

**Town of Waldoboro
Board of Appeals
Meeting Minutes
May 18, 2004**

I. Call to Order

The Board of Appeals met in the Town Office Meeting Room on Tuesday, May 18, 2004. Chairman of the Board, Sam Chapman called the meeting to order at 6:32pm and roll call was done. At this time it was decided that no one on the Board had a conflict of interest.

Members present were Samuel Chapman, Art Emanuelson, Bobbi Swiderek, and Russell Hansen. Staff present was Code Enforcement Officer John Black and Norma Hill recording secretary.

Public Present were Pam Creamer, Terry Gifford, Edward Karkow, Susan Alexander, Sarah Glader, David Lash, Celia Cart, Ron Dolliver, Tom Creamer, Geraldine Creamer, Kent Alexander, Gordon Stein, David Tasi, Gail Tasi, Court Creamer, Mike Colbert, Donald Boyington, Daniel Carter, Norman Carter, Chuck Campbell, Ron Carter, Ken Hildings, George Enman, Jo Ann Myers, Teresa Gregory, Robin Dostie, Sam Cohen

II. Minutes

Minutes will be approved at the end of the meeting.

III. Daniel Surrells/Judy Boucher, 1262 Dutch Neck Rd, Waldoboro, Map R 1, Lot 74-2. Shoreland Zoning, Lot Use Standards, Piers, Docks, Wharves, Bridges, and Other Structures Extending over or Beyond the Normal High-Water Line of a Water Body or Within a Wetland. This is an Administrative Appeal of a Planning Board decision.

Chairman Chapman outlined the meeting procedures. The appeal is being heard de novo.

Mr. Stein objects to this appeal being heard de novo. He states the standard review should be of the Planning Board record and not as a new case. Mr. Hansen and Chairman Chapman discussed if this objection should be heard now or later. Mr. Stein feels the BOA is obligated to review the record of the Planning Board. It is not up to the BOA to hear de novo appeals as the Shoreland ordinance does not state this.

Section 16, G3, B2 – Shoreland Zoning. This addresses the burden of proof, what findings are required to be reviewed but does not say fresh evidence can be presented. Chairman Chapman then read from the BOA manual. CEO Black also spoke with the town attorney and both feel this is a de novo case. Mr. Cohen would like an extension of the 15 minutes to present his case.

Mr. Hansen noted he is a resident of Dutch Neck Road but feels he is far south enough to not have a conflict. The board agrees to let him hear this case.

Chairman Chapman summarized this application and the appeal. Supporting documentation includes the file on the respective Planning Board meeting.

Chairman Chapman established jurisdiction and review under Shoreland Ordinance Section 16, G, 1A, for administrative appeals. The Board determined it has jurisdiction to hear this appeal.

Chairman Chapman's understanding is that the appellant has standing on all requirements in filing papers was met. The Board concurs.

Chairman Chapman and Mr. Hansen then discussed standards and findings.

Mr. Cohen spoke and requested 45 minutes for his presentation. He is opposed to having a time limit. Mr. Stein feels the 15 minutes is not for fresh evidence.

Mr. Cohen stated an example of a case in which the issue of infringing on the neighborhood.

Mr. Cohen called Bill Bragg as a witness. He is the shellfish warden in Waldoboro. Mr. Bragg is familiar with the area where the proposed dock would be located. This area is closed to clamming and has been for 2 years and will allegedly not be opening in the near future.

Mr. Hansen stated that in a case such as this the abutters are not a party but that the Planning Board should be. It comes down again to if this is a de novo or appellate type case. Mr. Stein pointed out that his clients are an aggrieved party and they should have standing. The Board agreed.

Chairman Chapman stated to the public that the Board is new at this and for them to have patience.

Mr. Stein asked Mr. Bragg who he spoke with at DMR. He asked what the DMR gave for a reason of closure of the clam flats. This is pollution. He also asked what DMR gave for a timeline of the clean up. That is not known at this time. Mr. Stein asked to keep the meeting open to continuation to have Ms. Barter from DMR come speak. Mr. Cohen objects to this. Mr. Stein again wants the record kept open for presentation of Ms. Barter since she has now been identified as a source. Mr. Cohen feels the abutters should have been better prepared to have expert testimony if that is what they wanted.

Mr. Dolliver is a private investigator now for 3 years. He was previously a Maine Marine Patrolman for 29 years. He outlined his duties as a patrol officer. He went to the site twice. Mr. Cohen outlined what the proposed dock's location is. Mr. Stein objected and was denied. Mr. Dolliver stated what he saw for material where the dock would be built. He did not see hardly any clam holes at this site. Again Mr. Stein objected. Mr. Dolliver does not feel that the dock would effect the clamming industry. He feels also it would not effect watercraft or any fowl life. He does foresee any erosion problems. There is no beach there according to Mr. Dolliver to be effected. He also does not feel it would effect conservation at all. He has video but it will not be shown at this time.

