

Board of Appeals
Bryce & Gail Molloy
February 23, 2017

The meeting opened at 7:00 pm. Board of Appeals members present Steve Miller, Chair: Mark Bartholomew, Fred Carey, Richard Cohen, Michael Jordan, and William Reinhardt.

Also present were: Tim Polky, Town Manager; Terry Brackett, CEO; Jane Brown, Anne Cox, Bob Cremoni, Jonathan Coggeshall, Terry Driscoll, Randy Elwell, Paul Gibbons, Kate Hewlett, Len Greenhalgh, James Katsiaficas, Pamela LaValle, Michael Hodgins, Bryce & Gail Molloy, Jocelyn Paquette, Bob & Anita Siegenthaler, Matthew and Anneelise Stern, Tammy Willey, Marguerite Wilson, Lee Wotton, Sandra Yakovenko, and Richard Young.

Quorum: There was a quorum.

Nature of the Appeal:

Bryce & Gail Molloy have applied for a dock & a ramp and have been denied by the Planning Board and now it's back here again.

Jurisdiction: The Board of Appeals has jurisdiction.

Determine Standing: James Katsiaficas, Paul Gibbons, Michael Hodgins and the Molloyes are present.

Discussion

Katsiaficas: We have the Molloyes who obviously are the parties who have been denied; we are the appellants and have standing. We do have an issue though with regard to other grief parties. Mr. Stern is not a neighbor and is not a direct abutter and therefore although abutters are generally given standing by the State Supreme Court, Mr. Stern is several properties over from the Molloyes.

Chair Miller: How does the Board feel about this? We have gone through this before and he had standing, so I believe, I would recognize him as having standing unless some members have a different opinion.

Reinhardt: I concur where they offered argument or their attorney did and commented several times regarding both applications, through quite a few of their discussions and providing expert witnesses, we recognize them as having standing in the previous appeals, I believe they certainly have standing now. Another thing that should be brought up, though, the Planning Board is a direct party of this appeal, too. They could be asked to comment or be allowed to clarify facts.

Determine Parties to the Action: Discussion allowed Matt Stern to be a party to the action.

Discussion

Reinhardt: One question. Jumping back to the Nature of the Appeal. What I read from the appellants, we really have 2 appeals again, correct?

Michael Hodgins: Still 2 applications; still 2 appeals.

Argument

Argument of Appellant

James Katsiaficas is the attorney who is representing Bryce & Gail Molloy, 542 Wallston Road, Tenants Harbor; he is with Perkins/Thompson, Attorneys at Law in Portland, Maine.

Katsiaficas: We are talking about 2 appeals. I want to talk about both appeals at the same time; I think Mr. Gibbons may do the same. We want to be efficient and use your time wisely. We understand your time is important. There are 2 applications for a ramp and a float in Watts Cove that the Molloyes have filed. One of them was denied in August of 2016. It was for a ramp about 32' long, a float 12'x20' seasonal, perpendicular to the shore. When that was denied, we filed an appeal, tabled it and filed another application that would be less impactful. That was a ramp 26' long, a 12'x16' float, pulled in closer to the shore at an angle toward the shore almost parallel. Again seasonal. Both of these are seasonal structures. We recognize we have the burden of proof on appeal. We recognize the ordinance standard is the Board of Appeals may reverse the Planning Board's decision when you find the decision made was contrary to the ordinance, specific provisions thereof are contrary to the facts that were presented to the Planning Board and generally the standard of appellate review is whether there is substantial facts, substantial evidence supporting the decision. Whether there was an error of law, whether there was an abuse of discretion. We are briefly going to go through that. You have my letter, I assume you have read it; I'm not going to read it to you. I'll try to summarize it and answer any questions you might have in that regard.

Errors of Law – Well, first of all this Board acted on 2 appeals; made 2 decisions. The first one remanded for findings of fact on the first application because there were none. The second one remanded for findings of fact on one criterion under the Shoreland Zoning Ordinance (SZO), Section 15(c)5. So in the first instance the Planning Board came up with findings on all of the Section 15 criteria for SZO permits, all of the Section 16 and denied for an additional ground, failure to meet Section 16(d)4. With regard to the second appeal which you had only remanded for a finding on Section 15(c)5, the Planning Board made findings on all of the other criteria and again denied on an additional criterion after reversing itself of Section 15(c)5. So we contend that is error of law; there was a remand order and they went beyond it. They exceeded their authority particularly with regard to the second application. You asked for one decision on one criterion and they went ahead and did 18 criteria. They flipped the decision, they reversed it on Section 15(c)5 in our favor and then held against us on one that you hadn't asked them to explore, Section 16(d)4. So we are saying they exceeded the scope of review that was a legal error. They also erred because they misapprehended or misinterpreted a standard. Section 16(d)4 asks whether the application would have an

adverse impact on the aquatic environment, on fish, on wildlife. What the Board did if you look at their findings and their findings were issued on February 14th, they talk about whether there was any activity that could affect bird feeding, roosting within 300', they said any impact would be undue impact. The standard again is "will have an adverse impact on spawning grounds, fish aquatic life, bird or other wildlife habitat". If you look at page 3, the Planning Board found that any activity could affect bird feeding, roosting within 300'; any impact would be an undue impact. And then when they came to the second application, the same criterion, they found, page 5, any disturbance within this habitat will affect shorebirds and waterfowl within many feet. The standard though isn't in any impact; that's almost impossible to try to measure or try to protect against. The standard is whether it unreasonably adversely impacts and the reason that standard exists is because the State Supreme Court made that decision with a similar Site Location of Development Law in 1973 in *In re Spring Valley Development*. Basically they stated it would be unconstitutionally vague and you couldn't enforce it if you were to say any impact is disqualifying because development has impact by definition. It's whether there's any unreasonable adverse impact. That's the standard that should apply; that's not the standard the Board applied when they looked at Section 16(d)4 in the first application and on the second application.

