



MUNICIPAL OFFICES
23 SCHOOL STREET • P.O. BOX 875
OGUNQUIT, MAINE 03907-0875
(207) 646-5139 General Offices
(207) 646-9326 Land Use
(207) 646-9546 Town Clerk
E-mail: townofogt@maine.rr.com

**OGUNQUIT ZONING BOARD OF APPEALS
MEETING MINUTES
March 5, 2015**

CALL TO ORDER - 6:00 PM

Members Present: Jay Smith - Chairperson
 Glenn Deletetsky - Vice Chair
 Peter Griswold - Secretary
 Mike Horn
 Doug Mayer
 Jerry DeHart (1st Alternate)

Also present: Scott Heyland, Code Enforcement Officer
 Maryann Stacy, Recording Secretary
 Natalie Burns, Esq. Representing Mr. Heyland
 John Mixon, Applicant
 John Bannon, Esq. Representing Mr. Mixon

Mr. Smith noted that a quorum was present.

ACCEPTANCE OF MINUTES – October 9, 2014

Mr. Griswold Moved to Approve the Minutes of the October 9, 2014 Meeting as Amended.
GRISWOLD/HORN 5:0 UNANIMOUS

UNFINISHED BUSINESS - None

NEW BUSINESS –

Mr. Smith confirmed that this meeting is not to approve or disapprove a subdivision. The sole purpose of the meeting is to make a determination of whether the Code Enforcement Officer erred in judgment when rejecting the most recent subdivision application plan. Mr. Smith noted that members of the audience will be allowed to speak for, or against, the application.

1. JOHN F. MIXON, JR – 5 Bourne Lane (Map 5 Block 35A) – Administrative Appeal under Article 5.2.A. Appeal of Code Enforcement Officer’s January 6, 2015 Decision regarding Shore Road Commons Subdivision.

Mr. Smith asked if any member of the Board had a conflict of interest sufficient to disqualify him from voting.

Mr. DeHart made it known that, in 2013, he held discussions with Mr. Mixon regarding an offer Mr. DeHart made to purchase this property. He did not feel that there was any aspect of this which would cause him to be unable to make a fair and impartial decision on this matter.

Mr. Smith asked the Board members if the Board has standing to hear this case.

Mr. Mayer questioned whether or not the Board has standing. This Administrative Appeal is based upon the June 10, 2014 Warrant, Article 9, which the voters overwhelmingly passed. Mr. Mayer referenced Mr. Bannon’s letters of February 5th and 19th wherein he states that because the Warrant Article was enacted illegally the amendment to the Driveway Definition is void and unenforceable. Mr. Mayer noted that this is based upon the decision of the voters, he (Mr. Mayer) hasn’t seen anything, other than Mr. Bannon’s opinion that the definition, as passed by the voters is illegal. He asked if the Board is being asked to overturn the voters’ decision.

Mr. Mayer noted that he looked for anything in the Ordinance which would indicate that the Board has jurisdiction to overturn a vote by the residents. He did find Article 1.6 which states *“In the event that any section, subsection or any portion of this Ordinance shall be declared by any court of competent jurisdiction to be invalid for any reason, such decision shall not be deemed to affect the validity of any other section, subsection or other portion of this Ordinance...”*. Mr. Mayer did not feel that the Board is a “Court of competent jurisdiction”. He was unable to find any language which stated that the Board has the jurisdiction to find an ordinance void and unenforceable.

Mr. Mayer Moved that the Board does not have standing to hear this case.
MAYER/GRISWOLD

Mr. Smith opened the discussion. He confirmed that the Board does not have the authority to overturn a Town vote, however this case does not completely depend on the Board’s disagreeing with the Town vote. The Applicant states, in his application that even if the Board agrees with the Town vote he proposes that it still had an invalid outcome. Mr. Smith asked the other Board members if the Board has jurisdiction.

Mr. Griswold referred to Planning Board Minutes, in which Mr. Heyland is quoted as saying that the definition standards will stand until a Court informs the Town that it is improper. Mr. Griswold suggested that the Board could hear this case if it makes it clear that it is not addressing the legality of the ordinance amendment, it is only focusing on the Code Enforcement Officer’s decision.

Mr. Horn stressed that the overriding factor is the Planning Board’s not holding a Public Hearing.

Mr. Smith responded that Paragraph A of the Applicant's letter deals with null and void issues, Paragraph B and all its sub-paragraphs deals with several other issues. While Mr. Bannon has separated the two arguments, he has not separated them completely.

