

South Portland City Council  
***Position Paper of the City Manager***

***Subject:***

**ORDER #112-13/14 – Authorizing the Code Enforcement Officer to execute a consent agreement between Stanley and Catherine Scribner and the City relating to a side yard setback encroachment at 38 Appletree Drive (Map 56, Lot 56-17). 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 side yard setback encroachment issue on property owned by Stanley and Catherine Scribner located at 38 Appletree Drive (Map 56, Lot 56-17).

On August 31, 2007, the Scribners acquired the Appletree Drive property. The property is improved with a single family house. The Scribners now wish to sell the property. The Scribners recently caused an existing conditions plan of the Property to be completed, which plan is entitled “Existing Conditions Plan of 38 Appletree Drive, South Portland, Maine” prepared for Catherine Scribner by Northeast Civil Solutions, Inc. dated March 5, 2014 (the “Plan”).

The Plan reveals that the southwesterly corner of the deck encroaches slightly (0.39 feet) into the side yard setback. (The side setback is 6 feet in the A residential zoning district, and the southwesterly corner of the deck is 05.61 feet from the side property line.) After receipt of the Plan, the Scribners surveyor approached the CEO about the best way to resolve this issue. The CEO observed that the building permit for the house and attached deck was issued in 1998; 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.

The CEO informed the Scribners’ surveyor that, under these circumstances, it would be best to seek to enter into a consent agreement with the City. (The Scribners cannot meet the “practical difficulty” variance standards, and so it did not seem appropriate to refer the Scribners to the Board of Appeals to request a variance that they are not legally entitled to.) Determinations on what qualifies and doesn’t qualify for variances have

changed over the years, resulting in the current day determination. The property did receive a three-foot variance a number of years ago by the former owner, but the variance approval was never recorded and has since expired.


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 the Scribners reimburse the City for its out of pocket costs (legal fees) but that no fine be imposed on the Scribners.

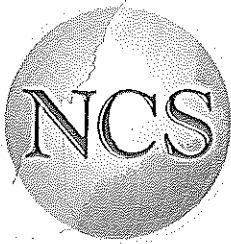
A copy of the proposed Consent Agreement (with Survey Plan) is attached. The CEO will be present at the March 17, 2014 City Council meeting to answer any questions.

I am requesting the City Council waive Rule 3 (e) and allow this item to be on the agenda for action. Waiver of Rule 3 (e) requires majority vote.

***Requested Action:***

Passage of ORDER #112-13/14.

  
City Manager



# Northeast Civil Solutions

INCORPORATED

March 7, 2014

153 U.S. Route 1  
Scarborough  
Maine 04074

Patricia Doucette, CEO  
City of South Portland  
496 Ocean Street  
South Portland, ME 04106

tel  
207.883.1000  
800.882.2227

RE: Consent Agenda Item for City Council Action (Setback Encroachment of  
a Rear Deck at 38 Appletree Drive)

fax  
207.883.1001

Dear Pat:

On behalf of Stanley and Catherine Scribner, owners of property at 38 Appletree Drive, we request consideration by the City Council, as a consent agenda item, to address a slight setback violation of a rear deck attached to the house that has existed since 1999. The property is identified as Tax Map 56, Parcel 56-17; is a lot in an approved subdivision; is in the Residential A zone; is not in a Shoreland or Resource Protection Zone; is not in a flood plain; and has no easements of record burdening the lot. There are some wetlands at the rear of the lot (not near the structure), and the Planning Board approved the subdivision plan in 2001 specifying a one (1') foot setback buffer from those wetlands; a copy of that subdivision is attached for your reference. The wetlands are not an issue with this project.

## BACKGROUND

The Scribners purchased the property at 38 Appletree Drive in 2001. They are now under contract to sell the property, but need to address a setback violation of the deck, which lies 0.39 feet (approximately 5") over the side setback buffer (see the attached Existing Conditions Plan of 38 Appletree Drive by Northeast Civil Solutions dated 3/5/14). This setback issue was previously addressed in a variance that was granted to Dwayne and Michele Masters by the Zoning Board of Appeals on July 25, 2001. The 4-0 vote by the Zoning Board approved a setback reduction of three feet to accommodate the existing deck encroachment. It appears that the encroachment was identified by a mortgage inspection plan of the property that was done in conjunction with the sale of the property to Mr. and Mrs. Scribner in 2001, and Mr. and Mrs. Masters completed a ZBA variance Application Request and represented themselves at the ZBA meeting.

