

**Town of Southwest Harbor Board of Appeals
Findings of Fact and Decision
Appeal by Dan and Ann Selmi**

Appellants: Daniel and Ann Selmi
P.O. Box 863
Southwest Harbor, ME 04679

Appellee: Southwest Harbor Code Enforcement Officer, John Larson
Town of Southwest Harbor
P.O. Box 745
Southwest Harbor, ME 04679

Party in Interest: 72 Clark Point Road LLC
Justin and Melody Podjasek, Members
72 Clark Point Road
Southwest Harbor, ME 04679

Nature of Appeal: Appellants Ann and Daniel Selmi appeal the issuance of December 18, 2024 building permit issued to 72 Clark Point Road LLC by CEO John Larson.

Date of Filing: July 3, 2025

Hearings: July 30, 2025 (regarding timeliness)
August 27, 2025 (regarding merits)
September 3, 2025 (regarding merits, cont.)
September 16, 2025 (regarding merits, cont.)

Date of Decision: September 16, 2025

Members: John Izenour, Chair
James Geary
Adam Babbitt
Scott Preston
Alyson Meiselman (recused)
Ted Fletcher

Record:

- 1. Documents received prior to and during July 30 hearing:**
 - a. December 9, 2024 Notice to abutters.

- b. January 22, 2025 Notice to abutters.
- c. July 1, 2025 Application for Appeal filed by Daniel and Ann Selmi, including June 30, 2025 letter in support of appeal signed by abutters Selmis, Ulla Norris, Natasha Johnson, and Pat and Carol Jackson.
- d. Undated “Memorandum and Exhibits on Issuance of Building Permit” submitted by Selmis including exhibits.
- e. Undated “Memorandum and Exhibits on ‘Good Cause’” submitted by Selmis.
- f. July 29, 2025 Packet from Attorney Andy Hamilton on behalf of Party-in-Interest 72 Clark Point Road LLC including:
 - Index of Materials
 - Letter to Southwest Harbor Board of Appeals
 - Legal memorandum
 - Table regarding Board’s jurisdiction
 - Exhibits
- g. July 30, 2025 “Handouts on Good Cause” submitted by Selmis.
- h. July 30, 2025 binder of annotated exhibits submitted by Attorney Hamilton regarding timeliness of appeal.
- i. July 30, 2025 list of mailing labels provided by Town Office in reference to record of abutter notice for December 9, 2024 letter sent by CEO to abutters.

2. Documents received after July 30, 2025 hearing:

- a. August 15, 2025 letter from Selmis regarding capacity for member Fletcher to participate in proceedings.
- b. August 20, 2025 informal petition regarding 72 Clark Point Road submitted by abutters Kay and William MacIntosh.
- c. August 21, 2025 “Reply Memorandum on Building Permit Issues” submitted by Selmis.
- d. August 21—25, 2025 email exchanges between parties and addressed to Chair Izenour.
- e. August 25, 2025 “Prehearing Materials of 72 Clark Point Road Property Owners” submitted by Attorney Hamilton, including cover letter, memorandum, and the following exhibits:
 - A: Conformance Table
 - B: CEO’s NOV of 5/17/2012
 - C: 3 Photos of Structure Taken on 5/17/2012
 - D: Judd Appeal Application 5/21/2012
 - D1: 11/12/2003 Permit Application and Permit #2011 for 72 CPR
 - E: Benson 2025 Survey Plan for 72/76 CPR
 - F: Salsbury 11/1/2024 Survey Plan for 72 CPR; Salsbury 6/24/2025 Survey Plan for 72 CPR
 - G: Board of Appeals Setback Variance Minutes of Meeting and Decision of 6/6/2012
 - H: Certificate of Variance 6/7/2012
 - I: December 2024 WMH Architect’s Design & Permit Appeal/Application Packet
 - J: CEO’s December 18 Building Permit

