

TOWN OF CAPE ELIZABETH  
MINUTES OF THE PLANNING BOARD

October 21, 2008

7:15 p.m. Town Hall

Present: Barbara Schenkel, Chair

Scott Collins

Elaine Falender

Peter Hatem

James Huebener

Also present was Maureen O'Meara, Town Planner.

Mrs. Schenkel delayed the start of the meeting for 15 minutes to allow Planning Board members time to review emails that were sent that day from members of the public.

Mrs. Schenkel called the meeting to order and read a list of the names of people who had sent email today, and assured everyone that the letters and emails are being reviewed by the Planning Board members. She then called for discussion or corrections of the minutes of September 16, 2008. Mr. Hatem moved to accept the minutes, and Ms. Falender seconded. The minutes were approved without amendment, 4-0. (Mr. Huebener abstained)

OLD BUSINESS

**Fort Williams Arboretum Site Plan** - The Town of Cape Elizabeth requests Site Plan Review to construct an arboretum in Fort Williams Park located off Shore Rd, Sec. 19-9, Site Plan Completeness.

Katherine Bacastow, a member of the ad hoc arboretum committee, outlined the project on behalf of the Town of Cape Elizabeth. She showed an overall drawing of Fort Williams. She said the intent is to ensure the natural beauty of the Fort. She said there is a need to clean up invasive vegetation and to maintain the trees that are there and plant new ones to ensure continuity. She said there are 15 pockets which are identified now, and they would be planted in a thoughtful way. They plan to have a demonstration site at the northern end of the Cliff Walk. It would be planted in phases and the committee wishes to have the entire plan approved at the next Planning Board meeting. She also said that each of the areas in the project would have oversight by the Fort Williams Advisory Commission.

Mr. Hatem said he sees no problems with the plan.

Ms. O'Meara pointed out that Chuck Wilson, Chairman of the Fort Williams Advisory Commission, is in the audience tonight.

Ms. Falender said the applicant is seeking approval of the whole plan, yet we only have detail on small portions of it.

Ms. Bacastow replied that the intent is to have the later areas reviewed by the Advisory Commission.

There was further discussion among the Board, with Mr. Hatem noting that the plan is only up for a completeness review tonight, and Mrs. Schenkel agreeing with him. Mrs. Schenkel's concern is only in case there are drainage problems, then she would want to have further oversight.

Ms. O'Meara noted that the applicant is looking for guidance from the Board of what might delay final approval at the next meeting.

Ms. Falender was reluctant to grant any approval without a detail of the entire plan.

Mr. Hatem made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Town of Cape Elizabeth for Site Plan Review to establish an arboretum on 15 selected sites in Fort Williams, located on Shore Rd, be deemed complete.

Mr. Collins seconded the motion and it passed 5-0.

The Board agreed that they did not need to have a site walk, and they agreed that they do want to hold a public hearing.

Mr. Wilson spoke for the Fort Williams Advisory Commission and said that they look at this as a way to meet the Master Plan. He said that trees are getting older and they are trying to be in readiness when they need to be replaced. He also noted that there are many invasive species of plants flourishing and they are trying to deal with that problem too. He said it meets the Fort Williams Master Plan and the demonstration project will clean out a large area of bittersweet and

get some new plantings in. It will take a number of years for the project to be completed.

He also responded to a question about any change in pedestrian pathways by saying that this will all be done along existing pathways.

Mr. Hatem moved:

BE IT ORDERED that the Fort Williams Arboretum Site Plan application be tabled to the regular November 18, 2008 meeting of the Planning Board, at which time a public hearing will be held.

Mr. Huebener seconded the motion and it was approved, 5-0.

#### OTHER BUSINESS

**BA Zoning/Wetland Amendments** - The Planning Board will consider amendments that refocus the Business A District as a neighborhood business district, amend the Business A District boundaries and reduce the RP1 wetland buffer to 100' for properties served by public sewer and water, Sec. 19-10-3, Amendments to the Zoning Ordinance Public Hearing.

Ms. O'Meara opened the presentation by reminding the audience that the Planning Board is not allowed to have private conversations about any project that is before them. All correspondence and emails should be sent to her and she forwards all of them along to all the Planning Board members. In Cape Elizabeth, the review process for changing the ordinance is that the Planning Board is in an advisory capacity to the Town Council. The Town Council is elected and they are the only ones authorized to make changes to an ordinance. The Planning Board makes recommendations to the Town Council and then the Council can make changes and have one or more public hearings.

