

Kennebunkport Planning Board
August 19, 2015 ~ 7:00 PM
Kennebunkport Village Fire Station, 6 Elm Street

A regular meeting of the Planning Board was held on Wednesday, August 19th, 2015. The meeting convened at 7:00 p.m. in the Kennebunkport Village Fire Station.

Members Present: Mr. Greg Reid (Vice-Chair), John Hathaway, Peter Fellenz, Helen Conaty, Ray Hilwig, Thomas Boak
Mr. Boak will have voting privileges for this meeting.

Approval of Minutes: Ms. Conaty made a motion to approve the minutes from the August 5th, 2015 Planning Board meeting. Mr. Fellenz seconded the motion and the vote was unanimous.

Items:

1. **150601 Kennebunk Kennebunkport & Wells Water District** – Site Plan Review – **Findings of Fact** – for approval to install 750' of new 12-inch water main, to be located within the existing Ocean Avenue public right-of-way. Two areas of the proposed work are within Resource Protection. *Peter Fellenz, Case Manager.*

Mr. Fellenz read the Findings of Fact into the record. Mr. Hilwig made a motion to approve said Findings. Ms. Conaty seconded the motion and the vote was unanimous.

2. **150701 Lora McGrath / Walsh Engineering, Authorized Agent** – Site Plan Review – **Public Hearing** - for approval to construct a riprap revetment to stabilize the shoreline of the property in two areas of erosion. [2 Oak Street, identified as Assessor's Tax Map 9, Block 001 Lot 8 in the Village Residential Zone.]

Mr. Reid introduced the Agenda item.

Mr. Bill Walsh of Walsh Engineering addressed the Board and gave a brief summary of the proposed shoreline stabilization project.

Mr. Reid acknowledged receipt of the Maine DEP permit and the Army Corps of Engineers permit and asked what material will be used in the revetment. Mr. Walsh replied they will use 18-24-inch boulders stacked along the edge slightly cutting into the embankment.

Mr. Reid asked if the Board members had any questions for the Applicant. There were no further questions from the Board.

Mr. Reid opened the Public Hearing. There were no questions or comments. Mr. Reid closed the Public Hearing.

Mr. Fellenz made a motion to approve the Application. Mr. Hilwig seconded the motion and the vote was unanimous. Ms. Conaty was assigned as Case Manager to prepare the Findings of Fact to be read at the next Planning Board meeting.

3. **150702 Andrew & Ellen Leinoff / Graham Architects, Authorized Agent** – Site Plan Review - **Public Hearing** – for approval to remove and relocate a portion of the existing driveway located within 50' of the coastal wetland and to add 420 square feet of driveway between the 50' and 75' setback to the coastal wetland. [8 Skipper Joes Point Road, identified as Assessor's Tax Map 31, Block 003 Lot 18 in the Goose Rocks Zone.]

Mr. Reid introduced the Agenda item.

Mr. David Graham representing the Applicants addressed the Board and gave a brief summary of the proposed driveway relocation. After meeting with Werner Gilliam, Mr. Graham explained the only area to build a new structure is on the south side of the property and so in the process of removing the existing driveway they are relocating some of the impervious surface to a less non-conforming area. Mr. Graham added they are removing 356 square feet of impervious surface, installing 334 square feet of grass pavers. Outside of the 50 ft. setback, Mr. Graham stated they are removing 190 square feet of impervious surface and asking, under Article 5.12 of the Land Use Ordinance, to install an additional 280 square feet within that area.

Mr. Reid stated the Board did receive a copy of the Maine DEP permit.

There were no questions from the Board members. Mr. Reid opened the Public Hearing. There were no comments or questions from the public in attendance. Mr. Reid closed the Public Hearing.

Ms. Conaty made a motion to approve the Application. Mr. Fellenz seconded the motion and the vote was unanimous. Mr. Hathaway was assigned as Case Manager to prepare the Findings of Fact to be read at the next Planning Board meeting on September 2nd, 2015.

