

December 22, 2015

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**12-14 Alba Street**

**Sec. 14-118 (a) 5**

**Conditional Use Application**

Prepared By:

Christopher Hickey  
5 Greenway Drive  
Falmouth, ME 04105  
(207) 215-1108  
[chickey@trcsolutions.com](mailto:chickey@trcsolutions.com)

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Jeff Levine, AICP, Director  
Planning & Urban Development Department

Ann Machado  
Zoning Administrator

**CITY OF PORTLAND ZONING BOARD OF APPEALS**  
**Conditional Use Appeal Application**

**Applicant Information:**

Christopher Hickey  
NAME

\_\_\_\_\_  
BUSINESS NAME

5 Greenway Drive, Falmouth, ME  
BUSINESS ADDRESS 04105

(207) 215-1108  
BUSINESS TELEPHONE & E-MAIL

See 7-1 and 9-1 in application  
APPLICANT'S RIGHT/TITLE/INTEREST

R-5  
CURRENT ZONING DESIGNATION

**Subject Property Information:**

12-14 Alba Street  
PROPERTY ADDRESS

133-C-13  
CHART/BLOCK/LOT (CBL)

Emily Hickey  
PROPERTY OWNER (if Different)

5 Greenway Drive, Falmouth, ME  
ADDRESS (if Different) 04105

(207) 641-7295  
PHONE # AND E-MAIL

\_\_\_\_\_  
CONDITIONAL USE AUTHORIZED BY  
SECTION 14- 118(a)5

**EXISTING USE OF THE PROPERTY:**

Two-Family

**TYPE OF CONDITIONAL USE PROPOSED:**

Additional Dwelling Units

**STANDARDS:** Upon a showing that a proposed use is a conditional use under this article, a conditional use permit shall be granted unless the Board determines that:

1. The volume and type of vehicle traffic to be generated, hours of operation, expense of pavement, and the number of parking spaces required are not substantially greater than would normally occur at surrounding uses or other allowable uses in the same zone; and
2. The proposed use will not create unsanitary or harmful conditions by reason of noise, glare, dust, sewage disposal, emissions to the air, odor, lighting, or litter; and
3. The design and operation of the proposed use, including but not limited to landscaping, screening, signs, loading deliveries, trash or waste generation, arrangement of structures, and materials storage will not have a substantially greater effect/impact on surrounding properties than those associated with surrounding uses of other allowable uses in the zone

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

The undersigned hereby makes application for a conditional use permit 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

11.19.15  
DATE

**To:** Portland Zoning Board of Appeals  
**From:** Christopher Hickey  
**Date:** 12/22/2015  
**Re:** 14 Alba Street Conditional Use Application – Reason for Application and Supporting Facts

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Dear Zoning Board of Appeals,

Emily and I are happy to submit the attached conditional use application for additional dwelling units at the existing two family at 12-14 Alba Street. We called this property home from 2006-2009 and have maintained our ownership since then, proudly offering the space to a small handful of stable tenants through the years.

The property has the unique condition of having two thousand square feet of vacant space in an attached building. This building previously held two additional units until a small fire forced it to be vacated. Because of the restrictions of Division 23 of the ordinance, it could not be restored and has existed as a shell of a structure since then. I have had dozens of conversations with City staff through the years about restoring this use and the response was always the same: "Yes, what you want to do makes a lot of sense," immediately followed by, "No, there is no mechanism within the ordinance that would allow you to do it."

As you know, Portland's City Council has been grappling with the issue of how to maintain Portland's share of growth in Cumberland County, in the context of a city with rapidly increasing cost of living and a competitive housing market. I personally attended the Housing Committee's meeting at the end of February earlier this year. I also met with Jeff Levine to discuss this particular property. I suggested at the meeting that there were opportunities for infill development in the city that were going unnoticed. Opportunities that did not fit neatly within an existing allowable or conditional use. Furthermore, I suggested that the owners or developers of such projects might be more amenable to additional restrictions on the nature of the development than would be the case with a typical use that is permitted by right. Fast forward to October and the City Council passed amendments to the land use code that accomplish this very thing. Although the inclusionary zoning language has received most of the attention, it also included amendments to the accessory dwelling conditional use in the R-5 zone – the conditional use under which this application is being submitted.

