

Zoning Board of Adjustment  
Case # \_\_\_\_\_  
Application for Variance  
Thomas Bifsha and Xhevit Bifsha

**Applicant's Application Material**

**Variance Requested:**

The Applicant is requesting a variance to develop the property for six (6) residential units on 43,027 square feet of land where 52,272 square feet is required.

**The Property:**

The property that is the subject of this proceeding is 210 Elm Street, Milford, New Hampshire. The property is shown on the Town Tax Map as Map 18, Lot 6.

The property consists of approximately one (1) acre of land. The property has 163 feet of frontage. The proposed development will meet all setback, height and open space requirements and will be serviced by Town water and sewer.

**The Issue:**

The Applicant's property currently consists of one single-family residential building. The Applicant proposes to renovate, or raze and rebuild the existing residential building and to construct up to five (5) additional units in a separate building on the property. Article V, Section 5.05.1 specifically allows multi-family residential use in the Commercial District in accord with the requirements of the Residence B District. Article V, Section 503.4 allows density of five (5) units per acre. Because the property is not quite one (1) acre in size, only four (4) units are permitted under a strict interpretation of the Ordinance. Consequently, a variance is required.

## VARIANCE CRITERIA

### 1. AND 2.

#### THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST AND WILL BE CONSISTENT WITH THE SPIRIT OF THE ORDINANCE.

The requirement that the variance not be contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance, and the two have for years been treated together by the State Supreme Court. See Malachy Glen Associates, Inc. v. Town of Chichester, 155 NH 102 (2007). Because the provisions of a zoning ordinance represent a declaration of public interest, any variance would be contrary thereto to some degree. Consequently, the Supreme Court has instructed that to determine whether a requested variance is not contrary to the public interest and is consistent with the spirit of the Ordinance, the Zoning Board of Adjustment (“ZBA”) must determine whether granting the variance “would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.”

The Court has recognized two tests for determining whether granting a variance would violate an Ordinance’s basic zoning objectives. One is to determine whether the variance would “alter the essential character of the neighborhood.” The second is to determine whether granting the variance would “threaten the public health, safety or welfare.”

Granting the variance will not alter the essential character of the neighborhood. The property is located in the Commercial District. Section 5.05.0 permits single-family dwellings, two-family dwellings and multi-family dwellings. Multi-family dwellings must meet the conditions set forth in the ordinance relative to the Residence B District. The Applicant’s proposal meets all of said conditions except for density. The existing neighborhood is made up largely of commercial and residential uses, many of which are two-family or multi-family. An additional two (2) units at the property (6 versus 4) will not alter the essential character of the neighborhood.

Nor would granting the variance threaten the public health, safety or welfare. The property will be served by municipal sewer and water. The additional units will not significantly affect traffic or noise or the level of emissions, vibrations or odor.

### 3. GRANTING THE VARIANCE WOULD DO SUBSTANTIAL JUSTICE.

“Perhaps the only guiding rule in this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.” Malachy Glen Assoc., Ibid. As stated previously, the property is situated in the Commercial District. Use of the property for multi-family dwellings and accessory structures is a permitted use and four (4) units are permissible under the ordinance. It is only the fact that the lot is an additional 1/100<sup>th</sup> of an acre smaller than required that necessitates a variance for five (5) units and the fact that the lot is 2/10<sup>th</sup> of an acre smaller than required that necessitates a variance for the sixth (6<sup>th</sup>) unit. The property can easily accommodate six (6) units without adversely effecting the public interest. The burden on the Applicant by losing

the full use and enjoyment of the property outweighs any benefit to the public of denying the Applicant the right to the full use and enjoyment of the property.

**4. GRANTING THE VARIANCE WILL NOT DIMINISH THE VALUE OF SURROUNDING PROPERTIES.**

The Applicant proposes to raze or rehabilitate an existing older building in need of significant rehabilitation or replacement and to construct six modern, attractive dwelling units. Four (4) such units are permitted as of right and the property is located in the commercial zone where the property is in the midst of commercial uses, and multi-family residential uses. Granting the variance allows two (2) additional units on a lot that is only 2/10<sup>th</sup> of an acre short of the required size for six units. The additional unit will not diminish the value of surrounding properties.

**5. OWING TO SPECIAL CONDITIONS OF THE PREMISES THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, DENIAL OF THE VARIANCE WOULD RESULT IN UNNECESSARY HARDSHIP BECAUSE 1) NO FAIR AND SUBSTANTIAL RELATIONSHIP EXISTS BETWEEN THE GENERAL PUBLIC PURPOSE OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PREMISES, AND 2) THE PROPOSED USE IS REASONABLE.**

The Premises consists of approximately 0.9 acres of land. The Premises is improved in part by a building consisting of approximately 2,736 square feet or 1,248 square feet of living area. The building was constructed in 1920 according to the Town's assessment records. The building is in poor condition, and the Applicant proposes to raze the building and replace it or rehabilitate it. But under existing zoning, only four (4) units per acre are allowed. The lot is 2/10<sup>th</sup> of an acre short of qualifying for six (6) units. A strict interpretation of the ordinance yields only 4.94 units.

No fair and substantial relationship exists between the general purpose of the ordinance provision and the specific application of that provisions to this property because the Applicant's proposal is in substantial compliance with the ordinance. The obvious purpose of the ordinance provisions is to regulate density and limit the potentially adverse effects arising from excessive density – lack of open space, visual congestion, excessive traffic, etc.

But in this case, the size of the lot supports 4.94 units. The lot is just 2/10<sup>th</sup> of an acre short of meeting the requirement for six (6) units. And the traffic from all six (6) units will be less than the traffic from many of the abutting and neighboring properties. And, the sixth (6<sup>th</sup>) unit can be constructed while still complying with the other requirements for multi-family dwellings. The project is served by municipal water and sewer. The lot meets the minimum lot size and frontage requirements. The proposed building will meet all set-back requirements. The project will meet the required open space requirements. And the proposed building will meet height limitations. In short, the variance can be granted without compromising the interests and values that the ordinance provisions are designed to protect.

And the proposed use is reasonable. As stated above, the proposed use is a permitted use in the Commercial District. The use, even with six (6) units, is completely consistent with the neighborhood and will not have adverse effect on abutters or the neighborhood in general.