

Appeals

Cushing led

106A-A-11

Permit # \_\_\_\_\_ City of Portland **BUILDING PERMIT APPLICATION** Fee \$50.00 Appeal Fee Zone \_\_\_\_\_ Map # \_\_\_\_\_ Lot# \_\_\_\_\_  
 Please fill out any part which applies to job. Proper plans must accompany form. \$25.00 Permit

Owner: Helen Sutter/Joshua Empson Phc 1e # \_\_\_\_\_  
 Address: Cambridge, Mass/Darien, CT  
 LOCATION OF CONSTRUCTION Island Ave. Cushings Is. 106A-A-11  
 Contractor: \_\_\_\_\_ Sub: \_\_\_\_\_  
 Address: \_\_\_\_\_ Plc 1e # \_\_\_\_\_  
 Est. Construction Cost: \_\_\_\_\_ Proposed Use: \_\_\_\_\_  
 Pas. Use: \_\_\_\_\_  
 # of Existing Res. Units \_\_\_\_\_ # of New Res. Units \_\_\_\_\_  
 Building Dimensions L \_\_\_\_\_ W \_\_\_\_\_ Total Sq. Ft. \_\_\_\_\_  
 # Stories: \_\_\_\_\_ # Bedrooms \_\_\_\_\_ Lot Size: \_\_\_\_\_  
 Is Proposed Use: Seasonal \_\_\_\_\_ Condominium \_\_\_\_\_ Conversion \_\_\_\_\_  
 Explain Conversion Variance Appeal for installation of subsurface septic system

**For Official Use Only**  
 Subdivision: \_\_\_\_\_ Name: \_\_\_\_\_  
 Date June 2, 1994 Inside Fire Limits: \_\_\_\_\_ Lot: \_\_\_\_\_  
 Bldg Code: \_\_\_\_\_ Ownership: \_\_\_\_\_ Public \_\_\_\_\_ Private \_\_\_\_\_  
 Time Limit: \_\_\_\_\_ Estimated Cost: \_\_\_\_\_  
 Zoning: Street Frontage Provided: \_\_\_\_\_ Back \_\_\_\_\_ Side \_\_\_\_\_ Side \_\_\_\_\_  
 Provided Setbacks: Front \_\_\_\_\_ Back \_\_\_\_\_ Side \_\_\_\_\_ Side \_\_\_\_\_  
 Review Required: Zoning Board Approval: Yes \_\_\_\_\_ No \_\_\_\_\_ Date: \_\_\_\_\_  
 Planning Board Approval: Yes \_\_\_\_\_ No \_\_\_\_\_ Date: \_\_\_\_\_  
 Conditional Use: \_\_\_\_\_ Variance \_\_\_\_\_ Site Plan \_\_\_\_\_ Subdivision \_\_\_\_\_  
 Shoreland Zoning Yes \_\_\_\_\_ No \_\_\_\_\_ Floodplain Yes \_\_\_\_\_ No \_\_\_\_\_  
 Special Exception \_\_\_\_\_  
 Other \_\_\_\_\_ (Explain) \_\_\_\_\_

Foundation:  
 1. Type of Soil: \_\_\_\_\_  
 2. Set Backs - Front \_\_\_\_\_ Rear \_\_\_\_\_ Side(s) \_\_\_\_\_  
 3. Footings Size: \_\_\_\_\_  
 4. Foundation Size: \_\_\_\_\_  
 5. Other: \_\_\_\_\_

Floor:  
 1. Sills Size: \_\_\_\_\_ Sills must be anchored.  
 2. Girder Size: \_\_\_\_\_  
 3. Lally Column Spacing: \_\_\_\_\_ Size: \_\_\_\_\_  
 4. Joists Size: \_\_\_\_\_ Spacing 16" O.C.  
 5. Bridging Type: \_\_\_\_\_ Size: \_\_\_\_\_  
 6. Floor Sheathing Type: \_\_\_\_\_ Size: \_\_\_\_\_  
 7. Other Material: \_\_\_\_\_

Exterior Walls:  
 1. Studding Size \_\_\_\_\_ Spacing \_\_\_\_\_  
 2. No. windows \_\_\_\_\_  
 3. No. Doors \_\_\_\_\_  
 4. Header Sizes \_\_\_\_\_ Span(s) \_\_\_\_\_  
 5. Bracing: Yes \_\_\_\_\_ No \_\_\_\_\_  
 6. Corner Posts Size \_\_\_\_\_  
 7. Insulation Type \_\_\_\_\_ Size \_\_\_\_\_  
 8. Sheathing Type \_\_\_\_\_ Size \_\_\_\_\_  
 9. Siding Type \_\_\_\_\_ Weather Exposure \_\_\_\_\_  
 10. Masonry Materials \_\_\_\_\_  
 11. Metal Materials \_\_\_\_\_

Interior Walls:  
 1. Studding Size \_\_\_\_\_ Spacing \_\_\_\_\_  
 2. Header Sizes \_\_\_\_\_ Span(s) \_\_\_\_\_  
 3. Wall Covering Type \_\_\_\_\_  
 4. Fire Wall if required \_\_\_\_\_  
 5. Other Materials \_\_\_\_\_

Ceiling:  
 1. Ceiling Joists Size: \_\_\_\_\_  
 2. Ceiling Strapping Size \_\_\_\_\_ Spacing \_\_\_\_\_  
 3. Type Ceilings: \_\_\_\_\_  
 4. Insulation Type \_\_\_\_\_ Size \_\_\_\_\_  
 5. Ceiling Height: \_\_\_\_\_

Roof:  
 1. Truss or Rafter Size \_\_\_\_\_ Span \_\_\_\_\_  
 2. Sheathing Type \_\_\_\_\_ Size \_\_\_\_\_  
 3. Roof Covering Type \_\_\_\_\_

Chimneys:  
 Type: \_\_\_\_\_ Number of Fire Places \_\_\_\_\_

Heating:  
 Type of Heat: \_\_\_\_\_

Electrical:  
 Service Entrance Size: \_\_\_\_\_ Smoke Detector Required Yes \_\_\_\_\_ No \_\_\_\_\_

Plumbing:  
 1. Approval of soil test if required Yes \_\_\_\_\_ No \_\_\_\_\_  
 2. No. of Tubs or Showers \_\_\_\_\_  
 3. No. of Flushes \_\_\_\_\_  
 4. No. of Lavatories \_\_\_\_\_  
 5. No. of Other Fixtures \_\_\_\_\_

Swimming Pools:  
 1. Type: \_\_\_\_\_  
 2. Pool Size: \_\_\_\_\_ x \_\_\_\_\_ Square Footage \_\_\_\_\_  
 3. Must conform to National Electrical Code and State Law.

Permit Received By Latini Hand Delivered Mail  
 Signature of Applicant \_\_\_\_\_ Date 6/2/94

CEO's District \_\_\_\_\_

CONTINUED TO REVERSE SIDE  
 Ivory Tag - CEO

White - Tax Assessor

APPEAL DENIED 7-14-94

FINDINGS OF FACT  
ALL APPEALS

TYPE OF APPEAL Variance

1. Name of Applicant Christopher S. Neagle on behalf of Helga Sotter and Joshua EMPSON
2. Address of Applicant One Portland Sq. P.O. Box 586 Portland 04112-0586
3. Right of applicant to appeal.  
Owner   
Option to Purchase
4. Location of property under appeal 106A-A-11 Cushings Island
5. Zone in which the property is located R-1
6. Present use of property vacant lot
7. Proposed use if the appeal is granted.  
residential

8. Names and addresses of those appearing in support of the application:  
Chris Neagle  
Linda Sotter  
Josh Empson

9. Names and addresses of those appearing in opposition to the application:  
David Silk  
John Thayer  
Bill Meserve  
Scott Thayer

10. Listing of the documentary evidence presented to the Board (e.g.,  
plans, photos, maps, etc.)  
P:3

VARIANCES

A variance may be granted if the Board finds that it will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the Ordinance would result in "undue hardship". The following questions must all be answered, with supporting findings of fact, in order to grant the appeal.

1. Can the land yield a reasonable return (not the highest return, without the granting of a variance)?  
No 6 deny the appeal)

Reasons (including evidence) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Are there factors which are unique to this property, and not to the general conditions of the neighborhood, which create a need for a variance?  
Yes 4  
No 2 (deny the appeal)

Reasons (including evidence) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. Will the granting of the variance alter the essential character of the locality?  
Yes \_\_\_\_\_ (deny the appeal)  
No 6

Reasons (including evidence) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. Is the hardship a result of action taken by the applicant or a prior owner (self-created hardship)?  
Yes 6 (deny the appeal)  
No \_\_\_\_\_

Reasons (including evidence) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



If the appeal is granted, does the Board wish to impose conditions which will further the intent and purpose of this Ordinance?

Yes \_\_\_\_\_  
No \_\_\_\_\_

Specific Conditions \_\_\_\_\_  
\_\_\_\_\_

Reasons \_\_\_\_\_  
\_\_\_\_\_

Date of Public Hearing 7/14/94

Motion That the same be granted as  
(including conditions and findings of fact) 106A-B-11 Lushings Island  
as held of Helen Soffer and Joshua Empson  
be granted.

Votes in Favor  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Votes Opposed - 6  
Matthew M...  
John S. ...  
...  
...  
Elizabeth J. ...

Inspections Services



William D. Giroux  
Zoning Administrator

CITY OF PORTLAND

June 2, 1994

Christopher Neagle  
Verrill & Dana  
Attorneys at Law  
One Portland Square  
Portland, ME 04112

Dear Mr. Neagle:

Please sign the enclosed check and return as soon as possible.

Thank You,

William Giroux  
Zoning Administrator

/el

done 6-3-94

Sony---

WV

VERRILL & DANA

ATTORNEYS AT LAW  
ONE PORTLAND SQUARE  
P. O. BOX 586  
PORTLAND, MAINE 04112-0586  
(207) 774-4000  
FACSIMILE (207) 774-7499

OFFICES IN:  
AUGUSTA, MAINE  
KENNEBUNK, MAINE

CHRISTOPHER S. NEAGLE  
Partner

June 2, 1994

Hand Delivered

Zoning Board of Appeals  
Room 315  
Portland City Hall  
389 Congress Street  
Portland, ME 04104

Re: Sutter/Empson  
Shore Road, Cushings Island  
Map 106A - Block A - Lot 11

Greetings:

I represent Helen Linda Sutter and her son, Joshua Christopher Empson, who together own an undeveloped parcel of land on Cushings Island. They would like to obtain a variance to install a subsurface septic system and residence on this parcel and I have enclosed the following:

1. A \$75 check to cover the application fee of \$50 plus \$25 toward a building permit.
2. The original Variance Application, including a Memorandum to the Zoning Board with appropriate attachments.
3. Ten copies of the Application and Memorandum.

I understand this request will be heard on Thursday, June 23, 1994 at 7:00 p.m. Let me know if you need anything else at this time.

Sincerely,

  
Christopher S. Neagle

Enclosure  
cc: Helen Linda Sutter

[Atty. CSH.Sutter.Cushings]Zoning.Board

CITY OF PORTLAND, MAINE

BOARD OF APPEALS



JOHN C. KNOX

MATTHEW D. MANAHAN  
THOMAS F. JEWELL  
EARL R. McDONALD  
WILLIAM E. NELESKI, J.  
Elizabeth Bordowitz  
MICHAEL E. WESTORT

June 3, 1994

RE: 106A-A-11  
Cushings Island

Mr. Christopher S. Neagle, Esq.  
Verzill & Dana  
Attorneys at Law  
One Portland Square  
P.O. Box 596  
Portland, Me. 04112-0586

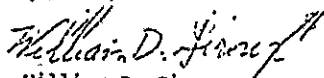
Dear Sir:

Receipt of your application on behalf of Ms. Helen Sutter and Mr. Joshua Empson for a variance regarding installation of a subsurface septic system and residence at the property identified as 106A-A-11 on Cushings Island, is acknowledged.

This appeal will be scheduled for review before the Board of Appeals on Thursday evening, June 23, 1994, at 7:00 p.m. in Room 209, City Hall, Portland, Maine. You must plan to attend to answer any questions which the Board members may have concerning this appeal.

We will send you a copy of the June 23rd agenda as soon as copies become available for distribution.

Sincerely,

  
William D. Giroux  
Zoning Administrator

/el

cc: John C. Knox, Chairman Board of Appeals  
Joseph E. Gray, Jr., Director of Planning and Urban Development  
P. Samuel Hoffses, Chief of Inspection Services  
Charles A. Lane, Associate Corporation Counsel  
Arthur Rowe, Code Enforcement Officer



CITY OF PORTLAND, MAINE

BOARD OF APPEALS



JOHN C. KNOX

MATTHEW D. MANAHAN  
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Elizabeth Bordowitz  
MICHAEL E. WESTORT

106A-A-11  
Cushings Island

All persons interested either for or against this Space & Bulk Variance will be heard at a public hearing in Room 209, City Hall, Portland, Maine on Thursday evening, June 23, 1994 at 7:00 P.M. This notice of required public hearing has been sent to the owners of property directly abutting and directly across a street or alley from the property as required by the Ordinance.

Mr. Christopher S. Neagle, Esq., on behalf of Ms. Helen Sutter and Mr. Joshua Empson owners of the property identified as 106A-A-11 on Cushings Island, hereby respectfully petitions the Board of Appeals to permit construction of a residence with a subsurface septic system at this location. A variance is requested from the requirements in section 14-145.5(1)(g) of the Land Use Code.

For more detailed information, please come to Room 315 at City Hall weekdays from 7:00 a.m. to 4:00 p.m.

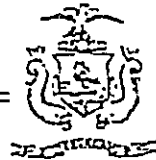
**LEGAL BASIS OF APPEAL:** Such appeal will be granted if the Board of Appeals finds that the conditions imposed by section 14-473(c)1 of the Zoning Ordinance have been met.

John C. Knox  
Chairman

/el

CITY OF PORTLAND, MAINE

BOARD OF APPEALS



JOHN C. KNOX

MATTHEW D. MANAHAN  
THOMAS F. JEWELL  
EARL R. MacDONALD  
WILLIAM E. NELESKI, JR.

MICHAEL E. WESTORT

VARIANCE APPEAL APPLICATION

Applicant's name and address: Helen Linda Sutter, Cambridge, Massachusetts  
and Joshua Christopher Empson, Darien, Connecticut

Applicant's interest in property (e.g. owner, purchaser, etc.):

owners

Owner's name and address (if different): same

Address of property and Assessor's chart, block, and lot number:

Island Avenue, Map 106A, Block A, Lot 11

Zone: IR-1

Present Use: vacant lot

Variance from: Section 14-145-5(1)(g)

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

The undersigned her-by makes application for a variance as above described, and certifies that all information herein supplied by him/her is true and correct to the best of his/her knowledge and belief.

