

**St. George Board of Appeals
St. George Town Office
Meeting Minutes and
H. Prescott Smith Appeal from Nonenforcement
of Alleged Violation of Stop Work Order
January 20, 2022**

A Board of Appeals meeting was called to order at 7:00 p.m. Present in person were: Steve Miller, Chair; Mark Bartholomew, Richard Cohen, William Reinhardt, Jane Conrad, Sandra Roak, Rick Erb, and Terry Brackett. Present via Zoom were: H. Prescott Smith, Attorney Stephen Hanscom, Lynn Smith, Michael Jordan, and Tammy Willey.

Conflict of Interest: Jane Conrad stated she had a conflict of interest involving the H. Prescott Smith case and recused herself for review of the minutes and the Appeals Hearing.

Quorum: Jane Conrad stepped down as a voting member for review of the December 9, 2021, minutes and the Prescott Appeal's Hearing. Sandra Roak (alternate) was elevated to voting status. A quorum was present.

Review of the Minutes of December 9, 2021.

A motion was made by Mark Bartholomew, seconded by Cohen, to waive the reading of the minutes. The vote was 5-0.

A motion was made by Mark Bartholomew, seconded by Cohen to approve the December 9, 2022, minutes as corrected. The vote was 5-0, in favor. The motion carried.

Adjustment to the Agenda: Discussion on the Remote Participation Policy was taken up before the H. Prescott Smith Appeal.

Discussion Regarding Remote Participation Policy: Chair Miller stated Jane Conrad had been working on the Remote Participation Policy issue and he asked the Board for input. Town Manager Erb stated he could update the Board as to what other committees had done.

Erb: The Select Board decided in December that beginning in January 2022, until further notice, they will do remote meetings. They have a policy in place that allows them to do that. The Planning Board and the Conservation Commission did the same. The Recreation Committee is about to implement the remote policy and the Budget Committee will be meeting remotely as of January 24, 2022.

Erb explained that all the committees had held public hearings prior to voting on the issue and the Board of Appeals would also need to do the same. He stated that once they had held the public hearing, the Board could decide on the Remote Participation Policy as soon as the hearing was over.

A motion was made by Mark Bartholomew, seconded by Cohen to hold a Public Hearing on Thursday, February 3, 2022, at 6 p.m., to review and discuss the "Policy Allowing Remote Meetings and Remote Participation in Public Proceedings." The vote was 5-0, in favor. The motion carried.

Board of Appeals Hearing:

The appeal of H. Prescott Smith from Nonenforcement of Alleged Violation of Stop-Work-Order.

Chair Miller opened the Appeals Hearing at 7:17 p.m. He explained that Attorney James Katsiaficas submitted a document agreed upon by legal counsel for the parties to the appeal and for the Board of Appeals, that the Board of Appeals remands this matter to the CEO to take additional information, to reconsider the Nonenforcement Decision and to issue a reviewable written decision.

The appeal is based on the following:

"After the Board of Appeals' December 9, 2021, remand of the appeal of H. Prescott Smith from issuance of Building Permit No. 2021-109 to the Code Enforcement Officer for preparation of a record and written decision with findings and conclusions, the CEO issued a Stop-Work-Order permitting certain activities to proceed to close down the site. H. Prescott Smith believed that certain of these activities violated the Stop-Work-Order and notified the CEO, who allowed those activities to continue.

"Therefore, Counsel for H. Prescott Smith filed an appeal on December 29, 2021, from the CEO's nonenforcement of the alleged violation of the CEO's Stop-Work-Order. Because there is neither a record nor a written decision with findings and conclusions to document the CEO's nonenforcement of the alleged violation of the Stop-Work-Order, the Board of Appeals faces the same issue as with the Building Permit, no written decision with findings and a record for appellate review. The parties' legal counsel and the Board's legal counsel have agreed that the best course is for the Board to also remand this appeal to the CEO for preparation of a record and written decision with findings and conclusions."

