

**TOWN OF KITTERY, MAINE
BOARD OF APPEALS**

**APPROVED
July 14, 2015**

Members present: Brett Costa, Craig Wilson, Brian Boyle, Gary Beers, Niles Pinkham, Jeffery Brake

Members absent: None

Staff: Robert Marchi, Code Enforcement Officer; Shelly Bishop, Assistant Code Enforcement Officer; Jessa Kellogg, Shoreland Resource Officer

Chairman Costa called the meeting to order at 7:02 p.m.

Town of Kittery Live Streaming Video for this meeting is found at:

http://www.townhallstreams.com/locations/kittery-maine/events/26109/council_chambers.

The broadcast runs for two hours and 43 minutes. These minutes include the approximate start-end time of the video for the hearing segments.

1. Call to Order, Introductory, Roll Call

2. Pledge of Allegiance

3. Agenda Amendment and Adoption

Chairman Costa adopted the agenda as presented.

4. Executive session - NONE

5. Public Hearings:

Patrick S. Bedard, Esq., attorney for Carson Investments, LLC, Owner, requesting Administrative Appeal to the terms of Title 16.8.8.1 & 16.9.1.3, regarding Notice of Violation and Order of Correction issued for 2 Stevenson Road, C-2 Commercial-2 zone.

[Video Clock: 04:12 to 17:45]

Mr. Beers requested a Point of Order to question the Board's jurisdiction and authority for this matter. Mr. Beers presented his own written review notes to the Board, Code Enforcement Office staff, applicant, and his attorney. He read from his notes [] as follows:

[The applicant asserts:

- 1) The State regulates State highways, not the local government enforcing zoning ordinances, citing 23 MRS §1 et seq;
- 2) With regard to Route 236 the State of Maine is not governed by any zoning ordinances in the Town of Kittery;
- 3) The State of Maine alone decides what can and cannot be done on its land and State highways;
- 4) The Town of Kittery, its Shoreland Officer and Code Enforcement Officer, have no authority with regard to the State highway; and,
- 5) The Town of Kittery has no legal authority to insert itself into this matter.

If any of those be the case, then this Board would not have the jurisdictional authority to hear the appeal.]

Mr. Beers said that in his review, he found:

[23 MRS §1 only establishes the Department of Transportation and delineates its responsibilities. However, the “et seq”, meaning “and what follows”, in that same Title, Part 1: State Highway Law, Chapter 13: Construction, Maintenance and Repairs, Subchapter 2: State Highways, §754, Town maintenance in compact areas, paragraph 1. Jurisdiction, it states:

“Except as otherwise provided, all state and state aid highways within compact areas of urban compact municipalities, as defined in subsection 2, as determined by the department must be maintained in good repair by the town in which the highways are located at the expense of the town.”

Also found, is 35-A MRS Public Utilities, Chapter 25: Regulation of Facilities in the Public Way, §2502. Definitions, where the applicable authority means MDoT:

“A. The Department of Transportation, when the public way is a state or state-aid highway, except for state or state-aid highways in the compact areas of urban compact municipalities as defined in Title 23, section 754;”

In which case the authority is:

“B. The municipal officers or their designees, when the public way is a city street or town way or a state or state-aid highway in the compact areas of urban compact municipalities and as defined in Title 23, section 754;”

Further to that, so much of Maine DoT Kittery Urban Compact Description of State Maintenance Boundary Lines established for delimiting the urban area of Kittery, York County, Maine, effective October 4, 2006, precisely describes the section of Route 236 adjacent to 2 Stevenson Road to be included in the Urban Compact:

“..... thence, northeasterly to the northerly right-of-way of U.S. 1 Bypass southbound at the intersection of the Route 236 SB On-ramp; thence, northwesterly along the westerly right of way of State Route 236 to the intersection of McKenzie Lane; thence southerly along the easterly right of way of State Route 236 to the northerly right-of-way of U.S. 1 Bypass southbound;”

Also found in 23 MRS Part 3: Local Highway Law, Chapter 305: Construction, Maintenance and Repair, Subchapter 5: Drainage and Watercourses, §3252, Drainage or obstruction of public ways, paragraph 1. Change in drainage; obstruction:

“A person, personally or through the person's agents or servants, may not do any of the following acts in a manner that changes the drainage of a public way or obstructs a public way:

C. Deposit within or along any ditch or drain in a public way any material that will obstruct the flow of water in the ditch or drain or otherwise obstruct the way.”

Further noted in the June 23, 2015 8:15AM – MDoT staffer Kyle Hall e-mail to CEO, SRO:

“As you are aware this area lies within the compact urban limits of Kittery, thus Kittery is the authority on highway opening permits, I will not over step that authority, but only stress that I have no objections to the proposed work. The final determination lies with the Town of Kittery.”]

With all that, Mr. Beers submitted the Town has the legal right, responsibility, and authority, to deal with land use issues in the Route 236 right-of-way adjacent to 2 Stevenson Road.

[The applicant also asserts:

“The State of Maine is not governed by local zoning. Local zoning is advisory only.”

Citing that 30-A MRS §4352 (6) makes zoning ordinances advisory.]

Mr. Beers said he found that 30-A MRS §4352, §§6, Effect on State, says: “A zoning ordinance that is not consistent with a comprehensive plan that is consistent with the provisions of §4326 is advisory with respect to the State.”

With that, he submitted that Town zoning ordinances must be honored by the State if they are shown to be duly ordained by its municipal officers in consort with a comprehensive plan which is itself consistent with Maine’s Growth Management Program (30-A MRS §4326).

He went on to say, 30-A MRS §4326, Growth management program elements, noted above, governs the submission requirements for local comprehensive plan approval by Maine DECD. Kittery’s plan was voter-approved and state certified compliant in 2002.

He stated that includes in [Section C, Natural Resources, Item 11, Issues and implications:

“As development occurs, runoff from impervious surfaces increases contributing non-point pollution to the Town’s surface waters. Kittery should consider if it needs to develop and apply performance standards that control stormwater runoff, reduce erosion, and minimize the migration of non-point pollution into the Town’s freshwater resources.”

And in Item 12, Goals and Policies:

Local Goals:

To protect and improve the quality of the surface waters within Kittery.

To protect and preserve the quality and supply of groundwater resources.]

With that, Mr. Beers submitted that Town Code Title 16, Chapter 8, Article VIII, Surface Drainage and Section 9.1.3, Prevention of Erosion, as cited by the Code Enforcement office, were duly ordained, and subsequently recodified on July 26, 2010 in toto, to which he personally attested, are consistent with the Town’s compliant and State-certified Comprehensive plan.

Beyond all that, he stated, 30-A MRS §2691; Town Charter 8.04; Title 16, Sections, 1.5.2 Powers and Duties; 6.4.1, Administrative Decision Appeal; and 4.5.6, Appeal of Notice of Violation and Order, all provide this Board the jurisdiction to hear this appeal.

