

**Meeting Minutes — Bar Harbor Board of Appeals  
Tuesday, September 13, 2022 — 4:00 PM — via Zoom**

*Under the Board's Remote Participation Policy (adopted August 30, 2021), this meeting was conducted fully remotely — via the online video meeting platform Zoom — due to the urgent issue of the continuing COVID-19 pandemic and the declarations of a public health emergency by both the US and Maine departments of Health and Human Services.*

*Members of the public were able to view the proceeding by watching Spectrum channel 7 (in Bar Harbor) or by visiting <https://www.townhallstreams.com> (where it is also archived for future viewing). Members of the public were also able to join the Zoom webinar and to offer comment during the public hearing portion of the meeting by following instructions that were posted online in advance of the meeting at: <https://www.barharbormaine.gov/216/Appeals-Board>.*

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Chairperson Ellen Dohmen, Vice-chairperson Anna Durand, Secretary Robert Webber, Member Heather Peterson and Associate Member Michael Siklosi were all present. The fifth regular-member seat on the Board is presently vacant. Associate Member Siklosi served as a regular, voting member during the meeting. William Kelly was present as attorney for the Board. Attorney Daniel Pileggi of Acadia Law Group, who normally serves as the Board's attorney, was unable to serve in that role for this meeting due to a conflict of interest.

Town staff present were Code Enforcement Officer (CEO) Angela Chamberlain and Assistant Planner Steven Fuller. Attorney Tim Pease of Rudman Winchell was present as legal counsel for the Code Enforcement Officer.

Kevin Knopp and Teresa Wagner were present as the applicants, as was their attorney, Philip Saucier of Bernstein Shur. Michael Curtis was also present as the owner of the subject property.

**I. CALL TO ORDER**

Chairperson Dohmen called the meeting to order at 4:35 PM (the delay was due to technical difficulties getting the Zoom meeting started).

**II. ADOPTION OF THE AGENDA**

**Secretary Webber made a motion to adopt the agenda, which Mr. Siklosi seconded. The motion then carried unanimously, 5-0, on a roll-call vote.**

**III. EXCUSED ABSENCES**

As all appointed Board members were present, there were no absences to excuse.

**IV. APPROVAL OF MINUTES**

**a. August 9, 2022**

**Secretary Webber made a motion to approve the minutes from the August 9, 2022 meeting, which Mr. Siklosi seconded. The motion carried unanimously, 5-0, on a roll call vote, after**

Chairperson Dohmen had asked if there were any changes that needed to be made to the minutes as prepared (Board members did not offer or request any such changes).

## **V. REGULAR BUSINESS**

### **a. Public Hearing: AB-2022-03 — Administrative Appeal**

**Applicants** – Kevin Knopp and Teresa Wagner

**Subject Property** – 72 Ledgeawn Avenue, Tax Map 107 Lot 135

**Application** – The applicants request that the Board of Appeals hold a public hearing, pursuant to §125-103 of the Bar Harbor Land Use Ordinance, for an administrative appeal of the Code Enforcement Officer's issuance on July 14, 2022 of a building permit to the owner of the subject property for the construction of a retaining wall that the applicants claim is partially on their property.

Mr. Saucier, attorney for the appellants, began by summarizing the written argument that was included as part of their appeal application. He recounted some of the things his clients had experienced leading up to their filing of an appeal, including reportedly seeing their neighbor (Mr. Curtis) using a circular saw to cut up and remove part of their paved driveway.

Mr. Saucier said the Board's review of this matter was *de novo*, and that it was "looking at it afresh." Chairperson Dohmen said that was understood. Mr. Saucier said there were three key elements of the appeal by his clients:

- That the building permit application filed by Mr. Curtis was incomplete because it did not include a plan drawn to scale or any documentation of right/title/ownership to either his own property (at 72 Ledgeawn) or that of Mr. Knopp and Ms. Wagner at 74 Ledgeawn. Mr. Saucier called this point "procedural, but important."
- The issue of standing. Mr. Saucier said Mr. Curtis did not have any right, title or interest to build a wall on Mr. Knopp's and Ms. Wagner's property. Mr. Saucier noted his clients had supplied a stamped survey by a professional surveyor that illustrated how Mr. Curtis had, in fact, done that. Mr. Saucier called this point the heart of his clients' argument.
- The issue of setback. While Mr. Saucier said he agreed with the Code Enforcement Officer that certain walls are exempt from setback, he said there is flexibility on that matter in light of safety or obstruction concerns. He said it was a safety hazard as built, and that his clients wanted it set back 3 to 4 feet from the property line.

