side line than the former steps; increases coverage almost immeasurably; is supported by the abutters; cannot be located so as to avoid the need for the variance; and do not violate the purposes of setback and lot coverage requirements, there is no harm to the public from granting the variance. Conversely, the McDonald family will be greatly harmed if the variance is denied because they in turn will be unable to add the amenity of a fireplace. There is thus no benefit to the public from granting the variance that outweighs the harm to the McDonald family if the variance is denied.

**V. CONCLUSION**

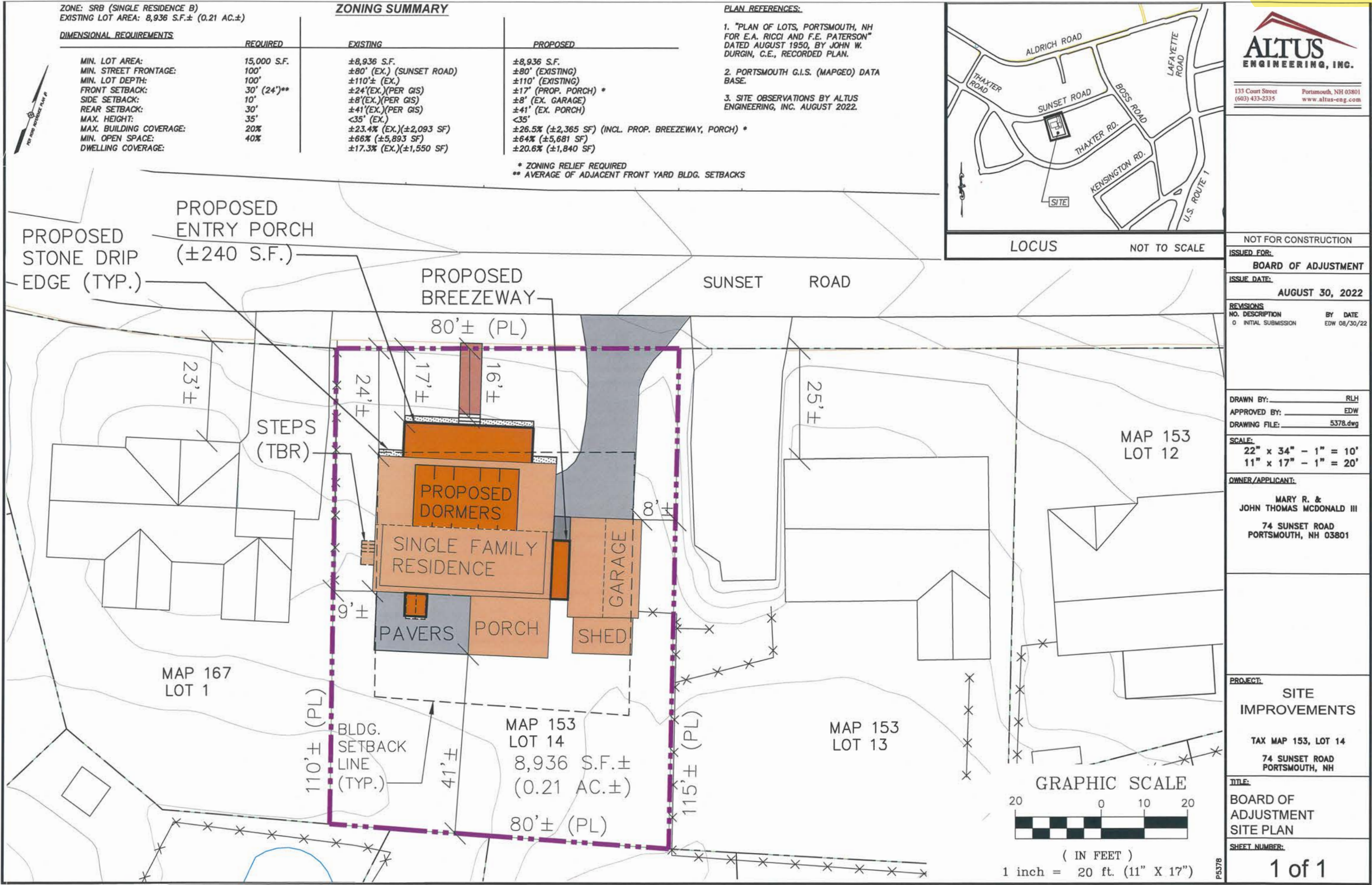
For all of the reasons stated, the McDonald family and entire team respectfully request that the Portsmouth Zoning Board of Adjustment grant the requested variance.

