I. Application for Relief

Applicant's responses to the questions within the Application for relief clearly indicate that the Application meets all of the standards for a granting of a Use Variance to permit the Use "Dwelling – Multi-Family" as well as the requested dimensional variance for parking.

The Providence Zoning Board of Review Variance Application form includes a series of questions and answers that appear to be derived from or related to the controlling law which sets forth legal elements necessary for relief. However, the application questions are distinct from the controlling legal standards, in particular question five (5). Exhibit 1 summarizes the responses to the Application's language.

II. Standards for Relief

Again, although helpful and insightful, the question-and-answer style organization of the Application and its Appendix does not in fact directly reflect the legal standards and causes a troublesome burden shift within question five (5). While the application may help inform the Zoning Board of Review, the standards that the Zoning Board of Review must apply are the standards set forth in State Law and PVD Zoning Code. If the Board relies on the standards of its application as opposed to the standard of the controlling law, that would amount to a clear error of law.

Specific to the interpretation of the controlling law, the rules of statutory interpretation are well settled, and well worth setting forth herein:

> "When the language of a statute is clear and unambiguous, we must enforce the statute as written by giving the words of the statute their plain and ordinary meaning." Harvard Pilgrim Health Care of New England, Inc. v. Gelati, 865 A.2d 1028, 1037 (R.I.2004). "But when the statute is ambiguous, we must apply the rules of statutory construction and examine the statute in its entirety to determine the intent and purpose of the Legislature." Id. In addition, "**where the statute is remedial, one which affords a remedy, or improves or facilitates remedies already existing for the enforcement of rights or redress of wrongs, it is to be construed liberally**." Ayers–Schaffner v. Solomon, 461 A.2d 396, 399 (R.I.1983).

Gem Plumbing & Heating Co., Inc. v. Rossi. 867 A.2d 796, 811. (**emphasis added**). In sum, as a variance is a statutory power that facilitates remedies, **it is to be construed liberally**.

Please see attached hereto **Exhibit 2 "Annotated Controlling Law"**, where said controlling law is broken down into its component parts and annotated to highlight the required liberal construction of the rights to relief. In accordance with the rules of statutory interpretation and Rhode Island General Laws §45-24-41:

- The **hardship** is the fact that the structure is a 50,000 square foot historic nursing facility in an R-2 zone on an abnormally large lot which is already a fully occupied parcel completely bounded by streets
- The **relief** is two (2) distinct requests:
    - (1) A **use variance** to allow for the use Dwelling Multi-family in an R-2 zone
    - (2) A **dimensional variance** allowing for 45 fewer parking spaces than required

III. The Facts as Applied to the Controlling Law

The following is each element of the standards as broken out in **Exhibit 2 – Annotated Controlling Law**. We have applied the facts of the application in red Verdana font.

A. Rhode Island General Laws §45-24-41

The hardship is the fact that the fact that the structure is a 50,000 square foot historic nursing facility in an R-2 zone on an abnormally large lot which is already a fully occupied parcel completely bounded by streets and accordingly said hardship is due to the unique characteristics of the land and the structure.

[…]

(d) In granting a variance, the zoning board of review, ~~or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission,~~ shall require that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

(1) That the **hardship** (the fact that the structure is a 50,000 square foot historic nursing facility in an R-2 zone on an abnormally large lot which is already a fully occupied parcel completely bounded by streets) from which the applicant seeks relief is:

(i) due to the unique characteristics of the subject land or structure and

Unique **Structure** Characteristics: Historic 50,000 square foot former nursing home are characteristics that create the hardship

Use Variance: The structure does not comport to any of the permissible uses in the R2 zone.[1]

Dimensional Variance: The structure cannot be altered in any way to create additional parking space and the structure drives the unit count.[2]

[1] *See* Expert Report P. 8-10; Application Appendix A response 7

[2] *See* Expert Report p. 1-2; Application Appendix A response 2

Unique **Land** Characteristics: U shaped lot that is bounded by streets on all four sides does not have any space to expand especially considering that the building is a contributing historic structure and therefore its footprint cannot be altered

Use Variance: Any review of the site plan[3] makes in plainly evident that there is no way to reuse the site to build a series of duplexes or single-family homes or any other use permissible in an R2 zone because the building and site are essentially completely inflexible and already completely occupied[4]

Dimensional Variance: The proposal increases the parking spaces from 12 to 26, but a review of the site plan plainly shows there is no more space to build any additional parking. The 71-unit count is driven by the existing historic structure.[5]

(ii) not to the general characteristics of the surrounding area;

No evidence has been submitted that the hardship is due to the general characteristics of the surrounding area. To the contrary, please see all evidence summarized above and further as submitted into the record that the hardship is due to the unique characteristics of the land and structure. Accordingly, the surrounding area is not the driver of the hardship.

