

WRITTEN DECISION

ADMINISTRATIVE APPEAL OF Q-TEAM, INC.

JANUARY 4, 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 Q-Team, Inc. of NOV issued 1/04/2022 Regarding 18 Fernwood Road (001/022/000; Zone LRR2)

Date of Decision: August 30, 2022

Date of Written Decision: September 6, 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 January 4, 2022, Notice of Violation ("NOV") concerning 18 Fernwood Road (001/022/000), came before this Board upon Q-Team, Inc.'s ("Q-Team") Notice of Appeal filed on January 25, 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 July 26, 2022, after which the record was closed and the Board began deliberations.

The following members heard this appeal: David Murch, Greg Dean, Tom Hennessey, Fred Miller, and Pete Lockwood on July 26, 2022.^{1 2} On August 30, 2022, members David Murch, Fred Miller, and Pete Lockwood only were present and made the final decision.

On August 30, 2022, based on the following record, findings of facts, and conclusions of law, the Board resumed deliberations and voted 3 to 0 to issue final decision, which is summarized in this written decision.

Contents of the Record

The record for this appeal consists of all of the materials submitted by the parties in advance of the March 29th hearing and the hearing held on July 26, 2022, with the exception of the

¹ At the March 29, 2022, hearing on a related appeal concerning 18 Fernwood, Fred Miller *sua sponte* raised the issue of whether he should be recused from this matter because he previously performed flooring work at 18 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. At the July 26, 2022, Pete Lockwood confirmed on the record he had reviewed all prior hearings concerning related appeals and, with no objections, the Board permitted him to vote on this appeal.

² 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.

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. 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 public hearing, on behalf of Q-Team, the Board heard oral argument from Attorney Rachin. 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.

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.

Findings of Fact and Conclusions of Law

The Board evaluated the appeal during deliberations by addressing in turn the issues raised in Q-Team’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 notes it finds Q-Team 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 Q-Team reasonably relied on the property owner’s contractor to obtain all required permits and act consistent with the SZO.

Q-Team argues that all violations should be vacated because Q-Team, like the property owner, reasonably relied on the contractor to obtain permits and act consistent with the SZO and, therefore, MCL did not violate the SZO. Q-Team submitted as evidence a contract showing Big Lake Marine assumed responsibility for obtaining the permits.

The Town argues it is irrelevant whether Q-Team has an agreement for someone else to obtain the permits because the only relevant issue is whether Q-Team engaged in conduct that violated the SZO. It further emphasizes the Town is not a party to this contract.

The Board agrees with the Town and concludes that the evidence shows Q-Team engaged in conduct which violates the Ordinance and the citation of Q-Team for said violations is consistent with 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].”) and SZO § 16 (various references to any person engaging in an unlawful activity or failing to obtain a permit being liable). The Board further found that while Q-Team may well have recourse against other parties, that is not for this Board to determine. Therefore, because Q-Team is responsible, the CEO did not err, and all violations are not vacated.

2. Whether Violation 1 and 2, concerning removal of vegetation less than 3’ in height without a permit, should be vacated

Violation 1 alleges Q-Team removed vegetation less than 3’ in height within 100’ of NHWL in violation of Section 15(Q)(c). Violation 2 alleges Q-Team did not obtain a permit required to remove vegetation less than 3’ in height within 100’ of NHWL in violation of Section 14(# 5). Without objection, the Town agreed to abandon Violations 1 and 2 of the NOV. Therefore, the Board declines to address arguments related to those violations.

3. Whether Violations 3 and 4, concerning removal of alleged hazard trees, should be vacated

Violation 3 alleges that multiple trees within the Normal High Water Line (“NHWL”) were removed, creating an illegal opening in excess of 250 square feet, and that the alleged hazard trees were removed without first consulting the CEO. This, the Town alleges, violates Section 15(Q)(2)(a) and 15(R)(1). Violation 4 alleges that a 6,000 square foot area of trees were removed in what would have been three 25’ by 50’ grids, for which there would have not been enough points to support selective removal of otherwise healthy trees, in violation of 15(Q)(2)(b).

