

Department of Planning & Urban Development

Marge Schmuckal
Zoning Administrator

Jeff Levine
Director Planning & Urban Development

RECEIVED



APR - 1 2013

Dept. of Building Inspections
City of Portland Maine **CITY OF PORTLAND**
ZONING BOARD OF APPEALS

Interpretation Appeal Application

APPLICANT INFORMATION:

SUBJECT PROPERTY INFO:

Hill Street Apartments, LLC
NAME

372-374 Park Avenue
PROPERTY ADDRESS

BUSINESS NAME

67-C-3
CHART/BLOCK/LOT (CBL)

c/o Jewell & Bulger, PA
ADDRESS

PROPERTY OWNER INFO (If Different):

477 Congress St, Ste. 1104, Portland

NAME

774-6665
TELEPHONE #

ADDRESS

Owner
APPLICANT'S RIGHT, TITLE OR INTEREST
(eg; owner, purchaser, etc)

Disputed Provisions from Section 14:

R-6
CURRENT ZONING DESIGNATION

Order, decision, determination or
interpretation under dispute:

Two buildings, one with two dwellings
and one with three dwellings

Zoning determination dated
dated March 7, 2013

TYPE OF RELIEF REQUESTED:

Allow property to be divided as functional division.

NOTE: If site plan approval is required, attach preliminary or final site plan.

The undersigned hereby makes application for an appeal as described above, and certifies that the information herein is true and correct to the best of his OR her knowledge and belief.

SIGNATURE OF APPLICANT
Attorney for applicant

April 1, 2013
DATE

JEWELL & BULGER, P. A.
Attorneys at Law
477 Congress Street
Suite 1104
Portland, ME 04101-3453

Thomas F. Jewell
Paul S. Bulger

Email: tjewell@jewellandbulger.com

Telephone: 207-774-6665
Fax: 207-774-1626

April 1, 2013

City of Portland Zoning Board of Appeals
Department of Planning & Urban Development
357 Congress Street
Portland, ME 04101

Re: 372-374 Park Avenue; Map 67-C-3
Functional Division request

Dear Sirs and Madams:

On behalf of Hill Street Apartments, LLC, we are submitting an appeal of the Zoning Administrator's decision dated March 7, 2103 denying our request to allow this property to be split into two lots as a "functional division." Together with this application, I enclose a check in the amount of \$100.00 for the cost of the appeal application.

Ms. Schmuckal's decision found that the application complied with the functional division criteria as set forth in *Keith v. Saco River Corridor Commission*, 464 A.2d 150 (Me. 1983,) a copy of which is enclosed, except that the two buildings currently share a single underground water and sewer service. We submit that the Zoning Administrator's analysis places undue emphasis on this one issue.

Admittedly, early in the *Keith* decision, the Court noted that the camps in question had separate septic systems. However, there is no further mention of this issue in the lengthy dissertation, and the Court never states that completely separate utilities are a requirement of its holding. We submit that having completely separate utilities is just one factor in the determination of whether the buildings are functionally independent and therefore may be divided.

As we stated in our submission, the Applicant would install separate utilities if the cost were not so substantial. In lieu of requiring the installation of separate utilities, we have submitted that the City's decision could require as a condition of approval that easements be granted so that each property would have the ability to install its own separate water and sewer line if there was ever a need or desire to do so in the future. For present purposes, upon future separated conveyances of the two buildings, the Applicant would draft an easement to share the existing water and sewer service.

City of Portland Zoning Board of Appeals
Department of Planning & Urban Development
April 1, 2013

We look forward to your review of this matter.

Respectfully submitted,


Thomas F. Jewell, Esq.
Attorney for Applicant Hill Street Apartments, LLC



PORTLAND MAINE

Strengthening a Remarkable City, Building a Community for Life • www.portlandmaine.gov

Jeff Levine, AICP, Director
Marge Schmuckal, Zoning Administrator

March 7, 2013

MAR 11 2013

Jewell & Boutin, P.A.
477 Congress Street
Suite 1104
Portland, ME 04101-3453

Attn: Thomas F. Jewell, Esq.

RE: 372-374 Park Avenue – 067-C-003 (the “Property”) – R-6 Zone

Dear Attorney Jewell,

I am in receipt of your request for a determination concerning the Property and a functional division of land. The Law Court upheld a concept of “functional division” in its ruling of Keith v. Saco River Corridor Commission.

The Law Court outlined criteria that are described at 464 A.2d 152 as follows:

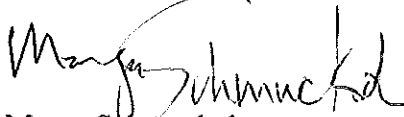
- (i) *The structures were in existence prior to the zoning ordinance:* The basis of the Land Use Zoning Ordinance currently in use is June 5, 1957. Both structures on the Property were in existence prior to June 5, 1957 as evidenced by the pre-1957 Assessor’s records.
- (ii) *From that time to the present they were separately use and occupied:* Nothing has been submitted to show that either structure was consistently and separately used and occupied since they were constructed. My research of Inspection Services files indicates that the two structures have been consistently used and occupied separately.
- (iii) *Each dwelling is served by its own utility and sewage disposal system:* I translate “each dwelling” from the Law Court Case into “each structure” in the case of multiple structures on a single piece of land, and not each dwelling within each structure on the land in question. In the scenario submitted to me for consideration, there are two structures on the Property. The front structure along the street is a legal two residential family building. The rear building is a legal three residential family building. Although electricity and gas have been shown to be independent for both structures on the Property, it is an important distinction that both structures share the common water and sewer to the Property. It is my interpretation of the Law Court decision that the lack of independent water and sewer for each structure moots the ability of the structures to remain functionally separate from each other if the

Property was divided. My reading of *Keith* is that the independence of water and sewer is a prime indication of each structure to function with autonomy. This vital criterion is not being met.

Because the required criteria of *Keith* is not being met, I have determined that the request to divide the Property is not allowable. Section 14-422 of the Land Use Zoning Ordinance states: "No lot shall be so reduced that yards, lot width, lot frontage, lot area, area per dwelling unit, and space for off-street parking and / or off-street loading shall be less than the minimum required under this article." I have not been afforded any information that indicates the proposed division of land can meet the underlying R-6 Zone requirements. Therefore the Property shall not be divided as proposed.

You have the right to appeal my decision concerning this matter. If you wish to exercise your right to appeal, you have 30 days from the date of this letter in which to appeal. If you should fail to do so, my decision is binding and not subject to appeal. Please contact this office for the necessary paperwork that is required to file an appeal.

Very truly yours,

A handwritten signature in black ink that reads "Marge Schmuckal". The signature is written in a cursive style with a large, sweeping initial "M".

Marge Schmuckal
Zoning Administrator

JEWELL & BOUTIN, P. A.
Attorneys at Law
477 Congress Street
Suite 1104
Portland, ME 04101-3453

www.jewellandboutin.com

Thomas F. Jewell
Daniel W. Boutin

Email: tjewell@jewellandboutin.com
Email: dboutin@jewellandboutin.com

Telephone: 207-774-6665
Fax: 207-774-1626

February 22, 2013

Marge Schmuckal, Zoning Administrator
City of Portland
357 Congress Street
Portland, ME 04101

Re: 372-374 Park Avenue; Map 67-C-3
Functional Division request

Dear Marge:

I write on behalf of my client, Hill Street Apartments, LLC, which is the current owner of the property at 372-374 Park Avenue, requesting approval for the division of this property as a functional division. Together with this application, I enclose a check for \$150.00 for the cost of your determination.

