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# Memorandum

**To:** Lamoine Board of Appeals

**From:** Jon Pottle, Esq.

**Date:** August 20, 2019

**Re:** **Alan Moldawer Appeal;**
**Tom and Kathy True's Pre-Hearing Statement**

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Dear Chair Fenton and Members of the Board of Appeals:

Tom and Kathy True respectfully submit this Pre-hearing Statement in support of the Lamoine Code Enforcement Officer's determination that the height of the Trues' home is in compliance with the permit issued. For the reasons set forth below, we ask that you DENY the appeal filed by Alan Moldawer, and UPHOLD the CEO's determination of compliance.

## SUMMARY

Moldawer has failed to meet his burden to demonstrate no evidence exists to support the Code Enforcement Officer's ("CEO") determination of compliance of the Trues' home with the permit, or that the Record compels a conclusion of non-compliance. His appeal should therefore be DENIED.

Since 2013 Tom and Kathy True have had plans to construct a home on their property at 114 Marlboro Beach Road. Since that time, they have worked with multiple CEOs, followed all the correct procedures, and provided all information necessary for the CEOs to review their permit applications. This was all part of a multi-year planning process to replace their existing cottage with a home.

In November 2018, the CEO approved the final design of their home, including the height of the building, in Building Permit #18-73. This height included dimensioned house drawings, elevations, and height calculations, all of which were approved by the CEO. The Trues then constructed their home based on the CEO's approval. They have not performed any work outside of what the CEO approved.

Moldawer did not appeal or otherwise challenge Building Permit #18-73 and the work it authorized, or any other approval issued by the Town for the Trues' home. Moldawer continues to maintain he is not challenging this building permit. The Trues' building permit and associated approvals are therefore final, valid, in full force and effect, and govern compliance of the Trues' home construction.

After their home was constructed, Moldawer complained stating the building is too high. He did not provide any evidence, such as a survey, – just speculation it is too high and outside of the work authorized by the Trues' building permit, Permit #18-73.

The CEO, in response to his complaint, inspected the Trues' property and verified their home was in compliance. The CEO, as well as the Planning Board Chair, took detailed height measurements and performed calculations using those measurements and existing plans and drawings – such as the Trues' dimensioned house drawings, elevations, and survey information regarding the property. The CEO, after collecting and analyzing this information, determined the Trues' home was in compliance. This compliance determination was reasonable, and is supported by the Record evidence. Moldawer has not pointed to any Record evidence that would compel a contrary conclusion.

His appeal should therefore be DENIED.

## FACTS AND BACKGROUND

On November 21, 2018, the CEO approved the final Building Permit for Tom and Kathy True to construct their home. The work authorized is all detailed in their dimensioned home drawings, elevations, and height calculations previously submitted by the Trues in August 2018. This "final design" of their home was the culmination of years of planning and prior permitting. No one has ever appealed or otherwise challenged the Trues' final Building Permit and the work it authorized, or any other approvals issued to the Trues.[1] Nor has anyone argued that they have not built in accordance with these plans.

The Record shows the significant level of detail the Trues provided to the CEO as part of approved Building Permit #18-73. Pages 27 through 53 of the record show the height of their home, together with dimensions and elevations. Further, a height calculation sheet was provided specifically to the CEO, clearly showing the height of the home and the method to calculate this height. All notes and calculations refer to "final" and "finished" grades. The CEO had all of this information, reviewed it, and approved the Trues' home in Building Permit #18-73.

The Trues began work authorized in their permits by demolishing the existing cottage. This demolition work began on August 24, 2018 based on prior approvals. In February 2019, the Trues poured the foundation for their home and on March 1, 2019, their home was placed on the foundation pursuant to Building Permit #18-73.

On March 12, 2019, when the house had been up nearly two weeks and after the Trues spent significant money to plan and construct their home, Moldawer sent a complaint letter to the CEO. In response, the CEO, together with the Planning Board Chair, conducted a site visit to

[1] Bruce Arnold attempted to challenge the Trues' Certificate of Occupancy based on septic design, but that appeal was dismissed by the Board.

gather height information of the Trues' home. Using this information, and the prior information approved as part of Building Permit #18-73, the CEO determined the Trues were in compliance with their permit and no enforcement action was warranted. (*See* Record at 27-53, and 93-99.) The CEO's analysis was summarized in her letter dated April 2, 2019, and she sent her written determination to Moldawer in a letter dated April 3, 2019. (*See* Record at 96-98.) On May 2, 2019, Moldawer sent an appeal letter to the Board of Appeals challenging the CEO's determination of compliance. Throughout this appeal, Moldawer has expressly stated he is not challenging Building Permit #18-73, but instead whether the Trues' home is in compliance.

