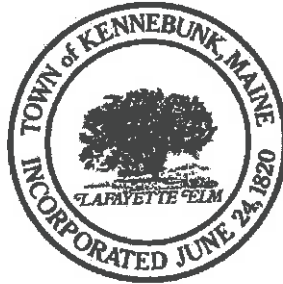


Town of Kennebunk, Maine



Zoning Board of Appeals

HEARING MINUTES

March 6, 2023

Zoom Teleconference and In-Person Meeting, Kennebunk

This meeting was held in person at Town Hall and likewise open to public participation via Zoom. It was televised live on Cable TV Channel 5 and streamed on *TownHallStreams.com*, where it is available for viewing at any time.

- 1. Call to Order:** The meeting was called to order at 6:36pm by Stephen Sayers, acting as Chair pro tem as the Chair [Leah Rachin] was indisposed. The meeting took place in person at Town Hall as well as via Zoom teleconferencing in keeping with the Board's "Remote Meeting and Participation Policy" for COVID safety. The start of the meeting was briefly delayed for technical reasons as one Board member [L. Rachin] participated remotely and one member [W. Berry] arrived late. Those in attendance were:

Present: Leah Rachin [Chair], Stephen Sayers [Vice Chair], and Wayne Berry [Member];

Absent: James Atwood [Member], and Paul Brinnel [Alternate],

Recused: Jon Sevigny [Member] as he was the appellant; and,

Also Present: Karen Winton [Deputy Director, Community Development], Brian Paul [Code Enforcement Officer], Frank Kunkel [Code Enforcement Officer], Benjamin T. McCall [Jensen Baird], James Katsiaficas [Perkins Thomson], Melanie N. Dorn [Perkins Thomson], and Matthew Williams [Hodson & Ayer].

There were, consequently, three voting members present: Rachin, Sayers, and Berry. The meeting is available for public viewing at any time at www.TownHallStreams.com.

- 2. Continued Applications**

There were none.

3. New Applications

Type of Appeal: Administrative Appeal – Article 6 Section 2.A.
Applicant: Jonathan M. Sevigny
Address: 17 and 21 Longwood Drive
Nature of Appeal: Appeal of the issuance of Certificates of Occupancy for 17 and 21 Longwood Drive.

Appellant Jonathan Sevigny, a resident of 15 Longwood Drive, addressed the Board first, alleging that the owner of 17 & 21 Longwood had received Certificates of Occupancy [COs] for both number 17 and number 21 which were wrongly issued by Kennebunk Code Enforcement Office on three counts:

- (1) **Drainage Issues:** According to Mr. Sevigny, there is significant water run-off from 17 and 21 Longwood which is pooling on and impairing his [J. Sevigny's] property as well as the properties of other neighbors. This, J. Sevigny said, violates the Town's requirement for adequate and approved grading and drainage;
- (2) **Illegal Tree Removal:** The owner of 17 and 21 Longwood, J. Sevigny stated, illegally cut down more than 80 eighty trees on a Priority 3 wetland, was subsequently ordered by the Town to replant them in accordance with a planting plan. Only 20 trees have been replanted which is not in line with the plan. Kennebunk's Code Enforcement Office, Mr. Sevigny asserted, should have only issued Certificates of Occupancy when the entire replanting was complete; and,
- (3) **Handrail Violation:** The houses at 17 and 21 Longwood do not handrails at the rear stairs of the dwellings as otherwise required by Town Ordinance. This violation, too, should have precluded the issue of the COs in J. Sevigny's view.

J. Sevigny then showed photos of his property and of the down-sloping grading at 17 and 21 Longwood. This down grading, Mr. Sevigny alleged, is causing water to pool on his [J. Sevigny's] property, to flow onto the properties of other abutters, and to pool on the street and cause road damage. He also showed correspondence from one neighbor stating that the writer had not seen this amount of water accumulation in the neighborhood prior to the construction at 17 and 21 Longwood.