Mr. Saucier closed by disputing the Code Enforcement Officer's assertion of how many times his clients had contacted her after the wall was built. He also said that by removing part of his clients' driveway, Mr. Curtis would have needed a building permit for that work, too. Mr. Saucier asked the Board to reverse the Code Enforcement Officer's decision (of granting the building permit), or, if it chose to leave the permit in place, to ensure the wall was set back from the property line shown on the survey by Plisga & Day.

Chairperson Dohmen asked Mr. Kelly for his opinion on what the Board could, and could not, consider as part of the review of this application (in light of some of the statements by Mr. Saucier). Reference was made to §125-103 D. (2) of the Bar Harbor Land Use Ordinance.

Mr. Knopp then spoke, and said the decision to file this appeal had not been made lightly. He recounted a history of interactions with Mr. Curtis and a series of events leading up to the installation of the wall. Mr. Knopp also recounted his interaction with CEO Chamberlain after the wall was installed. As Mr. Knopp continued, Chairperson Dohmen said she felt the comments needed to stick to the legal points of the appeal and asked if the appellants had anything else on that front. They concluded by stating that the wall in its present location was both a safety hazard and an obstruction.

Chairperson Dohmen asked CEO Chamberlain to speak. CEO Chamberlain recapped a memo she had prepared for the Board and which was shared with all parties in advance of the meeting. She recounted meeting with Mr. Curtis on site before he applied for his building permit, and how he believed where he wanted to put the wall was his property. She said the question of where a property line actually lies is not typically something she deals with. "That's not something I go out and solve," she said, noting that is up to property owners. "I'm not a surveyor and I don't pretend to be."

Mr. Pease, representing CEO Chamberlain, spoke briefly about the role of both the Code Enforcement Officer and the Board of Appeals. He referenced a recent Maine case, *Tomasino v. Casco* (Decision 2020 ME 96 from the Maine Supreme Judicial Court), and read from paragraph eight in that decision where the Court stated "a municipal zoning case is not the proper forum for a private property dispute between neighbors." Mr. Pease said that was exactly what this case was. "The town should not be making choices about where boundary lines are," said Mr. Pease. He said that was a matter for courts to decide, and a matter for the appellants to take to court.

Mr. Knopp said they were not asking the Board to settle the property line matter, but simply just to revoke the permit. Ms. Wagner added they hoped the Board would consider that the building permit at question was issued just to construct the wall and not to remove parts of the driveway.

Chairperson Dohmen invited Mr. Curtis to speak. He said the boundary line will be determined, and that he has a surveyor coming to establish the line. Mr. Curtis said the line he created will be "very, very, very, very close" to what the surveyor finds. "I measured very carefully," he said.

The Board began its deliberations. Mr. Siklosi referred to Mr. Saucier's point about an incomplete building permit application. Mr. Siklosi asked CEO Chamberlain if she would have accepted a site plan like the one Mr. Curtis submitted for his permit if it were submitted with an application for a \$7 million hotel on West Street. She said she would not have, because that is a whole different type of project. She said many property owners do not have surveys, and that as a result she does see many hand-drawn sketches included in building permit applications. CEO Chamberlain said that if there had been an applicable setback in this situation, she would have

sought a better visual representation from Mr. Curtis. She said Mr. Curtis's sketch "wasn't the greatest picture" she had ever seen in a building permit application, but said being out there with him had helped her to understand and visualize what he was applying for permission to do.

