

APPEAL SUBMITTED BY TODD MEROLLA



Page 1 of 7

August 31, 2009

e-mail: todd@TPMLIMITED.com

Susan Lessard, Chairperson
Department of Environmental Protection
Board of Appeals
17 State House Station
Augusta, Maine 04333-0017

ADMINISTRATIVE APPEAL

re: Application # L-24420-4P-A-N Southport
Southport Tax Map #25, Tax lot 12-3 (formerly
part of 12-1) Owners: Michael E. and Diane W.
Traphagen, DEP Field Determination ID # 6280
and July 31, 2009 documentation of tributary
stream location by Richard P. Baker, Shoreland
Zoning Coordinator

Please accept the following as an administrative appeal to the Board of Appeals regarding the unsigned and undated DEP "Department Order" Decision with cover letter dated August 2009 and received August 27, 2009 and with response due September 28, 2009 by 5:00PM. I am requesting a public hearing of this matter. Although the application number remains the same, this application bears little resemblance to the original. I am appealing this decision on the basis of a substantial amount of misinformation supplied by the applicant. This has resulted in the need for me to appeal for a review of the issues brought up in my letter of August 20, 2009 which was in direct response to DEP solicitation for comments and where I contest the Draft Decision of August 18, 2009. The subsequent permit decision, dated August 27, 2009, does not appear to address my comments as one would think it should have, at least to give some sense that there was a balanced review of the issues raised.

The third time the Southport Code Enforcement Officer, Ralph Spinney, found many major trees being cut down without a permit in the immediate area of the proposed dock and access, mostly in the 75' shoreland set-back, he called the DEP to the site. This is where this case began. Field Determination #6119 by DEP Enforcement Officer, Chris Redmond determined that there is a stream on the property. Subsequently, at the request of the applicant, there was a second Field Determination ID #6280, dated October 15, 2007 where both Chris Redmond and DEP Enforcement Officer Colin Clark confirmed the presence of a stream as defined by the N.R.P.A. There was yet another field determination by Rich Baker, Shoreland Zoning Coordinator, on July 28, 2009 at the suggestion of the applicant's agent, where the stream was confirmed to be a tributary stream which starts 31'-2" upstream (and closer to the northern property line,) than it had been located and surveyed at the direction of Traphagen's agent, Lauren Stockwell. Surveys currently referred to by the applicant continue to be based upon the previous mislocation.

The following will serve to cite omissions of relevant requirements, errors believed to have been made in interpretations, conclusions and relevant requirements:

Regarding "2, Existing Scenic, Aesthetic, Recreational or Navigational Uses" Site visits by Department staff does not include July 28, 2009 inspection by Rich Baker. In paragraph 4, which states "*The municipality issued an approval to the proposed project subsequent to this meeting on February 26, 2009,*" the Town of Southport is extremely limited under the auspices of the DEP, in its scope of review. Items in the Town's Land Use Ordinance such as the required determination of "operational need" for a dock permit are not able to be considered. (Consideration is strictly limited to property line set-back and potential navigational obstruction.) The Town relies upon the DEP to make a thorough review of the accuracy and veracity of information submitted by an applicant or his agent. On May 4, 2009, in a meeting between Acting Director Jim Cassida, Shoreland Coordinator Rich Baker, Southport Building Inspector Ralph Spinney, Southport Code Enforcement Officer Henry Berne, Traphagen's agent Lauren Stockwell and others, the DEP found the information submitted by the applicant and the applicant's agent, Lauren Stockwell, to be repeatedly false and/or misleading and therefore deferred the application decision to the Town of Southport. Southport has indicated to the applicant that a submitted building proposal would not meet set-back requirements and the plans have been

withdrawn by the applicant. It is questionable whether any building or septic plans for this parcel will be approved because of shorelands, wetlands and tributary stream set-backs along with topographical and deed restrictions and limitations. Poor stewardship of this lot has resulted in unsightly piles of slash and the disturbance of the tributary stream bed as illegally felled trees were dragged through by machinery following Traphagen's instructions to Ken Camera of Boothbay Tree and Landscape to "clear the land for construction."

