STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

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LAW COURT DOCKET NO. KNO-16-237

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STEVEN WOLFRAM, *et al.*,

Plaintiffs-Appellants

v.

TOWN OF NORTH HAVEN, *et al.*,

Defendants-Appellees

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ON APPEAL FROM JUDGMENT OF KNOX COUNTY SUPERIOR COURT
Docket No. AP-2014-05

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# BRIEF OF PLAINTIFFS-APPELLANTS STEVEN WOLFRAM AND MULLINS DEVELOPMENT TRUST

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## INTRODUCTION

This is an appeal pursuant to Me. R. Civ. P. 80B of a decision of the Town of North Haven Board of Appeals ("BOA") to uphold a conditional use permit issued by the Planning Board to Nebo Lodge, Inc. and Nebo Real Estate, LLC (collectively, "Nebo"). The challenged permit approves an application to build a new, larger accessory building to replace and change the commercial use of an existing accessory structure. (Appendix or "A." 7, 194.)

Nebo is a for-profit commercial enterprise managed by Hannah Pingree. (A. 52, 195 and 197.) Exhorted by Pingree in an email only found pursuant to a Freedom of Access Act ("FOAA") request to "move into the 21st century" and do "what it can to support a business that is currently employing over 30 people" (A. 209), the Town acceded to Nebo's latest in a series of illegal expansions, this time committing five substantive errors under the Town's Land Use Ordinance to do so. The BOA decision is further flawed by violations of Appellants' right to due process, including a series of improper *ex parte* communications and the non-recusal of the Chair of the Board of Appeals, despite having in the Planning Board proceeding called Appellants' objections to the latest expansion "un-American."

The Court should reverse the approval of Nebo's latest expansion request. Alternatively, the Court should remand for a new administrative review free of constitutional violations.

## STATEMENT OF FACTS

Plaintiffs-Appellants Steven Wolfram and Mullins Development Trust (collectively, "Wolfram") own real property on Mullins Lane in North Haven. Wolfram's home is located directly across the street from property that Nebo owns and operates as an inn, restaurant and bar known as Nebo Lodge. (A. 50; Administrative Record or "R.," tab 46 at 197, 199.)

Both Wolfram's home and Nebo Lodge are located within the Town's Village District, intended for residential use under the Town's Land Use Ordinance ("Ordinance"). (A. 50, 86.) Restaurants, lodging facilities, and other commercial uses are allowed as conditional uses in the Village District if they satisfy the conditional use requirements in Section 6.5 of the Ordinance. (A. 86.)

### I. Despite its location, small lot, and non-conforming status, Nebo has repeatedly been permitted to expand.

Nebo first received conditional use approval in 2005, allowing operation as an inn and restaurant. (A. 20, 22.) The Nebo lot is a legal nonconforming lot because it does not meet the 20,000 square foot minimum lot size requirement under the Ordinance, and Nebo buildings before its first expansion in 2009 were grandfathered nonconforming structures because they did not meet applicable property line setbacks. (A. 53.) The Nebo lot is, at most, 13,613 square feet. (A. 9, 104, 128.)

### A. The 2009 expansion used up and exceeded Nebo's 33% expansion allocation under Section 2.5(B) of the Ordinance.

The Ordinance prohibits enlargement of grandfathered nonconforming structures if the enlargement contains more than 33% of the ground area of the grandfathered structures. (A. 84, Ordinance § 2.5(B).)

In 2009, Nebo applied for a permit for an expansion of its office, kitchen, and waiting area, installation of a handicapped ramp/deck, and expansion of the foundation to allow year-round use. (A. 210-212.) According to the application, the ground area occupied by the existing Nebo Lodge structure was 2,769 square feet, and an existing shed to be torn down occupied 57 square feet of ground area. (A. 212.) A then-existing accessory structure (the "Bungalow"), which was not proposed to be modified, occupied an additional 951 square feet of ground area. (A. 202.) Thus, the total existing ground area occupied by structures amounted to 3,777 square feet, or 27.75% of the lot. (A. 128.)

The application proposed to add 902 square feet of occupied ground area to the Nebo Lodge building and a new handicapped ramp occupying 392 square feet of ground area. Thus, the total of additional occupied ground area (after subtracting the shed to be torn down) was 1,294 square feet. This was a 34.26% increase in occupied ground area.

The 2009 permit application, which made none of the showings required by the conditional use standards section of the Ordinance, Section 6.5, was granted on October 14, 2009. (A. 100, 211.)

**B. The 2010 expansion further exceeded Nebo's 33% expansion allocation under Section 2.5(B).**

In 2010, Nebo applied for a permit to allow construction of a 95 square foot platform/stairs addition for access to the side entrance of the main building of the Nebo Lodge complex. (A. 205-206.) Again, the permit application made none of the showings required by the conditional use standards section of the Ordinance, Section 6.5. Combined with the 2009 expansion, the total increase in occupied ground area over the ground area occupied by grandfathered structures was now 1,389 square feet, or an increase of 36.78%.