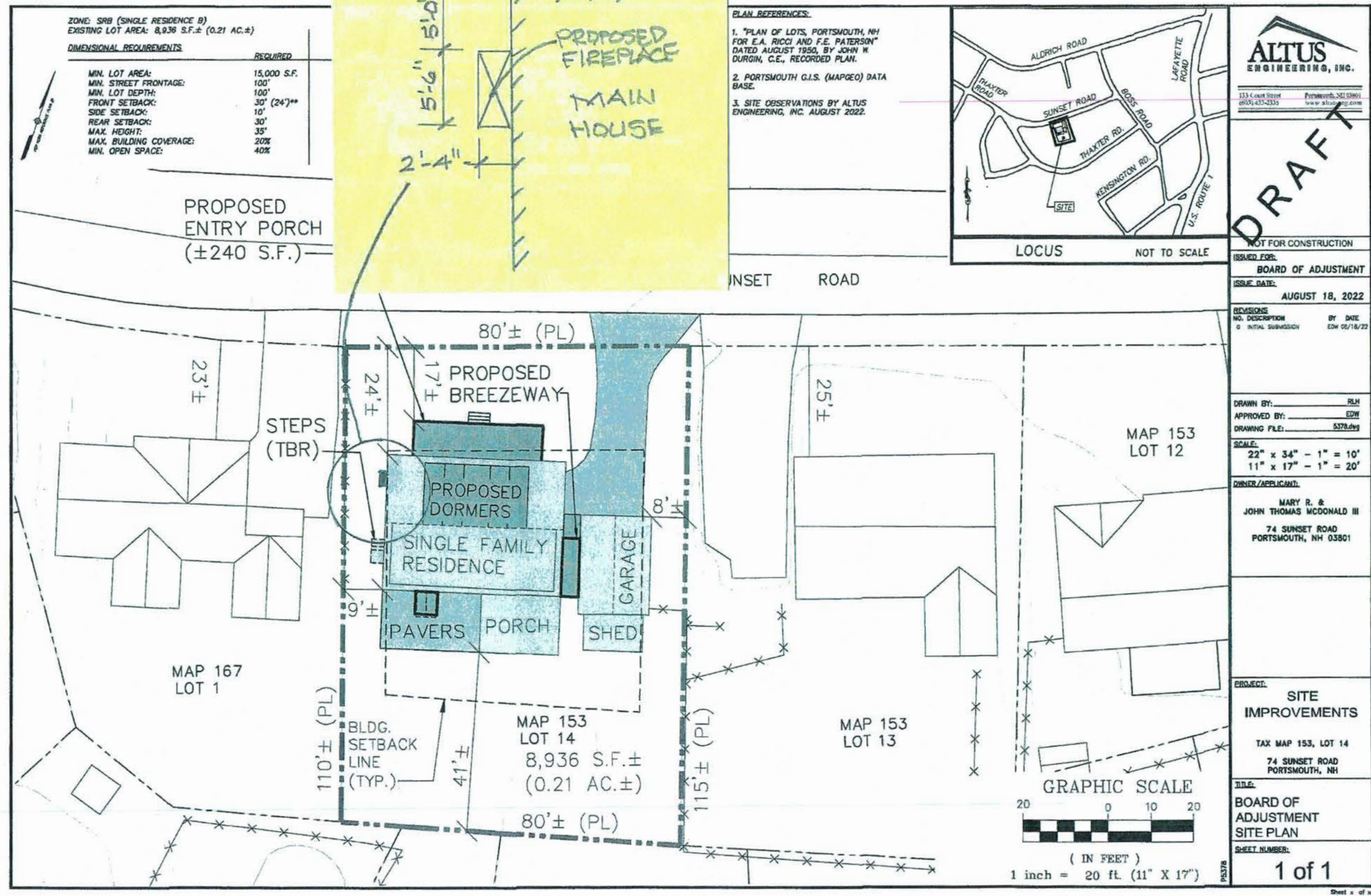
Respectfully submitted,  
Mary McDonald and John McDonald III



