

October 19, 2020

VIA HAND DELIVERY

St. Paul Department of Planning and Economic Development
City Hall Annex
25 West 4th Street, Suite 1300
Saint Paul, MN 55102

**Re: Notice and Statement of Appeal for HPC Approval of New Construction
File: 540 Portland Avenue, Carlos R. Perez (“Applicant”)**

Dear City Council Members:

We submit this appeal of the October 5, 2020 Historic Preservation Commission approval of a new three-unit residential structure that Applicant proposes to construct at 540 Portland Avenue (also referred to as 542 Portland Avenue and in this appeal as “the Property”) as a second principal building (the “Project”) on a lot with an existing three-unit residential apartment structure, on behalf of William Garman (“Gar”) Hargens and Mary (“Missy”) Staples Thompson, owners of a townhome located at 548 Portland Avenue.

The Project is located in and subject to regulations for the Heritage Hill Historic Preservation District (“Historic Hill District”) and the RT2 zoning district. Hargens and Thompson live within 50 feet of the Property and received a BZA Public Hearing Notice on or around September 11, 2020, regarding the Board of Zoning Appeals (“BZA”) review of six major variances requested by the property owner of 540 Portland Avenue. That was the first time that neighboring residents, including Hargens and Thompson, heard about the Project.

As a past chair of the HPC, Hargens understood that, as new construction in a historic district, the Project also required HPC approval. Having received no notice of an HPC hearing on the Project, Hargens contacted George Gause, HPC staff, on September 12, 2020. Gause informed Hargens that a public hearing was scheduled for September 21, 2020. Neighbors expressed concerns to Gause that (1) neighbors had not received prior notice of the HPC review and that (2) the Project adversely affected the Historic Hill District. In response to the concerns, the HPC postponed its public hearing until October 5, 2020 at 3:30pm (the “HPC Hearing”), to be held at a separate hearing at the same date and time as the BZA public hearing, making it impossible for a citizen to attend both hearings, and denying the BZA the benefit of input from the HPC. In an apparent attempt to mitigate its error, the HPC arranged a meeting, at the request of Applicant, between concerned neighbors and the Applicant before the HPC Hearing.

At the HPC Hearing, the HPC excluded testimony from Hargens and Thompson—and potentially other neighbors—opposing the Project, denying the HPC an accurate presentation of opposition to the Project, and excluding information from the record the City Council will review on appeal. The HPC approved the Project, concluding that the new construction, which is sited on a Portland Avenue lot, with a false front facing and simulating a principal structure on Summit Avenue, will conform to the massing, volume, height, façade proportions and scale of existing accessory structures and will not adversely affect the Program for Preservation and architectural control of the Historic Hill District under Saint Paul Legislative Code (the “Code”) Section 73.06(e).

Hargens and Thompson now respectfully ask that the City Council reverse the approval of the HPC because:

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- A. The construction of the Project will adversely affect the Program for Preservation and architectural control of the Historic Hill District under Code Section 73.06(e);
- B. The HPC finding that the Project, which is designed to simulate a principal structure on a Summit Avenue lot, complete with a false "front" porch, conforms with HPC standards for an accessory structure on Portland Avenue is clearly erroneous.
- C. The HPC violated the Minnesota Open Meeting Law by preventing the public from participating in the HPC Hearing.

Hargens and Thompson have also appealed the October 5, 2020 BZA approval of Applicant's six major variances. A copy of the BZA appeal is attached with this Notice and Statement of Appeal.

A. The construction of the Project will adversely affect the Program for Preservation and architectural control of the Historic Hill District under Code Section 73.06(e).

The HPC is required to review and approve or disapprove the issuance of city permits for any new construction within the Historic Hill District. Code Sections 73.04(4) and 73.06(a)(2). Any approval or disapproval must be consistent with the Historic Hill District guidelines for design review under Code Title IX, Chapter 74, Article III, Division 2. The HPC must determine whether the work to be performed pursuant to the Applicant's permit "adversely affects the program for preservation and architectural control" of the Historic Hill District. Code Section 73.06(e). For decisions related to a proposed new building, the HPC must make findings that "such building will not in itself, or by reason of its location on the site, materially impair the architectural or historic value of buildings on adjacent sites or in the immediate vicinity within the Historic Hill District." Code Section 73.06(i)(3).

The design review guidelines for new construction in the Historic Hill District are set forth under Section 74.65. Hargens and Thompson assert that the City Council must reverse the decision of the HPC and disapprove of Applicant's permit because the massing, volume, height, and scale of the Project are not in harmony with existing adjacent structures and are inconsistent with the guidelines under Code Section 74.65, and the Project will therefore materially impair the architectural and historic value of buildings on adjacent within the Historic Hill District. Each guideline under Code Section 74.65 is addressed below.

(1) General Principles

Maintaining the district's scale and quality of design are the basic principles for new construction in the Historic Hill District. Code Section 74.65(a). New construction in the Historic Hill District must advance the "overall pattern of harmony and continuity" of the district and "be compatible with the size, scale, massing, height, rhythm, setback, color, material, building elements, site design, and character of surrounding structures and the area." *Id.*

The Staff Report concludes that Code Section 74.65(a) is satisfied. As addressed in more detail in subparts (2)-(6) below, the Project does not satisfy these general principles. The Project is positioned on its Portland Avenue lot as a typical neighborhood carriage house, behind and subservient to the existing apartment building on Portland Avenue (see illustration below). Because of the depth of the Portland Avenue lot, the location of the new building is more closely aligned with the carriage houses on Summit Avenue, but not close enough. The size and character of the Project is more similar to a Summit Avenue house, with a setback from Summit Avenue that is too far from Summit to be a principal structure and too close to Summit to be an accessory carriage house. The Project pretends to be a Summit Avenue house in size and orientation, with the materials and details of an historic Portland Avenue townhouse, and a location on the lot that is out of character with everything in the district.

(2) Massing and Height

Code Section 74.65(b) provides that new construction must "conform to the massing, volume, height and scale of existing adjacent structures." The Staff Report concludes that the structure relates to the massing,

volume, height, and scale of existing adjacent structures because the Project “is still subordinate in height to the primary structure on the parcel as well as the neighboring structures on Summit Ave.”