Attorney Katsiaficas' letter to the Board stated, "The meeting packet includes a copy of the appeal filed December 29, 2021, and a proposed order for the Board of Appeals to adopt by motion, remanding the matter to the CEO for preparation of a record and written decision with findings and conclusions to permit appellate review. At present, the Board of Appeals will hear both appeals on February 24, 2022."

Discussion of the H. Prescott Smith Appeal:

Reinhardt: Why is Prescott appealing? I am not clear about this Nonenforcement of Alleged Violation. We agreed at the last meeting that certain activities could be done to close down the

site, and Brackett said he could work with that. The Select Board is the one that decides whether to go to court and enforce an Order. And the Order was already written, right?

Brackett: Yes.

Chair Miller: He refused to close it down, so they are appealing that.

Reinhardt: Not Brackett. Right?

Brackett: The Monday after the last appeal, Mr. Hanscom called me and said that there was a concrete truck that had gone in there and that was not in my letter that I had written to them. I had reason for allowing that truck to go in there, but that is basically why the appeal came in.

Reinhardt: So, you issued the Stop-Work-Order based on what . . .

Brackett: I didn't issue a Stop-Work-Order. I did write a letter to Stephen Smith, the architect, and cc'd Keith Daggett of Heritage Builders and listed what we had talked about at the appeal. I did not think that the Stop-Work-Order would work because they were still doing work to get it closed in.

Chair Miller: It seems to be a difference in opinion which was not verbalized at that meeting that night. Your idea with an engineering background and experience in construction might be different on how to close a worksite for the winter than mine as a layperson.

Chair Miller: We heard the conversation. This would involve a lot more than throwing a tarp over it and a couple of two-by-fours. This was going to involve protecting the construction that was there, and it is not as simple as it sounds. I guess they didn't think they were doing any more work on the site was necessary. It is a matter of "they agreed to disagree."

Reinhardt: I don't know what they're appealing as a nonenforcement. Brackett wrote a letter. He did not issue a Stop-Work-Order. He did not go into infinitive enforcement like issuing a time for a violation.

Brackett: Isn't that what the court would hear?

Chair Miller: That is what it has always been.

Reinhardt: Right. So, I don't know what they are appealing. There has really been no decision they are appealing. Apparently, they want some actions. Terry has done what we had on our decision. What's their appeal?

Roak: Did it go beyond fixing it up to keep it safe for the winter? That seems to be the issue.

Brackett: They have voluntarily stopped work down there at this point for the moment, but they do need to close it in more for the winter. As I understand it, they are not working on it right now.

Roak: So, at this point, they have not gone into construction mode, they have gone into covering it up for winter mode.

Brackett: I'm not sure exactly what they've covered and what they haven't covered, but they do need to close it in from the rain and things of that nature.

Chair Miller: The only thing the two parties really agree to other than the lawyers discussing it, is to disagree. It doesn't matter what Brackett does, he's in a no-win situation. He can't appease both sides. That is where we are at. I understand one party wanted him to stop the other party from doing any more work but both parties agreed to seal it up. (Reinhardt: Yes.) And from what we heard as a Board that night, they said they would take care of it, and they didn't want to discuss it in front of us. They said they would get together, have a meeting, and straighten it out. I am not sure what this Board can accomplish.

Attorney Hanscom: Mr. Chairman. This is Stephen Hanscom. I am the attorney for Prescott Smith. It's the opinion of my client that the work that has been done at the Smith house, is far in excess of what is specifically authorized in Mr. Brackett's letter. I called him to bring this to his attention, and he didn't feel that it exceeded what he contemplated, I guess. So, I had no alternative but to bring this to the attention of the Board because it is the Board's specific order that in my opinion and the opinion of my client particularly is being violated. The only way I can bring that to your attention is by way of an appeal. So, that is what we have done. We will provide you with pictures of exactly what has been going on and why it does violate the order that is contained in Mr. Brackett's letter of December 10th to Stephen Smith.

