

APPLICATION FOR PERMIT

PERMIT ISSUED

B.O.C.A. USE GROUP

B.O.C.A. TYPE OF CONSTRUCTION

01072

AUG 20 1986

ZONING LOCATION FR-2 PORTLAND, MAINE Oct. 30, 1985

City Of Portland

To the CHIEF OF BUILDING & INSPECTION SERVICES, PORTLAND, MAINE

The undersigned hereby applies for a permit to erect, alter, repair, demolish, move or install the following building, structure, equipment or change use in accordance with the Laws of the State of Maine, the Portland B.O.C.A. Building Code and Zoning Ordinance of the City of Portland with plans and specifications, if any, submitted herewith and the following specifications:

LOCATION 87-II- 38 A Street Peaks Island

Fire District #1 ☐, #2 ☐

1. Owner's name and address John Martin - same..... Telephone 764-5825.

2. Lessee's name and address Telephone

3. Contractor's name and address Jackson & Casey - Isl. Ave. Pks Isl. Telephone 766-5537.

..... No. of sheets

Proposed use of building dwelling..... No. families 1.....

Last use same..... No. families

Material No. stories Heat Style of roof Roofing

Other buildings on same lot

Estimated contractual cost \$ 3,000.....

Appeal Fees \$

Base Fee 35.00

Late Fee

TOTAL \$

FIELD INSPECTOR—Mr.

@ 775-5451

To construct addition to existing dwelling
as per plans, 1 sheet of plans. addition is for
bathroom
send permit to # 3 04108- 1199

Stamp of Special Conditions

NOTE TO APPLICANT: Separate permits are required by the installers and subcontractors of heating, plumbing, electrical and mechanicals.

DETAILS OF NEW WORK

Is any plumbing involved in this work? yes..... Is any electrical work involved in this work? yes.....

Is connection to be made to public sewer? If not, what is proposed for sewage?

Has septic tank notice been sent? Form notice sent?

Height average grade to top of plate Height average grade to highest point of roof

Size, front depth No. stories solid or filled land? earth or rock?

Material of foundation Thickness, top bottom cellar

Kind of roof Rise per foot Roof covering

No. of chimneys Material of chimneys of lining Kind of heat fuel

Framing Lumber—Kind Dressed or full size? Corner posts Sills

Size Girder Columns under girders Size Max. on centers

Studs (outside walls and carrying partitions) 2x4-16" O. C. Bridging in every floor and flat roof span over 8 feet.

Joists and rafters: 1st floor 2nd 3rd roof

On centers: 1st floor 2nd 3rd roof

Maximum span: 1st floor 2nd 3rd roof

If one story building with masonry walls, thickness of walls? height?

IF A GARAGE

No. cars now accommodated on same lot to be accommodated number commercial cars to be accommodated

Will automobile repairing be done other than minor repairs to cars habitually stored in the proposed building?

APPROVALS BY: DATE

BUILDING INSPECTION—PLAN EXAMINER

ZONING O.K. M.D. St. Aug 20, 1986.....

BUILDING CODE

Fire Dept.

Health Dept.

Others:

MISCELLANEOUS

Will work require disturbing of any tree on a public street?

Will there be in charge of the above work a person competent

to see that the State and City requirements pertaining thereto

are observed?

Signature of Applicant

Phone # same.....

Type Name of above Jackson & Casey Corp.

☐ 1 ☐ 2 ☐ 3 ☐ 4

sent in by Arthur Adda other

and Address

FIELD INSPECTOR'S COPY

APPLICANT'S COPY

OFFICE FILE COPY

NOTES

5-11-87 *Complete*

Permit No. 86/1072
Location 8711-384 *W. Olin St.*
Owner John Martin
Date of permit 10-30-86
Approved 8-29-86
Dwelling - Addition
Garage _____
Alteration _____

[The main body of the form, consisting of multiple horizontal lines for notes, is crossed out with a large 'X' drawn across it.]

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS



MERRILL S. SELTZER
Chairman

MICHAEL E. WESTORY
Secretary

ROBERT J. GAUDREAU
THOMAS F. JEWELL
EUGENE S. MARTIN
DAVID L. SILVERNAIL

John C. Knox

August 22, 1986

RE: 87-II-38
A Street - Peaks Island

Mr. John C. Martin
A Street
Peaks Island, Maine 04108

766-5005

A building permit has been issued and mailed to Jackson and Casey for your bathroom addition on your residence at A Street on Peaks Island.

The variance appeal has therefore been withdrawn from the August 21st agenda of the Board of Appeals.

Sincerely,

A handwritten signature in cursive script, appearing to read "Warren J. Turner".

Warren J. Turner
Zoning Enforcement Inspector

/el

cc: Merrill Seltzer, Chairman, Board of Appeals
Joseph E. Gray, Jr., Director of Planning and Urban Development
Alexander Jaegerman, Chief Planner
P. Samuel Hoffses, Chief of Inspection Services
Arthur Addato, Code Enforcement Officer

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS



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DAVID L. SILVERMAIL

John C. Knox

AFTERNOON APPEAL AGENDA

The Board of Appeals will hold a public hearing in Room 209, City Hall, Portland, Maine Thursday afternoon, August 21, 1986 at 4:00 P.M. to hear the following appeals:

1. Unfinished Business

Variances:

- a. Space and Bulk: (Section 14-473(c)1 of the Ordinance must be met by the following requests:

87-II-38 A Street, Peaks Island, John C. Martin - To permit construction of an 9'3" X 5' addition to be used for a shower and hot water heater. This lot contains 2666 square feet of land area and the proposed side yard is 10 feet instead of the required 20 feet in width. The Board questioned whether Section 14-436 building Extensions might offer some relief in this matter.

