

Kennebunkport Zoning Board of Appeals
Virtual Meeting (Via Zoom)
June 8, 2020 @ 6:00 P.M.

A virtual meeting of the Kennebunkport Zoning Board of Appeals was held on Monday, June 8th, 2020. The meeting convened at 6:00 p.m. via Zoom.

Members Present: Mr. Paul Cadigan (Chair), Gordon Ayer, April Dufoe, Wayne Fessenden, Jim Fitzgerald, Kevin McDonnell, Karen Schlegel
Others Present: Werner Gilliam, CEO

1. Attendance

Mr. Cadigan opened the meeting, explained the format and process for tonight's Zoom meeting, took attendance and confirmed a quorum.

2. Approval of minutes from March 9th, 2020 and any other minutes not previously approved.

This item was deferred until the next Zoning Board of Appeals meeting.

*3. **Randy Slager, Applicant** (submission date 12/27/2019) – The Applicant is appealing the lifting of suspension of permit in violation of Subsection 11.5.C. (200 Ocean Avenue, Tax Map 7, Block 12, Lot 5 in the Cape Arundel Zone,) The Hearing is to determine if the Board has jurisdiction to hear the appeal under L.U.O. Section 9.2.A.1. and 2.*

Mr. Cadigan introduced this Agenda item noting the Land Use Ordinance requires an Application be heard within a 35-day period under section 9.3.D. which has been extended by agreement of all of the parties for this item and the next Agenda item.

Mr. Cadigan acknowledged he recused himself the last time this Applicant appeared before the Board but not having any contact or professional relationship with the Applicant. Mr. Cadigan added he does not believe there is a conflict of interest with regard to hearing tonight's matters but will defer to the Board members to make that decision.

Mr. McDonnell made a motion to allow Mr. Cadigan to hear the matters before the Zoning Board of Appeals this evening based on the information he just provided. Mr. Fitzgerald seconded the motion and the vote was unanimous. Mr. Cadigan abstained from voting.

Mr. Cadigan reminded all participants they will have time for rebuttal after all parties have made their presentations. Mr. Cadigan acknowledged receipt of memorandums from Attorney Lourie, Attorney Rosenthal, and Attorney Tchao, all of which are detailed and have been reviewed by each member of the Board. Mr. Cadigan also asked all parties to not reiterate their memos in their presentations tonight and to limit their comments to the agenda item which is whether or not the Zoning Board of Appeals has the jurisdiction to hear this appeal under Land Use Ordinance 9.2.A.1. and 2.

Attorney David Lourie, representing Mr. Randy Slager, addressed the Board and gave a brief presentation initially focusing on Attorney Tchao's comments and the fact that Attorney Tchao is not representing the Zoning Board of Appeals but rather the Code Enforcement Office, recognizing one cannot simultaneously serve as counsel to the Board and represent Mr. Gilliam. Attorney Lourie then centered his argument on the premise that the Land Use Ordinance Section 9.2. is not consistent with state law, specifically Title 30A-§4353 which requires the Board to exercise jurisdiction on any appeal from the Code Office unless the Land Use Ordinance provides for a direct appeal to the Superior Court. Attorney Lourie argued the law court has repeatedly ruled that any doubt as to whether a board of appeals has jurisdiction of land use and code matters must be exercised in favor of the board jurisdiction because of the wording of section 4353 and because there is strong public policy disfavoring direct appeals to the Superior Court. Citing the last sentence of Article 9.1.A.1. which states "*Such enforcement actions*

are appealable only to the Courts as allowable by law and rules of civil procedure”, Attorney Lourie commented this does not create a right of direct appeal to the Superior court which is what the statute says you have to do in order to oust or divest the Board of Appeals from their usual jurisdiction. Attorney Lourie concluded his presentation by reiterating that the town ordinance does not comply with the statute and cautioned the Board that if it doesn’t hear this appeal now, it will eventually when it is remanded back to the Board by Superior Court.

Mr. Cadigan asked the Board members if they had any questions for Attorney Lourie.

Mr. Fitzgerald asked about the length of time it took for an appeal to be filed. Attorney Lourie responded his client had 30 days to appeal to this Board and the to court and they did both.

Mr. McDonnell asked for clarification from Attorney Lourie on the premise of his discussion is the fact that the word ‘Superior’ is missing in reference to the courts in Article 9.1.A.1. Attorney Lourie replied No the ordinance is not consistent with the state statute and because it is not consistent with the statute the default provision applies which is that the board has jurisdiction to hear this matter.