**THE STANDARD OF REVIEW IS "APPELLATE" IN THIS APPEAL, NOT *DE NOVO***

As discussed at the Board's July 11, 2019 meeting, the applicable standard of review is "appellate", which is a deferential review standard relative to the CEO's findings and characterizations as to what meets standards. It is not a *de novo* standard, which would involve a new evidentiary hearing and have the Board make its own independent findings. It is important to understand and appreciate the distinction between these two different review standards so the Board appropriately addresses the Moldawer Appeal.

In most instances, the standard of review is not in dispute; however, here Moldawer has attempted to introduce evidence outside the CEO record and has indicated his intent to introduce new evidence and witnesses at the upcoming September 25 meeting. A detailed discussion of how the appellate standard is correctly applied is therefore warranted and provided below.

Under the appellate standard of review, the role of the Board of Appeals is limited to whether the CEO's determination is supported by substantial evidence – the standard of review is not whether the Board itself would reach a different conclusion. This is sometimes referred to as the "substantial evidence" test, in which the Board reviews findings of the CEO and determines whether there is any substantial evidence in the record to support those findings. So long as substantial evidence exists, the Board upholds the CEO's findings. In its review, the Board must afford substantial deference to the CEO.

In applying the substantial evidence test in an appellate hearing, the Board only reviews the record before the CEO when she made her determination. No new evidence is allowed. Evidence not before the CEO, or evidence that post-dates the CEO's determination, is not part of the Record or the September 25th hearing.

In his Pre-hearing Statement, Moldawer fails to acknowledge this, as he believes and has expressed an intent to present new evidence through, for example, testimony and cross-examination. Further, he has attempted to introduce evidence in the record created *after* the CEO made her determination on his complaint. As Attorney Collier plainly stated at the last meeting, any evidence after the CEO's decision is not properly part of the record.

Under Maine statutory law, the default standard of review in an appeal to a Board of Appeals is generally *de novo*,[2] **unless** the municipal ordinance states the standard is appellate. *See, e.g., Adelman v. Town of Baldwin,* 2000 ME 91, ¶ 8, 750 A.2d 577, 581-82; *Sproul v. Town of Boothbay Harbor,* 2000 ME 30, ¶ 8, 746 A.2d 368, 372; *Sanford Properties, Inc.,* 609 A.2d at 288; *Veilleux v. City of Augusta,* 684 A.2d 413, 415. Thus, when an ordinance states the standard of review is appellate, the statutory default standard of *de novo* does not apply. As detailed below, Lamoine's Building and Land Use Ordinance specifically states the standard of review is appellate.

The case *Stewart v. Town of Sedgwick* describes this fundamental legal point as:

> If the ordinance prescribes an appellate function, the Board will review the record of the proceedings before the previous tribunal, review the evidence presented to that body, review the tribunal's written or recorded findings, hear oral or written argument of the parties, and determine whether the lower tribunal erred in reaching its decision.

*Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 8, 757 A.2d 773, 776.

Thus, when an ordinance provides that the Board of Appeals act in an appellate capacity, the Board of Appeals should limit itself to reviewing the record before the Code Enforcement Officer when she made her determination. *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 8, 868 A.2d 161, 164.

For example, the *Gensheimer* case clearly states what is, and is not, appropriate when conducting an appellate review. In *Gensheimer*, the Board of Appeals incorrectly applied the appellate standard when:

- Members of the Board of Appeals traveled to the site, completed an independent examination in person, and stated their opinions regarding various aspects of the site visit during the hearing;
- At least one member of the Board of Appeals also offered opinions based on past personal experiences with the site;
- The Board of Appeals asked numerous questions regarding the role that the developer still had in the maintenance of the site, evidence that had not been presented to the original decision maker; and
- The Board of Appeals considered the statements of two abutting landowners who had not spoken before the original decision maker.

The Maine Municipal Association also provides guidance on how to properly apply the appellate standard for boards of appeals:

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[2] *See* 30-A-A M.R.S. § 2691, which as explained *infra* does not apply when an ordinance requires an appellate review.

