

PLEASE PRINT

DATE REC'D: 4-8-19
FEE PAID (\$160.00): Yes No
TAX MAP #: 7 LOT 87-89

OGUNQUIT ZONING BOARD OF APPEALS APPLICATION

Appellant's Name: Lafayette Ogunquit LLC Representative: John C. Bannon, Esq.
Mailing Address: 155 Littlefield Avenue 75 Pearl Street
Bangor, Maine 04401 Portland, Maine 04101
Telephone #: 207-604-4154 207-523-8211

TAX MAP: 7 LOT: 87-89 ZONING DIST(S): Ogunquit Beach - SG1
STREET: 135 Beach Street

TYPE OF APPEAL & BRIEF DESCRIPTION OF FACTS OF APPEAL:

*Administrative Appeal - Article 5.2.A Please see attached letter from John C. Bannon to the Zoning Board of Appeals

*Variance Appeal - Under Article(s) _____

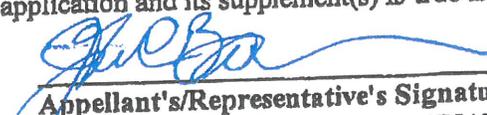
*Other Variances - ~~Under Article(s)~~ Variance to accommodate persons with disabilities.
Please see attached letter from John C. Bannon to the Zoning Board of Appeals

*Miscellaneous Appeals - Under Article(s) _____

THIS FORM, ACCOMPANIED BY A \$160.00 FEE MUST BE RETURNED TO THE CODE ENFORCEMENT OFFICE, DUNAWAY CENTER, SCHOOL STREET, OGUNQUIT TOGETHER WITH THE APPROPRIATE DOCUMENTATION AS OUTLINED IN THE LETTER ATTACHED.

I certify the information contained in this application and its supplement(s) is true and correct.

DATE: 02/25/2019


Appellant's/Representative's Signature

***SEE ATTACHED ARTICLE 5 OF THE OGUNQUIT ZONING ORDINANCE FOR DESCRIPTION AND CRITERIA FOR ABOVE APPEALS.**

February 25, 2019

Mr. Jay Smith, Chair
Ogunquit Zoning Board of Appeals
23 School Street
P.O. Box 875
Ogunquit, Maine 03907

Re: Administrative Appeal and Variance Appeal by Lafayette Ogunquit, LLC from Decision of the Code Enforcement Officer Dated January 25, 2019 Denying Application for Planning Board Site Plan and Design Review of the Addition of an Elevator to the Norseman Resort.

Dear Chair Smith:

This firm represents Lafayette Ogunquit, LLC, the owner of the Norseman Resort (hereafter the "Norseman") located at 135 Beach Street in Ogunquit. On behalf of the Norseman, I have filed an administrative appeal and variance appeal from a decision (hereafter the "Decision") by Code Enforcement Officer Scott Heyland (hereafter the "CEO") dated January 25, 2019 effectively denying the Norseman's Application to the Ogunquit Planning Board for Site Plan and Design Review of a proposed 200 SF elevator (hereafter the "Application")¹. I offer this letter in support of the Norseman's appeals.

I. ADMINISTRATIVE APPEAL

The primary basis for the Norseman's administrative appeal is that the CEO's Decision² erroneous interpretation of the definition of "building coverage" applicable to the Shoreland Zone under OZO Article 2 and footnote 13 to Table 703.1 led him to the mistaken conclusion that the Application, which proposes the construction of a 200 SF elevator for handicapped access, impermissibly increases the Norseman's legal nonconformity to the maximum shoreland building coverage standard. In addition, the Decision erroneously overlooks the fact that the proposed elevator is a permitted expansion of a nonconforming structure under OZO §§3.1(C) and 3.3(C)(4). Finally, the Decision

¹ An 8.5" x 11" copy of the complete Application is attached hereto as Exhibit A. 11" x 17" copies of the plans filed with the Application are attached hereto as Exhibit E.

² A copy of the Decision is attached hereto as Exhibit B.

misconstrues the relationship between OZO §§ 3.5 and §9.8(D) and the scope of the OZO's limitations on expansion of nonconforming hotels.

The Norseman also requests the Board to grant it a variance to construct the elevator. That request is based not on the typical administrative grounds for a variance set forth in OZO § 5.2(B)(2), but on a judicial doctrine holding that the Americans with Disabilities Act (hereafter "ADA") effectively compels a municipal board to grant a variance to allow disabled persons a reasonable accommodation for access to facilities that are accessible by non-disabled persons.³

A. Background

1. General facts and relevant legal principles.

The Norseman occupies Lot 7-87-89 as shown on Ogunquit Tax Map 7 (hereafter the "Parcel"). The portion of the Parcel occupied by the Norseman is located entirely within the "Ogunquit Beach--SG1 Zoning District" -- one of the Shoreland Zones. OZO § 7.1(L).

The Norseman is classified as a "Transient Accommodation Type 4 (TA-4) – Motel/Hotel" use (hereafter "TA-4 Use") under OZO Article 2. Although TA-4 Uses are currently prohibited in every zone other than the GB2 District, the Norseman was developed before the OZO was amended to prohibit TA-4 Uses in the SG-1 District. Therefore, the Norseman, is a legally nonconforming or "grandfathered" TA-4 Use.

For the purposes of the Norseman's administrative appeal, it is critical to recognize that OZO Article 2 sets forth two separate definitions of the term "building coverage:" one that applies only to non-shoreland zones, and another that exclusively governs Shoreland Zones:

Outside of any shoreland zone, the sum of the area of the footprints of all existing or new buildings, as defined by this ordinance, compared to the total area of the lot on which the buildings are located, expressed as a percentage. The computation of

³ In an effort to avoid filing this appeal, on February 12, 2019 I sent to CEO Heyland a letter presenting essentially the same arguments raised on this appeal and asked him to reconsider his decision. Among other things, my letter disclosed and corrected certain mistakes in the Applicant's calculation of "building coverage" on Site Plan Sheet I.2. A copy of that letter is attached hereto as Exhibit C. CEO Heyland replied via e-mail on February 13, 2019 that he did not agree with my analysis. A copy of the e-mail exchange between the CEO and me is attached hereto as Exhibit D. After writing my letter of February 12, 2019, I obtained additional information from Engineer Aleva concerning his calculations of Shoreland Building Coverage that significantly altered my understanding of his calculations. This letter reflects my current understanding of the facts.

building coverage includes all principal and accessory buildings, such as sheds and garages located on the lot.

