

**Town of Cumberland
Board of Adjustment and Appeals
Minutes of Meeting
Thursday, August 13, 2015**

I. Call to Order:

The meeting was called to order at 7:07 p.m.

II. Roll Call:

Present: R. Scott Wyman, Chair, Ron Copp, Andrew Black, Sally Pierce, Amanda Vigue

Absent: Christian Lewis, Matt Manahan, Mike Martin

Staff: Bill Longley, Code Enforcement Officer, Pam Bosarge, Administrative Assistant

Mr. Wyman, chair welcomed applicants and public to the meeting and gave an overview of the rules of procedure for the meeting. Mr. Wyman stated the Board has a quorum to allow the Board to conduct business. There will be an opportunity for public testimony, in favor, negative, or on a neutral basis.

Mr. Wyman introduced Leah Rachin, Esq., of Bergen Parkinson in Kennebunk who is present this evening to represent the Board of Appeals.

Mr. Black briefly provided the following disclosure referring to the case:

1. The Estate of Merrill Robbins is also the plaintiff in a lawsuit against the Chebeague & Cumberland Land Trust, the Town of Cumberland, and others seeking to enforce a conservation easement that it alleges prohibits the Town's proposal to use Broad Cove Reserve as a public beach.
2. Without address the merits of the case, the Superior Court granted the defendant's motion to dismiss that lawsuit on the grounds that the Estate of Merrill Robbins lacked standing and that the matter was not ripe for adjudication.
3. The Estate of Merrill Robbins appealed that dismissal to the Supreme Judicial Court.
4. The Office of the Attorney General, which was not a party in the Superior Court case, moved to file an amicus brief with the Supreme Judicial Court in support of the Estate's positions that it had standing and that the matter was ripe for adjudication.
5. The motion was granted, and on August 11, 2015, Lauren Parker, an Assistant Attorney General in the AG's Natural Resources Division filed the AG's amicus brief. The Attorney General has not taken a position on the underlying merits of the Estate's claims.
6. I am also an Assistant Attorney General and the Chief of the Professional and Financial Regulation Division. I have no involvement in the AG's amicus brief and am not involved in any matters handled by the Natural Resources Division.
7. After a review of the matter before the Board and my indirect connection to the related litigation as a result of my position in the AG's office, I have concluded that there does not exist a personal or financial conflict of interest that would require me to disqualify myself from participation in the matter scheduled to be reviewed by the Board.
8. I also have no bias with respect to the matter before the Board, and I believe that I will be able to participate in a fair and impartial manner.
9. I, therefore, intend to participate with the Board in this matter, but if any party or the Board member objects to my participation, I will reconsider my position.

The parties to the case before the Board did not have a problem with Mr. Black participating.

Mr. Wyman, Ms. Pierce, Ms. Vigue and Mr. Copp did not have a conflict with Mr. Black participating.

Mr. Copp moved that the Board saw no conflict with Mr. Black and no reason for him to be recused from the interpretation hearing.

Ms. Pierce seconded.

VOTE: 4 in favor
1 abstain (Black)

III. Hearings and Presentations:

Mr. Longley reviewed the agenda item as follows:

1. Interpretation Appeal: Interpretation Appeal: Merrill Woodworth, PR for the Estate of M. Robbins and Payson Family Heirs of 72 Spears Hill Lane: represented by Scott Anderson, Esq., Verrill Danna LLP request an interpretation of the Code Enforcement Officer's determination that Broad Cove Reserve, owned by the Town of Cumberland is a "municipal use" not an outdoor recreational facility, for property located at 179 Foreside Road, Tax Assessor Map R01, Lot 1 in the Low Density Residential (LDR) and Limited Residential (LR) and Resource Protection (RP) districts.

Ms. Juliet Browne, Esq., of Verrill Dana stated she was present this evening not Scott Anderson. She stated she appreciates that the Town's acquisition of this property and that proposed development has been contentious and has pitted neighbor against neighbor and there has been dispute over the project from the beginning and there is pressure to move forward. However, it is important particularly where the Town is both the applicant and the decision maker that the zoning ordinance be applied specific and fairly with the intent under which it was passed and enacted.