HPC staff focused on the massing and height of the principal residential structures on Portland Avenue and Summit Avenue instead of the garages and carriage houses that are adjacent to the Project. The garages and carriage houses are the comparable structures for the Project, not the principal residential structures on Summit and Portland. The Project is located where garages and carriage houses have historically been constructed in the Historic Hill District. And the typical garages and carriage houses in the neighborhood are shorter, smaller, and less embellished than Applicant’s proposed three-unit residential townhouse principal structure.

As shown in the images below, although the height of the Project may be subordinate to the existing three-unit apartment structure, the massing and height of the new townhouse structure (in red below) is more akin to the existing structure than the adjacent garages and carriage houses (outlined in blue below). But instead of maintaining the massing and height of surrounding carriage houses, it mimics the scale of homes on Summit Avenue. This is inconsistent with the massing and height guidelines under Code Section 74.65(b).



(3) Rhythm and Directional Emphasis

Code Section 74.65(c) states that the narrow lots in the Historic Hill District “naturally set up a strong rhythm of buildings to open space” and that the “directional expression of new construction should relate to that of existing adjacent structures.” Additionally, structures that are constructed on more than one lot should use “vertical façade elements to maintain and vary the overall rhythm of the street rather than interrupting the street with a long monotonous façade.” *Id.*

The Staff Report states that this guideline is met because the Project “contributes to the rhythm of Summit Avenue and its directional emphasis relates to that of the surrounding structures.”

However, the directional emphasis should relate to the surrounding garages and carriage houses that are the adjacent and comparable structures at the Project’s setback from Portland and Summit, as shown on the images on the previous page. At more than 100 feet from Summit Avenue, it is more appropriate for the Project to relate to the Summit Avenue garages and carriage houses with which the lot more closely aligns. For example, instead of facing Summit, the Project could adapt to the narrow lot by orienting North/South, with a south façade that relates to the carriage house façades. Currently, the design does not contribute to the rhythm of either Portland or Summit Avenues. In fact, the Project disrupts the rhythm of Portland and Summit Avenue by imposing a full-size house in a location that could work as a carriage house on either Avenue, with a setback that violates Summit Avenue setbacks, and faux-front porch that violates all historic design principles. The Project therefore does not satisfy the guidelines under Code Section 74.65(c).

(4) Material and Details

Under Code Section 74.65(d)(2), the materials and details should relate to the existing nearby buildings. Overall, the materials and details should contribute to the “overall thread of continuity provided by the range of materials commonly used by turn-of-the-century builders and by the way these materials were used. Code Section 74.65(d)(1).

The Staff Report states that these guidelines are met because:

- The proposed materials and details are appropriate for the district.
- The smooth lap siding and shake details as well as the aluminum clad wood windows relate to the district as well as the primary residence.
- The architectural asphalt shingles meet the guideline and the black color relates to the Dutch Colonial style of the structure as well as relates to the main residence at 542 Portland Ave.
- The white siding, black roof, white trim and black windows keep with the Dutch Colonial style.
- The roof design relates to the roof shape and pitch of the existing primary structure.
- No skylights are proposed.
- The size, rhythm, and detailing as well as the overall material and configuration of the proposed aluminum clad wood windows meets the guideline.
- The porch relates to the primary facades of neighboring residences on summit Avenue as well as the front porch on the primary structure.

The HPC focuses on matching the Project to the design and materials of the existing three-unit apartment structure on the 540 Portland Avenue property, while apparently guiding the Applicant to treat Summit Avenue façade as a Summit Avenue principal residential structure, and ignoring the fact that the location on the lot is appropriate only for a carriage house. The materials and design may be appropriate for a Portland Avenue townhouse, but the scaling, massing, and façade are inappropriately designed for Summit Avenue. The Applicant and the HPC failed to consider that the Project should be scaled down and designed to be consistent with carriage houses in the Historic Hill District.

Secondary structures in the Historic Hill District—garages and carriage houses—typically borrow from their main structures but use simpler forms and fewer materials. Here, the Project design copies extensively from

the main house and creates a confusing tension. Siding on the existing apartment structure is the cheapest of wood-textured vinyl siding, which the Guidelines specifically prohibit.

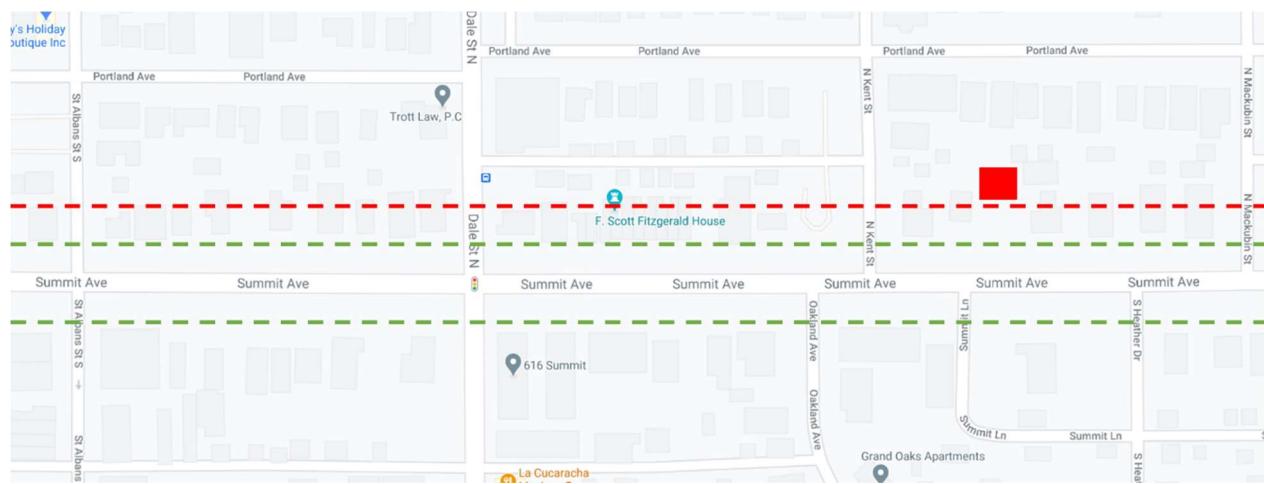
Hargens and Thompson assert that the design of this building is a missed opportunity. The Secretary of the Interiors Standards for Historic Preservation challenge designers to create buildings that respect the massing, fenestration (windows and doors), and materials of nearby buildings, but to also create buildings “of their time.” The guidelines espouse this so that history can continue to be reflected in the design of our buildings. Applicant could create a residential carriage house that expresses the simplicity of the past and the present. As proposed, using the gambrel roof form would make it the third major structure in the middle if the block to use that Colonial shape, which is not representative of the majority of roofs in the district.