2. Conditional Use Appeal:

70-76 Summit Street AKA 68 Summit Street - Leslie Newton - This applicant is petitioning the Board of Appeals to grant a conditional use to enable him to construct a sunroom, deck, breezeway and garage with a Mother-in-Law apartment in the R-2 single family zone not allowed because such a use is a conditional use in the R-2 Residence Zone as provided in Section 14-78(1)b. and Section 14-474(3)c(1) of the Zoning Ordinance. The Board postponed this item in order to allow for additional consideration and possible redesign of the proposal by the applicant, who was represented by John Carr, his son-in-law.

The Board will recess for dinner until 7 p.m. August 21, 1986.

Jackson & Casey Corporation

GENERAL CONTRACTING - PLUMBING & HEATING
ISLAND AVENUE

PEAKS ISLAND, MAINE 04108

EDWARD L. CASEY, PRESIDENT
766-2817 - 766-5537

CATHERINE B. CASEY VICE PRESIDENT
766-2817 - 766-5537

87-II-38
A Street

October 24, 1985

Mr. Arthur Addato, Bldg. Insp.
City of Portland
389 Congress St.
Portland, Maine 04101

Dear Arthur:

Enclosed you will find a drawing for a small
addition on John Martin's house, A St., Peaks
Island.

Please look it over and submit the necessary
documentation to obtain a permit for us. The cost
will be \$3,000.00.

If you need any more information please call.

Yours truly,

ELC

Edward L. Casey

ELC/dm

RECEIVED

OCT 28 1985

DEPT. OF BUILDING INSP.
CITY OF PORTLAND

Aug. 2, 1986

To whom it may concern:

We the undersigned agree with
granting John C. Martin, owner of
property 87-11-³⁸ A St., a variance
to allow him to build the
9'3" x 5' addition to the side of
his cottage.

Gustav C. Karlson

Ann Karlson

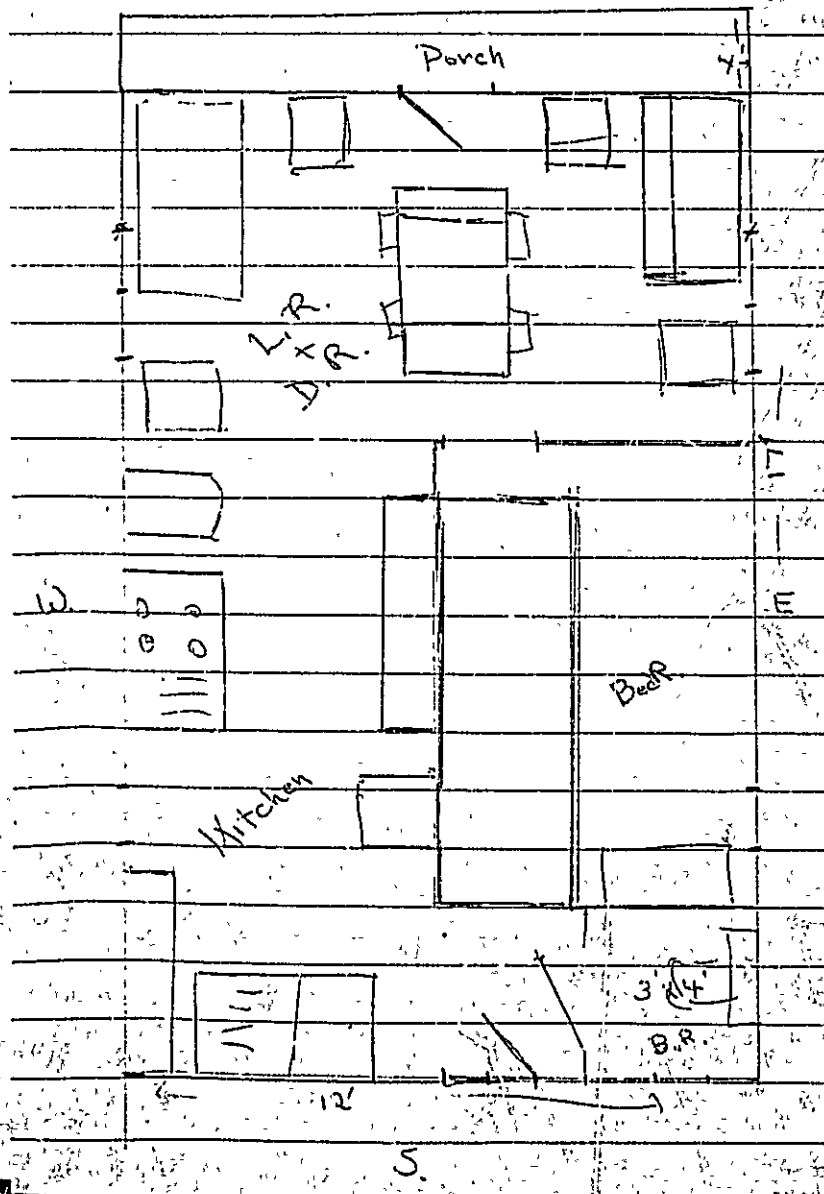
Upper A St.