The property currently has upon it two separate buildings, with two dwelling units in the front building and three dwelling units in the rear building. Each structure has been in existence and separately used since at least the 1920s according to the attached assessor information sheet. The owners propose to split the lot pursuant to the attached survey. The division would result in two lots which would share the driveway and would share the common water and sewer.

Except as noted above, these two residential structures at this location are separate structures independent from each other. They each have their own electric service (copies attached) and separate gas service (gas service to the property is directly billed to the tenants so we do not presently have copies of separate invoices from the two buildings), and each building has been functionally independent from the adjoining property since their construction in the 1920s. The proposed division would not change the current use or resulting impact of the property. Either one of the buildings could be destroyed and the remaining building could continue functioning.

There is one common water and sewer service for the property which runs through the front building and continues to the rear building. Although somewhat rare, we have seen several separately owned properties in Portland that share a common water and sewer lines. Typically such properties are in settings such as present appeal, where one building is behind the other. We submit that two separate buildings that share a water and sewer line are still functionally divided, as each could function without the other just as is the case when they share a driveway. As with many candidates for functional division that have been approved in the past, this present application would require a shared driveway.

Separate water and sewer lines could possibly be installed, and the Applicant has researched that possibility, but the price is prohibitive. At a minimum, easements will be created that would allow for the eventual separation of the water and sewer. The attached site plan from the Portland Water District shows the existing public water line on the far side of Park Avenue.

We would respectfully suggest that the Applicants' proposal is in harmony with the Maine Supreme Judicial Court decision, which set the precedent for "functional division" review, in *Keith v. Saco River Corridor Commission*, 464 A.2d 150 (Me. 1983,) a copy of which is enclosed. In that case, the owner sought to divide her property upon which was located several camps built prior to the adoption of the zoning ordinance. Her camps were lawfully non-conforming uses.

We do appreciate that although the Court in *Keith* did state, in its summary of facts, that the buildings in that case each had its own utility and sewage disposal system, there is nothing the following analysis by the Court that mentions anything further about the utilities or suggests that completely separated utility services are required to qualify for functional division approval. Instead, the focus of the inquiry in *Keith* was whether the proposed lot division "would be an extension, expansion or enlargement of existing buildings, structures or of nonconforming uses" *Keith*, at page 151, which would have required a permit. Similar to the Saco River Corridor Commission Ordinance, the grandfathering provisions of Portland Land Use Ordinance, Section 14-381, generally prohibit the extension, expansion or enlargement of preexisting nonconforming uses.

The Court in *Keith* concluded that the "mere" change of dividing the existing one large lot with three buildings into three separately owned parcels did not create such an extension, expansion or enlargement because it would not result in any change of the grandfathered use of the property. Therefore, the central question in the present application is whether dividing the lot of a property that is already functionally divided is an extension, expansion or enlargement of the lawfully preexisting nonconforming use so that it would be prohibited under Section 14-381 of the Portland Land Use Ordinance.

We submit that the result in *Keith* would likely have been the same if a couple of the camps shared a septic system. This assertion is based on the fact that the focus of the analysis of the Court in that case was on the issue of change of use, not on the details of the existing properties. The important finding of the Court in this respect was that "the property in question had been 'functionally divided' as separate lots by tenant occupation since before the enactment of the Act." *Keith* at Page 152. Similarly, our buildings have been used by different tenants since the 1920s, and dividing the parcel into two lots will have not change the ongoing use.

As a general rule of zoning law, one cannot create non-conforming lots. However, the proposed division in *Keith* resulted in the creation of three new lots that did not meet the minimum space and bulk zoning requirements for frontage, and setback requirements. Nonetheless, the Court determined that the Commission was compelled to approve the landowner's request to divide the property.

In *Keith*, at page 154, the Court stated as follows:

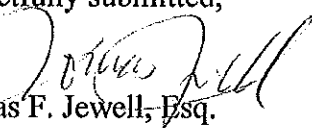
The post-sale fragmented title in no way would modify the nature or purpose of the pre-existing nonconformity of the respective buildings on the land, nor would it reflect any alteration in the land use itself prevailing at the time the Saco River Corridor Act [the applicable zoning ordinance] took effect, nor would it under any view of the factual situation create a new use different in quality, character or degree, from the original use; no change in intensity of use would result. Had the Keith holdings as functionally divided been owned by three different individuals at the time of the Act and each of them desired to convey his separate lot, there would be no zoning impediment to the sale. We cannot see wherein a different result should obtain simply because all the already functionally divided lots are owned by only one person. *[Bracketed text added.]*

Again, the Court focused largely on the effect of the division on the resulting grandfathered use of the property and found that the proposed division of the existing non-conforming lot into three new nonconforming lots would not result in any particular change in use. With no change in the use, the Court found there would be no public purpose served by denying the Applicant her request to divide the lot.

The Applicants' lot already hosts grandfathered lawfully non-conforming uses of two buildings with five dwelling units between them. The proposed division does not extend, expand or enlarge the units within the structures or the existing uses of the building footprint, driveways, yards or appurtenances. Splitting that one parcel into two will not result in any change to the land use effects associated with those two buildings, it will just create an invisible property boundary between the existing houses.

We submit that the Applicant's "mere change" from one lot with two structures, to two lots each with one structure meets the legal requirements for a permissible functional subdivision of the property as set forth by the Maine Supreme Judicial Court in *Keith* and request approval to create two lots at the subject property.

Respectfully submitted,



Thomas F. Jewell, Esq.

Attorney for Applicant Hill Street Apartments, LLC

Tax Map 67 c012

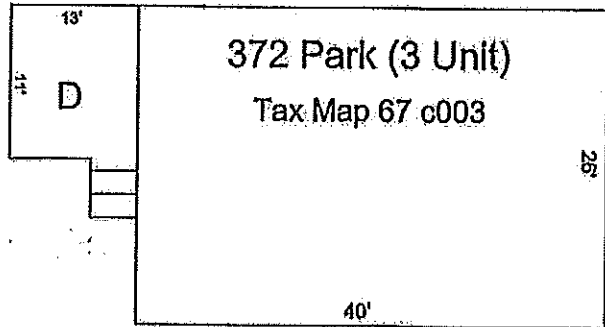
63' (Deed)

Tax Map 67 c008

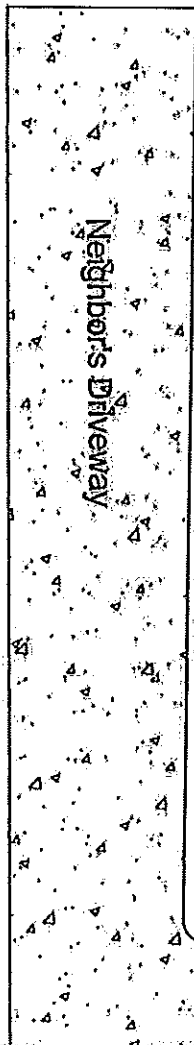
Tax Map 67 c004

372 Park (3 Unit)

Tax Map 67 c003



Tax Map 67 c015



Neighbor's Driveway

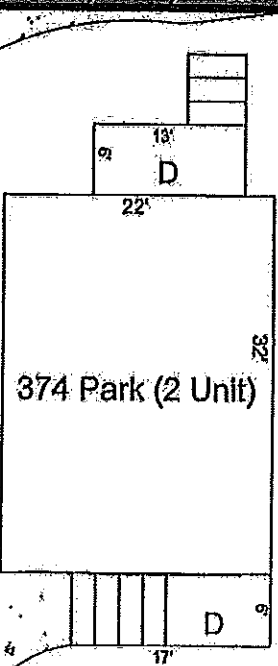
120' (Deed)

