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September 18, 2013

Jennifer L. Thompson, Esq.
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RE: 40 Deering Street, Portland, Maine (Tax Map 047 C016) - Building Permit

Dear Jennifer:

Per our conversation, this is to summarize the background of the issues involving the outstanding building permit for basement renovations of property at 40 Deering Street (Tax Map 047, Lot C016), a single family home owned by BWB40, LLC, a real estate holding entity for Patrick and Danika Babcock, who also own the single family residence next door at 38 Deering Street. 38 Deering is a family home for the Babcocks, but both properties are used as homes by clients served by Foundation House, a program operated by the Babcock's business, PK Holdings, Inc.

Foundation House provides counseling services and long-term, supportive residential homes for persons with addictions accepted into the program. Foundation house does not provide treatment nor does it provide short-term or transition housing for those in treatment. It accepts those who have completed treatment programs or graduated from transitional housing programs and require a stable, supportive, residential living situation. All of its clients must be employed, going to school, or engaged in productive community service, and be committed to a model of long-term clean and sober living. That model involves assuming responsibility to (and for the behavior of) others sharing a residence. Importantly, each Foundation House residence functions as a self-governing home, not a place of business or treatment. All counseling services that Foundation House provides are provided at leased business offices in the State Theater Building.

40 Deering is used solely as a single family residence, a permitted use in the R-6 Zone. Last year, a group of neighbors challenged the single family residential status of both 38 Deering and 40 Deering. The matter was heard by the ZBA on December 12, 2012. After a thorough airing of issues, the result was a unanimous denial by the ZBA of the neighbors' appeals.

A key factor in the argument before the ZBA was whether the unrelated residents of 40 Deering met the Zoning Code's definition of "family," which ties into the definition of "single family dwelling" as a permitted use.

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Sec. 14-47 Family: No more than sixteen (16) individuals living together in a dwelling unit as a single nonprofit housekeeping unit. A group occupying a hotel, fraternity house or sorority house shall not be considered as a family. The family may include necessary servants. (emphasis added)

The key to the definition is the concept of "a single nonprofit housekeeping unit." This describes exactly how the Foundation House residence at 40 Deering works. "Housekeeping unit" is also the primary difference between a "lodging house" and a "single- or multi-family dwelling" under the Zoning Code. Practically speaking, a resident in a lodging house doesn't need to meet or interact with fellow lodgers or participate in the "housekeeping" of keeping up the facility. A lodger can just rent a room, usually with its own key. But in 40 Deering, just as in other more traditional "family" dwellings, the residents are responsible for allocating all essential housekeeping functions among themselves - the cooking, the cleaning, and the respectful manner in which residents interact with and support each other. Bedrooms in 40 Deering are never locked.

Another important context to understand the current situation is the Oxford House line of cases, which derives from City of Edmonds v. Oxford House, Inc., (514 U.S. 725; 1995). That case and its progeny throughout the country involve attempted discrimination against group homes based upon single-family residential zoning. Ultimately, those cases hold that maximum occupancy restrictions in zoning ordinances, which can be lawful restrictions under the Fair Housing Act and similar State laws, cannot be based upon the concept of family relation by blood, adoption or marriage, because to do so is to discriminate against those unrelated persons who live together in a home with a common bond of addiction or disability or religion, rather than genetics, adoption or marriage.

Portland faced its own discriminatory zoning charges in a case involving Pharos House in the 1990's. The City was determined to have violated the civil rights of some of its residents by banning certain group residential uses in the downtown neighborhoods. The City's ordinance was invalidated by the Superior Court as unconstitutional. Ultimately the City was required to pay substantial legal fees to the plaintiffs. It is my understanding that the current Zoning Code's definition of "family" resulted from that aborted attempt to discriminate against unrelated household members.

Were this simply a matter of applying the Zoning Code, my client and the City Zoning Administrator would have no problem and the renovations would have been completed long ago. The issue is that the Fire Department has asserted that 40 Deering should not be treated as a "one-family dwelling unit" under the Fire Code (NFPA 101), but rather as a "lodging or rooming house." The practical consequence is that the building permit for relatively minor renovations would thus trigger the full sprinklering of the entire building, at a substantial cost. Unfortunately, the NFPA 101 definitions on which the Fire Department is withholding approval of the permit seem to tie exactly to the type of "family" discrimination outlawed in the Oxford House cases and which the City addressed in the Zoning Code following its own Pharos House litigation decades ago.

3.3.61 Dwelling Unit. One or more rooms arranged for complete independent housekeeping purposes with space for eating, living and sleeping; facilities for cooking, and provisions for sanitation.

3.3.61.2 One-Family Dwelling Unit. A building that consists of solely of one dwelling unit with independent cooking and bathroom facilities.

3.3.156 Lodging or Rooming House. A building or portion thereof that does not qualify as a one- or two-family dwelling, that provides sleeping accommodations for 16 or fewer people on a transient or permanent basis, without personal services, with or without meals, but without separate cooking facilities for individual occupants.

24.1.1.1 The requirements of this chapter shall apply to one- and two-family dwellings, which shall include those buildings containing not more than two dwelling units in which each dwelling unit is occupied by members of a single family with not more than three outsiders, if any, accommodated in rented rooms. (emphasis added)

The problem is that the heading of Chapter 24 of NFPA 101 is being interpreted by the Fire Department in a literal and traditional fashion, with a "single family" apparently required to be related by blood, marriage or adoption, and all other members of a household being unrelated "outsiders." Thus, if the exact same building permit were pending for the exact same house, but the residents were all siblings or parents of each other, the permit would be granted without imposing any requirement to sprinkler the entire building.

The problem would be solved if the Fire Department were able in this instance to incorporate the same "housekeeping unit" concept that the Zoning Code now incorporates into its definition of "family." Lieutenant Wallace was sympathetic to my client's concern at having beaten back at the ZBA a discriminatory challenge to its single family residential use, only to encounter precisely the same issue in a different guise under the Fire Code. However, he indicated that he was not willing, without guidance from either the State Fire Marshall or the City to interpret the "single family" or "outsiders" language of the NFPA to be consistent with the definition of "family" under the other Zoning Code.

Rich McCarthy of the State Fire Marshall's Office was also sympathetic to the dilemma, which was not one he had encountered before. However, his ultimate position was that although the State had an interest in uniformity of fire codes in every municipality, it was the City of Portland that adopted NFPA 101 as its Fire Code and ultimately had the only authority to interpret any ambiguities consistent with its other legislative enactments - namely the Zoning Code.

Finally, Captain Paroni was also understanding and reiterated that there was no intent to discriminate in application of the Fire Code. He suggested that in the circumstances the Fire Department

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would be amenable to take whatever direction the City Attorney's Office might be willing to provide after reviewing the entire situation.

I appreciate your willingness to coordinate a meeting with my client to resolve this long-standing situation amicably and sensibly, to the benefit of the City and its residents and property owners, including my clients.

Yours Truly,

Richard N. Bryant