

State of New Hampshire
Supreme Court

NO. 2015-0323

2015 TERM

NOVEMBER SESSION

Joseph & Ellen Yarborough

v.

City of Portsmouth, Zoning Board of Adjustment

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS/APPELLANTS

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QUESTIONS PRESENTED

- I. Should the court have granted a variance because Portsmouth's SR-B zone does not reflect the Middle Road neighborhood?
Preserved: *Hrg.* (Jan. 5, 2015) at 16, 43; PLAINTIFFS' MEMORANDUM IN SUPPORT OF APPEAL (Jan. 16, 2015) at 5, *Appx.* at 188; NOTICE OF APPEAL, question I.
- II. Should the Yarboroughs have been granted a frontage variance?
Preserved: Record, *passim*; NOTICE OF APPEAL, question II.

STATEMENT OF FACTS

I. Portsmouth's Zoning Ordinance

In 1925 New Hampshire passed the Zoning Enabling Act. LAWS 1925, ch. 92. In 1926 the United States Supreme Court resolved federal constitutional doubt about zoning. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). In 1927 Portsmouth adopted a comprehensive zoning ordinance. PORTSMOUTH ZONING ORDINANCE (1927) (only existing original on reverse of zone map on file at Portsmouth Planning Department, not part of the record, not included in appendix). In 1928 the New Hampshire Supreme Court resolved state constitutional doubt about zoning. *Sundeen v. Rogers*, 83 N.H. 253 (1928). In the 1960s Portsmouth added road frontage requirements to its ordinance. PORTSMOUTH ZONING ORDINANCE, *Schedule of Dimensional Requirements* §10-302 (Mar. 21, 1966) (on file at Portsmouth Public Library, not part of the record, not included in appendix); PORTSMOUTH ANNUAL REPORT 1960 at 18 (on file at Portsmouth Public Library, not part of the record, not included in appendix); LETTER FROM ABUTTER TO ZBA (June 12, 2014), *CR Tab 10*;¹ VIDEO (June 17) at 02:33:31.²

Portsmouth's ordinance contains numerous zones, including nine residential zones. Among these are "Single Residence A" (SR-A) and "Single-Residence B" (SR-B). PORTSMOUTH ZONING ORDINANCE, *Establishment and Purpose of Districts* § 10-410 (Jan. 1, 2010),

¹Citations to *CR Tab #* indicate the Certified Record, and the tab number behind which the cited reference is found. For the convenience of the Court, a few items in the certified record are also included in the appendix filed herewith.

²Videos of both the June 17, 2014 and August 19, 2014 ZBA meetings were put in the record by the City of Portsmouth, MEMORANDUM FROM JULIET WALKER, PLANNING DEPARTMENT (Nov. 18, 2014) *CR Tab 23*, and are available on the City of Portsmouth's YouTube Chanel. As the city noted, the June 17 video is available at <<https://www.youtube.com/watch?v=clAGEOimBgk>> and the August 19 video at <<https://www.youtube.com/watch?v=qyW7xI962g4>>. They are cited herein as "VIDEO (June 17)," or "VIDEO (Aug. 19)," with the approximate time on the video at which the cited evidence commences.

Appx. at 56, 68.³ The Yarboroughs' lot at issue here is in the SR-B zone. ORDER (Mar. 25, 2015) at 4, *Appx.* at 210; LEGAL NOTICE (June 9, 2014), *CR Tab 5*; LAND USE COMPLIANCE FORM (June 3, 2014), *CR Tab 2*.

While the purpose of both SR-A and SR-B is “[t]o provide areas for single-family dwellings at low to medium densities (approximately 1 to 3 dwellings per acre),” ZONING ORDINANCE, *Establishment and Purpose of Districts* § 10-410, SR-A is “residential - low density” whereas SR-B is “residential - medium density.” PORTSMOUTH MASTER PLAN (2005) at 19 (not part of the record),⁴ *Appx.* at 1, 9.

The SRB district accommodates smaller lot areas, reflecting the reality of development from the 1940s through the 1960s. Requiring a minimum lot area of 15,000 s.f., the SRB zone permits single family and other uses in similar to the SRA district, but in a substantially denser layout.

PORTSMOUTH MASTER PLAN - EXISTING CONDITIONS AND TRENDS at 28 (July 2003) (not part of the record), *Appx.* at 20, 48. Thus, the SR-B zone requires 15,000 square feet, or about $\frac{1}{3}$ of an acre, a lot depth of 100 feet, and street frontage of 100 feet. ZONING ORDINANCE, *Table of Dimensional Standards* § 10-521. Other residential zones have yet smaller dimensional requirements, including shorter minimum street frontages. *Id.*

³The Portsmouth Zoning Ordinance was not entered in the record before the ZBA, but the superior court took judicial notice of it. *Hearing on Merits* (Jan. 5, 2015) at 24-25. Included in the appendix filed herewith are: Ch. 10, Art. 2, “Administration and Enforcement”; Ch. 10, Art. 4, “Zoning Districts and Use Regulations”; and Ch. 10, Art. 5, “Dimensional and Intensity Standards.”

⁴Neither the current 2005 PORTSMOUTH MASTER PLAN, nor its 2003 supporting document, PORTSMOUTH MASTER PLAN - EXISTING CONDITIONS AND TRENDS, are part of the record, but portions of both are nonetheless included in the appendix hereto. *See* RSA 674:10 (Master Plan prerequisite to municipal zoning). As to the MASTER PLAN, the portion contained in the appendix is the chapter entitled “Land Use,” pages 13-29. As to the EXISTING CONDITIONS AND TRENDS, the portion contained in the appendix is the chapter entitled “Land Use,” pages 9-35. Because these documents are both “generally known within the territorial jurisdiction” of this Court and “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” N.H. R. EVID . 201, this Court may take judicial notice.

II. Portsmouth's Middle Road Neighborhood

Middle Road, also known as Route 33, is “very busy” as it connects Portsmouth to Greenland and Interstate 95, runs toward the middle of Portsmouth, and terminates near downtown at Lafayette Road. VIDEO (June 17) at 2:34:12 (testimony of neighbor opposing variance).

Before Route 33 crosses the Route 1 Bypass, the Yarboroughs' Middle Road neighborhood is bounded by Swett Avenue and Sylvester Street, two residential lanes lined by small house lots ranging from less than $\frac{1}{10}$ of an acre to about $\frac{1}{2}$ an acre. TAX MAP, *CR Tab 3*; TAX MAP 232, *Exh. C*,⁵ *Appx.* at 117.