Mr. Siklosi asked CEO Chamberlain whether she had any safety concerns (i.e., the wall possibly representing a trip hazard) when she issued the permit to Mr. Curtis. CEO Chamberlain said she might have been concerned about the wall being a hazard if it were taller. She noted the appellants also have no setback, and noted their driveway was built close to the property line. She asked if they should get deference simply because they built their driveway first.

Mr. Siklosi said he did not see a driveway as a hazard. He said if someone had a 12-inch cinder block in their living room (12 inches being the height of the wall, as indicated in the building permit), it would likely be considered a trip hazard as someone walked back and forth past it. Mr. Siklosi said he was formerly a safety officer for Proctor & Gamble, and said in that role trip hazards were something he worried about often. He said lower structures are more likely to be trip hazards because they are harder to see. He reiterated he saw a 12-inch high wall as a hazard.

Vice-chairperson Durand referred to §125-101 C. (1) (a), which states the Code Enforcement Officer may suspend a permit if it "was granted on incomplete or false information". She asked about the claim about removal of part of the appellants driveway, and how that figured into the discussion and how it would be looked at under this section of the ordinance. CEO Chamberlain said she would not have granted Mr. Curtis a permit to remove part of the appellants driveway. She said she did not consider his application incomplete because she did not have the Plisga & Day survey at hand when she issued the permit (the survey was not done until after that time).

Chairperson Dohmen asked, if the driveway was on Mr. Curtis's property, and he chose to remove part of it to put in the wall, would he have needed a separate permit for that? CEO Chamberlain said that work could have been put on the same permit as the one for the wall.

There were questions about what Mr. Curtis had already done (laying out strings, etc.) when CEO Chamberlain visited the site before issuing the permit. CEO Chamberlain said Mr. Curtis had put something in place to illustrate where the property line was. Reference was made to photographs submitted by the appellants, and CEO Chamberlain said no paver stones were in place when she visited the site. She said it was likely two bricks and some string were in place.

Vice-chairperson Durand asked about the survey, and how it was information that the Board had but which CEO Chamberlain did not. She asked how that could be resolved. Mr. Pease said even if the neighbors showed up with a survey earlier, it would not necessarily require the Code Enforcement Officer to re-think issuance of the permit. Mr. Pease said the permit in question was issued specifically for the building permit applicant's (Mr. Curtis's) property. "If there's a question raised about a boundary line issue, it's just not within the purview of the town to solve that," said Mr. Pease. He said the question was not so much whether Mr. Curtis had the right to do what he did, but whether the Code Enforcement Officer had the right to issue him the permit.

Mr. Saucier said it did not matter what information the Code Enforcement Officer had because this was a *de novo* hearing. “So, you have information,” Mr. Saucier told the Board. “It’s as if the application is afresh.” He said this was a live dispute over a property line, and he referred again to the *Tomasino v. Casco* case and said he agreed with Mr. Pease that the Board was not a title court. Mr. Saucier said the Board did have the authority, however, to determine whether an applicant has right, title and interest to a particular piece of property in order to use the property in the way that they are applying for. He read from the last paragraph of the Maine Supreme Judicial Court’s decision in that case, and reiterated that Mr. Curtis did not have authority or permission to build a wall on property belonging to his clients.

“So, at a minimum, the permit should not be granted and it should be revoked,” said Mr. Saucier. “The ultimate decision on that will likely come from court, as to where the line is, but you’re sitting in a *de novo* capacity and I think we presented enough evidence to show that there is, certainly at a minimum, a dispute, and that would not meet the standard of right, title and interest from my perspective. No permit should be issued until that issue is sorted out.”

On the subject of removal of part of the driveway, Mr. Saucier said there was nothing in the building permit asking for or allowing that work to be done. He said it could have been included in the permit, but was not.

Mr. Kelly said he believed that the Board had gathered the evidence that it needed to proceed, and that all sides had taken the opportunity to present the facts that they wished to present. Chairperson Dohmen noted she needed to hold the public hearing portion of the meeting. She said she also wanted to know if Board members had any additional questions for any of the parties involved, as typically such questions for outside parties (those not members of the Board) have not been allowed once the Board moves past this point in the meeting. There was discussion between Mr. Kelly and Chairperson Dohmen about proper process and procedure. Mr. Kelly said he wanted to wait until all the evidence was in before he commented on the question at hand. He said it was important to be in a deliberative phase before he weighed in. More discussion about process ensued. There were no more questions from the Board for other parties.