Peaks Island

Upper 4 St.
Perks, Cal

join to main cottage

N.



S.

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS



MERRILL S. SELTZER
Chairman

MICHAEL E. WESTORT
Secretary

ROBERT J. GAUDREAU
THOMAS F. JEWELL
EUGENE S. MARTIN
DAVID L. SILVERNAIL

John C. Knox

87-II-38
A Street, Peaks Island

All persons interested either for or against this Space & Bulk Variance Appeal will be heard at a public hearing in Room 209, City Hall, Portland, Maine on Thursday afternoon, August 21, 1986 at 4:00 p.m. This notice of required public hearing has been sent to the owners of property directly abutting and directly across a street or alley from the property as required by the Ordinance.

John C. Martin, owner of the property at 87-II-38 A Street, under the provisions of Section 14-473(c)1 of the Zoning Ordinance of the City of Portland, Maine hereby respectfully petitions the Board of Appeals to permit construction of 9'3" X 5' addition to side of cottage to be used for a shower and hot water heater at the above location, not allowed because Section 14-145.11(3)c. requires 20 feet side yard instead of the 10 feet setback shown on the plot plan for this proposed bathroom addition:

LEGAL BASES OF APPEAL: Such permit may be granted only if the Board of Appeals finds that the conditions imposed by Section 14-473(c)1 of the Zoning Ordinance have been met.

Michael Westort
Secretary

EL
8/8/86

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS



MERRILL S. SELTZER
Chairman

MICHAEL E. WESTORT
Secretary

ROBERT J. GAUDREAU
THOMAS F. JEWELL
EUGENE S. MARTIN
DAVID L. SILVERNAIL
MICHAEL E. WESTORT
John C. Knox

June 16, 1986

RE: 87-II-38

Mr. John Martin
74 Washington Avenue
Natick, Mass. 01760

Dear Mr. Martin:

A building permit can not be issued for your proposed bathroom addition on your cottage at A Street, Peaks Island, because the setbacks from the side and rear property lines are only 11 feet instead of 20 feet for the side yard and 25 feet for the rear yard setback.

We understand you may wish to petition the Board of Appeals for variances to allow your building addition to be built. The necessary application for a variance and relating materials are enclosed for your information.

Sincerely,

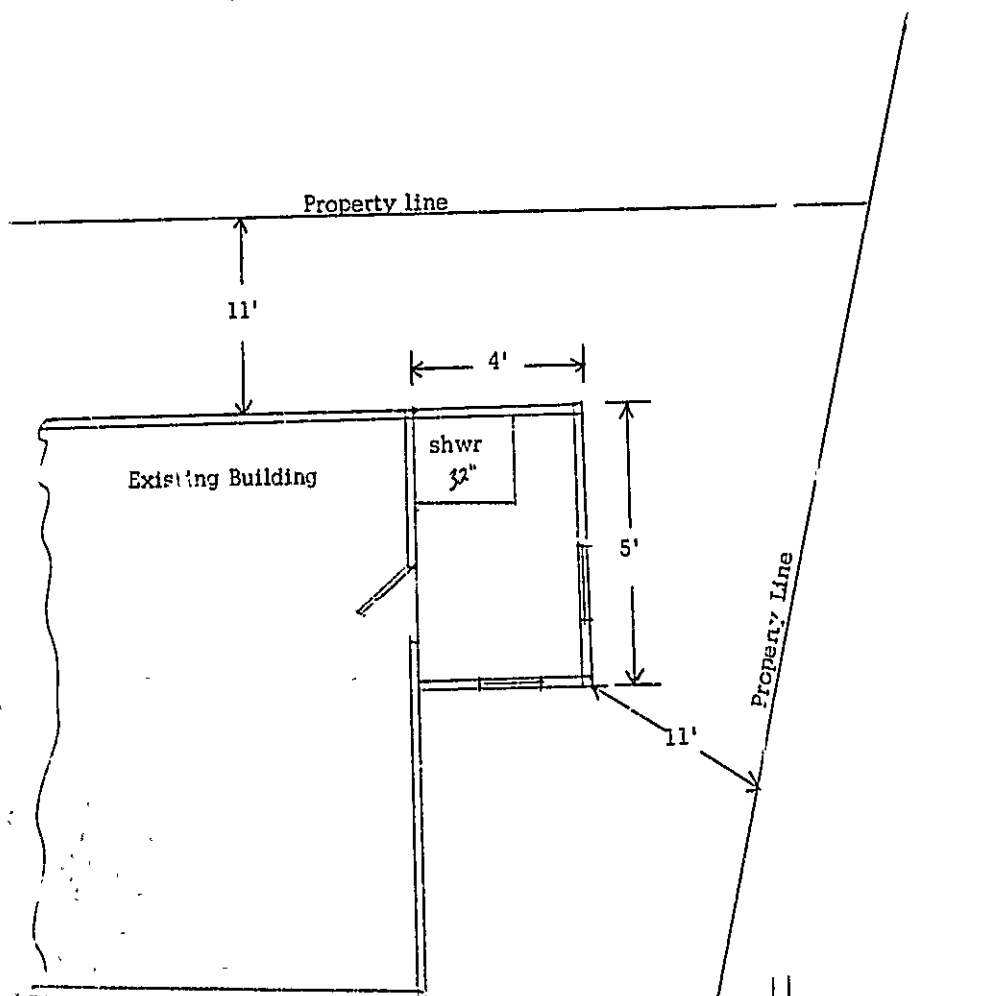
Warren J. Turner
Zoning Enforcement Inspector

