

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. YOR-26-59

CURTIS SAND & GRAVEL LLC et al.

Plaintiff/Appellant

v.

TOWN OF NORTH BERWICK

Defendant/Appellee

ON APPEAL FROM THE
YORK COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLANT

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INTRODUCTION

This appeal presents two questions that concern the limited authority vested in municipal planning boards to attach conditions of approval. The first is whether the Planning Board (the “**Board**”) for appellee Town of North Berwick (the “**Town**”) properly interpreted a provision in the Town’s Zoning Ordinance (the “**Ordinance**”) designed to guard against potential harm to waterbodies and the organisms that live in them to authorize the Board to impose a condition on its approval of the application by the appellant, Curtis Sand & Gravel LLC (“**Curtis**”), to operate a gravel pit (the “**Pit**”) that the Board intended to protect the terrestrial movements of a species that may visit those waterbodies. The second is whether the Board reasonably exercised its discretion in imposing that condition, despite it being significantly more restrictive than the recommendation of the expert state agency, the Maine Department of Inland Fisheries and Wildlife (“**MDIFW**”), that is entrusted and empowered by the Legislature to protect that species. Curtis respectfully submits that both of these questions must be answered in the negative. The Board committed an error of law and abused its discretion when it imposed a condition of approval that requires Curtis to maintain a 250’ setback between excavation activities and two freshwater wetlands, not as a means to protect those wetlands and the species that reside within them but to instead minimize potential harm to Blanding’s turtles that may (or may not) travel over the *land*

subject to the setback to reach those waterbodies (the “**Condition**”).¹ The only provision of the Ordinance relied on by the Board was Ordinance § 5.2.2, which prohibits excavation activities that “result in erosion, sedimentation, or impairment of water quality or fish and adequate life” (the “**Impairment Standard**”). However, that provision simply does not grant the Board the authority to impose such a condition. Curtis therefore appealed the Board’s decision to impose that condition to the Town’s Zoning Board of Appeals (the “**ZBA**”) and then to the Superior Court (*Mulhern, J.*), but both appeals were denied. Because imposition of the 250’ setback is premised on an error of law and constitutes an abuse of discretion, the Court should hold that Board erred as a matter of law and abused its discretion when it imposed the Condition and that, therefore, the Condition is unlawful; vacate the Superior Court’s judgment; and remand this matter to the Superior Court with instructions to remand it to the Board for further action on Curtis’s application for the Pit consistent with the Court’s decision. *See Nenfield Sand v. Town of Nenfield*, 2025 ME 45, ¶ 25, 335 A.3d 626.

STATEMENT OF FACT

The Pit is located on an approximately 120.3-acre property Curtis owns on Stub Marsh Road (the “**Pit Site**”), which is within the Town’s Farm & Forest zoning district. (App. 123–135.) The operation is comprised of two small, separate gravel pits—the 3.8-

¹ No Blanding’s turtle has ever been observed in or around those wetlands. There is also no evidence in the record that any activities authorized by Curtis’s permit for the Pit will cause any harm to or result in any impairment of those wetlands.

acre pit on the westerly side of the Pit Site (the “**West Pit**”) and the 7.8-acre pit on the easterly side of the property (the “**East Pit**”). (App. 135, 137, 139; *see* App. 67.) On the northwesterly side of the Pit Site is a wetland designated by MDIFW as a moderate value inland waterfowl and wading bird habitat (the “**IWWH**”). (App. 127, 129–130, 135, 142; *see* App. 67.) There are three other wetlands on the Pit Site: the approximately 3-acre wetland located northeasterly of the East Pit (“**Wetland #1**”), the 1.41-acre wetland near the southerly corner of the East Pit (“**Wetland #2**”), and the small wetland on the southerly side of the West Pit (“**Wetland #3**”). (App. 135; *see* App. 67, 127.)

Prior to submitting any application for the Pit, Curtis met at the Pit Site with an environmental specialist and the mining coordinator for the Maine Department of Environmental Protection (“**DEP**”), which is the state licensing authority for extraction activities like the Pit, to discuss the limits of the 250’ setback Curtis needs to maintain from the outer edge of the IWWH (the “**IWWH Setback**”).² (App. 127, 142; *see* App. 137–138.) All plans for the Pit show that extraction activities on the Pit Site will be located outside of the IWWH Setback and include a note that prohibits extraction operations within the IWWH Setback. (App. 135, 166, 212, 274, 276.) During their visit, the representatives of the DEP also assessed the other wetlands on the Pit Site,

² The performance standards for activities that involve the excavation of borrow, clay, topsoil and silt are set forth in Article 7, Chapter 3 of Title 38 and enforced by the DEP. 38 M.R.S.A. §§ 490-D, 490-H.

determining that they did not qualify as significant or trigger any statutory setback requirement or other protections. (App. 131–132, 142; *see* App. 138.) Nor does the Ordinance require a setback between those wetlands and any extraction activities.³ (App. 127, 138.)

Geoff Aleva (“**Aleva**”) of Civil Consultants, the engineering firm that represented Curtis before the Board, filed the first application for the Pit on August 9, 2021. (App. 123–135.) The Board found it to be complete on September 9, 2021 and held its first public hearing on the Pit on October 14, 2021. (App. 136–139, 140.) The Board also discussed that application at its meetings on November 18, 2021 and December 19, 2021. (App. 151, 156.)

On February 8, 2022, Aleva sent the Town a copy of the license (GPID# 365) the DEP issued for the Pit on the prior day. (App. 157–158.) That license is the only state approval Curtis needs to operate the Pit. 38 M.R.S.A. § 490-C.

The Board scheduled its next meeting on the application for the Pit for February 24, 2022. (App. 159–162.) At some point prior to that meeting, the Town received a copy of an email sent by Scott Lindsay (“**Lindsay**”), a regional wildlife biologist at MDIFW, to Mike Clark (“**Clark**”), the DEP’s mining coordinator, regarding natural resources “known to exist” on the Pit Site. (App. 192–193; *see* App. 161–162.) In his

³ Wetland #1, Wetland #2 and Wetland #3 do not qualify as a “[f]reshwater wetland” under the Ordinance, which is defined, *inter alia*, as an area in excess of 10 acres. Consequently, none of them trigger any mandatory setback under the Ordinance. (App. 99 (Ordinance § 3.2); *see* App. 127.)

email, Lindsay provided Clark with a map showing that the Blanding's turtle had been observed within the IWWH (but not Wetland #1, Wetland #2 or Wetland #3); indicated that the IWWH "may" provide habitat for that species; and stated that it was "critical" for Curtis to maintain the IWWH Setback to minimize any potential impacts on that turtle species. (App. 192–193; *see* App. 161–162.) Lindsay admitted that he was providing this feedback despite "not know[ing] the specific location of the[] proposed gravel pits" because he "ha[d] not been provided with a plan showing detail of th[e] project." (App. 192–193; *see* App. 161–162.)

During the February 24th meeting, the Board read Lindsay's email into the record. (App. 161–162.) Michael Peverett ("**Peverett**") of Civil Consultants then spoke on behalf of Curtis, reminding the Board that Curtis did not propose to conduct any extraction activities within the IWWH Setback, the Ordinance prohibited work within that area, and Curtis would voluntarily field locate the outer boundary of the IWWH Setback to ensure no activities occurred within its boundaries. (App. 161–162.) After that discussion, the Board decided to not take any action on Curtis's application for reasons unrelated to this appeal. (R. 233.)