**At 5:30 PM, the public hearing was opened.** Assistant Planner Fuller noted the only other person in the Zoom meeting was Deputy Code Enforcement Officer Mike Gurtler, who was observing rather than participating in the meeting. Assistant Planner Fuller stated for the record that information about how anyone could attend the meeting was provided in public notices mailed to abutters, in notices posted on the bulletin board in the Municipal Building, and in a notice posted in the *Mount Desert Islander*, all as required by ordinance. Those notices all directed parties to the Board of Appeals web page, where a Zoom link and other means of how to join the meeting were provided. **Chairperson Dohmen closed the public hearing at 5:32 PM.**

Chairperson Dohmen declared the Board to now be in its deliberative phase. She said both parties (the appellants, as well as Mr. Curtis) had the opportunity to provide additional

information to the Board if they wished to do so. She specifically noted that Mr. Curtis had not done so, and that as a result the only survey the Board had to work with was the one furnished by the appellant (done by Plisga & Day in August of 2022). She suggested the Board might begin to compile findings of fact.

**Chairperson Dohmen stated as a finding of fact that in support of the application, the Board received one survey by Plisga & Day, dated August 17, 2022. Mr. Siklosi made a motion in support of that finding of fact, as enunciated by Chairperson Dohmen. Vice-chairperson Durand seconded the motion, which carried unanimously (5-0) on a roll-call vote.**

Chairperson Dohmen stated she felt it was important for the Board to establish that what was being built was a retaining wall, and she made accompanying Land Use Ordinance references. She stated the finding of fact as **that, according to §125-67 B. (6) (g), and §125-109, Definitions, what the Board was discussing was a retaining wall. Mr. Siklosi made a motion to that effect, which was seconded by Vice-chairperson Durand. The motion then carried unanimously, 5-0, on a roll-call vote.**

Chairperson Dohmen offered as a third finding that, per the previous Land Use Ordinance citations, there was no requirement for a setback from the property line. Vice-chairperson Durand asked if the specific citations should be restated, which Chairperson Dohmen did: §125-67 B. (6) (g). There was no motion or second, and Chairperson Dohmen asked why there was no support. Mr. Siklosi said he believed the wall was a hazard, which would in turn require a setback. He elaborated on why he felt that way. He said it was reasonable to expect that someone getting out of a car on the appellants property might not stay exactly on the asphalt and then trip on the wall. Mr. Siklosi called that a “foreseeable hazard.” Chairperson Dohmen said she agreed, citing her hiking background and experiences. She said it could be a separate finding, however.

Mr. Kelly said Chairperson Dohmen’s approach was one way to look at the matter, to pursue two separate findings of fact which would not necessarily be inconsistent with one another. Chairperson Dohmen asked if her suggested third finding of fact might implicitly be part of the second finding of fact. Mr. Kelly spoke about the authority the Board has, and read aloud from §125-103 D. (2) (c) [1] of the Land Use Ordinance: “If the Board of Appeals finds that the appellant is entitled to relief, it may reverse the decision, subject to such terms and conditions it considers advisable to protect the public’s health, safety and general welfare...”. He said that language gave the Board the power to address something that it might find was hazardous.

Vice-chairperson Durand asked where the definition of “hazardous” was. Mr. Kelly noted there is not one in the Land Use Ordinance, meaning it defers to a common definition of the word. Chairperson Dohmen noted the Land Use Ordinance states that in the absence of defined terms words “shall have the meaning implied by their context in the chapter or their ordinarily accepted meanings as found in the current edition of Webster’s Collegiate Dictionary...” (this is found in §125-108 A. of the Land Use Ordinance). Mr. Siklosi said he would be willing to support the no-setback finding if the Board would consider introducing a later finding that the wall was a

hazard. Chairperson Dohmen offered a proposed revised third finding of fact that included a condition for safety. Mr. Siklosi asked for Mr. Kelly's opinion, and the attorney asked for clarification. Chairperson Dohmen re-stated it: that no setback is required for a retaining wall; however, if the structure was to be built, the Board reserved the right to condition it to safety (per to §125-103 D. (2) (c) [1]. There was agreement that was not entirely a finding of fact.