As designed, the materials and design of the Project, in combination with its massing and scale, is inconsistent with the guideline under Code Section 74.65(d)(2).

(6) Site

Code Section 74.65(f) states that “new buildings should be sited at a distance not more than five (5) percent out-of-line from the setback of existing adjacent buildings.” The Staff Report states that this guideline is met because “given the uniqueness of the parcel, the proposed structure is sited so that it can relate to the primary structures on Summit Avenue while still reading as a secondary structure from Portland Avenue.”

However, the siting of the Project fails to account for the patterns and forms in the Historic Hill District. Although the Project is set back from Portland Avenue at the position of neighboring garages and carriage houses, the Project appears to be a principal residential structure on Summit Avenue, set back much farther than other residences on Summit. The image below shows the standard setback of surrounding properties on Summit along the green lines and shows the Project’s setback with the red line. The unusual setback is inconsistent with setbacks of existing adjacent buildings and therefore inconsistent with the siting guideline under Code Section 74.65(f).



As a whole, the massing, volume, height, and scale of the Project are not in harmony with adjacent structures, and the Project will therefore materially impair the architectural and historic value of buildings on adjacent properties in the vicinity within the Historic Hill District. Accordingly, because the Applicant failed to establish the necessary design review guidelines under Code Section 74.65, the City Council must reverse the decision of the HPC and disapprove of Applicant's permit under Code Section 73.06(e).

B. The HPC violated open meeting laws by preventing the public from participating in the HPC Hearing.

Hargens and Thompson understand that different public hearing procedures are required because of the COVID-19 pandemic. However, the hearing process must still allow the public to participate in public

hearings before the HPC. The HPC conducted a public hearing for the purpose of determining whether the Project “adversely affects” the Historic Hill District pursuant to Code Section 73.06(e), which provides that the HPC shall render a decision “after receiving recommendations from concerned citizens.” Local government hearings, including the October 5 HPC Hearing, are subject to the open meeting laws under Minn. Stat. § 13D. Under Minn. Stat. § 13D.015, subdivision 2, a city may hold public meetings, including hearings, by phone or other electric means, provided that members of the public “can hear all discussion and all votes of members of the entity and participate in testimony.” (Emphasis added.)

Hargens, Thompson, and other interested parties could not participate fully in testimony at the October 5, 2020 public hearing of the HPC (the “HPC Hearing”) because of (1) inadequate technology for public hearings, (2) confusing and conflicting times for public hearings before the concurrent HPC and BZA public hearings, and (3) HPC members were not provided testimony in opposition of the Project submitted prior to the HPC Hearing.

First, due to inadequate technology for the HPC Hearing, neighboring property owners and renters could not participate in the testimony at the HPC Hearing and were unable to hear all discussion by members of the HPC. The HPC Hearing was held by conference call. The conference call platform was difficult to access and was poor quality. Hargens, Thompson and others could not hear all of the discussion and votes of the HPC members as required by Minn. Stat. § 13D.015, subdivision 2. Participants were also unable to use the conference call technology to make public comment or challenge Applicant testimony during the HPC Hearing.

Second, confusing and conflicting times for public hearings before the HPC and the BZA prevented interested parties from participating in the HPC Hearing. The HPC Hearing conflicted with a concurrent public hearing of the BZA regarding Applicant’s requested variances from the zoning code. Because the City scheduled the meetings at overlapping times—3:30pm for the HPC Hearing and 3:00pm for the BZA public hearing—Hargens, Thompson and other neighbors could not feasibly participate in both meetings and did not have an opportunity to hear all of the discussion and votes of the BZA and the HPC. And because the public hearings for the HPC and the BZA were rescheduled from September 21 to October 5, interested parties were confused by the meeting times and various processes for participating in the concurrent meetings. Concerned neighbors repeatedly requested postponement or rescheduling of the public hearings to allow for community attendance and were told that it was not possible to reschedule.

Third, testimony of Hargens and Thompson was excluded from the packets disbursed to members of the HPC prior to the HPC Hearing. The excluded written testimony is attached with this Notice and Statement of Appeal. Although Hargens and Thompson, and potentially other neighbors, submitted testimony in opposition to the Project so that it would be included in the record and considered by the HPC, such testimony was not included in the staff packets to members of the HPC. Furthermore, at the HPC Hearing, staff read one letter in opposition to the Project into the record, but ignored the opposition testimony submitted to staff prior to the HPC Hearing by Hargens and Thompson. And when asked whether there were any other objections to the Project, staff informed HPC members that there were no other objections to the Project, despite staff engagement with Hargens, Thompson, and many other members of the public who oppose the Project and submitted written testimony to HPC staff before the HPC Hearing. The HPC therefore received a distorted presentation of neighborhood support for the Project and was not able to receive and review “recommendations from concerned citizens” under Code Section 73.06(e).

Overall, the combination of scheduling of concurrent public hearings, the change in meeting dates (rescheduled from September 21 to October 5), and separate process required by the HPC and the BZA, resulted in confusion but also the inability of neighbors opposing the Project to ensure that their written testimony was received, read, and included in the staff packets to members of the HPC.

Because members of the public could not hear all discussion and votes of the BZA members and could not participate in testimony, Hargens and Thompson respectfully ask that the City Council (a) consider, or, in the alternative, require that the HPC reconsider, the record, including all of the testimony of the neighbors opposing approval of the Project, and (b) adopt, and require the HPC to adopt, a public hearing platform that allows the public to hear and participate in the public hearings by the HPC and the City Council.

October 19, 2020

Page 7

In this time of a pandemic, and the difficulties in accessing local government, Hargens and Thompson believe that transparency and communication with the public is especially important. The difficulties Hargens, Thompson and other members of the public have had with this process may also be affecting others throughout the City in their interactions as well, and Hargens and Thompson respectfully request that the City assess its current practices and procedures to ensure that the public is included in public hearings.

CONCLUSION

The Applicant respectfully asks the City Council to reverse the HPC approval of Applicant's Project on substantive and procedural grounds. Substantively, the Project does not satisfy the design review guidelines set forth under Code Section 74.65, and under Code Section 73.06, the Project adversely affects the Historic Hill District. Procedurally, the HPC failed to provide members of the public the opportunity to hear all discussion and votes of the BZA or participate in testimony at the HPC Hearing.

