

WRITTEN DECISION

ADMINISTRATIVE APPEAL OF BIG LAKE MARINE, LLC

March 10, 2022

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 Big Lake Marine, LLC, NOV Regarding 18 Fernwood Road (001/022/000; Zone LRR2)

Date of Decision: September 26, 2022

Date of Written Decision: September __, 2022

Pursuant to Section 16(G)(3)(b)(6) of the Shoreland Zoning Provisions a copy of this written decision will be 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 March 10, 2022, Notice of Violation ("NOV") concerning 18 Fernwood Road (001/022/000), came before this Board upon Big Lake Marine, LLC's ("BLM") appeal received on April 8, 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 August 30, 2022, after which the record was closed and the Board began deliberations, which it continued by unanimous vote to its next scheduled meeting on September 26, 2022.

The following members heard this appeal: David Murch, Fred Miller, Pete Lockwood.^{1 2}

On September 26, 2022, based on the following record, findings of facts, and conclusions of law, the Board voted unanimously to deny the appeal in part and grant the appeal in part.

Contents of the Record

The record for this appeal consists of all of the materials submitted by the parties in advance of the August 30, 2022, hearing, with the exception the following materials which were excluded from the record by a unanimous vote of the Zoning Board of Appeals at the preceding March 29, 2022, hearing: 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

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 5 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.

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 on file with the Town of Raymond. At the March 29th 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 5 related appeals concerning 18 Fernwood and 28 Whitetail and, therefore, the record for 5 related appeals shall include but is not necessarily limited to this record.

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. The record also includes a letter from Q-Team’s Aaron Gosselin that is undated and was provided to the Board by email through counsel on July 26, 2022.

At the July 26th meeting, 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 5 related appeals concerning 18 Fernwood and 28 Whitetail and, therefore, the record for 5 related appeals shall include but is not necessarily limited to this record.³

Preliminary Summary Motions / Objections

The parties made three preliminary motions before proceedings to the merits.

First, the Town moved to dismiss points 1, 3, 5, 6, 9, and 10 of BLM’s appeal on the grounds it failed to comply with the SZO by filing a concise written statement indicating what relief is requested and why it should be granted. The Board denies this motion on the grounds that BLM’s appeal was sufficiently detailed to allow the Board to identify what parts of the NOV BLM contests.

Vote to deny the Town’s motion: 3-0-0.

Second, BLM argues the NOV should be vacated because the Board has not reviewed the materials. As the Chair explained at the hearing, the Members received and reviewed the information in advance of the hearing. Therefore, the Board denies the motion.

Vote to deny BLM’s motion: 3-0-0.

³ At the August 30th hearing, BLM raised for the first time the argument that it did not have an adequate opportunity to participate in the prior appeals concerning 18 Fernwood and objected to any reliance on that evidence. The Board unanimously overruled that objection.

Third, BLM argues that it did not have adequate opportunity to participate in the prior appeals concerning 18 Fernwood and, therefore, was denied an opportunity to challenge factual findings in those appeals that are relevant to the present appeal. The Board denies this motion because BLM was provided adequate opportunity to challenge the evidence presented in the prior appeals. Even if BLM was not provided that opportunity, BLM is not prejudiced because each decision is made based on the evidence presented to it, regardless of findings made in prior appeals concerning the same or similar facts.

Vote to deny BLM's motion: 3-0-0.

Findings of Fact and Conclusions of Law

Following the August 30th hearing, the Board evaluated the appeal during deliberations by addressing in turn the issues raised by BLM, voting on its findings and conclusions concerning each issue. Those findings and conclusions are documented below. The Board also finds BLM 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 Violation 1 should be vacated.

Violation 1 alleges BLM engaged in filling and earthmoving in violation of SZO § 15(U)(1). In summary, 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.

BLM denies it committed Violation 1.

The Town argues BLM conducted the activity in question and the Board should uphold Violation 1 for the same reasons it was upheld in the Management Controls appeal relating to 18 Fernwood.

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. silt fence collapsed and loose), to further find that the activity was not designed in a way to prevent erosion and sedimentation of surface waters. Further, the Board previously found MCL committed this violation based on work done by BLM, and no evidence presented by BLM challenged this finding.

