March 9, 2020

Griff Fenton, Chair
Jon Van Amringe, Chair Pro Tem
Board of Appeals
Town of Lamoine
Lamoine, Maine 04605

Re: Moldawer v. CEO II

To the Members of the Board of Appeals:

I understand that the Board of Appeals meeting on my December 3 appeal of the Code Enforcement Officer’s November 30 re-determination of no violation is to be held on March 25, despite my request that it be held at a later date. The setting of meeting and hearing dates is the prerogative of the Board, which I respect. While, according to Stu Marckoon, there is a distinction between a Board “meeting” and a Board “hearing”, it appears that distinction no longer exists and the Board may well be prepared at the March 25 meeting to dismiss my appeal on the advice of James Collier, the Bar Harbor attorney retained to advise the Board. Apparently, Mr. Collier believes that I will then take my appeal to Superior Court and the Court will be called upon to resolve what the Town cannot.

While I have booked a flight to attend the March 25 meeting, flights to Maine from beyond New York require changes of planes and the CDC is advising persons over 60 years of age to avoid airports and air travel for now. Whether I will be able to attend on March 25 remains to be determined by travel advisories at that time.

I watched on live stream, along with others, the Board of Appeals meeting of March 4. I was surprised and dismayed at some of the legal and non-legal advice given to the Board by Mr. Collier—to which the Board appeared to be receptive. For the reasons set forth below, I believe what Mr. Collier has advised the Board to do next in this appeal should not be followed. His advice is not supported by the law and would be contrary to the best interests of the Board and our Town.

In reciting where this matter now stands before the Board of Appeals, Mr. Collier is correct. After months of hearings and deliberations by the Board, the Board made a final decision on October 29, 2019 that 1) upheld the appeal of the CEO’s April 3, 2019 determination of no-violation, 2) that decided the CEO misinterpreted and misapplied the Building Height Limitation in the Building and Land Use Ordinance (BLUO) and 3) that instructed the CEO how to measure the True house height in order to comply with the law. He correctly stated that “darn tootin the CEO was bound by the decision of the Board” and was required to follow it in enforcing the BLUO. Mr. Collier answered a number of other relevant questions put to him by Board members, including why an appellant cannot appeal directly from a CEO’s determination to Superior Court. He then gave legal and non-legal advice to the Board on how it should proceed going forward. This is where my agreement with the advice of Mr. Collier ends.
Mr. Collier recommended to the Board of Appeals that a way out for the Board of Appeals is for it to decide it is without jurisdiction to hear and decide the appeal filed on December 3. However, this recommendation to “pass the buck” (his words) on to a court of law instead of the Board simply deciding the issue on appeal is not only legally baseless but bad policy for the Board and Town. To be blunt: it would be, for all intents and purposes, an admission by the Board (and the Town itself) that it is incapable of resolving its own issues with the Town’s CEO and with code enforcement in general—that it cannot manage itself. It may be a clever fiction used in Bar Harbor to say “we have no jurisdiction,” but I submit it would be wrong for Lamoine.

While rightly stating that he is unable to find any precedent for a situation where a Code Enforcement Officer has simply disregarded a clear-cut Board of Appeals decision, Mr. Collier nevertheless argues that, ultimately, because the Board is powerless to compel the CEO to act in accordance with its decisions, and cannot itself discipline any official, it should surrender its statutory mandate to hear and decide the appeal under the guise of not having jurisdiction. Mr. Collier cannot cite any authority for his advice and there is no language in any statute, ordinance or case law that I have been able find to support it. On the contrary, state and local law says just the opposite.

