

TOWN OF CAPE ELIZABETH  
MINUTES OF THE PLANNING BOARD

December 9, 2011

12:00 p.m. Town Hall

Present:	Elaine Falender, Chair	Liza Quinn
	Josef Chalot	Henry Steinberg
	Carol Anne Jordan	Victoria Volent
	Richard Olfene	

Also present was Maureen O'Meara, Town Planner.

Ms. Falender opened the meeting.

**Inn by the Sea "600 Cottage" Site Plan Amendments Reconsideration-** The Planning Board will discuss possible reconsideration, as allowed under Section 4D of the Planning Board Rules of Procedure, of an approval granted November 18, 2011 to Inn by the Sea LLC for amendments to the previously approved Site Plan for the Inn by the Sea, located at 40 Bowery Beach Rd, to demolish and rebuild the "600 Cottage," under Sec. 19-9, Site Plan Amendments. The Planning Board has asked for reconsideration as an opportunity to review with the Town Attorney and Town Manager information regarding square footage calculations related to the Shoreland Zoning and Resource Protection 1 Buffer District nonconformance provisions.

Ms. Falender began by noting that this is not a routine procedure and she then outlined how the meeting will proceed. She gave the context for the meeting. She said we are here because subsequent to our November Planning Board meeting, information became available that said the calculations available at the time were incomplete or incorrect. The plans in front of the Board that night may not have been accurate, and perhaps the building might not have been in conformance with the applicable requirements.

It is also important that a site plan that is approved be consistent with the standards. If it is not in compliance, having Planning Board approval does not make it not in violation. It is not in anyone's interest that a plan in violation be approved.

In this case, because we have a building that is a non conforming structure, we have a very strict limit that its size, floor area and volume, can only be increased by 25%. The calculations were very close, 24.7% and 24.8%. In this case there wasn't much room for change before a building was in violation of the code. The Planning Board wanted to discuss what they can and should do when it appears that perhaps a determination we made was based on incomplete or incorrect information.

We are here on short notice because all these procedures have short time clocks. In order for a reconsideration, a member of the Board who voted in favor of the project must make a motion, seconded by another member who was in favor of the project, and then the Board will vote on that motion. Before we get to that possible motion, we will hear from the Town Attorney, and the applicant and any discussion by the Board.

Ms. Falender then addressed the Town Attorney and asked him to tell the Board, that given that this decision may have been made on incomplete or inaccurate information, what are our options?

John Wall, Town Counsel, from Monaghan and Leahy said he had looked very closely at the ordinance itself to see the allocation of responsibility. The Code Enforcement Officer is the authority to interpret the ordinance and enforce its provisions. As for recourse, in his opinion, the Planning Board role involves its review of standards in the Site Plan Ordinance. Nowhere in the ordinance did he find that the Planning Board has the need to look at whether the standards are met regarding the expansion restrictions in the particular districts involved. The Code Officer is the one to enforce the standards.

If the Planning Board believes an error has been made reconsideration is available. If the issue is not one that is in the purview of the Planning Board, they do not have the authority to reconsider. The Board does not have the authority to reconsider what they did not have the authority to consider in the first place.

Mr. Wall also looked at whether the Planning Board has the right to appeal a matter to the Zoning Board of Appeals. He is not aware of any such right in the law. The ordinance refers to aggrieved parties and that would be the applicant and someone affected by the decision. This does not include the Planning Board. It is his opinion that the Planning Board does not have any recourse to challenge this decision by the Code Officer.

Ms. Falender noted that one of our requirements is a complete packet in terms of plans and an accurate description of what the applicant intends to do. If one of our questions is that parts of our packet were from different dates. If the plans were revised subsequent to the letter of approval of the Code Officer, it might be in our purview to see if that final decision and the final plans are the same.

Mr. Wall said it is his opinion that it is the responsibility of the Code Officer to send the issue back to the Planning Board if there is any alteration in what has been approved. The Board is asking what happens if the Code Officer doesn't send it back. There is no authority for the Planning Board to send it to the Zoning Board of Appeals, or any other body. He does not see that the Planning Board is an aggrieved party.

Ms. Falender said she is not asking whether they are an aggrieved party, but whether it is appropriate to reconsider, as opposed to being a legally aggrieved party. She said the approval was based on a determination made on October 13, whereas the plans that were actually approved may have been revised from that date.

Mr. Wall is of the opinion that if the Planning Board records are internally consistent, there is no basis for reconsideration. It would be the Code Enforcement Officer's job to send the project back to the Planning Board if the final plans were not in agreement with what has been approved.

