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 23, 2019

APPELLANT'S REPLY TO TRUES' STATEMENT

Appellant, Alan Moldawer, hereby respectfully submits to the Board of Appeals of the Town of Lamoine the following Reply to the True's Pre-Hearing Statement:

The True's Memorandum or Pre-Hearing Statement (the "Statement") fails to give legal or factual support for the clearly erroneous determination of law and fact made by the Code Enforcement Officer (CEO) for several reasons, including:

- The Trues' Statement materially mischaracterizes the facts as they appear in the administrative record;
- The Statement chastises the Appellant for attempting to expand the record (relating to the CEO's own statements regarding her erroneous decision) and then attempts to introduce facts and evidence that are themselves not in the administrative record and that are either untrue, unsubstantiated or irrelevant;
- The Statement gives this Board only half of the standard of review of an administrative decision made by the CEO, omitting the most relevant in this case: that errors made by the CEO as to the application of the law, namely the Lamoine Building and Land Use Ordinance ("BLUO"), should not be disregarded by labelling them "fact finding," but are the bases for an appellate board or court reversing the decision upon which they are based;
- The Trues' Statement asserts implicitly, if not expressly, that aggrieved neighbors, not the property owners, have the burden of showing compliance or noncompliance with the BLUO; and
- And, the Statement asserts that a CEO may apply the BLUO inconsistent with its plain meaning as long as it reasonably serves the interest of the property owner at the expense of the neighborhood.

Appellant responds as follows:

1. The number of misstatements made by the Trues in their Statement as to the record is too numerous to address them all here, and some bear little relevance to the issue on

appeal. The house the Trues erected in the first week of March 2019 was not "part of a multi-year planning process . . . working with multiple CEOs, following all correct procedures." The True house and site plans constantly changed. The plans, if any, depicted in earlier issued building permits are irrelevant and immaterial and bear little to no resemblance to what was eventual erected. Prior permits were allowed in each instance to lapse.

2. Whatever final plans the Trues' can point to in the administrative record do not accurately show what was ultimately built (a three-story house on substantially raised grade) [R88, R90], particularly in respect to the ultimate height of the house when measured by the correct distance from top of the house to average original ground. Stating an intent to build a house 31 feet high and obtaining a building permit on that representation does validate subsequently erecting a house exceeding 35 feet. Again, the Trues ignore established case law that a building permit is not a blank check to later erect (without even a site inspection) whatever an owner wants.

3. The Trues' statement that the CEO made her measurements to rough final grade before fill was brought to the site is patently untrue (and not in the administrative record). The original grade was substantially raised before the house was first seen by the CEO. In addition, the Trues' failed to notify the CEO of the placing of the foundation or initiation of construction, and when the CEO observed for the first time the newly erected house and took her measurements, she observed that "at least five feet of fill" had been brought into the site. [R129].

4. The allegations that the heights of other houses built in the area were measured in the same (erroneous) way are simply untrue as well (and not included within the administrative record). The Trues criticize the Appellant for proposing to expand the administrative record to include evidence directly relevant to her erroneous application of the BLUO—but then go beyond that themselves. The Arnold house, a two-story house, was completed in 1997 (two years before the current BLUO was enacted), was constructed on original—not raised—grade, and is well-under 35 feet in height. The same for the other houses the Trues try to say were built similar to theirs.[1]

[1] The CEO was observed by neighbors walking around the area after her April 3 determination, noting the houses that were built in the last several decades and apparently sharing her observations with the Trues. Instead of owning up to her mistake or calling upon the Trues to provide assurance of compliance under the plain language of the BLUO, the CEO has spent time trying to find mistakes made by prior CEOs. There are none, certainly none that

5. The allegation that "national standards" call for something other than what the BLUO plainly states is also untrue (and also not included within the administrative record) and is irrelevant. The Town has a building code that specifically addresses the building height limit by which the True house is to be measured. And a review of height standards in other places in Maine and the U.S. show different height limits and different ways of measuring heights.

6. Mr. True's attempt to get the CEO to disregard the definition in the BLUO and apply the building height definition found in International Residential Code (IRC), as well as references to the IRC in the Trues' Statement, are unavailing as well. There is nothing in the administrative record that shows the CEO used what Mr. True supplied her, namely, either the definition of "grade plane" found in the IRC[2] or a building height calculation form used by the City of Milwaukee for measuring height limits of residential buildings in Milwaukee.

