

MEMORANDUM

TO: Cape Elizabeth Planning Board
FROM: Maureen O'Meara, Town Planner
DATE: October 6, 2015
SUBJECT: Technical Amendments package

Introduction

The Town Council authorized the Planning Board at the August 10, 2015 meeting to assemble a package of Technical Amendments. It has been the Town's practice to periodically assemble amendments to the Zoning Ordinance, and related ordinances, to clean up, clarify and update current ordinances. Unlike the last several packages of ordinances the Town has processed, a technical amendments package is not intended to include *major* policy changes. Technical Amendments are most often undertaken (1) to protect the town from unintended interpretations of existing ordinance provisions and (2) to improve customer service by adding clarity to existing regulations.

Technical Amendments list

Below is a list of possible amendments.

1. **Site Plan Regulations** (Sec. 19-9). A review of the Site Plan section of the Zoning Ordinance was last done in 1997 when a new Zoning Ordinance was adopted. Revisions are recommended that align the submission list with the standards of review. Currently, some of the information requested does not have a corresponding standard to review the information. Conversely, there are standards of review where specific information is not required for submission but is needed to conduct the review. A similar alignment of submission requirements and standards of review has been completed for the Subdivision Ordinance. As part of this revision, the Planning Board should include changes in response to the *Hartwell* Law Court decision.
2. **Minor Site Plan Amendments administrative approval** (Sec. 19-9-6). Any amendment to site plan approved by the Planning Board must be submitted to the Planning Board for approval. The Planning Board may consider allowing minor site plan changes to be approved by staff, with sign off by the Planning Board Chair. This amendment would need to characterize minor amendments, such as an amendment that does reduce buffering or change a condition of approval.
3. **Update Site Plan references in zoning districts** (Sec. 19-6-2 and others, subsection F). As part of the Special Event Facility amendments, it was noted that references to site plan review located at the end of each zoning district should be updated.
4. **Private Accessway Performance Guarantee Option** (19-7-9 (D)(5)). The Private Accessway provisions require that the accessway must be constructed before a

building permit for the lot can be issued. Many property owners do not want to completely construct their accessway, and incur damage from construction equipment, until after the building construction is done. An explicit provision that allows a performance guarantee in lieu of construction is suggested.

5. **Definition of a structure/dwelling unit** (Sec. 19-1-3). The definitions should be clarified and updated consistent with common practice.
6. **Nonconformance** (Sec. 19-4). Clarifications may include rewording of the three nonconforming sections to make clear that they are tied to nonconformance with ordinance provisions and not to the zoning district of the nonconforming lot, and clarifying how to treat enlargement of a nonconforming structure. There is also a dangling paragraph a with no paragraph b that should be reformatted (Sec. 19-4-3(a)).
7. **Building Permit notification requirement** (Sec. 19-3-3(D)(2)). Two years ago, a public notice requirement was added when a building permit is issued for a structure within 10' of the minimum property line setback. Staff is suggesting the Town consider exempting from the public notice sheds of no more than 150 sq. ft. in size.
8. **Affordable Housing** (Sec. 19-7-4). This summer, for the first time, the Town Council lifted affordable housing requirements from 2 moderate income units because a buyers had not been found long after the minimum marketing period. Moderate income units are affordable to families between 80% -150% of median income. The Planning Board may want to consider revising the upper limit to 120%, which is more in keeping with typical requirements. Other options may also be discussed.
9. **Minimum Inspection fee** (Sec. 16-2-6(d)). When a performance guarantee is required for a project, an inspection fee is also calculated based on a percentage of the performance guarantee. For small projects, such as private roads, the inspection fee amount can be too small to cover costs for final inspection to confirm compliance with the Planning Board approval. Recent uniform application of performance guarantee requirements have significantly improved compliance with Planning Board approvals, so a minimum inspection fee amount should be added to existing provisions.
10. **As Built Drawings** (Sec. 16-2-7 (f)). The Subdivision Ordinance requires the submission of as-built drawings when a subdivision is complete. Staff is recommending that a list of what must be included on the drawings should be updated. Clarification of whether as built drawings are required for private roads may also be appropriate.
11. **Street Tree plantings** (Sec. 16-3-2(A)(7), Appendix C). Town staff is recommending changes to the street tree requirements in the Subdivision Ordinance, including increased spacing between the trees and variety in the type of trees planted.