He said if the Chair wished a motion on this point, he was prepared to make one. Chairman Costa said to do so.

Mr. Beers moved that 23 MRS §1, §754, & §3252; 35-A MRS §2502; 30-A MRS §4352 §§6; Maine DoT Kittery Urban Compact Description, October 4, 2006; 30-A MRS §2691; Kittery Town Charter 8.04; and, Title 16, Sections, 1.5.2, 6.4.1, and 4.5.6, all provide this Board the jurisdiction to hear this appeal.

Mr. Wilson seconded. Motion carried unanimously

Mr. Beers requested a second Point of Order to raise a question if the filing of the appeal was valid in accordance with timing from June 23rd Amended Notice. He read from his notes [] as follows:

[The Town’s Notice, dated June 23rd, 2015 states: “If you comply with the following Order of Correction, then both the original Notice of Violation dated May 28, 2015 and the amended Notice of Violation dated June 8, 2015 will be removed”

First notice – May 28th; 1st Amended Notice – June 8th; 2nd Amended Notice – June 23rd. Appeal filed June 25th. Compliance period expires July 23rd. Normally, Maine Courts do not allow appeal until all local administrative remedies are exhausted. This Board is not a court of law, but it does appear that time is still available for the applicant to comply with the Notice; or, reach a consent agreement as provided for in the ordinance. At the same time, Town Code Section 6.5.1, states:

“16.6.5.1 Making an Appeal/Request. “An administrative appeal must be submitted within thirty (30) days of the date of the official, written decision being appealed.”

So the appeal is clearly within that scope. If the applicant wishes this appeal to stand and go forward, I submit there may be no objection by the Board. I request the Chairman query the applicant as to his wishes.]

Chairman Costa did so query and Attorney Bedard stated that they considered the appeal timely; that the Board did have jurisdiction; and, they wished to continue with the hearing.

Applicant’s Case First [Video Clock: 17:45 to 24:30]

Attorney Bedard raised issue with the notice of the meeting; that he had not received any notice and Mr. Carson had received it only last Friday; that an acquaintance had advised them of the notice in the newspaper, else they would not be there; and that he did not know if any abutters were given notice. He offered to present the Board with the Notice which indicated the date to be May 26th.

Mr. Wilson requested a Point of Order to hear from the Code Enforcement office regarding the status of the public notice. Ms. Bishop testified that she had mailed the meeting notice to abutters, applicant, and attorney, as well as the local newspaper notice, in the required time. She apologized that there was a typo in the notice. The Board accepted her statements.

Mr. Bedard wished to present written materials to the Board. Chairman Costa advised that the Board was in receipt of written correspondence including the Notices of Violation.

Mr. Wilson moved to waive Board rules and accept written materials from Mr. Bedard. Seconded by Mr. Beers. Motion carried unanimously.

Mr. Bedard said after review of the Board packet materials that he believed it to contain everything they wished to provide except for a tape-recorded message left on Mr. Carson’s voice mail by Mr. Kyle Hall of the Maine Department of Transportation. He noted that they include the May 28th, June 8th, and June 23rd Notices, as well as the [Business Use Change] approval Mr. Carson had received.

He noted that he also had a statement from Mr. Joe Noel regarding his meeting with Mr. Carson. Mr. Wilson said that he would not be averse to accepting those documents.

[Video Clock: 24:30 to 46:57]

Mr. Bedard proceeded to describe the issues in the Notices and Mr. Carson's responses. He averred that the Route 236 right-of-way is 50 feet from the centerline and owned by the State of Maine. He stated that when Mr. Carson had presented the matter to him he had made it clear to him that it was the State's road; they control it, govern it, and tell you what you can and can't do with it.

He went on to describe contact with Maine DoT staffer Kyle Hall and Mr. Hall's statements, visit, and communications to Mr. Carson regarding the matter. He advised the Board that Mr. Hall did not want the fill material removed as would be heard on the tape recording.

He then spoke to the erosion control measures saying that that appeared to be the only legitimate complaint the Town had. He mentioned the work done in that area this summer meant the State controlled the highway because no wetland protection measures had been used and the State did what it wanted. He said if the Town did that work, he was not sure why the Town took no measures to protect the wetland.

He spoke to Mr. Carson's having met the order to revegetate, as directed.

He then handed to the Board copies of the Hall voice mail transcript, saying that it confirmed Hall's message about preferring what Mr. Carson had done and that it go back that way. Mr. Carson played the recording and the Board agreed the written statement was an accurate transcription.

Mr. Beers requested to know the approximate date, at least, when the recording was received. After discussion, Mr. Carson indicated that it was within a day or so of his meeting with Mr. Hall on the 16th of June.

Mr. Bedard then addressed the June 8th Notice, expressing that the requirements of that had been done. He stated that the last notice was what prompted the appeal. He indicated that Mr. Carson had tried to work with the Town and had complied with the Maine DoT.

He averred that the last notice was "a moving target"; that from Hall's statements it was clear that stormwater was never obstructed; that it should go back to the way it was when the Town gave him the first Notice of Violation; that it was necessary to construct the silt fence; or Mr. Hall would have left a very different message.

He noted in the June 23rd Notice that item 3 was "per DoT request" meaning that the Code Enforcement office had no authority because the issue would be a violation of State law. Mr. Wilson questioned the point that it was a DoT request to be 3:1 slope. Mr. Bedard reiterated his point about Hall wanting it to return the way it was. Mr. Wilson stated that the subsequent Hall communications amended his tape recorded statement.

Mr. Carson requested a private moment with his attorney, granted by Chairman Costa.

The Board held a brief discussion during their absence regarding any question of rebuttal to Mr. Beers' statements regarding Board jurisdiction, the end of which was apparently heard by Mr. Bedard.

Upon returning to the lectern, Mr. Bedard said that he did agree that the Board had jurisdiction to hear the appeal for the reason that the Code Enforcement office issued a decision and the code said you could appeal. He stated that was different from the question of their right to impose sanction in a state-owned highway.

He stated that Mr. Carson had contacted Central Maine Power and that they had no issues with the pole. He pointed out in issue number five, that approval was required by Maine DoT because the Town directly acknowledged that it was the State's highway and they govern and rule it. He further addressed "the loam and seed within seven days" after MDoT approval was further proof it was their highway and that Mr. Carson would do so.

He made reference to Mr. Carson's Business Use Change approval, dated April 9th, which states approval for "landscaping contracting, excavation, materials and services for home builders, contractors, excavators, etc., exterior of structure, side & rear of property.", clearly meaning that he was permitted to store the material there to the extent he stored it on his own property.

