DECISION

ADMINISTRATIVE APPEAL OF MANAGEMENT CONTROLS, LLC
DECEMBER 16, 2021
NOTICE OF VIOLATION PERTAINING TO 18 FERNWOOD ROAD

Town of Raymond Zoning Board of Appeals

FINDINGS OF FACT AND CONCLUSIONS OF LAW / NOTICE OF DECISION

Re: Administrative Appeal by Management Controls, LLC of NOV issued 12/16/2021 Regarding 18 Fernwood Road (001/022/000; Zone LRR2)

Date of Decision: July 26, 2022
Date of Written Decision: August 3rd, *2022*
Pursuant to Section 16(G)(3)(b)(6) of the Shoreland Zoning Provisions a copy of this written decision will mailed or hand-delivered to the Department of Environmental Protection no later than 7 days from the date of the written decision.

This administrative appeal of the December 16, 2021, Notice of Violation ("NOV") concerning 18 Fernwood Road (001/022/000), came before this Board upon Management Controls, LLC's ("MCL") Notice of Appeal filed on January 18, 2022, pursuant to Section 16(G)(1)(a) of the Town of Raymond Shoreland Zoning Provisions (last amended June 7, 2016) ("SZO"). The Board of Appeals held a *de novo* public hearing on this Appeal on March 29, 2022, after which the record was closed and the Board began deliberations, which it subsequently continued by unanimous vote to its next regularly scheduled meeting on April 26, 2022.

The following members heard this appeal: David Murch, Greg Dean, Tom Hennessey, and Fred Miller.[1]

On April 26, 2022, upon the motion of all parties to all this and all related appeals concerning 18 Fernwood and 28 Whitetail Lane, the Board voted unanimously to table further deliberation on this and all related appeals until its next regularly scheduled meeting to accommodate the parties' mediation scheduled for May 4, 2022.[2] The matter was subsequently continued again at the May and June meetings of the Board. The Board resumed consideration of appeal on July 26, 2022.

On July 26, 2022, based on the following record, findings of facts, and conclusions of law, the Board voted unanimously to issue a final decision, which is summarized in this written decision.

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[1] Fred Miller *sua sponte* raised the issue of whether he should be recused from this matter because he previously performed flooring work at 19 Fernwood about five years ago for a previous owner. The Board moved to accept Miller as having no conflict of interest with a vote of 3 in favor, 0 opposed, and 1 abstention.

[2] By requesting deliberations be continued, the parties have waived any objection that may be made pursuant to Shoreland Zoning Provisions Section 16(G)(3)(b)(5) that the parties are entitled to a decision within 35 days after the close of the hearing.

Contents of the Record

The record for this appeal consists of all of the materials the parties submitted in advance of the March 29th hearing, with the exception of the following materials which were excluded from the record by a unanimous vote of the Planning Board: an email from Attorney Eric Wycoff to Alex Sirois and Chris Hanson, dated March 22, 2022, at 21:32:28, which was subsequently forwarded to the Board; and an email from Attorney Leah B. Rachin to the Administrative Assistant to the Board, Sandy Fredricks, dated March 29, 2022 at 12:10 (with enclosures via link) . Additionally, the record includes by a vote of 3 to 1 a March 28, 2022, letter to David Murch from the State of Maine Department of Environmental Protection ("DEP"). All record materials are available at https://www.raymondmaine.org/content/agenda and https://www.raymondmaine.org/boards-committees/zoning-board-appeals and are on file with the Town of Raymond. At the public hearing, on behalf of MCL, the Board heard oral argument from Attorney Rachin and testimony from Mike Morse of Archipelago Law. The Board heard oral argument from Attorney Wycoff on behalf of the Town of Raymond Code Enforcement Office and heard testimony from Code Enforcement Officer ("CEO") Alex Sirois.