Dated: June 2, 1994

Signature of Applicant  
Christopher S. Neagle,  
attorney for Sutter/Empson

Except as specifically provided by the Ordinance, a variance may be granted by the Board only where strict application of the Ordinance, or a provision thereof, to the petitioner and his property would cause undue hardship. In order for the Board to find "undue hardship" the applicant must answer all of the following questions, and provide supporting evidence. The Board will consider this evidence in deciding whether to grant the appeal.

1. Can the land yield a reasonable return (not the highest return) without the granting of a variance?

Yes \_\_\_\_\_ (deny the appeal)

No X

Reasons see attached memo

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2. Are there factors which are unique to this property, and not to the general conditions of the neighborhood, which create a need for a variance?

Yes X

No \_\_\_\_\_ (deny the appeal)

Reasons see attached memo

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3. Will the granting of the variance alter the essential character of the locality?

Yes \_\_\_\_\_ (deny the appeal)

No X

Reasons see attached memo

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4. Is the hardship a result of action taken by the applicant or a prior owner (self-created hardship)?

Yes \_\_\_\_\_ (deny the appeal)

No X

Reasons see attached memo

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It is up to the applicant to decide whether to file an appeal after reviewing the above requirements.

MEMORANDUM

TO: City of Portland Zoning Board of Appeals

FROM: Helen Linda Sutter and Joshua Christopher Empson  
By Christopher S. Neagle, Esq., their Attorney

DATE: June 2, 1994

RE: Shore Road, Cushings Island  
Map 106A - Block A - Lot 11  
Variance for Subsurface Septic System

A. Description of Property:

1. Sutter and Empson are co-owners of a 19,101 square foot parcel of land on Shore Road, on Cushings Island in the City of Portland. See the portion of Tax Map 106A attached as Exhibit A and a portion of 1989 survey plan attached as Exhibit B.
2. The lot is currently unimproved, but has the remains of an old stone foundation from the cottage formerly located on the lot. The lot is benefitted by an easement leading to Ottawa Avenue, and includes all rights in common with others to use the wharfs and beaches on Cushings Island.
3. The lot has been in the family for several generations. Linda's grandmother Helen Thomas Tenney purchased the lot with a cottage in 1927, and the family spent many summers in the cottage. The cottage on the lot was destroyed by a fire around 1936, and the Tenney family moved to another cottage on a separate lot owned on Cushings Island.
4. By deed dated May 4, 1990, Helen Linda Sutter purchased the lot from her cousins, Haral S. Tenney, III et al (See Book 9202, Page 189) and by 1993 deed recorded in Book 11349, Page 286 and 1994 deed recorded in Book 1143, Page 284, Linda's son Joshua was given an undivided one-half interest in the lot.
5. The owners would like a variance to construct a subsurface septic system and a residence, but the lot size is too small, based on the 1989 Island Zoning Amendments. No specific building plans have been developed at this time, since the zoning problem presents a serious obstacle to development. A variance is requested for the maximum two year period, to allow time to develop plans and to allow for construction of at least a subsurface septic system.



June 1, 1994

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1B. Zoning Problem:

1. On December 12, 1989, this lot was made subject to new zoning regulations imposed on all islands in Casco Bay, except Peaks Island. As a result of those 1989 zoning changes, the lot became non-conforming in two respects.

2. Minimum residential lot size. The IR-1 zoning requirements of §14-145.5(1)(a) require 40,000 square feet for a lot on public water and 60,000 square feet for lot without public water. The Sutter/Empson lot has 19,101 square feet. However, the lot is "grandfathered" because §14-433 provides that lots of record as of 1985 (this lot has been separately owned by the Tenney/Sutter family since 1927) which met applicable street-frontage requirements in 1985 (100 feet of frontage was required and the lot has 103 feet of frontage on Shore Road) are considered buildable lots if there is a minimum lot size of 10,000 square feet (this lot has 19,101 square feet) and provided buildings meet the appropriate 30 foot front and rear setbacks and 20 foot side setback requirements. Therefore, the lot is a lawful, non-conforming lot on which a residence may be constructed.

3. Minimum lot size requirements for lots with subsurface septic systems. In 1990, Sutter Linda had a soils test done by Goodwin Associates for a possible new subsurface septic system attached as Exhibit C. The lot can clearly support a lawful septic system which meets all plumbing code requirements "subject to local zoning". However, §14-145.5(1)(g) also requires that the lot have at least 40,000 square feet if it is serviced by a subsurface septic system, and there is no "grandfather" clause establishing protection for lots of record. Instead, §14-145.5(1)(h) provides that the additional area requirement for lots with subsurface septic systems can be obtained by acquiring "conservation easements" from other lots on the island. For the past 4+ years, Linda has tried unsuccessfully to obtain conservation easements from land owners with extra lot area on Cushings Island. She has tried personally and through friends on the Island, but no one is willing to give her an easement.

C. Variance Requirements:

1. The land cannot yield a reasonable return without the granting of a variance. With the current zoning requirements, no single family residence may be constructed on the lot despite the fact that it has always been a cottage lot and a cottage existed on the parcel for many years. The land is zoned for single family residential purposes, but no single-family residence can be constructed on the parcel without the variance.

2. The need for the variance is unique to the Sutter/Empson lot and not due to the general conditions of the neighborhood. The lot is the only unimproved lot in the immediate area and one

June 1, 1994  
Page 3

of only three unimproved substandard lots on all of Cushings Island. Virtually all lots in the neighborhood, including this lot, were improved with cottages at the beginning of the 20th century. However, the Sutter/Empson lot is unique in that the cottage has burned down. Until 1989, the lot was a "grandfathered" building lot and the family always has had plans to rebuild the cottage when time and finances allowed.

3. The granting of the variance will not alter the essential character of the locality. Cushings Island is a beautifully designed island from a land use viewpoint, with lots of open space and with most cottages well separated from each other. The lots on Cushings Island were originally laid out with input from Frederick Law Olmsted (the pioneer landscape architect responsible for New York City's Central Park) and John Calvin Stevens (one of America's great architects), and the Sutter/Empson lot was designed as one of the cottage sites. There are virtually no other vacant lots in this area of Cushings Island. Since any new cottage would replace a cottage historically located on the lot, the essential character of the locality will not be altered.

4. The hardship is not the result of action taken by the applicant or a prior owner. This lot has remained in the Tenney/Sutter family for several generations. It has always been a separate lot of record, and until 1989, the lot has always been "grandfathered" and buildable as a non-conforming lot. However, it is only due to the 1989 zoning changes on Cushings Island that the lot is now unbuildable.

D. Overview: When the City of Portland rezoned the islands of Casco Bay in 1989, it was to address a growing concern about density and ground water during the development boom. The Gerber ground water survey done for the City in 1989 set a housing density goal for all islands of no more than one unit per acre. While the 1989 island zoning proposal was originally aimed at the density problems occurring primarily on Peaks Island, for apparent political reasons, Peaks Island was ultimately excluded from the island rezoning in 1989.

Cushings Island contains approximately 220 acres. Because Cushings Island is already developed with large lots and open space controlled by the Cushings Island Trust, the density on Cushings Island will never cause groundwater concerns, even when measured against the 1989 standards. There are now approximately 35-40 dwellings on Cushings Island, and about 19 vacant lots that could possibly have cottages built in the future. Even if all lots were developed, there would still be over 3.5 acres per residence on Cushings Island. Even if all Cushings Island Trust land was turned into house lots (which is highly unlikely), given the current island zoning, the density would still be less than half of the recommended levels. Granting one variance for the construction of one new septic system and one new residence would

June 1, 1994

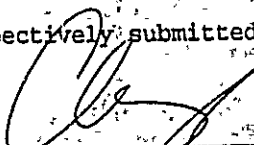
Page 4

do no harm to Cushings Island and would be completely consistent with the groundwater principles behind the 1989 zoning amendments for Cushings Island.

D. Request: The applicants request a variance from the minimum lot size standards of §14-145(1)(g) to allow construction of a subsurface septic system and ultimately a new single family residence. Because the applicants need time to develop plans and cost estimates for any new septic system and/or cottage, it is requested that the variance be valid for two years.

Dated: June 2, 1994

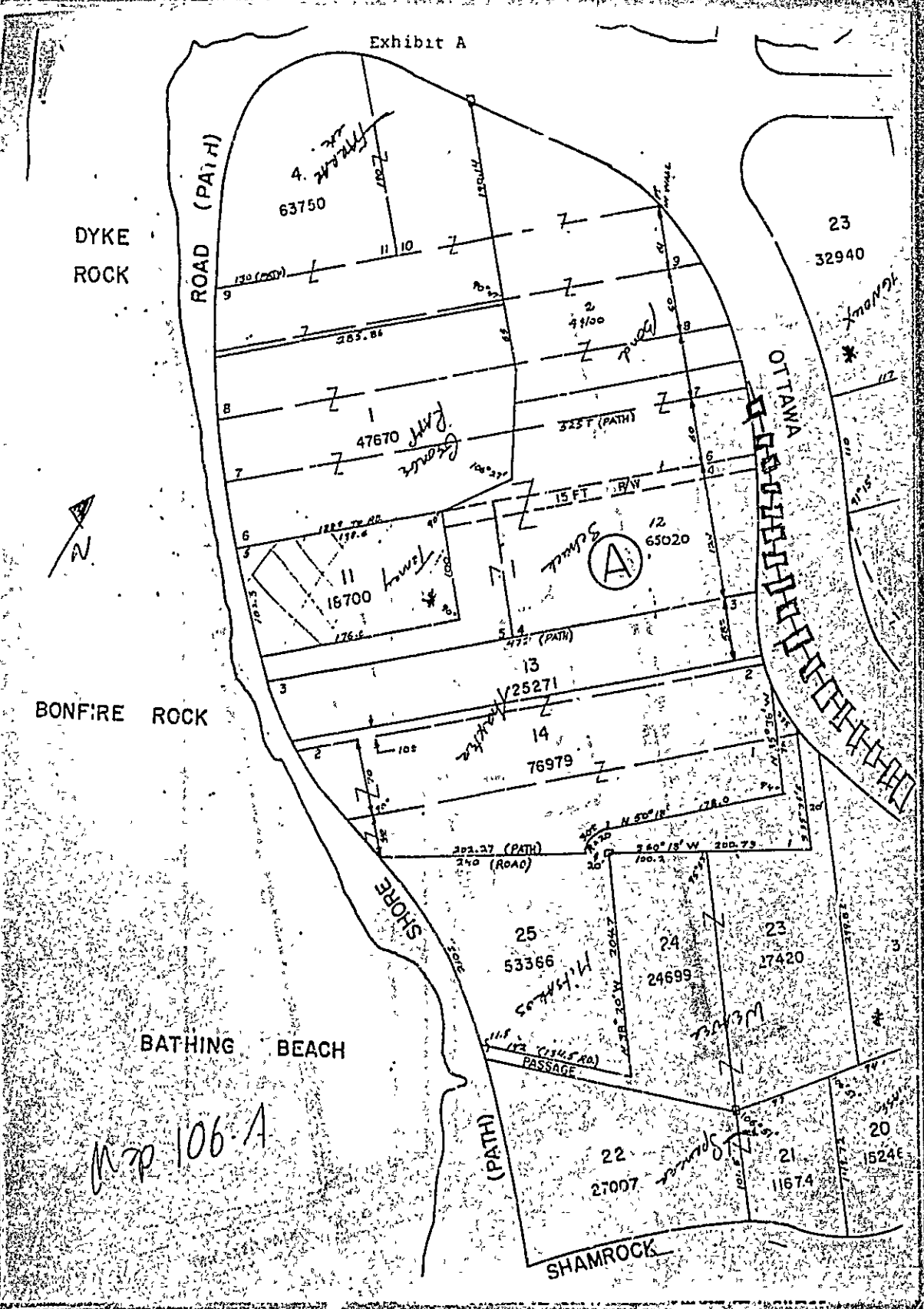
Respectively submitted

  
\_\_\_\_\_  
Christopher S. Neagle  
Attorney for Helen Linda Sutter and  
Josh Christopher Emson

[Aty.CSN.Sutter.Cushings]ZBA



Exhibit A



Map 106-A



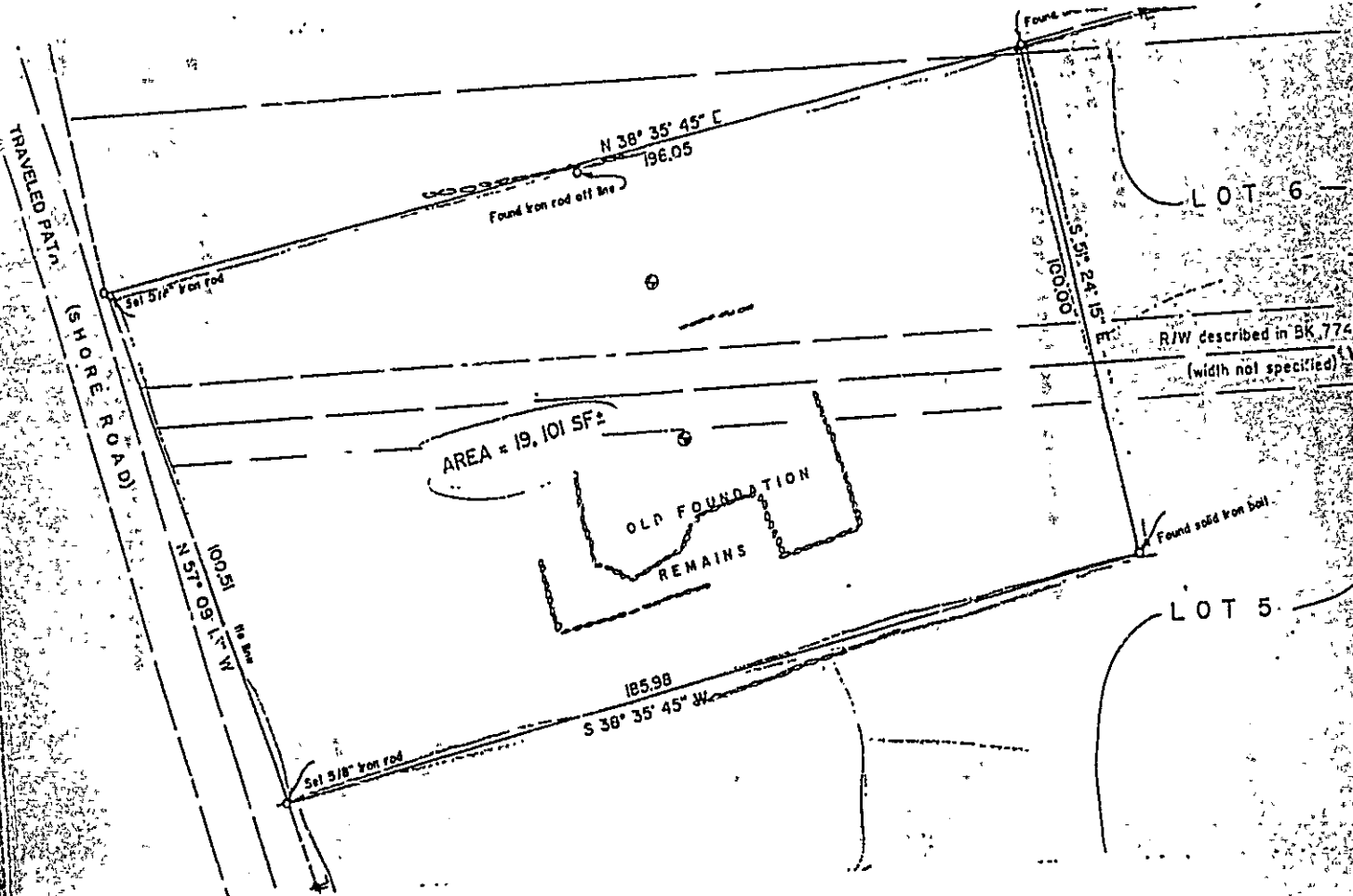


EXHIBIT B

EXHIBIT C  
*Goodwin Associates*

OCEAN SPRAY ROAD  
PEAKS ISLAND, MAINE 04109

May 15, 1990

Ms. Helen Linda Sutter  
34 Garden Place  
Brooklyn, New York 11201

Re: Site Evaluation- Shore Road on Cushings Island

Dear Ms. Sutter:

Attached please find two copies of the first two pages of the HHE-200 forms summarizing soil conditions found in my site evaluation of the property on Shore Road on Cushings Island you wish to purchase, shown as Tax Map 106A-Block A-Lot 11. The area evaluated on September 16, 1989, was tested and found to be acceptable for private wastewater disposal using subsurface systems.

