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November 7, 2017

Boothbay Board of Appeals  
Town of Boothbay  
P.O. Box 106  
1011 Wiscasset Road  
Boothbay, Maine 04537

RE: Appeal of Coastal Maine Botanical Gardens' Development Permit

Dear Chair Perkins and Board Members:

I am writing on behalf of Coastal Maine Botanical Gardens ("CMBG") regarding due process claims that CMBG wishes to bring to the Board's attention prior to the Board's vote on the appeal of CMBG's Development Permit on November 9<sup>th</sup>. CMBG is entitled under the due process clause of the United States and Maine constitutions to a fair and unbiased hearing. As explained in more detail below, due to the statements and actions by two board members, CMBG believes it has not received a fair hearing and has therefore been denied due process of law. CMBG also believes that the only way to cure said due process violations is for the two board members to be recused from the final vote.

Throughout the several meetings held by the Board of Appeals regarding the appeal of CMBG's permit by the Anthony's, board member Scott Adams acted and spoke in a manner that indicated he was not reviewing the record in a fair, unbiased manner and that he was predisposed to finding in favor of the appellant. Mr. Adams reinforced that bias at the October 17<sup>th</sup> meeting when he stated unequivocally that he was applying a different standard to CMBG than he would apply to another applicant. In a discussion regarding the requirement for an alternate leach field site, the Board's attorney advised Mr. Adams that he was required to apply the same standard for everyone and that it cannot be one standard for one applicant and one standard for another. Mr. Adams replied: "Same standard for everyone in the same class. This is in a class by itself with the volume." However, the Zoning Ordinance does not create such a distinction in its standards; CMBG is required only to meet the standards set forth in the ordinance, not a higher standard created by Mr. Adams.

Mr. Adams also stated on the record that he believed board members could do their own research and thus rely on information outside the record to make their determination. It was clear from the very beginning that Mr. Adams held a bias against CMBG and intended to vote in favor of the Anthony's' appeal, regardless of the evidence in the record and the applicable standards set forth in the Zoning Ordinance. The following quote of Mr. Adams during the

November 7, 2017

Page 2

discussion on whether a botanical garden is permitted in the Watershed Overlay is clear evidence of bias and a predetermined outcome:

“If we don’t find that they’re a museum and they don’t belong in the watershed we can’t stop them from doing anything else. . . This is an extremely important decision and the impact on the watershed . . . can be prevented or at least eliminated significantly by keeping them out now and forever in the watershed.”

CMBG is also asking for the recusal of board member Steve Malcom. Mr. Malcom displayed biased behavior at the last two meetings of the Board of Appeals – October 4<sup>th</sup> and 17<sup>th</sup>. Those two meetings followed (1) an individual site visit by Mr. Malcom, (2) ex parte communications between Mr. Malcom and the appellant, Kevin Anthony during the visit to the site and to the property of Vaughn and Joanne Anthony, and (3) individual research performed by Mr. Malcom outside the record. These activities outside the record had a clear impact on Mr. Malcom, resulting in bias toward CMBG.

The focus on a predetermined outcome by Mr. Adams and Mr. Malcom led the Board of Appeals to revisit their discussion and reverse their decision regarding whether CMBG is a permitted use in the Watershed Overlay Zone. At the September 21<sup>st</sup> meeting, the Board closed the record and began deliberations, first discussing the use issue. The Board members weighed in on whether they believed a botanical garden is a permitted use in the Watershed Overlay Zone. On September 21<sup>st</sup> four of the Board members, including Mr. Malcom, stated that it was similar to and compatible with an educational facility and therefore a permitted use in the zone. Mr. Adams was the only Board member to opine that it was not permitted. At the October 17<sup>th</sup> meeting, Mr. Adams and Mr. Malcom persuaded the Board to revisit the discussion, even though the record had closed at the September 21<sup>st</sup> meeting and no new evidence was introduced on the record, outside a group site visit. Nothing in the record changed relevant to the issue of whether a botanical garden is a permitted use in the zone and yet two of the Board members changed their position, no longer finding that CMBG is a permitted use in the Watershed Overlay Zone. We can only conclude, therefore, that something outside the record influenced the pressure to revisit the discussion, resulting in two board members changing their position on the issue.

Mr. Malcom’s complete reversal on the issue is inexplicable. At the September 21<sup>st</sup> meeting, when the Board first discussed whether a botanical garden is a permitted use, Mr. Malcom stated as follows:

“My opinion is that it’s a Botanical Gardens. It’s always been a Botanical Gardens and I believe that we don’t designate it as an educational facility or a museum. It is a Botanical Gardens and the town has granted permits under that definition for the last 10 years and I don’t believe we should change that.”

“I think I made my view clear. I side on it’s an educational facility.”

On October 17<sup>th</sup>, when the Board revisited that issue, Mr. Malcom did a complete 180 degree reversal stating as follows:

November 7, 2017

Page 3

“My problem is if we make a determination that the watershed doesn’t apply, I have a real problem with that. All the sudden our hands are tied and I don’t like that.”

“If you have to go down to the definition of it... then I’d have to go with a museum because I want to make sure that we are allowed to work through the watershed overlay zone, the issues in the zoning ordinance as it applies.”

Mr. Malcom’s complete reversal has clearly been influenced by something that occurred between September 21<sup>st</sup> and October 17<sup>th</sup>. Whether it was the site visit with the appellant or other information received outside the record, it is not clear. What is clear is that he based his determination of use, not on the applicable standard in the ordinance, but rather on a predetermined result: not allowing CMBG in the watershed zone at any cost.

The behavior and actions of Mr. Adams and Mr. Malcom resulted in an unfair and biased hearing. Because the Board has not formally voted on the appeal, there is one way that the due process violations could be remedied. Mr. Adams and Mr. Malcom should recuse themselves from voting.

This letter is intended to raise and preserve CMBG’s due process arguments in the event the Board grants the Anthony’s’ appeal and CMBG appeals the decision to the Superior Court. It is intended as a summary of the arguments which may be expanded upon appeal and upon discovery of additional evidence.

Thank you for your time and consideration.

Sincerely,

Mary E. Costigan

A handwritten signature in black ink, appearing to read 'ME Costigan', with a large, sweeping flourish extending to the right.