

BEFORE THE TOWN OF LAMOINE BOARD OF APPEALS

In Re: Moldawer v. Code Enforcement Officer

To: Chair and Board of Appeals
From: Alan Moldawer, Appellant
Date: August 12, 2019

APPELLANT'S PRE-HEARING STATEMENT AND BRIEF

Appellant, Alan Moldawer, hereby respectfully submits to the Board of Appeals of the Town of Lamoine the following pre-hearing statement and exhibits:

ISSUE ON APPEAL

1. This is an appeal to the Board of Appeals from the determination of the Town of Lamoine Code Enforcement Officer (CEO) dated April 3, 2019 that the new house erected by Thomas and Kathy True on Lot 48 in Map 16 of the Town of Lamoine (Marlboro section) does not violate the building height limit set forth in the Lamoine Building and Land Use Ordinance ("BLUO") as well as the CEO's denial of the Appellant's complaint regarding the True house building height filed on March 19, 2019.

2. At the urging of Thomas True, the CEO applied an erroneous interpretation of the Building Height limitation in Sections 6 and 17 of the BLUO which limits houses to 35 vertical feet in height and which defines Building Height as:

"The vertical distance between the highest point of the structure and the average final grade around the foundation, or the average grade of the original ground adjoining the building, whichever is greater."

3. When measuring the True house on two occasions, the CEO measured the True house to either the trim board or the raised, rough final grade. The CEO did not attempt to measure the vertical distance to the average original ground, and, knowing the original grade had been substantially raised and the building height was in question, the CEO failed to require the owner to provide reasonable evidence of compliance as set forth in "Section 3. General Requirements" of the BLUO. The overwhelming evidence existing before the CEO was that the True house exceeded the height limitation of 35 feet in the BLUO, but because of her failure to measure the house correctly or to require the owner to carry the burden of assuring compliance, the CEO clearly erred in her determination that no violation existed.

4. Applicable BLUO provisions and Maine Revised Statutes are as follows:

SECTION 6. CONSTRUCTION STANDARDS

A. Height:

No principal or accessory conventional structure shall exceed two stories in height nor shall any structure exceed 35 vertical feet (See definition of building height), except for municipal buildings, steeples, silos, detached barns, water towers or other accessory structures not designed for human habitation.

Section 17. Definitions

B. Definitions of key terms

Building Height: The vertical distance between the highest point of the structure and the average final grade around the foundation, or the average grade of the original ground adjoining the building, whichever is greater.

SECTION 3. GENERAL REQUIREMENTS

All applications for construction permits shall be subject to the requirements of this ordinance. The Code Enforcement Officer and any municipal board described in this ordinance shall consider the following general requirements in reviewing applications for a building permit. In all instances, the burden of proof in assuring compliance with these requirements shall be upon the applicant and, in reaching a determination, the Code Enforcement Officer or municipal board may require the applicant to provide, at the applicant's expense, sufficient information to permit sound judgments regarding the applicant's compliance with these requirements.

SECTION 7. APPLICATIONS, REVIEW CRITERIA AND ADMINISTRATION

C. Inspection

1. Inspection: The Code Enforcement Officer (or other municipal or licensed official as appropriate) shall inspect all projects for the purpose of administering and enforcing the provisions of this ordinance and all other applicable local and state laws affecting such activities. This shall include, but not be limited to, the inspection of placement of structures on the property to permit a determination that the building in fact conforms to the plans proposed in the application. Specifically, all construction shall be inspected at least at the following points by the appropriate town official:
 - a. after the foundation forms or footings are placed, but prior to pouring concrete (contact the Code Enforcement Office to check for lot lines and road setbacks);

SECTION 9. ENFORCEMENT

B. Violations.

Any building constructed or work performed in violation of the provisions of this Ordinance or of any permit issued by the Code Enforcement Officer or Planning Board, or any occupancy of any building constructed as a dwelling or of any commercial or industrial structure without the required certificate of completion, shall be considered a nuisance.

