

ADDENDUM TO REVISED DECISION

QUESTIONS AND ANSWERS REGARDING REVISED DECISION ON REMAND OF  
MORASH APPLICATION

OCTOBER, 2022

**1. Q: Why did the process for the Morash application take nearly two years?**

A. The original Morash application sought to have the Planning Board approve a plan that did not meet the road setback requirements. Accordingly, the Planning Board advised the applicant to either change the design to meet the road setback or obtain a variance.

Nearly one year later, the applicant, after failing to obtain a variance from the Board of Appeals, returned to the Planning Board with a revised plan. That revised plan relied on redesignating the road as a driveway. Based on legal opinions from both the Town Attorney and the MMA legal division, the Planning Board informed the applicant that such a plan would not be legal. The applicant then returned more than 7 months later with a plan which the Planning Board promptly reviewed.

**2. Q: Did the Planning Board determine that a reconstruction of the existing structure could meet all required setbacks based upon the “greatest practical extent” criteria?**

A: Yes. In its original decision, at Factual Finding number 3, the Planning Board found that the existing 2100 square foot structure could be reconstructed to meet all required setbacks, i.e. that there were none of the factors set forth in the greatest practical extent test that made reconstruction behind the 100 foot set back not achievable.

In addition, as set forth in the minutes of the Planning Board, the applicant and the applicant’s representative were repeatedly asked to identify any factor that impeded reconstructing the 2100 square foot structure to meet all required setbacks. Neither the applicant nor the applicant’s representative identified any such factor.

The applicant did argue that if he were to build his desired 4600 square foot house that the slope of the land would be an issue. However, under the LUO and state law, the right to reconstruct (subject to greatest practical extent analysis) applies only to the original 2100 square foot structure.

**3. Q: In determining whether the applicant meets the “greatest practical extent” test for reconstruction or relocation, why didn’t the Planning Board consider the “convenience” of the applicant ?**

A. The “greatest practical extent” test is set forth both in state rules and in the LUO. Both sources list a number of factors to be considered in the “greatest practical

extent” test. Those factors have to do with man-made or natural features of the land. None of the listed criteria contain any factor that could be construed or interpreted to be intended to address the convenience of the applicant.

In addition, using the *convenience of the applicant* as a standard would be entirely subjective, unrelated to protection of the shoreland zone and would be an exception that would swallow the rule. The town would also need to obtain approval from DEP to adopt a standard so at odds with state minimum shoreland zoning rules.

**4. Q: Does Readfield have to follow the state GUIDELINES FOR MUNICIPAL SHORELAND ZONING ORDINANCES?**

A. Yes. The Town of Readfield must at least meet the minimum requirements of the Guidelines. Towns may be stricter than the Guidelines or towns may propose alternative methods of achieving the goals of the guidelines. Where there is ambiguity in our ordinance, we resolve it in line with the Guidelines.

**5. Q: Are the state Guidelines “rules” or just guidance that is advisory to towns?**

A. The Guidelines are promulgated as “rules” through the state’s Administrative Procedures Act (APA). See attached Rule Making cover sheet. The rules are codified in the Code of Maine Regulations. Therefore, the rules are binding on towns. This does not mean that a town’s shoreland zoning ordinance must match the Guidelines verbatim, just that it cannot be less restrictive than the Guidelines, and any deviation must be approved by DEP.

**6. Q: Do the state rules apply in the Morash case?**

A: Yes. The Guidelines expressly address the issue presented to both the Planning Board and to the Board of Appeals. The Guidelines provide that:

**“If the total footprint of the original structure can be relocated or reconstructed beyond the required setback area, no portion of the relocated or reconstructed structure shall be replaced or constructed at less than the setback requirement for a new structure.”**

Shoreland Zoning Rules, Chapter 1000, Section 12 (C)(4), codified at Code of Maine Regulations 06-096

The Town of Readfield is required to interpret its ordinance in line with this rule.

**7. Q: Is the Planning Board’s decision to first determine whether a similarly sized replacement home can meet all setbacks the correct reading of the rules?**

A: Yes. Colin Clark, the Shoreland Zoning Coordinator in the Bureau of Land Resources Maine Department of Environmental Protection, reviewed the decision of the Planning Board and the Board of Appeals and stated the following:

“Please pass on my praise to the PB for reviewing this project the way they did this was done exactly right.”

See email dated 9/1/22 from Colin Clark to Chip Stevens, CEO, attached hereto.