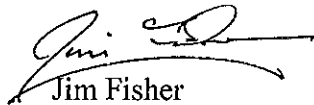
At the time the three-foot variance was approved, the Masters were apparently involved in an acrimonious divorce (hence the sale of the house to the Scribners). Following approval of the variance, the Certificate of Variance Approval was mailed to the Masters at their home address, to be recorded at the County Registry of Deeds within 90 days. Unfortunately, neither Mr. nor Mrs. Masters acted on recording the document as required, and they sold the property to the Scribners with all parties apparently believing that the encroachment issue had been satisfactorily addressed.

A recent mortgage inspection plan of the property, completed in conjunction with the imminent sale by the Scribners, again uncovered the problem with the deck. When the Scribner's researched the variance approval, they discovered that the Approval document had indeed not been recorded so the variance approval was null and void. At that point they contacted NCS to assist them in rectifying the issue. We then completed an instrument survey of the portion of the property that included the deck encroachment. Using a laser-based total station survey instrument, we were able to confirm the encroachment; however, instead of the encroachment being three feet as previously approved, we determined it to be .39 feet.

One of the vertical deck supports is at the outer edge of the encroachment and is anchored in a concrete-encased sono-tube, and the decking and railing above that support are also at the outer edge of the encroachment. Attempting to correct the problem by cutting off a portion of the deck, therefore, is not feasible without major reconstruction of the deck. Given that a variance for three feet was granted to address this issue, we respectfully request that the Council now approve this minor violation that will solve this problem once and for all. The Scribners are fully aware that, if approved, the Certificate of Approval must be duly recorded expeditiously at the Registry of Deeds.

Thank you for your consideration. Please contact us if you have any questions.

Sincerely,  
Northeast Civil Solutions, Inc.

A handwritten signature in black ink, appearing to read "Jim Fisher", with a long horizontal flourish extending to the right.

Jim Fisher  
President

Focus

0067515

DK16705 PG246

**WARRANTY DEED**

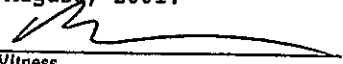
Know All Men By These Presents That We, Dwayne J. Masters and Michelle D. Masters of 38 Appletree Drive, South Portland, County of Cumberland and State of Maine,



for consideration paid, grant to Stanley E. Scribner and Catherine D. Scribner of 343 Woodsfords Street, Portland, County of Cumberland and State of Maine as Joint Tenants with WARRANTY COVENANTS:

A certain lot or parcel of land together with any buildings thereon situated in South Portland County of Cumberland and State of Maine, more particularly described in Exhibit A attached hereto and incorporated herein by reference.

In Witness Whereof, we have hereunto set our hand(s) this 31st day of August, 2001.


MAINE REAL ESTATE TAX PAID

  
Witness

  
Dwayne J. Masters  
  
Michelle D. Masters

State of Maine  
County of Cumberland ss.

On this 31st day of August, 2001, personally appeared before me the above named Dwayne J. Masters and Michelle D. Masters and acknowledged the foregoing to be his/her/their free act and deed.

  
Notary Public, Attorney at Law  
Matthew Campbell ESQ

Return to: Stanley E. Scribner,

File No: 01032180

## Exhibit A - Deed

A certain lot or parcel of land off Highland Avenue in the City of South Portland, County of Cumberland and State of Maine, being Lot 7 on Plan of Highland Woods prepared for Christopher Wagner by Richard A. Manthorne, P.L.S., dated February 20, 1995 and recorded in Cumberland County Registry of Deeds in Plan Book 195, Page 360.

Together with the right in common with others to use the 50 foot wide right of way known as Appletree Drive for ingress and egress by foot or vehicle and for the installation of utilities over, across and under said right of way to the parcel above described. Said right of way extends from the northwesterly sideline of the above described parcel to its northerly most point.

Meaning and intending to convey and hereby conveying the same premises described in a deed from Christopher S. Wagner dated September 25, 1997 to Dwayne J. Masters and Michelle D. Masters and recorded in the Cumberland County Registry of Deeds in Book 13342, Page 289.