MRSA: Title 30-A: MUNICIPALITIES AND COUNTIES

§2691. Board of appeals

C. The board may provide, by regulation that must be recorded by the secretary, for any matter relating to the conduct of any hearing, except that the chair may waive any regulation upon good cause shown. Unless otherwise established by charter or ordinance, the board shall conduct a de novo review of any matter before the board subject to the requirements of paragraph D. If a charter or ordinance establishes an appellate review process for the board, the board shall limit its review on appeal to the record established by the board or official whose decision is the subject of the appeal and to the arguments of the parties. The board may not accept new evidence as part of an appellate review. [2017, c. 241, §1 (AMD).]

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 the 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. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

JURISDICTION, STANDING AND TIMELINESS

5. In hearings held on May 13, May 20 and June 11, 2019, the Board determined that it has jurisdiction of this appeal, that the Appellant has standing, and that the appeal was in proper form and timely filed. A hearing on the merits date has been set for September 25, 2019.

6. The Board also determined that the standard of review to be applied to the appeal of the CEO's determination of no violation, under Section 8.B. of the BLUO, is the standard applied under state law to administrative appeals. The Board may reverse the decision of the CEO upon a finding that the decision was clearly contrary to specific provisions of the BLUO or was arbitrary or capricious. For the reasons set forth below and found within the administrative

record of the CEO, the decision of the CEO was clearly contrary to the Building Height limitation in the BLUO and, by her erroneously limiting her measurements from the top of the True House to the average final grade in the face of overwhelming evidence that the grade had been raised substantially, was arbitrary and capricious. The facts are the that the CEO misapplied the Building Height limitation in the BLUO, failed to measure the True house in accordance with the Building Height limitation in the BLUO, and failed require the owner to provide evidence that assured compliance with the height limitation in the BLUO. The True house, as it stood on March 13, March 27, April 3 and today is several feet taller than the BLUO allows.

THE ADMINISTRATIVE RECORD

7. The administrative record was assembled by the CEO with the assistance of the Appellant and Jon Pottle, counsel for Mr. and Mrs. True. However, the permit file was in substantial disarray and out of sequence. There were no agreements reached between the Appellant and counsel for the Trues regarding the accuracy or completeness of the administrative record as assembled by the CEO. There are records that may be absent from the administrative record compiled by the CEO for reasons unknown, as well as records that have markings or notations made on them by the CEO after April 3. The administrative record submitted contains no documents dated later than April 3, 2019—the date of the CEO’s determination. However, there are relevant documents dated or created after April 3, 2019 that are in the CEO’s permit file and that should be part of the administrative record because they are highly relevant to the determination made by the CEO. Included, without limitation, are a Memo the CEO wrote “To Whom it May Concern,” dated April 12, 2019 (see attached Exhibit A), and a Letter to the Selectboard, dated April 16, 2019, in which the CEO states that she reads the BLUO’s Building Height differently than when she “accepted” the way Tom True had urged her to erroneously interpret it (see attached Exhibit B). There are other documents that may be used in the cross-examination of witnesses that should be considered as part of the administrative record for purposes of this appeal.

FACTUAL BACKGROUND

8. Marlboro is a small, quiet residential community within Lamoine with seasonal and year around homes, bordering on Raccoon Cove, Skillings River and Frenchman Bay, with expansive views of the mountains of Acadia and Frenchman Bay. Most inhabitants have owned

or lived in Marlboro many years. Historically, Marlboro residents have respected one another, including the limited sight lines of their neighbors, particularly where improvements are made from time to time to their properties. That has changed by the selfish acts of Mr. and Mrs. True.

9. Mr. and Mrs. True live in Georgia. Kathryn True is a co-owner of Lot 48 in Marlboro, a non-conforming lot upon which has existed four (4) seasonal cottages for decades prior to the enactment of Lamoine's Building and Land Use Ordinance ("BLUO") and, thus, is subject to Lamoine's largely unwritten "grandfather rules." Among the four (4) cottages was a small, one-bedroom seasonal cottage (700+/- s.f.), known as the "Candy Cottage," that once contained a small retail store in which its owners, Flo and Maynard Ford, sold cigarettes, homemade donuts, gum and penny candy in the summers up to World War II. Ownership of Lot 48 passed to the Harris family in the 1980s, and eventually each of four (4) Harris family children, including Kathryn True, took separate possession and de facto ownership of one of the cottages. Because the four siblings could not lawfully subdivide a 1.8 acre parcel, in 2017 they created a condominium regime upon Lot 48, which allowed each of them to own a separate cottage as a condominium unit as well as to share ownership of a common element near the shore. As the Board knows, the Maine Condominium Act does not alter in any way the application of Lamoine's BLUO.

