

**St. George Board of Appeals
St. George Town Office
November 15, 2018**

Board of Appeals Hearing – Look East Investments, LLC (East Wind Inn)/Applicant

The hearing was called to order at 7 p.m. Present were: Steve Miller (Chair), Mark Bartholomew, William Reinhardt, Richard Cohen, Crystal Tarjick and Fred Carey. Also present were: CEO Terry Brackett and Tim Polky, Tammy Willey and Randolph Deutsch. Ty Babb arrived later.

Quorum: A quorum was present. Five regular voting members plus one alternate were present.

Conflict of Interest: Chair Miller asked if any Board member had a conflict of interest. There were no conflicts of interest.

Nature of Appeal: Look East Investments, LLC (East Wind Inn) filed an Administrative Appeal on October 3, 2018 based on a decision made by the Planning Board to deny a permit for the placement of a commercial shipping container to store a fork lift and fishing equipment located at 21 Mechanic St.

Chair Miller stated the appeal request has two parts. The first part is an Administrative Appeal: the Planning Board denied Mr. Deutsch's after the fact permit application. The second part is a request for a Variance should the Board of Appeals agree with the Planning Board's decision.

Chair Miller asked the Board if they felt they had jurisdiction to hear the appeal. Consensus of the five voting members of the Board of Appeals agreed they have jurisdiction to hear the appeal.

Standing and Determined Parties: Mr. Deutsch is representing Look East Investment and will also speak on Ty Babb's behalf. Mr. Deutsch will also be representing both parts A & B of the Appeal and included the following information to the Board:

1. Application for Variance or Appeal to the St. George Board of Appeals
2. A statement of facts and his argument of Mr. Deutsch's appeal; request for variance and justification for the variance, dated October 3, 2018
3. Section 15. Land Use Standards, Shoreland Zoning Ordinance
4. Property and aerial maps
5. Colored photographs of the East Wind Inn property and the storage container

Testimony: (non-verbatim and edited) For the file, Mr. Deutsch provided a copy of the above listed materials. Chair Miller asked Mr. Deutsch if he wished to give verbal testimony. Mr. Deutsch said the whole basis for his appeal is based on how St. George is going to read the footnote to the 75' setback under the Shoreland Zoning Ordinance, Section 15(A)(6). He felt this policy section could be read very narrowly or broadly but suggested, as a policy matter, to be read broadly.

Mr. Deutsch said if you look at his particular circumstance, it is somewhat unusual in that the trailer that was put in place is consistent with that very small dock area and in support of Ty's hauling. Under Section 15 (6), it says NHW, nonresidential and accessory, 75' which is LC (Limited Commercial), which Mr. Deutsch said he was.

Mr. Deutsch: "My whole appeal is based on the footnote – not applicable to piers, docks, wharfs, breakwaters, commercial boathouses and other structures projecting into or requiring direct access to the water as an operational necessity. I don't deny that if you just look at the face of the footnote without putting any meaning into it, it's not an absolute operational necessity that Mr. Babb have a trailer there to house all of his equipment. But in the sense of trying to expand my inn business and allow Ty to continue into the future, his hauling business, I believe you can read the footnote as applying that is an operational necessity to make both our businesses compatible so they can both work out of that property."

Board Discussion with the Applicant:

Cohen asked if the trailer was on that lot right now.

Deutsch said Ty put the trailer in without the proper permit.

Cohen asked how long ago?

Deutsch thought about a year ago.

Tarjick asked how far away from the 75' setback is the container?

Deutsch: I think it is over the line by about 8'?

Miller noted that the trailer was put on the property after Deutsch took over the property.

Cohen asked how this came to the attention of the Planning Board?

Deutsch said Mr. Brackett discovered the trailer and sent him a letter reminding him, they had not applied for a permit and had to file a permit.

Miller said Look East is affected by the fact that what it is working water front and some other designations that were not there before. You changed it over?

Deutsch said when he bought the inn in 2012, he believed it had not ever been properly designated and in order for him to get a bank loan to buy the inn, the bank required he comply with the laws and the zoning ordinance. The ordinance is that it is a Limited Commercial property. He noted the whole property is Limited Commercial.

Reinhardt said it was grandfathered and he was not in violation but the bank was the one that required him to be in conformance.

Reinhardt said it was Commercial Fishing and they changed it to Limited Commercial. He said it was never residential that he could recall. He said when the property was Commercial Fishing, that made the inn non-conforming; but it was a grandfathered non-conforming use.

Deutsch said Ty had been fishing there the whole time.

Carey asked what was everyone's opinion on operational necessity?

Cohen said what was important about that statement was the word **or**. It is like an either or. It is two sentences. Two options. An exemption.