Between the cross-streets, on Middle Road, there are a variety of uses. On the north side of the street is a church, with 244 feet of road frontage. TAX MAP 232, *Exh. C*; VIDEO (June 17) at 02:33:31 & 02:27:35. Occupying most of the block with 711 feet of frontage is a condominium complex containing 73 units. *Hrg.* at 21⁶; VIDEO (June 17) at 02:33:31 & 02:27:25; TAX MAP 232, *Exh. C*; ABUTTER LISTS (June 17, 2014) at 2-4, 9, *CR Tab 7*; DEFENDANTS' POST-TRIAL MEMORANDUM (Jan. 16, 2015) at 7, *Appx.* at 196. The condo complex is zoned GA/MH, or “Garden Apartment/Mobile Home Park,” but the church, like the rest of the neighborhood, is in the SR-B zone. STAFF REPORT (June 17, 2014) at 3, *CR Tab 12, Appx.* at 127; MASTER PLAN at 22.

⁵The court allowed the parties to file post-hearing memoranda. Attached to the Yarboroughs' memo, PLAINTIFFS' MEMORANDUM IN SUPPORT OF APPEAL (Jan. 16, 2015), *Appx.* at 188, were Exhibits A through G, several of which the court referred to in its order. ORDER (Mar. 25, 2015), *Appx.* at 210, *passim* and *see* n. 1 at 2. Those exhibits are referred to as “Exh. #” herein, and several are included in the appendix filed herewith.

⁶The Rockingham County Superior Court held a hearing on January 5, 2015, captioned “Hearing on Merits.” It is cited herein with the page number where the evidence appears, as *Hrg.* at #.

On the Yarboroughs' side of Middle Road, near the corner of Sylvester Street, is the entrance to the "Chase Home" orphanage, also zoned SR-B, and occupying 245 feet of frontage. TAX MAP 232, *Exh. C*. How many people live there is unknown. See generally <<http://www.chasehome.org/>>. The two lots on the corner next to the Chase Home each have 40-foot frontages. TAX MAP 232, *Exh. C*. Adjacent to the Yarboroughs' is a multi-family house, occupying 64 feet of frontage. TAX MAP 232, *Exh. C*; MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING (July 30, 2014) at 4, *CR Tab 17*; STAFF REPORT (June 17, 2014) at 1, *CR Tab 12* ("surrounding land uses: single and multi-family residential").

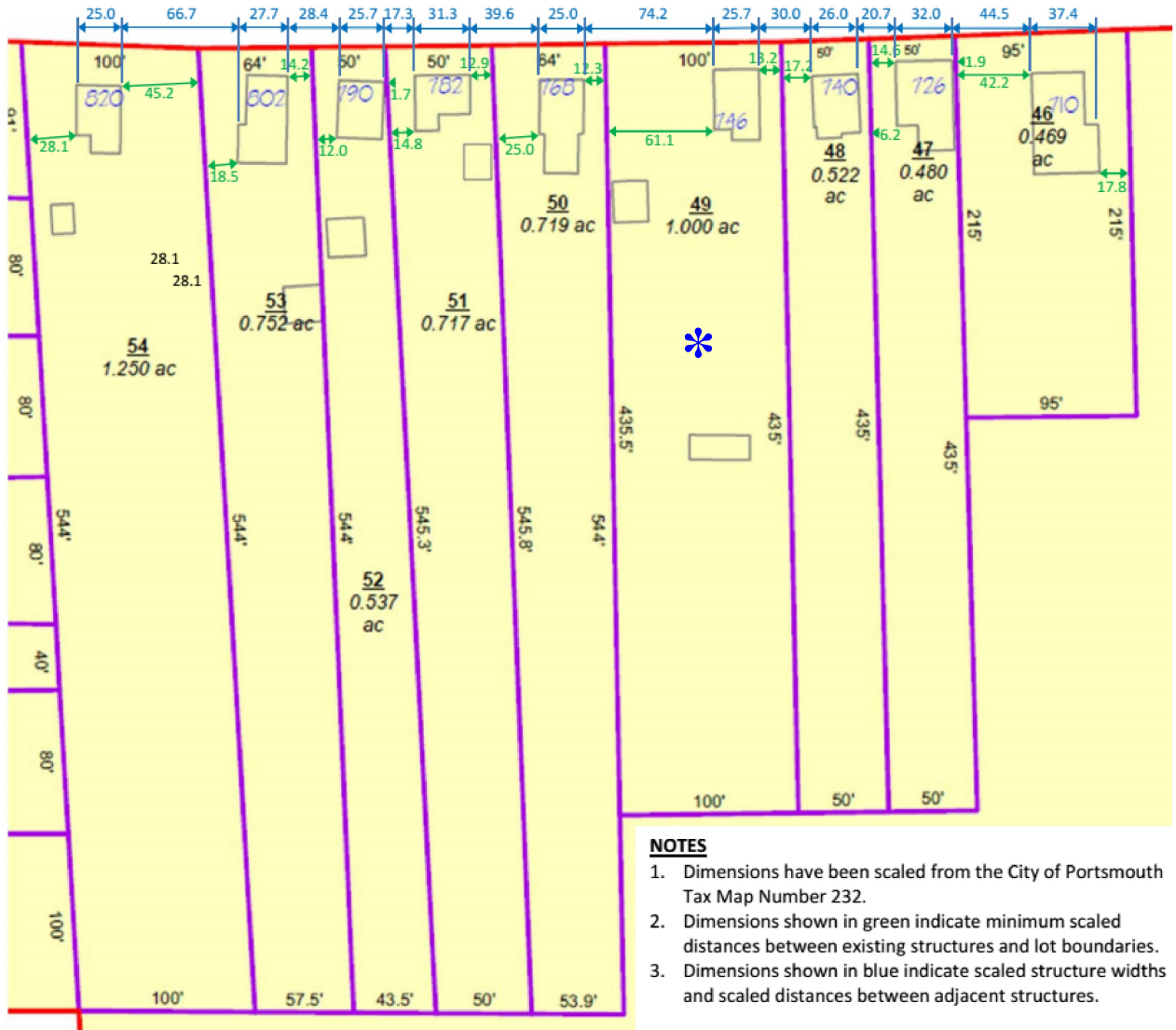
The remaining eight structures on the Yarboroughs' side of Middle Road are single-family houses sitting on deep but narrow lots. TAX MAP 232, *Exh. C*; ORDER (Mar. 25, 2015) at 3 (435 and 544 feet deep). They vary in size, with the smallest occupying less than $\frac{1}{2}$ an acre, and the largest $1\frac{1}{4}$ acres. TAX MAP 232, *Exh. C*. Collectively, these nine lots occupy about $6\frac{1}{2}$ acres, and have a net residential density about $1\frac{1}{3}$ dwellings per developed acre. According to the City, "the average net residential density for single-family properties in the Middle Road/South Street area is 2.7 units per developed acre." EXISTING CONDITIONS AND TRENDS at 19.