Inside any Shoreland Zone, building coverage shall include, in addition to the areas indicated above, the total area of all other structures, parking lots and any other nonvegetated surfaces.

(emphasis added)⁴

If that were not sufficiently clear, Table 703.1, which sets forth the dimensional standards applicable to each zoning district, repeats OZO Article 2's distinction between how building coverage must be measured in the non-shoreland zones and Shoreland Zones. In non-shoreland zones (other than the DB District⁵) served by public sewer and water, Table 703.1 establishes maximum building coverages of either 20% or 30%. In the Shoreland Zones (other than the SP and RP Districts⁶), the maximum building coverage is set at a uniform 20%, but is further subject to the footnote 13:

In the Shoreland Zones, the total area of all buildings, structures, parking lots and any other non-vegetated surfaces shall be included in the computation of maximum building coverage, and shall not exceed the indicated percentage of the lot area, or portion of the lot area thereof, located in the Shoreland Zone. See definition of Building Coverage in Article 2.

(emphasis added) For the sake of brevity, for the remainder of this letter I will refer to the definition of "building coverage" required in the Shoreland Zone simply as "Shoreland Building Coverage."

The use of Shoreland Building Coverage in the Shoreland Zone is mandated not only by the OZO but by State law. As the Board is aware, the Maine BEP has adopted Minimum

⁴ That separate definition of "building coverage" applicable to the shoreland zones is legally required because (a) the OZO may be no less strict than the DEP's Minimum Guidelines for Municipal Shoreland Zoning Ordinances, and (2) §15(B)(4) of those Guidelines specifies that:

With the exception of General Development Districts located adjacent to coastal wetlands and rivers that do not flow to great ponds, and Commercial Fisheries/Maritime Activities Districts, non-vegetated surfaces shall not exceed a total of twenty (20) percent of the portion of the lot located within the shoreland zone. For the purposes of calculating lot coverage, non-vegetated surfaces include, but are not limited to the following: structures, driveways, parking areas, and other areas from which vegetation has been removed.

(emphasis added).

⁵ In the DB District, there is *no* maximum building coverage.

⁶ In the SP and RP Districts, there is a 0% maximum building coverage.

Standards for Municipal Shoreland Zoning Ordinances, DEP Rules Ch. 1000 (hereafter the "Guidelines"). In order to be legally valid, municipal shoreland zoning regulations must be *at least* as strict as those set forth in the Guidelines. §15(B)(4) of the Guidelines provide, in pertinent part, as follows:

With the exception of General Development Districts located adjacent to coastal wetlands and rivers that do not flow to great ponds, and Commercial Fisheries/Maritime Activities Districts, *non-vegetated surfaces* shall not exceed a total of twenty (20) percent of the portion of the lot located within the shoreland zone.
...

For the purposes of calculating lot coverage, non-vegetated surfaces include, but are not limited to the following: structures, driveways, parking areas, and other areas from which vegetation has been removed.

The Guidelines provide no other definition of lot coverage in the Shoreland Zone. Hence, under the OZO, no different definition may be applied to lots or developments in the Shoreland Zone.

The Parcel has a total area of 59,613 SF. 54,020 SF of the Parcel is presently covered by "principal and accessory buildings, such as sheds and garages; ... structures; parking lots; and any other nonvegetated surfaces." Under OZO Article 2, footnote 13 to Table 703.1, and the State Guidelines, all such areas must be included in Shoreland Building Coverage. The Parcel's present Shoreland Building Coverage therefore is, as a matter of law, 54,020 SF or 90.6% of the total lot area.⁷ Because that area was developed before the adoption of any of the regulations pertinent to this appeal, it is legally nonconforming or grandfathered.

OZO Article 2 defines "Increase in nonconformity of a structure" as follows:

Any change in a structure or property which causes *further* deviation from the dimensional standard(s) creating the nonconformity such as, but not limited to, reduction in property line, water body, tributary stream or wetland setback distances, increase in lot coverage, or increase in height of a structure.

⁷ Although the non-shoreland definition of "building coverage" is inapplicable to this case, if it were relevant, the total area of the footprints of buildings on the Parcel is 30,142 SF or 50.6%. Hence the "building coverage" on the parcel is legally nonconforming even under the non-shoreland definition of that term.

2. The Norseman's application for Site Plan and Design Review of a 200 SF elevator for mobility-disabled persons who currently cannot access the second floor of the hotel.

The Norseman rents guestrooms to the transient public on the first and second floors of its buildings. However, persons with mobility limitations recognized as disabilities under the Americans with Disabilities Act (hereafter "ADA") currently have no means of accessing the second floor of the Norseman.

On or about January 15, 2019, the Norseman filed with the Land Use Office an application to the Planning Board for both Design Review and Site Plan Review of a proposed 200 SF elevator (hereafter the "Application"). The elevator's purpose is to allow persons who are physically unable to climb stairs, to access and use, on the same basis as persons without such a disability, the rooms and other facilities available on the Norseman's second floor. The elevator is therefore a means to bring the Norseman into better compliance with the Americans with Disabilities Act (hereafter the "ADA").

As is shown in the following excerpt from Site Plan Sheet L2, the elevator would occupy a minute portion of the Parcel, within a paved interior courtyard, at the intersection of two buildings known as the "Dunes" and the "Sundowner:"

