

**St. George Board of Appeals
St. George Town Office
Meeting Minutes and H. Prescott Smith Appeal
December 9, 2021**

A Board of Appeals meeting was called to order at 7:00 p.m. Present in person: Steve Miller, Chair; Mark Bartholomew, William Reinhardt, and Sandra Roak. (Jane Conrad and Richard Cohen were absent.) Also present in person: CEO Terry Brackett, Rick Erb, Attorney James Katsiaficas, Attorney John Cunningham, Attorney Paul Gibbons, Attorney Stephen Hanscom, James Dorsky, Stephen Smith, and H. Prescott Smith. Present via Zoom: Tammy Willey, Richard Bates, Lynn Smith, Andrew Love, and Bruce Robertson.

Quorum: Jane Conrad was absent. Sandra Roak was elevated to voting status as she was a voting member at the November 18, 2021, H. Prescott Appeal Hearing. Richard Cohen was absent. A quorum of four members was present.

Adjustments to the Agenda: None.

Conflict of Interest: Attorney Shana Cook Mueller stepped down as the town attorney due to a conflict. Attorney James Katsiaficas will serve as the town's attorney for the H. Prescott Smith hearing.

Review of the Minutes of November 18, 2021.

A motion was made by Mark Bartholomew, seconded by Sandra Roak, to dispense with the reading of the November 18, 2021, minutes. The vote was 4-0, in favor. The motion carried.

A motion was made by William Reinhardt, seconded by Bartholomew to approve the November 18, 2021, minutes as written. The vote was 4-0, in favor. The motion carried.

Board of Appeals Hearing - H. Prescott Smith:

Chair Miller opened the hearing. Attorney Katsiaficas notified Miller that he would be serving as the town attorney for the H. Prescott Smith appeal hearing and that he had a discussion with H. Prescott Smith's attorney, Stephen Hanscom, and Philip L. Smith's attorneys John Cunningham and Paul Gibbons. Chair Miller stated that the attorneys involved had come to a negotiated agreement on how they would like to proceed with the hearing, and asked Attorney Katsiaficas to present the agreement if there were no objections.

Attorney James Katsiaficas:

This is on appeal from the Code Enforcement Officer's decision of the issuance of a building permit in September 2021. Two days after the permit was issued, the State Supreme Court came out with a decision that causes us to talk about another way of handling this matter.

Let's take a look at what this is. It is a building permit, and building permits are appealable to the Board of Appeals under the Shoreland Zoning Ordinance and the Minimum Lot Size Ordinance. The way a building permit is usually written, it's approved or denied. That is pretty much the end of the story. That is all the form asks for and that is all any Code Enforcement

Officer in the state normally does. What the ordinance is saying is that when an appeal comes up and you hear those appeals from the Code Enforcement Officer's decisions, you decide them on an Appellate basis. Now, the general rule in Maine is that when you hear an appeal from a Code Enforcement Officer's decision, it is De Novo; you hear from the beginning, you hear afresh, you take evidence, you take documents, and you make a decision. But the ordinance says that you do this on an appellate basis whether it is from the Planning Board or the CEO.

On an appellate basis, it is a much more narrow scope of review. You are to look at a record of what happened below and look at the decision and the record to determine – is that decision supported by substantial evidence in the record? Was there an error of wrong? Was it arbitrary or capricious?

It is relatively easy to make that review from a Planning Board decision because the Planning Board has held a hearing. It has taken documents and testimony. There is a record. There may even be a transcript. There is something you can review, and a Planning Board will prepare Findings of Fact and Conclusions of Law to help the court or this Board in review. That doesn't happen in the normal course of events with the Code Enforcement Officer's decision.

