Appeals Board Meeting

December 5, 2022

Members present: William Gagne Holmes (Chair), Peter Bickerman (Vice Chair), Holly Rahmlow (Secretary), John Blouin, Clif Buuck, Henry Whittemore, Nate Rudy

Also in attendance: Chip Stephens (CEO), Scott and Dawn Morash (Appellants), Tom Gottschalk, Tom Molokie, Paula Clark (Planning Board Chair), Jack Comart (Planning Board Vice Chair), Eric Falconer, Karen Bickerman, Carol Doorenbos (Select Board member), Keith Meyer, Bobbie Gottschalk, Megan Morash, Elisabeth Fairfield and via Zoom identified as Dweezil, Todd and Sam

Will called the meeting to order at 6 p.m. at the Town Office and via Zoom. This entire meeting is available for viewing at https://www.readfieldmaine.org/appeals-board/minutes/board-appeals-meeting-video-final-decision

The first issue was the approval of the minutes from the August 15, 2022, meeting. Henry moved that the committee adopt the minutes as presented. John seconded. Six votes in favor; Nate abstained as he was not at that meeting.

Will proceeded to the main business of the meeting, which was a hearing in response to an appeal submitted by Dawn and Scott Morash from a revised decision issued by the Planning Board denying their application for a land use permit. Mr. and Mrs. Morash seek to demolish an existing nonconforming and grandfathered structure of approximately 2100 square feet and construct an approximately 4600 square foot residence further from the shore of Maranacook Lake, but still located closer to the shorethan the 100 foot setback specified in the Land Use Ordinance.

The Planning Board's previous denial of the Morashes permit application was appealed and remanded by the Board of Appeals to the Planning Board for further findings. The Planning Board's revised decision is dated October 25, 2022.

Will noted that the Board of Appeals reviews Planning Board decisions in a strictly appellate capacity. No new information can be presented to the Board of Appeals, and the Board of Appeals cannot substitute its judgment for that of the Planning Board on questions of fact."

Tom Gottschalk, a resident on Maranacook Lake, presented arguments for the Morashes. He is a retired attorney with credentials from Illinois and Washington, D.C., who is helping the Morashes, but is not acting as their legal representative.

He began by presenting the points of agreement, which included the current status of the property, a nonconforming summer home 14 feet from the shore of Maranacook Lake, which the Morashes want to replace with a larger year-round home 75 feet from the shore. Their application falls under the 2019 Land Use Ordinance, not the 2021 version.

He said the main legal question presented by the Planning Board's decision is whether the Planning Board can on its own volition apply the ordinance language found in the Maine Shoreland Guidelines to the Morash's application instead of the official Readfield Land Use Ordinance. He said the Maine state guidelines were never even mentioned until the day before the first appeal to this Board last August. He said that to the extent the Planning Board wants to apply terms in

the guidelines that do not appear in the Readfield ordinance, it is forbidden to do so by Maine law, and that whatever law is to be applied, the applicant must have notice of it under a town ordinance or it is a violation of Maine statute and the constitutional guarantee of due process.

The Planning Board and the Morashes agree that Article 3, Section 4 of the 2019 Readfield ordinance contains the criteria which are to be applied in deciding under that ordinance whether to grant the Morashes their permit.

Mr. Gottschalk then listed points of disagreement with the Planning Board decision:

He said that the Morash's application comes directly within the provisions of Section 4B and 4A of the ordinance. 4B applies expressly to relocations of nonconforming structures. 4C is the section cited in the revised decision by the Planning Board but expressly applies in situations where a structure has already been removed or destroyed. Mr. Gottschalk said that even if 4C were to be applied here, it would not change the result from applying 4B. He then went into detail about how he believes these ordinances should be applied and addressed the issue of " greatest extent practical."

Mr. Gottschalk said that if the Morash's application satisfies the 100-foot setback to the greatest extent practical, as they believe it does, Section B directs the Planning Board to look to section 4A1 to determine the maximum allowable exception to the setback. Section 4A1e says that if the proposed new structure is greater than 1500 square feet, in no case shall any portion of it exceed 1500 square feet within the 100-foot setback, which he noted is more than the roughly 500 square feet the Morashes wish to build within that limit.