12. **Other plantings list.** The ordinance includes a recommended street tree plantings list. The Town received a suggestion that a list of other plantings be developed and that the list not include "invasive" species.
13. **Stormwater Post construction requirements** (Sec. 18-4-6). As an MS4 community, the Town is subject to state and federal regulations on the control of stormwater. The most recent MS4 permit formalizes post-construction stormwater monitoring. Staff is recommending that, as part of Site Plan stormwater standard, a note be added to all plans specifying post-construction monitoring.
14. **Other amendments to be identified.** Planning Board members may want to suggest possible amendments consistent with a technical amendment.



Maureen O'Meara <maureen.omeara@capeelizabeth.org>

Recent Law Court Decision

1 message

Durward Parkinson <dparkinson@bergenparkinson.com>

Wed, May 6, 2015 at 10:44 AM

To: Maureen O'Meara <maureen.omeara@capeelizabeth.org>

Hi Maureen:

The Law Court issued the attached decision yesterday. As a town planner, I thought that you might be interested in it because it contains a strong message from the Court—about the Planning Board's ability to waive or disregard seemingly minor or irrelevant site plan submission requirements. In a nutshell, the Court is saying that a Board must follow submission requirements to the letter – and if they don't want to do so they should simplify or amend their ordinance.

Maybe this could be the subject of group discussion with other planners and/or town attorneys. I would be happy to discuss the particulars of this case sometime—because there is a lot more to it than meets the eye.

Another great spring day—hooray J

Durward W. Parkinson

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 2015 ME 51 Hartwell.pdf
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Decision: 2015 ME 51
Docket: Yor-14-228
Argued: February 11, 2015
Decided: May 5, 2015

Panel: SAUFLEY, C.J., and ALEXANDER, MEAD, GORMAN, JABAR, and HJELM, JJ.

JAMES HARTWELL et al.

v.

TOWN OF OGUNQUIT et al.

SAUFLEY, C.J.

[¶1] Amid continuing concerns regarding the costs and delays associated with the administrative process and appeals in municipal law, we confront this challenge: the inconsistent application of mandatory provisions in local zoning ordinances. Wayne C. Perkins appeals from a judgment entered in the Superior Court (York County, *Fritzsche, J.*) vacating the Ogunquit Planning Board's site plan review and design review approval of Perkins's application to convert his garage into a lobster pound. Because Perkins's application fails to comply with one of the Ordinance's requirements for design review, we must affirm the judgment of the Superior Court vacating the design review approval.

[¶2] We address this procedural issue in detail in the hope of assisting towns, applicants, and interested parties in their continued efforts to develop a

more predictable and less expensive process.¹ We also vacate the judgment of the Superior Court with respect to site plan review and remand with instructions to remand to the Board for further proceedings consistent with this opinion.

I. BACKGROUND

[¶3] Over three years ago, Wayne C. Perkins applied to the Ogunquit Planning Board seeking site plan review and design review approval to convert his garage, reached from Shore Road, into a lobster pound. Perkins indicated that, upon request of prospective purchasers, he anticipated cooking some of the lobsters before the sale. Although the sale of live lobsters was a permitted use in the zone at issue, the cooking of lobsters presented a question of ordinance interpretation: pursuant to the Ogunquit Zoning Ordinance, did cooking the lobsters make Perkins's proposed use a prohibited "Type 3 Restaurant," or was the cooking a permissible accessory use to retailing live lobsters?

[¶4] What should have been a simple process with a single substantive question became tangled in the requirements of the Ordinance. After a public hearing, the Board approved Perkins's site plan review and design review application without requiring Perkins to comply with certain mandatory provisions

¹ Almost ten years ago, GrowSmart Maine, in conjunction with the Brookings Institution, released a report recommending the adoption of a model local zoning ordinance. The Brookings Institution Metropolitan Policy Program, *Charting Maine's Future: An Action Plan for Promoting Sustainable Prosperity and Quality Places*, Brookings, 9-12 (Oct. 2006), <http://www.brookings.edu/research/reports/2006/10/charting-maines-future>.

in the Ordinance.² The Hartwells, who are abutting landowners, sought judicial review in the Superior Court. The review resulted in a remand to the Board based on the Board's failure to apply the requirements of the Ordinance.³

[¶5] On remand from the Superior Court, the Board addressed some, but not all, of the applicable provisions of the Ordinance. Specifically, Perkins supplemented his application with the necessary written requests to waive certain provisions for site plan review approval, but he did not submit the required elevations of the property to comply with the requirements for design review approval. *See* Ogunquit, Me., Zoning Ordinance §§ 6.6(C)(4), 11.6(A)(2) (June 14, 2011).

