

Appellants' Response to the Applicant's Initial Comments on Administrative Appeal
Gardiner Green Project at 150-152 Dresden Avenue

October 31, 2023

Response to Applicant's point #2 on Land Use Ordinance Procedures

The Applicant's attorney argues, in his initial comments on the appeal, dated October 24, 2023, that the Board of Appeals lacks authority to conduct a hearing or act on this appeal because the hearing is being held 60 days after the filing of the appeal, rather than 45 days as specified in LUO § 2.4.4.2.¹ Scheduling the hearing on this appeal 15 days after that deadline in no way deprives this Board of jurisdiction to act, however, because the 45-day provision is plainly directory and not mandatory or jurisdictional.

The Maine Law Court has consistently held that use of the word "shall" in setting a procedural deadline does not remove the administrative agency's jurisdiction to act if the deadline is not met unless there is "a clear manifestation in the statute to the contrary." *Doe v. Bd. Of Osteopathic Licensure*, 2020 ME 134, ¶11, 242 A.3d 182, 187. *See Bradbury Mem'l Nursing Home v. Tall Pines Manor Assocs.*, 485 A.2d 634, 640-41 (Me. 1984) (without a clear expression of intent to make it mandatory or jurisdictional, the time period "do[es] not mean that it is absolutely essential that the specified action take place within the set time periods else the action can never thereafter be taken"). Note that in *Bradbury*, the Law Court cites with approval a California court case finding a city ordinance that required the board of appeals to hold a hearing within 15 days and act on the appeal within 40 days to be directory and not mandatory or jurisdictional.

The language used in LUO § 2.4.4.2 is completely silent with regard to the consequences of not holding a hearing within 45 days of the appeal being filed, and there is nothing elsewhere in the city's ordinance to suggest a jurisdictional limit. There is no threshold issue here upon which this Board could dismiss the appeal.

It was reasonable for the Board of Appeals to reschedule the hearing on this appeal in order to allow adequate time for notices to be published in the newspaper and provided by certified mail to all abutters at least 14 days in advance of the hearing in accordance with LUO § 2.4.4.3. The Appellants had not realized it was their obligation to provide these notices before the October 17 hearing date because the plain language of the ordinance requires "the applicant" to provide the notice -- not "the appellant" or "the aggrieved person" as used elsewhere in the ordinance describing the appeal procedure. (*See* LUO § 2.4.4.1). Once informed of the obligation to provide these notices, however, the Appellants published the notice in the newspaper and mailed certified letters to all abutters who are not parties to this appeal more than 14 days in advance of the November 7th hearing date.

A delay of three weeks is *de minimis* under the circumstances, particularly given the number of times that the Applicant requested delays or tabling of his application for subdivision approval and site plan review while it was pending before the Planning Board.

¹ The first sentence of LUO §2.4.4.2 provides "Following the filing of an appeal, the Board of Appeals shall hold a public hearing within forty-five (45) days."

In short, there is no procedural bar to this Board hearing the merits of the appeal on November 7, 2023.

Response to points ##3 and 4

The Appellants' initial statement, filed on October 24, 2023, outlines our views on the remaining points made by the Applicant's attorney in his memorandum of the same date. We reserve further discussion of the merits of this appeal until the hearing on November 7, 2023.

Respectfully submitted,

Phyllis Gardiner

on behalf of Appellants Helen and Gordon Stevens,
Auta Main, Marianne Roth, Cheryl Clark, Michael
Gent, Robert Monniere, Janice Joyce, Ian and
Gillian Burnes, Holly and Dan Burnes, Susan Shaw,
Lisa St. Hilaire and Phyllis Gardiner