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Via Email: bmorin@bourqueclegg.com and First-class U.S. Mail

Mr. Bradley C. Morin
Bourque Clegg Causey & Morin LLC
P.O. Box 1068
949 Main St.
Sanford, ME 04073

Re: Shed and Gazebo at 296 Wadleigh Pond Road, Lyman; Response to Your Correspondence Dated October 28, 2021

Dear Brad:

Thank you for speaking with me on the afternoon of October 20th and for your follow-up letter dated October 28, 2021. I understand you are the Town Attorney for the Town of Lyman ("Town"). As you know, I represent Melina Amy Ilief-Ala and her husband, Paul J. Ala (collectively, the "Alas"), who currently own the residential property located on the shore of Wadleigh Pond at 296 Wadleigh Pond Road ("Property").

I. BACKGROUND FACTS

In early 2018, the Alas viewed the property at 296 Wadleigh Pond and received a copy of the MLS listing from the seller's realtor attached hereto as **Exhibit A**. The listing does not reference any accessory structures on the Property other than a dock.

When the Alas were first shown the Property, they made the following relevant observations:

- 1) There was a substantial wood shed approximately ten feet wide and eight feet deep with a shingled roof located to the west of the driveway near the fence along the road at the front of the Property. The shed appeared to rest directly on the ground and its state suggested it had been there for years. The shed had electric lighting, wired directly from the house, and appeared to have been used as a workshop and to store tools. See photo of old shed attached as **Exhibit B**.
- 2) There was a metal-framed, screened enclosure with a vinyl or canvas roof approximately 12 feet wide and eight feet deep located behind the home. The structure was roughly mid-way between the easterly and westerly boundaries of the Property and approximately 11 or 12 feet from the edge of the pond. Wooden boards had been added along the base of the enclosure and opaque plastic sheets had been hung over the interior walls, presumably so it could be heated for use in colder weather. It appeared to rest directly on the ground and was showing significant

wear-and-tear, suggesting it too had been there for some time. See photo of old screened enclosure attached as **Exhibit C**.

The shed and screened enclosure made the Property more attractive to the Alas. Before they even made an offer on the Property, they discussed how they might turn the shed into a storage/play room for their young son and how the screened enclosure could be renovated to provide a beautiful spot for them to enjoy the view of the pond.

Before the Alas made an offer on the Property, the realtor provided them with the Seller's Property Disclosure attached hereto as **Exhibit D**. The Disclosure does not reference the shed or screened enclosure. The only significant issue noted in the Disclosure was that the Property was considered seasonal because it has a holding tank rather than a septic system.

The realtor also obtained and provided the Alas with the tax records for the Property, **Exhibit E**, and documents related to the approval of the holding tank. **Exhibit F**. It is the Alas' understanding that the realtor obtained the documents regarding the holding tank from the Town, but they do not know if the realtor inspected the entire file for the Property or only requested those specific documents. However, at no time prior to their purchase of the Property did the realtor, or anyone else, inform the Alas that there were any potential issues regarding any accessory structures on the Property. Furthermore, prior to purchasing the Property, the Alas themselves did not review the Town's file for the Property. In fact, at that time, they were unaware that such a file even existed.

After the Alas's offer was accepted by the seller, they paid for a "mortgage survey" that was conducted by a professional surveyor on December 28, 2018. A copy of this survey is attached as **Exhibit G**. The survey depicts the locations of the shed and screened enclosure, labeling both as "moveable sheds".

On January 15, 2019, the Alas closed on their purchase of the Property. See Special Administrator's Deed, attached as **Exhibit H**.

During the spring of 2019, the Alas were excited to begin renovations, and one of the first things they did was to apply for a permit to replace the shed and screened enclosure. Prior to applying for the permit, the Alas undertook no investigations as they were unaware that any investigation was necessary. They had no reason to think the Town would not allow them to replace these dilapidated structures and thought any construction they did would be fine as long as they obtained the required permits.

On April 2, 2019, the Alas submitted their permit application to the Town Code Enforcement Officer, Ms. Patti McKenna ("CEO"). Along with the application, they provided the mortgage survey and their deed to the property. The Alas did not retain copies of their permit applications, but they should be in the Town file.