We believe the application satisfies both the letter and spirit of the new ordinance. Not only does it meet the conditions, it also promises to offer a high-quality, affordable home in a city that, in spite of having so much to offer, is rapidly becoming out-of-reach for many. Each of the conditions is detailed below, along with how the application satisfies the condition. We have also included substantial and carefully considered supporting documentation to provide a clear picture of the intended use and how we are seeking to absolutely minimize impacts to surrounding properties.

#### **General Standards**

- 1. The volume and type of vehicle traffic to be generated, hours of operation, expanse of pavement, and the number of parking spaces required are not substantially greater than would normally occur at surrounding uses or other allowable uses in the same zone;*

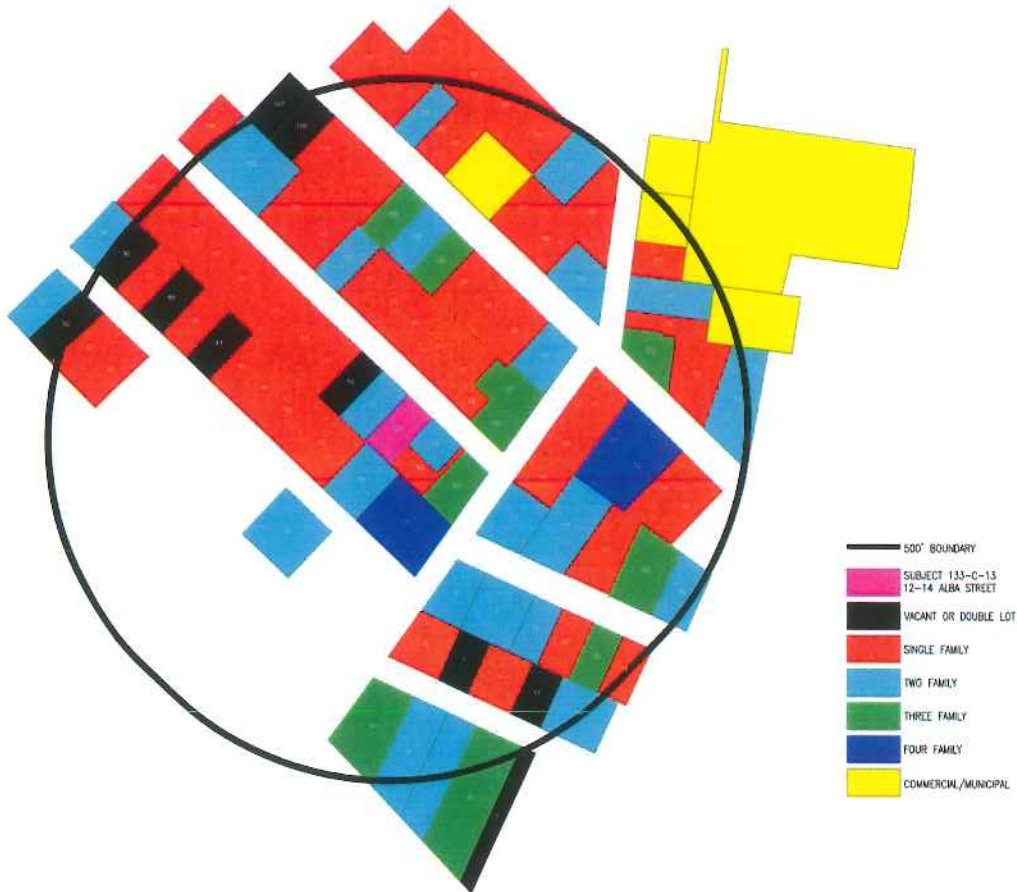
The operation of the property will be similar to surrounding uses – which include an existing three family and an existing four family within 100 feet of the property. As demonstrated elsewhere, the existing parking area will not be expanded and meets the requirements under the conditional use.

- The proposed use will not create unsanitary or harmful conditions by reason of noise, glare, dust, sewage disposal, emissions to the air, odor, lighting, or litter;*

Since the structure is existing, there will be extremely minimal impacts to surrounding properties. The units will take advantage of existing utility services already serving the property. Reasonable efforts are being made to maintain privacy to abutting properties as much as practicable with the interior arrangement of the units and placement of windows.

