

Town of Isle au Haut Planning Board
Isle au Haut, ME 04645

William Stevens
P.O. Box
Isle au Haut, ME 04645

via email: wmstevens@tds.net

Re: 10/1/14 Communication to Albert Gordon relating to questions on development issues on Arlena Tully Subdivision on Long Pond

Dear Bill:

As you know, Albert Gordon has resigned from the Planning Board for health reasons and the Selectmen have appointed me to take Albert's place on the Board. Further, the other remaining members of the Planning Board have elected me to replace Albert as Chairman of the Board. As I understand it, Albert never responded in writing to your communication to him of October 1, 2014, which contained statements and questions concerning Tina's subdivision on Long Pond that the Planning Board approved this past summer. Albert followed up your communication by sending it to Stephanie MacLagan of the Maine Department of Environmental Protection (DEP) and asking for her to comment on it. Apparently she is the person at the Maine DEP assigned to monitor the Town of Isle au Haut's compliance with the State-mandated Shoreland Zoning Ordinance, which is an overlay on Isle au Haut's own Zoning Ordinance. (I have attached both Ordinances for your use.)

Stephanie apparently placed her comments within the body of your communication. Albert sent the document to me and I have had to separate Stephanie's comments from yours by putting her comments in **bold**. She answered the questions or supplied the comments from her perspective (see attached). It is the Town's responsibility, ultimately, though, to issue decisions that interpret and enforce the State-mandated Shoreland Zoning Ordinance. Remember, however, that the State can challenge the Town if they believe we are not correctly enforcing their ordinance. Take what guidance you can from Stephanie's remarks. Remember that the Shoreland Zone overlay extends upland for 250' away in all directions from the normal high water mark of Long Pond so any actions within that distance (not just the Town Zone E(3) Greenbelt of 125' from Long Pond and Zone B which extends from 125' to 500' from Long Pond) is governed by the Shoreland Zoning Ordinance.

As the new Chair of the Board, I want to make the Application approval process as efficient as possible for both the Board and the Applicant. I am going to borrow some Application processing methods from the judicial and regulatory processes with which I am familiar. When appropriate, I will issue procedural and guidance memoranda to assist the Applicant and the Board. When questions arise about what the Board wants to see (such as yours with regard to sediment and erosion control techniques), I will suggest what I consider to be acceptable methods based on my own experience. Similarly, when an Applicant asks for interpretation of the Ordinances, I will give my initial interpretation. In both cases, you are free to request that the Board review and vote to change any opinions I deliver as Chair. The Board is not permitted to discuss or deliberate on any potential or filed Application except in public meeting, so my opinions as Chair are just that and subject to review by the Board in public meeting. In larger municipalities that have full-time planners on staff, these planners typically perform this same function in helping an Applicant through an Application process. In this case, there is no planning staff, so I will serve that function to the best of my knowledge and ability. So the upward chain of your appeal potential is first the Planning Board, then the Town Appeals Board, then Maine Superior Court, then the Maine Law Court, and, if issues of potential violation of federal rights are involved, the federal court system.

At this point, the Board has not requested any legal opinions from Counsel for the Town and would not do so until an actual Application is accepted as Complete and the Board decides, at its discretion, to do so (this is to minimize cost to the Town and insure that it only exercises this right when there is an actionable Application before it). If you do not agree with my initial opinion and you wish to provide an alternative legal opinion, please provide that with your formal Application on the matters discussed below. It is possible that you have other facts that I am not privy to at present and that may change my opinion. Offer those facts with your Application and not with another pre-Application letter exchange.

Referring to your original 10/1/14 communication to Albert, as commented on by DEP, my comments are numbered to refer to the numbers assigned to your original paragraphs:

- 1) Although I do not have current possession of it, I presume that you previously submitted to the Board a signed statement from Tina appointing you as her legal representative before the Planning Board in matters relating to this subdivision. Please re-submit this statement with any Applications you make relative to continuing representation before the Planning Board on this subdivision. Any driveway construction apparently requires the Applicant to notify the Planning Board that earthwork will begin so that the Planning Board can inspect and approve sediment control measures prior to earth moving. Further, channelized flow must be redistributed as non-channelized flow and clearing of trees is limited to 12,000 square feet outside of the Town's 125' setback. (These are all conditions that were added to the final plan by the Planning Board.) So research potential means of sediment control and submit a plan that shows where the roads to be constructed will be located and where the erosion control measures will be installed and what those measures will consist of. The Maine DEP has a manual of Best Management Practices (BMP) on its website at <http://www.maine.gov/dep/land/erosion/escbmeps/>. I have attached the section on sediment control measures as an example of the types of measures you could consider.
- 2) As the DEP indicates, there is no difference between a permanent and a temporary road as far as the requirements for erosion and sediment control. Provide scaled plans for both lots with the roads located as accurately as you can make them because the Board may plot these in ArcGIS and check the locations with a handheld GPS to make sure the roads are more or less where you show them to be on the plans. If the road is temporary, then it must be removed and the ground re-stabilized and re-seeded as described in the Maine DEP BMPs after the leachfields are constructed. The leachfields must be constructed in the locations shown on the plans unless you apply to the Board for, and are approved for, a plan amendment to move them. Remember that any portion of the roads or septic system that are located within 250' of the Pond must also meet the requirements of the State-mandated Shoreland Zoning Ordinance.
- 3) It is my interpretation of the Town's Ordinance that under its definition of "building" and the 3rd paragraph of Section III (Exclusions) of its Ordinance, that the "sea plane" ramp, so-called, on Lot 3 (you describe it as Lot 2 in your communication) cannot be re-built because it was a non-conforming use and was not used or maintained in the twelve months prior to the subdivision approval.