Originally, the Alas intended to re-build the shed in the same location where the old shed was located. However, their son was concerned about it being so close to the road. In June of 2019, Amy Ala and Linda Houy (owner of the abutting property to the east) discussed the placement of the new shed; and Linda Houy suggested they move it to the end of the driveway.

This idea appealed to the Alas, but wanting to make sure that would be okay with the Town, they contacted the CEO. The CEO informed them that the shed could be moved as long as it wasn't placed any closer to the water than the closest structure to the water (i.e. it could be moved no closer to the water than the existing screened enclosure). The CEO noted this in her letter dated September 14, 2020 that was apparently addressed to the Board of Selectman. **Exhibit I.**

On April 29, 2019, the CEO issued the permit attached hereto as **Exhibit J.**

The Alas demolished the screened enclosure and replaced it with a screened, vinyl gazebo at a cost of \$7,774.00. The gazebo was delivered on July 19, 2019. See Invoice dated 7/18/2019 attached as **Exhibit K.** The new gazebo is in the same location as the old screen enclosure, but its length is actually two feet shorter, reducing its footprint by 16 square feet.

The Alas use the new gazebo seasonally to relax in view of the pond while being protected from rain and insects.

The Alas replaced the shed at a cost of \$4,774.50. The new shed was built on site on August 9, 2019. See Invoice dated 8/8/2019 attached as **Exhibit L.** The shed is no larger than the old shed and is no closer to the water than the new gazebo and old screened enclosure. Absolutely no fill was added under the shed and, unlike the old shed, it sits on concrete blocks, allowing water to flow under it and absorb into the ground.

The Alas' son plays in the shed and it is used by the Alas to store some furniture. It is not used as a bedroom.

On August 14, 2019, the CEO inspected both the gazebo and shed and approved them.

After the issuance of the permit authorizing the construction of the new shed and gazebo, the Alas spent approximately \$60,000 for other upgrades to the Property, including the installation of new siding and electrical wiring for the home. Had they been aware that the shed would possibly need to be moved and the gazebo razed, they likely would have decided not to make these additional improvements.

According to the CEO, "some time after" the final inspection, then Selectman David Dulong, who is a friend of the Houys, voiced concerns over the placement of the shed; but the CEO advised him that she did not believe anything could be done because a permit had been issued and the shed had been approved after inspection. See Exhibit I.

In May of 2020, during the beginning of the pandemic, the Houys built a new fence along the road at the front of their property; and in the process, added fill to create a berm approximately eight feet wide and 60 feet long. Shortly thereafter, the Alas noticed that their driveway and front yard were being flooded because the berm directed stormwater away from the Houys' property and towards theirs. The Alas and Houys discussed this issue but no resolution was reached. Afterwards, their relationship began to break down. In mid-June, The Houys then preemptively complained to the CEO, alleging that the Alas had taken actions to cause increased stormwater drainage onto their property.

After their dispute with the Houys arose, the Alas requested to see the Town file regarding their Property for the first time. Their primary purpose was to investigate issues related to the drainage problem.

The Alas then received a letter from the CEO dated June 23, 2020, **Exhibit M**, in which she observed that the shed “seems closer to the lake than what I show on record for structures” and that she wanted to have a conversation about it. This letter was received by the Alas more than ten months after the new shed was built and was the very first time they received any notice there was a potential problem with its placement.

On August 19, 2020, the CEO had a discussion with Lucien Langlois, a representative of the Maine Department of Environmental Protection (“DEP”), regarding the placement of the shed. While the details of this conversation are unknown to the Alas, it does not appear that Mr. Langlois advised the CEO that placement of the shed was problematic. See Exhibit I. Furthermore, during Mr. Langlois’ site visit at the Property on July 23, 2021, he did not raise concerns about the shed having a negative environmental impact on the pond.

On September 11, 2020, the CEO conducted a site visit at the Property. At this visit, she determined that the shed appeared to be “not any closer [to the pond] than previous structures based upon the mortgage survey.” Exhibit I.

In her September 14, 2020 letter to the Town Council, the CEO stated:

As to the claim of the shed being moved closer to the lake. I erred when I did not require a site plan depicting the requested setback distance and relied upon the mortgage survey and applicant’s word that they would go no closer than the previous structure. I think it would cost the town legal fees to take a court action, and I think it is reasonable to question whether the town would prevail in a legal action because the Ala’s had earned vested rights in the shed’s location. For this reason, I propose to take no action to ask the shed to be relocated.