WJT/el

Enclosures: As stated above

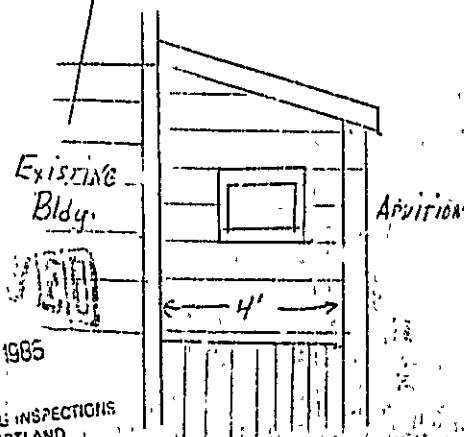
cc: Merrill Seltzer, Chairman, Board of Appeals
Joseph E. Gray, Jr., Director of Planning and Urban Development
P. Samuel Hoffses, Chief of Building Inspections
Arthur Addato, Code Enforcement Officer.

Proposed Bathroom Addition for
 John Martin
 Lot #87-II-38, A. St.
 Peaks Island, Maine



- 2" x 8" Floor joists
- 2" x 4" Studs in walls
- 2" x 6" Rafters
- 4" x 6" Posts on Sonotubes for foundation
- Roof to be shed type

NOTE: NOT DRAWN TO SCALE



APR 28 1985

BUILDING INSPECTIONS
 CITY OF PORTLAND



CITY OF PORTLAND

*Upper A Street
Peaks, Isl.*

REQUEST FOR VARIANCE APPEAL

Applicant's name and address: JOHN C. MARTIN SR.

74 Washington Ave Natch 3:2 01760

Applicant's interest in property (e.g., owner, purchaser, etc.):

OWNER

Owner's name and address (if different):

Address of property (or Assessor's chart, block and lot number):

A ST. PEAKS ISLAND # 8711 LOT 18

Zone:

Present use: SUMMER RESIDENCE
Charge of use
(if applicable)

Variance from: Section 14-

Relief requested from Board:

RECEIVED

JUL 16 1986

DEPT OF BUILDING INSPECTIONS
CITY OF PORTLAND

NOTE: If site plan approval is required, attach preliminary or final site plan.

The undersigned hereby requests a variance as above-described, and certifies that all information herein supplied by him is true and correct to the best of his knowledge and belief.

Dated: July 5 - 1986, 19

John C Martin Sr.
Signature of Applicant

(See other side for variance standards.)

A lot in the IR-1 and IR-2 zones that was described in a subdivision plat approved by the planning board after July 15, 1962, shall be considered a buildable lot, provided that the applicable yard dimensions can be met. (Code 1962, § 602.19.L; Ord. No. 539-84, 5-7-84; Ord. No. 32-85, § 1, 7-15-85)

Sec. 14-434. Corner clearance.

No obstruction higher than three and one-half (3½) feet above the lowest elevation at the curbline shall be permitted on a corner lot with an area of a triangle formed by a line intersecting the street lines of the intersecting streets at points twenty-five (25) feet from the corner. For the purpose of this section, the word "obstruction" shall mean any shrub, wall, fence, temporary building, sign, a pile of material, but shall not include permanent buildings or structures where permitted elsewhere in this article. (Code 1938, § 602.19.M)

Sec. 14-435. Unsewered residential districts.

Where a lot in a residence zone is not served by public sewers and septic tank disposal systems are required, the minimum lot area required shall be determined from the following table, except that on the islands in Casco Bay, such variation as shall be approved by the health officer may be permitted in the minimum required lot areas:

Standard Percolation

Test Rate of
Percolation
(minutes)

Lot Area
Required
(square feet)

2.....	7,500
3.....	8,400
4.....	8,500
5.....	9,100
10.....	10,500
15.....	11,800
30.....	13,800
45.....	15,500

(Code 1966, § 607.19.N)

Sec. 14-436. Building extensions.

A building existing on June 5, 1957, the height, yards and other open spaces of which conformed with the provisions of the zoning ordinance then in effect for new buildings may be extended upward throughout its area to the full height permitted herein for new buildings and may be extended horizontally provided the width and the depth of no yard or other open space which is less than that permitted herein is thereby reduced to less than the minimum width or depth of such yard or open space as existing on June 5, 1957. (Code 1968, § 602.19.O)

Sec. 14-432. Garages or accessory uses to dwelling, apartment or tenement houses.

