



TOWN OF HARRISON

HARRISON BOARD OF APPEALS MEETING MINUTES DECEMBER 5, 2019

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

Board Member Absent: Jonathan Whitney

Public Present: Matthew Munson, Jason Dennis-Munson's Attorney (Hastings Malia, P.A.), Jessica Maher-Attorney for Appeals Board (Moncure & Barnicle), Attorney John Richardson

Chairman McBride called the meeting to order at 7:00 pm. A quorum was determined.

Old Business:

Approval of the Meeting Minutes for October 10, 2019:

Doug moved, Lisa 2nd to approve the minutes for Oct. 10, 2019 as written. All were in favor.

Application for Administrative Appeal - Continuation – Matthew & Doreen Munson – 187 Norway Rd. Map 46 Lot 23:

Chairman McBride gave an overview:

This meeting continues the October 10th, 2019 hearing which was recessed so that the applicant and their attorney Jason Dennis could review the Harrison shoreland zoning ordinance approved June 26, 1974 and attempt to establish when the deck structure on the lake shore at 187 Norway Rd. was first in existence. They were considering contacting the father and or son of the Dam family, who the applicant states was a previous owner of the property from 1954 to 1987. In addition the Board would consider whether to obtain council going forward. The Board has obtained the services of Moncure & Barnicle of Topsham, Maine.

Attorney Dennis spoke:

The applicant left with the homework of trying to determine if the structure was earlier

than the 1970 shoreland zoning that was referenced at the meeting, that wasn't definitive of the date at that meeting. The Board was going to look into that issue. I have since seen the 1974 document. We do not have confirmation or the ability to get in touch with the father (Dam family). The son was reached and was unwilling to sign an affidavit from his personal observation because he didn't live there the entire time. We don't have additional evidence of the existence of that structure prior to the 1990 date that we all agreed on at the last meeting. From my perspective the issue is one of two things, If the 1974 document is valid and in effect then we don't have additional information with regards to pre-existing 1974 other than hear say. If the 1992 ordinance is the one that was in effect then we established that the structure did pre-exist that 1992 document. We all agreed on that based on tax records and aerial photos that the Board has seen. I would submit that per its own terms, the 1974 document is not valid for purposes of the determination of the pre-existing non-conforming use because the document itself, unlike the 1992 document, required that the ordinance be recorded and it never was recorded. The word used in there is it shall be recorded. It's common construction that if the term shall is used, it is mandatory, not discretionary, whereas may you can do it or not. Though the 1974 document exists, I've seen it, it was sent to me, the argument with regards to the pre-existing, non-conforming, grandfathered use, is that the document is not binding because it did not do what it said what it needed to do, which was be recorded. Therefore, it gets us back to the 1992 document.

Chairman McBride asked where it stated that it needed to be recorded.
Attorney Dennis said it's on page 2 of the 1974 document, section 3.

Chairman McBride read from that portion of the ordinance: Effective date of this ordinance is June 26, 1974. A certified copy of this ordinance shall be filed at the County Registry of Deeds according to the requirements of State law.

Attorney Dennis commented that obviously the Board can agree or not agree with my position and you brought council here to potentially advise you on what you want to do. Our position with regards to that issue is that the structure pre-dated the 1992 ordinance and therefore is a pre-existing non-conforming structure because the 1974 document is not valid.

I have been informed by council that the Board is not going to be entertaining the municipal estoppel argument that we made. I guess I would have to say for the record that as of now, without knowing more right now, I don't agree that the Board doesn't have the jurisdiction to make that decision. I would say if the Board does ultimately decide that the Board does not have that jurisdiction to hear that argument, I would submit that in exercising its powers you certainly have the right to confer with legal council as to whether in fact that may be the case.

Chairman McBride responded:

You are aware that the decision by the Board was made with the advice of council. Mr. Dennis replied: yes, that's what I was saying. The email I got came from council. What I'm saying is that I disagree because I think the decision at issue is a decision that is 1. No permit should be required so this is not a decision on the applicability of an ordinance, it's an action that was taken by the Code Enforcement Officer which is within the per view of the Board. Ultimately, though it has been decided without any feedback from me, I'm submitting that you certainly have the prerogative to get a second opinion

based on what I've just said but obviously you can say no, we have made our decision. The alternative of course is that that argument is used defensively in enforcement action when the dock isn't removed because they don't think they need to remove it.

