

Town of Canandaigua

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Zoning Board of Appeals Decision Notification

Public Hearing Opened: 10/20/2015

Meeting Date: 10/20/2015

Public Hearing Closed: 10/20/2015

Project: 041-15

<u>Applicant</u>	<u>Owner</u>	<u>Project Type</u>	<u>Project Location</u>	<u>Tax Map #</u>
Cheney & Blair LLP 40 South Main Street Canandaigua, NY 14424	Summit PPX 2911, LP 216 Genesee Street Chittenango, NY 13037	Interpretation of stop work orders/CEO Determination	3400 Poplar Beach Road	98.15-1-1.100

TYPE OF APPLICATION:

☐ Area Variance ☐ Use Variance ☒ Interpretation ☐ Rehearing

SEQR:

☐ Type I ☒ Type II

Variance/Interpretation Requested: Shall the decision of the Code Enforcement Officer be upheld issued in Notices of Violation dated April 20, 2015 in regards to §220-9A (1) – A. Preservation of natural features – No structure shall be built within 25' of the Mean High Water Mark Elevation of Canandaigua Lake.

☐ Unlisted

☐ See Attached resolution(s)

Negative Declaration Date:

Positive Declaration Date:

APPLICANT REQUEST:

☒ Overturned ☐ Denied ☐ Continued to:
☐ See attached resolution(s)

VOTING:

Bob Hilliard	<input checked="" type="checkbox"/> AYE	<input type="checkbox"/> NAY	<input type="checkbox"/> Abstained
David Emery	<input type="checkbox"/> AYE	<input checked="" type="checkbox"/> NAY	<input type="checkbox"/> Abstained
Kelly LaVoie	<input type="checkbox"/> AYE	<input checked="" type="checkbox"/> NAY	<input type="checkbox"/> Abstained
Chip Sahler	<input type="checkbox"/> AYE	<input checked="" type="checkbox"/> NAY	<input type="checkbox"/> Abstained
Terence Robinson	<input checked="" type="checkbox"/> AYE	<input type="checkbox"/> NAY	<input type="checkbox"/> Abstained

REASONS/CONDITIONS:

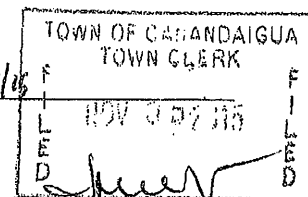
See attached Findings of Fact.

Certified By:

Terence Robinson
Chairman, Zoning Board of Appeals

Date:

10/29/15

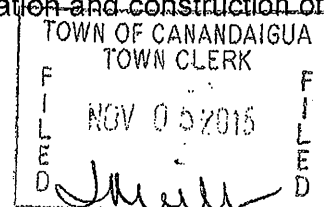


TOWN OF CANANDAIGUA
ZONING BOARD OF APPEALS

3400 Poplar Beach Road
Cheney & Blair LLP for Summit PPX 2911 LLC
CPN-041-15

FINDINGS

1. On March 4, 2015 Town of Canandaigua Code Enforcement Officer / Zoning Officer Chris Jensen, P.E., visited the property located at 3400 Poplar Beach Road as the result of a phone complaint received by the Development Office. While at the site Mr. Jensen observed the construction of a sea wall and related filling, grading, and excavation work.
2. The property is located in the RLD Zoning District.
3. No permits had been obtained by the property owner for the sea wall construction or the related filling, grading, and excavation work.
4. On March 5, 2015, Mr. Jensen issued a Stop Work Order to the property owner.
5. On April 20, 2015 Mr. Jensen issued the following four Notices of Violation – Orders to Remedy:
 - a. VIOLATION # 1: Town Code § 115-11(A) - Failure to obtain a floodplain development permit for construction activities and development in areas of special flood hazard. The Order to Remedy directed that corrective measures should be taken to restore the waterfront area to conditions prior to excavation and construction of concrete/stone wall and stairs.
 - b. VIOLATION # 2: Town Code § 165-7(B)(2) - Failure to obtain a 'Soil Erosion and Sedimentation Control' permit for activities within 500 feet of Canandaigua Lake that aggregate exceed the excavation or filing of more than five cubic yards of material. The Order to Remedy directed that corrective measures should be taken to restore the waterfront area to conditions prior to excavation and construction of concrete/stone wall and stairs.
 - c. VIOLATION # 3: Town Code § 220-64(C)(4) - Development within the Residential Lake District which exceeds such thresholds as would require a Soil Erosion and Sedimentation Control Permit to be issued. The Order to Remedy directed that corrective measures should be taken to restore the waterfront area to conditions prior to excavation and construction of concrete/stone wall and stairs.