Mr. Clark also attached to his email a copy of the Maine Shoreland Zoning News that addresses the exact issue that is before the BOA. He also attached some training aid regarding this issue. The Shoreland Zoning News explains the process in a clear manner:

Step 1: Determine where the *existing* building footprint can be located to meet the setback requirement to the greatest practical extent.

Step2: If the entire footprint is beyond the minimum setback, then no portion of the structure or addition can be added to within the buffer area.

**8. Q: Did the Planning Board determine that relocation of the 2100 square foot house could be accomplished without violating the limits on cleared openings in the canopy?**

A. As part of the Planning Board’s review process, the applicant submitted a revegetation plan that indicated that the applicant could meet the cleared opening requirements even with a house far larger than the original structure.

Should the placement of a 2100 square foot house beyond the 100 foot setback result in a potential violation of the cleared opening limits, the Planning Board could require revegetation of other areas of the site, including the area between the waterbody and the 100 foot setback. This area is currently pretty much cleared.

**9. Q: Does the applicant have the right to expand a structure to within the shoreline setback?**

A: No. There is a limited right to expand an existing nonconforming structure, but where the applicant proposes to replace the structure, it must be moved back behind the setback if possible. As set forth in the state rules and demonstrated in the Shoreland Zoning News, if the applicant is able to relocate the current structure to meet all setbacks or to reconstruct the current structure to meet all

setbacks, then no part of the structure may be located in the area within the 100 foot setback.

The applicant asserts that under the relocation provisions of the old LUO that he is entitled to build a structure that far exceeds the size of the current structure. The applicant misapplies and misreads the LUO.

First, the applicant's argument is based upon provisions of the "*relocation*" section of the LUO. However, the applicant never proposed a relocation, but instead proposed a reconstruction, i.e. the applicant does not propose to move the current structure, but rather he proposes to tear down the current structure and build a new structure. Thus, the relocation provisions of the LUO do not apply to this matter.

Second, even if this were somehow to be construed as a relocation, the applicant is wrong in his interpretation of the LUO. Under the relocation section, the first step in the analysis is to determine whether the "site of the relocation conforms to all setback requirements to the greatest practical extent as determined by the Planning Board." Art. 3, Section 4 (B)(1). Therefore, if the 2100 square foot existing structure can be *relocated* to meet all setbacks, after applying the greatest practical extent factors, then the process stops. The relocated structure is now a conforming structure. The expansion provisions in Art. 3, Section 4 (A), apply only to *non-conforming* structures, *not* to conforming structures. If the relocated structure is now conforming, then expansion provision plays no part. Any further expansion must take place beyond the 100 foot setback.

Ultimately, the applicant must comply with the Reconstruction or Replacement provisions of the LUO as the applicant did not propose to relocate the existing structure, but rather he proposes to tear down the existing structure and build a completely new structure.

By virtue of both state law and the Readfield LUO, the applicant gets to build part of the new structure within the 75-100 foot setback, *only* if the applicant cannot reconstruct the *current* structure, i.e. the 2100 square foot structure, in compliance with all setbacks as determined by the Planning Board utilizing the greatest practical extent criteria. To allow otherwise would result in the routine use of the 100 foot setback as a building zone. Applicants would merely have to propose a larger replacement structure that could not fully meet all setbacks and then argue that the 0-100 foot setback zone is fair game for building, thus defeating the existence of the 0-100 foot non-conforming zone.

**10. Q: Did the Planning Board apply the old (June 2019) LUO or the new LUO (November 2021) to the Morash application?**

A: The Planning Board, at the election of the applicant, applied the old LUO. The applicant's reading of the old ordinance is inconsistent with state rules and the Readfield LUO.

The applicant incorrectly seeks to apply the relocation provisions of the old ordinance rather than the reconstruction provisions. Putting that error aside, the applicant misses the point of the LUO. The LUO requires that any reconstruction meet all requirements of the LUO to the greatest practical extent. The reconstruction (like a relocation) is of the *existing* structure and not a new structure. Under the applicant's theory, the applicant could propose a 10,000 square foot house to replace the original 2100 square foot house, and then argue that only 7500 feet can be placed beyond the 100 foot setback and then seek to add an additional 1000 sq feet within the 50-75 foot setback and another 1500 square feet in the 75-100 foot setback. As state law makes abundantly clear, this is not permissible.

**11. Q: Can the applicant build a new home that is larger than the original home?**

A. Most likely. The Planning Board determined that the 2100 square feet of the current structure can be reconstructed beyond the 100 foot setback and otherwise meet all other requirements of the LUO. The applicant is free to enlarge the 2100 square foot house to any size provided that the expanded structure meets all road, side and waterbody setbacks and meets other standards applicable to the shoreland zone.

10/20/22