

**TOWN OF KITTERY
PLANNING BOARD MEETING**

Thursday, April 14, 2005

APPROVED
Council Chambers

Meeting called to order at: 6:13 p.m.

Present: Ron Ledgett, Chairman Russell White, Scott Mangiafico, Megan Kline, Janet Gagner
Also Present: Planner Jim Noel, Earldean Wells, Mark Eyerman

1. ROLL CALL

Roll call noted.

2. APPROVAL OF PREVIOUS MEETING MINUTES

Mr. Ledgett moves to accept the minutes of 3/17/05 as amended. Mr. Mangiafico seconds. All in favor.

3. DISCUSSION 6:15 to 8:45 p.m.

See 4/14/05 Action Items.

4. PUBLIC COMMENT ON NON-AGENDA MATTERS

A. Kittery Community Center

Bob Guay, Chair of the Kittery Community Center Building Committee, knows that the Board cannot officially review the application yet. He would like the Board to look at the initial sketches. The questions he has are when the Board might be able to review the application, if the applicant is exempt from the moratorium, and when it could, if the applicant is not exempt, and what the game plan would be to include York Hospital in the Village Zone. He would like to introduce Nick Isaac of JSA Architects and Will Conaway to introduce the plan.

Nick Isaac introduces himself. He is very excited about the potential. He is on the zoning rewrite committee and planning board in his town. They are proposing a 25,000 sf facility, one-story, with a gym and multiple use rooms along with 2,500 sf for York Hospital. That deal may not happen, but they are going along as if it will. The primary entrance is along Woodlawn Avenue, as it provides the best access. The senior community would occupy the west side of the building. The gym is at the center of the building. On the right is the physical education side of the building. York Hospital has the front corner and a physical therapy unit. There will be an aerobics or dance studio. They would share some of the weight equipment with York Hospital.

They are trying to treat each of the front areas as if they were separate buildings, so that it is more like a farm. They will have exposed timbers and an open canopy to welcome the public in. He has passed out documents that show the interior lobby as well.

Bob Guay says they have met with department heads a couple times and have tried to address parking issues and snow plowing to some extent. They are trying to get feedback from anyone that might be involved that has a concern. He asks the Board to tell them anything it sees that may jump out at it. Will Conaway is a landscape architect. He is caught between the landscape ordinance as to islands and the lighting requirements.

Chairman White says that they are running into a time limitation pretty soon. We can't make this a full-fledged sketch plan in fairness to others.

Mr. Conaway says that the inability to have islands makes it necessary to place the lights higher, which they don't think is fair to others in neighborhood. Any direction that might be given by the Board on this issue would be appreciated.

Chairman White says that handicapped parking is ADA driven. We do have a new lighting ordinance that you may want to look at.

Planner Noel says they have that.

Mr. Ledgett asks if they have the design handbook.

Planner Noel says no. That should be forthcoming through Mr. Eyerman in a couple weeks.

Mr. Guay says that they have asked Town Council to say that they are not subject to the moratorium.

Chairman White says to take that up with Planner Noel.

Planner Noel says that if they are not subject to the moratorium, the earliest they would be heard would be early summer. We have 3 sketch plans the Board will be reviewing this evening. Those will be moving on perhaps. The earliest conceivable time he could see would be luckily in July, the absolute earliest.

Chairman White says that is an issue to continue to work with Planner Noel on.

Mr. Guay asks if they are not exempt, the current moratorium ends in August? If the zone is approved through the Council, could it be released from the moratorium?

Chairman White says we have not really addressed this zone and don't know how much work is necessary in this zone. We did discuss tonight how to fold this in without reinventing the wheel.

Mr. Guay appreciates that. June 14, there will be a referendum from the Town as to whether the taxpayers want them to move forward with York Hospital.

Mr. Conaway asks if the lighting guidelines and design review would prevail over what department heads have for concerns.

Chairman White says we have to apply the ordinance. Department heads' concerns have a lot of weight. If you comply with the ordinance, we do what we have to do.

B. Red Roof at Fun Zone

Susan Emery would like to know how we got a bright red roof in the mixed use zone.

Chairman White asks where it is.

Ms. Kline says at the Fun Zone. It was installed last year.

Ms. Gagner thinks they started it last year.