Citing the same sentence from Article 9.2.A.1. that states “enforcement actions are appealable only to the Courts as allowable by law and the rules of civil procedure”, Mr. Cadigan asked that the rules of civil procedure direct that you need to file the action in Superior Court as a mandatory element of Rule 80B. Attorney Lourie responded that rule 80B does not allow this Board to proceed and doesn’t deal with what happens between the Code Enforcement Office and the Board of Appeals except that a final decision is rendered and appealable by the courts. Mr. Cadigan then asked if Rule 80B and the Maine rules of Civil Procedure pertain to any other court in the State of Maine, not District Court or Probate Court. Attorney Lourie replied Rule 80B does not, adding it is not only inconsistent with statute it is also vague.

There were no further questions from the Board for Attorney Lourie.

Representing the Code Enforcement Office and Mr. Werner Gilliam, Attorney Amy Tchao addressed the Board and gave a detailed presentation detailing where the Zoning Board of Appeals derives its authority from, specifically a combination of statute and local law. Attorney Tchao continued stating that the Zoning Board of Appeals is a body of limited jurisdiction that Maine law has been noticeably clear that boards of appeals cannot exercise jurisdiction over matters that are not expressly conferred upon. Citing state statute 30A-§2691 which states “*No board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board*”, Attorney Tchao explained that even though there might be some general rule that boards of appeals can hear enforcement matters, a municipality has the authority to decide what matters should/should not be heard by the board of appeals. Attorney Tchao agreed with Mr. Cadigan’s point that any decision that is a final decision, the appeal of that decision is clearly to be submitted under rule 80B. Attorney Tchao also argued that Article 9.2.A.1. does exactly what the statute in Title 30A-§2691 allows a municipality to do in caveating the Board of Appeals with respect to certain Code Enforcement decisions and continues that any action or decision is not appealable to the Board of Appeals. Attorney Tchao also dismissed Attorney Lourie’s argument that because the ordinance doesn’t specifically say Superior Court and as opposed District Court, it is confusing since Attorney Lourie know what court to file his appeal. Attorney Tchao concluded her presentation by stating the Zoning Board of Appeals does not have jurisdiction over the lifting of a permit.

Attorney Daniel Rosenthal, representing the owners of 200 Ocean Avenue, addressed the Board and gave a brief presentation stating he agrees with Attorney Tchao that appeals on enforcement matters should be decided in the courts. Attorney Rosenthal also stated that he is not arguing that the ordinance overrules the statute but instead the ordinance does what the statute allows you to do. Attorney Rosenthal concluded his brief summary by stating the appeal from December 27, 2019 is moot.

There were no questions from the Board members for Attorney Rosenthal.

Mr. Cadigan asked Attorney Lourie to provide his rebuttal remarks at this time.

Attorney Lourie acknowledged Attorney Tchao's citation of section 2691 but cautioned that section 2691 must be read in *pari materia* with section 4353. Attorney Lourie concluded this situation is governed by section 4353 of the state statute and that section 2691 is a red herring.

Mr. Cadigan asked the Board members if they had any questions for Attorney Lourie at this time.

Ms. Dufoe asked if there is a reason why Attorney Lourie would rather have the Zoning Board of Appeals here this matter rather than in the court. Attorney Lourie responded he would rather here this matter in the court but feels the court will only send the matter back to the board. Attorney Lourie continued that he believes the court wants to see a record developed by this board and under the statute he does not believe this Board has a choice but to hear the matter.

There were no further questions from the Board members.

Mr. Cadigan asked Attorney Tchao to offer her rebuttal remarks.

Attorney Tchao offered a brief statement disagreeing with Attorney Lourie that section 2691 is a red herring and adding that the December 27, 2019 appeal is moot and should be dismissed on that basis.

There were no questions from the Board members.

Attorney Rosenthal was offered the opportunity to provide rebuttal remarks as well. Attorney Rosenthal stated the ordinance is not confusing, Attorney Lourie admitted he is not confused by the ordinance and the fact that he appealed to the Superior Court and did it correctly shows he is not confused by the ordinance.

There were no questions from the Board members for Attorney Rosenthal at this time.

Ms. Dufoe asked Mr. Gilliam if he can ever remember a Superior Court sending something back to the Board with regard to an enforcement issue. Mr. Werner Gilliam replied no, there have been remands that have come back to the Zoning Board of Appeals but those were not related to enforcement matters.

Mr. Cadigan opened the Public Hearing portion of the meeting and asked if there were any folks listed as abutters or members of the public who would like to comment.

There were no questions or comments from abutters or the general public. Mr. Cadigan closed the Public Hearing.

Mr. Cadigan asked each of the Board members to offer their opinions on the matter before the Board regarding the appeal filed on December 27, 2019 and does the Board have jurisdiction to hear this appeal.

