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Via Email and First Class Mail

Maureen O'Meara, Town Planner
Town of Cape Elizabeth
P.O. Box 6260
Cape Elizabeth, ME 04107

Re: 287 Ocean House Road and Proposed Change of Use

Dear Maureen:

You asked for my opinion as to whether the Town's zoning ordinance requires site plan review for a change of use of the property at 287 Ocean House Road. I have reviewed the ordinance, the emails with the prospective property owner (or the prospective owner's representatives), and Attorney Bulger's letter. In my view, the ordinance does require the prospective owner to follow the site plan review process to effect the proposed change of use.

I understand that many years ago the subject property received site plan approval from the Planning Board for use as a gas station and convenience store. The approval addressed the impact of the proposed use on traffic flow and the other criteria required by the ordinance. In particular, the approval addressed the canopy associated with the gas station pumps, both in terms of the effect it would have on traffic moving on and around that site and the visual impact on the area.

I further understand that at some point after the property had ceased to be used as a gas station, the canopy was removed. I understand that the property has been vacant for some time.

I understand that the current plan is to use the property as office space and possibly a village retail shop. The prospective owner and his representatives have represented that the proposed project does not involve any new exterior changes to the building or an expansion of the footprint. The only new exterior changes identified to date would be signage, door upgrades, and paint.

Since the property at 287 Ocean House Road was developed for use as a gas station and convenience store pursuant to an approved site plan, any alteration to the property that is inconsistent with that plan is subject to the site plan amendment provisions in Section 19-9-6. Except with regard to "de minimus changes," the proposed alteration must be approved by the Planning Board in accordance with the review procedures set forth in Section 19-9-4. Ordinance

§ 19-9-6.B. A “de minimus change” is generally described as a “minor deviation from the approved plan.”

Applying these provisions to the current proposal, it is my view that the ordinance requires the proponent to submit the proposal for site plan review in accordance with the review procedures set forth in Section 19-9-4. The proposed plan involves use of the property without the gas pump canopy, which was a prominent aspect of the property’s approved use. Given the likely impact the canopy had on traffic (both in terms of entering and exiting the property and in terms of internal flow), lighting, and site appearance generally, I believe the current proposal – which involves use of the property without the canopy – constitutes an alteration that is “inconsistent with the approved site plan.” Moreover, the use of the property without such a prominent feature as the canopy does not strike me as a “de minimus change.”

Since the pertinent property is within the Town center district, the change of use also implicates Section 19-9-2.A.2. That section provides, in relevant part, that site plan approval is required for “[a]ny nonresidential expansion or change in use except that changes of use within the Town Center District shall be governed by the provisions of Sec. 19-6-4.E....”

It is my view that Section 19-6-4.E.3 does not exempt this current proposal from the review procedures set forth in Section 19-9-4. While it may be true that use of the property for office space and a retail shop constitutes a less intensive use under the criteria in Section 19-6-4.E.2, the proposed use assumes the removal of the canopy – which, again, was a prominent feature of the prior site plan approvals. The proposed use is therefore dependent upon a significant exterior alteration other than signage.

Finally, the fact that the canopy has already been removed does not, in my view, change the analysis. Section 19-6-4.E.3.b assumes – and, in fact, requires – that the subject property received site plan approval for its “current use.” The obvious intent in linking the concepts in subparagraphs “a” through “c” is to ensure that a proposed change to the use of a property that depends upon significant exterior alterations will be subject to site plan review, consistent with the amendment provisions in Section 19-9-6. Therefore, in my view, it is the deviation from the approved use of the site – including the significant exterior features of the site – that is the critical consideration in applying Section 19-6-4.E.3. With regard to 287 Ocean House Road, the “current use” approved through site plan review was as a gas station and convenience store that included a canopy over the gas pumps. The current proposal, as I understand it, involves use of the property without the canopy. As such, for the purposes of applying Section 19-6-4.E.3, I do not think that the prior removal of the canopy exempts the proposal from site plan review.

Please let me know if you require any further analysis of this issue.

Very truly yours,


John J. Wall, III