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July 11, 2019

Via Hand Delivery
Town of Lamoine Board of Appeals
c/o Rebecca Albright, Code Enforcement Officer
Town of Lamoine
606 Douglas Highway
Lamoine, ME 04605

Re: Moldawer v. Code Enforcement Officer

Dear Members of the Board:

I am writing to you on behalf of William and Joanne Harris, who own property located at 108 Lupine Lane in Lamoine. As you know, the Harris' property abuts the property owned by Tom and Kathy True, which property is the subject of the pending appeal.

My understanding is that at your meeting on July 11th the Board will be evaluating whether the appeal filed by Alan Moldawer is timely and properly before the Board. For the following reasons I respectfully suggest that Mr. Moldawer's appeal is timely, and ask that the Board reach the merits of the appeal.

Factual Background

After obtaining several initial permits that were not utilized, the Trues were issued a final building permit in November of 2018.[1] Based on Mr. True's May 9, 2019 letter to the Board, the True's new foundation was poured in February, 2019, with the house constructed as of March 1, 2019.

On March 12, 2019, Mr. Moldawer spoke to Ms. Albright in the town office, complaining about the True's construction, including his contention that the new structure exceeded the Town's height limit.[2] The next day, Ms. Albright visited the True's property and concluded that the new home was less than 35 feet in height.[3] On March 19, 2019, Mr. Moldawer delivered his formal complaint to Ms. Albright, challenging her determination that the True's new house complied with the height limit, and raising several other concerns.[4] With

[1] These facts are taken from the "CEO Timeline for Appeal Board," dated May 22, 2019, including the attachments, submitted by Rebecca Albright ("Albright Timeline").
[2] Albright Timeline, Ex. 5.
[3] Albright Timeline, Ex. 6.
[4] Albright Timeline, Ex. 7.

regard to the height issue, Mr. Moldawer argued that Ms. Albright's measurements on March 13th were taken from the final, post-construction grade, while the Town's ordinance required the True's not to exceed 35 feet in height from either the final, post-construction grade "or the average grade of the original ground adjoining the building whichever is greater."[5] Ms. Albright acknowledged receipt of Mr. Moldawer's complaint by letter dated March 20, 2019.[6]

On March 20, 2019, Ms. Albright drafted a memorandum regarding the issues raised in Mr. Moldawer's complaint.[7] She noted that the Trues never contacted her for a foundation inspection, as required by the Town's ordinance, prior to installing the foundation. Because the Trues did not comply with this requirement, Ms. Albright concluded that "[i]t is much more difficult to assess the original grade after its disturbance." Ms. Albright also concluded that it is the True's responsibility to, at their expense, retain a surveyor or other professional to identify the elevation of the pre-construction grade. To my knowledge the Trues have not complied with this requirement and have provided no information to Ms. Albright or the Board proving that their new structure is not more than 35 feet above the original grade.[8]

Finally, in response to Mr. Moldawer's March 18, 2019 complaint, on April 2, 2019, Ms. Albright issued an opinion that the True's house did not violate the building height restriction. Mr. Moldawer then appealed Ms. Albright's April 2nd determination to the Board.

Timing of Appeal

In his May 9th letter, Mr. True argues that Mr. Moldawer's appeal; which Mr. True contends was filed on May 6, 2019, was not filed within 30 days of any of the permits issued for the construction of the True's house. For the following reasons Mr. True's arguments are irrelevant, and Mr. Moldawer's repeated written complaints to the Town constitute either a timely appeal of the code officer's April 2nd enforcement determination or as a timely appeal of the November, 2018 building permit.

1. *Mr. Moldawer's May 2nd Appeal is a Timely Appeal of the CEO's Enforcement Decision.*

It does not appear from the True's permit applications that they identified the proposed grade elevation for their development. As such, the Trues did not provide information to the Town that would have shown their proposed house violated the height restriction. Following issuance of the November, 2018 permit, the Trues failed to notify Ms. Albright for a foundation inspection, and so the Town was unable to confirm that the construction was proceeding in a

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[5] Albright Timeline, Ex. 7, p. 3.
[6] Albright Timeline, Ex. 8.
[7] Albright Timeline, Ex. 9.
[8] All we have is a unsupported statement by Mr. True, in his letter dated March 26th, that "we have revisited the plans & determined that our building height is compliant regardless of how [the definition of "building height"] is interpreted." *See* Albright Timeline, Ex. 11. The calculations accompanying Mr. True's March 26th letter include only measurements from the final grade. No information was provided by the Trues regarding the original grade. For the reasons set forth below, there is simply no question that the definition of "building height" requires the Trues to show that their building is not higher than 35 feet from both the final, and original, grade.

lawful manner.

Under those circumstances, Mr. Moldawer's March 18, 2019 complaint was a request to the code officer to enforce a violation of the building and land use ordinance. Ms. Albright's April 2, 2019 response constituted her enforcement determination. Under the building and land ordinance any aggrieved party may appeal any code officer determination within 30 days of its issuance.[9] Section 8(B) does not distinguish between permitting or enforcement determinations, so the Board has jurisdiction to review appeals of all determinations by the code officer.[10]

Mr. Moldawer's formal appeal to the Board, filed on May 2, 2019, was brought within 30 days of Ms. Albright's April 2, 2019 enforcement decision, was timely, and the Board has jurisdiction to hear the appeal.[11]

2. *Mr. Moldawer's March 18, 2019 Complaint is a Timely Appeal of the November, 2018 Building Permit.*

In addition, the Board has jurisdiction to hear Mr. Moldawer's challenge to the issuance of the November, 2018 building permit.