> The role of the board of appeals is like that of an appeals court. The board is not conducting a hearing to solicit new evidence in order to create its own record. It is not starting from scratch and is not making its own independent decision. Its decision would not be in the form of "findings of fact" and "conclusions of law." That format is used only when the board conducts a de novo review of an appeal or is the original decision-maker, according to the court in *Yates, supra*. The board may hear presentations by each of the parties and members of the public, but only for the purpose of summarizing the case or trying to clarify certain points. **New evidence, issues and arguments may not be introduced and may not be considered by the board.** The board may consult the municipality's attorney or MMA Legal Services or other experts for guidance in interpreting evidence in the existing record or may ask the parties to submit briefs to assist the board in interpreting the record.

*MMA Board of Appeals Manual* (emphasis supplied).

The 2019 Lamoine Building and Land Use Ordinance clearly states in Section 8(B) that the Board of Appeals conducts an **appellate review** on all appeals from a determination made by the CEO. The only exception to this strictly appellate review is that the Board of Appeals uses a "de novo" standard for variance appeals or appeals made as a result of a tie vote of the Planning Board – neither of which are applicable to this case. The Board of Appeals thus defers to all findings of fact of the CEO that are supported by "substantial evidence" in the record, as well as the CEO's characterizations as to what meets legal standards.

"Substantial evidence" exists if a reasonable person would rely on that evidence to support a conclusion. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577 ("Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion; the possibility of drawing two inconsistent conclusions does not render the evidence insubstantial.").

Characterizations and fact-findings as to what meets ordinance standards are also accorded substantial deference. *See Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048 ("Although interpretation of an ordinance is a question of law, we [here, the Board of Appeals] accord 'substantial deference' to the Planning Board's [or CEO's] characterizations and fact-findings as to what meets ordinance standards.").

The Court in *J & J W. Tr. v. City of Portland* summarized the above points in describing the appellate standard of review as follows:

> [T]he court [here, the Board of Appeals] must affirm the decisions, unless such decisions were unlawful, arbitrary, capricious or unreasonable with respect to issues litigated before the municipal body. *Juliano v. Town of Poland,* 1999 ME 42, ¶ 5, 725 A.2d 545, 547. Also, the fact that the record contains inconsistent

> evidence or that inconsistent conclusions could be drawn from the record does not prevent the [board's, here the CEO's] findings from being sustained if there is substantial evidence to support them. *Ryan v. Town of Camden,* at 975. The Board's [here, CEO's] decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it. *Twigg v. Town of Kennebunk,* 662 A.2d 914, 916 (Me.1995). In addition, appellants bear the burden of establishing that the Planning Board and the PBA [here, the CEO] committed either an abuse of discretion, an error of law or reached conclusions unsupported by competent evidence in the record. *Kosalka v. Town of Georgetown,* 2000 ME 106, ¶ 10, 752 A.2d 183, 186. They must establish that the evidence compels a contrary conclusion. *Herrick v. Town of Mechanic Falls,* 673 A.2d 1348, 1349 (Me. 1996).

*J & J W. Tr. v. City of Portland*, No. AP-99-093, 2001 WL 1710588, at *2 (Me. Super. Mar. 8, 2001).

Accordingly, when acting in an appellate capacity, the Board of Appeals does not substitute its judgment for that of the fact finder. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577 ("We will not substitute our own judgment for the Planning Board's judgment") (*citing Twigg v. Town of Kennebunk,* 662 A.2d 914, 916 (Me. 1995)).

Here, that fact finder is the CEO, who is afforded substantial deference in her findings and characterizations as to what meets applicable standards.

**THE APPELLANT HAS THE BURDEN OF PERSUASION IN AN APPEAL**

As noted above, the burden of persuasion for an appeal always rests with the Appellant.[3] *See, e.g., Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 15, 989 A.2d 1128 (*citing Anderson v. Me. Pub. Employees Ret. Sys.*, 2009 ME 134, ¶ 3, 985 A.2d 501 *and Zegel v. Bd. of Soc. Worker Licensure,* 2004 ME 31, ¶ 14, 843 A.2d 18).

Here, that burden is Moldawer's, who must demonstrate that no competent evidence exists in the record to vacate the CEO's decision, and instead that the evidence compels a contrary conclusion. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577 ("To vacate the Planning Board's findings, [the Appellant] must demonstrate that no competent evidence supports the Planning Board's conclusions."); *see also Herrick v. Town of Mechanic Falls*, 673 A.2d 1348, 1349 (Me. 1996) (stating the appellant must establish that the evidence compels a contrary conclusion).