On April 7, 2022, Aleva met with Lindsay and MDIFW biologist Derek Yorks ("**Yorks**") on the Pit Site to discuss the plans for the Pit (the "**Site Visit**"). (App. 175–176, 179, 202.) Roughly two weeks later, on April 19, 2022, Aleva emailed Lindsay and York asking when they "may have some information regarding buffers for the project." (R. 302.) After Aleva sent follow-up emails on April 28, 2022, Lindsay responded that

same day, indicating that he and Yorks were “in discussion with DEP and expecting a response[] soon” and that they would “keep moving the discussion along and . . . follow up with [Aleva] as soon as possible.” (R. 302.) Aleva sent four additional emails to Lindsay between April 28, 2022 and January 30, 2023, asking him for an update regarding the Pit. (R. 298–301.) Lindsay never responded. (R. 298–301.)

In the interim, Clark replied to one of Aleva’s many emails to Lindsay on August 3, 2022, stating that there were no pending conversations between DEP (the only state agency with permitting authority over the Pit) and MDIFW regarding the Pit and that, from DEP’s perspective, the Pit had received all state permitting Curtis needed to proceed:

I talked to our Division Director this AM and he confirmed that he is NOT in any pending conversations with DIFW and confirmed that DEP’s position still stands as stated—that the Operator of this pit has filed a complete NOITC and all relevant habitat (mapped IWWH habitat) or other issues relative to the Performance Standards for gravel pits have been addressed.

(App. 174; *see* App. 169.) After waiting in vain for more than nine months to receive feedback from MDIFW, Curtis, through Civil Consultants, submitted an amended application for the Pit on January 19, 2023. (App. 164–166.)

The Board again met to review the application for the Pit on January 26, 2023. (App. 167–172.) Aleva and Peverett appeared on Curtis’s behalf. (App. 167–172.) After Aleva read Clark’s email into the record, the Town’s code enforcement officer (“**CEO**”) updated the Board regarding his communications with DEP and MDIFW and the

“excessive amount of due diligence” Curtis had exercised to ensure that MDIFW did not have any issues with the Pit (even though any guidance they offered would only be advisory):

[The CEO] stated that he spoke to [Clark] on the telephone, and he forwarded his email on to [Lindsay] requesting that [Yorks], the biologist review [sic] the site. [The CEO] indicated that today, he spoke to a person higher up the chain with IF&W, who [was] surprised that they had not gotten back to the Town with anything in writing and he ensured that some statement would come through. [The CEO] understand that there are no major concerns raised by [MDIFW] [The CEO] stated than an excessive amount of due diligence ha[d] been done to try to make sure that the IF&W does not have any concerns with the site.

(App. 169–170.) After deliberating and voting on other aspects of the Pit unrelated to Curtis’s appeal, Board member Anne Whitten (“**Whitten**”) made a motion to approve the Pit “on the condition that there is no adverse response received within 30 days from IF&W,” which was adopted by a vote of four to one (The “**First Decision**”). (App. 171–172.)

On February 10, 2023 (i.e., more than 10 months after the Site Visit), Lindsay sent an email to CEO and Aleva, attaching a letter from Lindsay and a report by Yorks outlining MDIFW’s recommendations regarding actions that could potentially be taken to minimize impacts on the Blanding’s turtle (collectively the “**First MDIFW Letter**”). (App. 177–180.) Through the First MDIFW Letter, the department provided the following observations and guidance:

- The IWWH was “the only wetland on the [Pit Site] that [was] confirmed to be occupied by the Blanding’s turtle.” (App. 179.)

- MDIFW found the proposed 250’ setback from the IWWH to be “acceptable.” (App. 177.)
- Despite there being no documentation of the Blanding’s turtle in or around Wetland #1, Wetland #2 or Wetland #3, Yorks believed that Wetland #1 and Wetland #3 (collectively the “**Proximal Wetlands**”) were “suitable habitat for the Blanding’s turtle and . . . likely to be utilized by the population that has been documented in the IWWH.”⁴ (App. 179.)
- The Department “recommend[ed]”—but did not (and could not) require—that Curtis “limit[] disturbances around [the Proximal Wetlands] . . . to a distance of 250 ft, as measured from the wetland edge.” (App. 177.)

The CEO forwarded the First MDIFW Letter to the Board on February 13, 2023. (R. 322.) On February 18, 2023 the Town Attorney authored a letter in which she advised the Board that the First MDIFW Letter violated the condition of approval that the Board not receive any “adverse response” from the department within 30 days of the First Decision and that, therefore, the First Decision was not a final approval of the Pit and Curtis’s application remained pending before the Board.⁵ (App. 181–183.)

The Board placed the Pit on its agenda for its February 23, 2023 meeting. (App. 197–200.) That day, Aleva emailed the CEO, requesting that the Board table its

⁴ Despite the comments by Lindsay and York regarding areas on the Pit Site that could *potentially* serve as habitat for the Blanding’s turtle, MDIFW has never formally mapped or designated *any* land in the State of Maine, let alone any part of the Pit Site, as an “essential habitat” of the Blanding’s turtle. 09-137 C.M.R. ch. 8, § 8.

⁵ Curtis did not dispute that the recommendation by MDIFW to maintain a 250’ setback between extraction activities and the Proximal Wetlands violated the condition of approval attached to the First Decision.

consideration of the Pit until Curtis had an opportunity to address the issues raised in the First MDIFW Letter and confirming that Curtis intended to work with MDIFW to satisfy the department’s recommendations. (R. 396.) At its meeting, the Board voted to reopen the record on Curtis’s application, schedule a public hearing, and table the Board’s consideration of the Pit to provide Curtis an opportunity to submit revised plans that addressed MDIFW’s recommendations. (App. 197–200; *see* App. 70.)

On April 13, 2023, Lindsay sent a second letter to Aleva that significantly changed MDIFW’s recommendations regarding measures Curtis could take to mitigate the Pit’s potential impacts on the Blanding’s turtle (the “**Second MDIFW Letter**”). (App. 201–209.) Whereas Lindsay recommended in the First MDIFW Letter that Curtis maintain a 250’ *setback* between the outer edge of the Proximal Wetlands and any excavation activities in which *no* disturbances would occur, Lindsay revised that guidance in the Second MDIFW Letter by recommending only “that ground disturbances be limited *as much as practicable* within 250 ft.” of the Proximal Wetlands (the “**Limited Disturbance Area**”).⁶ (App. 177; App. 201 (emphasis added).)

⁶ Although Lindsay used the term “buffer” in both letters, the limitation on extraction activities he recommended in the First MDIFW Letter was a 250’ setback—i.e., a “straight distance requirement” between two features or objects in which a certain activity is prohibited, regardless of what measures are taken to minimize the potential impacts of that activity within the area subject to that setback. *See Wyman v. Town of Phippsburg*, 2009 ME 77, ¶ 13, 976 A.2d 985 (defining a setback as “a straight distance requirement in all circumstances without regard to any other conditions”). By contrast, a “buffer” is an area in which an activity can occur if properly mitigated, *Id.* ¶ 14. *That* is the type of limitation on extraction activities recommended by Lindsay in the Second MDIFW Letter. This distinction was not lost on the Board—at least at first. When the Board received and reviewed the First MDIFW Letter, it recognized that Lindsay had recommended a “setback” between extraction activities and the Proximal Wetlands within which exaction activities were prohibited and not a “buffer” in which those

First MDIFW Letter	Second MDIFW Letter
“We are recommending to [the] [T]own that the applicant <u>limits disturbance</u> around wetland # 1 and wetland # 3 . . . <u>to</u> a distance of 250 ft., as measured from the wetland edge. (App. 177 (emphasis added).)	“It is my recommendation, though not a requirement, that ground <u>disturbance be limited as much as practicable, within</u> 250 ft. of wetland #1 and #3[.] (App. 201 (emphasis added).)