In paragraphs 6 and 7, the decision reads: "*The interested party submitted a report entitled "The Cameron Point Excavation at Southport Island, Maine" which outlines findings of an excavation that was conducted by the Maine Archeological Society in 1956. The interested party stated that a number of artifacts were found during this excavation. As proposed by the applicants, the proposed pier system will be constructed near the northeast corner of the property. The applicants stated that the shell midden is located on an abutting property. The applicants state that due, (sic) the midden will not be disturbed or altered by the construction of or activities associated with the proposed project.*"

I have previously submitted a copy of this report which clearly states, (not I,) that exploration at this site (on the Traphagen lot,) was undertaken in 1963 and 1964 in eleven 4'x8' grids. In this limited area, a number of fire pits were found, the deepest at 38". The following artifacts of significance were found: 13 points, 6 scrapers, 3 knives, 4 celts, 1 pestle, 4 bone awls, 3 bone fish hooks, 2 bone needles, 1 bone ornament, 5 bone harpoons and numerous potsherds, including painted pottery. Pictures are included of many of these. The report indicates that further research is needed and intended. This site is well-known to many Southport area residents who helped the professionals in the initial dig. The excavated area represents a small part of the shell midden area of approximately 3,000 sq. ft. where the mound extends northward along the shore and includes the proposed dock site. Early in June, as Southport Code Enforcement Officers measured and found a major discrepancy between surveyor-staked 75' Shorelands set-back and an actual measurement of 58', Code Enforcement Officer Henry Berne observed and remarked about the shells visible in the shell midden mound at the location of the proposed dock.

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It is more than obvious that, as the applicants have stated that "the shell midden is located on an abutting property," the Maine Historic Preservation Commission, the Passamaquoddy and Penobscot Tribes and other potentially interested State Departments and groups are not likely to be concerned with the proposed construction. Even so, in a letter which has been previously submitted to the DEP, Bonnie Newsom, THPO of the Penobscot Nation states: "If Native American cultural materials are encountered during the course of the project, please contact me."

I believe that it is appropriate to question a thorough review by DEP staff of the above information when a conclusive statement in this decision reads: "*The Department considered the comments submitted by the interested party. Based upon information in the record, the site visits, the Visual Impact Assessment, and conclusions made by MHPC, the Passamaquoddy Tribe and the Penobscot Indian Nation, the Department finds that the proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource.*"

In Section 4 of the Decision, "Habitat Considerations," mention is made that "*According to Geographic Information Systems (GIS) mapping software, there are no mapped areas of significant wildlife habitats or inland fishery habitat associated with proposed project site.*" Regardless of any GIS mapping, there exists on the subject lot deer, moose on occasion, rabbits, skunks, porcupine (many,) mink, squirrels, red fox, fishers, chipmunks, red squirrels, ospreys, eagles, other migratory birds, salamanders, turtles, a large variety of wetland plant life and lady slippers. The applicant's agent has also been deficient with regard to identifying abundant marine life in the area of the proposed dock. Lobstering, for instance, takes place daily in the exact location of this proposed dock. There are two lobster buoys in this spot today.

Also stated in the Decision, Section 6, paragraph 2: "Wetlands and Waterbodies Protection Rules: *The interested party asserted without documentation that the proposed pier, ramp, and float are sited within 30 feet of an existing stream. For this reason, the interested party contends that the proposed project violates regulatory set-back from protected natural resources. The applicants*

submitted a site plan, entitled "Traphagen Parcel," prepared by Knickerbocker Design Company, dated November 6, 2008 with the latest revision date being February 25, 2009. The survey indicates that the proposed project site is approximately 250' north of the outlet of the stream." I wrote in my response to the draft decision: "Consideration of "operational need" is not supported by someone attempting to improve the commercial value of a parcel of land which has not even been established as a building lot. Would this requested permit then be used as authorization to cut down even more trees to open up the view of the water from the advertised lot? Access to this proposed dock is within approximately 30 feet of the documented tributary stream/wetlands of special significance."

As surveys submitted to the DEP show, even the furthestmost-constructed pathway from the stream, running along the northern property line, which would access this proposed dock, would involve cutting even more trees within the 75' shoreland set-back and would come within approximately 30 feet of the tributary stream as recently established by Rich Baker, which by definition, is a wetland of special significance. This has nothing to do with the outlet of the stream. The Land Use Ordinance of the Town of Southport establishes a 75 foot set-back from a tributary stream.

