

**St. George Board of Appeals
St. George Town Office
Meeting Minutes
February 3, 2022 – 6 p.m.**

A Board of Appeals meeting was called to order at 6:00 p.m. Present in person: Steve Miller, Chair; Mark Bartholomew, Richard Cohen, William Reinhardt, Jane Conrad, and Sandra Roak. Also present in person were: Terry Brackett, Beth Smith, Rick Erb, and Richard Bates.

Quorum: A quorum was present. Jane Conrad stepped down as voting member for review of January 20, 2022, minutes, and Sandra Roak (alternate) was elevated to voting status. Conrad then stepped back up and resumed her voting status for the remainder of the meeting.

Adjustments to the Agenda: None.

- Review of the Minutes of January 20, 2022:

A motion was made by Mark Bartholomew, seconded by Cohen, to waive the reading of the minutes. The vote was 5-0. Motion carried.

A motion was made by Mark Bartholomew, seconded by Cohen, to approve the January 20, 2021, minutes as written. The vote was 5-0. The motion carried.

- Policy Allowing Remote Meetings and Remote Participation in Public Proceedings:

Chair Miller opened the discussion. Jane Conrad noted this policy was permitted under Maine State law, and Chair Miller explained that the Board of Appeals did not need the approval of the Select Board regarding this policy.

Chair Miller: If members used their phones, iPads, or computers at home and if it was brought to question in court, it could be called. How does the Select Board treat it if its members are remote? Do they use their personal device(s) at home?

Richard Bates: The Select Board, Planning Board, and Conservation Commission have all adopted the Remote Participation Policy and all use their own equipment. I think the difference between that and the issue of email is: "At the time we were discussing email, the convention was that the messages resided on your computer and consequently, you could have your computer seized. But emails are now all stored on the cloud, and you are merely showing the email on your screen, and I think Zoom comes into that same category."

Conrad: Nothing is being saved. We just are using our computers at home to participate while this is happening and the minute the meeting is over, it is just gone. It is off. If there is a record, it's saved at the town level, but it won't be on our computers.

Cohen: Is it saved?

Bates: We save the recordings, and the recording secretary uses it to supplement at home to do the minutes. At present, we are just saving audio, not video.

Cohen: Does it have to be saved for a certain amount of time?

Bates: From what we understand, no.

Conrad: If the Board of Appeals hearings are recorded, we should save those.

Bates: Then the same would apply to Marguerite's recordings as well. I think those need to be saved.

Conrad: If it is part of somebody's appeal, it is part of the record. But like tonight, there is nothing that is going to be captured anywhere other than the minutes.

Miller: I can remember that we were told not to bring recording devices or phones to the meetings because you could be held personally responsible. Advice from one of our attorneys to me as chairperson about three or four years ago was even notes written by members and in particular, the Chairman can be recalled. Do not take personal opinion of things when you write it down.

Bates: We can make sure the audio recordings of the meetings get preserved.

Roak: What constitutes an emergency or urgent issue? Do you have to get permission, or do you just use your judgment, or how does that work?

Bates explained that the town had operated under a state emergency order but that had ended.

Bates: So why, for example, is the Select Board meeting remotely? We are meeting remotely because Knox County is still in a high level of community transmission. We are over the threshold of 100 per 100,000 inhabitants, and MMA felt we are in a state of high-level community transmission. There is a bill going through the state legislature now to modify state law which would give towns and municipalities even more flexibility.

Bates: If the bill passes, it will do two things. The Select Board could vote on a policy, and it would apply to every committee and board. That is one of the proposed changes in the law. The second change is to give a little more latitude to what constitutes an emergency or urgent issue. I think it will give us even more opportunities if we want to meet remotely.

Chair Miller expressed concern about meeting remotely: I am not crazy about it. I can't imagine an Appeals Board hearing being done remotely as much as we go back and forth, have lawyers involved, and all the members on at home. I could see it would be midnight before we even got through the basics of the meeting, especially with a secondary appeal coming up.

Cohen noted the meetings did not have to be done remotely but that the Remote Participation Policy was a backup plan should it be necessary to do so.

A motion was made by Jane Conrad, seconded by Cohen to adopt the policy that allows Remote Meetings and Remote Participation in Public Proceedings for Board of Appeals' meetings. Roll call vote: Richard Cohen, yes; Bill Reinhardt, yes; Jane Conrad, yes; Mark Bartholomew, yes; Steve Miller, yes. The vote was 5-0. The motion carried.

Sandra Roak stated she was also in favor of this policy.

- Discussion on Procedures:

Chair Miller: I would like to know before our next meeting where, as a Board, we are on the DeNovo type proceedings. In particular, the Findings of Fact and Conclusions of Law. Are we going to get those from the Code Enforcement Officer and how we will treat those?

Conrad: The subcommittee has been working on revising the ordinances. The initial plan was to tackle all the Land Use Ordinances and bring those into one consolidated, comprehensive ordinance, and make sure (because now all the different parts like Subdivision, Wellhead Protection, Site Plan Review each has appeals sections within them) that those are all consistent and to have one consolidated Lane Use Ordinance.