Aerial Photograph 2, CR Tab 3 (asterisk added to indicate proposed structure)

Regarding frontage, two (including the Yarboroughs') have 100 feet, one has 95 feet, two (one of which is the multi-family abutting the Yarboroughs') have 64 feet, and four have 50 feet. TAX MAP 232, *Exh. C*. The frontages on the side-streets vary, and on Middle Road beyond the Chase orphanage, there are two lots with 40 feet of frontage. Accordingly, while the city argued the character of the neighborhood is 100-foot frontages, DEFENDANTS' POST-TRIAL MEMORANDUM at 11, a ZBA member accurately noted that "there was a 50' wide rhythm to the neighborhood lots." ZBA MINUTES (June 17, 2014) at 2, *CR Tab 15*; ORDER (Mar. 25, 2015) at 7 (quoting minutes); VIDEO (June 17) at 02:38:34; *Hrg.* at 19. Aerial and head-on photos in the record overture the 50-foot rhythm. AERIAL PHOTOGRAPH 2, *CR Tab 3, Appx.* at 123.

Because of the narrow lots, the neighborhood's side setbacks are generally close to (and several much less than) the 10-foot minimum, making many of the houses separated from each other by roughly the width of their side driveways. These spacings can be seen in the aerial photograph, *supra*, and the schematic showing setbacks, *infra*. NEIGHBORHOOD MAP WITH SETBACKS, *Exh. D, Appx.* at 118; ZONING ORDINANCE, *Table of Dimensional Standards* § 10-521.



NEIGHBORHOOD MAP WITH SETBACKS, *Exh. D* (asterisk added to indicate Yarboroughs' lot)

III. Yarboroughs' Lot and House

Directly across the street from the condominium complex is the Yarboroughs' single-family house, TAX MAP 232, *Exh. C* (showing Yarboroughs' lot 49); BUILDING PERMIT APPLICATION & LAND USE COMPLIANCE FORM (May 15, 2014) at 4, *CR Tab 2*, whose deed demonstrates no mergers, subdivisions, or association with any comprehensive plat plan. *Hrg.* at 31; ZBA MINUTES (Aug. 19, 2014) at 2, *CR Tab 22*; MEMORANDUM IN SUPPORT OF MOTION

FOR REHEARING at 4, *CR Tab 17*; DEFENDANT’S POST-TRIAL MEMORANDUM at 8.

Probably most of the houses on the Yarboroughs’ side of the road were built in the 1880s, with some as late as the 1940s. *Hrg.* at 30; ORDER (Mar. 25, 2015) at 4-5; VIDEO (June 17) at 02:33:31; LETTER FROM ABUTTER TO ZBA (June 12, 2014), *CR Tab 10*. The Yarboroughs’ is circa 1889. STAFF REPORT (June 17, 2014) at 1, *CR Tab 12*; ORDER (Mar. 25, 2015) at 4. Both the condo and the church across the street were developed decades after the line of houses on the Yarboroughs’ side of Middle Road. VIDEO (June 17) at 02:33:50.

Because it is a “double wide” lot, 100 feet in width and matching its neighbors 435 feet in depth, the Yarboroughs’ lot comprises 1 acre. TAX MAP 232, *Exh. C*; STAFF REPORT (June 17, 2014), *CR Tab 12*; BUILDING PERMIT APPLICATION & LAND USE COMPLIANCE FORM (May 15, 2014) at 1, *CR Tab 2*; *Hrg.* at 7, 16-17; ORDER at 3, 4.

The Yarboroughs’ house, however, is not centered on its lot frontage. Like some of its neighbors, from the lots’ eastern lot line, the house sits just 13 feet. But unlike its neighbors, from the lot’s other boundary, the house sits 61 feet. It is the only lot with such skewed siting. NEIGHBORHOOD MAP WITH SETBACKS, *Exh. D*; AERIAL PHOTOGRAPH 2, *CR Tab 3*; ORDER at 4. Because of this, it is also the only house in the neighborhood with a “landscaped side yard,” which provides its next-door abutter “views . . . of an old rock wall and several mature trees,” and creates a general impression of neighborhood “green space” and “land space.” LETTER FROM ABUTTER TO ZBA (June 12, 2014), *CR Tab 9*; VIDEO (June 17) at 02:32:20; *Hrg.* at 33-34; MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING at 4, *CR Tab 17*.

IV. Yarboroughs' Proposal

“Because the [Yarboroughs] work from home and are raising a growing family, they have considered various expansion alternatives. One ... alternative [is] the construction of a detached garage ... which would include office and storage space above.” MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING at 3, *CR Tab 17*. A two-storey garage/storage building would also solve a “dysfunctional” U-shaped driveway that does not accommodate two cars, “and a garage which is too small to comfortably park in.” *Id.* at 4, 5. No variances would be necessary. *Id.*; ORDER at 8. *Compare* SCENE RENDERINGS SR2, *with* SR3, *and with* SR4, attached to MEMO IN SUPPORT OF MOTION FOR REHEARING at 3, *CR Tab 17, Appx.* at 150, 153, 154.

The third alternative would be to divide the lot in half length-wise, leave the existing house, and build a home on the newly-created lot. From the existing lot measuring 100 feet wide by 435 feet deep, after subdivision there would be two lots each measuring 50 feet wide with the same depth. BOARD OF ADJUSTMENT APPLICATION (May 15, 2014) at 1, *CR Tab 1*; BUILDING PERMIT APPLICATION & LAND USE COMPLIANCE FORM (May 15, 2014) at 2, *CR Tab 2*; LETTER FROM YARBOROUGH TO ZBA (June 16, 2014) at 4, *CR Tab 3*; ORDER at 5.

Because the minimum frontage in the SR-B zone is 100 feet, however, to build the house the Yarboroughs need a variance. BUILDING PERMIT APPLICATION & LAND USE COMPLIANCE FORM (May 15, 2014) at 4, *CR Tab 2*; ORDER at 5 (variance necessary from Portsmouth Zoning Ordinance §§ 10.311 & 10.521); STAFF REPORT (June 17, 2014), *CR Tab 12*.