In the Planning Board's revised decision, Mr. Gottschalk said that despite the Board of Appeal's direction on remand, the PB made no finding of fact regarding whether the Morash plan satisfies the 100-foot setback to the greatest extent practical. Rather, it found only that a structure the size of their existing Readfield home could be built behind the setback and that a larger structure might also be built behind that line, but it made no finding as required as to whether or not it is practical to build the structure the Morashes propose to build entirely behind the 100-foot setback.

Mr. Gottschalk said that the Planning Board's decision is a substantive departure from the Readfield ordinance and that is why the Planning Board seeks to import provisions from the Maine guidelines as the basis for its denial of the application. He said the guidelines have language that does not appear in the Readfield ordinance, including Section 12.C.4, which says that if the total footprint of the original structure can be reconstructed beyond the required setback, no portion of it may be reconstructed at less than the setback requirement for a new structure. Mr. Gottschalk takes exception to the fact that the language from the guidelines does not appear anywhere in Readfield ordinance.

Mr. Gottschalk said that this is not a situation involving the reconstruction of an already damaged structure, which is what he asserts C.4 is intended to address. He stated that the application is for a relocation of an existing structure and would fall under C.3 of Section 12 of the guidelines, if those guidelines could be applied at all. It, like Section 4B of the Readfield ordinance, governs the relocation of an existing nonconforming structure and reads exactly like section 4B of the Readfield ordinance except that it does not limit expansion over the 100-foot setback to 1500 feet. He said the Morash's application satisfies the requirements of both the Readfield ordinance and the Shoreland guidelines regarding relocation of a nonconforming structure provided the site of relocation conforms to all setback requirements to the greatest extent practical.

But, Mr. Gottschalk said, even assuming section 12.C.4 is the relevant section of the guidelines and assuming it says what the Planning Board says it says, it cannot be relied upon to deny the Morash application for several reasons.

Section 438-A of the Shoreland Zoning Act specifically directs municipalities to adopt land use ordinances consistent with the act. The guidelines are not self-enforcing and without formal adoption by the town do not have the force of law. He said the Shoreland Zoning Act requires towns to adopt ordinances consistent with their provisions in substance, using the guidelines as a model. If the model ordinance is to be applied, it must be formally adopted as a town ordinance which requires under state law formal notice of the proposed ordinance and its approval at a town meeting. It is the 2019 Readfield ordinance as written and as approved by the town which must be referred to in deciding the Morash's application, not the guidelines.

Mr. Gottschalk said that a related question on this appeal is who gets to decide if the Readfield ordinance is deficient or not. He said the answer is the Commissioner of the Department of Environmental Protection and the state Board of Environmental Protection, not the town Planning Board, and that nothing authorizes any planning board to import the language of the guidelines into a town's ordinance and to bypass the required process for amendment of that ordinance.

Mr. Gottschalk said the Planning Board may not apply the different language of Section 12.C.4 of the guidelines in deciding the Morash's application because this would be a retroactive application of law of Title 1, Section 302 of the Maine Revised Statutes. Peter said that Title 1 of Section 302 applies to changes in law and that the state regulation has been in existence for some time prior to the 2019 Land Use Ordinance. Mr. Gottschalk replied that since that language has never been formally adopted in the Readfield ordinance it is a change of law.

Finally, Mr. Gottschalk noted that the guidelines have been around since 1992 and in those twenty years, so far as we can tell, no one thought to even reference the guidelines and certainly not to delete Section 4 from the ordinance. He said it is worth noting that when Section 4 was actually removed by formal amendment in 2021, the guideline language was not used as a substitute. In publishing the proposed amendment, the town actually used an example to tell voters how it would work. It said that a house which is 30 feet from the water could be relocated to 90 feet from the water, not that it must be built behind the 100-foot setback as the Planning Board says the guidelines require.

He questioned whether Section 4 of the Readfield ordinance has been applied to allow other enlarged replacement structures to be partially or wholly placed within the 100-foot setback if that setback has been met to the greatest extent practical. He said that if the Morashes move their proposed home behind the 100-foot line they will be faced with a steep slope that presents safety issues. He distributed a letter from Dustin Dorr of the Maine Department of Environmental Protection Bureau of Land Resources that recommends "avoiding the disturbance of steep slopes and existing vegetation is avoided to the greatest extent practicable during construction." The Dorr letter says that while activities within the 75-foot line could require a permit from the DEP, it does not refer to the 100-foot line as a possible barrier to the relocation.