(iii) and is not due to a physical or economic disability of the applicant,

a. excepting those physical disabilities addressed in § 45-24-30(a)(16);

No evidence has been submitted that the hardship is due to the physical or economic disability of the applicant. To the contrary, please see all evidence summarized above and further as submitted into the record that both the dimensional hardship and the use hardship is due to the unique characteristics of the land and structure. There are no physical or economic disabilities of the applicant which create the hardship.[6]

[3] *See* Application, Site Plan

[4] *See* Testimony of Kevin Diamond on 4/13/22; Expert Report P. 12

[5] *See* Expert Report p. 10, 11; Historic Tax Credit Letter

[6] *See* Expert Report p. 11

B. Rhode Island General Laws §45-24-41(d)

The greater financial gain standard appears to be inappropriately applied. The term greater does not mean more, but instead means, "considerably more than average." The standard is supposed to be applied to the knowable, current, hardship, not the speculative benefit of any relief requested.

Regardless of how the standard is applied, the application does not result primarily from the desire of the applicant to realize greater financial gain.

(2) That the **hardship** (again, namely, the fact that the structure is a 50,000 square foot historic nursing facility in an R-2 zone on an abnormally large lot which is already a fully occupied parcel completely bounded by streets):

(i) is not the result of any prior action of the applicant and

No evidence has been submitted that the hardship is the result of any prior action of the applicant. To the contrary, evidence has been submitted that the applicant is still in the process of acquiring the property and has taken no action relative to the existence of the hardship or the structure and lands current conditions.[7] [8]

(ii) [that the **hardship**] does not result primarily from the desire of the applicant to realize greater financial gain;

The hardship itself, *the fact that the structure is a 50,000 square foot historic nursing facility in an R-2 zone on an abnormally large lot which is already a fully occupied parcel completely bounded by streets*, has nothing to do with the finances of the property or anything related to desire for greater financial gain.

In addition to the application of the facts to the controlling law regarding Rhode Island General Laws §45-24-41(d)(2), the following analysis hones in on a potential gap between the controlling law and the questions of the Zoning Board of Review members as well as question five (5) within the application. Based on the questions within the Providence Zoning Board of Review's application and the questions presented on the date of the hearing and during the hearing, the

[7] *See* Expert Report P. 11, Testimony of Dustin Dezube on 4/13/22.

[8] Of note, Dustin Dezube's Testimony is fully admissible as expert testimony given his background and profession regardless of his interest in the proposal. *See* Tobin v. Carlson at 5, *citing* Michaud v. Michaud, 98 R.I. 95, 200 A. 2d 6, 8 (1964) quoting Hull v. Littauer, 162 N.Y. 569, 57 N.E. 102 (1900).

standard regarding greater financial gain may benefit from additional professional and legal context and analysis.

Contextually, in real estate, there two well-established contrasting principals known as "Economic Obsolescence" and "Functional Obsolescence." Economic Obsolescence is the phenomenon whereby a property loses value due to factors that are external to the property (such as changes in aircraft flight patterns, crime rates, construction on adjacent lots etc.) as opposed to characteristics of the property itself. Conversely, Functional Obsolescence is where features of the property itself cause the loss in value (such as an unfunctional floor plan or abnormal square footage).

The first two parts of R.I. Gen. Laws §45-24-41(d)(1) ("*That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area*") are a perfect test to determine if the argument for relief is derived from Economic Obsolescence or Functional Obsolescence. Accordingly, this is an apparent legislative intent.

In this case, there is no evidence in the record that factors external to the property are the drivers behind the request for relief, but there is an abundance of evidence on the record that the hardship is driven by the lack of function of the existing structure and land within the context of an R2 zone. The hardship before this Board, the fact that the structure is a 50,000 square foot historic nursing facility in an R-2 zone on an abnormally large lot which is already a fully occupied parcel completely bounded by streets, is a perfect example of Functional Obsolescence. Accordingly, the hardship is not a desire for greater financial gain as a result of Economic

Obsolescence, but instead is the natural result of a historic structure becoming functionally obsolescent over time.