- d. VIOLATION # 4: Town Code § 220-9(A)(1) - Construction of a structure (stone/concrete wall and stairs) within 25 feet of the mean high-water elevation of Canandaigua Lake. The Order to Remedy directed that corrective measures should be taken to restore the waterfront area to conditions prior to excavation and construction of concrete/stone wall and stairs.
6. The above-described Notices of Violation – Orders to Remedy were accompanied by Appearance Tickets 05709, 05710, 05711, and 05713.
7. On May 19, 2015, Cheney & Blair LLP, attorneys for Summit PPX 2911, L.P., sent a letter to Mr. Jensen notifying him that the property owner was appealing the issuance of the above-referenced Appearance Tickets and related Notices of Violation on the basis that the Town of Canandaigua lacked jurisdiction and authority to enforce local laws on lands that were below the Mean High Water Mark which are State lands and subject to DEC regulation only.
8. Summit PPX 2911, L.P. subsequently filed the appropriate Interpretation Application at the Town Development Office.
9. A public hearing was originally scheduled on this Interpretation Application for the July 21, 2015 Zoning Board of Appeals meeting. Said public hearing was adjourned at the request of Applicant until the August 18, 2015 Zoning Board of Appeals meeting. Prior to the August 18, 2015 Zoning Board of Appeals meeting Applicant again requested an adjournment and the public hearing was rescheduled for the September 15, 2015 Zoning Board of Appeals meeting. Prior to the September 15, 2015 Zoning Board of Appeals meeting Applicant again requested an adjournment and the public hearing was rescheduled for the October 20, 2015 Zoning Board of Appeals meeting.
10. The Zoning Board of Appeals conducted a public hearing on this Interpretation application on October 20, 2015. During the public hearing the Zoning Board of Appeals received information from the following individuals:
 - a. Town of Canandaigua Code Enforcement Officer / Zoning Officer Chris Jensen, P.E.
 - b. Don Cheney, Esq., of Cheney & Blair, LLP, attorneys for Summit PPX 2911 LLC.
 - c. Robert J. Fladd, of Fladd's Creative Stone, the masonry contractor who performed the work at the subject property.
 - d. Rocco Venezia, of Venezia Land Surveyors and Civil Engineers, a NYS Licensed Surveyor.

The information and discussion that was submitted as part of the Public Hearing at the Zoning Board of Appeals meeting on October 20, 2015, is hereby incorporated into these findings.

11. Code Enforcement Officer / Zoning Officer Chris Jensen, P.E., gave the Zoning Board of Appeals the following information in support of VIOLATION # 1:

- a. Notice of Violation / Order to Remedy, dated April 20, 2015;
- b. FEMA FIRM (Flood Insurance Rate Map) 360598 0020 C;
- c. Aerial Overlay of property and associated Special Flood Hazard Area;
- d. Photographs of active construction within the Special Flood Hazard Area, dated March 9, 2015;
- e. Photographs detailing the installation of the sea wall within the Special Flood Hazard Area, dated March 9, 2015;
- f. Site plan for 3400 Poplar Beach Road, dated January 28, 2014, last revised February 12, 2014, and approved by the Town Planning Board on February 13, 2014. The site plan specifies that the area was within a special flood hazard area. The approved site plan did not show any excavation, stripping, filling, or grading to be performed within the Special Flood Hazard Area, nor did it show the installation of a sea wall. Said site plan indicated that there was a "gentle slope" from the house to the lake;
- g. Photograph of the waterfront at 3400 Poplar Beach Road, dated October 26, 2010, detailing the natural grade of the property;
- h. Photograph, dated June 4, 2015, showing the filling performed in the Special Flood Hazard Area;
- i. Aerial image taken in March 2014 which showed the condition of the property located at 3400 Poplar Beach Road prior to construction.

