

Kennebunkport Planning Board
May 3rd, 2017 ~ 7:00 PM
Kennebunkport Village Fire Station, 6 Elm Street

A regular meeting of the Planning Board was held on Wednesday, May 3rd, 2017. The meeting convened at 7:00 p.m. in the Kennebunkport Village Fire Station.

Members Present: Mr. Peter Fellenz (Chair), Tom Boak, Russ Grady, D. Scott Mahoney, Mark Messer, Nina Pearlmutter

Approval of Minutes: Mr. Grady made a motion to approve the minutes from the April 19th, 2017 Planning Board meeting. Mr. Mahoney seconded the motion and the vote was unanimous.

Items:

1. **170204 Arundel Lodge #76, AF&AM / Jeffrey Zdunczyk, Esquire Authorized Agent** – Remand Hearing – **Public Hearing** – to re-address a previous decision by the Planning Board dated April 6, 2016. [10 North Street, identified as Assessor's Tax Map 11, Block 002 Lot 22 in the Village Residential Zone.]

Mr. Fellenz introduced the Agenda item.

Attorney Jeffrey Zdunczyk addressed the Board and gave a brief presentation outlining the history of this Application. Some of the items mentioned in Mr. Zdunczyk's summary are as follows:

- In 1993, the Lodge obtained Planning Board approval to build a parking lot in the back of the building.
- The Lodge is a legally non-conforming property.
- The parking lot is an accessory use to the building.
- A condition of the 1993 approval was a restriction on the use of the parking lot for public or lease parking.
- There is no mention of this condition or reasoning behind this condition in the minutes from the 1993 Planning Board meetings.
- In late 2015-early 2016 the Lodge filed a new application requesting use of 5 parking spaces be made available for rent to local businesses for employee parking.
- The 5 rented spaces would be seasonal from Memorial Day to Columbus Day.
- Spaces would only be rented in the off-season of the Lodge.
- The Lodge is closed for the months of July & August with very little business occurring in the months of June and September.
- The 2016 Planning Board denied the Application stating there was not a substantial reason demonstrated for reversing the 1993 decision.
- The Lodge appealed the Planning Board's decision and the court agreed with the Lodge's appeal and remanded the Application back to the Planning Board.

Mr. Zdunczyk argued this Application does not create any impact on the neighborhood and also provides a small benefit to the town by allowing five employees of local businesses a place to park thus freeing 5 spaces in other town lots.

To address concerns expressed previously that approval of this Application would set a precedent, Mr. Zdunczyk stated there is no precedent as every Application is unique.

Mr. Boak asked the Applicant for an explanation why their 1993 Application states there are 20 parking spaces and this new Application states there are 25 spaces. Mr. Zdunczyk responded the 20 parking spaces in the 1993 Application only refers to the back parking lot; adding the 5 spaces for rent are on the side of the building not in the back lot.

Mr. Boak also asked if a chain was placed across the entrance to the lot when there is not a function going on at the Lodge. Mr. Zdunczyk responded there are 2 entrances to the lot. The entrance off of North Street is usually chained off but the other entrance between the Lodge and the building next door is not chained, Mr. Zdunczyk explained.

Mr. Messer asked for clarification if the property is in the Shoreland Zone. Mr. Zdunczyk replied it is in the Shoreland Zone but he believes the Site Plan Review standards contained in Article 10.10 of the Land Use Ordinance do not apply in this instance.

Ms. Pearlmutter questioned whether this Application is changing the use of the property to a commercial use since they are taking money as rent of the parking spaces. Mr. Zdunczyk responded it is not a commercial use due to the fact that it is not a business but private agreements and is not open to the public.

Citing the definition of commercial use in the Land Use Ordinance, Ms. Pearlmutter read the following: *"The use of lands, buildings, or structures, other than a "home occupation," defined below, the intent and result of which activity is the production of income from the buying*

and selling of goods and/or services, exclusive of rental of residential buildings and/or dwelling units.” Mr. Messer agreed with Ms. Pearlmutter that he initially felt the Applicant was changing the use of the property but realized the change is a minor use of the lot and not the principle use. Ms. Pearlmutter argued that the lot is not a commercial parking lot, however, it is a commercial use as the 5 parking spaces are being used as a business providing income for the Lodge.

Ms. Pearlmutter cautioned about the precedent that would be set if this Application was approved citing it could allow anyone who wants to rent their front lawn for parking. Mr. Zdunczyk responded he could not comment on a hypothetical situation but countered the fact that if the Board approves a use in one location does not equate to a use in all locations.