Except for the frontage, both lots would otherwise be conforming lots. BUILDING PERMIT APPLICATION & LAND USE COMPLIANCE FORM (May 15, 2014) at 4, *CR Tab 2*; PLAINTIFFS' MEMORANDUM IN SUPPORT OF APPEAL (Jan. 16, 2015) at 5; LETTER FROM YARBOROUGH TO ZBA (June 16, 2014) at 1, *CR Tab 3*. They would both meet setbacks, and there is sufficient clearance for driveways and car parking. NEIGHBORHOOD MAP WITH

SETBACKS, *Exh D, Appx.* at 118; STAFF REPORT (June 17, 2014) at 3, *CR Tab 12*; *Hrg.* at 39-40, 41-42; LETTER FROM YARBOROUGH TO ZBA (June 16, 2014) at 1, *CR Tab 3*; VIDEO (June 17) at 02:29:00.



MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING (July 30, 2014), *CR Tab 17, Exh. A, Scene Rendering 2*

The home the Yarboroughs propose would be a single-family residence, with an attempt to fashion and size it in harmony with the existing homes on the block. ZBA MINUTES (June 17, 2014) at 1-2, *CR Tab 15*; LETTER FROM YARBOROUGH TO ZBA (June 16, 2014) at 1, *CR Tab 3*. Although no specific plans have been proposed, the court noted the Yarboroughs committed that the new house would be “similar in configuration and spatial relationship to those by which it is surrounded.” ORDER at 5. Likewise, although no blueprints have been drawn, the record contains a computer mockup of what the Yarboroughs have in mind. MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING (July 30, 2014), *CR Tab 17, Exh. A, Scene Rendering 2*.

STATEMENT OF THE CASE

In May 2014 the Yarboroughs submitted a building permit application and learned a variance would be necessary; in June they requested the variance. BUILDING PERMIT APPLICATION & LAND USE COMPLIANCE FORM (May 15, 2014) at 1-3, *CR Tab 2*. Abutters were notified, including the condominium, the church and group home, and the neighbors on the Yarboroughs' side of Middle Road. ABUTTER LISTS (June 17, 2014) *CR Tab 7*.

Two neighbors wrote letters and spoke at the June 17, 2014 ZBA hearing. One was the (now former) absentee owner-landlord of the multi-family house abutting the Yarboroughs', and the other lives a few doors down.

The immediate abutter said:

One of the greatest assets to the homes along this stretch of Middle Road is the land space. Currently, our property enjoys views from the windows of an old rock wall and several mature trees along the property line between ours and the Yarborough's properties. Should this variance be granted and plans move forward for the building of a new house on the proposed lot ... the views from our home will become that of exterior siding on any new construction. This variance seeks to take a beautiful property, perhaps the flagship of the neighborhood, that conforms to all standards and subdivide it resulting in a significant negative change to the neighborhood aesthetic.

LETTER FROM ABUTTER TO ZBA (June 12, 2014), *CR Tab 9*. The abutter also asserted that "granting this variance will be at our expense as it will very likely devalue our property." *Id.*; VIDEO (June 17) at 2:32:12; ZBA MINUTES (June 17, 2014) at 2, *CR Tab 15*. The other neighbor, who lives on a lot with 50 feet of frontage, worried precedent would be set by granting the variance, and also professed it would decrease the value of his property. LETTER FROM ABUTTER TO ZBA (June 12, 2014), *CR Tab 10*; VIDEO (June 17) at 2:33:26; ZBA MINUTES (June 17, 2014) at 2, *CR Tab 15*. The Yarboroughs explained their proposal, avouched it would conform to the character of the neighborhood, assured it would have positive economic and aesthetic

benefits, and suggested that their landscaped side yard should not be considered a community resource. ZBA MINUTES (June 17, 2014) at 2; VIDEO (June 17) at 2:29:00 and 2:36:30.

The ZBA voted to deny the variance because: 1) “It would not be in the spirit of the [o]rdinance to create two nonconforming lots,” 2) “Literal enforcement of the [o]rdinance does not create an unnecessary hardship on the property,” and 3) “The values of neighboring properties could be diminished if the variance [were] granted.” ZBA ACTION SHEET at 3 (June 17, 2014), *CR Tab 14, Appx.* at 130, 132; ZBA MINUTES (June 17, 2014) at 3, *CR Tab 15*.

In July 2014 the Yarboroughs requested a rehearing, MOTION FOR REHEARING (July 17, 2014), *CR Tab 16*; MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING (July 30, 2014), *CR Tab 17*, which in August the ZBA denied. ZBA ACTION SHEET (Aug. 19, 2014), *CR Tab 21*; ZBA MINUTES (Aug. 19, 2014), *CR Tab 22*; ZBA STAFF REPORT (Aug. 19, 2014), *CR Tab 19*; ZBA DENIAL OF REHEARING (Aug. 22, 2014), *CR Tab 20*; VIDEO (Aug. 19) at 00:09:27.

In September 2014 the Yarboroughs filed an appeal to the Rockingham County Superior Court pursuant to RSA 677:4, which held a hearing in January 2015. COMPLAINT (Sept. 17, 2014), *Appx.* at 161; *Hrg., passim*. The court (*Andrew R. Schulman, J.*) allowed submission of several exhibits outside the ZBA certified record, and entertained post-hearing memoranda.

In its order, the court first defined the “pertinent neighborhood” with which to compare the Yarboroughs’ lot. Its definition included the eight other dwellings on the Yarboroughs’ side of Middle Road, and also the Chase orphanage with 245 feet of frontage, the condominium with 711 feet, and the church with 244 feet. ORDER at 4 (Jan. 5, 2015), *Appx.* at 183. The court did not include in its definition the two lots at the corner each having just 40 feet of frontage. The court nonetheless explained the Yarboroughs’ neighborhood as “primarily ... residential lots with 100 feet or more of street frontage, although a minority of lots have only approximately 50

feet of street frontage.” ORDER at 10.

Then, in determining whether the Yarboroughs’ lot had special conditions which distinguish it from its neighbors, the court discounted the fact, apparently unique in the area, that the Yarboroughs’ house is close to one edge of its lot, thus leaving enough room to split the lot in half, creating two lots similar to those surrounding, without affecting the existing house. ORDER at 10-11. Rather, it compared the Yarboroughs’ to several lots that it found were slightly “off center” by just a few feet.

Though the court cited the density provisions of the SR-B zone, it also did not compare the zone’s “3 dwellings per acre” requirement to the fact that after development, the Yarboroughs’ proposal would collectively produce at most two dwellings on the acre. ORDER at 11-23.

Regarding hardship, the court wrote:

The purpose of the street frontage requirement in the SRB zone is to limit the number of lots in the neighborhoods within the zone and, thereby, limit the density of developed lots.