Reinhardt suggested the Board do nothing other than saying they were not going to recognize that this was a legitimate appeal. He added that since Brackett had to write a Findings of Fact for them to act on it as an appellate, they put it on the agenda for the February 24th meeting. Reinhardt said the Board would have to go through the same thing they always did, decide whether it was standing or was appealable. He suggested that they do not discuss the appeal at this meeting because they did not have a record to refer to.

Chair Miller: That is a good point. I don't see how you could just lump the two appeals together. You may hear them on the same night. but they may not necessarily end with the same decision.

Chair Miller: I am not sure how each party proceeds from this point if one party feels they need to do more sealing up at the site and the other party is against it. What we are hearing is that the CEO doesn't have that direct power.

Reinhardt: Looking at the last page of our minutes, they couldn't come to a "meeting of minds" about what was required to close the site down for the winter. H. Prescott Smith thought it was something different than Stephen Smith.

Bartholomew: We have nothing to do with that at this point.

Cohen: I don't see they have anything to appeal.

Chair Miller: At the next hearing, we could discuss whether we are going to hear that or not. (Reinhardt: Yes.) At that point, it is moot because we are going to hear the appeal of the total construction. The decision is almost going to be the same.

Roak: But that is a month away and what happens if . . .

Chair Miller: It is beyond our control.

Roak: But somebody has to have control of it.

Chair Miller: The legal system.

Brackett: At the appeal, I specifically asked the attorneys what closing in meant. The only one that got up and said anything was Stephen Smith. I could only assume that the others agreed with him.

Chair Miller: They agreed that night amongst the group, and Stephen Smith was here. (Reinhardt: Yes, he was here.) So, whatever he was verbalizing, the group, in general, agreed with. Whether it happened differently than what he said, is beyond our scope tonight.

Discussion on "Letter of Decision" drafted by Attorney Katsiaficas:

Cohen: Do we need a motion to accept this agreement so you can sign it?

Reinhardt: The way this is written by the attorney is that we agree that it is a valid appeal, and it is going to be heard on the 24th. I just don't understand what decision of the Code Officer he is appealing, and what we have to act on. Because basically, he wrote, "the parties agreed what was closing the place down for the winter." Apparently, one of the parties doesn't agree with what has been going on. What action of the Code Officer are they appealing?

Chair Miller: They can appeal almost anything, and at the February 24th meeting we will say, "It's going to be the Board's decision that we don't have jurisdiction."

Cohen: We usually go through four steps to see if we can even rule on something, and we are at that point. There's nothing to rule on here. What are they appealing?

Chair Miller: That the Code Enforcement Officer did not act in a manner that they approved of.

Bartholomew to Brackett: Did you issue a Stop-Work-Order?

Brackett: I did not issue a Stop-Work-Order. I wrote letters in lieu of that.

Chair Miller: They are contesting that he should have.

Brackett: But that night at the appeal, I assumed they gave them permission to close the building in and the Stop-Work-Order wouldn't work in that case, in my opinion.

Bartholomew: But in this letter, we are saying that there was a Stop-Work-Order for a Project. Am I reading it wrong? Paragraph one.

Conrad: You can issue an order that is different than the one that is in front of you. You don't have to go with that piece of paper.

Chair Miller: We can correct it.

Reinhardt: The Board of Appeals can't issue a Stop-Work-Order, we can only remand it to the CEO which we did. And they agreed with what was going on. The CEO has to issue the Stop-Work-Order. He did not issue a Stop-Work-Order.

Cohen: Because there was an agreement.

Brackett: I don't remember exactly how I worded the letter, but I said that they had to stop work on the project after the roof was framed, sheathed, and had roof topper or similar product applied.

Reinhardt: They just disagree on how.

Bartholomew: I don't see how we can approve this letter.