In order to use the soils information shown on these HHE-200 forms for the future design of wastewater disposal systems, the systems must be located in the areas where the test pits were dug as shown on these forms. If you or a future owner wish to install systems in different locations on the lot, new test pits must be dug and a new soils evaluation performed for these locations. These forms do certify that this lot can be further developed, subject to local zoning, using subsurface wastewater disposal systems as per the current Maine State Plumbing Code.

Once you have proposed a further development plan, I can design the appropriate wastewater disposal system and complete the THREE original HHE-200 forms necessary to obtain a plumbing permit from the Local Plumbing Inspector. Upon receipt of the three original sets of HHE-200 forms, you must sign all three copies and take them to the Plumbing Inspector's office. The Plumbing Inspector will attach a permit-sticker to the upper right corner of one form and return to you as the permit.

If you sell the property, please forward a copy of this letter and HHE-200 Forms to the new owner. Once the new owner has plans for a new system, I can design the system and prepare the necessary forms for him.

If you have any questions, feel free to contact me at (207) 766-2083.

Sincerely yours,

*William B. Goodwin*

William B. Goodwin  
Site Evaluator - Me. #3

cc: Christopher S. Neagle, Esq. - Vertill & Dana

Attachments:

5/21/90

Department of Human Services  
Division of Health Engineering  
(207) 289-3825

**SUBSURFACE WASTEWATER DISPOSAL SYSTEM APPLICATION**

**PROPERTY ADDRESS**

Town Or Plantation: PORTLAND CUSHINGS ISLAND

Street: SHORE ROAD

Subdivision Lot #: TAX MAP 106A BLOCK A LOT 11

**PROPERTY OWNERS NAME**

Last: SUTTER First: HELEN

Applicant Name: HELEN L SUTTER

Mailing Address of Owner/Applicant (if Different): 34 GARDEN PLACE BLDKLYN N.Y. 11201

**Caution: Permit Required**

The Subsurface Wastewater Disposal System shall not be installed until a Permit is attached here by the Local Plumbing Inspector. The Permit shall authorize the owner or installer to install the disposal system in accordance with this application and the Maine Subsurface Wastewater Disposal Rules.

**Owner/Applicant Statement:**

I certify that the information submitted is correct to the best of my knowledge and understand that any falsification is reason for the Local Plumbing Inspector to deny a Permit.

**Caution: Inspection Required!**

I have inspected the installation authorized above and found it to be in compliance with the Subsurface Wastewater Disposal Rules.

Signature of Owner/Applicant \_\_\_\_\_ Date \_\_\_\_\_ Local Plumbing Inspector Signature \_\_\_\_\_ Date Approved \_\_\_\_\_

**PERMIT INFORMATION**

<p><b>THIS APPLICATION IS FOR:</b></p> <p>1. <input checked="" type="checkbox"/> NEW SYSTEM</p> <p>2. <input type="checkbox"/> REPLACEMENT SYSTEM</p> <p>3. <input type="checkbox"/> EXPANDED SYSTEM</p> <p>4. <input type="checkbox"/> SEASONAL CONVERSION</p> <p>5. <input type="checkbox"/> EXPERIMENTAL SYSTEM</p>	<p><b>THIS APPLICATION REQUIRES:</b></p> <p>1. <input checked="" type="checkbox"/> NO RULE VARIANCE REQUIRED</p> <p>2. <input type="checkbox"/> NEW SYSTEM VARIANCE Attach New System Variance Form</p> <p><input type="checkbox"/> REPLACEMENT SYSTEM VARIANCE Attach Replacement System Variance Form</p> <p>3. <input type="checkbox"/> Requires only Local Plumbing Inspector Approval</p> <p>4. <input type="checkbox"/> Requires both State and Local Plumbing Inspector Approval</p>	<p><b>INSTALLATION IS COMPLETE SYSTEM</b></p> <p>1. <input checked="" type="checkbox"/> NON-ENGINEERED SYSTEM</p> <p>2. <input type="checkbox"/> PRIMITIVE SYSTEM (Includes Alternative Toilet)</p> <p>3. <input type="checkbox"/> ENGINEERED (+2000 gpd)</p> <p><b>INDIVIDUALLY INSTALLED COMPONENTS</b></p> <p>4. <input type="checkbox"/> TREATMENT TANK (ONLY)</p> <p>5. <input type="checkbox"/> HOLDING TANK</p> <p>6. <input type="checkbox"/> ALTERNATIVE TOILET (ONLY)</p> <p>7. <input type="checkbox"/> NON-ENGINEERED DISPOSAL AREA (ONLY)</p> <p>8. <input type="checkbox"/> ENGINEERED DISPOSAL AREA (ONLY)</p> <p>9. <input type="checkbox"/> SEPARATED LAUNDRY SYSTEM</p>
<p><b>IF REPLACEMENT SYSTEM:</b></p> <p>YEAR FAILING SYSTEM INSTALLED _____</p> <p><b>THE FAILING SYSTEM IS:</b></p> <p>1. <input type="checkbox"/> BED 2. <input type="checkbox"/> TRENCH</p> <p>3. <input type="checkbox"/> CHAMBER 4. <input type="checkbox"/> OTHER _____</p>	<p><b>DISPOSAL SYSTEM TO SERVE:</b></p> <p>1. <input checked="" type="checkbox"/> SINGLE FAMILY DWELLING</p> <p>2. <input type="checkbox"/> MODULAR OR MOBILE HOME</p> <p>3. <input type="checkbox"/> MULTIPLE FAMILY DWELLING</p> <p>4. <input type="checkbox"/> OTHER _____ SPECIFY _____</p>	<p><b>TYPE OF WATER SUPPLY</b></p>
<p><b>SIZE OF PROPERTY</b> 19,101 SF</p> <p><b>ZONING</b> I.R.1</p>		

**DESIGN DETAILS (SYSTEM LAYOUT SHOWN ON PAGE 3)**

<p><b>TREATMENT TANK</b></p> <p>1. <input checked="" type="checkbox"/> SEPTIC: <input type="checkbox"/> Regular <input checked="" type="checkbox"/> Low Profile</p> <p>2. <input type="checkbox"/> AEROBIC</p> <p>SIZE: 600 GALS.</p>	<p><b>WATER CONSERVATION</b></p> <p>1. <input checked="" type="checkbox"/> NONE</p> <p>2. <input type="checkbox"/> LOW VOLUME TOILET</p> <p>3. <input type="checkbox"/> SEPARATED LAUNDRY SYSTEM</p> <p>4. <input type="checkbox"/> ALTERNATIVE TOILET</p> <p>SPECIFY: _____</p>	<p><b>PUMPING</b></p> <p>1. <input type="checkbox"/> NOT REQUIRED</p> <p>2. <input checked="" type="checkbox"/> MAY BE REQUIRED (DEPENDENT ON TREATMENT TANK LOCATION AND ELEVATION)</p> <p>3. <input type="checkbox"/> REQUIRED</p> <p>DOSE: _____ GALS</p>	<p><b>CRITERIA USED FOR DESIGN FLOW (BEDROOMS, SEATING EMPLOYEES, WATER RECORDS, ETC)</b></p> <p>3 BEDROOM CONSERVATIVE</p>
<p><b>SOIL CONDITIONS USED FOR DESIGN PURPOSES</b></p> <p>PROFILE: U CONDICTION: A III</p> <p>DEPTH TO LIMITING FACTOR: 27</p>	<p><b>SIZE RATINGS USED FOR DESIGN PURPOSES</b></p> <p>1. <input type="checkbox"/> SMALL</p> <p>2. <input checked="" type="checkbox"/> MEDIUM</p> <p>3. <input type="checkbox"/> MEDIUM-LARGE</p> <p>4. <input type="checkbox"/> LARGE</p> <p>5. <input type="checkbox"/> EXTRA LARGE</p>	<p><b>DISPOSAL AREA TYPE/SIZE</b></p> <p>1. <input type="checkbox"/> BED _____ Sq. Ft.</p> <p>2. <input checked="" type="checkbox"/> CHAMBER 600 Sq. Ft. <input checked="" type="checkbox"/> REGULAR <input type="checkbox"/> H-20</p> <p>3. <input type="checkbox"/> TRENCH _____ Linear Ft.</p> <p>4. <input type="checkbox"/> OTHER: _____</p>	<p><b>DESIGN FLOW: 450 (GALLONS DAY)</b></p>

**SITE EVALUATOR STATEMENT** \* USED 24 INFILTRATOR CHAMBERS IN TRENCH CONSTRUCTION

On SEPTEMBER 16, 1989 (date) I conducted a site evaluation for this project and certify that the data reported is accurate. The system I propose is in accordance with the Subsurface Wastewater Disposal Rules.

William B. Gordin 0003/4814 5/21/90

Site Evaluator or Professional Engineer's Signature SE # PE # Date

\* Local Plumbing Inspector's Signature if a Local Site Evaluator Waiver under a Local Order.

**Exhibit C**  
**SUBSURFACE WASTEWATER DISPOSAL SYSTEM APPLICATION**

Department of Human Services  
Division of Health Engineering

Town, City, Plantation

**PORTLAND CUSHINGS ISLAND**

Street, Road, Subdivision

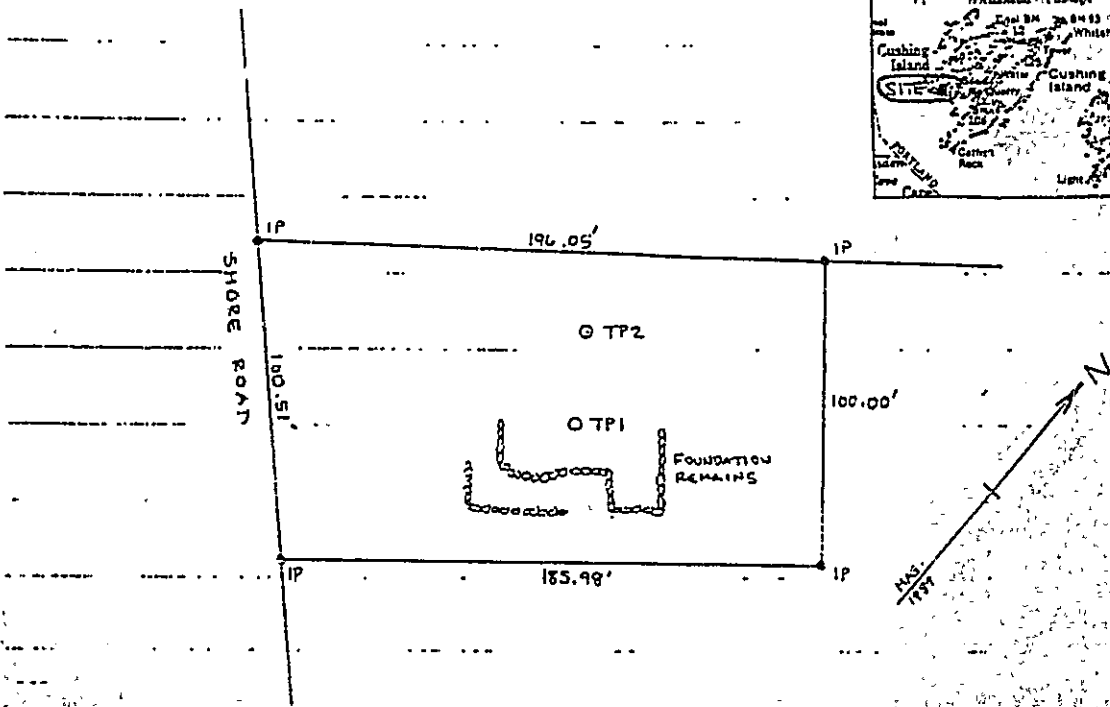
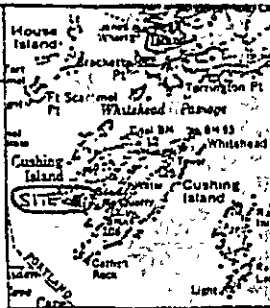
**SHORE ROAD 106A-A-11**

Owner's Name

**HELEN SUTTER**

SITE PLAN

Scale 1" = **50** Ft.