ORDER at 11. It thus found that:

“[T]he application of the street frontage requirement to the Yarborough’s lot is directly and tightly related to the purpose of the ordinance provision.... By prohibiting the mitosis of their lot into two tiny, high density lots, the ordinance limits the density of developed lots.

ORDER at 12.

While the court properly found there was no evidence of diminution of neighbors’ property values, it nonetheless ruled that the variance would not be in the spirit of the ordinance.

Finally, the court did not address the Yarboroughs’ claim that the ordinance itself does

not adequately describe existing conditions.

Accordingly, the court upheld the ZBA's denial of a variance.

In March 2015, the Yarboroughs filed a motion for reconsideration, to which the city objected; it was denied. PLAINTIFFS' MOTION FOR RECONSIDERATION (Apr. 6, 2015), *Appx.* at 226; DEFENDANTS' OBJECTION TO PLAINTIFFS' MOTION TO RECONSIDER (Apr. 23, 2015), *Appx.* at 234; NOTICE OF DECISION (Apr. 27, 2015), *Appx.* at 236. This appeal followed.

SUMMARY OF ARGUMENT

Joseph and Ellen Yarborough set forth the purposes of Portsmouth's SR-B zone, note that it does not resemble their neighborhood, and argue that the mismatch is unlawful.

They then suggest they proved the elements necessary for a variance. They proved a variance would promote the spirit of the ordinance because it maintains the character of the neighborhood both expressed in city documents and existing on the ground. They proved a variance would not diminish neighboring property values because their project, in harmony with its surroundings, would show continued investment in their area. They proved their lot exhibits special conditions that distinguish it from others because theirs is the only one that is wide, large enough to be subdivided without additional variances, and also eccentrically positioned. And there is no relationship between the purposes of the frontage requirement and its application to their property because there is no overcrowding, and there is plenty of room for emergency access.

Accordingly, they argue this Court should reverse.

ARGUMENT

I. Portsmouth's SR-B Zone Does Not Reflect the Middle Road Neighborhood

New Hampshire law requires zoning ordinances be drafted taking into consideration the already-built environment.

Every zoning ordinance shall be made with reasonable consideration to, among other things, *the character of the area involved* and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

RSA 674:17, II (emphasis added).

But “zoning ordinances must be consistent with the character of the neighborhoods they regulate.” *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 731 (2001). “[M]unicipalities must ... have their zoning ordinances reflect the current character of neighborhoods.” *Belanger v. City of Nashua*, 121 N.H. 389, 393 (1981) (changing use over time). Thus, “[t]he validity of [a] zoning classification, ... depends on whether the subject property is zoned in conformity with surrounding existing uses and whether those are uniform and established.” *Carbonneau v. Town of Exeter*, 119 N.H. 259, 264 (1979) (quotation omitted). When zoning does not reflect the current character of the neighborhood, denial of a variance is “unreasonable” as a matter of law, *Belanger*, 121 N.H. at 393, which a reviewing court can vacate. *Hill v. Town of Chester*, 146 N.H. 291, 292-93 (2001).

Portsmouth's SR-B zone is for “single-family dwellings,” yet Yarboroughs' neighborhood contains a church, an orphanage, a duplex, and though it is differently zoned, a 73-unit condominium across the street.

The SR-B zone is supposed to be “medium density,” meaning up to “3 dwellings per acre,” yet the Yarboroughs' neighborhood is much less dense. If the “pertinent neighborhood” is just the nine lots on the Yarboroughs' side of Middle Road, they collectively occupy about $6\frac{1}{2}$

acres, thus having a density of about $1\frac{1}{3}$ dwellings per acre – less than half the zoned density. If the “pertinent neighborhood” includes the church and the orphanage, the density is even less.

The SR-B zone requires lots in the zone to be at least $\frac{1}{3}$ of an acre, yet averaged, the lots are much bigger – about $\frac{3}{4}$ of an acre – and the Yarboroughs’ alone is even bigger at 1 acre.

For frontage, the SR-B zone requires 100 feet, but only two of the nine lots on the Yarboroughs’ side of Middle Road have that, one has 95 feet, two have 64 feet, and four – almost half – have just 50 feet. The two lots between the Chase Home and the corner have only 40 feet. As a member of the ZBA remarked, there is “a 50’ wide rhythm to the neighborhood,” which the photographs and aerial views confirm.

It is permissible for zoning to seek to eliminate non-conforming existing uses within a zone, *Stone v. Cray*, 89 N.H. 483 (1938) (“Classification by which unsuitable conditions are restrained within their existing extent is not unreasonable.”), or to discontinue objectionable conditions. *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361 (2008) (lot-size and frontage restrictions dictated by preservation of lake environment). But Portsmouth has nowhere indicated such purposes; rather its stated goals are to preserve existing character and to “[d]iscourage teardowns for larger, new construction to preserve neighborhood character.” MASTER PLAN at 76; EXISTING CONDITIONS AND TRENDS (July 2003) at 19.

While the SR-B zone may accurately describe some places in Portsmouth, it does not “reflect the current character” of this portion of Middle Road. But “[t]owns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge.” *Belanger*, 121 N.H. at 393 (quotations and citations omitted). The Yarboroughs understand their neighbors’ resistance to change, but their plan is just a part of the incremental growth of Portsmouth, and it was unreasonable for the ZBA to deny a variance. *St. Onge v. City of Concord*,

95 N.H. 306, 309 (1948) (error to deny variance for increase in number of apartments in building when neighborhood is already “predominated by multiple family dwellings and apartment houses”).

Accordingly, this Court should reverse, instruct the ZBA to consider the actual conditions of Middle Road, and grant the variance.

II. Under the Statutory Standard, the Portsmouth ZBA Should Have Granted the Yarboroughs a Frontage Variance

Property owners have constitutional rights to enjoyment of their property, and “[v]ariations are provided for by zoning statutes so that litigation of constitutional questions may be avoided.” *Bouley v. City of Nashua*, 106 N.H. 79, 84 (1964). “[A] variance is in the nature of a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose.” *Husnander v. Town of Barnstead*, 139 N.H. 476, 478 (1995), quoting *New London v. Leskiewicz*, 110 N.H. 462, 466 (1970).

There are six elements which an applicant must prove to gain a variance in New Hampshire:

1. The variance will not be contrary to the public interest;
2. **The spirit of the ordinance is observed;**
3. Substantial justice is done;
4. **The values of surrounding properties are not diminished;**
5. **Owing to special conditions of the property that distinguish it from other properties in the area ... 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**
6. The proposed use is a reasonable one.