Reinhardt: If we approve this letter as written, we are directing the CEO to write written Findings of Fact and Conclusion of Law for lack of enforcement.

Chair Miller: When we get to our hearing, you will have the choice to have the same conversation you are having right now. If you disagree with signing the letter, that makes it look like you agreed that there was a Stop-Work-Order.

Roak to Brackett: Are you clear of what is expected of you? Are you looking to us for some direction?

Brackett: No, I am not looking for direction from the Board. In my opinion, I got direction the night of the first appeal when they didn't dispute what Stephen Smith said he had to do to close that building in.

Attorney Hanscom: Mr. Chairman. May I interject here for a second? (Miller: Yes.) Mr. Brackett's letter of December 10th enumerates specifically what the Smiths can do to close this place in for the winter. The letter in the very last sentence of the third paragraph in Mr. Brackett's letter says, "Work must absolutely stop at this point until the right-of-way issue is resolved." We have no other option but to bring this matter to you as the Board of Appeals because we feel that they have exceeded the specific authority that was agreed to during that meeting. I brought this to Mr. Brackett's attention, and he disagreed so when he either acts or he fails to act, my only recourse is to appeal that action or that inaction. Which is what we've done. And your ordinances specifically provide that this is a matter for you to hear.

Brackett: But he did take that letter out of context, too, because that part you are referring to after they closed the building in, work had to stop.

Chair Miller: We don't have the letter, we have not had a chance to read it, and not all of the attorneys are privileged to our discussion tonight. At this point, my recommendation is that we go with the James Katsiaficas letter and deal with it on the 24th.

Reinhardt: In the meantime, with this order, we are directing the CEO to write a written Findings of Fact on the enforcement issue and in those Findings, it would give us (along with the submission of the letter he sent to Stephen Smith) a timeline and a reason why he (Brackett) disagreed with Mr. Hanscom. I guess that is fine, and we can decide whether it's a valid appealable issue when we take it up.

Chair Miller: I'll try to talk to Mr. Katsiaficas and get his view on this issue.

There was no further discussion.

Motion:

Chair Miller called for a motion regarding the Board of Appeal's Letter of Decision drafted by the town's, Attorney James Katsiaficas which states, "With the agreement of legal counsel for the parties to this appeal and for the Board of Appeals, the Board of Appeals remands this matter to the CEO to take additional information, to reconsider the Nonenforcement Decision, and to issue a reviewable written decision."

A motion was made by Richard Cohen, seconded by Bartholomew, to sign the Board of Appeal's Letter of Decision drafted by the town's, Attorney James Katsiaficas which remands this matter to the Code Enforcement Officer. The roll call vote was 5-0. The motion carried.

Other Discussions:

- The Board will meet on February 3, 2022, at 6 p.m. to review and discuss the "Policy Allowing Remote Meetings and Remote Participation in Public Proceedings."

- The Board will meet on February 24, 2022, to hear two appeals: Nonenforcement of Alleged Violation of Stop-Work-Order and the Appeal of H. Prescott Smith of the Building Permit No. 2021-109 issued to Philip Smith II.

- Land Use Ordinance: Reinhardt asked about the email regarding the town of St. George Land Use Ordinance. Conrad explained that she and Planning Board members Michael Jordan and Anne Cox, were on a subcommittee to consolidate all of the different Land Use Ordinances into one book. She noted that the Board of Appeals was covered in several of the Land Use Ordinances so the BOA would be included in the consolidation.

Conrad stated that one issue discussed was the Standard of Review for Code Enforcement Officer and Licensed Plumbing Inspector decisions. In a letter from the town attorney, it pointed out that the courts did not want to be wondering what the basis of the CEO decision was and because it was not usual for the CEO to articulate the reasons for his issuance of a permit, they have been frustrated. A Maine Supreme court decision stated they wanted all towns to do DeNovo reviews of CEO decisions because if and when a case went to court, there would be a more complete record of the basis for a decision.

