

**POLAND BOARD OF APPEALS  
MINUTES OF MEETING  
October 16, 2019  
Approved on 8-2, 2020**

**CALL TO ORDER** – Chairperson Mark Hyland called the meeting to order at 7:00pm with Members Gerard Bowes, Joseph Radziszewski, Jr, Lou Ann Lancaster, Code Enforcement Officer Scott Neal (CEO), and Recording Secretary Sarah Merrill are present.

**Public Attendance:** Michael Rosenthal, Stacy Sarno, Brian Beaulieu, Steve Lancaster, Michael Shapiro, John Conway, and Scott Grundin.

**MINUTES** – October 3, 2018 – Member Bowes Moved to approve the minutes. Member Lancaster seconded the motion. Discussion: None 3-yes 0-no 1 abstained (Member Radziszewski, Jr abstained as he was absent from that meeting.

**COMMUNICATIONS** – None

**APPEALS** – Administrative Appeal – Marla Dodie Rosenthal and Michael Rosenthal – 45 Garland Swamp Road – Map 32 Lot 8

- **Chairperson Hyland went through the procedure to be followed by the Board of Appeals (Board) and participants.**
- **Michael Rosenthal is present and representing the interests of Marla Dodie Rosenthal, his daughter.**
- **Conflict of interest among Board Members:** Chairperson Hyland asked if any members of the Board have a conflict on interest. The Board members all said they don't have any conflicts of interest.
- **Right, Title, or Interest by the Applicant:** Member Radziszewski, Jr moved to approve that the applicant has right, title, or interest in the property by way of the deed presented. Member Bowes seconded the motion.  
Discussion: None Vote: 4-yes 0-no
- **Standing:** Member Radziszewski, Jr moved to approve that Ms. Rosenthal has standing because there is a permit denied by the Code Enforcement Officer. Member Lancaster seconded the motion. Discussion: None Vote: 4-yes 0-no
- **Mr. Rosenthal presented his case to the Board:** Good evening Board Members and thank you for being here this evening to hear our appeal regarding our application for a dock on Tripp Lake. My family has owned our camp, situated at 45 Garland Swamp Road, since 1952. I grew up at our camp and spent every summer there from 1953 until I graduated from college in 1975. Upon graduation,

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I was married in 1975, and my wife and I spent summers at our camp thereafter. Our daughter Marla, the current owner of the camp, was born in 1982. My wife and daughter used our camp virtually every summer through the late 1990's and I joined them sporadically over the years. My wife, my daughter, and I utilized our camp on an intermittent basis thereafter. Our camp has an eight foot (8') right of way pursuant to our 1952 deed that permits us access to Tripp Lake. For more than forty (40) years, beginning in 1953 when our camp was remodeled, our family had a dock situated by our right of way. My family used the dock to dock our boats during these years. I retired recently and decided that I would spend summers back at our camp. This summer I filed the application for a dock permit which was denied.

- Chairperson Hyland – Mr. Rosenthal tell me. So, you have an eight foot (8') right of way. How much shore frontage is there? How many people have a right of way down to this particular spot?
- Mr. Rosenthal – Just our family.
- Chairperson Hyland – Alright is there an eight foot (8') section of shoreline that belongs to you and then there's camps on either side? How does that work?
- Mr. Rosenthal – It does not belong to us per se. We just have a right of way to the lake from our property. We have what you call the back camp, our neighbors at 49 Garland Swamp Road, have the front camp. They have a right of way over our property that's ten feet (10') wide to get down to their camp and we have an eight foot (8') right of way over their property to get down to the lake.
- Chairperson Hyland – Questions from the Board?
- Member Bowes – Who is the owner of the right of way?
- Mr. Rosenthal – The fee simple owner of the right of way is Stacy Sarno.
- Member Bowes – And how many feet of frontage is on the lake in total?
- Mr. Rosenthal – I don't know for certain, but I would say it's certainly less than one hundred and fifty feet (150').
- Member Bowes – Did I read sixty nine feet (69') in the package?
- CEO Neal – Yes

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- Member Bowes – So it's sixty nine feet (69'). I also read that if it's under two hundred feet (200') a dock can't be permitted on a beach especially if there's already an existing dock. To Ms. Sarno – You have a dock?
- Ms. Sarno – Yes. We own a dock.
- Member Bowes – So as the owner you own a dock. Okay. So, your reason for denying the permit, one of them, was because it was less than two hundred feet (200'), there was already a dock and there can't be more than one.
- CEO Neal – Right.
- Member Bowes – That's the ordinance, right?
- CEO Neal – Yes
- Mr. Rosenthal – Would you like me to explain why I have a different view?
- Member Bowes – Sure
- Mr. Rosenthal – After the Officer Neal in his email to me, of July 29, 2019 states and I quote "I can't approve a dock on a right of way unless the deed is written to say that you may install a dock". Officer Neal's reason for denying the dock based upon the fact that our 1952 deed does not specifically state that we are entitled to have a dock with our right of way is contrary to a Maine statute that is directly on point. Title 43 Maine Revised Statutes, Section 459, paragraph two enacted in 2017 provides and I quote as follows "Easements or right of way established on or after January 1, 2018. The only other easement or right of way leading to or touching a water body does not have the right by implication to construct a dock on the easement or right of way or use the easement or right of way to facilitate the construction of a dock on the water body if the easement or right of way if the easement or right of way is originally established in a written instrument on or after January 1, 2018 and the instrument granting or reserving the easement or right of way does not expressly include the right to construct a dock on the easement or right of way to use the easement or right of way to facilitate the construction of a dock on the water body".
- Mr. Conway – I have copies of that for everyone. This is state statute.
- Mr. Rosenthal – Section 459, paragraph two, of Title 33 Maine Revised Statutes is the controlling law on this issue. The first point of emphasis regarding section 459 is the fact that the legislature grandfathered in people who had rights of way that were created prior to January 1, 2018. As I'm sure you know this is common

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practice in legislation so as not to prejudice the rights of persons who are relying on the law as it existed prior to the change. In other words, to prevent the new law from retroactively changing existing legal rights. Our deed granting the right of way was granted in 1952. So, we would be grandfathered in and section 459 would not disallow our proposed dock. Furthermore, the language of section 459 paragraph two provides that the owner of an easement or right of way does not have quote "right by implication to construct a dock". The words "by implication" are very significant. The legislature included in the statute "by implication" to make it clear that existing law in Maine is that a person with a right of way to a lake had a right "by implication" of the right of way to build a dock so as to be able to obtain the full intended benefit of the right of way. See the leading Maine case on this superior court case *Sleeper v. Loring*, June 17, 2015. It of course makes good sense that a person with a right of way to access a lake would expect that the right of way would grant by implication the right to build a dock so as to get the full benefit of lake access. Officer Neal justifies his denial of the dock application in his letter of July 31, 2019 under the authority of Chapter 5 of the Town of Poland Comprehensive Land Use Code contending that we would need to have at least two hundred feet (200') of lake frontage with our right of way in order to be able to have a dock. As I'm sure all members of the Board are aware nearly every camp with frontage on the lake has a dock and virtually none of these camps has two hundred feet (200') of lake frontage. Yet, in spite of not meeting the two hundred foot (200') frontage requirement, which I understand came into effect by the Town of Poland code in 2001, even though our dock had been in existence for nearly forty years prior to that. All of these people with less than two hundred feet (200') of frontage have docks. To deny my family the right to have a dock based upon the two hundred foot (200') frontage rule is in my opinion unfair and unjust in view of the fact that other land owners have less than two hundred feet (200') of frontage and they are permitted to have docks. Officer Neal also cites Poland code Chapter 5 section 508.27 D.1 as justification of the dock permit. This provision is inapplicable as it was intended to prevent a single person from having two docks on his or her property unless that person had double the lake frontage needed for one dock. That provision was not intended to apply to a right of way situation. Under Officer Neal's interpretation of that code provision no person with a right of way would ever qualify to have a dock unless the right of way had two hundred feet (200') of frontage if the owner of the lakefront property already had a dock which is virtually always the case. With all due courtesy and respect to Officer Neal, I respectfully submit that his interpretation of the code is contrary to the plain meaning and intent of the Maine Legislature as set forth in Title 33 Maine Revised Statutes, section 459, paragraph two which was enacted in 2017 which is sixteen years after the code provision was put into effect. So, the Maine Legislature would take notice of the fact that the Poland code provision was already in effect. The dock that we have applied to construct is only eight feet (8') long. It is likely the smallest dock application ever filed with the Town of Poland. In applying for such a small dock, we were being sensitive to the needs of our neighbors as well as

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being environmentally sensitive. It is for these reasons that I respectfully request that you grant our application to construct the eight foot (8') dock at the end of our right of way. Thank you very much for your time and consideration of our appeal.