The state law standard does not limit the applicant's argument to economic obsolescence.[9] Financial statements and written cost data ***are not*** the only types of evidence considered regarding economic unfeasibility. Tobin v. Carlson 1998 WL 388351, RI Super. at 5, *Citing* Gaglione v. DiMuro, 478 A.2d 573 (R.I.1984). (***emphasis added***).

In fact, in Tobin v. Carlson (attached hereto as Exhibit 4) an appeal from a decision by the Providence Zoning Board where the matter before the zoning board was a nursing home and the applicant argued that the nursing facility was functionally obsolete due to the number of permissible units the applicant argued that the hardship was due to "functional obsolescence." Id. 5-6. Justice Sheehan upheld the Providence Zoning Board's finding that a limit on unit count was sufficient functional obsolescence to support a use variance. Id. 6. This application before this board is strikingly similar to the facts in Tobin. Both cases are a use variance application for an increase in units based on the functional obsolescence of the building in question.

In this case, on or about April 13, 2022, the Zoning Board of Review requested additional information related to finances and included caselaw allegedly in support of such request.[10] [11] This

[9] For more on the differences between the application and the state law, *see* Exhibit 1 – Application Summary, Footnote 1 re: Application Question 5's departure from the State's Legal Standards.

[10] *See* Exhibit 3 "Correspondence re: information request" Of note, the requested information is not required by the PVD ZBR Variance Application nor the Controlling Law. It is also not necessary for a finding of relief. *See* Tobin v. Carlson 1998 WL 388351, RI Super. at 5, Citing Gaglione v. DiMuro, 478 A.2d 573 (R.I.1984).

[11] Of note, and as detailed within Exhibit 3 "Correspondence re: information request," this application is distinct from the cases provided by the City of Providence in two critical ways.
First, the hardship in this case is related to the structure and land and the hardship is not related to the finances in any way whereas in the cases provided by the City the applicant appeared to be making a Economic Obsolescence style argument as opposed to this application's Functional Obsolescence argument.
Second, those cases made reference to an applicant's failure to provide evidence in support of their Economic Obsolescence style argument whereas in this Application the Applicant has provided financial evidence despite the

request was or is apparently related to some interpretation that blends the standards related to greater financial gain and least relief necessary.[12] In response the applicant submitted financial data and responded to a line of questioning apparently related thereto.[13] The Zoning Board of Review continued the matter and set a special meeting date of April 27, 2022 to specifically address the financials related to the project.[14] The record related to the financial aspect is supplemented in detail by Exhibit 5 "Financial Package 2" and further anticipated to be supplemented further still by the upcoming April 27, 2022 meeting of the Zoning Board of Review.

Although the financial analysis projections are in fact not related to the hardship as required by the state law's element for relief, the applicant is *assuming in arguendo* that the Zoning Board of Review wishes to consider whether the **relief**[15] ("Dwelling - Multi-Family" use with limited parking) is primarily for greater[16] financial gain.

Specifically, all of the evidence submitted into the record in regard to finances is that the proposed relief is necessary for economic viability. In other words, the permissible use of a duplex is not viable ***either*** structurally (two 25,000sqft units is nonsensical) or financially (there is no means to financially maintain the structure as two separate units). The relief being requested for the use "Dwelling – Multi-family" changes the structure from impossible to maintain to functionally and economically viable. The relief does not change the structure from somewhat

fact that the hardship is driven by the unique character of the structure and land that render the site functionally obsolescent.

[12] *See* Zoning Board of Review questions from 4/13/22

[13] *See* Exhibit 7 "Financial Package 1"; Testimony of Dustin Dezube 4/13/22

[14] **The Applicant would again like to thank the Board for its consideration and willingness to set a special meeting date. Our entire team is greatly appreciative of your willingness to give your time.**

[15] Please see Exhibit 1 – Footnote 1 re: the difference between the questions asked and the applicable standard.

[16] Please see Exhibit 2 – re: The word "greater" does not mean "more" the correct and legally controlling definition is "considerably more than average"

profitable to more profitable. The proposed use variance corrects for Functional Obsolescence, not Economic Obsolescence.

