

South Portland City Council
Position Paper of the City Manager

Subject:

ORDER #145-15/16 – Authorizing the Code Enforcement Officer to execute a consent agreement between Alison N. Eckert and the City relating to a side setback encroachment at 29 Channel Road (Map 1, Lot 27). Passage requires majority vote.

Position:

This item is brought forward to authorize the Code Enforcement Officer to execute a consent agreement on behalf of the City in order to resolve a side setback encroachment issue on property owned by Alison N. Eckert located at 29 Channel Road (Map 1, Lot 27).

The background of this request is detailed in the Code Enforcement Officer's memorandum to the City Council dated April 28, 2016. Note that Ms. Eckert cannot meet the "undue hardship" variance standards, and so it does not seem appropriate to refer her to the Board of Appeals to request a variance that she is not legally entitled to.

It is the City Council that decides what violations of the Zoning Ordinance to pursue (or not) in court in the exercise of its "prosecutorial discretion." Thus, City Council approval of the consent agreement is needed in order for the City and its Code Enforcement Officer to agree not to prosecute this side setback violation.

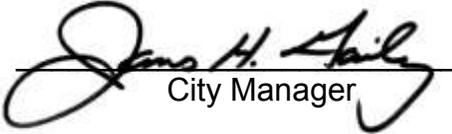
The attached Order requires the payment of \$1250.00 from the property owner to the City. Of the required payment, \$750.00 will go to reimburse the City's costs associated with Corporation Counsel's review and preparation of the document for Council review. The remaining \$500.00 is a fine for the encroachment. Historically, the City has allocated encroachment fines to the South Portland Food Cupboard.

A copy of the proposed Consent Agreement (with Survey Plan) is attached.

The Code Enforcement Officer will be present at the May 2, 2016 City Council meeting to answer any questions.

Requested Action:

Passage of ORDER # 145-15/16.


City Manager



CITY OF SOUTH PORTLAND

THOMAS E. BLAKE
Mayor

JAMES H. GAILEY
City Manager

EMILY F. CARRINGTON
City Clerk

SALLY J. DAGGETT
Jensen Baird Gardner & Henry

District One
CLAUDE V. Z. MORGAN

District Two
PATRICIA A. SMITH

District Three
EBEN C. ROSE

District Four
LINDA C. COHEN

District Five
BRAD FOX

At Large
MAXINE R. BEECHER

At Large
THOMAS E. BLAKE

IN CITY COUNCIL

ORDER #145-15/16

ORDERED, that the City hereby approve the attached consent agreement between Alison N. Eckert and the City to address a side setback encroachment on property located at 29 Channel Road (Map 1, Lot 27) and authorize the Code Enforcement Officer to execute the consent agreement on behalf of the City; and

BE IT FURTHER ORDERED, that the fine to be paid by Ms. Eckert pursuant to the terms of the consent agreement be donated by the City to the South Portland Food Cupboard.

Fiscal Note: \$750 to be credited to Account #10153062-628801
\$500 to be credited to Account #180935-431016

Dated: May 2, 2016

CONSENT AGREEMENT

THIS AGREEMENT is entered into this ____ day of May, 2016, by and between ALISON N. ECKERT, an individual with a mailing address of 29 Channel Road, South Portland, ME 04106, and the CITY OF SOUTH PORTLAND, a municipal corporation existing under the laws of the State of Maine and located at 25 Cottage Road, South Portland, in the County of Cumberland, State of Maine (hereinafter “the City”).