What happened here, just a couple of days before this decision came out, Mr. Brackett's permit issuance, there was a decision by the State Supreme Court in LaMarre v. the Town of China. What happened in LaMarre as I understand from reading the opinion there was an After-the-Fact permit issued to allow an RV on a lot. It was to clear the violation. The neighbors contested it. It went to the Board of Appeals. The Board of Appeals deferred to the issuance of the permit, went to Superior Court which reversed it, and then the State Supreme Court took a look at it. The Maine Supreme Judicial Court said, 'Wait a minute. Your ordinance says the Board of Appeals grants Appellate Review.' That means that the decision everybody should be looking at is the Code Enforcement Officer's decision. But the Code Officer's decision was "permit approved." That's it. There was no record. There were no Findings of Fact and Conclusions of Law, and so there was nothing really for the Board of Appeals to look at or for the Superior Court to look at to say, 'Is this right?'

So, what the State Supreme Court did was remand the case back to the Code Enforcement Officer to make a decision based on the record. To take additional evidence, to take rebuttal evidence, and then make that decision anew with Findings of Fact and Conclusions of Law that was sufficient for the Board of Appeals and the Superior Court to later take a look at.

The reason I go through all that is this. If you were to just go ahead, conduct a Public Hearing and make a decision tonight, there is a decision before you from the Code Officer that is simply approved. There's really not a lot of a record. There are some plans. There are some phone conversations. The abutters did not have an opportunity to say anything because they did not know there was something to appeal from yet. None of that was wrong. That is the way things are normally done, but what that did is not create a record. So, if you made a decision tonight just based upon what is in front of you, it would go to the Superior Court on appeal which would probably send it back to the Code Officer to put together a record, take additional evidence, take rebuttal evidence, make a decision again and then the parties could appeal it here. You would

then have a record. You would then have Findings of Fact and Conclusions of Law because that's what he would be instructed to do, like a court. But that would be a year from now. That would several tens of thousands of dollars from now, and that can be cured tonight which is why I spoke with counsel for both parties yesterday, and that is why I spoke with the Chair, and a draft Order was prepared for tonight. Attorney John Cunningham got the draft together and then we all collaborated.

The proposal is, my advice is, you have an Order before you which would make two Findings.

1. A decision for Building Permit being appealed from lack of Findings of Fact and Conclusions of Law that are adequate to allow a review.
2. Because there is a lack of Findings of Fact and Conclusions of Law based on record that building permit is contrary to law based on that new Supreme Court decision.

In no way am I suggesting that Terry Brackett made an error of any sort. Simply that the practice by 100% of Code Enforcement Officers in Maine is not to issue Findings of Fact and Conclusions of Law with any kind of building permit. It just does not happen. But because of the Ordinance that we have here in this town, it requires appellate review. You need that in order to conduct that appellate review.

You could wait and have a court order to go back, or you could order to go back which is what this Order does. It basically says that within the next 20 days after this Order, the parties can submit additional material. The things for example that you receive for tonight's meeting would go to the Code Enforcement Officer and then the parties would have an additional 10 days to submit to the CEO written arguments rebutting each other's evidence or submittals. Then the Code Officer would prepare a decision that would link to the evidence in the record and the parties will submit all that material and would prepare as part of that decision, Findings of Fact and Conclusions of Law that would be sufficient to permit this Board and if necessary, a Superior Court to review and make a decision based upon Appellate standards.

The idea here is to short circuit having to require this to go to court and come back to the same thing we could ask for now.

CEO Brackett: Are you saying that I should be doing Findings of Facts for every permit I sign now because of the new law?

Katsiaficas: If any permit is appealed you are going to have to do that. It is hard to know in advance what is going to be appealed, and it would be outrageously difficult to prepare Findings for each one of those. What my recommendation is, what the court's recommendation was in LaMarre, change your ordinance. If your ordinance requires appellate review of the CEO decision, change it to require a De Novo review of a code officer decision. There is never going to be a record to review from any CEO's normal business. So, the recommendation, in the end, is ask to have this put on the next town meeting warrant for both the Minimum Lot Size Ordinance and the Shoreland Zoning Ordinance so that there is a De Novo review from the CEO's decision. You have the power to change it (your ordinance). The State Supreme Court would love it if you changed it.

