STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KNO-16-237

STEVEN WOLFRAM, *et al.*,

Plaintiffs-Appellants

v.

TOWN OF NORTH HAVEN, *et al.*,

Defendants-Appellees

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

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

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Introduction

By allowing perpetuation of nonconformity through repair, maintenance, and even limited enlargement, the North Haven Land Use Ordinance is more generous to owners of lots with non-conforming uses and structures than are many municipalities. But this generosity is not without limits. The Ordinance sets substantive boundaries which the BOA's latest Nebo permit exceeds. Whatever the Town's motives in its successive approvals of Nebo's expansions, Nebo's neighbors in the historic Village District established by the Ordinance also have rights. They are entitled to a fair administrative hearing and application of the Ordinance as enacted.

I. The permit violates Ordinance requirements.

A. The permit violates the 33% expansion limit in § 2.5(B).

Appellees do not dispute that the 2009 and 2010 approvals resulted in expansion of occupied ground area by almost 37% beyond that of the two pre-existing nonconforming structures, the main Lodge and the accessory Bungalow. Instead, they argue that Nebo may expand yet again because, they contend, the 33% enlargement limit in § 2.5(B) should be read to allow expansion of up to 33% not of the total ground area of pre-existing nonconforming structures, but rather a 33% expansion of each such structure, however many there might be. Applying Appellees' interpretation in the circumstances in this case would allow an overall expansion of occupied ground area of almost 45% – the 37% expansion of the Lodge from the

previous approvals, combined with an additional 33% expansion from replacement of the Bungalow with the larger Annex.

The operative language in § 2.5(B) is set forth in full in the Blue Brief at 13-14 and at A. 84. It states that a pre-existing nonconforming structure "may be enlarged and/or accessory structures may be added to the site" provided "the enlargement or accessory structure ... contains no more than 33% of the ground area of the grandfathered structure." Thus, the 33% enlargement allowance may be deployed either through enlarging a pre-existing structure or building a new accessory structure. This reference in § 2.5(B) to added accessory structures would not make sense under the Appellees' interpretation.

For example, assume that Nebo had not already expanded the Lodge and did not want to expand the Bungalow 33% to create the Annex. Instead, it chose to build a new accessory structure, as the Ordinance expressly allows. Which pre-existing building – the Lodge or the Annex – would Nebo use to measure its 33% allotment? There are two buildings, and Nebo is allowed to build a third – so if each building is measured individually, with each pre-existing structure allowed to expand 33%, as Appellees assert, then how does one calculate the expansion allotment for the new structure? 33% of the pre-existing Lodge? 33% of the pre-existing Annex? That there is no answer to this question under Appellees' interpretation shows that it is fatally flawed.

The only workable way to read § 2.5(B) is to combine the ground area of the pre-existing Lodge and Bungalow, and allow new accessory structures to be 33% of that combined area. Because Nebo already used that 33% in expanding the Lodge, it could neither expand the existing Bungalow nor build a new accessory structure.

Appellees rely entirely on the fact that Section 2.5 uses the singular to reference a pre-existing nonconforming structure. But by statute, "[w]ords of the singular number may include the plural; and words of the plural number may include the singular." 1 M.R.S. § 71(9). *See also Morrill v. Sanford*, 49 Me. 566, 569 (1881) (reading statutory language in the singular as including the plural, noting that "[t]his construction is allowable under the statute relating to the publication and construction of statutes."). Thus, the Court looks to context. Given § 2.5(B)'s reference to accessory structures, context here makes clear that the Ordinance intends to use the singular and plural interchangeably. Confirming this conclusion, the text in § 2.5(B) elsewhere also uses the singular and plural interchangeably, stating that "accessory structure***s*** may be added to the site" provided that "the enlargement or accessory structur***e*** ... contains no more than 33% of the ground area of the grandfathered structure." (A. 84; emphasis supplied).

The ultimate touchstone for construing any statute or ordinance is intent. This is a land use ordinance. As noted in the Blue Brief, in Maine, it is a "hallmark of land use law" that ordinance language should be read narrowly against perpetuating or increasing nonconformance. *Merrill v. Town of Durham*, 2007 ME 50, ¶ 16, 918 A.2d

1203. The very function of a land use ordinance is to bring regularity – conformity – to the geographic area covered in the ordinance. The resulting overarching rule instructing the Court to interpret ordinance language strictly against perpetuation or enlargement of non-conformity must, in turn, be applied within legislative intent. When, for example, as here, an ordinance allows for repair, maintenance, and improvement of pre-existing nonconforming structures, such ordinance language can signal that the ordinance does not contemplate "complete adherence" to the principle that nonconforming uses will be eliminated "as speedily as justice will permit." *Keith v. Saco River Corridor Committee*, 464 A.2d 150, 154 (Me. 1983).