- K: Demolition Permit Application
 - L: Notice of Impending Issuance of Demolition Permit by CEO
 - M: CEO's Demolition Permit
 - N: 4/15/2025 WMH Progress Report
 - O: 4/15/2025 WMH Progress Photo
- f. Undated "Substantial Cost Statement" submitted by Mr. Podjasek (JJP-1).
 - g. Undated "Timeline for Continuously Unchanged Location of Frostwall Foundation for Garage, Airlock, Greenhouse and ADU" submitted by Mr. Podjasek (JJP-2)
 - h. Undated table regarding location of frost wall on property (JJP-3).
 - i. Undated letter from Aaron Zurek to John Atkinson regarding water and sewer capacity for 72 CPR, submitted by Mr. Podjasek (JJP-4).
 - j. August 27, 2025 binder titled "Oral Presentation on Issuance of Building Permit" submitted by Selmis.
 - k. Undated tabbed document titled "Statement of Property Owners of 72 Clark Point Road re: The 'Good Cause Exception' Must be Evaluated Afresh/It Does Not Apply Here" submitted by Attorney Hamilton.
 - l. Undated Binder entitled "Katahdin Law LLC Southwest Harbor Ordinances" submitted by Attorney Hamilton.
 - m. Scale drawings of the subject structures prepared by WMH Architects, submitted by Attorney Hamilton.
 - n. Survey drawings of the site prepared by Herrick & Salsbury Inc., submitted by Attorney Hamilton.
 - o. Undated "Supplementary Memo on Owner's Allegations of 'Fresh Evidence' Concerning 'Good Cause'" and "Supplemental Evidentiary Statement of Dan and Ann Selmi" submitted by the Selmis.

Findings of Fact and Conclusions of Law

Background

1. Appellants Daniel and Ann Selmi ("Appellants") filed their appeal (the "Appeal") on July 3, 2025, challenging the issuance of a building permit dated December 18, 2024 (the "Permit") by the Town's Code Enforcement Officer ("CEO") to Party-in-Interest 72 Clark Point Road LLC ("Party-In-Interest" or "Owner") related to the property located at 72 Clark Point Road (the "Property") owned by Party-In-Interest.
2. The Permit authorized the Owner to "construct new 3 bedroom guest cottage on existing footprint" of existing structures on the Property (the "Proposed Structure").
3. A separate permit, not subject to the present Appeal, was issued by the CEO on February 10, 2025, authorizing the demolition of an existing garage on the Property.
4. The garage structure included a greenhouse attached to the garage by an air lock (the "Existing Structures")

5. Following the issuance of those permits, Owner began demolition of existing structures on the Property, and construction of a 3-bedroom structure on that footprint.
6. The Property is subject to a variance issued by the Town on June 6, 2012 (the "Variance"), which granted a "13' variance on the southeasterly side of Map 4, Lot 1 at 72 Clark Point Road."
7. The Existing Structures were subject to a building permit issued by the Town on November 12, 2003.
8. The Property is in zoning district B, and is partially within the Shoreland Zone.
9. The Appellants are owners of property at 66 Clark Point Road, and reside in the neighborhood of the Property.
10. The Appellants allege that the Proposed Structure violates the applicable setback on the Property, and that the Owner cannot rely on the Variance to alter the setback, that the Proposed Structure is in fact in violation of the setback notwithstanding the Variance, and that to the extent the subject use or structure is nonconforming, Planning Board approval is required.
11. This matter was first heard on July 30, 2025 and at that meeting, the Board took up the question of their jurisdiction to hear the Appeal. All parties were in attendance.
12. Following presentations by the Appellant, Party-in-Interest, and CEO, the Board undertook deliberation of the question of whether the Appeal was timely, or if in the alternative, sufficient good cause existed for the Board to waive the requirement pursuant to Section IX(D)(1)(a) of the Land Use Ordinance ("LUO") and Section 16(H)(4)(a)(i) of the Shoreland Zoning Ordinance ("SZO"), any party must make an appeal "within thirty (30) days of the official, written decision appealed from, and not otherwise, except that the Board, upon a showing of good cause, may waive the thirty (30) day requirement."
13. Pursuant to IX(C) of the LUO and Section 16(H)(3) of the SZO, the Board undertook a de novo review.
14. As described in more detail below, by a vote of 3-1 (Alyson Meiselman recused, James Geary absent, and Scott Preston opposed) the Board determined that although the Appeal was untimely, that sufficient good cause existed to waive the ordinances' 30-day filing requirement, and that therefore the Board did have jurisdiction to hear the Appeal.
15. Upon determining that the Board had jurisdiction to hear the Appeal, the matter was scheduled for additional hearing on August 27, 2025, and for continued hearing on September 3, 2025, at which time the public hearing was closed and the Board took up deliberations regarding the merits of the Appeal. Member Geary, who was absent from