Mr. Kelly said the Board could potentially use the first half of that proposed finding, and then go on to state, "We find that for public safety, it should be set back blank [feet] from the common boundary line." Chairperson Dohmen said that was the direction she wished to head in. There was discussion of what the distance should be, where Mr. Kelly had said "blank". Chairperson Dohmen suggested 12 inches could be adequate, and she explained why she saw that as proper.

Chairperson Dohmen said she did not think the Board could put a condition in place that would essentially allow the appellants to use some of Mr. Curtis's property in order to get out of their vehicle(s) and in so doing deprive Mr. Curtis of an allowed use on his property. Mr. Kelly said he agreed, but said he believed there was a reason why there are setbacks and reasons why there is a reference to safety hazard in the setbacks section of 125-67 B. He said the Board would need to decide if that was happening in this case, and if so to make a motion and describe it. Mr. Kelly said the Board could decide if it was, or was not, a hazard for the wall to be right on the line.

Chairperson Dohmen said she agreed with Mr. Siklosi that the wall, as presented, represented a safety hazard. Secretary Webber and Ms. Peterson agreed with that position. Vice-chairperson Durand said she wanted to give the matter more thought. She said she saw the key issue was that the wall might not be entirely on Mr. Curtis's property. She said it seemed like a bit of a stretch to her for the Board to impose its own setback on Mr. Curtis's wall as part of another finding, and wanted it to be made clearer that the two things (whose property the wall is on, and what an appropriate setback might be) were separate. Chairperson Dohmen said she was more comfortable with making a finding of fact about whether the wall was on Mr. Curtis's property or not. She said safety and setback issues could be separate and self-standing. Vice-chairperson Durand said she felt more comfortable with that approach. Mr. Kelly said that was fine.

**Chairperson Dohmen restated her proposed third finding of fact: because this is a retaining wall, per to §125-67 B. (6) (g), it does not require a setback. Mr. Siklosi made a motion to that effect, which Vice-chairperson Durand seconded. The motion then carried unanimously, 5-0, on a roll-call vote.**

Assistant Planner Fuller screenshared a detail of the August 2022 Plisga & Day survey provided by the appellants as the Board's discussion turned to that document. Chairperson Dohmen noted that the detail referred to a 2004 survey, also done by Plisga & Day. She said this 2022 survey was the sole piece of evidence the Board had to determine whether the pavers Mr. Curtis had placed for his wall did, in fact, go over his property line and onto the appellants' property. As a fourth finding of fact, Chairperson Dohmen offered **that the survey by Plisga & Day, dated August 17, 2022, as well as by reference a previous survey also done by Plisga & Day in**

**2004, clearly shows a property line over which these pavers [of the retaining wall] extend. Mr. Siklosi made a motion to that effect, which Secretary Webber seconded. The motion then carried unanimously, 5-0, on a roll-call vote.**

Chairperson Dohmen then stated therefore, that **Mr. Curtis [owner of the subject property] has no right, title or interest in 74 Ledgelawn Avenue [the property of the appellants] and does not have the right to build on his neighbor's property. Mr. Siklosi made a motion to that effect, which Secretary Webber seconded. The motion then carried unanimously (5-0) on a roll-call vote. [Note: this vote by the Board was presented as its Conclusion in the written decision, dated September 13, 2022 and signed by Chairperson Dohmen the next day.]**

Chairperson Dohmen suggested the Board uphold the appellants and deny the building permit, or overrule the Code Enforcement Officer. She asked Mr. Kelly for guidance. He read from §125-103 D. (2) (c) [1], and noted the Board could either “reverse” or “vacate” the decision, with additional language after each option. Referring to the earlier question of whether the Board could issue the building permit, but with conditions, he said the language from that provision of the Land Use Ordinance suggested to him that it could. Chairperson Dohmen asked if the Board could simply deny the permit, and by so doing overrule the Code Enforcement Officer, and then in a separate motion remand it back to the Code Enforcement Officer with the parameters for safety that the Board agreed on. Mr. Kelly read the language that the Board could “vacate” the decision, and suggested that was the word Chairperson Dohmen would want to use.