The Planning Board approved the permit on April 13, 2011. (A. 206.)

**C. The challenged 2013 application sought a further expansion, though lacking any remaining ground expansion area under Section 2.5(B) and exceeding the 20% lot coverage limitation in Section 4.1(C) of the Ordinance, in order to tear down the Bungalow and replace it with a new, larger structure ("the Annex").**

On October 16, 2013, Nebo applied for a permit for, in its words, a 2,392 square foot "new building." (A. 194-195.) This is the permit challenged in this appeal.

The new building, known as the "Annex," is to house Nebo staff sleeping quarters; an office; storage for food, trash, recycling, and bikes; and space for food

processing and refrigeration. (*Id.*) The applicant proposed to "tear down the current bungalow building, which is in very bad condition and not winterized and replace it with a two-story storage building with 2-3 small efficiency rooms above it for guests and/or staff." (A. 203.) The proposed site plan stated "exist. bungalow to be demolished," and "new (2) storey [sic] . . . bldg." to be constructed. (A. 202.)

Consistent with this application request to "demolish" and "tear down" the existing building and "replace" it with a "new" building, the minutes of the November 4, 2013 Planning Board meeting in which the evidence was presented reference the proposed "new" building to "replace" the existing building. (A. 154.)

Section 2.6(B) of the Ordinance, however, only permits replacement of nonconforming buildings that are damaged or destroyed by external causes, such as fire. (A. 85: "Any non-conforming use or structure which is hereafter damaged or destroyed by fire or cause other than the willful act of the owner or his agent, may be restored or reconstructed to its original dimensions, and used as before within twelve (12) months of the date of said damage or destruction . . . ".)

The new Annex building was proposed to be 30% larger than the old Bungalow building, and to occupy 1,252 square feet of ground area, or 301 square feet more than the preexisting Bungalow. (A. 202.) Combined with the 2009 and 2010 expansions, the total net increase in occupied ground area over the ground area that previously occupied by grandfathered structures was now 1,690 square feet, or an increase of 44.74%.

Aside from proposing replacement of a voluntarily destroyed nonconforming building, and further exceeding the 33% ground area rule, the total occupied ground area, 5,467 square feet, would be 40.16% of the lot's size. Section 4.1(C) of the Ordinance, however, provides "in no case shall all structures, including the guest house, cover more than 20% of a lot." (A. 92.)

Finally, Wolfram and other neighbors submitted testimony to the Planning Board, incorporated in the BOA record, that, with the exponential growth in Nebo's activities since its original conditional use permit was granted in 2005, and especially since the 2010 expansion allowed under the 2009 permit, the Nebo bar and restaurant generates significant and disruptive noise and activity late into the evening and significant daytime noise and activity as supplies are delivered, trash is removed, cleanup activity takes place, and other commercial activities occur. The testimony was that this activity is incompatible with the residential Village District. (A. 180, 197; R. tab 46 at 199-200, 205; R. tab 49 at 212; R. tab 50 at 214, 220-221.) No contradictory evidence was presented on this point. (*See* A. 196-199.) (*See* A. 100, Ordinance § 6.5(A) ("A conditional-use permit may be granted by the Planning Board only in the event ... neither the proposed use nor the proposed site upon which the use will be located are of such a character that the use will have an adverse impact upon the value or quiet possession of surrounding properties greater than would normally occur from the permitted sue [*sic*] in the zoning district.")

## II. Both the Planning Board and BOA approved the latest Nebo expansion application.

### A. The Planning Board, communicating with the applicant *ex parte*, approved the permit.

The Planning Board voted to approve the permit on November 5, 2013, after BOA Chair Kim Alexander stated in the Planning Board hearing that Wolfram's efforts to mitigate the impacts of Nebo's operations were "un-American" and highly objectionable. (A. 154; R. tab 41 at 185.)

The written decision was issued on November 13, 2013. (A. 50-63.) In between those two dates, on November 10, 2013, unbeknownst to Wolfram until revealed in a FOAA request, Hannah Pingree emailed Planning Board Chair Patricia Curtis informing her that "[w]e are also in discussions with [Code Officer] Paul [Quinn] about how we can leave some portion of the building intact to comply with the ordinance." (A. 192.)

In its written approval, the Planning Board interpreted Nebo's proposal to be a request to "move, re-build and enlarge" the Bungalow, and "refurbish" it (R. tab 39 at 169), rather than to demolish the Bungalow and replace it with a new building, as Nebo until then had stated it proposed to do. (A. 202.) Even then, however, the Board admitted that the replacement structure would be "new." (A. 53 ("the newly rebuilt accessory structure"), 55 ("the new, rebuilt and enlarged accessory structure"), 61 ("this new accessory structure").)