4. **150703 Seaside Hotel Associates, d/b/a The Nonantum Resort** – Site Plan Review - **Initial Review** – for approval to remove an existing staircase and replace with a new elevator and staircase that meets current ADA requirements. [95 Ocean Avenue, identified as Assessor's Tax Map 8, Block 001 Lot 13 in the Riverfront Zone.]

Mr. Reid introduced the Agenda item.

Ms. Tina Hewitt-Gordon, General Manager of the Nonantum Resort addressed the Board and explained briefly they are asking for approval to remove an existing staircase and replace it with a new elevator and staircase to the back of the property that meets the current ADA requirements.

Mr. Reid commented it is always a positive when something can be made ADA compliant and noted the Application stated there will be 3 parking spaces eliminated for the new staircase and elevator.

Mr. Fellenz asked the Applicant to illustrate where the new elevator would be located. Using an enlarged site plan of the building, Ms. Hewitt-Gordon demonstrated where the existing staircase is located and where the new hallway, elevator and staircase would be built on the back side of property.

Mr. Reid asked if the proposal has been approved by the State Fire Marshall. Ms. Hewitt-Gordon responded it has not yet been approved but it will be inspected and hopefully approved once it's complete.

Mr. Hilwig asked if the existing stairway is inside the building. Ms. Hewitt-Gordon replied yes it is an interior staircase.

There were no further questions from the Board.

Mr. Fellenz made a motion to find the Application complete. Mr. Hilwig seconded the motion and the vote was unanimous.

Mr. Reid announced a Public Hearing will be held at the next Planning Board meeting on September 2nd, 2015.

5. **150401 Kennebunkport Conservation Trust / Sebago Technics, Authorized Agent** – Site Plan Review – **Deliberations** – for approval to construct a Community/Museum/Education Center/Building (Mill) with associated site improvements consisting of refining parking lot, walkways, landscaping and site lighting. [8 Mill Lane, identified as Assessor's Tax Map 09, Block 01, Lot 12 in the Village Residential Zone.]

Mr. Reid introduced the Agenda item stating the purpose of this meeting is for the Board members to deliberate and acknowledged receipt of the requested draft Findings of Facts from Town Counsel Amy Tchao, Attorney Ralph Austin and Attorney John Bannon. Mr. Reid announced the Board would not be making a decision of approval at this meeting.

Ms. Tchao asked the Chairman if the Board would like to address the one procedural issue first. Mr. Reid explained the Board received additional information from Peter Frink that was submitted after the submission deadline. Mr. Reid offered his opinion that the late submission should not be considered in the deliberations or as part of the Board's proceedings this evening. After contributing each of their opinions, the Board agreed it would not be appropriate to allow Mr. Frink's submission after the Public Hearing had been closed.

Mr. Reid then stated the Board would review each item in Attorney Tchao's draft Findings including all items in Article 10.10 of the Land Use Ordinance and provide Ms. Tchao with input for her to prepare a final Findings of Fact which the Planning Board would then vote on at the next meeting.

Mr. Hathaway questioned the method and procedure described by the Chairman and asked why the Planning Board doesn't vote this evening on the Application rather than wait until the next meeting. Mr. Hathaway argued this was not the Planning Board's normal procedure. Ms. Tchao cautioned the Board this procedure was suggested to avoid a situation where it is unclear what the Board members have voted on without a final Findings of Fact before them. Ms. Tchao added that courts have been increasingly clear that Planning Boards need to articulate the reasoning behind their Findings. The Board members, Town Counsel, and Town Planner Werner Gilliam had a brief discussion. In order to ensure the voting members will remain the same at the next meeting, Mr. Hilwig offered to recuse himself from voting as one of the Alternate members of the Board and give Mr. Boak voting privileges at the next meeting.

Ms. Tchao distributed copies of a template to aid the Board members in their deliberations.

For clarification purposes, Ms. Conaty asked if the deliberations will include all those present tonight and the vote will not include Mr. Kling as he is absent from this evening's meeting. Mr. Reid confirmed Ms. Conaty's assessment that both Alternate members will share their opinions and participate in the Board's deliberations but only Mr. Boak will be voting at the next meeting on this Application. Mr. Kling will also not be voting at the next meeting due to his absence tonight, Mr. Reid added.