Chairman McBride asked the Board if they are satisfied as a Board that the decision be that they do not have the jurisdiction to be able to entertain municipal estoppel. Lisa, Doug and John all stated that they are satisfied with that decision.

Doug moved, Lisa 2nd that the argument by the applicant regarding municipal estoppel is not applicable to our hearing. All were in favor.

Chairman McBride asked how Mr. Dennis knew that the 1974 ordinance was not filed. Mr. Dennis said that he searched the County Registry of Deeds and asked the Town's Council.

Attorney Maher stated:

It isn't current practice and I don't know that it ever was current practice that ordinances were recorded. I've never seen ordinances recorded so I'm not sure why that's in there. This ordinance pre-dates actual zoning law being established statewide so there are a lot of things in there that are not well written and not current but I have never seen one that is recorded.

Chairman McBride directed a comment to CEO Wentworth:

I have to believe that the ordinance in 1974 must have been challenged or questioned or there were cases where reference to the ordinance was made in making decisions by the Board of Appeals and it would seem to me that if the question of the illegality of the document had been raised that would have been brought to the attention of the Town and there would have been an amendment or a change and it would have been taken care of. I find it a little difficult to just say well it says in this sentence here and this was probably the first time the Town attempted to draft a shoreland zoning ordinance. I'm not sure how much reliance I would put on that statement.

CEO Wentworth replied:

Well I wasn't the CEO then however, all shoreland zoning ordinances are reviewed by the State, so any changes you make over time are reviewed by the shoreland zoning division of the State. The State is reviewing the ordinance to make sure that it is at least as restrictive as the State's ordinance. You submit it to them, they have so many days to respond, within 45 days it is deemed accepted and then it goes to Town Meeting for votes. I haven't seen them actually recorded at the Registry of Deeds, so I don't know that it would have been a legal requirement or not.

Chairman McBride asked the CEO if it would be a fair statement to make that this document was reviewed by DEP, in accordance with normal procedures?

CEO Wentworth answered:

You would think so but then again when it's your first, like any municipality, and it's something new coming out, everything changes a little bit over time. It never remains constant. So, they may have said we should amend it or update it. That's typically how municipal government seems to work.

Attorney Dennis commented:

I would submit that while the document says it is to be recorded but wasn't, it is equally possible that the document was never actually provided to DEP. Obviously the drafters of the document said they were going to do something that was not done at that time and so they may have made the same error, we don't have the confirmation from DEP. That wouldn't mean that the States approval is non-existent or doesn't count for the States purposes, because the provision is if there is no response it automatically is deemed, so that issue I would say is mute. If we are going to speculate about the documents, in fairness, we need to speculate about the existence of this deck being there based on the here say evidence that was provided.

We can't just say well we assume that the document was in effect but we are not going to assume that what the Munson's were told is true. That's unfair. That to me is the most important thing as far as making a fair and accurate determination. We have to work with what we've got for documents and not guess or then we need to take the evidence that the Munson's have provided which is that they were told that the structure existed in the 50's and we need to give that the exact same weight we give the well maybe as to the validity of the 1974 document.

Attorney Maher interjected:

I don't agree. There is nothing to suggest that the 1974 ordinance is not valid, aside from your argument that it wasn't recorded.

Attorney Dennis responded:

Right, I mean that's what Judges make decisions on is the arguments that Attorney's make in court.

Attorney Maher stated:

Well I guess a judge will have to make that decision at some point because the Board is only able to rely on this was our ordinance in 1974, this is what our records show.

Attorney Dennis:

Well they can easily say if we are using the standards of evidence we don't have proof that it was valid. We have a document, we don't have proof that it was valid so we are going to exercise our discretion.

Attorney Maher:

There is no proof that any of these things are valid then.

