

**WESTBROOK ZONING BOARD OF APPEALS
TUESDAY, JANUARY 12, 2021 7:00 P.M.
MINUTES**

Present: Aaron Burns (Chair), Michael Lemay, Nancy Milton Heath, Philip Brown (Vice-Chair), Sherri Quint, Michael Foster (Alternate), Karen Axelsen (Alternate)

Absent:

Staff: David Finocchietti, Code Officer, Linda Gain, Office Coordinator

Legal Staff: Mark Bower, James Katsiaficas

Applicant Legal Representative: C. Alan Beagle

MINUTES MAY NOT BE TRANSCRIBED VERBATIM. SECTIONS MAY BE PARAPHRASED FOR CLARITY. A COMPLETE RECORDING MAY BE OBTAINED BY CONTACTING PLANNING AND CODE ENFORCEMENT at 207-854-0638 ext. 1220 and lgain@westbrook.me.us.

Aaron Burns called the meeting to order.

****Notation: Voting members - Aaron Burns (Chair), Michael Lemay, Philip Brown (Vice-Chair), Sherri Quint, Michael Foster (Alternate)**

Nancy Milton Heath (Recused)

1. Call to Order
2. Approval of minutes dated November 10, 2020

Move acceptance by **Philip Brown** adding **Karen Axelsen** in attendance.

Minutes approved

November 10, 2020 Continuation

Aaron Burns introduced item:

3. Administrative Appeal, Beagle, Steeves & Ridge, LLC on behalf of Coyne Operated Properties, LLC, 9 Cumberland Street, is appealing the July 30, 2020 decision from David Finocchietti, Code Enforcement Officer, for the decision/interpretation of the Land Use Ordinance regarding uses and development of the merged portion of Tax Map: 040, Lot: 013, Zone CCD and Tax Map: 040, Lot: 211. Zone IPD

Aaron Burns at the closure of the last meeting we closed the factual records for the submission of the proposed Findings and Fact and Conclusion of Law from the parties and have received those. The Attorneys for each party would like to have ten (10) minutes to make a summation before the Board begins deliberations. Any objections to allow the Attorneys ten (10) minutes each?

No Objections

C. Alan Beagle on behalf of Coyne Operated, Mr. Chairman, thank you for the opportunity to address the Board. The reasons the Code Enforcement Officer gave for his determination that the division of the Portland Terminal Lot was not permitted was the remaining Portland Terminal Lot would not meet the frontage requirements and the Portland Terminal Lot would lose its lot of record status. In his letter the Code Enforcement Officer provided no explanation why the loss of record status is not allowed by the Ordinance.

As stated in our proposed statement of Findings of Fact and Conclusions of Law a loss of lot of record status did not occur upon the lot division because the Portland Terminal Lot never have lot of record status under the plain and unambiguous definition of lot of record because the Portland Terminal Lot never was a lot of record. So that status could not be lost.

The bottom line is the Portland Terminal lot was or is lot of record under the Ordinance, it does not matter in the analysis whether the division of the Portland Terminal lot is permitted under the Ordinance. The crucial issue is can a landowner by division create a new lot that does not conform to the Ordinance. The Code Enforcement Officer's position is no, as stated in paragraph 10 and 11 in the proposed Findings of Fact and Conclusion of Law.

The position of the appellant Coyne Operated Properties is the division of the Portland Terminal Lot is permitted by the Ordinance and the existence and creation of the nonconforming lot is permitted by the Ordinance.

The division of the Portland Terminal parcel first is expressly permitted by the Ordinance subsection 203.2B which specifically states:

"Ownership of lots which remain lawful but nonconforming by the adoption amendment of this Ordinance maybe transferred."

The purchase portion of the Portland Terminal lot became nonconforming upon its division from the original lot to the prior adoption of the Ordinance and its transfer was thereby expressly permitted. That is ownership of lots and portions of lots which are or become nonconforming maybe transferred.

The second reason is that the division of the Portland parcel is expressly permitted by the Ordinance Section 202.22 and its corollary. 202.22 states: *"Land may not be divided except in accordance with this Ordinance. All other division of land is expressly prohibited except that which is already lawfully existing at the time this Ordinance is enacted."*

The corollary for this provision is that land may be divided unless it is not in accordance with this Ordinance. We assured there has been no suggestion otherwise the no provision in the Ordinance exists expressly or imply ably which prohibits a parcel of land being divided and the divided portion being transferred to an abutting property owner.

On page five (5) of the proposed Findings of Fact and Conclusion of Law the CEO incorrectly and without the support of the Ordinance is that the division of the Portland Terminal lot was not permitted as the portion of the Portland Terminal lot does not have the same boundaries as the pre-division Portland Terminal lot parcel.

Obviously, a portion of a parcel are not the same as the original parcel. So, what, there is no requirement in the Ordinance that the boundary of the divided portion of a parcel remain as the same as the original parcel. Contrary to the apparent position of the CEO neither the existence nor the creation nor the division of non-conforming lots prohibit by the statute for several reasons.

1. There is no expressed prohibition in the Ordinance of the existence or the creation the division of nonconforming lots.
2. The very existence in the Ordinance Section 203 titling Nonconformance and its several subsections is premise on the existence of nonconforming lots.
3. The first Section 203.1 begins *"The intent of the Ordinance is to regulate nonconforming lots uses and structures."* This section does not say nor any subsection of Section 203 or any other Ordinance provision state that nonconforming lots cannot exist.

4. Case law states that the policy of Zoning Ordinances and regulations generally secure the original to cause the gradual elimination speedily as justice will permit of nonconformance. The division of Portland Terminal lot promotes that policy and promotes the interest of Westbrook.
 - a. Allowing the division of the Portland Terminal lot will avoid a taking claim from the Railroad by depriving the right to sell part or all of its property. A property right which the Railroad reasonably anticipated when it purchased the lot and the sale of the purchased portion of the Portland Terminal lot will be the joint development of that portion with lot thirteen (13) owned by Coyne Operated in accordance with requirements of the City Center District thereby reducing the amount of land in the remaining Portland Terminal lot that does not conform to the Land Use Ordinance and its requirements.

Finally, would be remiss for not pointing out that the case law cited by the Code Enforcement Officer confirms that the appropriate remedy for a division not being allowed under the Land Use Ordinance is not to rescind the division which power the Zoning Board of Appeals does not possess, rather the remedy is to not permit the grandfather status previously possessed by a parcel before the division not to be regained by the divided portions of the property after the division.

Thank you – any questions after due course.

**To: Westbrook Zoning Board of Appeals
City of Westbrook
2 York Street
Westbrook, ME 04092**

**From: C. Alan Beagle, Esq.
Beagle, Thomas & Ridge, LLC
10 Moulton Street
Portland, Maine 04101**

RE: Administrative Appeal of Coyne Operated Properties, LLC of the July 30, 2020 decision of David Finocchietti, City of Westbrook Code Enforcement Officer, regarding the division of Tax Map 040, Lot 211, Zone IPD and the development and use of the merged portion of Tax Map 040, Lot 013, Zone CCD and Tax Map 040, Lot 211, Zone IPD.