Parking 372-374

120' (Deed)

40' (Proposed)

60' (Proposed)



374 Park (2 Unit)

57' (Tax Map)

Tax Map 67 c002

Utility Pole

63' (Deed)

Park Avenue

QUITCLAIM DEED WITH COVENANT
(Special Warranty Deed)

U.S. Bank National Association, As Successor Trustee To Bank Of America,
National Association As Successor By Merger To LaSalle Bank National
Association, As Trustee Under The Pooling And Servicing Agreement Dated As Of
March 1, 2007, GSAMP Trust 2007-HE2 with its principal place of business at 1661
Worthington Road, Suite 100, West Palm Beach, FL 33409, for consideration paid,
Grants to Hill Street Apartments LLC, with QUITCLAIM COVENANT, the following
described land in Portland, County of Cumberland, and State of Maine:

A certain lot or parcel of land situated in in the town of Portland, County of Cumberland,
and State of Maine, being known as 372 374 Park Avenue, Portland, ME 04102, bounded
and described as follows:

See Exhibit A attached hereto and made a part hereof

Being the same premises conveyed to the Grantor herein by instrument dated October 24,
2011 and recorded in Book 29056 Page 147, Cumberland County Registry of Deeds.

Grantor covenants that it is seized and possessed of the said land and has a right to
convey it, and warrants the title against the lawful claims of all persons claiming by,
through and under it, but not further otherwise.

MAINE REAL ESTATE TAX PAID

IN WITNESS WHEREOF, U.S. Bank National Association, As Successor Trustee To Bank Of America, National Association As Successor By Merger To LaSalle Bank National Association, As Trustee Under The Pooling And Servicing Agreement Dated As Of March 1, 2007, GSAMP Trust 2007-HE2, has caused this instrument to be executed by Benjamin Z. Karp as Contract Management Coordinator, thereunto duly authorized, this 6 day of August, 2012.

Received
Recorded Register of Deeds
Aug 27, 2012 01:16:20P
Cumberland County
Pamela E. Lovley

U.S. Bank National Association, As Successor Trustee To Bank Of America, National Association As Successor By Merger To LaSalle Bank National Association, As Trustee Under The Pooling And Servicing Agreement Dated As Of March 1, 2007, GSAMP Trust 2007-HE2 By Owen Loan Servicing, LLC its attorney-in-fact

Marlene Saunders
Witness Marlene Saunders

Benjamin Z. Karp
Name: Benjamin Z. Karp
Title: Contract Management Coordinator
Company: Owen Loan Servicing, LLC

STATE OF Florida
COUNTY OF Palm Beach . August 8, 2012

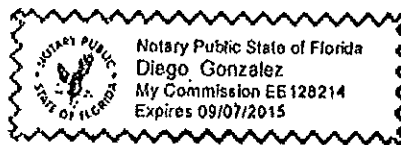
On 8/6/2012, before me, Diego Gonzalez, Notary Public, personally appeared (Name) Benjamin Z. Karp, the (Contract Management Coordinator) (Company) Owen Loan Servicing, LLC as attorney-in-fact for U.S. Bank National Association, As Successor Trustee To Bank Of America, National Association As Successor By Merger To LaSalle Bank National Association, As Trustee Under The Pooling And Servicing Agreement Dated As Of March 1, 2007, GSAMP Trust 2007-HE2 who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and of his/her free act and deed in said capacity and the free act and deed of Owen Loan Servicing, LLC as attorney-in-fact for U.S. Bank National Association, As Successor Trustee To Bank Of America, National Association As Successor By Merger To LaSalle Bank National Association, As Trustee Under The Pooling And Servicing Agreement Dated As Of March 1, 2007, GSAMP Trust 2007-HE2 and that his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Florida that the foregoing paragraph is true and correct.

Witness my hand and official seal.

Diego Gonzalez
Notary Public

(Print Name and Affix Seal)



Assessor's Office | 389 Congress Street | Portland, Maine 04101 | Room 115 | (207) 874-8486

City Home Departments City Council E-Services Calendar Jobs

This page contains a detailed description of the Parcel ID you selected. Press the **New Search** button at the bottom of the screen to submit a new query.

Current Owner Information:

Services	CBL	067 C003001
	Land Use Type	FIVE TO TEN FAMILY
	Property Location	374 PARK AVE
Applications	Owner Information	BANK OF AMERICA 4828 LOOP CENTRAL DR HOUSTON TX 77081
Doing Business	Book and Page	29056/147
Maps	Legal Description	67-C-3 PARK AVE 372-374
Tax Relief		7470 SF
Tax Roll	Acres	0.1715

Q & A

Current Assessed Valuation:

browse city services a-z	TAX ACCT NO.	10972	OWNER OF RECORD AS OF APRIL 2012 BANK OF AMERICA
browse facts and links a-z	LAND VALUE	\$70,000.00	4828 LOOP CENTRAL DR HOUSTON TX 77081
	BUILDING VALUE	\$87,700.00	
	NET TAXABLE - REAL ESTATE	\$157,700.00	
	TAX AMOUNT	\$2,967.92	



Best viewed at 800x600, with Internet Explorer

Any information concerning tax payments should be directed to the Treasury office at 874-8490 or [e-mailed](#).

Building Information:

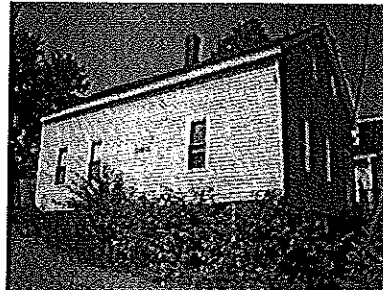
	Building 1
Year Built	1920
Style/Structure Type	APARTMENT - GARDEN
# Units	2
Square Feet	2112

[View Sketch](#) [View Map](#) [View Picture](#)



	Building 2
Year Built	1920
Style/Structure Type	APARTMENT - GARDEN
# Units	3
Square Feet	3952

[View Sketch](#) [View Map](#) [View Picture](#)



Exterior/Interior Information:

	Building 1
Levels	B1/B1
Size	704
Use	UNFINISHED RES BSMT
Height	6
Heating	NONE
A/C	NONE

	Building 1
Levels	01/01
Size	704
Use	APARTMENT
Height	8
Walls	FRAME
Heating	ELECTRIC
A/C	NONE



Your CMP account number:
441-038-3887-034



Central Maine Power
credit assistance line
1-800-686-4044
To report a power outage: 1-800-696-1000



HILL STREET ARTS LLO
372 R PARK AVE APT 3
PORTLAND ME
Service location

Billing date: 11/30/12

Read cycle: 19

Page 001 of 003

Customer Meter Summary

Meter Number	Read Date	Prior Read Date	Number of Days	Meter Reading	Prior Meter Reading	Total KWH
G053048729	11/29/12	10/29/12	31	100	66	34

Account Summary

Prior balance						\$36.07
Payments received through 11/30/12 - (thank you)					\$40.83-	
Other					\$40.83+	
Balance forward						\$36.07
New charges						
Electricity Delivery: Central Maine Power (see detail below)					\$9.41+	
Electricity Supply: Standard Offer Service					\$2.53+	
Total new charges						\$11.94
Current Account Balance:						\$48.01

Please pay before 12/29/12

Central Maine Power Delivery Service Account Detail

Prior balance for Central Maine Power delivery						\$31.16
Payments received - thank you					\$37.03-	
Other					\$35.54+	
Balance forward						\$29.67
Current delivery charges						
Delivery Charges: Residential						
Delivery Service:	34 KWH				\$9.41+	
Up to	100 KWH @	\$9.41				
Over	100 KWH @	.065831				
Total current delivery charges						\$9.41
Central Maine Power account balance						\$39.08

Please see back page for important information.