10. Mrs. True, or an entity formed by her, "owned" the Candy Cottage, which the Trues razed in 2018 and used as justification to relocate within their designated condominium unit a new house which is the subject of these proceedings. It is noteworthy, however, that condominium documents recorded among the Land Records of Hancock County [Book OR 6880 Pages 832-845, recorded 3/26/2018] imposed upon the True lot, which sits atop the hill nearest to the state road, a height limitation of 31 feet and, more significantly, imposed upon the three Harris cottages below the True house on Lot 48 even stricter height limitations specifically drawn for the purpose of protecting the Trues' unobstructed view of the mountains and bay. The evidence will show that the Harris siblings were persuaded to agree to these condominium covenants by Mr. True and were unaware of the intention of the Trues to substantially raise the grade of their part of Lot 48 and to build a house considerably in excess of what is permitted by either their condo covenants or the BLUO.

11. It is also noteworthy, according to Mr. True's own online profile, that i) Mr. True is, himself, a licensed, professional engineer and land surveyor in three southern states, and ii)

the Trues have made no effort to provide any evidence or “assurance” to the CEO, the Town or this Board that the house the Trues erected during the week of March 1, 2019, is in compliance with the properly interpreted height limitation of the Lamoine BLUO. That is because it is not.¹

THE PERMITTING PROCESS

12. Applications for building permits have been made by the Trues several times over the years without any construction taking place, including 2013 and 2015 [R18]. Those applications are noted on the True permit application in April 2018 [R18], and are in the permit file of the CEO, but are not included in the record of these proceedings. None of those permits were acted upon.

13. In June 2017, Kathryn True made application to the Town for a permit to open a new driveway entrance to relocate the driveway on Lot 48 to clear enough area to build a new house. Included with the application for the new driveway cut [R1 through R13] and in the permit file ever since, were photographs of that portion of Lot 48 upon which was eventually erected the True house [R10, R11 and R12]. It shows the original gradations of the land gently sloping down ward from the roadway on the north boundary of Lot 48, where the True house now sits, to the south and Frenchman Bay, and is a reference upon which the CEO could have looked to easily see (if she did not already know) how substantially the original grade was raised to lift up the height of the house.

14. In April 2018, the Trues filed a third application for a building permit and a permit was issued by the CEO, identified as Permit No. 18-7, on April 4, 2018. The record does not reflect that any house plans were submitted with the April building permit application for reasons that are unknown by Appellant. The house plans that are part of the record are all “revised plans” submitted by the Trues the following August or later.

15. In mid-August, the Trues sent to the CEO what appear to be “revised plans”, with house elevation drawings by Coastal Builders marked as “revised July 12, 2018”, although the documents produced by the CEO for the August 2018 time period in the administrative record

¹ The Trues had Lot 48 professionally surveyed before any construction was started and the original grades are part of the administrative record as well as in the possession of the Trues. It would not be difficult (then or now) for a professional land surveyor to measure the distance from the ridge of the house to the average original grades around the house to determine the height of the house under the Building Height provisions of the BLUO. The fact that the Trues have not done so under the facts of this matter, is extremely telling. The fact that the CEO has not made the proper measurement of height or required the owners to do so, under the facts of this matter, is a dereliction of her duty to enforce the BLUO and, as such, is arbitrary and capricious.

appear to be multiple copies of the same things and out of sequence [see R27 through R54]. On August 8, 2018, Mr. True emailed to the CEO [R27] that they have finished revising their plans and stated:

“Since the oceanside will be a walkout and the *distance from the peak to the final grade will be about 36’*. Given the scrutiny that this application has faced, I wanted to make sure that I have interpreted the “building height” regulation correctly. I have attached my understanding and calculations.”² [R27] (emphasis added).

