

Filing Fee: \$500.00

Map 27

Lot 18-3

TOWN OF LYMAN
ZONING BOARD OF APPEALS

RECEIVED

*Rec'd
DL*

OCT 18 2023

APPLICATION FOR VARIANCE OR
APPEAL TO BOARD OF ZONING APPEALS

Name of Appellant: Paul and Amy Ala

Mailing address: 22 Sagamore Road

City/Town: Arlington State: MA Zip: 02476

Telephone: _____

Name of Property Owner (if different from above): _____

Zoning District: Shoreland Map: 27 Lot: 18-3

The undersigned requests that the Board of Appeals consider the following:

1. **An Administrative Appeal.** Relief from the decision, or lack of decision, of the Code Enforcement Officer or the Planning Board, in regard to ~~an application for a permit~~. The undersigned believes that (Check one):

_____ an error was made in the denial of the permit.

_____ the denial of the permit was based on a misinterpretation of the ordinance.

_____ there has been a failure to approve or deny the permit within a reasonable period of time.

other See attached summary.

Please explain in more detail the facts surrounding this appeal (please attach a separate piece of paper). You should be as specific as possible so that the Board of Appeals can give full consideration to your case.

_____ 2. **A Variance.**

a. Nature of Variance: Describe generally the nature of the variance:

In addition, a sketch plan of the property must accompany this application showing dimensions and shape of the lot, the size and locations of existing buildings, the locations and dimensions of proposed buildings or alterations, and any topographic peculiarities of the lot in question.

b. Justification of Variance: In order for a variance to be granted, the appellant must demonstrate to the board of Appeals that the strict application of the terms of the Zoning Ordinance would cause undue hardship. There are four criteria which must be met before the BOA can find that a hardship exists. Please explain how your situation meets each of these criteria listed below:

1. The land in question cannot yield a reasonable return unless the variance is granted.

2. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.

3. The granting of a variance will not alter the essential character of the locality.

4. The hardship is not the result of action taken by the appellant or a prior owner.

I certify that the information contained in this application and its supplement is true and correct.

Date: 10/18/23 Appellant Signature: 

Note to appellant: Please file this form with the Appeals board clerk, at which time a fee of \$500.00 must be paid. You will be notified of the date of the hearing regarding your appeal.

SUMMARY ADMINISTRATIVE APPEALS LETTER – 296 WADLEIGH POND RD. STRUCTURES

We purchased our property in 2019 with an old shed and gazebo both of which had been on the property for ~25 years. These structures only became an issue when a dispute with the neighbors (John & Linda Houy) arose over them placing a large amount of fill by the roadside and waterfront which diverted a significant amount of stormwater onto our property causing flooding and erosion. In an attempt to cover up what they did and keep us quiet, they accused us of placing fill under our shed producing a dump truck picture they kept on file for over a year and a half (taken while we were friendly) until an opportunity presented itself. When that complaint was investigated and disproven, they then focused on the proximity of our new shed to the lake (the location which was suggested by Linda Houy). The reason for targeting the shed is because it is also used as a playhouse for our son besides storage (making this personal). Only when the Houy attorney reached out to DEP did our gazebo become an issue as well. This newly cited "violation" by the current CEO, (which coincidentally was issued ~1 week prior to our small claims court date with the Houys), is not because of an environmental concern over these smaller structures (8x10) that have been present for ~ four years now (Exhibits 1 & 2).

The information listed below will explain the reasons for vested rights for these structures:

- 1) In a letter dated September 28, 2020 (Exhibit 5), the Town of Lyman through its Code Enforcement Officer (CEO) informed us that we had earned vested rights on the placement of our shed. The CEO extensively researched our property and the placement of our shed. For example, she even contacted the Land Surveyor who prepared the 2018 Boundary Survey, which we presented along with our permit application, and confirmed the accuracy of our measurements. She summarized her research in the letter and deemed the placement of the shed vested and informed us that no further action would take place.

The replacement of the shed and gazebo were permitted on April 29, 2019 and received final approval 8/14/19 (Exhibit 4). There was a 30-day appeal period associated with that permit. There were no timely appeals to that permit. The Town would be seeking to invalidate a building permit more than four years after the appeal period. Due to these facts alone, the shed and gazebo's placement lawfully vested.

The letter from the CEO is over three years old. All appeal periods have lapsed. The notice of violation is untimely and moot.

- 2) With respect to the shed: The Lyman Shoreland Zoning Ordinance states that "There are provisions for allowing an 80 square foot shed within the buffer zone with a permit from the code enforcement office", which we have (Exhibit 6).

- 3) After the Houys complained about our shed, the CEO did several on-site inspections and admitted that she erred in not asking for a site plan (greatest practical extent) when discussing the relocation of the shed closer to the pond (Attachment 7- CEO chronology). Given that this was not common practice, if the Town wants to implement new protocols prior to granting permits that should be done moving forward, not retroactive to our permit.
- 4) The Town will likely be equitably estopped from requiring us to remove the shed and the gazebo, (We relied on a permit issued by the Town CEO and expended a considerable sum of money on construction costs based on such reliance. We had no reason to suspect that rebuilding the shed and gazebo were unlawful and we thought we had taken all the appropriate steps by applying for a permit and abiding by the instruction of the CEO) (Exhibit 11). In addition, after receipt of an untimely complaint, the CEO informed us that no action would be taken (Exhibit 5).
- 5) The shed and gazebo are moveable structures (on blocks, not a concrete foundation) as marked in the mortgage survey (12/28/18) attached to our permit application (Exhibit 3) and cause very minimal, if any, disruption to the environment. Unlike the Houys recent garage addition, which was permitted and involved excavation and placement of a new concrete foundation within 50ft. of the pond. If our shed and gazebo are such serious violations (we are being threatened with possible fines up to \$2500 per violation per day), how could the Houys have received a permit afterwards?
- 6) Historic photographic evidence supports "vested rights" of our shed and gazebo since they pre-existed shoreland zoning ordinances.

