



TOWN OF HARRISON

HARRISON BOARD OF APPEALS MEETING MINUTES OCTOBER 10, 2019

Board Members Present: Robert McBride, Doug Wall, John Strickland, Lisa Villa, Jonathan Whitney, CEO John Wentworth, Asst. CEO Jim Fahey, Secretary Kristen MacDonald

Public Present: Matthew Munson, Doreen Munson, Jason Dennis-Munson's Attorney (Hastings Malia, P.A.), James Dayton

Chairman McBride called the meeting to order at 5:00 pm following a site walk for the applicants, Matthew & Doreen Munson at 187 Norway Rd. A quorum was determined.

New Business:

Application for Administrative Appeal to Board of Appeals – Matthew & Doreen Munson – 187 Norway Road, Harrison – Map 46 Lot 23

The applicants have met the timeline requirements for submitting an appeal.

Chairman McBride stated the circumstances of this appeal:

The Munson's have submitted an administrative appeal in which they state that their request for a permit to repair a shorefront deck on their property on Crystal Lake (Map 46 Lot 23 – 187 Norway Rd.) has been incorrectly denied by the Harrison Code Enforcement Officer. Code Enforcement Officer, Wentworth denied the application as the town has no evidence that this deck is a legally non-conforming structure. The building file has no permit issued for this deck, nor a permit issued for repair or replacement. The applicant has also already started repair work on the structure without a permit which is a violation of the Shoreland Zoning Ordinance section 16B. The applicant contends that the structure is a legally non-conforming structure as it was built prior to 1990 and prior to the Town's adoption of the Shoreland Zoning Ordinance in 1992 and as such no permit is required to maintain and repair the structure as per 12A and 12B in the Shoreland Zoning Ordinance.

These SZO sections state in part that “non-conforming conditions that existed before the effective date of this ordinance or amendments thereto shall be allowed to continue, subject to the requirements set forth in section 12. Except as otherwise provided in this ordinance, a non-conforming condition shall not be permitted to become more non-conforming...This ordinance allows the normal upkeep and maintenance of non-conforming uses in structures including repairs or renovations that do not involve expansion of the non-conforming use or structure and such other changes in a non-conforming use or structure in federal, state or local building and safety codes may require. The ordinance defines a non-conforming structure as one which does not meet any one or more of the following dimensional requirements; setback, height, lot coverage or footprint but which is allowed solely because it was in lawful existence at the time this ordinance or subsequent amendments took effect.” The Appeals Board is asked to determine whether it believes the structure was in fact in lawful existence prior to the enactment in 1992 of the Harrison Shoreland Zoning Ordinance and whether the Appeals Board should approve the request for the issuance of a building permit for the deck structure.

The Harrison Board of Appeals does have jurisdiction over this appeal. Harrison Shoreland Zoning Ordinance Section 16-H-1 grants the Appeals Board jurisdiction to hear and decide administrative appeals on a “de novo” basis where it is alleged by an aggrieved party that there is an error in any order, requirement, decision or determination made by the Code Enforcement Officer in his review or action on a permit application under this ordinance.

We determine that the applicant does have standing to apply for the appeal. A copy of the Harrison town assessor’s records for the property was submitted with the application.

Chairman McBride commented that this is the first administrative appeal that he has had to do since he has been on the Board of Appeals which is why he gave a background as to what he has read in the manuals so that the whole Board is on the same page.

Mr. McBride asked the applicants the following questions:

When did you purchase the property designated as Map 46 Lot 23, 187 Norway Rd.?
Doreen replied: September 22, 2017.

What is your understanding as to when the deck in question was built and how have you come to the conclusion that it is a legally non-conforming structure?
Matthew’s response was: Per the previous owner (The Legacy’s) there was an existing structure there when his father purchased the property in 1987. The previous owner owned the house from 1954 to 1987. There was some structure built at that time, when his father purchased the property in 1987 that’s when they put new decking on, in 1987. To answer your question the structure has been there prior to 1987. I couldn’t get an exact answer from the Dam’s, the father is 94 years old and the son in 68 years old. The deck was there somewhere between 1954 and 1987. It was definitely there when the Legacy’s bought the property in 1987.

Board member Jonathan Whitney asked if the structure was in the same dimensions? Mr. Munson commented yes, the original telephone poles are from the prior deck, before the new decking was put on in 1987.