16. The building height calculations sent to the CEO by Thomas True purported to show that the proposed “building height to average ‘final grades’” were 31 feet (coinciding with the limit in the Lot 48 condo covenants) [R52]. They are all calculations Mr. True, not the CEO, made and are measured only to proposed “final grades,” without disclosing an intention to substantially raise the grades. Moreover, the plans accompanying Mr. True’s calculations show a two-story house, not the three-story house with walkout on the first-floor level that was erected. The CEO noted at one point in the record (another Memo or Letter “To Whom it May Concern”) that the plans showed a two-story house with walkout on the first level [R96] although no plans in the administrative record actually fit that description.

17. What verbal discussions the CEO and Mr. and Mrs. True might have had regarding building height is unknown and not part of the administrative record, although in her later letter to the Selectboard of April 16, 2019 (Exhibit B) she states that the erroneous interpretation of the BLUO put forth by Mr. True as to the building height which she says she had accepted, she subsequently disagrees with, suggesting at least that building height was at one time discussed between the CEO and Mr. True.

18. Without receiving a new building permit application, later that fall, perhaps November, and before construction began, the CEO issued another building permit to the Trues, Permit No. 18-73 (appearing twice in the record), which permit states it “replaces and modifies Permit 18-7” [R57 and R62].

19. What is clear, despite the relative chaos and incompleteness of the permit file and administrative record, is that Thomas True, during the time between building permit and construction, persuaded the CEO that the Building Height limitation in the BLUO meant

² Mr. True also attached a blank building height calculation form from the City of Milwaukee that is inapplicable to the Building Height definition in the BLUO. Its significance to the CEO’s eventual determination is uncertain but evidences a desire to avoid the clear meaning of the Lamoine BLUO.

something different than it clearly states. Mr. True wanted the CEO to interpret the BLUO to mean that an owner could raise the grade whatever amount he or she wanted and build a 35-foot house on top of it. Instead of the distance to be measured being the greater of the distance from the top of the house to average final grade or to original grade, he wanted the CEO to turn the BLUO Building Height definition on its head and interpret it to mean that he could raise his house (and their views of the bay and mountains) as high as he wanted and to build a 35 foot house on top of it.³ And, it appears from the record and the CEO's own words in subsequent memoranda that she misinterpreted and misapplied the Building Height limitation in the BLUO as a result, until later realizing her mistake.

20. In any case, there is nothing in the record that reflects the intention of Mr. and Mrs. True to raise the original grade by several feet and erect a three-story house on top of it.⁴ And the plans submitted by Mr. and Mrs. True do not accurately show what was ultimately erected. Certainly, there was nothing in the permit file by which an interested party could discern the Trues' true intentions. It was not until after the house was erected that the CEO became aware that the Trues had brought in substantial fill and raised the grade from five (5) to as much as 8-10 feet above the original ground [R88, 90, R88]. Photographs given to the CEO that are part of the record show how substantial fill had been brought in to raise the grade [R69-R72]. A visit by the Board of Appeals to the site today would reveal the same thing.

THE TRUE HOUSE GOES UP

21. During the winter months of 2018-2019, when none of the Harris siblings' cottages were occupied or summer residents living next to the property were present, construction of the True house began. Foundation forms and footings went into the ground sometime during the winter, although the CEO was not notified by the owner or Coastal Builders and there is nothing in the administrative record to indicate when that occurred. Substantial fill was brought in, from five (5) to 8 to 10 feet of fill [R69, R88, R90, R98]. Then, on or about March 1, 2019, Mr. and Mrs. True had Coastal Builders begin to erect a modular house on the

³ The absurdity of reading the Building Height limitation in the way the CEO was persuaded by Mr. True to do is obvious. If "whichever is greater" were applied to the elevations of the two grades, original and final, instead of the distance from the top of the house to the average final grade or from the top of the house to the original grade, one could raise their lot grade by any amount—say, 50 feet—and build a 35 foot house on top of it or lower the grade any amount— say, 20 feet—and build a 55 foot house.

⁴ It is also important to state that whether or not the Trues intention to raise their grade were disclosed in some way to the CEO, the total house height violation cannot be permitted or excused by a material misapplication of the law by the owner or CEO.

uninspected foundation, again before the CEO was informed. Completion of the three-story building took several days during that first week of March.

