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February 7, 2007

Erin Cooperrider, Chair
Planning Board
Town of Edgecomb
P.O. Box 139
Edgecomb, ME 04556

RE: Public requests for the Planning Board to give informal, advisory opinions about the Edgecomb Land Use Ordinance.

Dear Erin:

On January 18, 2007, two groups approached the Planning Board with questions about the prospective application of the Edgecomb Land Use Ordinance. The Planning Board has asked this firm to provide advice about the questions those parties raised before the Board.

First, Sigrid Sproul asked a question on behalf of the Emma C. Regut Revocable Living Trust. The Trust is considering selling property that it owns within the Resource Protection District of the Shoreland Overlay Zone. The Trust believes that a prospective buyer would want to add a second house onto the property and asked the Planning Board about the requirements that applied to such a hypothetical second house. In the course of that discussion, the Trust raised a question about the minimum shore frontage in the Resource Protection District. Art. III, § 1.9.1.6 does not mention the Resource Protection District in the context of creating a minimum shore frontage requirement for the Shoreland Overlay Zone.

Second, Curtis Fish and William Maier asked a question on behalf of a prospective owner of a portion of the Perry waterfront property on Parsons Point Road. The Perry property is within three zones, the Resource Protection and Limited Residential Shoreland overlay zones and the Marine I zone. The prospective owner did not have firm plans about the property. He provided sketches showing four or five possible home lots on the property, one of which may have been within the Resource Protection District. Under the Edgecomb Ordinance, a single family home may be built within that district only if the Planning Board issues a special exception. *Edgecomb Ordinance*, Art. III, § 1.10.4. To grant a special exception, however, the Planning Board must find that "[t]here is no location on the property, other than a location within the Resource Protection District, where the structure can be built." *Id.*, Art. III, § 1.10.4.1. The question therefore arose about how that provision would apply

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when the proposed home in the Resource Protection District was part of a larger subdivision of the property.

Before I answer those specific questions, I would like the Board to provide some clarification about the purpose and scope of the answers. According to the meeting minutes, the landowners ask the Board to provide answers to hypothetical situations. In effect, the landowners asked the Board to provide advisory opinions about the interpretation and application of the Ordinance.

This firm strongly recommends against providing advisory opinions such as those requested from the Board on January 18th. First, the Board has no jurisdiction to issue advisory opinions. The Board is empowered to interpret the Ordinance only in the context of a specific application. Because the Ordinance does not specifically authorize the Board to issue an advisory opinion, the public has no right to rely upon such an informal ruling. Moreover, the Board would be free to reverse its advisory opinion if, in the context of reviewing a specific permit application, the Board heard facts or legal arguments that persuaded the Board that its advisory opinion had been erroneous. For those reasons, an advisory opinion does not help the landowner.

Advisory opinions also cause the Board to waste its time and resources in attempting to address questions based upon facts that are minimal and/or hypothetical. The two questions on January 18th illustrate that problem. The first question rests upon an assumption that a future buyer may want to build a house. The second question rests upon a possible subdivision that may never come to exist. Nothing with respect to those hypothetical projects is fixed. The hypothetical and changeable nature of those facts creates a large risk of a misunderstanding by either the landowner or the Board. The Board could misunderstand the facts that the landowner has provided orally—or the landowner could neglect to provide all of the facts that pertain to a specific question.

As a result, it is entirely possible that the Board could issue an advisory opinion only to find that the eventual application contains facts that require the Board to reach a different conclusion from the one in its advisory opinion. There will be no good outcome in that situation. At best, an applicant could feel misled by the Board. At worst, the landowner will try to use the advisory opinion as a club to force the Board to approve something that the Ordinance

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prohibits. Even though the landowner would likely not succeed in forcing the Board to adhere to its advisory opinion, the process of defending against that claim will be unpleasant, drawn out, and expensive.

In contrast, the application process puts a burden on an applicant to think through their proposal. The applicant must then provide a substantial body of evidence to the Board that establishes specific facts regarding both the current state of the property and what is proposed as part of the application. Often, the public also has an opportunity to appear and add more information to increase the Board's understanding of the specific facts and legal issues present in a particular application. In other words, the formality of the process helps to ground the Board's interpretation of the Ordinance within a specific factual scenario.

Therefore, I strongly suggest that the Board not issue advisory opinions. Instead, members of the public should be advised to either consult with their own attorneys, surveyors, or other professionals,¹ or to file a formal application requesting that the Board grant permission for a specific project.

There is one final issue. I understand that the Board may feel that the two questions raised on January 18th have pointed out serious omissions within the Edgecomb Ordinance. The Board has the power to recommend changes to that Ordinance. *Edgecomb Ordinance*, Art. I, § 6 ("An amendment to this Ordinance may be initiated by the Planning Board provided that a majority of the Board has so voted."). In other words, it may be that the Board has asked the questions in order to identify whether there are problems within the Ordinance. Depending upon the nature and severity of the problems, the Board may wish to use the answers to those questions as a springboard for a discussion about whether and how to fix those problems. If that is the case, let me know and I will provide an answer to the Board as soon as possible.

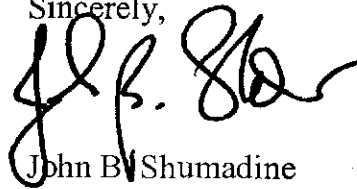
¹ Incidentally, to the extent that the Board relies upon its legal counsel to answer requests for advisory opinions, the Board will place itself in the position of providing free legal advice to members of the public. We strongly recommend against doing so.

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

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Shumadine". The signature is fluid and cursive, with the initials "J.B." being particularly prominent.

John B. Shumadine
jshumadine@mpmlaw.com

JBS/dmw

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