12. Code Enforcement Officer / Zoning Officer Chris Jensen, P.E., gave the Zoning Board of Appeals the following information in support of VIOLATION # 2:

- a. Notice of Violation / Order to Remedy, dated April 20, 2015;
- b. Photographs, dated March 9, 2015, of active construction at 3400 Poplar Beach Road;
- c. Site plan for 3400 Poplar Beach Road, dated January 28, 2014, last revised February 12, 2014, and approved by the Town Planning Board on

February 13, 2014. The approved site plan did not show any stripping, grading, filling, or excavation to be performed, nor did it show the installation of a sea wall;

- d. Survey by Venezia Land Surveyors, dated April 15, 2015, which shows the lawn level at the newly installed sea wall to be more than 3 feet;
 - e. Sketch of approximate cubic yards of material based on waterfront area and height of the lawn at the newly installed sea wall. Said sketch clearly shows an increase of 3,375 cubic feet (or 125 cubic yards);
 - f. Photograph of waterfront, dated October 26, 2010, detailing the natural grade of the property at 3400 Poplar Beach Road;
 - g. Aerial image showing the approximate area of disturbance of 2,800 SF. Said image specifically indicated that the 2,800 SF area of disturbance did NOT include the 700 SF of disturbance associated with the previously approved patio. Said image specifically indicated that the 2,800 SF area of disturbance did NOT include the 2,000 SF area of disturbance associated with landscaping performed in June 2015;
 - h. Photographs, dated June 4, 2015 of the existing site conditions and associated grading that took place at 3400 Poplar Beach Road.
13. Code Enforcement Officer / Zoning Officer Chris Jensen, P.E., gave the Zoning Board of Appeals the following information in support of VIOLATION # 3:
- a. Notice of Violation / Order to Remedy, dated April 20, 2015;
 - b. Photographs of active construction, dated March 9, 2015;
 - c. Site plan for 3400 Poplar Beach Road, dated January 28, 2014, last revised February 12, 2014, and approved by the Town Planning Board on February 13, 2014. The approved site plan did not show any stripping, filling, or grading to be performed, nor did it show the installation of a sea wall;
 - d. Photograph, dated October 26, 2010 of the waterfront at 3400 Poplar Beach Road, detailing the natural grade of the property prior to the grading, filling, and excavation that took place as part of the sea wall construction;
 - e. Aerial image of the property with approximate area of disturbance shown to be 2,800 SF +/-;

- f. Aerial images of the property from March, 2014, detailing the property conditions prior to sea wall construction;
 - g. Photographs, dated June 4, 2015, detailing the existing site conditions and associated grading.
- 14. Code Enforcement Officer / Zoning Officer Chris Jensen, P.E., gave the Zoning Board of Appeals the following information in support of VIOLATION # 4:
 - a. Notice of Violation / Order to Remedy, dated April 20, 2015;
 - b. Photographs, dated March 9, 2015 of active construction at 3400 Poplar Beach Road;
 - c. Site plan for 3400 Poplar Beach Road, dated January 28, 2014, last revised February 12, 2014, and approved by the Town Planning Board on February 13, 2014. The approved site plan did not show any stripping, grading, or excavation to be performed, nor did it show the installation of a sea wall;
 - d. Sketch plan provided to DEC as part of Fladd's Creative Stone's permit application. The sketch details the wall as being constructed behind the Mean High Water Mark;
 - e. DEC Permit, dated December 31, 2014. The permit cover letter specifically states "[p]lease be advised this permit does not exempt you from obtaining any other necessary local approvals, such as a building permit." The permit specifies that the project is to "[i]nstall 76.4 linear feet of new stone and mortar retaining wall approximately 6-12 inches above the mean high water (MHW), except in one location to preserve an existing tree and install toe stone along and below MHW."
 - f. DEC Compliance letter, dated May 20, 2015, which points out that "[p]ermittee is responsible for obtaining any other permits, approvals, lands, easements and rights-of-way that may be required to carry out the activities that are authorized by this permit."
 - g. Photograph, dated October 26, 2010, of the waterfront detailing the natural grade of the property at 3400 Poplar Beach Road;
 - h. Aerial images of the property from March, 2014 detailing the property conditions prior to construction of the sea wall;
 - i. Photographs, dated June 4, 2015, detailing existing site conditions and associated sea wall.