- The design and operation of the proposed use, including but not limited to landscaping, screening, signs, loading deliveries, trash or waste generation, arrangement of structures, and materials storage will not have a substantially greater effect/impact on surrounding properties than those associated with surrounding uses of other allowable uses in the zone.*

The structure is existing and will not experience any modifications or additions that will affect the exterior presence or footprint of the building. The low-impact residential-type use will be exactly similar to surrounding uses. See below for a figure showing existing densities/uses.



**Specific Standards**

*Sec. 14-118 (a) 5a*

*This section shall under no conditions permit more than four dwelling units on a lot and shall not allow more than two additional dwelling units on a lot above what would otherwise be permitted;*

The existing use is a legal two-family. The proposal is to add two units for a total of four.

*Sec 14-118 (a) 5b*

*Any units created under this section may not be sold as condominium units or otherwise separated from the ownership of at least one of the pre-existing units on the site;*

Ownership of the building will remain as-is. There is no intention of creating condominium units now or at any point in the future.

*Sec. 14-118 (a) 5c*

*Any units created under this section must be "low-income housing unit[s] for rent" as per Division 30 and are subject to income verification as further outlined in implementing regulations;*

The applicant understands this restriction and will comply with all current requirements. Furthermore, the applicant utilizes professional property management for the advertising, screening and placement of tenants and is confident they will utilize the correct criteria for verification.

*Sec. 14-118 (a) 5d*

*The additional units shall have a minimum floor area of four hundred (400) square feet and may not involve removing more than ten percent of the gross floor area of an existing dwelling unit into a new dwelling unit. Gross floor area shall exclude any floor area that has less than two-thirds of its floor-to-ceiling height above the average adjoining ground level and may include the attic if such space is habitable;*

Each unit is proposed to include approximately one thousand (1,000) square feet of finished space.

*Sec. 14-118 (a) 5e*

*Modifications to existing structures shall be minimal, and be limited to new doors, windows and other openings;*

As shown in the attached existing and proposed floor plans, the building structure will not change whatsoever. Some removal and adjustment of existing windows is proposed to fit with the proposed layout and to increase privacy relative to abutting uses. A small exterior stoop is also proposed to make the secondary entrance compliant with building codes.

*Sec. 14-118 (a) 5f*

*Parking shall be provided as required by Division 20 of this article;*

The existing parking area complies with Division 20, providing one off-street parking space for each existing and proposed dwelling unit.

*Sec. 14-118 (a) 5g*

*There shall be no open, outside stairways or fire escapes above the ground floor;*

None are proposed or required.

*Sec. 14-118 (a) 5h*

*The project shall be subject to Article V for site plan review and approval and the following additional standards:*

December 22, 2015

- i. *Any additions or exterior alterations such as façade materials, building form, roof pitch, and exterior doors shall be designed to be compatible with the architectural style of the building and preserve the single family appearance of the building;*

No building or roof modifications are proposed. Any alterations of window placement will be blended using siding that matches the existing. Exterior doors will be steel and will match the style of the existing exterior doors.

- ii. *The scale and surface area of parking driveways and paved areas shall be arranged and landscaped properly to screen vehicles from adjacent properties and streets.*

No additional pavement or parking areas are required. Furthermore, the applicant is currently seeking administrative authorization from the planning department with respect to the required site plan review.

**JEWELL & BULGER, P.A.**

*Attorneys at Law*  
477 Congress Street, Suite 1104  
Portland, ME 04101-3453

**Thomas F. Jewell, Esq.**  
tjewell@jewellandbulger.com

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F: (207) 774-1626

**Paul S. Bulger, Esq.**  
pbulger@jewellandbulger.com

December 1, 2015

City of Portland  
Dept. of Planning & Development  
ATTN: Anne Machado, Code Enforcement Director  
389 Congress Street, Room 315  
Portland, ME 04101

RE: Application for Interpretation  
Portland Zoning Ordinance Sec. 14-118(a)5(a)

Dear Ms. Machado:

What follows is a request for interpretation of the newly enacted 14-118(a)5(a). This appeal is filed on behalf of Christopher Hickey, owner of property located at 12-14 Alba Street, located in the R5 zone in Portland

The property currently functions as a 2-family with 2,000 square feet of vacant space at one time occupied by 2 additional units gutted following a fire. The property was granted a variance allowing 2 units in 1999 and is therefore a legal 2 unit. The additional 2,000 square feet remain unused and unoccupied.

