

**Town of Cape Elizabeth
Ordinance Committee Minutes**

May 30, 2013

8:00 a.m., Town Hall

Present: Kathy Ray, Chair
Jessica Sullivan
David Sherman

Guests: Victoria Volent, Planning Board Chair
Bill Brownell, FWAC Chair

Staff: Michael McGovern, Town Manager
John Wall, Monaghan Leahy
Robert Malley, Public Works Director
Maureen O'Meara, Town Planner

Mrs. Ray opened the meeting and asked for action on the minutes of May 2, 2013 meeting, which were unanimously approved.

Public Comment

No one wanted to make a comment.

Fort Williams Vendors

Mr. McGovern introduced the item. The Town currently approves food vendors in Fort Williams Park and a larger issue of street artists has arisen. Mr. Kristiansen is selling photos at Fort Williams and has asserted First Amendment rights to be there. Our attorney has advised us that there are First Amendment rights to be in Fort Williams. Mr. McGovern's concern is that one or two artists can be absorbed, but if the number grows, it could be a concern for the park. The Town Council needs to update its procedures. Bill Brownell, from the Fort Williams Advisory Committee, will be a valuable resource. Mr. McGovern expects a two-tiered approach and this committee will consider enabling language to adopt Rules and Regulations for the Park.

Mr. Wall said he is drafting Rules and Regulations that take a two-tiered approach. Our focus is street artists.

Mr. McGovern asked Mr. Wall to provide some background information to the committee. Mr. McGovern suggested that the details would be in the rules where they can be adjusted more readily.

Mr. Wall agreed that there is more flexibility in drafting ordinance language to authorize rules.

Mr. Wall focused on the second tier where vendors asserted First Amendment rights. Over the last decade, there has been litigation over how much regulation of street art vendors is permissible. The First Amendment protects freedom of expression, which can be through art. The Supreme Court is gravitating toward an interpretation that the selling of art is secondary to First Amendment protections. Regulating content must meet the highest standards of the court and is very difficult to do. Non-content based regulation is at a secondary level of review and must be narrowly tailored to meet a public need.

Mrs. Sullivan asked, for example, about selling profanity. Mr. Wall said that is not protected.

Mr. McGovern noted that the Town only sells items related to Fort Williams. Mr. Wall responded that street artists could sell non-Fort Williams items.

Mr. Sherman asked if we could regulate non-content areas such as vendor location?

Mr. Wall said that location could be regulated to protect historic landmarks and vistas, but couldn't limit location to places where there was no opportunity for public expression.

Mr. McGovern said that Tom Leahy has developed some language and we need to allow vendors in places so that we are not deliberating isolating them.

Mr. Wall responded to a question about the amount of regulation allowed for street vendors on sidewalks. He said there are both public safety and use of public property issues. New York City (NYC) negotiated with the ACLU (American Civil Liberties Union) on restrictions that preserved public safety, public vistas, disability access and compliance with other federal regulations.

Mr. Sherman stated that his concern is the gift shop. If street vendors are located there, it could impact sales and revenues, which maintain the park. Can we designate locations away from the gift shop?

Mr. Wall said that Portland Head Light and its immediate surroundings are an iconic image and you may want to preserve that view, as long as you provide street vendor locations nearby. You cannot regulate based on the impact on sales, but can because of the view. You can narrowly tailor your regulation to meet a public goal as long as you provide legitimate alternative forums for display.

Mr. McGovern said most people park at the central parking lot. He estimates it holds 70 cars while there are only 7-8 parking spaces at Portland Head Light (PHL). Somewhere between the parking lot and PHL is where vendors can locate.

Mr. McGovern continued that the Kristiansens are between the parking areas now, selling photos. I have no right to ask them to leave, but what if 20 vendors arrive? We should allow vendors where it preserves the court decisions and also preserves why people visit the site. People tend to react negatively to any change because they want the park to stay the same.