So not only were these errors of law made, but they influenced how the decision was made. When you think of any undue adverse impact, any unreasonable adverse impact, if you had an endangered species nesting above, that would be a problem. But the impact that the Board was looking at was whether this would cause wildlife to be disturbed within a 300' area. Where does that 300' area come from? That's a substantial evidence problem. If you look through the folder that each of us has, if you look at Item 12d there's an issue profile that has been prepared by the Maine Department of Fisheries and Wildlife and it talks about docks, piers, and wharfs and the impact on the environment. It's a general document; it applies statewide, up and down the coast. It is meant to be general in its applicability. It is not focused on Watts Cove. It is everywhere in coastal Maine and it recommends when you are measuring the total impact of a dock or a wharf, the area that you look at that is being potentially impacted is the footprint of the dock or wharf plus a 300' buffer in those areas as designated as being an area for waterfowl, tidal waterfowl, and wading bird habitat. It's important to recognize, though, in this case this was a seasonal ramp and float. It didn't require DEP approval, nor approval from DIF&W. This is not a mandate; this is not a law. This is an advisory guide that applies up and down the state. Why is that important? The very next month the Gregg application came before the Planning Board with the same designation but with a pier that was 144' long. They got a permit in a similarly designated area. So if this is a problem, if this 300' is so critical in every area, then how did the Gregg permit get issued? How did 10 other permits get issued that we brought to the Planning Board's attention that was in our PowerPoint presentation? How did that happen? Why the 300'? There is no 300' limit in the State of Maine law; there is a guideline. Yet the Board took it as gospel. When you also look at this, you will see that Paul Leper spoke. Paul Leper was their expert, Moody Mountain Environmental. He said the float could cause the birds to be scared away but not because of the structure, they would acclimate to the structure, they would become used to the "static stuff" as he said. It was the human activity that

would be the problem. When our expert from Stantec spoke, Bryan Emerson, a wetland scientist, he explained the float and ramp would not create undue adverse impact on the birds. They would acclimate to the structure and that any impact that did occur would be no worse than what is out there right now. There are 4 floats (moorings) that Mr. Molloy lawfully has. There are boats operating out there; Mr. Stern has a boat. The Molloy's use a boat; other people boat in Watts Cove. In fact, one of the opponents who spoke talked about what she saw from her boat, Sandy Yakovenko; she boats out there as well. There are boats out there. If human activity causes birds to disappear within 300' anywhere in the cove, then they would be long gone. Mr. Stern had a float out there. It's been awhile but he had it out there for several years. So to say that the evidence requires a finding that there is adverse impact is contrary to the evidence that was provided to this Board. The evidence shows instead there is no undue or unreasonable adverse impact caused on this.

There is one other letter from Dr. Podolsky, we don't know who asked him to write or who he was representing, or whatever but he submitted a letter saying a ramp would impact birds for up to 1500' on either side of the ramp. Again, we have Mr. Leper saying it isn't the ramp that would do it, it would be the human activity and we have Mr. Emerson saying the same thing. It seems not to be evidentiary reliable. The evidence really doesn't support a 300' buffer that has to be observed that makes this have an adverse impact that should result in denial. Instead it really compels a contrary finding; there is no unreasonable, adverse impact here.

We talked earlier about the error of law with the Board exceeding the remand authority. It's also an abuse of its discretion to take on more authority than it was given. On top of that, look again, if you haven't already, through the findings of the Planning Board, you will see there is discussion with regard to these piers, this wharf, the dock, the ramp, the float, there is discussion that no life is permissible here. The Chair and Member Hewlett agreed that under Section 15(c)5 they took the old reading again and looked at the use that no length of wharf or pier or float or ramp was appropriate. None because of the impact on the water birds and the use of the waterfowl, none. They also talked about workshops that they have had. Member Hewlett stated that they have had in previous Planning Board workshops experts that have talked about bird habitats and roosting bird habitats. When? There was no workshop with any of these 2 applications. Never was there a workshop where experts came in, where DIF&W came in and talked about wading bird habitats and what you need to do. Nothing that would support Ms. Hewlett's statement in the record that this Watts Cove is the gold standard for birds. We don't know where that came from but it was nothing that we were privy to. It was not a proceeding that we were at. We are entitled to a Planning Board that is impartial. A Planning Board that hasn't pre-judged a case. A Planning Board that hasn't made up its mind in advance. It makes up its mind based upon what is presented to it at that time. That has conversations with experts in the room or if it brings information from outside from previous workshops, tells everyone what that information is so we can all address it and understand it. This did not happen here. We have a Planning Board who has made up its mind in advance and there wasn't an even application of law. As I said earlier, we have the Gregg application that came in the following month, a much longer pier and part

of it permanent and in an area that is designated the same as the Molloy's by DIF&W and it received a permit. We did not. What is the difference? Allegedly one Planning Board member said "Well, it doesn't mud out." Well that doesn't make a difference and on top of that the year before in 2015 this same Planning Board had approved a large permanent structure in Mosquito Cove where it does mud out. And there is at least one Planning Board member who thought that Otis Cove did mud out and it is in the record as well in the Gregg application. So there isn't even the application of the law from one application to the next. This Board has the authority and the power to reverse the Planning Board's decision. We ask that for all the reasons I have stated here tonight, that you find in the letter, and find when you go through your own independent review and materials here tonight, you reverse the Planning Board's decision and issue the permit. We need a Shoreland Zoning permit in order to have approval of the float and ramp and then we will get a building permit with that. We're asking this Board given the context of what has happened here, we have only been before the Planning Board 3 times, now it's our second trip here, please issue the permit and if there are any questions, I would be glad to take those.