[¶6] In addition, by the time the application had been remanded to the Board, the Hartwells were presenting new facts, beyond the cooking of lobsters, that they asserted demonstrated that Perkins's use was a prohibited Type 3

² For example, for the Board to waive any of the required submissions for site plan review approval, the applicant must submit a written waiver request and the Board must find "that strict compliance with the required application submissions would unduly burden the applicant or be excessive in light of the nature of the proposed structure or activity or where there are special circumstances of a particular plan." Ogunquit, Me., Zoning Ordinance § 6.6(C)(4) (June 14, 2011). Design review approval requires the applicant to comply with the submission requirements in section 11.6 of the Ordinance, which includes submitting "[e]levations of each side of the proposed building to be constructed or altered, at a scale of at least ¼" = 1 foot, and in the case of alterations, showing conditions before and after the proposed alteration." Ogunquit, Me., Zoning Ordinance § 11.6(A)(2) (June 14, 2011).

³ The Superior Court (*O'Neil, J.*) stressed the Town's responsibilities when it noted that it

has been the longstanding practice of the Town not to enforce every submission requirement listed in [the Ordinance] and not to require written waiver submissions, however, the [c]ourt reviews the law de novo. The Ordinance requires enforcement of every submission in the absence of a reasoned waiver request.

Restaurant.⁴ Although it accepted this new information into the record, the Board did not make any factual findings regarding the substantive issue—the proper classification of the lobster pound. The Board again approved Perkins’s application, despite the missing elevations required for design review approval and without providing any factual findings on the substantive issue of whether Perkins’s proposed use constituted a “Type 3 Restaurant” as that term is used in the ordinance.

[¶7] The Hartwells again sought judicial review in the Superior Court pursuant to 5 M.R.S. § 11002 (2014) and M.R. Civ. P. 80B. Again, the Superior Court (*Fritzsche, J.*) concluded that the lack of elevations and other materials required for design review approval was fatal to the approval of Perkins’s application. It also concluded, contrary to the Board’s conclusion, that the facts in the record supported the Hartwells’ assertion that the lobster pound was properly classified as a prohibited restaurant, not a permissible retail establishment. The court therefore decided the substantive issue in favor of the Hartwells and vacated the Board’s approval of Perkins’s site plan review application. Perkins appealed.

⁴ For example, the Hartwells presented evidence that Perkins was advertising the business as a restaurant, was selling other food, and was providing an outside table for customers’ use.

II. DISCUSSION

[¶8] The matter before us involves two issues—one procedural and one substantive. We first address the procedural challenges.

A. Procedure

[¶9] The procedural issue concerns the defects in Perkins’s design review application and the Board’s incomplete action in applying mandatory provisions of the Ordinance. Perkins agrees that his application was subject to design review approval, *see* Ogunquit, Me., Zoning Ordinance § 11.3(C) (June 14, 2011), that the Board does not have the power to waive any of the design review submission standards, *see id.* § 11.6(A), and that specific elevations at a scale of at least 1/4” = one foot of each side of the garage were not submitted with his application for design review approval, *see id.* § 11.6(A)(2). Therefore, despite what we can only assume will be acute frustration with the additional costs and delays, we must again remand this matter to the Board because Perkins’s design review application remains incomplete. In an attempt to prevent any further delays, we provide the following guidance.

[¶10] When a municipal ordinance requires an applicant to submit specific information, and the ordinance neither allows for the submission of written waiver requests nor includes a provision allowing a planning board to determine that certain requirements are not applicable, the planning board has no authority to

disregard or waive the requirements of the ordinance. Similarly, the courts do not have the authority to determine that such mandatory requirements are *de minimis* or that the failure to include the required material constitutes harmless error. *See* M.R. Civ. P. 61.

[¶11] We are sympathetic to the limited resources of municipal governments and the efforts of often-volunteer municipal officers with no formal legal training. However, as the Superior Court correctly noted, we do not have the authority to ignore the plain language of Ogunquit's Zoning Ordinance.

[¶12] If the Town does not intend to require strict compliance with design review in all cases, especially where, as here, the alterations of an existing structure are minimal, the Town could amend the Ordinance to eliminate costly, unnecessary, or hyper-technical provisions. The Town could also provide a separate process for applicants of smaller projects so that they may by-pass the more complex requirements for applicants of larger projects and proposals, or the Town could provide a process to waive certain required submissions for design review similar to the existing waiver process for site plan review submissions.