Such measures, according to Lindsay, would “help maintain the habitat of these wetlands such that negative impact on a known population of endangered Blanding’s turtles[] will be minimized.” (App. 201.) Lindsay went on to recognize that Curtis had made revisions to the plan for the Pit “addressing these concerns,” including by adding a note requiring that “work will be phased with the [E]ast [P]it worked and restored before work commences on the [W]est [P]it,” which would “minimize the extent of ground disturbance at any one time.” (App. 201.) Lindsay also acknowledged that because the open pit area would be two acres or less, Curtis had complied with the applicable “DEP standard.” (App. 201.) Lindsay ultimately emailed the CEO a copy of the Second MDIFW Letter on April 24, 2023, explaining that it “reflect[ed] modifications to reduce potential impact on nesting turtles.” (App. 210.)

Curtis filed the final application for the Pit on August 30, 2023 (the “**Final Application**”), which included a revised plan reflecting the recommendations made by

activities would be limited (but permitted). (App. 199.) But later in the proceedings on Curtis’s application for the Pit, the Board (and the Town Attorney) conflated the two concepts (App. 237–239, 241–242, 253–256), despite Curtis repeatedly pointing out the critical distinction between them (App. 235, 248–251, 269–270).

MDIFW through the Second MDIFW Letter. (App. 211–219.) In the memorandum accompanying that application, Aleva provided a summary of Curtis’s work with MDIFW to draft that plan and explained how it addressed the department’s concerns about potential impacts on the Blanding’s turtle:

We have worked with MDIFW to review the project[’s] potential impacts and to provide protections along the proposed work areas. The attached revised project plan indicate notes and information that have been reviewed by MDIFW. They have also provided the [Second MDIFW Letter] that indicates review of the attached site plan and indicates that setbacks for wildlife protection are not a requirement of the MDIFW.

(App. 211.) The revised plan submitted by Aleva and reviewed by MDIFW showed that Curtis would phase excavation activities by completing work in the East Pit and reclaiming that area prior to commencing work in the West Pit; flag any potential turtle nesting site; and “contact [MDIFW] for direction” if a nest is observed. (App. 212.)

The Board scheduled its first meeting on the Final Application on September 14, 2023, at which time it voted to accept the Final Application and to schedule a public hearing for October 26, 2023. (App. 220; R. 441–442.) During that hearing, the Board received testimony from Curtis’s legal counsel through which he (a) summarized Curtis’s successful efforts in addressing MDIFW’s concerns with the Pit, as explained by Lindsay in the Second MDIFW Letter; (b) pointed out that the department did not find any evidence that the Blanding’s turtle had, in fact, travelled beyond the boundaries of the IWWH or had visited or used the Proximal Wetlands; (c) reminded the Board that DEP (not MDIFW) was the state permitting authority for gravel pits; (d) reiterated

that Curtis had obtained all necessary approvals from DEP; and (e) explained to the Board that unlike the First MDIFW Letter, the Second MDIFW Letter only recommended that Curtis avoid disturbances “as much as practicable” within the Limited Disturbance Area—not that Curtis maintain a 250’ setback from the Proximal Wetlands. (R. 235–236.)

After closing the public hearing, the Town Attorney advised the Board that it had “the authority to impose a condition requiring [Curtis] to implement a 250-foot buffer around Wetlands 1 and 3 to ensure that this proposal does not adversely impact or impair an endangered species that has been identified in the area or on this site.”⁷ (App. 237.) The Town Attorney then offered his unsolicited opinion—without any member of the Board asking him a question or for guidance on any provision of the Ordinance—that (a) the question of whether to impose a 250’ setback from the Proximal Wetlands implicated the Impairment Standard and (b) “a broad reading of aquatic life would include a turtle.” (App. 237.) The Chair of the Board, Jon Morse (“**Morse**”), responded by expressing his opposition to the implementation of a 250’ setback from the Proximal Wetlands on the grounds that “the turtles are still going to travel where they want and a 250-foot buffer . . . is not going to protect these turtles.”

⁷ This guidance was contrary to the opinion the Town Attorney offered in an earlier letter in which she correctly instructed the Board that it did not have jurisdiction over endangered species and only had the authority to enforce the provisions of the Ordinance applicable to Curtis’s application. (App. 152–155.)

(App. 237.) Afterwards, Peverett addressed the Board by reading into the record the portion of the Second MDIFW Letter in which Lindsay indicated that the revised plan for the Pit had satisfied the department’s concerns and pointing out that the letter contained “Mr. Lindsay’s acknowledgement that [Curtis] ha[d] addressed these concerns.” (App. 238–239.) Before the Board concluded the portion of the meeting on the Pit, Peverett reminded the Board that the Second MDIFW Letter “says limit disturbance and does not say no disturbance.” (App. 239.) Despite this reminder, the Board voted in favor of a motion to table consideration of the Pit until the Board’s December 14, 2023 meeting so Curtis could “come back with [a] new plan to include the 250-foot buffer and the incremental staging of excavation plans.” (App. 239.)

Following that hearing, Aleva submitted revised plans for the Pit showing the extent of the Limited Disturbance Area and the sequencing of extraction activities. (R. 474.) Even though MDIFW had acknowledged that Curtis’s proposal to phase work *between* the East Pit and West Pit was sufficient to address the department’s concerns, the phasing plan submitted by Aleva showed that Curtis would also phase work *within* each pit and reclaim each area in which Curtis completed extraction activities before commencing work in the next phased area, thereby voluntarily submitting to restrictions on excavation activities that exceeded MDIFW’s guidance.⁸ (R. 474.)

⁸ It is important to keep in mind that MDIFW had no direct jurisdiction or authority over the approval of the Pit. The only state agency with jurisdiction was the DEP, which granted Curtis the necessary permit. (App. 157–158.) Despite Curtis not being under any obligation to make any revisions to the

The Board reconvened to discuss the Pit on December 14, 2023. (App. 240–243.) During that meeting, Aleva provided an overview of the phasing of excavation activities between and within the West Pit and East Pit. (App. 241, 246–249.) In response, a member of the Board, David Ballard (“**Ballard**”), pointed out that Curtis proposed to conduct work within the Limited Disturbance Area, which prompted Aleva to *again* remind the Board that MDIFW recommended that Curtis *limit* disturbances to the degree practicable—not to maintain a 250’ *setback* from the Proximal Wetlands: “[T]hat 250-foot area is not - - it’s not a no-disturbance area. It’s a limited disturbance area and as agreed upon by the [MDIFW] report and indicated in that letter that was addressed to the Board.” (App. 248–249.) After Ballard continued to express confusion regarding the proposal to phase work that would occur, in part, within the Limited Disturbance Area, Aleva read into the record the portion of the Second MDIFW Letter in which Lindsay explained that MDIFW was not recommending *any* setback from the Proximal Wetlands. (App. 249–251.) The Board then voted in favor of imposing the Condition anyway by adopting the following motion:

I will move to adopt the [MDIFW] recommendation to impose a 250-foot buffer around wetlands 1 and 3 as identified in the [MDIFW] report where no excavation activity should occur, also in reference to [the Impairment Standard] and the [Ordinance] and also in our comprehensive plan at page 148 where it shows protection of the Blanding’s turtle.

plans for the Pit to satisfy MDIF, Curtis *chose* to comply with the department’s recommendations (as articulated in the Second MDIFW Letter).