Appellant Coyne Operated Properties, LLC ("Coyne" or "Appellant") respectfully submits this Proposed Findings of Fact and Conclusions of Law in support of Appellant's administrative appeal to the Westbrook Zoning Board of Appeals ("Board") pursuant to Section 703 of the Westbrook Land Use WLUO ("WLUO") of the determination of Code Enforcement Officer David Finocchietti ("CEO") that the division of Tax Map 040, Lot 211 ("Lot 211") owned by Portland Terminal Company (the "Railroad") was not allowed under the WLUO.

Appellant requests the Board affirmatively rule that the division of Lot 211 was allowed and that the portion of Lot 211 purchased by Coyne on July 31, 2020 ("the Purchase Date") from the Railroad ("Purchased 211 Portion") and Tax Map 040, Lot 013 ("Lot 13") owned by Coyne can be jointly developed subject to the zoning requirements of the Westbrook City Center District ("CCD").

APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

1. Prior to the Purchase Date:
 - a. Lot 211 was a parcel of land owned by the Railroad located within the Westbrook City Industrial Park District ("IPD") consisting of an area of almost 4.5 acres with frontage of 85 feet on Cumberland Street.
 - b. Lot 211 did not meet the frontage requirements of the IPD.
 - c. Lot 211 was not a parcel of land with ascertainable boundaries described in a recorded deed in a subdivision plan approved by the Westbrook Planning Board.
 - d. Lot 13 was a parcel of land owned by Coyne consisting of an area of approximately 25,700 square feet located entirely in the CCD and conformed to the zoning requirements of the CCD.
 - e. Lot 13 abutted Purchased 211 Portion.
2. On the Purchase Date:
 - f. Coyne bought Purchased 211 Portion consisting of an area of 24,000 square feet abutting Lot 13.
 - g. Neither Purchased 211 Portion nor the remaining portion of Lot 211 ("Remaining Lot 211") independently conformed before or after the Purchase Date to the IPD zoning requirements due to lack of road frontage.
 - h. Coyne contemplates developing the combined parcel of Lot 13 and Purchased 211 Portion (the "Merged Lots"), having a "combined" area of approximately 49,700 square feet for uses permitted in the CCD.
 - I. Coyne contemplates construction of a building on the Merged Lots having commercial space on the ground floor (possibly a restaurant, neighborhood grocery, mixed uses) and restaurant units on upper floors, which Coyne understands is the current use model preferred by the City along the Main Street-Cumberland Street corridor.
3. Procedural History:
 - J. By letter dated 24 July 2020, counsel for Coyne requested CEO's opinion(s) of any use limitations raised by the purchase by Coyne from the Railroad of Purchased 211 Portion.
 - k. By letter dated 30 July 2020, CEO responded to Coyne's counsel's request and opined that the division of Lot 211 is not allowed under the provisions of the WLUO, CEO stated the basis for his determination was his conclusion that Lot 211 was a "non-conforming Lot" as defined in Section 201 of the [WLUO]", "a single "lot of record" before its division into Purchased 211 Portion and Remaining Lot 211, and that Remaining Lot 211 after the division would no longer be a single lot of record but would instead become a "new lot" not meeting the current requirements of the IPD as required by Section 202.13 of the WLUO.

- l. By letter dated 4 August 2020, counsel for Coyne requested CEO reconsider his conclusion that the division of Lot 211 was not allowed.
- m. By letter to Coyne's counsel dated 12 August 2020, CEO confirmed his opinion set forth in his letter of 30 July 2020.
- n. On 25 August 2020 counsel for Coyne timely filed this appeal of CEO's determination that the division of Lot 211 was not allowed under the WLUO.
 1. This Board first considered the merits of this appeal in its meeting on 10 November 2020. The meeting was conducted remotely on the Zoom internet platform. The Board recognized the confusion existing in the written documentation regarding the identification of Lot 211 and Lot 13 and expressed its satisfaction that the parties' presentations to the Board had clarified the confusion. The Board instructed all parties to file no later than 5 January 2021 any memorandum of law and any proposed findings of fact and conclusions of law in support of its position. It then scheduled this appeal for further consideration on 12 January 2021.

C. CONCLUSIONS OF LAW

1. The stated premise of CEO's conclusion in his 30 July 2020 letter is that Lot 211 before its division on the Purchase Date "is a non-conforming lot, as defined in Section 201 of the [WLUO]". That premise is mistaken because Lot 211 was not a "lot of record" as defined in WLUO Section 201.15, a prerequisite for Lot 211 being a "non-conforming lot".¹
2. Lot 211 was not and never has been described in a "recorded deed in a subdivision plan that has been approved by the Planning Board" and, therefore, was not and never has been a "Lot of Record" under the WLUO.
3. Because Lot 211 was not a "lot of record" before its division, Lot 211 also was not and never has been a "nonconforming lot" as defined by the WLUO.²
4. Because Lot 211 was not a nonconforming lot before its division, the WLUO status of Remaining Lot 211 remains the same after the division as before the division of Lot 211.
5. The fact that Lot 211 was not a "Lot of Record" excludes Lot 211 from the provisions of WLUO Section 203.1 and WLUO Section 203.5.A, B and C, and these provisions therefore do not apply to the division of Lot 211.
6. WLUO Section 203.2 applies to the division of Lot 211 because this provision, unlike Sections 203.1 and Subsections 203.5.A, B and C, does not refer to nonconforming lots or lots of record.

¹ WLUO Section 201 Definitions defines a "Nonconforming Lot" as "A single lot of record which, at the effective date of adoption or amendment of this WLUO, does not meet the area, frontage, or width requirements of the district in which it is located (emphasis added).

² WLUO Section 202.15 defines a "Lot of Record" as "[a] parcel of land with ascertainable boundaries described in a recorded deed in a subdivision plan approved by the Planning Board and meeting prior zoning requirements at the time this WLUO was adopted." (emphasis added).

7. The division of Lot 211 was entirely consistent with and expressly permitted by Section 203.2.B which specifically provides that "Ownership of lots ... which remain lawful but become nonconforming by the adoption or amendment of this ordinance may be transferred, and the new owner may continue to use the nonconforming .. lot, subject to the provisions of this ordinance" (emphasis added). CEO was correct that Purchased 211 Portion and Remaining Lot 211 became nonconforming upon the division of Lot 211, but contrary to the determination of CEO, the division and transfer was expressly permitted by Section 203.2.B.
8. Additionally, WLUO Section 202.22 (Only Permitted Uses Allowed) states that "... land may not be divided, except in accordance with this Ordinance." (emphasis added). The corollary of this statement is that *land may be divided unless not in accordance with this Ordinance*. Nothing in the WLUO prohibits a parcel of land from being divided and the divided portion transferred to the owner of an abutting parcel. and such division was therefore in accordance with the WLUO. Further, the WLUO expressly contemplates the division of a parcel and its transfer to an abutting landowner. Thus, contrary to the conclusion of CEO, the division of Lot 211 was in accordance with the WLUO and legal. The subsequent development of the resulting sub-parcels of Lot 211 of course remains subject to the restrictions of the zoning districts within which such sub-parcels are located.
9. Further, the division of Lot 211 comports with the manner in which the divisions of lots are regulated by the WLUO. By virtue of the definition of "Subdivision", the WLUO excludes from the regulation of subdivisions the division of a tract or parcel of land "accomplished by the transfer of any interest in land to the owners of land abutting that land...." See WLUO Section 201, definition of "Subdivision". Purchased 211 Portion abuts Coyne owned Lot 13 and Purchased 211 Portion was sold to Coyne.
10. Contrary to the assertion of counsel for CEO at the November 10 Board meeting that the division of Lot 211 was illegal, the case law referenced by counsel for CEO confirms that the division of Lot 211 was not illegal under the WLOU. In both Town of Windham v. Sprague, 219 A.2d 548 (Me. 1966) and Day v. Town of Phippsburg, 110A.3d 645 (Me. 2015) the courts concluded that the challenged actions were illegal (and the transferred parcels thereby lost grandfathered status) *because such actions were specifically prohibited* by the applicable ordinances. As to lot divisions, in Day v. Town of Phippsburg, the Court held that the division of a grandfathered lot was in violation of the applicable ordinance clause which expressly prohibited any separation of a merged lot that had obtained its grandfathered status by virtue of having been previously merged. In this appeal, the WLUO does not prohibit the division of Lot 211 and such division was not illegal.³

