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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. <u>Sawyer Environmental Recovery Facilitation, Inc. v. Town of Hampden</u>, 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.*
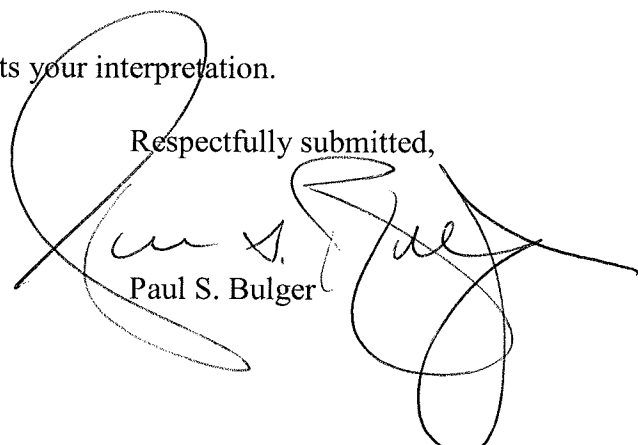
The provision, 114-18(a)5(a) does not define or qualify the meaning of "otherwise permitted" and must be given its plain meaning.

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

PSB/cmk

Enclosures