Ms. Falender noted that whether or not the Board has a right to appeal, a violation is a violation, and approval does not make it otherwise.

Mr. Wall said it requires that the injured parties must appeal. The Code Enforcement Officer is given the authority to interpret the code, subject to appeal to the Zoning Board of Appeals. Particular injury is needed to appeal.

Ms. Quinn asked if it were assumed that she had standing, when does the Code Officer need to document his decision since the 30 day appeal period is running.

Mr. Wall said it is his opinion that the appeal period does not start running until you have a building permit. You can appeal the building permit, not a letter or verbal opinion.

Mr. Chalot asked if the Board has design review.

Mr. Wall replied that they have authority to review what is in their requirements. In this case the Board does not have authority to review the 25% restriction.

Mr. Chalot asked if the Board had approved a plan that was 30% over the previous building, what happens then.

Mr. Wall said it would be up to the Code Officer to enforce the compliance with that provision of the ordinance. the Planning Board can give the approval, but it is up to the Code Officer to enforce compliance.

There was a further discussion of whether a building footprint was required in this case, and if it were to change would the Board need to reconsider.

Ms. Volent asked if they could reconsider under Sec. 19-9-4 sec.c-6. If dimensions include area and volume, there is an inconsistency.

Mr. Wall said if there is an inconsistency in your records, yes you can reconsider. But if there is a belief that there is another set of plans out there, then it is the Code Officer's responsibility to send it back.

Ms. Quinn agreed that there has been no inconsistency in the Board's records.

Nick Livesay of Pierce Atwood spoke for the Applicant. He said it is an interesting procedural matter, but it has always been their intent to do things properly. It's important to wrap this up quickly because they have a short time frame to get the project done. They only have the off season from Thanksgiving to Memorial Day to work. He understands there are concerns about the 25% limit on floor area and volume. They think they are in compliance. They have worked with the Town on this since 2010. The Code Officer said on December 1 that they were in compliance. On December 5, the Code Officer said there was a misunderstanding about the inclusion of the elevator in the calculations. In order to accommodate the inclusion of the elevator, they have changed the roofline of the building and are now in compliance.

Mr. Livesay said the crux of the matter is whether or not the Board needs to consider that correction. It is important to the applicant to get this wrapped up today so they can move forward with the project.

Ms. Falender noted that changes were made to the building due to fire code requirements. The stairways are called open stairs and they are in an enclosure, nor are the accessways open, they have roofs, floors and walls. The Planning Board requested information, but were never given what they asked for.

Mr. Livesay replied that the information that the Board now has is not a change in the plans, but a change in the shading. The code is a 25% increase in floor area, with stairwells and other areas not enclosed not to be included.

Mr. Chalot said the Shoreland Zone Overlay says decks are to be included.

Mr. Livesay said it is not nonconforming in the Shoreland Overlay, but nonconforming in the Resource Protection District.

Ms. Falender said the most restrictive requirements apply if the property is in more than one district.

Mr. Livesay said the 25% applies, but now we are into the Code Enforcement Officer's area. They are a conforming structure in the Shoreland Zone.

Ms. Falender said it is in the Purview of the Board if structures are in an environmentally sensitive area.

Mr. Livesay said they are working with the Town and he feels the differences are small. He would like the board to consider the change in the roofline and pass on this matter.

Ms. Falender made it clear that the Board is not against this project. The Board is here because they are concerned that the information on which we based our decision is not correct. It is an issue of the integrity of the Town and our ordinances. In order to move this along, we could reconsider our decision, or we could consider an amended site plan. Clearly changes have been made and we could just amend the plan and move forward.

Mr. Livesay said they need to go through some slides for the public record. The most expeditious thing would be to decide this today because we are all here.

Ms. O'Meara noted that there is no new site plan, so there is nothing to approve. The Board has floor plans, but not a new site plan.

Mr. Livesay said that the revisions are not of the nature the Board needs to approve. The site plan is not changed, and these changes are not material.

Gary Guerette of the Olympia Company spoke on behalf of the Inn by the Sea. He said Scott Teas and Dennis Morelli of TFH Architects and Steve Bradstreet, engineer were with him today. He said the process is to speak with the Town Planner and the Code Officer throughout the entire process. They have been doing that for about two years now.

