In the Appeal of Scott & Dawn Morash from Planning
Board Revised Decision of October 25, 2022

TO: Town of Readfield Board of Appeals

FROM: Scott & Dawn Morash

RE: Application for Building Permit at 111 Mayo Road

DATE: November 30, 2022

On August 29th, the Board of Appeals remanded consideration of our application for a building permit to the Planning Board for additional fact-finding regarding whether the proposed site of our new house conforms to the setback requirements of Readfield's 2019 Land Use Ordinance (LUO) to the "greatest practical extent." Specifically, the Board of Appeals wanted the Planning Board to provide additional facts regarding whether our plan satisfied the 100' setback from the lake to the greatest practical extent.

It is undisputed that our plans meet all other applicable standards in the 2019 LUO. Planning Board members expressed their agreement that our new house would be a significant improvement in terms of environmental protection over the existing structure and was reasonably sized for a year-round permanent family residence.

In the Planning Board hearings before the first appeal, we explained why the unique conditions of our parcel made compliance with 100' setback impractical. On remand, the Planning Board gathered no additional facts and kept the record closed. In short, the Planning Board did not do what we believe the Board of Appeals asked it to do.

Most disturbing, in its revised decision of October 25th, the Planning Board made no findings whatsoever as to whether our plan meets the lakeside setback to the greatest practical extent. Instead, it found (with no evidence to support it) that a smaller house could be built farther up the hill and kept behind the 100' setback. That was the sole basis offered for its denial of our application.

The Planning Board's revised decision is unsustainable for many reasons. The primary reason is that it did not even bother to apply the 2019 LUO to the house we seek to build, as it was legally required to do. In the proceedings before it, we were assured that our application would be decided under that ordinance and that assurance guided how we framed and supported our request for a building permit. Instead, only on appeal, the Planning Board assumed it had the authority to disregard the land use ordinance ratified by the citizens of Readfield and to apply a different ordinance, one suggested for adoption by the Maine Shoreland Zoning Guidelines.

The Planning Board can recommend changes to existing ordinances for consideration by the Select Board and submission to the voters. It cannot amend existing ordinances on its own volition. Nor can it conduct hearings on one legal basis

and then make its decision on another. The revised decision reflects an unauthorized arrogation of authority no planning board has and clearly violates basic principles of due process.

In this memorandum, we explain further how the Planning Board failed in its revised decision to apply the 2019 LUO to the factual record from the hearings which shows how our application meets the 100' setback to the greatest practical extent. We then explain why the 2019 LUO rather than the guideline ordinance must apply to our application. We request this Board to sustain our appeal and grant our application under the Town's ordinance as written.

In the balance of this memorandum, we discuss other prejudicial errors of law, both procedural and substantive, made by the Planning Board in reaching its revised final decision.

A. The Planning Board Did Not Apply the 2019 LUO to Our Application Which Satisfies the Expansion Limitations of That Ordinance.

The 2019 LUO provides that a nonconforming structure may be relocated on the parcel "provided that the site of the location conforms to all setback requirements to the greatest practical extent as determined by the Planning Board, and provided . . . (b) any expansions of the relocated structure do not exceed the expansion limitations set forth in Article 3, Section 4.A.1, or the size of the original structure, whichever is greater . . ." Art. 3, §4.B.1. (Emphasis supplied.)

Referring to Section 4.A.1, the 2019 LUO states that, assuming all other applicable standards in the ordinance are met (as they are in our case), setback requirements may be expanded or altered subject to specific limitations. If, as in our situation, the 100' setback has been met to the greatest practical extent, Section 4.A.1.e. specifically provides that a structure such as our proposed house, which in total is larger than 1500 square feet, may be partially located within the 100' setback provided that no more than 1500 square feet of the structure are located within that setback.