Exhibit I, Pg. 4, ¶3. The CEO then suggested that the Town consult with its attorney before taking any legal action. *Id.* at Pg. 4, ¶5.

The Alas are not aware of whether or not the Board of Selectman considered or discussed the CEO’s September 14, 2020 letter or whether or not the Town Attorney was requested to review the issues it raised and provide a legal opinion. However, through her letter dated September 28, 2020, the CEO informed the Alas that no action would be taken to require them to move their new shed stating:

When the permit was issued on April 29, 2019 it allowed you to remove and replace a shed and a gazebo. Based on the mortgage survey you provided with the application it was verbally agreed that you would go no closer to the water than the structures shown on that survey. Every permit that is issued has a 30-day appeal period

where abutters or aggrieved parties have the right to appeal the issuance of that permit. There was no appeal to this permit. There was no concern raised when the construction of the shed took place. Only many months later, did complaints get filed. It is my opinion that you have earned vested rights in the placement of that shed. I am taking no action on this complaint.

On receipt of this letter, the Alas reasonably believed that all issues related to the shed and gazebo had been finally resolved.

During the late fall of 2020 through the spring of 2021, the relationship between the Alas and Houys continued to degenerate. In early November 2020, the Houys constructed an extension of the boundary fence to the very edge of the pond, which the Alas believe is a spite fence intended primarily to interfere with their view of the pond. The Houys also placed fill along and under the fence extension to divert stormwater away from their property and onto the Alas' property.

On April 23, 2021, on behalf of the Alas, I submitted a formal complaint to the CEO requesting an investigation into three separate violations of the Town's Shoreland Zoning Ordinance by the Houys that directly affect the Alas' ability to fully enjoy their property. **Exhibit N.** The CEO responded to this letter via her correspondence of May 21, 2021, directed to the Houys. **Exhibit O.** I then contacted Mr. Langlois of the DEP requesting resolution of the complaints regarding the Houys' unpermitted placement of fill as a violation of the Natural Resources Protection Act. **Exhibit P.** In response, Mr. Langlois conducted a site visit. *Inter alia*, Mr. Langlois concluded that, "[w]ork has been conducted on the Houy property which has resulted in flooding and associated erosion issues (during storm events) at the Ala property. The Department does not have a record of permits issues [*sic*] to the Houys for the recent work." **Exhibit Q.** While Mr. Langlois stated that the Houys would be required to take remedial action after a site visit of their property, the investigation has stalled due to Mr. Langlois' resignation from the DEP and a protracted delay in his being replaced.

Next, by emailed letter to you and the CEO dated August 25, 2021, the Houys' attorney, Mr. Sigmund Schutz, filed a new complaint with the Town and the DEP regarding the Alas' placement of their shed. **Exhibit R.** Mr. Schutz's letter contains numerous factual errors that cast the Alas in a negative light. The Alas believe the Houys enlisted the assistance of Mr. Schutz in an effort to resurrect the issue regarding the shed as a way to retaliate against the Alas for continuing to attempt to have the Town and the DEP take action to remedy the Houys' numerous violations of the Shoreland Zoning Ordinance and Natural Resource Protection Act.

II. LEGAL ANALYSIS

A. The Town Does Not Have the Legal Authority to Require the Alas to Move the Shed or Remove the Gazebo Because This Would Be Equivalent to an Untimely Appeal of the Issuance of the Permit.

In the case of *Juliano v. Town of Poland*, 725 A.2d 545 (Me. 1999), the Maine Supreme Court found that a town could not issue a stop work order to cease construction of buildings when

the construction had begun pursuant to a building permit that had been issued and had not been appealed within the 30-day limit set forth under the town's zoning ordinance. In that case, the CEO for the Town of Poland had issued a building permit to a business owner to allow him to construct two additions to his commercial bottling plant. *Id.* at 546. The business owner began construction; but approximately two years later, the town's new CEO issued a stop work order after he determined that the permit had been issued in violation of the town's zoning ordinance. *Id.* at 548. The court reasoned:

...the stop work order, if issued because the work permit obtained [by the business owner] in 1995 was invalidly issued, is in essence a challenge to the former Code Enforcement Officer's decision to issue the building permit. Considered as an appeal from a prior decision of a Code Enforcement Officer, the stop work order was issued nearly two years after the permit was granted and was not timely due to the thirty day appeal period specified in the ordinance. We have noted that '[s]trict compliance with the appeal procedure of an ordinance is necessary to ensure that once an individual obtains a building permit, he can rely on that permit with confidence that that it will not be revoked after he has commenced construction.' *Wright v. Town of Kennebunkport*, 1998 ME 184, ¶ 8, 715 A.2d 162, 165.