As the Board is aware, issuance of a building permit does not include formal written notice to abutters or other individuals with legal standing to appeal the permit. As noted by Mr. True, after issuance of the final building permit in November, 2018, the True's house was not constructed until February and March of this year. As the abutters are summer residents, and given that the construction took place during the winter and spring, the abutters did not have knowledge of the issuance of the permit until long after the 30-day appeal period.

When Mr. Moldawer returned to his property in March he first became aware of the house's construction and, therefore, the issuance of the November, 2018 building permit.[12] He then acted immediately to investigate with the Town, meeting with Ms. Albright on March 12th. After Ms. Albright concluded there was no height violation, Mr. Moldawer filed his complaint on March 19th, less than 30 days after becoming aware of the construction and the issuance of the November, 2018 building permit. Under these facts, Mr. Moldawer's March 19th complaint (dated March 18, 2019) is his "appeal" to the Board of Appeals of the issuance of the November, 2018 building permit.[13]

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[9] Building and Land Use Code §8(B).

[10] This is in contrast to the ZBA appeal provision in the shoreland zoning ordinance, that expressly provides that the Board does not have jurisdiction to review enforcement decisions by the code officer. *See* Shoreland Zoning Ordinance §16(I)(a).

[11] As does the Superior Court, per the Law Court's recent decision in *Raposa v. Town of York*, 204 A.3d 129 (Me. 2019).

[12] To the extent this matter is treated as an appeal of a building permit, the operative permit is the last one—November, 2019—not the earlier April 4, 2018 permit. Given the changes to the design of the house the Trues were required to seek an updated permit and were not allowed to construct the existing house pursuant to the April, 2018, building permit.

[13] The fact that Mr. Moldawer did not address his March 18th letter to the "Board of Appeals" is irrelevant. *See Brackett v. Town of Rangeley*, 831 A.2d 422, 425 (Me. 2003) (a "detailed letter" to the

Under the Maine Supreme Court case *Brackett v. Town of Rangeley*, Mr. Moldawer's appeal was timely. In *Brackett*, a neighbor did not have notice of the issuance of a building permit, and only complained after returning to his property and noticing the offending construction. He acted promptly in raising an objection, and filed a formal written complaint within 30 days of learning about the issuance of the permit and the construction. Under those circumstances, similar to Mr. Moldawer's situation, it would have been a "flagrant miscarriage of justice" to dismiss the appeal, even though it was brought more than 30 days after the issuance of the permit. *Brackett*, 831 A.2d at 428; *see also Viles v. Town of Embden*, 905 A.2d 298, 302-303 (Me. 2006) (late appeal permitted because appellant did not have notice of issuance of permit and acted promptly when notified).

Because Mr. Moldawer was not aware of the November, 2018 permit when issued, and because he acted promptly and filed a formal appeal within 30 days of discovering the offending construction, and because his March 18, 2019 letter constitutes a formal appeal, his appeal was timely. Thus, the Board should reach the merits of this appeal either as a timely appeal of the November, 2018 building permit (on the ground that the Town erred in issuing the permit) or as a timely appeal of the code officer's April 2nd enforcement decision (on the grounds that the permit was properly issued, but the Trues simply violated the ordinance during construction).

The True's Home Clearly Violates the Height Limit

As noted in the cases cited above, another factor in the "flagrant miscarriage of justice" test for timeliness is the egregiousness of the permitting violation. Based on the information submitted by Mr. Moldawer and the observations of the code officer, there is no dispute that the Trues significantly raised the level of the grade surrounding their house. Ms. Albright has noted that the True's house "appears quite tall and imposing" and "has involved a great deal of fill."[14] Although everyone concedes that the Trues have used fill to increase the elevation of the original grade, no one, not the Trues nor the Code Officer, have shown that the height of the new house does not exceed 35 feet above the original grade.

As you know, the Town's Ordinance limits building height to 35 feet and 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.[15]

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town asking the town to enforce an ordinance provision constitutes an "appeal," even if "not on the required form"). His complaint was submitted to the Town's code enforcement officer, who is the staff person to the Board and who would receive appeals for forwarding to the Board, and it contained "all the information necessary for filing an appeal." *Brackett*, 831 A.2d at 425. If there was any confusion, Ms. Albright understood that her decision was being challenged, and she should have notified the Board of Mr. Moldawer's objections. *See id.*

[14] Albright Timeline, Ex. 13.

[15] Building and Land Use Code §17(B).

This definition is clear and unambiguous. It requires the Trues to show that the highest point of their house is not more than 35 feet from the average final grade or the average grade of the original ground adjoining the building, "whichever is greater." It is unclear what "alternative" interpretation was offered by the Trues, but the plain language of this definition is not subject to any other interpretation. The clause "or the average grade of the original ground adjoining the building" is not a stand-alone phrase, and has no meaning except to identify the second point where height must be measured to the "highest point of the structure."

Ms. Albright has concluded that the True's house is 34.5 feet in height above the existing grade, but has no information regarding the distance between "the highest point of the structure and…the average grade of the original ground adjoining the building." Ms. Albright has concluded that the Trues brought in a "great deal of fill," and based on Mr. Moldawer's evidence it is clear that the final grade is much higher than .5 feet over the original grade.

As such, the Trues house clearly violates the prohibition on building a new house more than 35 feet above the original grade. Either the Code Officer violated the Town's ordinance when she issued the permit last November or, more likely, the Trues did not provide Ms. Albright with any information regarding the original grade, and thus violated the ordinance when they constructed the house in violation of the 35 foot height cap. Either way, there is a clear and unambiguous violation and the Town's error, and the True's clear ordinance violation, support the Board considering Mr. Moldawer's appeal.

Thank you for your attention to these comments.

Very truly yours,

Scott D. Anderson

SDA/mtt