Carey said that was his interpretation of operational necessities. "You've got to crank some common sense into this and I look at bait, and a fork truck – all to be necessities to a lobster business."

Miller noted the Board is not arguing about the complete container. He said they were basically discussing 8 feet and whether it was a necessity that the cargo container had to be left on that 8 feet or not. "We are not actually approving anything that the Planning Board said or disproving, we are making our own judgment." "Whatever we do, it is a yes or no."

CEO Brackett Testimony:

-Brackett: "I don't believe his use is water dependent. I don't see that the use would change any if it was moved back beyond the 75' line."

-Cohen asked if there was property for that?

-Brackett: "I feel that there could be. It may not be the easiest thing to do. He explained the photo from google earth and said if you moved it back into here, there are two things that could happen. Right now, that is probably in the flood plain which it could be as an accessory building if there was some adaptations made for it. If they leveled the surface, it would still primarily be behind these bushes and I don't believe you would be seeing it from the inn or at least the Quarry Tavern side of the inn."

-Miller asked CEO Brackett, not speaking for the Planning Board, would it pass muster if the 8' was not into the 75' setback?

-Brackett: "I believe that the letter I wrote Randy, said that he had to remove it because it was within the buffer zone. If it is behind the buffer zone, I don't have an issue with it."

-Cohen asked Deutsch if that option had been presented to him.

-Deutsch: "Yes, it has but that is not a practical option. Again, I don't know if anyone has been to the property. Where it is now, it cannot even be seen from the lawn and I think the used trailer costs around \$2,000 to \$3,000. We are not going to spend \$10,000 digging into my hillside and taking out a tree to move it back 8 feet. The practicality of that is basically why one big reason I also added a variance to this. Again, if you talk about common sense. The way the property is, it really cannot be moved without great expense. If that was the answer, we would just have to pull it out. I am not going to changing the topography of the inn property."

-Tarjick asked if Ty could not use the container, would he still be able to lobster from where he has lobstered for 20 years?

-Deutsch: "Yes, he can. I am not going to deny that. Again, it was a matter of looking to the future because for a long time the inn for various valid reasons, the inn had a limited business plan and I think to my benefit and the benefit of the town, I have really tried to build up the inn business and am having a lot more weddings on the lawn."

-Deutsch said he would like to renovate the chandlery building to be used as a studio for painters or photographers. He has guests of the inn who would like to have classes. Currently the chandlery is being used for storage. He had not talked to Terry but would in advance of any plans. He said a lot of his guests stay off the dock because they do not know he owns it but could visualize for the future, people starting walk across the dock.

-Deutsch said Ty had been very, very good and very cooperative in keeping as neat and as clean and safe as possible but this was just an additional idea to keep the forklift truck he had and various other pieces of equipment locked up during the season. He certainly could and had supported the boat without the container there. Although in the last few years, he has had some equipment in the chandlery which eventually would have to clear out.

-Deutsch said they were not asking to have the container put on wheels. He said there seemed to be no simple solution and that was why he included the variance
Reinhardt said they could talk about a variance, if they got to that point.

There were no further questions for Mr. Duetsch, Ty Babb or CEO Brackett.

Discussion of the Board:

-Reinhardt: "I have a problem with consistency. I think we need to be consistent in this town. There are many places that whether it is in commercial fishing or in limited commercial or even marine residential that people fish off of the dock and they have structures or other accessory structures that's within 75' setback. Not just necessarily grandfathered since this applicable part of the ordinance which is quite old, has been in effect. Take for example at the Port Clyde Co-op. They have fuel storage which if you want to interpret it, it doesn't necessarily have to be in the Shoreland Zone. They have fuel tanks contained that supply fuel to the fishermen. Does that need to be functionally dependent?"

-Miller agreed. He said regarding our rules and regulations, it would be nice for the community if it was a little more open on interpretation. Miller said: "In particular, in this community and this state where the working waterfront is being slowly eaten away, it is tough for us to sit here (myself particular as a member of the working community) just see parts of it eroded because people made little mistakes."

-Reinhardt gave several other examples in town of not being consistent with the interpretation of the 75' setback ordinance. He said the way he looked at it, especially when it came to commercial fishing, it just made sense and logical sense that you were not going to locate something 300' away.

Discussion by the Board:

-Bartholomew asked about considering a variance. Reinhardt said there are four criteria on the variance that the Board would have to satisfy. The reason why they are asking for a variance, is the cause of the owner of the current property.

-Miller said variances are usually only granted because there is no alternative. Variances usually don't restrict the extremes you could go to or the money it could go to.

-Carey again stated it all gets down to what we the Board decides is operational necessity. He said he had done a little lobstering and in his opinion that all that stuff in the trailer is an operational necessity.

