

06/12

STATE OF MAINE
Cumberland, ss.

Ninth
Division
Civil &
Docket

Glean file

CITY OF PORTLAND, a body)
politic and corporate, located in the)
county of Cumberland and the)
State of Maine,)

Plaintiff)

v.)

JEFFREY S. JOHNSON and SANDRA)
A. JOHNSON,)

Defendants)

CONSENT DECREE

1. Description of Property.
The property is situated at 52-54 Codman Street.

128-A-9

2. Code Violations.
The City of Portland charges the Defendants with violations of its Land Use Code for permitting use and occupancy of 52-54 Codman Street as a four-family residential unit, instead of as a two-family residential unit, as required by the R-3 Zone in which the property is located.

3. Admission of Violations.
The Defendants neither admit nor deny the said violations, but agree to be bound by this Order.

4. Cure of Violations.
(i) The Defendants, jointly and severally, agree to cease and desist from the proscribed activity (all as more fully set forth in the Land Use Citation and Complaint which forms the basis of this action) upon the sooner to occur of either of the two events described below (the "triggering event"):

- (a) the Defendants convey their interest in the property to a third party; or
- (b) the survivor of them dies.

(ii) Upon the occurrence of the triggering event, the property will revert to two-family use within ninety (90) days from such event.

(iii) At the time of the commencement of the said ninety day period, either the owner of the property or the person having control of it (jointly and severally referred to as "Responsible Person") will give notice to those tenants who will be required to vacate the two illegal units.

(iv) If the tenants in the two illegal dwelling units have not vacated them within sixty (60) days from the time of the triggering event, the Responsible Person will be required to commence and to prosecute diligently forcible entry and detainer actions, seeking their eviction.

(v) At the expiration of the ninety-day period, City Inspectors shall have full and free access to the structure during normal business hours to verify compliance.

(vi) After City Inspectors have verified compliance with the terms of this order, the City will reassess the property to reflect its status as a two-unit building.

5. Removal of Illegal Kitchens and Bathrooms.

(i) Compliance with this order and restoration of the premises to two-family use will require the removal of all the plumbing connections in the two illegal kitchens and the two illegal bathrooms as well as the removal of all electric power sources in excess of 120 volts which presently serve those kitchens and bathrooms except as provided below.

(ii) In the alternative, the two illegal bathrooms (or either of them) may be retained, provided that it or they, as the case may be, are made into an integral part of either the first or second floor apartments. The bathrooms, or either of them, will be deemed to have become an integral part of either of the said two apartments when, to the reasonable satisfaction of the Building Authority, the dwelling units in the building have been reconfigured to incorporate the said bathrooms functionally into two dwelling units, each with two bathrooms. Subject to the foregoing conditions, nothing herein shall be deemed to require removal of any water heaters serving those bathrooms at the time of the triggering event provided they are made an integral part of either the first or second floor apartments and provided further that the entire premises are served by no more than two water meters.

All work required by such reconfiguration will be performed in accordance with applicable City Codes.

(iii) Removal of the said plumbing and electrical connections will be completed in such a way that the appurtenances serving them will be removed within interior walls. Any penetrations caused by such removal will be patched and repaired in accordance with the City Code.

(iv) The purpose of the foregoing requirement is to prevent reestablishment of the appliances serving the illegal kitchens and bathrooms without the need for such work to be performed by licensed professionals acting under the authority of plumbing and electrical permits, assuming such a use were otherwise permitted.

6. Electrical Service.

As part of the restoration to two-family use, the electrical service will be reduced to two meters, and the two excess meters will be removed.

RECEIVED

MAY 20 2002

PORTLAND DISTRICT
COURT

7. Time of Cure.

The property shall be brought into compliance within ninety (90) days after the triggering event.

If the premises have not been restored to two-family use in conformity with this Order within ninety days from the triggering event, the following civil penalties will be assessed against the property:

<u>Days</u>	<u>Civil Penalty</u>
91 through 130	\$25.00
131 through 159	\$50.00
160 through 180	\$75.00

The foregoing penalties will be suspended on any day or days when the civil actions are being diligently prosecuted seeking the removal of any tenant who refuses to vacate.

The suspension of penalties provided for herein will expire on the 181st day following the triggering event (the "Deadline").

8. Violations Existing After Deadline.

For each and every violation which may occur after the deadline, a civil penalty in the amount of Two Hundred (\$200.00) Dollars per day, for each day such violation exists will be assessed against the property by the City and the City shall recover its attorney's fees and costs as provided in section 9.