Munson's attorney, Mr. Dennis stated: "that I would like to add, for the record, that there was a site walk for the property in question so that the Board could take notice of the poles that were there and with regards to the issue of pre-existing non-conforming use, the shoreland zoning ordinance went into effect in 1992. That went into effect because of a state statute that basically forced all municipalities in Maine to enact shoreland zoning. That statute did not mandate municipalities to enact shoreland zoning until June of 1992 which I think is indicative of why and when Harrison's shoreland zoning ordinance came into place, it had to, so it just met the deadline and it requires the minimum standard for municipal ordinances which comes from the state statute. Municipalities can be more stringent but they can't be less stringent which is often the case when you have a state statute that then also gives some home rule power to the town."

"In this case, why its lawful is because something is lawful if it is not unlawful and there was no requirement for a permit at the time of this structure. The town's own building permit requirement today, the first sentence is before the construction, alteration, relocation, repair or replacement of any building or part thereof. Now in the court of law you can debate all day the semantics of building vs. structure but that deck from any common sense perspective is not a building. Since they didn't need a permit before the 1992 enactment of Harrison shoreland zoning ordinance, it is grandfathered in. Which is what we mean by pre-existing non-conforming use. It wasn't unlawful therefore it is lawful."

Chairman McBride explained that in some of the records he was reviewing it stated that an Act to Provide for a Building Permit for the Town of Harrison was approved at town meeting on March 16, 1974. Mr. Dennis commented that no one has ever produced that document to them. Chairman stated that it is a fact for the Town of Harrison. Doreen said that they went in and asked for the shoreland zoning records from then and they couldn't get them.

Chairman McBride said that after March 16, 1974 there was an act on the books in Harrison that stated you needed a building permit.

Board member Doug Wall affirmed that the mandatory State shoreland zoning law was enacted in 1971 and he had participated in the shoreland zoning mapping for the Town of Harrison in the 70's. They had different residential and commercial and other areas that came up with colored maps and they were reflecting the town opting for their own criteria, being the same or even more stringent. Harrison enacted something similar to what you see there in 1992 in 1974. Mr. Dennis commented respectfully he disagrees, what he heard was that there was a building permit act not a shoreland zoning act. Doug affirmed that there was absolutely a shoreland zoning ordinance enacted in 1974 and that they can get it from the CEO.

Chairman McBride asked CEO Wentworth if there was a shoreland zoning ordinance adopted in 1974. CEO stated that was correct. The Chairman also asked if it was the CEO's understanding that when you don't amend that one but you adopt another shoreland zoning ordinance does the one that is more recently adopted take precedence? CEO responded: I'm not sure what you meant by takes precedence? Sometimes you have adopted one specific ordinance; you may do ten amendments to it over time, those are listed on the faces of the ordinance but that doesn't mean you have to list every single amendment back to its inception. They adopted this one back in

1974, there were multiple amendments to that one over time. Then they adopt a new one, they don't put the old one back on there. McBride asked if the old one still exists? CEO states of course. McBride asked is it still in effect? CEO said no its was in effect at the time.

McBride commented so whatever was in effect in the 1974 Ordinance was replaced by the 1992 Ordinance. CEO replied let's say for example you have a 25 foot setback in the limited commercial district from the normal high water mark, that changes in the next ordinance, well if somebody builds 25 feet back in whatever particular year prior to the new ordinance that becomes legally non-conforming. If they build it 25 feet after the new ordinance goes into effect then it's illegal. Mr. Munson asked if that structure would be grandfathered in because it was built prior to the change? Chair and CEO replied only if it is non-conforming. CEO said if it was permitted it would. CEO commented that all structures were required to have a 75 ft setback and then a new ordinance went into effect and it was 100 feet.

Doreen stated that the deck had been there since the 50's according to the Dams. The Legacy's bought it in 1987 from the Dams and replaced the boards, which means the Dams had the deck when they owned it.

Chairman McBride said that the only thing they have in the record to indicate that it was built in the 1950's prior to the 1974 ordinance is the statement by the Munsons that the Dams told that to them. Doug Wall commented that although the town adopted it in 1974, the state mandated it in September of 1971. Attorney Dennis said he wanted to read to them from the mandatory shoreland zoning act that the deadline for the municipalities to adopt a shoreland zoning ordinance meeting the minimum guidelines by the Board of Environmental Protection is extended to July 1, 1992. Dennis stated that what he is looking at was adopted June 30, 1992 so the only evidence that we have in the record for when a prior ordinance was enacted is the code enforcement officer, who wasn't a code enforcement officer at that time, saying there was one and the board member saying there was one. There is no evidence in the record of what the requirements were at that time.