Mr. Fellenz expressed his agreement with Mr. Messer that this Application does not to create a commercial parking lot.

Mr. Grady asked what the size of the lot was exactly. Based on the 1993 Application, Mr. Zdunczyk replied there was a sketch plan submitted but did not currently know the dimensions of the lot. In reviewing the town’s GIS maps, Mr. Gilliam stated the gross area of the lot is approximately 80’x80’ without any travel lanes. Mr. Grady concluded the Applicant’s calculations on the number of allowable parking spaces are correct.

Mr. Fellenz acknowledged receipt of an email to the Board in opposition to the Application from David and Lisanne James.

Mr. Fellenz opened the Public Hearing. There were no comments or questions from the audience in attendance. Mr. Fellenz closed the Public Hearing.

Mr. Fellenz suggested the Board go through each item in Article 10.10 of the Land Use Ordinance and express their opinions with regard to this Site Plan Review.

Mr. Messer expressed his opinion that this Application should be reviewed under Article 8.8 Non-Conforming Uses: Change of Use rather than Article 10.10. Mr. Gilliam offered that the Application is not requesting a change of use and the Applicant hasn’t asked for a change of use. Mr. Zdunczyk added the original Application from 2015 is a request to modify a condition of approval and noted that the Planning Board in 2016 concluded the non-conformity was not increased. Mr. Zdunczyk also stated the actual use is not changing in that it was a parking lot and still is a parking lot; the only change is 5 spaces are requiring money.

Mr. Fellenz read the following sections from the Land Use Ordinance, Article 10.10.A: “...*the Planning Board shall approve a Site Plan application unless it makes a negative ruling on one or more of the following identified findings which would otherwise compel denial:*”. The Board members agreed to read and discuss each item in Article 10.10.A.

- a. *The proposed use meets the definition or specific requirements set forth in the Land Use Ordinance will be in compliance with applicable state or federal laws.*

Ms. Pearlmutter commented that the Board cannot override the commercial use as it sets a very bad precedent and is not allowed in the Village Residential Zone.

Mr. Fellenz, Mr. Grady, Mr. Mahoney, and Mr. Messer agree the Application meets the conditions of the above read item. Mr. Boak disagreed with the above read statement. The Planning Board voted 4-1 in agreement.

- b. *The proposed use will not create fire safety hazards and will provide adequate access to the site, or to the buildings on the site, for emergency vehicles.*

The Board was in unanimous agreement the Application complies with the above read statement.

- c. *The proposed exterior lighting will not create hazards to motorists traveling on adjacent public streets and is adequate for the safety of occupants or users of the site and will not damage the value and diminish the usability of adjacent properties.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- d. *The provision for buffers and on-site landscaping provide for adequate protection to neighboring properties from detrimental features of the development.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- e. *The proposed use will not have a significant detrimental effect on the use and peaceful enjoyment of abutting property as a result of noise, vibrations, fumes, odor, dust, glare or other cause.*

The Board was in unanimous agreement the Application complies with the above read statement.

- f. *The provisions for vehicular loading and unloading and parking and for vehicular and pedestrian circulation on the site and onto adjacent public streets will not create hazards to safety.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- g. *The proposed use will not have a significant detrimental effect on the value of adjacent properties (nor has a significant detrimental effect, which could be avoided by reasonable modification of the plan).*

The Board was in unanimous agreement the Application complies with the above read statement.

- h. *The design of the site will not result in significant flood hazards or flood damage and is in conformance with applicable flood hazard protection requirements.*

The Board was in unanimous agreement the Application complies with the above read statement.

- i. *Adequate provision has been made for disposal of wastewater or solid waste and for the prevention of ground or surface water contamination.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- j. *Adequate provision has been made to control erosion or sedimentation.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- k. *Adequate provision has been made to handle storm water run-off or other drainage problems on the site.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- l. *The proposed water supply will meet the demands of the proposed use or for fire protection purposes.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- m. *Adequate provision has been made for the transportation, storage and disposal of hazardous substances and materials as defined by state law.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

- n. *The proposed use will not have an adverse impact on significant scenic vistas or on significant wildlife habitat (nor will have such an impact that could be avoided by reasonable modification of the plan).*

The Board was in unanimous agreement the Application complies with the above read statement.