He then agreed that, to the extent he was in the State right-of-way, Mr. Carson needed permission to do that. He then presented the Board with a written statement from Mr. Joe Noel, hired by Mr. Carson to make sure that nothing to be done with wetlands on the property would violate Kittery ordinances, which stated that the Shoreland Officer didn't have any issue with Mr. Carson putting any fill in his back yard up to the point of right-of-way.

He concluded, saying to the extent a silt fence was required, Mr. Carson met that; he'd also met the removing of fill from the right of way and did revegetate; however the problem is that that is the State's enforcement. He asked the Board to overturn Code Enforcement's authority to regulate that activity, reiterating his point about the Maine Dot authority for regulation.

Public Testimony [Video Clock: 46:57 to 47:20]

Chairman Costa invited anyone in attendance to speak for, against, or about the appeal, in any way. No one came forward to offer testimony.

Code Enforcement Office [Video Clock: 47:20 to 54:48]

Mr. Marchi explained that Shoreland Resource officer Ms. Kellogg had been assigned to deal with the matter because she'd been asked by Mr. Carson to the April 1st meeting with Soil Scientist Joe Noel. He stated that she was presently the only staff certified by the State in erosion control measures.

Ms. Kellogg referred to the site visit on April 1st, saying that it was asked of her if Mr. Carson could place a little bit of fill, "like maybe a foot...to fill in back behind his garage...extending to the woodline..." She said the intent of that was to make the back yard level. She advised Mr. Carson that as long as he stayed on his property, he could add that little bit of fill.

She stated that shortly after that Mr. Marchi had noticed a considerable amount of fill placed in the Route 236 right-of-way, "encroaching up to being level with 236." She wanted it to be clear that it was not a three to one slope. She indicated that she believed what Mr. Hall had seen was not at that level, that he had seen it after some of the fill had been removed.

She indicated that she was the one who had issued the Notice of Violation because she had made the original site visit and Mr. Marchi had delegated her to do so.

She explained that the right-of way was not just the part directly behind the garage. It extends the entire length of the property. In the June 8th Notice that he hadn't fully satisfied condition number one, that was what was meant. There was no evidence of revegetation on the embankment at that point. She believed she was being nice in granting an extension to the end of the month to get it all done.

At that point, she said, she was asked by Mr. Bedard to visit the site and he had claimed that Mr. Carson had removed all the fill, reseeded, and was compliant. She went to the site with Mr. Marchi and saw the reseeding, but the fill had not been removed.

They went to Mr. Carson's office where Mr. Hall's tape recording was played. She said the applicants asked that the Town work with them and she noted they were happy to do that.

She went on to speak about the claim that the area was not under Town jurisdiction and pointed out Mr. Hall's e-mail message, that it is, and he would not overstep that boundary. She contacted Mr. Hall directly and he did say he preferred additional fill in the right-of-way because it would make the road safer because the guardrail does not extend all the way to the end where it intersects Stevenson Road. In the off chance that a car should roll there, more fill would be better.

She stated that she had asked Hall's opinions on the six items in the June 23rd Notice. She noted that in his reply e-mail he concurred wholeheartedly. She said she didn't think that this was something that came from DoT because it is in the compact zone and does think the Town has the right to issue the violations.

In regard to the third item in the June 23rd Notice, she stated that she was trying to work with Mr. Carson; that if DoT wants to have more fill there, the Town would allow it; however it must be according to the six steps listed as DoT had agreed. She said she was unsure why that was not working for Mr. Carson. He was allowed to put fill back as long as it met what DoT would like it to look like.

Speaking to the second issue of the fill material being stored, referencing the Home Occupation application with a line highlighted, showing he was permitted to have bins in the backyard to sell landscaping supplies in small quantities. In no terms was it allowed to have a massive 30-foot pile of fill. She referenced the pictures she had provided.

[Video Clock: 54:48 to 55:30]

Mr. Marchi pointed out that although the Town concurs with DoT's assessment, permission from DoT was not sought until well after all this happened. There was no permission from anybody when the original fill was put in.

Deliberations [Video Clock: 56:30 to 1:01:45]

Referring to his review notes [], Mr. Beers expressed the following:

- [1) What does the ordinance/statute require the applicant to prove?

That the Town has no authority to apply local zoning ordinance to the issue in question.

That storing and selling fill and gravel on his property are permitted use activities.]

Mr. Bedard concurred with those points, clarifying that he considered that DoT was the governing authority.

- [2) Does the ordinance/statute prohibit or limit the type of use being proposed?

16.6.6.2 FACTORS FOR CONSIDERATION: Consideration, among other things, to:

M. Assurance of adequate landscaping, grading, and provision for natural drainage:

- 3) What factors must the Board consider under the ordinance/statute in deciding whether to grant the appeal?

Were the CEO Notices a "plain error" which led to a "brazen miscarriage of justice?"

Were the CEO Notices made on "unreasonable grounds", or "without any proper consideration of circumstances"?

Does any State or Federal law apply to applicant's circumstances?

Is there any conflict between ordinances related to the issues?

Can the Board determine with a "definite and firm conviction that a mistake was committed" by the CEO?

4) Has the applicant met the burden of proof, i.e., Is the evidence presented substantial? Is it credible? Is it outweighed by conflicting evidence?

6) To what extent does the ordinance/statute authorize the Board to impose conditions on its approval?]

[Video Clock: 1:01:45 to 1:04:25]

Mr. Beers spoke to a letter in the packet, from the applicant, regarding trespass with the question being was it a valid notice and if so should it have affected the municipal staff visits. Could it be that illegal trespass would nullify discovery, potentially impinging on the applicant's due process rights? Stated otherwise, did the Code Enforcement office have the right to make their site visits.

Reading from his notes [] he went on to say:

[So much of applicant's filing:

"Also at this point I do not authorize you to trespass on my property located at 2 Stevenson road in Kittery, Chapter 635 -Unauthorized Entries section 635 : 2 if you decide to trespass again I will request a summons to be served upon you, or a writ by the court.

My reason for this decision making is for the following at this point: You, as well as other parties have given me authorization, misrepresentation and misleading information."

Note: No explanatory detail is found to show a relevant connection of the second part of the statement to the issues at hand.

Applicant's reference in the letter is apparently NH Statute LXIII, 635:2 Criminal Trespass, which is plainly irrelevant.

Town Code Title 16, Section, 16.5.3.1, Plans, states:

B. At any time between the initial request for a building/regulating activity permit and the granting of final occupancy certificate the CEO or designated representative is to have access to the subject property and structures without obtaining prior permission, written or oral, from the property owner or applicant.