Your electricity usage (in kilowatt hours)

	11/12	10/12	09/12	08/12	07/12	06/12	05/12	04/12	03/12	02/12	01/12	12/11	11/11
Daily	1	3											
Monthly	34	66											

Please return this stub with payment to GMP. If applicable, supply payments are forwarded to the appropriate energy provider. Do not send cash or coins, and do not return with staples or paper clips. Refer to back to fill in information for mail address changes or to sign up for the Automatic Payment Option plan.



Your CMP account number:
441-038-3887-034

Central Maine Power
PO Box 11752
Newark, NJ 07101-4752

Please pay this amount:
\$48.01
before 12/29/12 so you
can avoid late charges

AV 01 005712 76773B 27 A**5DGT
HILL STREET APTS LLC
212 SAINT JOHN ST
PORTLAND ME 04102-3041

Please write
amount paid:



\$ _____
Thank you!

Please do not write below this line

741130124410383887034000004801

005712 1/2

125

11/11/12 11:11:11 AM



Billing date: 10/30/12

Read cycle: 19

Page 001 of 003

Customer Meter Summary

Meter Number	Read Date	Prior Read Date	Number of Days	Meter Reading	Prior Meter Reading	Total KWH
G053048757	10/29/12	09/28/12	31	0	0	0

Account Summary

Prior balance		\$0.00
Payments received through 10/30/12	\$0.00+	
Balance forward		\$0.00
New charges		
Electricity Delivery: Central Maine Power (see detail below)	\$92.41+	
Electricity Supply: Standard Offer Service	\$0.00+	
Total new charges		\$92.41
Current Account Balance:	Please pay before 11/26/12	\$32.41

Central Maine Power Delivery Service Account Detail

Prior balance for Central Maine Power delivery		\$0.00
Payments received	\$0.00+	
Balance forward		\$0.00
Current delivery charges		
Delivery Charges: Residential Delivery Service:		
0 KWH		\$9.41+
Up to 100 KWH @ \$9.41		
Over 100 KWH @ .065831		
Establish service charge	\$23.00+	
Total current delivery charges		\$32.41
Central Maine Power account balance		\$32.41

Messages about your Central Maine Power delivery account

We'll go to any height to provide reliable service! We inspect our transmission lines via helicopter to look for potential problems before they cause an outage. This preventative maintenance helps provide reliable service.

Please see back page for important information

Your electricity usage (in kilowatt hours)

	10/12
Daily	0
Monthly	0

Please return this stub with payment to CMP. If applicable, supply payments are forwarded to the appropriate energy provider. Do not send cash or coins, and do not return with staples or paper clips. Refer to back to fill in information for mail address changes or to sign up for the Automatic Payment Option plan.



Your CMP account number: 441-185-9278-001



Central Maine Power PO Box 11752 Newark, NJ 07101-4752

Please pay this amount \$32.41 before 11/26/12 so you can avoid late charges

AV 01 005526 61409B 25 A**50GT HILL STREET APTS LLC 212 SAINT JOHN ST PORTLAND ME 04102-3041

Please write amount paid:



\$

Thank you!