Chairman White asks if it is on the building that was renovated.

Chairman White asks if it was in the proposal.

Ms. Gagner says no, it was not in the proposal.

Chairman White says it is an enforcement issue.

Susan Emery says that one of the things people did not like about the malls is the blue roofs. She looked back into the mixed use zone and it has not changed. Bold or bright hues are not permitted. People put a lot of time into those committees. We should not allow that to happen. It should not stay there.

Planner Noel says this is the first he heard of it.

Ms. Kline says that it was done last year.

Chairman White says their project was approved, and they did it. Then, years later, they had a leaking roof and put something on that grabs attention, he guesses. It looks like it needs to be referred to Code Enforcement and it should be addressed with the property owner. Ms. Emery can always write an e-mail to Code Enforcement and copy it to Town Council and anyone else who wants to see it. He appreciates hearing about it.

Ms. Emery thanks the Board.

5. SKETCH PLAN: WEATHERVANE SEAFOODS, 31 BADGERS ISLAND WEST, KITTERY, ME. APPLICANT IS PROPOSING TO INSTALL AWNING/CANOPY TO COVER EXISTING DINING AREA ON DECK. MAP 1, LOT 31, ZONED BI.

Ms. Gagner steps down.

Chairman White introduces the application.

Jeremy Gagner introduces himself as the Vice President of Site Development for Weathervane Seafoods. He wants to preface his presentation by letting the Board know that they are still having an issue with the sign located down there. It's been a dragged out issue and he thought it was OK, but they are .1 inch encroaching onto the adjacent property. He thought that they could chop some of the sign face off and take care of it today. That issue will be rectified by the time they receive the final approvals. He corrects himself on the measurement. It is .1 feet, so 1.2 inches. They are looking to put an awning over the existing deck where the existing dining area is and existing tables are. He does not know if there are any specific questions.

Chairman White says the awning is attached to building and does not appear to be blocking anyone else's view.

Mr. Gagner does not believe that it blocks anyone else's view.

Chairman White asks for the height of the awning.

Mr. Gagner believes it will be 1.5 stories. He does not have the exact height at this time.

Mr. Ledgett thinks this is a deck, but also a dock, so he needs to look at 16.32.490n3, page 317, the requirements for piers, etc. extending over the normal high water line. Under d and e, no new structure shall be built on or over a dock unless the structure requires direct access to the water as an operational necessity. We need to look at what that means. The key thing here, from a sketch plan point of view, is that the applicant goes through these requirements and knows how to deal with them.

Planner Noel, to follow up, says that he knows the Board is aware that there has been an agreement with the Planning Board and Port Authority as to a new procedure for review. The Planning Board will review most, if not all, applications, before they go to the Port Authority. He refers to page 312, 17b, as to whose responsibility this application lies with. Planner Noel would suggest to the Board that this application would be the responsibility of the Planning Board for review and approval. This perhaps would not need Port Authority review.

Mr. Mangiafico and Mr. Ledgett think that with 17a, it seems the Port Authority is also involved. Chairman White says 17a says piers, docks, structures, uses, but the types referred to are the primary structure, i.e. the pier itself. It looks like b means something built on top of the pier. It seems logical that the Port Authority would review something in the water, and the Planning Board would review something over the water.

Mr. Ledgett says that there is text that also applies.

Ms. Kline says b also refers to note 7 on page 314.

Planner Noel would suggest that the use has already been established.

Chairman White says we are really talking about adding a structure. He says the applicant should familiarize himself with 16.32.490.

Mr. Ledgett asks the applicant if he is presenting on the next item as well. There probably is a linkage between the applications.

Mr. Gagner thinks one would continue without the other.

Chairman White says we did not establish whether or not Port Authority review for the structure is necessary. Obviously, it is a fair question.

Milton Hall went down and looked at it and didn't see any problem with it.

Mr. Ledgett says that Mr. Hall did not answer the question.

Chairman White wanted to know what Milton Hall's interpretation of the ordinance is. He does not want to put him on the spot.

Mr. Ledgett and Chairman White tell the applicant that he should talk to Planner Noel.

Mr. Gagner says it seemed that Port Authority approval is not needed.

Chairman White says that he needs a memo from the Planning Department that Port Authority approval is not needed.

Ms. Kline says that as to the 15' height, she is curious why he would not use the current roof line.