**B. With input from the Planning Board and led by a Chair who had decried Wolfram's objections as "un-American," the BOA affirmed.**

On March 12, 2014, the BOA, led – over Wolfram's written objection – by BOA Chair Alexander, held a *de novo* hearing on the appeal. (A. 7, 154.)[1]

The entire Planning Board record was incorporated into the BOA record. (*Id.*) With the old Bungalow now gone and the Annex built, Wolfram additionally presented evidence, in the form of an affidavit from building contractor Mark Dierckes, that the new Annex building could not have been built as proposed without first entirely demolishing the Bungalow. Dierckes averred, in fact, that the Bungalow had been entirely demolished sometime before February 23, 2014; that he saw no

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[1] The parties agreed that the review was *de novo*, as did the Superior Court after further briefing on the topic. The Ordinance provides that the BOA "shall hear and decide appeals where it is alleged that there is an error in any order ... made by, or failure to act by the ... Planning Board in the administration of this Ordinance." (A. 97-98, Ordinance, § 5.5.) In *Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 7, 757 A.2d 773, the Court interpreted 30-A M.R.S.A. § 2691(3)(D) to mean that review by a board of appeals is *de novo* "unless the municipal ordinance explicitly directs otherwise." In *Yates v. Town of Southwest Harbor*, 2001 ME 2, 763 A.2d 1168, the ordinance at issue included language identical to that in the Ordinance here, and the Court concluded that the board review was appellate, not *de novo*. *Yates*, 2001 ME 2, ¶ 13. The ordinance in *Yates*, however, included additional language, missing from the Ordinance here, providing that the board may reverse the decision, or failure to act, of a town officer, board or commission "only upon finding that the decision, or failure to act, was clearly contrary to specific provisions of the ordinance in question or unsupported by substantial evidence in the record." *Id.*, ¶ 12. It was this additional language that limited the board of appeals to appellate review. That it was this additional language in *Yates* that called for appellate review was confirmed by the Court in *Gensheimer v. Town of Phippsburg*, 2005 ME 22, 868 A.2d 161. There, the Law Court quoted this additional ordinance language in ruling that "[t]his specific limitation negates the de novo review provision of section 2691(3)(D)." 2005 ME 22, ¶ 13. Because the North Haven Ordinance lacks this limiting language, the default *de novo* review rule applies.

evidence that any portion of the Bungalow had been preserved; and that the new building was an entirely new structure. He attached photos to his affidavit, taken during construction, showing that the new building is, as proposed, an entirely new building. (A. 111-121.) As a matter of simple engineering, the Bungalow had to be new, as it was built on a new concrete slab. (*Id.*, at 111-112, ¶¶ 4, 7.) Even Counsel for Nebo admitted that the Nebo application was to "replace" the existing Bungalow with a "new" building. (A. 20.)

The BOA voted to reject Wolfram's appeal on March 17, 2014 (A. 7), followed by a written decision on April 10, 2014. (R. tab 2 at 44.)

Wolfram filed his Rule 80B appeal with the Superior Court (Billings, J.) on April 30, 2014. The Superior Court rejected the appeal in a decision dated April 23, 2016 and docketed on April 26, 2016. (A. 3.) With respect to Wolfram's due process claims, the Court found "troubling" the statements attributed to the BOA Chair, which "if clearly supported by the record" would require a remand for consideration by a board with members with no bias. (A. 5.) The Superior Court did not so remand, however, because it found the record "not clear" on this point.

This appeal followed on May 19, 2016. (A. 3.)

## ISSUES PRESENTED

I. Does the permit violate:

A. the 33% expansion limitation in the Ordinance, § 2.5(B); or

B. the ban on the replacement of willfully destroyed non-conforming structures contained in the Ordinance § 2.6; or

C. the 20% lot coverage limitation in the Ordinance, § 4.1(C); or

D. the adverse impact rule in the Ordinance,§ 6.5(A) because

1. the BOA compared the impact of the Nebo proposal to other conditional, rather than permitted, uses in the Village District; or

2. the BOA considered only the impact of the Annex, not the entire Nebo operation?

II. Was the approval of the permit fatally tainted by due process violations because the applicant engaged in improper *ex parte* discussions with town officials and because, prior to hearing Wolfram's appeal to the BOA, the BOA Chair stated publicly before the Planning Board that Wolfram's efforts to impose conditions on Nebo operations were "un-American" and highly objectionable?

