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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,

This Letter, submitted on behalf of Jennifer and Timothy Lee (the "Lees"), is provided to the Planning Board to address concerns discussed at the Town of Alna July 5, 2022 Planning Board meeting. This Letter reiterates and expands on our position provided in my letter dated July 1, 2022 and submitted to the Planning Board for review.

I. Existing Cottages In The Resource Protection District Allowed Uses

If the Board has the authority to grant a permit for a use under the explicit terms of the Ordinance, that use cannot be found to be nonconforming.

a. Single Family Residential Is An Allowed Use

The Lees' use of the Cottages as residences is a lawful, conforming use in the Resource Protection District. The Planning Board must evaluate the Shoreland Zoning Ordinance for the Town of Alna (the "Ordinance") provisions in light of the "entire [ordinance] scheme to achieve a harmonious result." *Desfosses v. City of Saco*, 2015 ME 151, P8. The Ordinance defines "non-conforming use" as a "***[u]se*** of buildings, structures, premises, land or parts thereof ***which is not permitted in the district in which it is situated***, but which is allowed to remain solely because it was in lawful existence at the time this Ordinance or subsequent amendments took effect. [***emphasis added***]. Ordinance § 14 Table of Uses Table 1 clearly provides that both "one and two family residential, including driveways" and "structures accessory to allowed uses" are allowed uses with Planning Board approval.

The Planning Board must review the § 14 Table of Uses and the definition of non-conforming structure together to reach a harmonious result. The definition of non-conforming use provides that a use is only non-conforming if not permitted in the district which it is located. The Table of Uses provides that residential uses are allowed in the Resource Protection District and therefore the existing residential Cottages are nonconforming structures with conforming uses. As such, the Planning Board's analysis should be confined to Ordinance § 12.B.2 and the Lee's should be permitted to repair their Cottages.

b. The Special Exception Provisions Are Not Applicable to Existing Residential Uses

The Planning Board incorrectly determined that the existing Cottages are non-conforming uses because they cannot meet the Special Exception provisions of Ordinance § 16.I. However, "[a] special exception use differs from a variance in that a variance is authority extended to a landowner to use his property in a manner prohibited by an ordinance (absent such variance), while a special exception allows him to put his property to a use which an ordinance expressly permits. *Cope v. Brunswick*, 464 A.2d 223, 224. The existing residential use is allowed because the Ordinance expressly permits residential uses.

Existing residential uses within the Resource Protection District do not need to meet the provisions of Ordinance § 16.I. The Special Exception criteria allowing the Planning Board to permit ***new*** residential uses within the Resource Protection District only applies to structures within ***new proposed*** residential development areas. The intent to limit the inquiry to new proposed structures is clearly evidenced by the language of the Special Exception provisions:

> The Planning Board may allow the location of a Residential Development Area in the Resource Protection District … provided that the applicant demonstrates that all of the following conditions are met:
>
> 1. There is no location on the property, other than a location within the Resource Protection District, where the ***structure can be built***.
> 2. The lot on ***which the structure is proposed*** is undeveloped and was established and recorded in the Lincoln County Registry of Deeds before the adoption of the Resource Protection District.
> 3. The ***proposed location of all buildings***, sewage disposal systems and other improvements are: …
> 4. The total ground floor area … of all principal and accessory structures located in the area subject to the special exception is limited to a maximum of 1,500 square feet.
> 5. All structures, except functionally water-dependent structures, are setback to the greatest practical extent, but not less than 75

> feet, horizontal distance, from the normal high-water line of a waterbody… . In determining the greatest practical extent, the Planning Board shall consider the depth of the lot, the slope of the land, the potential for soil erosion, the type and amount of vegetation to be removed, ***the proposed building site's*** elevation in regard to the floodplain, and its proximity to primary wetlands.

[***emphasis added***]. Each of the Special Exception provisions outlined within the Ordinance references ***new construction, proposed buildings, proposed location,*** etc. There is clear intent to limit new proposed building location. The Special Exception provisions do not mention existing structures. Here, the structures are pre-existing, and the Lees' application does not propose any new buildings or any relocation whatsoever.

The Planning Board gave additional weight to provision #5, providing that all structures, except functionally water-dependent structures, must be setback a distance greater than 75' from the normal high-water line. However, the second sentence provides that the greatest practical extent criteria is applicable to "***the proposed building site***." [***emphasis added***]. The Planning Board failed to read the section in its entirety. This provision only applies to a new structure's proposed location on the property. This provision does not apply to existing residential dwellings, regardless of whether the structure is "water-dependent" or not.

The Special Exception provisions do not apply to existing residential structures, only the location of newly proposed structures. There is no question that residential uses are allowed within the Resource Protection District and therefore the use of the Cottages as residential dwellings are permitted uses.

c. Conversion of Seasonal Residences to Year-Round Residences and Uses Similar to Allowed Uses are Allowed Uses in the Resource Protection District

Ordinance § 14 Table of Uses Table 1, Line 18 allows for "Conversions of seasonal residences to year-round residences" subject to the Planning Board finding the "residence has a sewage disposal system, or that one can be installed, that is in accordance with [Ordinance §] 15(J)" Septic Waste Disposal standards. Additionally, the Table of Uses permits "uses similar to allowed uses" with Planning Board approval.