Please do not write below this line

811030124411859278001000003241

005526 1/2

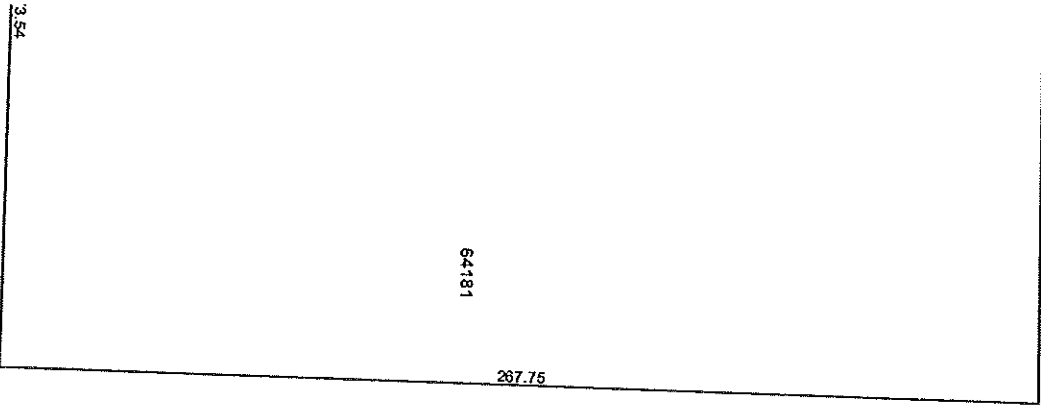
126

005526 1/2

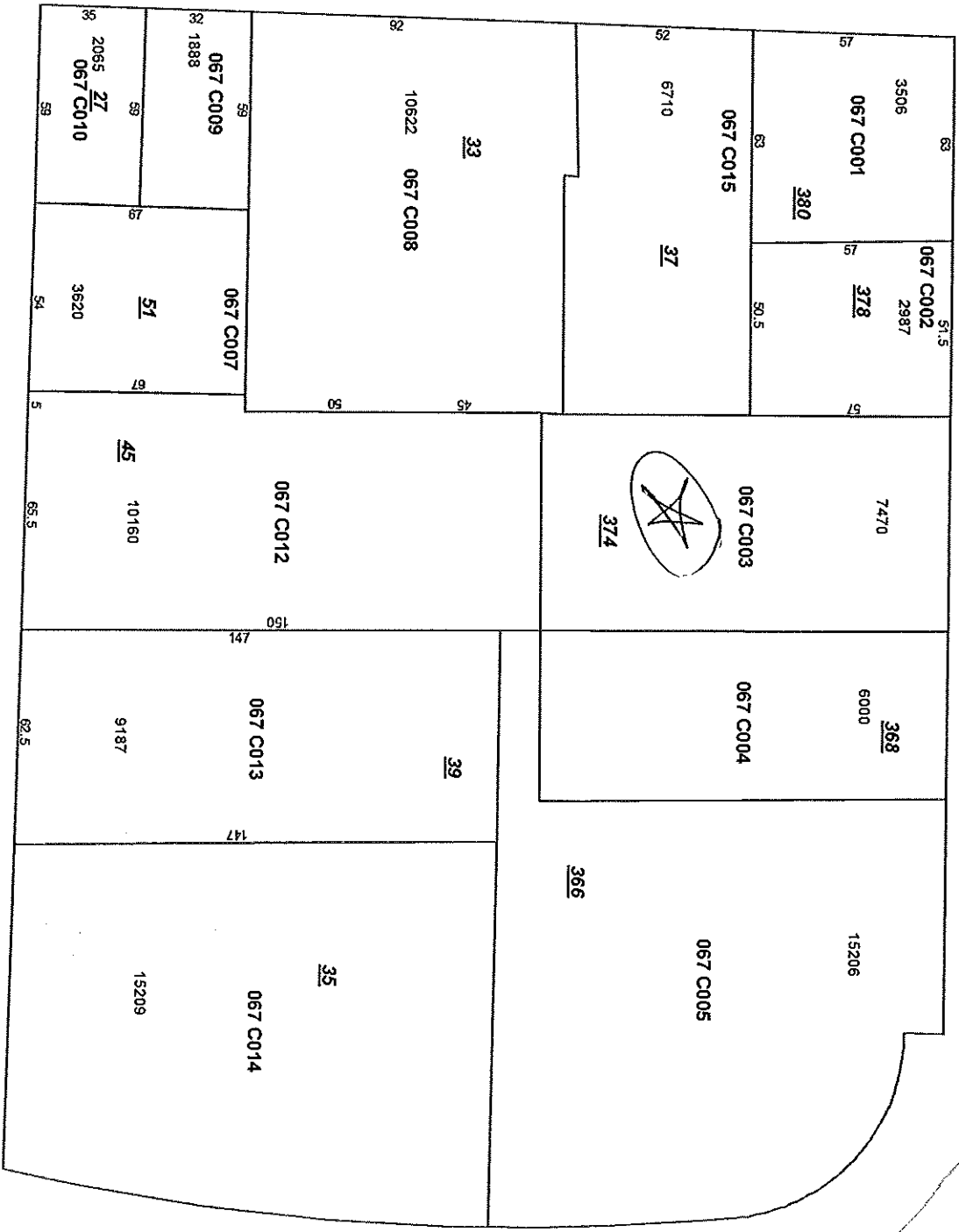
583 - 573
983 - 973

623 - 653
723 - 093

0 - 0
0 - 0



LOWELL ST 24 - 50
23 - 47

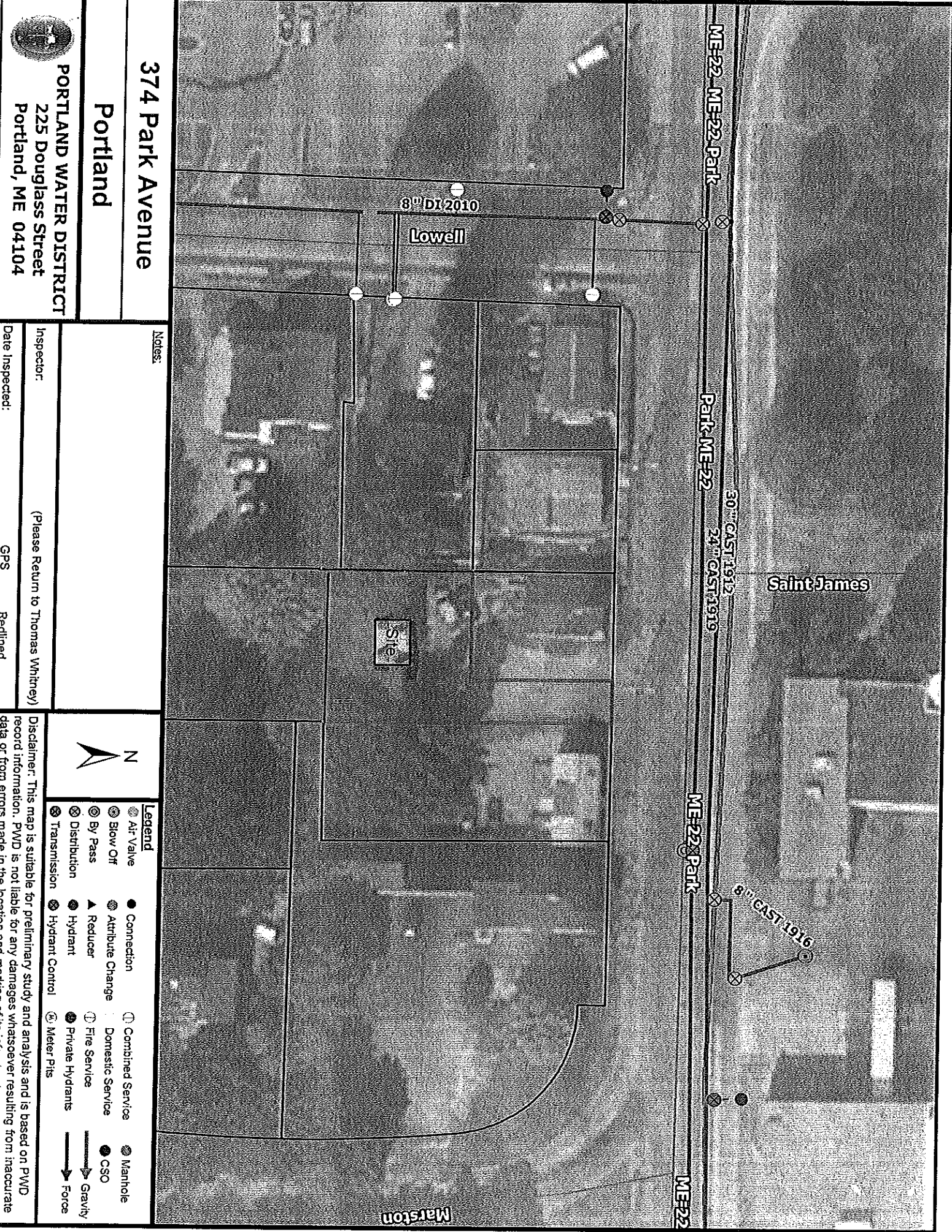


79 - 59
99 - 45

BURNHAM ST 35 - 22
25 - 92

140.89

22 - 32
11 - 31



374 Park Avenue

Portland

PORTLAND WATER DISTRICT
 225 Douglas Street
 Portland, ME 04104

Notes:

Inspector:

(Please Return to Thomas Whitney)

Date Inspected:

GPS _____ Redlined _____



Legend

- Air Valve
- Blow Off
- By Pass
- Distribution
- Transmission
- Connection
- Attribute Change
- ▲ Reducer
- Hydrant
- Hydrant Control
- Combined Service
- Domestic Service
- Fire Service
- Private Hydrants
- ⊗ Meter Pits
- Manhole
- CSO
- Gravity
- Force

Disclaimer: This map is suitable for preliminary study and analysis and is based on PWD record information. PWD is not liable for any damages whatsoever resulting from inaccurate data or from errors made in the location and marking of its infrastructure.

Carolyn Smart KEITH

v.

SACO RIVER CORRIDOR
COMMISSION.

Supreme Judicial Court of Maine.

Argued March 8, 1983.

Decided Aug. 3, 1983.

Property owner appealed from decision of the Saco River Corridor Commission denying her request for determination that her property was "grandfathered" and as such was not subject to restrictive provisions of Saco River Corridor Act. The Superior Court, York County, granted summary judgment to property owner, and Commission appealed. The Supreme Judicial Court, Dufresne, A.R.J., held that: (1) no legislative intent could be inferred from any of the provisions of Saco River Corridor legislation which would prohibit separate conveyance of parcels of land on which nonconforming buildings and structures have previously and continuously been factually treated separately simply because they happen to exist in common ownership at time zoning law was enacted, and (2) mere change from tenant occupancy to owner occupancy in proposed sale and division of three separate nonconforming lots and buildings thereon was not an extension, expansion or enlargement of previously existing nonconforming buildings, structures or use within meaning of restrictive provision of the Act, and thus property owner could as a matter of law convey dwellings with lots without being in violation of Act.

Judgment affirmed.