Id.

Similar reasoning was used by the Superior Court of Penobscot County when it ruled that a stop work order to prevent completion of an addition to a home within a shoreland zone was invalid, having been issued four months after the running of the period for appeal under the town's Shoreland Zoning Ordinance. *Brown v. Town of Hudson*, 2009 WL 3712676 (Me.Super.)(Trial Order).

The permit issued to the Alas to re-build their shed and gazebo was issued on April 29, 2019, therefore the Town of Lyman Shoreland Zoning Ordinance as amended on June 12, 2018 ("SZO") is applicable to the permit.

Under Section 13 of the SZO, the Alas property is located in a Limited Residential District. Accordingly, per Table 1 of Section 14 of the SZO, the Town CEO had authority to issue permits for accessory structures like the Alas' shed and gazebo.

SZO, Section 17(H)(4)(a)(i) provides:

An administrative or variance appeal may be taken to the Board of Appeals by an aggrieved party from any decision of the Code Enforcement Officer or the Planning Board, except for enforcement-related matters as described in Section 16(H)(1)(a) above. Such an appeal shall be taken within thirty (30) days of the date of the official decision appealed from, and not otherwise, except that the Board of

Appeals, upon a showing of good cause, may waive the thirty (30) day requirement.

The Town is now considering taking enforcement action to require the Alas' to move their shed and completely remove their gazebo, both of which were fully constructed in compliance with a permit issued by the CEO, and both of which were approved by the CEO after their construction was fully completed. If the Town were to attempt to require the Alas' to move the shed and remove the gazebo now, it would in essence be seeking to invalidate a building permit more than two years after the appeal period set forth in the SZO has run. Following the ruling in *Juliano*, a court will likely determine this is beyond the Town's authority.

B. The Town Will Likely Be Equitably Estopped from Requiring the Alas to Move the Shed and Remove the Gazebo.

In *Shachford & Gooch, Inc. v. Town of Kennebunk* (Me. 1984), the court examined the nature of the legal doctrine of promissory estoppel:

Proper application of the doctrine of equitable estoppel rests on the factual determination that 'the declarations or acts relied upon must have induced the party seeking to enforce the estoppel to do what resulted to his detriment, and what he would not otherwise have done.' *Martin v. Prudential Insurance Co.*, 389 A.2d 28, 31 (Me.1978) (quoting *Allum v. Perry*, 68 Me. 232, 234 (1878)). One who has induced another to believe what is untrue and to act in reliance on the untruth may not later assert the truth. *Roberts v. Maine Bonding & Casualty Co.*, 404 A.2d 238, 241 (Me.1979). Furthermore, the reliance upon which estoppel is claimed must have been reasonable. *Id.* In appropriate circumstances, equitable estoppel may be invoked against a governmental entity. *Maine School Administrative District No. 15 v. Reynolds*, 413 A.2d 523, 533 (Me.1980).

486 A.2d 102, 105–06.

In the case of *City of Auburn v. Degrosseilliers*, 578 A.2d 712 (Me. 1990), the Maine Supreme Court applied the doctrine of equitable estoppel to prevent the City of Auburn from enforcing a zoning ordinance against a business owner. In that case, the Degrosseilliers had applied for a zoning change to allow them to operate a multifaceted business, including landscaping services and a retail nursery. Prior to requesting the zoning change, the Degrosseilliers had explained the nature of their intended business to city officials and their property was re-zoned as part of the General Business Zone. They proceeded to invest to start their business and began operation. After belatedly realizing that the General Business Zone did not allow for the operation of landscaping businesses, the city brought an enforcement action seeking to require the Degrosseilliers to discontinue their landscaping business.