- o. *The proposed use will not cause unreasonable highway or public road congestion.*

The Board was in unanimous agreement the Application complies with the above read statement.

- p. *Existing off-site ways and traffic facilities can safely and conveniently accommodate the increased traffic generated by the development as far away from the development as the effects of the development can be traced with reasonable accuracy.*

The Board was in unanimous agreement the above read statement is not applicable to this Application.

Due to the fact that the property is in the Shoreland Zone, the Board members agreed to also go thru Article 10.10.B and determined the following conclusions with regard to this Application:

- a. *Will maintain safe and healthful conditions.*

The Board members unanimously agreed the Application complies with the above read statement

- b. *Will not result in water pollution, erosion, or sedimentation to surface waters.*

The Board members unanimously agreed the Application complies with the above read statement

- c. *Will adequately provide for the disposal of all wastewater.*

The Board members unanimously agreed the above read statement is not applicable to this Application.

- d. *Will not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat.*

The Board members unanimously agreed the Application complies with the above read statement

- e. *Will conserve shore cover and visual as well as actual points of access to inland and coastal waters.*

The Board members unanimously agreed the above read statement is not applicable to this Application.

- f. *Will protect archaeological and historic resources as designated in the Comprehensive Plan.*

The Board members unanimously agreed the above read statement is not applicable to this Application.

- g. *Will avoid problems associated with flood plain development and use.*

The Board members unanimously agreed the above read statement is not applicable to this Application.

- h. *Is in conformance with the performance Standards set forth in Section 5.6 of The Kennebunkport Land Use Ordinance.*

The Board members unanimously agreed the above read statement is not applicable to this Application.

Mr. Messer made a motion that based on the Board's findings as discussed to approve the Application as presented. Mr. Grady seconded the motion. The Board members had a brief discussion on the specific language of any conditions that should be included in the Findings of Fact. Mr. Zdunczyk offered to include wording that states "all conditions entered as part of the 1993 decision remain in full force and effect except as modified as herein".

The Planning Board voted 4-1 in approval of the Application. Mr. Boak voted against the motion to approve the Application. Mr. Messer was assigned as Case Manager to prepare the Findings of Fact to be read at the next Planning Board meeting.

2. **170103 Mills Road Subdivision and PDF Development & Construction / Attar Engineering, Authorized Agent** - Preliminary Subdivision Review - **Public Hearing** – for approval of a 14-lot cluster subdivision on Mills Road, identified as Assessor's Tax Map 23, Block 001, Lot 19A in the Free Enterprise and Shoreland Zones.

Mr. Fellenz introduced the Agenda item.

Mr. Ken Wood of Attar Engineering addressed the Board and gave a brief summary of the Application noting the property is approximately 27.2 acres located at 98 Mills Road across from Goose Fair. Mr. Wood explained they are proposing to build a cluster-type subdivision that will include 631,700 sq.ft. of open space of which 390,000 sq. ft. is upland. Mr. Wood also reported they have submitted a stormwater management plan and a road design to the town and have received the report from Acorn Engineering who performed the peer review.

Mr. Fellenz asked the Applicant to explain the well water testing performed. Mr. Wood responded they submitted test results from the first well to Sweet Associates who reported that the well would provide sufficient water and suggested that subsequent wells would do the same. An analytical test was also performed to determine the water quality, Mr. Wood added.

Mr. Fellenz commented the Applicant has supplied the Board with evidence there is both quantity and quality of water from the first well on the site.

Mr. Grady asked what growth zone the property is in. Mr. Gilliam replied the property is in a Transition Zone according to the Town's Comprehensive Plan.

Citing Article 2 in the Land Use Ordinance, Mr. Messer asked about having dug wells on the lots that are smaller than an acre. Mr. Wood clarified that the wells on each lot are artesian drilled wells not dug wells. Mr. Gilliam added dug wells are very rare because they are significantly more susceptible to surface contamination.

Mr. Boak suggested the Board make a condition to have a second well drilled and tested from the back of the property before the Final Subdivision approval. Due to the fact that it would be highly difficult and costly for the Applicant to clear enough of the land in order to fit a drilling rig to the other end of the property, Mr. Gilliam suggested perhaps the Planning Board could place a condition of approval that no building permit may be issued until a report is obtained illustrating sufficient quantity and quality of a second well.

Mr. Fellenz opened the Public Hearing.