The width of a side yard adjoining a garage need not be greater than the minimum side yard required for a building of its height. In addition, the following encroachments upon rear and side yards shall be permitted:

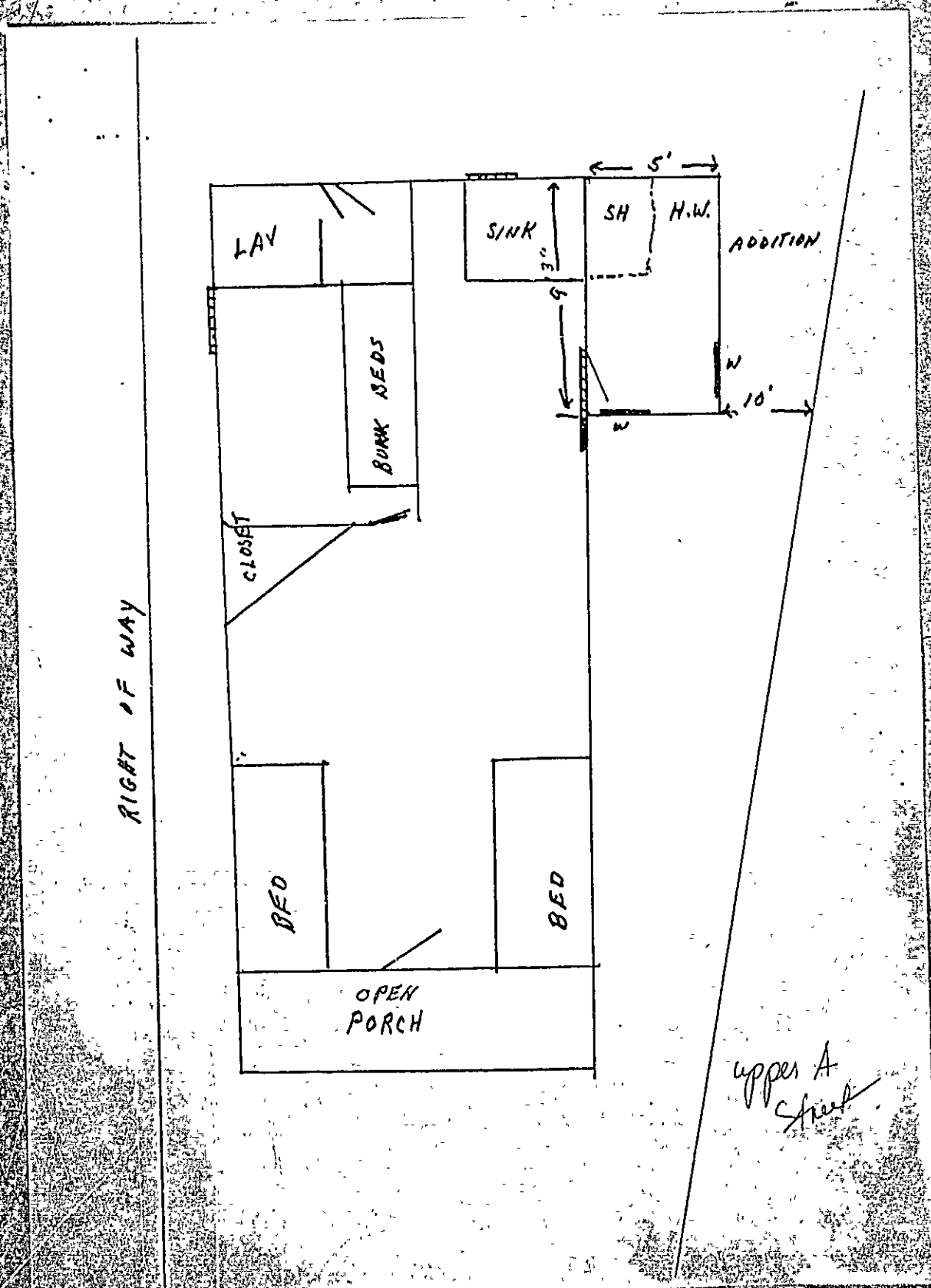
- (1) Detached garages or accessory structures not more than fifteen (15) feet in height which serve dwellings, apartment or tenement houses shall be permitted in required rear yards when occupying not more than thirty (30) per cent of the area of such yards or in required side yards if they do not extend from the rear wall of the principal building toward the front lot line more than twenty (20) per cent of the depth of that building. In no case shall any portion of such a garage or accessory structure be located closer to any lot line than as provided elsewhere in this article.
- (2) Garages or accessory structures attached to dwelling, apartment or tenement houses, or portions of such buildings for garage use only, may encroach upon required rear and side yards as provided for detached garages, but no such encroachment shall be located less than five (5) feet from any lot line.
- (3) Outdoor swimming pools accessory to dwellings, apartment houses, hotels or motels, shall be permitted on lots provided the following conditions are met:
 - a. No swimming pool shall be sited between a building and the street line.
 - b. No part of any swimming pool shall be located closer than ten (10) feet from the principal structure, nor closer than ten (10) feet from the side or rear lot lines. (Code 1968, § 602.19.K; Ord. No. 271-77, 5-16-77)

Sec. 14-433. Lots of record.

Any lot of record as of June 5, 1957, and held under separate and distinct ownership from adjacent lots and having a street frontage of forty (40) feet, or to which a means of access has been previously approved by the city council as provided elsewhere in this article, may be considered a buildable lot in any residential zone except as provided below for island residential zones, with a minimum lot size of five thousand (5,000) square feet except that a lot in the R-6 zone may have a minimum lot size of three thousand (3,000) square feet, provided that the applicable yard dimensions can be met.

A lot in the R-1, R-2 or R-3 zone that was described in a subdivision plat approved by the planning board after June 5, 1981 or a lot of record that conformed to the applicable lot size requirement, lot width and street frontage as of June 5, 1984, shall be considered a buildable lot, provided that the applicable yard dimensions can be met.