Chair Miller: Any questions.

There were none.

Argument of Parties to the Action

I'm Paul Gibbons and I represent Matt Stern and his wife. A couple of procedural issues I want to talk about. One is the claim that the Planning Board went beyond your edict to view sections of the ordinance. Section 16(d) of the SZO requires that the Planning Board make findings of fact on certain areas for every single application, with no exception. They didn't make those findings before so your town attorney was there and this issue came up with the Planning Board, the town attorney ruled yes the Planning Board must and they did consider the issues in Section 16(d) which deals with adverse impacts on wildlife. The second procedural issue is with respect to the 2 applications, the first application which was a larger float and ramp, you sent it back to the Planning Board and said we can't figure out what you did and make findings of fact. But one of the issues was whether or not the ramp and float under Section 16(d) was bigger than necessary to carry out the activity. The Planning Board also said you filed a second application where you had a smaller float and ramp and you also tucked it in closer to the land so we now find with respect to your first application that the first one is bigger than necessary because you prove in your second application you could make it smaller. So that pretty much takes care of the first one.

The issue of Section 16(d) dealing with adverse impacts, I think the first thing that common sense will tell you is this, this area as records show is mostly mud flats. At high tide it is only 5' deep. Most of the time it is mud flats and that makes it different from other areas of town. It's also a significant wildlife habitat and it's also a fact that is undisputed that the birds feed on the mud when the water isn't there. When it's high tide, a few birds feed on the water but not many. But when the water is low or no water, that's when the birds feed. When someone is kayaking up and down, it doesn't disturb the

birds because there is water there and they are in the trees and they are not disturbing their feeding area. It's about disturbing the feeding area and what effect will this have on them? So it's only at low tide when there isn't a lot of water there, this is an important point to keep in mind. That makes Watts Cove different from other places. We are not talking about no one would ever ask for a permanent pier going out hundreds of feet in Watts Cove because there's no low tide, these no tide there for a big boat. It isn't going to happen. The factual circumstances is the amount of water there and the tides there and the presence of the mud flats there and the absence of any other docks in the area, in that cove, demonstrates what this is really all about. Something that the applicants need to overcome. This cove is different, it has very little water, it has mud flats for the birds to feed there and they do feed there and that's why the State has it as a Significant Wildlife Habitat.

The Planning Board in their decision concerning wildlife habitat said an issue was "will not have an adverse impact on spawning grounds, fish aquatic life, birds and other wildlife habitat"; it was voted down 4-1 so the applicant did not meet this requirement and the burden is on the applicant to meet the requirement. The basis of this negative finding was that the impact on birds and bird feeding areas surrounding the dock, you are looking at this feeding area which this whole area is about and the argument before the Board was that any activity could affect bird feeding and roosting within 300' and any impact would be an undue impact. So if you disturb birds within 300', they are saying that's an undue impact. They go on to say that this area drains to mud flats at low tide, increases the available feeding area for the birds and increases possible impact. This is obvious, there are a lot of mud flats there and as you take away the area, there are less mud flats and that will affect the birds.

There was conflict in the arguments of the experts. We had 2 experts and they had one. Their expert, Mr. Emerson, claimed the more floats would not have a measurable direct or indirect impact to wildlife in the cove as compared to existing conditions. Our experts said just the opposite. Just the opposite. The question before this Board of Appeal is much different than if you were a Planning Board. Your question isn't how would I decide it if I was sitting there. You didn't get to see these people testify. You didn't see what they said or how they reacted to questions. All you have is this cold record. You didn't see any of that. You didn't see their explanations. People summarized their explanations but they are inadequate. That's why the court enforces a high burden on the appellant to overturn the Planning Board's decision. It's a very high burden and the real question is does the evidence before the Planning Board compel a different conclusion. You're not allowed to substitute your judgment of the facts of the Planning Board; you are not allowed to do that. If the evidence before the Board compels a different conclusion, then you must find for him but if you can't find that, then you must find for us. That is a very difficult rule to overcome because you weren't there, you didn't see the argument. You didn't see all the questions and answers.

We had Paul Leper of Moody Mountain Environmental file a report on August 9th with respect to both applications. He is a scientist and he said he is concerned about the disturbance and the fragmentation of significant bird habitat. He is talking about

disturbing the birds and they will go away. That is what he is concerned about and the potential of siltation and sedimentation disrupting the shellfish and wildlife habitat. If you read his report, these birds basically eat worms in the mud flats there. He notes that the Maine IFW biologists have mapped this area as a high or moderate waterfowl habitat. He said the proposed plan calls for an aluminum ramp and float to be placed in a waterfowl and wildlife habitat. The float will be grounded for a major portion of the tide cycle due to its location at the head of the cove. This will cause resuspension of the sediments as it is grounded and then refloated. This siltation may impact invertebrates and juvenile shellfish on the mud that serve as feed sources for the waterfowl and wading birds. He goes on to say.... That is something, by the way, a permanent structure won't do. He goes on to say the major concern regarding this project is an adverse impact caused from the intrusion of the floats into the flat and the associated activity of launching boats, location of the dock, this could cause the birds to avoid the area around the float. In addition because the cove is only 250' across at the project site, the float and associated activity may cause birds to avoid the rest of the cove. This activity could cause the birds to avoid the cove entirely.