9. Contempt.

In addition to the imposition of civil penalties referred to above, the Defendants may be found in contempt for any violation of this Order.

10. Attorney's Fees and Costs.

The Defendants will pay the City \$100.00 as costs. In addition, they will also be liable to pay attorney's fees and costs, pursuant to 30-A M.R.S.A. §4452(3)(D), relating to any action taken by the City of Portland to enforce this Order.

11. Relief from Order.

If, subsequently to the date of this order, use of the premises for more than two residential units should become legally permitted under Portland's Land Use Laws, then the Defendants or their successor in interest may petition the Court for relief from this order.

12. Notice of Change of Ownership.

The Defendants or the survivor of them will promptly notify the City of any change of ownership. Any instrument transferring their interest in the property shall reference this Order.

13. Recording.

The City of Portland will cause this Order or an attested copy thereof to be recorded both in the Cumberland County Registry of Deeds and also in the Office of Building Inspections.

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PORTLAND DISTRICT
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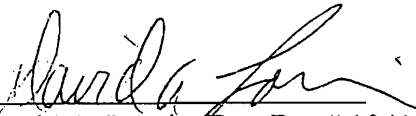
14. Notice to Tenants.

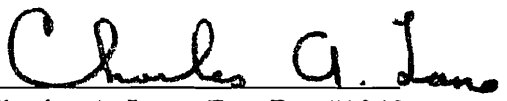
The Defendant's will furnish all present and future tenants with copies of this Order.

15. Submission to Court.

This Consent Decree is submitted to the Court by the parties jointly so that the Court may adopt it as its own Order.

Dated: May 16, 2002.


David A. Lourie, Esq. Bar # 1041
Attorney for the Defendants


Charles A. Lane, Esq. Bar #1040
Attorney for the Plaintiff

ORDER

The foregoing Consent Decree is hereby adopted as the Order of the Court this 22nd day of May, 2002; and the Clerk is directed to enter it upon the docket pursuant to M.R.Civ.P. 79(a).



Judge, Ninth District Court

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A true copy attest:

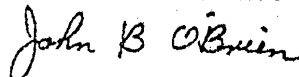


Clerk

RECEIVED
RECORDED REGISTRY OF DEED:

2002 MAY 29 PM 2: 27

CUMBERLAND COUNTY



128-A-9

Corporation Counsel
Gary C. Wood



CITY OF PORTLAND

Associate Counsel
Charles A. Lane
Elizabeth L. Boynton
Donna M. Katsiaficas
Penny Littell

February 12, 2002

David A. Lourie, Esquire
189 Spurwink Avenue
Cape Elizabeth, ME 04107

RE: 52-54 Codman Street (Illegal Units)

Dear David:

This is in response to your letter, dated January 5, 2002. Before drafting it, I reviewed records both in Building Inspections and in the Assessor's Office relating to 52-54 Codman Street (128-A-9), the subject property, and also 56-58 Codman Street (128-A-10), Mr. Johnson's residence since 1980. I also reviewed records in the Registry of Deeds.

I have read Town of Shapleigh v. Shikles, cited by you, and note that in footnote 4 the Court stated it was taking no position on the Defendant's assertion of estoppel. The facts in this case, as discussed below, suggest that the appropriate rule was stated in Turbat Creek Preservation, LLC v. Town of Kennebunkport, 2000 ME 109 ¶17: "A town cannot be equitably estopped from asserting a violation in a particular use of property when the renovations of the property leading to the use receive town approval based on misleading information provided by the applicant as to the nature of the renovations and the extent of the intended uses."

The Property Record Card shows that in 1953 52-54 Codman Street was a two family structure, containing two baths and two kitchens.

The next significant event relating to the property occurred on June 16, 1972, when a permit was issued to Ivan Perkins as owner to "... construct fire escape from third floor to ground...." The application recited: "No. families 2." Mr. Perkins did not acquire title to the property until three months later, however. See deed of Clifford A. Ridlon, et al. to Ivan A. Perkins, et al., dated September 30, 1971, and recorded in the Cumberland County Registry of Deeds in Book 3193, page 786.

David A. Lourie, Esq.
Re: 52-54 Codman Street
February 12, 2002
Page 2 of 4

Six months later, following issuance of the building permit, on December 18, 1972, Ivan Perkins conveyed the property to Mr. Johnson.

The City's next contact with the property occurred in 1975. On August 26, 1975, a neighbor complained that the property was being used as a three family dwelling. An inspection on August 29, 1975, however, revealed only two mailboxes and two electric meters. Nevertheless, on October 15, 1975, Mr. Johnson was sent a letter (addressed to 54 Codman Street) advising him of the complaint and instructing him to call within ten days. On October 17, 1975, Mr. Johnson called. A notation on that date, signed by retired building inspector Hugh Irving, indicates that Mr. Brown, his superior, would investigate.