(App. 253–254; *see* App. 71.) Following that vote, Whitten stated that the “Board ha[d] adopted the [MDIFW] recommendation to impose the 250-foot buffer” and instructed Curtis to “come back to the [Board] with another plan showing the work with that 250-foot buffer in place.” (App. 254.) Aleva then asked the Board to identify “where in the [MDIFW] letter it recommends a 250-foot buffer from wetlands 1 and 3?” (App. 254.) Whitten responded by stating that she was relying on Yorks’s report, which did not, in fact, contain any recommendation regarding a setback from those wetlands. (App. 255; *see* App. 179, 202.) The Board concluded the portion of the meeting on the Pit by voting to close the public record (even though the Board had only voted on imposing the Condition and had not rendered a final decision on the Pit), except to allow Curtis to submit a plan that complied with the Condition. (App. 258–260; *see* App. 71.)

The Board scheduled its final meeting on the Pit for April 11, 2024. (R. 279–281.) In advance of that meeting, Curtis submitted a memorandum from Civil Consultants; a letter from Curtis’s legal counsel; a plan showing the developable area of the East Pit and West Pit if Curtis had to maintain a 250’ setback from the Proximal Wetlands (the “**Setback Plan**”); and a plan proposing an additional fifth phase of extraction and reclamation activities in the West Pit. (App. 263–276.) According to the Setback Plan and accompanying memorandum, the requirement that Curtis maintain a 250’ setback from the Proximal Wetlands would reduce the yield from the West Pit and East Pit from approximately 223,000 cubic yards of material to just 36,000 cubic yards—i.e. by 84%. (App. 276.)

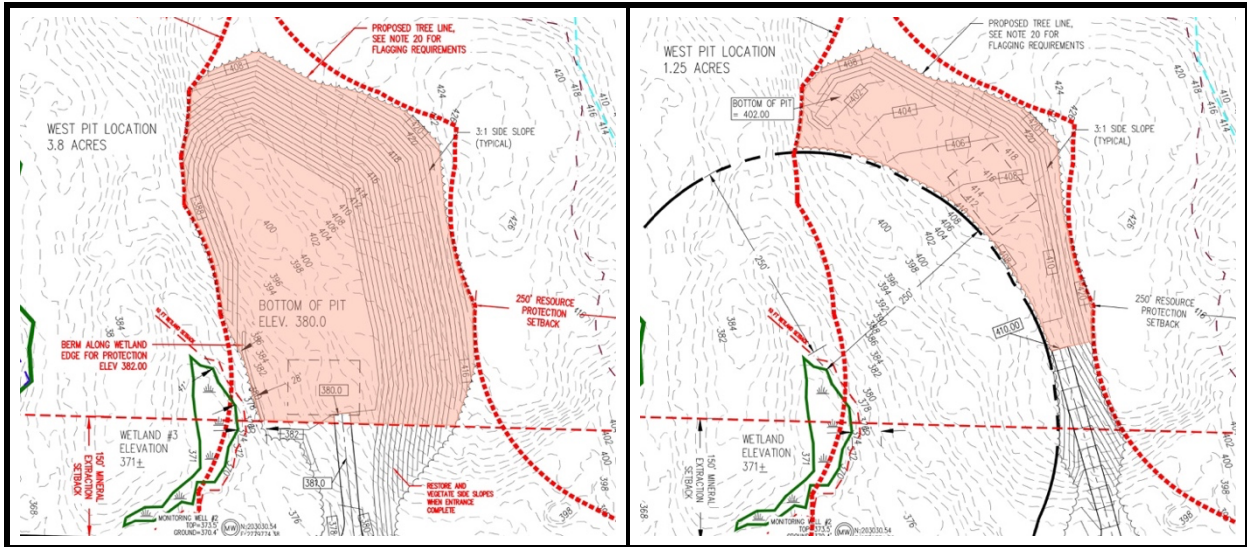


Figure 1: On the left is the portion of the plan sheet entitled “Proposed Mineral Extraction Plan” with a revision date of April 4, 2024 (the “**Extraction Plan**”). (App. 274.) The part of the West Pit in which Curtis could have extracted materials if the Condition did not exist is highlighted in orange. On the right is the portion of the Setback Plan with the limited area in which Curtis can currently extract materials highlighted in orange. (App. 276.)

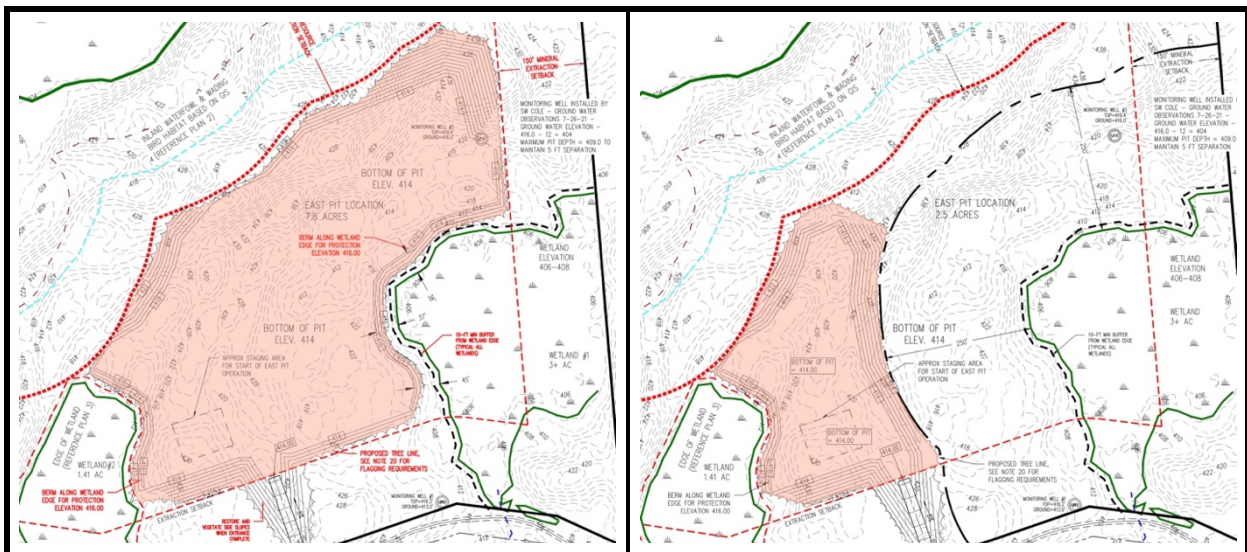


Figure 2: On the left is the portion of the Extraction Plan depicting the East Pit. (App. 274.) The part of the East Pit in which Curtis could have extracted materials if the Condition did not exist is highlighted in orange. On the right is the portion of the Setback Plan with the limited area in which Curtis can currently extract materials highlighted in orange. (App. 276.)

Aleva, in his memorandum, also pointed out to the Board that if Curtis developed the Pit as shown on the revised phasing plan, the maximum potential impact within the Limited Disturbance Area at any one time would be approximately 25%. (App. 263.)