[¶13] What the Board cannot do, however, is apply the mandatory provisions of the Ordinance to some projects but not others. The Ogunquit Zoning Ordinance, as currently written, requires the submission of elevations as stated in section 11.6(A)(2). Pursuant to the Ordinance's clear provisions, that requirement

cannot be waived, determined inapplicable, or satisfied with the photograph submitted with Perkins's application.

B. Substance

[¶14] The substantive issue before us concerns the scope of Perkins's use and whether certain uses by Perkins would convert a permissible retail lobster pound into a prohibited restaurant. In the absence of factual findings by the Board, and in the face of an ongoing dispute regarding the lobster pound's actual use, the court appears to have found and relied on facts that were not found by the Board to be true or accurate, including allegations that Perkins advertised the business as a restaurant and sold dinner kits, clams, chips, and soda. We do not defer to the court's determination on appeal. *See Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048. However, the record before us is devoid of any factual findings by the Board at the time of its final approval regarding Perkins's use of the property, including the scope of Perkins's authorized use or any findings addressing the factual allegations of the abutters. *See Carroll v. Town of Rockport*, 2003 ME 135, ¶ 30, 837 A.2d 148 (“[W]hen an administrative board or agency fails to make sufficient and clear findings of fact and such findings are necessary for judicial review, we will remand the matter to the agency or board to make the findings.”). Without factual findings, we are unable to provide effective appellate review on the substantive issue.

III. CONCLUSION

[¶15] Accordingly, we affirm the judgment of the Superior Court with respect to design review approval, specifically with regard to the missing elevations required by the Ordinance. Because there are inadequate factual findings from the Board, we must vacate the judgment of the Superior Court with respect to site plan review approval—that is, with regard to the lobster pound’s use classification. The matter is remanded to the Superior Court with instructions to remand the case to the Board for (1) review of elevations as required by the Ordinance’s design review provisions and (2) further factual findings regarding the lobster pound’s proper use classification.

The entry is:

Judgment of the Superior Court affirmed with respect to design review approval. Judgment of the Superior Court vacated with respect to site plan review approval. Remanded to the Superior Court with instructions to remand to the Board for further proceedings consistent with this opinion.

On the briefs:

Durward W. Parkinson, Esq., and Leah B. Rachin, Esq., Bergen & Parkinson, LLC, Kennebunk, for appellant Wayne C. Perkins

John C. Bannon, Esq., and John B. Shumadine, Esq., Murray, Plumb, and Murray, Portland, for appellees James and Patricia Hartwell

At oral argument:

Durward W. Parkinson, Esq., for appellant Wayne C. Perkins

John B. Shumadine, Esq., for appellees James and Patricia
Hartwell

York County Superior Court docket number AP-2014-01
FOR CLERK REFERENCE ONLY



Maureen O'Meara <maureen.omeara@capeelizabeth.org>

Accessory buildings

1 message

Benjamin McDougal <benjamin.mcdougal@capeelizabeth.org>

Tue, Aug 4, 2015 at 9:04 AM

To: Maureen O'Meara <maureen.omeara@capeelizabeth.org>

One idea:

An *accessory building* to a *single family dwelling* that is permitted as living space shall not have cooking facilities and shall not be used regularly as sleeping quarters.

Benjamin McDougal
Code Enforcement Officer
Town of Cape Elizabeth
320 Ocean House Road
P.O. Box 6260
Cape Elizabeth, ME 04107
(207) 799-1619



Maureen O'Meara <maureen.omeara@capeelizabeth.org>

Tech Amemdment

1 message

Benjamin McDougal <benjamin.mcdougal@capeelizabeth.org>

Wed, Sep 30, 2015 at 1:56 PM

To: Maureen O'Meara <maureen.omeara@capeelizabeth.org>

Maureen,

During the process of adopting the requirement for building permit notification, we discussed many different options for what triggers the notification. To be safe, we decided to cast a wide net, with the understanding that we could revisit the issue later.

Overall the building permit notification process has gone well and I think it is good addition to the ordinance. The only change I would suggest is that we don't send a notification for small sheds. People usually place sheds near the setback line so they usually trigger the notification requirement.

An amendment could read: "utility sheds less than 150 square feet are exempt from the requirement".

These sheds have a very low value, they are easy to move, and they are rarely the subject of disputes.