Mr. Smith stated that the application was denied by the Code Enforcement Officer, not based upon the legality, or illegality, of the Town Vote. It was based upon the current Zoning Ordinance as passed in June 2014. Mr. Smith noted that the Applicant is arguing that even if the Town vote is determined to be legal, the Code Enforcement Officer's decision was still improper. In effect the Applicant is proposing Argument A and if that doesn't work they will apply Argument B.

Mr. Mayer reiterated that the Code Enforcement Officer based his January 6th decision on the existing Ordinance language, and the Applicant has primarily argued that the Ordinance language is illegal and thus null and void. Mr. Mayer expressed his belief that it is not within the jurisdiction of the Board to determine the legal validity of the existing ordinance language.

Mr. Smith stated that the motion was made to "not hear" this case, and he called for a vote.

**Mr. Mayer Moved that the Board does not have standing to hear this case.
MAYER/GRISWOLD 2:3 (Mr. Smith, Mr. Horn, and Mr. Deletetsky Dissenting)**

**Mr. Smith called for a vote of those members who are in favor of hearing the case.
3:2 (Mr. Griswold and Mr. Mayer Dissenting).**

Mr. Smith noted that the Board has determined that the Board does have standing to hear this case. He opened the floor to the Applicant's representative.

Attorney John Bannon addressed the Board as the Applicant's representative. Attorney Bannon stated that he is not arguing that the voters made a mistake on the merits, or that the ordinance is a bad idea. He is also not asking the Board to decide in a general way whether the ordinance is valid, or not. Mr. Bannon argued that this Board does have jurisdiction to interpret the Zoning Ordinance, and he referred to Section 1.9 which deals with the amendment process and Section 6.4 which deals with the powers of the Planning Board.

Mr. Bannon argued that there are specific procedures laid out in the Ordinance which govern the way a Zoning Ordinance is enacted or amended, and because those procedures were not followed, the resulting ordinance amendment is not valid. Part of his argument is based on State Statute and part is based on the Town of Ogunquit's Zoning Ordinance.

Mr. Bannon referred the Board to Section 6.4.D of the Ogunquit Zoning Ordinance which states, in part, that the Planning Board has the authority to "...write, revise and update the Zoning Ordinance, the zoning map, the Subdivision Regulations, the Flood Plain Management...". Mr. Bannon pointed out that the body in Ogunquit responsible for drafting ordinances, debating them in public, discussing them, etc is the Planning Board and no other Board.

Mr. Bannon next referred to Section 1.9.A of the Ogunquit Zoning Ordinance which states, in part, that: "*This Ordinance may be amended ... provided that a public hearing shall first be held*".

Mr. Bannon noted that this is the core of his argument, that the Planning Board did not follow the procedures as set forth in Section 1.9 for the enactment of an amendment to the Zoning Ordinance. He went on to point out that Section 1.9.B of the Zoning Ordinance states that the Planning Board must post notice of the Public Hearing and also must publish Notice of that public Hearing in a local newspaper. Mr. Bannon stated that it has been suggested that the Select Board may take the place of the Planning Board in conducting the Public Hearing or publishing the required Notice. Mr. Bannon stated that Section 1.9 does not allow this. The only body with the authority to hold the public hearing and publish notice is the Planning Board. As support for this argument Mr. Bannon pointed out that in 2012 the voters added to Section 1.9.A a provision which states that a citizen wishing to submit an ordinance amendment must first submit it to the Planning Board's agenda.

Mr. Bannon suggested that it does not make sense to require the Planning Board to post notice of a Public Hearing being held by another Board. The only way Section 1.9 makes sense is if the Planning Board is the entity required to hold the Public Hearing and publish/post notice of said hearing.

Mr. Bannon cited, as the source of his information, minutes of the Town of Ogunquit Planning Board and Select Board meetings as well as information given to him by Attorney Natalie Burns. He summarized that the Planning Board held no Public Hearing for any of the Amendments for the June 2014 Town Meeting. He noted that the Select Board did not hold a Public Hearing during the time the Ordinance was being developed and drafted, and no agency of the Town ever published notice in the newspaper of any Hearing of the June 2014 Amendments. He acknowledged that Town Staff, not the Planning Board, posted notice of the Select Board's Public Hearing.

Mr. Bannon pointed out that the Planning Board's actions at the March 24, 2014 Meeting did not raise to the level of a Public Hearing. At that time the Board voted to send the proposed ordinances to the Select Board with a request that they be included on the June Warrant and that the Select Board hold the required Public Hearing. The Planning Board knew there had to be a Public Hearing but they apparently believed they could delegate that responsibility to the Select Board.