³ In Day v. Town of Phippsburg, the Court did not invalidate the division of the grandfathered merged lot due to its division having been illegal under the applicable land use ordinance WLUO. Rather, the Court recognized that the division had occurred and that the resulting sub-parcels

11. Lot 13 is a lot consisting of approximately 25,700 square feet located within the CCD. Purchased 211 Portion is a lot consisting of 24,000 feet located within the IPD. As confirmed by the guidance provided by CEO in his letter of 30 July 2020, since Lot 13 is the larger portion of the Merged Lots, the CCD is the primary district that governs the joint development of Lots 13 and Purchased 211 Portion.
12. Allowing the division of Lot 211 and sale of Purchased 211 Portion to Coyne is sound public policy and promotes the interests of the City of Westbrook. First, allowing the division of Lot 211 will avoid a takings claim from the Railroad for depriving it of its right to sell part or all of this property; a property right which the Railroad undoubtedly and reasonably anticipated when it acquired this land.⁴ Second, the result of the division of Lot 211 and the sale of Purchased 211 Portion will be the joint development of Purchased 211 Portion with Lot 13 in accordance with the requirements of the CCD; thereby reducing the amount of land within Remaining Lot 211 that does not conform to the WLUO requirements.⁵

C. CONCLUSION

For the foregoing reasons, this Board of Appeals reverses the determination of CEO that division of Lot 211 is not allowed under the WLUO and confirms that the Purchased 211 Portion acquired by Coyne from the Railroad and Lot 13 can be jointly developed by Coyne subject to the zoning requirements of the CCD.

Respectfully submitted this 5th day of December 2021,
C. Alan Beagle
ME Bar No. 1421
cab@beagleridge.com

were no longer grandfathered and held that such sub-parcels could not regain grandfathered status by being remerged together. Thus, even if Lot 211 was a 'lot of record' (which it was and is not) and its division was illegal, its division simply resulted in the resulting sub-parcels of Lot 211 having lost and unable to benefit from being grandfathered and thereafter unable to regain such status by being later remerged. Regardless of whether the Railroad's division of Lot 211 conformed to the WLUO, Coyne remains the owner of Purchased 211 Portion and is entitled to develop this land in accordance with the WLUO.

⁴ The courts have recognized that takings claims arise when property owners are deprived of lawful rights that they anticipated when they acquired their property. See Day v. Town of Phippsburg, 110 A.3d 645 (Me. 2015).

⁵ "The spirit of the zoning ordinances and regulations is to restrict rather than to increase any nonconforming uses, and to secure their gradual elimination. Town of Windham v. Sprague, 219 A.2d 548 (Me. 1966) at 552. "The policy of zoning is to abolish nonconforming uses as speedily as justice will permit. Id. At 553.

Aaron Burns Mr. Bower

Mark Bower on behalf of David Finocchietti, I want to briefly summarize where we are and how we got here. I think the first step is to reframe what the issue is for the Board tonight outlined in the proposed findings submitted back on December 30th.

The issue here is whether the CEO's interpretation should be upheld. That is what is before you tonight. The interpretation and I will quote:

"If the split occurs the remainder of the Portland Terminal lot would no longer be a single lot of record but instead become a new lot and now have to current requirements for the Industrial Park District of a lot as required by Section 202.13 of the Ordinance." "The remainder of the Portland Terminal lot would not meet the frontage requirements and the changes would cause it lose its lot of record status." For this reason, the proposed division of the lot is not allowed under the provisions of the Ordinance. That is what is before you tonight, that opinion, not the taking, not what the proper remedy is none of that is before you. Before you is whether the interpretation is correct or not. We submit that it was.

I think the parties will agree that it does not really matter if it is a nonconforming lot or not. Because the real problem is if a nonconforming lot or not you cannot create an illegal lot from a lot split and that is under Section 202.22 a parcel cannot be divided except in conformance with the Ordinance. What happened here, whether it is nonconforming or not is it would create a lot that does not meet the frontage requirements. That is not allowed under the Ordinance. The Ordinance has specific requirements of creations of lots, frontage requirements and lot size requirements. You cannot create a lot that does not meet those requirements.

Nonconforming lots are allowed to continue in existence because they were created before Zoning was put into place.

The Ordinance provision of Lot of Record needs to be interpreted reasonably. Section 202.15 lot of record definition says, "*A parcel of land with ascertainable boundaries described in a recorded deed in a subdivision plan*" I would submit that is a typographical error and it is supposed to read "**A parcel of land with ascertainable boundaries described in a recorded deed [or] in a subdivision plan**". A recorded deed in a subdivision plan does not make any sense as it would not be recorded in a subdivision plan. IT would also disqualify a great many City lots from the definition of Nonconforming Lot. When the Board is interpreting the Ordinance in order to avoid a result, the Board would need to interpret that to read "A parcel of land with ascertainable boundaries described in a recorded deed [or] in a subdivision plan approved by the Planning Board and meeting prior Zoning requirements at the time this Ordinance was adopted".

The Portland Terminal lot is a lot of record because it has ascertainable boundaries, it was described in a recorded deed and it met prior Zoning requirements at the time the Ordinance was adopted. It had nonconforming status until that lot split occurred in late July. That did away with the lot status and that is what the problem here is.

If you accept the applicant's theory that this is not a nonconforming lot of record then the question becomes how do you let him split it? Under what theory would you allow them to split it? That is why the CEO's interpretation has to be upheld. There is no viable way for him to split a lot that creates an illegal lot from what is remaining. That split will not comply with Zoning that is a violation of 202.22. You can only divide a lot to create a new legal lot. If that lot were split and could meet the frontage requirements, that would be fine.

I also wanted to note that section 203.2 which deals with nonconforming uses and that section does not apply because there is no nonconforming use here, there was no use of the lot at the time the lot was split so in essence if there was no nonconforming use that time there is no continuation of nonconforming use to continue on as of the date of the adoption of the Ordinance. That provision is not applicable.