Attorney Dennis:

The 1992 document does not contain the same restriction. I am not making an argument that it is legally invalid based on a law requiring it to be recorded. I am making an argument that it is invalid because it does not reply with its own requirements. It's pretty standard when we are entering documents that there is a HOA set of bi-laws, business contract, that the document has to apply with its own terms. It's not statutorily invalid, it's that the document on its own terms never did what it said that it needed to do.

Board Member Doug Wall asked Mr. Dennis:

I was wondering when you were doing your research at the courthouse, or where you were doing your research did you find that any Town's had any ordinances that were recorded?

Attorney Dennis responded:

I did it on the computer and I did not look for them because that would be irrelevant to the decision in this case which is whether this one was when it said it needed to be. Just like you wouldn't go see what a different town does for a setback.

Doug Wall:

Did you consider though that when Harrison wrote it's ordinance, and when other Towns wrote theirs there was structure given to us from the State to follow so the words that are there are mostly from the State of Maine.

Attorney Dennis:

Then it is definitely not valid because the State of Maine put in there that it needed to be recorded.

Chairman McBride: The ordinance that I have before me nowhere in this is it attested to be accurate and so forth with the true ordinance. How do we know that this wasn't changed a month later?

Attorney Dennis responded:

The Town is the custodian of those documents, not me, I can only rely on what I am given by the Town as to its documents. There is no way for me to know what may or may not have been changed if the Town does not provide it to me. I have been provided two documents, one that's available on-line the 92 document and the 1974 document. That came from the Town thru its Attorney so that is to me what was printed at the time. That's the actual document that existed. I take that to be the words that existed.

Chairman McBride:

Any opinions from any of the other Board Members as to the claim made that because this isn't registered this is not a document that we can rely on and make decisions from?

Doug Wall replied:

Well we did. We did rely on it and we did make decisions since 1974.

Chairman McBride:

That's why I was asking John (CEO) if it had been used for that number of years there must have been cases that came before an Appeals Board where if somebody was trying to get around a provision of the ordinance, they would have raised that point.

Doug Wall stated:

What about all the other towns in the State of Maine that had the same ordinance with the same words. Don't you think someone in some of these other towns would have. Somebody would have.

Board Member Lisa Villa:

If its not legally required by law and any other ordinance that we have had not been filed, I mean that would make everything invalid and we have made a lot of decisions based on what we have. I see what he says about not having been filed but I think it's a week argument and it would make everything that we have done since 1974 invalid and anybody who is hearing that would say that is ridiculous you can't take it back because it wasn't filed. That's my opinion.

John Strickland commented:

I feel like I'm way out of my league right now to be honest with you.

Doug Wall commented:

When we feel like we are out of our league then it has to go to the next league which is fine. That's the way it goes. If we can make our decision knowing that what we think is appropriate with regard to this situation and if council thinks that they need to take it to the next level because of their argument today then that's the way it works anyway.

Chairman McBride:

I agree with the comments that the Board has made. At this point I would accept a motion.

Lisa Villa moved, Doug Wall 2nd that the Board will not accept the argument that the 1974 ordinance is invalid due to the statement that it was not recorded. All were in favor.

Chairman McBride explained to Mr. Munson and Attorney Dennis:

The reason that we did adjourn the meeting from the 10th to today was to give you the opportunity to come up with other evidence that might lead us all to accept the fact that the structure was created prior to 1974. Council makes a good suggestion that for the purposes of the record what did you try to do and where were you successful? I know you mentioned contacting the son. Were there other things that you tried to do to establish the building date of this structure?

Mr. Munson replied:

I believe one question was raised about the telephone poles which were used to support the structure. One of the telephone poles had a marking on it NET&T, that pre-dates when they went out of business and taken over. It is minor but one of the telephone poles was tagged. I don't know what year they went out of business I couldn't find anything on-line about that.

Board Member John Strickland remarked:

That wouldn't matter because that pole could have set someplace else for 20 years. The poles had been there for a long time I will not dispute that, but it could have been somewhere before that.