We explained to the Planning Board during the hearing phase that our proposed location met that standard principally due to the angular shape of our lot and its increasingly steep slope as you move further back from the lake. The slope rises from 6% to 8% between the 100' and 75' setbacks to 18% and more farther up the hill. Moving our house farther back from the lake than what we propose would make winter access to the house dangerous and unsafe (no one contested that point). A significant stand of tall trees situated on the steeper part of the slope would have to be removed if we had to build entirely behind the 100' line (no one contested that point). We pointed out that removing those trees and excavating more of the hill in order to stay behind the

100' line would increase the risk of erosion and run-off into the lake (no one contested that point either).[1]

At its August 15th hearing and in its August 29th decision, the Board of Appeals asked for more facts to be gathered regarding whether our proposed location met the 100' setback to the greatest practical extent. On remand, as noted, the Planning Board made no effort to ascertain or supply additional factual information, nor did it allow us to provide further factual support for our application relevant to this Board's inquiry.

Most telling, the Planning Board's revised decision makes no finding whatsoever as to whether our proposal meets the greatest practical extent standard. Instead, that decision concludes only that:

(*i)* a structure the size of the camp we want to replace (2100 sq ft.) could be built behind the 100' setback (Findings 3 & 7);

(ii) a structure somewhat larger than 2100 sq. ft could be built behind the 100' setback (Finding 4);

(*iii)* even a 2100 square foot replacement structure would have to be sited on a slope of approximately 14%.

Neither of the two Planning Board decisions makes a finding that the 4600 square foot permanent residence we would like to build could be practically built entirely behind the 100' setback, nor any finding rejecting our evidence that it is not practical to do so. The board did not even analyze any of the information we presented on greatest practical extent as relates to the house we seek to build. The only basis offered for denying our application is the possibility that a smaller house than we wish to construct, and which the 2019 LUO allows to be built, could be built behind the setback.

The Planning Board did not apply the relevant ordinance as enacted by Readfield residents or as applied by the Planning Board itself in other analogous permit proceedings. Based on the record before the Planning Board, and applying the 2019 LUO as enacted, the Board of Appeals would be fully justified in granting our permit application. We respectfully request that it do so.

B. The Maine Guidelines Do Not Control the Decision on Our Application.

The 2019 LUO is the exclusive legal framework under which our application was to be considered by the Planning Board. At the first hearing on January 11, 2022, the chair of the Planning Board stated that at our application would be decided under that

[1] At the May 24th hearing, we used flip charts to present factual information regarding all of the factors relevant to determining greatest practical extent. The information on those flip charts is summarized on an attachment to this memorandum.

ordinance, rather than the current ordinance passed in 2021. She acknowledged that the first determination had to be whether the replacement structure meets the 100' setback to the greatest practical extent and if so consideration could then be given to allowing the structure to extend up to 1500 sq. ft between the 100' and 75' lines. (Zoom recording at 1:01.37 to 1:02.48.)

The revised decision does not adhere to the 2019 LUO's standards at all, as discussed above. It does not do so because the Planning Board instead now takes the position that if our house could not be moved farther back and higher up on the slope due to practical constraints, we should build a smaller house that would fit entirely behind the 100' setback and not extend past it. Nothing in the LUO gives the Planning Board the power or right to tell applicants that they must downsize their proposed residences to keep them behind that setback even though those structures as proposed meet the 100' setback to the greatest practical extent.

So, in its revised decision, the Planning Board reaches out to the language of the Maine Shoreland Zoning Guidelines to defend its change of legal theory. It would make a de facto substitution of the provisions of the model ordinance suggested in the guidelines for the actual Readfield ordinance as approved and enacted by the Town.

The first problem with this change is that it is an obvious denial of due process. The entire hearing on our application was conducted only in the context of the requirements of the 2019 LUO. The Planning Board's initial decision made no mention of the guidelines. No town board can tell an applicant that their request will be decided under one law, conduct all hearings on that premise, and then only on appeal "pull the legal rug" out from under the applicant by saying, "Never mind. We're going to apply a different law," or in this case a "guideline." This serious error is sufficient grounds by itself to require vacation of the revised decision.

