Archipelago

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Sent via Email to: jim.f.amaral@gmail.com

Jim Amaral
Planning Board Chair
Town of Alna
1574 Alna Road
Alna, Maine 04535

Re: Jennifer and Timothy Lee – Planning Board Application
Renovation of Two Existing Residential Cottages

Dear Chairperson Amaral and Members of the Alna Planning Board,

Please be advised that this firm represents Jennifer and Timothy Lee (the "Lees"), owners of land at 303 Head Tide Road in Alna, Maine. The Lees submitted an application to the Planning Board for renovation of two grandfathered non-conforming residential cottages (the "Cottages") and replacement and relocation of an existing septic system within the Resource Protection District. The proposed septic system will be relocated further from the adjacent Sheepscot River. This letter is meant to address the Planning Board's concerns about the rehabilitation of the Cottages located on the property.

I. Single Family Residential Is An Allowed Use In The Resource Protection District

The Lees' use of the Cottages as residences is a lawful, conforming use in the Resource Protection District. If the Board agrees, the inquiry ends there. The Shoreland Zoning Ordinance for the Town of Alna (the "Ordinance") § 14 Table of Uses Table 1 clearly provides that both "one and two family residential, including driveways" and "structures accessory to allowed uses" may be allowed under the provisions of § 16.I Special Exceptions. The Cottages cannot meet the Special Exception criteria for location of a new structure; however, they do not have to in order to be a conforming ***use***.

The Special Exception criteria allows the Planning Board to permit new residential development areas within the Resource Protection District provided that the applicant meets certain criteria. However, the proposed project is not seeking new residential development area and will not relocate the Cottages. The Special Exception criteria are directly related to location of structures within the Resource Protection District. Each requirement is only applicable to allowing non-conforming structures and have no relation to an existing conforming use.

The Cottages are previously existing structures intended to be renovated in place. The Lees are not requesting a Special Exception to the location of the structures, and the Planning Board has not contended that the need for a permit is due to the renovation of the existing non-conforming structures. Planning Board approval is required for resumption of a non-conforming use; however residential uses are in fact allowed within the Resource Protection District and therefore Ordinance § 2.D.2 *Resumption Prohibition* is not applicable to this application.

II. The Two Existing Cottages Have Retained Their Grandfathered Status

If Ordinance § 12.D.2 is deemed to apply to this project, the Cottages contain a grandfathered legally non-conforming use. Ordinance § 12 controls activity relating to Non-Conformance.

Ordinance language is ambiguous when it "can reasonably be interpreted in more than one way.'" *Portland Reg'l Chamber of Com. v. City of Portland*, 2021 ME 34, ¶ 23, 253 A.3d 586, 596. Property owners and developers are entitled to know with reasonable clarity what they must do under local land use control law to obtain the permits or approvals they seek. *Waterville Hotel Corp. v. Board of Zoning Appeals,* 241 A.2d 50, 53 (Me.1968). In general, where an ordinance is unreasonably vague regarding the interpretation of a specific provision, the Board should defer to the property owner's interpretation of the regulations.

In order for a use to be resumed, it must first be discontinued. The Ordinance explicitly removes residential dwellings from the one-year discontinuance allowance. The residential use therefore was never abandoned. Even if the Cottages were not inhabited for a period, they are seasonal, or are only utilized on a part time basis, the Cottages were used as residential structures. For example, if a home were considered abandoned or dilapidated, that home is still considered a residence, albeit one that may be in disarray. That abandoned home has not lost its legal status as a residence even if not inhabited for a period of time.

Currently, in the preceding five years, and since before the enactment of the Ordinance, the Cottages have existed as a residential use. Abutters have only provided evidence that the Cottages were underutilized, and the exterior maintenance was out of date. On the other hand, the Lees have provided substantial evidence that the Cottages are residential structures and have always been utilized as such without interruption. Even the Town's own tax records which show that the Cottages have continuously been considered residential structures and each property owner has been taxed as such.

The Cottages have never been discontinued as residential dwellings even if left idle for some time. The Ordinance deliberately removes any timeline a residence must sit idle for the use to be considered discontinued (*See Infra III*) and therefore even if Ordinance § 12 applies (and we would argue that it does not) the Cottages have retained their grandfathered status containing a legally non-conforming residential use.

III. Resumption of a Non-Conforming Residential Use

Assuming both that the residential use was discontinued and the use is non-conforming, the Ordinance carves out an explicit exception for residential uses from the one-year statute of limitations for all other non-conforming uses to lose their grandfathered status. Ordinance § 12.D.2 provides a prohibition on resumption of a non-conforming uses. This provision provides:

> A lot, building or structure in or on which a non-conforming use is discontinued for a period exceeding one year, or which is superseded by a conforming use, may not again be devoted to a non-conforming use except that the Planning Board may, for good cause shown by the applicant, grant up to a one-year extension to that time period.

The provision explicitly places a one-year time allowance before a non-conforming use is considered discontinued. Under this section, no non-residential non-conforming uses of a structure can be resumed after only one-year of discontinuance, unless an extension is granted by the Planning Board. However, the Town intentionally carved out an exception for the resumption of a residential use stating:

> This provision shall not apply to the resumption of a use of a residential structure provided that the structure has been ***used or maintained*** for residential purposes during the ***preceding five year period.***

[***emphasis added***]. There is a clear intention within the Ordinance to treat non-conforming residential uses differently than other uses (e.g. commercial, industrial, etc.). The Ordinance provision specifically excludes the one-year abandonment allowance and provides that residential resumption is allowed where an applicant provides evidence of use ***or*** maintenance within ***only*** the preceding five year period. "Where exemptions appear in favor of the property owner, the exemptions should be construed in favor of the owner. Ordinances cannot be enlarged by implication." *Toulouse v. Bd. of Zoning Adjustment*, 147 Me. 387, 393, 87 A.2d 670, 673 (1952).