the July 30 meeting, participated in the August 27 and September 3 meetings. Member Meiselman was recused and did not participate as a Board member in the proceedings.

16. The matter was continued to September 16, 2025 upon which time, as described in more detail below the Board, by a vote of 4-1 (Member Preston opposed), voted to remand the Permit Application back to the CEO for referral to the Planning Board for further review pursuant to Section III of the LUO.

Jurisdiction

17. In reaching its conclusion that the Appellants had demonstrated sufficient good cause to waive the requirement that the Appeal application be submitted within 30 days of the issuance of the CEO's issuance of the Permit, a majority of the present and voting members of the Board found the following:
 - a. Pursuant to Section IX(D)(1)(a) of the LUO and Section 16(H)(4)(a)(i) of the SZO, any party must make an appeal "within thirty (30) days of the official, written decision appealed from, and not otherwise, except that the Board, upon a showing of good cause, may waive the thirty (30) day requirement."
 - b. The Permit was issued on December 18, 2024.
 - c. The Appeal was filed on July 3, 2025.
 - d. Approximately 197 days passed between the issuance of the Permit and the filing of the Appeal, making the Appeal untimely.
 - e. In determining whether good cause existed to waive the 30 day filing requirement, the Board considered several factors including (1) whether the appellant had notice of the issuance of the permit; (2) how much time had passed between the applicant receiving actual knowledge of the permit and the filing of the appeal; (3) whether the municipality violated its own ordinances regarding proper process; and (4) whether the permitholder violated the terms of the permit that was issued.
 - f. In testimony and filings, the Appellants asserted that they received actual notice of the Permit on June 3, 2025.
 - g. The Appellants acknowledged that they received earlier written notification regarding the proposed demolition of structures on the Property.
 - h. The CEO issued a notice, dated December 9, 2024, regarding the impending issuance of the Permit, but the Appellants deny that they received that notice at that time.

- i. The Board heard testimony from the CEO that the notice may have been erroneously not been sent to the Selmis at that time. The Board reviewed mailing lists that appeared to be produced by the Town that were inconsistent as to whether the Selmis were included on the mailing list for that notice. The CEO could not confirm that the notice was actually sent to the Selmis.
 - j. The Board heard testimony from the Selmis that the Selmis were not at their residence on Clark Point Road at the time of the onset of construction, and learned of the construction from emails from neighbors in June 2025. The Selmis produced emails indicating receipt of notice from other neighbors of the construction on or around June 3, 2025.
 - k. On June 4, 2025, the Selmis admitted that they attended a hearing telephonically regarding a separate appeal related to the issuance of the Permit of the Property.
 - l. The Selmis further admit that they submitted a letter to the Board in that separate matter on or around June 16, 2025.
 - m. The Selmis provided uncontroverted testimony that upon inquiring about filing an appeal, they were instructed by Town officials to withhold filing that appeal until the resolution of a then-pending separate appeal, which was decided on July 2, 2025.
 - n. The Selmis filed their appeal one day later, on July 3, 2025.
18. Based on the foregoing, the testimony and documentary evidence submitted by the Appellants, and the the testimony provided by the CEO, the Board determined as a matter of fact that the Appellants did not receive actual notice of the Permit until June 3, 2025.
19. The Board further determined that the length of time between the actual notice and the filing of the Appeal was reasonable in light of the amount of time that transpired and the instruction received by the Appellants to wait to file their own appeal until after the close of a related appeal in the matter.
20. The Board further considered the lack of clarity regarding the manner that notice was provided by the Town regarding the initial issuance of the Permit in determining whether the Appellants' delay was reasonable.
21. Based on the foregoing, the Board voted 3-1 that notwithstanding that the Appeal was filed more than 30 days after the issuance of the Permit, that sufficient good cause existed to waive the 30-day filing requirement pursuant to Section IX(D)(1)(a) of the LUO and Section 16(H)(4)(a)(i) of the SZO.
22. The Board therefore determined that it had jurisdiction to hear the merits of the Appeal.