RECEIVED  
RECORDED REGISTRY OF DEEDS

2001 SEP -5 AM 11:53

CUMBERLAND COUNTY

*John B. Carlin*



CITY OF SOUTH PORTLAND

25 COTTAGE ROAD

P.O. BOX 9422

SOUTH PORTLAND, MAINE 04116-9422

BOARD OF APPEALS

August 9, 2001

Dwayne & Michelle Masters  
38 Appletree Drive  
South Portland, ME 04106

Dear Property Owners:

Please accept this letter as confirmation of action taken by the South Portland Board of Appeals on August 8, 2001 regarding your property located at 38 Appletree Drive, South Portland Assessor's Map 56 Lot 17 in the A Residential zoning district.

The Board voted to grant your request for a three foot (3') side property line setback variance for an existing eight foot by sixteen foot (8' x 16') deck on the rear of the home, a portion of which is three feet (3') from the side property line.

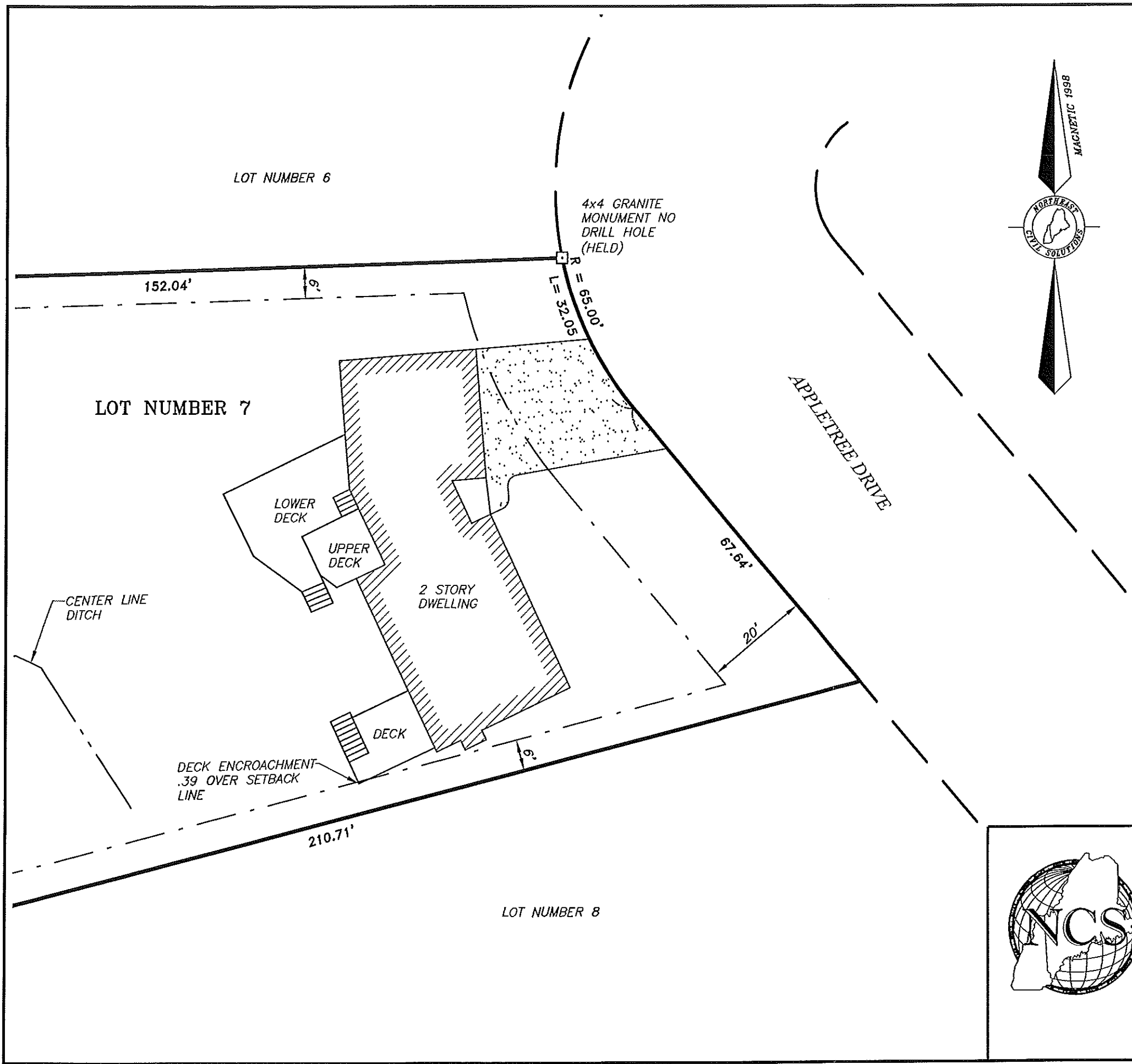
A copy of the Board's findings of facts is enclosed.