## SUMMARY OF ARGUMENT

### I. The five substantive errors in the BOA decision.

The BOA's decision makes five fundamental errors in the interpretation and application of the Ordinance. First, it ignores the 33% expansion limitation in Section 2.5(B) imposed on expansions of grandfathered structures. Second, it disregards the ban on replacing willfully destroyed non-conforming structures contained in Section 2.6. Third, it misinterprets and misapplies the 20% lot coverage

limitation in Section 4.1(C). Fourth and fifth, it misreads Section 6.5(A) of the Ordinance by comparing the impact of the expansion to other conditional uses rather than to permitted uses in the Village District, and by considering only the impact of the Annex, not the entire Nebo operation within the Village District. These errors of law require reversal as to the first three grounds, and a remand for a proper evaluation of adverse impact as to the fourth and fifth grounds.

*Standard of Review*: The Court reviews *de novo* the BOA's interpretation of its Ordinance, with no deference to the Superior Court's ruling. *See Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 7, 868 A.2d 161, 163-64. In construing an ordinance, the Court looks "first to the plain meaning of its language to give effect to the legislative intent, and if the meaning of the statute or ordinance is clear," does not look beyond the words themselves. *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903, 909. The language of the ordinance is to be considered as a whole. *Id.* Provisions of an ordinance should be read in harmony with each other, and all parts of an ordinance should be taken into account in determining legislative intent. *Cumberland Farms, Inc. v. Town of Scarborough*, 1997 ME 11, ¶ 6, 688 A.2d 914, 915.

Critically, because the underlying policy of zoning is gradually to eliminate nonconforming structures and uses, zoning provisions that restrict nonconformities are broadly construed, and zoning provisions that allow nonconformities are strictly construed. *Day v. Town of Phippsburg*, 2015 ME 13, ¶ 15, 110 A.3d 645; *Viles v. Town of Embden*, 2006 ME 107 ¶ 19, 905 A.2d 298, 303; *Brackett v. Town of Rangeley*, 2003 ME

109, ¶ 16, 831 A.2d 422. *See Merrill v. Town of Durham*, 2007 ME 50, ¶ 16, 918 A.2d 1203 ("The real purpose of the [ordinance] ... is to create better land use by eliminating nonconforming uses over time. We have long reiterated this hallmark of land use law.") (citations omitted).[2]

## II. The due process violations

Alternatively, a remand is required due to procedural irregularities tainting the proceedings. The improper *ex parte* communications with the Planning Board Chair reflect a bias that tainted not just the proceedings before that body, but the BOA as well, because the Planning Board Chair testified before the BOA. Independent of this due process violation, the statements of the BOA's Chair regarding Wolfram's objection to the project as "un-American" also squarely violated his due process rights.

*Standard of review*. Whether an administrative body violates due process rights is a legal question, subject to *de novo* review. *See Duffy v. Town of Berwick*, 2013 ME 105,

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[2] Consistent with this "hallmark of land use law," Section 2.1 of the Ordinance provides:

> **Purpose**
> The intent of the Zoning Ordinance is to regulate non-conforming lots, uses and structures. The Ordinance intends to be realistic so that: non-conforming lots of record can be reasonably maintained or repaired, and non-conforming uses can continue to be changed to other less non-conforming or to conforming uses. These regulations are designed for the betterment of the community and for the improvement of property values.

(A. 83.)

¶¶ 12-13, 82 A.3d 148, 154 (reviewing due process claim directly without articulating deference). In determining whether due process rights were violated, there is no heightened standard of review. *See id.*, 2013 ME 105, ¶ 13 (noting the appellant bears the burden of persuasion, with no reference to a heightened standard); *Lane Const. Corp. v. Town of Washington*, 2008 ME 45, ¶ 29, 942 A.2d 1202, 1211 (reviewing bias claim, noting that the Law Court reviews the administrative record directly, citing no heightened clear and convincing evidentiary standard).

## ARGUMENT

### I. The permit approval should be reversed because the latest Nebo expansion is prohibited under multiple provisions of the Ordinance.

#### A. The permit violates the 33% rule in Section 2.5(B) of the Ordinance.

Section 2.5(B) of the Ordinance prohibits enlargement of grandfathered nonconforming structures if the enlargement contains more than 33% of the ground area of the grandfathered structures:

> Any structure in existence as of the effective date of this Ordinance, which becomes nonconforming solely from a failure to satisfy the area requirements of the district in which it is located, may be repaired, maintained, and improved. It may be enlarged and/or accessory structures may be added to the site without a variance provided that:
>
> A. the enlargement or accessory structure itself meets the height requirements of the district in which it is located; and
>
> B. that the enlargement or accessory structure itself meets the setback requirements of the district, or, if located on the same lot as the non-conforming structure, and **contains no more than 33% of the ground area of the grandfathered structure**.

(A. 84; emphasis added.)

Here, there originally were two nonconforming, grandfathered structures on the lot – the Bungalow and the main lodge. Because the replacement Annex building was "located on the same lot as the non-conforming structure" (A. 50, 53.) – in this case, both structures – the total additional ground area occupied by the added "enlargement or accessory structure" is limited to 33% of the ground area of the two grandfathered structures.