Applying this precedent, the North Haven Land Use Ordinance reflects a balance. It allows the perpetuation of an existing nonconforming structure or use indefinitely by allowing maintenance, repair, and improvement, and even – subject to conditions – a 33% expansion. But expansion beyond that point is prohibited. Section 2.1 of the Ordinance (entitled "purpose") explains this balance, noting that the intent of the Ordinance is 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." (A. 83.)

The boundaries set in the Ordinance's balance must be respected. Indeed, the rule of interpreting ordinance language narrowly against expansion of nonconformity should apply with particular vigor with respect to the line that the Ordinance has chosen to draw. When an ordinance gives an inch, it does not give a mile, and the

inch should be measured strictly in light of the overarching goal of any land use ordinance: conformity. This perspective not only respects the overarching land use principle against nonconformity, but the specific balance set by this Ordinance: to allow nonconformity to continue and even modestly expand so that the lots can be "reasonably maintained or repaired" as they move toward lesser, not more, non-conformity.

Having already used its 33% expansion allotment to enlarge the Lodge, Nebo could not build an Annex with a footprint larger than the pre-existing Bungalow. A 33% expansion is not a 45% expansion.

B. The permit violates the willful destruction rule in § 2.6.

The Town concedes that "at first glance" § 2.6 prohibits construction of the Annex. (Town Br. at 19.) Both Appellees argue, however, that § 2.6 should be ignored. This view again misapprehends the balance set in the Ordinance and fundamental rules applied in construing ordinances, or, indeed, any legislative language.

Section 2.5 allows existing non-conforming structures to be "repaired, maintained, and improved." (App. 84.) As noted above, such structures can also be enlarged subject to compliance with the 33% restriction. As also discussed above, this language is in keeping with legislative intent to allow perpetuation of a nonconforming use or structure while seeking movement toward conformity at a realistic pace.

Section 2.6 provides that "[a]ny non-conforming use or structure which is hereafter damaged or destroyed by fire of [*sic*] cause other than the willful act of the owner or his agent, may be restored or reconstructed to its original dimensions[.]" (App. 85). Hence, if there is a fire or other calamity, § 2.6 allows for reconstruction when the use or structure is damaged or destroyed by such an Act of God.

Appellees argue that these provisions cannot be read in harmony – contrary to the rule of statutory construction urging courts to do so – because a structure is always "damaged or destroyed" when improvements are made.

As a threshold matter, this assertion is not correct. If, for example, a property owner replaces a hollow front door with a solid front door, he or she is improving the structure, not damaging or destroying it.

Sections 2.5(B) and 2.6 can and should be read in harmony. The Ordinance is generous towards the perpetuation of nonconformity, but again sets a clear limit: in the absence of an Act of God, a property owner cannot simply tear down the nonconforming structure and replace it with a new structure. The words "other than the willful act of the owner or his agent" would be meaningless surplusage were this not so.[1]

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[1] Nebo's citations of *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368, and *Bernier v. Town of Litchfield*, 2010 Me. Super. LEXIS 68 (Me. Super. Ct. 2010) (Mills, J.), to support the proposition that the North Haven Ordinance permits the voluntary destruction of a non-conforming structure in order to replace it with a new, bigger building, is misplaced. No ordinance provision prohibiting willful destruction was addressed in those decisions.

In any event, § 5.8 of the Ordinance provides: "Whenever the requirements of this Ordinance are inconsistent with the requirements of this Ordinance ... , the more restrictive shall apply." (A. 98). Hence, if there were a conflict between §§ 2.5 and 2.6, the result would not be application of the more permissive section, but the opposite.

Appellees seek to avoid the application of § 2.6's prohibition based on a BOA statement regarding incorporation of an element of the Bungalow into the Annex, which Appellees argue is a BOA factual finding to which the Court should defer in reviewing Wolfram's argument as to § 2.6. The BOA, however, only addressed § 2.5: "section 2.5 allows for the addition of entirely new accessory structures." (A. 16.) One will search in vain for any discussion, factual or legal, regarding § 2.6.