We have provided you with the appropriate variance certificate for recording with the local registry (enclosed). It is your responsibility to have your variance recorded within ninety (90) days of the date your variance was granted. The Building Inspector cannot approve your building permit application until proof of recording is provided (i.e., receipt from the Cumberland County Registry of Deeds).

Sincerely,

*Gerard Jalbert/cjc*

Gerard Jalbert, Chairman  
GJ/clc  
Enclosures



## NOTES

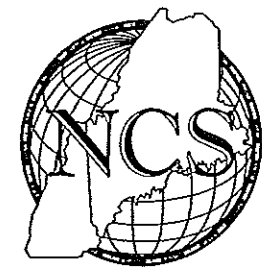
1. RECORD OWNERSHIP OF THE PARCEL SHOWN CAN BE FOUND IN A DEED FROM DWAYNE J. MASTERS & MICHELLE D. MASTERS TO STANLEY E. SCRIBNER & CATHERINE D. SCRIBNER DATED AUGUST 31, 2001 AND RECORDED IN DEED BOOK 16705, PAGE 246, CUMBERLAND COUNTY REGISTRY OF DEEDS (CCRD).
2. THE PARCEL SHOWN IS LOCATED ON THE TOWN OF SOUTH PORTLAND ASSESSOR'S MAP 56, PARCEL 56-17.
3. REFERENCE IS MADE TO THE FOLLOWING PLANS OF RECORD:
  - a. "AMENDED SUBDIVISION PLAN", BY RICHARD A. MANTHORNE, DATED AUGUST 12, 1998 AND RECORDED IN PLAN BOOK 198, PAGE 287 CUMBERLAND COUNTY REGISTRY OF DEEDS (CCRD).
  - b. "OLD BOG ROAD CONDOMINIUMS" BY LAND USE CONSULTANTS, DATED MARCH 1, 2007 AND RECORDED IN PLAN BOOK 207, PAGE 205 CUMBERLAND COUNTY REGISTRY OF DEEDS (CCRD).
4. THIS IS NOT A BOUNDARY SURVEY. THIS SKETCH PLAN EXCEPTS CHAPTER 90, PART 2, SECTIONS 4 THROUGH 8 OF THE MAINE BOARD OF LICENSURE FOR PROFESSIONAL LAND SURVEYOR'S RULES.

### EXISTING CONDITIONS PLAN OF 38 APPLETREE DRIVE SOUTH PORTLAND MAINE

SCALE: 1"=20'                      DATE: MARCH 5, 2014

PREPARED FOR: CATHERINE SCRIBNER  
38 APPLETREE DRIVE  
SOUTH PORTLAND, MAINE, 04106

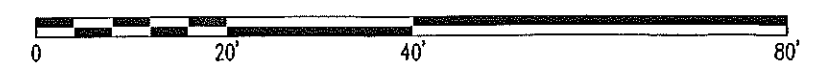
JOB NUMBER: 34240                      ACAD FILE: 34240.DWG



SURVEYING ENGINEERING LAND PLANNING  
**Northeast Civil Solutions**  
INCORPORATED