This meant there would be no activities occurring within the Limited Disturbance Buffer *at least* 75% (and up to 93.6%) of the time. (App. 275.)

Phase	Inactive Limited Disturbance Area
I	80.25%
II	79.82%
III	74.20%
IV	77.40%
V	93.60%

These are the figures the Board had before it when it voted to approve the Pit with the Condition attached.⁹ (App. 263, 275; *see* App. 68–69.)

When the Board convened on April 11, 2024, it began the proceedings by purporting to open the record for the limited purposes of accepting, *inter alia*, the Setback Plan and the letter from Curtis’s counsel and then “close the record” on the Pit.¹⁰ (App. 279–280.) The Board then deliberated on the Final Application; voted unanimously to approve the Pit with the Condition in place; and adopted the “Findings of Fact and Conclusions of Law” (“**FOFCOL**”) as the writing evidencing its final decision on the Final Application (the “**Final Decision**”). (App. 67–82.)

⁹ These figures are based on the area of each pit in use during each phase. (App. 275.) The fact that Yorks determined that one of the Proximal Wetlands (Wetland #1) would only provide a potential habitat for the Blanding’s turtle during “the spring and early summer” means that the potential impact on that species would likely be less than they suggest. (*See* App. 179, 202.)

¹⁰ The Board did not reference any legal authority for excluding materials submitted to it by an applicant prior to the Board rendering a final decision on an application. (App. 279–280.)

In the part of the FOFCOL addressing the Impairment Standard, the Board interpreted it to prohibit *any* excavation activities that could impair “aquatic life,” including the Blanding’s turtle, on the grounds that the provision “appears to be broadly intended to protect water bodies and water courses, fish, and other species that make use of such water courses or water bodies from the adverse impacts of earth removal and mineral extraction operations.” (App. 75–77.) Based on that construction of the Impairment Standard, the Board concluded that the Condition was necessary—not on the grounds that it would protect the Proximal Wetlands or any species living within them but instead to “ensure that the [Curtis’s] operations will not impair Blanding’s Turtles travelling between the [IWWH] . . . and [the Proximal Wetlands].” (App. 75–78.)

The Board then explained its decision to impose the Condition, concluding that “[a]lthough the Second MDIFW Letter notes that [Curtis’s] phasing proposal addresses MDIFW’s general concerns,” it had decided to go *beyond* the department’s recommendation on the grounds that “the Board d[id] not see how anything less than *prohibiting* excavation activities within 250’ of Wetlands 1 and 3 w[ould] be sufficient to *limit* ground disturbances within these areas.” (App. 77 (emphasis added).) In other words, the Board, when explaining its decision to impose the Condition, (a) expressly recognized that MDIFW *did not* recommend that Curtis maintain a 250’ setback from the Proximal Wetlands; (b) opted to *disregard* MDIFW’s expert guidance regarding the measures Curtis could take to effectively protect the Blanding’s turtles by phasing

excavation activities; and (c) decided to impose a *stricter* condition that *the Board* felt was necessary to minimize impacts on the turtle’s terrestrial movements. (App. 77.) The only part of the Ordinance the Board ever identified as granting it such authority was the Impairment Standard. (App. 75–78; *see* App. 291.)

Curtis filed in administrative appeal of the Final Decision to the ZBA on May 7, 2024 on several grounds, including that the Board acted *ultra vires* in imposing the Condition, despite MDIFW not recommending that Curtis maintain a 250’ setback from the Proximal Wetlands, and misinterpreted the Impairment Standard to authorize the Board to require Curtis to comply with the Condition.¹¹ (App. 284–285.) The ZBA convened on August 12, 2024 and denied Curtis’s appeal. (App. 66.) Curtis then filed an appeal of the ZBA’s decision in accordance with 30-A M.R.S.A. § 2691(G) and Rule 80B of the Maine Rules of Civil Procedure to the Superior Court on September 24, 2024 (App. 57–65), which was denied on January 12, 2026 (App. 16–46).

STATEMENT OF THE ISSUES

1. Whether the Board erred as a matter of law by interpreting the Impairment Standard to authorize it to impose the Condition.
2. Whether the Board abused its discretion by attaching the Condition to its approval of the Pit.

¹¹ Because of ambiguities in the Ordinance as to whether appeals challenging a condition of approval had to proceed to the ZBA first or directly to the Superior Court and to avoid any possible prejudice, Curtis contemporaneously filed an appeal of the Final Decision to the Superior Court and a motion to stay that appeal until the ZBA decided Curtis’s administrative appeal. (App. 114–116.)

SUMMARY OF ARGUMENT

The Condition is unlawful for two independent reasons.

First, The Board erred as a matter of law when it interpreted the Impairment Standard to provide it with the authority to impose the Condition. For the reasons discussed *infra*, the plain import of its language is that it only regulates potential impairments to waterbodies and organisms living within those waterbodies—not the terrestrial activities of semi-aquatic species like the Blanding’s turtle.

Second, even if the Ordinance granted the Board that power, the decision to impose the Condition is an abuse of the Board’s discretion. The Condition was not a reasonable means of achieving the Town’s legitimate zoning objectives, *Total Quality, Inc. v. Town of Scarborough*, 588 A.2d 283, 285 (Me. 1991), and the Board “exceeded the bounds of the reasonable choices available to it” given that the Condition is stricter than the what MDIFW ultimately recommended (in the Second MDIFW Letter), *Forest Ecology Network v. Land Use Regulation Comm’n*, 2012 ME 36, ¶ 28, 39 A.3d 74. Because the Board’s decision to impose the Condition is premised on an error of law and constitutes an abuse of discretion, the Condition is null and void.

STANDARD OF REVIEW

When considering an appeal of a decision by a municipal board in which the Superior Court acted in an intermediate capacity, the Law Court reviews the board’s decision directly “for error[s] of law, abuse[s] of discretion or findings not supported by substantial evidence in the record,” *21 Seabran, LLC v. Town of Naples*, 2017 ME 3,

¶¶ 9–10, 153 A.3d 113, “without deference to the Superior Court's ruling on the intermediate appeal,” *Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048. The proper construction of an ordinance provision is a question of law considered by the Court *de novo*, and a municipal board's interpretation of the relevant language is not entitled to any deference. *Cannon v. Town of Mount Desert*, 2025 ME 86, ¶ 7, 345 A.3d 115; *Newfield Sand*, 2025 ME 45, ¶ 11, 335 A.3d 626; *Tominsky v. Town of Ogunquit*, 2023 ME 30, ¶ 22, 294 A.3d 142. The plain meaning of that provision controls if its language is clear on its face. *Grant v. Town of Belgrade*, 2019 ME 160, ¶ 14, 221 A.3d 112; *Rudolph v. Golick*, 2010 ME 106, ¶ 9, 8 A.3d 694. But if that language is ambiguous, the Court must “construe the terms of an ordinance reasonably, considering its purposes and structure and to avoid absurd or illogical results,” *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, 179 A.3d 920, and may rely on the canons of statutory construction to resolve any ambiguities, *Zappia v. Town of Old Orchard Beach*, 2022 ME 15, ¶¶ 10, 19, 271 A.3d 753.

The municipal board's actions constitute an abuse of discretion when its conduct “exceeded the bounds of the reasonable choices available to it, considering the facts and circumstance of the particular case and the governing law.” *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567.