Chair Miller said he understood that it was the Board of Appeals who now heard the Harbor Committee and Harbormaster appeals.

Conrad: Land Use was the most common appeal before this Board but one of the questions was whether appeals of other things, like the Harbormaster or if the town adopted an ordinance allowing for recreational permits or entertainment ordinance would go before the Board of Appeals or to the Select Board. So, there was the question of whether the Board of Appeals would exercise jurisdiction over other kinds of appeals.

Jordan: The main thing suggested by Attorney Katsiaticas was that the Code Enforcement decisions on Land Use matters should be appealed to the Board of Appeals on a DeNovo basis. The reason for that is the Code Enforcement Officer would have to write Findings of Fact for every permit they issued or denied, and the system is not set up for that to happen.

Reinhardt: In a broader scope of things, when you said Land Use, you are still going to have the Subdivision Ordinance, Site Plan Review, Shoreland Ordinance, etc.?

Jordan and Conrad explained that the ordinances would all be incorporated into one master ordinance so everybody could find it in one place. The ordinances would be chapters in one book instead of separate books. This would simplify things for the public, the lawyers, and the CEO. Jordan said he did not think he could get the Subdivision Ordinance work completed for the November 2022 election. They noted that public hearings would need to be held after the draft had been reviewed by the town's attorneys.

Conrad: One question I have for the BOA (on DeNovo review), given the timing for a consolidated, comprehensive ordinance and the fact that our lawyers are going to review the whole comprehensive package and get in front of the voters, given what the Supreme Court has said, they want us to adopt a DeNovo review, do we feel like we should have some kind of hearing on this?

Conrad: If this group has a consensus that we agree that the legal advice we received and we agree with the Supreme Court's direction of us that they would like us to do this and we say yes, then the subcommittee has drafted an ordinance that includes that language, and it will go to the voters with the whole package.

Jordan said the plan is to have this ready for the November election. "If you want to get the appellate procedures fixed sooner than November then you have to have those be a stand-alone issue on the ballot in May."

Conrad added: I think it is complicated to segregate the DeNovo out given this ongoing process. The practical effect of waiting is that between now and November, we will be in a place where whenever there is an appeal of something the CEO has done or failed to do, we ask him to go back and write up his Findings of Fact and Conclusions.

Conrad: Some new ordinances are being proposed for peoples' consideration like noise.

Chair Miller: The complicated part about ordinances like noise is, who is going to enforce it? Not the CEO.

Jordan: The draft would need to be reviewed by counsel, publicized, and have a series of discussion meetings for public input.

Conrad: For tonight's minutes, I think the consensus is that we do want to move forward with having DeNovo review be the standard of review.

Chair Miller: I think that will be subject material for our next meeting.

Jordan: I read the memo that Attorney Katsiaficas wrote, and he proposed two things.

1. DeNovo review on CEO decisions.
2. Eliminating Board of Appeals review for Enforcement decisions by the CEO.

Conrad: I think we have agreement on the DeNovo review, but we probably need more discussion on the Enforcement issue. I would be interested in hearing from the Town Manager and Richard Bates at a meeting where the Enforcement issue is discussed further.

Conrad: If the subcommittee is on track for the DeNovo review to be part of the consolidated Land Use Ordinance, the goal is to get a draft of that whole package to the lawyers in March 2022. I do think we will have to decide about the Enforcement issue if we want to get that in the March draft.

Jordan: Now that I know where the Board is going with DeNovo review, I will prepare to send out something in a week or two for you to review and discuss in a workshop, not a formal public hearing. I want to know that you are behind what we are proposing because you are the ones to hear appeals, not the Planning Board.

There was no further business to come before the Board of Appeals. At 8:20 p.m., on a motion by Reinhardt, seconded by Cohen, it was voted 5-0 to adjourn the meeting.

Respectfully submitted,

Marguerite R. Wilson
Board of Appeals Recording Secretary