-Bartholomew asked about strictly water related.

-Reinhardt said to Babb, you store bait there, right?

-Babb said bait and a fork truck.

-Bartholomew thought as far as being totally water related, a case could be made.

-Cohen said it is a working front.

-Reinhardt said it is still an opinion.

-Deutsch said he and Ty and would be willing to accept any condition that it only applies to this grandfathered container and can only be used for water related purposes.

-Miller said for him, the simplicity was not to set a precedent. He said Boards are different than committees because they have a charge. They have a duty. Miller said the difficulty in making

decisions is you do not want to open the door and the next person that sits there could be 180 degrees out of what you are saying. They could just be fishing for mackerel and they want to put a container on their dock. It is fishing? People make their judgements.

-Cohen noted that this Board has a commitment to look at the law and ask has that law been upheld or not? We should not have an emotional decision about this. We need to find a way to allow this to happen within the law of the town.

-Miller said the Board needs to decide whether this individual container being 8' over the line is directly marine related and whether to approve it or not approve it.

-Board member asked if it moved 8 feet, would that be okay or is it that the whole container has to be more than 8 feet?

-Miller asked if it was sitting right on the line?

- Brackett said it was over about 10 to 12 feet.

-Town Manager Polky: "The issue here is to determine what is functionally water dependent. That is the whole crutch, here. This is something that was put into our ordinance, not because we wanted it, it was mandated by the State. When that was handed down to us, the test was, if you can do that function anywhere else besides right next to the water, then it is not water dependent."

-Cohen asked if expense mattered.

-Polky: "Expense has nothing to do with it. Aesthetics has nothing to do with it. It is the function. It has to be within the water proximity to function, then it is water dependent. If that can be done 100' from the water, then it is not water dependent."

-Cohen asked who in this town has their bait 100' from the water?

-Polky: "I agree with you. There are a lot of people that are in violation of that and that is where you have a problem., if you find in favor in what the state is saying."

-Reinhardt: "I don't agree with the state even when they came up with this because that would mean everybody that has a commercial wharf in Port Clyde or anywhere in the state of Maine, that has a building there and they are using it whether they are storing bait or painting their lobster bouy, or working on their traps, that can be something that can be done more than 75' back, they are all in violation."

-Polky said the Board had the authority to make the decision. If people think the rules are wrong, change the ordinance. Challenge the state.

-Miller agreed that you cannot keep ignoring the rules because you dislike them; you have to change the rules to apply to what people want.

-Polky explained that ordinances can be changed at the town level but they have to be approved by the state. So, if it is contrary to what the state has in their model ordinance, we have to have justification.

Tarjick: Maybe we can further dive into what the state defined. Instead of changing what the state has said, we can explain more in detail what we would like it to be according to the state. For a situation like this, we can look at it and say but it is for a commercial lobstering business so that is okay instead of seeing functionally water dependent. If we did change the ordinance and take it to the state, we could add examples of what functionally water dependent means to St. George.

-Miller: We are still deciding whether this is acceptable or not. If you find the use as it is now as acceptable, then we would have to vote against the Planning Board. If you find the Planning Board to be correct, you would just have to affirm what they said as far as the rule.

-Polky: If this Board rules in favor of the appeal, then you have the case law that says you can do it. You don't have to change the ordinance.

-Reinhardt asked Babb if there was any way he could move the container 8 feet?

-Deutsch: "I haven't gone out there and done a close measurement. I am a little confused as to where the 8' problem is. You can bring in, I guess if you are willing to do it, a crane and lift it up and put it back towards the fence. It can't go any further."

-Carey stated he looked at the container and if anyone tries to move that thing, it is going to come all unglued. It is an old logs trailer.

-Reinhardt: Now that Tim said we have a precedent regarding Allen's Island, it makes me a little bit hesitant. I have no problem with saying that is functionally water dependent. If it could be moved and made conforming 75', Randy could withdraw his appeal and go back to the Planning Board with a new plan saying it is going to 75' and then we do not have to deal with it.

-Polky: I think you can find in the files where the Planning Board has allowed this to happen many times and the town has not enforced it, even since Allen's Island.

-Miller: I am not sure as an individual where I am at. I don't know how comfortable I am setting a precedent.

-Polky: I also know that the town has allowed this to happen without enforcement. That is why we have an appeals board.

-Reinhardt stated there was no question in his mind bait storage on a wharf is important. He said it was just ridiculous to make everything have to be 75' or 100' back when you have a commercial operation.

-Cohen: The code enforcement was done because this is a high visibility spot.

Brackett said no, it had nothing to do with the visibility spot.

-Cohen asked if other people that were in violation getting the same?

-Brackett: "I have not allowed any others to be less than 75' from water."