- Member Bowes – You had discussed this with the Town Attorney before you issued the denial? Was the Town Attorney aware of this state thing?
- CEO Neal – Yes.
- Member Bowes – So does our local ordinance supersede the state? or how does that work?
- CEO Neal – I would have to refer to her. It was my understanding that that was only for new deeds created after 2018.
- Mr. Conway (Here with Mr. Rosenthal) – The other part, and a very persuasive argument made, another part of this is that this is a legally existing nonconforming use. This was clearly here long before the ordinance was ever in effect. I don't think there's any dispute as to that. Clearly the right of way was established long before there was an ordinance and the ordinance specifically allows for uses which were in effect at the time the ordinance came into effect to continue in effect as long as they don't become more nonconforming in fashion. There's nothing here, no evidence, I think you've heard very clearly from Mr. Rosenthal there's been no change in the use and the dock, we only have a picture on a phone, but we could show you that the dock is two four foot (4') section sitting and isn't even attached to the land. It sits in the water below the low water mark which may be another issue, but I don't think this Board needs to reach that. Seeing the Code Enforcement Officer's denial, I didn't see any discussion regarding grandfathering and why it was that a legally nonconforming use could somehow be eliminated based on an ordinance that came into effect forty years after that use began. Clearly that's not the case on any other nonconforming use you have in Town and I don't see anything in the ordinance that, in this particular ordinance, that's being cited that says that somehow it overrides the provisions of the ordinance regarding nonconforming uses.
- Member Bowes – When you're using the term grandfathering do you have any history, how many years ago you had a dock in that right of way?
- Mr. Conway – He just testified that there's been a dock there since 1953 he says.
- Member Bowes – Every year?

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- Mr. Conway – Every year. That's been there all the time that he's used the dock and that he put the dock in there. Beyond going and finding out from the Town's Attorney whether this state statute might preempt some of the local statute you can look to your own ordinance, and I think as the Chairman expressed at the beginning of the meeting that's really the duty of this Board. To look at the ordinances and look and see what the interpretation is because that's pretty much what governs the Town of Poland and the use. I think it's well established that uses that were in place prior to the adoption of an ordinance can remain. In fact, they can be replaced, you can put in new ones that aren't more nonconforming, you can actually expand them in certain cases. Your ordinance deals with them on a somewhat lengthy basis as to how they can be dealt with and it wouldn't do that if they disappeared when they drafted the ordinance. The reason all of that's in there is because the ordinance needs to deal with those uses and explain how to continue with those uses with how they're allowed. There's no argument here that there's no expansion or any change in the use of it which would require Mr. Rosenthal to then get a permit for it. In fact, there may be a discussion about whether he even needs to get a permit, we're not raising that at this point, but ... If you have a nonconforming building on a lot the Town doesn't go to it and say "you've got to go get a permit now", it's been there for forty years but now you've got to go get a building permit. That's the whole point of it. The ordinance itself says that uses which are new uses which come into play after the ordinance is adopted require permits pursuant to the ordinance. Thank you.
- Chairperson Hyland – Any other questions for Mr. Conway?
- Member Lancaster – Were there ever two docks on this property?
- Mr. Rosenthal – Not to my knowledge.
- Mr. Conway – When you say on the property, I think we should be clear and clarify for everyone. Do you mean on the right of way?
- Member Lancaster – On the right of way and or the sixty nine feet (69') of frontage.
- Mr. Conway – Well the sixty nine feet (69') of frontage is what we call in legal terms the servient estate. That's the land that – the land under the eight feet (8') Mr. Rosenthal's daughter – they don't own the actual ground. They just have the right to use that eight feet (8'). The case law that we've shown you is that the courts have said that one of the things that's implied when you have a right to get to the water is to be able to put a dock there to be able to use the water. And then the statute was probably somebody went to the Legislature and said we'd like to clean this up a little bit so that everybody can't show up and have a right to do it. There has to be ... someone has to tell you you've got a right to do it before you can do

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it. They did that because the implication is that you have a right. So, the eight feet (8') is the only piece of property that Mr. Rosenthal has a right to use. And that's where that dock has been, within that eight feet (8').

- Mr. Rosenthal – I'd like to clarify with respect to the question that you asked. I wasn't sure that I understood it correctly. At one point in time my family owned the front camp and the back camp. Of course, during that period of time there was only one dock because we owned both the front camp and the back camp. Prior to the time when we owned both camps, being the front camp and the back camp, there was a family, the Free family, was there for fifteen or twenty years and they had their own dock and we had our dock. So, there was one dock on our right of way and one by their property.
- Chairperson Hyland – When was the front camp sold?
- Mr. Rosenthal – Initially it was in my dad's estate and ... he died in 1975 so I would think, I don't know exactly, sometime in the early Eighties it was sold initially and then it was resold to Ms. Sarno, I believe, in 2016.
- Chairperson Hyland – Okay. So, during the time when you owned the front camp there was one dock on the water?
- Mr. Rosenthal – That's correct.
- Chairperson Hyland – And then when you sold the front camp what you're saying is you placed a dock on the right of way and whoever the new owner was put a dock wherever they were going to put a dock?
- Mr. Rosenthal – I want to make sure I understand you exactly. Basically, somebody had a dock on their property before my father bought it. There was somebody before my parents bought the front camp that had their dock there and we had our dock by our right of way. And then when my parents purchased that property, must have been in the late Sixties perhaps, when my parents purchased that and we owned both pieces of property ... then when we owned both pieces of property we didn't have a need for two docks.
- Chairperson Hyland – Any other questions for Mr. Rosenthal? Code Enforcement Officer do you have any other questions?
- CEO Neal – Nope.
- Chairperson Hyland – Anybody else in the audience have a question for Mr. Rosenthal? At this point just a question? Okay. Other people who are in support

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of Mr. Rosenthal's request for an appeal of the Code Enforcement Officer's decision. People opposed to Mr. Rosenthal's. Okay. Come forward.

- Ms. Sarno – Good evening everybody my name is Stacy Sarno. I'm the owner of 49 Garland Swamp Road shown as lot nine on the assessor's map thirty two. My lot is behind the Rosenthal's lot eight. Lot eight as you are aware has an eight foot (8') right of way over my lot to access Tripp Pond per our deeds. Whether Mr. Rosenthal is asserting a right to install a dock over the right of way or as he did this summer a few inches from my sure I assert that he does not have the legal right to install a dock at either location. Rosenthal's argument that he has a right to install a dock because his family had once owned both properties and has done so in the past is not an argument supported by law. It is true that Rosenthal's family had once owned both lots eight and nine, however lot eight and nine were under common ownership of Dodie Rosenthal and then Marty Rosenthal beginning sometime in the Sixties until the early Eighties when both lots were conveyed to different owners. Pursuant to the doctrine of merger an easement is terminated if the owner of the dominant estate obtains title to the servient estate. The land that is burdened by easement is known as a servient estate and the land that is benefitted is known as the dominant estate. The basic principle of the right of way easement is the right to pass through the land of another and you do not need the right to cross your own land. The Rosenthal family at this time of common ownership did not have the restrictions we face today on the right of ways since there was no right of way in existence due to unity of title. There is no legal argument for historical use or prescriptive easement when the land is under common ownership. And I cited some case references in my Exhibit A. I have sixty nine feet (69') of water frontage, however I only have about twenty five square feet (25 sq. ft.) of natural beach area. You can fit about two beach chairs in this area. A portion of this area is off of the right of way. This is the only natural beach area we have on our property and the only area where my daughter plays in the sand, where we swim off the shore, and where we sit on the beach. As you are aware it is against Town of Poland code to install a dock that interferes with existing, developed, or natural beach areas. And per code we do not have enough frontage to install two docks. An added dock on my shore would restrict my family of the full use and enjoyment of our property. I put pictures on the Exhibit B of the beach area. It's very small. And pictures of the dock that was installed. And the blocks and bricks there. Rosenthal created a hazard situation for my family, especially my three year old by installing a dock off our shore and leaving bricks and a cinder block in the water. Even when required to move by code he left a dock pole and a cinder block in the water, which is also on Exhibit B. A grant of a right of way does not give Rosenthal a fee in the land. I am the fee owner of the eight foot (8') right of way. I pay the taxes on the land, not lot eight. A grant of a right of way does not exclude the servient estate from the use nor enjoyment of the eight foot (8') right of way or the shore. My property borders the water, not Rosenthal's and the riparian rights go to the owner of the land that abuts the water. Common law