In Section 6-A "Avoidance," the applicant states: *"The applicants investigated the use of nearby boat launching facilities and marinas. The only public pier is on Southport Island and is known as the Newagen Town Landing. There is no large boat launch at this facility; the pier allows use by skiffs only. Further, there is a waiting list of several years for moorings in Townsend Gut. The Town of Southport has recently bought a parcel in Cozy Harbor and the construction of facilities, such as a pier, are still in the discussion stage. The waiting list for Cozy Harbor is over 10 years. A boatyard is present in the Town of Southport, known as the Boothbay Region Boatyard. However, the applicants stated that this facility is considerably costly. Due to the restrictions presented by these locations, the applicants determined that these alternatives were not feasible. The applicants acknowledged that they have a pier on property that they own in the Town of Boothbay. However, the applicants wish to have access to the resource on the site of the proposed project."* With all this detailed investigation, including mention of the Newagen Town Landing which is more

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than 5 miles away, the applicant fails to mention a large, free, public launching ramp and dock less than 1/2 mile away from the proposed dock site, also on Townsend Gut, next to the Southport Bridge. In addition, whereas the applicant states the necessity of the proposed dock for his 39 foot and 20 foot boats, he no longer owns the 39 foot boat and maintains the 20 foot boat at his nearby, new 40 foot dock (which was also established upon the basis of his briefly owned 39 foot boat.) Regarding "Avoidance": *"No activity may be permitted if there is a practicable alternative to the project that would be less damaging to the environment. Each application for a Natural Resources Protection Act permit must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist."*

Citing a lack of *operational need*, the DEP recently denied another permit application for a dock at the first house on the left on Joppa Road, Southport: Map 4, Lot 13. The spec house was under construction by Poland Builders and, of course, no one was in residence. Verification of this is also available through the Southport Building Dept.

Beth Callahan, Case Manager at the DEP, explained to me that all the information submitted into the applicants' file by the applicants' agent must be considered to be true as the agent was required to sign an affidavit that all information submitted is true. It is with this understanding that the DEP "finds that the applicants have avoided and minimized wetland and waterbody impacts to the greatest extent practicable, and that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of this project." Thus, many of the DEP conclusions reached within this decision have no more validity than the many misstatements offered by the applicants and the agent of the applicants.

The applicant is on record as having told the DEP that his intent is to build a "spec" house. Granting a dock permit for the purpose of making a lot more attractive to a buyer is truly not a DEP function. I trust that the Board will find pivotal conclusions reached in this decision, which were based upon misinformation, errors and omissions, to be just cause to reverse the Commissioner's decision to approve this permit.

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Please include the twelve letters which I have previously submitted to the file in response to the continually changing specifications of this application and in protest to the requested DEP approval. The dates of my letters are: May 19th, 2008, November 12th, 2008, November 17th, 2008, January 8th, 2009, January 26, 2009, January 27th, 2009, February 20, 2009, February 26th, 2009, March 10th, 2009, March 11th, 2009, April 17th, 2009 and August 20, 2009.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Park Merolla". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke at the end.

Todd Park Merolla
Cc: M. Cooper, Esq.

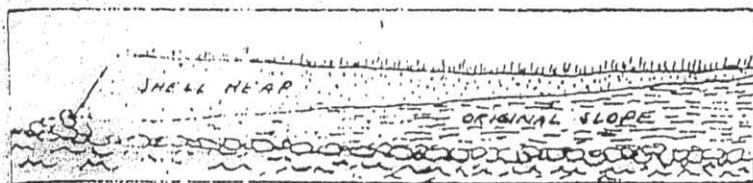
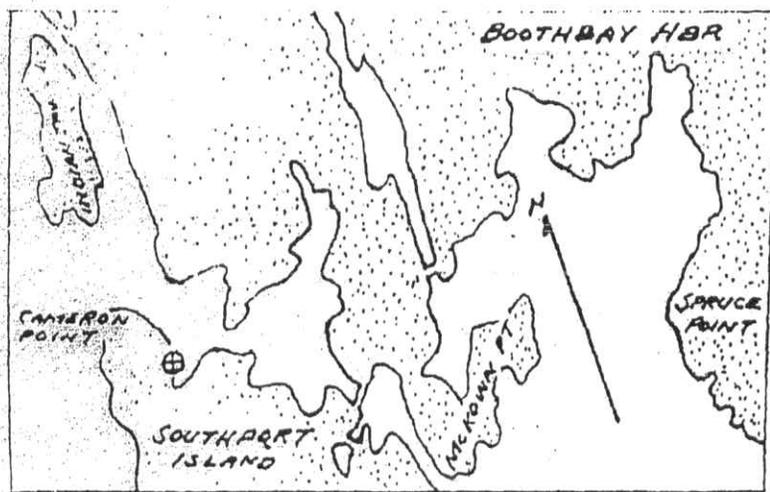
By Harry G. Nickel