Our shed

The Houys were recently given the opportunity to present picture evidence to grandfather their two docks, one of which had been discontinued for ~ six years prior to them purchasing their property. We have also obtained a picture that clearly shows a historic shed located on our property in the same location where our current shed sits. This picture was presented by the Houys, as part of their discovery, for the small claims court case between us involving the stormwater diversion. They claimed that this historic picture (Labelled Exhibit 23A) was taken in the early 1990s (Exhibit 8).

Our gazebo

In the Town file, we obtained what we believe to be historic pictures from the early 1990s (the old camp was inherited by the previous owner in 1990) which shows a structure that is located approximately where our current gazebo sits from the shoreland (Exhibit 9).

Furthermore, Exhibit 9A is the picture the Houys presented to the Town as evidence that two docks were present prior to 1993. Note they submitted a cropped picture. We later obtained the uncropped picture, which showed the presence of a historic gazebo in the same location as our gazebo. Given that the Town has already accepted this picture as evidence to grant grandfather status to the Houy's docks, we would also expect that our gazebo would be granted the same status.

- 7) The abutters are not affected by these structures. The old run down shed and gazebo were present when the Houys purchased their property in 2010 until we replaced them in 2019. In addition, the Houys wrote a letter to us in 11/9/20 stating that "the shed and gazebo did not bother us, in fact they looked very nice" (Exhibit 10).

In conclusion, we feel that we have earned vested rights on both structures. We relied on the permits issued by the then CEO that we obtained in good faith and spent a considerable amount of money replacing those historic structures (Exhibit 11). The ordinances are in place to protect the shoreland, these small, moveable structures have minimal, if any, effect on the environment or anyone else.

See attached permit, correspondence with the Town, survey map and pictures.

Thank you for your time and consideration.

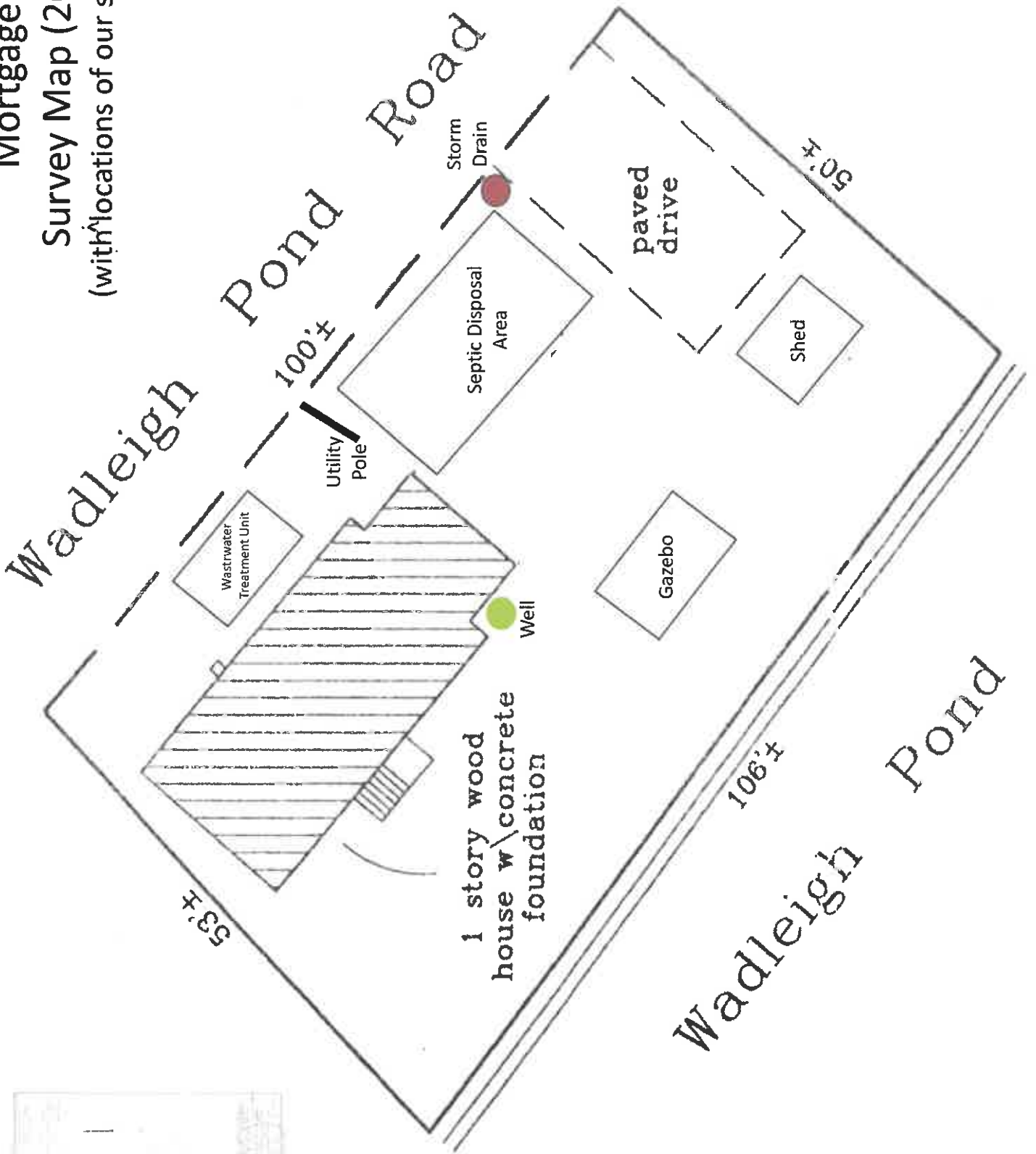
Regards,

Paul and Amy Ala

Locations of our shed and gazebo relative to our house.



Mortgage
Survey Map (2018)
(with locations of our structures)



Complete Statement of Work: We would like to replace the existing shed and gazebo with a new Reed's Ferry shed and gazebo, same size and same location on property.