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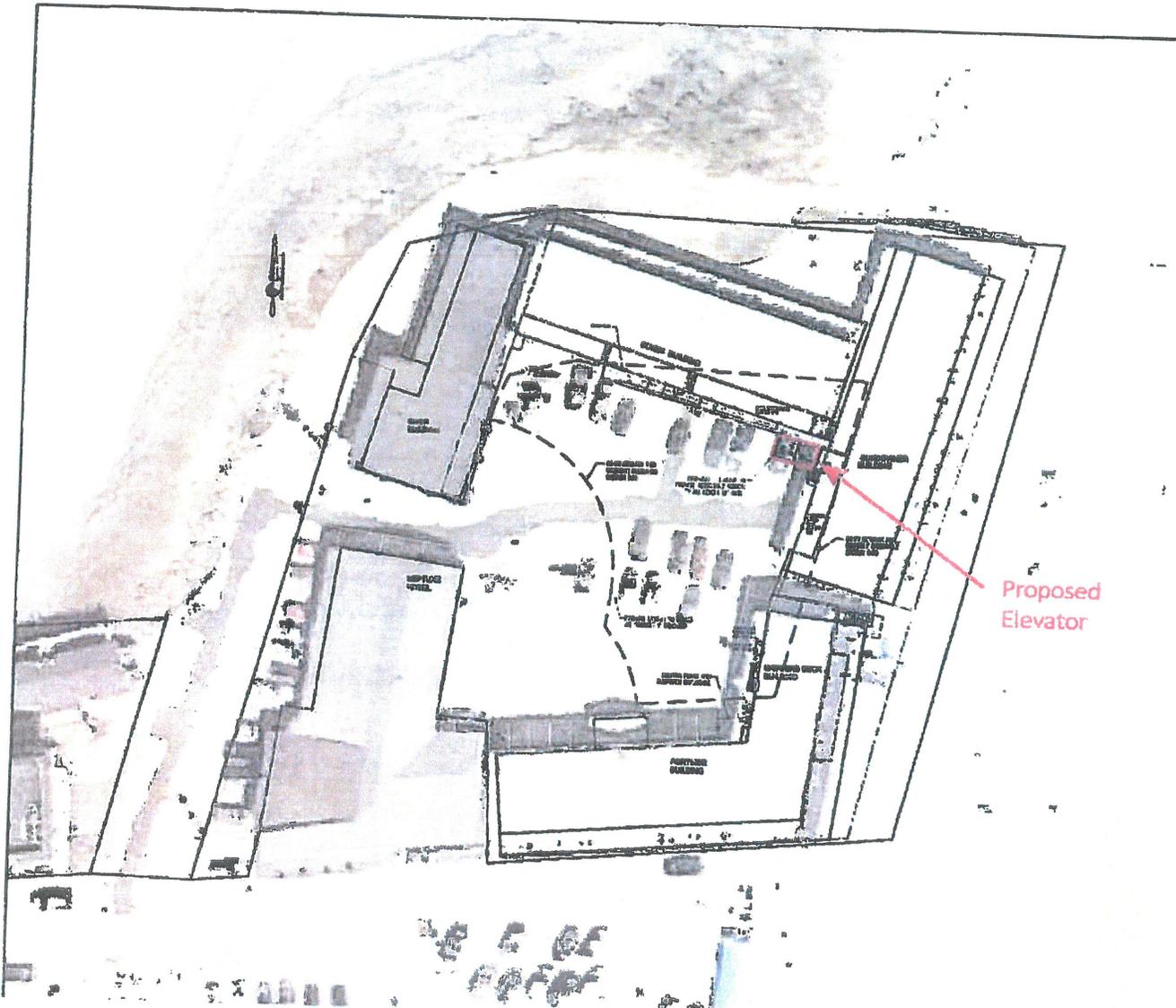


Figure 1
Excerpt from Site Plan Sheet L2 Showing the Size and Location of Proposed Elevator
Relative to the Total Area of the Norseman Development

The Norseman's interior courtyard is completely covered by bituminous pavement, primarily for use as a parking area for guests. The photographs and architectural renderings filed with the Application show that

- the elevator would be constructed over an area of the Norseman's interior courtyard that is currently occupied by part of one paved parking space, a set of stairs built over pavement, and a concrete "handicapped access" ramp;
- no currently vegetated areas of any kind would be removed or disturbed in building the elevator;
- the elevator would not be visible from the exterior of the Norseman complex⁸; and
- the elevator would be compatible with the design and scale of the existing development:

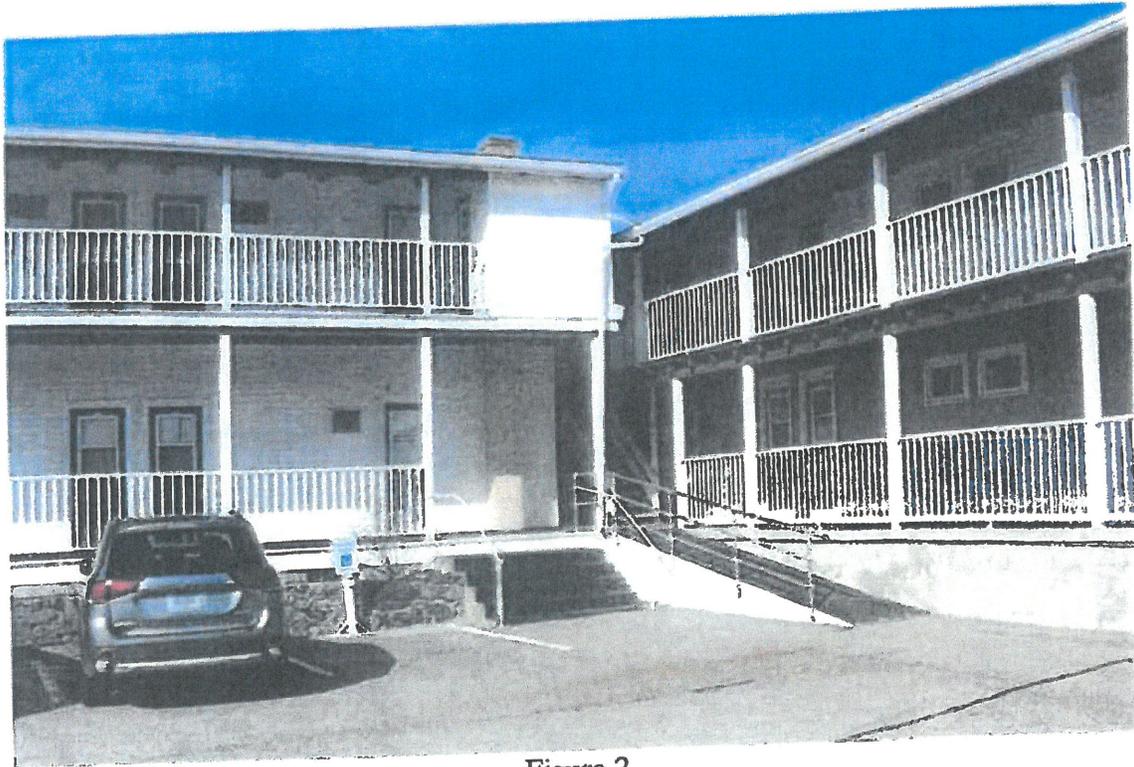


Figure 2
Ground View of Existing Building Intersection, Stairs, and Concrete Walkway
Where Proposed Elevator Would be Built

⁸ The same design for the elevator was approved by the Ogunquit Historic Preservation Commission during pre-Site Plan review at its meeting on October 10, 2018. The Commission concluded that the proposed improvements "were in an area of the building that would have no visual impact on the beach, river, or street." The OHPC's decision is attached hereto as Exhibit G.