22. Upon observing a house that stood out among all other residences for its extraordinary height on a grade being substantially raised, Appellant went to the Town Hall on the first day that the CEO was there to see the building permit file and ask about how such a large and imposing house could be built to replace a small seasonal cottage a fraction of its size on a non-conforming lot. The record reflects that the Appellant's visit to the Town Hall to see the permit file occurred on or about March 12, 2019 [R 52].

23. The CEO said she was unaware any construction had taken place. She expressed surprise that even a foundation had gone in, let alone that a house had been fully erected there. In violation of the permits issued and the BLUO, the CEO had not been notified by the Trues or Coastal Builders when the foundation was excavated in order to inspect the foundation before the house went up. Incredulously, Mr. True, a licensed professional engineer and land surveyor in three states (as well as Coastal Builders, an experienced local builder), in a later email to the CEO, claimed not to know that the CEO had to inspect the foundation or be notified of the construction. [R89] (Had the CEO been notified and had she gone to the site when the foundation forms and footings were put in, she might have been able to raise the issue of the building height at that time, before the house was complete, although given her misapplication of the Building Height limitation in the BLUO, this is uncertain.)

24. The Appellant, in his visit to the Town Hall on or about March 12, urged the CEO to go see the house because it was large and appeared to have been built upon fill substantially raising the grade, was grossly out of character in terms of its height for the other residences in the neighborhood, and was generally viewed by the residents of Marlboro as a monstrosity in their midst. It was at that first encounter that John Holt, Planning Board Chair, happened to come into the Town Hall. Hearing of the situation for the first time himself, he suggested in the presence of the CEO that the Appellant simply did not understand the BLUO or the unwritten "grandfather rules" for replacing non-conforming houses on non-conforming lots, but as to the height of the house, he advised that the Appellant "might have something there" and should "file a written complaint." Less than a week later, Appellant filed a written complaint.

THE CEO'S DETERMINATION OF BUILDING HEIGHT

25. The Record reflects that the CEO, accompanied by John Holt, drove out to the True property on or about March 13, 2019 [R66], saw the True house for the first time, taking an initial measurement--by means not reflected in the record--of the distance from the top of the house to the sill plate only, according to what she and John Holt later told Appellant.⁵ The record indicates that no measurement was made or attempted on this first site visit of the distance from the top of the house to either the average final or rough grade around the foundation or to the significantly lower original grade. Another Memo, purporting to have been written March 13, 2019 [R66], states an initial measurement was taken that day of 34.5 feet in height to rough final grade [R66, R76]. Again, Appellant contends it is uncertain when this memo was actually written.

26. No request was made of Mr. and Mrs. True by the CEO, at that time or at any time, to provide the CEO with evidence that the house met the height limitation set out in the BLUO, although the burden of proof of assuring compliance with the requirements of the BLUO is on the owner or applicant, and, in reaching a determination, the Code Enforcement Officer (or municipal board) may require the owner or applicant to provide, at the applicant's expense, sufficient information to permit sound judgments regarding compliance with the BLUO (see BLUO, Section 3, "General Requirements"). There is no question that the True house height was an issue from the first time it was seen by the CEO, as no less than two attempts to measure it were undertaken by her, on or about March 13 and on or about March 27, and the later came within inches of the height limit measured only to final grade.

27. On March 20, 2019, the CEO has stated that she wrote a "Memo from Code Enforcement" [R76] addressed to no one in particular, in which she recited the fact that a complaint regarding the True house had been made to the Town. She stated that she and John Holt had measured the height of the house and found it to be, on average, 34.5 feet tall, or just

⁵ An undated handwritten Memo to the file by the CEO [R65] attempts to document that Appellant came to the Town Hall to make a specific complaint about the True house building height on March 12, 2019. The Memo was submitted by the CEO as an exhibit at earlier Board proceedings in order to establish untimeliness of this appeal, although it clearly was not contemporaneously made, as it states in the Memo that the Appellant's visit "led to the site visits & measurements of the True house," which were later done, suggesting that it was written after the second site visit in late March, if not sometime after April 3, 2019, not on March 12 or 13. Likewise, the Memo at R66, Appellant believes, was not written until days, if not weeks, later than the date it purports to be written, as Appellant believes the CEO and John Holt, at the first site visit, measured the distance from the top of the house to the sill plate only.

inches short of 35 feet. She did not indicate in the Memo how the height was measured or if it was to the original grade but it clearly was not. She states at the last two paragraphs of the Memo at R76:

I was never called for a foundation inspection for this project. It is much more difficult to assess the original grade after its disturbance. The ordinance defines "Building Height" as "The vertical distance between the highest point of the structure and the average final grade around the foundation, or the average grade of the original ground adjoining the building, whichever is greater."

