

## RUDMAN WINCHELL MEMORANDUM

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FROM: Ed Bearor, Esq., Rudman Winchell  
TO: Town of Lamoine Board of Appeals  
Date: July 10, 2014

RE: Planning Board Request for Reconsideration  
Doug Gott & Sons Inc. Site Plan Application

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Applicant / Appellant Doug Gott & Sons, Inc. provides the following Memorandum to the Town of Lamoine Board of Appeals regarding a request for reconsideration by the Lamoine Planning Board.

### History

On January 21, 2014, Doug Gott & Sons, Inc. (hereinafter "Gott") submitted a detailed application to the Town of Lamoine Planning Board under Lamoine's Site Plan Review Ordinance. The application sought approval for construction of a 3,200 square foot, three-bay garage building on land owned by Gott in Lamoine, designated as Map 3, Lots 6 & 8 in the Lamoine assessors' maps. As proposed, the project would involve removal of approximately 70,000 cubic yards of gravel and other materials, to reduce the grade of the project site prior to construction.

The Planning Board denied the application at its meeting on March 4, 2014 following a public hearing. The stated reason for denial was that the applicant failed to demonstrate compliance with section J(1) of the Site Plan Ordinance's General Review Standards. Section J(1), in its entirety, provides as follows:

1. Preserve and Enhance the Landscape:

The landscape shall be preserved in its natural state insofar as practicable by minimizing tree removal, disturbance of soil, and retaining existing vegetation during construction. After construction is completed, landscaping shall be designed and planted that will soften or screen the appearance of the development and minimize encroachment of the proposed use on neighboring land uses.

Environmentally sensitive areas such as aquifers, significant wildlife habitat, wetlands, steep slopes, floodplains, historic buildings and sites, existing and potential archaeological sites and unique natural features will be maintained and preserved to the maximum extent.

Gott filed a timely appeal from the Planning Board's decision, under section M of the Site Plan Review Ordinance. The Board of Appeals held its hearing in May and on June 4, 2014 deliberated and announced its decision. Planning Board Chair John Holt was present, on behalf of the Planning Board. Attorney Ed Bearor attended on behalf of Gott. Lamoine Code Enforcement Officer Michael Jordan was also present.

Following its hearing, the Board of Appeals determined that the Planning Board had erred in its application of Site Plan review standard J(1) and voted to remand the application to the Planning Board with instructions to establish a limited construction period and impose buffering requirements between the project and an adjacent residential property. These conditions were acceptable to Mr. Gott and through counsel, he agreed to abide by them. However, the Board determined that it could not impose the conditions and, therefore, as part of its ruling it remanded to the Planning Board to impose the conditions and issue the permit to the applicant.

In its findings of fact, also approved at the June 4, 2014 meeting, the Board of Appeals, among other findings, determined that the garage as proposed would minimize visual disturbance as opposed to a garage built at the natural ground level ("Fact 3") and that the lack of language stating how much soil disturbance was too much made review standard J(1) vague ("Fact 4").

On June 12, 2014, the Lamoine Planning Board submitted a written request that the Board of Appeals reconsider its June 4<sup>th</sup> decision, on eight grounds bulleted in the Planning Board's attached memo.

Several of the Planning Board's cited grounds for reconsideration take issue with the form of the Board of Appeals' decision regarding interpretation of Site Plan review standard J(1). Other grounds challenge the Board of Appeals actions in receiving additional factual information at its hearing and site visit and in making findings of fact, on grounds that the Board of Appeals was limited by section M of the Site Plan Ordinance to a purely appellate role. Two other cited grounds challenge the Board of Appeals' authority to remand the application to the Planning Board with instructions to place certain conditions on approval of the application; and the sufficiency of the Board of Appeals' instructions concerning the conditions to be imposed.

### Discussion

The Planning Board's request raises a number of issues concerning the proper scope of review and the Board of Appeals' proper role with respect to Gott's application. Before addressing those issues, however, it is important to examine the proper role of the Planning Board in regard to appeals from that board's decisions.

#### Planning Board's Standing

As a general rule, municipal boards and their members do not have standing appeal or participate in appeals by others from the board's own decisions.<sup>1</sup> Like the Board of Appeals, the

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<sup>1</sup> This general principle has found expression by the Law Court in a variety of contexts. *See, e.g., Inhabitants of Boothbay Harbor v. Russell*, 410 A.2d 554 (Me. 1980) (municipal zoning board of appeals was not a proper party to

Town of Lamoine's Planning Board was supposed to act in a quasi-judicial role as a fact-finder and hearing board in regard to Gott's application. The Planning Board, if acting within its designated role, was not a party or an advocate with respect to the application. Nor (hopefully) can any Planning Board member or the Planning Board as a whole claim to have suffered the sort of "particularized injury" by reason of the grant or denial of Gott's application that is a necessary element of individual standing under Maine law in most land use appeals cases.<sup>2</sup>

Because neither the Planning Board nor its individual members were "parties" to the Planning Board's own hearing, both the Planning Board and the Board's members individually lack standing to challenge the Board of Appeals' decision on appeal or ask that the decision be reconsidered.