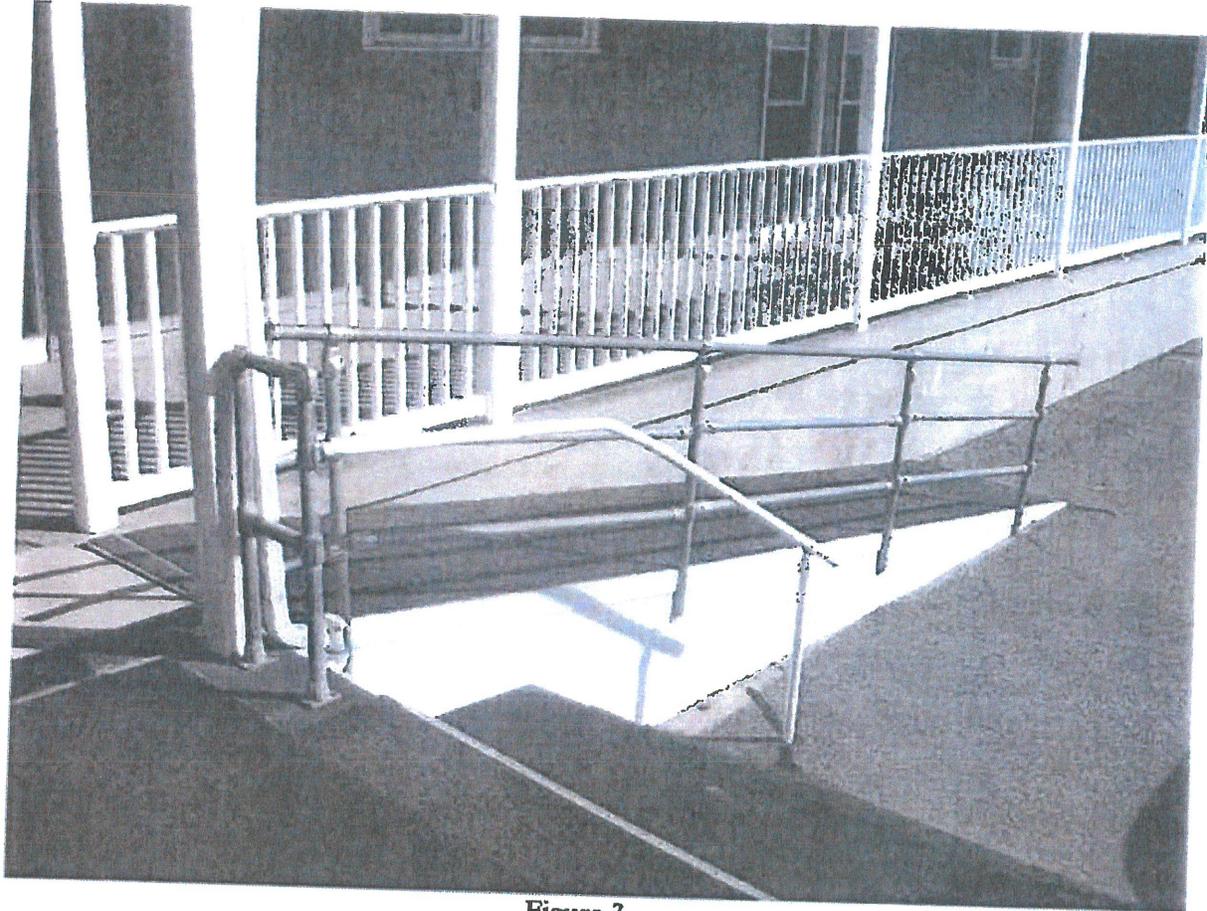


Figure 3
Close-Up View of Stairs, Concrete Walkway, and Parking Space That Would Be Replaced by Elevator Footprint

[Space deliberately left blank]

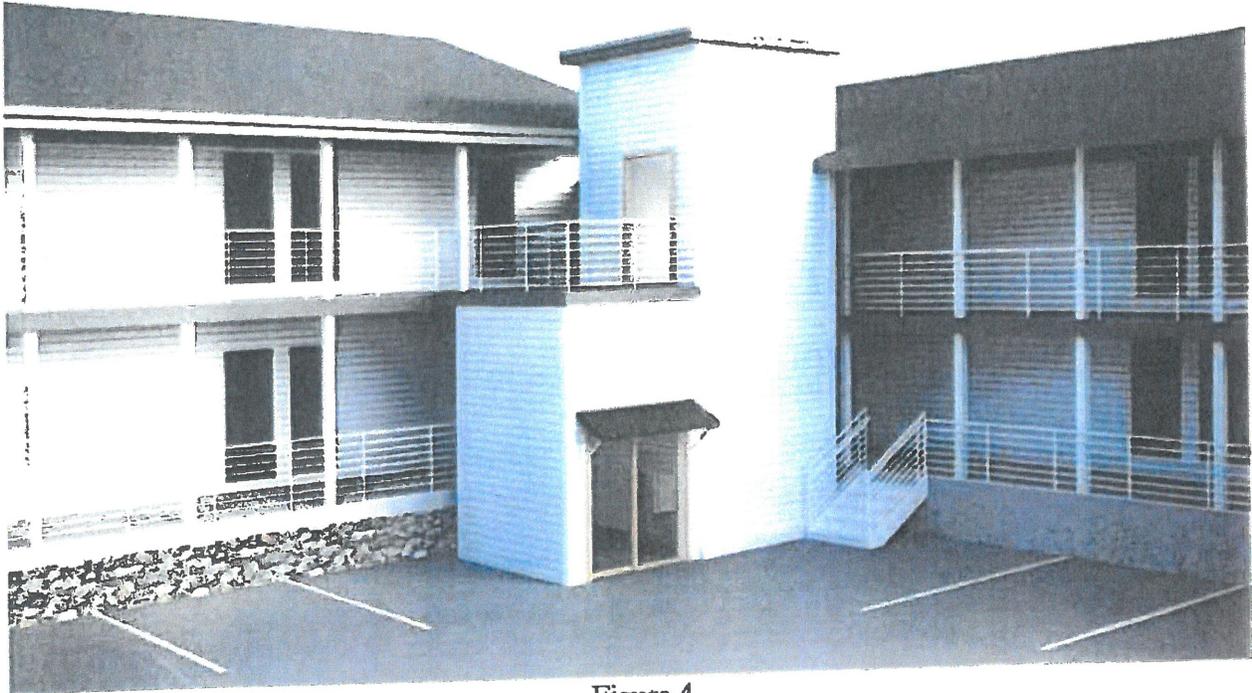


Figure 4
Artistic rendering of Completed Elevator

On Site Plan Sheet L2, Mr. Aleva included information blocks showing what he called the “Town of Ogunquit Building Coverage” for the Parcel, both before and after construction of the elevator:

[Space deliberately left blank]

EXISTING COVERAGE INFO

<u>EXISTING BUILDING</u>	
LOT AREA	59,613 SF
BUILDINGS/COVERED PORCH	18,825 SF
SECOND FLOOR DECK	5,300 SF
STAIRS	272 SF
CONCRETE/WOOD WALK	5,745 SF
PAVEMENT	23,878 SF
SAND/DUNE	5,593 SF
TOWN OF OGUNQUIT BUILDING COVERAGE	30,142/59,613 = 50.6%

PROPOSED COVERAGE INFO WITH ELEVATOR

<u>EXISTING BUILDING</u>	
LOT AREA	59,613 SF
BUILDINGS/COVERED PORCH	18,825 SF
ELEVATOR	200 SF
SECOND FLOOR DECK	5,300 SF
STAIRS	272 SF
CONCRETE/WOOD WALK	5,745 SF
PAVEMENT	23,678 SF
SAND/DUNE	5,593 SF
TOWN OF OGUNQUIT BUILDING COVERAGE	30,342/59,613 = 50.9%

Figure 5
Excerpt from Site Plan Sheet L2 Showing Calculations of "Town of Ogunquit Building Coverage" Before and After Construction of the Elevator

However, the blocks shown in Figure 5 created an inadvertent misimpression. What Mr. Aleva meant by the term "Town of Ogunquit Building Coverage" was the definition of "building coverage" applicable only to *non-shoreland* zones under OZO Article 2 and footnote 13 to Table 703.1. Thus, although those blocks show the area of improvements that must be included when calculating Shoreland Building Coverage, in fact, the only improvements that Mr. Aleva actually included in his total "Town of Ogunquit Building Coverage" of "30,142 SF" were the (a) "Buildings/Covered Porch," (b) "Second Floor Deck," (c) "Stairs," and (d) "Concrete/Wood Walk." Mr. Aleva did not include the area of the "Pavement" or "Sand/Dune" which, being nonvegetated surfaces must be included in Shoreland Building Coverage.

That ambiguity unfortunately created another misimpression. In the lower block, Mr. Aleva indicated that the construction of the elevator would increase the Parcel's "Town of Ogunquit Building Coverage" by 200 sq. ft. Mr. Aleva also reported that construction of the elevator -- which would be built entirely on paved areas -- would *decrease* the area of the "Pavement" on the Parcel by 200 SF. Therefore, had Mr. Aleva included the "Pavement" in his calculation of "Town of Ogunquit Building Coverage," the result would have been that the construction of the elevator, when combined with the decrease in Pavement area, would cause no net increase in the *Shoreland Building Coverage* on the Parcel.

After speaking with me about those ambiguities, Mr. Aleva prepared, for the purposes of this appeal, a revised version of Site Plan Sheet L2 which is attached hereto as Exhibit F. In that revision, the blocks showing building coverage on the Parcel now appear as follows:

EXISTING COVERAGE INFO

<u>EXISTING BUILDING</u>	
LOT AREA	59,613 SF
BUILDINGS/COVERED PORCH	18,825 SF
SECOND FLOOR DECK	5,300 SF
STAIRS/RAMPS	272 SF
CONCRETE/WOOD WALK	5,745 SF
PAVEMENT	23,878 SF
SAND/DUNE	5,593 SF
BUILDING COVERAGE	30,142/59,613 = 50.6%
SHORELAND BUILDING COVERAGE	54,020/59,613 = 90.6%

PROPOSED COVERAGE INFO WITH ELEVATOR

<u>EXISTING BUILDING</u>	
LOT AREA	59,613 SF
BUILDINGS/COVERED PORCH	18,825 SF
ELEVATOR	200 SF
SECOND FLOOR DECK	5,300 SF
STAIRS/RAMPS	203 SF
CONCRETE/WOOD WALK	5,745 SF
PAVEMENT	23,747 SF
SAND/DUNE	5,593 SF
BUILDING COVERAGE	30,273/59,613 = 50.8%
SHORELAND BUILDING COVERAGE	54,020/59,613 = 90.6%

Figure 6

Excerpt from Revised Site Plan Sheet L2 Showing Calculations of "Shoreland Building Coverage" Before and After Construction of the Elevator

In Figure 6, what Mr. Aleva had formerly described in Figure 5 as “Town of Ogunquit Building Coverage” is now called “Building Coverage.” Critically for this appeal, in Figure 6 Mr. Aleva now includes a calculation of the *Shoreland Building Coverage* as defined by OZO Article 2 and Table 703.1, footnote 13. According to Mr. Aleva, the Shoreland Building Coverage on the Parcel, both before and after construction of the elevator, is 90.6%. Therefore, adding the elevator would cause no increase in the Parcel’s legal nonconformity to the 20% maximum Shoreland Building Coverage set forth in Table 703.1.⁹

B. The CEO’s Decision.

Before the Planning Board could review the Application, the CEO scrutinized it himself. The CEO opined that construction of the elevator was impermissible because it would allegedly increase the Norseman’s legally nonconforming building coverage. The alleged increase in nonconformity was not relative to the 20% maximum Shoreland Building Coverage established by Table 703.1. Instead, the CEO applied the 15% maximum lot coverage established under OZO § 9.8(D) for TA-4 Uses – but calculated by the method authorized by OZO Article 2 for use only in *non-shoreland* zones.

By letter to Mr. Aleva dated January 25, 2019, the CEO articulated his Decision as follows:

I have reviewed the application for the addition of an elevator and associated structure to the property located at 135 Beach St. in Ogunquit. According to the plans and as outlined in the table of existing and proposed building coverage you provided on sheet L2 of the plan set, you have proposed an increase of 200 square feet or .3% building coverage. The existing building coverage which is 46%,¹⁰ currently exceeds the 15% limit as established in OZO Article 9.8 (below). Although only a minimal request of .3% additional square feet of building coverage, this is not permissible as it would constitute an increase in an existing non conforming condition.