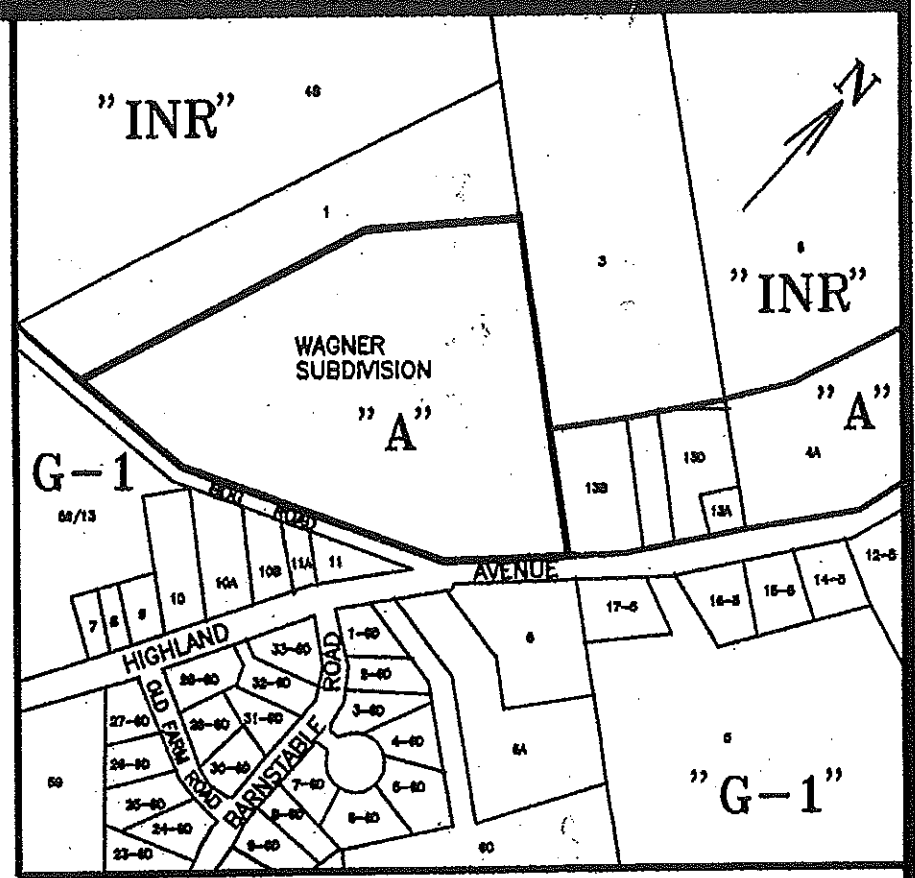
153 US ROUTE 1, SCARBOROUGH, MAINE 04074

tel 207.883.1000                      fax 207.883.1001                      e-mail info@northeastcivilsolutions.com  
800.882.2227

