

Town of Brunswick, Maine

Incorporated 1739

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JEFF HUTCHINSON
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85 UNION STREET
BRUNSWICK, ME 04011

Town of Brunswick Zoning Board of Appeals

AGENDA

**BRUNSWICK TOWN HALL
85 UNION STREET**

Room 206 – 2nd Floor

May 26, 2016 – 7:30pm

1. Hear the following case(s):

Case #2332 – Scott Bodwell, Richard Knox & Henry Heyburn

The Zoning Board of Appeals will hold a hearing to determine if the appellants, Scott Bodwell, 55 Ocean Drive; Richard Knox, 81 Simpsons Point Road; & Henry Heyburn, 215 Pennellville Road, have legal standing to pursue an Administrative Appeal of the Code Enforcement Officer's decision to issue a Minor Floodplain permit to Robert and Nancy King on property they own at 0 Tidal Run Lane (Tax Map 31, Lot 29). If the Board determines the appellants have standing, a hearing on the merits of the Appeal will be scheduled at a later date.

2. Other Business
3. Adjourn

Individuals needing auxiliary aids for effective communication please contact the Town Manager's Office at 725-6653 or TDD 725-5521

Julie Erdman

From: Anna Breinich
Sent: Monday, April 25, 2016 5:33 PM
To: Julie Erdman; Jared Woolston; Jeff Hutchinson
Subject: FW: Flood Plain Permit Appeal at Miller Point

FYI

Anna Breinich, FAICP
Director of Planning and Development
Town of Brunswick
85 Union Street
Brunswick, ME 04011

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From: Langsdorf, Stephen E. F. [<mailto:SLangsdorf@preti.com>]
Sent: Monday, April 25, 2016 3:22 PM
To: Richard Knox
Cc: John Eldridge; jloyd@eatonpeabody.com; Anna Breinich
Subject: RE: Flood Plain Permit Appeal at Miller Point

Richard, in follow up to our conversation I will recommend to the Chair of the Board of Appeals that a hearing be scheduled as a preliminary matter on the issue of standing only. You will have the right to submit something in writing and argue on your behalf. The Kings would be allowed to argue that you do not have standing and anyone else from the public could weigh in as well. I will answer questions from the Board as necessary. That meeting will occur as soon as we have sworn in a fifth member so that there will be a quorum. The Town is working in good faith to make this happen. If the Board determines that any of you have standing, the hearing on the merits would be at a later time. Please let me know if you have any questions about this.

Stephen E. F. Langsdorf

PretlFlaherty

From: Richard Knox [<mailto:knoxworthy@gmail.com>]
Sent: Friday, April 22, 2016 8:24 PM
To: Langsdorf, Stephen E. F.
Subject: Re: Flood Plain Permit Appeal at Miller Point

Hi again Stephen,

None of us are represented by counsel. I hired Mr. Smith for a limited assignment which ended last month.

I believe we do meet the requirement of a particularized injury. Can we discuss Monday or at your earliest convenience?

My number is 242-5578.

I look forward to speaking with you.

Thanks,

Rich

On Friday, April 22, 2016, Langsdorf, Stephen E. F. <SLangsdorf@preti.com> wrote:
Rich, I am concerned about responding because you have been represented by counsel. The issue of standing is that someone must show a particularized injury different from other citizens in general to have standing to appeal. An abutter has automatic standing but none of you are abutters. Please advise whether you believe you meet this requirement. Take care,

Stephen Langsdorf

> On Apr 22, 2016, at 10:20 AM, Richard Knox <knoxworthy@gmail.com> wrote:

>

> Hello Stephen,

>

> I left you a voicemail this morning with a clarifying question regarding our appeal of the Town issuing a Flood Plain Permit at Miller Point. Before we respond about standing, we would appreciate a reply from you with more detail via email. Or please give me or Scott a call if you wish to discuss. (Henry is currently out of town).

>

> Thanks,

>

> Rich, Scott, Henry

This E-Mail may contain information that is privileged, confidential and / or exempt from discovery or disclosure under applicable law. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege. If you are not the intended recipient of this communication, and have received it in error, please do not distribute it and notify me immediately by E-mail at slangsdorf@preti.com or via telephone at 207.791.3000 and delete the original message. Unless expressly stated in this e-mail, nothing in this message or any attachment should be construed as a digital or electronic signature or as a legal opinion.

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May 19, 2016

To: Brunswick Zoning Board of Appeals (ZBA),
From: Richard Knox, Scott Bodwell, Henry Heyburn
RE: Standing To Appeal

On April 14th we appealed the Town of Brunswick's decision to issue a Flood Hazard Development Permit (without first issuing other required municipal permits) in the matter of the shoreland stabilization project at Miller Point (The Project). See Attachment A which is the original letter attached to our appeal. We also filled out a form at the planning office and paid a \$75 filing fee. On April 19th we received a letter from Stephen Langsdorf (the town's lawyer) asking us to clarify whether we could demonstrate our standing to appeal. See Attachment B. We then followed up with a second letter to the Town giving more detail (Attachment C). We have since been informed that we need to make our case for standing to the ZBA prior to the ZBA hearing our actual appeal. This letter serves as further background for the ZBA in advance of our presentation planned for May 26th.

What are we appealing?

On March 17th, the Town issued a Flood Hazard Development Permit for The Project. However, the Brunswick Zoning Ordinance states in section 211.3.A that "No Flood Hazard Development Permit shall be issued until the Codes Enforcement Officer has determined that all other necessary federal, state, and municipal permits have been obtained." **We believe additional municipal permits should have been obtained prior to issuing the Flood Hazard Development Permit, thus we are appealing what we believe was an error by the Codes Enforcement Officer.**

As background, the week that The Project commenced, Richard Knox called Codes Enforcement Officer Jeffrey Hutchinson asking if municipal permits had been issued for The Project. Mr. Hutchinson said no local permits were necessary, saying "that would be double dipping". Shortly thereafter, Mr. Knox notified the Town via a letter that he believed that Mr. Hutchinson was mistaken and that the Brunswick Zoning Ordinance (BZO) required certain permits prior to work continuing on The Project (Attach D).

Then, on March 2nd, town attorney Langsdorf recommended to Town Manager Eldridge that the Town reverse course and require the issuance of at least one permit for The Project (Attachment E). Mr. Knox testified in front of the Town Council on March 7th reiterating his belief that, in addition to the Flood Hazard Development Permit, **additional local permits were required** (Attachment F).

Why are we appealing?

A number of state and local documents highlight the significance of the natural resources affected by The Project.

Middle Bay, and Miller Cove off Simpson's Point Road are named in the Town's *Parks, Recreation and Open Space Plan* as an integral part of its scenic inventory. Middle Bay is named as a Focus Area of Statewide Significance by the state's Beginning with Habitat Program because it supports rare plants and animals and supports commercially valuable species. The Town's 2014 Harbor Management Plan, prepared by the Town's Marine Resources Department and approved by the Town Council, provides

recommendations for preserving valuable natural resources such as the fringe salt marsh and shellfish habitat surrounding Miller Point.

To protect these resources, Maine law mandates that all municipalities must enact, administer and enforce a local shoreland zoning ordinance. As stated in the Maine Shoreland Zoning Citizen Guide: "Although it is difficult to gauge the cost of not enacting shoreland regulations, it is clear that Maine citizens and visitors benefit enormously from clean, clear lakes and streams; a healthy fishery; tree-lined shores; and an economy fueled, in part, by a healthy environment... The law protects water quality... conserves wildlife and vegetation, and preserves the natural beauty of Maine's shoreland areas. All municipalities must enact, administer and enforce a local shoreland ordinance."

We believe that the Town has erred in its administration of shoreland zoning. Why does this matter? The Project will have an extremely significant impact on the resources in this otherwise lightly developed landscape in Brunswick's Coastal Protection Zone—with impacts to the users of Middle Bay, Merepoint Bay and Miller Cove. **As we will demonstrate, Mr. Bodwell, Mr. Knox and Mr. Heyburn are frequent users and stewards of these impacted resources, and we will suffer a particularized injury to our personal rights as a result. Namely, the natural resource, aesthetic and recreational values afforded by the resource will be lessened.** The impacts of The Project are visible from a number of vantage points in Middle and Mere Point Bays, and especially from nearby Crow and White Islands. Rather than view a natural shoreline, we now will see a permanently altered shoreline with approximately 600 linear feet of hardened material visible at the toe of the slope and a major break in the flow of existing aesthetic of this landscape. We'll show you some pictures of the area and of us actually using the resource. This revetment, which will be the largest ever of its kind in Casco Bay, will significantly and permanently alter the shoreline of one of Brunswick's most ecologically sensitive and important stretches of shoreline.

Mr. Knox's original letter to the Town (Attachment D), and a subsequent email on February 27th (Attachment G) suggests that one of the purposes of the BZO is to minimize environmental impacts, especially in the Coastal Protection Zone. **It is our belief that The Project has not been subject to proper permitting as mandated by the BZO, and therefore there has not been proper formal review or consideration of design alternatives at the local level which would minimize environmental impacts created by The Project. This is why we are appealing.**

Why we believe we have standing to appeal.

There are a number of reasons why we believe we should be granted standing to appeal.

First, Maine case law is very clear what constitutes the foundation of standing in cases where standing has been called into question. Abutters are almost always automatically granted standing. For those who are not abutters, "standing has been granted liberally to people who own property in the same neighborhood as the property that is subject to a permit". See Nergarrd vs. Town of Westport (attachment H). Mr. Knox is only one lot removed from being an abutter. Mr. Bodwell is a waterfront property owner linked to the project site via the bay and tidal flats. Mr. Heyburn also lives in the Simpson's Point/Pennellville neighborhood which is where The Project is taking place.

And, even if not in the same neighborhood, if the appellant can demonstrate a "particularized injury" (actually using the affected resource), then standing is granted. While we are not abutters, we all reside in the same neighborhood as The Project AND can demonstrate that we actually use the affected resources (particularized injury). Either would suffice and all of us satisfy BOTH of these criteria.

We, all three of us, are actual users of the affected resource (Miller Cove, Middle Bay, Merepoint Bay). Mr. Bodwell is a long-term resident of Pennellville and has been using the resource for more than 50 years including lobstering, shellfish harvesting, fishing, boating, kayaking, canoeing, swimming, paddleboarding, ice skating, snowshoeing, waterskiing and cross country skiing. He is also a volunteer water quality monitor for the Friends of Casco Bay. Mr. Knox has been using the resource since 1988, a period of 28 years, for kayaking, canoeing, swimming, paddleboarding, waterskiing, shellfish harvesting, birding, fishing, cross country skiing, ice skating, and snowshoeing. Mr. Heyburn has enjoyed swimming, kayaking, sailing, canoeing, camping and Nordic skiing in and on Middle Bay for 29 years.

Moreover, Mr. Bodwell and Mr. Knox are volunteer land stewards for the public preserves at White and Crow Islands (just across from the King property) and as such use Miller Cove and Middle Bay in order to make stewardship visits to the islands (See Attachment I verifying this fact). They also are particularly concerned with the powerful effects of the Project on the natural and aesthetic values of the immediate area and particularly the islands that they are charged with protecting. Each makes visits to the islands year round, totaling more than 20 each year. Mr. Heyburn's wife is also a volunteer island steward and the two of them make several trips to the resource each year.

As a Maine licensed professional engineer, Mr. Bodwell also has an obligation to Society and his foremost responsibility is to the public welfare of projects he monitors. He has been in touch directly with town officials about the lack of technical diligence on this project which has led to engineering studies and review of the project.

All three of us intend to continue to use the resource in the coming years in each and every one of these particularized ways. The effect of The Project on each of us is pronounced and particularized, both as residents in the neighborhood of The Project and as users of the resource in the immediate area.

In sum, if not us, who could ever have standing to appeal a decision to the ZBA? It is important that the ZBA at least hear this appeal and consider the important issues that it raises. For the reasons listed above, we respectfully request to be granted standing to appeal¹.

