

Kennebunkport Planning Board

November 17th, 2021 @ 6:00 PM

Virtual Meeting Via ZOOM

A virtual meeting of the Planning Board was held on Wednesday, November 17th, 2021 via the ZOOM format. The meeting convened at 6:00 p.m.

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

Approval of Minutes: Ms. Pearlmutter made a motion to approve the minutes from the November 3rd, 2021 Planning Board meeting. Mr. Simmons seconded the motion, and the vote was unanimous. Mr. Boak abstained from voting.

Items:

- 1. 210801 Vincent & Nathan Thelin/Longview Partners Authorized Agent – Preliminary Subdivision Application – Continued Initial Review – To amend a previously approved subdivision resulting in the creation of 1 new lot (245 Arundel Road, Assessor's Tax Map 15, Block 3, Lot 4 in the Farm and Forest Zone.)**

Mr. Boak introduced the agenda item and asked Mr. Jim Logan to be promoted as panelist.

Mr. Jim Logan of Longview Partners addressed the Board and gave a brief recap of the Application stating this a redivision of a 10-acre lot that was part of a 1983 subdivision. The purpose of this application, Mr. Logan explained, is to separate 1 new lot out of that 10-acre parcel for Mr. Thelin's son Nathaniel. Mr. Logan continued stating the subdivision name will remain the same as stated on the survey plan by Livingston Hughes, a copy of which was provided to the Planning Board prior to this meeting along with an updated agent authorization letter. As discussed at the last meeting, Mr. Logan also discussed the list of waivers they are requesting which are: a high intensity soil survey, a hydrogeologic assessment, a traffic study, and a stormwater management waiver. Lastly, Mr. Logan mentioned he also submitted to the Board members a set of full-size plans of the original subdivision.

Ms. Pearlmutter asked if the proposed name of this subdivision is Amendment of Lot 3. Mr. Logan replied yes as it is officially shown on the plan.

Ms. Pearlmutter asked what the total acreage is of the subdivision. Mr. Logan replied it was 44 acres originally.

There was some confusion and discussion among the Board members, Mr. Gilliam and Mr. Logan as to the name of the original subdivision. A consensus was reached that the subdivision will be named Subdivision Amendment of Lot 3 (Larochelle Subdivision).

Mr. Francis made a motion the application is complete. Ms. Pearlmutter seconded the motion, and the vote was unanimous.

Ms. Pearlmutter made a motion to approve the 4 waiver requests for a high intensity soil survey, a hydrogeologic assessment, a traffic study, and a stormwater management plan. Mr. Simmons seconded the motion, and the vote was unanimous.

Mr. Boak announced a Public Hearing will be held at the next Planning Board meeting on December 1st, 2021.

2. 211002 Shmalo Family, LLC/Trades Center Inc. Agent -- Site Plan Review – Public Hearing - for review of a change of use to Residential Mixed Use (24 Ocean Avenue, Assessor's Tax Map 11, Block 9, Lot 10).

Mr. Boak introduced the agenda item and asked the representative from Trades Center to be promoted to panelist.

Mr. Boak also noted this application was declared complete at the last meeting and acknowledged receipt of a letter from the Fire Department.

Mr. Wade addressed the Board and explained he met with Fire Chief Everett on the site who asked if he could install a sprinkler system. Mr. Wade added he would need to gather some more information whether a sprinkler system would work and if not, they would have the buildings tied into a sprinkler alarm system as an acceptable alternative.

Mr. Simmons expressed his appreciation to the applicant for meeting with the Fire Department and questioned if the property was also in the Shoreland Zone and Resource Protection Zone. Mr. Gilliam responded that Dock Square is in a general development district, so it is not designated as a Shoreland Zone area and this location is not in the Resource Protection Zone either.

Mr. Simmons also noted line 8 on the Application should be a percentage and not the actual square footage. Mr. Wade replied he will correct that, and the building footprint is 20%.

Mr. Simmons also acknowledged some difficulty in duplicating the area calculations provided in the application and asked Mr. Wade if he could provide a breakdown of each of the building calculations. Mr. Wade agreed to provide that information.

