

Kennebunkport Planning Board
August 18th, 2021 @ 6:00 PM
32 North Street, Village Fire Station Meeting Room

A meeting of the Planning Board was held on Wednesday, August 18th, 2021 at the Kennebunkport Village Fire Station. The meeting convened at 6:00 p.m.

Members Present: Mr. Tom Boak (Chair), Nina Pearlmutter, Ed Francis, D. Scott Mahoney, George Lichte, John Harcourt

Approval of Minutes: Mr. Francis made a motion to approve the minutes from the August 4th, 2021 Planning Board meeting. Ms. Pearlmutter seconded the motion, and the vote was unanimous. Mr. Lichte had voting privileges for this item.

Mr. Francis made a motion to approve the minutes from August 11th, 2021 Planning Board meeting. Ms. Pearlmutter seconded the motion, and the vote was

as unanimous. Mr. Lichte had voting privileges for this item.

Items:

1. **201001 Boughton Hotel Corporation d/b/a/ The Colony Hotel / Walsh Engineering, Authorized Agent – North Campus** – Site Plan Review – **Findings of Fact** – for approval to demolish all existing buildings and parking areas and construct two new buildings with multiple parking areas. (128 Ocean Avenue / 12 & 14 Colony Avenue, identified as Assessor's Tax Map 8, Block 8, Lots 14, 15, & 16 in the Riverfront and Shoreland Zones.) *Nina Pearlmutter, Case Manager*

Mr. Boak read the Findings of Fact into the record. Ms. Pearlmutter made a motion to approve said Findings. Mr. Mahoney seconded the motion, and the vote was unanimous. Mr. Harcourt had voting privileges for this item.

2. **210405 Joseph A. Rizzo -- Preliminary Site Plan Review – Initial Review** – for approval to extend the private road Campbell Lane to serve an additional 1.4 acre lot that would be created out of an existing 27 acre lot. (Beachwood Avenue, Assessors Tax Map 13, Block 3, Lot 3.)

Mr. Boak introduced the Agenda item.

Mr. Joseph Rizzo addressed the Board and shared the site plans on the screen. Mr. Rizzo explained he has purchased a 27-acre parcel of land from some family members and is looking to extend the access road to that parcel. Mr. Rizzo indicated on the site plans and survey where the 50-foot Right of Way is located and provided photographs of the property where the proposed Right of Way will be extended if approved. Lastly, Mr. Rizzo shared drawings from Atlantic Resource Consultants of the proposed culvert to be installed along with the hammerhead turn.

Mr. Rizzo also indicated a lot on the property that he may wish to potentially sell or gift to a family member in the future. Mr. Boak asked what will happen with the remainder of the lot. Mr. Rizzo replied the rest of the lot he will retain ownership of and has no plans to do anything with that remaining land.

Regarding the proposed culvert and wetland crossing, Mr. Rizzo explained the Maine DEP determined that since they are not affecting more than 4,000 square feet of wetland, they will be exempt from the Tier 1 permit and if granted approval to build will need to apply for an Army Corps of Engineers permit.

Mr. Rizzo also explained he has spoken with his neighbors, the Dants and the Mr. Brad Heaven and have provided a rough framework on a maintenance agreement for the road to be handled either through a road association or another method per the town's recommendation.

For clarification purposes, Mr. Gilliam explained the reason this Application is before the Board is because it is an extension of a private road and is not a subdivision application. Mr. Boak asked if the road itself meets the town road standards. Mr. Rizzo put the cross section of the proposed road on the screen for the Board members. Mr. Gilliam added there currently is a 50-foot road and the extension onto the subject parcel is also 50-feet and 24-feet wide with plenty of room on each side for the required shoulder width.

Ms. Pearlmutter asked if the Board needs approval from the Fire Marshall for the proposed hammerhead turn. Mr. Gilliam replied he will certainly pass this information along to the Kennebunkport Fire Chief, but this is a standard design that the Board has seen before and has been approved before.

Mr. Boak asked where the shoreland zone was on the parcel. Mr. Rizzo indicated on the screen where Tyler Brook was located.

