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June 15, 2007

BY E-MAIL & REGULAR MAIL

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RE: Sheepscoot Harbor Village & Resort Site Plans

Dear Katharine:

Thank you for your telephone call asking about an issue that has recently arisen concerning the above-referenced project. Based upon your call and a May 24, 2007 e-mail from Byron Johnson, I understand that the Town has some concern that the Sheepscoot Harbor Village & Resort project (the "Project") may not comply with a minimum structure separation distances requirement in the Edgecomb Ordinance.

The specific provision at issue is § 4.8 in Article V of the Ordinance. Section 4.8 mandates that "[r]esidential [s]tructures must be separated by a minimum of thirty (30) feet." Ordinance, Art. V, § 4.8. It appears that some of the residential structures that have been constructed within the Project may not be separated by at least thirty feet.

The Project is planned to be built in three phases, called Phase I, Phase IIA, and Phase IIB. On September 15, 2005, the Planning Board approved Phase I. Phase I is now complete or substantially complete. Some of the residential structures in Phase I are less than thirty feet apart.

On January 19, 2006, the Board approved Phases IIA and IIB. Construction has begun on Phase IIA. All footings have been placed and some rough framing is complete. Again, some of the residential structures in Phase IIA are less than thirty feet apart. Phase IIB is not yet constructed. However, based on the site plan, all except for one pair of residential structures within Phase IIB are designed to be more than thirty feet apart. Moreover, the developer has voluntarily agreed to change its plan with respect to the single pair of residential structures in Phase IIB that are less than thirty feet apart.

After that change, all residential structures in Phase IIB will meet the minimum structure separation distances requirement.

In other words, it appears that some of the residential structures in Phases I and IIA are at odds with § 4.8. I understand that the Planning Board did not purport to grant a waiver or variance to allow the residential structures to be closer together than allowed under § 4.8. Apparently, no one even noticed the inadequate structure separation distances during the approval process. However, it is also my understanding that all of the construction complies with the plans that the Planning Board approved.

A question has arisen about whether the Town can take some sort of enforcement action against the developer because the houses built on Phases I and IIA are less than thirty feet apart. The answer is “no.” At this point, the Planning Board no longer has the authority to order changes to the Project. The appeal period has expired on the approvals for Phases I and IIA. No one took an appeal. Once the appeal period expired, the Town lost the power to challenge the approval or to order that work stop on the Project. *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545.¹ Moreover, the developer has obtained building permits, begun construction, and expended substantial funds in reliance on those approvals. Under the doctrine of “vested rights,” the developer is entitled to rely upon the approval the Planning Board granted.

Although it is unfortunate that this situation has occurred, the time for complaint was during the permitting process and its corresponding appeal period. It is also worth noting that, by all accounts, this situation was the result of an oversight by both the developer and the Board.

In short, unless the developer departs from the approved plan, the Planning Board does not have the power to interfere with the Project.

¹ Under *Juliano*, the Town would have authority to issue a stop work order if the construction deviated from the approved plan. However, that factor is not present in this case.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "J.B. Shumadine", with a stylized flourish at the end.

John B. Shumadine
jshumadine@mpmlaw.com

JBS/dmw

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