Referring to previous discussions regarding long-term rental of the proposed apartments, Ms. Pearlmutter asked if it were possible to put a condition on the Board's approval to state no short-term rentals or Airbnb rentals would be allowed. Mr. Wade agreed the owners are not looking at subletting the apartments short-term. Mr. Gilliam offered there is a requirement in the performance standards for residential mixed use that talks about providing workforce housing and requires dwelling units should be occupied as a primary residence so the Board could interpret that provision in the ordinance as requiring these to be long term rental units as opposed to short term. Mr. Simmons agreed to put some language to that affect in the Findings of Fact.

Mr. Boak opened the Public Hearing. There were no questions or comments from the viewing audience. Mr. Boak closed the Public Hearing.

Mr. Simmons made a motion to approve the application. Mr. Mahoney seconded the motion, and the vote was unanimous.

Mr. Boak announced the Findings of Fact will be read at the next Planning Board meeting.

3. 211001 K.J. Trudo Properties/Atlantic Resource Consultants, LLC Agent – Sketch Plan Review – Initial Review – for review of a proposed 9-lot subdivision on a 43.54 acre lot. (Goose Rocks Road, Accessor's Tax Map 15, Block 1, Lot 1.)

Mr. Boak introduced the agenda item.

Mr. Lucien Langlois of Atlantic Resource Consultants addressed the Board stating he has been working with Mr. Jim Logan on the design of this 9-lot subdivision on a 43-acre parcel in the Farm and Forest Zone. Mr. Langlois explained the wetlands and streams are mapped on the property with a looped road and one driveway will be a shared driveway to access lots 3 & 4. The design also includes approximately 6.5 acres of open space, Mr. Langlois continued, that includes a perimeter around the parcel and captures some wetland area in the northwest section of the parcel. There will be individual wells and individual septic systems for each of the lots, Mr. Langlois concluded.

Mr. Gilliam shared the site plans on the screen while Mr. Jim Logan joined the discussion.

Mr. Logan gave a brief history of his work on this project. Mr. Logan also explained the two back lots will be accessed by a common drive to limit the wetland impact.

Mr. Francis commented the open space in the northwest corner also extends in a narrow strip around the proposed lots to Goose Rocks Road on each side of the parcel. Mr. Logan agreed with Mr. Francis' statement adding they wanted every lot holder to have a strip of land to connect to the bigger piece of the open space land.

Mr. Francis asked if the bordering 25-foot open space area is included in the total open space calculation. Mr. Logan replied he believes it is. Mr. Francis then asked if the 15% requirement is met by the open space in the northwest corner plus the open space that is around the perimeter including Moose Rocks Road. Mr. Logan responded he believes only a portion of Moose Rocks Road was included but he will have to refer those questions to their land surveyor. Mr. Logan added it was intended to have the open space accessible to each individual lot inside the exterior of the parcel and the designated open space area also meets the proportional requirement for what amount of that open space is upland versus wetland. Mr. Boak pointed out that lots 8 and 9 are internal lots and do not have access to the perimeter open space areas.

Mr. Francis raised the question on the open space areas if perhaps the parcel could be reconfigured so that all the lots have access to that open space area. Mr. Logan agreed to review that issue.

Ms. Pearlmuter requested to see the soils map on these lots and to view the stream and setbacks as well as the FEMA flood zone. Mr. Langlois responded the FEMA flood zone is shown on a separate map in the packet and is associated with the stream that goes in the middle of lots 8 & 9. As for the soils map, Mr. Langlois added the parcel has been harvested for timber as can be seen

on the aerial image where much of the lot is Lyman soil. Mr. Logan added they have performed the preliminary soil tests on some of the lots and will have 2 passing soil test pit sites per lot in accordance with the ordinance before returning to the Board. Mr. Logan also added they will also be performing a high intensity soil survey for the parcel.

Ms. Pearlmutter also asked if they will have a wildlife survey and all significant trees marked when submitting their application. Mr. Logan replied they will probably ask for a waiver of the large trees except within the approved building areas since the property has been logged heavily there isn't a lot large timber left.

Ms. Pearlmutter also requested the maps to be more detailed to show precisely where the flood zone is, where the roads cross the wetlands and the exact size of the lots. Mr. Logan agreed to provide that information in their submission.

Mr. Boak asked the Board members if they wanted to do a site walk of the property. The Board members agreed to a site walk.

Mr. Simmons suggested perhaps changing the configuration of the lots to minimize the number of stream crossings. Mr. Logan explained they were challenged by the town's limitation on 1,000 feet for a single road.