We also had Dr. Podolsky send a letter to the Board on behalf of my client. He is an ornithologist, studies birds, has a Ph.D., and he said the mud flats are tremendously important to migratory birds. Migratory birds in particular need both feed and rest in order to make a success of their flights, from breeding to wintering grounds. Migratory shore birds and waterfowl can feed throughout the intertidal zone but from my experience they feed primarily on marine worms. Therefore, a long ramp attached to a large float covering up mud flat habitats could be net loss of resident and migratory shore birds and waterfowls that would have a small float situated at the high tide line. You put it at the high tide line there is a significant difference. He also says in his experience shore birds and water fowl do not forage within many feet of human made structures such as ramps and floats. Therefore, the Molloy ramp and float being proposed would functionally make much of the area around these structures unusual for birds; in fact, I would estimate that one quarter mile or up to 1,500 feet on either side of the Molloy float would experience dramatically reduced foraging used by birds if it were to be built. Indeed the longer ramp and float, the larger the float, the greater the loss of foraging habitat. So he is an expert, he says he has a Ph.D. in this, I know a lot about birds and this is what is going to happen if you put this float out there. So one could say, well look at the situation, you have Mr. Emerson from the appellant saying one thing; then you have Mr. Leper and Dr. Podolsky saying something else. The question is in that situation does that mean the Board finds Mr. Leper and Dr. Podolsky are right in their opinion. Does that mean the evidence compels a contrary conclusion? It does not. More importantly than that, is the article that we put in evidence from the DEP, concerning research about docks and birds and their effects on birds; what is important about this is, this is independent. We didn't hire the DEP; we hired Mr. Leper and Dr. Podolsky and they hired their expert. This is independent. This is objective third party evidence of the effect of structures on mud flats and wild bird habitats and it says "researchers conclude that shore birds are impacted by human activity occurring within 300' of feeding and roosting birds". Now to claim this is a standard that applies all over the place and that somehow it doesn't apply here, it makes no sense. Researchers find that 300' there is an impact, a significant

impact from preventing them to go away. If you look at the actual words used by the Planning Board in denying the permit for the reason, they found this would have an adverse impact but they said it would have a serious impact. Three hundred feet is a serious thing; the problem here is the cove is only 250' across. If you take the entire circle, you have almost the entire cove you are dealing with. So unlike other coves, this is almost mud flats all of the time. There will never be a big dock going out to low water because it is too far away. There are no structures there now like this and the only thing people can launch are canoes and small boats. There is not enough water there. The question is when you have that situation where there are so many birds feeding there, there is so much mud flats available for feeding and no one else is disturbing them, they are using their own kayaks or canoes launching them from shore and you know once you put the structure out there, its going to affect them from 300' away and Dr. Podolsky says much further. They have not met their burden; they had to prove that it wouldn't adversely impact the birds there. They didn't come anywhere near that. When you put it on a scale and say well, if we have to overturn this decision of the Planning Board, then we would have to find that the evidence compels a contrary conclusion that this one letter from Mr. Emerson as opposed from a letter from Mr. Leper and Dr. Podolsky and his article (third party article) that when they adopted these things over here and rejected their experts testimonies, you could not ever say that the evidence compels a contrary conclusion. You couldn't do it. You couldn't rationally do it.

I also want to talk to you about the standard on appeal. What is the standard on appeal? (inaudible) review the position of the Planning Board for errors of law, findings of fact unsupported by substantial evidence in the record or for abuse of discretion. They went on to say, they talked about issues, about what happens sometimes, it happens quite a bit when you have evidence in the record that says one thing and evidence in the record that says another thing. It says if there is relevant evidence in the record to support the Board's conclusion, the fact that the record contains inconsistent evidence or inconsistent conclusions to be drawn from the evidence does not invalidate the Board's findings. That's how high the burden is. So is there inconsistent evidence here, sure. There is Mr. Emerson who says it isn't going to bother anything and we have Leper, Podolsky and the Maine DEP article that says it does. Those inconsistencies cannot help them in their appeal. You have to find that the evidence compels the contrary conclusion. Thank you.

Rebuttals

Katsiaficas: May I have a moment for rebuttal? It's true when you are talking about evidence, about findings. The question is does the evidence compel the contrary conclusion. There is also a question if there was an error of law; also if there was abuse of discretion. Let's go back to the factual finding for a little bit. There was something said here about evidence from DEP. I wasn't at that hearing; my client tells me what was reported on the notebook under tab 12. You can take a look at it. It's one page, "Importance of Watts Cove to Migrating Shore Birds". There is no date, no author; I don't know who it's from. Mr. Gibbons said it was from DEP; I guess I will take his word. But what it says is "concerns regarding installation of temporary docks and floats

within shore birds significant wildlife habitat". There is a bullet: Increased human activity