1. Zoning and Planning ⇄747

Where superior court justice, in deciding motion for summary judgment in appeal from Saco River Corridor Commission decision, did not take or receive any additional evidence, but made his decision entirely from record developed before Com-

mission, Supreme Judicial Court would review administrative record directly, same as superior court did, and determine whether Commission abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record. 38 M.R.S.A. §§ 951-968.

2. Zoning and Planning ⇄327

Proposed division and sale of three functionally divided nonconforming lots and buildings thereon continuously rented to tenants as separate lots for dwelling purposes was not prohibited by Saco River Corridor Act and property owner did not have to satisfy legal standards for variances from frontage and setback requirements of Act before she could obtain Saco River Corridor Commission's approval of proposed division and sale of lots. 38 M.R.S.A. §§ 951-968.

3. Zoning and Planning ⇄321

Policy of zoning is to gradually or eventually eliminate nonconforming uses as speedily as justice will permit; but implementation of goal must be carried out within legislative intent.

4. Zoning and Planning ⇄335

Saco River Corridor Act does not contemplate complete adherence to goal of gradually or eventually eliminating nonconforming uses, since Act expressly authorizes repair, maintenance and improvement of existing nonconforming buildings or structures and permits, without a permit from Saco River Corridor Commission, reconstruction of such buildings or structures in substantially the same location and in the same size when decreased in value less than 75% by flood, fire or other casualty. 38 M.R.S.A. § 958.

5. Zoning and Planning ⇄321

Central point to be kept in mind when dealing with nonconforming buildings or uses is that it is building or land that is "grandfathered" and not the owner.

6. Zoning and Planning ⇄323

Once a nonconforming use or building is shown to exist, neither is affected by

user's title or possessory right in relation to owner of land.

7. Zoning and Planning ⇌ 323

Where a nonconformity legally exists, it is a vested right which adheres to the land or building itself and right is not forfeited by a purchaser who takes with knowledge of regulations which are inconsistent with existing use.

8. Zoning and Planning ⇌ 336

Property owner who sought determination by Saco River Corridor Commission that her property was "grandfathered" and as such was not subject to requirements of Saco River Corridor Act did not, by merely invoking Commission's power to decide whether proposed division and sale of her three nonconforming lots were permissible, thereby relinquish her rights to existing nonconforming uses. 38 M.R.S.A. §§ 951-968.

9. Zoning and Planning ⇌ 10

Supreme Judicial Court could not infer legislative intent from any provisions of Saco River Corridor legislation which would prohibit separate conveyance of parcels of land on which nonconforming buildings or structures have previously and continuously been factually treated separately, simply because they happened to exist in common ownership at time zoning law was enacted. 38 M.R.S.A. §§ 951-968.

10. Zoning and Planning ⇌ 327

Test to be used to determine whether questioned use of property fits within "grandfathered" or exempted use granted to nonconforming uses is whether use reflects nature and purpose of use prevailing when zoning legislation took effect, whether there is created a use different in quality or character, as well as in degree, from

original use, or whether current use is different in kind in its effect on the neighborhood.

11. Zoning and Planning ⇌ 329

Mere change from tenant occupancy to owner occupancy in proposed division and sale of three nonconforming lots and buildings thereon was not an "extension, expansion or enlargement" of the previously existing nonconforming buildings, structures or use within meaning of restrictive provision of section of Saco River Corridor Act. 38 M.R.S.A. § 958.

See publication Words and Phrases for other judicial constructions and definitions.

Smith & Elliott, Roger S. Elliott (orally), Karen B. Lovell, Saco, for plaintiff.

Hugh Calkins, Dover-Foxcroft (orally), for defendant.

Before McKUSICK, C.J., GODFREY, NICHOLS, CARTER * and WATHEN, JJ., and DUFRESNE, A.R.J.

DUFRESNE, Active Retired Justice.

The defendant-appellant, Saco River Corridor Commission (the Commission), appeals from the order of the Superior Court, York County, granting summary judgment to the plaintiff-appellee, Carolyn Smart Keith, in her appeal from a Commission decision denying Keith's request for a determination by the Commission that the premises located at 520-524 Ferry Road, in the City of Saco, were grandfathered and as such were not subject to the requirements of 38 M.R.S.A. § 957-B.3.E(3) and (5), or, in the alternative, for the grant of a variance from the requirements of the Act.¹ The Superior

3. *Uses allowed by permit.* Uses within the Limited Residential District which may be allowed by permit shall include:

E. Single family residences and accessory structures meeting all of the following performance standards:

(3) The combined river frontage and setback of any building shall be not less than 500 feet;

* Carter, J., sat at oral argument and participated in the initial conference but resigned before this opinion was adopted.

1. The Saco River Corridor Act, 38 M.R.S.A. §§ 951-968, provides as follows:

§ 957-B. *Limited Residential District*

Court found that the property in question had been "functionally divided" as separate lots by tenant occupation since before the enactment of the Act and concluded that, as such, the premises were lawful existing nonconforming uses under 38 M.R.S.A. § 958 and that the proposed shift from tenant-occupation to owner-occupation of the delineated lots did not constitute an extension, expansion or enlargement of the existing nonconforming use so as to defeat the grandfathered status of the property. The Superior Court did not reach the issue respecting Keith's entitlement *vel non* to a variance. We agree with the Superior Court's decision and affirm the judgment below.

Facts

Carolyn Smart Keith is the owner of land on the Ferry Road in Saco which she purchased in the early 1950's as one lot. From that time to the present, the structures thereon, together with appropriate curtilage, were separately occupied and used by tenants. The plot contained a duplex residence, and two detached single-family houses with garage, each dwelling being served by its own utility and sewage disposal system. The parties concede that the three dwelling houses and other structures on the land were lawful as such and in their use on March 19, 1974,² and thus, if the land remains undivided, "may continue although such use of structure does not conform to this chapter," etc. 38 M.R.S.A. § 958.

Keith proposes to divide the land into four separate lots with fixed delineated boundaries; each one of the three lots closest to the Ferry Road will have one of the dwelling-houses thereon. These three lots, she proposes to sell, while the fourth lot

situated in the rear and vacant, she would keep for herself. Situated on their separate smaller lots which Keith proposes to sell, none of the dwellings would conform to the aggregate frontage and setback requirements of the Act, nor would they ever be able to conform in the future; the vacant lot could be built on without problem.

Faced with this situation, Keith sought from the Commission a determination that her proposed division and sale of the three separate lots and buildings thereon were not subject to the restrictions of the Act on the ground that, prior to the enactment of the Act and continuously thereafter, the three lots were treated as functionally divided and used as such under separate tenanted occupancies. As alternative relief, Keith requested variances under the Act which would permit the project to go through. The Commission rejected Keith's contention that her land was exempt from the strictures of the Act and denied her relief by way of granting her the variances she was requesting. On appeal, the Superior Court reviewed the administrative record before the Commission, the pleadings and argument of counsel, which resulted in a decision in favor of the plaintiff-appellee on her contention that the strictures of the Act did not apply to her nonconforming property.

The issue raised by the Commission's appeal is, whether the mere change from tenant occupancy of the three separate lots to owner occupancy under Keith's lot division and sale proposal would be an extension, expansion or enlargement of existing buildings, structures or of nonconforming uses

(5) Where there is an accepted road or public right of way, as of March 19, 1974, within 500 feet of the normal or mean high water mark of the river with different land ownership on either side of the road or public right of way, the landowner on the far side of the road or public right of way from the river shall have an aggregate of setback from the river and frontage on the far side of the road or public right of way equal to 500 feet.