¹ Also, there is nothing in the Brunswick Zoning Ordinance which suggests that one must pass some sort of test to appeal a decision of the Codes Enforcement Officer to the ZBA. Maine case law reinforces the understanding that local ordinances determine whether a party has standing in an administrative appeal. "The question of whether a party has standing to bring an administrative appeal depends on the language of the governing ordinance." (Nergarrd) Some ordinances do have provisions spelling out what does and does not constitute standing to appeal. The BZO has no such provisions, only instructions for how to make an appeal. "Such appeal shall be made by filing in the Office of the Codes Enforcement Officer a written notice of appeal specifying the grounds for such appeal." (section 703.4). There are just no provisions in the Zoning Ordinance preventing Brunswick citizens from having the right to appeal to the ZBA a decision issued under the Zoning Ordinance.

As further background, the following excerpts from Case Law in Maine and the U.S. Supreme Court demonstrate the relevance of proximity of residence, as well as the importance of the very types of particularized injury we have suffered.

Proximate Location (Nergaard P 18)

"Additionally, standing has been liberally granted to people who own property in the same neighborhood as the property that is subject to a permit or variance."

Particularized Injury (Nergaard, Fitzgerald vs. Baxter Park, Sierra Club vs. Morton)

Nergaard P 18

"A particularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights." Anderson v. Swanson, 534 A.2d 1286, 1288 (Me.1987); See Sierra Club vs. Morton for more on personal rights and standing.

Nergaard P 21

"In Fitzgerald, five individuals demonstrated that the agency's actions would adversely and directly affect their personal rights to the use and enjoyment of Baxter State Park. 385 A.2d at 196-97. Unlike Nergaard and Stern, these plaintiffs were not merely members of the general public. They were "actual users of the Park," and thus suffered a particularized injury as a result of the agency's action in clearing timber from the Park, an injury that other Maine citizens could not claim. Id. In International Paper Co., environmental and public interest groups who intervened at the administrative level appealed under a site location development statute with less stringent standing language than the Westport Island Zoning Ordinance. 363 A.2d at 238. Moreover, International Paper Co. involved a permit issued under a statute enacted to protect certain areas from environmental hazards, and the plaintiffs were located in the areas that the statute was designed to protect. Id. at 238-39."

From Fitzgerald vs Baxter Park:

"All five of the individual plaintiffs have in the past been substantial users of Baxter State Park and intend to use it substantially in the future. By express stipulation of the parties,

"[i]f the action complained of by the Plaintiffs and taken by the Baxter State Park Authority is without legal support and found to be unauthorized by law or terms of the deeds of trust, then the Plaintiffs have been injured in their use and enjoyment of Baxter State Park and its resources."

Thus, the stipulation establishes a direct and personal injury suffered by the plaintiffs to their interest in Baxter State Park which, although not an economic interest in the sense of involving their livelihood or financial liability, is nonetheless worthy of the protection of the law. Sierra Club v. Morton, supra."

On what basis is this kind of effect on personal rights considered a Particularized Injury?

US Supreme Court: Sierra Club vs. Morton

"Personal Rights: Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are

shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”

“The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened.”

There is injury to us as neighbors and users of the affected resource, and we are already feeling it. We respectfully request to be granted standing to appeal.

Via Hand Delivery

April 14, 2016

Jeff Hutchinson
Codes Enforcement Officer
Town of Brunswick

Dear Mr. Hutchinson,

We are writing to appeal the Town of Brunswick's decision to issue a Flood Hazard Development Permit for the shoreline stabilization project being conducted by Robert and Nancy King at Miller Point in Brunswick. Our understanding is that this permit was issued by the Town on March 17th, 2016 and that we are within the required 30 day appeal window.

The grounds for this appeal are based on a stipulation in the Brunswick Zoning Ordinance (BZO) that "No Flood Hazard Development Permit shall be issued until the Codes Enforcement Officer has determined that all other necessary federal, state, and municipal permits have been obtained." (See section 211.3.A of the BZO). Our reading of the BZO clearly shows that other municipal permits ought to have been obtained prior to the Flood Hazard Development Permit, most notably a Special Use Permit as required under Brunswick's **current** Zoning Ordinance. (Emphasis added because we are aware that there is a pending update to the ordinance to bring it in compliance with the Maine Department of Environmental Protection Guidelines for Municipal Shoreline Zoning Ordinances, Table 1: LAND USES IN THE SHORELAND ZONE, which would have clearly triggered the need for a special use permit for this project had the USE table been part of Brunswick's ordinance.) Be that as it may, **the facts show that the current ordinance as written requires additional municipal permits for this project.**

For example, Brunswick's current Zoning Ordinance has its own existing use table for CP-1, where this project is located. Any use that is not listed in the table of uses is considered an "Omitted Use." (BZO Chapter 2(I)(1). In order for an Omitted Use to be allowed, it must obtain a Special Use Permit from the Brunswick Planning Board. BZO Chapter 2(I)(2) and 701 (Special Permit procedures and standards). In order to grant a Special Use permit, the Planning Board must find that the proposed project satisfies a number of criteria (BZ 701.2).

We understand that the Town has given this matter a lot of consideration. However it is our belief that, despite this consideration, **it was an error to issue the Flood Hazard Development Permit in advance of issuing other necessary permits required for this project. Thus we are appealing this action and are confident that The Zoning Board of Appeals will find that all or portions of the decision were faulty, in which case "the Board may remand that portion of the application to the Codes Enforcement Officer."**

Our reading of the language in the Brunswick Zoning Ordinance regarding appeals suggests that the Codes Enforcement Officer shall transmit to the Zoning Board of Appeal all of the papers specifying the record of the decision appealed from. As you are aware, there are extensive records regarding this matter. Please let us know if we have the opportunity to supply papers in

addition to this letter at this time, or whether there is another point in the appeal process for us to submit background information.

We would appreciate confirmation that you have received this appeal, and an answer to our question regarding supporting documents at your earliest convenience.

We have enclosed the \$75 fee to accompany this appeal.

Sincerely,

Scott Bodwell, 55 Ocean Drive

Richard Knox, 81 Simpsons Point Road

Henry Heyburn, 215 Pennellville Road

cc: John Eldridge, Town Manager

April 19, 2016

Richard Knox
81 Sampsons Point Road
Brunswick, ME 04011

Henry Heyburn
215 Pennellville Road
Brunswick, ME 04011

Scott Bodwell
55 Ocean Drive
Brunswick, ME 04011

RE: Zoning Board Appeal

Gentlemen:

This will advise you that the Town is in receipt of your appeal of the issuance of the Flood Plain Permit. Currently, we only have four members of the Board of Appeals and are unable to meet because we cannot meet the ordinance quorum requirement of five members. We are attempting to find another member, but it is possible that we will not be able to meet the ordinance deadline of 45 days. We will keep you posted regarding progress on this.

Your appeal raises the question of whether or not you have standing to appeal since none of you are abutters to the property. Please identify whether you have some particularized form of injury different from other citizens of Brunswick, so the issue of standing may be addressed.

I look forward to hearing from you.

Sincerely,



Stephen E.F. Langsdorf

SEFL:ryp

Via Hand Delivery

April 26, 2016

Jeff Hutchinson
Codes Enforcement Officer
Town of Brunswick

Dear Mr. Hutchinson,

We are writing with follow up information regarding our appeal of the Town of Brunswick's decision to issue a Flood Hazard Development Permit for the shoreline stabilization project being conducted by Robert and Nancy King at Miller Point in Brunswick. In our letter to you on April 14th we inquired regarding the provision of background information as part of our appeal—asking for clarification from you at your earliest convenience.

“Our reading of the language in the Brunswick Zoning Ordinance regarding appeals suggests that the Codes Enforcement Officer shall transmit to the Zoning Board of Appeals all of the papers specifying the record of the decision appealed from. As you are aware, there are extensive records regarding this matter. Please let us know if we have the opportunity to supply papers in addition to this letter at this time, or whether there is another point in the appeal process for us to submit background information.”

We have not heard back from you, but we did recently receive a letter from Stephen Langsdorf of Preti Flaherty inquiring as to whether we can demonstrate that we have standing to appeal. Therefore, we are supplying some additional background information at this time for your records to transmit to the Zoning Board of Appeals. We believe this information will demonstrate to the ZBA our standing to appeal.

First, although we are not direct abutters, all three of us live in very close proximity to the affected property. We will provide a map to the ZBA to demonstrate this, and you have our addresses. Second, all three of us are frequent users of Middle Bay / Mere Point Bay / Miller Cove. Mr. Bodwell has documented this in correspondence to the Town during the proceedings to date, and we will provide evidence to the ZBA of our frequent (even year round) use of this public resource that is being impacted by the proposed revetment. We will also demonstrate our intention to continue to use the resource. Third, as a Maine licensed professional engineer, Mr. Bodwell has an obligation to society and his foremost responsibility is to consider the public welfare of projects he monitors. He has been in touch directly with Town officials about his status as a professional engineer, and they have welcomed his input regarding this project.

We understand Mr. Langsdorf is inquiring with the ZBA about setting up a preliminary hearing

for our appeal. We look forward to hearing from you or Mr. Langsdorf regarding any further information related to this matter.

Sincerely,

Scott Bodwell, 55 Ocean Drive

Richard Knox, 81 Simpsons Point Road

Henry Heyburn, 215 Pennellville Road

cc: John Eldridge, Town Manager
Stephen Langsdorf, Town Attorney

3/7/16

Richard Knox

Public Comments at Brunswick Town Council Meeting.

Good Evening Councilors, Manager Eldridge, Attorney Langsdorf.

I am Richard Knox of 81 Simpsons Point Road. I have lived in Brunswick for 28 years and have raised a family here. We, like so many in our town, have a deep connection to the natural beauty of this place.

I am here to follow up on my communications to you regarding the Miller Point project.

First, I'd like to thank Town Manager Eldridge and attorney Langsdorf for their recent attention to this matter. I'd also like to thank Rob King for his generosity—allowing me and many neighbors to use his property for occasional walks and skis these past 16 years or so.

As you know, the Miller Point situation is extremely complex, involving several thorny issues. This evening, I'd like to focus your attention on just one of these issues. **I would like to request that the town change course and undertake substantive review and permitting of the proposed shoreline stabilization installation, which the State intended the Town to require, and the Brunswick Zoning Ordinance (BZO) was designed to require. I'm also asking that the citizens' voice be heard, as intended by the BZO.**

When I noticed that work had commenced on the project during the week of February 15th, I immediately called the town planning department to find out if town permits had been issued. I was told by the planning department: Quote: "That is not our responsibility on this project, because a DEP permit was issued. It would be double dipping to require the landowner to get more permits." Unquote. Having looked at the Brunswick Zoning Ordinance and consulted with an attorney, it seemed obvious that the BZO contained several likely triggers for substantive review and permitting of such a large scale project as this. Three weeks later, it has been determined that the planning department was wrong in its assessment that no local permitting was necessary, and it has been made clear that there are very strong arguments that favor a formal, substantive review process by the town's planning board.

Unfortunately, in the intervening days, the project proceeded in violation of the BZO despite a request by the Town for the Kings to voluntarily stop work (the Kings refused this request), and a request by me for the town to issue an immediate temporary stop work order, (which to my knowledge still has not been issued). It was also discovered through this process that the town has been out of compliance with state-mandated shoreline regulations for nearly 20 years.

Now, after a number of letters and meetings between attorneys, Mr. Langsdorf has prepared a legal review and analysis of the situation for the town, which concludes with three recommendations. While I appreciate the thoroughness of Mr. Langsdorf's analysis, I believe he ought to have included a fourth recommendation: to require substantive municipal review of, and

citizen input to this project before it continues. The fact that he didn't, despite referring to state law which would require it, and noting strong arguments that the BZO can be interpreted to require it, speaks volumes to the difficult position he has been put in by the planning department. A department "that's always done it this way", which cut corners and made factual errors in this case, and that issued an incorrect verbal recommendation which the landowner's counsel and contractor were content not to question or confirm in writing.