Mr. Gilliam offered to look at some possible dates for a site walk to make sure the notifications are sent out in sufficient time.

4. 211003 Yachtsman Hotel and Marina/Sebago Technics Agent – Site Plan Review – Initial Review – for review of a proposed conversion from a 3 season hotel to a year-round hotel. (57 Ocean Avenue, Accessor's Tax Map 10, Block 1, Lot 3).

Mr. Boak introduced the agenda item.

Mr. Steve Doe of Sebago Technics addressed the Board on behalf of Yachtsman Hospitality LLC adding this property is also part of the Kennebunkport Resort Collection. Mr. Doe explained this has been operated as a 3-season hotel and is a conditional use in the Riverfront Zone and would like to make it a 4-season hotel with no changes to the site itself except for some winterizing of the building.

Ms. Pearlmutter commented this property is in the Riverfront Zone so they do not have to meet the Shoreland or Resource Protection Zone requirements. Mr. Gilliam agreed with Ms. Pearlmutter's statement adding the Riverfront Zone is a general development area and is not subject to Resource Protection or other standard Shoreland Zone restrictions. Mr. Gilliam further explained the property does indicate some ownership of land that is below the high-water line and that is in the Resource Protection area but what the Board is dealing with is the hotel itself which is in the upland area as the buildings themselves are not in the Resource Protection Zone.

For clarification, Mr. Mahoney asked if the property is a legal nonconforming property and is also a hotel in a residential community. Mr. Gilliam clarified it is the Riverfront Zone which allows for hotels as a conditional use so the building is nonconforming because it does not meet the 75-

foot setback and the lot coverage is nonconforming, but it is not a use issue. There is previous documentation that references this property as seasonal, Mr. Gilliam continued, and believe it was even restricted as seasonal which is why the applicant is here to get approval from the Board.

Ms. Pearlmutter made a motion the application is complete. Mr. Simmons seconded the motion, and the vote was unanimous. Mr. Mahoney volunteered as Case Manager for this application.

Mr. Boak announced a Public Hearing will be held at the next Planning Board meeting on December 1st, 2021.

5. 211004 Ocean Woods/Sebago Technics, Authorized Agent - Preliminary Plan Review - Initial Review - for removal of existing 30 units (49 bedrooms) + 2 apartments and 108-110 seat restaurant to be replaced with 30 units (43 bedrooms) hotel cottages and replacement restaurant (88 seats) with 6 hotel rooms above within existing development area, along with other proposed site improvements (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 if the town attorney could also join the meeting.

Attorney Amy Tchao joined the meeting as Mr. Steve Doe of Sebago Technics and Attorney Ralph Austin began their presentation of the application.

Mr. Doe shared the site plans on the screen and gave a summary of the new application stating they have taken the site plan that was part of the first application that has been withdrawn and marked it up to show the changes proposed with this sketch plan. Mr. Doe indicated where the existing building sits and what is outlined in green is what they are specifying as the developed portion of the property. Mr. Doe also noted the following changes in this new sketch plan:

- The restaurant and pool are in the same location
- There will be 6 rooms added onto the 2nd floor of the building
- The parking lot will be located where the existing parking lot is
- The smaller buildings are the cottages
- Cottages #12 & #13 are the ADA cottages
- There is an access road or fire lane that runs through the cottage area and empties into the parking lot
- 4 additional cottages are added to the back portion of the green area
- The stormwater area is located outside of the green area
- A golfcart parking area was added to the parking lot
- A maintenance shed was added in the front of the property closer to the operation center of the complex
- The property will be served by public water and sewer.

Attorney Austin explained their primary purpose here tonight is to show the concept to the Board and get input from the Board members and the Town Attorney as to whether this concept meets the Land Use Ordinance provisions regarding nonconforming uses.

Mr. Boak noted the main question for the Board is how this scaled back version complies with the Land Use Ordinance and asked Attorney Tchao to share her opinion.

Before hearing the Town Attorney's opinion, Ms. Pearlmutter offered her opinion that in her research of case law and legal opinions, the question remains if this property is grandfathered as 1.) a restaurant, and 2.) a hotel. Ms. Pearlmutter added there has been incidental information about whether this has operated continually first as a restaurant. Ignoring the pandemic closings, Ms. Pearlmutter asked to see actual evidence of use first on the restaurant which is separate and second on the hotel from 2016 to 2019 in the form of sales tax receipts from those years or hotel tax or rental tax forms showing rental income for those years. Ms. Pearlmutter continued that she would like to see if the property has been operated in those years and if it hasn't then it is not grandfathered after the zoning change in 1985 and this whole application is extinguished. Stressing the importance of this grandfathering question, Ms. Pearlmutter concluded this really should be answered first.