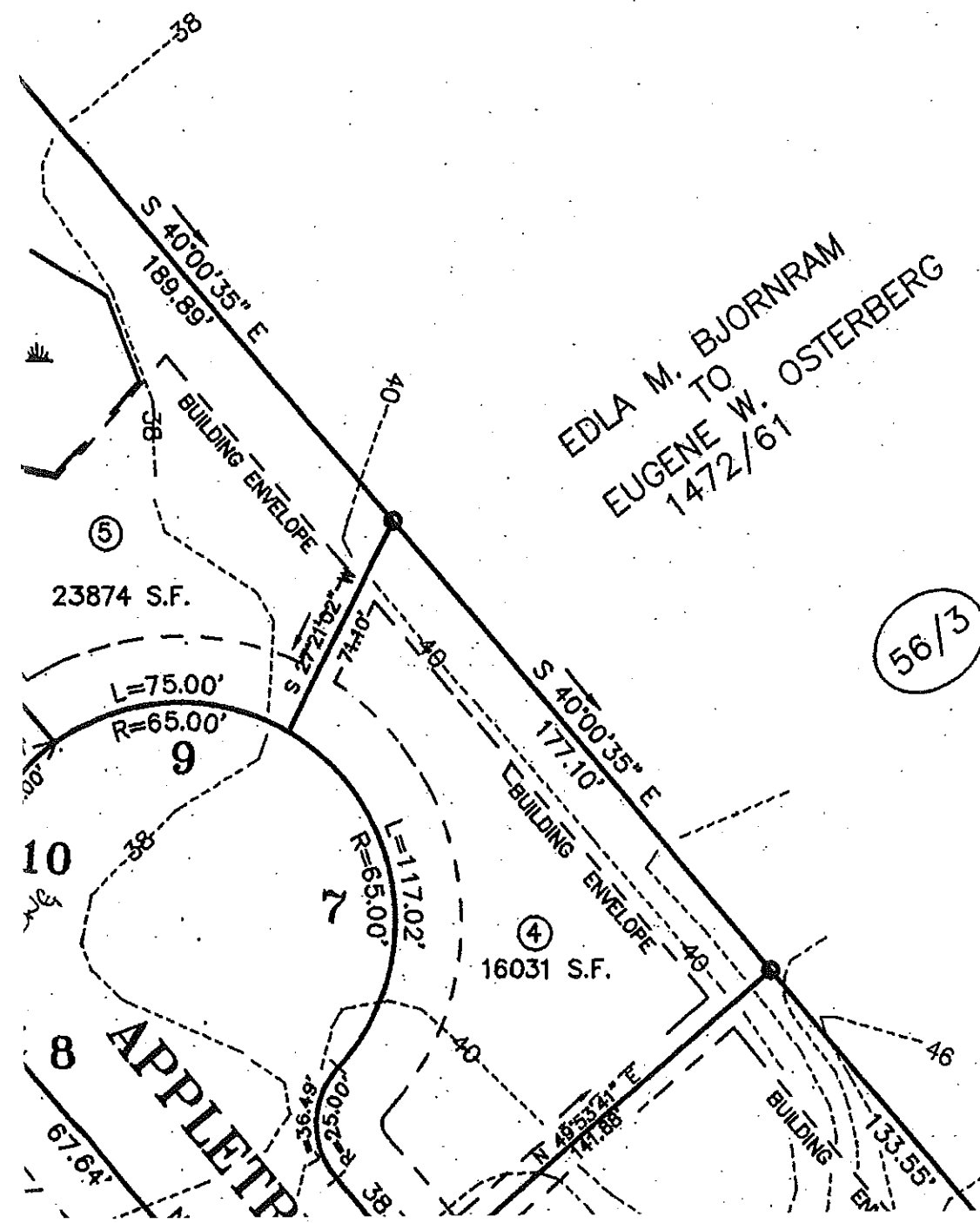




**REASON FOR REVISION:**  
 ELIMINATE THE 25' SETBACK TO EDGE OF WETLANDS  
 AND PLACE SETBACK AT 1' FROM EDGE OF WETLANDS.  
 IT IS IMPORTANT TO REMEMBER THAT THE BUILDING  
 ENVELOPE IS THE EDGE OF DISTURBANCE. ANY DISTURBANCE  
 WITHIN THE WETLAND REQUIRES D.E.P. APPROVAL.



LOCATION MAP N.T.S.



EDLA M. BJORNRAM  
 TO  
 EUGENE W. OSTERBERG  
 1472/61

56/3

State of Maine, Cumberland ss.  
 Registry of Deeds  
 Received September 10 1998  
 at 1 h 16 m. P. M and recorded in  
 Plan Book 198 Page 287









Attest: \_\_\_\_\_ Register  
*John B. O'Brien*

PLAN APPROVED BY THE CITY OF SOUTH  
 PORTLAND PLANNING BOARD

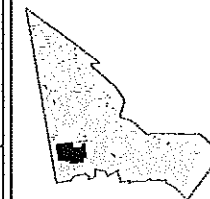
*Judym Carpenter*  
*Carol A. Thorne*  
*David Sawyer*  
*[Signature]*  
*[Signature]*  
*[Signature]*

DATE September 8, 1998

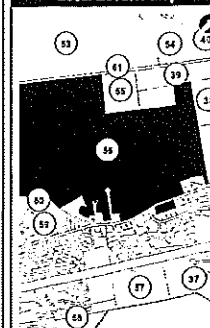
Legend

-  Property Boundary
-  City Boundary
-  Railroad
-  River, Stream, Brook
-  Waterbody
-  Map Number
-  Dimension
-  Map Lot

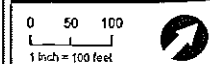
Town-Wide Locator Map



Local Locator Map



Scale and Orientation



Notes

Disclaimer:  
The information is provided as a reasonably accurate point of reference, but is not guaranteed and is not to be used for surveying. The City of South Portland is not responsible for the accuracy or misuse of the data. Copyright © the City of South Portland Tax Maps revised to April of 2013.