More importantly, and under the controlling state law, dispositively, this is not an application where there is "greater" financial gain. The term greater, under the rules of statutory interpretation, must be given its plain and ordinary meaning. Greater means "of an extent, amount, or intensity considerably above the normal or average" or "of ability, quality, or eminence considerably above the normal or average."[17] All of the evidence on the record shows that the proposal is below market average to the extent that it is only economically viable because of the risk of loss of already deposited sums.

This fact is absolutely critical. The term "greater" does not mean "more."[18] The rules of statutory interpretation require that the standard applied by the zoning board of review is interpreted as follows:

> [that the hardship] does not result primarily from the desire of the applicant to realize [**considerably more than average**] financial gain

See R.I. Gen. Laws §45-24-41(d)(2). Harvard Pilgrim Health Care of New England, Inc. v. Gelati, 865 A.2d 1028, 1037 (R.I.2004).[19] Even if the question of greater financial gain is inappropriately applied to a speculation regarding the value of the relief requested instead of as a means to define

[17] *See* Google Dictionary; *See further* Oxford Dictionaries

[18] Even if the Board wishes to debate arguable interpretations of the word "greater" (there are no definitions whereby greater means "more") the rules of statutory interpretation in this case require liberal construction because a variance is a remedy or relief and therefore even if there were multiple definitions of the term "greater" the definition most likely to afford the applicant with relief is the definition that would control. *See* Ayers–Schaffner v. Solomon, 461 A.2d 396, 399 (R.I.1983).

[19] "When the language of a statute is clear and unambiguous, we must enforce the statute as written by giving the words of the statute their plain and ordinary meaning."

the hardship, the financial question is not whether the project will have *more* financial gain, **but** whether that financial gain *amounts to an abnormal windfall*. That is clearly not the case.

All of the evidence on the record amounts to proof that:

1. The hardship is the result the unique characteristics of the structure and land
2. The relief requested is to correct for the unique characteristics of the structure and land
3. The finances related to the project, *even including all the requested relief for the full 71 units and maintaining the historic tax credits*, amounts to a **below market** projected financial gain.[20]

Even if the Board wishes to inappropriately apply a standard designed to define hardship as a tool to review whether or not the requested *relief* results primarily from a desire to realize 'considerably more than average' financial gain, there is nothing in the record to support such an assertion.

Bottomline, nothing in the evidence on the record in any way indicates that the hardship, or even the relief, is driven by or would result in, greater financial gain.

In conclusion, strict adherence to the controlling law applied to the evidence on the record renders any finding that the ***hardship*** results ***primarily*** from the desire of the applicant to realize *greater* or *considerably more than average* financial gain is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole of the record and arbitrary and capricious pursuant to R.I. Gen. Laws §45-24-69(d)(5-6).[21] The same would apply to the request for relief, with the additional caveat that such an inappropriate use of the standard would additionally trigger R.I. Gen. Laws §45-24-69(d)(1-4).

[20] *See* Testimony of Dustin Dezube on 4/13/22, Financial Packages 1 & 2.

[21] In terms of municipal liability, such a finding would invoke R.I. Gen. Laws §42-92-1 *et seq* "Equal Access to Justice for Small Businesses and Individuals" including but not limited to R.I. Gen. Laws §42-92-3 "Award of reasonable litigation expenses." *See* Tarbox v. Zoning Bd. of Review of Town of Jamestown, 142 A.3d 191 (2016).

C. Rhode Island General Laws §45-24-41(d)

(3) That the granting of the requested variance (Use=Multi-family; Dimensional=Parking):

(i) will not alter the general character of the surrounding area or

The variances necessary to facilitate the proposal will not have any impact on the surrounding area. There are currently forty-four (44) student dormitory units with approximately one hundred and twenty-six (126) beds. The proposal is for 71 units with 77 total beds. Moreover, the design of the units and their square footage are tailored for single occupancy. This translates to a decrease in intensity of use through fewer total residents.[22] The Neighbors, who have a specific and particularized knowledge of the neighborhood, support the proposal. This is indicative that there will not be any alteration of the general character of the neighborhood.[23] Comparably, the principal of the abutting school and the ward councilor are supportive[24] as is the Providence Preservation Society by and through its Planning and Architectural Review Committee comment Letter.[25]

Use Variance: The current use as a dorm even includes summer rentals.[26] In practice, the current use already effectively is Dwelling – Multi-family with a 126 bed count. The proposal amounts to an identical use with a reduction in beds. This will have no impact on the surrounding area because there is no evidence this amounts to a change in use. From a nursing home to a boarding school and a dorm, the property has always been used in a dense residential manner and the Dwelling – Multi-Family proposal is identical to that historic dense residential use.[27]

Dimensional Variance: The proposal relative to current use is a net reduction in residents.[28] The proposal more than doubles current parking spaces by adding fourteen (14) new spaces. The combination of a reduction in total residents with an increases in total spaces amounts to no parking impacts on the character of the surrounding neighborhood.