RSA 674:33, I(b); ZONING ORDINANCE, *Variances* § 10-233.⁷

The ZBA found that the Yarboroughs did not prove elements 2, 4, and 5 (highlighted in

⁷The statute, and echoing it Portsmouth’s ordinance, group the last two conditions as “unnecessary hardship.” Both this Court and the Legislature have altered the elements and standards of “unnecessary hardship” in the last decade. See generally, *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 512-13 (2011) (tracing recent changes in variance statute and jurisprudence); *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001).

bold type, *supra*), but ruled the others proved. Accordingly, only elements 2, 4, and 5 are addressed herein. *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 753 (2007) (“If any one of the ZBA’s reasons supported its denial of a variance, [the applicant’s] appeal of that decision fails.”).

A. Variance Promotes the Spirit of the Ordinance (Element 2)

“The first step in analyzing whether granting a variance would be contrary” to the spirit of the ordinance “is to examine the applicable zoning ordinance.” *Chester Rod & Gun Club, Inc. v. Town of Chester*, 152 N.H. 577, 581 (2005).

As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto. Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, we must determine whether to grant the variance would *unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives*.

Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011) (emphasis added). “[T]o ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality.” *Chester Rod & Gun*, 152 N.H. at 581 (2005).

For example, in *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361 (2008), the town determined that environmental degradation to Spofford Lake should be addressed by limiting shoreside development, which it did by mandating minimum lot sizes and road frontage. The variance applicant, however, proposed building on tiny lots next to the lake. This Court found the variance was correctly denied because the proposal was unduly outside of the ordinance and conflicted with its spirit in a marked degree.

In Portsmouth, the basic zoning objectives of the SR-B zone are:

- “single-family dwellings”;
- “medium density,” meaning up to “3 dwellings per acre”;
- “15,000 s.f.” – that is, a relatively small $\frac{1}{3}$ acre lot size.

The Yarboroughs’ current and proposed home are both single-family dwellings. After a variance, each lot will be a $\frac{1}{2}$ acre and the resulting density would be about $1\frac{1}{2}$ dwellings per acre – larger and sparser than the ordinance requires. The proposal thus easily meets all the objectives of the ordinance, and promotes the “essential character of the locality.”

The court however, found that the “spirit” element was not met because “all new subdivisions have a minimum requirement of 100 feet of continuous frontage,” and the variance “would create two nonconforming lots with half the frontage of what is required in the SRB zoning district.” ORDER at 12 (adopting portion of City’s post-trial memorandum) (quotations from DEFENDANTS’ POST-TRIAL MEMORANDUM at 10).

As this Court has noted, “any variance would in some measure be contrary” to the ordinance. *Harborside*, 162 N.H. at 514. The ZBA’s reasons, however, merely restate the technical requirements of the zone and say that the Yarboroughs’ proposal does not meet them. *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102, 107 (2007) (“[T]he 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.”); *see also, Beliveau v. Town of Rye*, N.H. Sup.Ct. No. 2012-0609 (Aug. 30, 2013) at 4 (“Just as the mere fact that a project violates an ordinance provision cannot be used as a justification for denying a variance, here the ZBA’s decision cannot be sustained simply because the town desires to enforce its zoning regulations. The object of a rule cannot be to prevent its violation.”) (non-precedential order) (citation omitted).

The ZBA nowhere found the proposal would conflict with the ordinance’s basic

objectives, whether “unduly” or “in marked degree.” Moreover, unlike the example in *Nine A*, 157 N.H. at 361, where the proposal would accomplish essentially the reverse of the environmental purpose of the ordinance, a variance here would cadence the 50-foot rhythm of the neighborhood.

Accordingly, the Yarboroughs have met their burden, the court’s ruling was unlawful and unreasonable, and this Court should reverse.

B. Variance Does Not Diminish the Value of Surrounding Properties (Element 4)

The superior court noted:

The ZBA had no expert evidence, no appraisals, no studies and no figures from which it could conclude that the issuance of the variance would result in a diminution of property values. The only “evidence” of possible diminution were *ipse dixit* from two abutters that their property would be worth less if the Yarborough’s lot was divided. However, the Yarborough’s had the burden of proof on this issue and they presented little more than conjecture.

ORDER at 12. The court ruled that it “need not determine whether the ZBA’s finding regarding diminution of property values was unreasonable or unlawful,” however, because it upheld the ZBA’s findings on other grounds.

The court’s recitation of the paucity of evidence is accurate. See *Garrison v. Town of Henniker*, 154 N.H. 26, 32 (2006) (expert testimony on values not required). Two abutters supposed that their property values would decline. The Yarboroughs suggested that new investment in an aging neighborhood tends to show the area is upturning, and thus their project would likely cause home values to increase. See *Gelinas v. City of Portsmouth*, 97 N.H. 248, 251 (1952) (improvements “will tend to increase rather than diminish the value of surrounding property”). This is so because the home the Yarboroughs seek to build will respect the size and shape of its cohorts, and not be subgrade construction. *C.f. Town of Bethlehem v. Robie*, 111 N.H.

186, 188 (1971) (“a mobile home on a lot would diminish the value of adjoining property”). Indeed, in Portsmouth and many localities nationwide, concern over gentrification is that values rise so much that existing residents get priced-out of housing. *See, e.g.*, MASTER PLAN at 7, 31-32 (expressing concern that increased housing prices for artists and middle class threatens to change character of city); EXISTING CONDITIONS AND TRENDS at 46, 48, 50-51, 53, 56, 58, 62-63, 73, 105 (same); *see generally* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006).

The only basis on which neighbors claimed the Yarboroughs’ proposal might diminish their values was losing their view of the Yarboroughs’ side yard – an area that despite their woe toward its potential loss, exists not because of plat or plan fashioned for their prosperity, but by some happenstance lost to history. Ironically, moreover, the Yarboroughs can lawfully and without any variance construct a garage of the same size and shape of the dwelling they propose, or even tear down their house and build something larger centered on the lot. Whatever detriment the neighbors allege by the current plan would be no less than these alternatives.

Finally, the ZBA’s ruling does not find any diminution of value. Rather, the ZBA conjectured that “[t]he values of neighboring properties *could* be diminished if the variance [were] granted.” ZBA ACTION SHEET at 3 (June 17, 2014), *CR Tab 14, Appx.* at 130, 132 (emphasis added).

Because there is no evidence of any diminution, because the ZBA did not find any diminution, because building a garage or expanding the existing home into a larger footprint would not bring any less diminution, and because *Buskey’s* holding that new construction in aging neighborhoods is likely to increase rather than decrease values, the ZBA’s determination is unreasonable and unlawful, and this Court should reverse.