Hargens and Thompson also respectfully request that the City Council adopt, and require the HPC to adopt, a public hearing platform that allows the public to fully hear and participate in public hearings by the HPC and the City Council.

Very truly yours,

Stinson LLP



Eric Galatz

Enclosure

cc: George Gause (via email, with enclosure)
 William Garman Hargens (via email, with enclosure)
 Mary Staples Thompson (via email, with enclosure)
 Diane Galatowitsch (via email, with enclosure)



ZONING APPEAL APPLICATION

To/From Board of Zoning Appeals

Dept. of Safety & Inspections
Zoning Section
375 Jackson Street, Suite 220
Saint Paul, MN 55101-1806
(651) 266-9008

To / From Planning Commission

Dept. of Planning & Econ. Devt.
Zoning Section
1400 City Hall Annex, 25 W 4th St.
Saint Paul, MN 55102-1634
(651) 266-6583

Zoning Office Use Only

File # _____

Fee Paid \$ _____

Received By / Date _____

Tentative Hearing Date _____

APPELLANT

Name(s) **William Garman Hargens and Mary Staples Thompson**

Address **548 Portland Ave.** City **St. Paul** State **MN** Zip **55102**
Email **gar@closearchitects.com; missy.staples.thompson@gmail.com** Phone **651-769-7183**

PROPERTY LOCATION

Project Name **Sullivan Property Investment LLC (20-069819)**

Address / Location **542 Portland Avenue**

TYPE OF APPEAL: Application is hereby made for an appeal to the:

- Board of Zoning Appeals**, under provisions of Zoning Code § 61.701(c), of a decision made by the Zoning Administrator.
- Planning Commission**, under provisions of Zoning Code § 61.701(c), of a decision made by the Planning Administrator or Zoning Administrator.
- City Council**, under provisions of Zoning Code § 61.702(a), of a decision made by the Board of Zoning Appeals or the Planning Commission.

Date of decision **October 5**, 20 **20** File Number **20-069819**

GROUNDS FOR APPEAL: Explain why you feel there has been an error in any requirement, permit, decision or refusal made by an administrative official, or an error in fact, procedure or finding made by the Planning Commission or Board of Zoning Appeals. Attach additional sheets if necessary.

See attached for Statement of Grounds for Appeal.

If you are a religious institution you may have certain rights under RLUIPA. Please check this box if you identify as a religious institution.

Appellant's Signature

Date **10/15/2020**

STATEMENT OF GROUNDS FOR APPEAL
Appeal of October 5, 2020 Decision
of the
St. Paul Board of Zoning Appeals
File No. 20-069819

This appeal is submitted on behalf of William Garman (“Gar”) Hargens and Mary (“Missy”) Staples Thompson, owners of a townhome located at 548 Portland Avenue.

Hargens and Thompson appeal the decision of the Board of Zoning Appeals (the “BZA”), approving the six major variances (collectively, the “Variances”) requested by Sullivan Property Investments II, LLC (the “Applicant”), from the requirements of the following sections of the Saint Paul Legislative Code (the “Code”):

1. Section 63.110-a (Primary Entrance Location);
2. Section 63.207 (Minimum Required Off-Street Parking);
3. Section 66.231 (Minimum Lot Area, Width and Rear Setback); and
4. Section 66.232 (Allowable Lot Coverage).

Applicant seeks the six Variances in order to construct a three-unit residential townhouse (the “Project”) as a second principal building on a lot that is currently developed with a three-unit residential townhouse. Applicant does not propose any modifications to the existing three-unit residential townhouse structure. The Property is located in and subject to land use controls for the RT2 zoning district and the Historic Hill Heritage Preservation District.

Hargens and Thompson live within 50 feet of the Property and received Public Hearing Notices regarding the BZA review of the Applicant’s requested Variances. They submitted comments in opposition to the Variances, which are included in the BZA’s record for the proceeding. Now, Hargens and Thompson respectfully ask that the City Council reverse the approval of the BZA because:

- A. Applicant failed to satisfy the six required findings for a variance under Code Section 61.601 and Minn. Stat. § 462.357, subdivision 6; and
- B. The BZA violated open meeting laws by preventing the public from participating in the Public Hearing.
- C. Applicant seeks to construct the Project, including demolishing the driveway, without the consent of the fee owners of the eastern four feet of the shared driveway.

Concurrent with this appeal, Hargens and Thompson are also appealing the October 5, 2020 Historic Preservation Commission (“HPC”) approval of Applicant’s application.

A. The BZA should have found that the Applicant failed to meet the six required findings for a variance under Code Section 61.601 and Minn. Stat. § 462.357, subdivision 6.

Code Section 61.601 and Minn. Stat. § 462.357, subdivision 6, provide that the BZA may only grant variances from the strict enforcement of the Code only upon a finding that:

- (a) The variance is in harmony with the general purposes and intent of the zoning code.
- (b) The variance is consistent with the comprehensive plan.

- (c) The applicant has established that there are practical difficulties in complying with the provision, that the property owner proposes to use the property in a reasonable manner not permitted by the provision. Economic considerations alone do not constitute practical difficulties.
- (d) The plight of the landowner is due to circumstances unique to the property not created by the landowner.
- (e) The variance will not permit any use that is not allowed in the zoning district where the affected land is located.
- (f) The variance will not alter the essential character of the surrounding area.

The City must find that the applicant satisfies each and every finding set forth under (a)-(f) above for each of the six Variances. For each of the six Variances, if the City Council determines that even one of the elements is not met for a variance, then the City Council must reverse the BZA's decision and deny the variance.

1. **The Variances are inconsistent with the general purposes and intent of the Zoning Code.**

The BZA adopted the findings of the October 1, 2020 Board of Zoning Appeals Staff Report (the "Staff Report"), which found that the Variances met the "general purposes and intent of the Zoning Code."

- a. **The BZA's reliance on "additional housing" and HPC design standards as bases for the Variances was not appropriate for the Project.**

The BZA supported its decision, in part, on the finding that the second three-unit residential townhouse on the Property will create "additional housing in the city," citing Code Section 61.103 in the Staff Report. Although the BZA justified the Variances on the basis of Code Section 61.103(j) ("to provide housing choice and housing affordability"), the BZA failed to recognize that the Project will not provide housing choice, just more of the same already on the site and in the neighborhood, and will not provide affordable housing. The BZA also failed to find that the Project could not provide additional housing without the Variances. Five of the six requested Variances are required due to the size of the Project, and the sixth relates to the orientation of the primary entrance. The Applicant could provide three new housing units without the Variances by reorienting the primary entrance and decreasing the size of the Project, which incidentally would probably also make the Project different from other housing in the neighborhood and more affordable.