Studies suggest human disturbances within 300' of feeding shore birds can reduce the amount of time shore birds feed in an area thus reducing their ability to prepare for migration. During permit review of permanent docks or piers, DIF&W considers a 300' area of impact around a structure. Okay, this isn't where DIF&W had any role. They didn't have jurisdiction. This is just a recommendation and it's about reducing the amount of time they feed, not whether they leave. When you are looking at evidence, you are not only looking to see if there is something in the record that supports it but is it competent? Is it reliable? Is this the sort of competency evidence you need to look at in making a statement as the Board did in stating unreasonable adverse effect on birds within 300'. That's not competent evidence to support that point. Neither is just a field guide. It's a general actability that DIF&W puts together. Then when you look at the actual findings the Board made, the Board was looking at the expert almost to make the decision. Again, the standard is, is there any adverse impact. We know the law court says it's unconstitutional, unless you read it as unreasonable adverse impact. They did that in a similar situation because otherwise any impact is adverse. It's not what anybody could reasonably mean. The argument before the Board was that any activity could affect bird feeding and roosting within 300' and any impact would be undue impact. They were basically taking the experts' statement as making their own determination whether it met the legal standard. That's the Board's determination not the experts. The experts can tell you what the impact is; the Board has to decide if it is an unreasonable adverse impact. So a legal conclusion supported by an expert can't be the Board's decision. When we look at all that, there are other things to consider. We are talking about a float and a ramp that is 300 square feet in area in a cove that is 14 acres. We are talking about a cove that is 300' wide, not 250'. These are all facts in the record. When you take what the experts said, what you see here, there are photos of birds in the record that still roost there, that still go there, and the Gregg wharf (a permanent structure, 144' long or more) and is in a similarly designated area and it is a roosting area and a feeding area. There are 3 tests you have:

- Was there an error of law
- Was there abuse of discretion
- Are there facts that are supported by substantial competent evidence in the record

We believe in all instances our appeals meet each of those and for each of those reasons the permit could be granted. As far as which one, because that maybe the next question, as to one it was denied on 2 criteria, the second is less impact and was only denied on one criterion. We could accept that the Board would grant the second application if that's how the Board determines. Thank you.

Chair Miller to Gibbons: Do you have something to say?

Gibbons: I think he has misconstrued the DEP researcher's study. The problem is... I call upon you to use your common sense. You have an area that you can't use big boats in because there is very little water. It's almost mud flats most of the time of the day.

The birds feed on those mud flats and it is important to keep the mud flats open so the birds can feed there. To claim that you put something out in the water that doesn't disturb them, I think you have to look at it as what evidence there is to support that conclusion. The problem is they have the burden of saying it absolutely doesn't disturb the birds. They didn't meet that burden. Common sense would tell you that if one person can do this, everybody on the..... if one person is entitled to put these temporary docks out there, then everybody else should be entitled to do the same thing. What would happen to the birds then? There is nothing special about Mr. Molloy, his next door neighbor could do the same thing. It's what I call the Goose Gander Rule. "What's good for the goose is good for the gander." When you measure that and what's happening in this cove, no one else has done this since the beginning of time practically, no one is doing this now. They want to preserve the birds there and if the experts say you need to do that, I think you have to find that they don't meet their burden.

Katsiaficas: I hate to do this but one point. To say no one has done this since the beginning of time, Mr. Stern admitted, it's in the record. He had a float, it was out there, it was on runners. If you want to talk about siltation; that created siltation. You can't say there has never been a float out there. You can say there isn't another one in Watts Cove right now but there has been one out there.

Chair Miller: Any questions from the Board. There were none. We want everyone to know that our Town Manager and Code Enforcement Officer is here in case you have any questions.

Discussion by Board

Chair Miller: We are acting on 2 appeals; both were denied. We have heard that and this is a fact in record that the Molloy's would be happy with the second float. The size of the float is what we are discussing as far as the appeals are concerned. Where would you like to start?

Cohen: My question would be the jurisdiction of the Planning Board to go beyond our recommendations.

Chair Miller: We referred it back to the Planning Board, just to clarify it, and the Board will support me on this, we were talking, and I don't want to be misquoted on this, but 15(c)5 other than peripheral conversation among the Board members, basically that was the reason that it was sent back, to address that issue. Am I missing something there?

Michael Jordan: I don't think I agree with that. We did discuss whether Section 16(d) was in play the last time and because the Planning Board had not made findings or a determination under Section 16(d)4, there was nothing for us to consider then. But I believe in Section 16(d)4 says that the Planning Board is not permitted to approve an application unless it makes an affirmative findings that there won't be disturbance to bird and aquatic life structure. When this matter was last here, they never made any finding one way or another about that because they had disposed of the matter in Section 15. So

I think the concept that they are exceeding the mandate that we sent back is mistaken because they wouldn't have done their job if they didn't on remand take up Section 16.

Chair Miller: That's not the issue we are discussing. I want to clarify first the reason we sent it back and that was not the reason we sent it back.

Jordan: Correct.

Chair Miller: Point of order, so the reason we sent back the main discussion was on Section 15(c)5 so I want to clarify that point and see how the members stand on that. The next thing is the denial on the other one, another denial, if someone wants to discuss that one. I guess I would like an understanding from the Board members if clarity to me if sending it back was it appropriate. Before we go on and discuss whether how we agree on their other decision, I need an understanding from the Board members and not from myself on how we handle that. Do we send it back on Section 15(c)5 and it wasn't acted on in that basis. Where are we going with this? What's our responsibility?

Reinhardt: Well, I don't have a problem with the fact that they produced findings of fact that addressed Section 16(d). I mean they had to produce, they were supposed to produce in our remand on the first application findings of fact and conclusions. We sent the second one back because we found that they had misinterpreted the ordinance or misapplied the ordinance; whether they denied or approved it, they had to produce findings of fact and conclusions; the ordinance says they need to provide... Section 16 is part of that, on all Shoreland Zoning applications, all of them, even if it isn't a dock. So, as far as they produced findings of fact that addressed those on the second application I think that is applicable.

Chair Miller: I am trying to cover all of our bases now so we don't have to do this again and hopefully each party can have some resolution in this.