Cameron Point is located about 2 miles west of Boothbay Harbor on the northern end of Southport Island, which is connected to the mainland by a bridge. The dig is at one of the many shell heaps that dot this coastal area of Maine. These sites represent the summer fishing grounds of the American Indian.

This site was called to the attention of the Society in 1956. However, it was not until the summers of 1963 and 1964 that any serious exploration was undertaken. The first grid, 4' x 8', yielded one fire pit about 12" below the surface. Two additional fire pits were uncovered; the lower one being at a depth of 38". The work to date covers a total of 11 grids, and has yielded the following artifacts of significance: 13 points, 6 scrapers, 3 knives, 4 celts, 1 pestle, 4 bone awls, 3 bone fish hooks, 2 bone needles, 1 bone ornament, 5 bone harpoons, and numerous potsherds. We have had fair success in reconstructing some of the pottery. The following drawings show many of the typical artifacts we found.

Since the presence of a spring nearby may indicate a permanent camp site, we intend to carry on our work. A full report will be issued when this is completed.

We acknowledge the able assistance of our daughter, Mae Beth. Others participating in the work included Gerald Dunn, Maurice Blaisdell, Jack Brown, Mr. and Mrs. Demers and their son James, Norman Fossett, Jack Nickel, Mrs. Florence Elliott, Arthur Benner, and Mr. and Mrs. M. F. Camp.