15. Attorney Don Cheney submitted the following information to the Zoning Board of Appeals:

- a. Applicant received a permit from the Town of Canandaigua to "construct a 340 sq.ft. covered porch addition to the rear of the dwelling facing Canandaigua Lake per conditions of approval set forth at the 3/18/14 ZBA meeting." Said permit was issued on July 30, 2014, and required the payment of a fee in the amount of \$118.00.
- b. Applicant had received other permits from the Town of Canandaigua in the past, including:
 - i. Permit issued on August 5, 2014 to "install a permanent dock with single boat hoist – 720 sq.ft."
 - ii. Permit issued on June 8, 2015 for the "[i]nstallation of an irrigation system (less than 5 cu.yds. of excavation involved)."
- c. A black and white aerial photograph of 3400 Poplar Beach and the surrounding properties believed to be obtained from Ontario County's OnCor website.
- d. Portions of the NYS DEC Permit issued for 3400 Poplar Beach authorizing the installation of "76.4 linear feet of new stone and mortar retaining wall approximately 6-12 inches above mean high water (MHW), except in one location to preserve an existing tree and install toe stone along & below MHW, in accordance with the plans referenced in Natural Resources Condition No. 1 of this permit." The NYS DEC Permit had an effective date of 12/31/2014. Mr. Cheney's submission to the Zoning Board of Appeals included only pages 1 of 6 and 2 of 6 from the NYS DEC Permit, as well as two copies of the hand drawn plan for the sea wall submitted to the DEC by Mr. Fladd.
- e. Letter from NYS DEC, dated May 20, 2015, stating that "[t]he wall is completed and built in accordance with the approved plans. Though it was noted a portion of the new wall now extends below the mean high water elevation, likely because of shoreline grade changes as a result of the disturbance, construction of, and scour from, the permitted new wall."
- f. Copies of the Stop Work Order and Notices of Violation / Orders to Remedy issued by Code Enforcement Officer Chris Jensen.
- g. Copy of the notice/informational sheet distributed by the Town of Canandaigua Development Office in August 2015 that Mr. Fladd received as a contractor who regularly performs work in the Town.

- h. Photographs and copies of DEC letters of completion for projects Mr. Fladd has constructed. Specifically, the following sea wall projects were submitted:
 - i. 17106B W. Lake Road, Town of Pulteney, Steuben County
 - ii. 594 E. Lake Road, Town of Milo, County of Yates
 - iii. 4998 County Road 11, Town of Gorham, County of Ontario
 - iv. Lady of the Lake Suites, Town of Jerusalem, County of Yates
 - v. 4947 West Lake Road, Town of Canandaigua, County of Ontario
 - vi. 14438B West Lake Road, Town of Pultney, County of Steuben
- i. Photographs showing the retaining walls on the properties located to the North and South of 3400 Poplar Beach as well as the retaining wall located on the subject property.

16. Mr. Fladd gave the Zoning Board of Appeals the following information:

- a. Mr. Fladd has built sea walls on Canandaigua Lake for over 30 years.
- b. Mr. Fladd has never been required to obtain a Town permit to construct sea walls in the past, but has obtained DEC permits to do so.
- c. Mr. Fladd indicated that Code Enforcement Officer Dale Zukaitis conducted an inspection of the porch construction at the property in October 2014 and was made aware that the owner wished to build a sea wall. Mr. Fladd further indicated that Code Enforcement Officer Zukaitis did not indicate that he would have to obtain any further permits.
- d. Mr. Fladd described other sea wall projects he has done in the past 2-3 years.
- e. Mr. Fladd indicated that he constructed a patio, porch, and fireplace on the property in 2014. He further indicated that he utilized silt fences, straw bales, and soil and erosion control practices during the process and that inspections were done by Code Enforcement Officer Dale Zukaitis.
- f. Mr. Fladd indicated that soil was excavated as part of the porch construction and then used as fill behind the porch and in other parts of the property.