Michael Hodgins: Just a point on that because you have taken up Molloy's third issue on appeal and as you go forward you will probably make on a decision on that. One of the arguments they made was the Planning Board exceeded their authority. So you might want to decide now or at some point if they did or did not exceed their authority. The one point I would like to make is Mr. Gibbons gave me a lot more authority than I had at the Planning Board. He said I ruled that they had to address it. In fact the statement I made was if they felt they had made findings on Section 16, then they could say they had already made the findings and they were fine. But as Mr. Reinhardt said they hadn't and then in order to grant the permit or for anyone to grant the permit, there had to be findings and I think that is why they went forward and made their decision.

Reinhardt: I will make a motion in regard to whether the Planning Board exceeded their mandate, I don't think they did. On that point I would agree they did not exceed their authority.

Carey: I will second that motion.

Chair Miller: So, you are accepting that the Board, on clarity, they had the right to discuss that point and that is our general agreement on that. This is the motion. The vote was 5-0 in favor.

Procedurally we have 2 appeals to act upon, is that correct? Are we only going to act upon the third appeal that you made a motion on? Do we have to go back concerning the other 2?

Reinhardt: When I say a third appeal, it's just the third point of their appeal.

Chair Miller: Which one would you like to address first?

Reinhardt: If the Board will bear with me, it will probably be slow, I have a methodical mind and I have read this information over and over again, I have reviewed all of the minutes starting in August 2016 to present. It helps me to deal with one issue at a time and I guess the best way to deal with it is to start with the appeal of the first application which we remanded to the Planning Board because we didn't have a substantial record, the minutes were fine, but the Board was rambling a lot in the record when discussing the evidence and issues but we remanded it because we did not have the findings of fact/conclusion of law that we could act on for the appeal. So we remanded it. Do we all agree on that?

The members of the Board of Appeal agreed.

Reinhardt: So they went back and I tell you that is a hard thing to do for the Planning Board. Here they heard it in August and we remanded it back to produce findings of fact. It is a hard thing to do especially in this case where it went onto a second application, another appeal and you are not supposed to consider what went on after the August meeting where they were first denied. So it is a hard thing to do and I give them credit, because at least in my opinion, I read the findings of fact they produced regarding the first appeal and I also went back to reread the minutes which were very detailed and found the minutes and the findings of fact did reflect as best as they could a separate conclusion. I felt that was to give credit where credit was due; they did produce findings that were fairly accurately reflected by the minutes, reflect by the record. That's my opinion only. That being said what I have to based that on is of course they reviewed Section 15(c)5 and the discussion indicates it and they reviewed it incorrectly based on a use. Now you look at the minutes and what they have said, they reviewed it not so much as a length; they were still focused and they had to be that because that issue hadn't come at that time whether they were intending to do that or not. The fact that they were incorrectly looking at it as a use and not as a length of the float was the situation back in August. And again the fact that they brought up, I think one of the members said that any float wouldn't suffice Section 15(c)5.

Well that's not the issue. The fact that Section 15(c)5 allows a float, whatever any contents, it's any float or any length means if it is zero length there is no float, there is no

ramp. So, you are getting into a circular argument there. Obviously, from my point of view they erred again in this application and appeal on that point should be granted because they looked and reviewed Section 15(c)5 as a use not as a length. That is just my opinion. You look at the statements; the statements have an effect. At least 2 statements in the record from the Chair and I think one other said any length pier, that is not the standard in Section 15(c)5. It might be in Section 16 but not in Section 15(c)5. In that case the finding of fact, well, they are correct and reflect the record but they also reflect and back up the fact that they incorrectly applied Section 15(c)5.

Then you go down to the more complicated issue on this first appeal, they in producing the findings of fact and conclusion, they produced a review on Section 16(d)4. Discussion again by the record they did in a generality on that first application in August discuss the issues that are addressed in Section 16(d)4. They didn't refer to that section per number or letter, they didn't to the reading of that section, they did not quote that section, but in generalities having to do with will not effect adverse impact to spawning grounds, fish, aquatic life; birds were mostly referred to. They discussed that fairly extensively in that first application. I think a reasonable man could assume they could since we told them to bring findings of fact that while they did not specifically refer to it come to a conclusion that they addressed those issues. Again, that is my opinion.

The problem I have is they incorrectly applied that in my view. I was on the Planning Board for 15 years and if you were applying that standard of adverse impact as no adverse impact, there would be nothing built in St. George, nothing, because any human activity has some adverse impact. The right way to evoke that standard is unreasonable or undue adverse impact and that is the standard that should be applied. You have, us sitting here creates an adverse impact, we consume electricity that has to be produced somewhere and that is an adverse impact. The fact that people boat up the cove and I refer to this cove, if they boat up there, they are going to have an adverse impact. Is it undue, unreasonable? No. The same way with the fact people go out there to an clam; right now, in my opinion, clambers cause more sedimentation than any wharf or float sitting on the mud flat half the time would ever occur or ever produce in 10 years. One wormer up there is going to stir up the cove; I have seen it. When the wormers come in, they rip the place right up. They can worm there, they can kayak there, they can walk around the shore there. I have it very hard to find, and I have to be careful that I am not prejudging the whole thing again; they misapplied that as undue/unreasonable impact. That is my opinion on there and of course, the same applies for the second appeal because the issue of a float on Section 15(c)5 the length, they found in favor of that in that one instance. That seems kind of funny because in the first instance they said that no float (2 of them at least, if not 3) said no float or any float would cause them to deny in Section 15(c)5 but in the second application they approved it. I am wondering what changed at that point.