Moreover, the unit size and experience of Providence Living with comparable units in the same area shows establishes an evidentiary history of a unit-to-parking-space demand ratio of

[22] *See* Expert Report P. 5

[23] *See* Support letters submitted into the record. Upon information and belief there are at least fourteen (14)

[24] *See* Testimony of Dustin Dezube on 4/13/22

[25] *See* Providence Preservation Society, Planning and Architectural Review Committee Letter dated 2/14/2022

[26] *See* Expert Report P. 5

[27] *See* Expert Report P. 5, 12

[28] *See* Expert Report P. 5,

approximately thirty-six (36%), equivalent to the proposed total usage.[29] This is consistent with the buildings walking distance to the Wickenden Commercial Corridor, India Point Park's extreme proximity, proximity to Downtown and the expected completion of a new grocery story at the top of the street. Together, this implies no off-site parking impact.

Further, PVD ZBR Member Wolfe noted that his personal review of the property showed that there were plenty of off-street parking spaces available in the area. The Zoning Officer also identified the availability of a program for acquiring off-street parking passes. This is relevant as George M. Cohan Blvd abuts the highway and there is no parking demand generated by the length of the opposite side of George M. Cohan Blvd. Therefore, even if parking demand exceeds expectations and there is demand for parking off-site, the character of the surrounding area will not change.

(ii) impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and

Please see Expert Report p. 6-7, 12, 14 and further Exhibit 6 "Comprehensive Plan Citations" attached hereto as well as the testimony of Paige Bronk on 4/13/22.

[29] *See* Testimony of Kevin Diamond and Dustin Dezube on 4/13/22.

D. Rhode Island General Laws §45-24-41(d)

A 50,000sqft historic nursing facility is functionally obsolescent unless it is permitted as "Dwelling – Multi-Family Use" because more than four (4) units are required for that amount of square footage.

(4) That the **relief** to be granted is the least relief necessary.

Use Variance: The least relief necessary within the context of a use variance is which use makes the proposal permissible. In this case, given how all uses within the R2 zone have been ruled out as functionally impossible given the historic structure and unique land,[30] there are only two (2) other residential uses in the Providence Zoning Code, "Dwelling – Three Family" or "Dwelling – Multi-Family." For all the reasons stated in the Application and Expert report, dividing a 50,000sqft historic nursing facility into three units is functionally obsolete. Therefore the only other relief available, and therefore the least relief available, is "Dwelling – Multi-Family."[31]

Dimensional Variance: The least relief necessary within the context a dimensional variance is what area relief is the least necessary to alleviate the hardship. In this case, the most amount of parking spaces the site can support is 26 spaces and that is the number of spaces proposed.[32] Requiring any more than 26 spaces is impossible on the site, and therefore 26 spaces is the least relief necessary.[33]

Of note, if this was a new building only ten (10) spaces of relief would be required.

If this was a new build as opposed to an adaptive reuse of an existing building, this proposal would be a Land Development Project that would be before the City Plan Commission and would be eligible for a fifty percent (50%) reduction in parking spaces. Accordingly, if this was a new build, only thirty-six (35.5) spaces would be required therefore the dimensional variance would only be for ten (10) spaces of relief instead of the 45 required for an existing building.

[30] *See* Expert Report P. 8-10; Application Appendix A response 7

[31] *See* Expert Report P. 8-10, 12-15; Application Appendix A responses 6-7

[32] *See* Application, Siteplan.

[33] *See* Expert Report P. 8-10, 12-15; Application Appendix A responses 6

Similar to the above analysis regarding Rhode Island General Laws §45-24-41(d)(2), in addition to the application of the facts to the controlling law regarding Rhode Island General Laws §45-24-41(d)(4), the following analysis hones in on a potential gap between the controlling law and the questions of the Zoning Board of Review. Based on the questions within the Providence Zoning Board of Review's application and the questions presented on the date of the hearing and during the hearing, the standard regarding least relief necessary may benefit from additional professional and legal context and analysis.