Using Ms. Tchao's prepared document, the Board began their deliberations on each item presented. [NOTE: Items in *italic* are from Town Counsel's prepared Draft Findings of Fact]

The first issue the Board discussed was whether the Clem Clark Boathouse is a museum, and if it is, is the proposed grist mill an accessory building to the Boathouse.

Mr. Fellenz began the discussion stating that it is within the Board's purview to determine both of those issues and unless the Board makes a positive finding on both, the rest of the exercise of reviewing each item in Article 10.10 is unnecessary. Mr. Reid disagreed with Mr. Fellenz's assessment. Mr. Hathaway asked for Town Counsel's advice on this matter. Ms. Tchao suggested the Board should continue to review and discuss all of the standards even if they made a negative Finding as to whether the Boathouse is a museum. The reason for continuing with deliberating, Ms. Tchao explained, is if there is further litigation the court would want to understand the entire basis for the Board's decision.

Mr. Fellenz offered his opinion that the Clem Clark Boathouse has been and is a museum meeting the definition used by both parties in the Land Use Ordinance and also, that the proposed grist mill is an accessory use and is water dependent and not a commercial enterprise. Ms. Tchao asked Mr. Fellenz to explain the facts he relied upon to come to that conclusion. Mr. Fellenz responded the definition of museum is met by the intermittent use of the Clem Clark Boathouse and its contents and has been for several years.

Ms. Conaty offered her opinion that the permitting process back in 2010 is somewhat imperfect by today's standard but the number of parking spaces approved were based on the Land Use Ordinance's requirements for a museum and the fact that approvals have been received from all of the governing bodies, she does not see any grounds to say the Boathouse is not a museum.

Mr. Reid agreed with Ms. Conaty's assessment there is nothing in the Land Use Ordinance's definition to prove the Boathouse is not a museum.

Mr. Reid asked the Board members' opinion whether the grist mill was accessory to the Boathouse.

Based on a comparison of the size of the two buildings, Ms. Conaty stated she believes the proposed grist mill can be considered an accessory building.

Mr. Hathaway complimented the Applicant on their thorough Application and commented the neighbors and others opposed to this project presented a professional and passionate presentation. In his opinion, Mr. Hathaway stated he feels the Applicant did not meet the burden of proof despite their great effort in that the project does not fit according to the Land Use Ordinance in the Village Residential Zone.

Based on all of the improvements made to the boathouse in years past, Mr. Hilwig offered his opinion the boathouse is obviously not residential and is in the purview of the Kennebunkport Conservation Trust to call it what they want. Mr. Hilwig agreed with the Applicant's assessment that the Boathouse is a museum and the proposed grist mill would be an accessory to the museum.

Mr. Boak agreed with the majority of the Board members opinion that the Boathouse is a museum and the mill is an accessory building.

Mr. Reid admitted he does not agree the accessory use of the grist mill is acceptable.

To aid the Board's discussion, Ms. Tchao read the Land Use Ordinance's definition of a museum and asked the Board members to provide more detail to their opinions. The definition of museum is: "A non-profit institution operated principally for the purpose of preserving and exhibiting objects of historical, cultural, scientific or artistic interest and which may also engage incidental retail sales of items related to its principal purpose."

Ms. Conaty cited testimony given by the Applicant that school children come to the Boathouse several times a year to view the artifacts in the museum.

Mr. Reid added the Land Use Ordinance definition provides no limitations on hours of operation, etc. so, it is difficult to say the Boathouse is not a museum.

Mr. Hathaway argued that the principal use of the boathouse is for storage and was initially designated as a public place for kayak use and boat launching.

Mr. Fellenz suggested the building itself is a historic artifact and exhibit's the historic nature of this community and the use of the river.

To begin the Board's discussion of whether the proposed grist mill is an accessory use, Ms. Tchao read the definition of an accessory structure from the Land Use Ordinance: "A subordinate use or structure customarily incidental to and located on the same lot as the principal use or structure, such as a detached garage, workshop, or the like..."

Mr. Hathaway stated the main issue he finds with this project is it is building a tourist attraction in a village residential area.