If there is a concern that the grade changed significantly as to raise the building higher than its original grade I would ask that a surveyor or other such professional be brought in at the owner's expense to verify this ultimately.



28. Then, again, on or about March 27, the CEO and John Holt went out to the True house to take height measurements. There is no explanation in the record of the reason for the second visit (if the first visit already yielded a measurement of 34.5 feet) except the CEO and John Holt state they attempted to measure the distance from the highest point of the house, the roof ridge, to the average of the rough final grades around the foundation or base of the house. This was done without including the deck (which is part of the building under the BLUO) on the south side of the house⁶. Again, no effort was made to determine the distance from the ridge to the original grades.

29. On this site visit, the CEO determined, with the assistance of John Holt, that the distance from the ridge of the house to the average rough final grade was 34.5 feet, mere inches below 35 feet. What was NOT done was any measurement of the distance of the ridge to the original grade. Recognizing the difficulty for her alone to determine the distance from the ridge to the original grades to apply the height limit standard set forth in the BLUO, the CEO did nothing more, not requesting the owner to provide a survey of the height or other assurances of compliance, even though the original grades or land contours (Herrick & Salsbury survey) were in the possession or control of the owner and had been submitted previously when the Trues made their 2017 application to relocate Lupine Lane—and even though it was plainly obvious, and to this day remains plainly obvious, that the original grades were several feet lower (five (5)

⁶ Including the deck in his measurements to average final grade (or original grade if it had been done) would increased the average distance to the ridge of the house. The BLUO defines a building or structure to include a deck (see BLUO Section 17.B.) Since the house already exceeds the height limit without including the deck, this is not a material issue.

or more) than the final grades, or, put another way, that substantial fill had been brought in to raise the grades.

30. What makes the CEO's erroneous determination even more egregious is the fact that, before she made her determination of no violation, she noted in an email to Richard Arnold, dated March 26, 2019 (the day before her second set of measurements was taken), that "approximately five feet of fill has been brought to the site." (Email of March 26, from beck albright lamoineceo@gmail.com to Richard Arnold at ra0094@yahoo.com, not included in the record by the CEO; copy attached as Exhibit C). And, yet, her measurements of 34.5 feet [R97] were of the distance from the top of the house to average final grade only.

31. To summarize, the most salient facts evidenced by the administrative record are the following:

a. The Trues filed for a driveway cut permit in 2017 in which they attached a land survey showing the original, pre-construction grade elevations of Lot 48, along with photographs evidencing the original contours of Lot 48 in the area later substantially raised with fill. Those documents remained in the True permit file.

b. In April 2018 the Trues filed an application for a building permit, which was issued that April (Permit #18-7). No house plans appear by the administrative the record to have been filed with the application in April, suggesting they were not filed until later.

c. In August 2018, the Trues submitted "revised" house plans and included calculations by Mr. True representing that they would be constructing a two-story house 31 feet in height.

d. Shortly thereafter, Thomas True sent an email to the CEO referencing another change in house plans, and the intent to make the basement level a walkout, creating three-stories, and indicating that the distance on the walkout side of the house to the top of the house would be 38 feet.

e. In November 2018, the CEO issued a new building permit, Permit #18-73 which replaced "and modified" Permit #18-7. No new application was filed for that permit and the record does not explain how the plans were specifically modified other than the overall footprint was reduced.

f. Sometime between November 2018 and early March 2019, substantial fill was brought into the True site raising the grade, the foundation forms and footings were placed, and the foundation was poured. No notification of the CEO was made of the work done by the Trues or by the builder and no inspection was made of the foundation.