Mr. Harcourt questioned wouldn't the restaurant require a victualer's license as well. Ms. Pearlmutter responded yes, and you could have the license for all those years, but it is not proof that it was actually operated and opened its doors; there should be sales tax receipts. Ms. Pearlmutter concluded stating if they don't have sales tax receipts then any activity after that was illegal and not permitted.

In response to Ms. Pearlmutter's comments, Attorney Austin stated the Board knows this is not a complete application and that we are here on a concept plan on how we would like to develop the property. When we come forward with a complete plan, Attorney Austin continued, we understand we need to prove to the Board and will provide that evidence, but we do not have that information here tonight. Ms. Pearlmutter noted in the last application, Attorney Austin did purport to put that evidence forward. Attorney Austin agreed with Ms. Pearlmutter's statement adding that application has been withdrawn.

Mr. Boak asked Attorney Tchao if she has reviewed the sketch plan presented tonight.

Attorney Tchao stated she has read the materials and reviewed the plan, as well as reviewed her letter to the Board dated September 8th, the submission from Attorney Austin dated October 27th, and an email she received today from Attorney Andre Douchette who represents the Lamey family who is a direct abutter to the property. Before speaking to those issues, Attorney Tchao added she will defer to the Board's pleasure as there is a threshold issue raised by Ms. Pearlmutter and there is a question of whether the grandfathered use or the legally nonconforming use has been abandoned under your Ordinance. Attorney Tchao asked if the Board wanted to request the applicant provide the requested information before getting into this legal analysis or can the applicant provide some indication that information will be forthcoming.

Attorney Austin responded stating he does not have that information with him tonight as it was not part of what was submitted but they believe this is a legally existing nonconforming use and will provide what information is available for the Board to make a determination whether they agree it is a legally existing nonconforming use.

Attorney Tchao asked the applicant if they are aware of the requested evidence, annual licenses, receipts, etc. exist. Attorney Austin replied he hasn't investigated that for tonight's meeting and did not realize that was going to be an issue for this evening.

At the chairman's request, Attorney Tchao began her presentation by stating she believes the Board should be looking at this and will ultimately need to be the fact finder on this application before making a determination of whether or not what is being proposed here is an expansion of a nonconforming use which is not permitted. One thing to bear in mind, Attorney Tchao continued, as the Board looks at the analysis and the various ordinance provisions that apply and could apply here is that the law disfavors the continuation of nonconforming uses which means any provision in the ordinance that limits nonconforming uses should be liberally construed and likewise any provision in the ordinance that limits the continuation of a nonconforming use should be followed strictly. So given that the laws disfavor nonconforming uses, Attorney Tchao added, the question here that arises is whether or not the nonconforming conditions that existed on the lot when this used to be called the Goose Rocks Inn in 1985, whether or not that hotel plan and structure on this lot can be repurposed and redistributed into separate new structures on the lot that did not exist before as long as the floor area has not been increased and/or as long as the ground area devoted to this particular use has not been increased.

With confirmation from the applicant and the assumption the property is not a nonconforming lot, and the structures are not nonconforming, Attorney Tchao further explained the issue is this is a nonconforming use as a hotel, which is no longer allowed in the zone since commercial uses in general are not allowed in the zone. Referring to her letter dated September 8th, Attorney Tchao stated there are several things that can constitute an expansion of use including the devotion of more floor area to a particular use and the devotion of more ground area devoted to a particular use.

Assuming the outlined green area on the plan is the previously developed area occupied by the Goose Rocks Inn, Attorney Tchao instructed the Board members that they need to make that determination of where that boundary is with respect to ground area and also to determine through fact finding whether that area that is to be repurposed or redistributed in a different manner and is arguably in a more intense manner that was used previously is that an expansion of a nonconforming use.