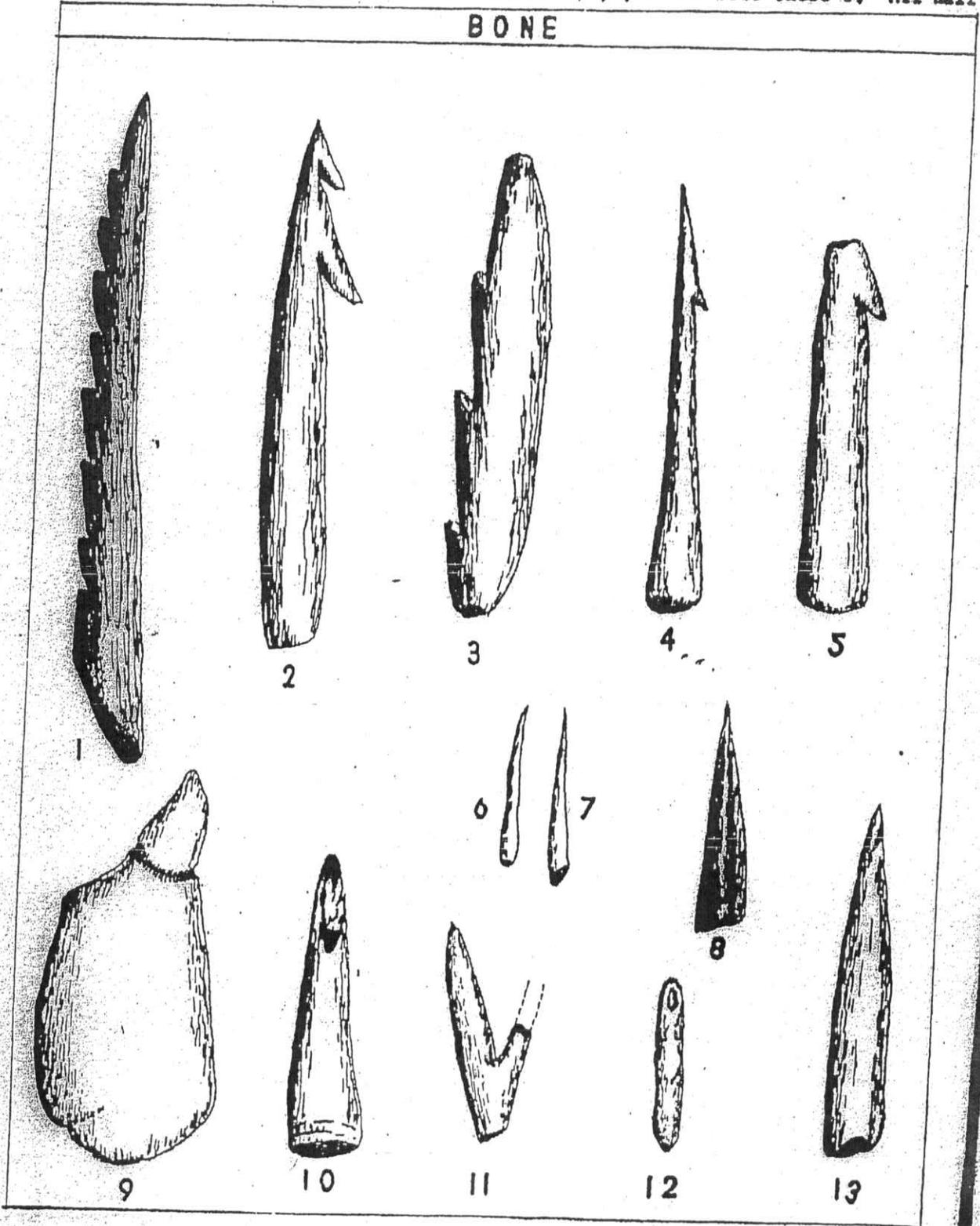


STRATIGRAPHY

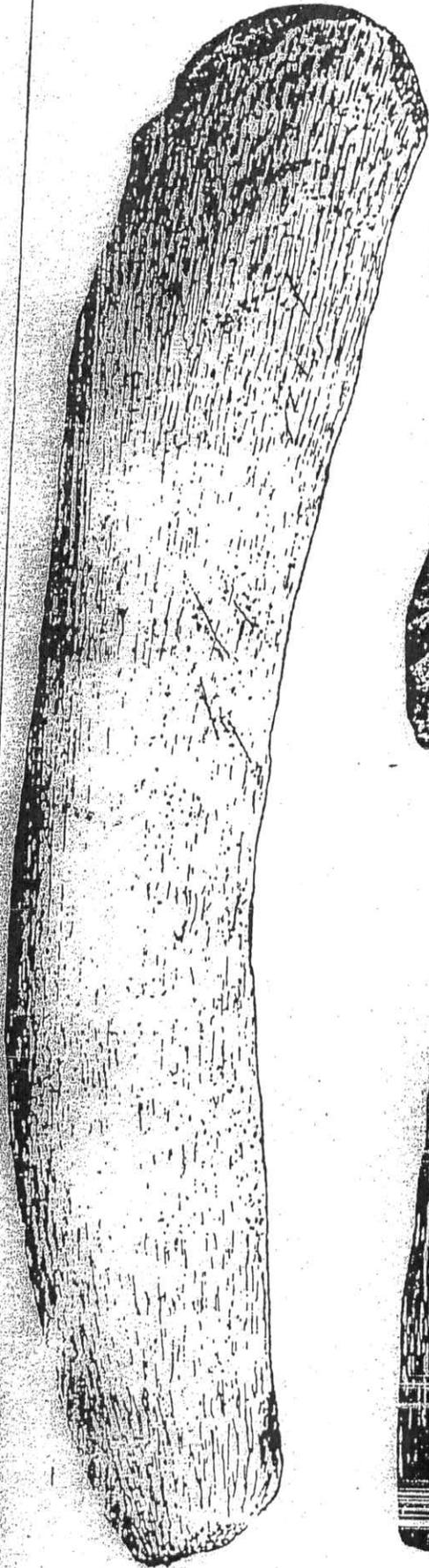
- 3" Sod
- 22" Broken Shells
- 2" Earth
- 4" Earth & Shells
- 2" Charcoal
- 3" Dirt, Ash, & Charcoal
- 2" Charcoal
- 10" Sand
- Bedrock

KEY TO DRAWINGS

- Page . Harpoons 1,2,3,4,5. Awls 6,7,8,13. Polished ornament, 9, Fishing
spear 11. Needles 10,12. All full scale.
Page . Pestle 1. Side notched points 2,3. Corner notched point 5. Small
stem points 4,10. Jasper Thumb Scrapers 6,7. Celt 8. Stemless knife 9. Full
Page . Rimsherd 1,5. Pot 3. Potsherds 2,4,6,7. Steatite shard 8. All half scale.