Ms. Tchao asked the Board members how the grist mill is subordinate to the principal Boathouse museum. Mr. Fellenz stated there could be a variety of learning experiences at the museum that the grist mill would complement.

Ms. Tchao asked the Board to discuss the issue of whether the grist mill is a commercial or industrial use that could otherwise be prohibited and whether or not it is a functionally water dependent use.

Mr. Reid responded that it is hard to say the mill is not water dependent as it takes water to turn the wheel but that doesn't necessarily mean it is allowed in the Resource Protection Zone.

After a brief discussion the Board reached a consensus the mill is functionally water dependent.

Mr. Reid instructed the Board members to turn to page 3 of Attorney Tchao's template and read the following:

"Pursuant to the requirements of Article 10.10.A of the Land Use Ordinance ("Guidelines for Decisions"), the Planning Board shall approve a Site Plan application unless it makes a negative ruling on any one of the following identified findings:

a. The proposed Use meets the definition or specific requirements set forth in this Ordinance or will not be in compliance with applicable state or federal laws;"

The Board members reached a consensus that the proposed Use does meet the definition or specific requirements of the Ordinance. Mr. Hathaway reiterated his opinion that he does not feel the proposed grist mill is an accessory use.

b. The proposed use will create fire safety hazards by not providing adequate access to the site, or to the buildings on the site, for emergency vehicles;

The Board members agreed there would be no fire safety hazards.

c. The proposed exterior lighting will create hazards to motorists traveling on adjacent public streets or is inadequate for the safety of occupants or users of the site or will damage the value and diminish the usability of adjacent properties;

A majority of the Board members agreed the adjustments made by the Applicant to avoid lights on other properties met this standard. Mr. Hathaway acknowledged the Applicant did a good job minimizing the impact on adjacent properties but still believes exterior lighting will be an issue with the neighbors.

d. The provisions for buffers and on-site landscaping do not provide adequate protection to neighboring properties from detrimental features of the development;

Mr. Fellenz, Ms. Conaty, Mr. Hilwig, and Mr. Boak agreed the Applicant has met this standard. Mr. Reid stated he is not 100% certain the landscaping proposed is sufficient. Mr. Hathaway abstained from offering his opinion.

e. The proposed use will 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;

Mr. Reid stated there has to be some detrimental effect because you're adding a tourist attraction to a residential area.

Mr. Fellenz offered his opinion that there would be no significant detrimental effect and offered there are mechanisms to deal with any violations within the Code Enforcement Office.

Attorney Matt Manahan interrupted the Board's deliberations to raise a point of order that the Board cannot find the requirements are satisfied without incorporating certain conditions the Applicant and his clients have agreed upon. Those conditions are contained on pages 8, 9, and 11 in the Applicant's proposed Findings of Fact, Mr. Manahan added. Mr. Reid acknowledged the Board members have received that information.

Mr. Hilwig and Mr. Boak agreed the Applicant has made adequate provisions to eliminate those issues described in Item e.

Ms. Tchao asked the Board members if there were any specific items listed that were of concern and if so, what is the rationale for concluding that. Ms. Conaty offered her opinion the Applicant has provided assurances on the sound testing after construction and before operation to ensure the mill is in accordance with the Ordinance. Mr. Hathaway acknowledge the Applicant has done all they could to meet these parameters but believes the mill will create noise that is beyond their control.

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 create hazards to safety;

Mr. Fellenz stated he believes the area is already congested and does not believe this project would exacerbate the situation. Ms. Conaty agreed with Mr. Fellenz adding the Applicant incorporated a traffic circle into the design to avoid vehicles backing up. Mr. Reid and Mr. Boak agreed with Mr. Fellenz and Ms. Conaty.

Mr. Hathaway voiced his opinion stating there is no doubt the Trust will do a great job and the proposed mill will be very successful, and that in and of itself will be a problem for the neighbors as it is already a very congested area.

g. The proposed use will have significant detrimental effect on the value of adjacent properties which could be avoided by reasonable modification of the plan;

Mr. Fellenz, Ms. Conaty, Mr. Hilwig and Mr. Boak agreed this Application would not have a detrimental effect on property values. Mr. Reid acknowledged there could be a potential problem with parking. Mr. Hathaway acknowledged the Applicant has made all reasonable modifications necessary and it is a question of if it is built it will have a detrimental effect on property value.