Continuing her presentation, Attorney Tchao began her review of the ordinances and raised the following points:

- It is the assumption that nonconforming uses are supposed to be abolished as quickly as justice would require; meaning we should try to get rid of those over time.
- Article 8.8.A. states that *"expansions of nonconforming uses are prohibited, except that nonconforming residential uses may, be expanded within existing residential structures or within expansions of such structures in shoreland zones as allowed"*.
- One threshold question to be answered is whether a nonconforming commercial hotel use may expand into a new structure or structures.
- The question follows then if the expansion of a nonconforming use into a new structure is prohibited does it not follow that the expansion of a nonconforming commercial hotel use into a new structure or structures is also prohibited.

- The Board also needs to consider if this expansion of floor area could also mean an expansion of floor area into a new structure.
- Article 8.1 states: *“It is the intent of this article to promote land use conformities, except that a nonconforming condition is permitted to continue as it existed prior to the date such condition became nonconforming under the provisions of this article, as amended....a nonconforming condition shall not be permitted to become more nonconforming.”*

Attorney Tchao concluded her presentation by stating the Board needs to look at the issue overall as to what is meant by the nonconforming condition and how much do you consider from the 1985 conditions of the law and how much is being changed.

Mr. Boak asked the Board members if they had any questions.

Citing one of the excerpts from the municipal Code Enforcement Officer’s Training and Certification Manual from the Maine State Planning Office, Zoning and Land Use regulations of 2010, Ms. Pearlmutter commented that it states the continued existence of nonconforming structures or uses as they existed at the time of enactment or amendment of the ordinance is guaranteed but the guarantee only applies as they initially were. No changes that expand or “improve the use or structure are generally allowed by the ordinance”, Ms. Pearlmutter continued stating when you take a hotel and break it into something more amenable and attractive and change your plans for more modern times, that would also be an improvement of the use.

Mr. Francis brought forth a previous application where the Board members had several discussions with the applicant who was applying for and was eventually approved to modernize an existing nonconforming property in the Village Residential zone, and based on Ms. Pearlmutter’s comments the Board should have prohibited that approval. A brief conversation occurred among the Board members comparing the approved Maine Stay application with this sketch plan.

Mr. Francis noted the Board’s discussion should center on if the improvements proposed make the use more/less nonconforming and not that any improvement is allowed.

Ms. Pearlmutter clarified the Board needs to look at the improvements proposed not just as it affects abutters but consider the whole zone and the character of the use and how it will impact that zone.

Mr. Francis did raise a concern that the ground area of the marked green area on the plans is not the only area that is being developed since the stormwater treatment basin which wasn’t needed in the past and is now needed arguably because of all the new structures, paving, and modifications, is outside of that marked area.

Attorney Austin responded to Mr. Francis’ comment by stating it is their position that simply modernizing a facility is not in and of itself an expansion of a use. We do not believe, Attorney Austin continued, that we have exceeded the floor area or ground area and the stormwater detention basin is a necessity to meet the modern development standards that the DEP has and that is really the only location on the property we have to put it. Mr. Doe added this property when it was first developed did not have to meet stormwater requirements and as time goes on and projects come forward, they have to meet the new standards, and this is one of them.

After further comments from the Board members on the location of the stormwater basin, Attorney Austin agreed to have Mr. Doe and the engineers review that.

The Board members had a brief discussion on the issues raised so far. Mr. Simmons agreed with other Board members who stated that whatever is developed should be inside that green boundary including treatment provisions.

Further discussion ensued on whether this proposal is in keeping with the character of the area or if there is something fundamentally flawed with this design that violates the Land Use Ordinance. Attorney Austin thanked the Board members and Attorney Tchao for their insight and robust discussion and asked if it were possible to get a consensus with the Board if they can prove that the green area was all historically used for hotel purposes does this plan meet the provision that they are not increasing the ground area devoted to a particular use. Ms. Pearlmutter responded she is unsure the Board can answer that question given the information that has been provided.

Ms. Pearlmutter asked if it were possible to get a copy of the Dow and Coulombe plan from 1986 that was filed in the Registry of Deeds. Attorney Austin agreed to provide that information.

Attorney Tchao added she appreciates the applicant would like a clear reading from the Board before investing significant money, but the Planning Board is not obligated to say how they would rule on this legal issue definitively, but they have provided the applicant with a good indication of what the main issues are.

Ms. Pearlmutter made a motion to continue this Initial Review until a later date. Mr. Simmons seconded the motion, and the vote was unanimous.

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

Submitted By: Patricia Saunders, Planning Board Recording Secretary