In the proposed findings there was reference to a subdivision provision of a transfer to an abutter. This is not a subdivision, so I did not want the Board to get confused about that. That provision is not relevant for your inquiry tonight because this was a single lot split, so the fact that it was transferred to an abutter really is of no consequence in this case.

I would like to end with a quote from the case *Day vs Pittsburg* in the proposed findings “In light of this policy zoning provisions that restrict nonconformities are liberally construed and zoning provisions that allow nonconformities are strictly construed.”

When you look at this you need to keep in mind that zoning does not prefer nonconformities. We and liberally interpret the Ordinance while to do what they want to do here does not agree with what the case law is, which is to strictly construe nonconformance provisions which is precisely what the CEO did here, and we ask that you uphold CEO’s determination. Thank you,

CITY OF WESTBROOK, MAINE
ZONING BOARD OF APPEALS

RE: COYNE OPERATED PROPERTIES,) LLC)
)
)

ADMINISTRATIVE APPEAL OF JULY 30, 2020
DECISION OF CODE ENFORCEMENT OFFICER
DAVID FINOCCHIETTI

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF CODE
ENFORCEMENT OFFICER DAVID FINOCCHIETTI

Following a hearing before the Zoning Board of Appeals in this matter, Code Enforcement Officer David Finocchietti offers the following proposed findings of fact and conclusions of law:

FINDINGS OF FACT

1. On or about August 26, 2020, Coyne Operated Properties, LLC filed this appeal of a decision of the Code Enforcement Officer dated July 30, 2020, regarding the uses and development of Lots 13 and 211 of Tax Map 40.
2. This matter came before the City of Westbrook Zoning Board of Appeals (“Board”) for hearing on November 10, 2020.
3. Present at the hearing were the Appellant, Matthew Coyne of Coyne Operated Properties, LLC (“Coyne”), and the City of Westbrook Code Enforcement Officer, David Finocchietti (“CEO”), both of whom were represented by counsel. The Board was represented by Attorney James Katsiaticas.
4. Counsel for each party presented legal argument, and Mr. Coyne and CEO each

presented testimony, and each submitted exhibits to the Board as follows:

Coyne's Evidence

- a. Application for Administrative Appeal to the Zoning Board of Appeals, dated August 25, 2020.
- b. Letter from CEO to Attorney Alan Beagle, dated August 12, 2020.
- c. Letter from Attorney Beagle to CEO, dated August 6, 2020.
- d. Letter from CEO to Attorney Beagle, dated July 30, 2020.
- e. Letter from Attorney Beagle to CEO, dated July 24, 2020.
- f. Email chain between Attorney Beagle and City of Westbrook Director of Planning and Code Enforcement, Jennie P. Franceschi, P.E., dated June 4, 2020 through July 16, 2020.
- g. Letter from Attorney Beagle to CEO, dated October 6, 2020 (with attachments).
- h. Release Deed from Portland Terminal Company to Coyne Operated Properties, LLC, dated July 31, 2020.
- i. Survey Plan prepared by Survey, Inc., dated August 18, 2020.
- j. Six (6) photos of the premises.
- k. Excerpt of City of Westbrook Tax Map 40.

CEO's Evidence

- a. Memorandum from CEO to ZBA, dated September 25, 2020.
 - b. Excerpt of City of Westbrook GIS map showing vicinity.
5. Coyne is the owner of the property located at 9 Cumberland Street in Westbrook, which is designated by the City Assessor as Map 40, Lot 13 (hereinafter, the "Coyne Lot").
 6. The Coyne Lot is located in the City Center District (CCD) under the City's Land Use Ordinance. With a lot size of 25,700 square feet, and street frontage of 168 feet, the Coyne Lot is a conforming lot in the CCD.
 7. Adjacent to the Coyne Lot is a 4.3-acre parcel of land owned by Portland Terminal Company, and is designated by the City Assessor as Map 40, Lot 211 (hereinafter, the "Portland Terminal Company Lot").
 8. The Portland Terminal Company Lot is located in the Industrial Park District (IPD) under the Ordinance. With only 85 feet of street frontage on Cumberland Street, the Portland Terminal Company Lot is a nonconforming lot, where 200 feet of frontage is required in the IPD.
 9. On June 4, 2020, Attorney Beagle emailed the Planning Director regarding his client's plan to

purchase a 24,000 square-foot portion of the Portland Terminal Company Lot and merge it with the Coyne Lot for purposes of development. In response, the Planning Director stated that the City's position is that the Portland Terminal Company lot is a nonconforming lot; therefore, the proposed lot split would not be permitted because the remaining portion of the Portland Terminal Company Lot would not meet the Ordinance's frontage requirement, and therefore would be an illegal lot.

10. After a further inquiry from Attorney Beagle, on July 13, 2020, the Planning Director sent an email reiterating the City's position that the Portland Terminal Company lot could not be divided as proposed and advised Attorney Beagle to request an interpretation from the CEO.
11. On July 24, 2020, Attorney Beagle sent a letter to the CEO, requesting an interpretation as to whether the Portland Terminal Company lot could be split as proposed.
12. On July 30, 2020, the CEO provided a letter of interpretation to Attorney Beagle with the following conclusion:

If the split occurs, the remainder of [the Portland Terminal Company Lot would no longer be a single lot of record but instead would become a 'new lot' and now have to meet the current requirements for the Industrial Park District for a 'lot', as required by Section 202.13 of the Ordinance. The remainder of [the Portland Terminal Company Lot] would not meet the frontage requirement and the changes would cause it to lose its lot of record status. For this reason, the proposed division of the lot is not allowed under the provisions of the Ordinance.

13. On July 31, 2020, Coyne and Portland Terminal Company went forward with the proposed lot split, and Coyne purchased roughly 24,000 square feet of the Portland Terminal Company lot (the entire area fronting on Cumberland Street), by deed recorded in the Cumberland County Registry of Deeds in Book 37106, Page 1.
14. On August 25, 2020, Coyne filed an appeal of the CEO's interpretation that is quoted above in Paragraph 12.

CONCLUSIONS OF LAW

1. This is an administrative appeal of the CEO's interpretation set forth in his July 30, 2020 letter to Coyne, which is an authorized appeal under Section 703.1 of the Ordinance: "A person aggrieved by a decision of the Code Enforcement Officer, as provided by this ordinance, may appeal to the Zoning Board of Appeals. The person must file a notice of appeal with the Code Enforcement Officer within 30 days of the action taken."
2. Coyne's appeal to the ZBA was timely.
3. The issue on appeal is whether the CEO correctly interpreted the Ordinance by concluding that the Portland Terminal Company Lot cannot be split as has been proposed.

Ordinance Provisions

4. Section 201 of the Ordinance defines "nonconforming lot" as follows: "A single lot of record which, at the effective date of adoption or amendment of this Ordinance, does not meet the area, frontage, or width requirements of the district in which it is located."
5. Section 202.13 of the Ordinance defines "lot" as follows: "A lot is a parcel of land of at least sufficient size to conform to minimum zoning requirements for use, coverage, and associated factors, and to provide such yards and other open spaces as are herein required. The lot must have the minimum lot frontage for its particular zoning district fronting on a public or private right-of-way...."
6. Section 202.15 defines "lot of record" as follows: "A parcel of land with ascertainable boundaries described in a recorded deed [or] in a subdivision plan approved by the Planning Board and meeting prior zoning requirements at the time this Ordinance was adopted."
7. It is apparent that Section 202.15 contains a significant typographical error, as the word "or," which is inserted in brackets above, was omitted and is necessary in order to give sentence any rational meaning. The phrase "a recorded deed in a subdivision plan" does not make any logical sense.