Mr. Gagner says that is the current roof line.

Ms. Kline will take his word for it. It will be like a shed roof?

Mr. Gagner says yes. It won't be over the existing roof.

6. SKETCH PLAN: WEATHERVANE SEAFOODS, 31 BADGERS ISLAND WEST, KITTERY, ME. APPLICANT IS PROPOSING TO EXPAND DINING AREA TO INTERIOR OF EXISTING BUILDING. MAP 1, LOT 31, ZONED BI.

Ms. Gagner stayed down for this item.

Chairman White introduces this item.

Jeremy Gagner, Vice President of Weathervane Seafoods, is here to present a minor modification to an approved plan. The note states that it was approved as an outdoor seasonal restaurant. They have looked at their existing sales there and the business they were doing and it has been

proven that they have negligible if any drive in sales, for which they allotted 15 parking spaces. They would like to take an existing area of the building, used for maintenance, and add a dining area. They come up with a net of -8 parking spaces. The new configuration requires 8 less parking spaces than the approved plan.

Planner Noel says it is -8 or -9 spaces.

Mr. Ledgett is not so sure this is a minor change. The primary use of this facility is working waterfront. If we go back to the minutes of our approval, we allowed a seasonal, weather dependent use. It is now being expanded into something that is more like a restaurant with indoor and outdoor components. The Comprehensive Plan is pretty clear that we are supposed to pay attention to protection of the working waterfront. He is concerned that this use is gradually being converted from a working waterfront to a restaurant.

Chairman White gives the example of Simeon's with a combination of uses that are clearly recreational, working, and tourist, and does not think one precludes the other.

Mr. Ledgett does not think so either. He thinks this is a significant shift in the use, though, and he recalls there was a significant abutter interest.

Mr. Gagner says that they would be adding somewhere between 24 and 30 seats and would then have 65 seats. They are looking to limit the hours of operation. There is no late night traffic. There is no reason at this time to be extending the seasons.

Chairman White asks about the season.

Mr. Gagner says that they would stay with May through October.

Chairman White says that they are eliminating take out and adding interior seats. They are not making any changes to the exterior of the building.

Mr. Mangiafico was looking at what is currently in the state statute with respect to shoreland zoning. It talks about having a 25' setback primarily in the commercial zone. We need to look at that and make sure we follow that the way we should have. In this zone, we have existing businesses and larger residential. Have we created something that will have a lot of conflicts? Do we really need the state statute? If we are going to create these zones, we need to look at this. Chairman White says that on this portion of Badgers Island, there are 2 working waterfront entities left, and Weathervane is one and Badger Island Marine is the other.

Mr. Mangiafico says that the statute was talking about the visual impact and may not apply. The whole idea of allowing the businesses to go down to 25' ... the zone looked like it was for businesses, not residential.

Chairman White says that everything we have approved has been for residential. He thinks it was proximity to water that was important.

Mr. Mangiafico says the state reviewed it and approved it, so maybe we just need to touch base.

Planner Noel has a couple questions for Mr. Gagner. He has provided a preliminary plan checklist. He would like to know if the Board has any issues. On the issue of a boundary survey, they do have a site plan prepared. He does not know if the Board will require anything further.

Chairman White thinks we have what was previously submitted and that is sufficient.

Planner Noel wants to know on page 2 whether there will be any machinery placed outside the building and any noise factor that may be involved with it. He tells the applicant to give that some thought. He suspects water is not going to be a problem. He does not know if the Board would require a letter from the water district.

Mr. Ledgett asks why not get the letter. It's not a problem.

Mr. Gagner confirms that the Board wants a letter.

Planner Noel says we are talking about an additional seven parking spots and seven cars, so he does not know if the Board wants information on vehicular traffic and its impact.

Mr. Ledgett remembers the issues concerning getting onto Route 1.

Mr. Gagner says there have been no changes in that intersection.

Planner Noel met with Mr. Rossiter on site there and he had some ideas, but none that were particularly functional. Planner Noel can talk to Mr. Rossiter again.

Chairman White asks if onsite parking is being reduced. It seems like they would be reducing vehicular impact according to that. To review the condition issue, they were supposed to resolve the sign issue. Over the past year, we have received a stream of communication from both sides. They have had the area surveyed and have represented that this will be remedied.