I have been helping with the Board of Appeals piece of it, and in the context of that discussion and the issue Mr. Katsiaficas raised, we've talked about the DeNovo review issue. In the last five or eight years, the Supreme Court of Maine and the legislature changed the law with respect to what is recommended for review of Code Enforcement Officer decisions. It is the recommendation of the Maine Supreme Court and the subcommittee that we change St. George's ordinance to be a DeNovo review; starting afresh looking at the judgment the CEO made.

The question that we haven't discussed in any detail with the Board of Appeals is whether the Board of Appeals should exercise jurisdiction over enforcement decisions that the CEO makes. We looked at what the Maine Supreme Court has done on that and what the legislature has said on that in the last eight years. We have Mr. Katsiaficas's advice, and then I sought and obtained it from the Maine Municipal Association.

The subcommittee is recommending the Board of Appeals takes jurisdiction over enforcement decisions including the decision not to enforce (unintelligible) violation order or something, but we feel that we should have a workshop so that we can spend the whole meeting talking about how that would work, what the reasoning is for that, what the court has said, and what the legislature has said.

At our last meeting, we also talked about the fact that once the Board of Appeals had DeNovo review, then the CEO would not have to be writing Findings of Fact and Conclusions of Law which is a very onerous obligation for that person.

The subcommittee met with Richard Bates and Rick Erb today. They are of the view that we should have one Board of Appeals ordinance that talks about all the different kinds of appeals that might come before us and what standard of review we would apply to each. Whereas now, there is a little appeals section in the Wellhead Ordinance, Coastal Water Ordinance, and a few others. If we do that, we can have the Board of Appeals comprehensive ordinance go before the voters in May and speed up the DeNovo review process.

Conrad stated that Michael Jordan had been working on revising the land use ordinance and suggested holding a workshop to discuss the draft ordinance. She said that Jordan could send Board members a copy of the draft before the workshop.

The consensus of the Board was to hold a workshop on the Proposed Board of Appeals Ordinance and Standards on Thursday, February 17, 2022, at 6 p.m., and it will be a public meeting.

Miller: I think Mr. Katsiaficas was involved in some of the DeNovo hearings.

Conrad: He recommended in his letter that the Board adopts DeNovo review. The place where there was a difference of opinion was that he recommended we choose to "do not hear" enforcement decisions of the CEO. But since the Maine Supreme Court has urged that people have an opportunity to come first to their town for an appeal, and if only if that fails, bring the lawsuit, I would be a proponent of having jurisdiction over enforcement decisions.

Also, the legislative default for towns that say nothing is that the Board of Appeals does have jurisdiction over enforcement decisions, both taken by the CEO or decisions not to do anything. The reason for that is what the CEO does. If he chooses not to act or if he does act, it affects a property owner's right about how to use their property. It can affect the value of the property. If it is your neighbor's property and how they are using it could impact you.

Miller: The combination of the complications that may exist, with remote participation, you have to have the written material on time.

Conrad: There is a lot more at stake for everybody in a hearing before the Board of Appeals than a lot of other committee meetings of the town because it is a quasi-judicial proceeding. You do need to have the evidence ahead of time.

Miller expressed concerns about complex appeals and meeting remotely. Conrad noted that the Board does not have to meet remotely and said that most of the appeals were not in the category of the current appeal, dealing with a lot of lawyers. Most of the Board meetings and appeals would probably continue to be more manageable matters.

Cohen: If we open this up to Shoreland Zoning or Wellhead, does that mean somebody that doesn't like what the statute for the ordinance says, can bring it to the Board of Appeals?

Conrad: Nothing is changing about who can bring an appeal. It has to be a person with Standing which is a legal concept that means a "right to bring the appeal."

Cohen: You don't see it as widening the group who could appeal?

Conrad: No.

Reinhardt: I see that.

Cohen: To me, it looks like it opens that up.

Reinhardt: If we are going to take on appeals of enforcement decisions of the Code Officer, I can see that doubling the number of meetings we do and the cases we get.

Miller: Our present case pending is a prime example of it. There is the matter of law, the matter of procedure, the matter of the CEO or the Planning Board.

Conrad: There are going to be issues like that but most likely the appeals are still going to be the ones you have had, historically. What will change with DeNovo is more work for this group; to have to start from scratch and decide if the CEO's decision was the right one or not. But the Supreme Court of Maine has said, this is what Boards of Appeals is here for.

Cohen: Did they say it as a statute, a law, or a recommendation?

Conrad: The Supreme Court said first there was a statute. If your town said nothing, the default is that BOA will hear CEO appeals DeNovo. Then the Maine Supreme Court said that they do not want every person showing up in the courts with no good record for them to review and make decisions. Essentially, that is what the Board's job should be.