Q-Team argues the violations should be vacated because many trees were hazard trees which may be removed. Further, Q-Team relied on BLM to obtain all requiring permits, including those pertaining to tree removal. Q-Team alleges it only removed trees identified on NOV Exhibit C and #1-4 and #14-15 and that the remaining trees were removed by the BLM.

The Town argues that the Q-Team’s reliance on BLM to obtain permits is irrelevant because the question is whether Q-Team committed conduct violates the SZO. As to the arguments some trees were hazards, the Town asserts that should not even be heard because the procedure to determine whether a tree is a hazard was not followed—i.e. the CEO was not consulted. Therefore, the Town argues, the Board cannot find that a tree was a hazard.

The Board concludes that the evidence overwhelming supports the Town’s position that the alleged violations occurred. The Board concludes that Q-Team’s argument that some trees were hazards is irrelevant because the CEO was never consulted and hazard trees can only be removed after CEO consultation. The Ordinance provides that if hazard trees are removed and it creates a canopy opening greater than 250 square feet, then replacement with native trees species is required, which did not occur. SZO at § 15(R)(1)(a) (SZO at p. 47). Revegetation may only occur pursuant to an approved revegetation plan, which was not submitted. SZO at § 15(T) (SZO

at p. 50). Here, the evidence shows stumps were removed, which is a violation even in the case of hazard trees. SZO at § 15(R)(1)(c) (SZO at p. 48). The evidence, specifically the photos and testimony of the CEO, demonstrates that trees were removed from within 100 feet of the NHWL that created an illegal opening in excess of 250 square feet. That same evidence also shows trees were removed from a 6,000 square foot area between the house and the NHWL, and there were not enough points under section 15 to support selective removal of otherwise healthy trees. The Board also finds that all of said removal occurred without a permit. Therefore, the Board upholds violations 3 and 4 of the NOV.

4. Whether Violation 5 should be vacated or consolidated with Violations 3 and 4 because they are duplicative

As the Town withdrew Violations 1 and 2, the Board considers only whether Violation 5 should be vacated or consolidated with 3 and 4 on the grounds that they are all the same violations and are only listed three times in order for the Town to be able to claim duplicative fines.

A majority of the Board finds that Violations 3 and 4 rely on different provisions of the Ordinance and are, therefore, separate violations. 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 Board's finding that Q-Team violated SZO § 15(Q)(2)(a) (SZO at p. 45), which prohibits removal of trees within 100 feet of NHWL that creased an opening in excess of 250 square feet. The evidence presented supports the Board's finding that Q-Team violated SZO § 15(Q)(2)(b) (SZO at p. 45-46). These violations are separate and distinct actions from Q-Team's failure to get 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 violations are duplicative when it evaluates fines, amongst other factors, and this decision does not change that. Therefore, the Board is not persuaded by Q-Team's argument and Violation 5 is upheld.

At the August 30, 2022, the three members present voted unanimously to adopt the findings and conclusions above. Therefore, this decision does not reflect the preliminary votes of the full membership of the Board.

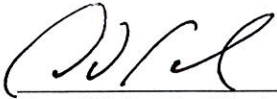
Decision

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. All violations, except for those withdrawn by the Town, are UPHELD.

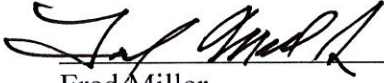
NOTICE: This decision may be appealed to the Superior Court within 45 days from the original Date of the Decision noted above by any aggrieved party who participated as a party during the proceedings before the Board of Appeals.

So ordered,

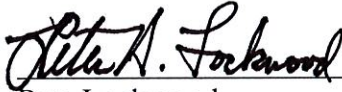
Town of Raymond Board of Appeals



David Murch, Chair



Fred Miller



Pete Lockwood