WHEREAS, Patricia Doucette is the duly appointed Code Enforcement Officer (“CEO”) of the City authorized under law to administer and enforce the provisions of the Zoning Ordinance of the City of South Portland (“Zoning Ordinance”);

WHEREAS, on August 15, 1994, Eckert acquired certain real property located at 29 Channel Road, South Portland, Cumberland County, Maine described in a deed recorded in the Cumberland County Registry of Deeds in Book 11581, Page 145 and currently shown on Assessor’s Tax Map 1 as Lot 27 as of the April 1, 2015 assessment date (the “Property”);

WHEREAS, the Property is located in the AA Residential zoning district;

WHEREAS, Section 27-514 of the Zoning Ordinance (and its predecessor provision in effect at all relevant times hereto) provides that the side setback for all principal buildings in the AA Residential zoning district is ten feet (10’);

WHEREAS, in 1991, the prior owners of the Property sought and obtained a variance from the South Portland Board of Appeals in order to construct a 3' by 5'2" addition to the existing single family house within six feet of the westerly sideline of the Property;

WHEREAS, in 1991, the Board of Appeals’ Certificate of Variance Approval relating to the variance obtained by the prior owners was recorded in the Cumberland County Registry of Deeds in Book 9654, Page 328;

WHEREAS, construction of the addition was completed in 1991;

WHEREAS, Eckert recently caused a boundary survey of the Property to be completed, which plan is entitled “Boundary Survey, 29 Channel Road, South Portland, Maine” dated April 22, 2016 and prepared by Spurwink Surveying LLC (the “Survey Plan”), a copy of which is attached hereto and incorporated herein as *Exhibit A*;

WHEREAS, the Survey Plan reveals that the northwesterly corner of the house on the Survey Plan encroaches two feet into the westerly side setback and parallel to the side lot line for a distance of approximately three feet, for a total encroachment by that corner of the house of approximately six square feet (2 ft. x 3 ft. = 6 s.f.) into the side setback;

WHEREAS, the northwesterly corner of the house that encroaches into the side setback and that is shaded in black and shown on the Survey Plan as “Area in Violation” constitutes a Zoning Ordinance side setback violation;

WHEREAS, Eckert now desires to sell the Property;

WHEREAS, any person who violates the Zoning Ordinance may be liable for civil penalties of between \$100 and \$2,500 per day under State and local law; and

WHEREAS, the City, its CEO and Eckert have subsequently been cooperating with one another in an attempt to resolve this matter;

NOW, THEREFORE, the City, its CEO and Eckert agree as follows:

1. Eckert hereby admits the current existence of violation of the side setback requirement of the Zoning Ordinance for which the Property does not have an appropriate variance.

2. Eckert acknowledges that the circumstances of the Zoning Ordinance side setback violation do not warrant the granting of a variance under State or local law and therefore waives the right to apply to the Board of Appeals for a variance relating to the side setback violation shown on the Survey Plan.

3. The City and the CEO agree to relinquish their right to prosecute Eckert for the violation of the side setback requirement of the Zoning Ordinance for which the Property does not have an appropriate variance in consideration of Eckert’s admission of

the violation and agree that that portion of the house shown as “Area in Violation” on the Survey Plan shall have the status of a legally existing nonconforming building or structure for purposes of the Zoning Ordinance. If Eckert, her heirs or assigns, breach any of the terms of this Consent Agreement, create any new violation of a dimensional requirement of the Zoning Ordinance, or violate any other terms of the Zoning Ordinance, the City and/or its CEO may institute appropriate court proceedings to enforce the provisions of the Zoning Ordinance.

4. Simultaneously upon execution of this Consent Agreement by the parties, Eckert shall (a) pay a civil penalty in the amount of Seven Hundred Fifty Dollars (\$750.00); and (b) reimburse the City its attorney’s fees and costs in the amount of Five Hundred Dollars (\$500.00). Such payments shall be made by two separate bank or certified checks, each made payable to the City of South Portland. Payment shall be made to the City, c/o City Manager, 25 Cottage Road, P.O. Box 9422, South Portland, ME 04116-9422.

5. This Consent Agreement shall run with the Property and be binding on and inure to the benefit of Eckert, her heirs and assigns, and it shall be duly recorded by Eckert at the Cumberland County Registry of Deeds within thirty (30) days of the date of this Consent Agreement, with a copy of the recorded instrument contemporaneously provided to the CEO, or else it is void.