There are two types of variances under Rhode Island Law, a Use Variance and a Dimensional Variance. They are distinct. In the precedence of land use law and land use theory, they are generally understood as follows:

> A use or "true variance" defines the relief sought when an owner seeks to employ land for a use not permitted in that zoning district under the applicable zoning ordinance. A dimensional or area variance-also known as a "deviation"-provides relief from one or more of the dimensional restrictions that govern a permitted use of a lot of land, such as area, height, or setback restrictions.

Sciacca v. Caruso, 769 A.2d 578, 583 Note 5 (R.I. 2001), *citing* Sako v. DelSesto, 688 A.2d 1296, 1298 (R.I.1997); Sawyer v. Cozzolino, 595 A.2d 242, 244 n. 4 (R.I.1991).

R.I. Gen. Laws §45-24-31 (65) defines a "Use" as, "The purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." and R.I. Gen. Laws §45-24-31(66)(i) defines a use variance as, "Permission to depart from the **use requirements** of a zoning ordinance […]". In contrast, R.I. Gen. Laws §45-24-31 (66)(ii) defines a dimensional variance as, " Permission to depart from the **dimensional requirements** of a zoning ordinance […]" While the term "dimensional" is not expressly defined, R.I. Gen. Laws §52(ii) "Nonconforming by dimension" states in pertinent part that, "[…]

Dimensional regulations include all regulations of the zoning ordinance, *other than those pertaining to the permitted uses* […]."

In principle, as outlined by the statutory language above, the difference between a use variance and dimensional variance is usually clear. Generally, a use is the activity at a location and a dimension is any regulation not controlled by the zoning ordinance's use table. In this case, the number of units under the Providence Zoning Ordinance for Dwelling – Multi-Family is simply more than Dwelling – Three-Family. There is no use designation for any number of units between 4 and infinity. When it comes to how many units are appropriate under a use classification of "Dwelling – Multi-Family" that exact number is not a use question. The unit count limitation of a Dwelling – Multi-Family Use is just inherent to dimensional limitations on total building size. In this case, the limitation on a Dwelling - Multi-Family use in the building in question is simply the number of units that can be safely constructed within the existing building. In other words, so long as a Dwelling – Multi-Family is the only *use* that renders a building viable, the number of units is controlled by the building and fire codes in combination with the present dimensions of the building, *but it is not controlled by the use*.

The question of number of units as controlled by a *use designation* versus number of units as set by a *dimensional limitation* is clearly set forth in R.I. Gen. Laws §45-24-31 (66)(ii), which states:

> A building or structure containing more dwelling units than are permitted **by the use regulations** of a zoning ordinance **is nonconforming by use**; a building or structure containing a permitted number of dwelling units by the use regulations of the zoning ordinance, but not meeting the lot area per dwelling unit regulations, is nonconforming by dimension.

(**emphasis added**). In this case, any proposal to use the structure in a manner greater than two (2) residential units is nonconforming by use and therefore requires a use variance. The number of

units greater than two (2) in an R2 zone is not a dimensional measurement of relief in terms of number of units, but an activity or purpose of the building. The total number of units is not a question of the extent of relief, but rather whether the building requires more than three (3) units in order to be viable. Because the number of units is a use nonconformity in this case, the exact number of units is not at issue before this Board.

In contrast, if this was a zone that permitted "Dwelling – Multi-Family" then the proposed 71 units would be a request for dimensional relief and the number of units relative to the dimensional standard at issue would be under this Board's authority. As such, in a dimensional relief matter, things like lot area per unit would be measurable controls within the context of this Board's review of least relief necessary. The facts before this Board in terms of number of units are that of a Use Variance and not a Dimensional Variance and therefore any attempt by this board to control the unit count through a use variance and use relief would trigger R.I. Gen. Laws §45-24-69(d)(1-4).[34] [35]

However, *assuming in arguendo*, that this Board may wish to inappropriately apply the "least relief necessary" standard to the unit count within the proposal, the evidence on the record shows that seventy-one (71) units is the least relief necessary.[36] The proposal is simply not economically viable with less than 71 units and currently projects as an anemic investment with below market returns with the inherent risk of historic adaptive reuse. Accordingly, parking relief

[34] *See* Footnote 21 re: Municipal Liability.

