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FACSIMILE TRANSMITTAL LETTER

DATED:

October 23, 2012

PLEASE DELIVER TO:

Cape Elizabeth ZBA

SENT BY:

Tery Foster, for DST

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Thank you.

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October 23, 2012

Cape Elizabeth Zoning Board of Appeals  
320 Ocean House Road  
Cape Elizabeth, Maine

SENT BY FAX (TO 799-2914) AND BY EMAIL (Aniko.Varadi@capeelizabeth.org)

Re: Building permit for Mr. and Mrs. Marshall Goldman  
27 Pilot Point Road  
Building Permit Number: 130056

Dear Members of the Zoning Board of Appeals:

I have been retained by Mr. and Mrs. Marshall Goldman to participate in this evening's hearing on the appeal of Maynard and Deborah Murphy, challenging the issuance of the Town's building permit. As you know, the Goldmans are seeking permission for the construction of a small stairwell in their yard between the Atlantic Ocean and their home. Your long-time Code Enforcement Officer, Bruce Smith, issued this permit because, it is my understanding, the stairwell sits well beyond 75 feet from the normal high-water line, which, in this case, is well below the top of an oceanside cliff. When I spoke with Mr. Smith several weeks ago, he assured me that his decision in this matter was consistent with his and the Town's construction of the applicable ordinance throughout his 30 years' employment with the Town.

Let me here set forth several of our salient arguments:

1. The enhancement/improvement/change proposed here is a minor one: a small set of steps below my clients' home and well away from the Atlantic Ocean and the top of the banking/cliff.

2. This enhancement is not visible to the Murphys or others in the neighborhood. This improvement will not alter, change, reduce, or otherwise affect anyone's view of or access to the Atlantic Ocean. No one will suffer any harm, and no one is "aggrieved."

3. The applicable law here is the Town's Ordinance; more specifically, its definition, at Section 19-1-3, of normal high water line of coastal waters and its shoreland performance overlay requirements at Section 19-6-11, calling for a 75-foot shoreline setback. An ancillary issue concerns so-called maximum coverage; here, the total footprint of all structures, parking lots, and other impervious surfaces must not be greater than 20% of the lot.

The State's shoreland zoning statute allows for implementation and enforcement of more restrictive municipal ordinances, provided that those ordinances have State approvals. I met with the Town's Director of Planning, Maureen O'Meara, some weeks ago, when she assured me that the Town's shoreland ordinance is more restrictive than applicable State law and that the same has received repeated State approval since 1992.

4. The Town's ordinance defines "normal high water line of coastal waters" as "that line on the shore of tidal waters which is the apparent extreme limit of the effect of the tides, *i.e.* the top of the bank, cliff or beach above high tide." As Mr. Smith explained to me, he and the Town have consistently interpreted the examples at the end of the definition as merely illustrative of where that line may be in any given case. Associate Justice Edward Godfrey of the Maine Supreme Judicial Court, in the well-known and often-cited case of Mack v. The Town of Cape Elizabeth, 463 A.2d 717 (Me. 1983), a former Dean of the University of Maine Law School, pedagogically chastised the Town for using the abbreviation *i.e.* [*id est*] instead of *e.g.* [*ex gratia*]. In this particular case, as with many cliffs and banks throughout Maine, including at Acadia National Park, the top of a bank or cliff could be yards, or even miles from the ocean or the effects of tidal waters. For the Goldmans, the top of their bank appears to be approximately 50 feet from the normal high water line of the Atlantic Ocean.

In cases like this, normally an inspection would be determinative. We do know that your Board inspected our neighbors' property on October 9 just an hour or so before high tide. It is our hope that you could then easily determine that even "the apparent extreme limit" of the Atlantic Ocean was well below the top of our cliff.

5. While it is true that our original survey, done by the Titcomb firm back in 2005, used the top of the bank as a southern terminus of and for our lot, it was wrong and can be and should be corrected. It is my understanding that Bruce Smith told my clients' landscape architect, John Mitchell, that when he approved this plan, he was not even looking at this particular line; his concern was that the house be sited an appropriate distance back from that line, which it was.

Even if the Titcomb survey is deemed accurate and binding against the Goldmans here, the new stairwell would not overburden/over-cover the lot. According to Mr. Mitchell's calculations, construction of the stairwell will still leave the Goldmans with 116 square feet for impervious enhancements and/or improvements.

6. Finally, the Murphys' reference to "salt tolerant vegetation" in the statute or DEP rules misses two important points. First, the Cape Elizabeth Town ordinance prevails, as discussed above. Second, this reference to such vegetation is merely an example of the possible effects of ocean water; it isn't determinative of the location of the mean high water line. We would submit that the presence of such vegetation is far more significant and meaningful in a marshy area, where it would be hard to establish a mean or normal high water line. Clearly this is not the case here.

7. While we don't think that a good case can be made for consideration of the State statute, its definition of normal high water line may be found at Title 38, §436-A-9:

that line which is apparent from visible markings, changes in the character of soils due to prolonged action of the water or changes in vegetation, and which distinguishes between predominantly aquatic and predominantly terrestrial land.

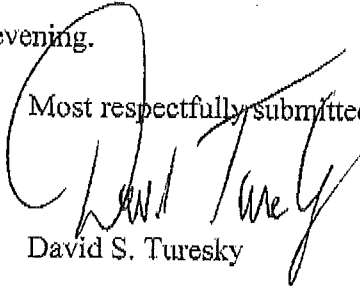
As your inspection would confirm, simply from the presence or absence of moisture in the upper area of the cliff wall here, the "normal high water line" is well below the top of that cliff.

Zoning Board of Appeals  
October 23, 2012  
Page 4

Finally, it is my understanding that the Murphys are represented by Attorney André Duchette; and I will be sending to him by email a copy of this submission.

We do look forward to addressing the Board this evening.

Most respectfully submitted,



David S. Turesky

DST/tf

cc: Mr. and Mrs. Marshall Goldman (via email)  
André Duchette, Esq. ([ADuchette@TMFAttorneys.com](mailto:ADuchette@TMFAttorneys.com))  
John Wall, Esq. ([jwall@monaghanleahy.com](mailto:jwall@monaghanleahy.com))  
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