Merits

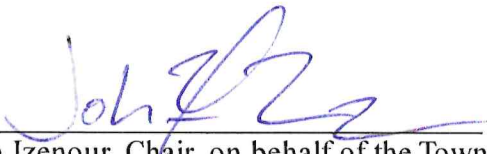
23. The Board reviewed the survey materials submitted by the Owner, specifically surveys provided by Herrick and Salsbury, and based on those representations, finds that the Proposed Structure would be located approximately .12 feet from the southeasterly boundary of the Property.
24. Based on representations by the Owner's architect and surveyor, and photographic depictions of the site included in the record, the Board finds that the Proposed Structure is within the footprint of the Existing Structure of the Property, and that that footprint has not changed since the issuance of the 2003 building permit for which those structures were permitted.
25. Pursuant to the current LUO, and the LUO in effect at the time of the issuance of the Variance, pursuant to Section V, Zone B(C)(1), structures must be located a minimum of 15 feet from any lot line.
26. By its plain terms, the Variance granted a 13-foot reduction in the applicable lot line setback. The applicable setback along the southeasterly boundary of the Property is therefore 2 feet from the property line, and not 15 feet from the property line.
27. The Proposed Structure is proposed to be located less than two feet from the southeasterly property boundary.
28. The proposed structure therefore would not conform to the applicable 2-foot property line setback on the Property would not constitute a conforming structure.
29. The Existing Structures, despite being located less than two feet from the property boundary line, were issued a lawful building permit in 2003, which was not appealed, and therefore have been in lawful existence since that time.
30. The LUO defines a "non-conforming structure" as "a structure which does not meet any one or more of the following dimensional requirements; setback, height, lot coverage or footprint, but which is allowed solely because it was in lawful existence at the time this Ordinance or subsequent amendments took effect."
31. The Existing Structures were in lawful existence by virtue of the 2003 building permit at the time of the most recent amendment to the LUO in 2020 and are therefore nonconforming structures notwithstanding the encroachment upon the southeastern property boundary setback.
32. Pursuant to Section III(C)(4) the use of a nonconforming structure may not be changed to another use "unless the Planning Board after receiving written application determines that the new use will have no greater adverse impact on the subject or adjacent properties and resources than the existing use."

33. Pursuant to Section III(C)(3) a nonconforming structure may be replaced “provided that a permit is obtained within one year of the date of . . . removal, and provided that such . . . replacement is in compliance with the dimensional requirements to the greatest practical extent as determined by the Planning Board in accordance with the purposes of [the LUO].”
34. The Permit application, by requesting the construction of a replacement structure in the footprint of the Existing Structures, and by proposing a new use for such replacement structure, is required under the LUO to receive Planning Board authorization in the first instance prior to the issuance of a building permit by the CEO.
35. To-date, the Planning Board has not undertaken review of the Permit application for compliance with Section III of the LUO.
36. Therefore, Planning Board review of the Owner’s application is required in the first instance before a Permit for the Proposed Structure may lawfully issue from the CEO.
37. For these foregoing reasons, the Board, by a vote of 4-1 (Member Preston opposed), hereby remands the matter back to the CEO for referral to the Planning Board for review pursuant to Section III of the LUO.

Pursuant to Section XI of the Town of Southwest Harbor’s Board of Appeals Ordinance and 30-A M.R.S. § 2691(F), any party aggrieved by this Decision may make an appeal to the Hancock County Superior Court within 45 days after the decision.

By unanimous vote of the members present and voting, the Board authorized Chair Izenour to sign this written decision on behalf of the Board.

Date: 9-17-2025



John Izenour, Chair, on behalf of the Town
of Southwest Harbor Board of Appeals