Regards,
Ben

Benjamin McDougal
Code Enforcement Officer
Town of Cape Elizabeth
320 Ocean House Road
P.O. Box 6260
Cape Elizabeth, ME 04107
(207) 799-1619

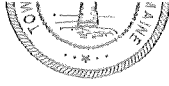
2013 Housing Facts for Cape Elizabeth

HUD Income Limits and Home and Rental Affordability Information

<u>Location</u>	<u>Income Range</u>	<u>Homes</u>				<u>Rental</u>		
		<u>HUD Income</u>	<u>Afford</u>	<u>*Median Home</u>	<u>Relative Affordability</u>	<u>Afford</u>	<u>Rent</u>	<u>Relative Affordability</u>
Portland HMFA	Extremely Low (< 30%)	\$22,900	\$75,436	\$230,000	0.33	\$573	\$1,166	0.49
	Very Low (< 50%)	\$38,200	\$130,316	\$230,000	0.57	\$955	\$1,166	0.82
	Low (< 80%)	\$61,100	\$210,678	\$230,000	0.92	\$1,528	\$1,166	1.31
	Median	\$76,400	\$263,434	\$230,000	1.15	\$1,910	\$1,166	1.64
	Moderate (< 150%)	\$114,563	\$395,022	\$230,000	1.72	\$2,864	\$1,166	2.46

Note: The HUD Income Limits and Home and Rental Affordability Information analysis for Homes assumes a Front End percentage of 28%, a Loan Period and Interest of 30 years at 4.3% fixed (zero points), Downpayment of 5% and Taxes based on 2012 Mil Rates. The analysis for Rents assumes rental costs do not exceed more than 30% of income. The data represents two bedroom rents and it does include a utility allowance. Also note that HUD Income Limits are county/MSA based. Data by individual town is not available from HUD. See the last page of this report to see county/MSA areas by town. Final note: A Relative Affordability number of less than 1 is Unaffordable, a Relative Affordability number of more than 1 is Affordable.

Source: 2013 HUD Income Limits, Statewide Multiple Listing Service (MREIS), MSHA Quarterly Rental Survey and Maine Revenue Services



TOWN OF CAPE ELIZABETH

PUBLIC WORKS DEPARTMENT

10 COOPER DRIVE
CAPE ELIZABETH, MAINE 04107

ROBERT C. MALLEY
PUBLIC WORKS DIRECTOR
TEL. 799-4151
FAX 799-4426
E-MAIL: robert.malley@capeelizabeth.org

September 18, 2015

Dear Abaco Drive Resident;

As you are aware, Abaco Drive is lined with several mature maple trees that border both sides of the street. They provide a wonderful canopy and contribute to the appearance of the neighborhood.

Unfortunately, some of the trees have grown to a point where they are now affecting our ability to safely perform summer and winter maintenance activities. Some of the limbs are protruding out into the traveled way to a point where they are now hitting the sides of our equipment. It is especially bad if they are weighted with ice and snow, when a low hanging limb can cause damage to the mirrors, windows and/or lighting systems.

We would like to trim up the trees where needed in a careful and professional manner on both sides of the street before the winter season begins. The intent of this letter is to inform you of our plan and to provide some contact information if you have any questions.

My e-mail address is robert.malley@capeelizabeth.org and my phone number is 799-4151 if I can be of further assistance.

Sincerely,

Robert C. Malley
Director of Public Works

Draft Condition of Approval Language for Post Construction:

Applicability:

Effectively sites that trigger Chapter 18 Conservation Article IV Post Construction Stormwater Management Ordinance are:

1. In the urbanized area of town,
2. Disturb one or more acres of land (effectively anyone who needs a DEP permit under Site Law, Chapter 500 or the Maine Construction General Permit has or will disturb one or more acres of land), and
3. Have stormwater structures that will remain under the property owner's control for operation and maintenance (i.e., will not be turned over to the town for maintenance).

Condition of Approval Language for Commercial or Single Family Residential:

Include a note on the Plans stating that,

"The site is within the Town's Municipal Separate Storm Sewer System regulated area and requires (a) a Maintenance Agreement for Stormwater Management Facilities to be executed with the Town and filed with the Cumberland County Registry of Deeds, and (b) after construction is complete, provide annually a certification to the Town that the Stormwater Management Facilities have been inspected and maintained in accordance with the Post Construction Stormwater Management Plan that was approved by the Town. Prior to receipt of an Occupancy Permit, execute the Maintenance Agreement with the Town and file the executed Agreement with the Cumberland County Registry of Deeds.

Provide the Town with perpetual easements conforming substantially with the lines of existing natural drainage, and providing adequate access for inspection, maintenance, repair, replacement and improvement in accordance with Chapter 18 Article IV."

And for subdivisions, add:

"Ensure that the site's Homeowner's Association documents include language requiring the Association to maintain the Stormwater Management Facilities and provide the annual certification to the Town once control of these facilities has been transferred from the developer."