8. The Portland Terminal Company Lot is a “lot of record” because it has ascertainable boundaries that are described in a recorded deed, and it met prior zoning requirements at the time the Ordinance was adopted.
9. The lot split that occurred on July 31, 2020, by way of the deed from Portland Terminal Company conveying the 24,000 square-foot front portion of the lot to Coyne, results in the Portland Terminal Company Lot losing its “lot of record” status because it no longer has the boundaries that existed at the time the Ordinance was adopted. As a result, it is no longer a nonconforming lot. The Law Court has held on multiple occasions that a nonconforming lot of record loses its “grandfathered” status when its boundaries are modified. See *Day v. Town of Phippsburg*, 2015 ME 13, ¶ 15, 110 A.3d 645; *Farley v. Town of Lyman*, 557 A.2d 197, 200-01 (Me. 1989).¹

¹ *Day v. Town of Phippsburg* involved two nonconforming lots that merged in 1989, were separated 2 years later, and then the owner tried to rejoin them to form a buildable lot. The Law Court held that once the grandfathered status of the lots was lost by the unlawful division of the merged lot, the grandfathered status could not be restored by recombining the illegally separated lots. Similarly, *Farley v. Town of Lyman* involved the merger of two adjacent, undersized, commonly owned lots into a single lot that complied with applicable lot size requirements. The Law Court held that, after their merger, each lot lost its individual grandfathered status, and that that status could not be revived should the lots cease to be commonly owned.

10. The new lot that has been created here (i.e., the remaining portion of the Portland Terminal Company Lot) must meet minimum lot standards, including frontage. See Ordinance § 202.22 (“A structure may not be constructed or used, and land may not be used or divided, except in accordance with this Ordinance. All other construction, use or division of land or buildings is expressly prohibited except that which is already lawfully existing at the time this Ordinance is enacted.”) (emphasis added).
11. Here, the legally nonconforming Portland Terminal Company Lot has not been divided in accordance with the Ordinance; the new lot does not meet the 200-foot frontage requirement for the IPD and, therefore, it violates Section 202.22. As a result, the lot split that occurred,

by deed on July 31, 2020, is prohibited under the Ordinance and therefore results in an illegal lot.

12. Coyne's reference to Section 203.1, which says "nonconforming vacant lots of record can be reasonably developed," is unavailing because that section depends upon the existence of a "lot of record." Here, as explained above, the Portland Terminal Company Lot lost its lot of record status after the lot split, so this language is inapplicable.
13. Under Coyne's interpretation, a nonconforming lot of record could be carved up any number of times, with each subsequent portion developed. That interpretation is not only inconsistent with the applicable Ordinance provisions; it completely undermines the purpose of the nonconformance provisions. Moreover, this would be an absurd interpretation of the Ordinance, which the Board must avoid. *Banks v. Maine RSA #1*, 1998 ME 272, ¶ 4, 721 A.2d 655 (noting that an interpretation of an ordinance must not create "absurd, inconsistent, unreasonable or illogical results.") (Citation omitted).
14. Similarly, Coyne's reference to Section 203.2(A) is inapt because that section refers to an existing, nonconforming use of land. Under that section, if a nonconforming use exists on a part of the land or existing structure, the use may continue. Here, there is no nonconforming use of the Portland Terminal Company Lot; rather, it is a nonconforming lot, so Section 203.2(A) does not apply.
15. The CEO's interpretation that the Portland Terminal Company Lot has lost its nonconforming status is not only consistent with applicable Ordinance provisions; it is also consistent with the applicable case law, given that "[t]he policy of zoning is to abolish nonconformi[ties] as speedily as justice will permit." *Town of Windham v. Sprague*, 219 A.2d 548, 552-53 (Me. 1966); see also *Day*, 2015 ME 13, ¶ 15, 110 A.3d 645 ("In light of this policy, zoning provisions that restrict nonconformities are liberally construed, and zoning provisions that allow nonconformities are strictly construed.") (quoting *Brackett v. Town of Rangeley*, 2003

ME 109, ¶ 16, 831 A.2d 422); id. ¶ 15:

“A grandfather clause, which allows the limited continuance of nonconformities, is included in zoning ordinances in order to avoid takings challenges. It is designed to strike a balance between a municipality’s interest in abolishing non-conformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property.”

In other words, the Ordinance’s nonconformance provisions are there to protect rights anticipated at the time a property was purchased; here, at the time that Coyne purchased the portion of the Portland Terminal Company Lot, there was no right to split a nonconforming lot to create a new lot.

CONCLUSION

Given the findings of fact and conclusions of law set forth above, the Board must deny the administrative appeal of the Appellant, Coyne Operated Properties, LLC.

Respectfully Submitted,

DATED: January 5, 2021

By:



Mark A. Bower, Bar No. 4132
Attorney for Code Enforcement Officer David
Finocchietti

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Aaron Mr. Katsiaficas do you want to advise the Board how to proceed at this point?

James Katsiaficas the Board right now is in the deliberation phase which means that it is time to be considering these arguments. The Public Hearing is closed, and you have heard argument from Counsel, you are able to ask questions of Counsel if you wish, but otherwise it is time to determine did the Code Enforcement Officer error in the decision. That is fundamentally it.

There are two issues that were raised, one was nonconformity the other is if someone is allowed to enlarge the lot if legal to allow City Center uses. You do not need to get there if you decide the split was illegal in the first place therefore could not be combined.

Aaron Burns is the second issue discussed?

James Katsiaficas both issues were appealed. If you do not get past the first issue I do not see how you can get to the second.

Aaron Burns the City's position at this point for the sake of argument, assume that the City agrees, the Board agrees that the activity on the new lot with the combined area is okay, is there a dispute that they can combine the two and use it for the City Center District uses?

Mark Bower the dispute is there cannot combine the lot because they created an illegal lot by splitting it.

Aaron Burns let us say they can combine the lot. Is there a dispute on the combined lot?

Mark Bower that was not appealed.

James Katsiaficas lets be sure.

Mark Bower that is a question of the appellant. I thought the appeal was whether the lot could be split at all.

Aaron Burns it was talked about. I was not aware of the hypothetical combined lot was an issue.

Alan Beagle I think the CEO said if the lots were combined would be the use would be governed by the City Center District the combined lot would exist, we agree with that.

Aaron Burns we do not need to get there one way or the other.

Alan Beagle fair enough.

Aaron Burns the issue before the Board now is whether the original Portland Terminal lot could be split under the Zoning Ordinance. That is the only issue we are deciding on tonight. We are not deciding what the remedy is as that is an enforcement question. We are answering the straight interpretive question. Looking through this today, it occurred to me that it seems like the question has been more what use of the remaining parcel is and the lack of ability to use the remaining parcel prohibits the split. IS that accurate?