ARGUMENT

I. THE BOARD ERRED AS A MATTER OF LAW WHEN IT MISINTERPRETED THE IMPAIRMENT STANDARD TO AUTHORIZE IT TO IMPOSE THE CONDITION.

Because the Board did not have the inherent authority to require Curtis to comply with the Condition and the Impairment Standard did not vest that power in the Board, it committed an error of law when it imposed the Condition on Curtis.¹²

Administrative tribunals like planning boards have no inherent authority; instead, they are creatures of statute with powers limited to those conferred upon it by the Legislature or arising by necessary implication. *Hopkinson v. Town of China*, 615 A.2d 1166, 1167 (Me. 1992). The Board’s “authority is no less nor more than the legislative body has given it.” *Kovack v. Licensing Bd. of City of Waterville*, 157 Me. 411, 414, 173 A.2d 554, 556 (1961). Consequently, the Board only had “the authority to make a zoning determination” if that power was “expressly granted by statute or ordinance.” *Noyes v. City of Bangor*, 540 A.2d 1110, 1111 (Me. 1988). This limitation on the power of a board applies with equal force and effect when it imposes conditions on an approval or permit:

“[A]ny conditions imposed must be authorized by the enabling ordinance and defined clearly when a permit is granted so that the permittee understands what is required. Permits and ordinances lacking those attributes may be vulnerable to challenge for vagueness or excessive delegation of the municipality’s legislative authority.

¹² The question here is not whether a municipal board generally has the authority to impose conditions of approval when attaching those conditions is expressly authorized by an ordinance; that is certainly true. Instead, it is whether the Impairment Standard, which is the specific provision of the Ordinance relied on by the Board, provided it with the power to impose the Condition.

Newfield Sand, 2025 ME 45, ¶ 17, 335 A.3d 626 (citations omitted). Therefore, if the Ordinance did not *expressly* grant the Board the authority to impose the Condition, then its decision to adopt that condition is null and void. *See Small v. Gartley*, 363 A.2d 724, 729 (Me. 1976) (explaining that decisions by a public agency that exceed the scope of the lawful authority granted to it is “null and void”).

Notably, the only provision of the Ordinance the Board referenced as the basis for its decision to impose the Condition was the Impairment Standard.¹³ (App. 75–78; *see* App. 291.) The problem for the Board—and the reason the Condition is illegal—is that the Impairment Standard cannot be reasonably interpreted to authorize the Board to

¹³ Municipal decisions stand or fall on the grounds on which they are based. *Day v. Town of Hiram*, 2025 ME 8, ¶ 13 n.6, 331 A.3d 365. This means that the Town cannot save the Condition by providing a *post hoc* justification for imposing it. Nor can the Condition survive if the Town can identify a provision of the Ordinance other than the Impairment Standard that could conceivably be interpreted to grant the Board the power to attach the Condition. But even if the Court *could* consider other parts of the Ordinance, no such provision exists. Notably, the general scope of the Board’s power to attach conditions to approvals is set forth in Section 6.9.7 of the Ordinance, which limits that power to conditions that are either “required elsewhere in [the] Ordinance” or that are designed to “mitigate any adverse effects on adjoining or neighboring properties”—not to protect endangered species. (App. 121–122.) That provision vests in the Board only the power to impose conditions when an ordinance provision expressly directs that such a condition *must* be attached to an approval. Ordinance § 5.2.2.d provides such a direction, instructing that the Board “*shall* specify such requirements in any conditional [u]se [p]ermit issued for earth material removal” that the Board “deems necessary or desirable to assure compliance” with the eighteen requirements listed in that section. (App. 107–108 (emphasis added).) But the Impairment Standard is not part of Ordinance § 5.2.2.d, and none of the requirements enumerated in that section concern endangered species (like the Blanding’s turtle) or setbacks from unprotected natural resources (like the Proximal Wetlands). (App. 107–108.) Likewise, the Condition cannot be considered lawful as a limitation on excavation activities that “mitigate[s] any adverse effects on adjoining or neighboring properties, which might otherwise result from the proposed use.” (App. 121–122.) Because the Board imposed the Condition based on its misguided belief that the Impairment Standard authorized it to restrict activities that might interfere with the terrestrial movements of an endangered species and not to satisfy a requirement of the Ordinance or mitigate potential impacts on neighboring properties, the Board simply lacked the authority under the Ordinance to attach the Condition to Curtis’s permit, rendering that conditional of approval void.

impose a condition of approval that regulates excavation activities that could potentially impede travel across the land from one waterbody to another.

The construction of the Impairment Standard is a pure legal question for the Court to answer. *Stiff v. Town of Belgrade*, 2024 ME 68, ¶ 12, 322 A.3d 1167. When interpreting it, the Court is obligated to look first to its plain language to divine its meaning. *Hartwell v. Town of Ogunquit*, 2015 ME 51, ¶ 11, 115 A.3d 81 (recognizing that the Court “do[es] not have the authority to ignore the plain language” of a zoning ordinance when interpreting its provisions). Here, the plain meaning and effect of the Impairment Standard is clear: it prohibits excavation activities that impair either the quality *of* a waterbody *or* aquatic species, like fish, living *in* that waterbody—not the terrestrial activities of species that may access or use that waterbody for a limited time or purpose. *See, e.g., Wavenock, LLC v. Dep’t of Transp.*, 2018 ME 83, ¶ 7, 187 A.3d 609 (“The first and best indicator of legislative intent is the plain language of the statute itself.”). The relevant portion of the Impairment Standard reads as follows:

[E]xcavation, processing and storage of soil, earth, loam, sand, gravel, rock, peat or any other mineral or organic deposits, which would result in . . . impairment of water quality or fish and aquatic life, is prohibited.

(App. 106.) The Impairment Provision does not list a series of independent clauses; it plainly does not read: “[E]xcavation . . . which would result in . . . impairment of water quality, fish, and aquatic life are prohibited.”¹⁴ (App. 106.) Instead, the provision

¹⁴ The use of the verb “is” in the Impairment Standard speaks to the disjunctive relationship between the two clauses contained therein. If the drafters of that provision intended the “or” to serve as a

prohibits excavation activities that result in the “impairment” of two, separate, yet related, categories of things, as reflected by the use of the disjunctive “or”: (1) “water quality” or (2) “fish *and* aquatic life.” (App. 106 (emphasis added).); *see Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 22, 868 A.2d 161 (“As a general rule, the use of a disjunction in a statute indicates alternatives and requires that those alternatives be treated separately.”); *accord Campos-Chaves v. Garland*, 602 U.S. 447, 457 (2024).

At no point did the Board justify the imposition of the Condition on the grounds that any excavation activities on the Pit Site would “impair[]” the “water quality” of any wetland, including the Proximal Wetlands. (App. 75–77.) Nor did the Board claim that it imposed the Condition to mitigate or avoid the possibility that excavation activities on the Pit Site would result in the impairment of any “fish.” (App. 75–77.) Therefore, whether the Impairment Standard granted the Board the authority to impose conditions of approval intended to protect the terrestrial movement of certain species depends entirely on if potential interference with that species overland travel qualifies, as a matter of law, as the “impairment of . . . aquatic life.”