The text of the amendment is on the web site. Ms. O'Meara then reviewed the major changes being proposed. These changes include reformulating the Business A District as a neighborhood district with design standards in place. Restaurants which serve alcohol are being regulated by limiting proportion of sales from alcohol, hours of operation and number of stools allowed.

The wetlands buffer for RP-1 wetlands in the BA District (now 250 ft.) is proposed to be reduced to 100 ft. for businesses which are connected to the sewer system.

There are two proposed map amendments. On the Route 77 Business A area, there will be two small slivers of land removed from the Business A district. In the Shore Road area, there is a property to be included into the Business district.

Mrs. Schenkel opened the public hearing and requested that the speakers limit their remarks to three minutes.

David Freeman of 3 Charles Road objects to the change of 553 Shore Road to the Business A District. It directly affects his property, and causes noise to his household. He would prefer that they reduce the business zone instead of increasing it.

Emily Materson of 2 Charles Road spoke for herself and also for the Sanfords of 1 Charles Road who are out of town. She strongly objects to the re-zoning of 553 Shore Road. She said we will all be detrimentally impacted by this re-zoning. 553 Shore Road was a residence when the current owner purchased it. It doesn't seem right that we should all be inconvenienced for someone's mercenary gain.

Ed Materson of 2 Charles Road everything my wife said is true, especially the fact that the Sanford property is imbedded and is a visual buffer for us. If, down the road, Mr. Sanford decides to turn his house into a business, it could turn into a parking lot. We do not want this kind of change in our neighborhood. He asked about mailed notices and why some got a notice and others didn't. He wants more expansion to be in the Town Center, not in this area.

Ms. O'Meara responded to his question about notice by noting that the Materson property is not a direct abutter to the Business A District, therefore he did not get a notice.

Mr. Popp spoke up and said he got a notice and he is not a direct abutter.

Ms. O'Meara said he is a direct abutter and so that is why he got a notice.

Lee Wilson of 82 Two Lights Road said she is one of the owners of 553 Shore Road. Yes, this is the oldest neighborhood and it is very dense. The house has

been there since 1900, and it's been a residence. If you stand on my front porch all you see is businesses. We have put a lot of money into the property to keep it from falling down. The noise will not change and there will be no change to the house.

Hughes Kraft of 41 Warren Avenue is against rezoning 553 Shore Road. His concern is that it will lead to more and more businesses and take away from the neighborhood. He wants expansion in the Town Center. There is no need to turn this area into Portland's Forest Avenue or Falmouth's Route 1. This is a very special neighborhood and we need to hold on to it.

Steven Popp of 10 Woodland Road has never seen a municipal body push so much for one issue. He questions what the relationship is between this Planning Board and this one property. We're being told as citizens that come hell or high water this change is going to be made. You have a job and you work for us. You are supposed to take that balance to see that one individual's commercial interest doesn't outweigh all others. He spoke of a petition and an attorney's opinion to take the exact language from the notice he received. He made a suggestion that the Town should compensate the owner to move to some other location. It was purchased as a residence. There is a need to reduce the business area, not enlarge it. Only one wants to enlarge it, many oppose it.

When he calls city hall, he is told he is not an abutter, but tonight I'm told I am an abutter. Either way he questions why you are having us come back over this issue. We have been in this chamber 4 times over this issue.

He then presented the Planning Board with the signatures of the people opposed to this issue, and said it was simple enough for them to understand. When Mrs. Schenkel said it was insulting for him to call them unintelligent, he replied that it is insulting to be dragged into this chamber over and over.

Morris Kreitz of 524 Ocean House Road thanked the Planning Board for their work. He is concerned about expanding the business zones. And he is concerned that it would be to the detriment of the people in the neighborhood. Once it is rezoned it can be used for anything permitted in the business zone.

His other concern is about the new definition of restaurant. He does not think a neighborhood business zone needs to have a drinking establishment open until 10:00 or 11:00pm. He does not think that is compatible with the neighborhood zone.