Because the 2009 and 2010 expansions of the main lodge had already resulted in an expansion of occupied ground area to almost 37% of the grandfathered structures, those prior expansions had used up the 33% expansion allowance that would otherwise have been available for the Annex. As noted above, the Annex's new 301 square feet of ground area coverage (as compared to the grandfathered Bungalow) results in ground coverage of the lot that is almost 45% greater than the ground coverage of the grandfathered structures.

We need go no further. The permit should have been denied on this ground alone.

**B. The approval violates the prohibition on reconstructing grandfathered structures that are willfully destroyed contained in the Ordinance § 2.6.**

Section 2.6 of the Ordinance provides:

> Any non-conforming use or structure which is hereafter damaged or destroyed by fire or cause **other than the willful act of the owner or his agent**, may be restored or reconstructed **to its original dimensions**, and used as before within twelve (12) months of the date of said damage or destruction . . . "

(A. 85, emphasis supplied.)

Section 2.6 thus embraces two concepts: (1) no restoration or replacement of a willfully destroyed or damaged nonconforming structure; and (2) limitation of any restoration or replacement to the structure's original dimensions. Both concepts were violated here.

Such a provision limiting restorations and replacements makes sense, given that, as noted, *supra*, zoning policy seeks to gradually eliminate nonconformity. The owner of a nonconforming structure cannot simply destroy the building and put up a new one – in this case, even larger than the old one.

The BOA concluded that there was no violation of Section 2.6 on the basis of a finding that there had not been a "complete demolition" of the building because, the BOA said, an unidentified element of the old Bungalow was saved and incorporated into the new accessory building, where it allegedly "now holds up the corner of the stairs." (A. 28, 47.) Even assuming for the purposes of this appeal, however, that there is some stick of wood salvaged from the old building incorporated in the brace

for the corner of the stairs in the new building, that does not mean that the old building was not willfully destroyed or damaged, and therefore cannot be restored or reconstructed, let alone replaced with a new, bigger building. As noted above, everyone recognized – as they had to – that the applicant was voluntarily tearing down the old building and replacing it with a new building that had not been damaged or destroyed by some external act. (*See supra* at 7-9.)

Even after improper *ex parte* coaching from the code enforcement officer, Nebo stated in its application for a "wrecking permit" to demolish the Bungalow that it was proposing to "mostly remove the current bungalow and rebuild a new accessory building." (A. 190.) While Nebo characterized their actions as a "partial tear down w/small piece of remaining building" (*id.*), the Town used the square footage of the entire building to calculate the amount due for issuance of the wrecking permit. (A. 191.) In issuing the invoice for the permit for the new building, the Town referred to it as a "new building." (A. 189.) Whether any piece of the Bungalow was incorporated into the new Annex, the Bungalow was destroyed or at least "damaged," and the Annex is a new building.

As a matter of law, Nebo could not circumvent Section 2.6 simply by saving and moving an unidentified small piece of the original building into its new building. Further, and in any case, even if the Bungalow had been entirely damaged or destroyed, Nebo did not propose to "restore or reconstruct" it "to its original dimensions," as allowed by Section 2.6, but to build an entirely new building that

incorporates the expansion allocation allowed by Section 2.5(B) for construction of a new accessory structure.[3]

In sum, the destruction of the Bungalow to allow the laying of the entirely new slab foundation for the new Annex building (A. 111-112, ¶¶ 4, 7), resulted in the willful damage or destruction of the original nonconforming structure, so that construction of the new building violated Section 2.6. Again, we need go no further.

**C. The permit violates the 20% lot coverage limitation in Section 4.1(C).**

Section 4.1(C) of the Ordinance states, "In no case shall all structures, including the guest house, cover more than 20% of a lot." (A. 92.) There is no dispute that, if Section 4.1(C) applies, the ground coverage of the lot with the additional Annex would exceed the 20% maximum. (*See* A. 14.) As noted above, with the addition of the Annex, the total lot coverage is just over 40%, or twice that allowed by the 20% lot coverage limitation.

The BOA, however, determined that the application was not subject to Section 4.1(C) because the Annex would not be, in their view, a "guest house." (A. 5, 13-14.)

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[3] Prior to the filing of the application, even the Planning Board Chair acknowledged discomfort given Section 2.6. In an email dated September 13, 2013, Curtis wrote that she was "having difficulty with Part II Non-Conformance, Sec. 2.6, Reconstruction, in the NH zoning Ord." (R. tab 61 at 237.) No one ever addressed that concern in writing (at least in materials provided to Wolfram under FOAA) – other than in the November 10, 2013 *ex parte* email discussed above. Somehow, however, in a manner not reflected in the record, Board Chair Curtis apparently overcame her concerns by the time the Planning Board deliberated and voted on this issue.