The existing size of the shed is 8' x 10' & the gazebo is 8 1/2' x 12 1/2'

We would like to replace the shed with a new 8' x 10' shed & the gazebo with a new 8' x 12' one.

9. General Information: (code enforcement will check applicable boxes)

Yes No

- If this is new construction you must supply a complete set of plans.
- If this is a new home you must supply (3) three complete copies of a subsurface wastewater disposal system (HHE - 200)
- If you are a new property owner you must submit a copy of the property deed.
- Internal Plumbing requires form HHE - 212 to be completed by the plumber along with their license number.
- Is a new electrical service required?
- Is the property in an approved subdivision?
- Is the property within the Shoreland Zoning District
- Is a DEP Permit required (if so supply a copy)
- Erosion Control plan and finish landscaping plans required for shoreland permits.

10. Contractors Information: N/A

Building Contractor: _____ Address: _____

City / Town: _____ State: _____ Zip: _____ Phone: (____) _____

Plumbing Contractor: _____ Address: _____

City / Town: _____ State: _____ Zip: _____ Phone: (____) _____

Electrical Contractor: _____ Address: _____

City / Town: _____ State: _____ Zip: _____ Phone: (____) _____

Excavating Contractor: _____ Address: _____

City / Town: _____ State: _____ Zip: _____ Phone: _____

11. Subdivision Information: (if the property is located in a subdivision complete this section)

Name of Subdivision: _____

Date Subdivision was recorded at Registry: _____ Plan Book: _____ Page _____

Any electrical work requires a separate Electric Permit prior to doing the work. Permits can be issued by the CEO. Inspections or questions can be directed to the Electric Inspector.

Site plan information: Attach a site plan or draw below a plan showing the size, location of all new construction and all existing structures on the property. Distances from all property lines, show all streets, distances from high water marks of marshland, water, brooks, ponds and wetlands. All data must be accurate!

- See attached survey plan from 1995
Please note shed was moved towards road.
- Also see attached mortgage survey from 2018

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MORTGAGE INSPECTION OF: DEED BOOK 15379 PAGE 615 COUNTY York
PLAN BOOK --- PAGE --- LOT ---

ADDRESS: 296 Wadleigh Pond Road, Lyman, Maine

Job Number: 1014-31

Inspection Date: 12-28-18

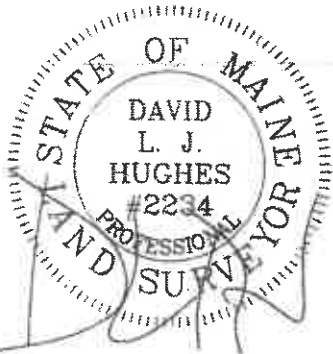
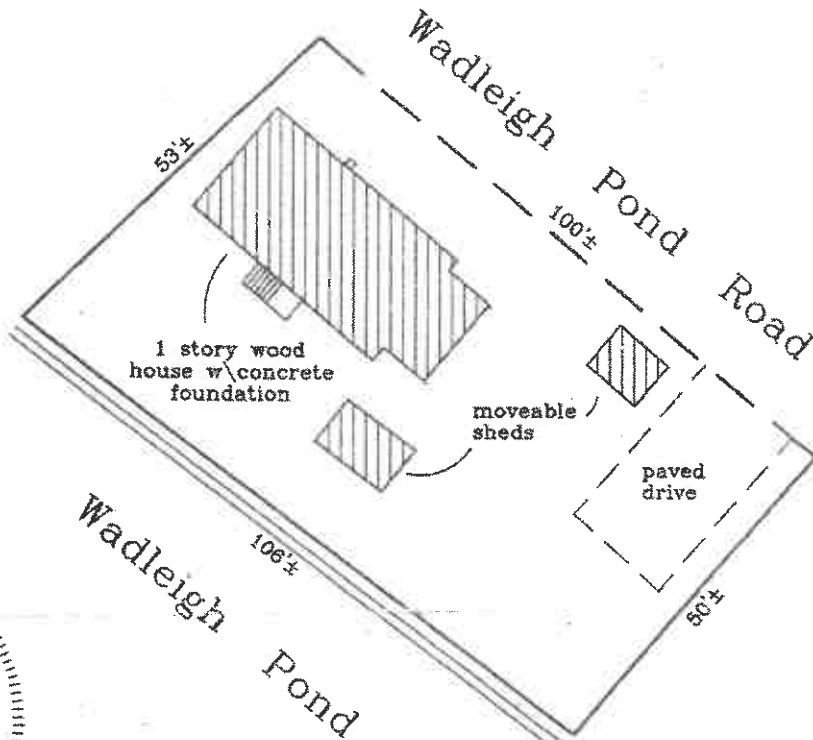
Buyers: Paul Ala & Melina Amy Ilief Ala

Scale: 1" = 30'

Client File #: 2018-1678

Seller: Estate of Albert W. Bishop, Jr.

NOTE: Lines of occupation are shown. A boundary survey may yield different results.



I HEREBY CERTIFY TO: Bay Area Title Services, Inc., Paul Ala, Melina Amy Ilief Ala and the title insurer.
Monuments found did not conflict with the deed description.

The dwelling setbacks do not violate town zoning requirements.

As delineated on the Federal Emergency Management Agency Community Panel 230195-0005A:

The structure does not fall within the special flood hazard zone.

The land does ~~not~~ fall within the special flood hazard zone.

A wetlands study has not been performed.

APPARENT EASEMENTS AND RIGHTS OF WAY ARE SHOWN. OTHER ENCUMBRANCES, RECORDED OR NOT, MAY EXIST. THIS SKETCH WILL NOT REVEAL ABUTTING DEED CONFLICTS, IF ANY.