Additionally, the Board heard argument from Attorney Gregory Braun, representing Durant Excavating LLC, concerning predominately procedural matters. It was acknowledged by all parties and the Board that much of the evidence introduced and argument made pertaining to this appeal are relevant and duplicative of the arguments and evidence pertaining to the other five related appeals concerning 18 Fernwood and 28 Whitetail and, therefore, the record for five related appeals shall include but is not necessarily limited to this record.

Findings of Fact and Conclusions of Law

The Board evaluated the appeal during deliberations by addressing in turn the issues raised in MCL's Notice of Appeal and submissions, voting on its findings and conclusions concerning each issue. Those findings and conclusions are documented below. Additionally, the Board also finds MCL has standing to bring this appeal, the appeal was timely filed, and the Board has jurisdiction to consider the matters raised on appeal pursuant to Section 16 of the SZO.

1. Whether all violations should be vacated because MCL reasonably relied on its contractor to obtain all required permits and act consistent with the SZO.

MCL argues that all violations should be vacated because MCL relied on its contractor to obtain permits and act consistent with the SZO and, therefore, MCL did not violate the SZO.

The Town counters that MCL, as property owner, is responsible for what activities occur on its property at its direction, that the contractor is MCL's agent, and MCL as principal is responsible for the agent's actions taken within the scope of the agent's contract.

The Board finds the MCL is the owner of 18 Fernwood and MCL contracted with Durant Excavating (or related entities) to obtain all permits and perform the activities giving rise to the NOV, making Durant MCL's agent. Having done so, it was the owner's responsibility to confirm the contractor was acting consistent with the contract and obtained all permits, especially when

the activities were conducted in the shoreland zone. The Board concludes this is consistent with 30-A M.R.S. § 4452(2) (owner liable for violations), 38 M.R.S. § 444 ("Any person who orders or conducts any activity in violation of a municipal ordinance adopted under this chapter is penalized in accordance with [30-A M.R.S. § 4452]."; SZO § 16(C) (permit applications must be signed by owner or person authorized by owner); and *Crowley v. Dubuc,* 430 A.2d 549, 552 (Me. 1981) (holding principal is liable for agent's conduct conducted within scope of agent's authority regardless of principal's knowledge of conduct). Therefore, the Board concludes that because MCL is responsible, the CEO did not err, and all violations are not vacated on the grounds MCL is not a responsible party.

Vote: 4-0-0.

2. Whether Violation 1 should be vacated.

MCL argues Violation 1 of the NVO should be vacated because it relates to soil and water conservation practices, which are allowed in the LRR2 zone without a permit (*see* SZO § 14 (item #8); there is no explanation or evidence that work was not conducted in a way to prevent erosion/sedimentation; and the purpose of the project that is the subject of the NOV was to prevent erosion.

The Town counters that the SZO requires filling and earthmoving to be done in a way to prevent erosion and sedimentation and, if a permit is required, that the activity be done in accordance with an Erosion and Sedimentation Control Plan. Because filling and earthmoving occurred without a permit, although a permit was required, and was not designed to prevent erosion and sedimentation of surface waters or pursuant to an Erosion and Sedimentation Control Plan, the activity violated the SZO, as stated in Violation 1.

The applicable standard alleged to have been violated is Section 15(U)(1). The Board finds the land use activity complained of consisted of filling and earthmoving of more than 10 cubic yards within 100' of the normal high water line ("NHWL") of the lake; it was not done in accordance with an Erosion or Sedimentation Control Plan; and was done without a permit. The Board relies on Exhibit B and Exhibit E of the Town's evidence, the testimony of the CEO, and its observations of measures that were or were not taken (e.g. hay bales), to further find that the activity was not designed in a way to prevent erosion and sedimentation of surface waters. Therefore, the Board concludes the activity was in violation of Section 15(U)(1), the CEO did not err, and Violation 1 is upheld.

Vote: 4-0-0.

