

TOWN OF CAPE ELIZABETH  
MINUTES OF THE PLANNING BOARD

September 17, 2013

7:00 p.m. Town Hall

Present: Victoria Volent, Chair  
Liza Quinn  
Josef Chalot

Carol Anne Jordan  
Elaine Falender  
Henry Steinberg

Absent: Peter Curry

Also present was Maureen O'Meara, Town Planner.

Ms. Volent opened the meeting and called for the approval of the minutes of the July 16, 2013 meeting. The minutes were approved as presented, 5-0 (1abstain).

NEW BUSINESS

**Rudy's Site Plan Amendment** - 517 Ocean House LLC is requesting amendments to the previously approved site plan to create two bump outs at the rear of the building totalling 70 sq. ft., Sec. 19-9, Site Plan Amendments.

Ms. O'Meara said the project was approved on December 20, 2011. The plan was amended and the approval was extended for one year in October 2012. They have a building permit and are looking for changes to add two rear bump outs. Those changes necessitate moving an easement for a public sewer line. The applicant has secured an easement from the abutter so they can preserve the width of the easement. The Town Council needed to approve this easement change, and they have given that approval subject to site plan approval from the Planning Board.

Pat Carroll, of Carroll Associates made the presentation on behalf of Rudy's. He began by saying that the original Rudy's came down today. Construction will probably start within 30 to 60 days. He showed the plans and where the sewer easement runs. The kitchen layout would benefit from adding 3ft. bump outs at the rear of the building. That will require shifting the sewer easement 3 ft. to the west. They have also moved the grease trap. The building got about 70 sq. ft. larger.

Mr. Chalot asked if we are approving easement change or floor plan change.

Ms. O'Meara said they are not approving the change in the floor plan, but the change in the footprint.

Ms. Falender asked if the changes are clear with the Town Engineer.

Ms. O'Meara said that meeting with the Town staff, it was felt that the changes were minimal.

Mr. Carroll said that all those changes will be made after tonight's meeting and the Town Engineer will have a chance to review them.

Ms. Volent had several questions about the recalculations of the square footage of Phase 2, impervious surface and plantings.

Mr. Carroll said they have done all the updating of the calculations and names of plantings.

Ms. Volent asked about the seating.

Ms. Falender asked if we are approving how many seats are inside or outside, but just that they have a total of 80 seats, as long as the perimeter does not change.

Ms. O'Meara said it has always been her interpretation that the approval is for 80 seats with no differentiation as to how many are on the porch and how many are indoors.

Ms. Falender said we are not approving a seating plan and not a floor plan, but a perimeter plan.

Ms. Quinn noted that now in the BA District, restaurants are limited to 80 seats. If that were to change to allow more seats, would Rudy's have to come back for another approval.

Ms. O'Meara said that in her opinion, once you get an approval for a number of seats, that's what you have and if you want to change that, you need to come back for an amendment.

Ms. Quinn asked if Rudy's could get an approval that says, 80 seats or the maximum allowed under the ordinance.

Ms. O'Meara said she would question that because number of seats has other issues attached to it, such as parking and sewer capacity.

Ms. Quinn then asked Mr. Carroll if they were allowed more seats, would they want to have more?

Mr. Carroll said not at the present time. They are happy with the layout and the 80 seats.

Ms. Jordan said they had one comment from an abutter and it has to do with the plantings. She said the plantings are part of Phase 1, not Phase 2.

Mr. Carroll said there are some plantings at the foundation that are part of Phase 2, but all the perimeter plantings are part of Phase 1.

Ms. Volent opened the public comment, and no one came forward to speak. The public comment period was closed.

The Board did not want a site walk, nor a public hearing.

Ms. Quinn made the following motion:

#### Findings of Fact

1. 517 Ocean House Rd LLC is requesting an amendment to the approval granted December 20, 2011 and then amended October 16, 2012 for Rudy's an 80-seat restaurant and Phase II village retail 1,240 sq. ft. building located at 517 Ocean House Rd to add 2 bump outs totaling 70 sq. ft. and shifting the sewer easement, which requires review under Sec. 19-9, Site Plan Regulations.
2. The Town Engineer is recommending several clarifying revisions to the plans.
3. The application substantially complies with Sec. 19-9, Site Plan Regulations, subject to the submission of information referenced in #2 above.