The BZA also concluded that the Applicant's work with the HPC would address any aesthetic and design concerns with the Project and that the Project "only exceeds the maximum lot coverage because of the HPC design standards." The BZA, however, cannot rely on historic preservation land use controls to forego enforcement of essential elements of the Zoning Code, including, but not limited to, density, scale, dimensional, and setback requirements that ensure uniformity, access to light and air, privacy, and stormwater drainage. Reliance on HPC design standards as justification for a zoning variance may be appropriate for modification of an existing building, where existing historic elements may not meet current standards. But the Applicant proposes a new structure on the Property, and the new structure can and must be constructed in accordance with both the Zoning Code and design standards of the historic district.

In this case, reliance on HPC design standards is especially inappropriate: The staff report cited the HPC requirement for a "front porch" as justification for allowing a variance to increase lot coverage. That front porch is only required because Applicant chose to orient the primary entrance to Summit Avenue, which requires yet another variance, because the Summit Avenue entrance is in fact at the back of the lot on

which the Project is located. In other words, the Applicant needs a variance for lot coverage because the Applicant seeks a variance for orientation of the primary entrance.

b. The BZA ignored elements of the Project that conflict with Code Section 60.103

Code Section 60.103 lists twenty general purposes of the Zoning Code. The BZA focused on select purposes of the Zoning Code without considering the context of other provisions. Specifically, the BZA focused on 60.103(a) (to promote and to protect the public health, safety, morals, aesthetics, economic viability and general welfare of the community), 60.103(j) (to provide housing choice), and 61.103(l) (to conserve and improve property values). By focusing only on these three purposes, the BZA failed to recognize that the Variances are directly contrary to the following purposes of the Zoning Code set forth under Section 61.103:

- (c) To classify all property in such manner as to encourage the most appropriate use of land throughout the city;
- (d) To regulate the location, construction, reconstruction, alteration and use of buildings, structures and land;
- (e) To ensure adequate light, air, privacy and convenience of access to property;
- (g) To lessen congestion in the public streets by providing for off-street parking of motor vehicles and for off-street loading and unloading of commercial vehicles;
- (i) To encourage a compatible mix of land uses, at densities that support transit, that reflect the scale, character and urban design of Saint Paul's existing traditional neighborhoods;
- (l) To conserve and improve property values;
- (m) To protect all areas of the city from harmful encroachment by incompatible uses;
- (n) To prevent the overcrowding of land and undue congestion of population;
- (o) To fix reasonable standards to which buildings, structures and uses shall conform;

Zoning ordinances allow a city to control the development of land within its community—both the type of structures built and land uses. Cities use zoning to guide private development and to ensure land gets used in a way that promotes both the best use of the land and the general welfare of its residents. Classifying property into zoning districts and regulating activities within those districts allows the city to prevent congestion, minimize fire and other health and safety hazards, and keep residential areas free of potential commercial and industrial nuisances such as smoke, noise and light. To serve their intended purpose, zoning regulations within a district must be applied equally within a district so that properties within each zoning district are equally burdened and benefited by the zoning regulations.

In applying the zoning regulations to the proposed Project, the City Council must conclude that the scale of the Project (as it complies with HPC design standards) is too big for the Property and the neighborhood. The requested Variances to Section 66.231 (Minimum Lot Area, Width and Rear Setback) and Section 66.232 (Allowable Lot Coverage) require substantial deviation from the Code requirements and will result in an oversized development on a property located in a historic district. The RT2 zoning district requires 2,500 square feet of lot size per unit, which means that a lot size of 15,000 square feet is

required for 6 units. Here, only 12,493 square feet is available, requiring a variance of 2,507 square feet, or a 17% variance from the Code requirement. In residential districts, principal buildings shall not cover more than 35% of any zoning lot, and here 38.39% is proposed for a variance of 3.39%. Additionally, a minimum rear yard setback of 25 feet is required and 15 feet is proposed, for a 40% variance of 10 feet.

Moreover, the large scale of the Project on the Property will likely cause issues related to stormwater drainage. 82% of the Property (9,470+ square feet) will be covered with hard surfaces, which requires careful attention to stormwater drainage. Water drainage is generally to the northwest of the Property, with most of the water directing to a new retaining wall where it will flow down the west side walk and across the boulevard sidewalk. This is a potential hazard to the public in winter and will affect the neighboring properties.

Finally, the Applicant's poor maintenance of the existing three-unit townhouse and its Property pose public health and welfare concerns moving forward. As referenced in the letter from John Sularz and Dan Chouinard dated September 30, 2020, the Applicant has failed to maintain the lawn on the Property, allowing erosion on either side of the front stairs. A significant portion of the boulevard is dirt. The Applicant fails to maintain the lawn, sidewalks, and retaining wall on the Property in accordance with the same standard of upkeep as neighboring properties and the surrounding neighborhood. The City, like Hargens and Thompson, should be wary of the Applicant's ability and commitment to maintaining an additional three-unit townhouse on the same property.

The oversized Project therefore violates the intent of the zoning regulations to restrict the overdevelopment of individual properties so as not to harm surrounding properties. The City Council must therefore reverse the decision of the BZA and deny Applicant's Variances.

2. The Variances are inconsistent with the Comprehensive Plan.

The BZA found that the Variances are consistent with the Comprehensive Plan because the Variances will promote the development of housing under Policy 1.40 (housing choice) and Policy 3.4 (infill housing). As stated above, the three additional housing units will not provide a new choice in housing, or affordable housing. Decreasing the scale of the Project could still create additional, possibly more affordable, housing without the need for the Variances.

Additionally, the Variances are inconsistent with Policy HP-16, which seeks to balance the "preservation of a historic and/or cultural resource and new development by considering the significance of the resource; impact of a proposed development action on the character-defining features of the resource and the area context; potential for displacement of area residents and businesses; evolution of the neighborhood and how neighborhood change is occurring; long-term benefit-cost analysis and impact; and appropriateness of mitigation activities should the resource be compromised or lost." 2040 Comprehensive Plan, Policy HP-16 (June 19, 2019).