C. Owing to Special Conditions of Their Property That Distinguish it From Others in the Area, There is No Fair and Substantial Relationship Between the General Purposes of the Ordinance and the Specific Application to the Yarboroughs' (Element 5)

New Hampshire's zoning enabling statute provides that variances are granted when, "[o]wing to special conditions of the property that distinguish it from other properties in the area ... 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". RSA 674:33, I(b)(5)(A); ZONING ORDINANCE, *Variances* § 10-233.30.

Thus there are two components of this element of the variance requirements. The applicant must show:

- The property exhibits special conditions that distinguish it from others in the area;⁸ and
- A lack of relationship between the purposes of the ordinance and its application to the property.

1. Special Conditions of the Yarboroughs' Property Distinguish it from Others in the Area

"Special conditions" include not only circumstances of the land itself, *Vigeant v. Town of Hudson*, 151 N.H. 747 (2005) (usable spot squeezed between road and wetlands), but also of structures on the land, including their size and shape, *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 518 (2011) ("very few buildings ... of a similar size"), or the absence a building. *Bouley v. City of Nashua*, 106 N.H. 79 (1964) (empty lot different from others in area).

⁸Under prior jurisprudence, the applicant had to show the property was "unique." See e.g., *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 752 (2007) ("[T]he applicant must demonstrate, among other things, that the hardship is a result of the property's unique setting in its environment."); *Rancourt v. City of Manchester*, 149 N.H. 51, 54 (2003) (funnel-shaped lot, "uniquely configured in that the rear portion of the lot was considerably larger than the front," allowing for stabling of horses). That standard has been loosened by statute. RSA 677:33, I(b)(5)(A) ("owing to special conditions of the property that distinguish it from other properties in the area...").

If some feature of the property is common in the area, it is not a special condition. *Garrison v. Town of Henniker*, 154 N.H. 26 (2006) (large rural lot); *Crossley v. Town of Pelham*, 133 N.H. 215, 216 (1990) (200 neighboring lots suffered same alleged special condition). Special conditions cannot arise from financial or other circumstances of the owner. *Ryan v. City of Manchester*, 123 N.H. 170, 174 (1983); *Carbonneau v. Town of Exeter*, 119 N.H. 259, 263 (1979).

As noted, the purpose of the SR-B zone is “single-family dwellings,” at “medium density” of up to “3 dwellings per acre,” on lots of at least $\frac{1}{3}$ an acre.

There is one other lot in the neighborhood that has 100 feet of frontage, and some other houses are slightly “off center” on their lots. But the Yarboroughs’ is the only one large enough to subdivide without additional variances, wide enough to split in half and maintain the neighborhood’s “50’ wide rhythm,” *and* with the house positioned far to one edge. Thus its east side is near the setback limits like its neighbors; but on its west side there is enough room to divide the property in half, site a harmonizing home on the new lot, and lay driveways for both. There is no other configuration like that in the area. No other lot can be split without becoming afoul of other zoning conditions, including setbacks and area, or without an eschewed “teardown.”

Because of the extra width of the Yarboroughs’ lot and the highly-eccentric situate of the house, after the requested variance the neighborhood will maintain its rhythm, and the zone will have fulfilled its function. Thus, the long frontage requirement, when applied here, does not bear a “fair and substantial relationship” to the purpose of the ordinance.

2. Defining “Fair and Substantial Relationship”

This case necessitates a definition of the phrase “fair and substantial relation.” The phrase is known to New Hampshire law in this Court’s development of middle-tier equal protection doctrine first developed in the context of medical malpractice, *Carson v. Maurer*, 120 N.H. 925 (1980), and also applied to a variety of other “important substantive rights.” *LeClair v. LeClair*, 137 N.H. 213 (1993); *see e.g., Brannigan v. Usitalo*, 134 N.H. 50 (1991) (cap on personal injury damages); *City of Dover v. Imperial Cas. & Indem. Co.*, 133 N.H. 109 (1990) (municipal immunity). Although this Court recently overhauled its middle-tier equal protection analysis, *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 752 (2007), and thus the holdings of cases employing the now-abandoned analysis may be called into question, from 1980 to 2007 the language “fair and substantial relation” was used to define middle-tier scrutiny and those cases are therefore instructive in defining what the phrase means here. Moreover, even given recent doctrinal changes, modern zoning in New Hampshire is still constitutionally evaluated using middle-tier scrutiny. *Community Resources for Justice*, 154 N.H. at 760; *Town of Chesterfield v. Brooks*, 126 N.H. 64, 68 (1985) (“Zoning ordinances consider and balance the interests of all landowners and for this reason are subject to our middle tier equal protection test and not the strict scrutiny standard.”).

In every known case employing the “fair and substantial relation” test, this Court first identified the purpose of the legislation, and then compared whether the statutory remedy at issue bore a “fair and substantial relation” to the identified purposes. *See Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 731 (2001).

Thus, for example, in *Asselin v. Town of Conway*, 135 N.H. 576 (1992), where this Court found unconstitutional a portion of Conway’s ordinance restricting readerboard signs to

“theaters or businesses featuring live entertainment,” it first identified the town’s legislative purpose as protecting scenic vistas, avoiding proliferation of signs, and “generally preclud[ing] readerboard signs except in the case of businesses whose unique advertising needs necessitate their use.” *Asselin*, 135 N.H. at 578. It then measured the remedy – disallowing restaurants from using readerboard signs – against that purpose. In *Asselin*, this Court found no “fair and substantial relation” because many people regard restaurants as entertainment.

Similarly, in *Town of Chesterfield v. Brooks*, 126 N.H. 64 (1985), the legislative purpose in restricting the location of mobile homes was aesthetic. This Court, however, held that “Chesterfield’s sweeping discriminatory regulation of mobile homes regardless of size or appearance does not bear a fair and substantial relationship to that goal.” *Id.* at 69.

If the stated goal of the town in discriminating against mobile homes is to protect the character of the community, it is not reasonable to require mobile homes to be 500 feet back from all paved roads or to be located on unpaved roads in order to achieve this goal. There are 51 miles of paved roads in Chesterfield. Surely not all of these areas are so charming as to require the town to put greater burdens on certain types of home owners in order to retain that charm. The nexus between “charm” and a paved road is not a logical one. In fact, in many areas of our State, the “charm” is better preserved by dirt roads which tend to discourage excessive building.

Additionally, requiring mobile homes to be 500 feet away from the road is not substantially related to guaranteeing scenic beauty. Even if a particular mobile home is unsightly, a 500-foot set back does not mean that it is hidden from sight. Nor does this restriction on mobile homes mean that site or stick built homes located close to the road will be eye-appealing.