Ogunquit Zoning Ordinance

⁹ Because the elevator would be built over areas that are already nonvegetated and therefore included in existing “Shoreland Building Coverage,” it would be mathematically impossible for the addition of the elevator to increase the Norseman’s legally-nonconforming Shoreland Building Coverage -- regardless of whether the *conforming* Shoreland Building Coverage is set at 15%, 20%, or any other percentage.

¹⁰ The CEO’s reference to a “46%” building coverage was apparently a typographical error. In a subsequent e-mail the CEO changed that percentage to “31%.” See footnote 12, *infra* and Exhibit D attached hereto.

Article 9.8 Transient Accommodation Type 4 - Motel/Hotel (TA-4)
D. Buildings shall not cover more than fifteen percent of the area of the lot.

You may request a Variance from the Board of Appeals as allowed in OZO Article 5. If you need assistance with that process please contact my office.¹¹

C. The CEO Erred in Calculating the 15% Building Coverage Set Forth in OZO § 9.8(D) As Applied to a TA-R Use Located in the Shoreland Zone.

In reviewing the Decision, the Board must examine the OZO for its plain meaning and construe its terms reasonably in light of (a) its purposes and objectives and (b) its general structure. However, where the OZO is clear on its face, the Board must look no further than the OZO's plain meaning. *D'Alessandro v. Town of Harpswell*, 2012 ME 89, ¶5, 48 A.3d 786, 788.

1. The Decisions is contrary to the plain meaning of the OZO.

In this case, the meaning of Shoreland Building Coverage as defined by OZO Article 2 and footnote 13 to Table 703.1 could not be clearer. Under the OZO's plain meaning, the CEO erred by failing to include all nonvegetated surfaces in calculating Shoreland Building Coverage. As a result, the CEO further erred in concluding that the proposed elevator would increase the existing nonconformity of the Norseman's Shoreland Building Coverage.

Although his methodology was fairly evident from his Decision, in a subsequent e-mail the CEO confirmed that, in his Decision, he had calculated the 15% building coverage using the definition of that term applicable only to *non-shoreland* zones.¹² To his credit, the

¹¹ See Exhibit B attached hereto.

¹² "John, I am *not* referencing a *Shoreland Zoning lot coverage standard* which you would be *correct* in interpreting that the area where the new elevator structure is proposed is over existing pavement. *In that test yes there would be no increase in lot coverage if a building (elevator shaft way) was erected there.*

The standard I am citing is:

ARTICLE 9 – STANDARDS FOR SPECIFIC LAND USES

Transient Accommodation Type 4 - Motel/Hotel (TA-4) (Amended 4-7-07 ATM)

D. Buildings shall not cover more than fifteen percent of the area of the lot.

Because the location of the proposed elevator footprint is not currently "building" then there would be an increase in building coverage with this new addition over the allowable 15%. The site currently is approximately 31% covered, any increase is an increase to a non conforming condition." (emphasis added) See e-mail from S. Heyland to J. Bannon dated February 13, 2019, which is a portion of Exhibit D attached hereto.

CEO also confirmed that if he *had* applied the definition of “building coverage” that is mandatory in the Shoreland Zone, the elevator would *not* increase the Parcel’s existing legal nonconformity to that standard:

John, I am not referencing a Shoreland Zoning lot coverage standard which you would be correct in interpreting that the area where the new elevator structure is proposed is over existing pavement. In that test yes there would be no increase in lot coverage if a building (elevator shaft way) was erected there.

It is therefore plain that the CEO’s conclusion, that the elevator would cause an increase in nonconformity to OZO § 9.8(D), was legally erroneous. Neither OZO § 9.8(D) nor any other OZO regulation authorized the CEO to apply, to a lot in the Shoreland Zone, a definition of “building coverage” other than that mandated by OZO Article 2, footnote 13 to Table 703.1, and the State Guidelines, all of which require the inclusion of the area of all “structures, parking lots and other nonvegetated surfaces.” The authorized method of measuring “building coverage” in the Shoreland Zone must be applied whether the *conforming* building coverage standard is 0%, 15%¹³, or 20%.

Neither OZO § 9.8(D) nor any other portion of the OZO grants Town administrators express or implied discretion to apply the non-Shoreland definition in the Shoreland Zone, or vice versa. To the contrary, the OZO Article 2 definition of “building coverage” expressly provides that “Zoning district lines, *other than Shoreland Zone boundaries*, may be adjusted for the purposes of making calculations of building coverage, pursuant to section 1.4.D¹⁴ of this Ordinance.”

There is no dispute about the following facts or legal principles:

¹³ Assuming that OZO § 9.8(D) establishes a maximum 15% Shoreland Building Coverage for a nonconforming TA-4 Use in the SG1 Zone, that would simply mean that not only buildings, but all nonvegetated surfaces, cannot exceed 15% on a parcel containing a nonconforming TA-4 Use. However, even if the maximum Shoreland Building Coverage for a nonconforming TA-4 Use were set at 15%, the addition of the elevator cannot increase the Parcel’s legal nonconformity to that 15% Shoreland Building Coverage standard.

¹⁴ OZO § 1.4(D), in turn, provides that when a zoning district boundary divides a single parcel, the use regulations applicable to the less restricted portion of the parcel may extend up to 50 feet into the more restricted portion – but *not* when the more restricted zone is a Shoreland Zone. Under OZO § 1.4(D), land within the Shoreland Zone is governed exclusively by the space and bulk regulations of the Shoreland District in which it is located. Those “space and bulk” regulations are set forth in Table 703.1.

- the Norseman Parcel is located exclusively in the Shoreland Zone, and more specifically, within the Ogunquit Beach SG1 Zone;
- the Parcel was developed in 1970 and 1977, long before the Town adopted the regulations that now render the Parcel legally nonconforming with respect to Shoreland Building Coverage;
- under Table 703.1, the maximum building coverage in the SG1 Zone is limited to 20%, but then is further limited by footnote 13 as follows:

In the Shoreland Zones, the total area of all buildings, structures, parking lots and any other non-vegetated surfaces *shall* be included in the computation of maximum building coverage and shall not exceed the indicated percentage of the lot area, or portion of the lot area thereof, located in the Shoreland Zone. See definition of Building Coverage in Article 2;

- the total area of the Parcel is 59,613 SF;
- the area of the Parcel that is presently occupied by nonvegetated surfaces is presently 54,020 SF;
- because the proposed elevator would be built on pavement that must be included when calculating the Parcel's *pre-construction* Shoreland Building Coverage, the addition of the proposed elevator would not and cannot increase the Shoreland Building Coverage on the Parcel; and
- the Shoreland Building Coverage on the Norseman Parcel both before and after the addition of the elevator would be 90.6%.