Ms. Browne gave a brief history of the Town's acquisition of the property. The Town in its application filed with the Planning Board, states that the proposed facility is for "low impact passive recreation, which includes walking and hiking, boating, swimming, shell fishing, picnicking, cross country skiing and snow shoeing". The application requested a parking area for 33 vehicles with 11 additional spaces, improvements to an access road to the beach a turn around by the water with handicapped parking and re-location of an existing bath house and public access trail.

The issue is the definitions in the ordinance,

"Municipal Use or Building – "Any use or building maintained by the Town Cumberland"

"Outdoor Recreational Facility" – A place designed and equipped primarily for the conduct of non-motorized outdoor sports, leisure-time activities, and other customary and usual recreational activities, excluding boat launch facilities, amusement parks, and campgrounds...

There can be no dispute that the Towns use is a municipal use, but it is also an outdoor recreation facility based on the definition of the Ordinance and the determination of the CEO. The LDR zone where the majority of this project is located allows for Municipal Uses, in fact Municipal Uses are allowed in most districts. It specifically does not allow an Outdoor Recreational Facility. An outdoor recreational facility is allowed in the RR1 and RR2 zones where Twin Brook is located. The Code Enforcement Officer made a determination the Town's proposed use in the LDR is allowed because it is a municipal use. A small portion of the project is in the Shoreland Zone; the Shoreland Zoning Ordinance does not have a municipal use as a blanket allowed use. For purposes of the Shoreland zoning analysis the determination was it was a low impact outdoor facility use; because that was the closest that applied to the proposed use. The CEO determined the use was Municipal use for the LDR zone, however, for the Shoreland Zone the determination is that it is a low impact outdoor recreational use. The question is whether the Town can proceed with an activity that is clearly not an allowed use in the LDR zone just because it is owned and run by the Town. The Case law says it can't do so and public policy says the Town shouldn't do so

without amending the ordinance to allow the use. The legal issue is you have a Legislative Enactment and an ordinance is no different than a statute. You have two provisions in the ordinance and one is more specific. If you apply the more specific it would lead to a different result. A case discussed in their appeal was the South Portland Civil Service vs the City of South Portland in that case there was a municipal ordinance with two provisions one provision stated all expenses incident to the operation of the commission shall be paid by the City. Another provision had a more specific provision on the process the commission had to follow if it were to hire outside legal counsel. In this case the commission retained outside legal counsel and did not go through the additional required process and it sought to have the fees reimbursed by the city. The court said you have a general provision, but instead it looked at the more specific provision and because that process had not been followed the court said those were expenses not to be paid by the city. This is relatively black letter law that a more specific provision rules over the general provision. From a policy prospective particularly in the area of zoning you are looking to ensure there are compatible uses in an area. Zoning strives to have development within the zones for compatible uses. To determine compatible uses you want to look at what is happening on the ground. In the LDR zone an outdoor facility is not an allowed use. The Town should go to the Council to amend the zoning ordinance to allow outdoor recreational facilities in the LDR zone; and go through the public process. The burden is on the town to show the use is compatible and consistent with the zoning ordinance. If it is determined by the Town Council that it is an allowed use, it would allow the Town Council to allow the use with appropriate restrictions and conditions to assure it is compatible with abutting uses in the area. For example Twin Brook is allowed in the RR1 and RR2 zone and has an overlay zone with additional provisions; the Town could do something similar at Broad Cove Reserve. It appears that the Town has circumvented the Ordinance to allow an activity to proceed because the Town will maintain the facility. For the neighbors in consideration of compatibility it doesn't matter who maintains the property. This is not a question of how we interpret the definition of "Municipal Use" or "Outdoor Recreational Facility" there is no disagreement on what the plain language is. The issue is how we harmonize two provisions that apply in this particular unusual circumstance that would result in a different outcome. Case law and public policy says to apply the more specific and doing so would carry out the intent of the Ordinance. It is a relatively simple legal issue, I am happy to answer questions, this summarizes why we think this use in the LDR zone is wrong.

Mr. Wyman stated he read in the materials provided there was a particular harm caused by the petitioner to the person and the person's property could you explain that in a little more detail.

Ms. Browne stated this was a hundred acre parcel that has been subdivided and one of the parcels is owned by the Robbins family. They are in plain view of activities. As a direct abutter they would be distinctly and uniquely impacted in a way in which someone who lives a mile away would not be.