2. The Saco River Corridor, enacted in 1979, c. 459, § 1, effective September 14, 1979, was a re-enactment of previous private and special legislation which became effective originally October 3, 1973. (See P & SL 1973, c. 150, as amended by P & SL 1973, c. 208, and by PL 1977, c. 276).

prohibited by 38 M.R.S.A. § 958 except on permit from the Commission.³

Preliminary considerations

[1, 2] Initially, we note that the Superior Court justice, in deciding the motion for summary judgment, did not take or receive any additional evidence, but made his decision entirely from the record developed before the Commission. Under such circumstances, we review the administrative record directly, the same as the Superior Court did, and determine whether the Commission abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record. *Driscoll v. Gheewalla*, 441 A.2d 1023, 1026 (Me.1982). See *Thornton v. Lothridge*, 447 A.2d 473 (Me.1982). Here, we say that the Commission committed error of law when it ruled against the plaintiff-appellee's contention. The proposed division and sale of the three functionally divided nonconforming lots and buildings thereon continuously rented to tenants as separate lots for dwelling purposes was not prohibited by the Act and the plaintiff-appellee did not have to satisfy the legal standards for variances from the frontage and setback requirements of the

Act before she could obtain Commission approval of the proposed division and sale of the lots. The Commission ruling to the contrary was based largely on the stated reason that

"Division of the parcel as proposed would eliminate any future possibilities for conformance to the requirements of the Act."

Having ruled that it had authority to approve or disapprove Keith's project *only* on the basis of variances legally allowable from the setback and frontage requirements of the Act, the Commission denied the relief sought by the plaintiff-appellee. We do not reach the variance issue on this appeal.

We further note that the Saco River Corridor legislation was expressly stated to be a comprehensive chart regulating the use of land and water in the area of the so-called Corridor.⁴ Although one of the purposes of the Act is said to be—to prevent overcrowding—nowhere in the Act is the Commission given express authority to regulate subdivisions of land as such. As a matter of fact, the Act contemplates full compliance with

3. 38 M.R.S.A. § 958 provides in pertinent part as follows:

§ 958. *Existing uses*

Any existing building or structure or use of building or structure lawful March 19, 1974, or of any subsequent amendment of this chapter or of any regulation adopted hereunder, may continue although such use of structure does not conform to this chapter or the regulations adopted hereunder. Any existing building or structure may be repaired, maintained and improved, but an existing building, structure or nonconforming use may be extended, expanded or enlarged only by permit from the commission. A nonconforming use, other than a single family residential use, which is discontinued for any reason for a period of one year shall be deemed abandoned and may not be resumed thereafter except on compliance with the requirements of this chapter.

If, as a result of flood, fire or other casualty, the value of a nonconforming building or structure is reduced by more than 75%, it may be rebuilt and the nonconforming use housed therein may be continued only by permit from the commission. If a nonconforming building or structure is decreased in value less than 75% by flood, fire or other casualty, it may be

rebuilt in substantially the same location and in the same size without a permit from the commission, even though it would otherwise violate the requirements of this chapter, provided that the rebuilding shall be commenced within 12 months of the casualty. (Emphasis supplied).

4. The purposes as listed in 38 M.R.S.A. § 951 are enumerated as follows:

In view of the dangers of intensive and poorly planned development, it is the purpose of this chapter to preserve existing water quality, prevent the diminution of water supplies, to control erosion, to protect fish and wildlife populations, to prevent undue extremes of flood and drought, to limit the loss of life and damage to property from periodic floods; to preserve the scenic, rural and unspoiled character of the lands adjacent to these rivers; to prevent obstructions to navigation; to prevent overcrowding; to avoid the mixture of incompatible uses; to protect those areas of exceptional scenic, historic, archaeological, scientific and educational importance; and to protect the public health, safety and general welfare by establishing the Saco River Corridor and by regulating the use of land and water within this area. (Emphasis added).

all federal, state and municipal regulations. See 38 M.R.S.A. §§ 959 and 961. The parties agree that the instant proposed division was not subject to control by the Board of Environmental Protection which is given authority over large subdivisions of land in excess of 20 acres. Also, the Planning Board of the City of Saco has determined that Keith's proposed division of land is exempt from subdivision review under the provisions of 30 M.R.S.A. § 4956.

[3, 4] True, as relied on by the Commission, the policy of zoning is to gradually or eventually eliminate nonconforming uses as speedily as justice will permit. *Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548, 552-53 (Me.1966); *Vermont Brick v. Village of Essex Junction*, 135 Vt. 481, 380 A.2d 67, 69 (1977); *Taylor v. Metropolitan Development Commission*, 436 N.E.2d 1157, 1159 (Ind.App.1982). But the implementation of this goal must be carried out within legislative intent. Here, the Act does not contemplate complete adherence to such objective, since the Act expressly authorizes the repair, maintenance and improvement of existing nonconforming buildings or structures and permits the reconstruction of such buildings or structures in substantially the same location and in the same size when decreased in value less than 75% by flood, fire or other casualty, and this, without a permit from the Commission.

[5-7] Also, the central point to be kept in mind when dealing with nonconforming buildings or uses is, that it is the building or the land that is "grandfathered" and not the owner. *Stewart v. Inhabitants of Town of Durham*, 451 A.2d 308, 310 (Me.1982); *Appeal of E & G Auto Parts*, 22 Pa.Cmwlth. 171, 348 A.2d 438, 440 (1975); *State ex rel. Keeven v. City of Hazelwood*, 585 S.W.2d 557 (Mo.App.1979). Once a nonconforming use or building is shown to exist, neither is affected by the user's title or possessory rights in relation to the owner of the land. *Your Home, Inc. v. City of Portland*, 432 A.2d 1250, 1260 (Me.1981); *County of Fayette v. Cossell*, 60 Pa.Cmwlth. 202, 430 A.2d 1226, 1229 (1981); *Graham Court As-*

sociates v. Town Council, 53 N.C.App. 543, 281 S.E.2d 418, 420 (1981). Where a nonconformity legally exists, it is a vested right which adheres to the land or building itself and the right is not forfeited by a purchaser who takes with knowledge of the regulations which are inconsistent with the existing use. *Johnny Cake, Inc. v. Zoning Board of Appeals*, 180 Conn. 296, 429 A.2d 883, 885 (1980); *Petruzzi v. Zoning Board of Appeals*, 176 Conn. 479, 408 A.2d 243, 246 (1979); *People v. Smith*, 38 Ill.App.3d 798, 349 N.E.2d 91, 92 (1976).

[8] The plaintiff-appellee acted reasonably in seeking Commission approval of her proposed plan to divide and sell her property. In so doing, she sought an official determination of the legality of her proposal from the agency whose duty it is to enforce the Act. She merely invoked the Commission's power to decide whether the proposed division and sale of the three nonconforming lots were permissible. She thereby did not relinquish her rights to the existing nonconforming uses. *Abbadessa v. Board of Zoning Appeals*, 134 Conn. 28, 54 A.2d 675, 678 (1947). See also *Watts v. City of Helena*, 151 Mont. 138, 489 P.2d 767, 769 (1968). The plaintiff-appellee's initial application to the Commission followed the directive of this Court in *State ex rel. Brennan v. R.D. Realty Corporation*, 349 A.2d 201, 206 (Me.1975), which suggested a determination first by the administrative agency, whether a project is subject to regulation by the pertinent authority or exempt therefrom by the "grandfather clause."

