

WRITTEN DECISION

ADMINISTRATIVE APPEAL OF MANAGEMENT CONTROLS, LLC JANUARY 28, 2022 NOTICE OF VIOLATION PERTAINING TO 28 WHITETAIL LANE

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 1/28/2022
Regarding 28 Whitetail Lane (001/020/000; Zone LRR2)**

Date of Decision: October 25, 2022

Date of Written Decision, Following Reconsideration: November 4, 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 28, 2022, Notice of Violation (“NOV”) concerning 28 Whitetail Lane (001/020/000) and Management Controls LLC (“MCL”), came before this Board upon MCL’s Notice of Appeal filed on February 28, 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 September 26, 2022, after which the record was closed. The record was again opened and closed on September 27, 2022, followed immediately by the Board’s deliberations.

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

On October 25, 2022, based on the following record, findings of facts, and conclusions of law, the Board voted 5 to 0 grant the appeal in part and deny the appeal in part, as summarized below.

Reconsideration Granted

By letter dated October 27, 2022, the Town requested the Board reconsider its October 25, 2022, decision solely with respect to Violations 6, 7, and 12. To keep the decision in both 28 Whitetail matters logically consistent and to avoid any potential confusion, the Town requested the Board revise its decision to uphold Violations 6 and 7, individually, and vacate Violation 12. By a vote of 5 to 0, for the reasons stated in the Town’s letter, the Board granted the request for reconsideration. Upon reconsideration, the Board upheld Violations 6 and 7 and vacated Violation 12. This is reflected in the written decision that follows.

¹ At a prior hearing on a related appeal, 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.

Contents of the Record

The record for this appeal consists of all the materials submitted by the parties in advance of the September 26th hearing, with the exception the following materials which were excluded from the record by a unanimous vote of the Zoning Board of Appeals at a prior 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;
- 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 taken at the prior March hearing, a March 28, 2022, letter to David Murch from the State of Maine Department of Environmental Protection (“DEP”).

At the September 26th hearing, the Board heard testimony from Code Enforcement Officer (“CEO”) Alex Sirois and oral argument from Attorney Rachin on behalf of MCL, Attorney Wycoff on behalf of the Town, and Attorney Braun on behalf of Big Lake Marine (“BLM”).

During deliberations held on September 27th, the Board considered the admission of two emails containing a total of three attachments submitted by Big Lake Marine and Rob Durant. The Board voted unanimously to exclude from the Record the attachment entitled “Buteau Emails Regarding Tree Removal.” The Board voted 4 to 1 to open the Record and public hearing again to admit the attachment entitled “Horizontal Positional Accuracy of Google Earth’s High-Resolution Imagery Archive – PMC” and the attachment entitled “How Accurate is iPhone Measure 8.7.2022.” The Board also heard argument from the parties and testimony from the CEO concerning these admitted records before closing again the record and the public hearing.

During prior related appeals, the above-noted parties agreed 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. 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 on file with the Town of Raymond.

Findings of Fact and Conclusions of Law

On September 27th, the Board evaluated 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 notes it 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 MCL is the owner of 28 Whitetail Lane and contracted with Durant Excavating, Big Lake Marine, and/or Robert Durant (collectively, "Durant") to obtain all permits and perform the activities giving rise to the NOV, making Durant MCL's agent. Having done so, it was MCL's responsibility to confirm Durant acted 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 rejects MCL's argument and concludes that because MCL is responsible for the actions of its agent, all violations are not vacated on the grounds MCL is not a responsible party.

Vote: 5-0-0

2. Whether Violation 1 should be vacated.

Violation 1 relates to filling and earthmoving occurring in violation of SZO §15(U)(1). The SZO requires such activity to be done in a way to prevent erosion and sedimentation of surface waters and that if a permit is required it must be done in accordance with an Erosion and Sedimentation Control Plan.

MCL argues Violation 1 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 conducted 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 Sebago 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.

The Board is not persuaded by MCL's arguments concerning the possibility of error in measurements relevant to this violation due to potential inaccuracies of the iPhone measurement application that the CEO used. The degree of possible inaccuracy of the iPhone measurement, if it even exists to the degree MCL claims has occurred, still puts the CEO's measurements within a reasonable tolerance of the threshold needed for the violation to occur. In other words, even if the iPhone measurement was inaccurate, the degree of inaccuracy is not so significant that it could have reasonably made any difference in the ultimate conclusion that 10 cubic yards of filling and earthmoving occurred within 100' of the NHWL. Further, the CEO took steps to determine the measurement application was accurate to inches and also verified his measurements on the property by other means. His conclusions are also supported by the photographic evidence submitted.