3. Whether Violation 4 should be vacated.

MCL argues Violation 4 should be vacated because the jetty was preexisting and its repair and maintenance did not require a permit. MCL offered evidence that the work merely consisted of replacing/repairing existing stones that had slipped. MCL maintains this is consistent with 28 M.R.S. § 480-Q(2). MCL explained the changing water levels make it appear the jetty was extended, but it was not actually extended.

The Town counters Violation 4 should be upheld because the construction of a jetty required Planning Board approval pursuant to SZO § 14 (line 17B), which was not obtained. Further, the Town argues a permit from DEP was not obtained pursuant to 38 M.R.S. § 480-C and SZO § 15(C)(11). The Town concludes that because the preexisting jetty was nonconforming, it could only be expanded, reconstructed, or replaced, with a permit, pursuant to SZO § 12(C). The Town presented evidence it purports demonstrates the jetty work was not merely repair or maintenance and the jetty was in fact enlarged and vegetation was removed.

The Board finds that the record showed that no Planning Board permit or DEP permit was received for the preexisting nonconforming jetty. To determine whether the jetty was expanded or merely repaired, the Board considers the photos submitted by the parties, and the testimony of the CEO. MCL argues the water level fluctuation made it appear the jetty was expanded but in fact it was not, while the Town and DEP concludes the jetty was expanded. A majority of the Board concludes the evidence to support a conclusion the jetty expanded and the activity was something more than mere repair and maintenance is not persuasive. Because the Board cannot conclude the jetty was expanded, a majority of the Board concludes the evidence does not support a conclusion section 14 or 12(c) were violated. As such, it is not necessary for the Board determine the applicability of 38 M.R.S. § 480-Q(2). Therefore, a majority of the Board concludes the CEO erred and Violation 4 is vacated.

Vote: 3-1-0.

4. Whether Violation 5 should be vacated.

Violation 5 asserts that the shoreline has been enlarged or expanded without a permit. MCL argues the shoreline was not enlarged or expanded, it was stabilized.

The Town counters that the shoreline was expanded as demonstrated by Exhibit C, showing large boulders that did not previously exist, and a shoreline extending beyond the stairs further than it did before.

MCL, through counsel, stipulates that Violation 5 and 11 should be upheld but consolidated. The Board concludes, therefore, that Violation 5 is upheld.

Vote: 4-0-0.

5. Whether Violation 6 should be vacated.

Violation 6 asserts that MCL constructed a beach without a permit in violation of SZO § 15(O). MCL argues Violation 6 should be vacated because the evidence does not show a beach being constructed, it only shows large pieces of riprap, and therefore no permit was required to construct a beach.

The Town counters that the violation should be upheld because the evidence, specifically Exhibit C to the NOV, shows that what may be understood as a beach consisting of stones and rocks has been expanded to a significantly larger size than previously existed, contrary to SZO 15(O).

The Board finds that the shoreline was altered to add a greater expanse of area consisting of stones and rocks than existed before and that no permit was obtained to do this. As a mixed conclusion of law and fact, based on the evidence submitted and the personal experience of the locality of the members about what is or is not a beach, a majority of the Board concludes this expansion constitutes a beach, triggering the requirement to obtain a permit under the SZO. As no permit was obtained, a majority of the Board concludes MCL violated Section 15(O) and, therefore, Violation 6 is upheld. The dissenting vote on the Board reasons the SZO cannot be enforced because the meaning of beach is too vague. To be clear, however, the entire Board agrees that there was some moving of materials and some expansion of area.

Vote: 3-1-0.

6. Whether Violation 7 and 8 should be vacated.

The Town asserts that MCL violated Section 15(Q)(c) because vegetation under three (3) feet and located within 100 feet of the NHWL of the lake was cleared or removed and because vegetation of any height was removed without a permit.

MCL asserts that existing vegetation less than three (3) feet in height was not "removed" but was trimmed down (leaving all root systems intact) and topped off with natural bark mulch.