**SOIL DESCRIPTION AND CLASSIFICATION (Location of Observation Holes Shown Above)**

Observation Hole 1  Test Pit  Boring  
2" Soil Depth of Organic Horizon Above Mineral Soil

DEPTH BELOW MINERAL SOIL SURFACE (Inches)	Texture	Consistency	Color	Mottling
0	ASH		BLACK	
2	LOAM			
10	VERY STONY		RED BROWN	
13	LOAMY CONCRETE	LOOSE	LIGHT RED BROWN	NONE EVIDENT
15				
20	VERY STONY		RED	
25	FINE SANDY GRAVEL		YELLOW	
30				
35	RED ROCK			
40				
45				
50				
55				
60				
65				
70				
75				
80				
85				
90				
95				
100				

Soil Classification: **AU** Slope: **36** Limiting Factor: **36**

Observation Hole 2  Test Pit  Boring  
2" Forest Floor Depth of Organic Horizon Above Mineral Soil

DEPTH BELOW MINERAL SOIL SURFACE (Inches)	Texture	Consistency	Color	Mottling
0	GRAVELLY LOAM		DARK BROWN	
2	VEGETATION			
10	STONY LOAMY GRAVEL	LOOSE	LIGHT RED BROWN	NONE EVIDENT
15				
20	VEGETATION			
25	STONY FINE SANDY GRAVEL		RED YELLOW	
30				
35	RED ROCK			
40				
45				
50				
55				
60				
65				
70				
75				
80				
85				
90				
95				
100				

Soil Classification: **AU** Slope: **27** Limiting Factor: **27**

*William B. Godwin* 0003/4814

5/21/90



EXHIBIT C  
**SUBSURFACE WASTEWATER DISPOSAL SYSTEM APPLICATION**

Department of Human Services  
 Division of Health Engineering

Town, City, Pincation

PORTLAND CUSHINGS ISLAND

Street, Road, Subdivision

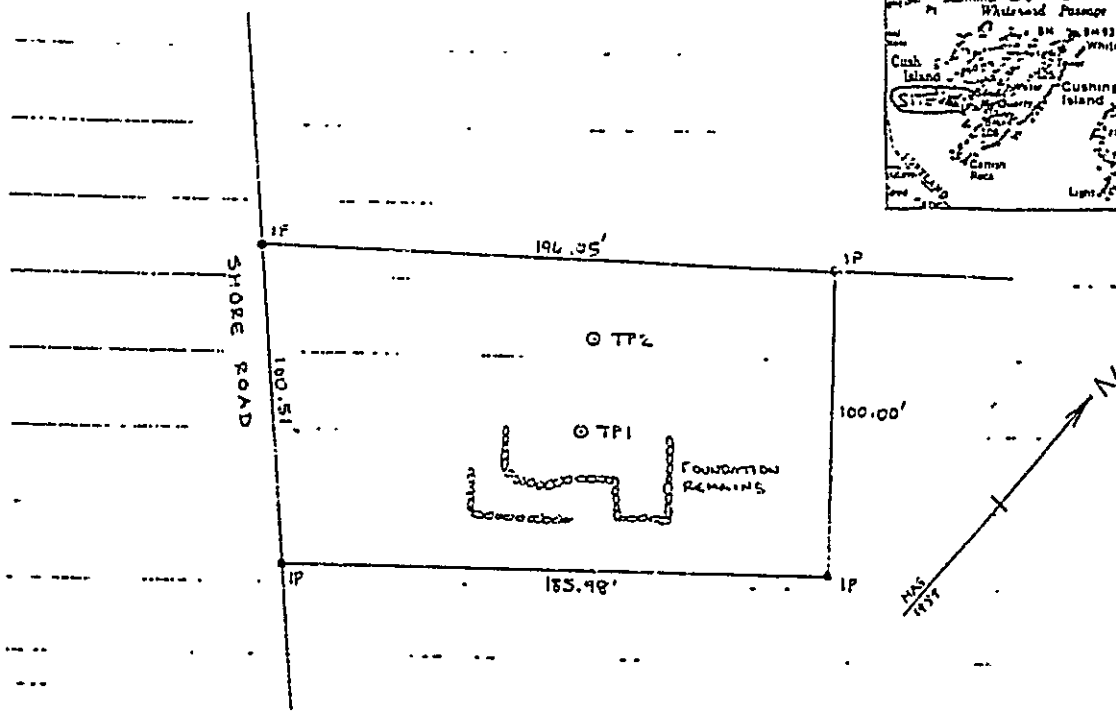
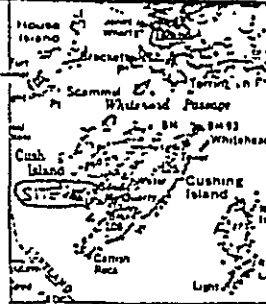
SHORE ROAD 106A-A-1

Owners Name

HELEN SUTTER

SITE PLAN

Scale 1" = 50' FL



**SOIL DESCRIPTION AND CLASSIFICATION**

(Location of Observation Holes Shown Above)

Observation Hole 1  Test Pit  Boring  
 2" Soil Depth of Organic Horizon Above Mineral Soil

DEPTH BELOW MINERAL SOIL SURFACE (Inches)	Texture	Consistency	Color	Mottling
0-2	ASIL		BLACK	
2-4	CLAY			
4-10	VERY STONY		RED BROWN	
10-15	SANDY GRAVEL	LOOSE	LIGHT RED BROWN	NONE EVIDENT
15-30	VERY STONY		RED YELLOW	
30-35	FINE SANDY GRAVEL			
35-45	RED ROCK			

Soil Classification: 4 A11  
 Slope: 36  
 Limiting Factor: 36  
 Comments: X

Observation Hole 2  Test Pit  Boring  
 2" Forest Peat Depth of Organic Horizon Above Mineral Soil

DEPTH BELOW MINERAL SOIL SURFACE (Inches)	Texture	Consistency	Color	Mottling
0-4	RAVELLY LOAM		PINK	
4-10	VERY STONY LOAMY GRAVEL	LOOSE	LIGHT RED BROWN	NONE EVIDENT
10-15	VERY STONY FINE SANDY GRAVEL		RED YELLOW	
15-30	RED ROCK			

Soil Classification: 4 A11  
 Slope: 27  
 Limiting Factor: 27  
 Comments: X

William B. Salwin 0003/4814

5/21/90

VERRILL & DANA

ATTORNEYS AT LAW  
ONE PORTLAND SQUARE  
P. O. BOX 586  
PORTLAND, MAINE 04112-0586  
(207) 774-4000  
FACSIMILE (207) 774-7499

OFFICES IN:  
AUGUSTA, MAINE  
KENNEBUNK MAINE

CHRISTOPHER S. NEAGLE  
Partner

June 21, 1994

Fax (874-8716)

Chairman, Zoning Board of Appeals  
Room 315  
Portland City Hall  
389 Congress Street  
Portland, ME 04104

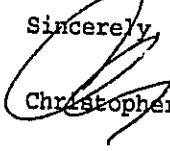
Re: Sutter/Empson  
Variance Request  
Shore Road, Cushings Island  
Map 106A - Block A - Lot 11

Dear Sir:

As I discussed with Bill Giroux this afternoon, Linda Sutter underwent surgery this week for an unexpected medical problem and will not be able to attend the hearing scheduled for this Thursday night. Therefore, I would like to postpone the request to be heard on June 23rd with the understanding that the request will be rescheduled for the next Zoning Board meeting on July 14, 1994.

Depending on her recovery, we may need a further extension, and I will keep you posted. On behalf of my client, thank you for your understanding in this difficult time for her.

Sincerely,

  
Christopher S. Neagle

cc: Helen Linda Sutter

[Atty. CRN.Sutter.Cushings]Zoning.Board

Inspections Services



William D. Giroux  
Zoning Administrator

CITY OF PORTLAND

June 22, 1994


RE: 106A-A-11  
Cushings Island

Christopher S. Neagle  
Verrill & Dana  
Attorneys at Law  
One Portland Square  
P.O. Box 586  
Portland, ME 04112-0586

Dear Mr. Neagle:

This is to acknowledge receipt of your letter (Fax) requesting we postpone the Sutter/Empson appeal on Cushings Island. We will schedule this appeal to be heard at the meeting of July 14, 1994. If a further extension, as mentioned in your letter, becomes necessary, please notify us as soon as you are notified by the appellants.

Sincerely,

  
William D. Giroux  
Zoning Administrator

/s/

UANA

299 P01 JUN 21 '94 14:54

One Foreland Square  
P.O. Box 586 DTS  
Portland, ME 04112  
TEL: (207) 774-4000  
FAX: (207) 774-7497

FACSIMILE TRANSMITTAL COVER SHEET

DATE: June 21, 1994

2 PAGES, INCLUDING COVER P

FROM: Christopher S. Neagle

CLIENT/MATTER NO. 78780-2970

TO: Chairman, Zoning Board of Appeals  
(NAME)

Portland City Hall, Room 315  
(COMPANY)

(CITY) (STATE)

874-8716

(FACSIMILE TELEPHONE NO.)

(OFFICE TELEPHONE NO.)

COMMENTS:

THIS COMMUNICATION IS INTENDED FOR THE USE OF THE ADDRESSEE NAMED HEREIN AND MAY CONTAIN LEGALLY PRIVILEGED AND CONFIDENTIAL INFORMATION. IF YOU ARE NOT THE INTENDED RECIPIENT OF THIS FACSIMILE, YOU ARE HEREBY NOTIFIED THAT A DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL COMMUNICATION TO US AT THE ADDRESS ABOVE VIA THE UNITED STATES POSTAL SERVICE. WE WILL REIMBURSE ANY COSTS YOU INCUR IN NOTIFYING US AND RETURNING THE COMMUNICATION TO US. THANK YOU.

If you do not receive this complete transmission,  
please call (207) 774-4000, extension 3119.



299 P02 JUN 21 '94 14:54

VERRILL & DANA  
ATTORNEYS AT LAW  
ONE PORTLAND SQUARE  
P. O. BOX 588  
PORTLAND, MAINE 04112-0588  
(207) 774-1000  
FACSIMILE (207) 774-7488

OFFICES IN:  
AUGUSTA, MAINE  
KENNEBUNK, MAINE

CHRISTOPHER S. NEAGLE  
Partner

June 21, 1994

Fax (874-8716)

Chairman, Zoning Board of Appeals  
Room 315  
Portland City Hall  
389 Congress Street  
Portland, ME 04104

Re: Sutter/Empson  
Variance Request  
Shore Road, Cushings Island  
Map 106A - Block A - Lot 11

Dear Sir:

As I discussed with Bill Giroux this afternoon, Linda Sutter underwent surgery this week for an unexpected medical problem and will not be able to attend the hearing scheduled for this Thursday night. Therefore, I would like to postpone the request to be heard on June 23rd with the understanding that the request will be rescheduled for the next Zoning Board meeting on July 14, 1994.

Depending on her recovery, we may need a further extension, and I will keep you posted. On behalf of my client, thank you for your understanding in this difficult time for her.

Sincerely,

  
Christopher S. Neagle

cc: Helen Linda Sutter

[Atty. CSH.Sutter.Cushings]Zoning.Board

Inspections Services



William D. Giroux  
Zoning Administrator

CITY OF PORTLAND

June 24, 1994

CORRECTED COPY

RE: 106A-A-11  
Cushings Island

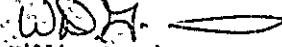
Christopher S. Neagle  
Verrill & Dana  
Attorneys at Law  
One Portland Square  
P.O. Box 586  
Portland, ME 04112-0586

Dear Mr. Neagle:

This is to acknowledge receipt of your letter (Fax) requesting we postpone the Sutter/Empson appeal on Cushings Island. We will schedule this appeal to be heard at the meeting of July 14, 1994. If a further extension, as mentioned in your letter, becomes necessary, please notify us as soon as you are notified by the appellants.

This appeal is scheduled to be heard at the afternoon session which begins at 3:30 p.m.

Sincerely,

  
William B. Giroux  
Zoning Administrator

/el

Inspections Services



William D. Giroux  
Zoning Administrator

CITY OF PORTLAND

June 30, 1994

RE: 106A-A-11 -- Cushings Island


Christopher S. Neagle  
Verrill & Dana  
Attorneys at Law  
One Portland Sq.  
P. O. Box 586  
Portland, ME 04112-0586

Dear Mr. Neagle:

This is to acknowledge your request per our telephone conversation today. The Sutter-Empson Appeal, Cushings Island is now scheduled to be heard at their meeting of July 14, 1994 at 7:00 p.m in Room 209 City Hall, Portland, Maine. It will be the first item to be heard on the evening agenda.

A copy of that agenda will be sent to you as soon as they become available for distribution.

Sincerely,

  
William D. Giroux  
Zoning Administrator

/el

CURTIS THAXTER STEVENS BRODER & MICOLEAU

ONE CANAL PLAZA • PORTLAND, MAINE 04112

P.O. BOX 7320

ATTORNEYS AT LAW

(207) 775-2361

FAX (207) 775-0612

SIDNEY W. THAXTER (1914-1977)

KENNETH M. CURTIS\*

ROBERT E. STEVENS

SIDNEY ST. F. THAXTER

JAMES N. BRODER

JOHN W. MICOLEAU

JOHN W. BERNOTAVICZ

MICHAEL R. PEISNER

D. MICHAEL FRINK

KIMBALL L. KENWAY

LAWRENCE C. WALDEN

JOHN D. GLEASON

STEPHEN E. CHAMPAGNE

DAVID P. SILK

MAURICE A. SELINGER III

NANCY C. ZIEGLER

CHRISTIAN T. CHANDLER

CATHERINE CHARETTE

JAMES L. COSTELLO

of counsel

WALTER E. COREY, III

BARNET D. SKOLNIK

BRUCE R. JOHNSON

\*on leave of absence

AUGUSTA OFFICE  
185 STATE STREET  
P.O. BOX 5307  
AUGUSTA, ME 04332-8307  
(207) 628-0388  
FAX (207) 628-3752

HAND DELIVERED  
July 6, 1994

Mr. William Giroux  
Zoning Administrator  
City of Portland  
389 Congress Street  
Portland, ME 04101

Mr. P. Samuel Hoffses  
Chief of Inspection Services  
City of Portland  
389 Congress Street  
Portland, ME 04101

Re: Linda Sutter Hardship Variance  
Cushings Island, Map 106A-A-11

Dear Bill and Sam:

Enclosed is my submission to the Board of Appeals with regard to the above matter and a copy of my letter to Charlie Lane. Also enclosed are copies of two pertinent cases I discussed with Bill. I understand my opposition will be presented to the Board as part of the record. I would still request that the hearing be continued until August when I can attend.