Mr. Fitzgerald offered his opinion that Attorney Lourie had no made any significant change to his thinking on whether or not this appeal should be heard and he doesn't believe the Board should accept this appeal. Mr. Fitzgerald added he is basing his opinion mostly on the ordinance.

Basing her opinion on the ordinance, Ms. Schlegel offered her opinion that this is not something that should be heard before this Board.

Mr. Fessenden commented it is cited in two places in the ordinance, 9.2.A.1. and 9.2.A.2. that this matter is not under the jurisdiction of the Zoning Board of Appeals.

Mr. Ayer had no comments at this time.

Mr. McDonnell stated he believes our ordinance is clear what this Board can and cannot do.

Ms. Dufoe offered her opinion based on the Town Ordinance and the state law that says any notice of violation issued by the Code Enforcement Office is not appealable to the Board of Appeals adding the courts have never sent anything back to the town boards because one of our ordinances is vague or not well written.

Mr. Cadigan agreed with the Board members opinion citing that Article 9.2.A.1. gives a direct line to the Superior Court for appeals on enforcement related matters.

Ms. Dufoe made a motion the Zoning Board of Appeals does not have jurisdiction to hear the appeal of Randy Slager in the Application submitted on December 27, 2019. Mr. Fitzgerald seconded the motion and the vote was unanimous, 7-0 in favor of the motion.

4. ***Randy Slager, Applicant*** (submission date 3/25/2020) – The Applicant is appealing the lifting of suspension of permit without all corrective measures ordered being taken. (200 Ocean Avenue, Tax Map 7, Block 12, Lot 5 in the Cape Arundel Zone.) The Hearing is to determine if the Board has jurisdiction to hear the appeal under L.U.O. Section 9.2.A.1. and 2.

Mr. Cadigan introduced the Agenda item and noted again that all parties agreed to an extension of the appeals to be heard today.

Mr. Cadigan asked each of the Attorneys at the meeting to take this opportunity if they wanted to add any further information.

Attorney Lourie reiterated that the Ordinance does not apply nor does Section 2691 of state statute and expects the courts to remand this matter back to this Board.

Mr. Cadigan asked Attorney Lourie if he is suggesting that this Board determine that the provisions in our Ordinance failed to comply with state statute and the Board should interpret that statute to direct us to take on this appeal. Attorney Lourie replied the state statute is very clear that this Board is required to hear appeals or any action.

There were no further questions from the Board members

Mr. Cadigan asked Attorney Tchao for any comments.

Attorney Tchao stated she does not have any substantive comments to add and disagree strongly with Attorney Lourie's statement that section 2691 is a red herring. Attorney Tchao also complimented the Board members on their coherent and concise comments.

Attorney Rosenthal reiterated his prior statements and offered that the Board members' deliberations reflect what the parties have submitted and have based their decisions on the Ordinance.

There were no questions from the Board members for either Attorney Tchao or Attorney Rosenthal at this time.

Mr. Cadigan asked all parties if they would like to offer any rebuttal comments. None of the Attorneys requested to offer any further comments.

Mr. Cadigan opened the Public Hearing portion of the meeting. There were no comments or questions from any attendees. Mr. Cadigan closed the Public Hearing.

Mr. Cadigan asked the Board members to indicate their direction of voting on this matter.

Mr. Fitzgerald offered he sees no change between the two appeals and offers the same arguments he gave in the first appeal.

Ms. Schlegel commented she feels the same that there is nothing new to add and reiterates what she offered before.

Mr. Fessenden agreed with Mr. Fitzgerald and Ms. Schlegel and reiterated his comments from the first Agenda item.

Mr. Ayer also agreed with his fellow Board members offering that Agenda Item #2 points out some deficiencies in our Ordinance that they do not have the opportunity to appeal to this Board. Mr. Cadigan offered while the Applicant does not necessarily have the opportunity to appeal to this Board, they still have the opportunity to appeal in court.

Mr. McDonnell, Ms. Dufoe, and Mr. Cadigan all reiterated their earlier comments.

Ms. Dufoe made a motion that the Zoning Board of Appeals does not have the jurisdiction to hear the Application received by Randy Slager submitted March 25, 2020. Mr. Fessenden seconded the motion and the vote was 6-1 in favor of the motion. Mr. Ayer voted against the motion. Mr. Cadigan announced the motion has passed and the Board holds it does not have jurisdiction to hear the second appeal.

Adjournment: A motion was made to adjourn; it was seconded and the vote was unanimous.

Submitted by: Patricia Saunders, Recording Secretary