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principles of riparian rights generally include the right to install a dock and as I mentioned Rosenthal does not have any riparian rights. 45 Garland Swamp lot eight does not abut the water, nor does the grant of a right of way grant anything other than a right to pass. There is no other language in the deed that would suggest any other rights other than ingress and egress. As defined by Black's Law Dictionary a right of way would suggest any other rights other than ingress and egress is limited to the right to pass through the property of another. The Maine courts have ruled that a dominant estate which has been granted only an easement interest over riparian land of the servient estate by means of gaining access to the water does not thereby become entitled to exercise such riparian rights that are pertinent to the servient riparian land. In *Rand Court V. Town of Glenburn*, the Maine Supreme Judicial Court stated that a deed granting a right of ingress and egress alone did not indicate a right to place a dock at the right of way existed. See Exhibit A for case law. I would also like to mention that I've read *Sleeper* and there's a big difference between *Sleeper* and the rulings that have said you couldn't install a dock on a right of way. The difference is that I own to the low water mark. In *Sleeper* they owned to the high water mark so there's that intertidal land. So basically, there was no fee ownership in the land. The Supreme Court ruled that when you own to the low water mark, without express language in your deed, you don't have a right. The dominant estate, lot eight, in this instance has no right to engage in any of these activities on the shore without the permission of the shoreland owner. I am not granting any such permissive use to the Rosenthal's. In *Merrill v. Parson* the Court rejected the plaintiff's claim of the right to use the beach for recreational purposes. The Court noted the servient estate includes the beach and unfettered right to use the beach would directly impact the owner of the land. I am the fee owner of the beach area not lot eight. In closing I request that the Board affirms Code Enforcement Officer Scott Neal's decision.

- Member Radziszewski, Jr – I'm confused. How many people have right of way?
- Ms. Sarno – I own lot nine and Mr. Rosenthal's family has the house behind me, and they have an eight foot (8') right of way, just then have an eight foot (8') right of way to cross our property per our deeds.
- Member Radziszewski, Jr – So they're crossing your land?
- Ms. Sarno – They're crossing my land to get to the water. That's the plain language in the deed of ingress and egress nothing furthermore.
- Member Radziszewski, Jr – And that's changed to that when you bought the property?

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- Ms. Sarno – What do you mean changed?
- Member Radziszewski, Jr – Well listening to what he was saying they've had those properties all along.
- Ms. Sarno – Well no they were under common ownership with his family until the early Eighties. The easements were terminated when they're under common ownership. So, when in 1983 his father Steve sold off my lot to I think it was the Begins and then Michael (Rosenthal) received lot eight and then he later gifted it to his daughter. To my understanding from the person I bought the property from, she owned my property for sixteen years and there's never been two docks on the property, I've owned the property for four years. I believe a representative from their family is hear today too. Lot eight has been ... Maine calls it a hazardous building, I believe it's called, since 2013 and the Rosenthal family hasn't been to that property since the Nineties from what something Mr. Rosenthal once said and from the neighbors. So, I don't know about what they're talking about being more than one dock with anyone other than the owners of lot nine.
- Member Radziszewski, Jr – So has there been a dock there every year since you've owned it?
- Ms. Sarno – We just installed our dock last summer. We got a permit. And for sixteen years that Kathy owned it - do you know if she had had a dock on there (Ms. Sarno asked this question of an audience member. He confirmed this.) So, for over twenty years.
- Comment from an audience member not at a microphone.
- Chairperson Hyland – Sir could you let us know who you are.
- Mr. Grundin – My name is Scott Grundin and I am Kathy Carroll's son-in-law, she's the owner of 43 garland Swamp Road.
- Ms. Sarno – She's our neighbor. Her property is also ... she's lot ten.
- Mr. Grundin – Kathy owns property 43 Garland Swamp Road and she owned property 45 and sold property 45 to the Sarno's a couple years ago. There was never a dock on that property since the early... she purchased it in the early Eighties I believe. There wasn't a dock on that property then. There's never been a dock in the right of way.
- Chairperson Hyland – Any other questions from the Board?

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- Member Bowes – Yeah. So, Mr. Rosenthal's testimony here tonight said that every single summer they had a dock on that right of way, if I heard you right that's what you said.
- Mr. Rosenthal – I said when we owned both properties there was only one dock on the property. Prior to that when the property was owned by the (garbled) family for a period of time and the people who owned it before which is 1953 to when my parents bought the front property, which was I believe sometime in the late Sixties or early Seventies. During the period of time from 1953 to late Sixties or early Seventies there were two docks. That predates what Ms. Carroll who acquired the property in 1982. So, she wouldn't know what the situation was prior to the time when she purchased it in 1982.
- Member Bowes – During your ownership did he ever have a dock there up until this year?
- Ms. Sarno – No. The property has been abandoned for a long time.
- Member Radziszewski, Jr – And how long have you had the property?
- Ms. Sarno – Since 2016. And prior to that the previous owner had it for sixteen years.
- Member Bowes – Which he just testified that during your sister's ownership there was never a dock on the right of way.
- Mr. Grundin – My mother-in-law. No there was never a dock on the right of way.
- Ms. Sarno – And like I said the doctrine of merger applies when you're under common ownership. You can do whatever you want when your property is under one ownership. You don't need permission from the right of way holder because there's not in existence. When the two properties are under common ownership the right of way's are severed. So, lot eight and lot nine were under common ownership there's no right of way it's terminated by operation of law. I would just like to point out that we are the fee owners in the land. We own the beach area. We're the riparian owners. There's no other grant in the deeds that grant fee ownership or riparian rights to the Rosenthal's or a right to construct a dock. And even because the 2018 statute doesn't mean that you're grandfathered in. The courts were looking at language in the deeds to determine if a right existed not relying on the statutes for 2018 going forward. What the courts are looking at, their taking extrinsic evidence, outside of the grant in your deed. So, if the grant doesn't have it and you're not the fee owner of the land then you're not getting it.

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- Member Radziszewski, Jr – Okay. I have one follow up question. For how many years was there not a dock from '18 back? From '19 back?
- Mr. Grundin – The whole time.
- Member Radziszewski, Jr – For how many years though? Back to the Eighties?
- Mr. Grundin – I only know after the Eighties.
- Member Radziszewski, Jr – Alright from the Eighties up there has not been a dock in the right of way?
- Mr. Grundin – On any of the properties.
- Member Radziszewski, Jr – On any of the properties. Okay. Thank you.
- Mr. Grundin – Can I say something? In my opinion opening this door to allowing docks on right of ways – what would stop multiple people who have rights of way. There are many rights of way that more than one person or property owner has the right of way. Well, are they going to share a dock? Are we putting multiple docks out there? Where he put his dock is basically right, in our view and in their view, where we would try to go to the water, where they would try to go to the water. And it was never there before.
- Ms. Sarno – We have a very small beach area. Very tiny beach area.
- Mr. Grundin – For thirty years or almost thirty years we've been there, and he has not been there.
- Chairperson Hyland – So Mr. Grundin are we talking about the same property? Is there more than one person on the right of way there?
- Mr. Grundin – (Garbled) Kathy Carroll owned the Sarno's property and she sold to them and she also owns number 43 (lot ten). Right next to the Sarno's.
- Ms. Sarno – She abuts both properties. She abuts both lots eight and nine.
- Chairperson Hyland – Okay. Where's the right of way in relation to eight and nine? Or nine and ten?
- Mr. Grundin – We're on the right side of it and he's on the left side of it.