Mr. Wyman asked if that would be on a short term or long term basis.

Ms. Browne stated it would be long term because it is a permanent fundamental change in use from what is currently allowed in the LDR zone.

Mr. Wyman confirmed Ms. Browne's position was that the law court says the Town should use the specific language and not the plain language as to "any municipal use".

Ms. Browne said the plain language is not clear, the plain language says it is a municipal use and can occur and the same plain language says it is an outdoor recreational facility which is not allowed. Which plain language do you follow there is nothing in the Ordinance that that says plain language should control over the more specific. If something is more specific the body responsible for the enactment has that particular activity in mind.

Mr. Black thanked Verrill Dana for providing the legal brief with background it was very helpful. He asked a question with regard to the definition of Municipal Use. I understand what you are saying that there is a conflict in the language. The definition says “any use or building maintained by the Town of Cumberland”. Mr. Black asked if her reading of “any use” meant any use permitted in the zone.

Ms. Browne stated the more specific language prohibits an outdoor recreational facility. The specific language indicates the use was specifically contemplated in the enactment of the ordinance and prohibited. If there were no discussion in the Ordinance regarding outdoor recreation facilities it would be a different situation. She referenced the South Portland case.

Mr. Black asked if it would be illegal for a town to say outdoor recreational facilities are not permitted unless maintained by the Town.

Ms. Browne stated you could make a conscious decision that a facility owned and maintained by the town could have a different impact. There is no language in the ordinance to suggest that.

Mr. Black asked if there is anything in the Ordinance to suggest opposition to that.

Ms. Browne stated the flat out prohibition of an outdoor recreational facility.

Mr. Black asked if there would be a conflict between the two.

Ms. Browne stated she didn’t think there would be a conflict, it would require you to read something into the ordinance that is not there. Typical municipal uses are fire, police etc., which are not specifically called out elsewhere in the ordinance.

Mr. Black said I heard you say it is not a problem that the Town clearly can treat property owned by the town differently than privately owned.

Ms. Browne stated the key is to give to Legislative Intent.

Mr. Wyman stated uses town wide such as fire; police etc. are not specifically regulated. We have ball parks all over town.

Ms. Browne stated it depends if you have an Ordinance which specifically regulates ball parks and sand and storage, when it specifically does you need to determine where the use is allowed and not allowed. You don’t have that with most other municipal functions in this ordinance.

Mr. Wyman thanked Ms. Browne for her testimony.

Mr. Wyman asked for testimony in favor of this application.

Good evening Board members my name is Ms. Natalie Burns, Esq., of Jensen Baird Gardner & Henry and I am representing the Town of Cumberland. The Town’s position is very simple as set forth in our letter what the Board must look at and give effect to: is the plain language of the zoning ordinance. The plain language of ordinance states “any use” that is maintained by the town of is a municipal use. A municipal use is allowed in this zoning district. The fact that there might be some other use argued this could fall into is irrelevant because there is no language in the ordinance that excludes any type of use from the definition of municipal use. The word “any” is clear on its face. By way of example I was trying to think of other things that would fall under the appellants’ arguments. I did bring the tax records for a building that will look familiar to the members of the board the property is 290 Tuttle Road and that

is the building we are in right now. It is located in the RR1 district, it is an office building it has other functions as well; but it is primarily an office building. An office building is allowed in other zoning districts in the town of Cumberland it is not allowed in the RR1 district. This is a relatively new building it is not grandfathered, it was built under the current or similar zoning provisions. If you accept the appellants' argument this use is an illegal use. If someone were to argue that fire department buildings were something other than a fire department it is a garage; which someone could argue there is a garage where vehicles are maintained. A garage would not be allowed, because it wouldn't be an allowed use. Garages are allowed in some districts but not all. Parks could fall into the outdoor recreation facility use, which simply is not what your ordinance says. If the town had wanted to exclude certain types of uses from municipal use we could have done so. Other municipalities have done so, for example the City of Portland allows municipal uses in their residential zones but they don't allow as permitted municipal uses any use that is specifically listed as a conditional or institutional use. Those need an additional review process. It is important to note that municipal uses require site plan review by the Planning Board. Ms. Burns referenced the cases cited in the appellant's application are inapplicable because the first rule to apply is the plain language. The plain language says "any use" it does not exclude any use; it simply says "any use". We would ask that you uphold the Code Enforcement Officer's determination as a municipal use. As far as the Shoreland use, which I don't think is part of this appeal it is the recreational use he found it to be.