Just a couple of other things that struck me. There has been a lot of talk about/support of their denial of it under Section 16(d), that this cove is unique. The fact that it has Resource Protection; it has a conservation easement; it has no floats there. The fact that Mr. French put a significant portion of that cove in a conservation easement is great and I

praise God for it. That is something he wanted to do. It's a wonderful thing but that does not imply that same duty on the Molloy's, the fact that he did that. The fact that Mr. Stern chooses not to put his float in anymore, whether it is permitted or not permitted and doesn't use the float, does not imply or appoint the same restrictions on Mr. Molloy for not having a float or use of his shore. The same goes with the Bulanchuks. J. Smith (former owner of the Bulanchuks' property) had a float there and a ramp, it was seasonal and the fact it is not used now does not imply that restriction on Mr. Molloy. My opinion is as far as the first application is, we accept those findings of fact; that the Planning Board did their job; they produced findings of fact that we can now rule on. The Planning Board misapplied the wrong standard on Section 15(c)5 and Section 16(d)4; they again misinterpreted the ordinance as no impact. I keep going back to the fact that if they truly felt no impact is acceptable, there wouldn't be an application in the shoreland zoning that would ever be approved. In fact, in December, I guess the minutes were supplied by you for the Gregg one, I read those and I was astounded, not the fact they granted the permit, but the lack of any review. They didn't provide findings of fact; they never went through any of the standards. They didn't do Section 15(c)5 or Section 16(d). They just passed it and it's the same situation, other than the fact its one cove removed. The same designation. You have got to be consistent. Lack of consistency gets us right here. I have had my say for quite awhile, I will shut up.

Chair Miller: Does anybody else have any questions or further discussion?

Bartholomew: I am bothered by this contrary science. I have a degree in Wildlife Management, 20 some years as a naturalist and guide and I don't know what could have more adverse impact than a 95' boat with 150 people on it going up to a cliff where birds are nesting every day. No birds left their nest. The distances involved are frankly quite confusing to me, 300'; 1500'. I had a blue heron that walked from the lobster pound, across the street, across Route 131, through my yard, and into the back yard to spear a couple of frogs in the pond. I didn't see any adverse impact on that wading bird from human activity. I agree it is an extremely important habitat, but people who look at a high value waterfowl habitat; one person will say this is a wonderful place, I will take out my spotting scope, my telephoto lens, and camera and take some photos; another person will say it is a perfect place for a duck blind. Both are permitted uses. I have hunted geese with permission not far from the area in question and the geese keep coming back. What is the measure we are looking at here? Any impact is probably unreasonable, unconstitutional but my question is where the adverse impact is; what standard do we have to use for that?

Fred Carey: I would like to talk in reference to SLZ in respect to 16(d), Items 4 and 5. "With kayaking, boating, clamming intrusion, wormers, duck hunters and hikers with usage of 4 existing moorings, along with road traffic and existing area residents, in my opinion, all have had current impact on the wildlife in the area. By deleting the 4 moorings and adding a float with ramp seems to be a trade-off in the big picture. There seems to be no practical way, with current rules, to make this cove off limits. At this juncture in time, with current or anticipated usage, there is no way this cove can be held to a "Gold Standard".

Chair Miller: My comment, not specifically, is one of the jobs of the Boards in this community is to represent the people. Not necessarily to take sides but to facilitate the Planning Board and ours, specifically, to facilitate a fair and equitable playing field for everybody. I listen to my fellow members and that would be my comment, I am not sure I understand the facts and the standards that were applied for the denial of this, and it was brought up in the argument they issued a bigger dock with less issue. I haven't heard any specific facts that state that this cove is that much better or that much more important than any other cove when it has the same use. Unfortunately, some have to loose for somebody to gain. This is a coastal community and we have a rough shoreline and not a lot of beaches like the rest of the country enjoy, Maine is a rocky coast, that's why we have so many docks and piers to facilitate the people to get to the water. I am at kind of a loss, and I haven't heard any real strong influence tonight that would tell me to understand how this was applied by the Planning Board; the facts and the standards that they applied. Listening to Bill and everybody else I am kind of going along the same way; I'm not understanding the rationale and reasoning here.

Carey: The rationale and reasoning of?

Chair Miller: Of their decisions.

Jordan: My reaction to reading the minutes of the January 10th meeting was that it was fair reading of what the Planning Board did to say that they applied not an absolute but a reasonable standard to whether the structure would have an undue influence not just any influence on the wildlife issues in Section 16(d)4 requires them to address. I think there was conflicting argument from the experts and others in all of the Planning Board hearings that happened from which you can get evidence that supports the conclusion they reached, I find it really hard to see that the other evidence that people put in requires a conclusion opposite from that which the Planning Board met. Therefore, I don't think they misapplied the ordinance; I don't think we have the factual basis to tell them they were wrong because they are entrusted to finding the facts.

Reinhardt: I am reading the findings of fact and it's having to do with Section 16(d)4, and their explanation of why they felt "will have an adverse impact" and this is what they say "the basis for the negative findings with the impact on birds and bird feeding areas surrounding the dock argument before the Board, they said, was that any activity could affect bird feeding and roosting within 300'. An impact, not any impact, but an impact would be undue impact. That is word for word for what they said in the findings of fact. So I do have a problem, in fact, continually referring to the impact; that is not the standard that should be applied. If you agree with that, you are going down a long slippery slope because any impact will be a reason to deny virtually any type of application for SLZ from here on in. I'm sorry but I just do not agree with that interpretation of the ordinance and I think the Supreme Court has indicated on one case any way that it means unreasonable or undue adverse impact.