THEREFORE BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of 517 Ocean House Rd LLC for an amendment to the approval granted December 20, 2011 and then amended October 16, 2012 for Rudy's an 80-seat restaurant and Phase II village retail 1,240 sq. ft. building located at 517 Ocean House Rd to add 2 bump outs totaling 70 sq. ft. and shifting the sewer easement be approved, subject to the following conditions:

1. That the plans be revised per the comments of the Town Engineer in his letter dated September 11, 2013; and
2. That no construction of the new building shall commence until the plans are revised and submitted to the Town Planner.

Ms. Jordan seconded and the motion passed 5-0 (1abstain).

**Old Hayfield Rd Private Road Review** - Stephanie Boggs is requesting approval of a Private Road under the Subdivision Ordinance proposed on a paper street known as Elizabeth Rd located north of Reef Rd, Sec. 19-7-9(B), Private Road Standards.

Ms. O'Meara said the lot owned by Ms. Boggs has no frontage on a road, but there is a paper Street, Elizabeth Road, shown on a subdivision plan. This lot is not a part of the subdivision, but the owner has an abutting lot that is part of the subdivision. Even though they do not have frontage on Elizabeth Road, they have rights in that road. They want to formalize their access to this back lot by creating a 22 ft. paved road over Elizabeth Road. They would name this road, Old Hayfield Road. There are no plans to build on the lot at this time, but the owners want to create access for this lot. They are asking for a waiver to build the road at 18 ft. wide, with 14 ft. of paved surface and a grassy strip of 2 ft. on each side of the road.

Ms. Falender asked who owns the paper street, and who has rights in it.

Ms. O'Meara said that in 1996 , the Town made an inventory of all its paper streets. They then extended their rights in all the paper streets in the Town except for a handful. This action also had a legal opinion from the Maine Municipal Association, that they could extend their rights for 20 years. There were 2 types of rights. The act of recording a subdivision conveys an incipient dedication to the Town, so they can go in and build the roads. It also conveys an easement to all the lot owners on the plan that created the paper street.

Ms. Falender wants to know who owns the road itself. Does the developer still own it?

Ms. O'Meara gave the reply that it doesn't matter who owns it, because it is still burdened by the rights to pass over it.

Ms. Falender asked who owns the subdivision numbered lot which has the rights to Elizabeth Road.

Ms. O'Meara replied that she has been told that Stephen Mette owns that lot and his wife, Stephanie Boggs, the applicant owns the back lot.

Ms. Falender said she is not comfortable that Stephen Mette is not an applicant because he is the one with rights to the road.

John Mitchell, of Mitchell and Associates represents Stephanie Boggs. He said they have addressed all of the questions by Amec and revised the plans accordingly. This is a 4.5 acre parcel. It is a back lot. He displayed a plan which shows Elizabeth Road

extending from Reef Road to the back parcel. This application will provide both access and road frontage. There is no intent to develop or build a house on the lot, but only to maintain their rights and keep this a buildable lot. The proposal is for a 14 ft. wide paved travel way that extends 340 ft. back from Reef Road. They have provided a hammerhead turnaround. The sight distance is good, over 350 ft. in each direction.

He spoke of the existing topography of the paper street. there is a very steep incline that declines sharply. there are large Oak trees in the right of way and ledge at the top of the knoll. They are asking for a waiver to offset the centerline of the right of way 5ft. to preserve the oak trees.

They are also requesting a waiver of the width of the road to a 14 ft. paved way with 2 ft. wide grass shoulders on each side.

The third waiver would be the road grade. If they built the road to the required grade it would definitely kill those trees. He said this has been reviewed by Amec and the Town staff, and Amec agrees with their proposal.

Mr. Mitchell then spoke of the utility plans and the storm water plans. He said there would be a very insignificant increase in runoff. They are not planning any detention of the runoff. Mr. Harding, Town Engineer has proposed that they install a dry well or a rain garden. Mr. Mitchell would like to use a rain garden to capture any runoff.

Mr. Steinberg asked if they were planning to build this road.

Mr. Mitchell replied that if someone decides to develop the back lot, this will be built.