Mr. Stein asked Mr. Dolliver what his job capacity had been upon being retained by Mr. Cohen. He surveyed the area based upon past job experience. His rate of pay was \$47.50 and 40 cents per mile. The figures have not been calculated yet. Mr. Dolliver only consulted a chart of the Medomak River in preparation. The closure of the area had no impact on his determination. Mr. Dolliver feels if this area were opened to clamming the dock would have no bearing on the industry.

Mr. Surralls is proposing a pier and dock to be built. The dimensions of the pier were described and would be about 400 feet from the channel. Within a mile of his property on his side of the river are possibly 6-8 docks along with 6-8 on the other side of the river, also within a mile. Mr. Cohen submitted photos of these docks.

Mr. Stein objects to the photos because these were taken up close from a boat. These pictures were not taken from the location of the proposed pier.

Mr. Surrall states he can see 6 docks from his front porch. The only permanent structure would be the stairs and pillars holding the ramp. Mr. Stein asked Mr. Surrall how and where he took the pictures from. They were taken from a boat in the river.

Mr. Lash is a marine contractor hired to build a pier for the applicant. The existing stairs will be stabilized. There will be 8 sets of pylons about 15 feet apart. The dock will be 6 feet wide. Nature wood will be used and this is approved by the DEP. DEP allows a residential dock to be 6 feet

wide. The ramp and float are seasonal. Mr. Lash does not see that this will encroach upon natural beach area or fishing.

Mr. Stein objected to this questioning. He asked what the chemical was that is used in nature wood. Mr. Stein submitted a brochure – Creamer's exhibit one regarding nature wood. Mr. Stein asked Mr. Lash if he had taken courses on this subject.

The pylons will be non-treated oak. Mr. Lash has approval from DEP to construct these types of docks with this type of material.

Mr. Cohen submitted the drawing of the pier to the Board.

Mr. Hansen asked Mr. Lash how many pylons there would be, approximately 42 at 8 inches diameter. There is also ledge all the way out. Mr. Stein asked Mr. Lash how he would dig through the mud to the ledge. This would be done with a viper shovel. The dirt goes back into the hole. Mr. Lash does not think there is a problem with silt. Pile drivers are approved by DEP.

Mr. Stein is representing Ken Creamer an abutter and Mr. Stein also noted the Tosi's who are abutters as well.

Mr. Creamer has owned this property for 18 years. He has seen clamming activity in this cove. He has seen small boat traffic here. There is also migratory bird activity. There are no piers within the cove. Mr. Creamer operates boats in this cove. He feels the proposed pier would be an obstruction to small watercraft.

Mr. Cohen objects to this line of questioning by Mr. Stein. He states there is no ordinance in Waldoboro prohibiting docks on the river.

Mr. Creamer is worried about cumulative impacts. He is also worried about nature wood materials. IT is a copper based material. He cites an expert that said copper is a risk and an important issue. Mr. Cohen asked Mr. Creamer how far from the proposed dock he is. Mr. Creamer has seen clamming north of Big Rock. He has also seen it south of this rock even though this area is closed. Mr. Cohen asked Mr. Creamer if this dock would effect wildlife. Mr. Creamer feels it would due to all the data he has read. Mr. Creamer feels the copper would leak out of the decking material into the water.

Mr. Stein asked Mr. Creamer if he would feel comfortable navigating a kayak between the pylons and under the dock. No he would not.

Mr. Tosi is an abutter since 1987. He supports the original Planning Board decision to deny this project. He did not give false testimony at the Planning Board meeting. He gave a brief history of his land when he purchased it. He outlined the amount of clamming in that area through the years. He feels the Planning Board made a good decision based on proper facts. Mr. Tosi asked Mr. Lash where the pier would tie into. They would tie into the existing stairs. These stairs, though, would be moved 25 feet per DEP recommendations. The elevation drop is the same. Mr. Creamer wants to know what determines good clamming versus bad.

Mr. Tosi feels that at some point in time those clam flats will be opened. Mr. Creamer is very concerned about the clamming industry in this area.

Mr. Abel is a resident of Dutch Neck. He does not feel the docks pose any threat to the clamming industry. He does not see that wildlife would be affected either.

Ron Carter is a clam digger. He states the DEP law says that you can't dig within 100 feet of any pier or dock.