Attorney Dennis:

The Code Enforcement Officer may be able to testify because he has been on that dock before he was a CEO with the previous owner the Legacy's. I can't subpoena him here but you certainly could get the information from the CEO about his sitting on that very

dock. The Legacy's told the Munson's when they bought it that the dock was there when they bought it, in 86 I believe. The dock was there with the poles as it is, it wasn't reconstructed and it was at least 86. If that company went out of business before then, it would have to be before then. Sometimes with evidence you don't get the best evidence, you have to get evidence that convinces you that this seems more likely than not or more probable than not beyond a reasonable doubt depending on what kind of case your in. I did actually attempt to go all over the place to find telephone pole experts that could look at that. I went on the NH Association for Justice page, the ME Association for Justice page, the trial lawyers list serve, I googled it, I couldn't find anybody. So that was one of the attempts we made. The Legacy's have shared the information they have. The Dams have shared the information that they have. The only new evidence is what you just heard from Mr. Munson. You know the here say evidence that they were told that that dock was there in the 50's. I would say that you have the discretion to believe that.

Attorney Maher:

For my benefit, I was not here at the first meeting obviously so can you summarize again what that here say evidence is, and what you heard and who you heard it from?

Mr. Munson responded:

The first time I contacted the Dams, Daniel Dam, the son of Richard Dam. He had his father in the room and was speaking directly to him. The father stated there was a structure down there, he couldn't exactly remember what, whether it was a deck, dock. In his words, he was 94 years old. The son Daniel, 68 at the time when I spoke with him, he stated that he didn't remember much about the property. He didn't live there. The father rented it out. There was a camper on the property at the time. They had a place in Bridgton and that's where they spent all their time pretty much. That's why Daniel wouldn't go on record as to what was actually down there. The father definitely answered him and said that there was something down there. As to exactly what it was or how big it was, he couldn't remember. 94 years old unfortunately.

Attorney Dennis:

You could talk about your conversations with the Legacy's. If they added anything. If they didn't that's fine but if they did.

Mr. Munson replied:

The impression I got from Wayne was he did not add anything to the original footprint. Well I say he didn't add to the footprint..the joists were all there, the supports were all there and he said that he may have added a board on the end to cap it off so no one would trip going on to the deck. So, did he increase the size, by an inch and a half maybe yeah.

Attorney Dennis asked Mr. Munson:

So, I know that we are not in court but is it fair to say that from what you heard from the Legacy's, the structure that was there when you bought it was there when they bought it.

Mr. Munson answered:

Correct and all they did in 1987 was put on new decking. Replace the decking on it. Which obviously you have all seen the condition of the pressure treated wood that was on now. It was fairly well rotted out and some spots we have broken through. I'm basing the age on the condition of the wood and the condition of the telephone poles.

Chairman McBride:

I would like to ask the Board, one of the reasons that we had recessed the meeting was to give the applicant the opportunity to come up with more evidence that would indicate when the structure was actually created. I would be interested in the Board's opinion as to whether they have heard anything tonight that adds to the question we all had which was, when was that structure actually built. I know that John Strickland had mentioned if there was a legal document that was submitted that would be something at least that we don't have today and that you would at least take that into consideration. That has not been forthcoming.

John Strickland added:

I was hoping that they could come up with somebody that was willing to make a notarized statement that they could indeed remember the situation and they haven't been able to do so. I applaud the gentleman. He was honest and said he didn't remember. I'm not disagreeing with how long it may have been there but we are being put in a position to enforce something that we get the impression that we can't. I think it has to go further up the ladder because everything that we do is based on past history of ordinances passed on or through for the last 30-40 years and now you're telling us that basically it's null and void because nothing was filed. We have nothing other than Mr. Munson's word which I'm not saying that you are misleading in any way, but maybe you have been misled. We don't know that. There is nobody here sitting here saying yes we did. It's all here say. Here say doesn't fly. You need a document or you need a person. This has got to go higher than us. I can't make a clean decision on what I have heard so far. I've stated before that I don't necessarily agree with all the rules but I'm put in a position that I have to go by them. I've got nothing to say that I can back up and say oh yeah go ahead and do whatever you want. Do you know how many people would love to be able to do anything they wanted to and that's basically what you just said here. None of this stuff has been filed so anybody can do whatever they want to because it's not legal. I shouldn't even be here. This is way above what this Board is supposed to be doing as far as I'm concerned.