Text of Section 14-118(a)5(a)

The text of Section 14-118(a)5(a) (attached) permits additional dwelling units on a lot, but not more than two additional dwelling units on a lot above what *would otherwise be permitted*. (Italicized for emphasis).

Therefore, the question for interpretation is whether “what would otherwise be permitted” applies to the existing legal 2 unit use permitted by variance, plus an additional 2 units. Or, on the other hand, whether “otherwise permitted” refers to the standards in the R-5 zone without regard to the variance.

Interpretation

We submit that the 2 family use is a legal and permitted in the zone and is therefore “otherwise permitted”, and that, therefore, he is entitled to an additional 2 units under the language of 14-118(a)5(a).

The basis for that interpretation is three-fold.



1. A use permitted by variance becomes conforming under the ordinance that authorizes the issuance of the variance. Sawyer Environmental Recovery Facilitation, Inc. v. Town of Hampden, 2000 ME. 179 760 A.2d 257. The lot is therefore conforming for 2 units and the new provision allows the addition of 2 additional units, provided the use otherwise meets the space and bulk provisions of 14-118, the income limits and parking requirements, which it clearly will under the applicant's proposal. (See the application);

2. The ordinance adds no qualifying language and any ambiguity must be interpreted in favor of the applicant. As stated by the Law Court:

When interpreting an ordinance, we look first to the plain meaning of the language in the ordinance and give any undefined terms of their common and generally accepted meaning unless the context clearly indicates otherwise. *Lakeside at Pleasant Mountain Condominium Association v. Town of Bridgton*, 974 A.2d 893 (Me. 2009).

In one of the earliest interpretations of a zoning ordinance in Maine, *Toulouse v. Board of Zoning Adjustment*, 87 A.2d 670 (Me. 1954), which is still often cited for the basic approach to the interpretation of a zoning ordinance, the Maine Law Court stated:

Before the adoption of modern zoning laws, the owners of property were restricted in the use of their property only by prohibitions of use recognized by the common law, or statute, as detrimental to the rights of the public. The restrictions of zoning statutes and zoning ordinances authorized by statute are in derogation to the common law *and should be strictly construed*.

The provision, 114-18(a)5(a) does not define or qualify the meaning of "otherwise permitted" and must be given its plain meaning.

3. The purpose of the change in the ordinance is to advance and promote housing in the City of Portland, and the ordinance Section 14-118(a)5(a) must be interpreted in a way that will advance those legislative intendments.

The application otherwise conforms with the requirements of Section 14-118(a) in all respects.

In conclusion, the applicant requests your interpretation.

Respectfully submitted,

  
Paul S. Bulger

December 1, 2015  
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PSB/cmK

Enclosures



Planning & Urban Development Department

*Jeff Levine, AICP, Director*  
*Ann Machado, Zoning Administrator*

December 7, 2015

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

Re: Interpretation of § 14-118(a)(5)(a) for Christopher Hickey at 12-14 Alba Street, 133-C-013

Dear Attorney Bulger,

I am in receipt of your letter, dated December 1, 2015, requesting a determination that your interpretation of § 14-118(a)(5)(a) as it relates to 12-14 Alba Street, Portland Maine (the "Property") is correct.

I have researched the history of the Property. The pre-1957 Assessor's card shows that the building was used as a residential four (4) unit building. This use appears to have been maintained until there was a fire in 1986. At that point the building was vacated. The building remained vacant for at least three years and therefore lost the nonconforming right to be four dwelling units. The Zoning Board of Appeals confirmed this on April 20, 1989 by upholding the Building Inspection Services decision that the nonconforming use was abandoned one year after the building became vacant. On May 25, 1989, the Zoning Board of Appeals granted a space and bulk variance to allow the building to be converted to a two family dwelling. On June 1, 1989 a building permit (#002167) was issued for interior renovations to make the building a two family. The front of the building has been occupied by these two dwelling units since then with the rear of the building remaining empty.

12-14 Alba Street is located in the R-5 residential zone. § 14-118(a)(5) allows the use of a space that has existed as of September 3, 2008 "to accommodate additional dwelling units" as long as certain conditions are met. § 14-118(a)(5)(a) states that "this section shall under no conditions permit more than four dwelling units on a lot and shall not allow more than two additional dwelling units above what would otherwise be permitted". The legal use of the Property is a two family based on the space and bulk appeal that was granted on May 25, 1989 and the building permit that was issued on June 1, 1989. Since this is the legal use of the Property, it is the permitted use and therefore two more dwelling units could be added to the property under § 14-118(a)(5)(a), and the interpretation as stated in the letter dated December 1, 2015 is correct.