Glen Prentice of 18 Ocean Avenue is glad he does not live on Shore Road. It seems invasive to him, and he thinks there should be a requirement for buffers around neighborhood, not just wetlands.

Joyce Freeman of 3 Charles Road said her property does not abut the house (553 Shore Road) but she can see it from her home. She listed the many businesses that have been in that area over the past years. She said when she looks out she can see children playing. This is a neighborhood, and we are unable to move our homes out. The house on Shore Road has had tenants and they have had parties where they are out on the porch after 9:00. She doesn't see any need why this house needs to be changed into a business.

Tara Bucci of 4 Kettle Cove Road spoke about 1 Crescent View Avenue. She asked if she had bought in a business zone and later decided she wanted it changed, would that make sense? Would you even ask the businesses to change their lifestyles to accommodate one person? This is what you are asking us to do in our neighborhood. We are a neighborhood community. We aren't being heard. Let's not make this a business zone, we want to remain a neighborhood where we are safe.

Gail Schmader of 511 Ocean House Road lives about 40 ft. from the Rudy's property. She wanted to ditto everything Tara Bucci just said. She doesn't want anything that resembles a bar or a tavern in her neighborhood. She does not agree with changing the closing hours from 9:00 pm to 10:00 pm. This is a quiet residential neighborhood and this severely impacts us. She doesn't want any outdoor seating, and especially not serving alcohol outdoors. As for the 50% of sales to be alcohol, she wants that limit to be applied to each hour. She said metalworking is an added acceptable use in the BA Zone and that is a very noisy business. She is opposed to changing the setback to wetlands. The wetland next to Rudy's is vital. She wants no tavern, no outside seating, no serving alcohol outdoors, no expansion of hours and no metalworking.

Fern Orr of 505 Ocean House Road said ditto to the previous view.

Mary Jean Mork of 4 Ocean Avenue was concerned about 1 Crescent View Avenue.

Mrs. Schenkel pointed out to her that 1 Crescent View Avenue is not part of the proposed expansion of the Business A Zone.

Ms. Falender added that although it is not part of the Planning Board's recommendation, we did ask for comments on that property.

Ms. Mork is concerned that she abuts the rear 1 Crescent View Avenue. She's concerned for the neighborhood and she worries about her own property. The entire neighborhood is connected to that property and it concerns her that she might not know about it if something happens to change the use of that property.

Marguerite Prentice of 18 Ocean Avenue and she also objects to making 1 Crescent View Avenue a business property. She feels the person who purchased that property purchased a residential property, and he should be responsible for that decision. She doesn't believe he should turn to the Town and to his neighbors to change the rules. I purchased my home in that residential area in reliance on the residential status of that area and she would view it as gross favoritism to take the needs of one person over everyone else.

Maureen Mersereau of 17 Charles Road said ditto to the Freemans comments.

Mike Duddy of 11 Crescent View Avenue opposes extending the Business A District to include 1 Crescent View Avenue. It's part of the neighborhood and should remain residential.

Dan Fishbein of Salt Spray Lane said he sees a desire to create more opportunity for businesses in town. He feels the objective is clearly to expand, but he doesn't see the need for that. He sees no balance and feels there needs to be equal support for residents, and he doesn't see that happening. He sees no effort to respond to the Town Council's directive to create an ordinance covering bars and taverns. He thought it should be a separate town-wide ordinance. He had a number of suggestions about changing the rules about the 50% per year cap on alcohol sales. He said that if the Planning Board is serious about the rules being to allow restaurants to serve alcohol then they need to change the rules. If they don't change the proposal, then he sees the Planning Board supporting bars in our neighborhoods.

Colleen Brazell of 579 Shore Road opposes the rezoning of 553 Shore Road. It was a residence when it was purchased and the owner has never lived in the home. She feels it was bought with the intention of rezoning. She opposes it.

Don Kennell of 142 Two Lights Road and he agrees with Colleen. And he is in support of Rudy's expanding its hours and having an outdoor area. He doesn't think it's a bar, it's a very friendly place. He thinks 9:00 is too early to close.

Carl Best of 12 Pond View Road is perplexed about applying downtown rules and regulations to the BA Zone. He thinks it's two separate topics. He is perplexed about a lack of development in the middle of town where there is no real growth, and trying to shoehorn it into the neighborhoods. He hopes you stress the neighborhood friendly aspect. There is not enough screening for noise and lighting, parking lots and traffic. He's concerned about entertainment licenses and how that might affect noise levels.