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By: R. Timothy Phoenix





Google Maps 69 Sunset Rd



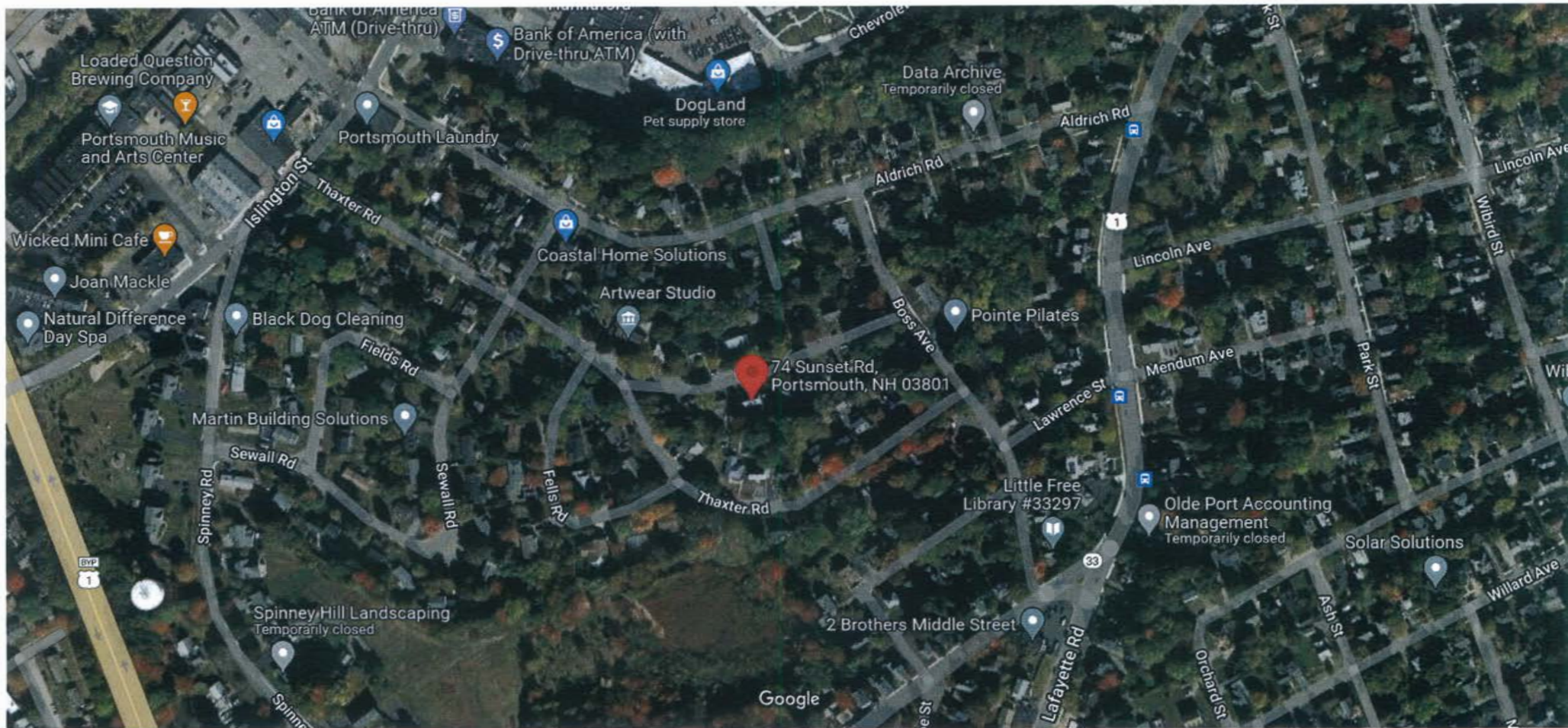
Image capture: Sep 2011 © 2022 Google

Portsmouth, New Hampshire

Google

Street View - Sep 2011





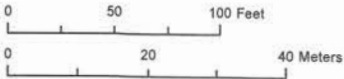


**Partial Legend**  
See the cover sheet for the complete legend.

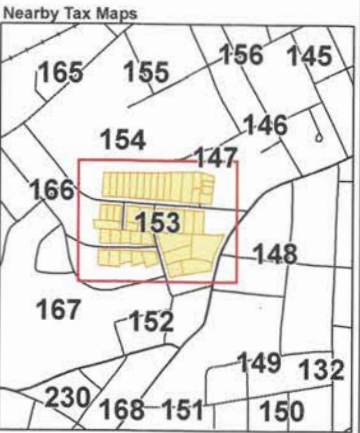
**7-5A** Lot or lot-unit number  
2.56 ac Parcel area in acres (ac) or square feet (sf)  
23 Address number  
233-137 Parcel number from a neighboring map  
68' Parcel line dimension  
SIMS AVE Street name