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Livingston-Hughes

Professional Land Surveyors

88 Guinea Road

Kennebunkport, Maine 04046

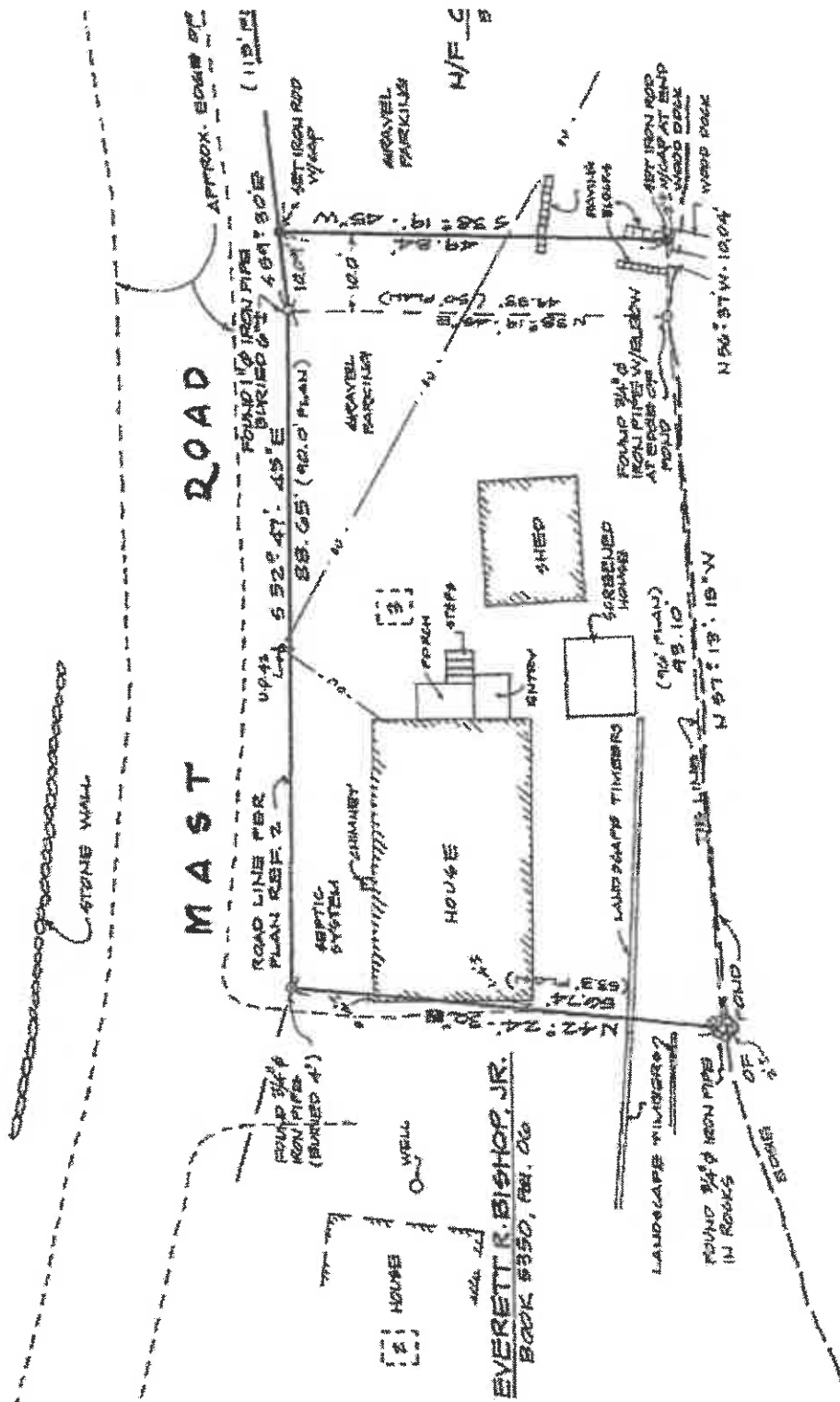
207-967-9761 phone

207-967-4831 fax

www.livingstonhughes.com

THIS SKETCH IS FOR MORTGAGE PURPOSES ONLY

1995 survey plan for our property



EVERETT R. BISHOP, JR.
BOOK 5350, PAGE 06

WADLEIGH POND

Boundary survey

Brad R. Lodge <surveyors2@gwi.net>

Mon, Mar 25, 2019 at 9:21 AM

To: Paul Ala <pauljala@gmail.com>

Good morning Paul

While preparing a contract, I reviewed the registry of deeds and found a 1995 survey plan of your property. I've attached a copy of a portion of the plan herewith. As a result, I'd recommend a boundary retracement survey of the lines shown on the 1995 plan. This would consist of searching for the boundary markers shown on the plan and replacing any which are missing, and preparing a new survey plan depicting the boundary lines and any new, and/or differences in, existing property improvements. I'd estimate the cost to be \$1,200 - \$1,500.

Please let me know if you'd like to proceed

Brad

Brad R. Lodge, P.L.S.
Middle Branch, LLC
Professional Land Surveyors
1A Depot Street, P.O. Box 618
Alfred, Maine 04002
(ph)207.324.8712 (fax) 207.324.6100
email: surveyors2@gwi.net
www.middlebranchsurveying.com

[Quoted text hidden]

**296 Wadleigh Pond.pdf**

314K



SPECIAL ADMINISTRATOR'S DEED

KNOW ALL PERSONS BY THESE PRESENTS, that **Richard E. Bridges**, duly appointed and acting Special Administrator of the Estate of **Albert W. Bishop, Jr. a/k/a Albert Wilson Bishop, Jr.** as shown by the probate records of York County, Maine, Probate Docket #2017-1168 and having given notice to each person succeeding to an interest in the real property described below at least ten (10) days prior to the sale, by power conferred by the Probate Code and every other power, for consideration paid, grants to **Melina Amy Ilief-Ala and Paul J. Ala**, whose mailing address is 22 Sagamore Road, Arlington, MA 02470, as joint tenants, the real property situated in the Town of Lyman, York County, Maine known as 296 Wadleigh Pond Road, so-called and being bounded as described as follows:

A certain lot or parcel of land together with the buildings thereon, situated in the Town of Lyman, York Co., Maine, on the shore of Wadleigh Pond, being Lot #3 on a certain survey by John R. Rossborough dated July 2, 1977 of said premises in Lyman plus ten (10) feet of the westerly side of Lot #4 on said survey from Mast Road to Wadleigh Pond.