If you have any questions regarding this matter, please do not hesitate to contact me.

Portland, Maine



Yes. Life's good here.

Planning & Urban Development Department

*Jeff Levine, AICP, Director*

*Ann Machado, Zoning Administrator*

Yours truly,

A handwritten signature in black ink, appearing to read "Ann B. Machado", with a long horizontal flourish extending to the right.

Ann B. Machado

Zoning Administrator

City of Portland, Maine

[amachado@portlandmaine.gov](mailto:amachado@portlandmaine.gov)

207.874.8709

CITY OF PORTLAND, MAINE  
ZONING BOARD OF APPEALS



12-14 Alba Street

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MERRILL S. SELTZER  
Chairman  
JOHN C. KNOX  
Secretary  
PETER F. MORELLI  
THOMAS F. JEWELL  
DAVID L. SILVERNAIL  
MICHAEL E. WESTORT  
CHRISTOPHER DINAH

May 30, 1989

Mr. Nicholas J. Sangillo  
2 Clinton Street  
Portland, Maine 04103

Dear Mr. Sangillo:

At the meeting of the Board of Appeals on Thursday evening, May 25, 1989, the Board voted by a unanimous vote of six members present to grant your request for a variance for the building at 12-14 Alba Street in the R-5 Residence Zone, which would enable the building to be converted to a two family dwelling, following the approval of a building permit.

A certificate of variance will be prepared to accompany this letter as an enclosure with the copy of the Board's decision. Your application for a building permit may now be processed. Please have the enclosed certificate of variance recorded within 30 days from the date of its approval at the Cumberland County Registry of Deeds, 142 Federal Street, in Portland.

Sincerely,

*William D. Giroux*  
William D. Giroux  
Zoning Enforcement Officer

Enclosures: Copy of Board's Decision  
Certificate of Variance

cc: Merrill S. Seltzer, Chairman, Board of Appeals  
Joseph E. Gray, Jr., Director, Planning & Urban Development  
P. Samuel Hoffses, Chief, Inspection Services  
Kathleen Taylor, Code Enforcement Officer  
Charles A. Lane, Associate Corporation Counsel  
Warren J. Turner, Administrative Assistant

CITY OF PORTLAND, MAINE  
MEMORANDUM

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TO: Jane Durgin, City Clerk  
FROM: Warren Turner, Administrative Assistant-Inspection Services  
SUBJECT: Report of Actions Taken at the Board of Appeals Meeting on May 25, 1989

*Warren J. Turner*

DATE:  
May 31, 1989

Chairman Merrill Seltzer called the meeting to order at 7:00 P.M. on Thursday evening, May 25, 1989, in Room 209, City Hall, Portland, Maine. There were six members present. Mr. Christopher Dinan was absent.

Unfinished Business

Interpretation Appeal:

Corner of Island & Welch Streets, Peaks Island, William A. Bonn, owner, requested an interpretation appeal as to whether the Board would uphold the decision of the Code Enforcement Officer regarding possible conversion of the former Innes House to a two family dwelling. The Board voted by a unanimous vote of six members present to deny this appeal.

Conditional Use Appeal

Corner of Island & Welch Streets, Peaks Island, William Bonn, owner, was granted this appeal to permit a change of use from single to two family for the building formerly known as the Inness House at the above address by a vote of 6 to 0.

New Business

Conditional Use Appeal

1093 Washington Avenue, Mr. and Mrs. James Ascanio, owners, were granted their appeal authorizing a day care center for 20 to 24 children at the above address by a vote of 6 to 0 subject to the condition that adequate turn around space be provided.

Variance, Space and Bulk:

12-14 Alba Street, Mr. Nicholas J. Sangillo, owner, was granted his request by a unanimous vote of six members, for the building at 12-14 Alba Street allowing it to be occupied as a 2 family dwelling. Formerly a four unit apartment house, the lot contains only 5,500 square feet of land area in the R-5 Residence Zone.

The meeting was adjourned at 8:25 P.M.

Enclosures: Agenda for May 25th  
Copy of Decisions