

## 2/1/2022 Lovell Planning Board Meeting

Call to order 6:40 PM

Board present: Heinrich Wurm, Jane Lansing, Andrew Brosnan

Others present: Alan Broyer CEO, David Hart - Fish Street Design, Lynn Hurd, Sarah Clemons, Bill, Online: Michael and Susan Stevens, applicants

Minutes from 1/4 accepted

Stevens Conditional Use Application:

David Hart - applicant representative gives overview of project - raise cottage, new foundation, no changes to footprint. Height will not be raised any more than 3'.

Jane - vegetation affected? - David - none

Heinrich - 4' deep? Yes if possible/actual to be determined.

David H. - existing foundation is in very bad shape.

Heinrich - review application 9.9 sections etc.

Jane - Asks Alan B. for any concerns.

Alan - None

Heinrich - site visit needed? straw poll for board - not needed

Alan describes site topography, believes current plan is best option

Andrew reads Dave Durrenberger's emailed concerns:

"Can we get a drawing of the planned "concrete foundation and concrete piers" indicating what will be below grade, what will be above grade?

I am not understanding what the foundation will consist of i.e. frost walls on footers, and or piers, and or will there be a poured floor with below grade space.

Can topographic map be overlayed on the survey provided?"

David H. - Describes the foundation plan. Actual foundation plan will be provided for permit.

Board members Dave Durrenberger, Eugene Jordan arrives 7PM, misunderstanding on start time.

Meeting so far is summarized for Dave and Eugene

Dave D: Sewage disposal field age?

Alan: Sewer disposal field is brand new.

Dave D - Who owns Merrill Rd?

Michael (applicant) - Association

Discussion about moving the cottage to GPE

Dave: GPE considered?

David Hart: Discussion but nothing formalized, had consultants look at it.

Dave: Why is not the GPE to put the structure on the other side of the road?

Heinrich: If greatest practical extent gets invoked, having a road in front is not desirable

Dave: Land across the road exists, this is the Ordinance, desirability is not part of our Ordinances

Alan: I have been there several times, it is wet.

Dave: Need a site visit, need to see wet, need to see the road. Putting a foundation underneath, triggers a GPE.

Heinrich: Voted not to have a site walk, before you arrived: Andrew, Jane, Heinrich

Dave D - any plans to move building across rd? Is it Wetland?

David H. - It is wet, but not official wetlands.

Discussion on moving road to allow moving cottage to GPE.

Michael Applicant - moving road was considered not possible.

Dave - is there a topo map?

Alan - no

Public question - was the DEP consulted?

Heinrich - No

Andrew - what is project timeline?

David H - ASAP

Discussion about calling the application complete.

Heinrich - motion to accept application as complete

Dave - does this mean no site walk possible.

Can we make a condition that vegetation buffer between cottage and lake be evaluated?

Eugene - seconds motion

Dave D. votes no

All others in favor - Heinrich, Eugene, Jane and Andrew

Motion passes.

Next steps?

Dave speaks about adding a condition that vegetation buffer between cottage and lake be evaluated?

Heinrich - why needed?

Dave D. - GPE is triggered, so since it is inside 100', why not?

Heinrich - total revegetation of shore can't be a condition - not reasonable.

Andrew - We are disregarding GPE so we want to 'make up' for the amount that the house is inside the buffer. How do we determine how much revegetation makes up for it?

Eugene - putting a foundation under a camp helps protect the lake.

Question from Public - Bill - stormwater runoff is bad in spring, how will this work?

David H. - Stormwater runoff is handled in plan

David H - Question on process - Complete vs Approval  
We voted it is complete. Now we are discussing Conditional Approval.

Dave H. - Maine Lakes stormwater evaluations - 50% fail on Kezar.

Heinrich - let's discuss conditions.

Andrew - Revegetation consult should be allowed as a condition.

Heinrich agrees with adding condition for consultant regarding runoff.  
Explains reasoning to Applicant

Heinrich makes motion to add conditions if approved:

1. Best practices followed concerning stormwater disposal
2. In consideration for not requiring GPE, have consultant familiar with LakeSmart principles evaluate area between house and shore for any recommendations on stormwater runoff management needed, and those recommendations be discussed at a future PB meeting with PB and Homeowner and a reasonable solution be found for both parties.

Discussion on requiring recommendations or not.

Heinrich - conditions must be reasonable and voluntary.

Vote passes 4-1, Dave D. votes no.

