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June 10, 2024

Zoning Board of Appeals
22 Monument Square
Concord, MA 01742

RE: 262 Virginia Road

Dear Members of the Zoning Board of Appeals:

I have been retained by Michael Gresty in connection with his pending application for a special permit, pursuant to Section 4.2.2.2 of the Concord Zoning Bylaw, to authorize the construction of an accessory dwelling unit (ADU) with a gross floor area in excess of 750 square feet on his property located at 262 Virginia Road (Property). The Property is unusual in the district, in that it is extremely long, thin and irregularly shaped. The existing single-family dwelling on the Property is accessed by a common driveway and is located at the back (southwest) portion of the Property, several hundred feet from Virginia Road. This location was necessary in order to comply with the lot-width requirement for reduced frontage lots under 6.2.4 of the Zoning Bylaw, which requires that "the dwelling" be located where the width of a lot is at least equal to the required frontage. The application proposes locating the ADU toward the front (north) of the Property, closer to Virginia Road and accessed by a short driveway. The proposed ADU would satisfy all required setbacks.

I understand that the primary issue that has been raised regarding this project is the applicability of Section 6.2.4 to the location of the proposed ADU, since the proposed location on the Property is not as wide as the required frontage in this district. Requiring the proposed ADU to be set back in the portion of the Property that would satisfy this requirement would result in a hardship to the applicant and detriment to the neighborhood. The existing single-family dwelling and septic system leave little room for construction of the ADU in this location, and requiring the ADU to be constructed in this location would place it much closer to the existing residences of abutters. Moreover, this portion of the Property is much closer to wetland resource areas and is at a lower elevation, prone to flooding. Construction of the ADU (and a new or expanded septic system) in this location would be more environmentally impactful and

would likely require relief from the Conservation Commission from buffer zone requirements. Moreover, the water table in this location is so high as to preclude construction of a basement for storage or utilities. Furthermore, the area to the east of the existing single-family dwelling contains significant ledge, which would likely require blasting and would certainly result in additional cost to the applicant and impacts to neighbors. Finally, requiring the ADU to be constructed in this location would require the ADU to be accessed via the common driveway, which would be an additional burden to the owners of other properties accessed via the common driveway, which is in poor condition and prone to flooding. This inconvenience would be particularly acute during construction.

As demonstrated above, the unusual soil conditions, shape and topography of the Property and the hardship created by strict application of Section 6.2.4 would clearly warrant issuance of a variance from that requirement. However, I have reviewed the analyses of Mr. Gresty's prior counsel and Town Counsel, and it is my opinion that the requirements of Section 6.2.4 simply do not apply to ADUs in accessory structures and that no variance is therefore needed. I offer the below analysis in further support of this position.

Analysis

Section 4.2 distinguishes between a "Single-family **dwelling**" (Section 4.2.1) and an "additional **dwelling unit**" as defined in (Section 4.2.2). [Emphasis added]. The use of these discrete terms remains consistent throughout Section 4.2.2 and the rest of the Zoning Bylaw. Section 4.2.2.2 states as follows:

For the purpose of providing small **additional dwelling units** to rent in the Town that will not substantially alter the appearance of the Town or for the purpose of enabling owners of **single-family dwellings** larger than required for their present needs to share space and the burdens of homeownership, a building permit may be granted for one **additional dwelling unit in a single-family dwelling** or detached accessory structure, provided that:

- (a) The area of the lot on which the **single-family dwelling** and **additional dwelling unit** is located shall not be less than the required minimum lot size for the applicable Zoning District;
- (b) The **additional dwelling unit** shall occupy no more than 750 square feet of gross floor area **of the single-family dwelling** or detached accessory structure;
- (c) No more than one such **additional dwelling unit** shall exist on the lot;
- (d) Either the **additional dwelling unit** or the **single-family dwelling** shall be occupied by the owner of the property except for bona fide temporary absences;
- (e) Dimensioned floor plans of the **additional dwelling unit** shall be filed with the building permit or special permit application;

- (f) No use or occupancy of the **additional dwelling unit** shall be allowed prior to the issuance of a certificate of occupancy by the Building Inspector;
- (g) **The additional dwelling unit** shall meet the required setbacks for the primary structure of the applicable Zoning District and a site plan, at a measurable scale, shall be submitted with the application to the Building Inspector showing the location of the **additional dwelling unit**, and the location and arrangement of parking spaces on the property;
- (h) One parking space shall be provided for the **additional dwelling unit**;
- (i) The property is served by Town sewer or, alternatively, the on-site subsurface disposal system is adequate to accommodate any increased flows generated by the **additional dwelling unit**;
- (j) The **additional dwelling unit** shall not be legally separated or sold apart from the **single-family dwelling**;
- (k) The **additional dwelling unit** shall meet the height restrictions for primary and accessory structures in the applicable Zoning District as required in Section 6.2.11;
- (l) The total gross floor area of all buildings on the lot shall conform to the maximum floor area ratio as required in Section 6.2.13, and;
- (m) The **single-family dwelling** or the **additional dwelling unit** shall not be used for a bed and breakfast under Section 5.3.15.
- (n) Any **Additional Dwelling Unit** that is subject to a special permit recorded with the Middlesex South Registry of Deeds prior to September 2020 shall be exempt from the requirements in Items (a), (b), (g), and (l) of this Section 4.2.2.2 provided that the dimensions of the **additional dwelling unit** conform to the dimensional requirements in the recorded special permit.