STONE



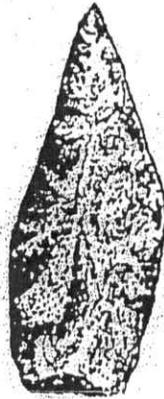
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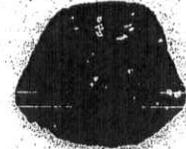
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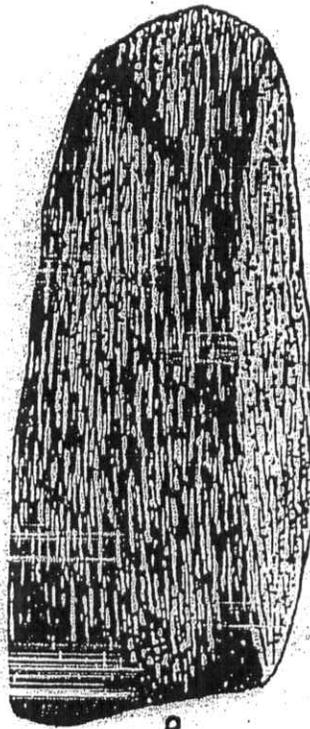
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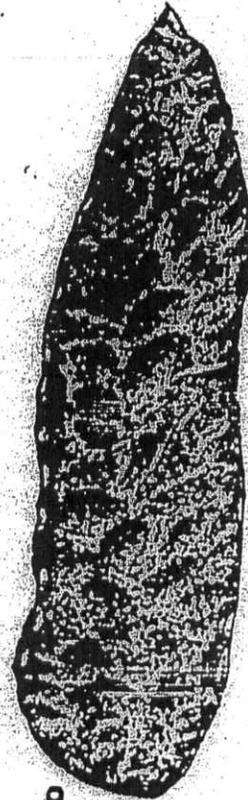
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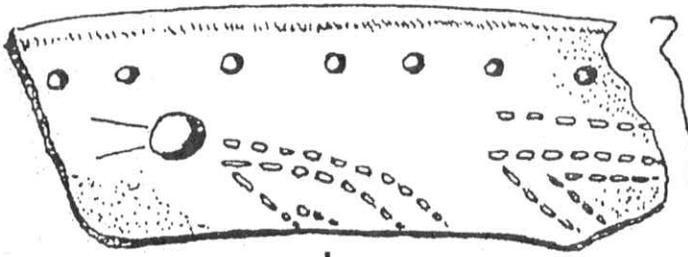


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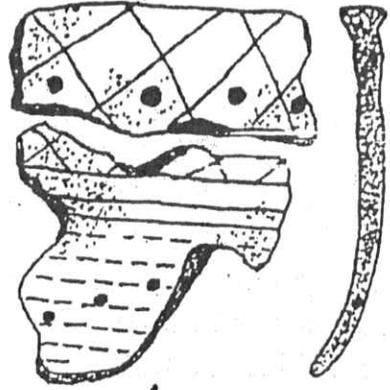


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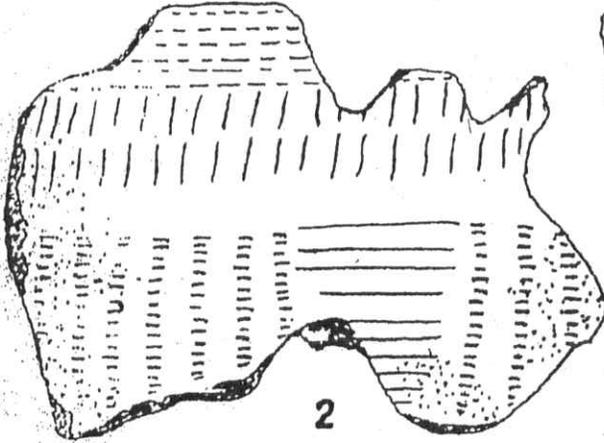
POTTERY



