

**Kennebunkport Zoning Board of Appeals**  
**32 North Street, Village Fire Station**  
**September 24, 2019 @ 7:00 P.M.**

A meeting of the Kennebunkport Zoning Board of Appeals was held on Tuesday, September 24th, 2019. The meeting convened at 7:00 p.m. in the North Street Fire Station.

Members Present: Mr. Paul Cadigan (Chair), April Dufoe, Wayne Fessenden, Kevin McDonnell, Karen Schlegel  
Absent Members: Jim Fitzgerald, Gordon Ayer  
Others Present: Werner Gilliam Code Enforcement Officer, Amy Tchao Town Attorney

*1. Attendance*

Mr. Cadigan opened the meeting and confirmed a quorum for tonight's meeting.

*2. Approval of minutes from the September 16th, 2019 meeting.*

Ms. Schlegel made a motion to approve the minutes from the September 16<sup>th</sup>, 2019 Zoning Board of Appeals meeting. Mr. McDonnell seconded the motion and the vote was unanimous.

Mr. Cadigan acknowledged a previous association with Mr. Slager and recused himself from the proceedings of this meeting. Mr. Fessenden, as Vice-Chair of the Zoning Board of Appeals, continued with the meeting and introduced the Agenda of tonight's meeting.

*3. Randy Slager, Applicant –*

*The Applicant is appealing the issuance of a building permit for 200 Ocean Avenue, Tax Map 7, Block 12, Lot 5 in the Cape Arundel Zone.*

*Executive Session – Title 1 M.R.S. 405(6)(E) – Consultation with Board's attorney regarding the legal rights and duties of the Board.*

Mr. Fessenden asked for a motion to go into executive session as stated above. Mr. McDonnell made a motion to go into executive session per Title 1 M.R.S. 405(6)(E) for consultation with the Board's attorney regarding legal rights and duties of the Board in this matter. Ms. Schlegel seconded the motion and the vote was unanimous.

The Board recessed the meeting.

After a brief recess, the Board resumed the meeting with Attorney Amy Tchao joining the Board.

Attorney Tchao introduced herself as counsel representing the Zoning Board of Appeals and acknowledged to initially having a couple of communications with Werner Gilliam but gave no substantive advice to Mr. Gilliam as it became evident she would be assisting the Board in her official capacity as Town Attorney. Ms. Tchao asked all parties if there were any objection to her role as stated tonight. There were no objections from the Board members or any of the invested parties or their attorneys in attendance this evening.

Mr. Fessenden called for another roll call and confirmed a quorum of 4 Board members. In accordance with the By-Laws of the Zoning Board of Appeals, Mr. Fessenden explained any matter before this Board shall confirm a majority vote of the members of the Board which means 4 votes would be required for approval and any vote by a lesser number would be considered a rejection.

In accordance with the Zoning Board of Appeals By-Laws, Mr. Fessenden asked the Board members to discuss if this Board has the appropriate jurisdiction to hear this appeal. Ms. Tchao read Article 9.3.A. from the Land Use Ordinance which states: *“Any person aggrieved by a decision of the Code Enforcement Officer, other than a decision or failure to act related to an enforcement-related matter as described in Article 9.2.A.1 of this Ordinance, may appeal that decision by filing an administrative appeal application on forms provided for that purpose with the Town Clerk within thirty (30) days of the decision. The Board, upon showing a good cause, may waive the thirty (30) day requirement.”* Ms. Tchao stated the parties in this appeal have indicated in letters that the issue of the thirty day requirement should be addressed and that the Board needs to determine if that requirement should be waived.

Mr. Fessenden stated for the record Mr. Slager filed his appeal in the town offices on August 1, 2019 and the building permit in question was issued on December 4, 2018.

Before hearing from both parties in this matter, Mr. Fessenden read through the other requirements for submission in the Zoning Board of Appeals By-Laws and determined there are no issues with conflicts of interest, application completeness, and submission of documents.

Mr. Fessenden asked Mr. Slager to begin his presentation.

Attorney Allan Atkins representing Mr. Slager introduced himself along with Mr. Fulton Rice and stated Mr. Slager would like to make a short statement.