Peter noted that the state DEP website requires a 100-foot setback for constructions on all great ponds.

Clif Buuck suggested that the 75-foot setback applies to streams and rivers. Chip agreed.

Mr. Gottschalk said he sees only two options: One is that the Appeals Board vacates the Planning Board decision and grants the permit or orders another remand. He said that he is not sure the latter would be helpful as he sees the Planning Board as very wedded to limiting all new building to the 100-foot limit regardless of circumstances. Mr. Gottschalk then suggested that perhaps an individual could be appointed to assess the situation and determine whether

the Morashes should be allowed to go ahead or come up with a compromise plan acceptable to all parties. He said perhaps CEO Chip Stephens or some other qualified person, such as a shoreline specialist, could fill that role.

Clif began the questioning by asking what language in the guidelines Mr. Gottschalk objects to. Mr. Gottschalk said it is the section in the guidelines that the Planning Board is using to deny any building within the 100-foot setback that is not stated in the Readfield ordinance. Clif also asked about the 1000-square-foot limit for buildings less than 75 feet from the shore. Mr. Gottschalk said that doesn't apply in this case, since the Morashes don't intend to build closer than 75 feet and the 1500-square-foot limit for anything inside 100 feet is more than adequate for what the Morashes plan.

Peter Bickerman said that the 1500- and 1000-square-foot limits being discussed refer to an expansion of a nonconforming structure, but in this case we are talking about the replacement or relocation of an existing structure. Mr. Gottschalk disagreed and said that Section 4.a.1 he cited that allows the 1500-square-foot limit carries over into 4b, which is the section upon which the Morashes are basing their claims. He said that 4b incorporates 4a and that 4c incorporates 4a. Peter said that's not the case because the Morashes are not relocating but replacing the existing structure.

Peter noted that zoning regulations often keep people from building the kind of houses they want to build on certain properties.

Paula Clark, Planning Board chair, spoke next. She said that the board based its review on information already in the record; no new information was considered. She said that she thinks much of the disagreement comes from the fundamentally different way the applicant views the ordinances and the way the Planning Board applied it. She said the Planning Board views the phrase "to the greatest extent practical" as applying only to the original structure, not to a larger building. She interprets the 1500-square-foot as total building size and not an expansion. She said that the Planning Board did not substitute the guidelines for the Readfield Land Use Ordinance. Paula noted that local land use ordinances cannot be less restrictive than the shoreline guidelines. She said the state has approved Readfield's ordinance.

Henry Whittemore asked how the Planning Board determines "greatest extent practical." He asked if the Planning Board looks at the existing structure as opposed to the replacement structure. Paula said they consider the current structure and other external factors but not a larger structure. She said greatest extent practical is often a consideration when someone wants to move a camp and large trees, slope, septic or other factors limit how much a building can be moved back from the water, but in that case the building size is limited to 1500 square feet. In the Morash application the existing building can be moved back 100 feet, so greatest extent practical does not apply to the larger home they wish to build. Once they are beyond the 100-foot setback no Planning Board permission is required.

Henry then asked about references to the issues of safety vs. convenience and improvement vs. full compliance in the context of greatest extent practical. Paula said they did not consider convenience. Paula said that Planning Board findings show that the current home can be moved back behind the 100-foot setback.

Henry referred back to the issue of safety vs. convenience in relation to the large slope behind the home and the difficulty of building a driveway that would be safe in wintry conditions. Paula noted that the materials put forth by the Morashes were based on applying the greatest extent practical standard to the 4600-square-foot structure, not the 2100, which is a fundamental difference to how each side sees the issue.

Jack Comart, vice chair of the Planning Board, spoke about Mr. Gottschalk's comments that the state Shoreline Zoning Guidelines not being mentioned in Readfield's ordinances is a violation of due process. He noted that in Article 1 Section 2 that the ordinances were adopted pursuant to the Shoreland Zoning Guidelines. If there is a conflict between the two, then the more restrictive of the two should apply. He said that the guidelines are clear: If the existing building can be moved back 100 feet, then the building can be enlarged. He said that if Mr. Morash wants to a larger home beyond the 100 feet that is not a Planning Board issue, just possibly code enforcement.