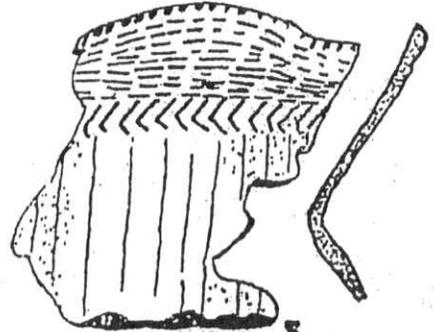
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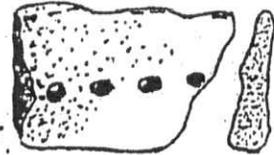
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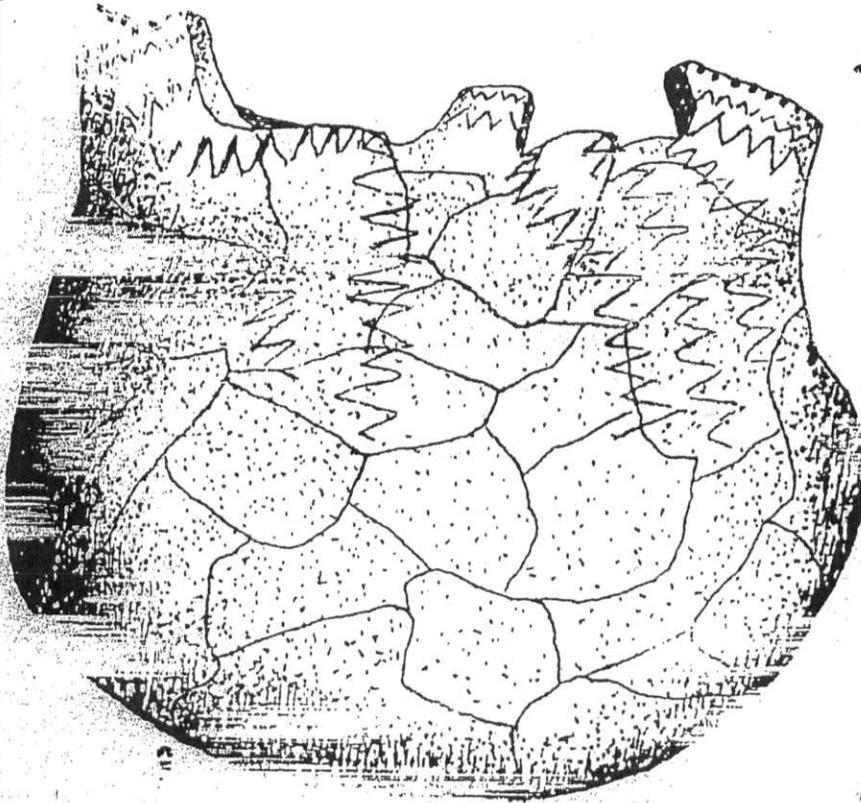
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DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF LAND AND WATER QUALITY

Field Determination Form

Field Determination ID: 6280

CONTACT

MICHAEL TRAPHAGEN
15 ALBION POINT ROAD
BOOTHBAY ME 04537
TELEPHONE 2076333280

DIRECTIONS

camerons point road, go to sharp left in road, turn right on ponderosa lane. site is on right. N-43-50-52.2, W-69-40-1.3

PROPERTY OWNER

TRAPHAGEN, MICHAEL
15 ALBION POINT ROAD

BOOTHBAY ME 04537
TELEPHONE 2076333280

STAFF REDMOND, CHRISTOPHER

RESOURCE RSB

TOWN ~~SOUTHPORT~~

TAX MAP

25 ~~25~~

TAX LOT

12-3

MEMO

In Field Determination # 6119, I determined that Michael Traphagen had a stream on his property in Southport. Mr. Traphagen wanted a second opinion on the basis that it was actually a manmade drainage ditch. Colin Clark from the Department accompanied me and met with Mr. Traphagen at the site.

After inspecting the area, Colin Clark confirmed that the resource in question was a stream as currently defined by the Natural Resources Protection Act (NRPA). Any soil disturbances within 75 feet of the stream would require a section 2 Permit by Rule for activities adjacent to a resource. Any soil disturbance activities within 25 feet of the stream would require a full NRPA permit. Areas having slopes steeper than 3H:1V may not be counted when determining the 25 foot setback.