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- Chairperson Hyland – So the right of way goes down between lots nine and ten?
- Mr. Grundin – Yes. (Board members conferring over this).
- Chairperson Hyland – But the right of way is all on your property?
- Ms. Sarno – Yes. I'm fee owner.
- Member Lancaster – Mr. Rosenthal's deed still states the fact it hasn't been altered at all of the fact that there was a right of way established back at the point in time it was to be transferred forevermore.
- Ms. Sarno – Well actually I think the right of ways were terminated by the operation of law and I think that there was a change in the right of ways when his father died. I think the attorneys were probably aware of that and changed the right of way to be ten feet (10') on one of the portions.
- Member Lancaster – (Garbled) that wasn't changed in the deed. The deed still states (garbled).
- Ms. Sarno – (Garbled) The deed changed. It didn't change the location of the right of way, but it changed the width of one of the right of ways.
- Chairperson Hyland – Okay. Anything else? Anyone else have anything in opposition to the appeal?
- Mr. Grundin – Did you receive a letter from my mother-in-law?
- Chairperson Hyland – yes.
- Mr. Grundin – okay. Is that something you could read? Or did you read?
- The Board confirmed they had it and had read it.
- Chairperson Hyland – Okay. Mr. Rosenthal is there anything you'd like to rebut?
- Mr. Conway – I understand there's a letter, but my client's never seen it. So, if there were letters that were sent to the Board, I'm wondering why...
- Chairperson Hyland showed Mr. Conway the two letters that were submitted to the Board.

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- Mr. Rosenthal – First of all the argument regarding merger is inapplicable and let me explain why. Our family owned both pieces of property. That means that the Sarno owned right of way over our property, she has a ten foot (10') right of way over our property. That means her right of way merged as well. That means she has landlocked property that she can't get to under the doctrine of merger. It was never intended that it merged and that's why the deed in 1982 makes it very clear that the right of way is in existence. It's disingenuous to say that our right of way has now merged out of existence and their right of way over our property which they need to get to their property stays in existence. That's the first point. To make that argument is quite short sighted if the Board were to accept it. With respect to the existence of docks I have been there from 1953 and through 1975 when I graduated from college and thereafter periodically, we had a dock at least until the early Eighties. Where prior to that there were always two docks. And for Mr. Grundin to try and talk about what was in existence prior to his mother-in-law acquiring the property, that's just not the case. And the reason there wasn't a dock there for the other years is we weren't living there. Had we been living there and using the camp we would have had a dock. I can tell you that every year that we were there for any substantial amount of time we had a dock. It was either in the right of way or where the Sarno dock is now. To argue that because we weren't living there, and we therefore didn't have a dock that means we somehow waived our dock privileges.
- Member Radziszewski, Jr – I have a question for you though. How is their property landlocked?
- Mr. Rosenthal - I can draw you a very simple diagram. This is their property, this is our property, this is the road. Our property is in between. They have a ten foot (10') right of way to go from the road over our property to their property. We have an eight foot (8') right of way over their property to get to the lake. If you applied the doctrine of merger as Ms. Sarno suggests saying that our right of way merged because of the merger of title, then their right of way merged as well. Which means they can't go over our property to get to their property. That was clearly never the case in the deed in the 1980's makes it very clear that they grant the right of way to them and the right of way exists for our daughter.
- Member Radziszewski, Jr – So the bottom line is you both have a right of way. So that they can get over your property and you can get over their property.
- Mr. Rosenthal – That's correct. And to contend that the Maine Supreme Court case that Ms. Sarno cited somehow applies but the much later 2015 case in Sebago Lake doesn't apply is absolutely wrong. As a matter of law the court has held that a person who has a right of way to go to a lake, it's implied, it's an implication that one of the rights that goes with the right of way to get to the lake to enable the person to have full enjoyment of their right of way in access to the lake is to have

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a dock. To not have a dock would basically make the right of way much less valuable than the grantor and the grantee expected when the right of way was created. That's what the case that we cited stands for. Thank you.

- Mr. Conway – A couple things – a number of the allegations or claims made by Ms. Sarno were incorrect. First of all, the right of way does run to the low water mark as you can see in the deed there. The language says it runs to the low water mark. She made a distinction between cases where they run to the high water mark or the low water mark, the right of way. So, that was incorrect. Additionally, the idea of merger is a red herring here. It's thrown out and I just want to make sure it's clear at the time when the two properties were owned there is a doctrine of merger that says if you own the servient estate and the dominant estate then they merge together. But when they were re-separated those rights of way were once again created. That was back in the 1980's so I'm not clear what relevance that would have to this case. This was still long before this ordinance had taken affect so I'm really unclear as to what relevance that would have in this case. I'm not disputing what she said necessarily it just doesn't really have any affect here.
- Member Bowes – I don't think she said that the right of way doesn't exist, she repeatedly said that the right of way is for ingress and egress to the water.
- Mr. Conway – That's not what the language in the deed says. You have the deed in front of you. It just says that it's a right of way that runs to the water. Okay? The statute which you've been shown and the case law which you've seen is clear in Maine that if you have a right of way to the water that includes, another case as well I can show it's a supreme court case in the state of Maine, that unless you don't have the right to put in a dock you have the right to put in a dock. Unless you can show by some other evidence that you don't have that right or you're going to interfere with someone else's use of the right of way in some fashion then you would have that right. Someone can come in and show you that. They can come and say look here's the situation we – we never intended for them, I'm the one who gave them the right of way I never intended for them to have a dock. You can go court and say that and if that's the case then the court might say fine. The reason the statute you saw is there is because it's addressing what Maine law is not common law, not Black's Law Dictionary, which is certainly not an authority of any kind, but what Maine law is. Maine law is the reason that statutes there it was put in to more or less, it switched the burden it now said it used to be that if you had a right to the water then by implication you had a right to put in a dock. For whatever reason and I didn't do the legislative history and I didn't hear from the prior speaker that there was any legislative history law. But for some reason someone decided that we were going to switch that burden we were going to make it so that the right of way says that you have a right of way to the dock when it's established after January 1, 2018. So now it flips it. Before that it was the opposite. If you had a right

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of way to the water by implication you were allowed to put a dock, there. And if you want to let someone have a dock you write it right in the easement you give them.

- Member Bowes – But the reason we're here is there's no debate about the right of way ingress and egress exists. The reason we're here is a dock was installed without a local permit. He applied for local permit; Code Enforcement Officer cited a couple of different things that it didn't meet the criteria to have a dock installed there. So even though the right of way exists the local authorities because there's sixty nine feet (69') of frontage, there's already an existing dock, and there's a natural beach it's not allowed.
- Mr. Conway – It is if it's grandfathered in there. If it's there before the ordinance it is.
- Member Bowes – I don't see it in the deed. I don't see anything in this deed that says a dock is allowed in the right of way.
- Mr. Conway – It's not a matter of whether it says it in the deed.
- Member Bowes – You just said that. (Talking over each other) it is written that says it the dock has to be, can be installed, but it's not there.
- Mr. Conway – That's after 2018. No. It's for right of ways that were established after 2018. That's not a shrug. That's what the statute says. What that says is that it doesn't apply to any rights of way which were established before 2018. Do you understand? This one clearly established well before whether it was in '52 and it merged for some period of time and then was reestablished in the early 1980's it's still long before 2018. It's a use that is there and has been there prior to the ordinance and therefore it's a legal nonconforming use. On that point I want to make one other point because I have now had a chance to see a letter which was referred to by Mr. Grundin that is apparently from his mother-in-law and this doesn't say anything about there not being any docks there. In fact, it indicates that there was a dock there. In fact, it indicates that there was a dock there and the pole has been left in and there's a block that's been left there.
- Multiple Board members corrected Mr. Conway saying that this letter is in reference to what Mr. Rosenthal left in the water from his dock.
- Mr. Conway – But it doesn't say anything about there not being other docks there. He came here to testify that his mother owns this property. This letter which is from the person who apparently lives there or at least has rights to be there doesn't say anything about that. This is the person who's apparently the eyewitness and it



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doesn't say anything about that. I heard that there was this letter that you guys were getting that was refuting it.