There is no record of what action, if any, was taken by Mr. Brown.

For the period from December 1980 to March 1982, during Mr. Johnson's ownership, the Property Record Cards report the presence of four bathrooms, four kitchens, four mailboxes, four electric meters as well as a fourth apartment in the basement. No permit was issued in connection with any of those improvements nor was a certificate of occupancy issued authorizing a change of use from two units to four units.

In 1986, Mr. Johnson obtained an electrical permit to convert to a 100 amp service with three meters.

Two years later in 1988, after an inexplicable lapse, Mr. Johnson was sent letters advising him that the property was illegally being used as a four unit dwelling. The first letter was dated September 27, 1988, and addressed to him at 56 Codman Street. The second letter was dated November 10, 1988, and mailed to him at the same address. The third letter was dated May 25, 1989, and addressed to 52 Codman Street. During that period of time, Mr. Johnson's home was situated at 56-58 Codman Street, immediately adjacent to the subject property. Presumably, the Postal Authority would have been able to conclude that mail addressed to Jeffery S. Johnson at either 52 or 56 Codman Street could be delivered to him at 58 Codman Street, since he had been a resident there for approximately sixteen years.

On June 15, 1995, Tammy Munson congratulated Mr. Johnson, by means of a letter addressed to him at 58 Codman Street, on the general condition of his property.

The City's next contact with the property were the letters from Arthur Rowe which prompted your interest.

The record suggests that, sometime after he had acquired the property in December 1972, Mr. Johnson either acquiesced in the establishment of illegal units or created them himself – all without permits. In June 1972, the purported owner, Mr. Perkins, had represented to the City that the structure was in use as a two family dwelling. Approximately eight years later, however, in 1980-82 the structure is described

David A. Lourie, Esq.
Re: 52-54 Codman Street
February 12, 2002
Page 3 of 4

as containing four apartments and the number of kitchens and bathrooms has been increased from two to four. In regard to his personal residence, on the other hand, Mr. Johnson was more fastidious, acquiring an electrical permit for a 100 amp service in 1982, a home occupation permit in 1986, and a permit for an in-ground pool in 1994.

While the follow up by former members of Building Inspection was inadequate, their defalcation does not exonerate Mr. Johnson, particularly since, except for his response to the complaint about an illegal third unit on October 17, 1975, he took no action until Arthur Rowe's notice of violation prompted him to contact you.

Under the circumstances of this case, however, the City is not disposed to interrupt a source of income which Mr. Johnson and his wife reasonably anticipated would be available to them during their retirement. Accordingly, I am authorized to offer a compromise which, in general, would provide the following: Mr. & Mrs. Johnson may continue use of the property as a four unit dwelling until: (i) they convey their interest in the property, or (ii) the survivor of them has died, whichever event should occur sooner.

When either one of the above conditions has been satisfied, the property will be required to revert to two-family use within 90 days.

At the time of the commencement of the 90 day period, either the Johnsons or the survivor of them, or their successor in interest, will give notice to those tenants who will be required to vacate the illegal dwelling units.

If the tenants in the illegal dwelling units have not vacated them at the end of the 90 day period, either the Johnsons or the survivor of them, or their successors in interest, will be required to commence and prosecute forceful entry and detainer actions, seeking their eviction.

At the expiration of the said 90 day period, City Inspectors will be granted full and free access to the structure during normal business hours to verify compliance. After City Inspectors have verified compliance, the City will reassess the property to reflect its status as a two-unit building.

At a minimum, compliance will require the removal of all the plumbing connections in the two illegal kitchens and the removal of all electric power sources in excess of 120 volts which presently serve the said kitchens.

Removal of the plumbing and electrical connections will be completed in such a way that the appurtenances serving them will be disconnected within interior walls. Any penetrations caused by such removal will be patched and repaired in accordance with the City Code.

The purpose of the foregoing requirements will be to prevent reestablishment of the appliances serving the illegal kitchens without the need for such work being

David A. Lourie, Esq.
Re: 52-54 Codman Street
February 12, 2002
Page 4 of 4

performed by licensed professionals acting under the authority of plumbing and electrical permits, assuming such a use were otherwise permitted.

The above agreement will be reflected in a Consent Decree which will be recorded in the Cumberland County Registry of Deeds and on microfiche in Building Inspection.