Parcel/Parcel boundary  
Parcel/ROW boundary  
Water boundary  
Structure (1994 data)

Parcel covered by this map  
Parcel from a neighboring map (see other map for current status)



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  
2021  
**Tax Map 153**

**MINUTES OF THE  
BOARD OF ADJUSTMENT MEETING  
EILEEN DONDERO FOLEY COUNCIL CHAMBERS  
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE  
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

September 27, 2022

**MEMBERS PRESENT:** Arthur Parrott, Chair; Jim Lee, Vice Chair; David MacDonald; Beth Margeson; Paul Mannle; Phyllis Eldridge; Thomas Rossi

**MEMBERS EXCUSED:** None.

**ALSO PRESENT:** Peter Stith, Planning Department

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Chairman Parrott called the meeting to order at 7:00 p.m.

**~~I. NEW BUSINESS~~**

- A. The request of **Emily Morgan Revocable Trust of 2021 (Owner)**, for property located at **127 Willard Street** whereas relief is needed to replace the existing front porch with new covered landing with steps which requires the following: 1) A Variance from Section 10.521 to allow a 6 foot secondary front yard where 15 feet is required. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be expanded, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 149 Lot 37 and lies within the General Residence A (GRA) district. (LU-22-180)

**SPEAKING TO THE PETITION**

The applicant Emily Dow was present to review the petition and criteria. There were no questions from the Board. Chairman Parrott opened the public hearing.

**SPEAKING TO, FOR, OR AGAINST THE PETITION**

No one spoke, and Chairman Parrott closed the public hearing.

**DECISION OF THE BOARD**

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

Referring to Sections 10.233.21 and .22 of the ordinance, Mr. Mannle said granting the variances would not be contrary to the public interest because it was a small request. He said it would observe

~~Vice-Chair Lee concurred. He said he met with the construction superintendent, who showed him the barn. He said the barn had been there a long time and that it was exciting to see someone go to the expense and time to preserve the historic property.~~

Mr. Stith said there was a section in the ordinance stating that the Board will notify the applicant that the required elevation might result in increased premium rates for flood insurance up to amounts of \$25 per \$100 of coverage, and that such construction below the required elevation increases risk to life and property. He said those two items would be added to the Letter of Decision.

~~The motion passed by unanimous vote, 7-0.~~

**G. The request of John T. & Mary R. McDonald (Owners), for property located at 74 Sunset Road** whereas relief is needed to add a front porch, front dormer and connection to garage which requires the following: 1) Variances from Section 10.521 to allow a) a 16 foot front yard where 30' is required; and b) 26.5% building coverage where 20% is required. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be expanded, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 153 Lot 14 and lies within the Single Residence B (SRB) district. (LU-22-182)

### **SPEAKING TO THE PETITION**

Attorney Tim Phoenix was present on behalf of the applicant and reviewed the petition and criteria

Mr. Rossi said the applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other similarly situated properties. He said the surrounding properties seemed almost identical in terms of size and setback. Attorney Phoenix said not all of the houses were identical, even though the ones across the street seemed to have similar setbacks. He said there were other lots in the area that were larger and had larger homes on them that appeared to meet the setbacks and probably met coverage. He cited a Manchester, NH case that stated that if an applicant was doing something that's already been done in that area, it was a form of hardship that allowed the applicant to proceed with getting their variances granted.

Chairman Parrott opened the public hearing.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

No one spoke, and Chairman Parrott closed the public hearing.

### **DECISION OF THE BOARD**

Vice-Chair Lee said he went through the house when it was for sale and that it was a nice house in a nice neighborhood but was burdened by an awkward floor plan. He said the proposed improvements made sense and would make the house more livable and enhance the values of the neighborhood.

Vice-Chair Lee moved to **grant** the variances as presented and advertised, seconded by Ms. Margeson.