Mr. Gagner would like to know how quickly he can get on the schedule for preliminary plan review.

Planner Noel would suggest that he call tomorrow and make an appointment to see him next week.

Mr. Gagner thanks the Board.

7. SKETCH PLAN: FIRST STEP LAND DEVELOPMENT, INC. APPLICANT IS PROPOSING A RESIDENTIAL PIER, RAMP, AND FLOAT SYSTEM FOR THE BRIERS HOMEOWNERS ASSOCIATION. MAP 17, LOT 43, ZONED UR.

Mr. Ledgett steps down for this item, as does Mr. Mangiafico, and Ms. Gagner returns to the Board.

Chairman White introduces this item. He then asks a threshold question on the standing issue as to who the applicant represents and whether there is evidence of that. He does note that in the Port Authority approval, this was a condition.

Paul Hollis says that the Board has it in front of them. He is acting as the applicant for those who have purchased lots. Mr. Hollis is president and owner of First Step Land Development, the applicant for the pier. He says there are permission slips in there. Only Chairman White has them. He will go through them with him. He thinks they are at the end. Mr. Hollis asks if the Chairman would like them pointed out.

Chairman White says no. Reviewing the papers before him, he says, OK, so you have an authorization from the owners of lot 1, lot 2, lot 3, lot 4, lot 5, 6, and 10.

Mr. Hollis owns 7, 8 and 9.

Chairman White asks whether relying on that representation, the applicant has satisfied the standing issue. Chairman White thinks so. Chairman White asks Attorney McEachern's opinion. These are faxed copies of authorizations.

Attorney McEachern asks what they say.

Chairman White reads them. They authorize Paul Hollis to act as their agent.

Attorney McEachern has not had any occasion to look at the documents. It would be sufficient with the Board of Appeals. He assumes these people can authorize someone to act as their agent.

Chairman White says it specifically references the Port Authority. It does not specifically

reference the Planning Board.

Attorney McEachern thinks they could proceed subject to satisfying that if it is a problem.

Chairman White says that because it is a sketch plan, the item can be proceed, but the authorizations must be amended to include the Planning Board as well.

Mr. Hollis asks if he needs them for the next meeting or soon after this one. He can get them in a few days.

Chairman White asks him to make his presentation.

Mr. Hollis thanks him. He introduces Jim Nadeau and Attorney John Bannon from Portland, who are here with him as well. He wishes he were here for an awning, but he's not. Back in the winter of 2001, they were introducing a property now known as the Briars. After meeting with David Schmidt, it was suggested that 15-18 lots could be put on the property. He made it clear that he was not interested in maxing out the site. Behold a theme started that less was better. He decided to go with a nine-lot subdivision. One of the ideas that came out was a community pier system. He was surprised that none had been suggested before a board before. There was nothing in any ordinance that disallowed such a use. It made perfect sense to them that building one pier rather than 3 adopted that same theme of less being better. This board approved the subdivision plan in a record 5 months, not including the dock. Little did he realize that the pier would create such controversy. They were instructed to go to the Port Authority first and seek approvals from them. He would like to apologize to this Board. There were times that they were going to be before this Board and did not show up at the last minute. The intent is to go forward with all Planning Board review. They have received every permit that they need to have. They have a DEP permit, updated Army permit, land lease permit, Port Authority updated permit dated 1/18/05. They were approved twice by Port Authority. They were going to be before the Planning Board in the fall of last year. Then they found out that the permit expired. They were back before the Port Authority and were told that they had to start their application all over again, which they did. They received waivers from lot owners 2, 3, and 4 to build a community pier on lots 2, 3, and 4. They received authorizations to act before the Port Authority and will amend those to get authority to act before the Planning Board. It took them about 8 months before the Port Authority for that Board to embrace the idea of a community pier. A community pier would not unreasonably interfere with marine uses or recreation, diminish services, or interfere with ingress and egress of riparian owners. As he goes through the design, he will show the progression and how they have what they have today. The very first application, they had a design of a 90' pier, 50' extension, and 120' float. It appeared obtrusive. They listened to the Port Authority Board and got input from others and decided to change the design. They came up with an 80' pier, 43' gangway, and float system of 60' that could accommodate 9 slips. They learned that there were docks scattered throughout with no restrictions as to the number of boats to be on them, limited controls on them, and no control as to aesthetics. The idea of building one pier rather than three, he thought was a great idea. The Port Authority decided to put restrictions and covenants together on the pier. He reads from the covenants. It will be maintained by the homeowners' association, privately owned, with access and use only for association members Chairman White interrupts just because of the hour. We need to have a motion to extend the meeting or expire. He would like him to run through the high points and perhaps we can then open the floor to some Board feedback.