In my conversation with Chairperson Amaral, he had indicated that the language "use or maintenance" does not require the structure to be utilized as a residence, but only that the structure has the ability to be used as a residence. Under the Ordinance, a "Residential Dwelling Unit" is defined as "a room or group of rooms designed and equipped exclusively for use as permanent, seasonal, or temporary living quarters for only one family." A showing that the structure contains a bathroom, kitchen, and sleeping area is sufficient evidence that a residential dwelling exists. By contrast, had these amenities been removed and not rebuilt within the preceding five year period, the non-conforming status would have been lost.

The Planning Board has indicated that they will require the applicant to provide evidence that the residential use has not been discontinued for ***each*** five year period since the Cottages were constructed. This interpretation directly conflicts with the plain language of the section as written for ***resumption*** of use. The intent of this section is to outline under what circumstances a discontinued non-conforming use is allowed to be resumed. It is illogical to require the applicant to show evidence of continuous use where they are asking to resume the activity. It is impossible to show use and maintenance for the time the activity did not occur. This is likely the reason the Ordinance language limits the required findings to only the preceding five year period. This section should be applied to require an applicant to submit evidence that the structures have been maintained for residential use only within the preceding five-year period. This interpretation conforms with the intent of this section allowing a resumption of the use rather than forcing the applicant to show the use existed continuously since the non-conforming structure was erected.

In their letter dated June 6th, 2022 submitted to the Planning Board, the Lees provided evidence showing the Cottages were used and maintained for at least the past five years. The evidence included a statement of their utilization of the Cottages since their purchase of the property, a letter from Jane Solorzano containing personal knowledge of the previous owners' use of the Cottages, various photos dating from 2017 through 2020 showing both the inside and outside of the Cottages, and the Town's tax records showing the Cottages continued assessed status as residential structures. The Lees' letter explained that they have maintained the exterior of the Cottages since purchasing the property in 2019 with plans to renovate the interior upon approval of the Board. Jane Solorzano's letter detailed her personal knowledge that Larry Wilkes, father of previous owner Catherine Marin, lived in the Cottages prior to the Marin's sale of the property. As evidence of Mr. Wilkes residence in the Cottages, the Lees also provided mail addressed to Mr. Wilkes at this address. The photos from inside the Cottages show a stove, sink, and furniture indicating that the structure has the ability to be utilized as a residence. These photos show the continued maintenance that has taken place on the exterior of the Cottages. Lastly, the Lees provided the Town's own tax records showing that the Cottages have been continuously assessed and taxed as residential dwellings.

Under the Ordinance, the Lees are only obligated to provide evidence that the Cottages could have been used as a residence within the past five years. The evidence provided by the Lees clearly shows that the Cottages contain all the necessary elements of a residential dwelling unit and have been or could have been utilized as such over the preceding five year period. The fact that the Cottages' amenities are functioning today without any assistance from the Lees is evidence enough the Cottages could have been used as a residence for well over the preceding five years. The Town's own tax records also indicate that the Lees and the preceding property owners have been taxed as if the Cottages are single family dwelling without any discontinuance since their erection. The Cottages have clearly been maintained as residential structures well beyond the preceding five year period.

IV. Normal Repair and Maintenance

The Lees do not intend on expanding, relocating, or replacing the Cottages. This permit application is only for the renovation of the decades old residential cottages. Ordinance § 12.B.2 specifically allows for repair and maintenance of non-conforming structures stating:

> This Ordinance allows the normal upkeep and maintenance of non-conforming uses and structures including ***repairs or renovations*** which do not involve expansion of the non-conforming use or structures, and such other changes in a non-conforming use or structures as federal, state, or local building and safety codes may require.

[***emphasis added***]. The renovation will not make the Cottages more nonconforming with any applicable zoning regulations, while the septic relocation will be less non-conforming with applicable setbacks. This is a simple repair and renovation of structures which, like all structures, require care for continued use. This provision is included within most Shoreland Zoning Ordinance to ensure non-conforming structures can be maintained with ease. Without the issuance of a permit from this Board, the structures will remain idle and be left to deteriorate in place.

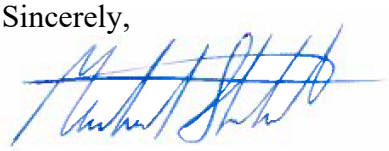
For these reasons alone, the required maintenance and repair of the Cottages should not require approval of the Board and this application should be approved.

Conclusion

In conclusion, the Cottages are an allowed use in the Resource Protection District and therefore the renovation of the Cottages should not require Planning Board review. The Planning Board should only consider the relocation and replacement of the septic system under this application. However, if the Board finds that the Cottages are non-conforming residential uses, the resumption exception in Ordinance § 12.D.2 shall apply. The Lees have submitted clear evidence showing that Cottages have been used for residence far beyond the preceding five year period. As grandfathered legally non-conforming residential uses, the Cottage are allowed to be maintained and renovated under Ordinance § 12.B.2. The Planning Board should therefore approve the renovation of the existing structures, and relocation and replacement of the septic system further away from the adjacent resource.

If you have any questions at all, please do not hesitate to contact me by phone or email at any time. Thank you in advance for your consideration of this matter.

Sincerely,



Michael J. Skolnick, Esq.