Based on these findings, the Board concludes that MCL violated SZO § 15(U)(1) and the CEO did not err.

Therefore, the Board denies the appeal on this ground and upholds Violation 1.
Vote: 5-0-0.

3. Whether Violation 2 should be vacated.

Violation 2 alleges filling and earthmoving of more than 10 cubic yards was done without a permit in violation of SZO § 14 (line 30).

MCL asserts this use is allowed without a permit in zone LRR2 and that there is no evidence to establish it was done without taking soil and water conservation practice measures. MCL also alleges Violation 2 is duplicative of Violation 1.

The Town argues Violation 2 should be upheld because the evidence presented established more than 10 cubic yards of filling and earthmoving occurred within 100' of the NHWL of Sebago Lake, and that this work was done without a permit, in violation of SZO § 14 (line 30).

The Board finds that the evidence submitted (specifically, NOV Exhibits A, B, C and D, as well as the CEO's testimony) demonstrates that more than 10 cubic yards of filling and earthmoving occurred within 100' of the NHWL, and that this work was done without a permit, in violation of SZO § 14 (line 30).

The Board is not persuaded by MCL's arguments concerning the possibility of error in measurements relevant to this violation due to potential inaccuracies of the iPhone measurement

application that the CEO used. The degree of possible inaccuracy of the iPhone measurement, if it even exists to the degree MCL claims has occurred, still puts the CEO's measurements within a reasonable tolerance of the threshold needed for the violation to occur. In other words, even if the iPhone measurement was inaccurate, the degree of inaccuracy is not so significant that it could have reasonably made any difference in the ultimate conclusion that 10 cubic yards of filling and earthmoving occurred within 100' of the NHWL. Further, the CEO took steps to determine the measurement application was accurate to inches and also verified his measurements on the property by other means. His conclusions are also supported by the photographic evidence submitted.

For the same reasons it articulated in regards to MCL's violations pertaining to 18 Fernwood, the Board is not persuaded by the argument that Violation 2 and 1 are duplicative.

Based on these findings, the Board concludes that MCL violated SZO § 14 (line 30).

Therefore, the Board denies the appeal on this ground and upholds Violation 2.

Vote: 5-0-0.

4. Whether Violation 3 should be vacated.

Violation 3 alleges MCL enlarged/expanded a boat launch at or below the NHWL without a permit from the Planning Board, in violation of SZO § 14 (line 17B).

MCL argues Violation 3 should be vacated because the boat launch was a lawfully existing use and was only replaced and modified slightly.

The Town contends that as a permanent structure, the boat launch required Planning Board approval, and there is no record of such a permit, making the launch nonconforming. As such, a permit was required for either its expansion or replacement, pursuant to SZO § 12(C), or for the construction of a permanent launch, pursuant to SZO § 14 (line 17B). The Town claims NOV Exhibit B shows a significant change that is both an expansion and a replacement, for which no permits were obtained.

The Board concludes the visual evidence, testimony from the CEO, and page 127 of "Documents Submitted by Management Controls, LLC and Q-Team, Inc. in Conjunction With Administrative Appeals Re 18 Fernwood Drive and 28 Whitetail Lane" (Archipelago Restoration Plan) clearly establishes there was a significant alteration and expansion to the pre-existing boat launch over or below the NHWL, and no permit was obtained for such work, in violation of the SZO. The Board is not persuaded by the argument that this was a minor modification to a nonconforming use. The visual evidence shows a dramatic departure from the now-removed planks of wood used to deliver small boats to the water. The Board also finds no evidence of a tree stump being a cause of the alteration.

The Board finds that while the NHWL may fluctuate, the expansion here appears to have fallen over or on the NHWL and the evidence concerning measurement accuracy does not alter this conclusion.

Based on these findings, the Board concludes that MCL violated SZO § 14 (line 17B) and SZO § 12(C)(4).

Therefore, the Board denies the appeal on this ground and upholds Violation 3.
Vote: 5-0-0.