The Town counters that the violations should be upheld because Exhibit C shows the vegetation was cleared and removed, and whether or not the root systems remain intact is irrelevant. As the work was done without a permit, the Town argues the above SZO sections were violated.

The Board finds the vegetation was cleared within 100 feet of the NHWL of the lake, covered in mulch, and that this was not done to establish a footpath or other purposes allowed by SZO Sections 15(q)(2) and (2)(a), and was done without a permit. Therefore, the evidence supports the CEO's alleged violations and the Board upholds Violations 7 and 8.

Vote: 4-0-0.

7. Whether Violation 12 should be vacated.[3]

Violation 12 asserts that MCL violated SZO Section 15(C)(12) because the stabilization work could have been but was not completed by using a barge.

MCL argues this violation is duplicative of Violation 11 and should therefore be vacated. Further, MCL argues this violation cannot stand alone because the CEO cannot enforce something that would have been a condition of a permit but a permit was not obtained. In other

[3] There was some discussion during deliberations about whether Violation 13 was raised on appeal. Further review of the record in preparing this decision reveals it was not.

words, the CEO's determination that the work should have been conducted by barge is premature and exceeds his authority.

The Town counters that because, pursuant to SZO Section 16(H)(2), the CEO may enforce any violation and is tasked with determining if a violation has occurred, the Planning Board has no role in enforcement and it was proper for the CEO to determine that a barge was feasible.

The Board is not persuaded by the argument that Violations 11 and 12 are duplicative. The Board finds that the CEO had authority to determine a barge was feasible, and the work violated Section 15(C)(12) because Section 16(H)(2) authorizes the CEO to enforce the code. Because MCL did not file an application with the Planning Board, the Planning Board did not have an opportunity to consider or waive Section 15(C)(12), rendering it applicable in the situation where work is performed without a permit. Because the Planning Board did not have this opportunity, MCL was obligated to perform from a barge if the CEO determined it was feasible. Otherwise, MCL would be able to evade responsibility for certain violations because it did not obtain a permit—an unlawful act cannot abdicate an applicant from other liability. The Board finds that the evidence (specifically, the CEO's testimony) shows that use of a barge was in fact feasible but the shoreline stabilization was instead conducted from the land, in violation of the above-cited provisions of the SZO. Therefore, Violation 12 is upheld.

Vote: 4-0-0.

8. Whether Violations 1 and 2 should be vacated as duplicative.

MCL's eighth issue is that Violations 1 and 2 constitute procedural error. The first concerns a violation for filling/earthmoving without steps being taken to control sedimentation and erosion and the second concerns filling/earthmoving without obtaining a permit.

MCL argues they are duplicative and the Town separated them in an attempt to double the fines. The Town counters they are separate violations and the Board has no role in evaluating fines.

Something can be unpermitted, triggering a violation, but that is separate from a failure to obtain a permit, which is itself a violation. The evidence presented supports the finding that earthmoving and filling occurred and no permit was obtained. Those are conceptually distinct and the CEO did not err by separating the unlawful act and the failure to obtain a permit. The Board acknowledges it does not have authority to issue fines, but that is not at issue here. It acknowledges a judge may consider the argument the counts are duplicative in evaluating fines, amongst other factors, and this decision does not change that. Therefore, the Board is not persuaded by MCL's argument, and it upholds Violations 1 and 2 as separate violations supported by the evidence.

Vote: 4-0-0.

9. Whether Violations 7 and 8 should be vacated as duplicative.

The next issue raised by MCL is that, for the same reasons noted for issue 8 above, it is procedural error to separate out Violations 7 and 8.