Balancing the preservation of historic resources—including properties in historic districts—and new development within historic districts requires the enforcement of both the design standards imposed by the HPC and the City's zoning code requirements.

3. The Applicant has relied on economic considerations alone and has not established that there are practical difficulties in complying with the Code provisions.

The practical difficulties described in the Staff Report are not inherent to the geography of the Applicant's Property. Rather, the asserted practical difficulties reflect economic considerations to design a three-unit townhouse structure that exceeds zoning requirements, purportedly to comply with HPC design standards,

instead of designing a smaller structure that complies with both zoning and HPC design standards. The BZA finding that the HPC design requirements create a practical difficulty in meeting the Zoning Code requirements for the primary entrance location, lot coverage, and rear yard setback requirement ignores the fact that the Project created the need for the Variances by electing to orient the Project toward Summit Avenue. If the Project was designed for the Portland Avenue lot it occupies, it would not need to meet HPC standards for Summit Avenue, and could comply with both the Zoning Code and the HPC design requirements without the Variances.

The record suggests that economic considerations have driven the scope of the Applicant's Project. Page 10 of the Application emphasizes that the Project increases density "with competitive pricing." A letter from the Summit-University Planning Council dated September 30, 2020, also references economic considerations, stating that "we also understand that new construction in this area can be very expensive due to design specifications in the Historic District. The project manager noted that this would not cause an increase in cost for the units, and that they would be priced at 10% below the average in Ramsey Hill."

The City Council should conclude that HPC design standards cannot establish a practical difficulty and that the Applicant must propose a design that comports with HPC standards and zoning regulations, even if that is not the most economical option for the Applicant.

4. The plight of the landowner is due to circumstances created by the landowner and not circumstances unique to the property.

Practical difficulties referenced in the Staff Report include the location within a historic district and the resulting HPC design standards. These are difficulties created by the landowner and are not circumstances unique to the Property. Unlike situations where a property has a unique geography, such as slope, drainage, soil condition, or other physical characteristic, the application of historic preservation land use controls is not a circumstance unique to the property. All properties within a historic district are subject to the same design standards imposed by the HPC, and the application of the standards depends on the design of projects proposed to the HPC.

The Minnesota Court of Appeals has held that "circumstances unique to the property not created by the landowner" include the physical characteristics of the property or surrounding properties. *See Nolan v. City of Eden Prairie*, 610 N.W.2d 697, 702 (Minn. Ct. App. 2000) (holding that the property's unique location at the end of a cul-de-sac and the existence of a stand of trees and a significant grade change were unique circumstances not created by the landowner); *State ex rel. Neighbors for East Bank Livability v. City of Minneapolis*, 915 N.W.2d 505, 518 (Minn. Ct. App. 2018) (holding that the existence of other buildings on the block of the property restricted how a project on the property could be built and the other buildings presented unique circumstances not created by the landowner). Such circumstances, the court has reasoned, are distinguishable from the hardships presented to the landowners "based solely on the property owner's decision-making" rather than circumstances unique to the property.

The lot at issue here is a conventional flat Portland Avenue lot. The only "practical difficulty" faced by the Applicant is the difficulty of building two large structures with opposite street orientations on one lot designed for a single building with a single street orientation. That is a choice the Applicant made, and not grounds for a variance. The fact that the Applicant requires six variance demonstrates that pretty clearly.

If the BZA grants these variances to the Applicant, future developers of properties within historic districts could seek similar variances, eroding land use controls for zoning and historic preservation. The Applicant's Property is not unique; the proposed Project simply cannot satisfy all of the applicable land use controls. The solution is not granting the Variances; the solution is requiring a design that complies

with the land use controls. The applicant could have avoided variances by proposing a design with two units or a design with three units that complies with HPC and Zoning regulations. Adhering to the zoning and HPC laws and guidelines is part of the privilege, responsibility, and benefit the Applicant accepted when it purchased the Property.

5. The Variances will alter the essential character of the surrounding area.

This Project does not “fit within the context of existing neighborhoods and compatible with the prevailing pattern of development” of the surrounding area. Despite the clever renderings (which omit inconvenient buildings), the new three-unit townhouse will dwarf the Summit carriage house next to it and overpower all the garages and backyards with Portland Avenue addresses. Additionally, having two similar (almost identical) structures on the same lot is totally inconsistent with historic/existing building patterns in the neighborhood.

The Project will drastically contradict the established rhythm of historic buildings on Portland Avenue, on Summit Avenue, and throughout the District, setting bad precedent and helping destroy the character of the District. The Project will not “blend in” but forever be an odd duck.

Moreover, the increased density with insufficient off-street parking will disrupt the character of the surrounding area. The street parking situation is bad on Portland Avenue, especially in the winter. With one-side-of-the-street parking and no alley or opportunity for any off-street parking for the properties on Portland that are on the west side of the Project, the possibility of any additional cars is unacceptable. The car lifts will likely not alter the situation. At present, residents of Applicant’s Property already park on Portland instead of parking in the parking lot spaces on Applicant’s Property.

Finally, the proposed building will affect the essential character and the historic and real estate values of the surrounding properties, including that of Hargens and Thompson. For example, the Project does not have a “functional front entrance,” but a fake one. It is an affront to historic preservation that the Project be allowed next to multifamily homes designed by Clarence Johnston and Cass Gilbert. The impact on Portland Avenue far exceeds that on Summit, where the BZA, the HPC and the Applicant have focused their attention.

Because the BZA’s findings fail to satisfy any one of the above-described findings required to grant the Variances, the City Council must deny the Applicant’s Variances.

B. The BZA violated open meeting laws by preventing the public from participating in the Public Hearing.

Hargens and Thompson understand that different procedures are required because of the COVID-19 pandemic. However, the public hearing process must still allow the public to participate in mandatory public hearings before the BZA. The BZA is required to conduct a hearing on a variance request. Code Section 61.203(c). All hearings conducted by the BZA are subject to open meeting laws and ordinances, including Minn. Stat. § 13D. Code Section 61.203(b). Under Minn. Stat. § 13D.015, subdivision 2, a city may hold public meetings, including hearings, by phone or other electric means, provided that members of the public “can hear all discussion and all votes of members of the entity and participate in testimony.” (Emphasis added.)