Mr. Steinberg said if they don't build it for 10 or 20 years codes would change.

Mr. Mitchell said once this is approved they will record the plan at the registry.

Ms. O'Meara said, once it is recorded it is good forever. It is unlike a site plan, it does not expire once it is recorded.

Ms. Falender asked who is responsible if it is built in 20 years from now.

Ms. O'Meara said you rely on the Town to make sure it is being done properly. We are treating it as if it will be built, even though the owners are proposing it to preserve their rights.

Ms. Falender said that if, at present the owner of the back lot has no rights in this road, we are not giving those rights are we?

Ms. O'Meara said the owner of the house lot (the Mette lot) has rights to the road. They can propose this private road as part of their rights.

Ms. Falender said that just because we authorize the applicant or Mr. Mette, build that road does not grant any rights to the owner of the back lot if, they do not have those rights now.

Mr. Mitchell asked if having Stephan Mette as co-applicant would provide those rights.

Ms. Falender said it would not provide rights to the back lot.

Ms. O'Meara said if they build it to Town standards and the Town accepts it, we would not have to convey rights to the back lot because they would have frontage on a Town accepted road.

Ms. Falender said the applicants are not the owners of the road, Mr. Mette may have an easement right for his lot on the subdivision plan, but, you cannot convey an easement right to someone else if you do not own the easement land. You cannot expand an easement without the consent of the land owner. She wants to be clear about what can be done here. They can build the road, but they cannot convey rights to another landowner. If this lot was not part of the original subdivision, it has no rights in this road through the subdivision plan, under the rule as explained to us by Ms. O'Meara.

Ms. Falender said that as she looks at the Mette lot she sees an 18 ft. wide strip that could be used as a much shorter access to the back lot.

Ms. Volent said she does not want to let this point be dropped, and would want a legal opinion.

Ms. Falender said it would be up to the applicant to provide the legal opinion.

Stephan Mette of 5 Overlook Lane said that Stephanie Boggs is his spouse. It was their attorney's suggestion to put the back lot in a separate name from the front lot. They will do whatever they need to do. If he is the applicant, even though the back lot is in his wife's name, does that solve the question?

Ms. Falender said no it does not solve it because we are being told that the back lot was not part of the original subdivision, therefore the back lot would not have rights to use this road from the subdivision plan. Even if you owned both lots, it would not resolve the legal question.

Mr. Steinberg asked if they were both bought together.

Mr. Mette replied that they were bought separately, but at the same point in time. They have been assessed separately. The only reason they are proposing the road is to preserve the right to cross over the paper street to reach the back lot.

Ms. Falender said it is possible that the back lot has some access somewhere, but you would have to ask your counsel. Just by creating this road, we do not create access rights.

Stephanie Boggs asked if her husband were co-owner of this back lot, would that not be sufficient?

Ms. Falender said it would not be sufficient.

Ms. Volent explained that if you were to take out a plan of all of Shore Acres with all the roads, you would not see the 4.5 acre lot on that plan. It is not there.

Ms. O'Meara said there are two issues, and one of them is that the lots are not in the same name, or names, and the other issue is the right to use the paper street.

Mr. Mette said there was an extinguished paper street called Bayview Street that ran the length of that 4.5 acre lot. Bayview Street was part of that subdivision.

Ms. Volent asked Mr. Mitchell if he was saying that a rain garden would not help in a large storm. What about the winter time when you get a thaw and get icy patches. Would a rain garden help in that instance.

Mr. Mitchell replied that it would.

Ms. Quinn made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Stephanie Boggs for a private road to be constructed within the paper street of Elizabeth Road, located off Reef Rd, to create access to a back lot located at the end of Elizabeth Rd, be deemed incomplete.

Ms. Falender seconded the motion and it passed 5-1.

Ms. Falender gave the applicant the guidance that the lots are not in the same names and there is not sufficient evidence that the parties have the legal rights to convey any rights in the road to the back lot.

PUBLIC COMMENT

Ms. Volent opened the public comment period for items not on the agenda. No one came forward to speak, so the public comment period was closed. The Board voted unanimously to adjourn at 8:25 p.m.

Respectfully submitted,

Hiroshi Dolliver

Minutes Secretary