Reinhardt: I know there was discussion quite a while ago with some of these rulings that came down from the State and the Board of Appeals and the Planning Board Handbook that suggested we were supposed to be able to, on the Code Officer's decision. If it was an appeal, we would do a De Novo.

Katsiaficas: The State law in Shoreland Zoning Ordinance allows it either way and towns can make an election when they bring it in front of the voters. If you would like, I can put together a very brief letter to the town Select Board to suggest this if you feel that would be helpful.

CEO Brackett: I would want to talk with the town manager tomorrow. I think it would be taken care of.

Katsiaficas: Okay. I am happy to help.

Chair Miller: It is our understanding. At least the Board has had a modest amount of conversation given that we have not been told we were kept from doing that. It was our understanding that if we wanted to, we could proceed (Reinhardt: That's what I thought.) on that basis.

Katsiaficas: That is not the case. The ordinance says it shall be appellate for both the Planning Board and the CEO and that is under both ordinances, Shoreland and Minimum Lot Size. Mr. Chair, perhaps you could ask counsel if they have any comments on this for the parties.

Chair Miller: Do you have any additions or any differences of understanding in the general outline and the agreement?

Cunningham: I think Jim explained it well. We wish things were different, but they aren't and we think this will save time in the long run which is why we think it is a good idea.

Reinhardt: So, my understanding is that the Code Officer will review his decision completely with new evidence?

Katsiaficas: Correct.

Reinhardt: And the appellant can submit evidence to the Code Officer?

Hanscom: Yes, both sides will have equal opportunity.

Chair Miller: Since the appeal has come before the Board, we have to go through the mechanisms. We have not accepted the appeal yet. How should we proceed? We would have to vote as a Board for it to go back to Code Enforcement Officer.

Katsiaficas: Yes. The motion would be to adopt this Order and to remand the matter to the Code Enforcement Officer as described in this Order.

Bartholomew: Am I correct in saying and thinking that we can't take this appeal because we do not have anything to appeal? Because we don't have Findings of Fact and Conclusion of Law.

Katsiaficas: Right. That is true and in fact, I think, what it shows is that both parties would probably like to offer additional evidence this evening if they were to argue the merits. Yet in an appellate review, you are limited to the record, and you are not supposed to take additional information. So, you are right. You really do not have a lot to review if you were to conduct a review. Which is another reason why you should be sending this back, so you have something that is appealed but then is reviewable.

Reinhardt: When you say we have nothing to review, don't we have the information that was submitted to the Code Officer to make his decision?

Katsiaficas: You do. You don't have the other side and that would be a denial of due process as the Court pointed out in LaMarre. On top of that, the information that the abutter would like to present that's in tonight, really couldn't be considered because it is new information, and you are supposed to be looking at what was before the Code Officer.

In terms of fairness, and in terms of waiting the time and cost to delay of having this go to a superior court and come back, we all agree it is much more efficient to send this back to the Code Enforcement Officer and have him get this information, make a decision that has Findings and that can be appealed to you if the parties wish. Maybe they'd reach an agreement. I don't know.

Review of the Order by the Board of Appeals: The Board reviewed the Order in regard to the H. Prescott Smith of the Building Permit No. 2021-109 issued to Philip L. Smith II, for a project located at 250 Harts Neck Road.

Chair Miller: The beginning of the last paragraph, "Therefore the Board of Appeals reverses the issuance of the building permit and the matter is remanded to the CEO," etc. That implies that we went through the process and turned the appeal down. At some point, we have to figure out how to reach that point.

Katsiaficas: This Board has the authority when hearing an appeal, to reverse the decision of the Code Enforcement Officer, if you make a finding that the issuance of that permit was contrary to law. It was contrary to law in that it was issued without Findings of Fact and Conclusions of Law. It does not mean that you are finding that on the merits it was wrong but that procedurally it was wrong. Because of that, it has to go back.