**NET RESIDENTIAL DENSITY CALCULATIONS**

TOTAL AREA	492,806 S.F.
WETLAND AREA	-235,700 S.F.
ROAD AREA	- 37,009 S.F.
	<u>220,097 S.F.</u>

220,097 S.F./43,560 S.F.X4  
= 20 DWELLING UNITS

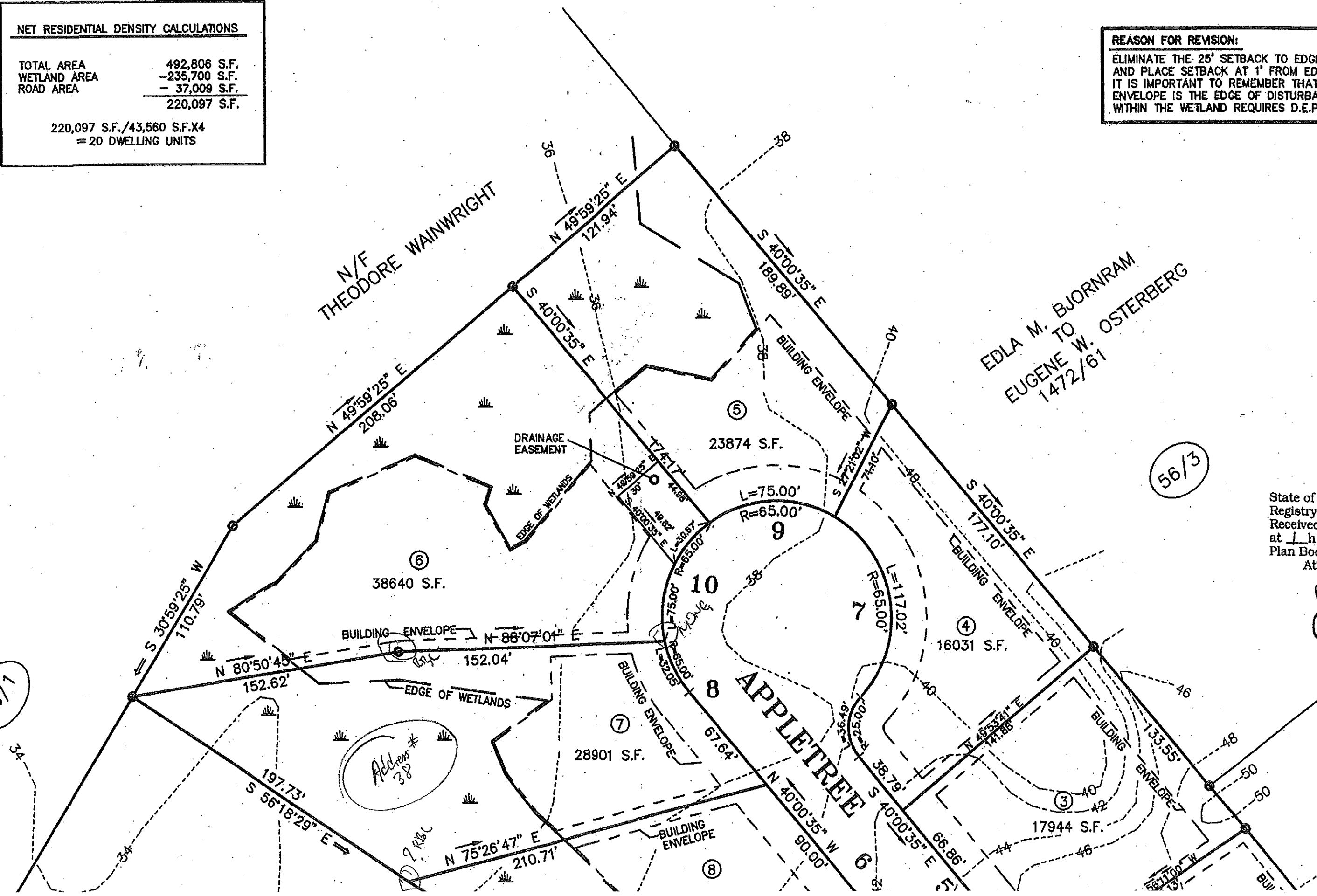
**REASON FOR REVISION:**

ELIMINATE THE 25' SETBACK TO EDGE AND PLACE SETBACK AT 1' FROM EDGE. IT IS IMPORTANT TO REMEMBER THAT ENVELOPE IS THE EDGE OF DISTURBANCE WITHIN THE WETLAND REQUIRES D.E.P.