Being the same premises as conveyed in a deed from Richard Boisvert, Personal Representative of the Estate of Elmer E. Andrews to Albert Wilson Bishop, Jr. dated February 8, 1990 and recorded in the York Co. Registry of Deeds in Book 5350 Page 5. See also a deed from Albert W. Bishop, Jr. to Albert W. Bishop, Jr. and Anne M. Bishop, as joint tenants, dated March 20, 2008 and recorded in Book 15379 Page 615. Anne M. Bishop deceased May 11, 2010, leaving Albert W. Bishop, Jr. as surviving joint tenant. The said Albert W. Bishop, Jr. a/k/a Albert Wilson Bishop, Jr., deceased February 4, 2017.

Witness his hand and seal this 15th day of January, 2019

Witness

Richard E. Bridges
Special Administrator, Estate of
Albert W. Bishop, Jr.

State of Maine
County of Cumberland, ss.

January 15, 2019

Personally appeared the above named Richard E. Bridges in his said capacity and acknowledged the foregoing instrument to be his free act and deed and the free act and deed of the said estate.

Before me,

Print Name
Notary Public/Attorney at Law
My Commission expires _____

Maine R.E. Transfer Tax Paid

p7 Bay Area Title Services
1711 Congress St.
Portland, ME 04102

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MORTGAGE INSPECTION OF: DEED BOOK 16378 PAGE 615 COUNTY York
PLAN BOOK --- PAGE --- LOT ---

ADDRESS: 296 Wadleigh Pond Road, Lyman, Maine Job Number: 1014-31

Buyers: Paul Ala & Melina Amy Lief Ala

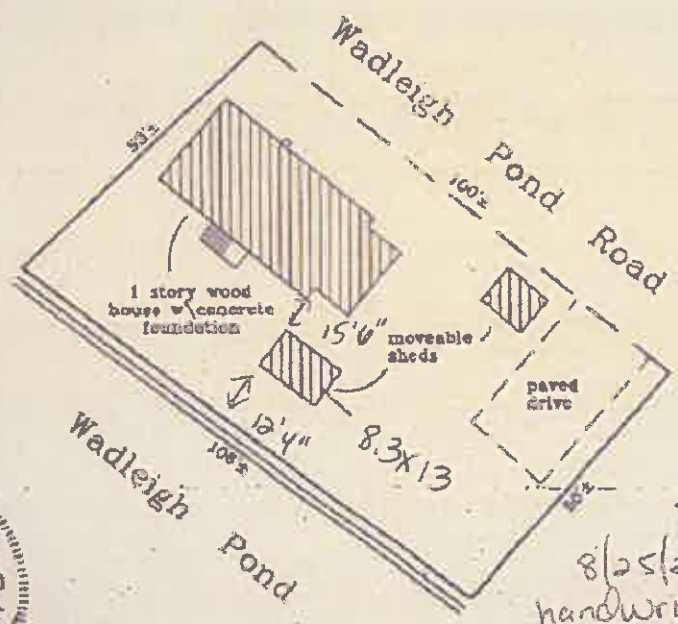
Inspection Date: 12-28-18

Scale: 1" = 30'

Client File #: 2018-1578

Seller: Estate of Albert W. Bishop, Jr.

NOTE: Lines of occupation are shown. A boundary survey may yield different results



PJM
8/25/21 - these handwritten measurements are my estimations after discussing w/ Dale Hugg after the shed was removed.

I HEREBY CERTIFY TO: Bay Area Title Services, Inc., Paul Ala, Melina Amy Lief Ala and the title insurer.
Monuments found did not conflict with the deed description.
The dwelling setbacks do not violate town zoning requirements.
As delineated on the Federal Emergency Management Agency Community Panel 230105-00061.
The structure does not fall within the special flood hazard zone.
The land does ~~not~~ fall within the special flood hazard zone.
A wetlands study has not been performed.

APPARENT EASEMENTS AND RIGHTS OF WAY ARE SHOWN. OTHER ENCUMBRANCES, RECORDED OR NOT, MAY EXIST. THIS SKETCH WILL NOT REVEAL ABUTTING DEED CONFLICTS, IF ANY.

Livingston-Hughes
Professional Land Surveyors
88 Guinea Road
Kennebunkport, Maine 04048
207-667-9751 phone 207-667-4931 fax
www.livingstonhughes.com

THIS SKETCH IS FOR MORTGAGE PURPOSES ONLY

Please Read Applications and Notes, if any attached

TOWN OF LYMAN, MAINE
BUILDING PERMIT # 19-033

Building: \$
Other: \$
SSWD: \$
Total: \$40.-

This is to certify that: Paul + Amy Ala
has permission to: Remove existing 8x10 shed + 8x12 gazebo +
replace with 8x10 shed + 8x12 gazebo
Located at 296 Wadleigh Pond Rd Map 27 Lot 18-3 Zone Shoreland ✓

- Provided that the person or persons, firm or corporation accepting this permit shall comply with all of the provisions of the Statutes of Maine and of the Ordinances of the Town of Lyman regulating the construction, maintenance and use of buildings and structures, and of the application on file in this department.
- > Notification for inspection must be given and written permission procured before this building or part thereof is sheathed or otherwise closed-in, unless waiving of these requirements is indicated in the space below.
 - > A certificate of occupancy must be procured by owner before this building or part thereof is occupied, unless waiving of such requirement is indicated in the space below.
 - > This permit is issued subject to applicable ordinances, current state version of MUREC Building Code. Permit is void if work is not begun within 90 days of the date below.
 - > Inspections required as follows:

- Preconstruction (erosion control)
- Foundation/footing
- Framing
- Rough Plumbing-electric
- Insulation
- Final

8/14/19 PM

A reinspection fee will be charged for all inspections requested before work is completed. Fee must be paid before reinspection.