I am emphasizing, no error was made. We are not talking about an error being made by the Code Enforcement Officer. We are talking about it didn't have findings. The court has told us it has to have findings; therefore, the decision was contrary to law. If you make that finding you can reverse the decision and remand the case.

The reason for reversing the decision is this. It could very well be that information is presented to the Code Enforcement that might make him decide to deny the permit. We do not know what that information is because it has never been provided to him before. It is like reconsidering a

decision. It is like taking you back to that point where you have received the application. You have taken evidence and now you are reconsidering after having reached a decision. You are going back to deliberation. You are sending this back for the CEO to deliberate.

Reinhardt: That just raises the point that Terry previously said. If you say his issuance of a permit originally was contrary to law that means that every single thing that comes in front of him, he has to do a Findings of Fact?

Katsiaficas: What it means is potentially when someone files an appeal from one of those permits, we will be in this same situation again.

Chair Miller: It is not the CEO's job to investigate both sides. In this case, it may be possible but as a job that puts twice the burden on his job and makes him make decisions he should not have to make.

Katsiaficas: Absolutely, which is why I will be speaking with the Town Manager because you will need to have the ordinance amended. Until then, not every permit gets appealed. In those instances where there is an appeal, this issue could be brought up and if they have to go back for Findings. I am not saying he has to issue Findings for every permit because it is unlikely every one of those is going to get appealed and that work burden would be unmanageable. I understand that but we have to be practical, and right now if this kept going and goes up to the court, it will come back. We could short circuit that piece and at least have a decision for this case on this appeal that can be reviewed.

Chair Miller: This is how I am viewing it. Not that the Board turned down the appeal because we have not made a decision one way or the other. Yet it is more likely that on the advice of the attorney, the appeal was not heard and was remanded. That has to go in there as well because it is not actually a Board decision because have not reviewed the evidence and we do not know the Maine laws on this. We will listen to the attorneys of both parties, but we have not viewed any facts.

Katsiaficas Recommendation: Insert in the first sentence, second paragraph after the word, Therefore, the wording '*with the agreement of legal counsel for all parties and for the Board of Appeals.*'

Chair Miller: I am just looking at the facts of why we (the BOA) made a decision because it is not to say that a month from now the lawyer(s) of one party or the other say, "You know, we made a large mistake here. I've got some new material that came in that solidifies our side and I don't think we should proceed the way we did." I think it should be written right.

Katsiaficas: It would be a due process argument that people have to raise now or they waive. I will defer to Mr. Cunningham.

Cunningham: I just want to point out that one of the "new" requirements imposed by the law court was that the CEO's decision if it is going to be an appellate review, has to include written

Findings of Fact. If it doesn't, you have to send it back says the court. So, you do not have to go any further, if you do not want to than looking at what you got from Terry and seeing if has written Findings of Fact, which it doesn't, and you are done. That is enough to say, we need to send it back.

Katsiaficas: That is what paragraph one says. The building permit appealed from lacks Findings of Fact and Conclusions of Law.

Bartholomew: I think what you are worried about more than anything, is the process. (Miller: Right. The legal wording.) What I am hearing is in this particular case, we don't have to go through the entire process. We can stop before we even start.

Miller: Right. I just want it in the record that was not our decision. It was on the advice of attorneys that we made this decision. That we did not actually hear the case.

Reinhardt: I don't like the fact that ultimately this whole thing is a property boundary legal dispute regarding the right-of-way and property lines, etc., and you have two surveyors who are both very reputable and the CEO is supposedly having to make some type of judgment when it actually should go to court if they cannot resolve it themselves.

Chair Miller: Apparently, we have been eliminated from the process of making a decision.

Cunningham: Could I offer another comment? (Miller: Yes.) Like I said, certainly we wish things were different. But we are hoping to achieve is if this goes the way that Order says and if things work the way we hope, we are going to be back in front of you for you to have a hearing a couple of months from now. Whereas, if we don't do it this way, it will go up through the courts and it will be six months or a year before we are back in front of you.