Mark Bower I think that is accurate as to what is remaining when you split the front 24,000-foot portion that went to the Coyne lot, what is left over becomes an illegal lot. That is what the CEO found was the problem. You cannot do a lot split that results in an illegal lot, the Ordinance is clear about that.

Aaron Burns is it clear on that particular issue or you cannot build on the remaining lot because it has lost its grandfathered status.

Mark Bower it will help to read the provision 202.22 *"The structure may not be constructed or used, and land not be used or divided except in accordance with this Ordinance. All other construction use, or division of land is expressly prohibited except that is already lawfully existing at the time the Ordinance is enacted."*

That is the key provision that the Board wants to look at is 202.22

Aaron Burns do you have to consider that provision in light of what is present on the parcel that is being split? You have vacant land, so splitting off part of it that creates a setback violation that creates a space and bulk violation it does not do anything other than create a lot that you cannot build on.

Mark Bower if you can do a split that meets all the space and bulk requirements for a lot size that is not a problem. But the problem here it does not meet the frontage requirements. This is a very specific case here. They split off a lot and it does not have the frontage requirements; it is illegal under Section 202.22.

Aaron Burns it is not being used for anything.

Mark Bower it is not being used.

Aaron Burns it is not a question where you have a building that needs ten (10) foot setback where a portion is being carved off to an abutter and now you are violating a setback.

Mark Bower the Ordinance is clear about what requirements is there for a lot. In this zone you need two hundred (200) feet of frontage. You are not allowed under 202.22 to divide land except in accordance of the Ordinance.

Aaron Burns but the applicant before us did not divide the land, the Railroad divided the land.

Mark Bower this is not a case of a notice of violation, this is an interpretation. The interpretation that was requested was this lot split allowed. The CEO said no, and they went ahead with the lot split anyway against the CEO's advice. This is not an enforcement issue it is a pure interpretation issue that happened before the lot split occurred.

Aaron Burns I am going to stay with my previous comment that we are not dealing with the remedies tonight.

Mark Bower the interpretation was given on July 30th and the lot split happened on July 31st. There may be an enforcement action that comes from that, but it is on the ultimate answer is. This is really; did the CEO err in his interpretation of the Ordinance on July 30th. I think under 202.22 you find that he did not.

Aaron Burns if I own a nonconforming lot I split off part of it make it further nonconforming fully understanding what I am retaining is land for a long time unless I can find someone to sell it too to merge with other properties. I cannot take that analysis that is my business interest to keep an unbuildable portion of land for a period of time.

Mark Bower I cannot speculate to your example. This is not an abstract or a theoretical thing, this is a specific set of facts and under these set of facts you will find you cannot divide that lot.

Aaron Burns we are looking at the facts before the split happened.

Mark Bower looking at the fact as of the date of the interpretation, July 30th. You cannot take a nonconforming lot and split off a portion that does not meet lot size requirements regardless of if it was July or today.

The zoning has not changed there, it still needs two hundred (200) feet of frontage.

Alan Beagle the fact that the remaining lot was nonconforming does not make it an illegal lot all it means is it is a nonconforming lot. The question is can you have a nonconforming lot before and can you divide off a portion of the lot. If you had a nonconforming lot before the remaining portion would remain nonconforming and there is nothing in the Ordinance that says a nonconforming lot is not permitted, all it says if it is a nonconforming lot in Section 203 you cannot use it for certain purposes and the Ordinance applies. A nonconforming lot can exist in Section 203 is based upon the existence and the creation in 203,

ownership of the lot or a portion of the lot can be transferred. In Section 203.2B says you can transfer ownership whether or not you end up with a nonconforming lot does not make it an illegal lot, it means it is a nonconforming lot. Nothing in the ordinance that says you cannot create a nonconforming lot.

Aaron Burns in Section 202.22 in land may not be used or divided except in accordance with this Ordinance.

Alan Beagle correct

Aaron Burns used or divided; you are saying I can transfer it even if I did it illegally. I do not think it is a question of zoning law, I think it is a question of real estate law. The question is, is it a question of zoning law, yes or no. They are saying it cannot be divided.

Alan Beagle unless it is in accordance with the Ordinance and there is nothing in the ordinance that says that a lot cannot be divided and 202 that Mr. Bower referred to does not say unless it is in accordance with the Ordinance. If it is not stated that it cannot be done then it can be done.

Aaron Burns the CEO interprets the other way around, he says you cannot do it.

Alan Beagle that is not what 202.22 says.

Aaron Burns it cannot be used or divided except in accordance with the Ordinance.

Alan Beagle corollary of that is if the Ordinance does not prohibit it must be allowed. The position of the CEO cannot create a nonconforming lot and that is not in accordance with the Ordinance. The Ordinance says you can create a nonconforming lot in Section 203 it talks about existence and changes of ownership of nonconforming parcels.

Mark Bower I think it would be helpful for the Board to look at the definition of a lot, section 202.13 defines the lot “*A parcel of land of at least sufficient size to conform to minimum zoning requirements for use, coverage, and associated factors, and to provide such yards and other open spaces as are herein required. The lot must have the minimum lot frontage for its particular zoning district fronting on a public or private right-of-way and may consist of*”. That is key for a lot under the Ordinance to comply with Zoning it must meet that definition.

When I say illegal lot, I am not talking about sending someone to jail, I am talking about a lot that is not complying with Zoning. If it is not complying with that definition and this one does not as it does not have the right amount of frontage then it is not allowed under the Ordinance.

The Ordinance is clear that if is not expressly allowed then it is prohibited. If it is not permitted, it is prohibited. There is no corollary to that rule. The definition of lot is key to this analysis.

Aaron Burns looking at 202.13 at the very end “*a parcel of land divided private or public way, provided in the case of subdivision or a combination of lots no remaining lot or parcel will be created which does not meet the requirements of this Ordinance*”.

That probably does not apply. I could not find any language that meets that.

James Katsiaficas that goes with the concept if you are going to divide something must be legal. You are asking where to start on this and if I can suggest is this, what the Code Enforcement Officer decided is that the Portland Terminal lot was a lot of record. That is contested by the appellant. Then the next step is can you take a lot of record and divide it in a way that is not lawful, does not meet the requirements to be a lot. Can you make something more nonconforming and the Code Enforcement Officer’s opinion on that is no.

Maybe it makes sense to look at those two determinations, is this a lot of record and then from there is the division of a lot of record that results in a remnant that is not conforming, that is not a lawful lot, and does not meet dimensional standards.

Aaron Burns questions from the Board?

Michael Foster this is an issue as this was a nonconforming lot that was split. A purchase of the whole lot, would this even be a problem?

Mark Bower from the CEO's perspective it would not be an issue of the whole lot, the issue was the division. Whether or not it is a lot of record you must look at Section 202.22 and it is a division that does not comply with the ordinance, so it is not allowed.

Aaron Burns anyone else?

Michael Lemay hypothetical, Say I own a house and I have a small back yard and my neighbor behind me has a gigantic lot that is directly behind my house that he does not use. What I am hearing is he cannot split a piece of his land and say Mike, the land is yours and I am going to use it as my back yard. Say I want fifty (50') x twenty-five (25') feet to have a bigger back yard we go to a lawyer and now I own this and use it for a back yard.