Mr. Hollis asks whether the Board wants to do a motion now to extend.

Chairman White says we will do it in due course. We do not need the covenants read to us.

Mr. Hollis says that the applicant was asked by the Port Authority to determine the soils. It has been determined that the community pier will not affect the shoreline. He will pass it on to Mr. Melende.

Peter Melende of Brentwood, NH, is not an owner, but does have a P&S with Eileen Roberts with respect to Lot 6, that may or may not be executed. On looking at this, he noted issues, and went to Mr. Hollis about it. He is a chemical engineer and a business owner in Hampton. What he is about to give us may be a little obsessive. He contacted Milton Hall and asked and Mr. Hall explained about the pier limitations in size. He talked to Greg Normandeau about it and about Spruce Creek in general. Mr. Melende states he is a fly fisherman and wants to preserve water quality. Mr. Normandeau pointed out that anything north of the railroad trestle is tidal flat area. Mr. Melende says he went out and took pictures and that is a Coast Guard certified channel. Another issue was that there was developable land around Spruce Creek area. He made a tax map of Spruce Creek. He mapped the basic channel that exists throughout Spruce Creek. What you'll find is that the channel substantially narrows in the center portion making some large tidal flats. Below the railroad trestle, you can have piers, and there are significant piers there along with smaller piers. He started to look and try to find where was the developable land in the Spruce Creek drainage area and had a hard time finding it. Most of the east side of Spruce Creek has been developed. There happens to be one that is next to Rogers Park that has some significant volume to it.

Ms. Gagner makes a motion to extend to 10:30.

Ms. Kline seconds.

All in favor.

There is a point of order raised from the audience as to whether there is a quorum necessary to take that vote.

Chairman White says that we do not have a quorum to take that vote. It is a procedural vote, not a substantive vote. We can either ask a member to rejoin or let the meeting expire.

Ms. Kline says that the continuance is for continuing the presentation of the sketch plan.

Chairman White says that it is an interesting presentation. He would like to put a time limitation on the sketch plan.

Ms. Gagner thinks that what Ms. Kline is saying is that if we do that and the other Board members have not heard it, then we may not have a quorum for the final vote.

Chairman White says to the applicant that it might be that he would want to come back and make this presentation at a time when we are going to have those other members here. We need to have enough so that when we have deliberation, we have a quorum. He is inclined, if the Board will go along with it, to invite a Board member back on for the purposes of the motion to extend only. He asks Mr. Mangiafico to come back on for the purpose of the motion to extend only, and Mr. Mangiafico agrees, remaining seated in the audience.

Ms. Gagner reopens her motion to extend.

There is no discussion on the motion.

Ms. Kline seconds the motion.

All in favor, including Mr. Mangiafico.

An audience member raises a question as to whether the public will have a chance to comment, as the meeting has been extended.

Chairman White says that we will ask to limit the sketch plan to another 10 minutes for presentation. We will get some comments from the Board. Then there will be a short time for public comment. It is clarified that Mr. Mangiafico was only here for the procedural vote and is not on the Board for this item.

Mr. Melende thinks the most salient elements of it are that the character below the railroad trestle area is significantly deeper water and closer to the shoreline. He shows a representation of the proposed pier at the Briars. If you look at the pictures that are there, it is unlikely that there is any available deep water access from the shore with the existing limitations. In the process of doing this, he determined that 99% of all the water flowing into and out of Spruce Creek is tidal and his calculations support that. A major concern that he has is what is happening in Portsmouth Harbor. The potential risk to Spruce Creek is much more outside of Spruce Creek than inside Spruce Creek. When he looked at lot density, that located within Briars is generous compared to that around it. It is similar to the Hartley Road area. He is a lifelong NH resident. He is coming to ME because he found a development that he looked at and found that he could endorse. It had character and did not impose on the area. It had a sanity to it. He was surprised that the more information he gathered, the more common sense it made. It made sense to have community pier. His mother has a summer home and they deal with jet skis in the lake there. It makes sense to have 10 people responsible for what happens at that pier. That is his overall perspective. He did this because he wanted to understand what is going on.