The BOA did state – for what reason it did not say – that "[t]here was not complete demolition of the old accessory building; a portion was saved and is incorporated into the new accessory building." (*Id.*) The sole evidence as to what element of the Bungalow was incorporated into the Annex consists of the following testimony from the CEO: "They [Nebo] incorporated the northeast corner of the old building. It's serving a structural purpose in holding up the risers that go upstairs[.]" (A. 231, p. 65 lines 12-15.) [2]

[2] As noted *infra* at § II.A, Nebo and the CEO, with whom Nebo was conferring *ex parte* during the pending BOA appeal, wanted to avoid characterizing the Annex as a new building. While not relevant to § 2.6, as noted *supra*, § I.A, that the Annex is a new building underscores the violation of

As a legal matter, it is immaterial if a portion of the Bungalow was "incorporated" into the Annex. Section 2.6 says nothing about circumventing its prohibition on reconstruction of a willfully damaged or destroyed pre-existing nonconforming structure if an element of the pre-existing structure is incorporated into the new structure, whether that new structure is deemed new or rebuilt.

In any event, there can be no debate that Nebo tore down the Bungalow and replaced it with the Annex. The evidence is uncontested that a new concrete slab was poured and that the Annex built upon it, which was only possible after the complete destruction of the old Bungalow. (*See* A. 111-112.) Nebo's own counsel admitted that Nebo's application was to "replace" the existing Bungalow with a "new" building. The proposal was to "tear down the current bungalow building"; the site plan stated the Bungalow was "to be demolished" and replaced by a "new (2) storey [sic] ... bldg." (A. 20, A. 190, 194-95; 202-03; *see* Blue Br. at 4-5.) That a corner of the Bungalow is used to brace the Annex stairs contradict that the Bungalow was not willfully damaged or destroyed and replaced.

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the 33% rule in § 2.5(B). To calculate how big the Nebo accessory structure could be, clearly the 33% expansion allowance had been used up in expanding the Lodge, with none left for building a new accessory structure under § 2.5(B). The problem for Nebo is that tearing down the Bungalow and replacing in with the Annex does not fix this problem. Under § 2.6, the Bungalow could not be torn down voluntarily and then re-built. But even if § 2.6 did not exist, if the 33% allowance was already used in expanding the Lodge, with none left for a new accessory structure, then it makes no difference whether the existing Bungalow were replaced or not – the 33% allowance was used up, and the Bungalow can neither be expanded 33% nor replaced by a larger Annex.

Before the BOA, Nebo's own counsel acknowledged flaws in Appellees' argument, describing the position that use of a piece of the Bungalow to make construction of the Annex permissible was "awkward" and "arbitrary."[3]

In sum, the BOA's finding that a corner of the Bungalow was incorporated into the Annex cannot sustain the legal conclusion that voluntary destruction of the Bungalow and construction of the Annex was permitted under § 2.6.[4]

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

Appellees do not dispute the facts: with replacement of the Bungalow with the larger Annex, total lot coverage exceeds 40%. Instead, they assert that such expansion is permitted under the Ordinance, either misapprehending or failing to apply its text.

1. The Annex is a guest house.

The Ordinance does not include a definition of a guest house. Appellees assert that the Annex is not a guest house citing § 3.3's definition of a "Lodging Facility." (Town Br. at 20). Setting aside that § 4.1(C) refers to guest houses, not lodging

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[3] Nebo's counsel stated: "we did retain a piece of the building .... It's a very awkward thing. A really arbitrary thing is to keep a small portion of the building and that's how you retain a piece of the structure, but we did it in close contact with the code enforcement officer, so it is there." (A. 226, p. 48, lines 16-24.)