Approved Date: 4/29/19
Permit expires 1 year from this date

Patti McKenna
Patti McKenna Code Enforcement Officer

Town of Lyman
Code Enforcement Office / Land Use Director
So. Waterboro Road
Lyman, Maine 04002
247-0647
ceo@lyman-me.gov

September 28, 2020

Paul & Amy Ala
22 Sagamore Rd.
Arlington, MA 02470
Re: map 27 lot 18-3

Dear Paul & Amy,

I am writing to finalize all outstanding issues we have been communicating about at your property located at 296 Wadleigh Pond Road in Lyman. Thank you for getting the after the fact permit for the loam brought in to re-establish the lawn. DEP and I were out there to inspect, and the fill brought in and reseeding is in compliance with what is allowed in the rules. This matter is resolved.

As you are aware, I have received complaints that you filled more than just a couple inches for your lawn and that when you reconstructed the shed, it was placed closer to the lake than the previous structures. I reviewed your application submission which included a mortgage survey from just prior to your purchase of the property which showed two moveable structures. I reviewed pictures provided to me by an abutter and before pictures provided by you. I reviewed google earth images from previous years.

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.

As to the claim that you raised the level of your lot with fill more than just reseeding your lawn, I don't find clear evidence of that. I was provided a picture of a truck dumping fill from a year and a half ago. I reviewed the before pictures and went out numerous times to compare the before and after of the property. I see no evidence of significant filling. I am taking no action on this complaint.

As to your complaint about the abutter placing fill at his property which you claim is displacing storm water onto your property, I am leaving that to you and the abutter to resolve as a civil matter. Each of you has claimed the other has placed fill which creates more run off onto your properties. There is a law in Title 17 ss 2807 chapter 91 that makes this claim a civil matter between property owners which I have no authority to mitigate.

Sincerely, *Patti McKenna*
Patti McKenna
Code Enforcement Officer

Shoreline Zoning Buffer Standards

This sheet provides notification of standards required by the Lyman Shoreland Zoning Ordinance.

Violation of any of these standards will require the contractor(s) and/or landowner(s) to fully restore any site conditions not in compliance to their pre-construction condition and could possibly include legal action and violation fines.

NOTE: This form summarizes key Ordinance provisions. Other restrictions and Maine DEP requirements may also apply. Approval of a DEP permit does not supersede these standards that in some cases are more restrictive.

Please review the town's shoreland zoning ordinance to determine if a local permit from the code enforcement office is required. It is suggested that you contact the code enforcement office prior to doing anything within the shoreland zone. Shoreland zone regulations apply to all land areas within **250** feet of the normal high-water line of any great pond, river or the upland edge of a freshwater wetland, and within **75** feet of the normal high-water line of a stream.

The following standards apply within the buffer area. The buffer area for structures is typically 100 feet from a pond, lake or river and 75 feet from a stream. (See the official Shoreland Zoning Map for exact boundaries.)

- Structures are not allowed within the buffer area. This prohibition includes storage buildings, boathouses, patios, decks, tents and any portion of a dock extending above the normal high water line. Retaining walls are a structure and require building permits. ~~There are provisions for allowing an 80 square foot shed within the buffer zone with a permit from the code enforcement office.~~ *

- One winding footpath of no more than six feet in width is allowed for each lot or for each 200 feet of shoreline frontage. Footpaths must be winding in order to provide opportunities for runoff to disperse into the buffer. They cannot be constructed so as to create a view corridor.

- In the off-season, docks should be stacked on the footpath to avoid damage to buffer vegetation. The placement of a new dock requires planning board approval.

- Fill cannot be brought into the buffer except for path construction or to re-vegetate bare ground as part of an approved re-vegetation plan which requires a permit.

- Trees can be limbed on the lower one third of the tree.

- Openings or view corridors in existence prior to January 1, 1989 can be maintained but not enlarged.

Town of Lyman
Code Enforcement Office / Land Use Director
So. Waterboro Road
Lyman, Maine 04002
247-0647
ceo@lyman-me.gov

September 14, 2020

Sequence of events related to 296 Wadleigh Pond Rd.

4/2/2019 -- application submitted by Paul Ala to replace existing shed and gazebo. Information submitted with app was a mortgage survey from Livingston and Hughes dated 12-28-18 showing two "moveable sheds". Deed showing the purchase of the property on January 15, 2019.

I confess to making a mistake in reviewing this application. I did not require a site plan showing the location of the new shed and gazebo. Instead I relied upon verbal agreement that the new structures would go no closer to the water than the closest structure to the water.

4/29/19 -- Building permit number 19-033 was issued to remove existing 8 x 10 shed and 8 x 12 gazebo and replace.

30 days lapsed after the issuance of the permit with no appeal.

8/14/19 -I did a final inspection of the shed and signed off on the shed. Almost 4 months had lapsed without anyone complaining about the shed.

I received a concern about the location of the shed some time after I had done the final inspection from Selectman David Dulong. I stated at that time, I felt there was not much I could do after I had issued a permit and inspected the shed. He stated if they lied on the application then he felt I could do something about it.

About the second week of June in 2020 I received a verbal concern from Linda Houy regarding stormwater runoff. The claim was that a new fence had been installed between the properties and due to some filling and culvert and or ditch alteration/ filling causing the stormwater flow to be drastically increased across the Houy's property. Also, that a new lawn was installed, and fill was brought in on the Ala property at 296.

June 23 - a letter was mailed out to Paul Ala regarding the fill of loam and replanting of a lawn without a permit.

On June 23 -- received emails from Mr. Houy asking about the land under the shed being raised and the shed moved closer to the water. Mr. Houy directed me to research google earth for before pictures of the shed. Mr. Dulong also directed me to look on Zillow for the real estate pictures of the shed.