Mr. Langsdorf is doing his job, and part of doing his job is to defend the practices of town staff (however questionable) and to reduce the town's legal exposure. In my opinion, this clearly influenced his decision not to change course and not to recommend substantive review and permitting for this project right now. **But what about the interest of the Citizens of Brunswick? That's what is being overlooked here.** Despite the false sense of urgency that has been portrayed for this project, and the issue of legal liability having been raised, the Town ought not be pressured or intimidated by these tactics, or be comforted by doing things "the same old way" in deference to an insistent landowner. If the Council feels that it should change course now, it has every right to do so without unduly changing the equity of the situation. Case law, common law and common sense support this notion.

The Kings say that they just want to do what is right and what the law requires. If the Town Council determines that the project requires planning board review, why would the Kings fight that determination? If the project meets the BZO review standards, there should be no problem and everyone will be happy. If not, that is another matter. Engaging in the planning board review process would surely be faster, easier and cheaper for the Kings than engaging in litigation against the town.

So now I ask the council to do its job and consider citizen interest, even after the staff has not. Two wrongs will not make this situation right. Please reverse course and insist on substantive planning board review on this project before another day passes. Mr. Langsdorf's analysis leaves the door open for you to do the right thing on behalf of the citizens of Brunswick, despite having not formally recommended it. I trust you will demonstrate the courage and integrity to walk through that door.

Thank you, I would be happy to answer any questions.

----- Forwarded message -----

From: Richard Knox <knoxworthy@gmail.com>

Date: Fri, Feb 26, 2016 at 10:49 AM

Subject: Miller Point

To: John <jeldridge@brunswickme.org>

Cc: slangsdorf@preti.com, Steve Walker <swalker@mcht.org>, "Smith, Gordon" <gsmith@verrilldana.com>

Dear Mr. Eldridge,

I am writing regarding my request last week for the Town of Brunswick to apply and enforce the Town's Natural Resource Protection Zone/Coastal Protection Zone standards with regard to the King property on Miller Point. Please forward this letter, if appropriate, to the Town Council, the Planning Board and the Conservation Commission. I would also appreciate acknowledgement of receipt.

While I truly appreciate the time you have spent addressing my request thus far, I have been frustrated by the Town's overall lack of proactive attention to this matter, and it is unfortunate that it has taken my hiring of legal counsel for the town to give proper consideration as to whether and how the Town's Natural Resource Protection Zone/Coastal Protection Zone should be applied in this situation. I would like to reiterate the point that my sole intention here is make sure that the Town uphold its responsibilities in this matter, and it is not my intent to dispute the Kings' right to pursue their stabilization project. However, having looked at the facts, I believe there is more than enough evidence to conclude that formal town review, including review by the planning board, should have been conducted prior to work starting on this project. It is my hope that after considering these facts, the Town will come to the same conclusion, and that any actions needed to remedy the situation are undertaken as expeditiously as possible, including formal staff review, third party peer review, planning board review, temporary stop work orders, or fines.

On Thursday February 18th, Gordon Smith of Verrill Dana called on my behalf to inform you of my request. He followed up with a letter on Monday the 22nd, (documenting the points he made to you verbally) in an effort to help you, the town attorney, and the Town staff in your interpretation of the Brunswick Zoning Ordinance and how we feel it ought to be applied to this situation. At the Town's request, Mr. Smith spent more than two hours yesterday further explaining our interpretation of the ordinance in a meeting with you, the town attorney, the Town planning staff and attorneys representing the Kings. As promised, after the meeting, Mr. Smith conducted additional research on the Town's behalf regarding one of the points in question, and provided a clear explanation to help you and the Town staff better understand the definition of the flood plain.

At yesterday's meeting I understand that, after some discussion regarding the various legal interpretations of the Ordinance, Mr. King's lawyers said something to the effect of: "Mr. Knox and his lawyer are torturing the ordinance, looking for every way they can to fit a square peg into a round hole and trigger permitting for this project at the local level." At which point Mr. Smith replied something to the effect: "On the contrary, you and the Town are torturing the ordinance, looking for every way to avoid applying it and enforcing it, as there are clearly several sections of the ordinance that could (and should) trigger formal local review and permitting for this project."

I think that exchange gets to the heart of this matter. Anyone I've talked to about this project is incredulous that something this impactful to one of the Town's highest valued coastal resources in the Coastal Protection Zone and Natural Resource Protection Zone did not trigger any need for citizen input or permitting at the town level (it is the largest shoreland stabilization project ever in Brunswick and indeed all of Casco Bay, not counting the Portland pier). I respect the fact that state and federal permits were applied for and received by the applicant, but state and federal review will never substitute for the right and need for the Town and its citizens to ensure that the project complies with local standards. Indeed, it is the citizens of Brunswick who will be most affected by this project and I too am incredulous that the Town and the landowner's contractor did not go through a formal review and permitting process at the local level before proceeding with this work. It simply does not pass the straight face test.

Page one of the Brunswick Zoning Ordinance lists the purposes of the Ordinance, including:

- Conserve natural and historic resources and minimize environmental impacts.
- Provide an efficient and fair land use regulation system.
- Require the recognition and evaluation of flood hazards in all official actions relating to land use in designated floodplain areas. (Amended 1/19/99R)

The Ordinance is very detailed and comprehensive, and of course in every instance of regulating land use, professional interpretation is needed. An instance as significant and precedent setting as the Miller Point project calls for a rigorous and responsible interpretation of the Ordinance that, by design, was created to take into account and properly consider all land use impacts. A cursory review of a case like this which erred on the side of disengagement or deferral of accountability for whatever reason would be irresponsible.

The town ought not be comforted or persuaded by arguments that give it a convenient way to ignore the challenging facts of this matter. On the contrary, this is a time for the town to step up and honor the Ordinance it created for situations just like these! My understanding is that the Ordinance is very clear that the town has the ability to bring in third party peer review when a development project is thought to be beyond the technical expertise of the staff. It is also my understanding that this provision was included in the Ordinance to maintain the rigorousness of local review rather than depending on, or deferring to, state and federal agencies that don't have a full appreciation for local circumstances. If the town needs help in this instance, let's get it.

I've lived in Brunswick for 28 years, and have always felt a sense of pride telling friends and family that I live in a town with amazing natural resources and a town that invests in qualified and responsible staff to manage those resources. Frankly, this past week my sense of town pride has been severely eroded, and I know I'm not the only resident that feels this way.

From my perspective, the town has an opportunity and a responsibility to correct course on this project and uphold its reputation as a leader in town government. It is not too late, and there are many benefits in doing so. In fact, each day this issue drags on is a day that work continues on the project in violation of an ordinance that was duly enacted by the citizens of Brunswick.

For your reference, I have attached a photo of the property, forwarded to me by a member of the Brunswick Conservation Commission earlier this week, which clearly shows that work has indeed commenced on this project. My understanding is that most of this work was completed after my initial request for a temporary stop work order until proper Town permits were issued.

In closing, I again appreciate the recent attention you've given to this matter and hope it remains a high priority for the Town. As Mr. Smith's email from yesterday said, I would like to see a written determination from the Town in a timely fashion so that it is clear what future role the town staff, town committees, or third parties will have in this matter. I'm sure the Kings and the citizens of Brunswick would appreciate some clarity on this as well. I sincerely hope that the Town can resolve this matter properly without the need for appeals at the Town or State level.

Thank you for your consideration,

Richard Knox

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 2009 ME 56

Docket: Lin-08-536

Submitted

On Briefs: February 26, 2009

Decided: June 2, 2009

Panel: CLIFFORD, ALEXANDER, LEVY, SILVER, MEAD, and GORMAN, JJ.

Majority: CLIFFORD, ALEXANDER, LEVY, SILVER, MEAD, and GORMAN, JJ.

Concurrence: ALEXANDER, J.

PAUL L. NERGAARD et al.

v.

TOWN OF WESTPORT ISLAND

GORMAN, J.

[¶1] Paul L. Nergaard and Michael E. Stern appeal from a judgment of the Superior Court (Lincoln County, *Hjelm, J.*) affirming a decision by the Town of Westport Island Zoning Board of Appeals (Zoning Board) that the two men did not have standing to appeal a decision by the Planning Board concerning plans to improve the Town's boat-launching site. Because we conclude that the Zoning Board did not err as a matter of law in deciding that Nergaard and Stern were without standing, we affirm the judgment of the Superior Court.

I. BACKGROUND

[¶2] In the fall of 2006, the Westport Island Board of Selectmen submitted an application to the Planning Board to improve the Town's only public boat-launching site. The proposal, which called for improving the boat ramp and

access road to the site and expanding the parking area, was projected to increase daily trips to and from the site by thirty-six vehicles during the peak season.

[¶3] Located at the intersection of Route 144 and Ferry Road, the boat-launching site is about one mile south of the bridge that provides the only access to and from the mainland. A study by the Maine Department of Transportation estimated that 1638 vehicles pass through the intersection every day in August, which is the Island's peak period.

[¶4] Although both Nergaard and Stern live on the Island, their properties are neither directly abutting nor within close proximity to the site.¹ However, they opposed the project and attended the Planning Board hearings to express their views. During the first public hearing on October 10, 2006, Nergaard, Stern, and two other men who attended the meeting to express their opposition, requested that the Planning Board grant them party status. The Planning Board voted in favor of granting party status to the four individuals because they all frequently travel Route 144 and must pass the boat-launching site.²

¹ Nergaard and Stern never identified the exact location of their properties. However, they acknowledged that a tax map presented to the Zoning Board depicting the site and about forty surrounding properties did not include their lots.

² The Town hired Attorney William Dale to advise the Planning Board during its consideration of the Town's application to improve the boat-launching site. According to the minutes of the public hearing on October 10, Attorney Dale advised the Planning Board that Nergaard, Stern, and the others had party status simply because they spoke during the meeting.

[¶5] Nergaard and Stern expressed their concerns that the increased use of the facility would worsen traffic conditions and seriously endanger their safety. They asserted that Ferry Road was not wide enough to accommodate the changes, which would permit boat trailers to travel in both lanes at the same time. The two men also questioned the potential bias of a member of the Planning Board due to their belief that she was an employee of the Town, and thus had a conflict of interest.

[¶6] After a total of four public hearings, the Planning Board approved the project on May 14, 2007. Nergaard and Stern appealed the Planning Board's decision to the Zoning Board. The Town's attorney, James Katsiaficas, advised the Zoning Board on issues related to the appeal.

[¶7] The Zoning Board held a hearing on the appeal on July 5, 2007, and the question of whether Nergaard and Stern had standing to bring the appeal was among the first issues addressed. Attorney Katsiaficas attended the hearing and directed the Zoning Board to the Town's Shoreland Zoning Ordinance, which explains that only "aggrieved parties" can bring appeals.

[¶8] Nergaard and Stern argued that although they were not abutters to the site, they were aggrieved parties because their personal property was threatened due to the increased risk of traffic accidents at the frequently traveled intersection. The Zoning Board rejected this theory and dismissed the appeals based on a

finding that Nergaard and Stern lacked standing. Specifically, the Zoning Board concluded that “[n]one of the [a]ppellants owns property abutting the Town’s property” and they both failed to prove any “potential injury different from that suffered by the general public traveling over Route 144.”

[¶9] On August 17, 2007, Nergaard and Stern appealed to the Superior Court pursuant to M.R. Civ. P. 80B.³ The Town filed its opposition, by and through Attorney Katsiaficas, on September 12, 2007. Then, on September 21, 2007, Nergaard and Stern filed a motion to disqualify Katsiaficas as counsel for the Town, alleging that Katsiaficas had a conflict of interest having served as legal counsel to the Zoning Board.

[¶10] The court issued its order on July 29, 2008. In denying the motion to disqualify Katsiaficas, the court reasoned that because Katsiaficas did not function as a judge or as a nonjudicial adjudicative officer in his role advising the Zoning Board, his representation of the Town in the Rule 80B action did not violate the

³ A third individual, E. Davis Allen, also filed an appeal with the Zoning Board but did not attend the hearing. Nergaard, who is an attorney, informed the Zoning Board at the start of the hearing that he would appear as Allen’s representative, not his attorney. Allen subsequently joined the Rule 80B appeal to the Superior Court. However, the court dismissed his appeal based on a finding that neither Allen nor a person with lawful representational authority appeared at the Zoning Board hearing to represent his interests. Allen has not appealed the Superior Court’s decision.