Sincerely,



Sidney St. F. Thaxter

SST/CMA  
Enclosures

SST/884437.AM19



CURTIS THAXTER STEVENS BRODER & MICOLEAU  
ONE CANAL PLAZA • PORTLAND, MAINE 04112

P.O. BOX 7320  
ATTORNEYS AT LAW  
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JOHN W. BERNSTAVICZ  
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D. MICHAEL FRINK  
KINGALL L. KENWAY  
LAWRENCE C. WALDEN  
JOHN D. GLEASON  
STEPHEN E. CHAMPAGNE  
DAVID P. SILK  
MAURICE A. SCLINGER, III  
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CHRISTIAN T. CHANDLER  
CATHERINE CHARENTE  
JAMES L. COSTELLO

of counsel  
WALTER E. COREY, III  
BARNET D. SKOLNIK  
BRUCE H. JOHNSON

\*on leave of absence

AUGUSTA OFFICE  
185 STATE STREET  
P.O. BOX 5301  
AUGUSTA, ME 04332-9301  
(207) 626-0388  
FAX (207) 626-3072

HAND DELIVERED  
July 6, 1994

Charles A. Lane, Esq.  
7 Dana Street  
P.O. Box 102  
Portland, ME 04112

Re: Linda Sutter Variance Request  
Cushings Island, Map 106A-A-11

Dear Charlie:

Enclosed is my submission to the Board of Appeals with regard to the above-noted application. I also wanted to send you copies of the enclosed cases which I believe are applicable to this situation. I have also sent this memo on to Sam Hoffses who I understand will be at the hearing. It seems to me that it is absolutely clear that Linda cannot meet the criteria for a hardship especially given the fact that she bought the property after the ordinance went into effect and with full knowledge of the ordinance. In fact, she appeared before the City Council to contest the ordinance based on the very lot she intended to buy and did buy. She certainly has no legal basis for a hardship variance.

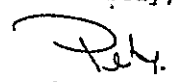
I would also note that there is an interesting wrinkle here. The ordinance provides that the owner obtain a conservation easement and it would seem to me that in order for her to obtain a hardship variance she would have to show that she was unable to obtain a conservation easement or buy another piece of land to combine with her lot. She has not attempted to do either.

I talked to Bill Giroux and informed him that unfortunately I will be out of town the night of the hearing. Evidently, it is not going to be continued. Having filed this, do I have appeal

Charles A. Lane, Esq.  
July 6, 1994  
Page 2

rights as at interested party or should I send a lawyer? For that reason, if you have any questions, I would appreciate if you could give me a call sometime this week.

Sincerely,



Sidney St. F. Thaxter

SST/CMA  
Enclosures.

cc: Mr. P. Samuel Hoffses  
Mr. William D. C'roux

SST/88443/AM16

M E M O R A N D U M

TO: Chairman John Knox and the Board of Appeals  
FROM: Sidney St. F. ("Pete") Thaxter  
DATE: July 6, 1994  
RE: Cushings Island, 106A-A-11  
Response to Variance Application of Linda Sutter and  
Josh Empson

---

Attached is a photocopy of a section of Cushings Island which shows my lot and Linda Sutter's lot. The maps submitted with her application do not accurately depict the present development of the area.

When Mrs. Tenney died, she left the lot in question and the Tenney family cottage which is elsewhere on the island to Scott Tenney and his brothers. Since the fire in 1936, I do not believe anyone has paid much attention to the lot or the fact that it even existed. Scott Tenney and his brothers had been attempting to sell the lot and had talked to some of us on the island. As I recall, the price was \$30,000 and it was being sold as non-developable. A group of the abutters were about to make the Tenneys an offer when Linda Sutter bought it. Shelby Schuck and myself continue to be interested in buying it. Before Linda Sutter bought the lot, she appeared before the City Council and argued the application of the ordinance under which she now seeks a variance to the lot in question. She went ahead anyhow and bought the lot after the ordinance went into effect.



1. Ordinance Requirements. Section 14-145-5(1) (a) provides that additional area requirements for lots such as this can be obtained by acquiring conservation easements from other lots on the island. The purpose of this provision as admitted by the applicant's attorney Mr. Neagle was partly a concern for groundwater and partly a concern for density. The application states that she has tried but no one is willing to give her an easement. There is land available to purchase that when combined with her land could make her lot developable. The applicant appears to be saying that somehow she should be given free of charge a conservation easement that would then make her land double or triple in value. There is plenty of land to be purchased and I submit that the conservation easements could also be purchased. The statute specifically provides for this option and the applicant has not been ruled out from the opportunity to do so as it appears she is suggesting in her application. To allow an application to proceed with this kind of mere statement would negate the requirements in the ordinance to obtain the easements. Clearly, this particular lot has value in that it can be added to another lot and vice versa.

2. Undue Hardship Requirements. The applicant is seeking a variance under Section 14-473(c) (1) as undue hardship.

A. THIS LAND CAN YIELD A REASONABLE RETURN WITHOUT THE GRANTING OF AN EASEMENT.

First, the price that was offered to me and others was a price that clearly took into account that the lot was undevelopable. Even so, the lot can be sold to abutters. In



fact, a group of the abutters were getting ready to make an offer when the applicant stepped in and purchased the land from Mr. Tenney. The lot can be used for summer picnicking and access to the island. This would carry rights with it to use the island beaches and substantial other usage rights on the island (see the attached deed). The land may also be sold to others and combined with other lots under the ordinance to create a buildable lot.

B. THE NEED IS NOT UNIQUE TO THE APPLICANT AND IS NOT  
DUE TO GENERAL CONDITIONS IN THE NEIGHBORHOOD.

The lot is not the only unimproved lot. The map submitted herewith shows four unimproved lots within a very short distance. Two of which do not meet the zoning requirement of a 40,000 square foot minimum. It is not correct that there are only three unimproved substandard lots. There are numerous other unimproved substandard lots on the island. The cottage that was on this lot burned down in 1936. I do not agree with the statement that the Tenney family had always intended to build a house there. I worked for numerous years for Mrs. Tenney in her garden and she never made a single comment about the lot or building anything there. The desire to build on this lot is obviously of recent vintage. It is disingenuous to imply this lot is part of a family history. In this instance, you have a first cousin selling a lot to another first cousin. Mrs. Tenney left all her land on Cushings Island to Scott Tenney and his brothers and did not leave it to the Sutter side of the family. This is no different than any other arms length transaction.

C. THE GRANTING OF THE VARIANCE WILL ALTER THE ESSENTIAL CHARACTER OF THE LOCALITY.

It is correct to state that Frederick Law Olmstead did design some of the landscape and lots on the island. John Calvin Stevens had no involvement in the land use plan to my knowledge. However, the lots we are looking at here come off of something called the Howe Plan and were not part of the grand design of Frederick Law Olmstead. Indeed, the Olmstead design looked at two-acre lots on the ocean with the smaller lots to be in the central part of the island. This variance request is contrary to the Olmstead design. There are other vacant lots in this area of the island. There are three in the immediate adjacent area. What this does, unfortunately, is take one of the areas of the island that is most congested and make it more congested. I would dispute that this cottage is a replacement of a once historically placed cottage. The "historical cottage" was only there for nine years and has not been there in Linda Sutter's lifetime. The lot was abandoned over a half century ago and to suggest that this is a replacement of a historical cottage is not correct.

D. THIS IS A CLASSIC CASE OF A HARDSHIP THAT IS THE RESULT OF THE ACTION TAKEN BY THE OWNER.

Linda Sutter, prior to purchasing this lot, went to the City Council and complained about the application of the ordinance to this lot which she did not own at the time. Nevertheless, she went ahead and purchased the lot after the effective date of the ordinance. To meet the hardship requirements of Maine law as

reflected in the Portland Zoning Ordinance, you cannot create your own hardship. "When a landowner purchases land with actual or constructive knowledge of the zoning restrictions, he may not be granted a variance on the ground of undue hardship." Sibley v. The Inhabitants of the Town of Wells, 462 A.2d 27 (Me. 1983). See also Bishop v. Town of Eliot, 529 A.2d 798 (Me. 1987). Both of these Maine cases are very similar to this case. I would argue that the degree of knowledge that the applicant had here was far greater than that of either the Sibley or Bishop case. The Maine courts apply the same law the Board of Appeals applies in looking at a hardship.

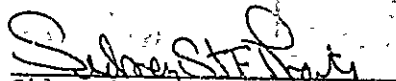
3. Additional Facts. As I am sure the Board knows, the zoning ordinance is not entirely limited to density and groundwater, although those were issued. Total density on the island was an issue as well as density in any particular area. While Cushings does have some City water, if I wish to have year-round City water, which I do, or if Shelby Schuck (the other abutter) does, we would have to drill wells and they would be in very close proximity to the Sutter septic system. There is an attempt here to leverage the fact that there is other vacant land on Cushings. The point is that this is a dense area of the island and the exact point of the zoning ordinance is to encourage others to occupy the other large tracts of vacant land. There are numerous lots and/or houses that have been for sale. There are now 42 houses on Cushings with a large number of



building plans in the process. The island has always discouraged development and has not assisted anyone in development because the lack services and facilities.

I, therefore, request that this application be denied. It does not meet the standards for a hardship. Linda Sutter bought this lot with full knowledge of the applicability of the ordinance and she allegedly paid a price that took that into consideration. There is continuing value in the piece of land because of the ordinance. The abutters stand willing and ready to make a reasonable offer for the land. If a hardship is granted, the character and nature of this area of the island will be altered.

Respectfully submitted,

  
Sidney St. F. Thaxter

cc: Shelby Schuck  
Christopher Bond  
Bill Meserve  
John Thaxter  
Schuyler Thaxter

SST/88443/AM7



SK9202PG0189

WARRANTY DEED

024753

HARRAL S. TENNEY, II, of Newburgh, New York, CHARLES THOMAS TENNEY, and DUNCAN C. TENNEY, for full value and consideration paid, heraby grant to HELEN LINDA BUTTER, of Cambridge, Massachusetts, with varranty covenants, the following real estate:

A certain lot or parcel of land, located on the northeast side of Shore Road, on Cushings Island, in the City of Portland, County of Cumberland, State of Maine, bounded and described as follows:

Beginning on the northeast side of Shore Road, so called, at that portion which led from the steam-boat wharf to the main bathing beach in 1905, at a 5/8th inch iron rod at the northwest corner of land of Sidney St. F. Thaxter;

Thence along Shore Road, N 57° 09' 15" W, 100.51 feet to a 5/8th inch iron rod at the southwest corner of land now or formerly of Judy H. Jennett described in Book 6842, Page 135;

Thence N 38° 35' 45" E, along the land of Jennett, 196.05 feet to a drill hole at land of Shelby Schuck described in Book 4539, Page 88;

Thence S 51° 24' 15" E, along land of Schuck, 100.00 feet to a solid iron bolt at land of Thaxter recorded in Book 8991, Page 82;

Thence S 38° 35' 45" W, along land of Thaxter, 185.98 feet to the 5/8th inch iron rod at Shore Road at the point of beginning.

This lot contains approximately 19,101 square feet, based on a November, 1989 survey plan of the Helen T. Tenney lot by John L. Cothern, R.L.S. The courses described above are based on that plan.

TOGETHER WITH a right of way from this lot to the wharf of Francis Cushing and to the bathing beach at the southwest side of Cushings Island, over the roads leading thereto constructed on land owned by Francis Cushing in 1905.

ALSO TOGETHER WITH our right, title and interest in and to: the 15 foot access easement, running northeast to Ottawa Avenue, across land of Shelby Schuck; all rights to the common property of Cushings Island Trust, Cushings Associates, Inc. and/or the Cushings Island Conservatio. Corporatio.; use of the public avenues and ways as they are used in common with other property owners on Cushings Island; use

MAINE REAL ESTATE TAX PAID

BK9202PG0190

in common of the parks, beaches, shores and landings; and all other appurtenant easements, rights and privileges.

Being the same premises described in the October 14, 1927 Warranty Deed to Helen Thomas Tenney recorded in Book 1277, Page 3. Further reference is made to the probate records for Helen Thomas Tenney, Cumberland County Probate Docket 62410; to the will of Helen Thomas Tenney, an abstract of which is recorded in Book 3025, Page 21; to the October 24, 1946 Certificate of Discharge of Inheritance Tax Lien recorded in Book 2978, Page 160; and to the December 8, 1975 Affidavit of C. Thomas Tenney recorded in Book 3382, Page 190.

SUBJECT HOWEVER, to real estate taxes assessed April 1, 1990 for the July, 1989 - June 1991 tax year, which the Grantee assumes and agrees to pay.

Dated this 4th day of May, 1990

Harold S. Tenney  
Harold S. Tenney, Jr.

Charles Thomas Tenney  
Charles Thomas Tenney

Burton C. Tenney  
Burton C. Tenney

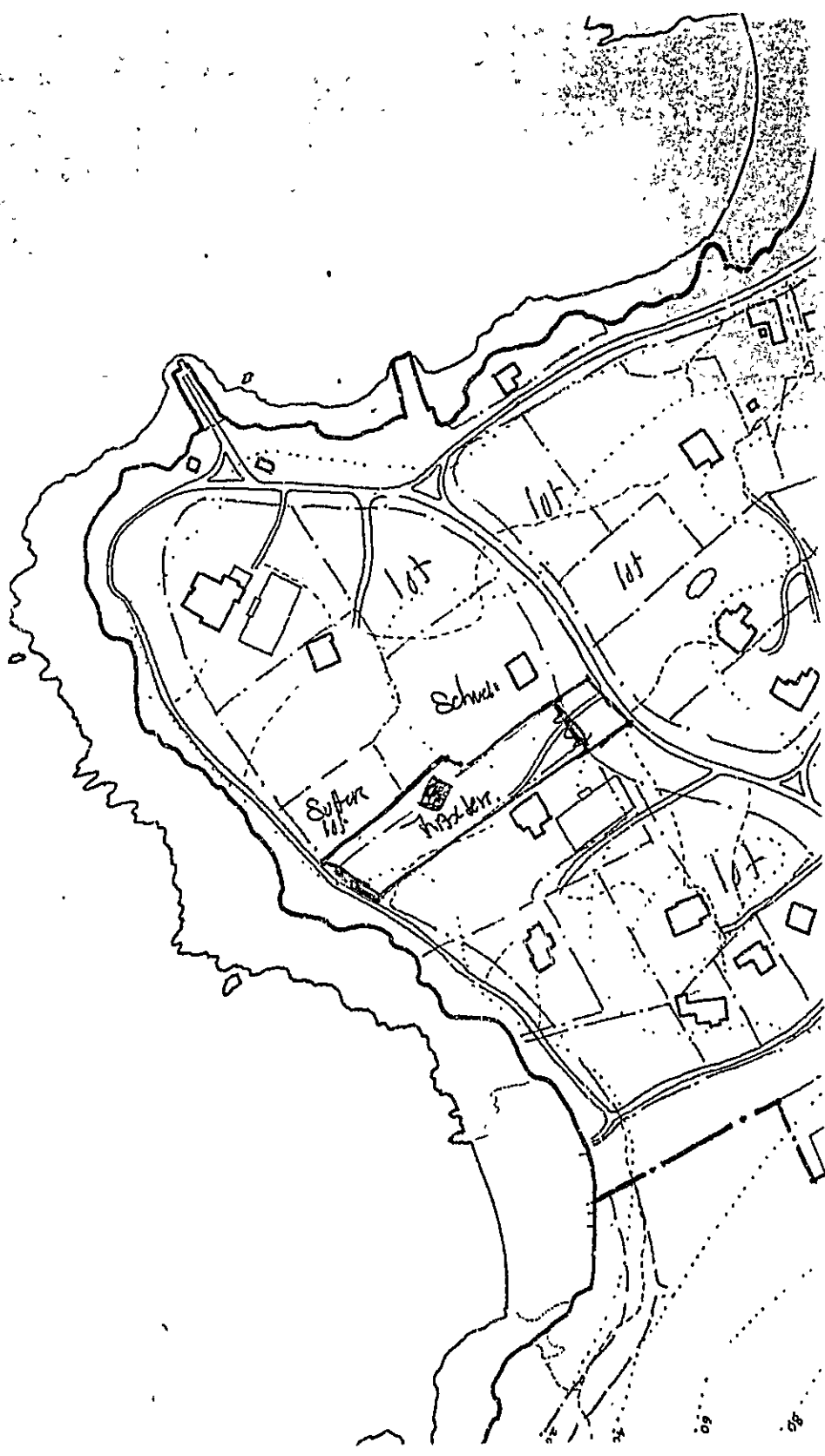
May 4th, 1990

State of New York  
County of Cumberland

Personally appeared the above named Harold S. Tenney, Charles Thomas Tenney and Burton C. Tenney and acknowledged the foregoing instrument to be their free act and deed.