7. The Trues have tacitly admitted, by failing to provide any evidence of compliance to support the determination of the CEO, that the house they erected is too tall when measured from the top of the house to the average original grade. Not once have they even attempted to

match the excessive building height of the True house or that establish a prior practice of misapplying the BLUO building height limit.

[2] The International Building Code uses a "grade plane" formula not used by the CEO and not the equivalent of what the CEO erroneously measured. Again, the Trues seek to conflate the issues. Had she calculated a "grade plane" measurement falling away from the True foundation, she would have had to add a lot more than 6 inches to her distance of 34.5 feet to average final grade at the foundation.)

evidence compliance. Instead of accepting that the burden of compliance and proving compliance is upon the property owner, not the Town or aggrieved neighbors, they seek to provide weak cover for a mistake made by the CEO by asking the Board to shift the burden to others, to apply height standards from elsewhere in the country, or simply to disregard the plain meaning of the height limitation in the BLUO.

8. Just as the Trues would have this Board ignore the plain language and meaning of the Building Height limitation in the BLUO, the Trues would have this Board ignore the clear language of the BLUO as it applies to administrative appeals. Section 8. B. of the BLUO expressly provides in regard to Administrative Appeals that

> "Following such hearings, the Board of Appeals may reverse the decision of the Code Enforcement Officer or Planning Board only upon a finding that the decision is clearly contrary to specific provisions of this ordinance."

9. In this case, Section 8. B. of the BLUO means that the standard of review is not simply a "substantial evidence test" (although, as argued below, the CEO's determination miserably fails that test) but whether the CEO, in making her determination, applied the law correctly and consistent with the BLUO. In the final analysis, is it not the public's right to expect that errors of law will not be glossed over by the misnomer of "fact finding"?

10. The Trues cite a number of appellate cases to argue that the Board cannot reverse the fact-finding of the CEO. They argue that the "substantial evidence" test is whether a reasonable mind acting as a CEO would consider the evidence in the record sufficient to rely upon and support the CEO's conclusion that, in fact, the True house does not exceed 35 feet under the BLUO. However, applying that standard to uphold the factual determination of the CEO in this case simply would be ignoring the stark evidence to the contrary <u>in the record</u> and would be <u>unreasonable</u>: the CEO admits to having measured only to rough final grade, coming up just inches short of 35 feet, while observing at the same time that as much as five (5) feet of fill had been brought in raising the grade [R88, 127] to which her measurements were made. The CEO proposes (but does not act upon) that if there is a question about the height of the True house, the owner should be required to have a professional survey show compliance. Moreover, there is NO evidence in the record that a measurement was made by either the CEO or the owner as required by the BLUO and, thus, there is no competent evidence, let alone substantial evidence, to support the CEO's erroneous fact finding.

11. In addition, all of the Trues' quotes from appellate cases regarding the standard of appellate review of CEO determinations fail to address the distinction that exists between questions of fact and questions of law; between the role of fact-finder and determiner of the law. The Trues make the case themselves in their Statement as to why the Board of Appeals can and should reverse the determination of the CEO under Maine law. There is an important distinction to be made between "errors of fact" and "errors of law" and the deference to be paid to each. Here again, the Trues have sought to conflate the issues.

12. Even though the CEO did not deliberate over her determination with the thoroughness of a tribunal such as a planning board or call upon resources that were readily available to her, her "findings of fact" in an appellate review are entitled to considerable deference. However, the amount of deference is far from absolute, and does not require this Board to suspend common sense or reason. And, as to interpretation of the law, in this case the Town's Building and Land Use Ordinance, Maine case law clearly holds that a Board of Appeals, or court of law, can and will reverse a decision of a CEO on appeal that rests upon an erroneous interpretation of the law. CEOs are not entitled to make their own law or to misinterpret the law or apply it in ways not intended. In the case cited in the Trues' Statement, Bizier v. Town of Turner, 2011 Me 116, 32 A2nd 1048, the Court held that, in applying the appellate standard cited by the Trues, a court (or Board of Appeals in this case) will vacate a decision that includes an error of law as opposed to finding of fact—or, importantly so, an abuse of discretion or finding not supported by substantial evidence. When reviewing a determination of a CEO under the Town's BLUO, this Board looks for "for errors of law, abuse of discretion or findings not supported by substantial evidence in the record." Aydelott v. City of Portland, 2010 ME 25, 990 A.2d. It is critical to note here that "[t]he interpretation of a local ordinance is a question of law" Logan v. City of Biddeford, 2006 ME 102, 905 A.2d 295. A court will vacate a Planning Board's decision if it includes an error of law, abuse of discretion, or finding not supported by substantial evidence, Rudolph v. Golick, 2010 ME 106, 8 A.3d 684.