- g. Mr. Fladd indicated that he brought in 3 dump trucks worth of topsoil totaling 9 cubic yards of fill.
- h. Mr. Fladd testified that he graded and filled the lakeside portion of the property with the excavated soil and the 9 cubic yards of topsoil fill he brought in.
- i. Mr. Fladd indicated that he constructed a sea wall approximately 2.5' in height, 17" in depth, and 74' in length. He further indicated that doing so required excavation and filling behind the sea wall.
- j. Mr. Fladd stated that he created the drawings submitted to the DEC to apply for a permit.

17. Mr. Venezia gave the Zoning Board of Appeals the following information:

- a. Mr. Venezia stated that he created a survey of 3400 Poplar Beach showing the location of the sea wall in relation to the Mean High Water mark.
- b. Mr. Venezia stated that the footers of the sea wall were below MHW.
- c. When asked his opinion of applicant's submission to DEC, Mr. Venezia stated that he felt the numbers should have been questioned by the DEC agent processing the application.
- d. Mr. Cheney asked Mr. Venezia if it was his testimony that the wall is on DEC land, to which he replied "yes", according to the mean high water mark.

18. The Zoning Board of Appeals gives no weight to any evidence submitted about other sea walls built with or without the required Town permits. The determinations made by the Zoning Board of Appeals are specific to the interpretation application submitted for 3400 Poplar Beach Road only.

19. The Zoning Board of Appeals gives no weight to any evidence submitted about conversations with Code Enforcement Officer Zukaitis.

20. As to VIOLATION # 1, the Zoning Board of Appeals hereby determines that development was undertaken in an area of special flood hazard.

- a. Canandaigua Town Code § 115-11(A) states, in part, that "[i]t shall be unlawful to undertake any development in an area of special flood hazard, as shown on the Flood Insurance Rate Map enumerated in § 115-6, without a valid floodplain development permit."

- b. Town of Canandaigua Town Code § 1-17 defines "development" as follows: "[a]ny man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, paving, excavation or drilling operations."
 - c. Town of Canandaigua Town Code § 115-6 identifies Flood Insurance Rate Map Index No. 360598-0020 as identifying an area of special flood hazard.
 - d. The Zoning Board of Appeals hereby determines that the activities undertaken as part of the sea wall construction project at 3400 Poplar Beach included filling and excavation. Mr. Jensen established that there was grading of at least 2,800 SF that took place within the area of special flood hazard. Mr. Jensen further established that there was at least 1,000 SF of development included in the construction and filling for the sea wall project.
 - e. The Zoning Board of Appeals further determines that the area adjacent to the lake on 3400 Poplar Beach Road is located within Flood Insurance Rate Map Index No. 360598-0020. The development described above took place within the special flood hazard area identified on this map.
 - f. The Zoning Board of Appeals further determines that the development that was undertaken in an area of special flood hazard was not part of the prior approval granted in March 2014.
 - g. The Zoning Board of Appeals further determines that a Floodplain Development Permit was not sought for the grading and fill development that took place as part of the sea wall construction project.
 - h. The Zoning Board of Appeals further determines that a Floodplain Development Permit was required for the development that took place as part of the sea wall construction project pursuant to Canandaigua Town Code § 115-11(A).
 - i. Therefore, the Zoning Board of Appeals hereby affirms the Code Enforcement Officer's Notice of Violation / Order to Remedy for VIOLATION # 1.
21. As to VIOLATION # 2, the Zoning Board of Appeals hereby determines that site preparation was undertaken which in the aggregate exceeded stripping or grading of 500 SF or the excavation or filling of 5CY.
- a. Town of Canandaigua Town Code § 165-7(B)(2) requires that a permit be obtained for any stripping or grading which affects more than 500 SF or for

any excavation or filling of more than 5 CY of material that takes place within 500 feet of Canandaigua Lake.