Before me:  
Robin A. De Caro  
Notary Public  
Robin A. De Caro  
(CYPB of New York)  
Notary Public, State of New York  
No. 4859841  
Qualified in Ulster County  
Commission Expires December 11, 1991

RECEIVED  
REGISTERED OFFICE OF DEEDS  
1990 JUN 11 PM 3:51  
CUMBERLAND COUNTY  
[Signature]



60 65





Corporation Counsel

Gary C. Wood



CITY OF PORTLAND

Associate Counsel

Charles A. Lane  
Elizabeth L. Boynton  
Nahalle L. Durns  
Donna M. Katsiaficas

July 8, 1994

John C. Knox, Chairman  
Board of Appeals  
44 Bramblewood Drive  
Portland, ME 04103

RE: Linda Sutter Variance Request - Cushings Island

Dear John:

Sidney St. F. Thaxter, Esquire, who opposes the variance requested by Linda Sutter which is scheduled for hearing before the Board on July 14, has filed some material explaining his opposition.

I have forwarded copies of the materials submitted by him to you, the other members of the Board, and to Christopher S. Neagle, Esquire, the attorney for the applicant.

Very truly yours,

Charles A. Lane  
Associate Corporation Counsel

CAL:rlj  
Enclosure.

cc: Appeal Board Members:  
Elizabeth L. Bordowitz  
Thomas F. Jewell  
Earl R. MacDonald  
Matthew D. Manahan  
William E. Neleski, Jr.  
Michael E. Westort

William D. Giroux, Zoning Administrator

Christopher S. Neagle, Esquire

Cushings Island  
Portland, Maine 04108

July 13, 1994

VIA FEDERAL EXPRESS

City of Portland  
Zoning Board of Appeals  
389 Congress Street  
Portland, Maine 04101

Re: Variance Appeal Application of Helen Linda Sutter and  
Joshua Christopher Empson

Location: Shore Road, Cushings Island, Map 106A--  
Block A--Lot 11

Dear Members of the Zoning Board of Appeals:

As a longtime resident of Cushings Island and the former Chairperson of its Land Use Subcommittee, I am writing to oppose the above referenced request for a variance to permit the construction of a subsurface septic system and, eventually, a residence, on a lot that is substantially smaller than the minimum lot size requirement set forth in Section 14-145.5(1)(g) of the Portland Zoning Code. There is no reasonable basis to grant a variance for a lot that is less than half the minimum lot size required at this location.

The critical facts are as follows: On December 12, 1989, the lot in question became subject to new zoning regulations that required a lot serviced by a subsurface septic system to have a minimum lot size of 40,000 sq. ft. Helen Linda Sutter, the principal applicant, purchased the lot in question on May 14, 1990, approximately six months after the new zoning requirements had gone into effect and with full notice that it was a non-conforming lot. The lot in question contains only 19,101 sq. ft. so it is less than half the minimum lot size required by the Zoning Code.

In the memorandum in support of the application, counsel for the applicants states that the lot is non-conforming in two respects. First, he contends that although it does not meet the minimum residential lot size, it may be grandfathered under

Cushings Island  
Portland, Maine 04108

July 13, 1994

VIA FEDERAL EXPRESS

City of Portland  
Zoning Board of Appeals  
389 Congress Street  
Portland, Maine 04101

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Joshua Christopher Empson

Location: Shore Road, Cushings Island, Map 106A--  
Block A--Lot 11

Dear Members of the Zoning Board of Appeals:

As a longtime resident of Cushings Island and the former Chairperson of its Land Use Subcommittee, I am writing to oppose the above-reference<sup>d</sup> request for a variance to permit the construction of a subsurface septic system and, eventually, a residence, on a lot that is substantially smaller than the minimum lot size requirement set forth in Section 14-145.5(1)(g) of the Portland Zoning Code. There is no reasonable basis to grant a variance for a lot that is less than half the minimum lot size required at this location.

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In the memorandum in support of the application, counsel for the applicants states that the lot is non-conforming in two respects. First, he contends that although it does not meet the minimum residential lot size, it may be grandfathered under

July 13, 1994

Section 14-433 because the lot met applicable street frontage requirements in 1985. The provisions of Section 14-433 don't apply, however, to lots with subsurface septic systems such as this one, so the grandfather provisions of Section 14-433 are simply not applicable. Even if they were, however, I don't think that the lot has the required 100 feet of frontage, for I don't believe that the so-called Shore Road, which is actually a limited right-of-way, constitutes a street for purposes of the frontage requirements. The closest street is Ottawa Avenue, to which this lot has an easement, but on which it has no frontage.

Second, counsel for the applicants acknowledge that for a lot with a subsurface septic system, Section 14-145.5(1)(g) requires a minimum lot size of 40,000 sq. feet. The lot in question does not meet that requirement. Although § 14-145.5(1)(h) permits an individual to meet the minimum lot size requirements by acquiring conservation easements elsewhere on the Island sufficient to enable the subject lot to meet the minimum lot size requirement, the applicants have not done so. Thus, there can be no question that this lot fails to meet the zoning requirements.

In the memorandum in support of the application, applicant's counsel suggests that some sort of general equitable considerations should permit her to construct a residence on this lot. He argues that but for the zoning change, the lot would have been "grandfathered" because a dwelling had been situated on the lot in the early years of this century. The fact of the matter, however, is that the prior dwelling was destroyed by fire around 1936. It simply is not reasonable to assert that some form of grandfather rights persist nearly 60 years after the fire. The much more critical point is that the zoning was changed in 1989 to protect the islands from overly dense development. Any grandfather rights that might have existed prior to 1989 were eliminated by that zoning change. The fact that a residence might have been located on an undersized lot at some time in the past does not constitute sufficient grounds to confer development rights in violation of the explicit language and purpose of the Zoning Code, particularly with respect to a buyer who purchased a lot on the open market after the new Zoning Code was in effect with full notice that the lot did not conform.

Furthermore, the fact that the lot happened to be owned by the principal applicant's grandparents for a period of some nine years before she was even born is irrelevant. Her grandparents owned another house on the Island in which her grandmother and uncle lived for some thirty or forty years. This was the "family



homestead." That house and the small lot here in question were left to Linda Sutter's cousins, not her. Her cousins, who kept the house, then offered the lot for sale for several years. Linda Sutter bought it like any other prospective purchaser -- related or unrelated -- might have, but she did so after the zoning laws had changed. She cannot now complain of some unexpected hardship because the zoning laws that existed at the time she bought the lot are now enforced. To the contrary, to permit an admittedly undersized lot to be developed would create an unwarranted windfall.

Arguments that this variance would cause a de minimis impact on the Island are simply not accurate. The lot in question is located near a fairly narrow tip on one corner of the Island. There are already two residences in rather close proximity with the very real prospect that two additional residences on legally sized lots will be built within the next few years. A fifth dwelling located on an undersized lot in this same area would cause substantial congestion in what is now one of the most scenic parts of the Island. When added to those other dwellings, it could also create an adverse effect on the ground water in the area. Moreover, any septic system constructed on this lot would probably be located less than a hundred yards from the waters of Casco Bay.

At the time the new zoning requirements were adopted, the Land Use Committee on Cushings Island met and agreed that as a matter of policy, the Island should oppose any request for a variance from the protection afforded by the new zoning. That recommendation was adopted as Island policy. We are concerned by the impact that the density caused by increased development will have on the rural character of the Island and on the ability to provide necessary services to the Island's residents. Several undersized lots exist on the Island (the number is higher than the three mentioned in the memorandum submitted by applicant's counsel), and the Island does not want to distinguish among potentially competing cases, particularly since there are a significant number of legally sized lots that are likely to be developed over the next few years. Given the deep concern of Island residents with the negative impact of overly dense development, we urge you, as taxpayers of the City of Portland, to enforce the protections the Zoning Code is intended to afford us and to deny the request filed by Ms. Helen L. Sutter and Mr. Joshua Empsor for a variance permitting installation of a subsurface septic system and residence on their non-conforming lot on Cushings Island. Other properties that do not present zoning issues are for sale or have been for sale on Cushings

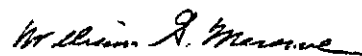
City of Portland

-4-

July 13, 1994

Island, and this is a far better alternative for the applicants to pursue.

Sincerely,



William G. Meserve

WGM,lme

Inspections Services



William D. Giroux  
Zoning Administrator

CITY OF PORTLAND

July 18, 1994

RE: Cushings Island  
106A-A-11  
Helen Sutter and Joshua Empson

Christopher S. Neagle  
One Portland Sq.  
P. O. Box 536  
Portland, ME 04112-0586

Dear Sir:

As you know, at its meeting of July 14, 1994, the Board of Appeals voted to deny your request permitting a placement of a subsurface septic system at the above named location for owners Helen Sutter and Joshua Empson.

A copy of the Board's decision is enclosed.

Sincerely,

  
William D. Giroux  
Zoning Administrator

/el  
Enclosure

cc: Joseph E. Gray, Jr., Director of Planning and Urban Development  
P. Samuel Hoffses, Chief of Inspection Services  
Arthur Rowe, Code Enforcement Officer

residence on Lot 3A. After a public hearing during which the abutters appeared and were represented by counsel, and in which the Town and the appellant were also represented by counsel, the Board voted in favor of granting a variance for Lot 3A by a vote of 3 to 1. The abutters sought review of the Board's decision to the Superior Court pursuant to M.R.Civ.P. 80B in *Robbins, et al. v. Town of Eliot and Richard Saklad*.

The Superior Court ordered the two cases consolidated pursuant to M.R.Civ.P. 42, and affirmed both decisions of the Board. The court entered final judgment on Counts I and II of *Bishop's* complaint pursuant to M.R.Civ.P. 54(b). We ordered the cases consolidated for purposes of this appeal.

## II

[1] We first address whether Bishop and Saklad were required to obtain variances from Town Zoning Ordinance § 305(p)(2) before building on their respective lots. Both Bishop and Saklad contend that their lots were nonconforming lots of record predating the Town's zoning ordinances respecting road frontage requirements. Because they contend that Lots 3A and 3B are "grandfathered," they claim that they are not required to obtain variances under Town Zoning Ordinance § 404.1. That ordinance provides:

A single lot of record which, at the effective date of adoption or amendment of this Ordinance, does not meet the area, road frontage, or setback requirements of the District in which it is located, may be built upon provided that such lot shall be in separate ownership and not contiguous with any other lot in the same ownership, that all other provisions of this Ordinance, shall be met and shall conform with all State laws and regulations.

Bishop and Saklad contend that, although their lots do not meet the town's road frontage requirements, they may nevertheless build on their lots under Section 404.1 because Lots 3A and 3B are not contiguous with any other lot in the same ownership and because all other Town ordinance pro-

visions are met. We disagree with that part of their contention that all other ordinance provisions have been met.

Lots 3A and 3B do not comply with Town Zoning Ordinance § 305(p)(2). See *supra* n. 2. In the context of this ordinance we interpret the "30 foot right-of-way" provision to require that a backlot be served by a right-of-way that is 30 feet in width. Neither right-of-way serving Lots 3A or 3B is 30 feet wide. Third Avenue, the right-of-way serving Lot 3B, is 16½-feet-wide. Fourth Avenue, serving Lot 3A, is 25-feet-wide. We therefore conclude that Bishop and Saklad were not exempt under Section 404.1 from obtaining a variance before building on their lots.

## III.

We next consider the Board's decisions granting a variance to Saklad but denying Bishop's request for a variance. Because the Superior Court here acted as an intermediate appellate court reviewing the Board's actions, we directly examine the record developed before the Board. *Kittery Water District v. Town of York*, 489 A.2d 1691, 1693 (Me.1985). On review, we must determine whether there was an abuse of discretion, an error of law or findings not supported by substantial evidence in the record. *Id.*

In order to obtain a variance from Town Zoning Ordinance § 305(p)(2), Bishop and Saklad, as variance applicants before the Board, each had the burden of proving by competent evidence that all of the statutory requirements for the granting of variances had been met. *Curtis v. Me. 482 A.2d 1253, 1257 (Me.1984)*. The relevant town zoning ordinance provides in pertinent part:

The Board of Appeals shall grant a variance where a party establishes that the strict application of this Ordinance will cause undue hardship. The words "undue hardship" mean:

1. That the land in question cannot yield a reasonable return unless a variance is granted;
2. That the need for a variance is due to the unique circumstances of the



## PURCHASE AND SALE AGREEMENT

This document represents a Purchase and Sale Agreement made in September 1989, between HARRAL S. TENNEY, II, DUNCAN C. TENNEY and CHARLES THOMAS TENNEY, hereinafter referred to as "Seller", and HELEN LINDA SUTTER of Brooklyn, N.Y., hereinafter referred to as "Buyer".