In finding for the Degrosseilliers, the court noted that: 1) a town official, with knowledge of the nature of the business they intended to operate, advised them to apply for a zoning change

to a General Business Zone; 2) the Degrosseilliers invested a significant sum in the business; and 3) the city issued permits for signage advertising the landscaping business. It concluded that "...the City's declarations and acts were reasonably relied upon by the Degrosseilliers, induced them to do what they would not otherwise have done, and resulted in a detriment to [them]." *Id.* at 715.

Notably, the court in *Degrosseilliers* expressly rejected the city's argument that it could not be estopped because a city official and its Planning Board acted *ultra vires* by implicitly approving a land use in violation of its zoning ordinances. *Id.* In addition, the court stated that, "[w]hile we do not consider the City's delay in enforcing the ordinance determinative of the estoppel issue, we do consider it a factor to be weighed."

In *F.S. Plummer Co., Inc., et al. v. Town of Cape Elizabeth, et al.* (Me. 1992), the case cited in your letter, the court declined to apply the doctrine of equitable estoppel to a landowner seeking to develop residential property that had been re-zoned as wetlands that could not be built upon. However, in that case, the appellant property owner asserted that the town should be estopped based solely on the manner in which its property was taxed and oral representations of town officials, some of whom were unnamed. 612 A.2d 856, 861. Citing prior case law, the court determined that equitable estoppel may not be invoked on the basis of how a property is taxed and then determined that "[r]eliance on oral unauthorized representations of a municipal official, where a written building permit is required for a project, is unreasonable as a matter of law." *Id.*

The current situation with the Alas' shed and gazebo is analogous to that of the Degrosseilliers and readily distinguishable from that of F.S. Plummer Co., Inc. The Alas reasonably relied on a building permit issued by the Town CEO and they expended a considerable sum, \$12,548.50, on construction costs based on such reliance. In addition, after receipt of an untimely complaint, the CEO informed the Alas that no action would be taken; and the Town, after being apprised of the situation through the CEO's September 14, 2020 letter, delayed taking any further action.

While the courts do tread lightly when applying the doctrine of equitable estoppel to allow a land use in violation of zoning ordinances, they are also mindful to render judgments that are fundamentally fair and just. In reviewing other cases where courts declined to recognize a defense of equitable estoppel, it appears that the party seeking estoppel invariably had unclean hands. That is not true of the Alas. They had no reason to suspect that re-building their shed and gazebo would be unlawful in any way, and they thought they were taking all the appropriate steps by applying for a permit and abiding by the instruction of the CEO.

If a court were to look at all the circumstances and weigh the equities, it would likely estop the Town from requiring the Alas to move their shed or remove their gazebo.

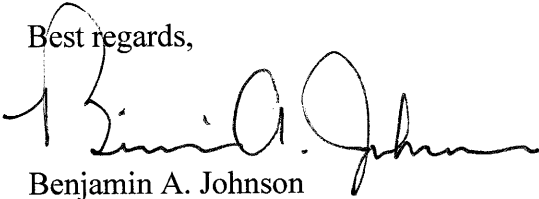
III. CONCLUSION

I hope the above facts and attached documents will serve to give the Town decision makers a clearer understanding of what has led up to this point, and I hope my legal analysis is helpful to the Town as it formulates its legal position on this matter.

If you have any other facts, legal authority or argument that you believe I should be aware of, please let me know; and I will give them all due consideration. However, as you have likely gathered, the Alas are not presently inclined to agree to move their shed or remove their gazebo; and, absent any further developments or negotiations, they intend to defend against any enforcement action brought by the Town.

I have personally spoken with Mr. Hark, the attorney for the appellants in the *Degrosseillier* case; and he informed me that, while not mentioned in the published opinion, his clients were ultimately awarded their attorney fees. I submit that it would not be in the best interest of the Town to pursue this matter through court action and that its resources would be better allocated to taking steps to avoid similar occurrences in the future.

Best regards,

A handwritten signature in black ink, appearing to read "Benjamin A. Johnson". The signature is fluid and cursive, with a large initial "B" and "J".

Benjamin A. Johnson

Attorney for the Alas

cc: Jeffrey Kalinich, Assistant Shoreland Zoning Coordinator, Maine DEP