

SUBMISSION BY FRIENDS OF LAMOINE TO THE APPEALS BOARD FOR THE
DETERMINATION OF QUESTIONS A through H PRIOR TO HEARING

a. Jurisdiction:

To determine whether the Lamoine Board of Appeals has jurisdiction to hear an appeal from the decision of the Code Enforcement Officer on a formal complaint, it is necessary to examine the relationship between the various town ordinances implicated and state statutes and case law involved. It is not possible to cite one section of an ordinance or statute as decisive on this issue.

Although the Lamoine Gravel Ordinance states that "Any decision of the Lamoine Planning Board may be appealed by any party of standing to the Lamoine Board of Appeals." (Section 7(G)(1)), this does not mean that this is the exclusive means by which a party may appeal a decision with regard to a violation the Lamoine Gravel Ordinance.

To be clear, Friends of Lamoine's formal complaint filed with the CEO was for the failure to apply for a permit and not for any permit that had been obtained under a Site Plan Review or Commercial Building application.

From a plain reading of the entire Gravel Ordinance, it is apparent that Planning Board decisions appealed to the Appeals Board are limited to issues of related to the gravel permitting process and not whether the ordinance has been violated for the failure to obtain a permit. See, CEO's memo of December 16, 2014, stating the the reason to deny jurisdiction is that the Gravel Ordinance only allows a Planning Board decision to be appealed to the Appeals Board.

It is the Code Enforcement Officer who ensures compliance with all town ordinances and regulations. (See Section 9.A of the Lamoine Building and Land Use Ordinance). The Lamoine Planning Board is simply not empowered to make any final determination as to whether an ordinance violation has occurred by the failure to obtain a necessary approval. As the Building and Land Use Ordinance (BLUO) makes clear, "The Code Enforcement Officer shall be appointed by the Board of Selectmen for the purposes of ensuring compliance with, and assisting the Planning Board in the administration of all town ordinances and regulations." It is the CEO who performs the actual investigation of a violation. (see BLUO at Section 9.A). The Planning Board cannot render a decision, whether a failure to obtain a permit or an application for a permit, on a matter that was not before it i.e., a gravel permit for the subject project.

Reference is made by Respondent to Title 30-A §2691 as the basis for denying the Appeals Board jurisdiction in an appeal from a decision by a CEO in response to a formal complaint and, specifically, to a determination by the CEO that no action is required. This section states, in part, "Absent an express provision in a charter or ordinance that certain decisions of its code enforcement officer or board of appeals are only advisory or may not be appealed, a notice of violation or an enforcement order by a code enforcement officer under a land use ordinance is reviewable on appeal by the board of appeals and in turn by the Superior Court under the Maine Rules of Civil Procedure, Rule 80B." (underline added).

The conclusion then from this language that only a notice of violation or an enforcement order may be appealed absent express language to the contrary is erroneous. Nowhere is it stated in §2691 that a formal complaint to a CEO that results in a finding of no ordinance violation is not appealable.¹

It is clear from both the Maine Revised Statutes and case law² that the Lamoine Gravel Ordinance is a zoning ordinance. Title 30-A, §4301.15-A, of the Maine Revised Statutes, states:

‘Zoning ordinance’ means a type of land use ordinance that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district. (underline added).

There is an important relationship and interplay between the Lamoine BLUO and the Gravel Ordinance, and the fact that they are not independent of each other, that cannot be overlooked in determining jurisdiction. Not only does the BLUO establish standards for a variety of land use activities but it also specifies what types of land uses are allowed within a particular zone (see p.10 of the BLUO, Table of Land Uses). One of these land uses is Sand/Gravel Pits, Etc. (#27 on the list of Land Use Descriptions) which are allowed only in the Development Zone and the Rural and Agricultural Zone.³

Further, the BLUO makes clear in footnote 2 attached to "Sand/Gravel Pits, Etc." that the Gravel Ordinance is a part of and incorporated into the BLUO for this particular land use: "See separate standards in the Lamoine Gravel Ordinance."