13. As this Board knows well, in its capacity as an appeals board and in reviewing the administrative record below, the Board must examine an ordinance for its plain meaning and "construe its terms reasonably in light of the purposes and objectives of the ordinance and its general structure." Stewart v. Town of Sedgwick, 2002 ME 81, 797 A.2d 27. Additionally, if an

ordinance defines a term specifically, a court will not redefine that term (or allow a CEO to do so) Malonson v. Town of Berwick, 2004 ME 96, 853 A.2d 224.

14. The Trues argue that the Appellant failed to provide evidence to the Town that the True house exceeds the height limitation. However, this appeal was filed following a specific complaint about the height the of the True house and the simple, plain fact that the grade upon with the house was constructed was raised five (5) feet or more, by the CEO's own observations in the record [R88, R90]. Appellant appealed the subsequent specific determination by the CEO that the house measured 34.5 feet in distance from top of the house to the average final grade around the foundation. It would simply be dismissing the obvious to say that when measured to the average original ground, the house is still less than 35 feet. Measured to average original ground, the house obviously exceeds the height limit by several feet. There are bridges for sale to buyers who would believe otherwise.

15. There is no case law to support a presumption of correctness in a CEO's determination such that the burden falls on the Appellant to do the job of the CEO. The CEO's fact-finding and interpretation of the law is either adequate under the standard of appellate review or it is not. Appellant is not an "applicant" under the BLUO, as argued by the Trues. The CEO has a duty to the Selectboard and the Town to support her determination within her own administrative record with facts and a legal interpretation that withstand scrutiny. And, the burden of compliance is and remains on the property owner (or "applicant" seeking a permit on behalf of the owner).

16. If the Trues want to expand the record in their own way and continue to argue that the Appellant has failed to show the actual height of the house, and insist on continuing to shirk their burden of providing the Town with evidence of compliance themselves, then Appellant is prepared to disclose the results of a professional survey of the height of the True house that has been done in recent weeks at the behest of a large number of the Trues' neighbors. A professional survey of the height of the True house, based upon original grades recorded prior to construction by the co-owners of Lot 48, and measured as the BLUO requires, from the top of the house to the average original grades, will be available for the Town to see. Do the Trues want the Town to know the facts or argue it is reasonable to misapply the law if it benefits just them?

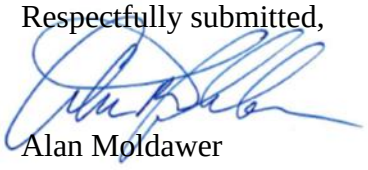
17. Anticipating that the CEO's determination must face a hearing before this Board, the Trues also suggest that the Appellant is not entitled to present evidence, witnesses, cross-examine witnesses or generally put on a case before this Board. Appellant respectfully reminds the Board that Title 30-A §2691 provides, in subpart D, that *"[e]very 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." (emphasis added).

18. Lastly, for purposes of this Reply, Appellant respectfully refers the Board to his arguments in his initial statement with respect to the plain language in the Building Height definition of the BLUO. As their final refuge from having to comply with the Town's ordinance, the Trues argue that the Building Height definition is "ambiguous." In response, the Appellant respectfully restates that the meaning of the definition is clear and unambiguous. The absurdity of reading the Building Height limitation in the way the CEO was persuaded by Mr. True is obvious. If "whichever is greater" were applied to the elevations of the two grades, original and final, instead of the vertical 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. And, it appears from the record and the CEO's own words in subsequent memoranda she authored, that she erroneously applied the Building Height limitation in the BLUO as a result. The Board must not excuse the error of law and must uphold the plain meaning of its ordinances. 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. 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)).

19. 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).

Appellant looks forward to the opportunity to present further argument and evidence at the hearing of this matter on September 25, 2019.

Respectfully submitted,



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A copy of this Reply Statement and has been emailed to Jon Pottle, Esq., this 23rd day of August, 2019, as well as six (6) copies delivered to Stu Marckoon at the Town Hall.