There are three problems with this conclusion. First, the Annex provides accommodations for two members of Nebo's staff. (A. 194.) Although the Ordinance does not define the term "guest house," a temporary lodging meets any rational understanding of the term. Indeed, the public notice for the Planning Board hearing stated that the application was to "replace an existing guest house." (A. 148.)

Second, in any event, whether or not the Annex qualifies as a guest house is immaterial, because Nebo Lodge itself is indisputably a guest house, thus subjecting the entire lot to the 20% lot coverage limitation.

Third, Section 4.1(C) is not limited to properties containing guest houses. Although it is contained in Section 4.1, entitled "Guest House," that title does not limit the application of paragraph C. Although that section addresses guest houses, the point of Section 4.1(C) is to ensure that all structures on a lot, "**including** the guest house," do not occupy so much of the lot that there is insufficient remaining open space (emphasis supplied).

It would make no sense to limit this provision to guest houses, and to exempt all other structures, including accessory structures, from any lot coverage limitation whatsoever. Using that logic, every owner in the historic Village District could build structures such as barns or garages that, together with the owner's residence, occupy 100% of the owner's lot, subject only to setback requirements. There is no rational basis for the Ordinance to impose a lot coverage limitation only on guest houses, but not on any other uses. Such a reading would be absurd, and cannot have been

intended. "Words [in an ordinance] must be given their plain and ordinary meaning and must not be construed to create absurd, inconsistent, unreasonable, or illogical results." *Bushey v. Town of China,* 645 A.2d 615, 617-18 (Me. 1994) (quotation marks omitted). This is particularly important when, as in this case, we are applying the Ordinance provisions to nonconforming structures, in which context courts broadly construe zoning provisions that limit nonconformity.

### D. The permit violates the "adverse impact" rule in Section 6.5(A) of the Ordinance.

#### 1. The BOA incorrectly compared the proposed Annex to other commercial uses rather than to permitted uses.

The BOA reviewed the impact of the Nebo proposal under the conditional use adverse impact standard in Ordinance Section 6.5(A) by comparing the proposed Annex to other conditional uses allowed in the Village District. (A. 9-10, 27-28.) Under Ordinance Section 6.5(A), however, the correct basis of comparison is to the **permitted** use in the zoning district:

> A conditional-use permit may be granted by the Planning Board only in the event that the applicant has established to the satisfaction of the Board that:
>
> A. neither the proposed use nor the proposed site upon which the use will be located are of such a character that the use will have an adverse impact upon the value or quiet possession of surrounding properties greater then would normally occur from **the permitted sue [*sic*]** in the zoning district; . . . .

(A. 100 (emphasis added).)

The permitted uses in the Village District are limited to (1) low intensity recreation uses, (2) single family dwellings, and (3) timber harvesting. (A. 86.) Uses allowed as "conditional" uses are not the same as "permitted" uses and are separately listed in the Ordinance. (A. 86.)

This distinction is further demonstrated by the Ordinance's definition of "conditional use":

> **Conditional-Use** – A use permitted **only after review and approval by the Planning Board**. A Conditional Use is a use that would not be appropriate without restriction, but which, if controlled under the provisions of this Ordinance, such uses may be permitted if specific provisions of such conditional use is [*sic*] made in this Ordinance.

(A. 80 (Ordinance § 1.6) (emphasis supplied).) Because a use listed as a conditional use is not permitted until that specific use has been reviewed and accepted by the Planning Board under Section 6.5, the impacts of a conditional use cannot be used as a stand-in for a permitted use when determining the impacts of a proposed conditional use.

Indeed, in its written decision, the BOA states that because Nebo's "inn and restaurant is the only current operation of its kind" "there is no comparison to be made to other such uses," then voted to approve. (A. 9.) Thus, the BOA appears to have abdicated reviewing this criterion entirely because there was no other nonconforming use like Nebo in the vicinity. The BOA made no effort to engage in the proper comparison, which is exclusively to existing permitted uses in the Village District.

### 2. The Planning Board and BOA incorrectly considered only the impacts of the Annex, and not the entire Nebo operation.

The BOA also improperly applied the conditional use standards by considering only the use that was proposed to occur in the Annex, and not considering the impacts of the proposed changed Nebo use as a whole. Specifically, the BOA reviewed only the impact of the new Annex building and the expanded capabilities of the kitchen, the housing, and the office space that were proposed to take place in the Annex. This is particularly troubling given the Planning Board's prior failures to require Nebo to demonstrate that it would comply with the conditional use standards in the Ordinance, Section 6.5, before issuing previous permits. The Planning Board has never lived up to its obligations under Ordinance Section 6.5 with respect to Nebo as a whole, but has instead simply waived Nebo's applications through without making the findings required by Section 6.5.