Any lot of record as of July 15, 1985, and held under separate and distinct ownership from adjacent lots and meeting the applicable street frontage requirements of that time, may be considered a buildable lot in the IR-1 and IR-2 zones, provided that the applicable yard dimensions can be met, and provided further that a lot in the IR-1 zone shall have a minimum area of ten thousand (10,000) square feet and a lot in the IR-2 zone shall have a minimum area of six thousand five hundred (6,500) square feet unless it is served by a public sewer, in which case it shall have a minimum area of five thousand (5,000) square feet.



June 20, 1986

Board of Appeals
Portland, Maine

As the abutters (on the south side) of the property owned by John C. Martin (on Pease Island) we have no objection what so ever to his erecting said addition (on the west side) to his cottage.

We use that area as our drive (entrance) to our cottage; and said addition would not be coming as far out as the bush that is growing there now.

Upper A St.

William R. Martin

Harriet E. Martin

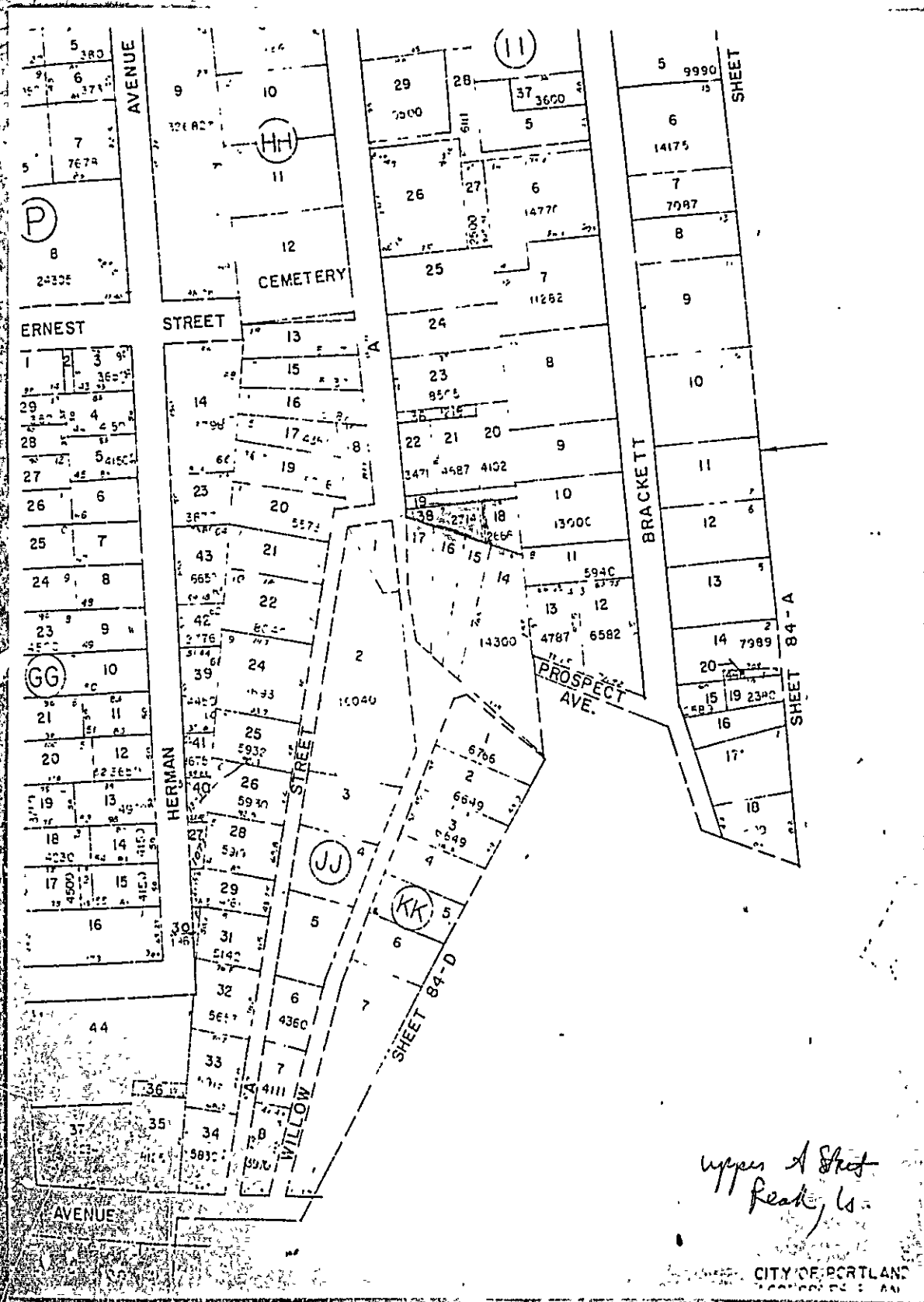
Upper A Street
Peaks, Isl.

I John Martin am applying for a variance for an addition to my cottage on Peaks Island. #87 Lot 18.

1. The land and building are practically worthless without showering facilities.
2. The land is a right triangle with approx 10 ft front on A St.
3. The variance will not alter the character of the locality as the addition will face the back of adjoining cottages.
4. The hardship is not the result of any previous action taken.

