

South Portland City Council
Position Paper of the City Manager

Subject:

ORDER #98-13/14 – Authorizing the Code Enforcement Officer to execute a consent agreement between Thelma P. DiPierro and the City relating to a rear yard setback encroachment at 63 Carignan Avenue (Map 63, Lot 1C). Passage requires majority vote.

Position:

This item is brought forward to authorize the Code Enforcement Officer (“CEO”) to execute a consent agreement on behalf of the City in order to resolve a rear yard setback encroachment issue on property owned by Thelma P. DiPierro (“Mrs. DiPierro”) located at 63 Carignan Avenue (Map 63, Lot 1C).

On December 19, 1967, Mrs. DiPierro acquired the Carignan Avenue property. The property is improved with a single family house and garage. Mrs. DiPierro’s husband is deceased, her health is failing and she now wishes to sell the property. Mrs. DiPierro recently caused a boundary survey of the Property to be completed, which boundary survey is entitled “Lot Re-Configuration Plan, 63 and 71 Carignan Avenue, South Portland, Maine” prepared for Thelma P. DiPierro by Northeast Civil Solutions, Inc. dated January 6, 2014 (the “Survey Plan”).

The Survey Plan reveals that the southeasterly corner of the garage shown in cross-hatch in Detail “A” on the Survey Plan (17± s.f.) encroaches slightly into the rear yard setback. (The rear setback is 20 feet in the A residential zoning district, and the southeasterly corner of the garage is 0.14 to 1.16 feet from the rear property line.) After receipt of the Survey Plan, Mrs. DiPierro’s surveyor approached the CEO about the best way to resolve this issue. The CEO observed that the building permit for the garage was issued in 2002; that there is no evidence that the zoning setback violation is willful; that the zoning setback violation is *de minimis*; and that there are no other known zoning violations on the property. (Note that there are some unrelated land swaps shown on the Survey Plan that do not relate to the consent agreement request but that have been placed on the plan in order to eliminate the need for further survey work at a later date. Per the CEO, the proposed land swaps do not create any nonconforming space or bulk issues.)

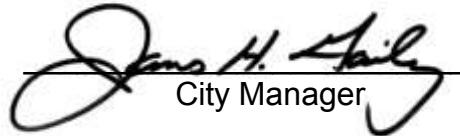
The CEO informed Mrs. DiPierro's surveyor that, under these circumstances, it would be best to seek to enter into a consent agreement with the City. (Mrs. DiPierro cannot meet the "practical difficulty" variance standards, and so it did not seem appropriate to refer Mrs. DiPierro to the Board of Appeals 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 CEO to agree not to prosecute this setback violation. Given the circumstances surrounding the violation, City staff recommends that Mrs. DiPierro reimburse the City for its out of pocket costs (legal fees) but that no fine be imposed on Mrs. DiPierro.

A copy of the proposed Consent Agreement (with Survey Plan) is attached. The CEO will be present at the January 22, 2014 City Council meeting to answer any questions.

Requested Action:

Passage of ORDER # 98-13/14.


City Manager



CITY OF SOUTH PORTLAND

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Mayor

JAMES H. GAILEY
City Manager

SUSAN M. MOONEY
City Clerk

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MELISSA E. LINSKOTT

District Four
LINDA C. COHEN

District Five
GERARD A. JALBERT

At Large
MAXINE R. BEECHER

At Large
THOMAS E. BLAKE

IN CITY COUNCIL

ORDER # 98-13/14

ORDERED, that the City hereby approve the attached consent agreement between Thelma P. DiPierro and the City to address a rear yard setback encroachment on property located at 63 Carignan Avenue (Map 63, Lot 1C) and authorize the Code Enforcement Officer to execute the consent agreement on behalf of the City.

Fiscal Note: \$400 to be credited to Account #10153062-628801

Dated: January 22, 2014

CONSENT AGREEMENT

THIS AGREEMENT is entered into this ____ day of _____, 2014, by and between THELMA P. DiPIERRO, an individual with a residence in South Portland, County of Cumberland and State of Maine with a mailing address of 15 RiverPlace Drive, Unit 1533, South Portland, ME 04106 (hereinafter the “Mrs. DiPierro”), 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 December 19, 1967, Matthew L. DiPierro and Mrs. DiPierro acquired certain real property located at 63 Carignan Avenue, South Portland, Cumberland County, Maine described in a deed recorded in the Cumberland County Registry of Deeds in Book 3024, Page 107 and currently shown on Assessor’s Tax Map 63 as Lot 1C as of the April 1, 2013 assessment date (the “Property”);

WHEREAS, a boundary survey was not required by the City in order to apply for a building permit for a single family house at the time the DiPierros applied for and were issued a building permit to construct a 28' by 48' single family house with 24' by 24' attached garage on the Property in June of 2002;

WHEREAS, Matthew L. DiPierro is deceased, and Mrs. DiPierro is the surviving joint tenant;

WHEREAS, Mrs. DiPierro now desires to sell the Property;

WHEREAS, Mrs. DiPierro recently caused a boundary survey of the Property to be completed, which boundary survey is entitled “Lot Re-Configuration Plan, 63 and 71 Carignan Avenue, South Portland, Maine” prepared for Thelma P. DiPierro by Northeast

Civil Solutions, Inc. dated January 6, 2014 (the "Survey Plan"), a reduced copy of which is attached hereto and incorporated herein as *Exhibit A*;

WHEREAS, the Survey Plan reveals that the southeasterly corner of the garage shown in cross-hatch in Detail "A" on the Survey Plan (17± s.f.) encroaches slightly into the rear yard setback;

WHEREAS, the southeasterly corner of the garage shown in cross-hatch in Detail "A" on the Survey Plan constitutes a Zoning Ordinance setback violation; and

WHEREAS, the City, its CEO and Mrs. DiPierro have subsequently been cooperating with each other in an attempt to resolve this matter;

NOW, THEREFORE, the City, its CEO and Mrs. DiPierro agree as follows:

1. Mrs. DiPierro hereby admits the current existence of a violation of the rear yard setback requirement of the Zoning Ordinance for which the Property does not have an appropriate variance.

2. Mrs. DiPierro acknowledges that the circumstances of the Zoning Ordinance setback violation do not warrant the granting of a variance under State or local law and therefore waives the right to apply to the Zoning Board of Appeals for a variance relating to the setback violation that is shown in shown in cross-hatch in Detail "A" on the Survey Plan.

3. The City and the CEO agree to relinquish their right to prosecute Mrs. DiPierro for the violation of the rear yard setback requirement of the Zoning Ordinance for which the Property does not have an appropriate variance in consideration of Mrs. DiPierro's admission of the violation; provided, however, if Mrs. DiPierro, 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. Mrs. DiPierro agrees to reimburse the City for its attorney's fees incurred relating to this matter in the amount of \$400.00 on or before February 1, 2014. Such payment shall be made by bank or certified check made payable to the City of South Portland. Payment shall be made to the City, c/o City Manager, City of South Portland, 25 Cottage Road, South Portland, ME 04106.

5. This Consent Agreement shall be binding on Mrs. DiPierro, her heirs and assigns, and it shall be duly recorded by Mrs. DiPierro 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 January 22, 2014, 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.

THELMA P. DiPIERRO

Thelma P. DiPierro

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.

_____, 2014

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

