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BY HAND

Michael J. Patterson, Chair
Portland Planning Board
c/o Molly Casto -- City of Portland
389 Congress Street
Portland, Maine 04101

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BRUCE A. MCGLAUFLIN
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Via Hand Delivery

December 17, 2007

Michael J. Patterson, Chair
Portland Planning Board
c/o Molly Casto -- City of Portland
389 Congress Street
Portland, Maine 04101

RE: 130 Promenade East

Dear Planning Board Members:

This firm represents two abutters to the proposed addition at 130 Eastern Promenade -- Nicolino & Patricia Ciccomancini at 14 Wilson Street and Lucy and Robert Tanner at 126 Eastern Promenade. The purpose of this letter is to make two requests on behalf of these abutters: 1) that the public hearing scheduled for January 22, 2008 be postponed, and 2) that the Board place the matter on another meeting agenda to more fully address the application's compliance with Section 14-382(d) of the Land Use Code.

At the December 11, 2007, workshop, the Planning Board rejected my contention that the proposed addition constitutes an illegal expansion of a nonconforming structure under Section 14-382(d). This was based on advice from legal counsel stating that Mr. Ciccomancini had failed to appeal the Zoning Administrator's September 26th decision on this point. Unfortunately, the Board did not have the benefit of my written response to this legal argument, which is set forth in the enclosed letter. That letter was faxed to Ms. Littell shortly after her letter of the same day was faxed to me. Although Ms. Casto was listed as a recipient of the fax, she did not receive it and did not include it in your December 11th packet. For the reasons stated in the enclosed letter, as expanded on below, Section 14-382(d) must be addressed by the Board.

I request that the hearing be postponed and this legal issue be scheduled for another meeting because I do not believe the Board has had a full opportunity to consider it; because a ruling on it will avoid unnecessary expenses that would be incurred if we

proceed directly to a hearing; and because I have an unavoidable conflict on January 22nd. I have an all-day trial in Ellsworth on that day and will be unable to attend the public hearing to represent the interests of the two immediately adjacent abutters. If this dispositive issue is not addressed up front, my clients will be forced to incur the expense of having appraisals performed to determine the impact of the addition on their property values and the Applicant will continue to incur expenses on a project that is in clear violation of the Code.

I take this opportunity to more fully explain why this issue is dispositive and why the Board should not avoid confronting it at this juncture in the proceedings. As explained in the enclosed December 7 letter, the Ciccomancinis are not foreclosed from making this argument for failure to appeal Ms. Schmuckal's September 26th determination. There was no basis for appealing that determination because it was in the Ciccomancinis' favor – they won and the application was withdrawn.[1] Because the application was rejected by Ms. Schmuckal, the Ciccomancinis were in no sense aggrieved by the decision. It is no different from winning a court case in which you make several arguments; even though the court rejects all but one of the arguments, you still won and have no basis for appealing the arguments you lost.

Even if the Ciccomancinis were foreclosed from making this argument now, the Tanners are not. They have separate interests and were not "party" to Ms. Schmuckal's determination. Mr. Tanner presented the same argument to the Board on December 11th, but the Board declined to respond to him.

The Board *must* make a determination on Section 14-382(d), because it is obligated to make a specific finding under Section 14-526(a)(17) that the application complies with *all* applicable provisions of the Code -- this includes compliance with Section 14-382(d). Because Ms. Schmuckal's September 26th determination on this point was clearly erroneous, the Planning Board would be seriously remiss to rely on it. The determination was clearly erroneous because it directly contradicts the words in

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[1] Apparently, the current proposal is being treated as a revision of the July 12 application even though no revised application form has been submitted. The Application was for a specific plan and design with nine units. Those Plans, and therefore that application, were rejected. The Applicant has submitted a completely new proposal with a new design and site plan that involves 7 units. The November 20, 2007, Plans showing seven units are not revisions of the earlier Plans. The Board's choice to treat this administratively as one application and one proceeding, does not alter the operative fact that the Applicant's July 12 proposal was rejected. The Ciccomanicins assumed that Casco Bay had given up. They received no notice of the "amended" application until early December long after the 30 day appeal period ended.

Section 14-382(d). Ms. Schmuckal interprets the provision as if the following words were deleted:

> **where the proposed changes in existing exterior walls and/or roofs would be within the space occupied by the existing shell of the building.**

Only by deleting these words, could this provision mean that an addition may be made to the building beyond the existing shell so long as it does not create any new nonconformity or increase any existing nonconformity. When these words are not ignored, the provision clearly permits an addition to the building *only* if: 1) there is no new nonconformity or increase in nonconformity, *and* 2) any changes to the exterior walls and/or roofs are kept within the existing shell of the building.

The Board will commit clear error if it adopts Ms Schmuckal's interpretation when it is called upon to determine that the application complies with all applicable provisions of the Code. Such clear error will be subject to reversal by the Superior Court, rendering all of the time and cost expended by the Board and the parties for naught. The Ciccomancinis and the Tanners have a right to have their interests protected in accordance with the Land Use Code, and the Planning Board Members have the duty to interpret and to apply the Code, *as written*.

For the foregoing reasons, I request that you postpone the January 22nd public hearing and schedule another meeting to fully consider this threshold issue.

Sincerely,

Bruce A. McGlauflin

BMcG/d
cc: Nicolino and Patricia Ciccomancini
Robert and Lucy Tanner
Wally Geyer, Casco Bay Ventures

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BRUCE A. MCGLAUFLIN
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December 7, 2007

Via Fax
Penny Littell, Esq., Associate Corporation Counsel
389 Congress Street
Portland, Maine 04112-8555

Re: 130 Eastern Promenade

Dear Penny:

This letter is in response to your letter of December 07, 2007 in which you indicate that the Planning Board is not the appropriate body to address zoning issues and that my argument relating to the interpretation of §14-382 (d) should not be considered by the Board in its review of Casco Bay's site plan application. I respectfully disagree with your interpretation of the Planning Board's jurisdiction. Under site plan review, the Planning Board must make a determination that the applicant's proposal meets all of the criteria set forth in 14-526 in including the criterion that the applicant "has submitted all information required by this article and that the development complies with all applicable provisions of this Code" §14-526 (a)(17). Thus, the Planning Board is required to make a determination as to whether or not the proposal satisfies §14-382 (d) of the Code.

I understand that the Planning Board may rely on a preliminary determination by the Zoning Administrator with respect to such zoning requirements. For that reason, I requested that Ms. Casto send a copy of my December 6th letter to Ms. Schmuckal as well as the Planning Board. By copying *this* letter to Ms. Schmuckal and her counsel James Adolf, Esq., I request that a preliminary determination be made on the application of section 14-382 (d) to the new proposal. I did not appeal Ms. Schmuckal's previous determination (in her September 26, 2007 letter) because the then pending application was denied on alternative grounds. There was no reason nor basis for an appeal since my client was not aggrieved, the application was withdrawn, and any appeal would have been moot.

It would be in the interest of all the parties to have this zoning issue addressed and decided before the Planning Board expends any time and energy on Casco Bay's new proposal.

Thank you for your assistance.

Sincerely,

Bruce A. McGlauflin

BMcG/ed
cc: Molly Casto
Marge Schmuckal
James R. Adolf, Esq.
Nicolino Ciccomancini (via U.S. postal service)