[4] The Town additionally argues that its CEO told Nebo how to build the Annex and therefore the doctrine of "Municipal Estoppel would prevent the Town from claiming the building reconstruction was inconsistent with the Ordinance." (Town Br. at 7.) Setting aside that this is not a Town enforcement action and many other flaws in this argument, an estoppel defense could not apply based on any such informal CEO instruction. *Shackford & Gooch, Inc. v. The Town of Kennebunk*, 486 A.2d 102, 106 (Me. 1984). Nebo chose to build while its permit was on appeal, understanding the risks involved. The assertion in the Town's brief that Nebo was following what the CEO said to do, and that the appeal should be rejected on this ground whatever the Ordinance itself says, only underscores the due process problems infecting these administrative proceedings. *See infra* at §II.A.

facilities, the Annex meets the definition of a lodging facility: "A building in which rooms are offered for overnight accommodations, with or without meals, for compensation." (A. 81.) The Annex provides sleeping quarters for staff on the second floor, with accompanying parking spaces and a commercial kitchen on the first floor. (A. 22, 23, 38, 52, 55, 57, 194, 204, 226, 264-5, 269.) Nothing in the Ordinance distinguishes between sleeping quarters for outside visitors paying cash versus seasonal staff as part of their compensation package in determining what constitutes either a guest house or lodging facility.[5]

The Town also cites the Ordinance definition of a "Single-Family Dwelling Use," noting that it permits accessory uses such as "guest house." (A. 82, Town Br. at 20-21.) It is unclear how this citation is intended to advance the Town's cause. Contrary to the Town's position, nothing in this definition defines a guest house as an accessory structure to a single family dwelling. It does not follow that, because a residence can have a guest house, a structure with sleeping quarters on lodge property is not a guest house.

Finally, the reasoning used by the BOA to conclude that the Annex was not a guest house is internally inconsistent. Its decision states that the Annex does not

[5] While much discussion took place before the Planning Board and BOA as to the impact of a kitchen, the definition of "Lodging Facility" expressly provides that the accommodations can be "without meals." The BOA decision looks at the definition of a "Dwelling Unit," which references "living, sleeping, cooking and eating" and appears to have found this significant. (A. 13-14.) Setting aside that the definition of a Dwelling Unit says nothing about whether something is a guest house, there is a kitchen on the first floor of the Annex; those sleeping on the second floor just need to go outside and back in to access it. (*See id.*; A. 269, p. 55 line 21 to p. 56, line 14.)

produce rental income "in the fashion one would typically see of a guest house[.]" In the very next sentence, however, the decision contradicts itself, stating that "[a] guest house is traditionally for family use, perhaps extended family and relatives." (A. 13-14.) Is the BOA saying that guest houses are for ***paying*** family members only?

These verbal gymnastics underscore the lengths that the BOA, consistent with other Town officials and bodies, will go to circumvent the language of the Ordinance in order to grant Nebo's requests.

2. Nebo Lodge is itself a guest house.

Section 4.1 provides that "[i]n no case shall all structures, including the guest house, cover more than 20% of the lot." (A. 92.) If a lot has a guest house on it, the total lot coverage cannot exceed 20%. Thus, if either the Annex or the Lodge is viewed as a guest house, this language squarely applies. But, under the Town's logic, the Lodge itself is not a guest house either. Not only is this proposition never suggested in any Ordinance language, it is again contrary to the ordinary understanding of a guest house.

3. The text of § 4.1 is not limited to guest houses.

Appellees argue that the Court should not read the text of this provision literally given its placement in a section discussing guest houses. But wherever placed in the Ordinance, there is a fundamental logic to limiting the lot coverage of structures on a lot to 20% of the entire lot, and an illogic in imposing such a limitation on lots with guest houses only. Section 4.1 makes clear that its limitation applies to

main and accessory structures: the total lot coverage cannot exceed 20%. Under Appellees' interpretation, there is no lot coverage limit to main and accessory structures ***except*** if an accessory structure happens to be a guest house. There is no logical reason to limit the lot coverage rule in this fashion, and the actual language of the section does not include such a limit.

D. The BOA did not engage in the proper review under § 6.5.

1. The BOA did not compare the proposed Annex to permitted uses in the Village District.

The Town argues that the BOA compared the application to permitted uses because the BOA recited the standard, then voted that this standard had been met. (Town Br. at 25, 26.) But there are no findings to that effect, and nothing in the record indicates that such a comparison actually took place. To the contrary, the BOA decision itself indicates only that the BOA made **no** comparison at all because there were no other uses similar to Nebo's conditional use for comparison. (A. 9.) The deliberations reflect that the BOA compared to conditional, not permitted uses. (*E.g.*, A. 237, p. 92 lines 11-18.)

Confirming, moreover, that the Town still does not apprehend the difference between permitted and conditional uses, the Town argues that Wolfram's argument should fail because there is "almost no distinction" between the two types of uses. (Town Br. at 27.) There are three permitted uses for the Village District: "Low-Intensity Recreation use"; "Single-Family Dwelling Use;" and "Timber Harvesting."