As the CEO himself concedes, based on the above circumstances, construction of the elevator could not increase the Norseman's legally nonconforming Shoreland Building Coverage.

Because the Decision is contrary to the plain meaning of the definitions of Shoreland Building Coverage set forth in both OZO Article 2 and footnote 13 to Table 703.1, the Decision is clearly erroneous. For that reason, the Board should vacate the Decision and remand this matter to the Planning Board for Site Plan and Design review of the application.

2. **The Decision is contrary to the purposes, objectives, and general structure of the OZO regarding expansion of a nonconforming TA-4 Use in the Shoreland Zone.**

The plain language of the definitions of “building coverage” discussed above are sufficient to resolve this case. However, the Decision is also erroneous because to prohibit the addition of an elevator that would provide ADA access to the Norseman’s second floor is contrary to the “purposes and objectives of the ordinance and its general structure.” *Bizier, supra.*

a. **OZO §3.1(C).**

OZO Article 3.1(C) provides that

This ordinance allows the normal upkeep and maintenance of nonconforming uses and structures; repairs, renovations, or modernizations which do not involve expansion of the nonconforming use or nonconforming portion of a structure; and such other changes in a nonconforming use or structure *as Federal, State, or Local building and safety codes may require.*

As was noted at the beginning of this letter, the sole purpose of the proposed elevator is to bring the Norseman into better compliance with the ADA’s directive that public facilities such as hotels must accommodate the needs of mobility-challenged individuals. Title III of the Americans with Disabilities Act and the ADA Standards for Accessible Design require existing hotels to make readily achievable accessibility accommodations to enable the disabled public to access the hotel on the same basis as those who are not disabled.

Accordingly, OZO §3.1(C) supports the conclusion that the Norseman is permitted to “change” its nonconforming TA-4 Use by adding of an elevator to provide ADA-compliant handicapped access to the upper floors of the hotel.

b. **OZO §3.3(C)(4).**

To the extent the Norseman exceeds the Shoreland Building Coverage, it is classified under OZO Article 2 as a “nonconforming structure”:

A structure or portion thereof, lawfully existing at the time of adoption or amendment of this Ordinance, that does not conform to the...lot coverage regulations of this Ordinance, which is allowed solely because it was in lawful existence at the time this Ordinance or subsequent amendment took effect.

Although OZO § 3.3 imposes several restrictions on the expansion of nonconforming structures, not all structural enlargements of a nonconforming structure are defined as prohibited “expansions.” In particular, OZO §3.3(C)(4) provides that:

The addition of steps or the enclosure of an existing porch shall not constitute the expansion of a nonconforming structure. But the addition of a deck does constitute the expansion of a nonconforming structure and therefore the deck shall meet all the dimensional requirements of this Ordinance.

(emphasis added) The evident logic behind OZO §3.3(C)(4) is that because the provision of access to a nonconforming structure or the enclosing of an existing porch does not increase the habitable area of a nonconforming structure, such improvements cannot reasonably be regarded as an “expansion” of the nonconforming structure. OZO §3.3(C)(4) contrasts such improvements with the addition of a *deck* which, because it *does* increase the amount of habitable space, *is* considered an “expansion.”

The addition of the proposed elevator to the Norseman is not meaningfully distinguishable from the addition of “steps” to a nonconforming structure. Under OZO §3.3(C)(4), the Norseman could add steps leading to the second floor of the hotel without causing an expansion of that structure. The provision of a modernized version of “steps” that is ADA-accessible and provides no habitable space to the Norseman should likewise be deemed permitted by OZO §3.3(C)(4).

c. OZO § 3.5

The Decision relies entirely upon the CEO’s interpretation of OZO §9.8(D). However, as is true of every section of the OZO except Article 3, Article 9 sets performance standards that are to be applied *prospectively* to (a) proposed new uses regulated by that Article and (b) existing uses to the extent they are capable of complying with those performance standards. Accordingly, OZO §9.8 cannot be applied literally to a grandfathered TA-4 Use, such as the Norseman, that is already nonconforming to its performance standards.

OZO § 3.5 is the only ordinance provision that, on its face, deals specifically with the expansion of nonconforming TA-4 Uses. The introductory paragraph to OZO § 3.5 explains the Town’s purposes in declaring TA-4 Uses a prohibited use in all zoning districts except the GB2 District:

With the rapid expansion of transient accommodation type 4 uses in recent years, hotels and motels now take up a disproportionate share of the town’s land area. [The prohibition of TA-4 uses is intended] to promote the health, safety and welfare of Ogunquit citizens, to comply with the most recent amendments to the

Comprehensive Plan adopted in 2004, to mitigate parking, traffic and congestion problems, and to preserve community quality....

The addition of a small elevator to a legally nonconforming TA-4 Use in order to render it handicapped-accessible would contravene none of those goals. To the contrary, such a corrective measure would “promote the health, safety and welfare of Ogunquit citizens” and “preserve community quality.”

Moreover, Article 3.5 does not prevent *all* expansions of nonconforming TA-4 Uses. Instead, it is designed to prevent expansions that would exacerbate the problems that motivated the Town to prohibit such uses: (a) taking up “a disproportionate share of the town’s land area,” and (b) “parking, traffic and congestion problems.”

For example, OZO § 3.5(3) prohibits “expansion, reconstruction or structural alteration... [that would] increase the *overall number* of individual guest accommodations” – a change that would increase the number of possible guests and potentially increase traffic and congestion problems. However, OZO § 3.5(3) allows “*enlargements* of individual guest accommodations,” which would not increase the number of rooms and therefore would not produce such adverse effects.

In addition, OZO § 3.5(4) allows expansion, reconstruction, or structural alteration of a nonconforming TA-4 Use in order to create amenities for “the patrons at the facility, such as a laundry room, pool or fitness center.” Although such changes might slightly increase the total size of the buildings, they likewise would not increase the number of rooms.

Perhaps most significantly, OZO § 3.5(4) provides that the “[e]xpansion of *restaurant, retail, or office uses* located on a property with an existing, nonconforming TA-4 use, shall *not be considered an expansion of the TA-4 Use.*”¹⁵ It logically follows that the addition of an elevator, which would not itself increase any adverse impacts of the *TA-4 Use* on the community, do not constitute a prohibited expansion of a TA-4 Use.