5. Whether Violation 4 should be vacated.

Violation 4 alleges the shoreline was enlarged/expanded without a Planning Board permit, in violation of SZO § 14 (line 17B). SZO § 14 (line 17B) requires a permit for expansion or enlargement of structures over or below the NHWL.

MCL contends the shoreline was stabilized, not enlarged or expanded. Further, MCL argues a shoreline is not a structure within the meaning of SZO § 14 (line 17B) and, therefore, MCL cannot have violated SZO § 14 (line 17B) by enlarging or expanding the shoreline.

The Town alleges a shoreline expansion can violate SZO § 14 (line 17B). Here, MCL violated this section of the SZO because the evidence (specifically NOV Exhibits B and D) establishes BLM expanded the shoreline itself and that no permit was obtained for this work.

The Board concludes that SZO § 14 (line 17B) applies because a shoreline is a structure. The definition of structure includes in part anything constructed or erected in or on the ground. Consistent with a structure, a shoreline can be used for activities, such as for a boat ramp, and a shoreline can exist of materials (like riprap) added or installed for the purpose of expanding a property and creating more usable shoreline.

The Board concludes that the visual evidence presented by the Town and the testimony from the CEO establishes that the shoreline was expanded and no permit was obtained for this work. This work included more than just the activity associated with the boat ramp, such as the construction of a wall and installation of riprap.

The Board finds that while the NHWL may fluctuate, the expansion here appears to have fallen over or on the NHWL and the evidence concerning measurement accuracy does not alter this conclusion.

Based on these findings, the Board concludes that MCL violated SZO § 14 (line 17B) when it expanded the shoreline without a permit.

Therefore, the Board denies the appeal on this ground and upholds Violation 4.

Vote: 5-0-0.

6. Whether Violation 5 should be vacated.

Violation 6 alleges the construction of a beach violates SZO § 15(O), which requires a DEP permit for any beach construction on a great pond.

MCL contends there is no violation because the alleged activity does not constitute a beach, as that term is commonly understood. MCL also argues the evidence fails to establish that fill was placed below the NHWL aside from riprap, and that existing riprap near the base of the stairway had separated from the slope of riprap and were relocated to their present location to ensure stability, which is an exempt maintenance activity pursuant to 38 M.R.S. § 480-Q(2).

The Town counters that Violation 5 should be upheld because Exhibit C of the NOV shows a beach was created by removal of some boulders. This violates the SZO because no permit was obtained for this work. In regards to the argument this is permitted stabilization work, the Town argues 38 M.R.S. § 480-Q(2) does not apply because that relates to structures, as defined by 38 M.R.S. § 480-B(7), which a beach is not.

The Board agrees with MCL that the evidence fails to establish that a beach was created. The CEO testified that the conclusion a beach was created was based on the apparent removal of some rocks or boulders. This is insufficient to establish a beach. At most, there was mere maintenance, which is no "beach construction." Further, the apparent erosion of sand over time does not necessarily indicate a beach was constructed because beaches are dynamic and change over time. Because no beach was constructed, no beach construction permit was required. Having found that a beach was not constructed, it is not necessary to address the remaining arguments.

Based on these findings, the Board concludes the MCL did not violate SZO §15(O).

Therefore, the Board grants the appeal in part and vacates Violation 5.

Vote: 3-2-0

7. Whether Violations 6 and 7 should be vacated.

MCL's seventh issue on appeal is that Violations 6 and 7 are duplicative and should both be vacated. Violation 6 alleges MCL removed vegetation less than 3' in height in violation of SZO § 15(Q)(c), which states that such vegetation shall not be cut, covered, or removed, except to provide a footpath or other permitted uses. Violation 7 alleges MCL removed without a permit in violation of SZO § 14 (line 5), which requires a CEO permit for clearing or removal of such vegetation for activities other than timber harvesting.

MCL argues that photos taken prior to this project show that existing vegetation was limited in both area and density, and had been growing opportunistically at or near the base of the slope on pockets of soil that had previously slumped off of the adjacent slope. Therefore, MCL argues, this vegetation likely provided negligible or no benefit to slope stability, and the vegetation near the base of the slope and any accompanying soil would have likely eroded into the lake during typical high lake water events. MCL also argues the vegetation was trimmed, not removed. Finally, MCL argues the violations pertain to area that included ornamental shrubs and existing lawn, removal of which is generally not regulated by municipalities and, regardless, will be replanted.