It was stated earlier at the outset of this meeting that we have to confine ourselves to the record we have. We have to confine ourselves to a record that does not provide any zoning requirements before 1992. We cannot use that version of the 1971 or 1974 because it is not in the record. McBride asked what does that mean? Dennis said that they can't actually look at it to say what was the requirement in 1971 or 1974. Doug commented that maybe they should recess and gather what is requested and meet again if that's the stumbling block. Produce the information.

CEO Wentworth recommended that if the Munson's are going to have legal represent them about whether we actually had an ordinance then maybe the Board should have their own attorney present in these proceedings also. Mr. McBride acknowledged that since its not clear cut so that the Board can understand it then that is probably correct.

Board member John Strickland asked when did this first come to light to the town that this deck existed? Mr. Munson informed the Board that it came out in the towns assessing records in 1990. John Strickland then asked if it was brought to light in 1990 why is it being addressed now in 2019? Assistant CEO Jim Fahey responded that assessing and code don't necessarily work hand in hand. Code would only know if

something was built if somebody actually came in and legally obtained a permit. He has no reason to go through assessing records unless someone comes in and asks for a permit or if he notices a violation and goes back and looks at assessing records.

Chairman McBride asked Mr. Fahey how this violation was found with the Munson deck on their property? Mr. Fahey responded: My understanding is that approximately 6 years ago CEO Wentworth had an assistant and they started policing the lakes to find out what the violations were because they wanted to enforce shoreland zoning to protect the water quality. I came on board in February and it was in May when the Town Manager instructed us to go out and start with Crystal Lake to find any violations of shoreland zoning. Mr. Fahey said he had sent out 25-35 letters for violations found and for the property owners to contact us. Most have been corrected and he gave them time to take care of the issues. Unfortunately, some permits were never obtained back in 1975, 1985 or even 1995 - they are still illegal structures so they were required to be removed.

Mr. McBride stated that the Munson's are not the only ones that had a violation and a permit could not be found. Mr. Fahey replied no they are not. He commented that nobody got cited except for the Munsons because Doreen had said that she is not going to comply no matter what they do. Doreen responded: that isn't true. I asked John how can I keep my deck and John said apply for a building permit. And then what happens? He said I am going to deny it. And then what happens? Then you go to the Appeals Board and I said who ultimately makes the decision for the Appeals Board? And John said I do. Mr. McBride said there is a misunderstanding here.

Doreen said she even met with the Town Manager because of it and after that retained a lawyer. That there was so much miscommunication. Doreen also said that she was told by the CEO that it's on them to show burden of proof of a building permit. She also stated that she had a statement in her purchase and sales agreement to talk with the CEO because the deck was about to fall apart and they had 7 days to check in with him before they sign and agree to buy the house. If we were told when he went there that we couldn't do anything to that deck we wouldn't have purchased the house.

Chairman asked CEO Wentworth the process which he would follow for an administrative appeal. He said if he denies an application for a permit and the applicant wants to appeal his decision then it goes before the Board of Appeals and they make the decision.

John Strickland spoke to the applicants. He said he can tell them right now that a decision will not be made tonight. He doesn't necessarily agree with all the rules but he needs to understand some of this. There is no definite proof other than here say that the deck existed 50 years ago, but he believes something was there because of the telephone poles and how they look. His problem is knowing what they can and cannot do and that they are going to need guidance and they need to know exactly when the ordinance was adopted before he can feel comfortable making any decision. Mr. Strickland told the applicants that this was done to them and they came into something that was already existing and he hates to see them get punished because of it but he needs more information as to what was there and when in order to go any further.

Chairman McBride suggested the Board discuss what are the actual facts of this appeal:

In 1990 the assessors had a tax record for the deck.
The Legacy's owned the property from 1987 - 2017
The Dams owned it from 1954 – 1987.

Assistant CEO Fahey wanted to state that with the records that they have this is the first time anybody has pulled a permit in reference to this deck and they were required to. There was never a permit to build it or rebuild it and this is the first gentleman to come in and try to do something with it.

Mr. Dennis believes that a recess would be the most reasonable and legal thing to do since all of the information is not available at this point in time. They do not have the Dams or the Legacy's here for their statement as to when the deck was built and we do not have the physical document of 1971 as far as the ordinance goes. He knows the Munson's do not want to have to come back but he agrees that a decision should not be made without a complete record.