Hargens, Thompson, and other interested parties could not participate fully in testimony at the October 5, 2020 public hearing of the BZA (the “Public Hearing”) because of (1) inadequate technology for public hearings, and (2) confusing and conflicting times for public hearings before the concurrent BZA and HPC public hearings.

First, due to inadequate technology for the Public Hearing, neighboring property owners and renters could not participate in the testimony at the Public Hearing and were unable to hear all discussion by members of the BZA. The Public Hearing was held using Skype. The Skype platform was difficult to access and was poor quality. Hargens, Thompson and others could not hear all of the discussion and votes of the BZA members as required by Minn. Stat. § 13D.015, subdivision 2. Participants were also unable to use the Skype technology to make public comment or challenge Applicant testimony during the Public Hearing.

Second, confusing and conflicting times for public hearings before the BZA and the HPC prevented interested parties from participating in the Public Hearing. The Public Hearing conflicted with a concurrent public hearing of the HPC regarding Applicant's proposed development. Because the City scheduled the meetings at overlapping times—3:00pm for the BZA's Public Hearing and 3:30pm for the HPC public hearing—Hargens, Thompson and other interested parties could not feasibly participate in both meetings and did not have an opportunity to hear all of the discussion and votes of the BZA and the HPC. And because the public hearings for the BZA and the HPC were rescheduled from September 21 to October 5, interested parties were confused by the meeting times and various processes for participating in the concurrent meetings. Concerned neighbors repeatedly requested postponement or rescheduling of the public hearings to allow for community attendance and were told that it was not possible to reschedule.

Because members of the public could not hear all discussion and votes of the BZA members and could not participate in testimony, Hargens and Thompson respectfully ask that the City Council (a) consider, or, in the alternative, require that the BZA reconsider, the record, including all of the testimony of the neighbors opposing the variances, and (b) adopt, and require the BZA to adopt, a public hearing platform that allows the public to hear and participate in the public hearings by the BZA and the City Council.

In this time of a pandemic, and the difficulties in accessing local government, Hargens and Thompson believe that transparency and communication with the public is especially important. The difficulties Hargens, Thompson and other members of the public have had with this process may also be affecting others throughout the City in their interactions as well, and Hargens and Thompson respectfully request that the City assess its current practices and procedures to ensure that the public is included in public hearings.

C. Applicant seeks to construct the Project, including demolishing the driveway, without the consent of the fee owners of the eastern four feet of the shared driveway.

As further discussed in the attached letter, the Applicant seeks the Variances for the Property, which includes an area of property that is not owned in fee simple by the Applicant. A portion of the Property, as depicted in the survey, site plan, and deed submitted with Applicant's Application is owned by the owners of 536 Portland Avenue, Gary Currie and Elizabeth Currie (the "Curries"). The Curries own the east four feet of the narrow eight-foot driveway that is shared between the Applicant and the Curries.

The Site Plan submitted by Applicant notes that a part of the Project will include "demolish[ing] existing concrete driveway for installation of new utilities (water, sewer, storm & gas) and replacement with new concrete driveway to match existing." Applicant has not obtained the consent from the Curries to (i) construct the Project using the east four-feet of the easement that is owned by the Curries or to (ii) disrupt the Curries' easement rights to the west four feet of the easement. The City therefore cannot permit the Applicant to proceed with the Project without the consent of the Curries.

CONCLUSION

The Applicant respectfully asks the City Council to reverse the BZA approval of Applicant's Variances on substantive and procedural grounds.

Substantively, the proposed Variances do not satisfy the 6 required findings under Code Section 61.601 and Minn. Stat. § 462.357, subdivision 6. Specifically:

- (1) The Variances are not in harmony with the purposes and intent of the zoning code;
- (2) The Variances are inconsistent with the 2040 Comprehensive Plan;
- (3) Applicant is only prevented from complying with the strict requirements of the zoning code because of economic considerations alone;
- (4) Applicant's plight is self-created (and not caused by unique characteristics of the Property) because Applicant can develop the Property for the proposed use within the land use controls imposed by heritage preservation and zoning laws and Applicant simply choosing not to comply with both sets of laws; and
- (5) The Variances are inconsistent with the essential character of the surrounding neighborhood.

Even if the City Council believes that the BZA correctly concluded that the Applicant satisfied some of the above-described findings, failure of the Applicant to establish any one of these required findings requires the City Council to reverse the decision of the BZA and deny the Applicant's requested Variances.

Procedurally, the BZA failed to provide members of the public the opportunity to hear all discussion and votes of the BZA or participate in testimony at the Public Hearing.

Hargens and Thompson also respectfully request that the City Council adopt, and require the BZA to adopt, a public hearing platform that allows the public to fully hear and participate in public hearings by the BZA and the City Council.

October 15, 2020

The Department of Safety and Inspections Zoning Section
375 Jackson Street Suite 220
Saint Paul, MN, 55101

Re: BZA File 20-069819; Sullivan Property Investment LLC
Appeal of Variances

To the City Council:

We submit this letter on behalf of Gary R. Currie and Elizabeth A. Currie, owners of 536 Portland Avenue, St. Paul, Minnesota, neighbors of 542 Portland Avenue. We are writing in support of the appeals filed by Gar Hargens and Missy Staples Thompson of variances granted by the Board of Zoning Appeals and approvals granted by the Heritage Preservation Commission to Sullivan Property Investments for the three-unit townhouse Sullivan proposes to construct behind the existing triplex on 542 Portland Avenue.

The proposed construction includes demolition and re-construction of an existing driveway, half of which is located on the Currie's property. The Curries do not consent to that construction and the City does not have authority to grant approvals for construction on the Currie's property without the Currie's consent.

Section 61.301(b) of the St. Paul Legislative Code requires that an applicant for a variance be a "person having an ownership or leasehold interest in the subject land and/or building (contingent included)." Section 73.03.1 of the St. Paul Legislative Code requires that an applicant for an approval from the heritage preservation commission be a "person having an ownership, leasehold, or contingent interest in the heritage preservation site . . .".

Sullivan does not own and does not have a right to develop the easterly 4 feet of the development site. The center line of the existing 8-foot wide common driveway that serves the Currie's home and the three existing units on the Sullivan Property, is the property line between the Currie property and the Sullivan property. Sullivan holds a driveway easement over the west 4 feet of the Currie property. The Curries hold a reciprocal driveway easement over the east 4 feet of the Sullivan property. Sullivan proposes to demolish and replace the existing driveway and double its use of that driveway. The reciprocal driveway easement does not provide Sullivan the right to build on the Currie property and the Curries do not grant that right.

