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March 10, 2023

Kittery Board of Appeals  
200 Rogers Road  
Kittery, ME 03904

Re: Request for Reconsideration: Murphy Miscellaneous Variation, 52 Goodwin Road

Dear Board Members:

I am writing on behalf of Matthew Brock, abutter to 52 Goodwin Road, to request that the Board reconsider its decision of February 28<sup>th</sup> in which the Board erred as a matter of law by creating a new, vacant, undersized lot. The new lot created by the Board is not only undersized, but also blocks a preferred access route to the property with far less environmental impact.

### **Creation of an Illegal Lot**

According to the draft findings of the Board, 52 Goodwin Road was conforming as to lot size, with 2.08 acres, and was non-conforming due to road frontage prior to the Board's vote. On February 28<sup>th</sup>, the Board voted to allow the Murphys to merge the two existing principal structures onto one lot and create a new, vacant lot at 52 Goodwin that would contain 1.19 acres and would now be nonconforming due to both road frontage and lot size.

Although the Board did not make any decisions related to future development of the new lot, it inferred that the lot could, in fact, be developed. However, according to the following provisions of the Town's Land Use Code, the new lot cannot be developed unless a hardship variance is granted for the nonconforming lot size.

Section 16.1.8.B(1) states that "no building, structure or land may hereafter be used or occupied, and no building or structure or part thereof may hereafter be erected, constructed, expanded, moved or altered, and *no new lot may be created except in conformity with all of the regulations herein specified for the zone where it is located, unless such structure or use exists as a legally nonconforming use or a variance is granted.*" To be clear, the action taken by the Board on the 28<sup>th</sup> was not a simple adjustment of a lot line between lots that each have a principal structure. Rather, the Board's actions placed both principal structures onto the same lot and created a new, vacant, nonconforming lot. Because the new lot at 52 Goodwin Rd. is not in conformance with all

of the regulations specified for the zone in which it is located, namely it is less than the required 80,000 square feet in area, the lot cannot be developed unless a variance is obtained.

In accordance with Section 16.1.8.C(2)(b), only nonconforming vacant lots of record may be developed. A nonconforming vacant lot of record is defined as “a single lot of record which was created prior to July 13, 1977, or subsequently created by legislative or judicial decision, which does not meet the area and/or frontage requirements of the district in which it is located; or is the result of legally authorized development created between July 13, 1977, and April 26, 1990, and became nonconforming as a direct result of the implementation of this title.” The new vacant lot that was created by the Board in its February 28<sup>th</sup> vote does not meet the definition of nonconforming vacant lot of record and therefore cannot be developed without a variance.

### **Erroneous Application of Miscellaneous Variation**

According to the draft findings, the Board is relying on Section 16.2.12.F in creating the new, vacant, nonconforming lot. According to the Town Ordinance, the Board is permitted to hear and decide on a miscellaneous variation request to permit variation in “nonconformance as prescribed in § 16.1.8.” Section 16.1.8(C)(6)(a)(1) allows for the use of a miscellaneous variation request for “relaxation of yard and other requirements **not involving area or width.**<sup>1</sup>” Thus, the utilization of a miscellaneous variation request for relaxation of lot area is not permitted by the Ordinance.

As noted above, the only way to approve creation of lot that does not meet minimum lot size requirements is through an undue hardship variance.

### **Erroneous Application of and Omission of Findings under Section 16.1.8.C.6(d)**

According to the Board’s discussion at the February 28<sup>th</sup> meeting and the Board’s draft findings, the Board reviewed the Murphys’ application as an adjustment of a common boundary line of nonconforming lots. First, that provision does not allow for the merger of both principal structures onto one lot, creating a new, undersized vacant lot. Second, the Board did not discuss any of the review standards of that section. If it had, it would likely have found that each resulting lot is not as conforming as practicable.

Under Section 16.1.8.C.6(d), if the CEO determines the proposed lot line adjustment makes the lot more nonconforming, the Board of Appeals or Planning Board (for property within the Shoreland Zone) must make additional findings. Here, the CEO determined that the lot at 52 Goodwin Road would become more nonconforming because it was conforming as to lot size prior to the Board’s decision and it contained a principal structure. Therefore, in order to approve the lot line adjustment, the Board of Appeals must find that each resulting lot is as conforming as practicable, and (1) each resulting lot is not less than 20,000 sq. ft. when not served by public sewer; or (2) or each resulting lot is not less than the smallest residential lot permitted under the Town’s land use base zones, Title 16.3, when served by public sewer. If the presence of wetlands brings either lot under the shoreland zone regulations, the Planning Board must find that each

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<sup>1</sup> As noted previously any relaxation of zoning standards can only be granted through an approved variance as asset forth in 30-A M.R.S. §4353.

resulting lot is as conforming as practicable to the DEP shoreland zoning standards and certain additional requirements.

When the result of the line adjustment is a new vacant lot that is just over half the required lot area, each resulting lot is not as conforming as practicable. The Board should reconsider its decision under the provisions above and refer the decision to the Planning Board if applicable.

### **New Lot Configuration Blocks Preferred Access**

As noted previously, Mr. Brock's primary objection to the reconfiguration of the lots is that it blocks off an existing access way to 52 Goodwin Road and forces the destruction of wetlands should someone be permitted to develop the new vacant lot. As you can see from the survey provided by the Murphys and attached here for reference, 52 Goodwin Road, in its original configuration, is bordered by both Tower Road and Goodwin Road. Access to the garage and dwelling on 52 Goodwin is via a driveway from Tower Road. The Board's decision to create the new vacant lot at 52 Goodwin blocks access from Tower Road. If development is allowed on the new lot, the only way to access a new structure on 52 Goodwin would be to build a long driveway that will require the filling of a significant amount of wetlands, unless the Murphy's grant access over their property from Tower Road.

Under the Land Use Code, the Planning Board can approve a driveway in a Resource Protection Overlay Zone only when they find that no reasonable alternative route or location is available outside the zone. The reconfiguration of the Murphy lots by the Board of Appeals interferes with the Planning Board's ability to consider the more environmentally responsible access way from Tower Road as an alternative, resulting in the unnecessary construction of a driveway through valuable wetlands.

We therefore request that the Board reconsider its decision and deny the proposed lot reconfiguration. If the Board decides to approve the reconfiguration of the lots, we ask that the Board require that the Murphys grant an access easement to 52 Goodwin Road over their Tower Road property in order to avoid the destruction of valuable wetlands.

We appreciate your time and consideration.

Sincerely,



Mary E. Costigan

cc: Matthew Brock