Furthermore, 30-A MRS §4452. Enforcement of land use laws and ordinances, paragraph 1. Enforcement, states:

A municipal official, such as a municipal code enforcement officer, local plumbing inspector or building official, who is designated by ordinance or law with the responsibility to enforce a particular law or ordinance set forth in subsection 5, 6 or 7, may:

A. Enter any property at reasonable hours or enter any building with the consent of the owner, occupant or agent to inspect the property or building for compliance with the laws or ordinances set forth in subsection 5. A municipal official's entry onto property under this paragraph is not a trespass;

5. Application. This section applies to the enforcement of land use laws and ordinances or rules that are administered and enforced primarily at the local level, including:

S. Local ordinances and ordinance provisions regarding storm water, including, but not limited to, ordinances and ordinance provisions regulating nonstorm water discharges, construction site runoff and postconstruction storm water management, enacted as required by the federal Clean Water Act and federal regulations and by state permits and rules.]

He submitted that the Code Enforcement Office has full legal authority to have made the site visits conducted.

[Video Clock: 1:04:25 to 1:10:15]

Mr. Beers then addressed whether the CEO Notice violations were applicable, noting the site is not in shoreland overlay, but is in proximity to a mapped wetland. He submitted from the beginning point of order that the sum of Maine law for the area in question in the Route 236 right-of way is governed by municipal ordinances, duly ordained, and is under the operable authority of the Code Enforcement office. He thereby rejected the argument whereby only Maine Department of Transportation may say what can be done.

He then referred to excerpts from various communications in the packet listed in chronological order beginning on page 10 of his notes, which he then read from []:

[June 23, 2015 8:15AM –Department of Transportation (MDoT) staffer e-mail to CEO, SRO:

“As you are probably more than aware Brian Carson has been in contact with me regarding work within the ROW along Route 236 which abuts his property.

I met with Mr. Carson on site, June 16th to discuss his intentions. In review of his request I have no objections. His plan to flatten the slope to 3:1 is in the best interest of public safety.

As you are aware this area lies within the compact urban limits of Kittery, thus Kittery is the authority on highway opening permits, I will not over step that authority, but only stress that I have no objections to the proposed work. The final determination lies with the Town of Kittery.”

June 23, 2015 10:52 AM - SRO e-mail to MDoT, CEO:

“Thank you for your opinion on this matter. When the original Notice of Violation was issued on May 28, 2015 to Mr. Carson the extent of fill was nearly level with Route 236 (not a 3:1 slope) and Central Maine Power had requested that the fill be removed from around their pole and guide wires. After discussing this with Bob we agree that if Me DOT prefers the embankment slope to be 3:1 then we will allow the fill to be placed back with a few conditions.

1. Stormwater runoff flow must not be disrupted.
2. The silt fence must remain until the site is fully revegetated. Removal of the silt fence to be approved by Code Enforcement.
3. Embankment not to exceed a 3:1 slope per MeDOT request. All additional fill on Mr. Carson's property to be removed.
4. Central Maine Power to approve the fill around their pole and guide wires.

5. Me DOT to inspect the final grading of 3:1, approve the work and to provide the Town with notice when complete (email is sufficient).

6. Reseeding of the embankment within 7 days of Me DOT final approval.”

June 23, 2015 11:03 AM - MDoT e-mail to SRO, CEO:

“I concur whole heartedly, I would like to change #3 and #5 to read as follows.

3. Embankment shall be a 3:1 or flatter slope per MeDOT request. All additional fill on Mr. Carson's property, not directly related to the slope shall be removed.

5. Me DOT to inspect the final grading approving the slope work and provide the Town with notice on completion (email is sufficient).

Not to exceed 3:1 is the same meaning, I just put it in more common engineering speak.

As for#5 I just changed it to read smoother without repeating #3”]

Mr. Beers stated that the June 23rd SRO letter fundamentally repeats those points verbatim. He suggested the evidence heard regarding Mr. Hall’s participation was exclusive to road safety and not infringement in the right-of-way with respect to erosion control or stormwater drainage. He said that the CEO citations with full authority as concurred by the Maine DoT representative, referencing relevant passages from Title 16, sections 8.8.1 and 9.1.3, were applicable.

[Video Clock: 1:10:15 to 1:12:15]

He continued, addressing the second issue of allowability or permissibility of fill being stored on the site. He noted that the applicant’s Business Use Change permit, not the Home Occupation application, was approved by the Code Enforcement Officer and Town Planner, so the question, again from his notes[]:

[Was the applicant’s Business Use Change approval by the Town Planner / CEO valid? Does the storing of gravel/fill on the site meet the conditions of the applicant’s business use change approval?

This question is raised because in applicant filing Item 2, it is asserted that:

“2. Storing gravel/fill on the site meets the conditions of Mr. Carson’s approval – The approval dated April 9, 2015 allows Mr. Carson to have “Landscaping contracting, excavation, materials and services for home builders, contractors, excavators, etc., exterior of structure, side and rear of property.”

And as seen in so much of Planning Department Notice, 4-9-15:

“The Town Planner and Code Enforcement Officer have reviewed the Business Use Change (BUC) application 3-26-15, and Building/Regulated Activity permit application dated 3-26-15, and makes the following findings for the proposed new business of:

BDC Enterprises, Inc. to include:

Single Family Dwelling, (Currently exists, will remain)

Retail, 3 rooms, 1st floor

Auto detailing and stereo installation, garage

Landscaping contracting, excavation, materials and services for home builders, contractors, excavators, etc., exterior of structure, side & rear of property.

However it is noted in the June 23, 2015 – SRO Letter to Applicant:

Order of Correction:

3. Embankment shall be a 3:1 or flatter slope per MeDOT request. All additional fill on your property, not directly related to the slope shall be removed.

I submit that whether the Business Use Change may or may not have been valid is moot, because as reflected in MMA Board of Appeals Guidance Manual, as supported by Maine case law:

“once the appeal period has expired an applicant may rely on the building permit even if improperly issued.”

A finding as to which CEO statement is correct, or that which may be verified as a final understanding, is in order.]

He suggested that because it so states in the 4-9-15 business use change, storage of fill material is permitted, it is simply not permitted in the Route 236 right-of-way.

[Video Clock: 1:12:15 to 1:13:05]

He concluded that he found the sum of the Code Enforcement records provided for this appeal, including site photographs, do validly demonstrate the physical fact of the violations cited; he found no issues derived from Section 16.6.6.1, Conditions; and, noted two issues under Section 16.6.6.2, Factors for Consideration which potentially needed to be resolved.

He said there may be an issue with the Board’s authority regarding unsightly storage of equipment, vehicles, or other materials, but thought it was not relevant to bring it into play. He did suggest that paragraph M, Assurance of adequate landscaping, grading, and provision for natural drainage, applied.