[3] Similarly, the Lamoine Building and Land Use Ordinance puts the burden on the applicant. Here, the "applicant" is Moldawer as the person who filed a complaint. Indeed, as the person who initiated that complaint process, he had the opportunity to provide all the information he wanted to the CEO.

For the reasons stated below, Moldawer is unable to meet this burden as the record contains substantial evidence to support the CEO's determination of compliance with the permit.

**THE TERMS OF BUILDING PERMIT #18-73 GOVERN COMPLIANCE; THE CEO'S DETERMINATION OF COMPLIANCE IS SUPPORTED BY THE RECORD**

The Record is clear that the CEO approved the Trues' home based on a height of 31 feet to the final grade of the building. (*See* Record at 52, and prior pages at 49-51.) This approved height of 31 feet was based upon the height of the roof to the top of the foundation (28'7") and the distances from the top of the foundation to the rough final grade for each wall (*see* Record at 52). This is what Building Permit #18-73 approved relative to the height of the home. (*See* Record at 57.) The CEO did not return to the site for additional measurements knowing that more fill was being brought to the site, making the building even more compliant.

This height calculation accepted in the November permit governs compliance of the Trues' home. As the Court stated in *Salisbury v. Town of Bar Harbor*, "If the permittee has complied with the terms of a valid permit, an abutter may not challenge the issuance of the certificate of occupancy based on a defect in the permit. If, however, the permittee has meaningfully exceeded the authority contained in the permit, or otherwise violated conditions of the permit, the issuance of the certificate of occupancy may be challenged." *Salisbury v. Town of Bar Harbor*, 2002 ME 13, ¶ 14, 788 A.2d 598 (emphasis supplied).

Here, the terms of the Trues' permit regarding height is evidenced by the building design, dimensions, elevations, and height calculations of the house as approved by the CEO. Thus, as directed by the Court in *Salisbury v. Town of Bar Harbor*, it is the terms of the Trues' Building Permit (Permit #18-73) that govern compliance in any subsequent challenge – whether it is their certificate of occupancy (not appealed by Moldawer) or a complaint. Moldawer has acknowledged this point, stating he is not challenging the terms of Building Permit #18-73, nor can he.

The CEO and Planning Board Chair, in response to Moldawer's complaint, measured the height of the building from the roof peak to the bottom of the trim board, which was 28'10" (*see* Record at 94) (note: the trim board overlaps slightly over the foundation). This demonstrates the house matches the plans. Further, as the CEO's analysis states, this leaves 6'2" of height that could be utilized by the Trues. The CEO then calculated the average slope from original elevations,[4] determining that for every 7 feet the slope rises 1 foot. The CEO then measured the tallest distance on the downslope side at 38'8", and then the upslope side at

[4] The CEO even used a lower elevation than where the new house rests on the downslope, as the Record shows it is principally at 94.5' and not 93.5' (*see* Record at 90), which makes the CEO's calculations more conservative.

30'9". Based on these measurements, the CEO determined the height was 34'9" based on the conditions at the site during her inspection. (*See* Record at 96-97, and at 98.)[5]

It is important to note that at the time when the CEO and Planning Board Chair visited the property, fill had not yet been brought to final grade around the foundation of the home. This is because construction activities for the overall project had not yet been completed. This is why a height of 31 feet from the roof peak to final grade as averaged across each wall was not measured and determined – because fill had not yet been placed to final grade. Plainly, this final height as approved in Building Permit #18-73 can be complied with, as the Trues have done subsequent to Moldawer's Appeal. More to the point, even though the Trues had not yet brought in fill to the final grade, the CEO's compliance determination was still below 35'.[6]

Further, with respect to number of stories, the Trues' home design is clearly a two-story structure, not a three-story structure as Moldawer argues. This is plainly demonstrated in the various cross-sections of the home (*see* Record at 31-32, 35, 44, 46, 78-79). The CEO's determination that this design is a two-story structure is reasonable (i.e., the Trues' basement is not a third story, just like no one's basement in Lamoine constitutes a story). The Trues' house is consistent with these cross-sectional plans, and therefore they are compliant with Building Permit #18-73 in this respect as well.

Accordingly, the Record evidence, which includes the Trues' building design, dimensions, elevations, height calculations, existing elevations from surveys, and the CEO's and Planning Board Chair's measurements and calculations, supports the CEO's determination of compliance with the permit which should be UPHELD by the Board.