g. During the first week of March 2019, the Trues erect a modular house on the uninspected foundation. Again, no notice was given to the CEO that the house was erected.

h. The following week, Appellant visits the CEO at Town Hall and the CEO learns for the first time that the Trues had built their house.

i. Subsequently, on March 13 and again on March 27, after receiving Appellant's complaint regarding the height of the True house, the CEO, with the assistance of John Holt, goes to the site and measures the house, first to the sill plate only and then to the rough final grade only, determining that the distance from the top of the house to the rough final grade averages 34.5 feet.

j. The CEO observes on those visits that substantial fill ("at least five (5) feet") had been brought into the site raising the original grade, but does not attempt to measure the distance to average original grade and does not require the owner to provide assurances that the house height complies with the BLUO.

k. Despite patent evidence that the original grade has been substantially raised and after determining that the house erected on it is only inches from the height limit when measured to average final grade only, the CEO decides on or about April 3 that the True house does not violate the Building Height limitation in the BLUO.

l. The CEO subsequently states in a letter to the Selectboard that she believes the Building Height limitation is vague and that she no longer reads the BLUO Building Height limitation in the way that she was persuaded to read it by Mr. True, a licensed professional engineer and land surveyor from Georgia motivated to make his house as tall as possible.

m. Although the burden of proving compliance with the BLUO is upon the property owner, not the Town or CEO, the CEO fails to call upon the owner to provide assurance of compliance with the Building Height limitation in the BLUO.

ARGUMENT

31. This is not a complicated case. While evidence is still to be submitted at the merits hearing of this appeal on September 25 relating to the erroneous determination of the CEO, witnesses to be presented and cross-examination of witnesses to take place, it is clear from the administrative record and simple observation alone that the Trues have erected a house that violates the 35-foot Building Height limitation in the BLUO, not merely by inches but by several feet. It was obvious or should have been obvious to the CEO—who measured the distance from the top of the house final grade to be 34.5 feet, just inches below the limit—that the distance to average original ground or grade was several more feet than 34.5. The Board has seen the public hearing rooms filled with "the great unwashed" of Marlboro who are there because they know this obvious fact and expect to see the BLUO enforced, not disregarded. Even the Trues have

not argued the house height complies with the BLUO, because if the house does not violate the height limitation, they could have long ago presented evidence of height compliance instead of spending months fighting the issue of the timeliness of this appeal.

32. It appears from the record that the CEO was persuaded of a wrongful, tortured interpretation of the Building Height limit that made her measurements invalid in terms of compliance. Her measurements are meaningless, except to underscore what should have been the common-sense solution of requiring the property owner (and her builder) to provide assurance from a professional surveyor (other than Mr. True himself) that the house, properly measured by the greater distance from top of the house to average original grades, complies with the BLUO Building Height limit. This, the CEO should have done, pursuant to “Section 3. General Requirements” of the BLUO. Had this been done, after the CEO learned that the house had been built, but before making her clearly erroneous determination, this matter would be where it belongs, before the Selectboard to determine how the Town should enforce noncompliance in this matter.

33. A Code Enforcement Officer cannot by act or spoken word change the plain meaning of a building code. The fact that the CEO in this instance was persuaded to do so by Thomas True, because he wanted to have an unobstructed view over other houses on the same lot to the south, does not change the result. The fact that the CEO and John Holt may not have been equipped in March to measure the height of the True house to the average original grades as required by the BLUO is unavailing and results in an arbitrary and capricious determination that this Board must reverse.

34. The Town has made it clear in its BLUO that the burden of compliance is on the property owner, not the Town, and where information is needed in order to make a proper determination as to compliance, the property owner, not the Town, should be required to prove compliance, whether that owner lives in Lamoine or in Georgia. Needless to say, with full knowledge that the height of the True house, measured as required by the BLUO was, in fact, not only a “concern,” but a matter of official complaint, not only did the CEO not measure the height of the house to anything but final grade, coming up just inches short of the limit, but she failed to require the owner to establish compliance by having a “surveyor or other such professional” brought it at the owner’s expense—even though the BLUO expressly calls for the owner or

applicant to prove compliance with the BLUO when sufficient information to permit sound judgments regarding compliance is required (BLUO, Section 3, “General Requirements”).