[Video Clock: 1:13:05 to 1:17:08]

Chairman Costa spoke regarding the slope, noting that 3:1 had been expressed a number of times and the State had said, “or flatter”. He stated that bringing it to the level of 236 would be flatter which to him doesn’t warrant any kind of issue. He referred to Hall’s message regarding jurisdiction on road opening permit. He felt a road opening permit was just that meaning permits to access the road.

He went on to speak of Hall’s June 23rd e-mail which starts off, “I concur wholeheartedly” and talks of number 3 and number 5 which reads, “Me DOT to inspect the final grading approving the slope work and provide the Town with notice on completion”. He indicated to him that meant that the State was retaining authority on that part of the project. He said that Hall clearly was stating that they would inspect the project and notify the Town.

He then addressed the other small point on removal of the fill, saying that it goes to the permit for operation of the business that the State may not be privy to and may not know that is the case, but nevertheless may apply to the area within the State’s governing. He referred to the meeting with Joe Noel on filling in the wetland. He said that whole thing seemed to be pretty amicable with what was going on, that there didn’t seem to be any issue.

[Video Clock: 1:17:08 to 1:22:25]

Mr. Wilson asked about the distinction between the Home Occupation application and the Business Change permit. Mr. Beers pointed out the relevant comments in the documents concluding with the business permit statement regarding, “Landscaping contracting, excavation, materials and services for home builders, contractors, excavators, etc., exterior of structure, side & rear of property.”

[Video Clock: 1:22:25 to 1:24:25]

Mr. Beers asked to continue to somewhat refute the Chairman's statement on Mr. Noel saying his statement says, "...fill to the edge of his property to the right-of-way", as evidenced by Ms. Kellogg, where the evidence showed that a large amount of fill was placed into the right-of-way, nearly level with 236. He suggested that Mr. Hall would understand that level adjacent to the roadway would be safer than a steep slope. He said he believed the sum of communications from Mr. Hall indicate they do not retain their authority to approve or overstep the authority of the Code Enforcement Officer of the Town to issue violations related to stormwater drainage and erosion control.

Chairman Costa indicated that they had a difference of opinion and Mr. Hall clearly says they would notify the Town of their approval. Mr. Beers said that he doesn't say "of their approval". That it says he will inspect it which does not imply, nor may it be inferred, that he is retaining authority, or not. Chairman Costa rebutted, saying the message says, "...approving the slope work and provide the Town with notice on completion".

[Video Clock: 1:24:25 to 1:27:45]

Chairman Costa then read the statement from Joe Noel, where it concludes, "...she (Ms. Kellogg) had no concerns regarding this work". Mr. Beers said that was correct and pointed out that that relates to fill as she expressed to level out his back yard on his property and not placing fill in the 236 right-of-way. That there was no understanding from Mr. Noel regarding that, at that time, nor is it expressed in his letter.

Mr. Wilson asked Ms. Kellogg was he correct in understanding there were no large piles of fill there on April 1st? She confirmed there were no piles of fill. He asked if her concern was that the large piles were contributing to stormwater issues and erosion issues related to the wetland. She confirmed that those were indeed her concerns.

Mr. Wilson asked her if that was irrespective of her opinion whether he was allowed to store it there or not, that for sake of argument if he is allowed to store it, her concern would be some kind of sedimentation or diversion of stormwater. She replied, "Correct". Mr. Wilson expressed that the situation on Mr. Noel's visit was very different than what later took place and wondered what his opinion on the matter would now be.

He went on to say that in the Board's ability to modify the Code Enforcement Officer's decision we may need to seek Mr. Noel's advice.

[Video Clock: 1:27:45 to 1:29:01]

Mr. Wilson then spoke to Mr. Hall's voice mail message and asked if playing that may have been a violation of his rights. Mr. Bedard responded that Maine is a one-party consent state. He expounded that Maine law is clear when you leave a message on a machine you are being recorded.

[Video Clock: 1:29:01 to 1:52:30]

Chairman Costa called for a motion in the matter. Lengthy discussion ensued regarding the essence of the appeal and necessary structure of such motion on addressing the individual violation notice items, or applicant appeal Item 1 to overturn all Notices of Violation pertaining in any way to the State of Maine Route 236 right-of-way because they do not relate to the Town of Kittery.

[Video Clock: 1:52:30 to 1:55:43]

Mr. Beers moved to affirm the Code Enforcement's Officer's Notices of Violation and Order, dated May 28th, June 8th, and June 23rd, 2015 to Carson Investments, LLC, regarding violations of Town Code, Title 16, Sections 8.8.1, Stormwater Drainage, and 9.1.3, Prevention of Erosion, at 2 Stevenson Road, Kittery.

Mr. Pinkham seconded. Roll call vote requested.

Mr. Beers – Yes / Mr. Boyle – Yes / Mr. Wilson – Yes / Mr. Brake - Yes

Mr. Pinkham – Yes / Chairman Costa – Yes. Motion is approved unanimously.

[Video Clock: 1:55:43 to 2:00:00]

In the matter of applicant appeal Item 2 that Mr. Carson is not in violation of his Business Use Change approval by storing and selling fill and gravel on his property:

Mr. Wilson moved to strike the phrase in Code Enforcement Order Item 3 of the Violation Notice of June 23rd, 2015, "All additional fill on Mr. Carson's property to be removed", as it is in error and must be removed.

Mr. Beers seconded. Motion carried unanimously

Ms. Kellogg pointed out to the Board that a silt fence was only temporary; was not a sufficient measure; and, that other measures may be necessary to resolve the drainage and erosion issues. The Board concluded that dealing with that would not be with the Board's purview, but a matter for enforcement to deal with.

Mr. Beers requested a Point of Privilege and Chairman Costa granted a two-minute recess. Mr. Wilson requested postponement of the review of Findings of Fact and Conclusions of Law for this appeal in order to not keep the patiently waiting next applicant any longer. Chairman Costa so ordered.

[Video Clock: 2:02:17 to 2:23:35]

6. Unfinished Business:

Secretary Wilson noted the Board had the authority under Title 16, Section 1.5.2F4, as expressed in the May 26th meeting, to continue the Public Hearing originally heard that date:

Continuation- Matthew Greco, Blind Pig Provisions, Map 1, Lot 44, 2 Badgers Island West, Mixed Use-Badgers Island (MU-BI) zone, requesting Miscellaneous Variation Request to the terms of Title 16.8.9.4, to request variation in parking requirements.

He questioned the protocol in regard to public notice and input. Mr. Beers noted that the ordinance allows for hearings to be continued to other times and places and you just pick it up where it left off.

Applicant's Case First

Mr. Matthew Greco spoke of the joint use parking agreement with Greenpages Technology Solutions to provide 15-20 parking spaces just down the street from their location at 33 Badgers Island West. He indicated those additional spaces were enough to meet the Town code. He pointed out the additional materials provide in the packet, including a letter from Greenpages.