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

The Board members came to a unanimous consensus the Application is in conformance with applicable flood hazard protection requirements.

i. Adequate provision has not been made for disposal of wastewater or solid waste or for the prevention of ground or surface water contamination;

j. Adequate provision has not been made to control erosion or sedimentation;

k. Adequate provision has not been made to handle storm water run-off and other drainage problems on the site;

l. The proposed water supply will not meet the demands of the proposed use or for fire protection purposes;
m. – Adequate provision has not been made for the transportation, storage and disposal of hazardous substances and materials as defined by state law;

The Board members agreed Items *i, j, k, l, and m*, were either not applicable or the Application meets the requirements for the standard.

n. The proposed use will have an adverse impact on significant scenic vistas or on significant wildlife habitat which could be avoided by reasonable modification of the plan;

Citing the documentation provided in the Application from various state agencies, Mr. Fellenz stated the proposed project would not have an adverse impact on wildlife. Mr. Fellenz also stated his opinion the scenic vistas would not be affected by this project. All of the other Board members agreed with Mr. Fellenz's statements.

o. The proposed use will cause unreasonable highway or public road congestion; or

p. Existing off-site ways and traffic facilities cannot safely and conveniently accommodate the increased traffic generated by the development as far away from the development as the effects of development can be traced with reasonable accuracy.

Mr. Fellenz stated the area is already congested and believes this project itself as described will have a modest flow of traffic. Ms. Conaty added in her opinion the Applicant has met the requirement for off-street parking. Mr. Hathaway acknowledged the Applicant has met the standards but this proposal is a tourist attraction that will increase the traffic. Mr. Hilwig added the parking will be more structured with this proposal than it is currently. Mr. Boak agreed with Mr. Hilwig's statement.

Mr. Reid read the following from Attorney Tchao's memo:

11. When a proposed development will be located within the Shoreland Zone or Resource Protection Zone, in addition to the requirement of the Kennebunkport Land Use Ordinance Article 10, the Town-wide Regulations in Article 6, and the Performance Standards for Specific Activities and Land Uses in article 7, approval of the development will also require that the Board make positive findings based on the information presented that the proposed use:

- a. Will maintain safe and healthful conditions;*
- b. Will not result in water pollution, erosion, or sedimentation to surface waters;*
- c. Will adequately provide for the disposal of all wastewater;*
- d. Will not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat;*
- e. Will conserve shore cover and visual, as well as actual, points of access to inland and coastal waters;*
- f. Will protect archaeological and historic resources as designated in the comprehensive plan;*
- g. Will avoid problems associated with flood plain development and use; and*
- h. Is in conformance with the Performance Standards set forth in Article 5.6.*

The Planning Board members reached a unanimous consensus that the proposed Site Plan Application meets the town standards pertaining to the above items *a* through *h*.

Mr. Reid asked the Board members if they had any other general comments regarding the Application.

Mr. Fellenz expressed his gratitude for the enormous amount of work done on this Application and hoped there is a satisfactory conclusion for all.

Ms. Conaty suggested a change in the Rules and General Information section of the Application to have a more specific statement addressing that no wedding ceremonies or receptions can occur on the premises and that "all functions shall be limited to educational activities related to the Kennebunkport Conservation Trust mission at the time of approval."

The Board members discussed briefly other subjects to be considered in composing the conditions of approval in the final Findings of Fact. Ms. Tchao cautioned the Board to consider conditions that were mostly role-based. The Board discussed possible conditions such as:

- Regular hours of operation should be 9:00am to 5:00pm, 5 days/week
- Season should be May thru October
- Functions should be limited and run no later than 8:00pm
- No indoor/outdoor amplified music
- No public restroom facilities.

Ms. Tchao stated she will incorporate the Board's deliberations and draft Findings of Fact for them to consider at the next Planning Board meeting.

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

Submitted by: Patricia Saunders, Planning Board Recording Secretary