The Planning Board has discussed the fact that the Cottages may not be fit for year-round use. Although the Lees have provided evidence that the Cottages have been used year-round, the Planning Board could permit the renovation of the Cottages to be suitable for year-round use if it determines that the structures have only been used for seasonal purposes. The Lees have provided evidence of an existing working septic system and have proposed a replacement system meeting all the requirements of Ordinance § 15(J). The existing Cottages are allowed to be converted to

year-round residences where the Planning Board finds only seasonal use; however, the Lees only seek to renovate existing year-round residential dwellings to improve them and make them more comfortable for their intended use, year-round habitation. Their plan is to insulate the Cottages and introduce more reliable year-round heat sources. The proposed renovation is narrower and much less impactful than the allowed conversion from seasonal residences.

If the Planning Board has difficulty determining the use of the existing Cottages, they can permit the use as a "use similar to allowed uses." There is little doubt that the Cottages are similar to other allowed uses, such as: single family residential, structures accessory to allowed uses, conversion of seasonal residences to year-round residences, or repair and upkeep of conforming structures. Each of these allowed uses are similar, or in some cases identical, to the use of the existing Cottages and therefore the proposed renovation is an allowed use.

II. There Is No Prohibition Against Resumption Of A Discontinued Residential Structure Used Or Maintained For The Five-Year Period Prior To Resumption Of The Use

If the Planning Board finds that the residential use of the Cottages is non-conforming, Ordinance § 12.D.2 applies. When interpreting the Ordinance, the Planning Board must "look first to the plain meaning of the terms of the ordinance to give effect to the legislative intent." *Lane Constr. Corp. v. Town of Washington*, 2007 ME 31, ¶ 7, 916 A.2d 973. Even where drafters of the "Ordinance intended that nonconformities be reduced, it is also clear that even the strictest interpretation of the Ordinance does not require their immediate and complete elimination in contravention of its plain language, which provides for numerous exemptions and exclusions." *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, P18, 772 A.2d 256, 262, 2001 Me. LEXIS 70, *15-16. "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).

a. Residential Use is Exempt from the Prohibition Against Resumption

Ordinance § 12.D.2 provides a prohibition on resumption of non-conforming uses. However, the Town intentionally carved out an exception for 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.***

The Ordinance clearly intends to treat residential structures capable of residential uses differently than other uses (e.g. commercial, industrial, etc.).

The fact that a board has made prior mistakes in the interpretation of an ordinance does not have any precedent-setting value. "Past mistakes do not give any administrative board the right to act illegally." *Rushford v. Inhabitants of York*, 1989 Me. Super. LEXIS 253, *4. The Planning Board has said that they historically interpreted this exemption to only exclude the one-year abandonment allowance for non-residential uses, replacing it with a five-year allowance for residential uses. This analysis is incorrect. The plain language of the exemption clearly states that the prohibition against resumption does not apply to residential uses, provided the applicant offers evidence of use or maintenance for the preceding five-year period. The Planning Board cannot read in language to change the plain meaning of the Ordinance.

b. Only Evidence of Residential Use or Maintenance of the Residential Structure For The Preceding Five-Year Period Is Required for Resumption of Use

The Courts have determined that the Planning Board "must interpret [the Ordinance] to avoid absurd, illogical, unreasonable, inconsistent, or anomalous results if an alternative interpretation avoids such results." *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 18, 179 A.3d 920. "An ordinance may not be interpreted in such a way to read a provision out of existence or to render it surplusage." *Jade Realty Corp. v. Town of Eliot*, 2008 ME 80, P8, 946 A.2d 408, 411, 2008 Me. LEXIS 81, *5.

The Planning Board has wrongly required the Lees to provide evidence that the residential use has not been discontinued for ***each*** five-year period since the Ordinance was adopted. This interpretation is illogical and directly conflicts with the plain language of the section. The plain language of Ordinance § 12.D.2 provides residential resumption is allowed where an applicant provides evidence of use ***or*** maintenance within only ***the preceding five-year period***. The Planning Board cannot simply ignore or read in language to change the meaning of the exception.

It is illogical to require the Lees to show evidence of continuous use where they are asking to resume the activity. The Ordinance section is titled "Resumption Prohibition", but deliberately exempts residential use from that prohibition. The exemption allows residential uses to be stopped, then resumed with a showing of use over the preceding five-year period. An applicant cannot show continued use where the use has been discontinued and therefore the Planning Board is requesting an impossible task. However, the Lee's have in fact provided evidence of continued use and maintenance and this section should not apply.

The Planning Board's interpretation sets an absurd and unreasonable precedent for all future applicants. All future applicants altering residential structures within the Resource Protection District will be required to provide evidence that the structure has not been discontinued back to 1994. This burden requires significant research, contacting of previous owners, and supporting hearsay to make a finding of fact supporting the applicant's request. This burden becomes increasingly difficult and potentially impossible as time passes. The logical and realistic approach is a simple showing that the structure has been maintained for use over the preceding five-year

period. Forcing each applicant to prove available use for each five-year period over multiple decades is a ludicrous result that surely was not the intent of the Ordinance drafters.