Jack also addressed Mr. Gottschalk's reference to the example used in the town warrant where a camp might be moved back 90 feet instead of 100 feet. He said that in some case it is not possible to move a building back the full 100 feet, but that doesn't mean it shouldn't be done when it is possible to move back the full 100 feet.

Peter asked Jack if a 14 percent slope is atypical in the shoreline zone. Jack said it is not, and Mr. Morash is free to build on that slope.

Town Attorney Kristin Collins reviewed the statutes and ordinances for shoreline zoning and how they work with each other and how they apply to landowners and the limitations it imposes on them. Again, the more restrictive of the state or local ordinance are applied. She said she doesn't see the Morash application as reconstruction but rather a new building altogether.

She next addressed Section 4.A.1.c, upon which the Morashes are basing their appeal. She said it doesn't apply because their current home doesn't straddle the setback line.

She said that the Planning Board decided this issue correctly and that if the Planning Board had allowed the project to go ahead, it could bring DEP enforcement down upon the town.

Nate Rudy asked what the consequences are for the town if they allowed the building to go ahead. Kristin said that the DEP could take the town to court and force Readfield to follow state guidelines, possibly stopping a building in process.

Henry asked about the four cases where residents were allowed to build larger homes closer to the water than the 100-foot setback. Kristin said that precedents don't bind municipal boards, only courts. Even if these other applications were decided incorrectly, she asked, does that mean we should continue that error?

Peter said that if the Planning Board in the past had decided one of these cases incorrectly and a court had found that the Planning Board had acted incorrectly, then that would be different and a precedent would then be set.

Finally Kristin said she did not see any violation of the Freedom of Access law in her meeting with the chair and vice chair of the Planning Board to plan procedure.

Keith Meyer addressed the board. He said he found it offensive that the greatest extent practical is considered irrelevant. He also said he doesn't understand how the four cases that appear to break the rules can be irrelevant and that it appears that there is a double standard for those "from away" as opposed to locals.

Mr. Gottschalk rebutted Kristin Collins interpretation of the land use ordinance saying it doesn't apply to new structures. He returned to his argument that the state guidelines are not part of the Readfield ordinance and thus not applicable because they were not adopted by the town. The steep slope behind the house is a safety issue, he claimed, and should be considered as a factor in the greatest extent practical. He said he tried to talk to Colin Clark of the DEP, but he would

not do so. He also spoke to the unfairness issue comparing the current application to the four cases Mr. Morash found where the 100-foot setback was not enforced.

Carol Doorenbos spoke about her recent awareness of the Morash issue and said she found it troubling. She noted the lengthy process the Morashes have undergone and asked to read into the record some details from the four properties mentioned as comparable properties that were allowed by the Planning Board with exceptions. Will said much of the material she wanted to present had already been heard by the board. Peter noted that new material could not be considered in this hearing, as it was not part of the Planning Board's record. Carol objected, saying these properties had been mentioned several times in the meeting. John Blouin noted that much of what she was saying was already known to us. Ms. Doorenbos' testimony on the other properties was not heard.

Mr. Gottschalk rebutted again saying that the information on the other properties should have been heard by the Planning Board.

Henry moved that we go into deliberations. Peter seconded. All agreed.

Kristin mentioned that we could adjourn pending the receipt of legal advice.

Will Gagne Holmes noted that that would delay that event for at least a month as notice must be given.

Peter said that with all the legal experience on the board he doesn't see the need to put off the decision for the sake of having another lawyer join the discussion, which will take more time and money.

Henry asked about the details of our remand in reference to the "greatest extent practical."

Peter said that he felt the original decision was rather cryptic and he wanted to see it fleshed out. He said the Planning Board could have revised their decision after receiving more information, but that it wasn't necessary.

Henry said that he hoped the Planning Board would address some of the details we discussed and that there would be a more collegial feel to the process with better communication between the Planning Board and the Morashes.

Will asked Henry if he felt better about the decision now that the Planning Board has determined that the current home can be moved back completely. Henry said he walked the property today to try and get a feel for the slope and other issues. He said he was a little confused about the road-driveway and steep slopes issues, but Will noted that issue is not part of the current deliberations.

Will asked how the board feels now about what the Planning Board decided, that the current home could be picked up and moved back.