Mr. Francis asked if the Applicant intends to bring any utilities up alongside the road. Using one of the photos included in his Application, Mr. Rizzo explained currently there is a pole at the intersection where Mr. Heaven's driveway turns off to the right and he will extend the utilities from there but has not decided yet if they will be underground utilities or not.

Mr. Francis then asked if the water and sewer would be private septic and well. Mr. Rizzo responded that is correct.

Mr. Boak asked if in the future if someone is going to build a house on that new lot, would they need to install a fire suppression system. Mr. Gilliam explained in the Maine Uniform Building Code fire suppression is not a requirement for single family homes.

Ms. Pearlmutter made a motion the Application is complete. Mr. Mahoney seconded the motion, and the vote was unanimous. Mr. Lichte had voting privileges for this item and volunteered as Case Manager.

A Public Hearing will be held at the next Planning Board meeting on September 1st, 2021.

3. **210405 Ocean Woods / Sebago Technics, Authorized Agent -- Site Plan /Review -- Public Hearing** -- for approval of a complete reconfiguration of the existing hotel/motel, by replacing the existing buildings with a new one store, 88-seat restaurant and pool, with 30 individual one and two bedroom cottages, and a reconfiguration of the parking area to create 68 parking spaces, a new main entrance and use the existing driveway for service vehicles and employees. (71 Dyke Road, Assessor's Tax Map 37, Block 5, Lot 2 in the Goose Rocks Zone.)

Mr. Boak introduced the agenda item and asked for Mr. Steve Doe of Sebago Technics and Attorney Ralph Austin to be promoted to panelists.

Mr. Doe addressed the Board and asked for Mr. Brian Knipp, Architect also be promoted to panelist.

Mr. Doe began his presentation by noting they have had a public site walk of the property and submitted two other documents to the Board since they last appeared before the Planning Board. One of the documents submitted was from Attorney Austin addressing concerns from abutters and the people of the Goose Rocks area, Mr. Doe stated. Mr. Doe continued explaining he submitted on July 20th, 2021 a letter addressing three items the Board had asked them to respond to which are:

1. The number of restaurant seats that were provided in Attorney Austin's memo,
2. Clarification on the hotel units and the bed count
3. A response to Robert and Ellen Emmons' letter.

Referring to the kitchenettes in the hotel rooms, Mr. Boak asked if there was any official clarification on that issue. Attorney Austin responded there will be no kitchenettes in the units only an under the counter type refrigerator. Mr. Knipp confirmed, the rooms will just contain a sink and an under counter refrigerator and the outlets will be installed per the Building Code.

At this point, Mr. Boak explained he has provided a final copy of a memo to Mr. Gilliam before this meeting asking several questions to town counsel Amy Tchao related to a letter from Richard Driver as well as some general comments in terms of expansion of use.

Mr. Gilliam asked the Applicant that the Board is requesting Town Attorney Amy Tchao to review a list of questions the Board has and would like to request the Applicant to deposit to the town \$2,500 in escrow to cover those legal fees. On behalf of the Applicant, Attorney Austin agreed to Mr. Gilliam's request.

Mr. Boak opened the Public Hearing and announced this Public Hearing will be continued to another meeting as the Board is awaiting further information regarding this Application. Mr. Boak also asked those members of the public who wish to speak to please remain on topic and to be courteous and civil in your comments.

Mr. Richard Driver of Goose Rocks addressed the Board and questioned why the Planning Board was conducting a public hearing before having input from the Town Attorney and commented that the letter Attorney Austin submitted to the Board was not posted on the town's website. Mr. Driver also commented in his memo to the Planning Board that was sent prior to this meeting he composes a legal argument why this Application should not go forward because it violates the town ordinance on non-conforming uses.

Mr. Gilliam ran through all the items that have been posted on the town's website for this Application to date and asked to please inform him if there is something missing, and it will be posted to the site. Mr. Gilliam also noted the town does not typically post all the abutter correspondence on the website, but it is included in the file in the Code Enforcement Office.