Miller: "I really think the important part that is being brought up and discussing is almost a philosophy. If you put this on paper and we are going to accept this then you have to start the road how you are going to judge individual cases. They are never the same. There will never be another trailer that is 8' across the line and can't be moved. Next time it will be a boat trailer or a building, whatever. I would like to see a general judgment."

Tarjick: "If we say that the Planning Board was wrong and when we make our determination, if we are to say that it is functionally water dependent, can we limit what we are approving? Can we say, yes this is functionally water dependent but only because it's right next to where he operates his lobster business and the structure includes his fork truck, bait, and supplies?"

-Miller: "What happens in four years? You are individualizing it. In four years when this container is gone and he wants to replace it with another similar product, are we going to come to the Board again or is he going to consider it okay. It's just a replacement. It is not as simple as it sounds. I don't think we can limit it."

-Reinhardt said if you are going to make a ruling in the favor, you have to determine and be specific in the findings of fact what it is that you are determining is functionally water dependent. For example, bait storage is functionally water dependent to the commercial use of

that wharf. You can't just say, well we've ruled that it is functionally water dependent. That leaves it open to a lot of things and what is going on down there.

-Tarjick suggested going set by set on what they were approving. When the next one came up, the Board could say no.

-Brackett: "Are you putting any restrictions on how close to the water they go? Is it that this one is 62' back and no one can go any closer?"

-Miller said everybody puts their bait containers and fork trucks on the wharf.

-Brackett: "But this is not about bait containers and fork trucks."

-Carey: I think it is about water dependent.

Bartholomew asked if there was any practical way that it would be feasible? Allen Island had plenty of room without completely stultifying the operation.

-Miller thought the Board was making this appeal too complicated because more questions were being brought up and he felt this case required a yes or no answer. He said the Board cannot make the laws and the rules.

-Carey said the Board is interpreting water front usage. He liked Crystal's suggestion that in the findings of fact, you cover all of the contingencies.

-Tarjick said she would not have it that was the law for the next time. Just write in the reasons they are approving this as water dependent.

Bartholomew: "If we just overturn the Planning Board would anybody object? Would there be an appeal that could cause us to be taken (unintelligible) for consideration? If we went against the Planning Board, could they say I am going to appeal?"

-Miller said the Planning Board went by the strict interpretation of the rules and their notes said basically see how the Board of Appeal's handles it. Miller said it is either yes or no. Either you agree or disagree with the Planning Board.

-Reinhardt said they were to determine if it was functionally water dependent and cannot try the whole thing all over again.

-Miller: "It is not whether we like the ordinance or not. The Planning Board said it was not a necessity; the structure was not water dependent."

-Cohen asked, "Is it water dependent or not?"

-Miller said it's up to this Board to decide and asked if there was any further discussion. Hearing none, Chair Miller called for a vote.

Motion on Appeal:

A motion was made by Richard Cohen, seconded by Crystal Tarjick to grant the Administrative Appeal on the grounds that the use of the structure is functionally water dependent. A vote was taken. The vote was 5-0. The motion carried.

Findings: The Board of Appeals had reviewed the following facts:

- Randolph Deutsch is owner and operator of the East Wind Inn, Tenants Harbor.
- Mr. Deutsch has allowed Ty Babb to use Mr. Deutsch's wharf for lobster-fishing since he purchased the Inn in 2012. The previous owner also allowed Mr. Babb to use the Inn's wharf. Mr. Deutsch stated Mr. Babb has used the wharf for commercial fishing for the last 20 years.
- Approximately one year ago, Mr. Babb placed an old storage container on the Inn's property to house his forklift and bait which he uses for his lobster-fishing business.

- Mr. Deutsch did not get a permit but requested one after the fact based on a discussion from CEO Terry Brackett.
- On October 23, 2018, the Planning Board denied Mr. Deutsch's request for a permit based on Site Plan Review Ordinance #20(D)(4), as per Shoreland Zoning Ordinance.
- On October 3, 2018, Mr. Deutsch filed an Administrative Appeal.
- On November 15, 2018, The Board of Appeals discussed the nature of the appeal, the Shoreland Zoning ordinances as to whether this storage container was needed for operational use and if the use was functionally water dependent.

Conclusion:

The Board of Appeals passed a motion to grant the Administrative Appeal of Randolph Deutsch, Look East Investments, LLC (East Wind Inn) on November 15, 2018.

The Board voted to adjourn the hearing and to schedule November 29, 2018 at 5:30 p.m. as the follow up meeting to review the Board minutes and Findings and Conclusion and approve the written decision.

Dated November 29, 2018.

Steve Miller, Chair

Mark Bartholomew

Richard Cohen

Crystal Tarjick

William Reinhardt