With regard to appeals, the BLUO states:

The Board of Appeals, upon written application of an aggrieved party within 30 days of Code Enforcement Officer or Planning Board determination, and after public notice, may hear appeals of such determinations on administrative grounds. Such hearings shall be

¹ Respondent’s letter to the Appeals Board dated December 16, 2014 also incorrectly cites two cases for the proposition that the present matter should be "filed directly with Superior Court". In fact, both cases involved a CEO’s refusal to find a violation that were appealed first to the local Appeals Board and then to the Superior Court.(see, Richert v. City of Portland, 740 A.2d 1000, (ME 1999), and Toussaint v. Town of Harpswell, 698 A.2d 1063, (ME 1997)).

² See George BENJAMIN et al.v. Lucien HOULE et al, 431 A.2d 48 (ME 1981).

³ The zones of the Building and Land Use Ordinance where new Sand/Gravel Pits, Etc. are allowed was amended on June 10, 2014.

held in accordance with state law. Following such hearings, the Board of Appeals may reverse the decision of the Code Enforcement Officer only upon a finding that the decision is clearly contrary to the provisions of this ordinance. (Section 8.B)

The above language does not limit a CEO decision to any particular type determination and does not exclude determinations as to whether this ordinance has been violated. It is not possible to read the Gravel Ordinance in isolation since the BLUO provides the zones where the standards of the Gravel Ordinance are to be applied. An unpermitted gravel pit as defined by the standards set forth in the Gravel Ordinance is a violation Etc. as listed in the Table of Land Uses and allowed in a particular zone is, when applying the incorporated standards of the Gravel Ordinance (1) is a determination to be made by the CEO that is (2) appealable as a jurisdictional matter to the Board of Appeals. Whether or not the effect of an Appeals Board on this matter is advisory or has some other consequence if it were found that a violation had occurred, is not germane to the question of whether the Appeals Board has jurisdiction to hear an appeal on the formal complaint.

In similar respect, the decisions of the Planning Board or Appeals Board on the the Site Plan Review and the expiration of the time for appeal on those decisions, is not material to whether jurisdiction exists in the Appeals Board. Whether or not the Gravel Ordinance shall apply to the Gott matter is part of the merits of the case and not the initial determination of jurisdiction. Again, this is an appeal based on a formal complaint that a necessary permit was not obtained and is not a complaint about what was already granted,

b. Standing of Applicant

The formal complaint and appeal were signed by several members of Friends of Lamoine. The membership of Friends of Lamoine is not limited to those signing these documents. Although no physical abutter to the Gott property in question is a member of Friends of Lamoine, one member resides in the immediate vicinity and will be present at the hearing on February 25, 2015 to show the particularized injury necessary for the group to establish standing. Being a physical abutter is not the sole test for a determination of standing.

c. Parties to Hearing

It is the Friends of Lamoine position that the proper parties to the hearing for the eight threshold questions are the Code Enforcement Officer and the Friends of Lamoine. Any other parties are to be determined by the Board of Appeals as part of their initial determinations.

d. Timeliness

The Friends of Lamoine filed their formal complaint with the CEO on October 22, 2014. The CEO responded with his decision on November 13, 2014. The Appeals Board received the appeal on December 12, 2014 and within the 30 days specified for prosecuting an appeal.

The is an appeal from a decision on the formal complaint. The reiteration that this is an appeal of a prior decision of the Planning Board is immaterial and irrelevant.

e. Poll Board for Conflicts of Interest

Friends of Lamoine has taken no position on conflicts of interest at the present time.

f. Determination of Quorum—makeup of hearing board

Whatever discussion or comments were made at the prior meeting of the Appeals Board on this matter, these are reviewable by any Appeals Board member through the recording made of the meeting. In any event, to the extent that the merits of the case were discussed prior to the determination of the threshold questions, such interchange should not affect the participation of any absent member.

g. Rules of Procedure/Hearing Format

The proceedings should be conducted in accordance with state law.

h. Time and location of hearing

Time of hearing should set for after the appropriate public notice.
Hearing should be held in a venue where it can be recorded.

Respectfully submitted on behalf of Friends of Lamoine,

/S/ Kathleen Rybarz

Dated: March 11, 2015