Public Testimony

Secretary Wilson made note of the testimony on May 26th of abutters Mr. Tony Marchi and Mr. Bruce Crawford.

Chairman Costa invited anyone present who wished to speak about the application in any way. There was no further testimony.

Deliberations

Mr. Beers presented his own written review notes to the Board, Code Enforcement Officer, and the applicant. He stated that his calculations showed that 31.5 spaces were required for existing uses; and, the addition of 500sf seating area would add 11 more for a total of 43, rounded up. A joint use parking arrangement with Greenpages added 20 spaces to the 29 shown on the plot plan, making a total of 49 available, six more than the requirement.

He went on, reading from his notes, to review applicable ordinance sections:

“Article IX. Parking, Loading and Traffic

16.8.9.4 Off-street Parking Standards.

“M. The Board of Appeals may approve the joint use of a parking facility by two or more principal buildings or uses where it is clearly demonstrated that said parking facility will substantially meet the intent of the requirements by reasons of variation in the probable time of maximum use by patrons or employees among such establishments.”

16.8.9.4: J. Required off-street parking in all commercial, business and industrial zones must be located on the same lot with the principal building or use, or within one hundred (100) feet measured along lines of public access, except that where off-street parking cannot be provided within these limits, the Board of Appeals may permit such off-street parking to be located a reasonable distance from the principal building or use, measured along lines of public access.

16.8.9.4: J. Such parking areas must be held under the same ownership or lease, and evidence of such control or lease is required.”

Referring to an aerial view of the area with the Greenpages parking sites outlined, and an approximate walking path along the public access between the sites, he said the distance on the road along the arrowed path to far parking is approximately 800 feet, about 320 steps; and the distance to the near parking (Greenpages 1/38) is approximately 560 feet, 224 steps. He concluded by saying that he thought that was a reasonable distance.

Mr. Beers then noted prospective issues from Title 16, Section 6.6.2, Factors for Consideration, in Board decisions regarding light and noise:

“F. Will the use cause disturbing emission of electrical discharges, dust, light, vibration or noise?”

He suggested that they be conditions of approval and, along with the Greenpages agreement document to be reviewed and deemed satisfactory to the Code Enforcement Officer and Town Attorney, were sufficient for approval of the request. Chairman Costa called for a motion.

Mr. Brake moved to grant the Miscellaneous Variation Request to The Kitchen Restaurant Group d/b/a Blind Pig Provisions, Mixed Use – Badgers Island zone (MU-BI), per Title 16, Section 8.9.4, Off-street Parking Standards, to create a 20' x 25' (500sf) outdoor seating area addition to existing restaurant space. Conditions of Approval established are:

- 1) compliance with Town Code ordinance provisions regarding light and noise;*
- 2) the off-site joint parking arrangement with Greenpages must be held under the same ownership or lease, and evidence of such control or lease is required and must be reviewed and deemed satisfactory by the Code Enforcement Officer and Town Attorney; and,*
- 3) the off-site joint parking arrangement to be reviewed by the Code Enforcement Office annually with the application for the liquor and victualers license.*

Mr. Pinkham seconded. Motion carried unanimously

Chairman Costa noted that the approval is not the granting of a building/regulating activity permit, and any aggrieved party may appeal this decision to Superior Court within 45 days. He requested and Mr. Greco acknowledged by signing the request document.

Findings of Fact:

The Board deliberated the issues and made the following findings:

The Kittery Board of Appeals does have jurisdiction to hear this matter.

There are no outstanding violations on the property.

The application is complete and the applicant does have standing.

The applicant's burden of proof was clarified.

Scott Osgood is the owner (Madison Street, LLC) of the property at 2 Badgers Island West (Map 1 Lot 44). Matthew Greco and Michael Prete are tenant operators of the Blind Pig Provisions restaurant, recently opened at that location.

The applicants requested a variation in parking requirements of Title 16, Section 8.9.4, Off-Street Parking Standards, paragraph M, for approval of joint use of a parking facility by two or more principal buildings or uses, in order to be permitted to create a 20' x 25' (500sf) outdoor seating area addition (table and chairs, no construction), to existing restaurant space.

The Blind Pig restaurant was created in spaces previously used for similar operations. Other uses in existence at the site include three apartment dwelling units and an 11-slip marina.

Mr. Matthew Greco spoke of applying for more seating; existing patio seating on the further end; and, that the Town was unable to determine how those came into being. He expressed that there was endless foot traffic across the bridge and that parking shouldn't really be an issue through the summer months. He expressed those as the two areas of concern to allow more seating.

Public testimony was heard from:

Mr. Tony Marchi, owning the property directly across from the subject property, expressed that he is not against all this, but is concerned about whether anyone would be there to make sure people park in the right spots. He owns a dock there and the building next door.

Mr. Bruce Crawford lives at 6 Badgers Island West. He stated that there is a big parking issue that's been like that for years; people park all along the street and they don't park in Portsmouth and walk to Badgers Island; they park in Badgers Island and walk to Portsmouth, especially when there are plays to save a couple of bucks. He has a concern about parking but is more concerned about noise, if there are people out there drinking late at night. He said he didn't know what the patio hours would be, but it would affect him more than anyone else which is his biggest concern.

Mr. Wilson raised a procedural question that the application requested a miscellaneous variation to the terms of Town Code Title 16, Section 6.4.3.B, where that section is one of Board authority to hear Miscellaneous Variation Requests. He stated that in his opinion the request was actually for a variation to the terms of Section 8.9.4, Off-street Parking Standards.

Chairman Costa explained the issue to the applicants who acknowledged that was the case. Applicant Mr. Matthew Greco made a pen and ink change to the application to note agreement with the section to be considered.

The Board deliberated the issue and made the following findings:

The site location falls under the Mixed Use – Badgers Island (MU-BI), Shoreland Overlay, and Commercial Fisheries/Maritime Uses Overlay Zones. No ordinance requirements of those zone standards conflict with the base zone provisions.

The actual current residential (4.5), marina (11), and restaurant (16) uses require a total of 31.5 spaces. 29 spaces are laid out on the plot plan. The 500sf addition requires an additional 11 spaces, for a new combined required total of 43 (rounded up).

Required off-street parking may be satisfied by the joint use of parking spaces by two or more uses if the applicant can show that parking demand is non-conflicting and will reasonably provide adequate parking for multiple uses without parking overflowing into undesignated areas. Non-conflicting periods may consist of daytime as opposed to evening hours of operation, or weekday as opposed to weekend hours of operation, or seasonal variation in parking demand.

The applicants arranged with Greenpages Technology Solutions, of 33 Badgers Island West (Map 1 Lot 32 and Map 1 Lot 38) for use of 20 spaces at an approximate distance not in excess of 800 feet along the traveled way at times not in conflict with Greenpages use, as evidenced by letter from Ms. Belinda Braley, Chief Executive Officer, dated June 3, 2015.