J. Sevigny called the Board's attention to several other pieces of correspondence as well. A letter from Kennebunk Code Enforcement Officer Brian Paul affirmed that there was water runoff on Mr. Sevigny's property coming from 17 and 21 Longwood. A document from Kennebunk's Planning Board stated that its approvals for building permits for 17 and 21 Longwood were contingent upon "a drainage plan". The Planning Board, J. Sevigny asserted, required a drainage plan and subsequent demonstration that there was no adverse drainage effect on neighbors. But there are significant problems, the appellant said, "and there was no enforcement."

Appellant next showed an aerial diagram and numerous photographs of the neighborhood, pointing out where and why, in his view, water was accumulating in different

locations on different properties. He cited a survey done in 2022 by Leon Blood of the Lower Village Survey Company which identified water flow directions.

"The owner [of 17 and 21 Longwood] took a low area of wetlands and built it up," J. Sevigny opined, "...and it's causing flooding on my property" and damage to others.

Appellant stated that he had repeatedly expressed concerns in writing about the drainage issue to the Town's Code Enforcement Officers and Town Engineer, and had done so before the COs were granted. The Town should not have granted the COs, he said, because of the drainage, tree, and handrail issues.

J. Sevigny next elaborated on his neighbor's removal of trees. He showed a diagram illustrating the large swath of the Priority 3 wetland at 17 and 21 Longwood that had been denuded of trees. He also showed correspondence from the Code Enforcement Office to the owner of 17 and 21 Longwood [whom the appellant cited as "Mr. Centore"] which correspondence stated that the tree removal was, indeed, illegal and which mandated the owner to carry out a restorative plan.

Appellant said that Leon Blood of the Lower Village Survey Company had formulated this plan. It called for planting some 88 replacement trees along with some 98 other, lower plants. But, Sevigny said, only 20 or 21 of the trees were ever planted. L. Blood, J. Sevigny said, also recommended that the owner of 17 and 21 Longwood create an escrow account to ensure that "forest was growing back" properly. It was not clear, Sevigny said, if that account was ever created and, in any event, the restoration work has not been carried out in full as required -- again, ample reason for not issuing Certificates of Occupancy.

J. Sevigny next asserted that the dwellings at 17 and 21 Longwood did not have handrails on the rear steps as required. "The Town also let this go by" and should not have granted COs, certifying that the dwellings wholly complied with all Ordinance requirements.

Applicant then introduced and read a letter from Susan Hill, a neighbor at 22 Longwood Drive, who could not be present at this meeting but who also decried the Town's issue of the Certificates of Occupancy. Mr. Centore, she asserted, should be required to honor all of the conditions of approval stipulated by the Town's authorities.

S. Sayers asked for copies of this correspondence, which had not been included with Mr. Sevigny's application, and the applicant agreed to provide them.

J. Sevigny then asserted that, although it had been one of the Planning Board's conditions of approval, no "Grading and Drainage Plan" was ever submitted before the building permits were issued. He showed a "Grading and Drainage Plan" which the owner of 17 and 21 Longwood allegedly did submit to the Town's Code Enforcement Office and Town Engineer -- but later. "And it appears that this plan," Sevigny said, "was not met [i.e. carried out]."

Appellant also showed a cross-sectional diagram of 17 and 21 Longwood, depicting the site's original grade and built-up grade after the Centore group's construction. The illustration, he said, had been prepared by the Lower Village Survey Company, as well. It allegedly illustrated how Mr. Centore's grading was elevated, provoking water flow in the direction of Mr. Sevigny's property.