Nebo applied for conditional use approval "as a result of a change in the commercial use of this accessory structure." (A. 50-51.) The Planning Board noted that, "at present the restaurant uses this structure for storage. The new, rebuilt and enlarged accessory structure will have a different commercial use." (A. 55.) Specifically, "the second floor of the accessory structure will be used as a business office and shall contain two bedrooms for staff use only. The first floor will contain a commercial kitchen and also store items of personal property, trash, inventory and

equipment belonging to the restaurant. This will require a conditional use permit." (A. 55.)

The Planning Board acknowledged that the Bungalow was accessory to the main Nebo lodge: "This building meets the definition of an accessory structure because it is located on the same lot and is of a nature customarily incidental and subordinate to the principal use of the structure, i.e. a lodge and restaurant." (A. 53-54.) Although acknowledging that the Bungalow was, and the Annex will continue to be, used as an accessory structure to the main Nebo lodge, the Planning Board nonetheless considered only the proposed Annex use and not the main lodge use in determining whether the conditional use standards would be met: "The building application before this Board pertains solely to the accessory structure on the property." (A. 50.)

The BOA did not correct this defect on appeal, even though the BOA acknowledged that the Annex building would be accessory to the main Nebo Lodge, and would continue to be part of that use:

a. This is an application for a conditional use for an accessory building;
b. The building falls into section 3.3(3)[4] (restaurant uses) as support for the inn and restaurant;
c. The proposed accessory building is of a nature incidentally subordinate to those of the principal structure;
d. The proposed accessory building supports the uses of the main structure as subordinate to the main building . . . .

(A. 10.)

[4] This reference should be to Section 3.3(C)(3).

Because the proposed Annex building admittedly was and is part of the principal use of the lot as an inn and restaurant, it is part of that use, and a change to that use cannot be considered independently of the principal use. As the BOA acknowledged, the Annex is "subordinate to" the main building and "falls into section 3.3(3) (restaurant uses) as support for the inn and restaurant." Thus, any proposed changed use of the accessory structure is a change to the underlying conditional use, not just to the use of the accessory structure. *Cf. Kurlanski v. Portland Yacht Club*, 2001 ME 147, ¶ 11, 782 A.2d 783 ("Although the Club applied for site plan approval of a boathouse, the ordinance requires it to submit the necessary documentation to enable the Planning Board to conduct a review of the site in its entirety.").

In sum, the failure to review the impact of the entire use of the lot, including the existing, underlying use, as a result of the proposed expansion was an incorrect application of the conditional use provisions of the Ordinance. For that reason, the Court should remand the matter for proceedings correctly applying the standard of review under the conditional use provisions of the Ordinance.

## II. The approval proceedings violated Wolfram's right to due process.

The Law Court has stated that "both an applicant and members of the public who oppose a project are" entitled to fair and unbiased proceedings. *Duffy*, 2013 ME 105, ¶¶ 15, 17. With respect to *ex parte* communications, the Court has stated that it "will vacate a planning board's decision if, as a result of [*ex parte*] communications, the decision results in 'procedural unfairness.' Procedural unfairness refers to the idea

that the *ex parte* communication affects 'the integrity of the process and the fairness of the result.'" *Id.*, ¶ 18 (citations omitted).

Both the Planning Board and BOA exhibited material bias against Wolfram, and in favor of Nebo, to Wolfram's prejudice, with the result that the Planning Board and BOA hearings were not fair to Wolfram and undermined the integrity of the process. Although the BOA proceeding was *de novo*, the bias of the Planning Board unavoidably infected the BOA proceeding, because members of the Planning Board, including Planning Board Chair Patricia Curtis, testified before the BOA. (A. 8, 24.)

First, improper *ex parte* email exchanges between Nebo and the Town – which were not made available to Wolfram until he filed a FOAA request with the Town on April 14, 2014 – reflect fatal procedural irregularity and bias. For example, in an email exchange on December 9, 2013, the Town Administrator wrote to Nebo, with a copy to Planning Board Chair Curtis, regarding Wolfram's appeal to the BOA, stating that "this man is tedious." Curtis replied to that email chain, with a copy to Nebo [and not Wolfram]: "Scary to know he's a 'powerful lawyer' isn't it?" (A. 186-187.)

When the matter was pending before the Planning Board, as noted, Hannah Pingree and Curtis emailed each other about the pending matter *ex parte*, with Pingree informing her that she was carrying on discussions with the code enforcement officer as noted above, to try to circumvent Section 2.6 of the Ordinance. In response to this information, Curtis e-mailed back, copying the other members of the Planning Board but not Wolfram, that it was "good to have the correct scoop!" (A. 192.)

In short, the Planning Board and the applicant were in cahoots in coming up with a strategy to circumvent the legal requirements of the Ordinance before the Planning Board issued its decision, with Wolfram – that allegedly "tedious" man and "powerful lawyer" – left completely in the dark.