- Chairperson Hyland – Help me out with right of ways Mr. Conway. It seems to me and I think my betters had this very same problem on Hyland Lake in Falmouth and that is does a right of way allow you access and egress to the water?
- Mr. Conway – A right of way actually allows you the use of a specific piece of property for many different uses. So, it can change.
- Chairperson Hyland – Let's be more specific. Can I set up a boat shed on my right of way?
- Mr. Conway – On your right of way?
- Chairperson Hyland – Yes. Could Mr. Rosenthal set up a boat shed to keep his lawn chairs and things like that?
- Mr. Conway – I it was there prior to the ordinance being established, yes.
- Chairperson Hyland – Well that's kind of not what *Sleeper v. Loring* says. It says that if you store property there that's not what a right of way is. A right of way does not allow you to store property.
- Mr. Conway – But that, but there's no argument in there that it was a legally nonconforming before the ordinance. You're mixing two things up here, I think. There's two different ways of looking at it. If the ordinance ... if the easement was granted after the ordinance was passed, then it has to comply with whatever the rule may be. If it's before it or if you go around the lakes now for instance, you'll see that there are boat houses and they're right on the water and they're actually in the water.
- Chairperson Hyland – But they're not in the right of way.
- Mr. Conway – But they're in the water. But I'm just giving that as an example that talks about how nonconformance works. This is a little different. You couldn't do that now.
- Chairperson Hyland – What I'm saying though is that a right of way allows you passage. It doesn't allow you to store your stuff and do lots of things like you own the property.

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- Mr. Conway – it may not. It's an interpretation of the ordinance. You could have a right of way that says that you could park cars on the right of way for instance, you could, we're not suggesting this does. You could have a right of way that allows you to drive a car across it which apparently people do have. So, there's different ones. That's not the issue here though. The issue is whether when you have a right of way to the water whether it allows you to put a dock there. And the case law in Maine is pretty clear that it says that prior to 2018 what the new statute said there was an implication that you can. Now the owner of the servient estate could come in and say 'No. No. No. We never told them they could do that. We have evidence we did.' You can make that argument against it if that were the case. There's no argument here about that because obviously the rights of way were established long before the people here were involved in it.
- CEO Neal – Where does it say in 459 that anything established before 2018 would get a dock?
- Mr. Conway – It doesn't say that. It says that if it's before 2018 it's by implication there's a right to have a dock. If you read it. It says it in the negative. It says that if it's established after that then you can't have an implication because, unless, it can't be by implication it has to be expressed. That's the purpose of the statute. The flip side of that is anyone before that can establish a dock by implication. Like I said it's not an absolute. It doesn't say you absolutely can have it, but the argument is that it can be implied within the right of way to the water. In this case I don't think that that really though matters because we're here with a right of way that's been used in this fashion prior to the ordinance even being established.
- CEO Neal – Well that use was also abandoned for how many years before the code came into place.
- Mr. Conway – Well, I think we have evidence here that it wasn't abandoned or that there may have been a sporadic loss...
- CEO Neal – (garbled) was abandoned before the code came into place.
- Mr. Conway – how do you know that?
- CEO Neal – I think we've heard enough people say that they were there before. I mean he says he hasn't been here since the Nineties.
- Mr. Conway – He never said that. I don't know what you heard. I never heard him say that.

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- Member Bowes – I heard Mr. Grundin say that the whole time his mother-in-law owned the property there was never a dock in the right of way.
- Mr. Conway – We've had... That's what he said and I'm just pointing out his mother sent a letter and never even thought to mention that.
- Mr. Grundin – She was never asked to say that. I'm here representing her to speak for that and she will absolutely send a letter saying there wasn't one there if that's a big deal. I'm here to testify on that. I was asked to speak by the Sarno's about what was there, and I said what was there. I've been there now since the early Eighties, so I know exactly what was there. Beside what Mr. Conway said. I'm saying there wasn't one there and that's my testimony.
- Mr. Conway – Understood. I don't think anybody challenged that. All I'm saying is that ...
- Mr. Grundin – You did.
- Mr. Conway – Excuse me...
- Chairperson Hyland – Guys. Guys. Mr. Grundin please.
- Mr. Conway – All I'm saying is that the person wrote the letter without any of that in it.
- Chairperson Hyland – We actually have heard from Mr. Rosenthal that they have not put a dock in there in at least twenty years.
- Member Radziszewski, Jr – Right. He said that.
- Mr. Rosenthal – First of all my family has continuously owned the property since 1952. So, to contend that we didn't own the property so we couldn't put in a dock that's absolutely untrue. What I said was that whenever we were there when we were living in the property for any substantial period of time, we had a dock on the property. In the early 1980's when the property was split up and Ms. Carroll ended up acquiring the property thereafter, we didn't have a dock except at sporadic periods of time, for very short periods of time. For a few years during that period, that I will submit, that for a substantial period of time that after 19 say '83, '84, '85 we did not have a dock there. But the only reason we didn't have a dock there was because nobody was living there. Whenever anyone was living there, we had a dock. It didn't make any sense to us if we weren't living there to keep a dock.

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- Chairperson Hyland – Okay. Thank you. Umm. Yup.
- Ms. Sarno – I just wanted to bring up the doctrine of merger again. The reason that I brought that up. I wasn't trying to say that his right of way was extinguished and mine wasn't. I was trying to bring up a point that common ownership does sever the right of way. It was later revived. However, the point was that you can't claim historical use on you having a dock when you're under common ownership and the right of ways were terminated. You owned one parcel. The parcels weren't considered to be separated under common ownership. So, it was to refute the argument that there was historical use, when you can't have historical use on something when your right of way was terminated.
- Chairperson Hyland – Okay. But we have a deed from 1987 so we know from at least from then on.
- Ms. Sarno – Okay. I think his father's estate went through a trust, so I think on '83 they were revived.
- Chairperson Hyland – Okay. Thank you. Anyone else? For or against? Sir?
- Mr. Beaulieu – Yeah. There hasn't been anyone there for thirty years so there hasn't been... so there is no historical use. Plus, you can't put a dock on a beach area. And that's a Maine law. That's where my daughter plays. It's a beach. His right of way goes right down to it and it's just very small. So, if they go and put a dock there how am I going to get to the water? And what is she going to do? Smash her head off the thing when she's down at the beach? There was never one there and I just don't see it. You know?
- Chairperson Hyland – Unfortunately it doesn't extinguish the ability to use the property. Even though it's not been used.
- Mr. Beaulieu – There was never one there. It's a right of way. The right of way is to the water and then disperse. It doesn't say anything about a dock.
- Ms. Sarno – It just restricts our use as fee owners in the land. The cases that they're bringing up where they allow docks, they weren't the fee owners of the land. Some of the case law where they owned to the high water, basically it's that intertidal area, when you have high tide and low tide. It's like they didn't own this, so they allowed them to put a dock because the servient estate didn't own that. But we own the beach. Our boundary line is to the low water mark of the water. So, allowing someone that has just an eight foot (8') right of way just to pass to obstruct our property is just not right. And the 2018 statute doesn't mean that it's grandfathered in automatically. It means that the courts look at it. And the courts

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decided that you have a fee ownership in the beach area you don't have a right to install a dock.