MAGNETIC LAND

56/1

56/3



State of  
Registry  
Received  
at Lh  
Plan Bo  
At



CITY OF SOUTH PORTLAND

GERARD A. JALBERT  
Mayor

JAMES H. GAILEY  
City Manager

SUSAN M. MOONEY  
City Clerk

SALLY J. DAGGETT  
Jensen Baird Gardner & Henry

**IN CITY COUNCIL**

**ORDER # 112-13/14**

District One  
MICHAEL R. POCK

\_\_\_\_\_

District Two  
PATRICIA A. SMITH

\_\_\_\_\_

District Three  
MELISSA E. LINSOTT

\_\_\_\_\_

District Four  
LINDA C. COHEN

\_\_\_\_\_

District Five  
GERARD A. JALBERT

\_\_\_\_\_

At Large  
MAXINE R. BEECHER

\_\_\_\_\_

At Large  
THOMAS E. BLAKE

**ORDERED**, that the City hereby approve the attached consent agreement between Stanley and Catherine Scribner and the City to address a side yard setback encroachment on property located at 38 Appletree Drive (Map 56, Lot 56-17) 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: March 17, 2014

## CONSENT AGREEMENT

THIS AGREEMENT is entered into this \_\_\_\_ day of March, 2014, by and between STANLEY E. SCRIBNER and CATHERINE D. SCRIBNER, individuals with a mailing address of 38 Appletree Drive, South Portland, ME 04106 (hereinafter the “Scribners”), 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 31, 2001, the Scribners acquired certain real property located at 38 Appletree Drive, South Portland, Cumberland County, Maine described in a deed recorded in the Cumberland County Registry of Deeds in 16705, Page 246 and currently shown on Assessor’s Tax Map 56 as Lot 56-17 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 prior owners of the Property applied for and were issued a building permit to construct a single family house with an attached 12' by 16' deck on the Property in February of 1998;

WHEREAS, the Scribners now desire to sell the Property;

WHEREAS, the Scribners recently caused an existing conditions plan of the Property to be completed, which existing conditions plan is entitled “Existing Conditions Plan of 38 Appletree Drive, South Portland, Maine” prepared for Catherine Scribner by Northeast Civil Solutions, Inc. dated March 5, 2014 (the “Plan”), a reduced copy of which is attached hereto and incorporated herein as *Exhibit A*;

WHEREAS, the Plan reveals that the southwesterly corner of the deck at the southerly end of the two-story dwelling shown as “Deck Encroachment .39 over setback line” on the Plan encroaches slightly (0.39 feet) into the side yard setback;

WHEREAS, the southwesterly corner of the deck at the southerly end of the two-story dwelling shown on the Plan constitutes a Zoning Ordinance setback violation; and

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

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

1. The Scribners hereby admit the current existence of a violation of the side yard setback requirement of the Zoning Ordinance for which the Property does not have an appropriate variance.
2. The Scribners acknowledge that the circumstances of the Zoning Ordinance setback violation do not warrant the granting of a variance under State or local law and therefore waive the right to apply to the Zoning Board of Appeals for a variance relating to the setback violation that is shown on the Plan.
3. The City and the CEO agree to relinquish their right to prosecute the Scribners for the violation of the side yard setback requirement of the Zoning Ordinance for which the Property does not have an appropriate variance in consideration of the Scribners’ admission of the violation; provided, however, if the Scribners, their 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. The Scribners agree to reimburse the City for its attorney’s fees incurred relating to this matter in the amount of \$400.00 on or before April 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 the Scribners, their heirs and assigns, and it shall be duly recorded by the Scribners 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 March 17, 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.

**STANLEY E. SCRIBNER**

---

Stanley E. Scribner

**CATHERINE D. SCRIBNER**

---

Catherine D. Scribner

**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



**NOTES**

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**EXISTING CONDITIONS PLAN  
OF  
38 APPLETREE DRIVE  
SOUTH PORTLAND  
MAINE**

SCALE: 1"=20'  
DATE: MARCH 5, 2014  
PREPARED FOR: CATHERINE SCRIBNER  
38 APPLETREE DRIVE  
SOUTH PORTLAND, MAINE, 04106

JOB NUMBER: 34240 ACAD FILE: 34240.DWG

SURVEYING ENGINEERING LAND PLANNING  
**NECS**  
INCORPORATED  
*Northeast Civil Solutions*  
153 US ROUTE 1, SCARBOROUGH, MAINE 04074  
Tel 207.883.1000 fax 207.883.1001 e-mail info@northeastcivilsolutions.com  
800.882.2227