Geraldine Creamer states a number of different people stated the clam flats are closed for different number of years. She is concerned that canoes will be in more danger being closer to the channel in having to go around the pier. She was told that pollution doesn't flush out of the cove that well and the proposed pier will not help that. She states also there is a beach in this area and the pier will have an effect on this as well. She has seen people within site of the Surrell property clamming.

Mr. Carter said the reason the area was closed was because of shells being dumped on the landing. The area is closed from Stahl's bar to Art Traverse's.

Sarah Gladu works with a group that monitor the Medomak River. She has a map showing marine resources in this area in question. She also showed a map showing the soils in the area in question with regards to runoff. Increased foot traffic, etc will possibly have an increase in erosion. She mentioned what is being done by a number of people to identify and clean up the bacteria in the river. As a citizen she values the river being uncluttered.

Elaine Abel is very concerned of the whole process. A citizen should be able to go before a Board with regulations and if they meet the regulations they should be able to have their permit.

Mrs. Creamer states the DEP permit was approved in only 5 days. She states that it was not a complete application as the pictures were done in the winter and should have been done in the spring.

Mr. Lash's assistant spoke about the application she submitted to DEP for this project.

Bo Yerksa gave his extensive history in marine studies, etc. He noted the April 14, 2004 Planning Board findings. He stated aesthetics were not what the decision to deny was based on. He feels that it is inevitable that this will have some sort of impact on the surrounding area.

Jo Ann Myers is a Planning Board member. When the ordinance is read it does not mention if clam flats are open or closed, good or bad, just if there will be an impact.

Ed Karko is also a Planning Board member. He states his thoughts on the value of the Planning Board decision.

Terry Gifford another Planning Board member spoke. She feels the applicant needs to prove the project will not have an environmental impact. She states she is not biased. The clam diggers know these flats and they are the experts to be listened to.

Dan Carter asked if Waldoboro had a harbor council would it better regulate the number of docks going in. That is not the issue at this meeting. (9:30).

Chairman Chapman ended discussion from the applicant, abutters, and public.

Mr. Cohen noted the minutes of the April 14, 2004 Planning Board meeting and disputes a statement made by Mr. Morris. The Planning Board relied on review stands 1D. His client has minimized the effect on marine life by moving the dock 35 feet per DEP recommendations. Mr. Cohen feels with the testimonies of Mr. Lash and Mr. Dolliver that they have shown burden of proof. He asks the BOA to read the court cases he handed out at the start of the meeting.

Mr. Stein feels the BOA must determine if the evidence can go either way. He mentions the testimony of the abutters, the testimony of the public, and DEP statements that the flats will reopen. The decision by the Planning Board must be upheld unless the BOA can find there was no evidence to substantiate the Planning Board.

The pristine nature of this cove is an attraction of this area and should be protected. Mr. Stein noted he had asked to continue the meeting to have Jan Barter testify. He feels this would balance the hearsay testimony by the shellfish warden.

Mr. Emanuelson asked Mr. Surrell if he lived here year round and if the property owner lives here year round. It was also noted that Mr. Surrell has a 14 foot boat he uses.

Chairman Chapman asked if the Planning Board generally interprets what the ordinance says. Yes they do. IT was noted that the BOA also interprets the ordinances.

Ms. Swiderek asked why the Planning Board felt this dock was different than others that had been approved. This is one that went over clam flats and others just went out over ledge.

Motion – Mr. Emanuelson motioned the BOA approve the appeal. There were no seconds to this motion.

Motion – Ms. Swiderek motioned to deny the appeal, seconded by Mr. Hansen who added this is to confirm the decision made by the Planning Board in this matter.

Mr. Hansen states the BOA is specifically charged with standards it uses on page 36, #2. It is the BOA's job to interpret provisions. (10:00)

Mr. Hansen believes there was no new evidence showing the Planning Board erred in denying the permit. He does not feel any violation of due process of rights was done.

The BOA must decide if there was anything presented that shows the Planning Board was wrong.

The Board then looked at the April 14, 2004 Planning Board minutes. Burden of proof of impact on wildlife, environment, etc was discussed.

Chairman Chapman has a hard time not granting a pier but also understands the process of showing burden of proof. He feels the BOA needs to back up the Planning Board.

Call for vote.

VOTE – 3-1 (Mr. Emanuelson) to deny the appeal and uphold the Planning Board decision.

IV. Other Business

The minutes were tabled until next meeting of June 15, 2004

V. Adjournment.

Adjournment was at 10:20pm with a motion by Mr. Hansen, second of Ms. Swiderek and vote of 4-0.

Samuel R. Chapman, Chairman

Norma A. Hill
Recording Secretary

Arthur Emanuelson

Barbara Swiderek

C. Russell Hansen