Therefore, the Board denies BLM's appeal in part and upholds Violation 1.

Vote: 3-0-0.

2. Whether Violation 2 should be vacated.

Violation 2 alleges BLM engaged in filling and earthmoving of over 10 cubic yards without a permit, in violation of SZO § 14, No. 30.

BLM denies it committed the violation identified as Violation 2. BLM also argues this violation is duplicative of Violation 1.

The Board finds that a permit was required because BLM engaged in filling and earthmoving of more than 10 cubic yards in the LRR2 zone, in violation of SZO § 14, No. 30. This finding is supported by Exhibits A, B, and C of the NOV, and pictures presented by the CEO during the August 30th hearing show earthmoving, regrading, and that fill was deposited along the shoreline. But BLM did not obtain a permit. The Board also finds, for the reasons explained in prior appeals pertaining to 18 Fernwood, that Violations 1 and 2 constitute separate violations.

Therefore, the Board denies BLM's appeal in part and upholds Violation 2.

Vote: 3-0-0.

3. Whether Violation 3, concerning SZO § 14, No. 17B, should be vacated.

BLM denies it committed Violation 3.

The Town asserts BLM committed Violation 3 because it constructed a new stairway to the shoreline without obtaining a permit in violation of SZO § 15(B)(8).

The Board finds the evidence showed BLM removed a stairway, replaced the stairway, and did not obtain a permit for this work, which was required by SZO § 15(B)(8) and §14, No. 17B. Therefore, the Board denies BLM's appeal in part and upholds Violation 3.

Vote: 3-0-0.

4. Whether Violation 4 should be vacated.

Because the Town withdrew Violation 4, Violation 4 is vacated.

Therefore, the Board grants BLM's appeal in part and vacates Violation 4.

Vote: 3-0-0.

5. Whether Violation 5 should be vacated.

Violation 5 alleges BLM expanded the shoreline without a permit in violation of SZO § 14, No. 17B.

The Town alleges BLM engaged in work without a permit that expanded the shoreline.

BLM denies the violation occurred, arguing that nothing in the SZO says a shoreline itself cannot be enlarged and that the shoreline does not constitute a structure under the SZO.

The Board does not find BLM's arguments persuasive. It finds that the evidence demonstrates the shoreline was expanded as a result of BLM's work. For example, recent photos show boulders that did not previously exist, that the stairs protrude further into the lake than before, and that the shoreline in front of the stairs protrudes further into the lake than it did before. Further, no permit was obtained for this work, in violation of §14.

Therefore, the Board denies BLM's appeal in part and upholds Violation 5.

Vote: 3-0-0.

6. Whether Violation 6 should be vacated.

Violation 6 alleges BLM created a beach without a permit from DEP in violation of SZO § 15(O).

BLM denies the violation occurred, arguing the shoreline does not constitute a beach.

The Town counters that a beach can be composed of stones and rock. It cites the dictionary definition of beach and asserts that Mainers understand that a beach can be made of stones and rocks. The Town cites Exhibit C, describing it as depicting a much larger beach area than what existed before BLM's work.

The Board concludes BLM did not obtain a permit for beach construction and that BLM's work did in fact result in the creation of a beach, even if that beach is made of stones and not sand.

Therefore, the Board denies BLM's appeal in part and upholds Violation 6.

Vote: 3-0-0

7. Whether Violation 7 should be vacated.

Violation 7 alleges BLM violated SZO § 15(Q)(c), which prohibits the clearing or removal of vegetation under 3' within 100' of the NHWL.

BLM denies it committed this violation. BLM argues the violation did not occur because vegetation was trimmed but not cleared and removed.

The Town presented numerous photos and testimony from the CEO to demonstrate vegetation was cut. It argued that whether or not the root system remained was irrelevant and that the work was done without a permit.

Just as it found in the MCL appeal for this property, the Board finds that BLM cut or removed the vegetation and this work was done without a permit, in violation of SZO § 15(Q)(C).

Therefore, the Board denies BLM's appeal in part and upholds Violation 7.

Vote: 2-1-0

8. Whether Violation 8 should be vacated.

Violation 8 asserts BLM cleared or removed vegetation of any height without a permit in violation of § 14, No. 5.