[35] The only review of the Unit Count before this Board that is within its authority is the relief relative to the number of parking spaces. The standard for the limitation on the number of parking spaces is "more than a mere inconvenience" and that shall be addressed in detail in another section.

[36] Application Appendix A Responses 5-7, Expert Report 8-15, Testimony of Kevin Diamond, Dustin Dezube, Paige Bronk on 4/13/22, Financial Packages 1 & 2

of 45 spaces is the least relief necessary as 26 spaces is the most spaces that can fit on the lot and the only viable use of the property requires 71 units.

The sensitivity study and heat map contained within Exhibit 5 "Financial Package 2" indirectly function as proof that unit count is an inappropriate consideration for a use variance because the impact of each unit fewer is an intensely complicated calculation that ends up creating a multi-variable continuum. The issue of a multi-variable continuum is that there is no clear threshold for what is considered the "least relief." While the math shows that the 71 unit proposal is a below market return, the least relief standard is not a financial standard. The financial standard exists only in R.I. Gen. Laws §45-24-41(d)(2) which is related to **hardship**, not relief. Even if the §45-24-41(d)(2) hardship standards were applied to relief, the term "greater" means "considerably more than average."

If the Zoning Board of Review were to inappropriately apply R.I. Gen. Laws §45-24-41(d)(2) hardship standard regarding greater financial gain to relief instead of hardship, and then further inappropriately blended the "least relief necessary" standard with the "greater financial gain" standard, then conflated mega-standard would effectively be:

"least relief necessary to be less than considerably more than average financial gain."

Here again the obvious problem of the multivariable continuum arises. How can anyone determine on a per-unit basis what amounts to financial gain less than considerably more than average? That standard does not allow for a meaningful or quantifiable upper threshold. However, it does allow for a clear minimum threshold: Average.

An average financial gain is, by definition, less than a "considerably more than average" (a/k/a "greater") financial gain. Even under this twice over inappropriate conflating of the

applicable standards which creates an unknowable upper threshold for least relief, the application before this board comfortable meets the least relief necessary because the financial evidence before this board proves that the proposal amounts to a less-than-average financial gain. While there is no way of knowing the maximum number of units permissible under the conflated-pseudo-standard, we definitively know that anything average or worse is permissible and the evidence before this board proves that the returns are worse than average.

In conclusion, the fact that the financial evidence before the board shows that seventy-one (71) units projects as a financial gain that is average or worse, any finding that seventy-one (71) units and twenty-six (26) parking spaces is not the least relief necessary would trigger R.I. Gen. Laws §45-24-69(d)(1-6) and §§42-92-1 *et seq*.

E. Rhode Island General Laws §45-24-41

Expert evidence has been submitted into the record showing that not a single one of the permissible uses of an R2 zone are functionally possible at the site and therefore the subject land and structure cannot yield any beneficial use except "Dwelling – Multi-Family."

(e) The zoning board of review, ~~or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission~~, shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that:

(1) In granting a use variance,:

(i) the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance. ~~Nonconforming use of neighboring land or structures in the same district and permitted use of lands or structures in an adjacent district shall not be considered in granting a use variance~~; and

The subject land and structure cannot yield any beneficial use based on any of the permissible uses in a R2 zone.[37]

[37] *See* Expert Report P. 8-10, 13-15; DPD Recommendation to the Zoning Board of Review dated 4/7/13; All exhibits hereto, including but not limited to Financial Packages 1&2; Historic Tax Credit Letter re: inappropriateness of wholesale demolition; Application Appendix A Responses 5-7; all testimony submitted before the board.

F. Rhode Island General Laws §45-24-41(e)

The parking relief is intrinsically connected to the unit count, and anything less than the relief requested 71 units and 26 parking spaces will render the project non-viable.

> (2) In granting a dimensional variance, that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience. The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief. ~~The zoning board of review, or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission has the power to grant dimensional variances where the use is permitted by special use permit if provided for in the special use permit sections of the zoning ordinance.~~

If the Board grants less than forty-five (45) spaces of parking relief, then the Board is inherently reducing the unit count within the building. For all the reasons set forth in footnote 31, fewer than seventy-one (71) units will render the proposal non-viable. Viability is much greater than more than a mere inconvenience.[38]

[38] *See* Testimony of Paige Bronk, 4/13/22.