The Board may grant a Special Permit for relief for an **additional dwelling unit** located on a lot with less than the required minimum lot size for the applicable Zoning District, and/or an **additional dwelling unit** up to 1,000 gross square feet, and/or a reduction in the required setbacks for a detached **additional dwelling unit**, provided that the desired relief may be granted without substantial detriment to the neighborhood and without derogating from the intent and purpose of this Bylaw.

[Emphasis added].

Section 4.2.2.2 therefore makes twenty references to an “additional dwelling unit” and seven references to “the single-family dwelling.” There is not a single reference either to an ADU as a “dwelling” or to the primary residential structure as simply a “dwelling unit.” Indeed, the Bylaw specifically contemplates that an additional **dwelling unit** may be located either within the single-family **dwelling** or in an accessory structure. Therefore, it is absolutely clear that the term “dwelling” refers to the primary structure—i.e., the single-family dwelling—

whereas an additional dwelling unit may either be located within “the dwelling” or within an accessory structure.¹

The language of Section 6.2.4, which allows the construction of “**a [i.e., one] dwelling**” on a lot having 80% of the required frontage, provided that “**the [only] dwelling**” is located such that its front wall is set back to a location in which the width of the lot equals the required frontage, must be read in a manner that is consistent with the use of this term in Section 4.2.2 and, indeed, throughout the Bylaw. First, this provision uses singular phrasing and clearly contemplates that there will only be one “dwelling” subject to the requirement that “the” dwelling be set back to a location on the lot that is as wide as the applicable frontage requirement.

Second, the clear purpose of this requirement is to control the location of the principle single-family structure, which is almost certain to be the largest and tallest structure on a property. Section 6.2.4 does not impose this requirement on any accessory structure. Again, this is likely because such accessory structures will almost certainly be significantly smaller than the primary single-family dwelling. Therefore, where Section 4.2.2.2 allows a small additional dwelling unit either to be located in “the single-family dwelling” or in an accessory structure, it is clear that an accessory structure containing an ADU does not constitute “the dwelling” for purposes of Section 6.2.4.

A contrary interpretation would be inconsistent with the purpose of Section 4.2.2.2 which is to encourage the creation of small additional dwelling units. It would also lead to illogical results. For instance, a reduced frontage lot may lawfully contain an accessory structure such as a garage or barn in a location that is narrower than the required frontage. However, under the proffered interpretation of Section 6.2.4, that existing accessory structure could not be converted to an ADU, even though Section 4.2.2.2 explicitly states that an ADU may be located either in “the single-family dwelling” or in an accessory structure. Town Meeting clearly intended the requirements for location of detached ADUs to be less stringent than those governing single-family dwellings, since Section 4.2.2.2 allows the Board to grant relief from setback requirements. Since the lot-width provision of Section 6.2.4 functions in a manner similar to setback requirements, it is not reasonable to conclude that Town Meeting intended that provision to be rigidly applied to detached ADUs. Doing so would have anomalous results and would undermine the clear intent of Section 4.2.2.2 to expand the opportunity to create new ADUs by

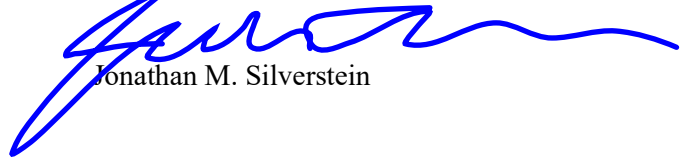
¹ The second paragraph of Section 4.2.2.1 also clearly differentiates between the “dwelling”—i.e., the primary residential structure—and the creation of another “dwelling unit,” where it states, “[i]n the Residence C Zoning District, the Board may grant a special permit for the construction of a new two-family **dwelling** or alteration of an existing single-family **dwelling** into a two-family **dwelling**. The **dwelling units** or any additions to create an additional **dwelling unit** in an existing **single-family dwelling** shall share a common wall...” [Emphasis added]. Indeed, these terms are used consistently throughout the Bylaw.

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preventing detached ADUs from being located in the front portion of reduced-frontage lots, either in existing or new accessory structures.

For the reasons set forth above, and in the memorandum submitted by Mr. Gresty's prior counsel, I submit that the requirement in Section 6.2.4 that "the dwelling" be set back to a location where a lot is at least as wide as the required frontage in the district cannot reasonably be applied to detached ADUs. Thank you for your consideration, and please do not hesitate to contact me with any questions or if I can provide any further information.

Very truly yours,



Jonathan M. Silverstein

cc: Client