A couple of other things; I just had to question and I don't mean..... Attorney Gibbons has said in his presentation here tonight there was basically no impact when there is water

in the cove. Correct me if I am paraphrasing that wrong, but I did hear you say there was no impact when the tide is in. Then what activity occurs at low tide? The tide is out and the float is sitting on the mud flat right there. What human activity goes on then?

Nothing unless he is going to sit out there on a chair on the float which already has boats on it. There was a lot of discussion earlier about the size of the float. It is now 12'x16'. I mean let alone pulling up a couple of kayaks, you get too much smaller than 12'x16' you will lose stability on the float. There was never a discussion all through this whole thing about float size. What did the Planning Board want as far as float size? It was never discussed; the discussion was any float, pretty much any size float. You get much below 12'x16' you are going to fall overboard. I don't understand what the impact is to the birds when the tide is out which Mr. Gibbons has already said when the tide is high, so if there is no impact when the tide is high, what is the impact when the tide is low?

I agree any activity; birds are going to fly away. I live in a cove very similar to this, not as long, there are 4 seasonal floats in it and yes, you go out to launch your boat or untie your boat, and the birds are there, they are going to fly away but they are going to come back. The great blue herons are there feeding in my cove all the time at low water. If I go out and walk in the cove, they will fly away but they come back. The same way with ducks and geese. There has been a lot of discussion about the silt that this float is going to stir up, I go by there on my way to work and on my way home every single day and many times I see cars parked on the side of the road, especially by Bulanchuks, and people walk down there to clam. One clammer down there in a tide is going to stir up more mud and sediment than any float will do in 10 years. I still see those birds coming back.

Carey: The other point I think from October 1 until the end of January duck hunters are prevalent in that area and their 12ga. shotguns going off that's got to have an impact. It seems we are governed by the shoreland zoning but there may be some need in the future to change the verbiage in the ordinance.

Reinhardt: I know a lot of people are upset by our talk up here, by some of our talk about this because they certainly have expressed their view that this is, they have coined now that this is "Gold standards of birds" almost like the "mother of all piers" from Mr. Lentine. So now we have another one. The avenue, if that is what you want to do, to protect or restrict any activity on this cove or any other cove or any other piece of land in St. George is to change the ordinance. If you want to make that cove area totally no wharfs, no nothing, no activity, no bird hunting, no clammers, or whatever, talk to the Planning Board, get them to support you, or even lacking their support, file a petition to amend the ordinance, go before the town and have the town vote for it or not vote for it. I know it's an emotional issue, to not follow the law. We have to follow the laws that are in place and misinterpreting the laws are not following the laws.

Chair Miller: One of our mandates of this Board is we are representing our community and being equitable to everybody that applies to the Planning Board, CEO, or any avenue that they take, I know every case is unique, but everyone has to be treated the same. That's why you have standards; that's why you have rules. I know our 2 boards are here

to facilitate them. We are the last recourse; I'm not disagreeing with the Planning Board. I just don't understand where they were going. I don't understand where they reached the facts that they concluded based upon argument that didn't apply. As Bill said, either 15 or 16, both are not supported.

Richard Cohen: We have an ever narrowing range of things that we can make a decision on. As it goes down to first and second appeals, that range is smaller each time. This is an emotional/social issue.

Hodgins: I was going to raise a procedural point. It seems like you are talking around the issues. I think if you look at Mr. Katsiaficas' letter of February 6th because I think what they were talking about in their first argument there is an error of law. I think you have laid out the issues. It seems to me you should address in section A, page 2, "Did the Planning Board misinterpret Section 15" in the first application. I know Mr. Reinhardt spoke about that in terms of whether they applied the correct standards; I think you should decide on that. The next step is you have 2 issues below which are Section 16(d)4 in terms of the first application, did they apply the correct legal standard for Section 16(d)4 on the first application and then you do the same analysis on the second application, did they correctly apply it. You have talked around the issues but at some point you have to make a decision.

Discussion between Hodgins and the Board of Appeals on procedures on which appeal to grant, which Board will issue the permit, Sections 15 and 16.

Making a Decision:

A motion was made by Reinhardt, seconded by Cohen, on the first appeal that the Planning Board erred in the matter of law in reviewing the standard for Section 15(c)5 by incorrectly applying use rather than length. There was no discussion. The vote was taken; 5-0.

A motion was made by Reinhardt, seconded by Cohen, on the first appeal, likewise on the second appeal, that the Planning Board incorrectly applied as a matter of law Section 16(d)4 by interpreting as any adverse impact rather than no unreasonable adverse impact. There was no discussion. The vote was taken; 5-0.

A motion was made by Reinhardt, seconded by Cohen, the record of the evidence does not support the findings that there is unreasonable impact caused by the float and ramp.

Jordan: I would disagree with that for the reasons I have given.

Chair Miller: Now the appeal has been approved; do we have any further consensus. Is there any other motion that needs to be made or do we send it back to the Planning Board with instructions? I don't think its fair for everybody to play on this merry-go-round.

Reinhardt: We have to have a motion that we grant the appeal on both one and two.

A motion was made by Cohen, seconded by Carey, to confirm the approval of both appeals. There was no further discussion. The vote was 5-0 in favor.

A motion was made by Reinhardt, seconded by Cohen, to remand it back to the Planning Board with direction to grant the permit for the second application. There was no further discussion. The vote was 5-0 in favor.

A motion was made by Reinhardt, seconded by Cohen to adjourn; the vote was 5-0; the meeting adjourned at 8:45 p.m.

Respectfully submitted by,

Cherie A. Yattaw
Recording Secretary