6. At a meeting of the South Portland City Council on May 2, 2016, the City Council approved the resolution of the above-described land use violation based on the terms and conditions set forth herein and authorized the CEO to sign this Consent Agreement on behalf of the City.

ALISON N. ECKERT

Alison N. Eckert

CITY OF SOUTH PORTLAND

By: Patricia Doucette
Its Code Enforcement Officer,
duly authorized on behalf of the City
and also in her capacity as
Code Enforcement Officer

STATE OF MAINE
CUMBERLAND, ss. _____, 2016

Personally appeared before me the above-named Patricia Doucette and swore the above statements to be true based upon her personal knowledge and acknowledged the foregoing instrument to be her free act and deed and the free act and deed of said City of South Portland.

Before me,

Notary Public/Attorney at Law

Print Name

April 28, 2016

To: City Council

From: Patricia Doucette, Director of Code Enforcement

Re: Request for Consent Agreement
29 Channel Road

The resident at 29 Channel Road is under contract to sell her home. A Mortgage Loan Inspection Plan that was prepared for the buyer indicates a side yard setback violation.

In 1991, the previous owners were granted a four (4) foot side property line setback variance in order to construct a 3' x 5'2" addition to their home six (6) feet from the side property line.

This property is located in the AA Residential zone. The required side yard setback is ten (10) feet. The addition was supposed to be built six (6) feet from the side property line.

The Mortgage Loan Survey indicates that the addition is actually four (4) feet from the side property line. The property owner has recently obtained a Boundary Line Survey that confirms that the addition is four (4) feet from the side property line.

I have reviewed the variance application and it clearly indicates that a four (4) foot variance was requested by the applicant. The plans and survey indicate that the addition was to be four (4) feet from the side property line, not six (6) as was indicated on the application.

The Board of Appeals does not have the authority to grant an "after the fact" variance. Through the guidelines adopted by the City Council, I recommend that the City enter into a Consent Agreement with regard to this *de minimis* violation of a dimensional regulation. Consent agreements are to be entered into sparingly and only referred to the City Council on a limited basis. I believe that the property owner meets all of the consent agreement guidelines and that this is a *de minimis* violation.

1. The violation is *de minimis* in nature, meaning that the minor violation does not exceed twenty-five percent (25%) of the dimensional setback requirement, which in this AA zone is ten (10) feet for the side yard setback. In 1991, the Board of Appeals granted a four (4) foot side yard setback variance to allow construction up to six (6) feet from the side property line. There is a six (6) square foot encroachment in the area two (2) feet beyond the side yard setback the variance allowed. A two (2) foot by three (3) foot section of the addition is four (4) feet from the side property line. The violation is *de minimis* in nature because the two (2) foot violation is less than twenty-five percent (25%) of the standard requirement for a ten (10) foot side yard setback in the AA zone. Twenty-five percent (25%) of a ten (10) foot setback would be two and a half (2.5) feet.

2. The violation is not a use violation of the zoning ordinance or a space/density violation.
3. The violation is not within a shoreland setback requirement.
4. The violation does involve a non-movable structure; this addition is a permanent structure on a foundation.
5. The violation was not willful; I believe the application was completed incorrectly by the applicant and the error was carried throughout the application process. Plans that were submitted with the application indicate that the addition was to be four (4) feet from the side property line, not six (6) feet.
6. The applicant cannot purchase land from her neighbor. The neighbor's lot is legally nonconforming.
7. The violation has not resulted in environmental damage.
8. The violation did not involve a municipal work stop order.
9. The previous owner obtained a building permit.
10. The current property owner did not provide the City with incorrect information. The area was created by the previous owner. When the violation was discovered the property owner began the process with the City to work towards a solution.
11. A deck that was built by the previous owner in violation of the side yard setback has been removed.

Attachments include a copy of the original variance request with supporting documents, a certificate of variance approval, a copy of the current owners deed and a portion of the boundary line survey.