Moreover, while we are not in a position on this appeal to present full legal arguments on our behalf, we believe that there is no basis for the Planning Board's substitution of the guidelines for the 2019 ordinance. Three points support of our view:

1. The guidelines do not amend the 2019 LUO. Tacitly, the Planning Board is importing into the 2019 LUO the provisions of the suggested municipal ordinance contained in the guidelines. In effect, that amends that LUO. It eliminates section 4.A.1 which allows a structure which satisfies the setbacks to the greatest practical extent to extend up to 1,500 square feet inside the 100' lakefront setback. It replaces that provision with a different rule that a replacement structure can never extend past the 100' setback if the structure it is replacing could be rebuilt behind that line.

Such a major amendment of the Town ordinance requires action by the Select Board and the citizens of Readfield -- not the Planning Board. The voters did amend the LUO in 2021 to restrict replacement structures to the 100' setback, but that amendment was not in effect when we filed our application and all agreed our application was "grandfathered" under the provisions of the 2019 LUO.

2. The 2019 LUO is valid and should be enforced according to its terms notwithstanding the guidelines. In fact, the guidelines themselves indicate that a duly enacted land use ordinance by the Town, such as the 2019 LUO, is not invalid and is to be given effect.

-- The Preface to the guidelines allows some flexibility to towns in drafting the LUOs. It says that municipalities need not adopt the guidelines word for word.

> "In fact, the Department of Environmental Protection (Department) encourages municipalities to consider local planning documents and other special considerations, and to modify this ordinance into one that meets the needs of the particular community. Municipalities may wish to adopt more stringent ordinances, or ordinances which are completely different from the guidelines, provided that such ordinances are equally or more effective in achieving the purposes of the Act." 06-096 CMR Ch. 1000.

-- Section 1 of the guidelines states their purposes. They include general goals such as maintaining safe and healthful conditions, to prevent and control water pollution; to protect fish spawning grounds, aquatic life, bird and other wildlife habitat; to protect against flooding and erosion; to protect freshwater; to control building sites and placement of structures; and, to conserve shore cover, natural beauty and open space. The 2019 LUO was presumably intended to achieve those same goals as much as the guidelines.

-- The guideline dealing with relocation is almost identical with the 2019 LUO. It says that a "non-conforming structure may be relocated within the boundaries of the parcel on which the structure is located provided that the site of the relocation conforms to all setback requirements to the greatest extent practical as determined by the Planning Board. . ." 06-096 CMR Ch. 1000,§12.C.(3). That section also explains how to evaluate whether a relocated structure meets the setback to the greatest practical extent: size of the lot, the slope of the land, the potential for soil erosion, the location of other structures and any septic system, and the type and amount of vegetation to be removed to accomplish the relocation. Ibid. These are the same factors the Board of Appeals asked the Planning Board to give further consideration to, but instead the Planning Board decided not to even consider greatest practical extent except in the context of a smaller camp structure, rather than the house we propose.

-- Finally, and most dispositive, Section 4 of the guidelines requires a town to submit amended land use ordinances to the DEP commissioner for approval. "If the Commissioner fails to act on [the] Ordinance or Ordinance Amendment within forty-five (45) days of … receipt of the Ordinance or Ordinance Amendment, it shall be automatically approved." (Emphasis supplied) The Readfield land use ordinances presumably were supplied to the DEP. There is no suggestion that the 2019 LUO was not approved either "automatically" or by express action. Consequently, it cannot be argued that the LUO is invalid or not enforceable as written. Changes to a LUO must

be done prospectively through the amendment processes which by ordinance are governed by the Select Board and the town residents. The Planning Board committed serious error by failing to apply the applicable LUO according to its terms.