Mr. Tony Gelardi, an abutter at Goose Fair, addressed the Board to express his concern regarding the storm water flow, culverts and planned road improvements on Route 9. Using the enlarged site plans, Mr. Wood indicated where the retention ponds were located and the direction of the drainage. Mr. Gelardi asked if perhaps when the town modified Mills Road, they look at another location of the culvert so that it would be beneficial for all those in the area. Mr. Gilliam suggested Mr. Gelardi address his concerns about the culvert to Mr. Mike Claus, the town's Highway Superintendent.

Mr. Frank Federman of 90 Mills Road addressed the Board to express his concern about the increased traffic on Mills Road along with the possibility of their aquifer being drained with the additional 14 houses. Mr. Federman suggested building 6 or 7 houses on the property would be more compatible for the Cape Porpoise area.

Ms. Mary Giknis of 116 Mills Road addressed the Board to express her concern about the increase traffic with the addition of 14 houses and agreed with Mr. Federman that 5 or 6 additional houses would be more preferable. Ms. Giknis also expressed her concern with the area having an adequate water supply.

Mr. Fellenz clarified the Planning Board had spent several meetings discussing the issue of bringing in a public water line and the Applicant demonstrated to the Board's satisfaction that the cost of extending the town water line would be most prohibitive.

To address concerns regarding draining wells, Mr. Wood stated there is typically not an issue of drying up an aquifer for people who have drilled wells and encouraged anyone to contact the Maine Department of Health and Human Services for further information.

Mr. Sheldon Pope of 106 Mills Road addressed the Board and asked if by extending the sewer line, would that limit others down the road from tying into it. Mr. Wood replied if the homeowner reached an agreement with the town they could tie into the sewer with a force main connection. Mr. Gilliam added that as part of the sewer extension review, which is currently being reviewed by Pinkham and Greer, the town only looks at the current development and any development it passes by. However, the force main to be installed is generally more than capacity, Mr. Gilliam added, but the review is only based on the number of connections proposed in the Application.

Mr. Fellenz closed the Public Hearing.

Ms. Pearlmutter asked if it were possible to get an estimate from the Department of Health and Human Services on how large the aquifer is in that area. Ms. Pearlmutter also expressed concern of the increase in water salinity due to the number of pipes to be placed in that coastal area. Mr. Wood responded he was skeptical the DHHS has any numbers on the size of the aquifer or of any salinity being increased.

Ms. Pearlmutter also asked if Mike Claus could provide the Board with some information on the type of work to be performed on Route 9 and on the size of the culvert there.

The Board members and Mr. Gilliam had a brief discussion to determine the property is in the Transitional Area in accordance with the Comprehensive Plan. Mr. Messer asked if the Applicant and Mr. Gilliam could provide confirmation of what area the property is in for the Final Site Plan Review.

Mr. Boak made a motion to authorize the Chairman of the Planning Board to sign correspondence granting approval of this Preliminary Application with the condition that would include further well testing is required producing satisfactory results and other findings before a building permit is issued and that there will be a second peer review of the Final Application. Mr. Mahoney seconded the motion and the vote was unanimous.

3. **140401 State of Maine Department of Environmental Protection – Site Plan Review – Initial Review** – for approval to replace a 33 year old aluminum air monitoring shelter with a new shelter. Ocean Avenue, identified as Assessor's Tax Map 07, Block 001, Lot 08 in the Cape Arundel, Shoreland and Resource Protection Zones.

Mr. Fellenz introduced the Agenda item.

Ms. Liza Woodward of the Maine Department of Environmental Protection Air Quality Monitoring Program addressed the Board and supplied pictures of the current shelter. Ms. Woodward explained they are asking to replace the existing temporary shelter with an 8'x8' year-round shelter that will be anchored in bedrock. The new shelter will be built to be aesthetically pleasing in order to blend in with the existing landscape, Ms. Woodward added. Ms. Woodward concluded her presentation by stating this site is an integral part for the data collected in the DEP's ozone monitoring program.

Mr. Grady asked if the air quality sensors were on the roof of the structure. Ms. Woodward replied outside of the shelter there is a hole drilled with a probe that connects to a monitor and a calibrator inside the shelter.

Mr. Messer made a motion the Application was complete. Mr. Boak seconded the motion and the vote was unanimous. A Public Hearing will be held at the next Planning Board meeting on May 17th, 2017.

Adjournment: A motion was made to adjourn, it was seconded and the vote was unanimous.

Submitted by: Patricia Saunders, Planning Board Recording Secretary