Peter said he thinks there is a fundamental divergence about how to apply greatest extent practical in a situation of this kind, where the appellant wants to replace the current structure with a much larger one. He read from their Nov. 30 document: "Neither of the two Planning Board decisions makes a finding that the 4600-square-foot permitted residence we would like to build could be practically built entirely behind the 100-foot-setback nor any finding rejecting our evidence that it is impractical to do so." Peter said that the Planning Board's view of the law is that that's not what they are there to look at, that nobody has a right to build a structure of any particular size on a nonconforming property, and that they decided this correctly based on the law.

Holly said as a nonlawyer and just listening to the arguments that the process came across as a bit unfair.

Henry spoke about the land use ordinance and whether it includes the shoreline zoning ordinance. He said that looking at the dates of the documents, his concerns about the due process are eased. That the town did adopt those guidelines with the ordinance.

Clif said he sees this issue as being about grandfathering and the right to continue existing nonconforming conditions of the property as described in Article 3 Section 1. He said as far as he's concerned the Planning Board decided it correctly based on the 2100-square-foot home. He said that previous decisions of the Planning Board mentioned by the Appellants in which permits were granted on other lots were not examples of people "getting away" with anything because there were other obstacles preventing full conformance in those cases. He said he voted for remand because he was concerned about the vegetation issue and native vegetation is preferred, but the Planning Board's position is revegetation is allowed. There are no factors which prohibit building on a 14 percent slope. There's no provision for convenience or practicality. He doesn't see an obstacle to moving it back, and again it all gets back to grandfathering what is already there.

John said he didn't believe that the Planning Board had done anything incorrect or inappropriate or that we have any new evidence that changes what we did before. He hoped the remand would improve communication and perhaps lead to a compromise. He said he's troubled by the four alternative cases that were permitted and feels badly that the communication has made it difficult for the applicant to predict the outcome, but that he doesn't see that the Planning Board decision was incorrect.

Clif asked about case law where guidelines are used to interpret an ordinance. Will noted that an attorney argued tonight that they do it all the time. Peter said it's an odd rule making situation where you have mandatory shoreline zoning rules which can contain different language from the state guidelines, but you have to be at least as stringent as the model rules.

Nate said he's coming from a different place as a new member to the board and someone who works for local government and has sympathy for all parties. He doesn't see the applicant's view as supported by the documentation and doesn't think the 1500-square-foot limitation applies at all. He said he was particularly interested in the "greatest extent practical" and how the Planning Board applied it and how it compares with a hardship clause. No ordinance, including the 2019 ordinance, is exempt from shoreline zoning. He spoke about the difficult job volunteers have and how we cannot be expected to violate the law. Our job is to apply the law correctly whether or not that is consistent with prior cases. He said the Planning Board has met that standard in this case.

Henry said he felt frustrated by the appellate nature of our board and the sketchiness of the Planning Board records. He said he doesn't feel like we had enough information and that it's unfortunate that we cannot unbundle the footprint of the house and the driveway. The house will fit, but the road and house don't work together. He said he would like to see a way to make the project work.

Henry said he felt frustrated by the appellate nature of our board and the sketchiness of the Planning Board records. He said he doesn't feel like we had enough information and, as an appellate board, we can only validate the Planning Board's decision. He said it's unfortunate that we cannot unbundle the footprint of the house and the driveway. The house will fit, but the road and house don't work together. He said he would like to see a way to make the project work.

John moved to end deliberations. Peter seconded. All in favor.

Henry asked about our options, but we had closed deliberations.

John moved to reopen deliberations. Will seconded. Nate asked why. Henry said to discuss the next step. Passed by six: Peter abstained.

Peter read the ordinance that outlines our options.

Nate noted that this is probably the end of this proposal but not the end of the applicant's options.

Holly asked about the Morashes next step and whether they would need to come back to the Planning Board. It was explained that as long as they move back 100 feet from the high-water mark, they may not need to go back to the Planning Board; that they just have to submit plans to the code enforcement officer.

John moved we end deliberations. Will seconded.

Will moved we deny the applicant's appeal of the Planning Board's revised decision of Oct. 25. John seconded. Six in favor; Holly abstained. Appeal denied.

Nate moved we adjourn, John seconded. All in favor. Adjourned at 8:35.

Minutes prepared and submitted by Holly Rahmlow and Peter Bickerman