Mr. Slager read his statement to the Board providing background on his life, past employment, past business ventures and real estate purchases including his current property at 196 Ocean Avenue. Mr. Slager also detailed his lengthy search to find legal counsel along with a chronological account of his extensive medical issues, medical procedures and rehabilitation. Upon return from his Florida residence, Mr. Slager stated he found his neighbor had built a raised patio on his property line about 6 feet from his house that not only creates a loss of privacy but also presents a direct danger to his house’s foundation because of the way the patio was constructed.

Attorney Atkins began his presentation by stating Mr. Slager believes the Town of Kennebunkport made an error in not referring the Applicant (Ms. Bell) to the Planning Board under Article 10.2.A.3. which states; *“Expansion, enlargement or change of any existing use, including an expansion, enlargement or change of use occurring entirely within an existing building.”* Mr. Atkins also argued that the town did not submit a list of building permits issued bi-monthly as required by the Town Ordinance. Mr. Atkins continued there is no record of the town sending a list to the York County Coast Star and there is no record in the Coast Star of any list being published. Mr. Atkins also stated the first notice Mr. Slager received of Ms. Bell’s building permit was April 1<sup>st</sup>, 2019 when he found a letter in his backyard upon returning from Florida.

Mr. Atkins passed out copies of a timeline of events to the Board members, other parties and Town Counsel Attorney Tchao.

Mr. Atkins read through each item noted on the timeline and concluded his presentation by stating Mr. Slager exercised every single effort possible to earn the right to get a waiver.

Attorney Dan Rosenthal representing Ms. Lori Bell owner of 200 Ocean Avenue, addressed the Board and gave a lengthy presentation stating it has been 10 months since the building permit has been issued. Mr. Rosenthal also stated that not only has the 30 day requirement not been met, but also the good cause standard has also not been met. Mr. Rosenthal cited the following cases to support his argument:

- Thibeault v. Town of Newfield, where the law court maintains the “strict compliance with the appeal procedure of an ordinance is necessary to ensure that once an individual obtains a building permit he can rely on that permit with confidence that it will not be revoked after he has commenced construction.”
- Bracket v. Town of Rangely which recognizes the important filing and appeal deadlines are for people who are investing substantial sums to be able to have some certainty.

Mr. Rosenthal then explained a similar chronology of notices, permit issuance, and email correspondences between Ms. Bell and Mr. Slager, and written notices.

Mr. Rosenthal asked the board if he could supply some additional information.

After a brief discussion, Mr. McDonnell made a motion to allow and review the additional data provided by Attorney Rosenthal. Ms. Schlegel seconded the motion and the vote was (4-0) unanimous.

Mr. Rosenthal distributed copies of weather reports and a photograph of the property in January of 2019.

Mr. McDonnell asked when the notification was delivered. Mr. Rosenthal replied Mr. Thompkins, Ms. Bell's architect, said he delivered the notices on December 4<sup>th</sup> when the permit was issued.

Mr. Rosenthal continued with his presentation on the chronology of events similar to Mr. Atkins presentation.

Mr. Rosenthal concluded by stating the Maine Supreme Court tells us that people need to be able to rely on permits.

Mr. Fessenden asked if the Board members had any questions.

Ms. Dufoe asked how much money had Ms. Bell invested in her project as of August 1<sup>st</sup> when Mr. Slager filed his appeal. Ms. Bell responded she has spent close to \$1,000,000. Ms. Schlegel commented she didn't think the Board needs to know the exact dollar amount just that time, money and effort has been invested.