At this junction, S. Sayers asked for a recapitulation of the several new exhibits which J. Sevigny had introduced but which had not accompanied the appellant's application or been shared with the Board prior to this meeting. There were five such exhibits which J. Sevigny enumerated and offered copies to K. Winton:

- (1) The email of Susan Hill dated March 6, 2023;
- (2) An email from Tyler Barter dated June 3, 2022;
- (3) A graphic illustration entitled "Average Grades" from Lower Village Survey Co. and dated December 29, 2022; ;
- (4) A partial topographical survey also prepared by Lower Village Survey Company and dated December 29, 2022; and,
- (5) An array of photographs offered by the applicant during the hearing.

The Board accepted these items into evidence.

Benjamin McCall, an attorney representing Code Enforcement Officer Frank Kunkel, spoke next, making several assertions. The Code Enforcement Office, he said, did not refute the water issue and did not dispute the fact that the tree removals at 17 and 21 Longwood were illegal. However, the role of the Zoning Board of Appeals, McCall said, is limited by Maine state law to determine if the issuance of the two Certificates of Occupancy "meaningfully" met the requirements of Kennebunk and building code regulations.

McCall remarked that 17 and 21 Longwood were originally one lot. The Planning Board, he added, had stipulated, as a condition of approval, that the owner of that property had to submit a "Grading and Drainage Plan". The owner did so, and the Town Engineer deemed the plan to be satisfactory. Once the Planning Board approved the issuance of building permits, there was a limited time frame during which abutters could have objected. But the abutters, McCall said, had not.

B. McCall went on to note that numerous "work-in-progress" inspections or "spot checks" took place at which Code Enforcement Officers found no significant irregularities vis-à-vis Kennebunk's regulations. At the final inspection, the Officers looked to see if the constructions met the norms and conditions of the Town's Ordinance.

S. Sayers interjected that the "Grading and Drainage Plan" offered as evidence was for 15 Longwood Drive, not 17 and 21. B. McCall responded that the Town Engineer deemed the plan for 15 applied to adjacent properties as well since the topography was the same. B. Paul further explained that the Planning Board had initially looked at the overall project as "15 Longview". "Because of the similar flatness and elevation

characteristics of 17,” Paul said, “no additional plan specifically for 17 was deemed necessary.”

L. Rachin asked if she understood correctly that the requirement for a Grading and Drainage Plan was a condition of approval for the building permits. If so, “that ship has sailed as I understand it,” Rachin said. “We are [instead] dealing with a Certificate of Occupancy, which is much later in time than the building permit, itself.”

Responding to Ms. Rachin, attorney James Katsiaficas, representing Kennebunk Zoning Board, agreed with the comment. He additionally offered this view:

“An important consideration here is the scope of the ability to appeal a Certificate of Occupancy. ...It can’t be used as a substitute for failure to appeal an earlier Planning Board approval.”

J. Katsiaficas cautioned Zoning Board not to attempt to litigate the building permit which had been approved much earlier. “That ship *has* sailed,” he affirmed. He noted that abutters had been invited to participate in the Planning Board’s hearings and had an ample, fixed time window to object to the Planning Board’s approval. However, no abutter objected, and the time frame for objections had long passed.

L. Rachin asked if enforcement matters were also outside of the purview of the Zoning Board [ZBA], and J. Katsiaficas responded in the affirmative. The Town, Katsiaficas said, had the right to decide how, when, and if to enforce conditions of approval or correct infractions. When it came to enforcement matters, he declared, the Town could litigate or decide in what manner to deal with violations. However, enforcement was not a matter for ZBA involvement, Katsiaficas stated. How a violation is resolved, he said, is for the Town to decide, not the ZBA.

L. Rachin asked if this meant that the Zoning Board of Appeal was meant to solely focus on the appropriateness of the Certificates of Occupancy, and not enforcement issues. J. Katsiaficas voiced assent.

B. McCall voiced concurrence as well. The fundamental question, McCall said, was this: Did the houses built at 17 and 21 Longwood Drive comply with the Town’s housing regulations? The Town, he reiterated, might decide to take enforcement issues to court or seek other remedies, but that was and is strictly the Town’s prerogative.