Mr. Wall quoted from a court decision that that the town could “eliminate discordant and excessive commercialism in order to preserve aesthetic values.”

Mrs. Sullivan commented that this amendment is consistent with town goals for Fort Williams since we purchased it. We should protect First amendment rights and protect traditional use and enjoyment of Fort Williams Park.

Mr. McGovern noted that we had a vendor on the water side and received a complaint. We moved the vendor to the inland side and there was more traffic and no complaints.

Mrs. Ray asked what happens if we allow space for 20 vendors, that fills up and then more come?

Mr. Wall said that there have been efforts by other communities to regulate size and area. Those have been tested by negotiations and court, but there is no consensus yet. It is a first come, first serve situation. If they fill up the park, then there is no more park.

Mr. McGovern said that since 1975, the town has defined areas of the park to preserve with no structures. Perhaps that could be a guide going forward.

Mr. Sherman asked if allowing food vendors close to PHL detracts from our concern?

Mr. McGovern agreed we may need to look at that.

Mr. Sherman said that he loves the food vendors there, but if it opens the flood gates, then...

Mr. McGovern said current vendors have their permits for this year. He asked if we can require a permit.

Mr. Wall explained that the ACLU is strident in its opposition to a registration requirement. It is a way to restrict people by introducing hoops. In NYC, they negotiated for no registration. There is no court consensus that registration is impermissible. The test is that every hurdle is a challenge and how necessary is that hurdle to meet a legitimate goal.

Mr. Wall distributed the draft ordinance amendment. It was agreed to email Mr. Wall's draft to the committee. Mr. Wall said the draft is modeled after the NYC experience.

Mr. Sherman made a motion to send the proposed amendment to the Town Council, seconded by Mrs. Sullivan.

Mr. McGovern stated that, in the meantime, our intent is that anyone in the PHL area will be asked to leave and anyone else will be directed to the same area as Mr. Kristiansen. He noted that the vendor currently at PHL contributes one-half of his proceeds to the town. He also confirmed that food vendors who do not have a permit will still be removed.

Mr. Brownell asked Mr. Wall about what constitutes "expressive material." Can the Fort Williams Advisory Commission define what is appropriate, such as things are handmade, not just made in China, etc?

Mr. Wall referenced the language from NYC. Part of their effort was to consolidate public park regulations. With the ACLU challenge, there is now a compromise. This draft is to show what has been done in other areas. Some cities have had challenges with "expressive matter." You can still regulate billboards even though they are "expressive."

Mr. Brownell observed that the Portland regulation is much narrower than NYC and Mr. Wall responded that it was not the same level of challenge.

Mr. McGovern said the town also has First Amendment rights. We may have signs that indicate which vendors share sales with the lighthouse. His worry is cruise ship days when the town benefits from revenues and then are overrun by vendors.

By a vote of 3-0, the motion was passed to recommend an amendment to the Town Council.

Public Comment

Marilyn Kristiansen, 40 Alewife Cove Rd- She is a vendor at Fort Williams and has been following what Portland has done. They tried to define art, including duct tape wallets, and gave up. They wanted to require a free registration and when challenged by the Maine Civil Liberties Union (MCLU), gave that up. Portland can't limit how close artists locate to existing businesses. There is a guitarist in Fort Williams now. We wrote to the town in advance. Portland now has a brochure online on rules and she provided a copy to the committee.

Mr. Sherman said he expected the Fort Williams Advisory Committee to dig deeper on rules and Mr. McGovern said the Town Council will need to approve the rules.

Mrs. Kristiansen said she thought the leaflet was good. She considered locating in Portland but it is too congested. She is willing to consider donating a percentage of proceeds to the park. The MCLU has been helpful and did say they would sue if there is a registration. People have enjoyed our vending very much. Outdoor vending is not an easy occupation, especially in all weather.