In its judgment on the Rule 80B appeal, the court incorrectly notes that Stern improperly signed the complaint and other submissions on behalf of Allen. Among their arguments on appeal, Nergaard and Stern contend that the court committed clear error in making this finding because it was Nergaard—not Stern—who signed for Allen. Although Nergaard and Stern are correct that it was Nergaard who signed for Allen and stated at the Zoning Board hearing that he also was there to represent Allen, the court’s misstatement in its judgment is harmless error because Allen has not appealed the decision by the Zoning Board and because we review the Zoning Board’s decision directly. *See* M.R. Civ. P. 61.

Maine Bar Rules. Additionally, the court concluded that the Zoning Board correctly determined that Nergaard and Stern lacked standing given that neither owns property abutting the site nor would sustain a particularized injury.

II. DISCUSSION

A. Standards of Review

[¶11] When the Superior Court acts as an intermediate court of appeals, we review directly the decision of the tribunal of original jurisdiction. *See Peregrine Developers, LLC v. Town of Orono*, 2004 ME 95, ¶ 9, 854 A.2d 216, 219. Here, the Zoning Board acted as the tribunal of original jurisdiction and conducted a de novo fact-finding process to decide the issue of standing. Therefore, we review directly the Zoning Board's decision to deny standing to Nergaard and Stern for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record. *Id.*; *see also Brackett v. Town of Rangeley*, 2003 ME 109, ¶ 15, 831 A.2d 422, 427.

[¶12] Because the question of whether a party has standing to bring an administrative appeal depends on the language of the governing ordinance, our analysis requires us to interpret and apply the relevant sections of the Shoreland Zoning Ordinance for the Town of Westport Island. *See Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 9, 953 A.2d 378, 381 (“Whether a party has standing depends on the wording of the specific statute involved.”). Our interpretation of the provisions

of this Ordinance is a question of law that we review de novo. *Stewart v. Town of Sedgwick*, 2002 ME 81, ¶ 6, 797 A.2d 27, 29. “We examine the plain meaning of the language of the ordinance, and we construe its terms reasonably in light of the purposes and objectives of the ordinance and its general structure.” *Id.*

B. Shoreland Zoning Ordinance

[¶13] The Town of Westport Island Shoreland Zoning Ordinance states that the Zoning Board has authority “[t]o hear and decide appeals where it is alleged that there is an error . . . by[] the Code Enforcement Officer or Planning Board.” Town of Westport Island Shoreland Zoning Ordinance § 16(G)(1)(a) (2004). The Ordinance further states that only an aggrieved party can take an administrative appeal of a Planning Board decision to the Zoning Board. *Id.* § 16(G)(3)(a)(1).

The Ordinance defines an aggrieved party as:

an owner of land whose property is directly or indirectly affected by the granting or denial of a permit or variance under this Ordinance; a person whose land abuts land for which a permit or variance has been granted; or any other person or group of persons who have suffered particularized injury as a result of granting or denial of such a permit or variance.

Id. § 17.

[¶14] Nergaard and Stern bore the burden of proving that they met the definition of aggrieved parties.⁴ See *Gensheimer v. Town of Phippsburg*, 2005

⁴ Nergaard and Stern’s primary argument is that they do not have to prove that they are aggrieved parties because the Ordinance gives the Zoning Board authority to hear any appeal when an error by the

ME 22, ¶ 18, 868 A.2d 161, 166. Because the two men conceded at the Zoning Board hearing that they did not claim to be abutters and they do not raise this particular issue on appeal, we do not address it. *See Brown Dev. Corp. v. Hemond*, 2008 ME 146, ¶ 3 n.2, 956 A.2d 104, 106 (declining to reach conclusions on issues not raised on appeal). Instead, Nergaard and Stern argue that they have standing to appeal to the Zoning Board because (1) the Planning Board granted them party status; and (2) each has demonstrated a particularized injury as a resident of the Island who frequently drives by the boat-launching site to enter and exit the Island. We address these two contentions separately below, and ultimately conclude that neither one provides a basis for vacating the decision of the Zoning Board.

C. Party Status

[¶15] The record indicates that the Planning Board granted party status to Nergaard and Stern because they live on the Island and frequently travel by the site, and because they attended the Planning Board hearings and expressed their opposition to the proposed project. However, the Planning Board's decision to grant party status to Nergaard and Stern at the proceedings before it does not demonstrate that Nergaard and Stern are "aggrieved parties" entitling them to

Planning Board or code enforcement officer is alleged. In support of this argument, they cite the first paragraph of the appeals provision in the Ordinance, which states that the Zoning Board has authority "to hear and decide appeals where it is alleged that there is an error" Town of Westport Island Shoreland Zoning Ordinance § 16(G)(1)(a) (2004). Because subsequent language limits who can take an appeal and defines "aggrieved party," *id.* §§ 16(G)(3)(a)(1), 17, this argument has no merit.

appeal to the Zoning Board within the meaning of section 16(G)(3) of the Zoning Ordinance.

[¶16] To establish standing, one must demonstrate not only that he or she had party status at the administrative proceedings, but, *in addition*, that he or she has suffered a particularized injury or harm. *Norris Family Assocs., LLC v. Town of Phippsburg*, 2005 ME 102, ¶ 11, 879 A.2d 1007, 1012. Being allowed to make a case to the Planning Board does not relieve one of showing the particularized injury necessary to require the Zoning Board to accept an appeal. Here, Nergaard and Stern have no property affected directly or indirectly by the boat ramp permit, *see Lakes Environmental Association v. Town of Naples*, 486 A.2d 91, 93 (Me. 1984), and no economic interest, *see Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1381 (Me. 1996), that could give them standing. They rely only on their status as members of the driving public.

D. Particularized Injury

[¶17] Nergaard and Stern essentially argue that they have a particularized injury merely because they live on the Island and drive by the site frequently, risking death, injury, and damage to their property. They argue that although any resident of the Town could claim these same injuries, the injuries are particularized because they affect each resident individually and they are distinct from any generalized injury to the public. Additionally, Nergaard and Stern argue that they

demonstrate a particularized injury because they are, in part, challenging the validity of the process employed by the Zoning Board by questioning the bias of one of its members. The Town argues that any potential injury suffered by Nergaard and Stern cannot be labeled as particularized given that more than 1600 people drive by the site every day.

[¶18] A particularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights. *Anderson v. Swanson*, 534 A.2d 1286, 1288 (Me. 1987); *see also Halfway House, Inc.*, 670 A.2d at 1381 (holding that potential economic injury that results from government action is sufficient to confer standing). A person suffers a particularized injury only when that person suffers injury or harm that is "in fact distinct from the harm experienced by the public at large." *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984). For example, we have held that in the context of disputes involving an abutting landowner, the threshold for demonstrating a particularized injury is minimal. *Roop v. City of Belfast*, 2007 ME 32, ¶ 8, 915 A.2d 966, 968. Additionally, standing has been liberally granted to people who own property in the same neighborhood as the property that is subject to a permit or variance. *See Singal v. City of Bangor*, 440 A.2d 1048, 1050 (Me. 1982).

[¶19] Here, neither Nergaard nor Stern asserts that his real property abuts, is in the same neighborhood, or is even in the same vicinity as the boat ramp

property. Nergaard and Stern therefore make no claim that their properties are affected in any way by the Planning Board's decision to grant the permit. They assert only the harm that they will suffer as members of the driving public. They allege that they travel on Route 144 daily, and that the boat ramp project will cause dangerous traffic conditions on Route 144 at its intersection with Ferry Road.

[¶20] Nergaard and Stern are not unique in their use of Route 144; 1638 vehicles pass by the boat ramp location each day during the summer months. There is no difference between the potential harm asserted by Nergaard and Stern and the potential harm to these 1638 drivers and to their passengers—members of the public—who use the same road on a daily basis. Nor is that harm “distinct” from the potential harm to every person who lives on or visits Westport Island.

[¶21] Contrary to Nergaard's and Stern's assertions, our decisions in *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978); *In the Matter of International Paper Co., Androscoggin Mill Expansion*, 363 A.2d 235 (Me. 1976); and *Roop*, 2007 ME 32, 915 A.2d 966, do not support a decision to grant standing to them. In *Fitzgerald*, five individuals demonstrated that the agency's actions would adversely and directly affect their personal rights to the use and enjoyment of Baxter State Park. 385 A.2d at 196-97. Unlike Nergaard and Stern, these plaintiffs were not merely members of the general public. They were “actual users of the Park,” and thus suffered a particularized injury as a result of the

agency's action in clearing timber from the Park, an injury that other Maine citizens could not claim. *Id.* In *International Paper Co.*, environmental and public interest groups who intervened at the administrative level appealed under a site location development statute with less stringent standing language than the Westport Island Zoning Ordinance. 363 A.2d at 238. Moreover, *International Paper Co.* involved a permit issued under a statute enacted to protect certain areas from environmental hazards, and the plaintiffs were located in the areas that the statute was designed to protect. *Id.* at 238-39. Finally, although our decision in *Roop* broadens standing requirements by holding that a person who challenges the validity of the *process* used by the agency has demonstrated a particularized injury, based on the potential infringement of that person's right to participate in the government process, the holding is based on the plaintiff's status "as citizens of Belfast owning land that abuts the new district" that was created by the agency's actions. 2007 ME 32, ¶ 11, 915 A.2d at 969. Nergaard and Stern, again, do not own property that is anywhere near the boat ramp property.⁵

[¶22] Given the particular facts and circumstances of this case, neither Nergaard nor Stern has demonstrated a particularized injury. Therefore, the

⁵ Nergaard and Stern also argued that they were wrongfully denied standing because the Zoning Board improperly relied on a letter from a recused member of the Planning Board, expressing his opinion that Nergaard and Stern lacked standing to bring the appeal. Again, because neither Nergaard nor Stern owns property abutting or in the same vicinity as the boat ramp, this unfounded allegation by Nergaard and Stern that the Zoning Board improperly considered the opinion of an excused Planning Board member does not rise to the level of a particularized injury.

Zoning Board did not err as a matter of law in deciding that neither Nergaard nor Stern had standing to appeal.

E. Motion to Disqualify

[¶23] We next consider Nergaard's and Stern's argument that the court erred in denying the motion to disqualify the Town's attorney from representing the Town in the Rule 80B proceedings.

[¶24] Our review of orders disqualifying or refusing to disqualify counsel is highly deferential. *See Estate of Markheim v. Markheim*, 2008 ME 138, ¶ 27, 957 A.2d 56, 62; *see also Butler v. Romanova*, 2008 ME 99, ¶ 11, 953 A.2d 748, 750. We will not disturb a court's decision on a motion to disqualify if the record reveals a sound basis for the decision. *Butler*, 2008 ME 99, ¶ 11, 953 A.2d at 750-51.

[¶25] Nergaard and Stern argue that Attorney Katsiaficas should have been barred from representing the Town in the Rule 80B action before the Superior Court because he had served as an advocate and legal advisor to the Zoning Board on the same matter. The Maine Bar Rules do prohibit attorneys from serving certain dual roles. Specifically, Rule 3.4 states:

A lawyer shall not commence representation in a matter in which the lawyer participated personally and substantially as a judge or judicial law clerk. A lawyer shall not commence representation in a matter in which the lawyer participated personally and substantially as a nonjudicial adjudicative officer, arbitrator . . . or law clerk to such a person, unless all parties to the proceeding give informed consent.

M. Bar R. 3.4(g)(2)(i).

[¶26] In this situation, the Town attorney's role in advising the Zoning Board and representing the Town at the Rule 80B proceeding did not conflict. The Zoning Board is a branch of the Town; Attorney Katsiaficas was simply doing his job as the Town's legal representative when he advised the Zoning Board at its hearing. He did not act in a judicial or quasi-judicial capacity, and Rule 3.4 is not implicated here. Therefore, the motion to disqualify was properly denied.

The entry is:

Decision of the Westport Island Zoning Board of Appeals is affirmed. Judgment on motion to disqualify affirmed.