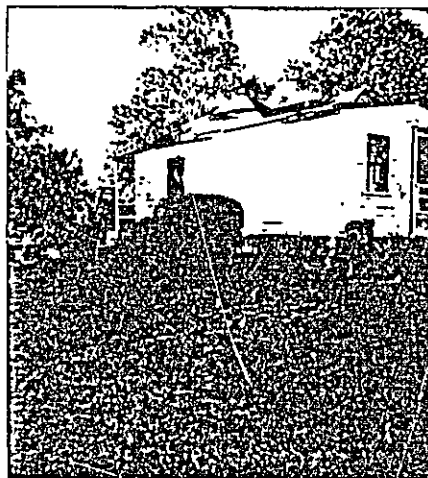
I am now retired and would like to use the cottage all summer, as it is now my wife and I have to go home after a week to shower. My wife and I both have Arthritis and it is very hard to take a sponge bath.

John C Martin Sr.



upper A sheet
ready to

CITY OF PORTLAND
RECORDS & AM



Upper A St.

CITY OF PORTLAND, MAINE

MEMORANDUM

To: Chairman and Members of the Board of Appeals
From: Christine Foster, Associate Corporation Counsel
Date: July 21, 1986
Subject: Findings of Fact and Final Vote

I enclose for your information a copy of the recent Law Court Decision, Marchi, et al v. the Town of Scarborough, et al, Decision No. 4186, decided July 11, 1986. In that case, the Court vacated a Superior Court judgment affirming the decision of the Town of Scarborough's Zoning Board of Appeals which denied an application for a set-back variance. The Court did so by reviewing the necessary findings of fact underlying the final tie vote denying the hardship variance. In doing so, the Court found that one of the Board members who denied the variance did so based upon a finding that the lot could yield a reasonable return, a finding that the Court found to be unsupported by the evidence. What the case suggests is a willingness on the part of the Court to review individual votes on independent necessary findings rather than simply relying on the final vote on the overall issue. The difficulty which this raises for our Board was identified in an earlier memo by David Lourie, Corporation Counsel, to the Mayor, Members of the City Council, Members of the Board of Appeals, and Members of the Planning Board, a copy which I have attached for your information. The scenario which Mr. Lourie posited in that earlier memo has been confirmed by the Marchi case. Therefore, it is even more urgent than before that the Board address this problem. It seems to me there are a variety of options available. They include the possibility that in the final vote all Board members must adhere to the individual findings of fact made by the Board as a whole throughout their deliberation or the use of an administrative tally of those independent findings made by the Board in the form of the vote of at least four of its members and the declaration of the outcome based on that tally. Either approach would require, in my mind, an ordinance amendment.

I would be more than happy to discuss this matter with the Board at a time which they find convenient. In the interim, if you have any questions, please do not hesitate to contact me directly.

Chud

Christine Foster
Associate Corporation Counsel
CF:dh

cc: Clark Neily, Acting City Manager
David A. Lourie, Corporation Counsel
Joseph E. Gray, Director of Planning
and Urban Development

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 4186
L w Docket No. Cum-85-502

PAUL AND JOANNE MARCHI, et al.

v.

TOWN OF SCARBOROUGH, et al.¹

Argued May 6, 1986
Decided July 11, 1986

Before McKUSICK, C.J., and NICHOLS, ROBERTS, WATHEN, GLASSMAN,
and SCOLNIK, JJ.

SCOLNIK, J.

Plaintiffs Paul and Joanne Marchi and Francisca Hamilton appeal from a judgment of the Superior Court (Cumberland County) affirming a decision of the Town of Scarborough Zoning Board of Appeals (the Board) that denied the plaintiffs' application for a setback variance. The plaintiffs contend, *inter alia*, that they met their burden of proving that they would suffer "undue hardship" if the variances were not issued. We agree and vacate the judgment.

In February, 1985, the Marchis signed an agreement to purchase from Hamilton for \$16,000 a corner lot located in a residential zone in Scarborough, conditioned upon receiving a variance from the setback requirements of the Scarborough Zoning Ordinance that would make the parcel a buildable lot. If the setback requirements for such a corner lot are strictly applied, the buildable portion of the lot would be limited to an area measuring five feet by nineteen feet. One of Hamilton's neighbors has indicated that he

¹Paul Lempicki is named as a defendant in his capacity as building inspector for the Town of Scarborough, along with the municipal corporation.

would be willing to pay \$3500 for the lot if unbuildable. After the Scarborough building inspector denied the Marchis a permit, they filed a variance appeal with the Board, as required by the town zoning ordinance. The Board denied the variance request by a tie vote of two to two. Pursuant to Rule 80B of the Maine Rules of Civil Procedure and 30 M.R.S.A. § 2411(3)(F) (1978), the plaintiffs appealed to the Superior Court. That court affirmed the Board's action. This appeal followed.

When the Superior Court acts as an intermediate appellate court reviewing the action of a Board of Appeals, as here, no presumption of validity attaches to its judgment and the Law Court will directly examine the record as developed before the Board. Curtis v. Main, 482 A.2d 1253,1255 (Me. 1984); Mack v. Municipal Officers, 463 A.2d 717,719-20 (Me. 1983). We must determine whether the decision of the Board was unlawful, arbitrary, capricious, or unreasonable. Penobscot Area Hous. Dev. Corp. v. City of Brewer, 424 A.2d 14,21 (Me. 1981); Lippoth v. Zoning Bd. of Appeals, 311 A.2d 552,557 (Me. 1973).