Without question, the Board of Appeals has jurisdiction to hear and decide this appeal. That jurisdiction is not discretionary but is mandatory. Section 2691 of Chapter 123 of Title 30-A of the Maine Revised Statutes says that: “Absent an express provision in a charter or ordinance that certain decisions of its code enforcement officer or board of appeals are only advisory or may not be appealed, a notice of violation or an enforcement order by a code enforcement officer under a land use ordinance is appealable on appeal by the board of appeals . . .” The Maine Supreme Court in the Raposa case (previously cited) held that appealable “enforcement orders” include determinations of no violation. Nothing in our state law or Town ordinance provides that a Board of Appeals can decide it has no jurisdiction simply because it thinks its decision will be ignored. If the advice of Mr. Collier were to be followed by the Board, all a CEO would have to do in future to deny the Board of Appeals jurisdiction is to announce in advance that, just like in Moldawer v. CEO, any Board decision overruling the CEO will not be respected.

Mr. Collier further opines to this Board that the ruling in Raposa is bad case law and attorneys who represent towns like Bar Harbor and elsewhere agree with him. I urge this Board to read again the opinion of Maine’s highest court in Raposa. Not only does the Maine Supreme Court disagree with Mr. Collier, there are many land use attorneys in the State of Maine who believe the Raposa case, as one prominent Portland land use attorney recently told me, was “long overdue.” To advise the Board, and indirectly this Code Enforcement Officer, on how best to avoid future appeals by not putting official determinations in writing, is to further promote bad government policy and do a disservice to the residents of Lamoine. The next failure to enforce the BLUO or Shoreland Zoning Ordinance by a CEO might not be limited in effect to a small community like Marlboro or seem as “petty” as this one does to some townspeople.

Mr. Collier goes on. In response to a question posed by one of the Board members as to whether the Board of Appeals or any individual member can or should communicate with the Board of Selectmen—who clearly have “as directed” authority over the CEO—to be sure the Selectmen are accurately told what the Board decided and what the CEO has failed to respect in her redetermination, Mr. Collier responded that, while it was not “legal advice” to say “no”, he
recommended that the Board and Board members “stay in their own lane” and say nothing. This recommendation, respectfully, is also ill-advised. Elected and non-elected officials at every level of government confer all the time with one another in order to find solutions to problems within their jurisdictions. Subject to the Open Meeting rules, it’s not only appropriate but good government to try to resolve town issues collaboratively before forcing them to a court. Board member Fowler is justified in being concerned about the growing cost to the Town of this dispute, but the cost is not the result of a citizen who appealed to this Board but the result of a rogue CEO who has gone to considerable lengths to misinterpret and misapply the law, who tried to keep the Board from hearing this appeal in the first place, and who has stubbornly since refused to respect it’s decision.

As matters now stand, what confronts this Board and equally the Town is less a question of whether the True house will remain as constructed than whether the Board of Appeals has a reason for being; whether it can discharge its duties; and whether the Town can govern itself. Creating a fiction that the Board does not have jurisdiction in order to “pass the buck” and force a court to intervene (likely sending it right back to the Board of Appeals to do its job) is a bad precedent for the Town. The CEO’s contempt for the Board should not be used as the basis for abandoning the Board’s role. The Board should hear the appeal of the CEO’s redetermination, as it is required to do, and, relying upon the Board’s prior decision, uphold the appeal, remanding it back to the CEO with clear direction for her to act. It will then be up to the Selectmen to direct the CEO to do her duty, or sadly, to decide itself to look the other way and disregard the Board’s decisions as well. It is not for the Board of Appeals to decide the Town can’t govern. Nor is it the responsibility of Moldawer or any other individual citizen to have to go to court to accomplish for the Town what the Town has the responsibility to do for itself.

I apologize if the tone of this letter seems harsh and I mean no disrespect of Mr. Collier. Members of the Board have put in many long hours dealing with this case, for which they deserve a lot of credit and respect. But as the Town celebrates its 150 years in existence, one would think it has learned to resolve its problems in a more rational and responsible way than to follow the course Mr. Collier suggests in this case, or to let CEO’s contempt for the Board go unaddressed. And, if there is anything to come out of this tortured process, it should be more than the charting a future path for ways to dodge compliance and the accountability of its officials.

Thank you again for your consideration of this letter.

Respectfully submitted,

[Signature]

Alan Moldawer