- Comment from Mr. Conway that's not clear.
- Chairperson Hyland – Yeah and we've gone back and forth. Any other things that anyone wants to say at this point? Last chance. Any questions of any of the people you've heard testify so far? Mr. Neal do you have any questions?
- CEO Neal – Nope.
- Chairperson Hyland – Okay. Then I'll close this part of the hearing.
- Member Radziszewski, Jr – What about, do you close it before...
- Chairperson Hyland – Oh no. If you've got testimony, then we certainly want to hear it.
- CEO Neal – No. Everything I needed to say was on record already.
- Chairperson Hyland – Okay. So, the reason... So, let's ask you some questions then. So, when you went to Town Attorney with some of this.
- CEO Neal – Yes.
- Chairperson Hyland – Under Title 33 Chapter 7 it seems to me that this right of way has been there for a long time, it's probably been used, it's probably had a dock on it. That we don't have the people here that granted the right of way in the first place, so we don't know what their intent was. It seems to me that we have to look at this broadly and say yeah, they didn't restrict it. They didn't say no docks. So, I'm uncomfortable with the idea that every right of way can have a dock. That means that the lake is just covered with docks.
- CEO Neal – That's what we're opening up.
- Chairperson Hyland – On the other hand I'm reluctant to extinguish someone's use of their property or their right of way that there's historic use of.
- CEO Neal – I mean we can call it historic use, but ...
- Chairperson Hyland – Oh I know. It's old historic use.

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- CEO Neal – We're talking Eighties here. Which predated this zoning. So, if it's been gone that long does it not require a new permit?
- Chairperson Hyland – We currently give permits for every dock that goes in the water?
- CEO Neal – Every new dock.
- Chairperson Hyland – Every new dock. Okay.
- Member Bowes – I'm hung up on this last paragraph of this 459. It says, this is dated 2017 which is pre '18, the instrument granting or reserving the easement of right of way does not expressly include the right to construct a dock on the easement of a right of way or the right of the easement of the right of way to facilitate the construction of a dock on the body of water. That's what you gave us.
- Mr. Conway – But you're missing the context. If I could explain it.
- Member Bowes – Sure.
- Mr. Conway – First of all I won't bore you with my law school education. But the first thing they told us was you should start at the beginning when you're reading something, and you should read it all the way to the end. Because, picking one thing out is hard to clarify. So, if you look at this entire section what it says is that the owner of an easement or right of way leading to or touching upon a water body does not have the right by implication to construct a dock on the easement or right of way or use the easement or right of way to facilitate the construction of the dock on the water body if and then it has two conditions. Those two conditions are joined by an and so they both have to be true. So, you don't have those rights if the easement or right of way is originally established in a written instrument executed on or after January 1, 2018. Clearly, we don't fall within it because we're outside of that. And then the instrument granting or reserving the easement or right of way does not expressly... so if you get an easement after January 1, 2018 in order to get a dock on it it has to expressly say you can have a dock. Before 2018 it's saying you don't have to have that in there.
- Member Bowes – I get it. I'll go back to my earlier comment that the deed just says the right of way to pass to the water. There's no language about construction of a dock.
- Mr. Conway – Cause, you don't need it before 2018. It's by implication.

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- Member Bowes – (garbled) the ordinance.
- Mr. Conway – I understand. That's a different piece. I just wanted to go back over that.
- Ms. Sarno – One more thing. I actually have a deed here that does have restrictions. It was originally granting the right of way that restrict encumbrances on the property on the right of ways. So that would show intent. See if I can pull it up here. Alright I don't have it here. I can pull up the original right of way deed. I thought I had it here, but I don't have it here.
- Chairperson Hyland – Okay.
- Member Radziszewski, Jr – Okay I have a question for the Code Enforcement Officer. Isn't our ordinance it has more restrictions than state law.
- CEO Neal – We can be more restrictive; we can't be less restrictive.
- Member Radziszewski, Jr – Right. So, this thing from the state we can be more restrictive and that's allowable according to the state.
- CEO Neal – That's my understanding.
- Mr. Conway – Actually the way it works is that (garbled)
- Mr. Dulberg – Please go to a mic.
- Mr. Conway – I'm not saying that's never true. Okay. And I don't want to make any blanket statements, but generally if state law governs a certain area then unless it expressly says that local laws can be more restrictive, they probably can't be. They're preempted by that law. Now I'm not trying to tell you...
- Chairperson Hyland – Zoning laws can be more...
- Member Radziszewski, Jr – Right. Because I've heard it here...
- Mr. Conway – If the state law says it and in many cases the state law does say it, they'll say right in them, if you look at shoreland zoning laws they'll often say that local can be more restrictive or local law can do this. But it's specific to the law that they can do that. I'm not sure that matters in this particular case because what that simply says is by implication you can have docks on right of ways.

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- Member Radziszewski, Jr – I think that it has meaning here because you throw out a state law and it overrides our zoning laws.
- Mr. Conway – That's I don't think the argument so much that we're trying to make is that the use has been in place long before the statute was in place. And that's what really ... so what your ordinance says is that there's a use in place at the time the ordinance is passed the ordinance can't get rid of it. Can't just say it's no good. Can't just put a restriction on it that gets rid of it. It has to allow that to happen. But if you file after the ordinance is in place then you have to meet all of the restrictions of the ordinance. That's the crucial point is was the use in place prior to the ordinance in place. And you have a whole section in your ordinance about nonconformance for that reason so that because obviously the slate isn't wiped clean when you put a zoning ordinance in. There's a whole town here. There's a whole, people are living here, everything's going on all of a sudden you put restrictions on it many of those prior uses couldn't meet the restrictions. But zoning ordinances in order to be constitutional have to have that nonconformance language in them. Because otherwise you'd be taking people's use of their property away by passing a law. Okay. Which the constitution limits that.
- Chairperson Hyland – Let me ask Mr. Conway while you're still here. Our ordinance says that no more than one pier, dock, or wharf, or similar structure located in the high water line of a water body is allowed on a single lot. So, this is a single lot and there's an easement across that lot, but it's still a single lot, right? We're not talking about having two lots here.
- Mr. Conway – Nope. It's an easement across a lot. That's correct.
- Chairperson Hyland – Okay. So then why is a second dock allowed? Because the ordinance says only one dock per lot.
- Mr. Conway – Well we go back to the same thing. If the use was allowing docks, there prior to the ordinance being passed then that wouldn't restrict it. It would only (garbled) after the easement was put on.
- Chairperson Hyland – So you're saying that the second dock is a nonconforming use?
- Mr. Conway – Yes.
- Chairperson Hyland – Okay.



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- CEO Neal – So if that was a use our ... under nonconforming uses if that was discontinued for a period of a year then it was no longer conforming.
- Mr. Conway – No. What the argument is the claim is that the right of way is for the right to use the water. The dock is using the water. It's the use of the water.
- CEO Neal – You're using the argument of history here where that presumption of use.
- Mr. Conway – They used the water. That's the argument that the right of way goes to the water, it wouldn't go to the water and this is where the implication comes in, easements wouldn't go to the water unless it was implied that you could use the water. You don't get a right of way to go to the water so that you can stand on the shore and look at the water. The idea is that you get a chance to use the water. That's what the cases have said, that's what the cases we've provided to you said is that that's what the courts have said is that when you get to the water it's implied that you can use it. And you can make use of the water.
- Member Bowes – What people typically do is use the right of way to moor a boat out on the lake so they can access their boat without having a dock there.
- Mr. Conway – I can guarantee you that there are hundreds of docks on rights of way currently in the Town of Poland. Hundreds. And they're on rights of way on land of other people that have docks on their property. There may be that many on Tripp Lake alone. This isn't breaking new law here. This is something that is common throughout this Town and with all due respect to the Code Enforcement Officer because I think he hopes that everybody has a permit for their dock I'm guessing that ...
- CEO Neal – No. I know they don't. new docks. Anything since 2001 should, but I understand that there are historical docks in this lake that don't.
- Mr. Conway – Right. And there's more than one dock on many properties as well. And that's because of rights of way and because some people put two docks on their own property. That's been known to happen too. I'm not sure that's the argument that everybody wants because someone else did it everyone else gets to do it, but certainly rights of way for use for docks is not something new. Courts have dealt with it and the Town of Poland has seen it for years.
- Member Radziszewski, Jr – So, to your knowledge how is it that we have two docks that we're talking about? All I've been hearing about is the dock that couldn't go in. Where's this two dock thing.