35. The fact that a building permit was issued in April or August of 2018 to build a house on Lot 48 also does not excuse or “permit” a subsequent violation of the BLUO. A building permit is not a carte blanche to build whatever suits the property owner when it suits her.

36. The Trues have repeatedly tried to portray themselves as unwitting victims of a misinterpretation of the definition of Building Height in the BLUO. But the definition of Building Height in the BLUO is not ambiguous or “vaguely written”. It is not subject to multiple interpretations. The plain reading of the Building Height definition in the BLUO is the distance measured from the top of the house to the average final grade or to the original grade, whichever is greater. To interpret “greater” to apply not to the “distance” to be measured but to the comparative average elevation of grades would result in a nonsensical rule that would permit a property owner to either raise the original grade under a house however much he or she wanted (50 or more feet?) and then build a 35-foot structure on top of it, or, equally nonsensical, to lower the grade (25 feet, for example) and build a 60-foot structure on the final grade. Such an interpretation would render the clear language of the Building Height definition senseless.

37. A zoning ordinance must be interpreted pursuant to its plain language, Jade Realty Corp. v. Town of Eliot, 2008 ME 80, 946 A.2d 408. Statutory terms should be given their common and generally accepted meaning unless the context clearly indicates otherwise, Ballard Builder, Inc v. Westbrook, 480 ME 1985, 502 A2.2d 476. In this instance, the CEO has, without any authority or precedent whatsoever, disregarded the plain meaning of how Building Height is to be determined in the BLUO and denied a determination of violation where a violation clearly exists.

38. Aside from the fact that Mr. True is a licensed professional engineer and almost certainly knew what he was selfishly planning to do to, the concept that “ignorance of the law is no excuse” is written in common-law stone. All citizens, including permit applicants and local code enforcement officers, are charged with knowledge of the law, including local ordinances. See City of Auburn v. Mandarelli, 320 A.2d 22, 30 (Me. 1974). It may be to Mr. True’s credit that he was able to convince the CEO of an incorrect interpretation of the BLUO, as the CEO has admitted in her Letter to the Selectboard of April 16, 2019 (Exhibit A), but his apparent success

at altering the plain meaning of the BLUO to suit his purposes does not justify what has become a clear violation of the BLUO.

39. When a public officer or agency exceeds its statutory authority or proceeds in a manner not authorized by law, its resulting orders, decrees or judgments are null and void and may be attacked collaterally (see Small v. Gartley, 363 A.2d 724, 729 (Me. 1976)).

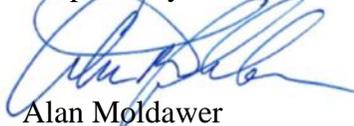
40. What is most telling in all of this is that the Trues have not once offered to prove to the Town or this Board that the house is in compliance with the BLUO height limitation, because it is not. Instead, they have relied upon the CEO's mistakes and the attempts by her and John Holt to excuse the Trues' noncompliance. The Trues have ignored the burden, which is theirs, to assure the Town of compliance with the Building Height limit.

CONCLUSION

41. The administrative record, with what is already known by the Board, establishes that the CEO misapplied the Building Height limitation in the BLUO and did not properly measure the height of the True house. This followed the failure of the Trues to notify the CEO of the installation of the foundation or the construction of the house when required by the BLUO to do so. The decision of the CEO that the house does not violate the height limitation, therefore, is clearly contrary to the law, erroneous and arbitrary and capricious and should be reversed. In addition, common sense and the BLUO dictates that the CEO should require the Trues to provide assurance of compliance or face the consequences of what is a clear violation of the BLUO.

42. A hearing is scheduled to be held on September 25 before the Board in this matter. At that hearing, Appellant will be prepared to provide relevant admissible oral and written evidence, rebuttal evidence and to cross examine witnesses, and well as make further argument on this appeal in order to achieve a full and true disclosure of the facts and correct application of the law.

Respectfully submitted,



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A copy of this Pre-Hearing Statement and Brief has been emailed to Jon Pottle, Esq., this 12th day of August, 2019, as well as six (6) copies delivered to Stu Marckoon at the Town Hall.