As we discussed, the presence of a stream does not necessarily mean that the lot is unbuildable, just that permits are required to work near the stream as discussed above. Mr. Traphagen had several possible plans in mind, some of which would require an individual NRPA permit.

If you decide to pursue an individual NRPA permit, you should contact Jim Cassida, head of licensing, in writing, to request a formal pre-application meeting. He can be contacted at Maine DEP, 17 State House Station, Augusta, Maine, 04333-0017. Please include a description of your project, a preliminary site plan, a regional map with the site marked, and photographs of the area. I have included a NRPA permit application for your use as well as an information sheet about pre-application meetings. It is helpful to start filling out the application prior to the pre-application meeting so any questions or concerns can be discussed at this meeting.

A permit pursuant to the Natural Resources Protection Act would also be needed for any regulated activity within 75 feet of the ocean.

The owner should make sure that all applicable DEP permits, as well as any local permits, have been obtained prior the start of any work. Erosion control devices must be installed and maintained on the project site during any soil disturbance activity.

NAME:

Chris Redmond 287-8899

RECEIVED: 10/8/2007

SITE VISIT: 10/15/2007

COMPLETED: 10/22/2007

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



JOHN ELIAS BALDACCI

GOVERNOR

DAVID P. LITTELL

COMMISSIONER

July 31, 2009

Ralph Spinney
Building Inspector
Town of Southport
P.O. Box 149
Southport, Maine 04576-0149

Re: Tributary Stream on Traphagen Property

Dear Ralph:

I am writing to document my findings regarding the tributary stream that flows through the Traphagen property adjacent to Townsend Gut. My findings come from our July 28, 2009 site visit with you, Henry Berne and Selectman Gerry Gamage.

In the shoreland zone, new structures must be set back at least 75 feet from the normal high-water line of tributary streams. A tributary stream is defined as:

a channel between defined banks created by the action of surface water, which is characterized by the lack of terrestrial vegetation or by the presence of a bed, devoid of topsoil, containing waterborne deposits or exposed soil, parent material or bedrock; and which is connected hydrologically with other water bodies. "Tributary stream" does not include rills or gullies forming because of accelerated erosion in disturbed soils where the natural vegetation cover has been removed by human activity.

Note that a "tributary stream" pursuant to municipal shoreland zoning is different than a "river, stream or brook" pursuant to the Natural Resources Protection Act (NRPA). The NRPA definition is based on meeting two of five specific characteristics, whereas shoreland zoning only requires that you have a defined bank with a mineral soil base.

I found that there is a "tributary stream" flowing through the Traphagen property, and that the tributary stream is formed further up-stream than where other DEP staff found a "river, stream or brook" to be formed. I concluded that a tributary stream begins just below an area of large-leaved wetland vegetation that has no defined channel. Below that "clump" of vegetation there is a bank and an eroded channel. There is a small angular-cut tree stump (perhaps 4" inches in diameter) adjacent to this site).

AUGUSTA
17 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0017
(207) 787-7633 FAX: (207) 287-7826
RAY BLDG. HOSPITAL ST.

BANGOR
106 HOGAN ROAD
BANGOR, MAINE 04401
(207) 941-4570 FAX: (207) 941-4584

PORTLAND
312 CANCO ROAD
PORTLAND, MAINE 04103
(207) 822-6300 FAX: (207) 822-6303

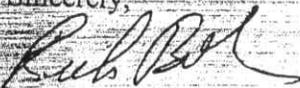
PRESQUE ISLE
1235 CENTRAL DRIVE, SKYWAY PARK
PRESQUE ISLE, MAINE 04769-2094
(207) 764-0477 FAX: (207) 760-3143

Letter to Ralph Spinney
Page 2 of 2.

On site, we also discussed the possibility of one obtaining a variance to construct a modest sized within 75 feet of the tributary stream. I believe such a request could generate a variance to construct a modest home on the level adjacent to the gravel roadway if the new Traphagen lot was not created after the tributary stream setback requirement became part of the ordinance.

If you have any questions regarding this matter you may contact me after August 19, 2009.

Sincerely,



Richard P. Baker
Shoreland Zoning Coordinator

cc: Henry Berne, Code Enforcement Officer
Gerry Gamage



This is the Tributary
Stream looking South
toward the Bridge
from the West-Stream
Property line.



This is the Tree
Dump with its
Rising Water
reg. on. Co.