Curtis engaged in other such *ex parte* communications with Nebo. See, for example, an October 21-23, 2013 email exchange, in which they discussed whether a "tear down" permit was needed for the Bungalow, and which Curtis characterized as "confusing!" (A. 200.) This *ex parte* email exchange took place one week after Nebo had submitted its application that is the subject of this appeal, and yet was not made part of the public record in this proceeding until Wolfram filed his FOAA request in April 2014. Curtis and Pingree also had prior *ex parte* email exchanges relating to preliminary Planning Board consideration of this application at its October 15, 2013 meeting. In those emails Nebo asked questions about applicable requirements, and Curtis provided answers. (R. tab 59 at 235; R. tab 61 at 237-239.) Those exchanges were not made available to Wolfram until he filed his FOAA request, even though they related directly to this application.

These emails followed a history of emails in which then-Speaker of the Maine House of Representatives Pingree applied pressure on the Town and the Planning Board to be more responsive to her applications and "move into the 21st century" to do "what it can to support a business that is currently employing over 30 people." (A. 209.)

Such improper communications and reflections of bias did not stop with the Planning Board. In his appeal to the BOA, Wolfram objected to the participation of BOA Chair Alexander, given her comments during the Planning Board hearing, that Wolfram's efforts to mitigate the impacts of Nebo's operations were "un-American" and highly objectionable. (A. 154.) It is black letter law that someone who has advocated a position in a specific matter cannot later act as adjudicator in that matter. *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me. 1990); *see also Walsh v. Town of Millinocket*, 2011 ME 99, 28 A.3d 610.

The Superior Court acknowledged this rule of law, noting that the statements violated Wolfram's due process rights, and yet did not order any relief, on the ground that the record was not clear as to whether the statements were made. (A. 5-6.) But Wolfram cited Alexander's statements exactly, in quotations, and signed his submission to the BOA. **No one contradicted him,** including Alexander. Even at the Superior Court level, the Town could have sought to supplement the record with some sort of denial from her or some other witness. It did not.[5] While the Superior

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[5] To the contrary, the Town has never denied she made these statements. Instead, it argued that "even if true," the statements did not reflect bias, and the objection was waived because, the Town argued, Wolfram did not "flash a bright light" on that objection within his filing. Wolfram's objection was in writing, clear, and comprehensive:

- Kim Alexander should not participate in this Appeal for two reasons:
  (i) As co-owner of an enterprise that is the recent recipient of a substantial "working waterfront" grant from the State of Maine for which the owner of Nebo Lodge, Chellie Pingree,

Court noted that Wolfram's signed statement was unsworn, there is no requirement that testimony be sworn in BOA proceedings, and the Court did not cite any. The Superior Court also appears to have erred by imposing a clear and convincing burden of proof on Wolfram, unsupported by law. (*See* A. 5 (a remand would be required if "clearly" supported by the record.).)

In sum, the uncontradicted evidence shows Alexander's participation was a flagrant due process violation that alone requires relief. When coupled with the series of preceding *ex parte* communications noted above, the fatal taint in the administrative proceedings becomes even more apparent

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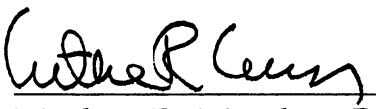
> and Hannah Pingree have taken credit and for which Kim Alexander has publicly given them credit, she cannot be considered to be objective in deciding a matter that concerns Nebo Lodge;
>
> (ii) During the public hearing, Kim Alexander participated in the discussion and made a declaration –rather emphatically– to the effect that she found the notion that an abutting property owner should attempt to impose conditions on Nebo's use of its property to be "un-American" and highly objectionable. While she has a perfect right to speak her mind openly, having done so, she cannot impartially participate in this Appeal. The Ordinance contains both the requirement and the discretion for the Planning Board under certain circumstances to impose conditions on such use in connection with a conditional-use permit. As Kim Alexander has publicly declared her opposition to such conditions, she cannot reasonably be considered to be objective in the decision of this appeal.
>
> Failure of . . . Kim Alexander to be recused will be grounds for appeal of the decision of the Appeals Board to the Superior Court.

(A. 154.)

## CONCLUSION

For the foregoing reasons, the Court should vacate and reverse the decision of the BOA. Alternatively, the matter should be remanded for further proceedings to correctly apply the appropriate standards, without bias or other procedural irregularities.

Dated: August 8, 2016



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## CERTIFICATE OF SERVICE

I, Catherine R. Connors, Esq., hereby certify that two copies of this Brief of Plaintiffs-Appellants Steven Wolfram and Mullins Development Trust and one copy of the Appendix were served upon counsel at the address set forth below by email and first class mail, postage-prepaid on August 8, 2016:

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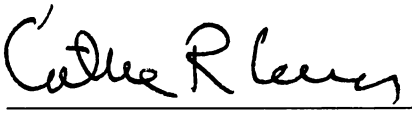

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