Scott Irving of 27 Crescent View Avenue opposes a zone change for 1 Crescent View Avenue. He said there will be more traffic looking for the beach than there already is. It would change the character of the neighborhood. He worries because the property is directly across from the school bus stop, and it could be a safety problem for the children.

Jennifer Duddy of 11 Crescent View Avenue strongly opposes the expansion of the business district to include 1 Crescent View Avenue (in case it comes up in the future). She agrees with Tara Bucci, and she is worried about traffic. She worries about the bus stop being right there and that it would be a safety concern.

Mary Page owns Rudy's of the Cape at 517 Ocean House Road said she has done everything that has been asked of us. She said this is a community place. We do a lot of donations, we help kids when they fall off their bikes, we bring coffee and muffins to firemen who are out all night and we do much more to help the community. We have gotten all the licenses needed to serve alcohol with meals. We are a community business. We have done everything that has been asked of us.

Catherine Miller of 7 Crescent View Avenue said she'd like closure on the 1 Crescent View Avenue. She doesn't want to have to keep coming back all the time, getting petitions together. They want it off the table for good.

Mrs. Schenkel said that right now it's off the table and that drew applause.



Ms. O'Meara cautioned that the Town Council still has to review this and they can make revisions. It is beyond the authority of the Planning Board to finally decide this issue.

Joseph Foley of 511 Ocean House Road thinks the amendments should all be thrown out. He attended all the workshops and saw the violations. He saw you allow a business owner to speak at a workshop in violation of the rules. He saw you allow a resident to talk in the workshop in violation of the rules. He would strongly recommend that you throw the whole thing out and start anew. All future meetings should be held in this room and be televised so that all the residents can see what happens.

He then said he feels a neighborhood business district should show respect for all the adjacent properties. He is against the rules for alcohol use. He said there is no respect for the neighbors. Rudy's employees come before 5:30 am. He's in favor of 6 am to 6 pm weekdays and 6 am to 9 pm on weekends. He has seen public urination, loud and obnoxious behavior, unsupervised children running around, and vehicles left running. He does not consider them to be good neighbors. He's not in favor of the 35 ft height for buildings, wants it to be 25 ft maximum. He is not in favor of rezoning any residential properties to businesses. He doesn't see guidelines on pubs in this document. He cited the 50% of sales of alcohol. When, per hour, per day, week, year?? Who will review this? My response is no, no, no, no bars no taverns, no pubs no respect for neighbors. He is also opposed to the wetlands changes.

Andrew Ingalls, owner of 515 Ocean House Road thanked the Planning Board. He talked about greater density and how it will be advantageous to bringing in even more of a residential element to the district. He also noted that it will be very advantageous to bring sewer in.

Carl Pearson of 27 Fowler Road said he has an option to purchase the Jordan Farm and Garden Center. He thanked the Planning Board for all their time and effort. He affirmed that we are one community and respect one another and often we have different points of view and different hours of operation. We are planning for our future and one document won't work to do it. He did talk at a workshop as a business owner by request of the Planning Board. He asked that the community show respect for one another and get along.

Jan Corey of 493 Preble Street, South Portland is the Personal Representative of the Estate of Richard Taylor at 509 Ocean House Road. She talked about the

noise from Rudy's and the fact that it comes right up to her property. She said the owner of Rudy's says it's a restaurant, but some of the signs and advertisements say pub or tavern.

Patrick Babcock of 503 Ocean House Road is a recovering alcoholic who has a business specializing in the rehabilitation from drugs and alcohol. He says Rudy's is really a bar or pub. He wants no further expansion of that business.

There being no further comment, the public hearing was closed.

Mrs. Schenkel summarized the major points for discussion based upon the public comment. They are, the hours of operation for restaurants, the serving of alcohol, the wetlands setback, the expansion of the BA District to include 553 Shore Road, screening and setbacks for the BA District.

Mr. Hatem said the Board has heard this at least 3 or 4 times and he is very reluctant to start micro-managing this. He wants to move it on and let the Town Council make any changes if they choose to. He wants to move on.

Mrs. Schenkel said that she thinks we should consider the public's opinion as expressed.