1. Real Estate: The Seller hereby agrees to sell and the Buyer hereby agrees to buy the 18,700 square foot vacant lot owned by Seller on Shore Road on Cushings Island, City of Portland, County of Cumberland, State of Maine, shown on City of Portland Assessor's Map 106A, Block A, Lot 11, and being described in a October 14, 1927 deed to Helen Thomas Tenney recorded in Book 1277, Page 304 together with all appurtenant easements and other rights and privileges.

4. Deed--Title: Seller agrees to convey to Buyer a good and marketable title in accordance with the Maine State Bar Association title standards, and an insurable title for a standard owners title insurance policy, free and clear of all encumbrances, by warranty deed delivered at closing. Seller also agrees to sign the standard title insurance owners affidavit and indemnity attached as Exhibit A, at closing. Should the real estate title prove unmarketable and/or uninsurable, then Seller shall have reasonable time to remedy the title defects, not to exceed thirty (30) days after

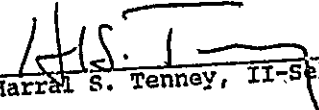
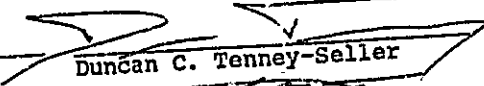

15. Seller's Representations: Seller represents that, to the best of their knowledge and belief, this lot has been separately owned by Seller and their family members for more than 50 years, and that there has been no adjacent real estate owned during this time period; that there are no underground oil or gasoline tanks, dangerous chemicals or other hazardous substances on the real estate; and that no lawsuits or other proceedings are pending with respect to the real estate. These representations shall not survive the closing.

16. Miscellaneous: All dates mentioned are an essential part of this agreement. This agreement shall be governed by Maine law, and shall be binding on and be for the benefit of all parties, their respective heirs, successors, and assigns.

17. Execution: There are two original copies of this agreement, one held by Seller and one held by Buyer and each party has signed one on the day and year written next to their names.

WITNESS:

DATE:

_____	Helen Linda Sutter-Buyer	09-____-89
_____	 Harrah S. Tenney, II-Seller	09-12-89
_____	 Duncan C. Tenney-Seller	09-12-89
_____	 Charles Thomas Tenney-Seller	09-____-89

specific performance, and including all costs and reasonable attorney's fees.

14. Real Estate Broker: All parties to this agreement represent that there is no real estate broker involved in this transaction, nor is there any real estate commission due for the sale of this property.

15. Seller's Representations: Seller represents that, to the best of their knowledge and belief, this lot has been separately owned by Seller and their family members for more than 50 years, and that there has been no adjacent real estate owned during this time period; that there are no underground oil or gasoline tanks, dangerous chemicals or other hazardous substances on the real estate; and that no lawsuits or other proceedings are pending with respect to the real estate. These representations shall not survive the closing.

16. Miscellaneous: All dates mentioned are an essential part of this agreement. This agreement shall be governed by Maine law, and shall be binding on and be for the benefit of all parties, their respective heirs, successors, and assigns.

17. Execution: There are two original copies of this agreement, one held by Seller and one held by Buyer and each party has signed one on the day and year written next to their names.

WITNESS:

\_\_\_\_\_

Helen Linda Sutter  
Helen Linda Sutter-Buyer

DATE:

09-18-89

\_\_\_\_\_

Hartal S. Tenney, II-Seller

09-\_\_\_\_-89

\_\_\_\_\_

Duncan C. Tenney-Seller

09-\_\_\_\_-89

\_\_\_\_\_

Charles Thomas Tenney-Seller

09-\_\_\_\_-89

grandfather - strict fantasy

reasonable return

1. sale to abetter not relevant
2. if ordinary return 40,000 w/o. ~~after~~  
 would find ~~hardship~~ - ~~conservative~~ ~~as~~  
 fact cannot obtain

umpire - ~~age~~ - few substantial

alter essential - no

self created -  
 hardship ~~over~~ with property  
 could protect self in contract

grandfather - strict fantasy



SIBLEY v. INHABITANTS OF TOWN OF WELLS Me. 27  
Cite as 462 A.2d 27 (Me. 1983)

The rule applied by the Court's opinion is that on retrial, after a mistrial, the defendant may object on grounds of competency or relevancy to transcribed testimony from the prior trial even though such objections were not lodged to the testimony at the prior trial, but that the defendant is precluded from asserting objections on the ground of unresponsiveness unless such objections were made at the prior trial.

I disagree with any restriction placed upon defendant's ability to assert any legitimate objection at the second trial because of her failure to make such objection at the prior trial. Such a restriction is inconsistent with the defendant's right to one, complete, fair trial and with the effect of the mistrial. I think it to be indisputable that in a criminal case such as this,

[t]he declaration of mistrial rendered nugatory all of the proceedings during the first trial. The State and defendant were returned to their original position as if there had not been a trial. Each was entitled to offer evidence and to make motions and objections without limitation to that which had been offered or made at the first trial and without being bound by the prior rulings of the Court with respect thereto.

*State v. Hale*, 127 N.J.Super. 407, 413, 317 A.2d 731, 734 (1974). (Emphasis added.)

After a mistrial was declared, this defendant was perfectly free to change or to modify her plea for purposes of the second trial, to plead anew any available defenses, to change the factual basis of the defense and, indeed, to change within the strictures of pleading the theory of the defense. A mistrial "means that the [prior] trial itself was a nullity." 317 A.2d at 733. Given the broad flexibility allowed to the defendant in respect to these significant trial functions, I can see no rational justification for, nor any purpose to be accomplished by, attributing any preclusive effect to anything so mundane, by comparison to the breadth of those options, as the conduct of either counsel on examination or cross-examination of witnesses or the court's prior

rulings on evidentiary questions at the prior trial.

More importantly, such a preclusive effect results in defendant not receiving a single, comprehensive, fair trial. Rather, the adjudication of her guilt or innocence is based in part upon a trial that has been declared a nullity and in part upon the final proceeding as afflicted by those portions of the prior "non-trial" imported into it. Our concept of the adjudication of criminal guilt is so important and the ideal of fair trial so multifaceted that neither can exist undiminished, in my view, side-by-side with a permitted practice of "patchwork litigation."



Russell SIBLEY et al.

v.

INHABITANTS OF the TOWN  
OF WELLS et al.

Supreme Judicial Court of Maine.

Argued May 4, 1983.

Decided June 30, 1983.

Appeal was taken from judgment of the Superior Court, York County, affirming decision of zoning board that denied application for sideline setback and minimum lot size variances to construct house, and permitted construction of house only if landowners joined their two contiguous substandard lots and removed existing mobile home from one of the lots. The Supreme Judicial Court, McKusick, C.J., held that: (1) landowners failed to sustain burden of showing that need for variance was due to unique circumstance of the property, and that resulting hardship was not a result of their own action, and (2) no unconstitutional taking resulted from denial of the vari-

ances where substandard lot had substantial use and value in conjunction with adjacent lot.

Affirmed.

#### 1. Zoning and Planning ⇨536

Under statute empowering municipal boards of appeal to grant variances when application of local ordinance would cause undue hardship, burden was on landowners seeking variances to prove at agency level that they met all statutory requirements. 30 M.R.S.A. § 4963, subd. 3.

#### 2. Zoning and Planning ⇨490

Mere fact that lot was substandard was not a unique circumstance, justifying grant of zoning variance, where all undeveloped lots in neighborhood were of substandard size. 30 M.R.S.A. § 4963, subd. 3.

#### 3. Zoning and Planning ⇨503

Administrative relief is not warranted where owner of contiguous substandard lots can solve problem by combining them to meet minimum requirements of zoning regulations; in such case, development plans may have to be revised, and property owner may not be able to extract maximum profit from his tract, but he has not been denied reasonable use of his land.

#### 4. Zoning and Planning ⇨504

Where owners of substandard lot sought variances to construct a house on lot, their ownership of contiguous lot, which could be added to former lot so that house could be constructed without violating sideline setback requirements, eliminated any hardship that otherwise might result to owners from small size of former lot and deed restriction applicable to it. 30 M.R.S.A. § 4963, subd. 3.

#### 5. Zoning and Planning ⇨467

When a landowner purchases land with actual or constructive knowledge of zoning restrictions, he may not be granted a variance on grounds of undue hardship.

#### 6. Zoning and Planning ⇨497

Where landowners purchased substandard lot with constructive knowledge of zoning restrictions and deed restriction, they could not be granted a variance on grounds of undue hardship.

#### 7. Zoning and Planning ⇨501

Local zoning board's decision, permitting construction of house only if landowners joined their two contiguous substandard lots and removed existing mobile home from one of the lots, was not unlawful, arbitrary, capricious, or unreasonable, where substandard lot was by no means unique in its neighborhood and any hardship on landowners was result of their own action in buying undersized lot and constructing illegal foundation upon it. 30 M.R.S.A. § 4963, subd. 3.

#### 8. Eminent Domain ⇨2(1)

No taking exists unless property has been rendered substantially useless.

#### 9. Eminent Domain ⇨2(1.2)

No unconstitutional taking resulted from zoning board's denial of variances to build house on substandard lot, where land had substantial use and value in conjunction with adjacent lot, notwithstanding that landowners paid \$4,200 for lot, and as an unbuildable lot it was worth only \$1,000.

Bourque & Clegg, Ronald D. Bourque (orally), Sanford, for plaintiffs.

Verrill & Dana, Michael T. Healy (orally), Portland, for defendants.

Before McKUSICK, C.J., and GODFREY, NICHOLS, ROBERTS, CARTER and WATHEN, JJ.

McKUSICK, Chief Justice.

In this M.R.Civ.P. 80B action, Russell and Mary Sibley appeal from the judgment of the Superior Court (York County) affirming a decision of the Town of Wells Zoning Board of Appeals (the Board) that (i) denied their application for sideline setback and minimum lot size variances to construct

a house, and (2) permitted construction of the house only if the Sibleys joined their two contiguous substandard lots and removed the existing mobile home from one of the lots. This was their second application with respect to the proposed house. The Superior Court held that "the Board did not err in denying plaintiffs' request for variances and that the record provided substantial evidence to support the Board's decision." The court also concluded that the doctrine of administrative *res judicata* barred the Board's consideration of the Sibleys' second application for the variances. On appeal to the Law Court, the Sibleys argue that 1) the doctrine of *res judicata* is applicable in the circumstances of their case; 2) the Board's decision denying the requested variances was unreasonable, arbitrary, and unsupported by the evidence; 3) the contiguous lot provision of the Wells zoning ordinance is inapplicable to their property; and 4) the minimum lot size and setback restrictions of the Wells zoning ordinance, as applied to their property, result in an unconstitutional "taking" by the Town of Wells. We deny the appeal.

In Wells the Sibleys own two contiguous lots, each with a 60-foot frontage on Elridge Avenue and with a depth of 100 feet. They purchased lot # 30 in the Buena Vista Park subdivision in 1973, and since 1974 have lived on that lot in a mobile home that they placed there. In 1977, the Sibleys purchased lot # 29, immediately adjacent to lot # 30, for a price of \$4,200. At the time that the Sibleys purchased it, lot # 29, 5,000 square feet, did not conform to the 10,000 square foot minimum lot size requirement of the Wells zoning ordinance, which had been enacted in 1976. Lot # 29 is also subject to a deed restriction requiring any structure erected on it to be at least 26 feet wide. It is not possible to build a

26-foot wide structure on that lot and still comply with a zoning ordinance provision, in effect when lot # 29 was purchased by the Sibleys, requiring a 15-foot sideline setback.

Lot # 29 remained vacant until early 1980, when the Sibleys, without obtaining a building permit, constructed a concrete foundation on the lot. The foundation violated the zoning ordinance in two respects: (1) the lot did not meet the 20,000 square foot minimum lot size requirement, and (2) the foundation being 11 feet from one sideline and 4 feet from the other, violated the 15-foot sideline setback requirement. The Town's code enforcement officer served the Sibleys with a notice of violation and an abatement order on February 8, 1980.

On February 11, 1980, the Sibleys applied to the Zoning Board of Appeals for a variance from the sideline setback and lot size requirements of the ordinance, treating lots # 29 and 30, each of 5,000 square feet, as a single 10,000 square foot lot. After a public hearing the Board granted a variance from the minimum lot size requirement on the condition that the mobile home be removed after the completion of the new dwelling. The sideline variance was denied. The Board also treated both lots as one, and in order to comply with the Board's order, the foundation on lot # 29 would have had to be moved four feet closer to lot # 30. The Board's decision was not appealed to the Superior Court, and the foundation and the mobile home remained as they were.

Eighteen months later the Sibleys filed the application that is the subject of the present 80B action, seeking both sideline setback and minimum lot size variances for lot # 29 alone, in order to construct a 20-foot by 36-foot house on the foundation.<sup>2</sup>

Because we affirm the Superior Court's judgment on the merits without reliance on the doctrine of *res judicata*, we do not reach the question whether that doctrine is applicable to these administrative proceedings. We also intimate no opinion on whether, even if the doctrine were so applicable, it must be raised before the administrative agency as an affirmative

defense or may be asserted for the first time in the Superior Court during the 80B review.

2. Section IV(D)(12) of the zoning ordinance, which permits reapplication, states:

12. If the Board of Appeals shall deny an appeal, a second appeal of a similar nature

The Board rendered a decision on the second application identical to its decision on the first. However, the granting of a minimum lot size variance only if the two lots were joined amounted to a denial of such a variance for lot # 29 alone. The Board based its decision on the following findings: (1) the land would yield a reasonable return under the Board's plan; (2) the land possessed no unique characteristics; (3) the granting of a sideline setback variance would alter the essential character of the locality; and (4) the hardship claimed by the Sibleys had resulted from their own actions during 1980.

The Sibleys sought 80R review in the Superior Court, challenging both the application to their property of section II(D)(5) (the contiguous lot provision) of the zoning ordinance and the denial of minimum lot size and sideline setback variances. The Superior Court affirmed the decision of the Board, and the Sibleys now appeal that affirmation.

#### 1. Validity of Denial of Variance

[1] Section IV(B)(3) of the zoning ordinance provides that a variance may be granted by the Board if the applicant can show "unnecessary hardship." 30 M.R.S.A. § 4963(3) (1978 & Supp. 1982-1983), which empowers municipal boards of appeal to grant variances, states:

3. Variance. A variance may be granted by the board only where strict application of the ordinance, or a provision thereof, to the petitioner and his property would cause undue hardship. The words "undue hardship" as used in this subsection mean:

shall not be brought before the Board within one year from the date of the denial by the Board of the first appeal, unless in the opinion of a majority of the Board, substantial new evidence shall be brought forward, or unless the Board finds, in its sole and exclusive judgment, that an error or mistake of law or misunderstanding of facts shall have been made.