3. Accepting the Planning Board's substitution of the guidelines as the controlling authority for permits under the 2019 LUO, and its similar predecessors, would retroactively call into question whether permits previously issued in accordance with its terms were invalid under state law. It would potentially cast a cloud on whether replacement structures which were allowed to be built partially or wholly within the 100' zone were erected in violation of the guidelines, and possibly affect the land values of those properties.

C. Errors Committed after Remand.

The revised decision should also be vacated because of three prejudicial errors committed by the Planning Board following this Board's remand. We summarize them briefly:

1. Failure to Gather Additional Facts on the Greatest Practical Extent Standard. From its remand decision and the colloquy among Board of Appeals members leading to it, we think the Planning Board failed to comply with the intent of the remand's directive which was to gather additional facts shedding light on whether our application met the greatest practical extent standard. Obviously, the authority on this point is the Board of Appeals itself. So we will say nothing more other than to emphasize that no additional fact-finding or factual analysis was done on that specific issue.

2. Refusal to Allow Applicants to Supplement the Factual Record on Greatest Practical Extent. On September 27th, we expressly asked the Planning Board pursuant to the remand to allow us to present additional facts confirming that our proposed house met the greatest practical extent standard. No action was taken on our request and the Planning Board kept the record closed. Having heard nothing from the Planning Board following remand, we were surprised in late October to be notified "as a courtesy" that the Planning Board intended to have a public meeting in two days to consider approving a revised decision. We again asked for a hearing to present additional fact information on the topics specified by the Board of Appeals, including the topography of the property, the slope of the hill, and other landscape factors including the impact on existing vegetation, particularly the tree stand holding up the upper part of the hill. No action was taken on our request and the record remained closed.

To illustrate the relevance of our additional information, we provided the Planning Board with a letter from Mr. Joe Perryman, a qualified Maine road builder. In it, he advised against locating a driveway connecting to a road on a slope as great as 12% to 14%. He explained that doing so would present a significant risk of loss of control and injury to drivers and occupants especially when attempting turns. He stated that the potential for injury to people and damage to property would be much less on a grade of 6% to 8%. He further stated that most experienced road builders would always advise

against locating a driveway on a steep slope when there is a much less steep slope and much less dangerous alternative location available on the property.

We observe that in its revised decision, the Planning Board found that even a 2100' structure abutting the 100' setback line would be on a slope of 14%. (Finding 6) Yet, despite the potential safety risk implicated by the steep slope of our property, it preferred to close the record -- and its eyes -- to a real safety concern and give it no credence, just as it foreclosed consideration of any other additional facts regarding the net negative environmental consequences of forcing our proposed house to be built entirely behind the 100' setback.

3. Discriminatory Handling of the Record. The Planning Board did not close the record, however, to supplementation by it. The major supplement of course was to change the legal basis for its denial of our application. But, it even added an email comment apparently communicated to it by Colin Clark of the DEP congratulating the Planning Board for the way it applied the guidelines. There is no suggestion that he was addressing the application of the 2019 LUO or even aware that our application was being considered under it. There is also no suggestion that Mr. Clark was aware of the slope issues presented by our property, despite the assessment of a DEP environmental specialist who had actually visited the site in 2021 and warned that the steep slope be avoided be avoided to the greatest extent practical. That letter is in the record with our application.

The Planning Board chose to open the record to add its supplemental material, but denied us that opportunity and even the opportunity to be heard on the material it was adding to the record. That too is serious error requiring vacation of the revised decision.

D. The Planning Board Violated the Freedom of Access Act.

We are advised that the post-remand procedural course which the Planning Board took also violated of Maine's Freedom of Access Act, 1 M.S.R.E §§401, 405. At its October 25th public meeting, Ms. Clark explained how the Board had proceeded after the remand. About two weeks before the public meeting, she and the Planning Board's vice-chair engaged privately in a "series of back and forths" with the town attorney to rewrite the findings and other content of the Planning Board's initial decision and issue a draft revised decision for consideration to the rest of the Planning Board.