Chairman McBride asked CEO Wentworth if he had any other cases in the past where there was no permit to be found and maybe he had looked to other things that would show something was there at a certain time or a way to figure out what makes it a legally non-conforming structure. Mr. Munson commented that it was all word of mouth back in the 70's and 80's, that there were no permits. Mr. Strickland stated that he could believe that people may have been told you can get started but you need to come in and get a permit but he does not believe they would have been told over the phone to go ahead and do all the work with no permit. Mr. Dennis responded that they heard from Mr. Fahey that a ton of properties did not have any permits and he had to send them notices. Mr. Fahey commented that a lot of them were projects that they were permitted to do certain things and they went beyond what their permit allowed for and a lot of them were built more recently, they didn't go back that far. Unfortunately, a lot of them inherited the problem, they didn't create it and there is an alternative. There is a seasonal docking system that is removable. A deck is a permanent structure. The docking system can be removed in the fall and put back in the spring. There are some stipulations and it wouldn't be as convenient for them but they have an option and would still have access to enjoy the waterfront property.

CEO Wentworth explained that Mr. Fahey has given each person time to call him back, get ahold of him, have discussions, so he has given them time to fix things. If by at some future date they don't call him back or make any effort to do anything then they will get a violation notice.

Mr. Dennis spoke: I want to mention one additional argument for the existence of the structure which is municipal estoppel which is maybe something that is right for discussion with municipal council like John (CEO) had mentioned. I don't want to cost the town more money in attorney's fees but if you feel like you need it then you got to get it. The doctrine of estoppel is this, if a town tells someone they can do something, it doesn't have to be in writing, and the property owner acts in reliance upon it and especially if they act in reliance upon it to the tune of money out of their pocket, then the town is estopped from saying you can't do that anymore. It's like grandfathered in a

way because we the town told you, you relied on it, you spent money, we can't take that right away from you now. That is case law and its illegal.

Chairman McBride responded: But you said it doesn't have to be in writing. How do you prove what the town said and what they relied on?

Mr. Dennis: Ultimately I guess it would come down to you go to court, you call the witness, you ask the homeowners what they were told and then the town gets up there and says what they told them and a judge or jury decides who they believe. It awful but it becomes he said she said. I don't like dealing with he said, she said, I like dealing with figures and facts, but if this dispute isn't resolved then it goes to court and comes down to basically who do we like more or who do we trust more.

So, in this case the estoppel comes in two ways. When they got their purchase and sales agreement they actually put the condition on there that it's subject to talking with the CEO of Harrison within 7 business days of acceptance. They asked if they could repair the dock. They were told they could do it as long as it doesn't expand the footprint. That's exactly what they have done and now they are being told that they can't do it.

The other aspect that could have ramifications after today is it's on the assessment card. If it comes out there is a tax abatement issue because they have been taxed on it since they have owned it. You've got to run it by town council.

Board member Jonathan Whitney asked the Munson's how the process with that condition on their purchase and sale agreement and how the conversation went with the CEO.

Mr. Munson replied: I explained who I was, where the property was. According to the previous owner John had been on the property before and was aware of the deck so I took it for his word. That he knew the deck, knew it was there, go ahead and re deck it as long as you don't change the footprint.

Chairman asked CEO Wentworth if he recalled the conversation.

CEO stated: There was a conversation and he believes it was over the phone.

Typically what happens is I get a call that someone is buying something and they say I need to know by Friday whatever the question happens to be. These all take research as you are well aware. I can't typically tell them or have the time to tell them within their 2-3 day time frame that they have. As I recall the exact words that Mr. Munson said to me was well that's ok, it's not a deal breaker anyway. We would buy it even if we had to remove it.

Doreen Munson interjected that's not true.

CEO asked the Chair to have Doreen address the Chair and not interrupt when other people are speaking.

Doreen said if we were going to say that it wasn't a deal breaker then we wouldn't have put it in the purchase and sale agreement. That totally would have been a deal breaker for us. We would have looked elsewhere. We actually looked at a few properties on Crystal Lake and didn't buy them because there was no deck near the shore.

Board member Doug Wall said it seems like we have two choices here, we can seek council or go to court. One of the things in our shoreland zoning ordinance is burden of proof is on the people that are appealing so we don't need to make stuff up, they have

to prove that it existed prior to 1971 but then we need the information that the ordinances did exist in 1971 or 1974.

Mr. Dennis commented: The Munson's really want their deck or they wouldn't have put it in the contract or asked the town about it. You can make a decision today one way or the other, it could be appealed. We could suspend for you to get legal advice from council, we could suspend for us to see if something physically exists for 1971 or 1974. You guys are in the driver's seat. We had a site inspection and you saw the deck, I mean what on earth why are we really here and saying they can't have that deck. I get it there is a shoreland zoning ordinance, but the way out is it existed before. So why don't we let this nice couple have a nice deck, it doesn't bother anybody in the world and we will be happy.

Mr. Munson: If you think about it we are removing the wood that was chemically treated and harmful to the environment and putting safer wood in.