Cohen: Does that shift the cost to the person who is appealing to the town versus them paying the lawyers that would be dealing with their issues in court? Is the Board substituting for part of the legal process for these people?

Conrad: Yes. But another way to look at it is, most of our neighbors can't afford lawyers to go to court if they are being deprived of something they feel matters on their property. This is just the first step and if they don't like it, they are going to have to come up with the money to bring the lawsuit.

Cohen: Do you think that this new method is going to make the process longer per case for the Board of Appeals?

Conrad: It will be much longer for CEO cases.

Cohen: I would like to see a two or three-sentence definition of each written down. What does it mean to have an appellate review? What does it mean to have a DeNovo review? So, every person can understand the difference.

Conrad: That is in our notebooks already, but we can pull it out if you want it handy.

Bartholomew asked about the jurisdiction of the CEO: The CEO goes out on something that he has been permitting and he finds an issue to cease and desist. Does he have to come to the Board before that?

Conrad: No, only if somebody wants to appeal that our process is triggered.

Miller: If we take on DeNovo, the CEO's role will basically stay the same as now except the CEO will have to keep more detailed records of his decisions.

Miller: We seem to have been doing appeals semi-DeNovo anyway, but we may have to report on them a little more and write our findings in a more detailed manner.

Bates: I think it is important to separate the issues of DeNovo from the remote participation. I hope we will be able to get away from this, but it is useful to have the remote meetings policy as an option.

Miller: It will be up to the Board to decide whether we have an appeal that way or not.

Bates: You can always have a hybrid meeting.

Roak: Could you give me an example of what we would do if we were supposed to enforce something, and the person said no?

Conrad: We are not enforcing. We are making a judgment about what CEO did or did not do was consistent with the ordinance. If a neighbor came and said that his neighbor is violating an ordinance, he called the CEO, the CEO came out and chose not to issue a violation and they bring an appeal of that, the Board would review the information in front of them from the neighbor, the CEO, and whomever else provided information and make a decision.

Roak: Who enforces? I thought this Board did.

Conrad: Basically, all we would say is the CEO should have issued a notice. Then the Board is done. Then the CEO does or does not issue a notice. It can be appealed to a court or if somebody is in violation, the Select Board can bring an enforcement action. The people have to pay a fine for being in a violation.

Reinhardt: The subgroup was thinking of writing a separate ordinance just for the Board of Appeals? We have an appeals section in every ordinance.

Conrad stated correct and stated that when she first came onto the Board of Appeals, "I thought I was going to look at one place and see what all the appeals were we might be hearing, what are the standards that would apply to those, what are the procedures, etc., but you have to look in each separate ordinance. So, we would be pulling all the pieces from all of those making sure that the rules were consistent for all of them, and the CEO and LPI decisions would be DeNovo, and the Harbor Master decisions would be DeNovo. These will be in one ordinance called Appeals Ordinance of the Town of St. George."

Reinhardt commented that he thought there would be a problem with a couple of the ordinances that are mandated by the State like the Shoreland Zoning Ordinance. If an appeals section is taken out of the SZO then make sure it's compliant with the states.

Conrad: The town is still going to have an appeals process for most everything.

Erb: Along those lines, I want to point out one of the things I really like about a DeNovo hearing is that it gives you better information. I think everyone wants to make the right decision. This allows evidence to be entered into the decision. I think in the long run, you are better off with it so I am hoping that the Board will endorse that.

Reinhardt expressed concern about the enforcement issue: All you are doing is taking on appeals of enforcement of a nonenforcement which is probably more likely. You are going to have a lot more business here at this Board because it principally puts the Board as an intermediate step before the appellant goes to the Select Board.

Right now, if someone has a complaint against the CEO nonenforcement of something or an issue with a neighbor, they go to the CEO and tell him the issue. The CEO will go out and he will make the call. If they don't like that or if it is something that the CEO says needs enforcement and they don't comply, the Select Board has the decision, so it never comes here. The Select Board decides whether they are going to do an enforcement action.

So, all we are really doing here then is throwing in a first step that people can go to first without costing a lot of money to complain or try to get an appeal on any decision the CEO makes. But they can still, if they don't like that, go to the Select Board or go to court.

Conrad: It is worth thinking about and that is what we will be airing on February 17.

Miller: I would like to have a discussion and have a resolution.

Reinhardt: How much does it cost to appeal a decision of the Code Officer?

CEO Brackett: An appeal is \$150.00.

Reinhardt: If we end up doing the enforcement appeals, we should increase the cost of that appeal. Bates and Conrad agreed with the suggestion.

Reinhardt: In my opinion, we need to get that straightened out now rather than a year from now. I am assuming when we meet on February 24th, we are going to have a Findings of Fact and Conclusions of Law from CEO Brackett?

Other Business:

There was no further business to come before the Board of Appeals. At 7:00 p.m., on a motion by Richard Cohen, seconded by Conrad, it was voted 5-0 to adjourn the meeting.

Respectfully submitted,

Marguerite R. Wilson
Board of Appeals Recording Secretary