According to McCall, the drainage and tree removal issues cited by the appellant were enforcement matters. The water issues were and are real, he said, but they not the purview of the Zoning Board. The same was true of the tree cutting issue. On the other hand, B. McCall agreed that the absence of handrails on the two dwellings could be grounds for the Town to revoke or amend its Certificates of Occupancy. However, he added that “the handrail issue is, in fact, already being resolved”.

L. Rachin asked J. Katsiaficas if the ZBA could require the Town to add, as a condition of Certificate of Occupancy approval, the requirement that handrails be installed by some specific date, and Mr. Katsiaficas responded in the affirmative. W. Berry agreed,

reiterating that there were time limitations for appealing a building permit as well as time limits for appealing a Certificate of Occupancy.

The appellant asked to rebut. Mr. Sevigny stated that the Town's final inspection did not identify the absence of handrails despite the need for them per the Town's Ordinance. He added that the Planning Board's requirement that Mr. Centore provide a drainage plan did not take into account whether the plan would adequately work or not. Any drainage work done, Sevigny alleged, had not worked effectively after all to the detriment of the neighborhood.

"This is not an issue between two neighbors," the appellant added. Construction at 17 and 21 Longwood Drive, he said, affected the entire neighborhood, moving water onto other properties and causing street flooding, as well.

J. Sevigny cited several court decisions which, in his view, buttressed his legal standing in objecting to the Certificates of Occupancy. W. Berry asked the appellant to provide the names and summaries of those rulings to Mr. Katsiaficas.

J. Katsiaficas then reiterated that this appeal had, at its core, three key facets: (1) the drainage issue; (2) the tree replacement issue; and (3) the handrail deficiency. The first two, Katsiaficas ventured, were essentially enforcement issues; they were not in the purview of the Zoning Board of Appeals. The handrail issue, he said, could be remedied by making the installation of handrails a condition of Certificate of Occupancy approval, specifying a particular date by which the handrails would have to be installed.

L. Rachin agreed, again remarking that abutters had had 30 days to contest the issue of the building permits, but that opportunity had long lapsed.

S. Sayers asked the appellant if he had contemplated private litigation against the owner of 17 and 21 Longwood for remedy. J. Sevigny responded that he had not considered that option as the cost would be prohibitive and he relied on the Town's goodwill and good governance.

There being no other Board questions or comments, S. Sayers then opened a Public Hearing and solicited public comments.

Matthew Williams, an attorney representing the owner of 17 and 21 Longview, asked to correct the record. The owner of that property, he said, was actually "The Centore Group LLC". M. Williams agreed with J. Katsiaficas that the first two of the applicant's three core issues were enforcement issues, and the Zoning Board did not have, in his [Williams'] view, jurisdiction on enforcement matters. The handrail issue, M. Williams added, would be remedied by end of next week.

M. Williams alleged that the appellant had "frequent" and "multiple" contacts with the Town to go over the drainage plan and other details of the Planning Board's approval. Williams also offered three exhibits which ZBA members agreed to accept into the record: (1) the Warranty Deed for the two properties [17 and 21 Longwood] dated

December 30, 2021 confirming 'The Centore Group LLC' as the owner; (2) a copy of the Sevignys' Warranty Deed dated January 14, 2022; and (3) the Occupancy Agreement between Sevigny and O'Donnell dated January 14, 2022.

J. Sevigny, in turn, asked the Board to accept "Exhibit #6", an email from B. Paul dated March 9, 2022, into the record as well. Board members agreed to accept it, but also agreed (with Mr. Sevigny's concurrence) that no other exhibits or evidence would be introduced.

Sheila L. O'Donnell, the former owner of the appellant's home at 15 Longwood Drive, spoke next. She affirmed that she had lived at 15 Longwood for 26 years. She described it as a "wet property" which had a long history of drainage issues. "The problem," she said, "is not new...and it is sporadic." Water accumulation, she asserted, had continually been an issue whenever there were very heavy rains. She professed that Mr. Sevigny's depiction of the flooding seemed to her to be "exaggerated".