Chairman White asks for any further presentation.

Mr. Hollis would be happy to answer any questions the Board has.

Chairman White says there was a request for public comment. He asks if the Board wants to take the opportunity to do Board comment now. He guesses we could do a couple minutes of public comment first.

John Robinson lives on Haley Road, and he welcomes concerns about the creek. He represents a group of citizens who have concerns about the development of the community pier. He wants to list the concerns, but not elaborate upon them. The proposed community pier does not conform with the Land Use and Development Code. It is not in character with existing piers. The Board should look at the number of slips, not the length of the pier. It does not conform with an existing use. It confers waterfront use to non-waterfront owners. As Mr. Hollis said, the proposed structure is not specifically addressed in any ordinance language. Insofar as there are definitions that could apply, the closest that comes is a marina. They do not feel those issues have been fully adjudicated. A dock is available for use by waterfront owners as an accessory use to owners of that lot. This is not tied to any existing lot. They have concerns regarding the conditions of the approval of the Port Authority. The Board struck one of those tonight when it asked about the authority of the applicant. He would refer the Board to the minority report from the Port Authority. One of the other concerns is the attempt to protect the creek and its users by covenant. That is not enforceable by government agencies. There is the issue of conferring waterfront rights to non-waterfront owners and how that affects the valuation of lot owners. He, as a waterfront owner, would like his land value to go down if this is approved. They keep hearing that one dock is better than 3. The Board needs to think about having three families on

the water versus nine families on the water.

Katherine Johnston, 23 Vaughn Road. She is concerned that a community pier is not permitted and not in any land use codes.

Chairman White asks her to be quick, as we have already heard this from the previous speaker.

Ms. Johnston asks if they have information on the DEP easements required across lots 2, 3, and 4. The DEP letter requires Mr. Hollis to retain an easement. He did not own any of those lots at that time. As of today, in the registry, there has been no filing of any of the easements. She is curious as to whether his application is complete.

Chairman White says this is a sketch plan. It is a salient point to raise, but we are not there yet.

Ms. Johnston says that is her point and have a great night.

Chairman White says that the easement point that was made, if it is a requirement, the applicant needs to address it. The applicant should review 16.32.490.N.3.d, page 317 of the ordinance, and look at existing character and use language. Another issue that has been raised is exactly what is this. Within the existing ordinance as it is now, is it a marina? We don't have a community pier in the ordinance. We have to approve something that is in the ordinance.

Mr. Hollis says it is not a marina.

Chairman White says he needs to revisit this with the Planning Board. What use is it? Where does it appear in the ordinance? And how do you support that? The purpose of the sketch plan is to point up issues we see. Probably there are some things that we will not get to tonight.

Ms. Kline would like to know at low tide the depth of the water when you stretch out 80'. There must be a depth there. She would like the rationale for why the applicant is stretching it out 40' beyond that.

Mr. Hollis says that they are going to the allowable 150' out.

Ms. Kline wants to know whether there is a rationale to go out that far.

Planner Noel wants to let Mr. Hollis know that he has received numerous questions and inquiries. He will compile a list to submit to Mr. Hollis and hopefully he can answer them. He probably will get it next Thursday.

Mr. Hollis says that is fine.

Chairman White asks if Planner Noel will provide Mr. Hollis with copies of other correspondence received. Chairman White has a copy of a letter from Brian Raudonis received tonight.

Ms. Gagner asks if the covenants have been recorded.

Mr. Hollis says they are recommended covenants. They cannot be changed except by the Planning Board or Port Authority. He hopes to add to them and strengthen them further as a result of discussions with the Planning Board.

Mr. Hollis asks when he is allowed to come back.

Chairman White says to get together with Planner Noel.

Mr. Hollis thanks him.

8. OLD BUSINESS

Mr. Ledgett and Mr. Mangiafico return.

9. PLANNER'S TIME

There is a hand out from Planner Noel.

10. ADJOURNMENT

The Board adjourns for Executive Session at 10:21.