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- Mr. Conway – The two docks comes from the fact that what we have here is a parcel of land which is called the servient estate, okay for easement purposes, that's the Sarno's who own the land, the dirt, they own it. Granted over that land is an eight foot (8') strip to get to the water. That's the right of way. The two docks would be on the one lot because the servient estate lets the dominant estate use that eight foot (8') right of way doesn't give them the land itself. It's still on one lot. So, if they have a dock and they have a dock there's two docks on that one lot. That leads to two docks on the lot. That's how it would happen with a right of way across property.
- Mr. Beaulieu – So he said we had to prove it. We just proved it. For thirty years there's no dock there. You just said you have to prove it. He just said his mother-in-law owned the both of them. There wasn't anything there for thirty years plus you can't put a dock on an established beach area.
- Chairperson Hyland – Well you can put a dock on established beach area. There's nothing that prevents you from doing that. I understand that things are tight on your lot.
- Mr. Beaulieu – It's more than tight. It's the only place my daughter plays. It's our only way to get in the water. And you want to put a dock there, so she smashes her head off of it. It just doesn't make any sense.
- Chairperson Hyland – Okay. Thank you. So, there's a couple of things here from what I've heard tonight. There's a couple of different ways of dealing with this. It sounds like historically the right of way has had a dock on it. Off and on. Not recently. Not anything recently, but certainly in the past. It's a right of way of long standing. It's not something that was recently created. The ordinance is pretty clear that you're allowed one dock per lot. Well this is one lot. So, in theory it shouldn't have two docks on it. But there is historic use of the right of way for a dock. So, the questions then becomes, and then Mr. Conway agreed, that the dock is a nonconforming use based on our ordinance. And Mr. Neal pointed out that at some point a nonconforming use gets extinguished if it's not used. Usually that's a year. So that's where you are. We're left with a couple of different problems. You're left with the problem of this is a right of way that's been there a long time and there's historic use with a dock on it. Not recent use but certainly historic use. So, that's where we are. I'm not sure what the best approach is because I don't think we're going to solve anybody's problem either way.
- Member Bowes – I think you just summed it all up though.
- Chairperson Hyland – Well that's two different decisions. One is to say we affirm the use of the right of way, it's been used like that in the past, it continues to be

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used like that and a dock can be placed on it. Or we say, the ordinance is clear only one dock per lot and the nonconforming use of two docks on this lot has been extinguished by no use over the last twenty years. Frankly that would be a court fight either way.

- Member Bowes – And there's opposition from the landowners that pay the taxes on it.
- Chairperson Hyland – Well. Yeah. People fight over rights of way all the time.
- Ms. Sarno found the historical deed she was looking for on her phone and shows her phone to the Board. She says that there's restrictions that rights of ways are not to be encumbered with vehicles or any other manner. So, it's basically saying that there shouldn't be a structure on the surface of the right of way. This is the original grant.
- Mr. Conway – Excuse me, but we're all here. You could go to the microphone so we can all hear.
- Chairperson Hyland – Do you have a way of sending that so we can get a written copy of that somehow.
- Ms. Merrill – I can go get it if you send it...
- CEO Neal – Stacy if you send it to me.
- Chairperson Hyland – We should all benefit from seeing what this says.
- Member Bowes – You never saw this before?
- CEO Neal – No. Not this one. No.
- Member Bowes – I wonder why it's not attached to the deed.
- CEO Neal – This is probably a historical deed. They get shortened over time.
- Chairperson Hyland – So you see the problem Scott. You've taken the approach that the ordinance says one dock per lot and that if we assume that the second dock is a nonconforming use then it's been extinguished from being a nonconforming use by the fact that it hasn't been used in the last twenty years.

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- CEO Neal – Plus.
- Chairperson Hyland – And that's okay. But the other side of that is there are court cases that say that if you have a right of way there's an assumption, notwithstanding new law, that you can use it to put a dock on it.
- CEO Neal – But there are also court cases ...
- Chairperson Hyland – Yeah. They go both ways. And it's all based on intent in the end. Landowner intent.
- CEO Neal – If we use the historical fact that it was there, we're going to open up right of ways to...
- Chairperson Hyland – Well yeah, I know.
- Mr. Conway – I might add to that if you go to removing every dock that's on a right of way, you're going to open up a bigger can of worms. Because I don't think this is being enforced currently in this town. So that is the message then I think that would also have a very significant effect on water and who has rights to use water.
- Member Bowes – I recall a case back in '14 on Range Pond something similar to this. So, we have been enforcing it. This isn't the first time.
- Mr. Conway – I'm not saying it is. I'm saying (garbled)
- Mr. Grundin – I'd like to say that it is possible that there are docks on right of ways and I'm wondering if the people who own the property that the right of way is on are okay with that? Obviously, they're not okay with that.
- Chairperson Hyland – Well no it's a mixed bag. It's not a factor if the right of way was granted by a previous owner. The new owners don't really have a say.
- Ms. Sarno – (garbled) Then she goes over previously heard testimony. It became a free for all by people in the audience speaking over each other without being on microphone.
- Member Lancaster – There was testimony that at one time there were two docks on that property.
- Chairperson Hyland – Right. So, you were going to email that to...

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- Ms. Sarno – I did.
- CEO Neal – Sarah's going to print it out. She's printing it up now.
- Ms. Merrill returned and gave the copies to the Board.
- Chairperson Hyland – Okay. Ms. Sarno what you're suggesting here is in this deed is that a dock is the same as parked vehicle?
- Ms. Sarno – or in any other manner so you can imply that it's a structure on the surface of the right of way. Parked cars or any other manner. So parked cars is a vehicle, it's an encumbrance, it's a structure. Or any other manner you can imply that they're referring to a structure on the top of the right of way.
- Mr. Conway – If I might respond. There're two distinctions to be made. One is first of all the dock is not on the right of way. It's at the end of the right of way. It's actually in the water below the low water mark is where the dock sits in the water. That's number one. Number two. Well I think there's three actually. Number two I don't think that when you refer to a parked vehicle you in any way imply that it wouldn't allow a dock. But even in any other manner. If they didn't a dock on there and it's a right of way that runs to the water, it seems clear that they easily could have just said no parked cars or docks are allowed in the right of way. Third though is the argument that they have made all night long and that is this is in 1952. Subsequent to this the easements merged. And then they were reestablished without this language in there. So, it's really irrelevant in this matter.
- Ms. Sarno – If it's irrelevant then why are they looking at historic use then?
- Chairperson Hyland – Well I assume that the Rosenthal's reestablished the right of way and so the language is not the same. Okay. So, I will close the public part of this hearing and we'll open up for discussion by board members.
- Mr. Beaulieu – Where does our daughter swim? (garbled).
- Chairperson Hyland – I know that it's troubling. You've made your point sir.
- **Member Lancaster moved to close the hearing to the public. Member Bowes seconded. Discussion: None    Vote: 4-yes 0-no**
- Chairperson Hyland – We'll move into the decision making part of this. Say what you think. It's not an easy one.

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- Member Radziszewski, Jr – I've got a couple observations here. If Mr. Rosenthal was using docks all the way up through the last twenty five years, thirty years, it's one thing. He hasn't had a dock on there for quite some time. All of a sudden that pops up. We have an ordinance that says one dock. I guess you have a dock too. You have sixty nine feet (69') of property. He's got a dock over here and you've got a dock over here, that's my assumption. But I have a problem with trying to use it as historical and we're talking about things back in the Fifties, and then there's a break, and then for thirty years or whatever no use, and then all of a sudden you pop up and want to put a dock on it and there's another dock there. I have real issues with that. And the ordinance says one dock. That's the biggest issue I have with it. And you know we have these zoning ordinances and the reason I brought the thing up with overriding the state, which is probably the wrong term from the lawyers point of view, but you know they said that local can be more restrictive. And we happen to be more restrictive. So, I have a real problem with passing this. That's my observation.
- Member Bowes – I'm pretty much with you. In addition to Scott consulting with the Town Attorney and supported him by denying the permit.
- Chairperson Hyland – I think there's two right answers here. And it's difficult for me to extinguish historic use on a right of way. The deed doesn't say no docks. So, we're kind of left with it did have a dock on it for a period of time and then it did not for many years. Now it's got a dock on it again. I don't think you want to be real restrictive of rights of way. And try and interpret those. Because every property association and things like that in this town has got different rights of way and things like that. It's a problem. On the other hand, you can likewise say that the ordinance is clear only one dock per lot, and that the second dock is a nonconforming use, but the nonconforming use has been extinguished because it hasn't been used in many years. So, now they're down to one dock. So, I think you can parse this one either way you want. I don't think there's one right answer here.
- Member Radziszewski, Jr – I don't either. But there is one other thing and it was brought up earlier we want to be careful precedentting how we handle this. Because it opens up the whole Town of Poland with this issue.
- Chairperson Hyland – Yeah. If we take a rigorous approach to the ordinance we'll be meeting more often, and Scott will be very busy.
- Member Lancaster – I think the same way that if we extinguish the rights, we'll be opening up...
- Chairperson Hyland – Yeah. We could be.