However, if a building is not occupied or maintained for a period of more than twelve months in a condition suitable for occupancy, its exemption shall lapse. Thereafter, any use of the building or its site must be in conformity with this Ordinance.

Although the “ramp” is not something normally associated with the term “occupancy”, the Ordinance makes it clear that any above-ground man-made structure is a “building” and that no new “building” may be located within 125’ of the Pond. Once the grandfathered status of a “building” lapses for more than 12 months, it may not be re-built unless moved more than 125 feet from the Pond. In this case, the “building” use was as some sort of “ramp” to move sea planes in and out of the Pond. The DEP comments that the Shoreland Zone Ordinance does allow some water-related structures, but the Isle au Haut Town Ordinance does not (small swimming floats in the lake during summer months and moved to the shore during the winter have historically been treated as exceptions by the Town) and the State-mandated Shoreland Zoning Ordinance indicates that when two or more ordinance requirements cover the same area, the more restrictive condition rules (Section 7).

- 4) Since it is my opinion that the ramp was a lapsed non-conforming use and, therefore, cannot be re-built, application to the Maine DEP under the Natural Resources Protection Act for its reconstruction would likely be a waste of time and effort unless you can get the Planning Board to overrule this opinion.
- 5) So noted.
- 6) I consider a lateral (i.e., sideways) 30% expansion of the boathouse a new “building” in a zone in which the Town does not permit new buildings. However, a vertical expansion might be considered, subject to the 50% rule stated in the Shoreland Zoning Ordinance, which the Town must also enforce. As to the replacement of existing sills and flooring, there are two aspects to consider. First, the jacking up of the building and replacement of sills would require outdoor work and disturbance of soils. I believe that the Applicant would have to apply to the Maine DEP under the Natural Resources Protection Act (“NRPA”) to do this specific type of work. An Application would also have to be made to the Town for appropriate Sediment and Erosion control measure implementation. As to the replacement of other parts of the building in like kind, such as flooring, I would consider that as “repair” work and consider that in a different light than “expansion” or “improvement” and not subject to the 50% rule as suggested by the DEP. I consider the “boathouse” to be a storage building, and storage of objects can extend for years, so I do not consider 12 or more months passage since the last human entry into the building as a “lapse” of use and therefore as cause for loss of grandfathered status. However, I do not consider any human occupancy (e.g., overnight sleeping, etc.) of the building to be a preserved grandfathered use. As to the 50% rule, I will entertain your suggestions for determining the current appraised value of the boathouse and how the value of “improvements” would be calculated. I consider vertical expansion subject to the 50% rule, as well as addition of interior partitions or placement of additional windows (as examples, only). So the Board will require detailed plans and specifications for any work proposed on the boathouse in order to determine whether it is “repair” or “expansion”.
- 7) See both the DEP’s comments and my comments on #6 above.
- 8) You refer to the existing foundation on Lot 1. Based on the plan that I have, the only existing foundation is on Lot 4. Assuming it is the foundation on Lot 4 that you are referring to, you have the DEP’s statement of their requirements (although the foundation is outside of the Town’s 125’ setback, it is within the 250’ setback where the Shoreland Zoning Ordinance applies). During the subdivision application process, the use of this foundation was not specified. If you wish to do any work on the building or around it, you must tell the Board of its proposed use and plans must be provided to show what the proposed final grading, clearing, vegetation planting, etc., around the building will be and how the detailed plans for

sediment and erosion control will be designed, installed, and maintained. Note that the lot is only approved for one single family dwelling at this time so if this is proposed to be a dwelling, provide the Board with detailed plans for connecting the building to the proposed septic system. If any pumping of sewage is proposed, provide the Board with detailed plans that will assure the Board that no failure of a sewage pump could cause sewage to leak into the environment other than through the leachfield itself.

- 9) The conditions that the Board added to the approval of the subdivision refer to various requirements for sediment and erosion control, including a reference to 38 M.R.S.A. § 420-C. This section was presumably referred to because the subdivision is in the watershed of a Great Pond, considered a "protected natural resource". I have given you a website link to the DEP's BMPs for sediment and erosion control and the DEP has further reminded you that all earthwork in the 250' Shoreland Zone must be done or overseen by a person certified by the Maine DEP to design and maintain sediment and erosion controls. Further, as mentioned above in item #2, the plans should be specific enough that they are accurately located on a plan such that a person can transfer the locations to a GPS device and reproduce the locations in the field to the field accuracy of the specific GPS device.
- 10) The Board will notify you one week in advance of its meeting time. We are attempting to arrange a meeting before end of January, subject to the availability of a quorum of the Board members. At that meeting you may ask the Board to review any opinion stated here, present any Applications, or ask any additional questions for the Board's consideration. If you present an Application, the Board may take up to 35 days to issue its ruling as to whether the Application(s) is/ are considered "complete" for processing by the Board (Section 16(D) of the Shoreland Zoning Ordinance). If they are not considered complete, the Board will notify you in writing and specify any additional information or material that it requires in order to consider the Application(s) complete. Please submit separate Applications for each lot so deliberations on one lot's issues will not hold up processing another lot's Application.

In the interest of preventing an endless back and forth by letter, any additional submissions or questions with regard to the specific matters discussed in this letter will not be responded to except by the Board meeting in public session and there should be no further ex parte discussion outside of the Board meetings. If you want guidance on a matter different from what was described in your 10/1/14 memo, feel free to inquire, providing as many facts as possible at the time of the inquiry.

Sincerely,

Isle au Haut Planning Board

Robert G. Gerber, Chairman

Enclosures: DEP response to 10/1/14 Stevens memo; Town of Isle au Haut Zoning Ordinance; State of Maine Shoreland Zoning Ordinance for Isle au Haut; excerpt on sediment control from Maine DEP's BMPs on Sediment and Erosion Control