

Katharine Braid, Chair  
Planning Board  
Town of Edgecomb  
P.O. Box 139  
Edgecomb, ME 04556  
RE: Sheepscot Village Site Plan and Subdivision Application  
Dear Katharine:

Thank you for your letter of April 8, 2008, concerning the above referenced application. In your letter, you outline three questions about the application that the Planning Board would like us to answer. Those three questions are:

1. Is the application prohibited by Article V, § 4.14 of the Land Use Ordinance because it exceeds the maximum floor area for retail businesses?
2. Do the additional standards for large scale developments set out in Article IV, § 3.5 apply to this application?
3. Is the proposed use allowable in the Edgecomb Gateway District with planning board approval?

As set forth in more detail below, the answer to the first two questions is “no.” Article V, § 4.14 does not prohibit the Sheepscot Village project. The standards set forth in Article IV, § 3.5 do not apply to the project. The answer to the last question is “yes.” The use proposed is an allowed use under the Edgecomb Ordinance.

## **FACTS**

In rendering our opinion, I have relied upon the following facts. These facts are taken from the Sheepscot Village Application for Site Plan Review and Subdivision Approval and from your April 8, 2008 letter.

JBK Properties, LLC and Edgecomb Development, LLC have applied for subdivision and site plan approval for the Sheepscot Village, located on Eddy Road in Edgecomb, Maine. The property is primarily located in the Edgecomb Gateway District. There is a small portion of the property within the Shoreland Zone. However, the Sheepscot Village project will not intrude into the Shoreland Zone.

As currently proposed, the Sheepscot Village project is an assisted living facility. It will contain 54 one and two bedroom units located on a parcel that is approximately 5.7 acres in size.

It is my understanding that the building footprint will be approximately 22,000 square feet. The entire project will contain approximately 56,500 square feet over three levels. Based upon the plans submitted with the application, the residential units will make up the great majority of that 56,500 square feet.

However, in addition to the residential units, Sheepscot Village will also contain common areas for the benefit of the residents. Among other things, Sheepscot Village will have recreational facilities, including exercise and game rooms, as well as centralized dining facilities.

Finally, Sheepscot Village will provide certain services to the residents. There will be a pharmacy on site, and nursing services will be available to residents if required. In addition, Sheepscot Village will offer some personal care services to residents. According to the plans, there will be a hair salon and a general store on site. The pharmacy, general store, and hair salon occupy a tiny portion of the overall square footage of the project.

All of the services described in the application will be made available to residents only. Indeed, the Sheepscot Village facility is designed for the benefit of residents only. There will also be no “day care” or similar services offered to the general public.

## **DISCUSSION**

### **I. Article V, § 4.14 of the Ordinance does not prohibit the Sheepscot Village project.**

The first issue concerns Article V, § 4.14 of the Ordinance. Section 4.14 sets forth specific size standards for “retail businesses”:

Notwithstanding any other provision in this Ordinance, no single retail business, whether located in a single structure, a combination of structures, single tenant space, or aggregate of structures or tenant spaces in an aggregate of structures, shall exceed 35,000 square feet of floor area. All adjacent retail or service establishments which share a common check stand, management, controlling ownership or storage areas shall be considered a “single retail business” and their aggregate square footage of floor area shall be used to determine compliance with the standards of this Ordinance. This maximum floor area restriction shall apply to all new retail businesses and to all expansions of existing retail businesses.

Ordinance, Art. V, § 4.14. Therefore, § 4.14 will only apply to Sheepscot Village if it is a “retail business.”

Under the Ordinance, a “retail business” is a “business establishment engaged in the sale, rental, or lease of goods or services to the ultimate consumer for direct use or consumption.” Ordinance, Art. I, § 8.2. The principal use within the Sheepscot Village project is residential—i.e., providing assisted living housing. In other words, the principal use of Sheepscot Village is not as a “retail business.”

Sheepscot Village will contain some accessory uses that conceivably could be termed retail. For instance, the project will include a hair salon, general store, and pharmacy. Those uses fall under the definition of “retail

business.”<sup>1</sup>

The inclusion of accessory retail uses in the project does not change the primary use of the project. It remains residential. Residential projects are not subject to the size limitations in § 4.14.

Moreover, § 4.14 does not bar the accessory retail uses planned as part of Sheepscoot Village. Under § 4.14, only floor space devoted to retail use is actually counted towards the 35,000 square feet maximum. The retail uses in 1 Of course, the pharmacy, hair salon, and grocery store will not provide goods or services to members of the general public. Under some dictionary definitions, these uses would not be considered “retail.” *See, e.g., The Oxford Paperback Dictionary*, 691 (3rd Ed. 1990) (defining “retail” as “the selling of goods to the general public”). However, the Board is bound by the definition in the Ordinance. That definition does not make a distinction based upon whether a sale is to the general public or otherwise. Instead, the distinction is based upon whether the sale, etc. is to a consumer (as opposed to a re-seller) of the product or service in question.

Sheepscoot Village will occupy only a small portion of the overall building—and far less than 35,000 square feet. As a result, § 4.14 does not act to prevent the Sheepscoot Village project.

**II. The additional standards for large scale developments set out in Article IV, § 3.5 do not apply to the Sheepscoot Village project.**

The second question concerns the special performance standards set forth in Article IV, § 3.5 of the Ordinance. Section 3.5 is designed to regulate only a small portion of development within the Town of Edgecomb. The first sentence of § 3.5 sets its scope:

In addition to the criteria and standards set forth in Section 3.4 above, all large-scale development; commercial development with a drive-thru facility and/or outdoor fuel sales; and formula restaurants shall also conform to the following performance standards.