The Town responds that these violations should be upheld and treated separately for the same reasons the Board did so in regards to 18 Fernwood MCL Violations 7 and 8. The Town points to Exhibit D of the NOV, which shows vegetation in the rocks was replaced with dark mulch and that vegetation near and on the slope was removed. The CEO testified this removal occurred without a permit and within 100' of the NHWL. The Town urges the Board to disregard MCL's arguments about the utility of the vegetation because the CEO would have considered those issues if a permit had been filed. The Town dismisses the argument concerning existing lawns and ornamental plants because the relevant fact is whether vegetation was removed within 100' of the NHWL and, if so, whether a permit was obtained.

The Board concludes Violation 6 and 7 are not duplicative. Violation 6 refers to all vegetation under three feet in height, specifically including ground cover, whereas Violation 7 refers to vegetation of any height. The vegetation cut that leads to Violation 6 but not Violation 7 includes but is not limited to pine needles, leaf litter, dead wood, and other ground cover. Further, like Violations 1 and 2, the failure to get a permit is a separate violation from taking actions that would only be allowed with a permit, which was not obtained.

As to Violation 6, the evidence demonstrates vegetation under 3' in height within 100' of the NHWL was cut or removed, that the apparent regrowth does not demonstrate this cutting or removal did not occur, and there was no permitted use for this cutting. Based on these findings, the Board concludes MCL violated SZO § 15(Q)(c) and § 14 (line 5).

As to Violation 7, the evidence establishes that vegetation was removed within 100' of the NHWL without a permit, that this work was done under the direction of MCL as owner, and that this work was done without a permit. This violates SZO § 14 (line 5).

Therefore, the Board upholds the Violations 6 and 7.

Vote upon reconsideration to consolidate Violations 6 and 7: 1-4-0

Vote upon reconsideration to deny the appeal in part and uphold Violation 6: 5-0-0

Vote upon reconsideration to deny the appeal in part and uphold Violation 7: 5-0-0

8. Whether Violation 9 should be upheld.²

Violation 9 alleges MCL violated SZO § 15(C)(12) because the shoreline stabilization activity that occurred could have been but was not performed from a barge.

² Violation 8 alleges that stabilization of the shorefront was completed from the land without a permit from the Planning Board or CEO in violation of SZO § 15(C). While the Board did allow evidence to be admitted pertaining to this violation, the Board does not address this specific violation independently because it concludes MCL failed to raise that issue in its notice of appeal.

MCL argues it should be vacated because it is duplicative of Violation 8, relying on the arguments it made on this point for Violation 12 of the NOV issued to MCL in regards to 18 Fernwood. MCL also disputes the CEO's claim it was feasible to complete the work from a barge.

The Town also relies on the arguments it made at the hearing for 18 Fernwood in regards to duplication. It claims the Board should disregard MCL's feasibility arguments because the feasibility of the barge was something the Planning Board would have considered had MCL applied for a permit. Regardless, Exhibit E of the NOV establishes it was feasible to use a barge here.

The Board concludes the violations are not duplicative for the same reasons articulated in section 7 of its decision on the 18 Fernwood MCL decision, which are hereby incorporated by reference. As to the merits of Violation 9, the Board agrees with the Town. Because MCL failed to apply for a permit for the shoreline stabilization work that occurred at 28 Whitetail, the Planning Board never had the opportunity to determine if a barge was feasible, so the issue of feasibility is irrelevant. To find otherwise would mean MCL could evade responsibility for certain violations because it did not obtain a permit—an unlawful act cannot shield an applicant from other liability. The Board finds that shoreline stabilization work occurred but was not all conducted from a barge, even though that was feasible here (see NOV Exhibit E), in violation of SZO § 15(C)(12).

Therefore, the Board upholds Violation 9.

Vote to consolidate Violation 8 and 9: 0-5-0

Vote to uphold Violation 9: 5-0-0

9. Whether Violations 10, 11, and 12 should be vacated.

Violation 10 alleges multiple trees were removed within 100' of the NHWL of the lake, creating an opening in excess of 250 square feet, in violation of SZO § 15(Q). Violation 11 alleges that between the house and water vegetation was removed in excess of what is allowed by the point system, in violation of SZO § 15(Q). Violation 12 alleges vegetation was removed within a 1,250 square foot area between the house and water without a CEO permit in violation of SZO § 14 (line 5).