Mr. Johnson will pay a \$100.00 filing fee for the enforcement action, and \$10.00 for recording fees, but the City will not seek civil penalties nor attorney's fees.

This offer of compromise will expire 30 days from the date of this letter.

THIS IS AN OFFER OF COMPROMISE SUBMITTED PURSUANT TO
M.R.EVID. 408.

Very truly yours,



Charles A. Lane
Associate Corporation Counsel

CAL:ses

Enclosures

CC: Gary C. Wood, Corporation Counsel
Michael J. Nugent, Manager of Inspection Services

O:\OFFICE\CHARLIE\LTR\Lourie 52-54 Codman St 02-06-02.doc

128-A-009

**CITY OF PORTLAND, MAINE
M E M O R A N D U M**


TO: Gary C. Wood, Corporation Counsel
FROM: Charles A. Lane, Associate Corporation Counsel
Ext. 8429
DATE: February 7, 2002
RE: 52-54 Codman Street (illegal units)

In early January, David A. Lourie, Esquire, wrote a letter (a copy of which is attached hereto) on behalf of the owner of the above described property. The owner had been advised by Arthur Rowe that the building contains two illegal apartments. David argued, on behalf of his client, that the City had not taken appropriate enforcement action and was either estopped or should ignore the violation, permitting Mr. Johnson to continue to use the building as a four unit dwelling.

My review of the facts in the case, however, as my letter to him indicates, suggests that approximately 30 years ago a real estate entrepreneur who held title to the property for only three months created an illegal third unit and that subsequently Mr. Johnson established a fourth illegal unit in the basement.

The purpose of this memorandum to you is to request that you review my letter to David, especially the proposed compromise. The compromise I propose to make is that the Johnsons (who are now retired) be allowed to continue use of the building with four units until they either transfer it or die; and that, following the occurrence of either of those events, the building will be restored to its grandfathered, two family use.

In view of the housing shortage in Portland, I am reluctant to send this letter to David without a consensus that this is an appropriate resolution of the matter.


Charles A. Lane
Associate Corporation Counsel

CAL:ses

Enclosures

CC: Michael J. Nugent, Manager of Inspection Services

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DAVID A. LOURIE
Attorney at Law
189 Spurwink Avenue
Cape Elizabeth, ME 04107
(207) 799-4922 - Fax 799-7865
dal@maine.rr.com

JAN 7 2002

January 5, 2002

Joseph E. Gray, Jr.
City Manager
City of Portland
389 Congress Street
Portland, Maine 04101

Gary Wood, Esq.
Corporation Counsel
Portland City Hall
389 Congress Street
Portland, ME 04101

RE: 54 Codman Street

Dear Joe and Gary:

I represent Jeffrey Johnson of 58 Codman Street. Mr. Johnson has owned the four (4) unit house at #54 Codman St. for almost thirty (30) years. Mr. Johnson recently retired from the telephone company, in part in reliance upon the income from four units on this property. Mr. Johnson recalls meeting with two representatives of building inspections with regard to the zoning in the late 1970's, at which time the City appeared satisfied that the four units were grandfathered. However, after passage of twenty (20) years, Mr. Johnson was contacted by Arthur Rowe last Fall and told that he had the burden of proving that two of the four units were illegal, and that if he could not do so he would have to eliminate them.¹

Arthur and I discussed this matter several times. While Arthur is sympathetic to Mr. Johnson's plight, he feels that his hands are tied by the ordinance and the department's policy of strict enforcement. He suggested that we go to the Board of Appeals. However, the Board remedy cannot help Mr. Johnson, unless we can prove that the four (4) units were present in 1958, and I can only document their existence for only about 35 years (about 10 years before Mr. Johnson bought the property.) Before that time, the trail of prior owners becomes too cold.²

¹ This determination was apparently as the result of a complaint made in retaliation for a complaint made by the Johnsons about a neighbor, although Arthur will not confirm this.

² Mr. Johnson located the broker (James DiPhilippo) who had sold the property to him in 1973. I interviewed Mr. DiPhilippo, who not only recalled the 1973 transaction but

Joseph E. Gray, Jr. and Gary Wood
Re: 54 Codman Street Zoning
January 5, 2002
Page 2

Arthur Rowe will be referring the case to Corporation Counsel shortly for legal action, if he has not yet done so already. I am writing to you in the hope that you will exercise some prosecutorial discretion in this matter, in light of the problems of proof and the City's record of neglect with respect to this matter.