ALEXANDER, J., concurring.

[¶27] I concur in and join the Court's opinion. It accurately states the law addressing the prerequisites to attain aggrieved party status to give standing to appeal from municipal administrative decisions. I write separately only to observe that this opinion necessarily narrows the criteria for person aggrieved status that are articulated in *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978).

[¶28] The Court's opinion at paragraph 20 states that *Fitzgerald* can be distinguished from the instant case. Such a distinction is not possible. *Fitzgerald* involved a claim by residents of the State who asserted that they were users of Baxter State Park and, based on that user status, were persons aggrieved who suffered a particularized injury as a result of the Baxter State Park Authority's timber clearing practices.

[¶29] The Court's opinion suggests that *Fitzgerald* is distinguishable because the *Fitzgerald* plaintiffs claimed an adverse affect to their "personal rights to the use and enjoyment of Baxter State Park." The Court observes that "unlike Nergaard and Stern, these [*Fitzgerald*] plaintiffs were not merely members of the general public," they were "actual users of the Park." However, while characterizing their capacity to use the park as "personal rights," in fact, the *Fitzgerald* plaintiffs demonstrated no greater right to use Baxter State Park than any other member of the public who might choose to use the park. The "rights" at issue were the public "right" to use a public park—or a public road.

[¶30] It is reasonable to expect that in the course of a year, many thousands of members of the public are "actual users" of Baxter State Park. That population is undoubtedly far greater than the population of Westport Island, where the plaintiffs in this case reside. In that sense, the residents of Westport Island who do and must use the road by the boat ramp to get to and from their homes are a much

more defined and smaller population than the users of Baxter State Park. They have a right to use that road to the same or greater extent than the public has a right to use Baxter State Park. If *Fitzgerald* remains good law, the plaintiffs here would have standing to challenge the Town's action that, they allege, could affect traffic on the road that provides access to their homes.

[¶31] Today's opinion denies the plaintiffs "drive by standing" as persons aggrieved. It holds, in essence, that one's status as a user of a public facility, even a frequent user, does not create a status sufficiently distinct from any member of the public to become a "person aggrieved" with standing to challenge in court an action that, allegedly, may affect one's use and enjoyment of the public facility. This holding necessarily restricts our holding in *Fitzgerald* which found "person aggrieved" status based only on a person's claim to be a user or frequent user of a public facility.

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May 11, 2016

Richard Knox
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Brunswick ME 04011

To whom it may concern:

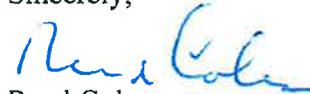
I am writing to attest to the service provided by Richard Knox and Scott Bodwell as community stewards for the Harpswell Heritage Land Trust.

Mr. Knox has been a steward for our Crow Island Preserve in Middle Bay since 2004 and each year since has made more than a dozen monitoring visits to the island in fulfillment of his stewardship duties. He has installed signage monitored the island's campsite, and communicated with neighbors and visitors to the island.

Mr. Bodwell has been a steward for our White Island Preserve also in Middle Bay since 2014 and each year since has made several monitoring visits to the island in fulfillment of his stewardship duties. Mr. Bodwell also provided photo documentation of the mudflats near the island that helped us win a substantial federal grant we used to acquire the preserve in 2013.

The Harpswell Heritage Land Trust relies on community volunteers like Mr. Bodwell and Mr. Knox to carry out the stewardship task that keep its preserves open for appropriate public use and maintaining the enjoyment of visitors while assuring that the natural resources are well cared for. Mr. Bodwell and Mr. Knox have expressed a desire to continue to offer volunteer stewardship work for these two important preserves in Middle Bay, and the Harpswell Heritage Land Trust appreciates their commitment.

Sincerely,


Reed Coles
Executive Director

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February 22, 2016

Via Electronic Mail

John S. Eldridge, Town Manager
Town of Brunswick
85 Union Street
Brunswick, ME 04011-2418

**Re: Analysis of Municipal Permitting Requirements for Miller Point Revetment
and Request for Stop Work Order**

Dear John,

I am writing on behalf of Richard Knox of 81 Simpsons Point Road, as well as other concerned Brunswick residents, regarding the 500-foot rip rap revetment being constructed on Miller Point by Robert and Nancy King (the "Revetment"). As we have discussed, my reading of the Town of Brunswick Zoning Ordinance ("Ordinance" or "BZO") indicates that construction of the Revetment requires municipal approval and that such approval has not been obtained. In an effort to assist the Town in its analysis, this letter sets forth the legal basis for that conclusion. Mr. Knox's goal is to work constructively with the Town and only wants to ensure that the Town's land use regulations are applied fairly and appropriately, whatever the outcome.

I understand that Revetment construction has commenced and is currently underway without the necessary Town review and approval. This construction involves the use of heavy equipment to remove a large swath of trees and native vegetation and to imbed over 1,000 tons of rip rap in some 500 feet of previously undeveloped shoreline. This industrial-scale work is taking place exclusively within the Town's Natural Resource Protection Zone ("NRPZ") and Coastal Protection Zone ("CPZ"), which are the areas of greatest environmental sensitivity in Brunswick. It does not make sense, and is contrary to the Ordinance, for a construction project of this magnitude and intensity to go forward in the Town's NRPZ and CPZ without any substantive municipal oversight.

Accordingly, we request that the Town issue an immediate stop work order until the necessary review and approval of the Revetment has been completed. Because of the major environmental impacts that are occurring every day that construction continues, prompt action by the Town is of the essence.

I. The Revetment Requires Either a Special Exception Permit from the Brunswick Zoning Board of Appeals or an Omitted Use Special Permit from the Brunswick Planning Board.

The Revetment is located within the Town's Coastal Protection Zone 1 ("CP-1"). Within the CP-1 table of uses, the only listed use under which the Revetment could plausibly be classified is "Marine Activities." BZO Table 209.1. Marine Activities in the CP-1 require a Special Exception permit from the Brunswick Zoning Board of Appeals ("ZBA"). *Id.*; BZO § 703.3 (special exception review criteria). In order to grant a Special Exception permit, the ZBA must determine that the proposed project satisfies a number of criteria, including the Development Review criteria set forth in section 411 of the Ordinance. BZO § 703.3.

If the Town determines that the Revetment does not fit within the definition of a Marine Activity, then it necessarily constitutes a use that is not listed within CP-1. Any use that is not listed in the relevant table of uses is considered an "Omitted Use." BZO Chapter 2(1)(1). In order for an Omitted Use to be allowed, it must obtain a Special Permit from the Brunswick Planning Board ("Planning Board"). BZO Chapter 2(1)(2) and § 701 (Special Permit procedures and standards). In order to grant a Special Permit, the Planning Board must find that the proposed project satisfies a number of criteria, including requirements that it be harmonious and compatible in scale with its surroundings. BZO § 701.2.

To the extent that it is argued that the Revetment should be allowed as an accessory use, that argument is without merit. First, "accessory use" is not a listed use within the CPZ. For the reasons discussed above, classification as an accessory use cannot be the basis of approving the Revetment without first obtaining a Special Permit from the Planning Board.

Second, an accessory use cannot exist without a principal use to which it is related and subordinate. *See, e.g., Kelly v. Zoning Hearing Bd. of Mars Borough*, 554 A.2d 1026 (Pa. Commw. Ct. 1989) (affirming denial of building permit for accessory use (garage) where applicant's property did not contain a related principal use (residence) and stating that "in order to establish a right to an accessory use, an applicant must prove that the use sought is secondary to the principal use."). In this case, the only principal structure on the King's property is a farmhouse that is located off of Mere Point Road, on the other side of Miller Creek from Miller Point and the Revetment. The Revetment will not provide any protection to the Farmhouse and accordingly the two structures are unrelated. The Kings apparently plan to build dwellings that would be protected by the Revetment at some point in the future, but, based on our conversation, I understand that no concrete plans for such dwellings have been either submitted or approved. The Revetment cannot be bootstrapped as "accessory" to an inchoate, speculative use. At this point, the Revetment is not accessory, i.e. related and subordinate to, any principal use or structure on the King's property.

Third, an accessory use can "occupy no more than 40% of the floor area of all structures on a lot." BZO § 111 (definition of accessory use). The King's Revetment will occupy approximately 7,500 square feet of surface area. In order for it to qualify as an accessory use under the Ordinance, the principal structures on the lot would need to be in excess of 18,750 square feet. My understanding is that structures of that size do not currently exist on the King property.

Accordingly, absent either a Special Exception permit from the ZBA or an Omitted Use Special Permit from the Planning Board, construction of the Revetment is proceeding in violation of the Ordinance.

II. The Revetment Is Prohibited Unless and Until it Obtains Development Review Approval from the Planning Board.

In addition to the approvals discussed in Section I, which determine whether the Revetment is a use that may be permitted in the CP-1 Zone, the Revetment requires Major Development Review by the Planning Board.

Major Development Review by the Planning Board is required for "any development activity, or combination of activities that, within a five year period, result in the construction of . . . 5,000 square feet or more of new impervious surface." BZO § 402.2(B)(1)(b). As stated above, the Revetment will consist of approximately 7,500 square feet of impervious rip rap,¹ well above the threshold for Major Review. Furthermore, the Ordinance specifically states that any development requiring a Special Permit (e.g., an Omitted Use) that will create over 5,000 square feet of impervious surface requires Major Review. BZO § 402.2(G). Even if the Revetment did not trigger Major Review based on square footage, it would require Minor Review by the Staff Review Committee because it is a structure located in the NRPZ "requiring direct access to the water as an operational necessity." BZO § 402.1(F); 211.2.A.2. Finally, the exemption from development review granted to accessory uses or structures does not apply to the Revetment because, as discussed above, the Revetment is not subordinate or related to any existing principal use or structure and is not less than 40% the size of any existing structures.

Accordingly, absent Major Development Review and approval by the Planning Board, construction of the Revetment is proceeding in violation of the Ordinance.

III. The Revetment Has Obtained Neither NRPZ Zoning Approval Nor Flood Hazard Development Approval from the Town.

The Revetment triggers numerous review standards within the Town's NRPZ, which extends 250 feet inland from the high tide line. BZO § 211.1(A).² Specifically, no "beach construction," an undefined term, may commence within the NRPZ without "a permit from the Department of Environmental Protection and site plan approval from the Planning Board." BZO § 211.2.C (emphasis added). "Structures and uses extending over or below the normal high-water line of a water body or within a wetland," such as the Revetment, are subject to special NRPZ standards. BZO § 211.2.G. All uses within the NRPZ must meet standards governing clearing and vegetation removal (BZO § 211.2.D), erosion and sedimentation control (BZO § 211.2.E), soil suitability (BZO § 211.2.P) and stormwater runoff (BZO § 211.2.S). My understanding is

¹ The Ordinance defines an impervious surface as "Any material covering the ground through which water does not readily penetrate, including but not limited to roofed structures, decks, concrete, stone, tar, asphalt, pavement, gravel, crushed stone and shale." BZO § 111.

² The area delineated in the Ordinance as the NRPZ is the same area subject to the mandatory state shoreland zoning regime, which all municipalities are required to adopt and administer. Sec 38 M.R.S.A. § 435 (definition of mandatory shoreland zone); § 438-A (requirement that municipalities adopt shoreland zone land use controls).

February 22, 2016

Page 4

that the Town has not reviewed the Revetment for compliance with any of these standards, which are imposed by the state and must be administered by the Town specifically because of the environmentally sensitive nature of the NRPZ.