BLM denies it committed this violation. BLM argues the violation did not occur because vegetation was trimmed but not cleared and removed. BLM also argues Violation 7 and 8 are duplicative and should be vacated or consolidated.

The Town presented numerous photos and testimony from the CEO to demonstrate vegetation was cut. It argues that whether or not the root system remained is irrelevant and the work was done without a permit.

Just as it found in the MCL appeal for this property, the Board concludes BLM cut or removed the vegetation, this work was done without a permit, and the violations are not duplicative. A majority of the Board finds that the Town submitted sufficient evidence to show it was BLM that was responsible for obtaining the permits and that BLM failed to obtain the permits.

Therefore, the Board denies BLM's appeal in part and upholds Violation 8.

Vote: 2-1-0

9. Whether Violation 9 should be vacated.

Violation 9 asserts BLM failed to obtain a permit from the Planning Board in accordance with SZO § 15(C)(12) for a stabilization project.

BLM denies it committed the violation. It argues the Board concluded Durant did this work and, therefore, BLM did not commit the violation.

The Town asserts BLM conducted activities without a permit that constitute shoreline stabilization.

The Board concludes BLM engaged in work that constitutes shoreline stabilization and did not get a permit for that work. BLM's estimate for the work demonstrates BLM was responsible for obtaining a permit.

Therefore, the Board denies BLM's appeal in part and upholds Violation 9.

Vote: 3-0-0

10. Whether Violation 10 should be vacated.

Violation 10 alleges BLM completed a shoreline stabilization project without utilizing a barge, which was feasible, in violation of § 15(C)(12).

BLM denies it committed the violation.

The Town asserts that BLM concedes the work constitutes shoreline stabilization. It asserts that it was feasible to use a barge and, therefore, a violation of § 15(C)(12) to engage in the work without a permit or barge.

The Board upholds this violation for the same reasons it upheld the violation in the MCL appeal relating to 18 Fernwood. The evidence establishes a barge was feasible, that BLM had the equipment and experience to use it, but that BLM did not use a barge or obtain a permit for shoreline stabilization. This violates SZO § 15(C)(12)

Therefore, the Board denies BLM's appeal in part and upholds Violation 10.

Vote: 3-0-0

11. Whether Violation 11 should be vacated.

Because the Town withdrew Violation 11, Violation 11 is vacated.

Therefore, the Board grants BLM's appeal in part and vacates Violation 11.

Vote: 3-0-0.

12. Whether all violations should be vacated on the basis BLM's work met DEP Permit-by-Rule requirements.

BLM argues that all violations should be vacated because BLM's work meets the requirements for a DEP Permit-by-Rule under Chapter 305, Section 8 of DEP rules, pertaining to shoreline stabilization, and meet the SZO requirements.

The Town responds that the work did not, in fact, meet the requirements of either DEP rules of the SZO.

The Board agrees and upholds all violations.

Vote: 3-0-0.

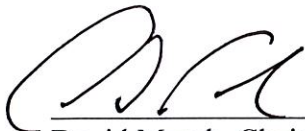
Decision

Based on the above findings and conclusions, having held a public hearing, the Board voted 3 to 0 that the application for an administrative appeal be DENIED IN PART and GRANTED IN PART. Violations 4 and 11 are hereby VACATED. All remaining violations are UPHELD.

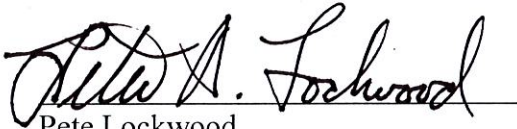
NOTICE: This decision may be appealed to the Superior Court within 45 days from the original Date of the Decision noted above by any aggrieved party who participated as a party during the proceedings before the Board of Appeals.

So ordered,

Town of Raymond Board of Appeals

A cursive signature of David Murch, consisting of a large 'D' and 'M' followed by a horizontal line.

David Murch, Chair

A cursive signature of Pete Lockwood, with the first name clearly legible, followed by a horizontal line.

Pete Lockwood

A cursive signature of Fred Miller, with the first name clearly legible, followed by a horizontal line.

Fred Miller