Mark Bower as long as what is left over on his lot meets the lot size and frontage requirements that is fine, no problem.

Aaron Burns unless it is part of an approved Subdivision.

Mark Bower there is a lot of factors you can throw in there, but in your situation two stand-alone lots, not part of a subdivision, and you do a boundary adjustment as long as what is left over is a legal lot and it meets the definition and the dimensional standards it will not be a problem. The problem here is what was left only had 80 feet of frontage instead of 200 feet.

Michael Lemay what I have left is not a legal lot either.

Mark Bower you are not the problem, it is the other persons problem. You are not splitting off your lot you are getting some land. Just like the Coyne lot is not the problem, it is the Portland Terminal lot that is the problem. It is what is left over from the split.

Michael Lemay the Portland Terminal is not here, and we are not being asked what to do with the rest of their property that is their problem. We are being asked to figure out what is left.

Mark Bower again this is an interpretation appeal so it not an appeal of violation, it is an appeal of the interpretation that CEO which was, that a split cannot occur because what is left over does not comply with zoning. It is not a legal lot.

Michael Lemay but in my understanding it was not in the beginning anyway. It was nonconforming and now they have another nonconforming lot.

Mark Bower no, it was legally nonconforming before and it was allowed to continue on as it met zoning when the zoning was adopted. It is once you split off a portion it no longer has the same lot boundaries, and you need to treat it as a different lot. It loses its lot of record status.

Once you mess with the boundaries on a lot of record it loses that status, so that is the problem here that you cut off the 24,000 square feet and what is left over no longer has its lot of record status and it does not meet the zoning requirements, so it is not allowed.

Michael Lemay what I am saying is it is not the appellants problem; it is the other guy's problem.

Mark Bower it maybe his problem but that is not what is before you tonight, what is before you is the interpretation of the CEO.

Aaron Burns we are being asked is the opinion that was given on July 30th, 2020 is correct or not. The confusion is we do not know what the consequences are. The only thing that is being decided here tonight is whether or not the letter the CEO wrote June 30th is a correct interpretation of the Ordinance.

Michael Lemay my other thought is it has already happened. People are out money stuff has happened and I think we must move forward. This happened in July, six months ago. We are holding people up who has money invested, spending money \$900.00 dollars an hour on three lawyers. It seems like this has already happened, what do you want us to do?

Aaron Burns I guess the Board could decide is it is moot; it has already happened. But my view is that there probably some collateral consequences to what occurred that makes it not moot. The decision tonight will certainly inform the Code Officer how to proceed going forward.

Alan Beagle I would like to respond to Mr. Lemay's question. Your abutting neighbor has a bigger lot and wants to transfer a small portion to you.

Let us assume that the neighbor has a nonconforming lot he did not have enough road frontage, he was grandfathered but you wanted 5 feet to put a shed on it, and the position of the CEO is he could not transfer it to you.

I think that is wrong and I think it is a misinterpretation of the statute and the reason is that I say it is a misinterpretation of the statute is that there is nothing in the statute that says his lot before was created an illegal lot. It was a nonconforming lot and reduced that size by a tiny bit, but that does not make it an illegal lot or an illegal transfer. The Ordinance is not designed to prohibit that. Can a nonconforming lot have a portion transferred to the abutter, and that is the question? And it is not prohibited by the Ordinance in fact the Ordinance encourages that example.

James Katsiaficas I will just point out that under general rule you do not create a nonconforming lot by carving off some additional land that you do not think you need. What the law does is allow a lot that becomes nonconforming because of the change in law, the change in Ordinance, we go from one (1) acre minimum to two (2) acre minimum, the one (1) acre lots are now grandfathered and can build on them as lawful nonconforming you cannot go out and take a two (2) acre lot and then divide it into one (1) and say it is legal, it is not.

Under 203.2 Transfer of ownership, you can transfer a lot. Ownership of lot structures and uses which remain lawful that become nonconforming by the adoption or amendment of this Ordinance maybe transferred and the new owner may continue nonconforming use or continue nonconforming structural lot subject to the provisions of this Ordinance. You can transfer it as is, it is a lawful nonconforming lot of record, you can sell it as the full lot of record, but you are not allowed under this Ordinance to divide off a part of a lot of record because you are not creating a lot that conforms to the Ordinance at that point, you are creating a greater nonconformity. That is really what this case is about.

Aaron Burns Mark you had something to add earlier?

Mark Bower Jim said it better than I would. Also helpful is to go back to the definition of a lot.

Aaron Burns follow-up question?

Phillip Brown 202.22 I think it speaks exactly to the situation we have. I believe it applies and I think the Board should adopt that as a Finding of Fact & Conclusion of Law

Aaron Burns Sherri do you have anything?

Sherri Quint 203 does not talk about the division of the lot, just for use, is that correct?

Aaron Burns one side talks about 203 being applicable the Code Officer's team says it is not applicable.

Sherri Quint it does not say anything about division

Aaron Burns the start of 203 Says nonconforming use provisions.

James Katsiaficas 203 itself does not prohibit the division of a non-conforming lot of record. But it does allow you to transfer it. What Mr. Beagle has said that it allows you to transfer less than the entire lot of record. When you look at 202.22 it says all other division of land is expressly prohibited.

Aaron Burns Karen?

Karen Axelsen No comments

Aaron Burns I think we can work of the factual findings and establish who what where and why type things.

The way we have done this in the past is vote on fact findings individually.

James Katsiaficas ultimately there is one opinion from the CEO that is on appeal. On the findings you are technically supposed to vote on each one.

Aaron Burns what I am trying to do is try to get through the actual fact findings.

Mark Bower the CEO has written decision, but I agree the Board is making their own findings of fact and conclusion of law.

Aaron Burns we are not deferring

James Katsiaficas unless the ordinance provides for an appellant review it is De novo proceeding.

Aaron Burns Alan do you agree with that?

Alan Beagle there were no findings of fact made by the CEO

Aaron Burns we are deciding on the facts.

Alan Beagle I agree with the testimony and evidence put before the Board. I believe that Mr. Bower or I can object to the other one's proposal. -

James Katsiaficas the findings is for the Board to work through and only ask Counsel if they have questions.

Aaron Burns Fining 1. *The matter before the Board is the Administrative Appeal Coyne Operated Properties LLC of the July 30, 2020 decision of David Finocchietti, Westbrook Code Enforcement Officer regarding the division of Tax Map: 40, Lot: 211 and the development and use the merged portion of Tax Map: 050, Lot: 013*

1. 5-0 in favor (Michael Foster voting)

Philip Brown is it possible to use somebodies' script, so we have a written tally of what is before us?

Aaron Burns yes I think the best way is to tell Jim what we think in workshop and he can bring back the findings of fact and conclusions of law as a package.

James Katsiaficas that might be more efficient.

Michael Lemay another meeting next month

Mark Bower are you anticipating a vote tonight?

Aaron Burns I think we will do a straw vote and have Jim write up the proposed findings.

Mark Bower it will not be under the seven-day provision then.