To determine the meaning and scope of that term, the Court must consider the precise way it is used in the Ordinance. *Priestly v. Town of Hermon*, 2003 ME 9, ¶ 11, 814 A.2d 995. Tellingly, “aquatic life” does not appear in isolation. Instead, it is connected

conjunction, then the proper verb would have “are” to signal that all three subjects listed (water quality, fish and aquatic life) are collectively protected from impairment. But that is not how the legislative body of the Town decided to draft that provision, and the wisdom or reasonableness of that decision is not before the Court. *Odiorne Lane Solar, LLC v. Town of Eliot*, 2023 ME 67, ¶ 17, 304 A.3d 253.

by the word “and” to a related term—“fish.” It is this conjunction of “fish *and* aquatic life” that clearly settles that the Impairment Standard has nothing to do with the terrestrial activities of any species. When used in an ordinance or statute, “[t]he word ‘and’ is ordinarily a conjunction connecting words or phrases and expressing the idea that the latter is to be added to, or taken along with, the former.” *Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me. 1979); *accord Pulsifer v. United States*, 601 U.S. 124, 133 (2024). In the Impairment Standard, that word serves exactly that purpose, indicating that (1) the provision is violated only when there is impairment to *both* “fish and aquatic species” and (2) the meaning of “aquatic species” is something fish-like—not a species that spends significant portions of its life on land.

As to this first point, the use of the word “and” reflects a clear intent by the drafters of the Impairment Standard that it imposes a conjunctive requirement—i.e., that two things (fish and aquatic life) must *both* be impaired for any excavation activities to be prohibited by that provision. *See, e.g., Doe v. Forino*, 2020 ME 135, ¶ 8, 242 A.3d 1098.

As to the second point, it is a fundamental principle of ordinance interpretation that words are defined by the company they keep. *Robinson v. Bd. of Appeals of Town of Kennebunk*, 356 A.2d 196, 198 (Me. 1976). This is because “[s]tatutory language . . . cannot be construed in a vacuum.” *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quotation marks omitted); *Knoppers v. Rumford Cmty. Hosp.*, 531 A.2d 1276, 1278 (Me. 1987) (“[T]he meaning of a statute may be more than that of the separate words, as a melody is more than the notes[.]” (alterations omitted)). Therefore, the proper

interpretation of the term “aquatic life” is a definition that resembles the other term appearing in the same context—i.e., “fish.”

The Blanding’s turtle is not a fish-like aquatic species. (App. 268.) Federal and state agencies, including the U.S. Fish and Wildlife Service and MDIFW, define the turtle as “semi-aquatic”—i.e., a species that is only aquatic *in part*. (App. 268.) The reason the Blanding’s turtle is not a truly an aquatic species is that “they inhabit mosaic landscapes of upland habitat and both permanent and temporary bodies of water.” (App. 268.) That is not remotely fish-like, given that fish and other exclusively aquatic species perish if deprived of water for even a short period of time.

Because the Blanding’s turtle is not “aquatic life,” *as that term is used in the Impairment Standard*, the Board lacked the authority to impose the Condition under that provision. Indeed, it is precisely *because* the turtle is not purely aquatic that there is even a possibility that any extraction activities on the Pit Site would interfere with their travel, as Curtis at no point proposed to excavate materials from *within* any waterbody, including the Proximal Wetlands. That is the absurd paradox at the heart of the Board’s decision to impose the Condition: it was only by grossly misreading the term “aquatic life” in the Impairment Standard to capture *any* species that relies on access to water to survive that the provision became relevant to the approval of the Pit. The Court must reject such an absurd construction of the Impairment Standard. *See, e.g., Lippman v. Town of Lincolnville*, 1999 ME 149, ¶ 5, 739 A.2d 842.

The Board’s legal error was particularly egregious given that the context in which “aquatic life” appears includes another, related category that is protected from “impairment” by excavation activities: “water quality.” This reference to the water itself narrows the scope of the Impairment Standard significantly, eschewing considerations related to activities that have no possible impact *on* a waterbody. It is not what the term “aquatic life” might mean devoid of any context that matters when interpreting the Impairment Standard; it is instead the meaning of that word when connected by the conjunction “and” to “fish” and appearing in the same clause as “water quality.” *That* is what controls the meaning of “aquatic life”—and the scope of the Impairment Standard. *See, e.g., In re Scates*, 94 Me. 579, 48 A. 113, 113 (1901). For the Board to construe a standard clearly intended to prevent impairment to waterbodies and species that reside within them to allow it to impose a condition to protect the *terrestrial* movements of a species is a legal error.

Applying the other relevant canons of construction lead to the same result. Because the Impairment Standard places a limitation on the use of private property under certain, limited circumstances, it must be strictly construed and not expanded by implication. *City of Portland v. Grace Baptist Church*, 552 A.2d 533, 535 (Me. 1988). This “basic principle” extends to the construction of undefined terms. *Zappia*, 2022 ME 15, ¶ 10, 271 A.3d 753. As the Board recognized in the FOFCOL, it could *only* consider the Blandings’ turtle to be subject to the Impairment Standard by adopting a “broad reading of aquatic life,” which is not defined by the Ordinance. (App. 76; *see* App. 237.) But that

is impermissible when a narrower reading is possible. *Town of Union v. Strong*, 681 A.2d 14, 18 (Me. 1996). Because the Board could not base its decision to impose the Condition on a “broad” construction of the term “aquatic life” and that is precisely what the Board *admitted* that it did, it erred as a matter of law when it attached the Condition to its approval of the Pit.

The Impairment Standard must also be interpreted to avoid absurd results. *Banks v. Maine RSA No. 1*, 1998 ME 272, ¶ 4, 721 A.2d 655, *as amended* (Jan. 19, 1999). If the Blanding’s turtle qualifies as “aquatic life” under that provision, then so too would a moose or bear, the protection of which would certainly fall beyond the bounds of the Impairment Standard. The mere fact that an animal might spend some part of its life in or around a waterbody does not mean the Board can use the potential presence of that species on an applicant’s property as justification to impose a condition for the *exclusive* purpose of protecting the terrestrial movements of that species across that property. Consequently, the Board’s misreading of the Impairment Standard to provide it the power to impose a 250’ setback from the Proximal Wetlands to protect the overland travel of the Blanding’s turtle that might cross onto the Pit Site constitutes an error of law that renders the Condition null and void.

II. THE BOARD ABUSED ITS DISCRETION WHEN IT ATTACHED THE CONDITION TO ITS APPROVAL OF THE PIT.

Even if the Impairment Standard vested in the Board the power to require Curtis to comply with a condition of approval designed to protect the overland travel of the

Blanding’s turtle, which it most certainly does not, the Board abused that discretion and acted *ultra vires* by imposing a setback that bears no rational relationship to any reasonable zoning objective and that went beyond the recommendations of MDIFW.

The authority vested by an ordinance provision in a municipal tribunal to attach conditions of approval is not boundless; those conditions must be a “reasonable means of achieving the goals stated in the [o]rdinance.” *Total Quality*, 588 A.2d at 285; *Olevson v. Zoning Bd. of Review of Town of Narragansett*, 44 A.2d 720, 722 (R.I. 1945) (“That discretion, however, is not unlimited . . . [A]ny such condition and safeguard must be reasonable.”). That authority is further limited by standards set in the ordinance, as any delegation to a municipal board of the “discretionary authority to approve or disapprove applications . . . as the [b]oard thinks best serves the public interest” is unlawful on equal protection grounds. *Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 52 (Me. 1968); see *Newfield Sand*, 2025 ME 45, ¶ 17, 335 A.3d 626. Likewise, there must be an “essential nexus” between, on the one hand, the condition of approval and, on the other, a “legitimate land-use interest” to avoid a regulatory taking of private property. *Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267, 268 (2024) (“[W]hen the government . . . conditions a . . . permit for reasons unrelated to its legitimate land-use interests, those actions amount to extortion.”).