Section V(B)(3) of the Scarborough Zoning Ordinance gives the Board the power to grant variances where "owing to special conditions, a literal enforcement of the provisions of [the] Ordinance would result in undue hardship." A variance may be granted only by majority vote of those members present and voting. The Ordinance requirements with respect to undue hardship comport with the statutory prerequisites of 30 M.R.S.A. § 4963(3) (Supp. 1985-1986), which reads in pertinent part:

3. Variance. A variance may be granted by the board only where strict application of the ordinance, or a provision thereof, to the petitioner and his property would cause undue hardship. The words "undue hardship" as used in this subsection mean:

- A. That the land in question cannot yield a reasonable return unless a variance is granted;
- B. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
- C. That the granting of a variance will not alter the essential character of the locality; and
- D. That the hardship is not the result of action taken by the applicant or a prior owner.

The Board unanimously found that the plaintiffs met statutory requirements C and D: that the variance approval would not alter the essential character of the locality and the hardship was not the result of the applicant's action. However, in support of his vote denying the variance, one of the Board members found that the Hamilton lot could yield a reasonable return in the absence of a variance, although in his view the three other criteria of "undue hardship" were met.² We conclude that because the evidence does not support this finding, the decision of the Board is unreasonable.³ See Lippoth, 311 A.2d at 557.

²We focus on this finding, and review it in the same manner as a finding of the Board, because if it is unsupportable, the vote of this member, when corrected, must be deemed to provide the majority vote of the four member Board that necessary for granting the variance.

³Because only a majority vote is required for a variance approval, we do not address the negative finding of another Board member with respect to the unique circumstances requirement of the Ordinance. Cf. Curtis, 482 A.2d at 1258 n.6 (court not required to test Board's negative finding as to one of statutory

This court has repeatedly recognized that reasonable return is not maximum return. See, e.g., Leadbetter, 485 A.2d at 227; Curtis, 482 A.2d at 1257; Barnard v. Zoning Bd. of Appeals, 313 A.2d 741, 749 (Me. 1974). The standard for measuring reasonable return is whether "strict compliance with the terms of the Ordinance would result in the practical loss of substantial beneficial use of the land." Leadbetter, 485 A.2d at 228; see also Driscoll, 441 A.2d at 1029. Here, the record reveals, inter alia, that the property is strictly confined to residential use, is unbuildable unless the variance is granted, and the applicant is not an abutting owner. This record fully establishes the absence of any other beneficial use for this substandard lot. As in Driscoll, it clearly appears that literal adherence to the relevant setback restrictions, which would limit the size of the home to five feet by nineteen feet, would deprive the applicants of a reasonable return, and absent the variance, would result in the practical loss of the substantial beneficial use of the land. Compare Driscoll, 441 A.2d at 1029 (proposed home limited to seventeen feet by twenty feet); see also Makel v. Zoning Bd. of Appeals, 2 Ill. App. 3d. 360, 276 N.E.2d 485 (1971) (seventeen feet wide residence on corner lot would yield reasonable return); BCL, Inc. v. West Bradford Township, 36 Pa. Commw. 96, 387 A.2d 970 (1978) (where lot too small to conform to minimum area requirements, enforcement of ordinance will sterilize the land creating necessary

criterion when Board's denial sustained absent proof of another of the requirements).

hardship to justify variance); Denton v. Zoning Bd. of Review, 86 R.I. 219, 133 A.2d 718 (1957) (denial of variance rendering small lot unbuildable deprives owner of all beneficial use of land); cf. Cushing v. Smith, 457 A.2d 816, 823 (Me. 1983) (where zoning restrictions would narrow the permitted uses of the property to single or two family residence, Board reasonably concluded that property would not yield a reasonable return because it was best suited to use as a multi-family residence)

The defendants contend, however, that the finding of reasonable return was supported by evidence of the potential and substantially lower offer made by a neighboring property owner. We disagree.

A variance to permit development of a substandard parcel may not be denied solely on the ground that the applicant had an offer of purchase. A landowner has the right to develop his land; he is not required to sell it.

3 Anderson, American Law of Zoning § 18.54, at 292 (2d ed. 1977). The fact that the property has a potential for sale to an abutting owner does not in and of itself derogate from the applicants' clear showing that this parcel is not susceptible to a beneficial use. See Gougeon v. Board of Adjustment, 54 N.J. 138, 253 A.2d 806 (1969); Kent County Land Co. v. Zoning Bd. of Review, 100 R.I. 418, 216 A.2d 511 (1966); (opportunity to sell his land does not provide owner with a "land use" within the zoning concept); cf. Chirichello v. Zoning Bd. of Adjustment, 78 N.J. 544, 397 A.2d 646 (1979) (salability of land for fair price constitutes only one yardstick by which to measure undue hardship).

Because the Board could not reasonably find that the denial of the variance would not result in the practical loss of substantial beneficial use of the land, a majority of the Board must be deemed to have concluded that all four undue hardship criteria have been met. Accordingly, the plaintiffs are entitled to a variance. We find it unnecessary to address the plaintiffs' remaining arguments on appeal.

The entry is:

Judgment vacated.

Remanded to Superior Court with instructions to reverse the Board's decision denying the variance.

All concurring.

Attorney for Plaintiff:

MURRAY, PLUMB & MURRAY
John C. Bannon, Esq. (orally)
75 Pearl Street
Portland, Maine 04101

Attorney for Defendant:

BERNSTEIN, SHUR, SAWYER & NELSON
Christopher L. Variotis, Esq. (orally)
One Monument Square
Portland, Maine 04101

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