“So, ‘vacate’ would be your operative word, subject to what conditions you wished to apply,” Mr. Kelly summarized.

**Mr. Siklosi made a motion to vacate the original issuance of the permit by the Code Enforcement Officer for the subject property, issued on July 14, 2022. Secretary Webber seconded the motion, which then carried unanimously (5-0) on a roll-call vote.**

Chairperson Dohmen referenced and read from §125-103 D. (2) (c) [1], and there was discussion on the language therein. **Mr. Siklosi made a motion to remand this back to the Code Enforcement Officer. Vice-chairperson Durand seconded the motion, which then carried unanimously (5-0) on a roll-call vote.**

There was discussion on what the Board might do next, under the provisions of §125-103 D. (2) (c) [1]. Mr. Siklosi said Board members had, implicitly or explicitly by their previous votes, agreed that there needed to be a setback due to a hazardous condition. He said the Board would need to determine what was reasonable in this case. He said the taller a structure is, the less of a trip hazard it represents because it is that much more obvious to a passerby. Mr. Siklosi said it was not within the Board’s purview to tell Mr. Curtis how high to build his wall. Chairperson Dohmen acted out getting out of her car, in order to determine what an appropriate distance would be to get out and not trip. She estimated the necessary distance to be 3 feet, for something as low as the wall Mr. Curtis was proposing. Mr. Siklosi said he agreed with that distance.



Chairperson Dohmen asked if it would be appropriate, in a subsequent motion, to state “any further permit for this retaining wall needs to be 3 feet from the property line.” Mr. Kelly said the Board could make a finding that in order to protect public safety, that the Board finds that the low retaining wall should be set back 3 feet from the boundary line, and direct the Code Enforcement Officer to add that as a condition in any permit that she issues.

At the request of Chairperson Dohmen, Assistant Planner Fuller restated what Mr. Kelly had said: **In order to protect public safety, the Board finds that this low retaining wall should be set back 3 feet from the boundary line, and direct the Code Enforcement Officer to make that a condition on any permit that is issued. Mr. Siklosi made a motion to that effect, as read aloud by Assistant Planner Fuller, and Secretary Webber seconded the motion. The motion then carried unanimously, 5-0, on a roll-call vote.**

Chairperson Dohmen noted that that concluded the Board’s business.

#### **VI. OTHER BUSINESS**

Mr. Siklosi thanked all three of the attorneys present for doing an exemplary job of explaining quite succinctly what their respective positions for their clients were. He thanked the other parties for remaining quite civil in spite of a “rather fraught” dispute. Mr. Pease said it was high praise coming a safety official such as Mr. Siklosi.

Mr. Kelly said he thought that in an odd way, everybody was right. He said CEO Chamberlain acted on the information she had at the time that Mr. Curtis applied for his permit. He said Mr. Pease was correct that a Board of Appeals must steer clear of getting into title issues and acting like a court. He said Mr. Saucier was correct that there are times, under the *Tomasino* case, when it is so obvious (as with the one survey the Board had, which Mr. Kelly called the best evidence) that it would be a dereliction of the Board’s duty to ignore that evidence of the boundary line in terms of right, title and interest. He said he also agreed with the decision the Board had reached.

#### **VII. ADJOURNMENT**

**At 6:20 PM, Secretary Webber moved to adjourn the meeting. Mr. Siklosi seconded the motion. There was discussion of whether a vote was needed, and Chairperson Dohmen stated that a vote was not necessary and she declared the meeting adjourned.**

Signed as approved:



Robert Webber, Secretary  
Bar Harbor Board of Appeals

10-14-2022

Date