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Jeff Levine, AICP, Director
Marge Schmuckal, Zoning Administrator

TO: Chair and Zoning Board of Appeals
FROM: Marge Schmuckal, Zoning Administrator
SUBJECT: 372-374 Park Avenue - 067-C-003
DATE: April 26, 2013

This appeal is in regard my determination letter dated March 7, 2013 concerning the request to functionally divide a parcel in common ownership with two separate structures located thereon. In making my determination, I used the Law Court's ruling of Keith v. Saco River Corridor Commission.

In its ruling, the Law Court outlined criteria that was used for its decision making process. I believe that each of the three criteria outlined must be met in order to meet the concept of a "functional division" of land. Each of the three criteria is essential to determining compliance with a "functional division". My analysis revealed that the property met the first two *Keith* criteria, but not the third criteria which requires each structure to be served by its own utility and sewage disposal system. I do not agree that my analysis place undue emphasis on the failure to meet the third criteria. I believe that it is a major factor that the two structures be independent of each other and can operate separately. The applicant affirms that both structures on the property share water and sewer (two different utilities) lines. Part of the *Keith* decision states that the buildings or structures be "previously and continuously" functioning separately and to be "continuously functional" as such. The fact is that the two structures on the property do not and have not functioned separately and are dependent on both water and sewer services. This precludes the two structures from functioning separately from each other. Proposed easements would not rise to the level of meeting the *Keith* criteria and would not be acceptable as a substitute of such. The proposal does not meet the criteria for a "functional division" and cannot be divided using the *Keith* decision.

The underlying decision of my determination results in the proposed division of land to constitute a violation of the City of Portland Land Use Zoning Ordinance (section 14-422) which 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 believe that there is concurrently a violation of 38 M.R.S.A §957-B.3.E(3) and (5) or §958.

Therefore because this property cannot meet the criteria for a "functional division" and cannot meet section 14-422 of the Land Use Ordinance, it cannot be divided and must remain one property with two legally nonconforming structures.