- b. Town of Canandaigua Town Code § 165-5 defines "excavation" as "[a]ny activity which removes or significantly disturbs rock, gravel, sand, soil or other natural deposits."
- c. Town of Canandaigua Town Code § 165-5 defines "filling" as "[a]ny activity which deposits natural or artificial material so as to modify the surface or subsurface conditions of land, lakes, ponds or watercourses."
- d. Town of Canandaigua Town Code § 165-5 defines "grading" as "[t]he alteration of the surface or subsurface conditions of land, lakes, ponds or watercourses by excavation or filling."
- e. The Zoning Board of Appeals hereby determines that the activities undertaken as part of the sea wall construction project at 3400 Poplar Beach Road included filling, grading, and excavation.
 - i. Irrefutable evidence demonstrated that filling took place at 3400 Poplar Beach Road. Mr. Fladd stated that he brought in at least 3 dump trucks of topsoil of 3 CY each. Thus, at least 9 CY of topsoil was deposited that modified the surface of the land at 3400 Poplar Beach Road.
 - ii. Mr. Jensen established that there was grading of at least 2,800 SF that took place at 3400 Poplar Beach Road. A comparison of the photographs taken before and after construction of the sea wall clearly shows that the grade was significantly changed. Mr. Jensen further submitted drawings and an aerial photograph showing the amount of grading to be at least 2,800 SF. Thus, the surface of the land at 3400 Poplar Beach Road was clearly altered.
 - iii. Excavation clearly took place as part of the sea wall construction project. Soil was significantly disturbed at 3400 Poplar Beach Road as part of the sea wall construction project. Approximately 125 CY of grading took place adjacent to the lake.
- f. The property located at 3400 Poplar Beach Road is clearly within 500 feet of Canandaigua Lake.
- g. Therefore, the Zoning Board of Appeals hereby affirms the Code Enforcement Officer's Notice of Violation / Order to Remedy for VIOLATION # 2.

22. As to VIOLATION # 3, the Zoning Board of Appeals hereby determines that there was development in the RLD Zoning District that exceeded 1,000 SF.

- a. Town of Canandaigua Town Code § 220-64 requires site plan review for any development in the Residential Lake District which exceeds 1,000 SF and such thresholds as would require a permit to be issued pursuant to Chapter 165, Soil and Erosion Control.
- b. Town of Canandaigua Town Code § 1-17 defines "development" as follows: "[a]ny man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, paving, excavation or drilling operations."
- c. The Zoning Board of Appeals hereby determines that the activities undertaken as part of the sea wall construction project at 3400 Poplar Beach included filling and excavation. Mr. Jensen established that there was grading of at least 2,800 SF that took place within the area of special flood hazard. Mr. Fladd stated that at least 9 CY of topsoil was brought in as fill.
- d. For the reasons stated in paragraph 21, above, a permit would be required by Chapter 165 for the development that took place at 3400 Poplar Beach Road.
- e. 3400 Poplar Beach Road is located within the RLD Residential Lake Zoning District.
- f. Therefore, the Zoning Board of Appeals hereby affirms the Code Enforcement Officer's Notice of Violation / Order to Remedy for VIOLATION # 3.

23. As to VIOLATION #4, the Zoning Board of Appeals hereby determines that there is not sufficient information to affirm the Code Enforcement Officer's Notice of Violation.

- a. Multiple sets of figures were provided to the Zoning Board of Appeals which were not consistent as to Mean High Water Mark. Thus, in this specific case, the Zoning Board of Appeals was not able to determine where the sea wall was placed in relation to the Mean High Water Mark.
- b. Therefore, the Zoning Board of Appeals declines to affirm the Code Enforcement Officer's Notice of Violation / Order to Remedy for VIOLATION # 4.