I did spend some time researching google earth and was able to go back in time to see how the properties have changed. I took note of the lack of trees remaining on the Houy's property compared to the past, as well as the relocation of the dock. Which I later learned was to incorporate a boat ramp installed without a permit.

June 26- application was submitted from the Ala's for an after the fact permit to add soil and re-seed existing lawn. Over the phone Paul stated that they added 1/2"-1" of loam and seeded. Paul reminded me that he had asked if he could

reseed the lawn verbally. I remembered that when reminded. He did not ask about bringing in loam and I did not expound upon my answer to say if he was bringing in loam, that would require a permit. For that reason, I did not charge double or a penalty for the after the fact permit.

July 20, 2020 – received email from Paul Ala with a picture showing a bank of earth recently made by the Houy's that he claims is responsible for the flooding on his land.

July 22, 2020 – Site visit with Lucien Langlois from ME DEP to the Houy property at 292 Wadleigh Pond Rd and the Ala property at 296 Wadleigh Pond Rd. Present at 292 was Linda Houy with John on the cell phone on speaker. Present at the Ala property was Paul Ala.

We met with Paul Ala to view the lawn area. Paul asked me about the shed because I had brought it up by email.

There is a claim by two people, the Houy's and David Dulong that there was fill brought in around the back side of the trees on the slope at the shore. The claim is, that it is clear to see the fill around the tree. Looking at the before pictures provided by the Houy's and the Ala's it is not clear to me that the ground on the Ala's side was significantly raised by the Ala's. It very well may have been raised years ago, but it appears to me based on a review of all the pictures that the only fill brought in was to replant the lawn.

The site inspection at 292 Wadleigh Pond Road showed the area of the fence nearest the shore to have been filled by both parties apparently. It was apparent that recent rainstorms had washed some of the loam out and through the rocks that were placed. Also, it was noted that a new boat launch appeared to have been placed at this property that I did not recall on previous visits.

We were shown an area on the other side of the road where there is claimed to be a culvert crossing the road into a catch basin in front of 296 property. There was a little berm in front of the catch basin. It was reported by Linda that Paul Ala cleaned out the catch basin once and said he was never going to do that again and blocked the culvert. That Paul installed a ditch along his side of the fence that directed stormwater to the lake and was washing out her side of the fence. The claim is that when the new fence was installed, to replace an old fence, that fill was brought in so that the fence went straight out to the shore instead of following the slope of the land as the previous fence did. Causing land to wash away on her side of the fence when it rains.

7/27/20 – email from Paul Ala received. He states that the Houy's had an underground drainpipe on their property that they claim was broken when the new fence was installed. Mr. Ala claims that when the Houy's replaced the roadside fence in front of their property, they moved it further into the road, and placed a bank of loam on the roadside of the fence. This was reported to me previously by someone else by phone, about the fence moving closer to the road previously. I brushed it off because fences do not require permits. If the fence is in the right of way of the road that is always a risk the person takes of having damage or having to remove it if road work is required. The Ala's are claiming that prior to this additional fill along the Houy's property they, (Ala) did not receive a lot of stormwater across their property. The Ala's feel the Houy's have altered their land with fill creating more stormwater on their property. Mr. Ala also provided numerous before pictures that support his claim that he did not significantly raise the land at his property.

August 19, 2020- I conversed with Lucien Langlois during a site visit at other locations regarding this possibly being a civil matter. This being the stormwater flow disagreement between property owners. I also

discussed the shed location and that I had not required a site plan, but verbally agreed to allow the structures to hold the line where the previous structures were. I felt that because no one appealed the issuance of the permit for the shed, at any time, and that I had done inspections of the shed and not made an issue of its location, and more than a year had gone by since the issuance of the permit that I on the town's behalf wouldn't have legal standing to make them move the shed now. I used the term estoppel. But I think vested rights is the better term. Estoppel, means, based on the facts of a particular situation, a municipality may be equitably estopped (prevented) from revoking a permit because a person has changed his or her position in reasonable and detrimental reliance upon a lawfully issued permit. I think vested rights apply here: In order for a right to proceed with construction under the existing ordinance to vest, three requirements must be met: 1. There must be the actual physical commencement of some significant and visible construction. 2. The commencement must be undertaken in good faith... with the intention to continue with the construction and carry it through to completion. And 3. The commencement of construction must be pursuant to a validly issued permit.

9/11/2020 – Met with Mr. and Mrs. Ala at their property with the before pictures to compare. The Ala's had various other questions about planting wildflowers and putting down mulch on the flat area nearest the shore to keep land from further washing out. I informed them they could plant wildflowers and they could fill in with conservation mix, or stump grindings. Both products are the same thing and a preferred product by DEP. I went there to view the claim that the land was raised and that I could easily see by looking at the trees. Also, I wanted to scale the mortgage survey that I relied upon when issuing the permit to determine if they had placed the new shed closer to the lake than the previous structure. It appears to me that they are not any closer than previous structures based upon the mortgage survey. Also, the before pictures of the land look very much the same as it is now, making me believe the only fill placed was to re-establish the pre-existing lawn area.

9/11/2020 – Mr. Houy was waiting for me in the parking lot of town hall when I returned from this site visit asking why I was there. I told him I wanted to compare the land to the before pictures. I told him that I had informed Mr. Ala and I am informing him that I was leaning towards the stormwater issue being a civil matter between them. I informed Mr. Houy that it bothered me that I got the complaints about the fill over a year later and it would have been helpful and easier to deal with had I known when it was happening, not long after the fact. Mr. Houy was not happy with the fill being a civil matter. He stated that I knew about the shed before a year later.

My conclusion in these two complaints are as follows:

1. Both parties claim that both abutting landowners placed fill that has displaced storm water onto their property. I believe that both parties did place fill. One did so with an after the fact permit from the town and a permit by rule from DEP.