Mr. Guerette than showed some slides. The first one was of the letter of Planning Board approval . Then he showed the emails from the Code Enforcement Officer. The roof plan showed how they have moved the parapet wall to accommodate the change in the volume of the building. He also noted that they have been at this for a long time and they have been complying with everything all along the way. The next slide was one showing the costs they have incurred since the Planning Board approval. And there was a slide showing the costs incurred all along the way.

Mr. Guerette said they have an aggressive schedule on this project to meet business deadlines. They have to do this in five months from start to finish. If they can't build now, if the Board puts this off until January, it would set the whole project back until December 2012, at a cost of about \$400,000.

Ms. Falender asked why, if the only adjustments have been made to the roof line, why is the floor area of the second floor changed from 3041 ft. to 3088 ft. ?

Dennis Morelli of TFH architects said they have been making changes as we go along. The reason the areas are different is because in October things were still in flux. The walls were thicker and they have changed the thickness of the plywood from 1/2 in. to 1/4 in. and that made a difference in the area.

Mr. Steinberg asked why the corridors are not shaded on the plan. They seem to be internal to the building.

Mr. Morelli said it is because they are open to the elements, they are not counted as part of the building.

Ms. Quinn said that a year ago they approved a plan that had the stairs as interior stairs and they were counted as part of the volume of the building. Now we have plans where the stairs are external with roofs and walls, and they are not counted as part of the building. She then read the standards for the counting of the volume of the building for the record.

Mr. Morelli notes that a 3 ft. high knee wall is not counted as a wall.

Mr. Chalot said the definition is a roof and walls and an open porch is not usually included in the calculations.

Scott Teas of TFH Architects spoke next and said they were not the original architects for the project. They came on board in August. We all have experience, and we go to people all along the way. We go to the state Fire Marshall, we go to the Code Enforcement Officer, the Planner to get feedback and interpretation of the codes. We inherited this project, and we have gone to Augusta, and to Bruce (the CEO). We have had a back and forth, because there was a threshold of 25%. Cape Elizabeth has experienced people who can read the Code and come up with a decision that allows us to move forward. We have made adjustments based on Bruce's opinions.

He also stated that if you have 10 architects looking at the same set of plans, the take-offs would all be different.

Mr. Chalot said he had calculated the figures from the December 7, 2011 plans and came up with only a 22% increase, and the volume is even less than the existing volume.

We are close to the final plans. Normally the Planning Board gets a plan in the early stages. It is up to the Code Enforcement Officer to be sure the final building doesn't stray too much from what is approved.

Ms. Falender asked if the plans of the building before them today are the same as the building shown on site plan, with all the elevations and all other information we have.

Mr. Morelli said the corrections are to an architectural drawing, not a site plan change. The site plans haven't changed and his recommendation is to not reconsider this matter.

Ms. Falender asked if the dark black line that depicts the building on the site plan has been changed.

Mr. Morelli said the footprint of the building has not changed. The elevations have not changed. The roof adjustment doesn't change the view of the roof.

Ms. Falender opened the public comment period.

Janet Villiotte said she is interested in these proceedings. Her specific question has to do with the way the ordinances have been interpreted. She doesn't think there is much wiggle room in the interpretation. There is not much room for ambiguity. She feels that open to the elements does not mean walls, floors and roofs. She has asked about the citizen's role in the appeal process. If this goes to appeal, when does the 30 day clock start. She does not want to hold up this project, but she thinks there is a significant amount of square footage that is left up to one individual's interpretation. She wonders if the interior corridors and porches were added to the calculations, would it put this project over the 25%. She feels there needs to be public mention, and a need for future projects to be carefully scrutinized. She wanted this to be stated by someone other than the Planning Board or other interested parties.

Mr. Olfene noted that the site plan that was approved had calculations, and the Code Officer made his decision based on that. What was approved is not what is now being built.

According to Ms. Falender, none of the plans and sight lines would be changed. The visual representation is not part of our package.

Ms. Quinn said John Wall's presentation was very helpful in giving her clarity. The Board has no standing, and there is nothing more for us to do.

Ms. Jordan thanked everyone and said she agreed with Ms. Quinn. There is nothing further we can do unless the Code Officer sends it back to us.

Mr. Steinberg said he is not against the Inn by the Sea expanding. He still goes back to the interior corridor which he thinks is a bit contrived. He agrees that we should let it stand.

Ms. Falender opened the floor to a motion to reconsider. No one made such a motion, so Ms. Falender declared the meeting closed at 2:10pm.

Respectfully submitted,

Hiroshi Dolliver  
Minutes Secretary