Mr. Bannon argued that the procedures required for the adoption of zoning amendments was not followed in this case, and because the Planning Board failed to hold the Public Hearing, provide Notice, or anything else that is required of it so that the public may participate this amendment didn't have any validity even before it reached the voters. Procedurally the process by which this amendment got to the voters was illegal therefore the amendment itself is illegal.

At this time the Board decided to resolve the question of "Point A" the legality of the June 2014 Ordinance Amendment.

Mr. Smith asked Mr. Bannon if he was, in effect, asking this Board to rule in a manner which would nullify a Town Vote.

Mr. Bannon agreed.

Mr. Smith suggested that State Statutes, Town Ordinances, as well as the Town's Attorney all indicate that the Zoning Board of Appeals does not have the authority to nullify a Town Vote.

Mr. Smith agreed that Article 6 strongly implies that it is the Planning Board's function to hold the public hearing, but it falls short of explicitly stating so, even though a reasonable person would assume that the Planning Board would hold the public Hearing. Mr. Smith pointed out that clearly the Planning Board knew that a public hearing was required, but they formally abrogated that responsibility by forwarding the proposed amendments to the Select Board with a request that the Select Board hold the Public Hearing. Given the generic nature of Select Board Agendas, and the busy time of year for them, it was probably not a good idea for the Planning Board to hand off the Public Hearing to them. However the Select Board Minutes indicate multiple public informational public hearings. There was a forum for the public's input.

Mr. Smith proposed that the ordinance amendment process met the spirit of the law if not the "letter of the law" and if the Applicant wants to pursue the legality of the law there are avenues other than the Zoning Board of Appeals.

Mr. Bannon confirmed that the Superior Court would be the "other avenue".

Mr. Griswold suggested that, given his expertise, Mr. Bannon knew what the Board's reaction would be to his primary argument, and what the limits are to this Board's jurisdiction. Yet, he made this his number one argument and continued to press it throughout his presentation.

Mr. Bannon responded that there are a number of things he has to do to satisfy his duty to his client, one is to raise several points, whether in Court or before this Board. He did not assume this Board would find that the Board has no power to determine the legality of this ordinance.

Mr. Smith reiterated that he does not feel comfortable overturning a Town Vote, and there are other ways the Applicant may proceed if he is so inclined. He acknowledged that the process may have taken some shortcuts particularly due to the approaching deadlines at the time. He agreed that the specific situation of the time does not negate due process, it may explain the actions of the Planning Board which may have been attempting to meet the spirit of the law.

Mr. Horn stressed that both State and Local Statutes require the Planning Board hold the Public Hearing for an ordinance amendment. That was not done in this case. The violation of the required protocol makes the amendment null and void.

Mr. Smith again stated that he is not comfortable overturning a Town Vote, even if due process was not followed to the letter, even if short cuts were taken. There were hearings held, there was notice posted and even if the depth of the public dialog was not as extensive as it might have been. He asked if the Board might still move forward with the second part of Mr. Bannon's argument.

Mr. Horn argued that the Board cannot take action on Mr. Bannon's second part of his argument until it has been determined whether or not the language, which the Code Enforcement Officer relied upon, was legal and valid.

John Mixon noted that there hasn't been a Planning Board Public Hearing for an ordinance change since 2006. The 2014 case was not unique, it was a regular practice. He also referred to a letter to the Planning Board, issued by the MMA, which states that if the community is going to adopt or amend ordinances the Planning Board must hold a public hearing and the hearing must be preceded by public notice in the newspaper.

Mr. Griswold suggested the Board might wait until Mr. Bannon's Argument A is resolved before it hears the rest of the case. He suggested that the two arguments are intimately tied together and may not be separated.

Mr. Bannon stated that in order to move things along, his remaining arguments will assume the validity of the 2014 amendment to the driveway definition. The two issues may be separated. If the Board is unwilling, or unable to invalidate the ordinance amendment he (Mr. Bannon) will argue the substance of the Code Enforcement Officer's decision. He is willing to proceed to his other arguments which do not depend on the invalidation of the 2014 drive way ordinance amendment.

Mr. Mayer pointed out that the Code Enforcement Officer's decision was based upon the validation of the amended language as adopted by the voters.

Mr. Smith agreed and stated that if the Board were to move forward it would be under the premise that the ordinance amendment has been legally adopted. The applicant would be allowed to argue that the Code Enforcement Officer made an improper decision and it has nothing to do with the validity of the town vote.