Referring to Mr. Driver's statement, Mr. Francis asked if the town attorney's response to the Board's questions could also be posted to the town website when that becomes available. Mr. Gilliam agreed, yes those will be posted once received.

Mr. Gilliam also noted if the Board wished to have the town attorney present at the next meeting, he can certainly ask but it is best to present Attorney Tchao with the Board's questions ahead of time so that she can provide solid researched answers.

Ms. Pearlmutter agreed with Mr. Gilliam's statement that it is best if Attorney Tchao is presented with the Board's questions ahead of time so that she can provide guidance that is based on well researched case law, but it might be helpful for the public if Mr. Boak reads the Board's questions to her for the abutters and the people of Goose Rocks to know what the Board is asking.

A brief discussion with the Applicant and the Board members occurred on specific dates supplemental materials were submitted. Mr. Gilliam agreed to check through all the correspondence, resend anything that would have come in from the Applicant last Friday and make sure it gets posted to the town website.

Mr. Francis recognized Mr. Driver's opinion that it is pointless to hold a Public Hearing before receiving the advice from the town attorney but offered the Public Hearing will continue to another meeting and the Planning Board will not be deciding on this Application without the opinion from Attorney Tchao.

Mr. Boak added the Planning Board has no independent funding in this town so they do not fund the town attorney which is why Mr. Gilliam asked for escrow funds from the Applicant that they would cover the cost of receiving a legal opinion from town counsel which is why the Board is not able to issue their memo to Attorney Tchao until now.

Mr. Driver asked Mr. Boak if he would read their letter to the town attorney.

Mr. Boak read the Planning Board's memo into the record in its entirety. Some of the questions asked in said memo are as follows:

"Questions from the Planning Board to town attorney dated 18, August, 2021.

The hotel and restaurant are legally, non-conforming uses which were approved as an allowed conditional use by the Planning Board in January of 1985, at which time the property was in the Free Enterprise Zone. Goose Rocks Zone was subsequently expanded to include this property, property no longer allowing restaurants or hotels.

- 1. Goose rocks resident Richard Driver has written a letter dated August 3, 2021 which we need to have evaluated by the town attorney.*
- 2. Since the hotel and restaurant have not operated since 2019, is it allowed to return or resume operation in 2022 under LUO 8.8.B Resumption Prohibitive and is the letter provided by applicants and an August 4, 2021 submission from Justin Grimes of the Kennebunkport Resort Collection sufficient for this.*
- 3. Under the Land Use Ordinance 8.8.A Expansions of Use are not allowed. Is this considered a different use or an expansion of use, since:*
 - a. It takes that much more than twice the overall area 9.3 to 19.84%*
 - b. Changed from one building to 31 separate building spread over that area*
 - c. The increase in parking, golf cart, human activity, and structures will be much closer to the abutters' properties.*
- 4. Since the building is non-conforming due to a change in the Land Use Ordinance, does the grandfather's terms still apply when the building is raised and new significantly different buildings are erected in vastly different function and with vastly different locations.*
- 5. Does Land Use Ordinance 8.7.F require the new buildings be designed to conform to the same architectural style.*
- 6. Kennebunkport ordinance simply states that the expansion of use is not allowed without being more specific and other towns have clarified that by adding language to clearly say that land area for that use cannot be enlarged."*

Mr. Driver asked if the Board was going to forward his letter to Attorney Tchao. Mr. Boak responded yes. Mr. Driver suggested the public should be entitled to hear the exchange from the Planning Board and Attorney Tchao and request to have Attorney Tchao present at the next Public Hearing.

Ms. Jennifer Comeau addressed the Board and agreed with Mr. Driver's statements and questioned why is it that the town does not have independent funding for a legal attorney. Ms. Comeau also voiced her strong concerns about what the Applicant has labeled outflow in 100-year storms which does not provide storm frequency and intensity due to climate change. Referring to her letter submitted to the Planning Board prior to this meeting, Ms. Comeau described in detail the negative impacts on our shellfish harvesters, wetlands, wildlife, and outflow/overflow into our marshlands that are already degraded.