Doug Wall:

I feel the Board can make a decision. If we had had that document we could have looked to council to say is this something we can accept, I felt we could but that never happened. I haven't seen anything tonight to add to the facts that we stated from the last session.

Chairman McBride stated:

One of the things that was in the outline that we were following from the meeting on October the 10th was a listing of the statement of facts that were relevant to the situation. They were not read into the record so I will take this opportunity to do that.

Statements of Facts:

1. The property in question is located at 187 Norway Rd., Map 46 Lot 23 and was purchased by the applicants in 2017.
2. The lakefront property is .34 acres and has 130 feet of road frontage.
3. The home was built in 1950 it was remodeled in 2010.
4. The deck on the shore is listed in the Harrison records at 160 sq. ft.
5. An act to provide for a building permit for the Town of Harrison was approved at Town Meeting on March 16, 1974.
6. A Shoreland Zoning Ordinance for the Town of Harrison was approved on June 26, 1974.
7. Town of Harrison Assessors records list the deck has been constructed with an approximate build date of 1990. Photos taken by the Lakes Environmental Association in 1992 appear to support this information.
8. A letter to Matthew and Doreen Munson on May 13, 2019 from Assistant Code Enforcement Officer Jim Fahey advise them that a "recent lakeside inspection of properties on Crystal Lake in Harrison, Maine turned up several code violations on many properties and that unfortunately their property was one of those.
9. In a letter dated July 18, 2019 to Mr. and Mrs. Munson the Harrison CEO John Wentworth states that a search of the Town's records in regard to the deck near their property shoreline indicates the building file has no permit issued for this deck nor a permit issued for repair or replacement.
10. A letter dated August 12, 2019 to the applicant states that the owner of the property at the time the deck was built did not get a permit from the Town or the Department of Environmental Protection. The letter states that the CEO cannot determine whether the deck is or was a legally existing non-conforming structure and that he was denying the permit application.
11. Work has been started on the existing deck without a permit.

Chairman McBride asked the Board if there were any other facts that should be included in the list. No other board members had anything to add.

McBride asked if the applicant had any other comments?

Attorney Dennis:

I guess I'm getting the sense that the decision is that we can't rule on one of the arguments and you don't think there isn't enough evidence for the other one. The municipal estoppel can't be used offensively so we can't sue the Town and say we need to keep this. The Town needs to initiate an enforcement action. When you deny these people the right to have this little tiny deck that doesn't bother anybody at all. That you initiate enforcement action so that they can fail to do what you tell them to do so that you can sue them and they can bring the municipal estoppel action as a defense to the enforcement action. Procedurally they can't appeal something that hasn't been decided. What we are asking for is a decision that allows them to take it to the next league.

Chairman McBride:

The applicant was denied a permit and you have reasons to which you have outlined as to why you think the CEO was incorrect in denying the permit. I'm not sure what you need from us in order to enable you to go to court which is I guess what your saying.

Attorney Dennis:

Well I guess nothing, if you say that they need the permit and then they don't do anything, the Town can either choose not to enforce it and let them keep the deck or initiate enforcement action to force them to remove the deck. That'll be the Town's issue so disregard all that and we'll deal with it as it comes up.

Chairman McBride:

A question to John Wentworth, was a letter sent requesting that the deck be torn down?

CEO Wentworth:

yes, you have no authority in that matter really. They are challenging my decision to not issue a permit.

Chairman McBride:

Right we don't have enforcement authority, I understand that, but that is still sitting out there.

Doug Wall moved, John Strickland 2nd that the permit should not be issued. The applicant has not been able to provide evidence that the deck is a legally non-conforming structure being in existence prior to June 1974. All were in favor.

Chairman McBride thanked the Applicants, Lawyers and the Board for coming back and for preparing and he appreciates everybody's effort.

Chairman McBride moved, Doug Wall 2nd to adjourn the meeting at 7:15 pm. All were in favor.

Chairman Robert McBride

Secretary Kristen MacDonald