Town of Chesterfield, 126 N.H. at 70. The Court also reviewed the special problems of living on dirt roads, and declared that those burdens do not have “fair and substantial relation” to the Town’s aesthetic purposes. The Court said that “Chesterfield may achieve its goal of retaining its rural, residential character in less restrictive, more effective ways,” and suggested restrictions

on “roads which truly do affect the town’s character [or] establishment of historic districts.” *Id.* at 71.

Thus a “fair and substantial relationship” exists only when the purpose of the ordinance “truly do[es] affect the town’s character,” and the objective cannot be accomplished “in less restrictive, more effective ways.”

3. There Is No Fair and Substantial Relationship Between the Frontage Requirement and its Application to the Yarboroughs’ Lot

This Court has elucidated only two purposes of a frontage requirement: as a method to control overcrowding, *Hannigan v. City of Concord*, 144 N.H. 68, 76 (1999); *Metzger v. Town of Brentwood*, 117 N.H. 497 (1977), *overruled on other grounds by Boulders at Strafford, LLC v. Town of Strafford*, 153 N.H. 633 (2006), and for access by emergency vehicles. *Sanderson v. Town of Candia*, 146 N.H. 598, 600 (2001) (“The evident purpose of [the frontage] requirement is to insure that a dwelling may be reached by the fire department, police department, and other agencies charged with the responsibility of protecting the public peace, safety and welfare.”); *Hannigan v. Concord*, 144 N.H. at 76; *Trottier v. City of Lebanon*, 117 N.H. 148, 150 (1977); *see also Belluscio v. Town of Westmoreland*, 139 N.H. 55, 56 (1994).

This Court has admonished that frontage is *not* a tool to address density. *Cosseboom v. Town of Epsom*, 146 N.H. 311, 315 (2001) (“The superior court determined that the pre-existing use ordinance included ‘frontage’ because it is a measurement in a particular direction and thus a ‘dimensional’ requirement. While the court was correct in construing ‘dimension’ as a component of ‘size,’ we disagree that ‘frontage’ is a dimensional requirement. Rather, ‘frontage’ is defined as the ‘linear distance of property along street, highway, river, or lake.’ As a result, the *sine qua non* of ‘frontage’ is the property’s location, making it more a creature of geography than geometry.”) (citation omitted).

This court has also made clear that frontage is *not* a tool to address size.

“Size” is defined as “physical magnitude, extent, or bulk: the actual, characteristic, normal, or relative proportion of a thing.”... “[S]ize” includes both “dimension” and “area”: two mutually exclusive terms, with “dimension” representing a linear measurement and “area” representing a spatial measurement. “Frontage,” however, is not encompassed within either of these categories, and is not a constituent of “size.”

Cosseboom, 146 N.H. at 314-15.

The superior court erroneously declared:

The purpose of the street frontage requirement in the SRB zone is to limit the number of lots in the neighborhoods within the zone and, thereby, limit the density of developed lots.

ORDER at 11. Then, the court applied its erroneous expression of the purpose:

“[T]he application of the street frontage requirement to the Yarborough’s lot is directly and tightly related to the purpose of the ordinance provision.... By prohibiting the mitosis of their lot into two tiny, *high density lots*, the ordinance *limits the density of developed lots*.

ORDER at 12 (emphasis added).

The superior court made three errors. First, it misstated the purposes of frontage requirements, which is overcrowding and emergency access, not number of lots or density.

Second, it used frontage to control density. But applying the lawful purposes of the frontage, there is no danger of overcrowding or to safety. After a variance, the neighborhood will contain about 1½ dwellings per acre – much sparser than the ordinance’s maximum of three per acre. And given the commonplace separation of houses by their side driveways, which nobody has alleged presents emergency access obstacles, the variance creates no safety risk. Moreover, even if density were a proper focus of frontage, because of the lot’s large size alone, that purported purpose has been met.

The court’s third error was ruling on the basis that enforcing the frontage requirement

would create “two tiny ... lots” – that is, size. But size and frontage are not lawfully related. Nonetheless, after a variance, both lots would meet the ordinance’s area requirements.

Accordingly, this Court should reverse so the Yarboroughs’ variance application can be measured against permissible purposes of the frontage requirement, or find as a matter of law it meets those purposes.

D. Wide Lot, Eccentric Placement, No Overcrowding, and No Safety Risk, Means the ZBA Should Have Granted a Variance

The Yarboroughs must prove that “[o]wing to [the] special conditions” of their lot that “distinguish it from other properties in the area,” there is “no fair and substantial relationship” between the “general public purposes of the ordinance ... and the specific application” here. RSA 674:33, I(5)(A).

Their lot is the only one with the house off to one side, large enough to be subdivided, and also wide enough that it can be split without impinging the character of the neighborhood. A variance results in neither overcrowding nor safety risks. The Yarboroughs have accordingly met the terms of the 5th element of the variance statute.

The superior court’s ruling was thus unlawful and unreasonable. This Court should vacate its holding, and order the ZBA grant the Yarboroughs a variance from the 100-foot frontage provision of Portsmouth’s SR-B zone. *Malachy Glen*, 155 N.H. at 108.

CONCLUSION

The Yarboroughs’ family and businesses would benefit from more room. For whatever reason, their lot is double-wide and their house was built off to one side, allowing them the possibility of expanding by constructing extra space, or subdividing and building a new home. Their proposal is reasonable, and part of the normal growth of a vibrant community. This Court should reverse the ruling of the superior court, and order the ZBA grant the variance.

REQUEST FOR ORAL ARGUMENT

Joseph and Ellen Yarborough requests their attorney, Joshua L. Gordon, be allowed oral argument because this case gives this Court the opportunity to construe Portsmouth’s zoning ordinance in the context of accommodating modern pressures while maintaining municipal character, because this Court has not for nearly 35 years addressed the RSA 674:17, II connection between ordinance and neighborhood in an urban setting, and because of the apparent misunderstanding of the purposes of frontage requirements by both the ZBA and superior court.

Respectfully submitted,

Joseph & Ellen Yarborough
By their Attorney,

Law Office of Joshua L. Gordon

Dated: November 8, 2015

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that on November 8, 2015, copies of the foregoing will be forwarded to Jane M. Ferrini, Esq., Portsmouth City Attorney.

Dated: November 8, 2015

Joshua L. Gordon, Esq.

ADDENDUM

- 1. ZBA ACTION SHEET (June 17, 2014), *CR Tab 14* (expurgated)..... 32
- 2. ORDER (Mar. 25, 2015)..... 34