3. In 1979, section II(D)(5) of the zoning ordinance was enacted and it reads:

A. That the land in question cannot yield a reasonable return unless a variance is granted;

B. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

C. That the granting of a variance will not alter the essential character of the locality; and

D. That the hardship is not the result of action taken by the applicant or a prior owner.

The burden was on the Sibleys to prove at the agency level that they met all of these statutory requirements. See *Driscoll v. Gheewalla*, 441 A.2d 1023, 1029 (Me.1982). The Board concluded that the last three requirements were not met. The Superior Court was bound, as is this court, to affirm the Board's denial of the requested variances unless that denial was unlawful, arbitrary, capricious, or unreasonable. See *id.* The Superior Court correctly rejected the Sibleys' attack on the Board's decision.

#### A. Unique circumstances

[2-4] The Sibleys contend that because lot # 29 is only 50 feet wide, and because the property is subject to a deed restriction requiring any structure built upon it to be at least 26 feet wide, the circumstances of the lot are unique. However, the mere fact that the lot is substandard is not a unique circumstance; all the undeveloped lots in that neighborhood are of substandard size. See 3 R. Anderson, *American Law of Zoning* § 18.58 (1977). Although it is the deed restriction that combines with the small lot size to present a problem for the Sibleys, they did not show at the hearing before the

E. If two or more contiguous lots are in the same ownership on or after November 2, 1976, they shall be considered as one lot for the purpose of the minimum lot size provisions of this Ordinance, and no portion of said parcel shall be built upon or sold which does not meet the dimensional requirements of the Well Zoning Ordinance. Variance of other dimensional requirements may be obtained only through action of the Board of Appeals.



Board that the deed restriction is unique to their property. In fact, there was discussion at the hearing that many parcels in the Buena Vista Park subdivision are burdened in the same way. Moreover, since the Sibleys do own the adjacent lot # 30, they can easily build without violating the sideline setback requirements of the ordinance. "Administrative relief is not warranted where the owner of contiguous substandard lots can solve his own problem by combining them to meet the minimum requirements of the zoning regulations. In such a case, his development plans may have to be revised, and he may not be able to extract the maximum profit from his tract, but he has not been denied reasonable use of his land." 3 Anderson, *supra*, § 18.54, at 291. In other words, ownership also of lot # 30 eliminates any hardship, that otherwise might result to the Sibleys from the small size of lot # 29 and the deed restriction applicable to it.

#### B. Cause of Hardship

[5, 6] The hardship relied upon by the Sibleys before the Board was the fact that if they could not build their house on lot # 29 the property would be worth only \$1,000, as opposed to the \$4,200 that they paid for it. The Sibleys claim that the hardship is not the result of their own action because the lot was established before the zoning ordinance was enacted. However, when a landowner purchases land with actual or constructive knowledge of the zoning restrictions, he may not be granted a variance on the grounds of undue hardship. 3 Anderson, *supra*, § 18.42. The Sibleys were charged with knowledge, when they bought lot # 29, of the zoning ordinance provisions that would create problems both because of the lot size and because of the deed restriction contained in their deed to the lot.<sup>4</sup>

4. Because the burden was on the Sibleys to establish that they meet each and every requirement of 30 M.R.S.A. § 4963(3), and because the evidence is clear that as to at least two of those requirements the Sibleys failed to

#### II. The Contiguous Lot Provision of the Wells Zoning Ordinance

[7] It is unnecessary for us to decide the proper construction and application of the contiguous lot provision that the Town of Wells added to its zoning ordinance in 1979. See n. 3 above. Even if the 1979 amendment had never been adopted, the Board's decision would not have been changed in any respect. As previously discussed, the undersize of lot # 29 is by no means unique in its neighborhood and any hardship upon the Sibleys is a result of their own action in buying the undersized lot in 1977 and constructing an illegal foundation upon it in 1980. In granting the Sibleys a conditional variance, the Board properly took into account the fact that Sibleys also owned lot # 30. See 3 Anderson, *supra*, § 18.59 ("Conditional variances, generally"). The Board's decision represents a carefully considered balancing of the interests of the Sibleys in maximizing the economic use of their property against the important social and public purposes of the zoning laws. By no means was the Board's action unlawful, arbitrary, capricious, or unreasonable.

#### III. Taking

[8, 9] Finally, the Sibleys argue that the refusal of the Board to grant the requested variances constitutes a "taking" under the fifth and fourteenth amendments to the United States Constitution. They paid \$4,200 for lot # 29, and as an unbuildable lot it is worth only \$1,000. No taking exists unless the property has been rendered substantially useless. *Seven Islands Land Co v. Maine Land Use Regulation Commission*, 450 A.2d 475, 482 (Me. 1982). The Sibleys' land has substantial use and value in conjunction with the adjacent lot. No unconstitutional taking resulted from the Board's denial of the variances requested by the Sibleys.

meet their burden, we need not decide whether the Board was correct in deciding that the proposed use of lot # 29 would alter the essential character of the locality.

The entry is:  
Judgment affirmed.

All concurring.



James Daniel GLUSE, et al.  
v.  
Naurice Ann DENNISON, et al  
Supreme Judicial Court of Maine.  
Argued March 7, 1983.  
Decided June 30, 1983.

The Cumberland County Probate Court terminated parental rights upon petition of aunt and uncle of child, and appeal was taken. The Supreme Judicial Court, Nichols, J., held that: (1) any error with respect to timeliness of Uniform Child Custody Jurisdiction Act affidavit was harmless, and (2) trial court did not abuse its discretion in failing to appoint a guardian ad litem and in not ordering a custody study.

Appeal denied and order of termination affirmed.

#### 1. Infants $\Leftarrow$ 253

Even if the Uniform Child Custody Jurisdiction Act applied to the instant termination proceedings, any error with respect to the timeliness of an affidavit filed by child's aunt and uncle and any contentions regarding veracity of affidavit would be deemed harmless since dispute was solely intrastate in nature and no party was arguing that Maine was not the appropriate forum for the litigation 19 M.R.S.A. §§ 802, subd. 1, 810.

1. The Gluses, Plaintiffs in this action, had standing to bring this petition as custodians of

#### 2. Infants $\Leftarrow$ 205

Where termination of parental rights is sought as part of adoption petition, appointment of guardian ad litem is discretionary. 19 M.R.S.A. § 533-A, subd. 3, par. A.

#### 3. Infants $\Leftarrow$ 208

Where one of petitioners in proceeding for termination of parental rights is a blood relative, a custody study is discretionary. 19 M.R.S.A. § 533.

#### 4. Infants $\Leftarrow$ 205, 208

In proceeding to terminate parental rights upon petition of child's aunt and uncle, trial court did not abuse its discretion in failing to appoint a guardian ad litem and in not ordering a custody study. 19 M.R.S.A. §§ 533, 533-A, subd. 3, par. A.

Bowie, Matthews & McDonough, Kim Matthews (orally), Portland, for plaintiffs.

Remington O. Schmidt (orally), Portland, for defendants.

Before McKUSICK, C.J., and GODFREY, NICHOLS, CARTER and WATHEN, JJ.

NICHOLS, Justice.

On June 17, 1982, the Cumberland County Probate Court terminated the parental rights of the Defendants, Naurice and Stanley Dennison, with respect to their thirteen-year-old son, Willard Cushing Burns Dennison, upon the petition of Willard's uncle and aunt, James and Faith Gluse, with whom he had been living for the previous ten years.<sup>1</sup> After a hearing the Probate Court had concluded that clear and convincing evidence showed (1) that the Dennisons had willfully abandoned Willard; (2) that circumstances were unlikely to change in a reasonable time; and (3) that termination of parental rights was in Willard's best interest.

The Defendants took this appeal, challenging the termination order on several grounds. We conclude that their appeal must be denied.

Willard. 22 M.R.S.A. § 4052(1) (Supp.1982-1983).

Cynthia BISHOP

v.

TOWN OF ELIOT, et al.

Josephine ROBBINS, et al

v.

TOWN OF ELIOT and Richard Saklad.

Supreme Judicial Court of Maine.

Argued June 11, 1987.

Decided Aug 17, 1987.

Applications for variance from town zoning ordinance were filed. Zoning board granted one variance but denied the other. Abutting landowners to property for which variance was granted and landowner whose application was denied appealed. The Superior Court, York County, affirmed the decisions of the zoning board. Appeals were again taken. Upon consolidation, the Supreme Judicial Court, Scolnik, J., held that: (1) exception clause to town zoning ordinance requiring variance was not met, and (2) both applicants had created their hardships, and were not eligible for a variance.

Judgment denying variance affirmed; judgment granting variance vacated and remanded with instructions.

### 1. Zoning and Planning ⇨503

Zoning ordinance provision permitting variance for existing nonconforming lots as to road frontage requirement, where "all other provisions" of ordinance were met, was not applicable where lots did not meet requirements for width of right-of-way for access.

### 2. Zoning and Planning ⇨497

Constructive knowledge of zoning ordinance was charged to purchasers of land, for purposes of determining whether any zoning hardship was self-created, where purchasers of land applied for zoning variance on same date on which they entered into contract for purchase of land in question. 30 M.R.S.A. §§ 4963, 4963, subd. 3.

### 3. Zoning and Planning ⇨503

Zoning hardship was self-created, by purchasers of nonconforming lot, where purchasers had actual and constructive knowledge of town zoning restrictions, and thus purchasers could not receive a variance from zoning ordinance to build lots not having required access. 30 M.R.S.A. §§ 4963, 4963, subd. 3.

John C. Bannon, (orally), Murray, Plumb & Murray, Portland, for plaintiff.

James R. Erwin (orally), Strater, Hancock & Erwin, York, Christopher L. Vaniotis (orally), Bernstein, Shur, Sawyer & Nelson, Portland, for defendants.

Before McKUSICK, C.J., and NICHOLS, GLASSMAN, SCOLNIK and CLIFFORD, JJ.

SCOLNIK, Justice.

In this consolidated appeal, Cynthia Bishop, the owner of a parcel of land in the Town of Eliot ("Town") and Richard Saklad, the owner of another lot in the same town, each applied for variances from the same Town Zoning Ordinance in order to build residences on their respective lots. The Town Zoning Board of Appeals ("Board") denied Bishop's request for a variance but granted Saklad's request, and the Superior Court (York County) affirmed both decisions of the Board. Bishop appeals from the Superior Court judgment, contending that: (1) the Board's decision requiring her to obtain a variance before being entitled to obtain a building permit was clearly erroneous; (2) the Board's decision denying her request for a variance was either clearly erroneous or unsupported by any competent evidence in the record; and (3) the Board's decision represented an unconstitutional taking of her property. Josephine Robbins, Nancy Talbot and William Hodgdon, the abutters to Bishop's and Saklad's lots, contest the Board's granting of Saklad's request for a variance. In particular, the abutters argue that the Board erred as a matter of law: (1) in concluding that Saklad's lot was unique, and (2) in concluding that Saklad's hardship

was not self-created. On cross-appeal, Saklad contends: (1) he was not required to obtain a variance in order to build on his lot, and (2) even assuming that he was required to obtain a variance, the Board's decision granting his request for a variance was supported by competent evidence in the record. We affirm the judgment of the Superior Court denying Bishop's request for a variance, but vacate the court's judgment granting Saklad's variance request.

## I.

The lots in question in this case share a common background. Lot 3A, the subject of the *Robbins* litigation, and Lot 3B, the subject of the *Bishop* suit, were each originally comprised of several smaller lots as part of a 1924 subdivision created by Ransom Derrick. The lots were subsequently acquired by George Varney, who in turn conveyed them to Robert and Eleanor Mullins. On November 6, 1985, the Mullins conveyed Lot 3A by warranty deed to Richard Saklad and conveyed Lot 3B by warranty deed to Cynthia Bishop. Both Bishop and Saklad had originally contracted to purchase Lot 3B from the Mullins on July 18, 1985, but Bishop ultimately acquired the property in her name alone.

Both Lots 3A and 3B are "backlots" within the meaning of Town Zoning Ordinance § 305(p)(1), in that they are physically situated behind one or more lots, having no direct street frontage. Although the two lots have no direct frontage on Park Street, the nearest public street, the lots

are accessible to Park Street over two narrow rights-of-way both lying perpendicular to Park Street. Lot 3B is accessible to Park Street over Third Avenue, a 16½-foot-wide right-of-way. Lot 3A is accessible to Park Street over Fourth Avenue, a 25-foot-wide right-of-way.

In the summer of 1985, Bishop and Saklad applied to the Town's Code Enforcement Officer for a building permit to construct a residence on Lot 3B. The officer denied the permit on the ground that all backlots in the town must be served by a right-of-way at least 30 feet in width in compliance with Town Zoning Ordinance § 305(p)(2).<sup>1</sup> On July 18, 1985, Bishop and Saklad filed an application with the Board for a variance from Town Zoning Ordinance § 305(p)(2), and on the same date, entered into a sales agreement with the Mullins to purchase Lot 3B. After two public hearings, during which the abutters appeared as parties in interest and were represented by counsel, and in which the Town and the appellants were also represented by counsel, the Board denied the appellants' request for a variance by a vote of 3 to 1. Bishop and Saklad appealed the Board's decision to the Superior Court.<sup>2</sup> Bishop thereafter purchased Lot 3B in her own name and Saklad was dismissed as a party in *Bishop v. Town of Eliot, et al.*

In March of 1986, Saklad applied to the Board for a variance from the identical Town Zoning Ordinance, Section 305(p)(2), for the purpose of building a single family

1. Section 305(p)(2) provides:

p. Backlots may be used provided they meet the following criteria:

2. A 30 foot right-of-way or frontage shall serve one or two backlots. For 3 or more backlots, the right-of-way or frontage shall be at least 40 feet, and the driveway serving the backlots shall be graded, tarred, or paved, and shall be at least 15 feet wide.

3. The complaint in *Bishop* contained four counts. Count I sought review under M.R. Civ.P. 80B, alleging that the Board's decision was unlawful, arbitrary and capricious, and not supported by substantial evidence in the record. Count II sought a declaratory judgment that Lot 3B was not subject to the provisions of the Town Zoning Ordinance in that Lot 3B was a lot of record pre-dating any Town zoning ordi-

nances. Count III averred that the application of the Town Zoning Ordinance destroyed the value of the property so as to constitute a confiscation of their property without payment of just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, Art. I, §§ 6-A and 21 of the Maine Constitution and 42 U.S.C. § 1983. Count IV alleged a denial of substantive due process and equal protection of the laws in violation of the same constitutional and statutory provisions specified in Count III. The Superior Court ordered Count I and II administratively severed from the remainder of the complaint and heard as a review of the Board's action under Rule 80B. The court further ordered the remaining counts to be treated as a single action pursuant to 42 U.S.C. §§ 1983 and 1985.