The total number of spaces available becomes 49, or six greater than minimum requirements.

The applicant stated that the outside seating would be seasonal and weather permitting; they have already reduced open hours and only serve lunch Friday through Sunday and dinner six nights a week starting at 4:00pm to 9:30pm. The hours are nearly opposite Greenpages hours, avoiding conflict of parking space usage.

Required off-street parking in the MU-BI zone must be located on the same lot with the principal building or use, or within one hundred (100) feet measured along lines of public access, except that where off-street parking cannot be provided within these limits, the Board may permit such off-street parking to be located a reasonable distance from the principal building or use, measured along lines of public access.

The approximate 800-foot distance between the two parking area is determined to be reasonable; and the ease and safety of pedestrian access to shared parking by the users served was considered in making that decision.

Based on a most frequent basis and not “worst case” scenario, the parking demand is adequately non-conflicting and will reasonably provide adequate parking for multiple uses without excessive parking overflowing into undesignated areas.

Non-conflicting periods consisting of hours of operation opposite Greenpages; weekend hours of operation; and, seasonal variation in parking demand are sufficient to meet the intent of the ordinance.

There is sufficient data that shows that the proposal, “will substantially meet the intent of the requirements by reasons of variation in the probable time of maximum use by patrons or employees among such establishments”.

The location of the proposed use will not have excessive additional effect upon the congestion, nor undue increase of vehicular traffic congestion on public streets or highways.

The use will not cause disturbing emission of electrical discharges, dust, light, vibration or noise.

The applicant’s evidence presented for the matter: was substantial; was credible; is not outweighed by conflicting evidence from the Town; and, the applicant did meet the burden of proof for granting the request.

The ordinance authorizes conditions to be imposed on its approval, and the Board requires as follows:

- 1) Compliance with Town Code ordinance provisions regarding light and noise;
- 2) The off-site joint parking arrangement with Greenpages must be held under the same ownership or lease, and evidence of such control or lease is required and must be reviewed and deemed satisfactory by the Code Enforcement Officer and Town Attorney; and,
- 3) The off-site joint parking arrangement is to be reviewed by the Code Enforcement Office annually with the application for the liquor and victualers license.

Mr. Wilson moved to accept the Findings of Fact.

Mr. Boyle seconded. Motion carried unanimously.

Conclusions of Law

The Board determined the following statute/ordinance provisions link the specific statements covered in the findings of fact to the performance standards/review criteria which the applicant was required to meet in order to receive the Board’s approval:

The Board of Appeals has the authority to grant a Miscellaneous Variation Request, under Town Code Title 16, Section 1.5.2, pursuant to Section 8.9.4, Off-street Parking Standards, to:

“M. approve the joint use of a parking facility by two or more principal buildings or uses where it is clearly demonstrated that said parking facility will substantially meet the intent of the requirements by reasons of variation in the probable time of maximum use by patrons or employees among such establishments.”

Furthermore, pursuant to Section 16.3.2.14, Mixed Use - Badgers Island MU - BI.

F. Special Parking Standards.

2. Joint Use Parking.

Required off-street parking may be satisfied by the joint use of parking spaces by two or more uses if the applicant can show that parking demand is non-conflicting and will reasonably provide adequate parking for multiple uses without parking overflowing into undesignated areas. Non-conflicting periods may consist of day time as opposed to evening hours of operation or weekday as opposed to weekend hours of operation or seasonal variation in parking demand.”

Mr. Wilson moved to accept the Conclusions of Law.

Mr. Boyle seconded. Motion carried unanimously.

[Video Clock: 2:25:10 to 2:33:57]

Chairman Costa brought the postponed Carson Appeal Findings and Conclusions to order.

Findings of Fact:

The Board deliberated and made the following findings:

Statutes and ordinances reviewed demonstrate that the Town does have legal authority to enforce Town code in the State-owned Route 236 Right-of-Way as further delineated in the “Description of State Maintenance Boundary Lines established for delimiting the urban area of Kittery, York County, Maine”, effective October 4, 2006.

Statutory and ordinance evidence reviewed demonstrates that the Kittery Board of Appeals does have jurisdiction to hear this matter.

The filing of the appeal is valid in accordance with timing from June 23rd Amended Notice, as affirmed by the applicant’s attorney.

Brian Carson, Carson Investments, LLC, is the owner of the property at 2 Stevenson Road, Kittery (Map 29 Lot 38). The application is complete and the applicant does have standing.

The applicant’s burden of proof was clarified. As confirmed with the applicant’s attorney, the relief sought as noted in the appeal filing asked the Board to find:

“All Notices of Violation pertaining in any way to the State of Maine right of way Route 236 should be overturned because they do not relate to the Town of Kittery.”; and,

“He is not in violation of his approval by storing and selling fill and gravel on his property.”

In order to grant the appeal, the applicant needed to demonstrate that:

- 1) The Town has no authority to apply local zoning ordinance to the issue in question: and,
- 2) Storing and selling fill and gravel on his property are permitted use activities.

Mr. Carson applied to the Town for a Home Occupation permit which was converted to a Business Use Change permit and approved by the Town Planner and Code Enforcement Officer on April 09, 2015. The Notice of Decision issued approval for new business to include: *“single family dwelling, (currently exists, will remain); retail, 3 rooms, 1st floor; auto detailing and stereo installation, garage; and, landscaping contracting, excavation, materials and services for home builders, contractors, excavators, etc., exterior of structure, side & rear of property.”*

The applicant's 05-28-15 letter regarding trespass was not a valid notice and municipal staff site visits were legally conducted.

The Board suspended its rules and allowed introduction of written information by the applicant, including a transcription of a recorded voice mail message to the applicant from MDoT staffer Kyle Hall, on or about June 17th; and, a statement from Mr. Joe Noel, a Maine-certified Soil Scientist, concerning his visit to the site on April 1st, 2015.

The applicant requested and the Board allowed the recording of the voice mail message to be played aloud. The Board agreed that the written statement was an accurate transcription.

The applicant's attorney's comments regarding issues with notice of the meeting were addressed by the Assistant Code Enforcement Officer and found to be compliant with the ordinance.

Soil Scientist Noel's site visit pre-dated the fill activity cited in the violation notices and no evidence was offered that he had visited the site after April 1st, where he had met with the applicant and Shoreland Resource Officer and noted in his statement: *"Brian Carson asked if he could place fill to level out his backyard on his property to the edge of the right of way and it appeared that she (SRO) had no concerns regarding this work."*

MDoT staffer Hall's voicemail message to the applicant differed materially with his e-mail communications to the Code Enforcement office. In the voice mail to the applicant, he stated, *".... I made it very clear that the way you had it before they made you take it out was safer for the highway and I would prefer that it went back that way...."*

In email to the Code Enforcement office, June 23, 2015 8:15AM, he stated, *"I met with Brian Carson on site, June 16th to discuss his intentions. In review of his request I have no objections. His plan to flatten the slope to 3:1 is in the best interest of public safety."*

As you are aware this area lies within the compact urban limits of Kittery, thus Kittery is the authority on highway opening permits, I will not over step that authority, but only stress that I have no objections to the proposed work. The final determination lies with the Town of Kittery."