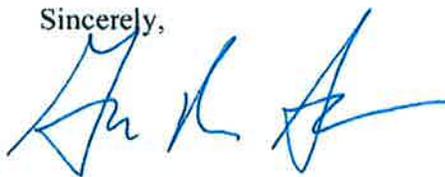
Finally, the Revetment requires a Town-issued floodplain permit. All development within special flood hazard areas requires a Flood Hazard Development Permit from the Town's code enforcement officer. BZO § 211.3.A. The definition of the term "development" captures even extremely minor site activity and certainly captures a project as large as the Revetment. BZO § 111 (defining development as "any change caused by individuals or entities to improved or unimproved real estate, including but not limited to . . . filling, grading . . . excavation . . . and the storage, deposition or extraction of materials"). Special flood hazard areas subject to permitting requirements include Zones A, A1-A30 and V1-V30, as identified by FEMA on its January 3, 1986 Flood Insurance Study and Flood Insurance Rate Map. BZO § 211.3. According to the January 3, 1986 FEMA Flood Insurance Rate Map, the Revetment is located in Zone A2. As such, the Revetment is located in a special flood hazard area and requires a Flood Hazard Development Permit from the CEO. This permit cannot be issued until all other required federal, state and local permits have been obtained. BZO § 211.3.A.

Accordingly, absent a Flood Hazard Development Permit and approval under the NRPZ requirements, construction of the Revetment is proceeding in violation of the Ordinance.

As stated above, I understand that Revetment construction is currently underway at full speed. Every day this project moves further toward completion, the environmental and other impacts become more irreparable. As such, a prompt determination by the town, either way, is critical. I hope this letter will be helpful by providing the legal basis for our interpretation of the Ordinance's permitting requirements. Mr. Knox's sole objective is to assure the appropriate application of the Ordinance, and he sincerely hopes that this matter can be resolved constructively and amicably with the Town, the Kings and the other interested parties.

I very much appreciate your time and attention to this matter.

Sincerely,



Gordon R. Smith

cc: Richard Knox
John F. Loyd, Jr., Esq.
Stephen F.F. Langsdorf, Esq.
Marybeth Richardson, Maine DEP
Michael Morse, Maine DEP

Stephen E.F. Langsdorf
slangsdorf@preti.com

MEMORANDUM

TO: John Eldridge, Town Manager

FROM: Stephen E.F. Langsdorf, Town Attorney 

DATE: March 2, 2016

RE: **Miller Point Revetment Project**

QUESTION

You have asked me to review the information the Town of Brunswick ("Town") has received regarding the ongoing revetment project at Miller Point to determine whether any necessary Town permits were obtained, whether a stop work order should be issued, and to recommend the Town's course of action at this time.

BACKGROUND

The revetment project is a shore stabilization project at property owned by Robert and Nancy King at Miller Point on Middle Bay. The project is currently underway and has been permitted by the Maine Department of Environmental Protection ("DEP") and the Army Corps of Engineers ("ACE"). The project involves stabilizing 500 linear feet of shoreline along an eroding bluff by using a combination of hard and soft engineering, including riprap, native soils and vegetative plantings. Approximately 2,534 square feet of area below the highest annual tideline will be altered. Riprap will extend in varying heights from 12 feet to 18 feet up the embankment. It involves the placement of riprap after the removal of approximately 48,000 to 60,000 cubic feet of material. The riprap will be buried below the eventual ground level by approximately 1.5 feet of soil and covered by grasses and other vegetation which will be planted.

The Town has been actively involved in monitoring this project since May, 2014. At a meeting occurring at the Town office on March 14, 2015 attended by Brunswick staff, the Kings' consultant presented the revetment project in detail. The Town staff took the position that the Town did not have a specific permitting role in the revetment project, but would require a re-vegetation plan to be approved by staff.

Ten similar revetment projects of varying sizes have occurred within the Town since 1998. The staff has consistently taken the position that there is no ordinance requirement of a permit or planning board approval, although there are regulatory standards which have to be met involving the removal of trees and re-vegetation.

The Kings submitted an application to the DEP for the revetment project on March 12, 2015. All abutters to the property received notice of filing of the application. The Town participated actively in meetings involving the project both before the DEP and the ACE. Meetings involving the Kings, their representatives, and Town staff occurred on March 18, 2015 and April 9, 2015. On June 26, 2015 the DEP issued a permit for the revetment project. The DEP sought but did not receive comments from a number of entities, including the Town.

The staff also participated in meetings with the ACE and played a role in requiring amendments to the project which staff thought were environmentally preferable. On February 1, 2016 the ACE issued an amended permit for the revetment (originally issued April 28, 2015), which included a number of special conditions. In particular, tree removal was required to occur between October 16, 2015 and April 19, 2016 when bats affected by the project would be expected to be hibernating in caves.

On February 18, 2016, Gordon Smith, Esq. of Verrill Dana, who was retained by Richard Knox, a resident of Brunswick, spoke to the Town Manager. Mr. Smith advocated for the project to be stopped temporarily while a determination could be made as to whether Town permits should have been issued. He followed up with a detailed letter on February 22, 2016 specifically addressing the portions of the Town's ordinance that he asserted should have required permitting and further review. Those parts of the ordinance were:

1. The revetment required either a special exception permit or an omitted use special permit because the revetment is a structure located within the Coastal Protection Zone ("CP-1"). Structures are prohibited within 125 feet of the high water mark, Brunswick Zoning Ordinance ("BZO") section 211.2.A.1, unless they meet the definition of a structure requiring water access. "No new principal or accessory structures except structures which require direct access to the water as an operational necessity (including, but not limited to piers, docks, retaining walls, public waterfront trails, but excluding recreational boat storage buildings)"(emphasis added), shall be located within 125 feet of the normal high water line of a coastal wetland. Alternatively, Mr. Smith argued that if the revetment did not meet the definition of marine activity it should be considered an Omitted Use requiring a Special Permit from the Planning Board. BZO ch. 2(I)(2) and section 701.

2. The revetment could not be considered an accessory use because it is not listed as a use within the zone and is not subordinate or related to a primary use. The principal structure on the property is a farm house on the other side of Miller Creek. The revetment does not provide protection to the farm house.

3. The revetment required either major or minor development review, BZO section 402.2(B)(1)(b), because it involved the construction of 5,000 square feet or more of new impervious surface. If it was determined that the project was less than 5,000 square feet of impervious surface, it required minor review by the staff review committee as a structure located in RPZ requiring direct access to the water as an operational necessity. BZO sections 402.1(F), 211.2.A.2.

4. The revetment required a Floodplain Development Permit. Development within the flood hazard area requires a flood hazard development permit from the Codes Enforcement

Officer. BZO section 211.3.A. The definition of development under the ordinance includes "any change caused by individuals or entities to improved or unimproved real estate, including but not limited to . . . filling, grading, . . . excavation, and the storage, deposition or extraction of minerals."

The attorneys for the Kings were given the opportunity to respond to Mr. Smith's letter. The Town Attorney requested that the Kings voluntarily suspend the project while the legal issues were resolved. The Kings declined to suspend work. John Loyd, Esq. of Eaton Peabody, provided a letter to the Town dated February 24, 2016, which set forth in detail the Town's involvement in the DEP and ACE permit applications and process. Mr. Loyd also argued as follows:

1. The revetment project is not a use. Use refers to the purpose for which the land or buildings or structures are occupied or maintained. The project does not change the use of the property in any way. It will be an embankment before and after the work is completed. He argued that the revetment project is an ancillary activity that serves a use, but does not itself constitute a use. This would be similar to clearing of brush, mowing lawn, etc.

2. The revetment project does not involve impervious surface area, so it does not trigger minor or major development review. The definition in the BZO of impervious surface is "any material covering the ground through which water does not readily penetrate, including but not limited to roofed structures, decks, concrete, stone, tar, asphalt, pavement, gravel, crushed stone and shale." BZO section 111. Since the project involves buried riprap which is covered by soil which has or will have surface vegetation, it is not an impervious area.

3. The project is not beach construction and does not require a flood hazard development permit. Regardless of whether the revetment project is within the floodplain, Mr. Loyd argued that it did not require a permit as that only applied to certain structures.

4. The NRPZ imposes vegetative clearing standards that do not require a permit, but are subject to enforcement by the Town.

On February 25, 2016, a meeting was held at the Town Hall to allow the attorneys an opportunity to further elaborate on their letters. In attendance were Gordon Smith, representing Richard Knox, John Loyd and Jon Pottle, representing the Kings, Joseph LeBlanc, consultant for the Kings, John Eldridge, Town Manager, Derek Scrapchansky, Assistant Town Manager, Jeff Hutchinson, Codes Enforcement Officer, Anna Breinich, Planning and Development Director, Jared Woolston, Town Planner, and Steve Walker, District 2 Councilor. The meeting was facilitated by Stephen E.F. Langsdorf, Town Attorney.

The parties spent approximately two hours discussing the legal issues. Issues were discussed that had not been included in the attorneys' letters. In particular a question arose as to whether the project met the definition of a structure. If it is a structure, it would only be allowed if it also met the definition of a structure requiring direct access to water as an operational necessity. BZO section 211.2.A.1 (including but not limited to . . . retaining walls). Town staff and Kings' attorneys took the position that the revetment is not a structure and has never been considered a structure by the Town. During the meeting the Codes Enforcement Officer stated

that it was his professional opinion that the project was not within the floodplain, therefore it did not require a permit.

Mr. Smith raised an additional argument that a mineral extraction permit was required under BZO section 211.2.F because more than 100 cubic yards of soil will be removed from the site. Actually, mineral extraction is prohibited within 125 feet of the high water mark. BZO section 211.2.F.2. He also identified that while the ordinance implied that accessory uses were allowed within the zone, there was no specific provision in the ordinance which allowed accessory uses such as the revetment project.

Mr. Loyd made arguments in response to the arguments made by Mr. Smith. Principally, he argued that the revetment is an activity and not a structure or a use and that the staff handled the process correctly. Activities do not generally require permits from the Town.

Town staff and the Town Attorney met after the meeting to further discuss the project and the Town Attorney was asked to prepare a memorandum with his recommendations.

Later in the day on February 25, 2016, the Town received information from Mr. Smith, after consultation with Peter Slovinsky of the Maine Geological Survey. Detailed information was provided showing that a portion of the project was located within the floodplain zone. On February 26, 2016, the Town determined that a floodplain permit was required and informed the attorney for the Kings that they needed to apply for that. The floodplain permit is reviewed and issued by the Codes Enforcement Officer. The Kings applied for the floodplain permit on February 29, 2016.

Also on February 26, 2016 it was determined that there was a significant omission to the BZO. A specific table of uses (see Attachment A) was not included in the BZO when approved by the State in August 1994. By law the Town's Shoreland Zoning Ordinance must be consistent with minimum State law requirements. The table makes it clear that, to meet minimum state requirements, a Planning Board permit is generally required when more than 10 cubic yards of soil or other materials are being removed from a property. If this table had been included in the BZO, it would have been clear that this matter would have been reviewed by the Planning Board.

The land use table was not included within the BZO even though the Ordinance was specifically approved by the DEP at the time of its enactment in 1994. The missing use table was never identified as a deficiency and has not been included in the BZO to date. A review of the DEP files shows that the Town properly submitted the Ordinance for review in 1994, 1998, 1999, 2002 and 2009 and the State approved it each time. Although the DEP provided detailed comments on the language of the Town's Ordinance and how the ordinance was administered, those comments never identified the so-called Table of Uses as missing from the BZO.

On February 29, 2016, Michael Morse of the DEP confirmed that the State had approved the Town's Ordinance in 1994 and the other dates stated above and that the Ordinance did not include the land use table from the DEP's Chapter 1000 regulations or an equivalent table. He also confirmed that the provisions in the table, or substantially equivalent provisions, should have been included and must be included when the Ordinance is amended. In particular, the Planning Board should be reviewing all projects where 10 cubic yards or more (or a slightly

higher threshold if in the ballpark) are to be removed or added to a property in the shoreland zone.

LEGAL ANALYSIS

Since it is clear that the BZO does not specifically identify this type of project as requiring a permit, and Town staff took the position that no permit was required, it is necessary to review the provisions implicated to determine whether it would be appropriate to insist that the project undergo additional local review at this time. None of the sections that have been identified as potentially requiring a permit are clear on their faces and strong arguments have been made both ways as to whether or not a permit was required. Given that the Town has historically not required permits for these types of projects and has relied on the DEP and the ACE, it would be inappropriate to stop this particular project and to require additional permitting activity. Rather, the Town must amend its Ordinance and clarify which provisions would apply in the future for projects of this nature and specifically adopt State minimum requirements. A court would give significant deference to the Town's historic interpretation of its own ordinance, especially in light of the fact that the Maine DEP went through a formal review and approval process with regard to the BZO several times in the past.