MCL concedes trees were removed but asserts many trees were hazard trees, removal of which is allowed provided they are replaced with similar native trees, which MCL has committed to do. MCL also argues the violations are duplicative and should be consolidated.

The Town asserts that MCL's arguments that trees were removed to accommodate shoreline stabilization and that some of them were hazard trees should not be considered because those are issues that the CEO would have considered but did not because he was never consulted, as required by the SZO. The Town asserts that the evidence establishes the violations occurred. For the same reasons it argued Violations 14 and 15 contained in the NOV for 18 Fernwood MCL were not duplicative, the Town asserts Violations 10 through 12 here are not duplicative.

For the similar reasons it articulated in its decision pertaining to 18 Fernwood MCL Violations 14 and 15, which are hereby incorporated by reference, the Board concludes that Violations 10 through 111 are independent violations and, therefore, should not be consolidated. Violation 10 is for removing trees within 100' of the NHWL that created an illegal opening in excess of 250 square feet. Violation 11 is for removing vegetation from a 1,250 square foot area, without enough points to support selective removal.

As for Violation 12, the Board concludes this references the exact same section as Violation 7 and is duplicative. It would be unworkable to conclude, as it appears the Town suggests, that each tree cut is an independent violation. To be clear, the fact that the Board concludes this is duplicative and cannot stand on its own does not in any way diminish the magnitude of Violation 7.

Turning to the merits, the Board makes the following findings and conclusions: trees were removed within 100' of the NHWL, creating an opening in excess of 250 square feet, in violation of SZO § 15(Q)(2) and trees were removed from a 1,250 square foot area without sufficient points within two 25' by 50' grids to support selective removal of healthy trees in violation of SZO § 15(Q)(2)(b).

The Board is persuaded by the CEO's testimony that the measurements taken by the CEO were accurate. Even if the Board were to accept MCL's claim the measurements made by google earth and the iPhone measurement application were inaccurate, the degree of inaccuracy is not large enough to mean the cutting was too small to violate the SZO or was located outside of 100' from the NHWL.

Therefore, the Board upholds Violations 10, 11, and vacates Violation 12.

Vote upon reconsideration to vacate Violation 12 as duplicative of Violation 7: 4-1-0

Vote to uphold Violation 10: 5-0-0

Vote to uphold Violation 11: 5-0-0

10. Whether Violations 1, 2, 4, 5, 6, 7, 9, 10, 11, and 12 should be struck on the basis they are subsumed by and/or duplicative of Violation 8.

MCL argues the Board should strike Violations 1, 2, 4, 5, 6, 7, 9, 10, 11, and 12 because they are subsumed by Violation 8. The Town urges the Board to deny this motion because the only issue on appeal pertaining to Violation 8 is that it is duplicative of Violation 9. The Board concludes that having determined Violation 8 was not raised on appeal and is, therefore, effectively upheld, it has already addressed this issue. Regardless, each of these Violations are related to separate activities that are each independent of one another and each violate separate sections of the SZO. Therefore, they are not all subsumed by Violation 8.

Vote on motion to strike Violations 1, 2, 4, 5, 6, 7, 9, 10, 11, and 12: 0-5-0.

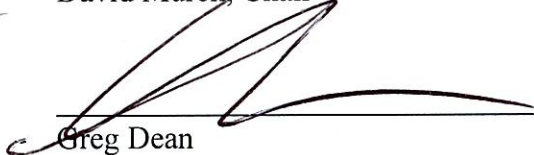
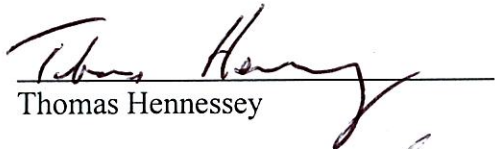
Decision

Based on the above findings and conclusions, having held a public hearing, and granted the Town's October 27, 2022, request for reconsideration, the Board voted 5 to 0 that the application for an administrative appeal be DENIED IN PART and GRANTED IN PART. Violations 5 and 12 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


David Murch, Chair
Greg Dean
Thomas Hennessey
Fred Miller
Pete Lockwood