The Board then decided to take the list of issues and decide them one by one. First up was the inclusion of 553 Shore Road into the BA District.

Mr. Huebener was unprepared for the amount of negative response. He said his mind is changing based on the negative response.

Ms. Falender said that tonight we have heard from the neighbors and she thinks we need to think about the town as a whole. The Comprehensive Plan had made a goal to expand viable businesses in the town. In prior hearings, other town residents have spoken about how valuable it is to have that business district. We did not hear that voice tonight. She is not concerned about the slippery slope because it is only slippery if they choose to go that way. She does want to see buffering requirements for the rear of the properties too. Her inclination is to leave it in the proposal.

Mr. Collins agrees with Ms. Falender. He's inclined to leave it in.

Mr. Hatem said ditto to that. He said people want to have businesses they can walk to. He is 55% for leaving it in.

Mrs. Schenkel is inclined to take it out. She's concerned that a new owner can come in and do something different to the property.

Mr. Hatem made a motion to leave 553 Shore Road in as a recommended expansion of the BA District. Mr. Collins seconded and the motion passed 4-1(Schenkel).

Setbacks and buffering were next on the items of discussion. The discussion was brief and it was agreed to leave the proposal as it is in that regard.

The wetland setbacks were agreed to be left as they are.

The definition of a restaurant was then discussed.

In response to a question from Mr. Collins, Ms. O'Meara said the committee was not requested to create a separate bar and tavern ordinance. The Planning Board did survey bar and tavern restrictions in comparable communities and found none. While not comparable, the Planning Board had to look at regulations in Portland, where restrictions are incorporated into the land use regulations. Those type of restrictions are included in this proposed ordinance package.

Mr. Collins asked what period of time is meant to be included in the 50% rule for sales of alcohol. He took it to be annually. The rest of the Board also agreed that that is what they were thinking.

Mr. Schenkel said she can see the problem with figuring it annually. A restaurant could sell few drinks on Monday to Wednesday and then sell a lot of alcohol on Thursday, Friday and Saturday. She's also concerned about the hours of operation. She wouldn't want that next to her home.

Mr. Huebener asked how you could keep track of the 50% sales.

Ms. Falender said we have looked at this in detail, and we did think of all of these potential problems. We are balancing the creating of a viable business climate with the concerns of the neighbors. We did not want to impose a huge accounting burden on the business to account for the sales of alcohol by the hour. She thinks 10:00 pm is a reasonable hour whenever, but if we tell a restaurant

they must be closed by 9:00 pm we are compromising their business viability. We are saying that they must be closed by 9:00, not just that the last order may be taken at 9:00 pm. She is not in favor of that. She wants the ordinance to specify that the 50% of alcohol is to be annually. She also noted that the Town Council had sent a definition of a bar or tavern as an establishment where more than 50% of sales are of alcohol. We said no to that idea. There will be no such establishments in Cape Elizabeth.

Ms. O'Meara said that it would be too difficult to monitor alcohol sales on a more frequent basis than annually. She said that if the Board was concerned about the ability of a restaurant to sell too much alcohol in certain time periods, they could lower the percentage of sales to a number less than 50%.

Ms. Falender is not comfortable with changing that percentage without more research and discussion.

Mr. Collins suggested that we go with what we have and let the Town Council make adjustments if they choose.

Ms. Falender made a motion that the hours of operation be until 10:00 pm weekends (Friday and Saturday) and during the week until 9:00 pm, and that on alcohol that it's 50% annually.

It was suggested that she make two separate motions.

Ms. Falender made a motion that the establishments shall not be open to customers between the hours of 9:00 pm and 6:00 am Sunday through Thursday and 10:00pm and 6:00 am on Friday and Saturday.

The motion failed to get a second, so it was defeated.

The addition of the word annually to the 50% of alcohol revenues was passed by consensus of the Board.

Mr. Huebener made the following motion:

BE IT ORDERED that, based on the materials and facts presented, the BA District Zoning overhaul text and map amendments as modified be recommended to the Town Council for consideration.

Mr. Collins seconded and it was approved 5-0.

Mr. Hatem moved to adjourn and Mr. Collins seconded. It was approved 5-0.

The meeting was adjourned at 9:50 pm.

Respectfully submitted,

Hiroshi Dolliver