Overall, it would be absurd to interpret OZO § 3.5 as allowing a nonconforming TA-4 Use to enlarge its guest rooms, add functional space such as fitness room for their patrons, and expand its accessory *commercial* uses such as restaurants, retail space, and office uses, but bar the addition of a 200 SF elevator for the purpose of providing disabled persons better access to TA-4 Use.

¹⁵ Instead, under OZO § 3.5(4), expansions of restaurants, retail uses, and office uses associated with a TA-4 use are allowed wherever such uses are permitted in Land Use Table 702.1, subject to Site Plan Review and the remaining requirements of the OZO.

The Norseman recognizes that OZO §3.5 provides that “the expansion, reconstruction or structural alteration shall meet all the current standards of this ordinance, including all provisions of section 9.8...” However, that proviso is not inconsistent with the foregoing conclusions. The Board must interpret the OZO to avoid “absurd, illogical, unreasonable, inconsistent, or anomalous results if an alternative interpretation avoids such results.” *Desfosses v. City of Saco*, 2015 ME 151, §16, 128 A.3d 648, 653. Language requiring a nonconforming TA-4 Use to “meet all the current standards of this ordinance, including all provisions of section 9.8” cannot reasonably be construed as applying to nonconforming TA-4 Uses that *already* violate those standards and provisions. If it were so construed, OZO §3.5 would become so hopelessly circular and self-contradictory that there would be no nonconforming TA-4 Uses to which OZO §3.5 could apply.

II. VARIANCE APPEAL

At the conclusion of his Decision, the CEO informs Mr. Aleva that “You may request a Variance from the Board of Appeals as allowed in OZO Article 5.” The Norseman believes that no variance is needed to allow the construction of the elevator. However, as directed by the CEO, the Norseman hereby requests a variance to allow the Norseman’s legally nonconforming building coverage to become 3%¹⁶ more nonconforming in order to construct the elevator.

The scope of the Board’s authority to grant variances is set forth in OZO §5.2(B). Because the Norseman Parcel is located in the Shoreland Zone, the Board has no authority to grant the Norseman a “relaxed dimensional standards variance” under OZO §5.2(B)(2)(a). Likewise, because the Norseman cannot credibly claim that, absent the elevator, the Parcel cannot “yield a reasonable return” as defined by the Maine Supreme Judicial Court, the Norseman cannot obtain a “dimensional standards variance for structures located in shoreland zones” as described in OZO §5.2(B)(2)(b). Finally, because the Norseman is not the “owner of a dwelling,” it cannot – despite its goal of increasing handicapped access to its facility – qualify for a “disability variance” under OZO §5.2(B)(2)(c).

However, a body of caselaw has recently arisen that holds that a municipality and/or its land use agencies violate the ADA and similar laws protecting the handicapped if those agencies interpret the municipal zoning ordinance in a manner that fails to provide a reasonable accommodation for the needs of disabled persons. For example, it has been held that a Board of Appeals’ denial of a variance to allow persons with muscular dystrophy to maintain a paved parking space in front of their home violates the ADA and therefore warrants the grant of an injunction against the Town’s prohibition of that parking space.

¹⁶ Under Mr. Aleva’s revised calculations, even under the non-shoreland definition of “building coverage,” the elevator would increase non-shoreland building coverage by only 2%.

Trovato v. City of Manchester, 299 F. Supp. 493 (D. NH. 1997). In that case, the court cited, among other authorities, the following illustration of the type of variance a board of appeals may be compelled to grant:

ILLUSTRATION 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

The Americans with Disabilities Act: Title II Technical Assistance Manual § II-3.6100. See 28 C.F.R. § 35.130. Thus, a municipality is required to make zoning accommodations, not just directly to *disabled persons* themselves, but also to the owners of businesses that are attempting to make their facilities useable by disabled persons. See also, *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir.1997); *Mx Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002), *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999); *Start, Inc. v. Baltimore County*, 295 F. Supp. 569 (D. Md. 2003); *Fuller-McMabon v. City of Rockland*, 2005 WL 1645765 (D. Me. 2005).

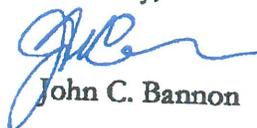
For the Board to grant the Norseman a variance to render its second floor accessible to mobility-disabled persons would be a reasonable accommodation for such persons as defined by the ADA. Accordingly, under the above authorities, the Board is empowered, as a matter of law, to grant the Norseman a variance to allow it to construct the proposed elevator.

CONCLUSION

For the foregoing reasons, on behalf of the Norseman, I respectfully request the Board either to (a) grant the Norseman's administrative appeal and vacate the CEO's Decision; or (b) grant the Norseman's variance appeal to add the elevator; and (c) in either instance, to remand this case to the Planning Board for site plan and design review of the Norseman's Application.

Thank you very much for your attention to this letter. I look forward to hearing from you.

Sincerely,


John C. Bannon

JCB/kpm
Enclosures

February 25, 2019
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cc: Ms. Katheryn Kelly (w/encl)
Mr. Geoffrey R. Aleva (w/encl)

Maryann Stacy

From: Maryann Stacy [mstacy@townofogunquit.org]
Sent: Tuesday, April 9, 2019 10:20 AM
To: 'colin.a.clark@maine.gov'
Cc: 'Scott Heyland'; 'John C. Bannon'
Subject: TOWN OF OGUNQUIT SHORELAND ZONING VARIANCE REQUEST
Attachments: NORSEMAN APPLICATION 5-9-19.pdf; NORSEMAN APPLICATION SUMMARY BY ATTY BANNON 5-9-19.pdf

Good Morning Mr. Clark,

Attached you will find an application which has been submitted to the Ogunquit Zoning Board of Appeals. The Town's Zoning Ordinance requires we submit all variance requests to build in the Shoreland Zone to the DEP for review. Would you kindly take a look at this proposal and forward your comments to us at:

Town of Ogunquit
Zoning Board of Appeals
Post Office Box 875
Ogunquit Maine 03907-0875

You are also welcome to respond to me via e-mail.

I will be sending you a hard copy of the attached material this morning.

Feel free to call if you have any questions or if you need any additional information.

Maryann Stacy
Town of Ogunquit
Zoning Board of Appeals
Admin. Asst