1. In particular there is a significant question as to whether or not the revetment is a structure. A structure is "an object built for the support, shelter or enclosure of persons, animals, goods or property of any kind, together with any other object constructed or erected with a fixed location on or in the ground. This definition does not apply to customary lawn accessories such as fences, mailboxes, benches and other such items as determined by the Codes Enforcement Officer." BZO section 111. There is no obvious answer as to whether or not this is a structure. On one hand it can be argued that the revetment is an object built for the support of property, with a fixed location on or in the ground. Its specific purpose is to support the bluffs adjacent to the water. On the other hand it can be argued that this is a repair or maintenance project that will become part of the property when completed. It will not be a structure at all, but rather will be a functional part of the property itself. The final result will be a vegetated bank, not a structure.

2. There is also a significant question as to whether or not this is a use. It is not a use in the typical sense where some ongoing activity is going to be occurring on the property. However, "use" is not defined under the Brunswick Zoning Ordinance. Under State law it could be considered a use. For example, functionally water-dependent uses are defined as those uses that require for their primary purpose, location on submerged lands or that require direct access to, or location in, coastal or inland waters and that cannot be located away from these waters. These uses include but are not limited to ". . . shoreline structures necessary for erosion control purposes . . .". 38 M.R.S. § 436-A(6). This would still require a determination that the revetment is a structure, however.

3. The project does not clearly involve impervious surface which would trigger major or minor development review. Impervious surface is defined as any "material covering the ground which does not readily penetrate, including but not limited to roofed structures, decks, concrete, stone, tar, asphalt, pavement, gravel, crushed stone and shale". BZO section 111. While some of the material placed is stone, the riprap does not cover the ground. It is installed 1.5 feet below ground level and is covered by soil, vegetation and shrubbery which are

pervious. Further, the irregular spacing of the riprap is designed to allow water to filter through, rather than run off.

4. The project does not appear to meet the definition of a mineral extraction activity. The definition of mineral extraction includes the requirement that it be extracted for a use elsewhere, which is an intent requirement, and prohibits mineral extraction within 125 feet of the high water mark. The information provided was that the materials were being dumped elsewhere, but the purpose of the extraction was not for use elsewhere. It is now clear, however, that if the Table of Uses had been in place, a Planning Board Permit would have been required because more than 10 yards of material were being removed regardless of what the purpose was, pursuant to State law. However, that language is not currently contained within the Ordinance.

5. Although the project is not beach construction, it requires a floodplain development permit. The permit application pending before the Codes Enforcement Officer.

The most important question at this point is what a Court would do if the Town decided now to reverse course by issuing a Stop Work Order and requiring Planning Board and staff approval. Necessarily that process would take a period of months to complete and would certainly put in jeopardy the ACE permit which requires the tree removal to be completed prior to April 16, 2016.

To make its determination, the Court would follow the standards established by the Law Court in *City of Auburn v. Desgrosseilliers*, 578 A.2d 712 (Me. 1990). In that case, the Court held that a municipality will be estopped from enforcing an unambiguous part of its zoning ordinance if the property owner reasonably relied to his detriment on conduct of the Codes Enforcement/Planning office. The Court would review the totality of the circumstances to decide whether principals of fairness and justice would prevent enforcement of the ordinance. In the *Desgrosseilliers* case, the owner invested money and opened a business after the issuance of permits by the City. When the City later went to Court and argued that the use should not be allowed to continue under the ordinance, the Court ruled in favor of the property owners.

Many of the same considerations apply to the ongoing situation. The Kings provided their plans for the concept to the Town almost a year ago. The staff attended meetings, offered suggestions to improve the project and were kept informed of all actions at the DEP and the ACE. Staff affirmatively represented that all that was required locally was a re-vegetation plan (which is not a permit itself) and that no permits were required. The Kings relied on this by obtaining their DEP and ACE permits and expending resources on consultants and contractors. The Kings should not be punished for relying on an ordinance that (although in error) was approved by both the Town and the State. Delay would endanger the ACE permit required to complete certain work by April 16 with no assurance it would be re-issued for work which then would not be able to commence until at least the fall.

My opinion is that the balance of the equities and fairness and justice lean heavily in favor of the owners who relied completely on the Town. This is especially true where there is no clear requirement for a permit and it is not likely the project would "seriously threaten the safety, welfare, prosperity or character of the land use." *Desgrosseilliers*, 578 A.2d at 718.

Based on all of the foregoing and the procedural and substantive facts of this case, my recommendations are as follows:

- The instant project be allowed to proceed upon the developer receiving (if appropriate) a floodplain permit issued by the Codes Enforcement Officer;
- The Town move forward immediately with changes to the Ordinance, which include the State minimum requirements (including the Model Shoreland Zoning Ordinance's Table of Uses) and clarify the precise nature and forum for review (i.e., Codes Enforcement Officer or Planning Board) for all projects proposed after the revised BZO becomes effective.
- The Town initiate a moratorium regarding Codes Enforcement Officer and Planning Board consideration of all projects that may be impacted by inclusion of the Model Shoreland Zoning Ordinance's Table of Uses in the Brunswick Zoning Ordinance until such time as the Brunswick Zoning Ordinance is amended to include such Table of Uses.

SEFL:ryp

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COPY

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May 19, 2016

VIA EMAIL ONLY

The Town of Brunswick Zoning Board of Appeals
c/o Stephen E.F. Langsdorf, Esq.
Preti Flaherty
45 Memorial Circle
Augusta, Maine 04330

**RE: Robert and Nancy King: Tax Map 31, Lot 29
Appeal Filed by Scott Bodwell, Henry Heyburn and Richard Knox**

Dear Board Members:

My partner, John Cunningham, and I represent Robert and Nancy King in the above-referenced matter. Pursuant to Attorney Langsdorf's email dated May 16, 2016, I write to provide the Kings' position on the issue to be addressed at your May 26, 2016 hearing: Do Appellants Scott Bodwell, Richard Knox, and Henry Heyburn (the "Appellants") have standing, using their own words, to "appeal the Town of Brunswick's decision to issue a Flood Hazard Development Permit for the shoreline stabilization project being conducted by Robert and Nancy King at Miller Point in Brunswick"? Per Attorney Langsdorf's specific direction in his May 16, 2016 email, we are emailing this letter directly to each of the three Appellants at the same time it is provided to Attorney Langsdorf.

It is the Kings' position that the Appellants do not have standing to pursue this appeal because (1) they are not abutters; and (2) they cannot allege any type of injury that is distinct from the public at large and that adversely and directly affects their property, pecuniary, or personal rights.

In their follow-up letter dated April 26, 2016 to Jeff Hutchinson, the Appellants present three arguments in support of their contention that they have standing to proceed with this appeal: (1) although they admit they are not abutters, they claim that they live in "very close proximity" to the King property; (2) they claim that they are all "frequent users of Middle Bay/Mere Point Bay/Miller Cove" and that their frequent "use of this public resource" is impacted by the King project; and (3) because Mr. Bodwell is a licensed engineer, he "has an obligation to society" to consider the public welfare with respect to this project. All of the Appellants' arguments fail to satisfy the standard necessary to confer them with standing to proceed with this appeal, and I will address each of their arguments below.

Maine courts apply two standards in determining whether or not an appellant has standing to pursue an administrative appeal - one more lenient standard is applied to abutters, and another far more stringent standard is applied to non-abutters. If an appellant is an abutter, the Maine Law Court has recognized that such an appellant has to then demonstrate a "conceivable injury" caused by the project at issue. *Norris Family Associates, LLC v. Town of Phippsburg*, 2005 ME 102, ¶¶ 19-20. However, when an appellant is not an abutter, the appellant must demonstrate that he or she suffers a "particularized injury," and a "particularized injury" is defined as an injury or harm that the appellant suffers that is "in fact distinct from the harm experienced by the public at large" and "adversely and directly affects a party's property, pecuniary, or personal rights." *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18.

1. The Appellants Are Not Abutters.

As noted above, the King property is located at Tax Map 31, Lot 29. Attached hereto as **Exhibit A** is a copy of Brunswick Tax Map 32 with notations identifying the location of the King property, as well as the locations of the properties owned by each of the Appellants. In their appeal, Mr. Bodwell provided an address of 55 Ocean Drive (which is depicted on Brunswick Tax Map 32, Lot 37), Mr. Knox provided an address of 81 Simpsons Point Road (which is depicted on Brunswick Tax Map 32, Lot 40), and Mr. Heyburn provided an address of 215 Pennellville Road (which is depicted on Brunswick Tax Map 33, Lot 8).

The Brunswick Zoning Ordinance (the "BZO") does not define "abut" or "abutter" but any reasonable definition of either term would not extend to the Appellants. Black's Law Dictionary defines "abut" as "[t]o join at a border or boundary; to share a common boundary with." *Black's Law Dictionary* 10 (7th ed. 1999); see also *Merriam Webster's Collegiate Dictionary* 6 (11th ed. 2001) (defining "abut" as "to touch along a border or with a projecting part"). It also defines "abutter" as "[t]he owner of adjoining land; one whose property abuts another's." *Id.*

As Exhibit A clearly demonstrates, none of the Appellants own property that in any way abuts the King property. In fact, each of Appellants' properties are located a significant distance from the King property, and there are many other properties (properties owned by individuals who have not appealed the permit at issue) that lie between the King property and each of the Appellant's properties. Although Appellants allege that they own property that is "in very close proximity to" the King property, Exhibit A demonstrates that even that is not true.

Even if one argues that these definitions of "abutter" are too strict, the Brunswick Zoning Ordinance itself clearly elevates the interests of those most likely to be effected by a project from the interests of everyone else in Brunswick. The procedures governing the Zoning Board of Appeals require that "[a]ll property owners of record whose properties lie within 200 feet (200') of the perimeter of the affected property" receive a direct written notice of hearing at least ten days in advance, while the rest of the residents of the Town of Brunswick (meaning all those whose properties lie more than 200 feet from the perimeter of the property at issue) are subject to notice only by publication seven days in advance of the hearing. See BZO § 703.4(B). None of

the Appellants' properties lie within 200 feet of the perimeter of the King property and, therefore, none of them are entitled to receive the elevated, direct form of notice required by the Ordinance. The Appellants are not abutters in any sense of the word and, therefore, must satisfy the higher standard for injury necessary to obtain standing in this matter.

2. The Appellants Cannot Satisfy the Higher Threshold for Injury Necessary to Confer Standing on Non-Abutters.

As non-abutters, Appellants must demonstrate that they will suffer a particularized injury if this project proceeds, meaning an injury or harm that they suffer that is "in fact distinct from the harm experienced by the public at large." *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18 (quoting *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984)). "A "particularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights." *Id.* Appellants cannot meet this standard.

First and foremost, the Kings note that there have been instances where even abutters have been found to lack standing where they have failed to meet the lower standard applicable to them. In *Harrington v. Town of Kennebunk*, the Law Court determined that abutting landowners lacked standing because the landowners could not demonstrate a "particularized injury" resulting from an immediate neighbor's permit to rebuild, relocate and enlarge a structure. 496 A.2d 309 (Me. 1985). The landowners theorized that the project could potentially obstruct their view or lower their property values. *Id.* The Law Court held that the appellants failed to support either contention and dismissed the appeal for lack of standing. *Id.*

In evaluating whether a non-abutter satisfies this higher standard, a "particularized injury" is an injury or harm that is "in fact distinct from the harm experienced by the public at large" and "adversely and directly affects a party's property, pecuniary, or personal rights." *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18. In *Nergaard*, two residents of Westport Island appealed the Planning Board's decision to grant a permit allowing the improvement of a boat launch. The Town's Board of Appeals dismissed the appeal for lack of standing, and the residents appealed to the Law Court. The Law Court determined that the residents lacked standing, holding that neither resident had a property affected directly or indirectly by the boat ramp permit nor any economic interest sufficient to give them standing. The residents relied only on their status as members of the driving public, alleging that the increased traffic generated by the improved boat ramp would increase the number of accidents.

