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October-18-17

Ann Machado
City of Portland
Inspections Division
389 Congress Street
Portland, Maine 04101

Re: 100 Salem Street Garage Nonconformity

Dear Ann:

I am writing concerning Ms. Towle's situation at 100 Salem Street. As you are aware, Ms. Towle demolished the grandfathered garage in 2006 (with a 3' lot setback) to accommodate the construction of a replacement 2-story porch to bring her residential structure into compliance as to egress requirements. Even with the benefit of a dimensional variance it would not be feasible to locate a useable garage between the property line and the reconstructed porch.

As I write today, Ms. Towle has a lawful garage foundation at the end of her driveway (that replaced the prior garage in its same footprint), which needs to be completed. As the original building permit has expired, she requires another. I am therefore writing to clarify the legal status of the partially completed garage under Code §14-385, so that you may issue the required permit.

The garage and porch replacement projects needed to be done in phases concurrently due to their physical proximity to one another. I can supply photographs and other documentation to demonstrate this further, if required. The building of the two story porch with a roof had to be done first. The garage

was removed, staging was set up, the two story porch and roof were removed, excavation for the garage was done, footings were poured for both the garage and porch, piers for porch and foundation walls with ledger component for floor system for the garage were poured, and backfill was completed and inspected for compliance with the grandfathered setback. Finally, a noncombustible precast concrete floor was installed, and an EMB rubber membrane laid over it, with a spruce plank temporary deck as a work surface.

About this time, the contractor was repeatedly not on site nor available and discussion about this resulted in the dispute with this contractor over his responsibilities that caused him to leave the job incomplete. Finding a replacement contractor was not pursued because Ms. Towle was distracted by the abrupt and tragic death of her father, and the subsequent, burden of caring for (and ultimately burying) two other close relatives, as well as a calcaneal fracture to her foot in between these deaths. Thus, she failed to complete the garage project prior to expiration of the permit through as a result of excusable neglect¹ Ms. Towle's explanation for the delay in completion to date was a combination of distraction, and financial burden of care for those three relatives that caused Ms. Towle not seek a new permit to complete the garage until now.

At no time during the application for permits, approval and issue, and the actual building process of the garage and the two story porch with a roof

¹ It appeared to Ms. Towle and that time that completion of the garage could easily wait. Ms. Towle understood from Permit No. 06-1236 that she would need a new building permit if she failed to complete within the time permitted by the building permit. She did not understand that failure to complete in that timeframe could leave her with a useless, but lawful foundation for a garage that she could never finish.

did Ms. Towle understand that the expiration of the building permit to replace this garage would also forfeit her grandfathered right to complete the garage. (She thought she could just have to get another permit if her building permit expired, as her careful examination of the Zoning and Building documents (but not the ordinance itself) indicated that if the completion of the garage structure occurred beyond the one year, a new application for completion of the garage must be made.)

Ms. Towle recently consulted with me upon the issue of whether her exemption from conformity with sideline setback (that allowed her to put in the foundation and deck) can still be relied upon to obtain a permit for completion. I have concluded that under a proper construction of §14-385, Ms. Towle's right *to complete* the garage structure continues, as the replacement was commenced timely, and her grandfathering was not lost due to the expiration of the original building permit. I submit the following reasons for that result:

Most if not all of §385 deals only with situations involving demolition or destruction due to sudden and immediate destruction, or due to decay. It is possible that none of the limitations in §385 were intended to apply to Ms. Towle's situation (where it was physically necessary to temporarily remove a nonconforming nonresidential structure in order to rebuild another structure), rather than destruction or decay.

Moreover, §385(c) provides that a nonconforming structure may be restored or rebuilt where restoration or reconstruction occurs within one (1) year of demolition of a nonconforming non-residential structure. There is no

express deadline for *completion* in ¶(c), nor elsewhere in §385, except in the case of ¶ (d), which is applicable only where “[r]estoration or reconstruction [is] necessitated by decay.” The requirement in ¶ (d) that any *reconstruction necessitated by decay* must be completed within one (1) year of demolition could have been included in ¶(c) as well, had this limitation been intended to apply to all such demolitions. It was not so included. As there is no express requirement that a reconstruction commenced under ¶(c) be completed within any specified time frame to avoid loss of nonconforming status, a reasonable period can be implied. Given Ms. Towles’ personal situation until the recent death of her younger sister, it is not unreasonable for her to complete the garage construction at this time.

There is no doubt that the partial garage reconstruction on the property can stay, as it is lawful. However, the foundation and floor is of little or no benefit to Ms. Towle. As applied to the 100 Salem Street garage, a strict reading of the ordinance yields an absurd result.

The result that the foundation for the garage can remain, but that the garage cannot be completed under the Ordinance, would be an absurd and illogical result. Since the result is illogical, and the ordinance is ambiguous as to completion of a replacement project timely commenced, you should employ what the Law Court has termed the “cardinal principle” of statutory construction in your interpretation of the Ordinance. That principle is the avoidance of absurd or illogical results in the absence of an express requirement governing completion. You should interpret §385¶(c) to permit the completion of the garage reconstruction consistent with Dickau v. Vermont Mut. Ins. Co., 2014 ME 158, ¶¶22-23, 107 A.3d 621, 628, where the Law Court held that *in determining a statute's “practical operation and potential consequences*, you must reject any construction that “creates absurd, illogical,

unreasonable, inconsistent, or anomalous results if an alternative interpretation avoids such results.”

I submit that on these unique facts, *not* allowing the completion of a garage structure commenced in accordance with the Ordinance would be such “an absurd, illogical, unreasonable, inconsistent, or anomalous result” that you should adopt “an alternative interpretation of §385 [which] avoids such results” by allowing Ms. Towle to complete subject to the limitations in 14-385. Ms. Towle will not object to any condition requiring that her project be now completed by a date certain to preserve her grandfathered status.

Ms. Towle timely commenced the reconstruction of the garage by putting in the foundation. That is all that is necessary to preserve grandfathered status under §385. Please allow her to obtain a new building permit to complete the work.

Please advise if you have any questions concerning the above.

Sincerely,
Sincerely,

A handwritten signature in blue ink that reads "David A. Lourie". The signature is written in a cursive, flowing style.

David A. Lourie

Cc: Deborah J. Towle