Vice-Chair Lee referred to Sections 10.233.21 and .22 of the ordinance and said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because the proposed use would not be in conflict with the explicit or implicit purposes of the ordinance and would not alter the essential character of the neighborhood nor threaten the public's health, safety, or welfare or injure any public rights. He said substantial justice would be done because the benefit to the applicant would not be outweighed by the general public or other individuals, which satisfied Section 10.233.23. He said the addition and renovation of the property will add to the value of the surrounding properties, satisfying Section 10.233.24. Referring to Section 10.233.25, literal enforcement of the ordinance would result in an unnecessary hardship, he said the property is somewhat burdened by a zoning restriction that makes it distinct from other similarly situated properties, and because of those special conditions, a restriction is applied to the property that doesn't serve that purpose in a fair and substantial way. He said the proposed use is reasonable and doesn't alter the essential character of the neighborhood, so it satisfies the hardship criteria. For those reasons, he moved to grant the variances.

Ms. Margeson concurred. She said she had had the same question that Mr. Rossi had, and she did find that Walker vs. the City of Manchester applied because there were existing nonconformities in the area which constituted a special condition.

The motion **passed** by unanimous vote, 7-0.

~~H. The request of Neila LLC (Owner), for property located at 324 Maplewood Avenue~~  
whereas relief is needed to convert the existing garage into a dwelling unit which requires the following: 1) Variances from Section 10.5A41.10A to allow a) a lot area per dwelling unit of 1,780 square feet where 3,000 square feet is required; and b) a 1 foot side yard where 5 feet is required. 2) A Variance from Section 10.1114.21 to allow an 8.5 foot wide by 18 foot long parking space where 8.5 feet by 19 feet is required. Said property is located on Assessor Map 141 Lot 1 and lies within the Character District 4-L2 (CD4-L2) and the Historic district. (LU-22-183)

## **SPEAKING TO THE PETITION**

Attorney Monica Kaiser was present on behalf of the applicant, along with LLC Principle Nicole Abshier. She said Ms. Abshier lived next to the property and that the applicant had support from several abutters. Attorney Kaiser said the garage petition was before the Board twice in 2009 and both times Ms. Abshier opposed any upward expansion. She reviewed the tax map and the petition and said they were not proposing any physical changes to the site and that the garage would stay the same but the interior parking space was a half foot shorter than required. She asked if there were questions pertaining to Fisher v. Dover. Ms. Margeson said she didn't think it applied but said it seemed that the building was going up one story. Attorney Kaiser said that photo was from the proposal that was denied and that they were just making the garage nicer and renovating the inside. ~~She said the zoning had changed and the variance request was a lot less. She reviewed the criteria.~~



# CITY OF PORTSMOUTH

**EXHIBIT F**

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

## ZONING BOARD OF ADJUSTMENT

September 29, 2022

John T. McDonald III & Mary R. McDonald  
74 Sunset Road  
Portsmouth, New Hampshire 03801

**RE: Board of Adjustment request for property located at 74 Sunset Road (LU-22-182)**

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, September 27, 2022**, considered your application for the addition of a front porch, front dormer and connection to garage which requires the following: 1) Variances from Section 10.521 to allow a) a 16 foot front yard where 30' is required; and b) 26.5% building coverage where 20% is required. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be expanded, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 166 Lot 36 and lies within the Single Residence B (SRB) district. As a result of said consideration, the Board voted to **grant** the request as presented with the enclosed Findings of Fact.

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,

Arthur Parrott, Chairman of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, PLLC  
Eric Weinrieb, Altus Engineering, Inc.

Tim Phoenix

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**From:** Julie Geller <Jules71462@outlook.com>  
**Sent:** Wednesday, February 22, 2023 8:10 AM  
**To:** McDonald, Mary Labbe  
**Subject:** Variance

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

-----  
We, Mark and Julie Geller of 73 Sunset Road approve of the variance. We are out of town, but you can reach us if need be.

Sent from my iPhone

February 22, 2023

to Sunset Road  
Portsmouth NH

I/we, Seth Chaudon, undersigned  
affirm that I/we have no issue or opposition to the fireplace cantilever on the right side of John and  
Mary McDonald's home at 74 Sunset Rd.

✓ I/we do not oppose the variance required by the City of Portsmouth.

Thank you,

Seth Chaudon 2/22/23

Print name

[Signature]

Signature

Print name

Signature

February 22, 2023

I/we, Jennifer + Rich Matthes / \_\_\_\_\_, undersigned  
affirm that I/we have no issue or opposition to the fireplace cantilever on the right side of John and  
Mary McDonald's home at 74 Sunset Rd.

I/we do not oppose the variance required by the City of Portsmouth.

Thank you,

Jennifer Matthes

Print name

John J. Matthes

Signature

Print name

Signature