Merits

[9] The only real difference in the change contemplated by the division and sale of the three reference lots is a change in ownership. Without clear language to the contrary, we cannot infer a legislative intent from any of the provisions of the Saco River Corridor legislation which would prohibit the separate conveyance of parcels of land on which nonconforming buildings or structures have previously and continuously been factually treated sepa-

Cite as 464 A.2d 150 (Me. 1983)

rately, as in the instant case, simply because they happened to exist in common ownership at the time the zoning law was enacted. See *LaPointe v. City of Saco*, 419 A.2d 1013, 1016 (Me.1980). This is consistent with our holding in *Wickenden v. Luboshutz*, 401 A.2d 995 (Me.1979). This case is distinguishable from *Barnard v. Zoning Board of Appeals of Town of Yarmouth*, 813 A.2d 741 (Me.1974), where the alleged functional division of a large lot into two separate lots was found to exist only in the owner's subjective plan to erect a second dwelling on the land in order to maximize the potential return of her land holdings. In the instant case, the three nonconforming buildings preexisted the legislation.

Section 958 of title 38 provides that an existing [nonconforming] building, structure or nonconforming use may be extended, expanded or enlarged only by permit from the commission. The issue is whether Keith's planned separate conveyances of her three separate nonconforming dwellings with suitable curtilages of land as continuously functionally used by tenants prior to and since the enactment of the Saco River Corridor legislation, without resulting compliance with aggregate of setback and frontage requirements of 38 M.R.S.A. § 957-B.3.E.5, constitutes an unlawful extension, expansion or enlargement of a previously existing nonconforming use. We are aware that, in construing legislation dealing with nonconforming uses recognized as a valid means of preserving particular uses of property existing prior to the enactment of a zoning law, the accepted legal standard has been to strictly construe zoning provisions relating to the extension, expansion or enlargement of nonconforming buildings or uses. See *Abbot v. Commonwealth*, 56 Pa.Cmwlth. 482, 425 A.2d 856, 858 (1981). But the plaintiff's proposed conveyance of three separate lots with their respective nonconforming buildings thereon in the instant case does not come into conflict with the stated principle.

[10] Indeed, the test to be used to determine whether the questioned use of proper-

ty fits within the "grandfathered" or exempted use granted to nonconforming uses is: (1) whether the use reflects the "nature and purpose" of the use prevailing when the zoning legislation took effect; (2) whether there is created a use different in quality or character, as well as in degree, from the original use, or (3) whether the current use is different in kind in its effect on the neighborhood. *Town of Bridgewater v. Chuckran*, 351 Mass. 20, 217 N.E.2d 726, 727 (1966). Examples of unlawful extensions, expansions or enlargements of nonconforming uses will be seen in cases such as *Appeal of Veltri*, 355 Pa. 135, 49 A.2d 869 (1946); *Fulford v. Board of Zoning Adjustment*, 256 Ala. 336, 54 So.2d 580 (1951); *Salerni v. Scheuy*, 140 Conn. 566, 102 A.2d 528, 530-31 (1954); *Council of the Town of Los Gatos v. State Board of Equalization*, 141 Cal.App.2d 344, 296 P.2d 909 (1956); *Jasper v. Michael A. Dolan, Inc.*, 355 Mass. 17, 242 N.E.2d 540 (1968); *New Castle County v. Harvey*, 315 A.2d 616 (Del.Ch., 1974); *Hooper v. Delaware Alcoholic Beverage Control Commission*, 409 A.2d 1046 (Del.Supr., 1979). But see *Schneider v. Board of Appeals*, 402 Ill. 536, 84 N.E.2d 428 (1949); *Keller v. City of Bellingham*, 92 Wash.2d 726, 600 P.2d 1276 (1979).

[11] The mere change from tenant occupancy to owner occupancy in the instant case is not an extension, expansion or enlargement of the previously existing nonconforming buildings, structures or use within the meaning of the restrictive provision of section 958. *Beers v. Board of Adjustment of Township of Wayne*, 75 N.J.Super. 305, 183 A.2d 130 (1962); *Town of Seabrook v. Tra-Sea Corporation*, 119 N.H. 937, 410 A.2d 240, 244 (1979); *Town of Coventry v. Glickman*, 429 A.2d 440, 442 (R.I.1981). See also *Graham Court Associates v. Town Council*, 53 N.C.App. 543, 281 S.E.2d 418 (1981) (conversion to condominium style of ownership). The case of *Isabelle v. Town of Newbury*, 114 N.H. 399, 321 A.2d 570 (1974), is distinguishable from the instant case, since in *Isabelle* the town had specific subdivision regulations properly

enacted under enabling legislation, whereas the Saco River Corridor Act does not purport to regulate land subdivisions. The post-sale fragmented title in no way would modify the nature or purpose of the preexisting nonconformity of the respective buildings on the land, nor would it reflect any alteration in the land use itself prevailing at the time the Saco River Corridor Act took effect, nor would it under any view of the factual situation create a new use different in quality, character or degree, from the original use; no change in intensity of use would result. Had the Keith holdings as functionally divided been owned by three different individuals at the time of the Act and each of them desired to convey his separate lot, there would be no zoning impediment to the sale. We cannot see wherein a different result should obtain simply because all the already functionally divided lots are owned by only one person. See *Goldstein v. Lincoln Park Planning Board*, 52 N.J.Super. 44, 144 A.2d 724, 727 (1958). See also *Appeal of E & G Auto Parts*, 22 Pa.Cmwlth. 171, 348 A.2d 488, 440 (1975).

For the reasons stated, we conclude and hold that the plaintiff-appellee may as a matter of law convey the reference dwellings with the proposed suitable delineated lots without being in violation of the Saco River Corridor Act and do affirm the judgment of the Superior Court, to the extent that it declares the rights of the plaintiff-appellee as the following entry indicates:

Judgment affirmed.

The proposed change of occupancy from tenant-occupation to owner-occupation is not a change of use, nor does it constitute an extension, expansion or enlargement of the existing lawful nonconforming use in violation of 38 M.R.S.A. § 957-B.3.E(3) and (5) or § 958.

All concurring.



The HANOVER INSURANCE
COMPANY

v.

Clinton R. HAYWARD, Jr.

Supreme Judicial Court of Maine.

Argued May 9, 1983.

Decided Aug. 8, 1983.

Appeal was taken from a judgment of the Superior Court, Washington County, denying insurer punitive damages in action to recover insurance it paid defendant convicted of arson relative to fire for which he was paid insurance. The Supreme Judicial Court, Nichols, J., held that: (1) trial court did not abuse its discretion in refusing to award insurer punitive damages in light of defendant's lack of assets and deterrent effect served by defendant's three-year sentence for arson, and (2) for purposes of civil action, prior criminal action for arson was conclusive proof of all facts necessarily adjudicated in earlier criminal conviction.

Appeal and cross appeal denied; judgment affirmed.

1. Damages \Leftrightarrow 91(1)

Award of punitive damages, when available, is within sound discretion of fact finder after weighing all relevant aggravating and mitigating factors; aggravating factors may include whether defendant's conduct was intentional, wanton, malicious, reckless or grossly negligent, while mitigating factors may include defendant's good faith, defendant's lack of assets to satisfy award of punitive damages, or any other factor indicating that award of punitive damages would not serve deterrent function beneficial to society.

2. Damages \Leftrightarrow 181

Fact finder may consider defendant's wealth in making award of punitive damages.