Ordinance, Art. IV, § 3.5. As the quote indicates, § 3.5 does not apply to the Sheepscoot Village.

Sheepscoot Village is an assisted living facility. It is not a “commercial development with a drive-thru facility and/or outdoor fuel sales.” It is not a formula restaurant.

Finally, Sheepscoot Village is not a large-scale development as that term is defined in the Ordinance. Under the Ordinance, “large-scale development” is defined as:

Large-scale development: Unless otherwise described, a retail sales establishment that exceeds 10,000 sf of gross floor area or a

nonresidential development that exceeds 25,000 sf of gross floor area; large-scale development does not include agricultural buildings or commercial greenhouses and nurseries accessory to a retail or wholesale sales establishment.

Ordinance, Art. I, § 8.2. Therefore, a particular project is a “large-scale development” only if it is either a) a retail sales establishment larger than 10,000 square feet or b) a nonresidential development over 25,000 square feet.

As discussed in Section I above, Sheepscot Village is not a retail sales establishment. Moreover, Sheepscot Village is a residential development. As a result, the “large-scale development” definition does not apply to Sheepscot Village. Sheepscot Village does not have to comply with the additional performance standards set forth in Article IV, § 3.5 of the Ordinance.

### **III. Subject to site plan and subdivision approval, the Sheepscot Village project is allowable within the Edgecomb Gateway District.**

Finally, a question has been raised about whether Sheepscot Village is an allowed use in the Edgecomb Gateway District. This question has arisen for two reasons. First, Sheepscot Village falls under a specific defined use under the Ordinance—“Congregate Housing.” The Ordinance defines “Congregate Housing” as: “Residential housing consisting of private apartments and central dining facilities and within which a congregate housing supportive service program serves occupants.” Ordinance, Art. I, § 8.2. The term “Congregate Housing” is not used anywhere else in the Ordinance.

Second, Article II, § 3 contains a table of land uses. That table lists a number of land uses. Next to each listed use, the table indicates what kind of permit (if any) is required for the use within the zoning districts in Edgecomb. “Congregate Housing” is not included in the § 3 table of land uses. As a result, there is an issue about whether “Congregate Housing” is an allowed use within Edgecomb.

The answer to this question hinges upon whether the land uses set forth in Article II, § 3 are the exclusive land uses allowed within the Town of Edgecomb. Based upon the Ordinance itself and the governing law, my opinion is that the table in § 3 is not an exclusive list of the only land uses allowed within the Town.

The first principle governing the interpretation of zoning ordinances is that terms or expressions in an ordinance are to be construed reasonably with regard to both the objectives sought to be obtained and the general structure of the ordinance as a whole. *Roberts v. Town of Phippsburg*, 642 A.2d 155, 156 (Me. 1994). However, zoning ordinance provisions that limit the use of property will be strictly construed in favor of the property owner, so long as such construction is not incongruent with the ordinance’s purpose. *Town of*

*Union v. Strong*, 681 A.2d 14, 18 (Me. 1996).

There are four considerations that underlie my conclusion that the list of land uses in § 3 is not exclusive. First, in the past, the Planning Board has concluded that the § 3 table is not the exclusive list of land uses for the Town of Edgecomb.

Second, the Ordinance does not contain any provision stating that if a use is not listed in § 3, it is not permitted. In my experience, such provisions are common in nearly all other zoning ordinances. The absence of such a provision raises significant doubt about whether the table in § 3 is exclusive.

Third, the § 3 table omits some fundamental land uses. For instance, multi-family housing is not listed at all. If § 3 contains the exclusive list of uses within Edgecomb, no new multi-family dwellings could be constructed without a variance. All existing multi-family dwellings would also become non-conforming uses. The omission is even more strange given the way that the Ordinance defines “Dwelling”:

Dwelling: Any building or structure or portion thereof containing dwelling units.

1. Single-family Dwelling – Any structure containing only one (1) dwelling unit.
2. Duplex Dwelling – A structure containing only two (2) dwelling units.
3. Multi-family Dwelling – A structure containing three (3) or more dwelling units.

Ordinance, Art. I, § 8.2. If the Ordinance truly meant to make all non-single family dwellings nonconforming, there would be no reason to distinguish between duplex and multi-family dwellings.

Finally, interpreting § 3 as the exclusive list of land uses within Edgecomb would place a significant restriction upon the use of property. Under *Town of Union v. Strong*, 681 A.2d 14, 18 (Me. 1996), the Ordinance must be strictly construed against limitations upon the use of property unless doing so would create an irrational reading. Given the omissions discussed above, and the inclusion of “Congregate Housing” in the definitions section of the Ordinance, it is reasonable to interpret the Ordinance as allowing “Congregate Housing.”<sup>2</sup>

In sum, “Congregate Housing” is allowed under the Ordinance. However, I make no opinion about any other regulatory matter, including whether the Sheepscot Village project is entitled to site plan or subdivision approval.

Thank you for your attention. Please let me know if I can be of further

assistance.

Sincerely,

John B. Shumadine

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JBS/dmw

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2 I express no opinion about whether a land use that is not mentioned in either the § 3 table or in the definitions section of the Ordinance would be allowed in Edgecomb.