Referring to Mr. Atkins argument that Ms. Bell's plans should have gone before the Planning Board, Ms. Dufoe asked Mr. Gilliam to explain further. Mr. Gilliam first cited Article 10.2.A.2 which states: "*Construction, alteration or external enlargement of any building or structure*" which is the general language. Mr. Gilliam cited Article 10.2.B.1 for more specific language on what is required to obtain Site Plan Review and Approval. Article 10.2.B.1 states "*Site Plan Review and Approval shall not be required: 1. For detached single family dwellings, accessory apartments, two family dwellings, home occupations and their accessory building, driveways and parking areas*". Mr. Gilliam added it has been the long standing interpretation of the Code Enforcement Office that this property is a single family home and the structures and improvements on the property are accessory to the use of that single family home. To address another section of the Land Use Ordinance referenced in Mr. Slager's appeal, Mr. Gilliam stated Article 11.4.E. gives the Code Enforcement Office discretion as to whether or not to send a particular application to the Planning Board. Mr. Gilliam added all of these references have been in the Land Use Ordinance since 1985 and was put in place for specific and unique circumstances in which under the discretion of the Code Office proposed permit or use is such that the code officer does not feel as if they have the authority to render a decision. There is a specific exemption that states Site Plan approval for single family homes and the associated uses does not require Site Plan approval by the Planning Board, Mr. Gilliam concluded.

Ms. Dufoe asked Mr. Gilliam if it was correct that there is no requirement in the Land Use Ordinance that anybody needs to get notified when a basic building permit is issued. Mr. Gilliam replied our notice requirements are specific within the Ordinance in that notice requirements specifically apply to Planning Board Site Plan Review projects, Zoning Board of Appeals scenarios, and blasting permits. Those are the cases in our Ordinance that require us to notify abutters, Mr. Gilliam added. Ms. Dufoe commented that other than that nobody needs to get notified. Mr. Gilliam agreed with Ms. Dufoe's comment.

In response to the question about notice to the newspaper, Mr. Gilliam explained it has been a long-standing practice in the Code Enforcement Office that we keep track of all the permits being issued and those are distributed to the Board of Selectmen, different departments within the town offices and are also sent to the York County Coast Star.

Mr. McDonnell commented that Article 11.11 Publication of Building Permits states *“The failure of the Code Enforcement Officer to make available this list, or the decision of the newspaper not to publish this list, shall not invalidate any building permit.”*

Mr. Atkins asked to raise the following two points:

- The Shoreland Zone review requires this Application be sent to the Planning Board under the provisions of Article 10.3.
- The events that took place prior to April 17<sup>th</sup>, Mr. Slager was led to believe the only thing being done was landscaping.

Mr. Atkins added that Mr. Slager’s long history of debilitating medical issues and the fact that he lives in Florida should itself warrant an exception of the 30 day requirement.

Mr. David Douglas, licensed architect for Mr. Slager, addressed the Board and asked them to consider the health, safety and welfare of the occupants as sufficient reason for good cause in granting a waiver of the 30 day requirement.

Mr. Fessenden asked Mr. Atkins if he believes the Code Office has been working to make corrections to any actions that were not part of the permit. Mr. Atkins replied he believes the Code Office has gone out of the way to accommodate Ms. Bell in giving her leniency in establishing requirements and deadlines which haven’t been met and keep getting extended.

Mr. Rosenthal asked to address the following points in response to Mr. Atkins’ and Mr. Douglas’ comments:

- The reference that Shoreland Zone requires Planning Board approval states the uses listed in Article 5 have to go to the Planning Board which are uses that are not landscaping.
- The permit application on file contains a lengthy narrative of the work to be done with plans attached.
- What is lost if this appeal is allowed is for an applicant to have a sense of certainty that if they start working and doing what they’ve been asked to and what the town has told them they can do that they can continued and proceed.
- Ms. Bell has acted in good faith and provided any information the town has requested so revoking this permit or hearing an appeal filed in August of a permit issued in December does not prevent this town from being able to be confident that safety can be provided.
- Mr. Slager’s reasoning for missing the 30 day deadline is not the same thing as having good cause.

Mr. Fulton Rice addressed the Board to argue that Article 4.14.B and specifically item #4 Public and private recreational areas involving minimal structural development, requires Ms. Bell’s patio construction to obtain Site Plan Approval from the Planning Board.

In response, Mr. Gilliam citing Article 4.14.A. items #4 and #5 stating that it has been the longstanding interpretation of the Code Enforcement Office that when we refer to single and 2-family dwellings that includes accessory elements of the property.