B. McCall addressed the Board again, repeating that the drainage problem was an enforcement issue.

Lesliebeth Lindgren, a resident at 22 Longwood Drive, then spoke, stating that "the Town dropped the ball with this one". According to Ms. Lindgren, there was poor Town follow-up on the tree replacement requirement. The few trees that have been planted, she said, are invasive and problematic. What recourse, she asked rhetorically, do residents have to cause the Town to address the drainage and tree problems that have not been fixed?

John M. Noyes, a resident at 26 Longwood Drive, opined that "the tree situation must be fixed...and the drainage situation is abysmal." He called on the Town for remedy.

As there were no other public comments, W. Berry called on the two Code Enforcement Officers -- Brian Paul and Frank Kunkel -- for their remarks. B. Paul explained that the Planning Board had called for and the Code Office and Town Engineer had duly received a survey of 17 and 21 Longwood as well as a drainage plan. The survey and drainage plan were satisfactory. Building permits had then been issued. The Certificates of Occupancy, Paul said, were subsequently issued because the two new dwellings met all of the Town's building standards and requirements. F. Kunkel had no comment.

J. Sevigny asked B. Paul whether an escrow account had been created to ensure the proper replanting of the trees. Paul replied that no "escrow account", per se, had been established. However, the owner of 17 and 21 Longwood, Paul said, did create a different type of bank account in the Town's name containing \$5,000 for use by the Town if it deemed the replantings to be inadequate or faulty. Paul explained that not all of the 88 trees envisioned in the original restoration plan were, in fact, planted because tree specialists had advised the Town that planting 2-inch trees throughout the wetland would "thoroughly disturb" that sensitive geography. Hence, only 22 trees were planted.

B. Paul also reported that surveyor Leon Blood had visited the site and found that the smaller vegetation recently planted on the property was doing well and that the restoration "growth is coming back extremely well". Paul additionally reported that a study by the same surveyor found that the water pooling problem in the neighborhood was not, in the main, caused by the construction or grading at 17 and 21 Longwood. Water coming off one side of Mr. Sevigny's residence, too, was also contributing to area-wide drainage issues, the Blood report allegedly stated, along with general wetland conditions.

There being no other public comments or questions, Zoning Board members moved to close the Public Hearing.

Motion: Move to close the Public Hearing
Moved: S. Sayers
Second: WB. Brinnel
Vote: Roll call vote. 3 votes in favor, none opposed; the motion carried.

W. Berry then joined S. Sayers in suggesting that this Agenda be continued until a later date so Board members could study the exhibits in more detail and give today's comments and information due deliberation.

J. Katsiaticas reminded the Board that it had to render its decision within 30 days of today's Public Hearing. Board members agreed to hold a follow-up meeting on Thursday, March 30th, 2023 at 6:30pm. Katsiaticas volunteered to draft a "provisional decision" based on the points raised in today's meeting, and Board members agreed that he do so, but reserved the right to disagree.

Motion: Move to continue this meeting and this Agenda until Thursday, March 30, 2023.
Moved: W. Berry
Second: S. Sayers
Vote: Roll call vote. 3 votes in favor, none opposed; the motion carried.

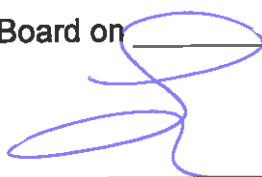
This ended today's session at 9:15pm.

[Note: Throughout this hearing, participants interchangeably used the terms "Certificate of Occupancy" (in the singular) and "Certificates of Occupancy (in the plural). In point of fact, there were two Certificates of Occupancy issued for 17 and 21 Longwood Drive respectively.]

Respectfully submitted by,
J. Schlagheck

Adopted by the Board on 4-18-23
DATE

Signed by:



ZONING BOARD OF APPEALS