There is a law in Title 17 Chapter 91 ss 2808 named alteration of surface water flow. It states that unreasonable use of land that results in altered flow of surface water that unreasonably injures another's land or that unreasonably interferes with the reasonable use of another's land is a nuisance. An action under this section must be commenced within 3 years after the cause of the action occurs.

In June of 2020 I was given pictures showing a dump truck bringing the fill in for the lawn, Before the shed was placed. The shed had to go in after the permit date of April 29, 2019. A year and some months later I am shown a picture of a dump truck dropping loam. Had I known of the fill being brought in at that time and been able to monitor this project the claim of illegal fill could have been

avoided. However, after viewing the before and after pictures I am inclined to believe that the land was not raised significantly but rather loam placed to reseed as the Ala's claim.

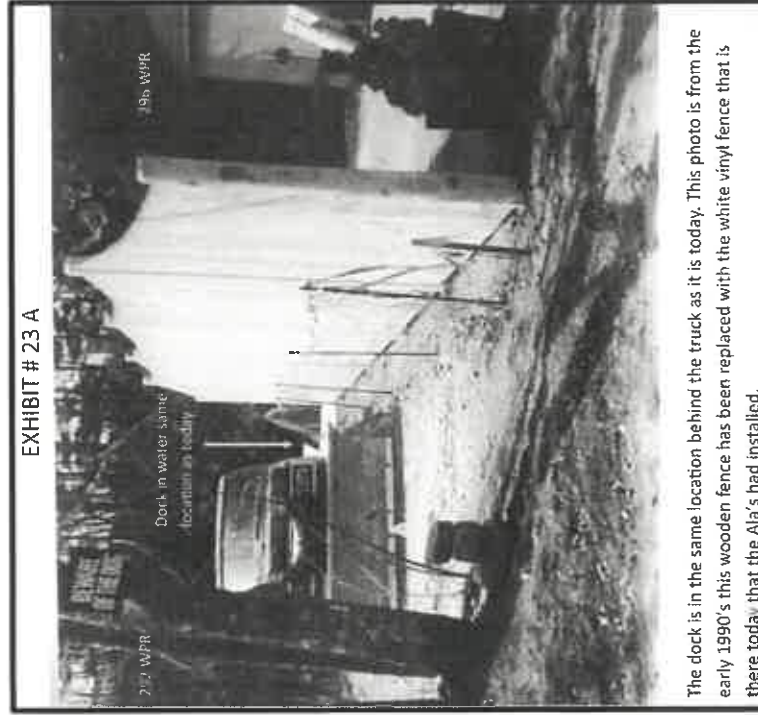
I am taking no action on the claim of fill from either property at this time.

2. 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.
3. I do want to investigate further the installation of what appears to be a boat ramp at the Houy's property at 292 Wadleigh Pond Road. I also want to investigate whether there is replanting of trees that should take place for the opening in the canopy of leaves created at this property based on the previous google earth pictures and recent tree removal.
4. I have not asked nor have I consulted with the town attorney. I suggest before the town considers taking any action that could ultimately cost legal fees, that we get an opinion to support or deny my findings on this.

Respectfully,

Patti McKenna,
Code Enforcement Officer

Historic (prior to 1993) location of shed and current location of our shed.



4-15-2023

Historic pictures (early 1990's) of a structure being built by the previous owner of our property.



Note previous owner's original camp, and a structure, which is located approximately where our gazebo sits.

----- Forwarded message -----

From: **Denice Morais** <milford@vendettibus.com>

Date: Thu, Oct 7, 2021, 3:34 PM

Subject: FW:

To: <lindahou1@gmail.com>

Hi Linda,

I found this photo from about 1991-1992. My youngest son was born end of August 1991. While my father still had the old camp. The picture shows a dock in the place your currant dock is located.

Sincerely,
Denice Morais



Cropped picture presented by the Houys, and accepted as evidence of two docks being present prior to 1993.



Note the uncropped picture shows the presence of a historic gazebo in the same location as our gazebo.

Exhibit 9A

11/09/2020

Dear Paul & Amy Ala

It is time to clear the air.

After reading the letter that was sent to both of us by Patty McKenna, Lyman CEO, I want to clarify a few things.

Paragraph 2 states, "I reviewed pictures provided to me by an abutter and before pictures provided by you." I had a problem with the word that Patti used "abutter". I did go down and meet with Patti to discuss as I felt abutter meant next door. After talking to Patti, about this word abutter, she stated that her meaning of abutter refers to anyone in the vicinity of the pond. Patti also stated that she felt that she had made it very clear to you guys that it was not John or I that complained.

My only complaint was related to the water flow that was coming unto my property. Patti asked if the shed or gazebo bothered us and our reply was to Patti by both me and John, that the shed and gazebo did not bother us, in fact they looked very nice. I even mentioned to Patti and the DEP when they were here, that I liked all of your improvements and that my only complaint was the water flow problem that started with blocking up the culvert.

I am not looking to be your friend, however we are neighbors and have to live beside each other. Patti has made her rulings, right or wrong so be it. I will respect Patti's ruling. In return I expect that you should respect my personal space. After speaking to Patti about the pictures and videos and now the new addition of the camera she has given us permission to place a fence between us. Sorry it has to come to this but I see no other choice.

Respectfully,
John & Linda Houy

Law Office of Benjamin A. Johnson

75 Pearl St., 2nd Floor
Portland, ME 04101

Phone: (207) 517-2210
Fax: (207) 203-4018

November 26, 2021

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.

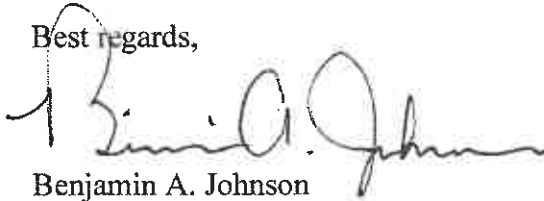
III. CONCLUSION

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