Ms. Schlegel commented that in the original building permit it states it is repairing or replacing existing walls so it is not as though it is new construction that wasn’t there to begin with. Mr. Gilliam added that while the walls are considered structures they are accessory to the single family home use and those were shown on the plans as applicable so it does fall under the guise of the permit and its attachments.

Both parties again presented arguments on whether sufficient notice was provided and the nature of the proposed work being done.

Mr. Fessenden asked if any members of the audience wished to speak. There were no comments or questions from the audience in attendance. Mr. Fessenden closed the Public Hearing portion of the meeting.

Mr. Fessenden asked Mr. Gilliam if he had anything further to present.

Although it is not the subject of this appeal specifically, Mr. Gilliam gave a detailed description of the corrective action and the letter sent to Ms. Bell after town staff conducted site visits in response to Mr. Slager's concerns. Mr. Gilliam concluded his account of events by stating the Code Enforcement Office has responded appropriately to Mr. Slager's concerns regarding structural integrity and believes they have taken the appropriate measures in securing information that what is on Ms. Bell's property is structurally sound.

Ms. Dufoe asked what was the very first date Mr. Slager came into the Code Enforcement Office with concerns. Mr. Gilliam responded he has in his notes that Mr. Slager came into the office on May 20<sup>th</sup> to find out if there were any new plans for 200 Ocean Avenue and asked the office to let him know if the plans have changed.

Mr. Fessenden announced the Board has heard a large of amount of information from all parties but the real issue before the Board is one of timeliness.

Hearing no further information from all parties present, Ms. Tchao instructed the Board to begin deliberations on the question whether the Board upon a showing of good cause determines to waive the 30 day requirement.

Mr. McDonnell offered his opinion that it certainly appears that there was knowledge of the work being done all the way back to the January timeframe with email documentation back and forth and based on that there is not good cause for going beyond the 30 day requirement.

Ms. Dufoe commented that even before the permit was issued Mr. Slager knew something was going to happen and that there is not good cause to nullify a permit that was issued months before.

Ms. Schlegel acknowledged there are other things that have happened that is not in this Board's jurisdiction but this appeal was not filed in a timely manner and does not meet the criteria for a waiver of the 30 day requirement.

Mr. Fessenden offered his opinion that even with the large amount of submitted material, it is reasonable to assume Mr. Slager was aware of what was going on and has not provided good cause to warrant a waiver of the 30 day requirement.

There were no further questions or comments.

Ms. Tchao asked the Board members if they would like to vote at this meeting and she would provide a written decision with the Board's findings and conclusions within 7 days or wait until she has provided a final written state and vote at a subsequent meeting. All Board members agreed to vote at tonight's meeting and have Ms. Tchao prepare a formal written statement within 7 days of this meeting.

Ms. Tchao shared the following notes to be included in the Board's formal statement:

- In terms of evidence the Board is relying on email documentation going back and forth and actual visits to the property by Mr. Slager in January with email documentation spanning from December 4<sup>th</sup> when the permit was issued all the way forward.
- Mr. Slager visited the Code Enforcement Office on May 20<sup>th</sup>
- Appeal wasn't filed until August 1<sup>st</sup>.
- Considerable medical issues and difficulty in obtaining legal representation are not sufficient reasons.
- Ms. Bell relied upon the permit in good faith and made substantial investment based on that permit.

Ms. Tchao also shared her notes that it is the finding of the Board that issues to do with structural integrity or safety of what has been going on are not within the purview of this Board and rather should be reviewed by the Code Enforcement Office.

All Board members agreed with Ms. Tchao's notes.

Mr. McDonnell made a motion to deny the appeal for the issuance of a building permit for 200 Ocean Avenue, Tax Map 7, Block 12, Lot 5 in the Cape Arundel Zone. Ms. Tchao offered to amend the motion to add the denial is based on the timeliness of the appeal being filed well after the 30 day requirement in the Land Use Ordinance under Article 9.3.A and being no sufficient showing of good cause to waive the 30 day requirement. Ms. Dufoe seconded the amended motion and the vote was unanimous (4-0) in favor of the motion.

**Adjournment:** A motion was made to adjourn, it was seconded and the vote was unanimous.

**Submitted by:** Patricia Saunders, Recording Secretary