(A. 86.) These are all low-impact uses. In contrast, there is a long list of conditional uses, including multi-family dwellings, restaurants, retail trade, and business and professional offices. (*Id.*) These uses are qualitatively different than permitted uses. Thus, when § 6.5 requires compatibility of a proposed conditional use with the three permitted uses to demonstrate that the conditional use will have no more adverse impact than any of the permitted uses, it is not allowing any use falling within the listed category of conditional uses, but only those specific uses compatible with the three low-intensity permitted uses. Neither the Planning Board nor the BOA, however, undertook that comparison.

The gist of the Town's argument, from the Planning Board to the BOA to even today, seems to be that Wolfram should not complain because the Town believes that Nebo will operate in a tidier fashion if allowed to expand again. Nebo also suggests that Wolfram should not complain because, citing no evidence, it claims that at some point he ate at the Lodge. (Nebo Br. at 1.) These arguments require no reply. They are not based on the Ordinance language, nor even on the concerns behind that language. The goal of the Ordinance, as noted, is to strike a balance that allows the continuation of a non-conforming use or structure, and indeed some expansion, but within the strict limits expressed in the Ordinance. These limits have never been applied to Nebo. While Nebo argues that it built the Annex in response to Wolfram's complaints, it does not explain how building a ***bigger*** structure, with a larger

footprint, and expanding for a third time, reduces the intensity of its non-conforming operations.

2. The BOA failed to consider the impacts of Nebo's non-conforming lodging and restaurant use.

Under § 6.2(B) of the Ordinance, any expansion of a non-conforming use "shall require a conditional-use permit." (A. 98.) Section 6.5 provides that "[a] conditional-use permit may be granted by the Planning Board only in the event that the applicant has established ... 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 .... [and] (B) the proposed use will be compatible with permitted uses ...." (A. 100.)

The focus of this language in § 6.5 is on the non-conforming use, not the expansion. The "proposed use" here remains as a lodge and restaurant, listed allowed conditional uses. Under the plain language of Part VI of the Ordinance, the review process for a conditional use permit requires an analysis of those uses, not simply how a proposed change will affect that use. This review, however, did not occur. (*See* A. 7 (BOA decision) (referencing "conditional use permit for certain additional uses and the renovation and expansion of an accessory structure"); A. 10-11 (discussing only the proposed uses of the Annex itself); A. 278, p. 92, lines 14-16 ("the conditional use permit that's in front of us is only dealing with the accessory building.").

The question is not just the impact of the expansion, but whether the lodge and restaurant use as expanded will have an adverse impact and be compatible with permitted uses in the Village District. This is not a distinction without a difference. If the lodging and restaurant uses without the requested expansion do not currently meet these criteria, nothing can be done to stop those pre-existing non-conforming uses because they are grandfathered. But if an applicant seeks an expansion of these adverse and/or incompatible pre-existing nonconforming uses, then the expansion can be rejected on this ground.

That the Ordinance calls for such a review when an expansion is requested makes sense and is consistent with the overall balance it strikes. Review of an expansion request involves examining whether existing non-conforming uses are compatible with the district's permitted uses. If they are not, then the expansion is denied. In this way, perpetuation of nonconformity lingers, but gradually moves toward conformity for "the betterment of the community" and "improvement of property values." (A. 83.) Section 6.5, like §§ 2.5 and 2.6, reflects a legislative intent to allow expansion of nonconforming structures and uses but only within strict confines. These confines were not respected here.

II. The Planning Board and BOA violated Wolfram's right to due process.

A. The *ex parte* conversations between Nebo and Town officials later appearing as witnesses before the BOA violated Wolfram's right to due process.

The Town argues that all the *ex parte* communications were "perfectly proper." (Town Br. at 32.) They were not.

As noted in the Blue Brief, these conversations included discussions, **while the BOA appeal was pending**, between Nebo and the CEO about what piece of the Bungalow should be included in the Annex "to comply with the ordinance." (A. 192.) Subsequently, in the hearing before the BOA, the CEO testified that, as constructed, the Annex included a piece of the Bungalow. The Town is now citing the CEO's testimony not only to uphold the BOA decision, but to argue that estoppel principles prevent any relief for Wolfram, whatever the Ordinance provides. Yet Wolfram was not privy to any of these Nebo-CEO discussions. The only evidence before the BOA as to what element of the Bungalow was incorporated into the Annex was the CEO's testimony, and Wolfram had no idea that Nebo and the CEO were working behind the scenes to build this evidence to defend the permit in his appeal. Wolfram was unable to raise and question the CEO's conduct before the BOA because he did not know it was happening.