For the same reasons it was not persuaded by MCL's argument pertaining to issue 8, the Board is not persuaded by them as applied to issue 9. Violation 7 relates to the violation of the requirement that vegetation less than three (3) feet cannot be cut, covered, or removed, except for certain purposes not applicable here. Violation 8 pertains to removing any vegetation without a permit. *Compare* SZO § 15(Q)(C) *with* SZO § 14 (line 5). Further, even with a permit, the removal of vegetation less than three (3) feet tall would have been in violation of the SZO, demonstrating the conceptual difference between the two violations. Therefore, the Board upholds Violation 7 and 8 as separate violations supported by the evidence.

Vote: 3-1-0.

10. Whether Violations 11 and 12 should be vacated as duplicative.

This issue concerns whether 11 and 12 are duplicative.

The Board concludes, similar to the reasons above, these are separate violations. Violation 11 pertains to stabilizing the shorefront without a permit in violation of SZO § 15(C)(12), whereas Violation 12 pertains to stabilizing without a barge in violation of SZO § 15(C)(12), which the CEO has determined that is feasible. Therefore, the Board upholds Violations 11 and 12 as separate violations supported by the evidence.

Vote: 4-0-0.

11. Whether Violations 14 and 15 should be rejected.

The Board concludes, similar to the reasons above, these are separate violations. Violation 14 is based on SZO § 15(Q)(2)(b), which allows only selective cutting of trees within a buffer strip, so long as a well-distributed stand of trees and other natural vegetation is maintained and if other trees are present which provide sufficient points to allow selective cutting of otherwise healthy trees. Violation 15 is for removing vegetation without a permit. SZO § 14 (line 5). Even if vegetation in excess of selective cutting occurred with a permit, it would be a violation, and similarly, even if vegetation was cut, not in excess of selective cutting, a permit was required. In short, the violations are not dependent on one another.

To the extent MCL argues the evidence is insufficient to support Violation 14 and 15, the Board disagrees. As provided in Violation 14, and evidenced by the testimony of the CEO, trees were removed from a 6,000 square foot area between the house and the NHWL from what would have been three 25'x 50' grids. Vegetation was removed from a 6,000 square foot area between the house and the NHWL. Trees were removed in what would have been three 25'x 50' grids. The three grids did not contain enough points to support the selective removal of otherwise healthy trees. The removal of trees occurred without a permit. The three grids did not contain enough

points to support the selective removal of an otherwise healthy tree. The Board concludes this tree removal violated SZO §15(Q)(2)(b). As provided in Violation 15, the removal without a permit violated SZO § 15 (line 5). Therefore, the Board upholds Violations 14 as 15 as separate violations supported by the evidence.

Vote: 4-0-0.

12. Whether all violations should be vacated because CEO did not explain the corrective actions necessary.

MCL argues that contrary to SZO Section 16(G) the CEO did not indicate the action necessary to correct the violations.

The Town counters that the level of detail in the original NOV is sufficient and consistent with SZO § 16(H)(2)(a) and 30-A M.R.S. § 4452(3)(C-2). Further, the Town says that in any event, on February 22, the Town provided a supplemental Notice of Violation which provides more guidance, which MCL declined to appeal.

The Board concludes both the NOV, both the original and the supplemental, provide sufficient detail in accordance with the SZO and state law.

Vote: 4-0-0.

13. Additional issues

MCL made a broader argument that if it had obtained a Planning Board permit, many of the other violations would have been subsumed within that, and those violations should, therefore, be vacated. The Board is not persuaded by this argument and concludes it is duplicative of MCL's other arguments made and considered above.

DECISION

Based on the above findings and conclusions, having held a public hearing, the Board voted unanimously that the application for an administrative appeal be DENIED IN PART and GRANTED IN PART. Violation 4 is hereby VACATED. All remaining violations are UPHELD.

NOTICE: This decision may be appealed to the Superior Court within 45 days from the original Date of the Decision noted above by any aggrieved party who participated as a party during the proceedings before the Board of Appeals.

So ordered,

Town of Raymond Board of Appeals

David Murch, Chair

Greg Dean

Thomas Hennessey

Fred Miller