Reinhardt: Ultimately, I think when you come down to actually making decisions regarding property lines and property disputes, it should go that way anyway.

Katsiaficas: That is true, but the problem is that in the six months to a year, they won't be deciding property lines, they will be saying, "well the Code Enforcement Officer should have issued Findings of Fact" and then we will have to start the whole process over.

Reinhardt: Right. We have had many, many times people have come here and wanted the Board of Appeals to decide a boundary dispute and say this line is guy's, etc., and it is not our jobs to do that or the CEO for that matter.

Cunningham: I did not want you to think we were cutting you out. We want to get this done as fast as we can.

Chair Miller: I thought we had the option if we decided to review an appeal that we could ask for submitted evidence.

Reinhardt: We always determined that we were not going to do a De Novo for Planning Board decisions (Bartholomew: Right.) because you have a Board that is hearing things for sometimes months of testimony and expect the Board of Appeals to jump in and second guess everything and go through it all again.

Katsiaficas: Some towns are just saying that Planning Board decisions should go straight to Superior Court rather than have to go to BOA because if it is an appellate review and the decision in the Board of the original jurisdiction is the Planning Board, Superior Court is going to look at the Planning Board's decision not yours. So, it is only if people want to stop at your level that it has any bearings but definitely, the CEO De Novo review makes all the sense.

There was no further discussion from the Board of Appeals.

Motion:

A motion was made by Mark Bartholomew, seconded by Reinhardt, to adopt The Order of the Board of Appeals as amended to include the wording 'with the agreement of legal counsel for all parties and for the Board of Appeals' in the second paragraph, line one of the agreement. The roll call vote was 4-0, in favor. The motion passed.

Discussion of the Approved Order:

Hanscom: I am not quite sure how this Order that you just approved impacts us. I just learned tonight that construction is continuing and has been continuing throughout. With this Order that says the Board of Appeals reverses the issuance of the Building Permit, it seems to me as if there should be no further construction until the Code Enforcement Officer has an opportunity to deal with the underlying issues. In other words, the status quo should be maintained.

Cunningham: We have talked about this issue, and we realize the same thing that Mr. Hanscom is just saying. That if this Order goes through, the project needs to stop while the determination goes on but given the weather and it is December and snow is coming in, we do need to "button up" the site to protect it against the weather, but that is just making sure the foundation does not get ruined. That sort of thing. Doing the things you need to do to protect it against the weather but not continuing with the project.

Hanscom: I would certainly concur with that.

Chair Miller: These are the things that we do have our Code Enforcement Officer for. That is what he reviews.

Cunningham: We want Terry to be checking to make sure we are in sync.

Hanscom: That seems very reasonable.

Brackett: I am not sure what they are saying "buttoning up" means. Does it mean getting a roof on it? Getting it water-tight with paper or something? Or does it mean putting a tarp over the floor and calling it good?

Smith: I am Stephen Smith. I am the architect on the project. Based on this discussion tonight, I have asked the contractor, which is Heritage Builder, to write out a memo to us tonight to

present tomorrow to Terry Brackett as to what he needs to do. He is going to outline exactly what he needs to do to make this building weathertight and eliminate moisture problems; they still have to heat the foundation during this period. He has a certain responsibility or liability to that structure. It is a more complete process than just throwing a tarp over it.

Katsiaficas: Will the town share that information with Mr. Hanscom?

Cunningham: That would be public record. Yes.

Hanscom: In other words, it is my understanding that a memorandum would be provided to the Code Enforcement Officer and no work beyond what the Code Enforcement Officer specifically approves to preserve the building site with the undertaking.

Cunningham: That is my understanding, too.

Brackett: That will work for me.

There was no further discussion. At 7:37 p.m., on a motion by Bartholomew, seconded by Reinhardt, it was voted was 4-0, to adjourn the Appeals Hearing.

Respectfully submitted,

Marguerite R. Wilson
Board of Appeals Recording Secretary