These conversations and this CEO conduct, unbeknownst to Wolfram, were improper. A town and an applicant cannot have secret conversations as to how to go forward building under a permit under appeal in order to create evidence to use

against the appellant in that appeal. Compounding this violation, Planning Board Chair Curtis was informed of this Nebo-CEO collusion to circumvent the Ordinance and subvert the appeal, stating that it was "good to have the correct scoop!" – again unbeknownst to Wolfram, rendering him unable to raise this point in the BOA appeal when she also testified defending the Planning Board decision. (A. 192, 230.)

B. BOA Chair Alexander's adjudication of the BOA appeal violated Wolfram's right to due process.

Appellees tacitly concede, as they must, that statements from someone prior to an appeal that the appellant's efforts to impose conditions on the use of permittee's property are "un-American" and "highly objectionable" render that person unfit to participate in the adjudication of the appeal. (*See* A. 154.) Instead, the Town argues that Wolfram failed to object sufficiently to Alexander's participation, and both Appellees argue that Wolfram failed to sustain his burden of proving that Alexander made these statements before the Planning Board. Neither argument has merit.

1. Wolfram adequately objected to Alexander's participation.

Wolfram objected at length to Alexander's participation in his written appeal. The objection was extensive and explicit.[6]

The Town argues that a flat declaration by Alexander at the opening of the BOA hearing that there was no conflict[7] required Wolfram to object ***again*** in order to preserve his written objection. Wolfram is unaware of any authority to support this proposition and the Town cites none. No one on the BOA asked whether Wolfram was withdrawing his objection; Alexander simply declared that there was no conflict

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[6] The objection provides as follows:

- 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, 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.)

[7] Alexander stated at the outset of the March 12, 2014 BOA hearing that because the selectmen had appointed several new BOA members, "I believe that we now have no issues with conflict of interest or bias of this Board. We just cleared that up." (A. 215, p. 4, lines 20-23.)

because the other BOA members with conflicts had recused themselves. To preserve an objection, it must be raised sufficiently so the board has the opportunity to address it if it chooses to do so. *See Forest Ecology Network v. LURC*, 2012 ME 36, ¶¶ 25-27, 39 A.3d 74. That the BOA Chair ignored Wolfram's objection, explicitly set forth in detail in Wolfram's written submission, does not mean it was waived.

2. Wolfram met his burden of proof.

Because the Planning Board hearings were not recorded, Wolfram set forth Alexander's statements in his written BOA appeal materials. As an attorney in good standing (New York State bar), Wolfram is an officer of the court, and he signed his written submission reporting her statements. (A. 155.)

As the appellant, Wolfram bears the burden of proof. But the only evidence in the record on this point is an uncontested submission that these statements were made, signed by an officer of the court. Most notably, ***no one, before the BOA, the Superior Court, or now, has ever denied that these statements were made.*** The BOA simply ignored the issue, making no findings.

There was no reason for Wolfram to produce more evidence or think he needed to before the BOA, or to seek to take additional evidence at the Superior Court level pursuant to Maine Rule of Civil Procedure 80B(d), because no one ever contested the only evidence in the record on this point. No legal precedent supports the proposition that Wolfram's evidence should be deemed inadequate under these circumstances. In the absence of any contrary evidence or even assertion that the

statements were not made, or any case law alerting Wolfram that he needed to do more than submit his signed materials, to allow the BOA's decision nevertheless to stand in light of Alexander's statements would be a profound miscarriage of justice.

Conclusion

For the foregoing reasons, the Court should vacate the decisions of the Planning Board and BOA or, in the alternative, should remand the matter for further proceedings to correctly apply the appropriate Ordinance standards, without bias.

Dated: October 11, 2016

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Certificate of Service

I, Catherine R. Connors, Esq., hereby certify that two copies of this Reply Brief of Plaintiffs-Appellants Steven Wolfram and Mullins Development Trust were served upon counsel at the address set forth below by email and first class mail, postage-prepaid on October 11, 2016:

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