By conducting these substantive matters in private, we (and the public) were deprived of the opportunity to provide our input regarding those matters which directly affected and influenced the Planning Board's consideration and disposition of our application on remand. If those discussions were held pursuant to public notice in an open meeting, we (and the public) would have had the opportunity to understand what was going on and to provide comment on it.

The Maine Supreme Court has held that private meetings between board members and the town attorney to discuss substantive matters pending for decision violates the policy and purpose of the Act which requires the public's business to be debated and decided in public meetings. Underwood v. City of Presque Isle, 1998 ME 166, 715 A.2d 148 (ME.S.Ct 1998). The Act itself provides that not only actions taken by public bodies be done so openly, but that "their deliberations be conducted openly" as well. 1 M.S.R.E §401. This section further states that the public policy it establishes "shall be liberally construed and applied to promote its underlying purposes and policies."[2]

Conclusion

We respectfully request the Board of Appeals for all the foregoing reasons to vacate the revised decision of the Planning Board and to grant our building permit under the 2019 LUO. In the alternative, we ask that the revised decision be vacated and and remanded again for further fact-finding relative to greatest practical extent. We ask that any remand direct (1) that further proceedings and decision making be done consistently with the dictates of the Readfield 2019 land use ordinance and (2) that the record in our proceeding be reopened to allow us to present additional facts and legal authority in support of our application and responsive to the Board of Appeals' previous remand.

[2] The Act does allow a public board to meet in executive session with counsel but only if such a session is approved by vote taken at a prior public meeting where the purpose of the session is clearly indicated. 1 M.S.R.E. §405. A similar violation apparently occurred earlier when the Planning Board chair consulted privately with counsel on the relevance of precedent under the 2019 LUO and thereafter told us that such precedents would not be considered in construing the ordinance.

In determining whether the building relocations or replacement, or the construction of a new, enlarged or replacement foundation beneath an existing non-conforming structure meets the setback requirements to the "greatest practical extent" the Planning Board shall consider all relevant factors including, but not limited to:

The size of the lot,

The lot is 0.61 acres. *The impervious soil requirement is specified at a maximum of 20% limits the amount of build area on the lot, thus maintaining a balance with size of build insuring the proper drainage of the soil. At an impervious soil calculation of 15.9% we are well within this guideline.*

The slope of the land, *The land at the proposed location is sloped from 8-14% of grade, the back part of the lot away from the water starts to approach 24% at its worst point. Building at the 75 foot mark requires the least amount of soil and earth disturbed.*

The height of the building, *The height of the proposed building will be under the maximum of 25ft allowed inside the 75' to 100' HWM and then after the 100ft mark the structure will reaches the allowable 35ft in height.*

The potential for soil erosion, *Rain garden swales have been designed into the landscaping along with vegetated naturalized buffer area consisting of flow bush shrubs, native flowering plants, and mulch base.*

The locations of other structures on the property and/or adjacent properties, *The proposed structure is sized uniformly with the adjacent structures on Mayo Road. One structure being larger, one being the same size and one being smaller.*

The locations of the septic systems, *The proposed structure and new septic design will allow for the 1970 septic system 50ft from the water to be replaced by a 2022 design more than 75ft from the water*.

The locations of any existing easements, *No easements are in place.*

The type and conditions of the buildings foundation, *The current structure has no foundation.*

The type and amount of vegetation to be removed to accomplish the relocations. *The proposed building area beginning at the 75ft mark will limit the amount of trees that will be required to be removed on the back of the property, limiting the disruption to the property as much as possible.*

Further the Planning Board shall determine that such relocation, reconstruction, replacement or Foundation construction does not cause an "increase in non-conformity" as defined in paragraph 4.E.2 below.

The new house will be located at 75’ from the HWM of Maranacook Lake. With the planned configuration, the house could not be moved back any further due to the shape of the property with proximity to the Driveway/Mayo Road and the topography of the hill is much greater at the back of the property.