The City's record of enforcement is as follows:

1. In 1972, Earle Smith issued a building permit for a 3rd floor fire escape to the then owner (Ivan Perkins.) As one of the units is in the attic, I do not understand why a permit would be approved for a fire escape to an "illegal" unit.
2. Two years later Hugh Irving apparently investigated the occupancy of 54 Codman Street before writing to Mr. Johnson on October 15, 1975 asking him to contact Malcolm Ward or Allan Soule concerning an alleged increase from *two to three units*. Mr. Johnson immediately contacted one of these persons. (Mr. Johnson recalls having discussions with two elderly City inspectors about this time.) Hugh Irving notes that Mr. Johnson contacted Malcolm Ward on 10-17-75, and that the matter was turned over to Bob Brown, who said he would investigate. Mr. Johnson heard nothing more after talking to Mr. Brown, and believed that the City was satisfied that there were no illegal units at 54 Codman Street.
3. Over thirteen (13) years later, Warren Turner wrote to Mr. Johnson *at 56 Codman Street* in September of 1988, questioning the density of the four units at 54 Codman Street. (This letter was mailed *to 56 Codman Street*. There is no such address, and Mr. Johnson says that he never got this letter.) On November 10, 1988 Warren Turner wrote to Mr. Johnson again *at 56 Codman Street*, asking for documentation of approval of the change *from two units to four units* at 54 Codman Street. Mr. Johnson never got this letter either. A year later, Bill Giroux also wrote to Mr. Jordan, but this letter was addressed to *52 Codman Street* and concerned the alleged increase in the number of units *from two to three units*, and stating that this issue had never been resolved. Mr. Johnson and his wife swear that they never received this letter either, which is certainly possible as it was also misaddressed. I called Bill Giroux and he recalled the whole issue, that he never got a response to his May 25, 1989 letter, and that he had no personal knowledge of the matter beyond writing the letter.
4. In 1995, Tammy Munson conducted a housing code inspection which found the property to meet the housing code, recommending only that existing smoke detectors be replaced

recalled that he had been on the property sometime when it was owned by Dan Sullivan (1966-69), at which time he had been given a tour of the four units. I tracked down Mr. Sullivan, who stated that there were four units in 54 Codman Street when he bought the property, and when he sold it.

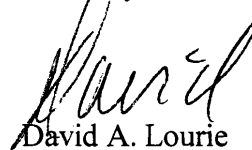
Joseph E. Gray, Jr. and Gary Wood
Re: 54 Codman Street Zoning
January 5, 2002
Page 3

with hard-wire back up smoke detectors.

After 40 years of no problems or complaints (other than a retaliatory complaint from a neighbor), a likelihood that these units are grandfathered, and where the City's failure to act earlier has prejudiced Mr. Johnson's ability to establish that these units may be grandfathered, it is submitted that the City should devote its enforcement efforts to other matters. If the City takes this case to court, it is likely that a court of equity would refuse to order the removal of the extra units on the facts of this case, even if a violation is proved. (Mr. Johnson was not culpable with respect to the creation of any illegal units, and his opportunity to prove that these units were legal units in 1958 has been compromised by the acts and omissions of City staff. It is possible that the building inspectors were fully satisfied that these units were grandfathered in 1975 and that the issue was finally resolved when it was first raised (when prior owners were probably available and memories were fresher.) *See, Town of Shapleigh v. Shikles* 427 A.2d 460, recognizing that equitable defenses are applicable in the enforcement of alleged code violations. It is simply unfair for the City to again raise this issue 10 or 25 years later, and put the burden upon Mr. Johnson to prove it to be a lawful 4 unit where the four units undoubtedly existed prior to Mr. Johnson's purchase of the property some 30 years ago. Mr. Johnson should not have to endure the risk and expense of a board of appeals or court proceeding to establish his right to continue a use that has existed for so long, and upon which he now depends for income in his retirement years. Please advise as to your thoughts on this matter.

Thank you.

Sincerely,



David A. Lourie

enclosure

cc: Arthur Rowe
Michael Nugent

DRAFT

February 7, 2002

David A. Lourie, Esquire
189 Spurwink Avenue
Cape Elizabeth, ME 04107

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David A. Lourie, Esq.
Re: 52-54 Codman Street
February 6, 2002
Page 2 of 4

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David A. Lourie, Esq.
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Page 4 of 4

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**THIS IS AN OFFER OF COMPROMISE SUBMITTED PURSUANT TO
M.R.EVID. 408.**

Very truly yours,

Charles A. Lane
Associate Corporation Counsel

CAL:ses

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CC: Gary C. Wood, Corporation Counsel
Michael J. Nugent, Manager of Inspection Services

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