Gott has a due process right to an impartial finder of fact in proceedings on its permit application. This right applies and continues at each level of proceedings and appeals. The sort of advocacy or particularized injury that would support individual standing as a party by the Planning Board or its members would also violate Gott's right to an impartial fact-finder and would support a claim of impermissible bias with respect to Gott's application. If members of the Planning Board consider themselves to be advocates for denial of Gott's application, or believe that they will suffer particularized injury if the permit is granted and the garage is built, then the Planning Board members concerned are disqualified from acting on the application. Personal interest or advocacy with respect to a pending application is entirely inconsistent with the Planning Board's official quasi-judicial role.

Maine law provides a limited, statutory exception to the general requirements for standing that apply in most permit cases. Title 30-A M.R.S. section 4353(1) and (3), addressing the procedure for administrative appeals in zoning cases, provide as follows:

**Sec. 4353. Zoning adjustment**

Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section.

**1. Jurisdiction; procedure.** The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless only a direct appeal to Superior

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a Rule 80B appeal challenging the board's decision; Rule 80B appeal brought only against the Board of Appeals must be dismissed); *Assessors of Town of Bristol v. Eldridge*, 392 A.2d 37 (Me. 1978) (municipal assessors lacked standing to file a Rule 80B appeal contesting county commissioners' decision that reversed the assessors' valuation decision); *Cohen v. Board of Selectmen, Town of Kennebunk*, 376 A.2d 853 (Me. 1977) (municipal selectmen who dissented from the board of selectmen's grant of a wharf license had no standing in their official capacity as select board members to appeal the decision of the board's majority to Superior Court under Rule 80B).

<sup>2</sup> As a general matter, persons seeking to establish individual standing to contest the grant of a municipal permit must demonstrate that they (a) actually participated in hearings conducted by the original decision-maker *see Lucarelli v. City of South Portland*, 1998 ME 239, 719 A.2d 534 (Me. 1998), among others and (b) will suffer "particularized injury" if the grant of the permit is upheld, *see Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me. 1983), among others.

Court has been provided by municipal ordinance. . . .

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**3. Parties.** The board shall reasonably notify the petitioner, the planning board, agency or department and the municipal officers of any hearing. These persons must be made parties to the action. All interested persons must be given a reasonable opportunity to have their views expressed at any hearing.

The narrow exception provided by this statute is limited to *zoning* appeals cases. It does not apply to other types of appeals in other types of cases.

The present appeal is not a zoning appeals case. Gott’s application does not raise any issues concerning interpretation or application of the *zoning* provisions of Lamoine’s Land Use Ordinance. Instead, all issues in the present case arise under the Town’s separate Site Plan Review Ordinance.

A municipal site plan review ordinance is not a zoning ordinance. *See, e.g., Bragdon v. Town of Vassalboro*, 2001 ME 137, para. 8 and 9.<sup>3</sup> Because the Site Plan Review Ordinance is not a zoning ordinance, 30-A M.R.S. section 4353(3) does not apply. Accordingly, because no other statute or Town ordinance confers “party” status on the Planning Board with respect to the pending application, the Planning Board is not a “party” before the Board of Appeals, and has no standing to challenge the Board of Appeals’ decision on the appeal, by way of a request for reconsideration, direct appeal or otherwise.

The Planning Board’s lack of standing extends to challenges to the Board of Appeals’ overall decision, as well as to challenges to the standard of review or type of hearing conducted by the Board of Appeals. Any legal challenge to those aspects of the Board of Appeals’ decision must be raised, if at all, by a party to the proceedings, and not by the Planning Board or its members individually.

### Scope of the Remand

The Planning Board’s lack of standing however, does not prevent the Planning Board from seeking clarification of the scope of the Board of Appeals’ remand. If uncertainty exists concerning the scope of issues to be reviewed by the Planning Board upon remand, the Board of Appeals may take action to clarify its original decision in light of the Planning Board’s request.

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<sup>3</sup> . . . A zoning ordinance is a specific type of land use ordinance ‘that divides a municipality into districts’ and ‘prescribes and reasonably applies different regulations in each district’. [Citing 30-A M.R.S. sec. 4301(15-A).] Zoning involves the ‘particularistic division of the city into zones for the purpose of applying different proscriptions and . . . regulations in the different zones.’ [Citations omitted.] Municipal regulations that regulate ‘in a general and uniform city- or town-wide manner’ such as a building code, do not qualify as zoning.

“The site review ordinance at issue resembles a building code rather than a zoning ordinance. It does not regulate growth or determine where within a community a particular facility should be located. Instead it applies specific standards for construction on any site, without regard to the number or location of sites to be developed.”

In clarifying the scope of its remand, the Board of Appeals may also give consideration to those provisions of the Site Plan Review Ordinance that have been highlighted in the Planning Board's request.

In particular, section M of the Site Plan Review Ordinance, concerning appeals, provides in part as follows:

“When errors of interpretation are found, the board of appeals may modify the interpretation or reverse the order of the board but may not alter the conditions attached by the board. All changes in conditions, other than changes made by the granting of a variance, shall be made by the board, in accordance with the board of appeals' interpretation.”