Assistant CEO Fahey: It is a big deal as to this little deck because if their little deck stays then the neighbors little deck stays and so on and then they end up longer and wider and you end up with horrible water quality. That's why the State put these laws into effect.

Mr. Munson replied: Well then it would be up to them to prove their argument. Not us.

CEO Fahey: In his defense, and I can't speak on behalf of anybody except the conversations I had, he called me after he got my letter and I explained it to him and he told me he would take it down. I put on the notes that it was all set. Then I received a call from your wife who was extremely upset. Told me on no certain terms it wasn't going to happen so I passed it on to my supervisor.

Jon Whitney commented that basically they need to see the files on the Shoreland Zoning Ordinances to know exactly when the first ordinance was approved.

Chairman McBride explained let's say that there is one found for 1971 they still do not know when the deck was actually built. We are basing everything on he said she said and not on the fact of when it was built.

John Strickland added that the only fact is that in 1990 the deck was placed on the assessor's card. In 1992 there was pictures by LEA showing the deck. What was the rule in 1990? We don't know whether this was grandfathered or not because we don't know what rules were in place at that time. We need to know what was going on in 1990 when the town discovered it being there. There are no facts showing it there before 1990 so how can we base any decisions on anything prior to that. We need to know what guidelines were in existence at that time.

Chairman McBride asked the CEO when did the setback change from 75 feet to 100 feet. CEO stated he couldn't say exactly but he thinks around 1986 or 1987. They would need to verify.

Chairman McBride stated: We only know for a fact that it was there in 1990, how are we going to determine that it was there before 1971 and if we have no way of determining it and we are not going to agree how it was there then who cares what 1971 says. Doug Wall responded well let's say this document didn't exist in 1990, they would have it grandfathered so we have to get the document so we can tell it exists.

CEO Wentworth: I urge caution because the Munson's are represented by legal and you may or may not want to be represented by legal, that's your choice but I would like to enter into the record the entire building file for their property and this folder here with the photos so that everything is in the record. I would recommend that you request the earliest shoreland zoning ordinance the town adopted. There is no question in my mind that there is one in the 70's.

John Strickland made a motion that we adjourn until we get further information on the start of shoreland zoning regulations. There was a 2nd. Discussion went as follows: Doug Wall asked if there is a time that would be more convenient for the Munson's to attend. Mr. Dennis asked that if there is no further information needed from the Munson's would they be able to call in for the meeting or could just one of them show up if they aren't both able to attend? The Board agrees that is fine.

John Strickland asked if the Munson's attorney could locate the previous owners, the Dams and possibly get a statement as to when the original deck was built? The Munson's said they aren't sure where they are now and may not be able to locate them. Mr. Dennis asked the Board if they are able to find the prior owner and have them do this will you actually accept that as evidence? No motion was made regarding this request but conversation was about the support that such a statement might add to the applicants attempt to date the existence of the deck structure. John Strickland said he could not speak for the Board but it would be meaningful to him. Doug Wall stated that the prior owners would need to know that they are swearing that the statement they sign is the truth. It was mentioned that the Dams could be questioned by a court if the case ever got to that point.

Board member Lisa Villa asked CEO Wentworth if he sees any problems with this as to setting a precedence. CEO replied that he does not believe this would set a precedence because it has different circumstances.

John Strickland asked if they need to set a time frame for their convenience and the Munson's? Chairman McBride said he will leave that to the Munson's to let us know when they would be able to reconvene. We could get our information together pretty quickly. McBride asked the Board if they have any question with sharing what they find as far as the ordinance with their attorney. Doug Wall said they definitely should. The Board is ok with that.

Mr. Dennis: At the end of the day, from my perspective, if evidence comes forward of a zoning restriction from whatever time before 1992 that would impact a decision, and we just can't find evidence to support that the structure existed before that time, I can't make that argument if I am following my professional rules of conduct. I would withdraw that argument. I would not withdraw my municipal estoppel argument so we would be here on that, but we would not be arguing about dates of when, where, why, adopted, amended, and whatnot. I can write that up for you if you would like to run that by legal. The Board said that would be appreciated.

After discussing a range of timetables for a resumption of the meeting which was being recessed for parties to obtain additional information CEO Wentworth suggested the Board might wish to check with their own counsel regarding the timing of our resumed meeting.

Mr. Munson mentioned that he can only do Thursday and Fridays. The Board said they will accommodate that.

John Strickland moved, Lisa 2nd to adjourn at 6:56 pm. All were in favor and the meeting was recessed until a date to be determined by the Board.

Chairman Robert McBride

Secretary Kristen MacDonald