Assuming, solely for the sake of argument, that protecting the terrestrial movements of the endangered species like the Blanding’s turtle is a “legitimate land-use interest” of

the Town,¹⁵ the Condition cannot stand because it is not “reasonable means” of achieving that objective. *Total Quality*, 588 A.2d at 285. As the record reflects:

- MDIFW recommended to Curtis that extraction activities need only be “limited *as much as practicable* within 250 ft.” of the Proximal Wetlands. (App. 201 (emphasis added); *see* App. 76.)
- MDIFW determined that Curtis’s plan to phase work between the West Pit and East Pit and to flag potential Blanding’s turtle nesting areas were sufficient measures to achieve that objective and “address[]” the “concerns” the agency had with any potential impact on that species. (App. 201.)
- Curtis submitted a revised plan to the Board for approval that provided for phasing *within* each pit, thereby *exceeding* the measures MDIFW recommended that Curtis implement minimize any possible interference with the Blanding’s turtle’s access to the Proximal Wetlands. (App. 275.)
- That plan showed that only between 6.4% and 25.8% of the Limited Disturbance Area would be active at any one time, meaning that between 93.6% and 74.2% of that area would be undisturbed over the lifespan of the Pit. (App. 275.)
- One of the Proximal Wetlands (Wetland #1) would only provide a potential habitat for the Blanding’s turtle for less than half the year (i.e., during “the spring and early summer”), thereby further reducing any potential impacts on that species. (App. 179, 202; *see* App. 68.)
- The Blanding’s turtle has never been observed on any portion of the Pit Site other than the IWWH. (App. 179, 202; *see* App. 68.)

¹⁵ It is telling that the prefatory language to the section of the Ordinance in which the Impairment Standard is codified makes no mention of mitigating or preventing any harm to the natural environment. (App. 104 (vesting in the Board authority to consider plans “for the effective control and/or elimination” of “[u]ses which would be obnoxious or injurious because of odor, dust, smoke, refuse matter, fumes, noise, vibration or waste materials, or which would be dangerous to the health or safety of the community or to the community's disturbance or annoyance”).)

- The Board was aware that MDIFW found that Curtis had addressed the department's concerns. (App. 70–71, 77.)

Given these facts and circumstances, it is clear that the Condition is not a reasonable means of realizing any zoning objective that might conceivably be related to the Blanding's turtle because it is grossly disproportionate to the possible harm it was supposedly intended to mitigate. Consequently, the Board abused its discretion by imposing the Condition, which renders it null and void. *Robinson*, 356 A.2d at 201 (holding that when a municipal tribunal "clothed its actions with a discretion nowhere granted it by the Ordinance," its action was "ultra vires and void").

The unreasonableness of the Board's decision comes into further focus when one considers that the Condition is far more restrictive than the recommendation of the expert state agency tasked with protecting the very species the Board claimed to be safeguarding. As the Board itself explains in the FOFCOL, it knowingly decided to *disregard* MDIFW's final recommendations by attaching the Condition to its approval of the Pit:

Scott Lindsay, an MDIFW regional biologist, issued the First and Second MDIFW Letters, which contain certain recommendations to avoid take of the Blanding's Turtles known to inhabit the area Mr. Lindsay's Second MDIFW Letter also states: "[i]t is my recommendation, though not a requirement, that ground disturbance be limited as much as practicable within 250 ft. of wetland #1 and #3."

Although the Second MDIFW Letter notes that [Curtis's] phasing proposal addresses MDIFW's general concerns, the Board does not see how anything less than prohibiting excavation activities within 250 ft. of Wetlands 1 and 3 will be sufficient to limit ground disturbances within these areas

In order to ensure that the [the Pit] does not impair the endangered Blanding's Turtle species that is known to inhabit the IWWH Wetland, and likely travels between that Wetland overland to Wetlands 1 and 3, the Board finds that it is necessary to impose a condition requiring a 250 ft. buffer around Wetlands 1 and 3 in which no extraction activities, or hauling of materials, may occur.

(App. 76–77 (emphasis added).) In other words, the Board *knew* that Lindsay found that Curtis's plans to phase excavation activities on the Pit Site "addresse[d] MDIFW's general concerns" and that Lindsay had revised his guidance (in the First MDIFW Letter) by only recommending that "ground disturbance be limited *as much as practicable* within 250 ft. of Wetland #1 and Wetland #3" (in the Second MDIFW Letter). (App. 76–77.) Nonetheless, the Board still imposed an absolute *prohibition* on any and all excavation activities within 250' of either wetland because it assumed it knew better than MDIFW that the only way to protect the Blanding's turtle was to implement that setback. (App. 76–77.) The Board's decision to impose the Condition would at least be understandable if Lindsay had recommended in the Second MDIFW Letter that Curtis not conduct any extraction activities within 250' of the Proximal Wetlands, even though that guidance was nonbinding. But that is not what happened. Instead, the Board, after deferring review of Curtis's application so that guidance from MDIFW could be obtained and followed, proceeded to completely *ignore* Lindsay's recommendations, which reflected the cooperation between Curtis and MDIFW, and Lindsay's

representation to the Board that the revisions to the plans for the Pit “addressed” the department’s “concerns.”¹⁶

As the Town conceded in its brief to the Superior Court, the Board’s actions would *certainly* have been arbitrary if it had “disregard[ed]” MDIFW’s guidance when imposing the Condition:

Curtis claims that the imposition of the [Condition] was arbitrary, but the relevant inquiry is this: wouldn’t it have been arbitrary for the Planning Board to disregard MDIFW’s recommendation?

Defendant Town of North Berwick M.R. Civ. P. 80B Brief at 32. Curtis could not agree more. Given that is *exactly* what the Board did when it attached the Condition to Curtis’s permit, the Board abused its discretion by “exceed[ing] the bounds of the reasonable choices available to it, considering the facts and circumstance of the particular case and the governing law.” *Forest Ecology Network*, 2012 ME 36, ¶ 28, 39 A.3d 74; *Sager*, 2004 ME 40, ¶ 11, 845 A.2d 567. Consequently, the Condition is null and void.

CONCLUSION

For the foregoing reasons, Curtis respectfully requests that this honorable Court the hold that Board erred as a matter of law and abused its discretion when it imposed the

¹⁶ The fact that Curtis took additional steps to minimize activities within the Limited Disturbance Area after MDIFW found that Curtis had satisfied the department’s concerns renders the Board’s decision to impose the Condition all the more arbitrary and unreasonable. Even though MDIFW advised that phasing *between* the East Pit and West Pit was an adequate measure to protect the Blanding’s turtle, Curtis agreed to phase extraction activities *within* each pit, thereby reducing the amount of disturbed area at any one time to a greater degree than what MDIFW recommended. (App. 275.) Despite these actions, the Board still decided to attach the Condition. (App. 201; *see* App. 75–77.) That is an abuse of discretion.

Condition and that, therefore, the Condition is unlawful; vacate the Superior Court's judgment; and remand this matter to the Superior Court with instructions to remand it to the Board for further action on Curtis's application for the Pit consistent with the Court's decision.

Dated: May 14, 2026.



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