The evidence provided by the Lees' further supports the intent of the Ordinance. The Lees' have submitted evidence that the Cottages were maintained and lived in by the preceding property owners with no opposition from the Town. It would be illogical to require proof of continued use for preceding decades where we can look to recent memory to prove the structures could be utilized as residential dwellings. For example, why would it matter if the structures were not maintained in 1993 when they were used as recent as 2018? The language only requires evidence of recent use, not evidence of an irrelevant period more than a decade ago.

The only logical reading of this section is to require an applicant to submit evidence that the structures have been maintained for residential use only within the preceding five-year period.

III. Evidence

In support of the use and maintenance of the residential structures, the Lees provided 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. Mrs. 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.

At the Planning Board's request, the Lees have provided new evidence showing continued use and maintenance of the Cottages dating back as early as 1994. The Lees submitted email communications from Kimberly Averill providing first-hand knowledge of the Cottages condition and use ranging from the early 1990's to 1995. Mrs. Averill recalls that the daughter and granddaughter of previous residents of the property, the Pingrees, stayed in the Cottages while visiting Alna. Mrs. Averill babysat the grandchildren during their visit. She provides testimony that the rustic Cottages had functional utilities, including a small kitchen and running water. The Lees further provided email communications from Katherine Papagiannis. Mrs. Papagiannis provides testimony that her friend, Frankie, lived in the Cottage closest to the river for three years ranging from 1995-1997, and possibly longer. She also stated that her two friends, Ginger and Steve, lived in the Cottage closer to the existing house in the early 2000's while working for her

stepfather, Les Fossel. Mrs. Papagiannis indicated that she spent "a lot of time in the cabin closest to the river." Lastly, Mr. Fossel supported Mrs. Papagiannis's statements stating her friend, Frankie, lived in one of the Cottages for a summer.

In addition, the construction necessary to provide the existing amenities to consider the Cottages dwellings would require Planning Board approval. There is no evidence the work was not completed prior to the Ordinance being adopted. The presence of these fully functioning amenities alone is a clear indication that the Cottages have been capable of being used as a residence since before the Ordinance was adopted. The Planning Board can infer from the evidence submitted that the Cottages could be used for residential purposes since the amenities were constructed.

In opposition, multiple letters have been submitted, all but one by members of the DesMeules family who will be directly affected by the increased use of the Cottages. Mark, Dale, and Stewart DesMeules repeat and reallege a similar message. They claim that the Cottages have not been used or maintained as residential dwellings throughout their ownership of the abutting residence since 1994. Their letters point to the general appearance of the structures as "dilapidated" and state the Cottages have not been continuously used. However, they fail to take into consideration the required finding of the Planning Board. The Planning Board must determine that the Cottages ***could have been*** used, not that the Cottages were used. The mere observation that brush was overgrown or the appearance was untidy has no effect on the functionality of the dwellings. The DesMeules letters provide no evidence whatsoever that the Cottage could not have been used as residential dwellings.

Jeff Philbrook's letter provides similar statements indicating that the Cottages are in disrepair. However, his letter provides pivotal support that the Cottages could have been used for residential use since as early as 2007. In his letter, Mr. Phibrook provides that the existing Cottages have looked like they "were in disrepair, and looked like they have not been used or maintained in a very long time." He goes on to say "[f]rom my memory the cabins of 2007 looked nearly identical to what I observed during the planning board site visit on the property on 4/27/22." At their April 27, 2022 site walk, the Planning Board determined that these structures were used or maintained as residential structures because they could have been used as such. This finding is now supported by evidence dating back to 1994.

Conclusion

In conclusion, the residential use of the Cottages is an allowed use in the Resource Protection District and therefore the renovation of the Cottages should not require Planning Board review beyond replacement of the proposed septic system.

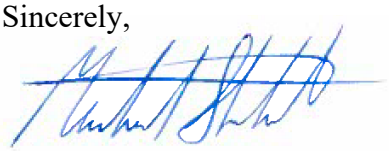
If the Board finds that the Cottages are non-conforming residential uses, the Ordinance clearly provides an exemption for the resumption of residential uses. To resume a discontinued residential use, the Lees must only show the ability to use the Cottages as a residence over the past five-years.

The Lees have submitted clear and substantial evidence showing that Cottages have been used as residences far beyond the preceding five-year period and as early as 1994. The Lee's have complied with the Planning Board's request for additional evidence of the continuous residential use and maintenance of the Cottages to establish their grandfathered status. As grandfathered legally non-conforming residential uses, the Cottage are allowed to be maintained and renovated under Ordinance § 12.B.2.

Under each analysis, the Planning Board should approve the Lee's application for a permit to renovate the existing structures and the relocation and replacement of the septic system further away from the adjacent resource.

Thank you in advance for your consideration of this matter.

Sincerely,



Michael J. Skolnick, Esq.