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- Member Lancaster – It could be a big problem. And it wouldn't be just stopping here.
- Chairperson Hyland – It would be. Scott would be busy for a long time.
- Member Bowes – Well, If the dock was in place every single year up until today. That's one thing. But where it hadn't been in in over thirty years. It was installed, a report was reported, our ordinance supports only one dock on one lot unless it's two hundred feet (200'). They still have rights to the lake. No one's denying that.
- Member Lancaster – But that right of way did have a dock at one point in time. And there was at one point in time two docks on that piece of property.
- Member Bowes – That was probably pre our ordinance.
- Member Lancaster – Sure.
- Member Bowes – And I'll add one more thing. Even though you've only owned it for a couple of years when you purchased the property you didn't have any docks on that property.
- Ms. Sarno – No. We didn't have a boat yet.
- Member Bowes – You didn't have a boat and the right of way dock wasn't there either. So, in your minds you never thought that would be a problem. You never saw that coming until you saw he installed it.
- Chairperson Hyland – Yes. Let's not go back and forth with the... Does everyone know what they're going to do? The Board said they did. Okay. Then you should make your motion positive and it's got to be made... So, does that mean we've got to affirm, to approve the appeal of the code enforcement officer's decision. Okay.
- Ms. Merrill – And then you vote for or against that.
- **Member Bowes – I make a motion to vote for the appeal of the code enforcement's decision in this matter.**
- Ms. Merrill – For recording purposes I would like clarification of what that means exactly. Because I'm confused. Are you...

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- Chairperson Hyland – You’ve got to approve the appeal of Mr. Rosenthal to grant his permit for a dock.
- Ms. Merrill – That’s not what I heard so that’s why I asked for, that’s not what he said so that’s why I asked for clarification.
- Member Radziszewski, Jr – No. Just make that correction. We’re making it in a positive fashion.
- Ms. Merrill – Right.
- Chairperson Hyland – So we’re going to grant the appeal.
- Member Radziszewski, Jr – So we’re going to grant Mr. Rosenthal’s appeal.
- Chairperson Hyland – His administrative appeal.
- Ms. Merrill – Thank you. I just need that, we need that on the record, and we need to record it that way so that we’re clear.
- **Member Lancaster seconded the motion. Discussion: None**  
**Vote: 2-yes 2-no    Appeal is Denied**
- Chairperson Hyland – Oh that’s a good one. That’s one I haven’t seen in a long time. Just so you know the way this works is that we’ve voted two – two and in order to sustain a successful appeal it takes three members voting in the affirmative. So, what we’ve done is denied the appeal. We’ve upheld the Code Enforcement Officer’s denial of the permit. That means we get to go through the ....
- Ms. Merrill – You usually use page 213.
- Chairperson Hyland – is that the one I’m using?
- Mr. Conway – Will you be drafting a Conclusions of Fact and Findings of Law?
- Chairperson Hyland – Correct.
- Ms. Merrill – We’re going to do that right now.
- Mr. Conway – and then sent to us.



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- Ms. Merrill – Correct.
- Chairperson Hyland – And you have 45 days to appeal that.

**A. FINDINGS OF FACT:**

1. Name of Applicant: Michael Rosenthal
2. Mailing Address: P.O. Box 15
3. City or Town: West Poland                      State: ME              Zip: 04291
4. Telephone:
5. Name of Property Owner (if different from applicant): Marla Rosenthal, 109 Mariners Walk, Milford, CT 06460
6. Location of property for which variance is requested (street/road address): 45 Garland Swamp Road, Poland, ME 04274
7. Zoning district in which property is located: Rural Residential 2, Aquifer protection Overlay 1, and Limited Residential District.
8. Tax map and lot number of subject property: Map 32 Lot 8
9. The applicant has demonstrated a legal interest in the subject property by providing a copy of a deed.
10. The applicant proposes to establish a four foot by eight foot (4'x8') dock at the end of the eight foot by eighty-six foot (8' x 86') right of way.
11. The completed application was submitted on July 29, 2019 and the Code Enforcement Officer denied the application on July 31, 2019. The Application for Administrative Appeal was received on September 17, 2019.
12. A public hearing was held on October 16, 2019.
13. The relevant sections of the Poland Comprehensive Land Use Code are: §303.1, §303.2. C., §508.27. D.1., §508.27. D.3., §508.27. E., §504.4. B.
14. The other relevant factors are as follows:

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- a. The lot contains sixty-nine feet (69') of shore frontage which is less than the minimum two hundred feet (200') of shore frontage. The ordinance, §508.27. D.1., is clear that only one dock per lot for shore frontage of that size.
- b. We heard testimony from Mr. Rosenthal that the right of way had a dock on it in the eighties and maybe the early nineties. We heard testimony from Mr. Grondin that there has not been a dock on the right of way for more than twenty years. Mr. Rosenthal from his testimony confirmed that. §504.4. B of the ordinance prohibits the resumption of a non-conforming use that has been discontinued after 1 year.
- c. Mr. Bealieu's testimony stated that the dock interfered with a natural beach area in violation of the Town's ordinance §508.27. D.3.

**B. CONCLUSIONS OF LAW:**

Based on the above stated facts and the provisions of the ordinance cited, the Board concludes that the deed of the right of way does not prohibit the use of a dock. However, the shore frontage for the lot is sixty-nine feet (69') and the ordinance does not allow for more than one dock per lot for a shore frontage of that nature. A second dock on that lot was a nonconforming use and that nonconforming use was extinguished more than twenty years ago because a dock has not been placed on the lot in the last twenty years. Also, the ordinance does not allow a dock to interfere with an existing developed or natural beach area.

**C. DECISION:**

Based on the above findings of fact and conclusion, the Town of Poland Board of Appeals votes to deny your application for administrative appeal. If you are unhappy with this decision you may request a reconsideration by the Board within thirty (30) days of the date of this decision. You may file an appeal in the Superior Court within forty-five (45) days of the date of this decision.

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**ANY OTHER BUSINESS** – Officers – It has been more than two years since a new chair has been picked.

Member Radziszewski, Jr moved to approve Jerry Bowes as Chairperson. Member Hyland seconded the motion. Discussion: None    Vote: 3-yes 0-no 1-abstained

Member Radziszewski, Jr moved to approved Mark Hyland as Vice Chairperson. Member Lancaster seconded the motion. Discussion: None    Vote: 3-yes 0-no 1-abstained

Vice Chairperson Hyland moved to approve Joe Radziszewski, Jr as Secretary. Chairperson Bowes seconded the motion. Discussion: None    Vote: 3-yes 0-no 1-abstained.


In each of these votes the member being nominated from the position is the party that abstained from voting.

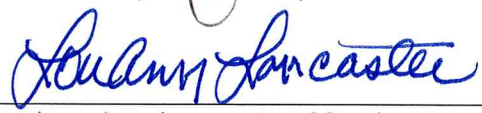
**ADJOURN** – Chairperson Bowes moved to adjourn the meeting at 9:12 pm. Member Lancaster seconded the motion. Discussion: None    Vote: 4-yes 0-no

Recorded by: Sarah Merrill

Board of Appeals

  
\_\_\_\_\_  
Mark Hyland, Chairperson

  
\_\_\_\_\_  
Gerard Bowes, Vice - Chairperson

  
\_\_\_\_\_  
Lou Ann Lancaster, Member

  
\_\_\_\_\_  
Joseph Radziszewski, Jr., Member

\_\_\_\_\_  
, Alternate

\_\_\_\_\_  
, Alternate