## THE CEO'S APPROVAL OF THE TRUES' BUILDING HEIGHT IS CONSISTENT WITH TOWN PRECEDENT

It bears emphasis that the CEO's approval of the height of the Trues' home is consistent with past precedent both in respect to measuring height to final grade and not considering basements to be stories of a home. For example, the height of Mr. Arnold's home, which is in close proximity to the Trues', was approved using the same height measurement method to average final grade. Similarly, the Kimball-Hamm buildings to the west are also not considered three stories.

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[5] A building of height of 33'9" was also determined by the CEO. It appears that the CEO later corrected this determination to a height of 34'9".

[6] The Trues note that the CEO did not perform a weighted average in arriving at a height of 34'9", which is a term of Building Permit #18-73; nonetheless, this would overstate the actual height, so performing a weighted average would actually result in a height less than 34'9". This is a harmless error, as it is non-determinative of the outcome in this appeal.

**THE CEO'S INTERPRETATION AND APPLICATION OF THE HEIGHT STANDARD TO THE TRUES' HOME AND OTHERS IN TOWN IS A POSSIBLE INTERPRETATION THAT MUST BE CONSTRUED IN FAVOR OF PROPERTY OWNERS**

Even if the terms of Building Permit #18-73 were ignored in this appeal, which per *Salisbury v. Town of Bar Harbor* would be improper, for the sake of argument the CEO's interpretation and approval of the Trues' home utilizing average final grade is nonetheless supported by the Building and Land use Ordinance.

Land use ordinances are in derogation of common law private property rights. Any ambiguities in an ordinance must therefore be resolved in favor of the property owner's proposed use. *Forest City, Inc. v. Payson*, 239 A.2d 167, 169 (Me. 1968). Because zoning ordinances are in derogation of private property rights, they are given strict interpretation and may not be extended by implication to limit a landowner's proposed use. *Moyer v. Bd. of Zoning Appeals*, 233 A.2d 311, 316 (Me. 1967).

An ordinance is "ambiguous" if it is capable of being understood in two or more possible senses. *See e.g., Webster's New Collegiate Dictionary* (1977 ed.) ("ambiguous" – "2: capable of being understood in two or more possible senses").

Here, the Lamoine Building and Land Use Ordinance states that building height is: "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 grade adjoining the building, whichever is greater." (*Lamoine Building and Land Use Ordinance "Definitions"*.) When approving the Trues' permit, the CEO determined this to mean that the "whichever is greater" language is in reference to final or original grade compared to one another. This is how Ms. Albright and other CEOs have historically applied the ordinance, such as the Arnolds' and other residences in Town. This is also how height is measured in various national and international codes, such as the *International Building Code*. (*See* Illustrative Exhibit A.) Indeed, it is common industry practice to measure the height of a building to the average final grade, which is what the Lamoine Building and Land Use Ordinance contemplates when the average final grade is greater than the average original grade.

While Moldawer's interpretation of the height standard is a possible interpretation, so is the CEO's given the ambiguity of the ordinance and common industry standards. Regardless of any ambiguities, it was perfectly clear that height would be measured to final grade for the Trues' permit. As noted above, because zoning is in derogation of private property rights, it is construed in favor of a property owner – here, the Trues. Further, the CEO's characterizations and findings as to what meets ordinance standards is afforded substantial deference under the appellate standard. Here, there is simply nothing that compels a contrary conclusion to the CEO's approval and compliance determination.

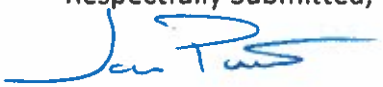
## CONCLUSION

Building Permit #18-73 contains the terms that govern compliance of the height of Tom and Kathy True's home, and the Record contains substantial evidence to support the CEO's findings and determination of compliance. Moldawer's appeal should therefore be denied on this basis alone. Although not necessary to deny Moldawer's appeal, the CEO's interpretation of the height standard is consistent with rules of ordinance interpretation that must be construed in favor of property owners, which utilize the average final grade as a measure when it is greater than the average original grade – a common industry practice. This is also consistent with the Arnolds' building height calculation as well as many other homes in the immediate vicinity. There is simply no Record evidence to compel a contrary conclusion that their home is over 35 feet.

## REQUEST FOR RELIEF

For each of the above reasons Tom and Kathy True respectfully request that the Board of Appeals DENY the Moldawer Appeal, and UPHOLD the CEO's determination of compliance with the permit.

Respectfully Submitted,



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