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September 1, 2011

Mr. Wayne Fostin, Acting Building Inspector
Town of Mattapoisett
16 Main Street
Mattapoisett, MA 02739

Re: Cease and Desist Order
22 Ocean View Avenue, Mattapoisett, MA

Dear Mr. Fostin:

I represent Jeremy Malcolm, John G. Malcolm and Elaine L. Malcolm. This is in response to your cease and desist order of August 29, 2011.

Your assertion that my clients' activity at 22 Ocean View Avenue is in violation of the Mattapoisett Zoning By Law is based on (1) factually erroneous assertions concerning current use of the property, (2) your failure to recognize my clients' rights as a lawfully existing non-conforming use and (3) your misinterpretation of the Zoning By Law. Although we are prepared to address these issues by administrative appeal to the Zoning Board of Appeals, I request that you rescind the order after considering the matter stated below.

First, the Malcolms have owned this property since May 1960. According to Assessors records, the house was built in 1956. John Malcolm has since 1960 conducted a business at 22 Ocean View Avenue that is substantially the same in nature as that conducted at the present time. Jeremy Malcolm has already supplied substantial material documenting this use to Andrew Bobola. The business historically and currently consists principally of landscaping and servicing and mechanical repairs of boats. (The small amount of welding done is ancillary to these two activities.) Without conceding that any of these activities exceed those permitted as an accessory use permitted under Section 5.4.3.1.1 of the Zoning By Law -- which authorizes "trades conducted by resident occupants, such as carpenters, electricians, plumbers, masons, landscapers, welders, painters or general contractors," and that language is certainly broad enough to

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encompass boat repair activities performed by an occupant tradesman -- those activities are in any case authorized as a lawful non-conforming use, because the use restrictions under the Zoning By Law were first enacted in 1967.

My clients do not operate a marina. As is evident from an inspection of the assessors' maps, my clients' property does not abut the waterfront. My clients do not store boats on their property except for boats that they own. They have never charged for storage services. There are usually several other boats on the property which are being worked on. My clients do not launch boats on the property. My clients do launch boats at a nearby ramp located on community land designated as a "reservation" in the original 1918 plan of Brandt Beach. That land and that ramp are available for use by all residents of Brandt Beach, or any tradesman providing services to residents of Brandt Beach. The ramp was lawfully constructed in 1961. There is an adjacent float, also available for community use which my clients use in common with other members of the Brandt Beach community when launching boats. My clients do not rent float space, nor do they rent moorings.

Your assertion that a permitted accessory use may not be conducted on a lawfully non-conforming undersized lot has no basis in the Zoning By Law. Section 6.5 of the By Law, which imposes the area requirement, applies only to the "erection of structures," and makes no reference to use. Notwithstanding that fact, my clients' property conforms to "current dimensional requirements." As the house existed in 1973, it "shall continue to be governed by the dimensional requirements applicable to said dwelling on August 3, 1973" under the last sentence of Section 6.5 of the By Law. The Brandt Beach area was in a W-10 Zoning District in 1973, and the applicable area requirement was and remains 10,000 square feet.

My clients have no materials for sale on the site that are stored outside. They do keep equipment for their trade outside, and have recently installed seven foot high arborvitae to screen the equipment from view in compliance with Section 3.4.1. This equipment is not "displayed" within the meaning of Section 5.4.3.1.2.

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Please confirm your rescission of the cease and desist order. Because your order has no lawful basis under the Zoning By Law, it has no legal effect. My clients intend to continue their lawful activity, but will avail themselves of the remedies available to them under Chapter 40A, sections 8 and 15, if you decline to rescind the order.

Very truly yours,


DANIEL C. PERRY

DCP/tmf

cc: Jeremy Malcolm
John G. Malcolm
Elaine L. Malcolm
Town Administrator
Town Counsel
Richard Foss, President & Treasurer of the Brandt Beach Boaters Club Ltd.