Please understand that this is not an objection based on the Curries' objections to how the Board of Zoning Appeals and the Heritage Preservation Commission exercised their jurisdiction and discretion. The Currie's objection is, the Board of Zoning Appeals and the

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STINSON LLP  STINSON.COM

October 15, 2020

Page 2

Heritage Preservation Commission do not have jurisdiction to grant Sullivan authority to build on the Currie's property under any circumstances.

Accordingly, the Curries ask the City Council to determine that the Board of Zoning Appeals and Heritage Preservation Commission do not have authority to grant the variances and approvals Sullivan requested, and grant the appeals of Gar Hargens and Missy Staples Thompson.

Very truly yours,

Stinson LLP

A handwritten signature in black ink, appearing to read "Eric Galatz".

Eric Galatz

Galatowitsch, Diane B.

From: Missy Thompson <missy.staples.thompson@gmail.com>
Sent: Monday, October 19, 2020 12:47 PM
To: Galatowitsch, Diane B.
Cc: Gar Cell; Galatz, Eric
Subject: Fwd: Neighborhood Meeting about new Carriage House at 540 Portland
Attachments: 542 Portland HPC.docx; ATT00001.htm

External Email – Use Caution

Begin forwarded message:

From: Gar Hargens <gar@closearchitects.com>
Subject: Re: Neighborhood Meeting about new Carriage House at 540 Portland
Date: September 22, 2020 at 9:55:34 AM CDT
To: George Gause <George.Gause@ci.stpaul.mn.us>
Cc: WENDY SURPRISE <wendysurprise28@gmail.com>, Simon Jette-Nantel <sjettenantel@gmail.com>, Missy Thompson <missy.staples.thompson@gmail.com>, Daniel Chouinard <danchoui@icloud.com>, Ann Schroder And Nick Marcucci <alsnjm@gmail.com>, Emilia Mettenbrink <curls3645@gmail.com>, Laura Kindseth <reallife2@msn.com>, Daniel Lupton <danlupton@gmail.com>, Claire Wahmanholm <wahmanholm@gmail.com>, Mary Wiley <mary.wiley@rsmus.com>, Patty Voje <patty@spotcreates.com>, Dan Roth <DAN@voxcreativeinc.com>, "Graybar, Matthew (CI-StPaul)" <matthew.graybar@ci.stpaul.mn.us>, Elena Esters <elena@foxhomes.com>, Sam Isaacson <sam@foxhomes.com>, John Sularz <J_sularz@hotmail.com>, "carlos@sketchesllc.com" <carlos@sketchesllc.com>, "lov@swedishcraftsman.com" <lov@swedishcraftsman.com>, "Mason Riddle (masonriddle@mac.com)" <masonriddle@mac.com>, "Suhan Eggers, Allison (CI-StPaul)" <allison.suhan.eggers@ci.stpaul.mn.us>, cathy maes <timcathymaes@gmail.com>, jtpatalonis@earthlink.net

Hi Neighbors and City Staff,

Missy and I have been considering how to address this sudden and disturbing proposal in our midst. To help focus my reaction, I considered the HPC staff application of the Guidelines to the project. I've attached my comments below.

During my terms as HPC Commissioner (nine years, three as Chair), we initiated the Design Review meetings as a way to hear informally from neighbors and offer unofficial advice to applicants. We also asked applicants if they had met with neighbors and the neighborhood Assoc. I and the staff also championed the idea that designers should consider the opportunity to express current forms and styles while respecting the historic ones around them. This would seem a perfect opportunity to do that.

We look forward to seeing many of you on the Skype meeting this evening. Please pass this on to any neighbors we've left out.

Gar

Gar Hargens AIA, NCARB

President/OwnerClose Associates Incorporated, Architects

612-339-0979 office and cell

gar@closearchitects.com

close architects.com

3101 East Franklin Avenue

Mpls., 55406

542 Portland Ave., 2/10/2020 HPC Staff Report

Comments from neighbors at 548 Portland and others to....:

D. STAFF COMMENTS:

We endorse the need for this project to relate to its Portland Avenue address ...but not necessarily Summit Avenue.

- (a) General Principles: This structure is positioned on its lot as a typical Neighborhood carriage house, behind and subservient to the main house on Portland. It is most near a typical, large carriage house to a property on Summit. However, because of its size and character, it is out of scale with this neighbor, pretending instead to be a Summit house. It in no way meets this guideline.
- (b) Massing and Height: “existing adjacent structures” are garages and a carriage house, barely two stories high. This building has the height and massing of its parent on Portland. It is not subordinate, although the presenter would like you to believe so. It does not relate to existing adjacent structures, it mimics its house and homes on Summit. It does not meet the Guideline.
- (c) Rhythm and Directional Emphasis: The structure should not try to pretend it has a relationship to Summit. At more than 100’ from Summit with required setbacks, it is appropriate for it to mirror garages and carriage houses in the Neighborhood. The design chooses to face Summit, creating an imposing and fake facade. Rather, it should try adapting to the narrow lot by orienting North/South. Currently, the design doesn’t make a welcome contribution to either Portland or Summit. It fails this Guideline.

- (d) Material and Details 1-4: The secondary structures in the Neighborhood typically borrow from their main structures but use simpler forms and fewer materials. This design copies extensively from the main house and creates a confusing tension. Siding on the Main House is the cheapest of wood-textured vinyl siding which the Guidelines specifically prohibit.
- (e) Building Elements 1-3: The design of this building is currently a huge missed opportunity. The Secretary of the Interiors Standards for Historic Preservation challenge designers to create buildings that respect the massing, fenestration (windows and doors), and materials of nearby buildings but...to also create buildings “of their time”. The Guidelines espouse this so that history can continue to be reflected in the design of our buildings. As a secondary building – rightly a “residential carriage house”- this design could express the simplicity of the past and the present. The repeat of the gambrel roof form would make it the third major structure in the middle of our block to use that Colonial shape and would not be representative of the majority of roofs in the Neighborhood. This is a pale and uninspired interpretation of the Guideline.
- (f) Site 1,3a&b: This building is aggressively/poorly sited without regard to Neighborhood patterns and forms. It should respect views of it from Summit Ave. but that should be not its primary task. Garage doors face Portland, which is not recommended in these Guidelines. As the parking is shown, it will severely impact a dominant spruce tree at the edge of the property.