Day Camp Zoning Amendment

Victoria Volent presented the Planning Board recommendation. The Board reviewed current definitions of child care and also Maine State law. She noted that the Town Council referral specified "limited" and "small" when describing the day camp use. Citizen comment received by the Planning Board also commented on day camps running only during the summer, for a maximum of 4 weeks, limited to 4 hours a day. The Zoning Ordinance defines "day care facilities" as 7 or more kids and requires Planning Board review. "Home Day Care" is up to 6 kids with CEO review and possibly Zoning Board review. Both have a "regular program of care." There is also state licensing, based on different number of kid thresholds.

The Planning Board recommended a definition of day camps that sets a limit of 6 kids, located in the operator's residence, limited to 4 hours during school vacation periods. She noted that this use has no oversight by the town in terms of obtaining a permit or a board review.

Mr. Sherman asked if this amendment would prevent the shutdown that occurred last summer? What about the 6 kid limit?

Mrs. Volent said that we had no public input at Planning Board meetings regarding negative effects of day camps. We did receive public comment asking for more kids to be allowed so that there would be enough kids for teams, in the range of 8-10. Because there is no regulation, we don't know if the camp would be quiet or loud.

Mr. Sherman stated that a resident's daughters are operating a day camp this summer. Their mom is on site and wants the number limited as well and does not want the camp to operate more than 3 weeks. Still, he thinks the number of kids could increase some and likes 8-10. He knows of three camps operating this summer. If we experience noise complaints, he would be willing to revisit. Last year's complaint was retaliation and we do have noise regulations that could apply. Most camps are run by a couple of teens with a parent at home.

Mrs. Ray asked if we should say an adult has to be on the premises?

Mr. Sherman responded that it is hard to believe a parent would not be on the premises.

Mrs. Volent offered that it was the Planning Board's sense that a parent would not enroll their child in the camp if there was not a parent on premises.

Mrs. Ray noted that if there is a problem, it is the property owner's responsibility.

Responding to an inquiry, Ms. O'Meara said that she had researched regulation of this type of use in other communities and found no models.

Mr. Sherman remarked that it must be happening without registration.

Mrs. Sullivan said she liked the 6 kid limit because it was consistent with the state limits and is a small size. She could also see the 8-10 group.

Mrs. Ray said she liked 6, but might be persuaded. She doesn't want to set up people to bump into the Nuisance Ordinance.

Mr. Sherman noted the Lawson Rd example. All the campers walked to the day camp. Six is limiting and may result in folks ignoring the ordinance. It is not a great example to violate the ordinance.

Mrs. Ray said she had lived in the Lawson Rd neighborhood. There is potential for any noisy activity to bother neighbors. 8 is ok but 10 is a lot.

Mrs. Sullivan is concerned with reacting to a specific neighborhood situation when this could happen in other neighborhoods.

Mr. McGovern asked if the number included the kids already living in the house?

Ms. O'Meara suggested that most camps we know of have 8-10 kids, so most camps will violate this definition.

Mrs. Ray said she doesn't want to set up folks to violate. We can always come back to this if there is a problem.

Mrs. Sullivan said she could also compromise at 10. All agreed that kids in the house count.

In reviewing operating hours limitation, Mr. Sherman said that four hours is what is happening now and parents don't want more hours.

Mrs. Sullivan agreed.

Mr. Sherman made a motion to forward to the Town Council the Day Camp Amendments as drafted with the change to increase the number of campers to 10. Mrs. Sullivan seconded the motion and it passed 3-0.

Mr. McGovern said he will put the revised amendment on the Town Council agenda under what is already set to public hearing in June.

The Ordinance Committee thanked the Planning Board for a great job and thorough presentation.

Next meeting

The committee scheduled the next meeting for Thursday, July 11th at 8:00 a.m., if needed.

Mr. Sherman made a motion to adjourn the meeting, seconded by Mr. Sullivan and passed unanimously.

Respectfully submitted,

Maureen O'Meara