Mr. Wyman asked Ms. Burns if she was present at the Planning Board meeting.

Ms. Burns stated yes, and I was representing the Town as well.

Mr. Wyman asked if there was a public hearing for the Site Plan Review.

Ms. Burns stated yes.

Mr. Black asked if the Site Plan was granted.

Ms. Burns stated yes.

Mr. Black asked if there was public input.

Ms. Burns stated yes, absolutely and Mr. Anderson was present at the Planning Board representing his clients.

Mr. Black stated in the Ordinance §315-69 Water extraction and storage: Groundwater or spring water may be pumped, extracted and/or bulk stored for municipal and/or quasi-municipal purposes for distribution through a public water system or for municipal fire protection services....

If we were to read the "any use" as any use by a municipality why was this language added.

Ms. Burns stated the purpose was the town did not want to allow commercial extraction of water; it only wanted to allow extraction of water for municipal use.

Mr. Black stated if any municipal use is allowed why that provision was is needed.

Ms. Burns stated the extraction of water could only happen in certain districts. There was a concern if there weren't specific conditions it could be interpreted that commercial extraction could happen. There was a concern there might be an argument that commercial use was allowed. This was limited to areas where it could happen and municipal use.

Mr. Black asked based on municipal ordinance would it be your position that if the Town were to transfer this property to a private party would the use change and not be allowed.

Ms. Burns stated if the Town were not to develop it, and said we have an approval and wanted to sell the property to Fun Town it would be problematic. The Town could transfer it to the State of Maine which is a government entity. The State of Maine is not subject to zoning. I think there would be some restrictions on the Town transferring it to someone else.

Mr. Black stated what you are saying is what makes it a municipal use is that it is maintained by the Town.

Ms. Burns stated yes, sometimes municipalities have to find locations for unpopular uses such as the salt shed, public works garage and those uses can be quite controversial so municipal uses will be allowed in certain or all zoning districts in town. There are some zoning districts where municipal uses are not allowed; they are not allowed in the Val Halla Overlay and Twin Brook Overlay; you can't move town hall down to Twin Brook or move the salt shed it is not allowed. You can have a municipal use where it is listed as a permitted use in the Ordinance.

Mr. Wyman stated the LDR district states what is allowed Section A. # 16 - Municipal uses and buildings subject to Site Plan Review which has been done by Planning Board. This approval can happen because the ordinance allows it.

Ms. Burns answered yes.

Mr. Black stated is it the town's position that the issue here is the definition of a municipal use.

Ms. Burns stated yes, the plain language of the ordinance states municipal use allows "any use" as long as it is maintained by the Town.

Mr. Black asked would you agree it is the job of the Board to try and figure out the intent of the Town Council when it adopted the ordinance.

Ms. Burns stated I think you only try to get at the intent if the language is unclear; that is the first rule of statutory construction including ordinance construction. If the language is clear or plain you don't go any further that is where you stop your inquiry.

Mr. Black asked if we disagree and feel the language is ambiguous as a whole we do try to ascertain the intent of the Town Council.

Ms. Burns stated yes, you could look at other ordinances and legislative history.

Mr. Black stated if we assume that the language is ambiguous is there anywhere in the ordinance other than plain language that would support "any use" in other words that the Town intended implied differently for the municipality of the town.

Ms. Burns stated you can look at existing uses in the town and where they exist and you can determine that there are ball fields in various areas of town that would not allow outdoor recreation facilities. There is a public works garage that is in a location that would not allow a garage. You can determine Town Hall is located in a district that would not allow an office use. You can determine that the Police Department is located in a district that an office is not allowed. You can also look and determine that the Town has restricted municipal uses in the overlay districts at Twin Brook and Val Halla.

Mr. Black is there anything in the ordinance, purpose or intent provisions that points the town was trying to create a municipal use.