James Katsiaficas it will just be a straw vote and is not under the seven-day provision.

Aaron Burns I do not think there is any dispute that the lot numbers, the Portland Terminal land is vacant, that Coyne Operated is an abutter and the remaining land for Portland Terminal Co would be modifying the boundary lines of a grandfathered lot. I think the historical facts in both of them are accurate

James Katsiaficas why don't you leave it to me to put the findings based upon facts recited here?

Aaron Burns yes, the problem with making a decision on an open meeting is difficult. We have to stumble through on the fly in front of the camera so speaking for myself, I think that my analysis of this sways back and forth quite a bit. Looking at it as an issue and framing it in the correct way to look at this makes easier to decide, I think we are blissfully cannot consider the collateral consequences of whatever we decide. The question before us is the letter the Code Enforcement Officer wrote on July 30, 2020 is a correct interpretation of the ordinance based on the De novo review.

Philip Brown mentioned 202.22 speaks to the division issue. An open question in my mind is what happens when Coyne Operated applies for a building permit, realizing the is not question in front of the Board. Only question is, was it okay to be split in the first place. Whether there is some way to force the recombination of the lots is not something we have to deal with. I do not know how the Code Enforcement Officer deals with something like a legal conforming lot for a building permit that was created on a split that was not created in accordance with the Ordinance. I do not know the answer to that. My view is 202.22 answers the question here. There is nothing in the Ordinance that allows this it creates further nonconformity. Whether the Ordinance allows it or not, the answer would have to be no.

Michael Lemay is we agree that the CEO was correct, but this has already happened our decision is going to render both lots useless.

Aaron Burns that is not what is in front of the Board now. What is in front of us is whether he was correct or not.

James Katsiaficas what is difficult tonight is what is before you is not to solve the problem. It is whether the CEO made the correct decision.

Michael Lemay but our decision has consequences that involves thousands of dollars and rendering lots useless. I understand that we are not here to find a solution but what I said earlier, it has already happened.

James Katsiaficas the Board makes its decision, and the parties will have to deal with the consequences.

Philip Brown can I ask a clarifying question as to where we are? I think I heard that Jim is going to put together a fact sheet that we can consider in a future meeting whether we buy into that set of facts or not.

James Katsiaficas I will put together a draft finding and draft conclusion of law and you can respond to them if you want to adopt or change them but at least you will have a draft to review at the next meeting.

Aaron Burns He could not do that ahead of time, because he did not know which way the Board was going to lean.

Philip Brown where does that leave us at tonight?

Aaron Burns continuing the appeal to the next meeting.

Phillip Brown so are we done?

James Katsiaficas are there any other comments before I start the draft?

Aaron Burns appropriate speak after the meeting about the findings?

James Katsiaficas no procedural things like time of the meeting but substance would not be appropriate, it would have to happen in public.

Aaron Burns I know that but was trying to...

James Katsiaficas we operate under the Freedom of Access Act.

Phillip Brown is it appropriate to ask on a particular item that should appear on your findings?

James Katsiaficas yes

Phillip Brown I would like to bring forward provision 202.15, it has been suggested that a word was left out and frankly I find the argument to be persuasive. But I would like to hear your advice on that now.

James Katsiaficas I think it is up to this Board to interpret the Ordinance. What Mr. Beagle suggested earlier that a lot of record could only be one that had been in a subdivision because of his reading of the Ordinance without the "or". If you look at provisions

203.5 Nonconforming lots it talks about; "

Except in the Shoreland Zone, where a nonconforming lot of record was part of a subdivision approved in conformance with City and state subdivision regulations and statutes, said lot may be constructed upon in accordance with the zoning requirements in effect at the time the lot was lawfully established, provided the proposed use is a permitted one. However, such zoning requirements shall apply only to new

construction upon a vacant lot.” If the only lots of record you could have were in a subdivision, you would not need to have that language. It implies you could have a lot of record in other circumstances. That solidifies the argument that Mr. Bower has put together that there is a missing “or” here. That is something that should be brought up to the Council to see if they agree to change it. If that is your interpretation that is up to this Board to do. I will add that and all of you can respond to it.

Aaron Burns I find the “or” to be more plausible in the interpretation of that section. I am persuaded that the word “or” was intended to be there.

James Katsiaficas anything else?

Michael Foster I think it might be worth referring to 203.1 “purpose of the nonconformance” which helps clarify.

James Katsiaficas is there a particular sentence, or do you wish to have the whole paragraph?

Michael Foster the biggest part is the second sentence *“This article intends to be realistic so that nonconforming vacant lots of record can be reasonably developed, nonconforming existing structures can be properly maintained or repaired, and nonconforming uses can continue to be changed to other less nonconforming uses or to conforming uses.”*

I think it points out the intent that whole section in dealing with nonconforming lots.

Also *“These regulations are designed for the betterment of the community and for the improvement of property values.”*

Aaron Burns also reference 202.13 the definition of what a lot is, would be useful. A creation of a lot must be conforming.

Michael Lemay is this something we will be able to review prior to the meeting?

Aaron Burns we will get it a week before the meeting like we usually would allow us a chance to go through it and you will have a chance to vote on something like what the Attorneys have written and numbered in sequence of findings and conclusions so we can vote on each one.

Michael Lemay so in what is being written, will there be a timeline of exactly what happened and when?

James Katsiaficas if you think those facts are relevant we can include them. I will put in the critical dates, so you have the history.

Aaron Burns Jim will write it up and we are giving him consent to which way we think it is going. He is going to do his best to encapsulate this discussion into something that is an actual decision to vote on.

Michael Lemay is the timeline relevant?

Aaron Burns if you find that it is relevant, sure, it is up to you. I am unable to give you more guidance as everyone on the Board must make their own decision about all the findings and conclusions.

James Katsiaficas I think I have my marching orders and I will see that you receive it in advance of the next meeting, and we will take it from there.

Aaron Burns anything else to come before the Board tonight? A preview of the next meeting, On February 9th we will vote on election of officers, if there are any other variances or Administrative Appeal we will deal with those. Linda are we anticipating anything?

Linda Gain we are not anticipating any other items.

Aaron Burns it looks like we will approve these minutes, the annual report and the election of officers, and final conclusion on what Jim provides as the template.

James Katsiaticas so with that a motion to continue this appeal to the February 9th meeting.

Aaron Burns anyone want to make that motion?

Phillip Brown so moved

2nd by Sherri Quint

Aaron Burns It has been moved to continue this meeting to the February 9th meeting. Is there a strong sense whether we should do this in person or Zoom? I am fine with in person, but I know some people may be uncomfortable with it.

Karen Axelsen my understanding that we had to do a Zoom meeting as the school was closed.

Aaron Burns I do not think we are required to use the space if we wanted to do the meeting on Zoom for additional safety. I do not want to make that decision alone without input from the Board.

Board affirmed they prefer in person meeting.

The vote is unanimous in favor to adjourn this meeting to February 9th.

Aaron Burns I would entertain a motion to adjourn this meeting.

Sherri Quint so moved

2nd by Michael Lemay

The vote is unanimous in favor

ADJOURN

THANK YOU, respectfully submitted by Linda Gain lgain@westbrook.me.us