Mr. Mayer stressed that is has been legally adopted until a Court says that it has not.

Mr. Horn stressed that the amendment is null and void because the Planning Board's actions did not meet the State and local requirements.

Attorney Natalie Burns addressed the Board to clarify Mr. Horn's citation that requires the Planning Board to hold a public hearing on a Zoning Ordinance Amendment. She stated that the only location in either the Statute or in the ordinance where it says the Planning Board shall hold the public hearing for an ordinance amendment is in conditional and contract rezoning. In all other types of rezoning the language is that a Public Hearing will be held before there is a vote on the amendment.

Mr. Smith suggested that in this case the Town vote may have been proper even though the process may have been truncated.

Mr. Deletetsky asked about Mr. Griswold's idea of having an outside authority resolve the validity of the amendment before the Board hears the rest of the Applicant's arguments.

Mr. Horn reiterated that the Planning Board erred in the process.

Mr. Deletetsky suggested that it isn't this Board's prerogative to overturn the voter's decision.

Mr. Griswold moved that given the proposal from the Appellant to consider the entire package, and given the Board's concern with item A, and the feeling that the Board doesn't have jurisdiction over the voters, that the Board wait until this issue has been resolved either in court or in Town's government before it hears the case. To do otherwise would mix two things together.

GRISWOLD/HORN

Mr. Mayer suggested that the letter from the Code Enforcement Officer was written in January 2015 and based upon a 2014 Warrant Article. The appellant made his application sometime in late 2014. It is the Board's duty to look at those dates, and note that there was an article voted on by the people and it was after that date that the Applicant filed his application, and subsequent to that the Code Enforcement Officer denied the application and the appeal went in within a month of that decision.

Mr. Smith asked Mr. Griswold to repeat his motion.

Mr. Griswold responded that the Board would not continue discussion until "Argument A" has been resolved by other venues or bodies that are empowered to do something about it.

Mr. Griswold Moved to Table the Appellant's request until the Board receives clarification about the ordinance that is the essence of this case. He noted that the Applicant has made "Argument A" the center of his argument.

Mr. Bannon advised that the Board cannot "kick the can to anyone else". It isn't possible for a Court to accept a question from the Board and answer it. The Board needs to make a decision and the Court will determine whether that decision is correct or not.

He suggested that the proposed procedure isn't proper under Maine Administrative Law.

Mr. Griswold Moved that the ZBA Table this appeal until such time that the issue raised by the appellant concerning the vote on the driveway ordinance is clarified by a competent body.

Attorney Burns stated for the record that while she is the Town's attorney, she is before this Board representing the Code Enforcement Officer not as the Board's attorney.

Attorney Burns advised the Board, on behalf of the Code Enforcement Officer, that she did not agree that the Board can say that isn't going to make any decision except that it doesn't have the authority to hear this case therefore it is going to table everything else. As the Chair has stated, the Board has the question of the validity of the driveway amendment before it, and it can make a decision on that. The Board can then proceed to the merits of the interpretation of the Ordinance. It is her opinion that if the Board postpones this case, and Mr. Bannon appeals to Superior Court, the Superior Court will send it back to the Board with an order to hear it on the merits.

Attorney Burns suggested that the Board might make a decision as to whether or not the Board may determine if the Ordinance was properly enacted, and then the Board may determine whether or not the ordinance was properly interpreted by the Code Enforcement Officer.

Mr. Smith asked why the Court would send it back.

Attorney Burns responded that an appellant can challenge a Board's failure to act, and she cannot find anything in the Ordinance that allows that Board to not consider a matter because there is another legal matter attached to it. If the Board has an appeal in front of it that is properly brought before it, then the Board is required to hear the appeal and make a decision.

Attorney Burns also pointed out that the challenge to the validity of the amendment goes through a different process than that of the Code Enforcement Officer's decision which goes through an appeal process.

Mr. Mayer asked Attorney Burns to confirm that she is saying that the Board should make a decision whether or not the Code Enforcement Officer acted properly in denying the Applicant's request based upon the article which was voted on by the town residents. It has nothing to do with whether or not the warrant article was valid or not, but based upon the warrant article as it stands now.

Attorney Burns responded that they should, and this is the second part of the appeal, whether the Code Enforcement Officer has properly interpreted that ordinance as it stands now. For that purpose the board will assume that it was properly enacted. The Board will also have to act on the first part of the appeal and determine whether or not it has jurisdiction over the legal validity of the amendment.