Ms. Burns stated the purpose of the ordinance states “is to promote public health, safety, and general welfare, to encourage the most appropriate use of land throughout the Town...” There is nothing to give intent of municipal use.

Mr. Wyman clarified that Ms. Burns was speaking in support of the application.

Ms. Burns stated yes.

Mr. Wyman asked for testimony on a neutral basis neither for nor against the petition, but on a neutral basis.

Mr. Shane, Town Manager stated the fire station is not allowed in the MDR and the MDR allows private schools not public schools. The Town Landing Road supports outdoor recreation activities from kayaking to passive recreation. He also pointed out the public process on this project; there were multiple public meetings held by the Town Council and there was a vote to the entire town of Cumberland where 75% of voters participated. The vote received 56% support.

Mr. Wyman closed the public portion of the meeting.

Ms. Browne stated there was discussion regarding Site Plan Review process, there was no analysis of compatibility of uses, the Planning Board didn’t have jurisdiction to determine if it was an allowed use. Also, one of the questions was is this specifically prohibited; as the town’s ordinances are structured a permitted use has to be specifically allowed in a zoning district. An outdoor recreational facility is allowed in some districts; but not this district so it is de-facto prohibited in this district. The RR1 specifically allows Municipal Office buildings, so I am confused by the relation of general office building which is prohibited, unless it is a professional office building.

Mr. Black confirmed that the appeal did not include the Shoreland Zone decision.

Ms. Browne stated correct we are not appealing the Shoreland use. There would be no harm in the legislative body examining the use and perhaps adding an overlay district, such as Val Halla.

Mr. Black stated Val Halla is not strictly a municipal use.

Ms. Browne stated she was mistaken Twin Brook is not an overlay; it was the West Cumberland facility which is not a specific municipal use and could be transferred to another entity.

The public portion of the meeting was closed. The Board deliberated as follows:

Mr. Black moved that the board affirm the interpretation of the Code Officer.

Mr. Copp seconded.

Discussion:

Mr. Wyman stated for findings if we find that we uphold the decision of the Code Officer we would want to state for public record that we uphold and support this use as a municipal use as allowed under the zoning ordinance.

Mr. Black stated the two parties framed the issue differently and the applicant has said we have a conflict between the two terms and because there is a conflict we should apply the specific over the general language. The Town's position is there is no conflict therefore the plain language of the definition of "municipal use". My review would be to go with the town's approach "any use" is the appropriate interpretation. I don't think it is unusual for the Town to treat municipality owned properties different than privately owned properties. For purposes of the applicant's position you have to read it as "any use permitted" in this area; you need to add additional language. Also some points were made about popularity of this decision; I think that is irrelevant this is strictly a legal issue. You look at the language and if the plain language is ambiguous you need to look at the intent behind it. My conclusion is the plain language "any use" means any use and there was valid rationale for that purpose.

Mr. Copp agreed with Mr. Black He didn't think when the Ordinances was drafted anything was left out. He agreed with the plain language.

Ms. Pierce agreed that "any use" covers everything.

Mr. Wyman agreed with the interpretation of the plain language of the ordinance.

Mr. Black re-stated his motion: that the Board affirm the Code Enforcement Officers interpretation that Broad Cove Reserve owned by the Town of Cumberland is a municipal use not an outdoor recreational facility for property located at 179 Foreside Road, Tax Assessor Map R01, Lot 1 in the Low Density Residential District (LDR) and the Limited Residential (LR) and the Resource Protection (RP) districts.

Mr. Copp seconded.

VOTE: Unanimous 5-0

IV. Minutes of April 10, 2014

Mr. Black moved to approve the minutes of the April 10, 2014 meeting.

Mr. Copp seconded.

VOTE: 3 in favor Black, Copp, Wyman
2 abstain (Pierce, Vigue)

V. Administrative Matters:

Mr. Wyman stated that the Board's attorney Leah Rachin, Esq., will draft findings to be approved at next month's meeting on Thursday, September 10, 2015 at 7:00 p.m.

VI. Adjournment:

Ms. Pierce moved to adjourn.

Mr. Copp seconded.

VOTE: Unanimous 5-0

The meeting was adjourned at 8:50 p.m.

A TRUE COPY ATTEST:

R. Scott Wyman, Board Chair

Pam Bosarge, Clerk to the Board