Under this language the applicant, Doug Gott & Sons, Inc., believes that it is appropriate for the Board of Appeals to undertake the following actions in response to the Planning Board's request:

(1) Reaffirm the Board of Appeals' finding that General Review Standard J(1) fails to provide meaningful guidance concerning extent of tree removals, soil disturbance and removal of existing vegetation that are allowed under the Site Plan Review Ordinance, and that General Review Standard J(1) is therefore impermissibly vague and cannot be applied as a grounds for denial of the permit application.<sup>4</sup> *See Bragdon v. Town of Vassalboro*, 2001 ME 137, para. 6 (“A standard that is too vague is a standard that is void.

(2) Reaffirm the Board of Appeal's reversal of the Planning Board's March 4, 2014 denial of the Gott permit application.

(3) Identify any review standards under the Site Plan Review Ordinance that were inadequately addressed in the Planning Board's findings or fact or written decision as a result of the Planning Board's vote to deny the application in its entirety.

(4) Remand the application to the Planning Board for entry of additional factual findings or revision of the Planning Board's decision with respect to the review standards identified by the Board of Appeals as not having been adequately addressed in the Planning Board's March 4, 2014 denial.

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<sup>4</sup> *See Bragdon v. Town of Vassalboro*, 2001 ME 137, para. 6 (“A standard that is too vague is a standard that is void. *Kosalka v. Town of Georgetown*, 2000 ME 106, para. 12, 752 A.2d 183, 186. A void site review standard cannot be applied to bar an application.”)

## Standard of Review

Although the Planning Board lacks standing to contest the standard of review applied by the Board of Appeals in this case, the applicant nonetheless wishes to comment on that issue briefly.

The Planning Board's discussion of this issue suffers from a fundamental flaw, by confusing the Board of Appeals' *scope of review* under section M of the Site Plan Review Ordinance with the *standard of review* applicable to the Board of Appeals proceedings.

Under section M of the Site Plan Review Ordinance, the *scope* of the Board of Appeals' review is expressly limited to "appeals involving administrative procedures or interpretation of this ordinance." This limitation is consistent with the provisions of Maine's Board of Appeals statute, 30-A M.R.S. section 2691(4). That subsection provides, in part, that:

"No board [of appeals] 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."

Thus, it would be correct for the Planning Board to assert that the Board of Appeals may not overturn any *purely factual finding* made by the Planning Board that is *unrelated* to administrative procedures or ordinance interpretation issues, or overturn any permit conditions imposed by the Planning Board.

However, within the proper scope of its jurisdiction, section M of the Site Plan Review Ordinance does not limit, or purport to limit, the Board of Appeals to a purely appellate review of the Planning Board record. When considering whether or not the Planning Board erred with respect to administrative procedures or interpretation of the Site Plan Review Ordinance, the Board of Appeals remains free to conduct hearings, receive evidence and enter relevant factual findings. To take a mundane example, if the Planning Board denies a permit application on the ground that required notices were not given or the application was untimely, the Board of Appeals, in a review of those determinations, is not bound by the factual record made by the Planning Board, but may and take additional evidence concerning those issues.

The Board of Appeals' ability to take additional evidence concerning those matters within its jurisdiction is underscored by the board of appeals statute and the Maine Law Court's decision in *Stewart v. Sedgewick*, 2000 ME 157.

Title 30-A M.R.S. section 2691(3), governing board of appeals procedures, provides in relevant part as follows:

**D.** The board may receive any oral or documentary evidence but shall provide as a matter of policy for the exclusion of irrelevant, immaterial or unduly repetitious evidence. Every

party has the right to present that party's case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct any cross-examination that is required for a full and true disclosure of the facts.

Citing section 2691(3)(D) the Maine law Court, in *Stewart*, 2000 ME 157 para. 7, held as follows:

. . . unless the municipal ordinance explicitly directs otherwise, a Board [of appeals] must conduct a hearing de novo. When a Board holds a hearing de novo, it does not examine the evidence presented to the decision maker or tribunal below, nor does it review the procedure below except to assure that the matter is properly before it. Instead, it looks at the substantive issues afresh, undertakes its own credibility determinations, evaluates the evidence presented, and draws its own conclusions. Thus, in the absence of an explicit ordinance creating a purely appellate review by the Board, the function of the Board is to take evidence, make factual findings, and apply the laws and ordinances to the petition or application at issue, and do so independently of the decision, if any, of the lower tribunal.

Thus, in reviewing those matters within the scope of its jurisdiction, the Lamoine Board of Appeals *is not bound* by the record and findings made by the Planning Board, and indeed *should give no consideration to them*.

The Planning Board's assertion that the Board of Appeals was limited by ordinance to a purely appellate role and therefore erred in entering its own factual findings reflects a fundamental misunderstanding of the Site Plan Review Ordinance, 30-A M.R.S. section 2691 and the applicable case law. The Board of Appeals did not err by taking new evidence on those matters within the scope of its jurisdiction. Reconsideration should not be granted on the basis of this argument by the Planning Board.

July 10, 2014

Doug Gott & Sons, Inc.

(By)



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