Mr. Griswold asked Attorney Burns if the Board can separate the two issues.

Ms. Burns responded that the two issues won't mix together from the Code Officer's perspective. His duty is to interpret and apply the ordinance as passed at Town Meeting. It is not his job to determine whether or not an ordinance is valid, constitutional, in compliance with State Law, etc. Those determinations are made by the Court.

Mr. Griswold asked if the Code Enforcement Officer was asked about the legality of the Ordinance.

Ms. Burns responded that she was asked about that and she gave her opinion.

Mr. Heyland responded that he was asked about the validity of the vote. But the day after an election the ordinance is enacted. There were conversations with the Applicant about the legality of the ordinance but he never made a determination whether it was legal or not.

Mr. Bannon suggested the Board table the application and obtain legal counsel.

Mr. Smith summarized that the basis of the Code Enforcement Officer's denial is based on his interpretation that the subdivision doesn't meet the requirements of the "current zoning ordinance".

Mr. Smith again pointed out that the Ordinance doesn't specifically state that the Planning Board MUST hold the Public Hearing. Common sense says the Planning Board holds the Public Hearing but the Ordinance lacks specificity. At the time the Planning Board passed the responsibility for the Public Hearing to the Select Board.

Mr. Horn stated that the Planning Board may have misjudged what they were required to do. He noted that even the Applicant admitted that this was a common practice.

Mr. Smith called for a vote on Mr. Griswold's Motion.

Mr. Griswold Moved that the ZBA Table this appeal until such time that the issue raised by the appellant concerning the vote on the driveway ordinance is clarified by a competent body because the Board does not have the jurisdiction to make that decision.

GRISWOLD/HORN 3:2 (Mr. Smith and Mr. Mayer Dissenting)

Mr. Smith summarized that the Board wants a ruling on the legitimacy of the process before it hears the rest of this case.

Mr. Horn asked what the process is now.

Mr. Smith suggested the minutes need to be presented to the Town Manager and/or Select Board.

Attorney Burns suggested that the Board might ask the MMA to provide an attorney to come to the meeting to advise the Board. Because Ogunquit is a member of the MMA that will be at no cost to the town. She agreed to speak with the Town Manger and the Code Enforcement Officer about that.

She also suggested reconsideration. If the request is made by someone other than the Board it must be in writing and there is a deadline for submitting the request, and the Board must render a decision within 45 days of the date of this Meeting. If the request for reconsideration comes from a member of the Board it does not have to be in writing and can be made at any time.

Mr. Griswold stressed that the issue is between the applicant and the Town. He asked why the ZBA should work with an attorney after the fact of a Town vote.

Attorney Burns responded that the Board needs to have a discussion with its own attorney to address the questions of whether or not the Board may bifurcate the issue of whether the Town Meeting vote was valid and therefore whether the ordinance is valid, from the other question as to whether assuming the ordinance is valid was it properly interpreted and applied in this case.

Mr. Horn asked where the Board goes from here.

Attorney Burns responded that the Board will send out a decision letter to the Applicant, in the meantime one party or the other will request reconsideration and another meeting will be scheduled. She agreed to speak with the Town Manager about having an MMA attorney represent the Board.

Attorney Burns noted that there is another alternative. The Board might reconsider and postpone the appeal to allow the Town to get legal counsel. This would avoid the parties having to go through the reconsideration process. It also avoids the 45 day deadline.

Board members of any Board have the authority to request reconsideration of any matter as long as the request is made at the meeting in which the decision is made or no later than the following meeting.

Mr. Mayer expressed his concern that the appeal is based on the Code Officer's decision based upon the Ordinance as it stands.

Ms. Burns explained that if the Board votes to reconsider it puts the matter back to where it was before the Board voted.

**Mr. Deletetsky Moved to Reconsider.
DELETETSKY/MAYER 5:0 UNANIMOUS**

**Mr. Deletetsky Moved to Postpone this matter until the MMA provides an attorney to advise the ZBA.
DELETETSKY/HORN 5:0 UNANIMOUS**

Attorney Burns agreed to speak with the Code Enforcement Officer and the Town Manager to arrange an MMA Attorney to advise the Board.

CODE ENFORCEMENT OFFICER BUSINESS – None

OTHER BUSINESS – None

ADJOURNMENT –

**Mr. Griswold Moved to Adjourn at 8:15 p.m.
GRISWOLD/HORN**

Respectfully Submitted

Maryann Stacy
Planning Board
Recording Secretary

Approved on June 3, 2015