To which the Shoreland Resource Office responded to him via e-mail June 23, 2015 10:52 AM: *"Thank you for your opinion on this matter. When the original Notice of Violation was issued on May 28, 2015 to Mr. Carson the extent of fill was nearly level with Route 236 (not a 3:1 slope) and Central Maine Power had requested that the fill be removed from around their pole and guide wires. After discussing this with Bob we agree that if Me DOT prefers the embankment slope to be 3:1 then we will allow the fill to be placed back with a few conditions. (citing six conditions)"*

And to which Mr. Hall replied June 23, 2015 11:03 AM: *"I concur whole heartedly, I would like to change #3 and #5 to read as follows. 3. Embankment shall be a 3:1 or flatter slope per MeDOT request. All additional fill on Mr. Carson's property, not directly related to the slope shall be removed. 5. Me DOT to inspect the final grading approving the slope work and provide the Town with notice on completion (email is sufficient)."*

The Board concluded that Mr. Hall's communications related exclusively to the grade of the right of way embankment as a matter of public safety, affirming the condition as a MDoT request, and expressing no regard of drainage or erosion matters of concern to the Town.

The Board noted that Mr. Hall acknowledged the Town's authority over highway opening permits in that area of Route 236 [such permit is the MDoT protocol for "any operation involving the intentional displacement of earth, rock, or pavement surface within the limits of a highway"].

The CEO does have the authority to issue the subject violation(s) notice. The Shoreland Resource Officer is an appointed and certified Code Enforcement Officer; holds certification in erosion and sediment control measures through MDEP; and is a Code Enforcement office designated staff member.

The CEO violation notice citations of May 28th, June 8th, and June 23rd, do reflect ordinances enacted pursuant to the Comprehensive plan and are applicable.

The Code Enforcement office record and photographs related to the site activity violations cited by the CEO are affirming of violation in the context of the Title 16 Sections 8.8.1 & 9.1.3 requirements.

Conditions as found in Title16, Section 6.6.1B 1-4, as reviewed, are satisfactory.

Factors as found in Title16, Section 6.6.2A-P, as reviewed are satisfactory, except the requirements of: “*M. Assurance of adequate landscaping, grading, and provision for natural drainage*”, must be met.

As the issues appeared to be a mix of law and facts, the Board conducted an “arbitrary and capricious” review in effort to determine whether the Code Enforcement office issued the Notices based on “unreasonable grounds” or “without any proper consideration of circumstances”.

No evidence was found that:

- 1) the CEO Notices were a "plain error" which led to a “brazen miscarriage of justice”.
- 2) the CEO Notices were made on “unreasonable grounds” or “without any proper consideration of circumstances”.
- 3) there was any conflict between ordinances related to the issue.

The Board could not determine with a "definite and firm conviction” that a mistake was committed by the Code Enforcement Office.

The applicant’s evidence presented for the matter regarding Town and Code Enforcement authority to issue the Notices of Violation and Order: was substantial; was not credible; is outweighed by conflicting evidence from the Town; and, the applicant did not meet the burden of proof for granting the appeal with respect to the Violation Notices.

The applicant’s evidence presented for the matter regarding Code Enforcement Order Item 3 of the Violation Notice of June 23rd, 2015, “*All additional fill on Mr. Carson's property to be removed*”: was substantial; was credible; is not outweighed by conflicting evidence from the Town; and, the applicant did meet the burden of proof for granting the appeal.

The Town’s Business Use Change approval is moot, any appeal period having expired, and storing of gravel/fill on the site does meet the conditions of that approval as shown in the Planner/CEO Notice of Decision, dated 4-9-15.

The Shoreland Resource Officer pointed out to the Board that a silt fence was only temporary and that other measures may be necessary to resolve the drainage and erosion issues. The Board concluded that dealing with that would not be with the Board’s purview, but a matter for enforcement to deal with.

Mr. Wilson moved to accept the Findings of Fact.

Mr. Boyle seconded. Motion carried unanimously.

Conclusions of Law

The Board determined the following statute/ordinance provisions link the specific statements covered in the findings of fact to the performance standards/review criteria which the applicant was required to meet in order to receive the Board's approval:

23 MRS §1 establishes the Department of Transportation and delineates its responsibilities.

23 MRS §1 Part 1: State Highway Law, Chapter 13: Construction, Maintenance and Repairs, Subchapter 2: State Highways, §754, Town maintenance in compact areas, 1. Jurisdiction.

35-A MRS Public Utilities, Chapter 25: Regulation of Facilities in the Public Way, §2502. Definitions.

23 MRS Part 3: Local Highway Law, Chapter 305: Construction, Maintenance and Repair, Subchapter 5: Drainage and Watercourses, §3252, Drainage or obstruction of public ways, 1. Change in drainage; obstruction.

Maine DoT Kittery Urban Compact Description, October 4, 2006, Description of State Maintenance Boundary Lines established for delimiting the urban area of Kittery, York County, Maine.

30-A MRS §4352 §§6, Effect on State.

30-A MRS §2691; Town Charter 8.04; and Town Code Title 16, Section 6.1.5.2F(2), Administrative Decision Appeal.

Town Code Title 16, Sections 6.4.1, Administrative Decision Appeal; 4.5.6, Appeal of Notice of Violation and Order; and, 6.5.2, Hearing and Notice.

Town Code Title 16, Chapter 8, Article VIII, Surface Drainage and Section 9.1.3, Prevention of Erosion.

Mr. Wilson noted that, given the law citations, contrary to the applicant's assertion the Town of Kittery, did have jurisdiction over the 236 roadway, and could therefore apply its municipal ordinances.

Mr. Beers moved to accept the Conclusions of Law.

Mr. Wilson seconded. Motion carried unanimously.

7. New Business – NONE

8. Acceptance of Previous Minutes:

The minutes of June 09, 2015 were accepted as presented.

The minutes of June 23, 2015 were accepted as amended.

9. Board Member or CEO Issues or Comment

Mr. Beers advised that two documents handed out were the first draft set of proposed Board application forms and the packet for the proposed Title 14.

10. Adjournment

Mr. Beers moved to adjourn. Seconded by Mr. Wilson. Motion carried unanimously.

The Board of Appeals meeting of July 14, 2015 adjourned at 9:44 p.m.