To clarify, Mr. Gilliam explained the town does maintain a legal budget for its operations; however, it is our process here that we do not set aside funds for the review of projects on private property which this is

so it is our standard practice to require escrow funds to pay for that level of review should the Planning Board choose to ask for that. Mr. Gilliam again stressed the town does have a legal budget but these are different circumstances as the Planning Department does not run a separate legal budget for the review of private applications and requires applicants to provide funding for that purpose.

Mr. Paul Hogan addressed the Board to say in similar communities in New Jersey where there are intense development pressures, Planning Boards do have town attorneys that are there to analyze, question, and inform on a regular basis for the Planning Board. Mr. Hogan also questioned the transparency of the Board since members of the community were not invited to pose similar questions to the town attorney in the memo that was sent to Attorney Tchao.

A brief discussion on Board policies and procedures ensued between the Board members and Mr. Hogan.

Ms. Robin Phillips, an abutter, addressed the Board and read her letter to the Planning Board that was sent to the town office prior to this meeting. In her letter Ms. Phillips noted the many florae and fauna inhabiting the Applicant's property and surrounding area and asked for a comprehensive environmental study be done of the property.

Mr. Wesley Phillips of Buzzy's Way addressed the Board to express his strong opposition to this Application noting this is a unique property with much wildlife and flora that will be destroyed if approved. Mr. Phillips also agreed with Mr. Driver's and Ms. Phillip's statements that this Application is a clear expansion of use of a non-conforming property and should not be approved.

Mr. Fred Stafford addressed the Board in opposition to this Application and asked what the long-term benefit of this resort will be to the Kennebunkport residents. Mr. Stafford added there is absolutely no benefit for the residents as this project will neither help nor preserve nor improve the quality of life for its residents that are already being harmed by overcrowding. Mr. Stafford also agreed with other folks' prior statements that there will be much loss of wildlife habitat, loss of wetlands, increased heavy truck traffic servicing the resort and increased traffic congestion on Dyke Road and Kings Highway as a direct result of this project if approved.

Ms. Gerry Fitzgerald of Goose Rocks Beach addressed the Board in opposition to this Application and asked if the state approves the Applicant's request to fill wetlands is the town obligated then to allow them to fill wetlands or is the town permitted to have a higher standard for the preservation of open space and storm runoff or other issues. Mr. Gilliam responded that it has been typical of the Board's practice of projects that have been approved by the Maine DEP to accept those as part of their project review. The Board can look at that, Mr. Gilliam continued, and apply a higher standard within it's Findings which goes through a process of answering questions in their Findings. Mr. Boak further explained it is the Board's responsibility to enforce the Land Use Ordinance and if folks in town wish something in the Land Use Ordinance to be changed, there is a procedure to change that but it is not done through this Board.

Ms. Kate Burke addressed the Board in opposition to the Application as it is a change of use of the property by advertising as a destination to hold large special events such as weddings. Ms. Burke asked if those events will be held outside or inside the proposed new restaurant. Mr. Doe replied he did not know the answer and will speak with the owner to get a response.

Mr. Hogan addressed the Board again to state there is no mechanism for any follow-up or consequences if an Applicant ignores or disobeys any conditions imposed by the Planning Board in their Findings of Fact. A discussion occurred amongst Mr. Hogan, the Planning Board members and Mr. Gilliam on noise levels in town, tent permits and outdoor weddings.

Ms. Comeau addressed the Board again to ask the Planning Board to consider the town is currently working on a new Comprehensive Plan that has a completely new vision for this town with a shift to eco-tourism and use that level of perspective in which to meet these applications that are coming forward.

The Applicant, Board members and Mr. Gilliam had a brief discussion on the timing of Attorney Tchao's response and the Applicant's responses to the questions asked in tonight's meeting along with their response on the peer review of the stormwater plan.

Mr. Boak made a motion to continue this Public Hearing to the Planning Board meeting on September 15th, 2021. Ms. Pearlmutter seconded the motion, and the vote was unanimous. Mr. Harcourt and Mr. Lichte had voting privileges for this item.

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

Submitted By: Patricia Saunders, Planning Board Recording Secretary