Like the appellants in *Nergaard*, the Appellants rely on their status as alleged users of the Bay. Although they appear to suggest that the project will somehow impact their enjoyment of the Bay, they do not provide a single example of *how* this project would allegedly impact their use and enjoyment. Indeed, the fact that they have frequently used the Bay does not in any way distinguish them from the public at large. The Bay is available for use by anyone and everyone. The Kings themselves frequently use and enjoy the Bay, and have no intention of harming it in any way.

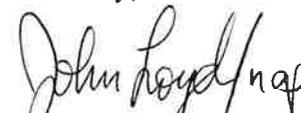
The Town of Brunswick Zoning Board of Appeals
c/o Stephen E.F. Langsdorf, Esq.
May 19, 2016
Page 4 of 4

In addition, Appellants have failed to allege how the project will "adversely and directly affect" any "property, pecuniary, or personal right" they may have. Appellants cannot allege, let alone demonstrate, that the proposed project will in any way affect their property rights. Their properties are all located a significant distance from the King Property. As demonstrated in the *Harrington* case discussed above, even an abutter would be required to demonstrate how a project would impact his or her property values. There can be no viable argument that this shoreline stabilization project impacts any pecuniary interest of the three Appellants. As for any personal rights, this project will not in any way affect the Appellants' ability to use and enjoy the Bay. To the extent that there are any environmental concerns or a suggestion that this project would somehow impact the Bay's ecosystem, this project has already been reviewed, approved and permitted by both the Department of Environmental Protection and the Army Corps of Engineers. The project includes a plan to re-vegetate the bank so that it will look natural and aesthetically pleasing and the Kings are committed to doing just that.

The final basis for standing presented by Appellants is their contention that Scott Bodwell's occupation as a licensed engineer is somehow relevant. With all due respect to Mr. Bodwell, the fact that he is an engineer does not elevate his status above any other citizen of the Town of Brunswick. According to his website, Mr. Bodwell specializes in Environmental Acoustics and Noise Control Engineering, a specialty that is not in any way relevant to the project at issue. Although Mr. Bodwell allegedly feels he owes an "obligation to society" and that he must "consider the public welfare of projects he monitors", he was not hired by either the Town or the Kings to "monitor" this project. If one applied Mr. Bodwell's argument to other occupations then every attorney who resides in the Town of Brunswick would have the opportunity to appeal any decision of the CEO, the Planning Board or the Zoning Board of Appeals if he or she felt that there was a legal issue which was not handled properly. There is no reason for the Zoning Board of Appeals to elevate Mr. Bodwell's opinions above those of other Brunswick residents.

I hope that you have found this information to be helpful. My partner, John Cunningham, and I will attend the hearing on May 26th, and we are happy to answer any questions you may have.

Sincerely,


John F. Loyd, Jr.

cc: Nancy and Robert King
Scott Bodwell, Appellant
Henry Heyburn, Appellant
Richard Knox, Appellant

KNOX

Town of
BRUNSWICK
Maine



Legend

- Public Road
- Private Road
- ROW
- Water
- Hydrography Line
- ROW Property Access
- Other Road
- Town Boundary
- Other Lot Boundary
- Parcels_Lines

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The information is provided as a reasonably accurate point of reference, but is not guaranteed and is not to be used for conveyances. The Town of Brunswick shall not be held responsible for the accuracy or misuse of this data.
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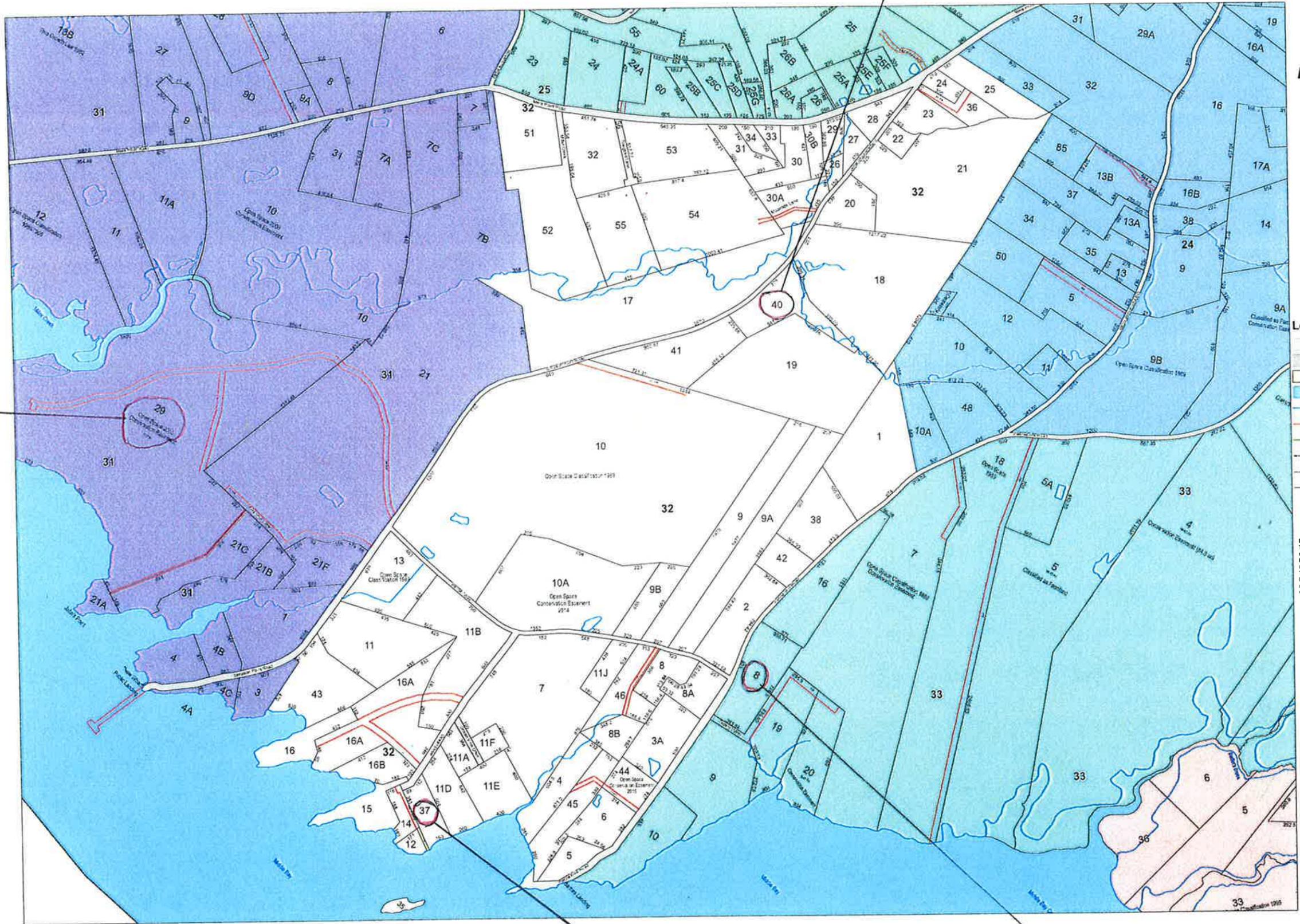
1 inch = 300 feet

Revised To: April 1, 2015
Maps Prepared by:
Town of Brunswick

MAP
32



KING



BODWELL

HEYBURN

The Rev. Frank C. Strasburger

27 Tidal Run Lane
Brunswick, ME 04011

Phone: 207/798-7985 Fax: 207/798-7986
Mobile: 207/577-7271 e-mail: fstras@gmail.com

May 16, 2016

Zoning Board of Appeals
Brunswick Town Hall
85 Union Street
Brunswick, ME 04011

John Poutree, Chair; Nicholas Livesay, Vice Chair; Jessica Braun; Steven Garrett; Robert Thompson; Jeff Hutchinson, Codes Enforcement Officer

To the Zoning Board of Appeals:

As a near (almost abutting) neighbor of the King property on Miller Point, I have substantial reason to be interested in the bank reinforcement project that has engendered so much recent controversy—more, arguably, than any of the appellants who are seeking a ruling on standing at your meeting May 26th. But while, as I said in an earlier email to Jeff Hutchinson, I admire the appellants' concern for the health of organisms in Middle Bay, I am deeply chagrined by their lack of interest in fairness and decency for the human beings involved. Both are important; what's been missing in their approach is any sense of balance.

I understand that the sole issue to be dealt with on the 26th is standing. Let me say at the outset that, as far as I can see, the appellants have none.

When they first raised the issue with the Town Council that the Town had failed to demand of the Kings a permit it should have required, the Town acknowledged its error and established a moratorium while procedures were to be reviewed. The Council sought legal advice on whether the King property should be included in the moratorium, and their attorney advised them unequivocally that it should not—that to do so would be entirely unfair to the Kings, who had, at every step of the way, followed the procedures they were told to follow. To hold them responsible for the Town's mistake by insisting that they wait through a moratorium to obtain a permit they had been told they didn't need would be entirely unfair to them and would place the Town in a position of significant liability.

The Council accepted that advice but, in deference to those who had brought the complaint, established negotiations between the Town and the Kings to find a mutually agreeable plan for the reinforcement of the bank. At the meeting that followed that action, when the Town Manager reported on the negotiations, several members of the Council responded that there was no need for such a report—that the Council's expectation was that the Manager and the Kings' representatives would arrive at a solution. The rest of the Council affirmed that understanding. The matter was therefore presumably finished.

The day after the Council set up the negotiations, the Kings directed their contractor to continue cutting trees in preparation for the altered bank plan toward which the negotiations were headed. At the time, there was a tree-cutting deadline, so they were under the gun. (That deadline was

subsequently extended.) Without the Kings' permission, the contractor began installing riprap, engendering the anger and immediate reaction of the parties who had initially objected to the project. Despite the fact that the Kings equally immediately fired that contractor and made it clear that he had not acted at their direction, those parties escalated their fight against the project by filing an appeal with the Zoning Board.

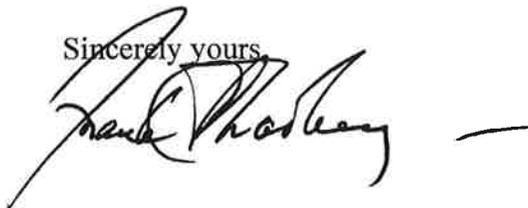
(It is apparent to me from their reaction as well as subsequent remarks from one of them in an email this morning that they don't believe the Kings. The irony here is that Rob King voluntarily sat down with them several months ago to entertain their questions and comments. Despite his efforts, the others waited until he left to express the depth of their concerns to one another and decide to hire an attorney. Instead of talking honestly with him as a neighbor, they took their case to the Town Council and the local press. It is therefore fascinating to me that *he's* the one being branded as dishonest in this process; in my experience—and I hasten to add that I have yet to lay eyes on either of the Kings—Rob King has gone out of his way to be entirely transparent throughout the process, though he has certainly not been treated in kind.)

With respect to the question of standing, as I understand the Town government, the Zoning Board of Appeals serves the Town Council, and not the reverse. The decisions of a Council elected by the people of Brunswick surely trump those of a board appointed by that Council. When the Council decided to deal with the King property by referring the issue to a negotiation between the Town Manager and the Kings' representatives, in so doing the Council rendered all other options moot. Lest that be misunderstood, the Council reaffirmed its intent at the following meeting when it informed the Town Manager that there was no further need for him to report to the Council on said negotiations.

Governments don't always act with efficiency, good sense, and good will, nor do those qualities always converge in public decisions. The Brunswick Town Council's handling of the King project was, in my opinion, a sparkling example of good government: the Council acknowledged the Town's mistake; took steps to ensure that it wouldn't recur in the future; declined to hold a non-offending party responsible; and chose a creative, efficient, and effective means of arriving at a good conclusion for all.

I hope and trust that the Zoning Board of Appeals won't undo the good work of the Council by permitting this unfortunate and unnecessary controversy to continue.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul Mackey", followed by a horizontal line.