Discussion on Approving Application

Eugene makes a motion to approve Conditional Use Application

Vote passes 4-1 Dave D. votes no

Dave D. discusses no vote reasons - no teeth to conditions

Dave requests executive session regarding section 9.9

Discussion on additional Planning Board Rules and Regulations

Heinrich suggest combining PB Rules and Regulations with Town Ordinances

Dave asks for vote on having Executive Session regarding section 9.9

Discussion re 9.9

Heinrich reads from PB Manual re adding conditions

More discussion about 9.9 and is a lawyer needed?

Heinrich suggests contacting MMA re 9.9

Dave makes motion to hire attorney to go into executive session to train us and let us ask questions re 9.9

Andrew seconds

Vote fails 3-2, Dave and Andrew vote yes.

Heinrich is in favor of having an attorney discuss and train on 9.9 at a public session.

Andrew makes a motion to add an agenda item to a public meeting by having an attorney answer questions and provide insight on section 9.9

Dave D. seconds

Vote fails 3-2 Andrew and Dave vote yes.

Eugene asks for discussion about Planning Board turnover

Do we have a secretary? No

Heinrich - we will need chair, second chair and secretary

Discussion on hiring a recording secretary.

Amendment updates - communication amendment will not be on March meeting.

Public - Sarah Clemons - thank you for Jane working with PB for eight years

Public question - was the planting done for storage units in keeping with PB plan?

Alan/CEO will approach Storage Unit owner re existing plantings/height not meeting approved plan.

Motion to adjourn by Heinrich

Second by Andrew

Discussion - Ordinance committee still has work to do.

Motion Passed Unanimously.

Meeting Adjourned.

Minutes submitted by Andrew Brosnan

Addendum to minutes provided by Heinrich - excerpt from the PB Manual that Attorney Jim K. sent Heinrich in response to his question on article 9.9 I. and Jim's take on it is highlighted below:

**Conditions of Approval.** A planning board has inherent authority to attach conditions to its approval of an application. See generally, *In Re: Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977). Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal. *Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.2d 53 (Me. 1969). There must be a "nexus" and "rough proportionality" between a condition of approval and the impact of the proposed development. *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). A conditional approval "which has the practical effect of a denial...must be treated as a denial." *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty, Jan. 12, 1990). Any conditions which the board wants to impose on the applicant's project must be clearly stated in its decision and on the face of any plan to be recorded to ensure their enforceability. *City of Portland v. Grace Baptist Church*, 552 A.2d 533 (Me. 1988); *Hamilton v. Town of Cumberland*, 590 A.2d 532 (Me. 1991); *McBreairty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). (See Appendix 3 for sample language.) If it is the municipality's intention to render a permit void if the permit holder fails to comply with conditions of approval within a certain time frame, this should be stated clearly in the ordinance. *Nightingale v. Inhabitants of City of Rockland*, CV-91-174 (Me. Super. Ct., Knox Cty., July 1, 1994).

If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed based on the evidence presented in the record and what kinds the ordinance/statute allows the board to impose. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Before granting approval with certain conditions attached, as a practical matter, the board should be certain that the applicant has the financial and technical ability to meet those conditions. Otherwise, the board may find itself later on with a situation where the applicant has not met the conditions, forcing the municipality to go to court to convince a judge to enforce the conditions of approval. Unless the board and applicant can reach an agreement on reasonable conditions to impose which are both technically and financially feasible for the applicant and adequate to satisfy the ordinance requirements, the board should not approve the application. Cf., *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990).

In a case where an applicant had to prove that his project would not generate unreasonable odors detectable at the lot lines, the court upheld a board's condition of approval requiring that

an independent consultant review the design and construction of a biofilter as it progressed and to report back to the board regarding problems. The court found that it was not an unguided delegation of the board's power to the consultant and also found that it was not necessary for the board to require the applicant to provide it with a final filter design before granting approval. *Jacques v. City of Auburn*, 622 A.2d 1174 (Me. 1993).

In *Bushey v. Town of China*, 645 A.2d 615 (Me. 1994), the planning board granted conditional use approval for a kennel subject to a number of conditions, including the installation of a buffer for noise control and the installation of a mechanical dog silencer device; the owners had to fulfill these conditions by a stated deadline. The planning board later found that the conditions were satisfied and a neighbor appealed to the board of appeals, claiming that the conditions had not been effectively satisfied. The board of appeals agreed based on the evidence presented and voted that the permit conditions had not been met and revoked the permit.

The Maine Supreme Court has upheld a condition of approval imposed by a planning board that authorized the City planner to approve minor changes to an approved project plan. *Fitanides v. City of Saco*, 2015 ME 32, 113 A.3d 1088. The court found that the condition did not constitute an improper delegation of legislative authority in violation of the Constitution. The court also found that the condition did not violate any express or implied prohibition against a delegation of administrative authority in the City's zoning ordinance. (For a discussion of the appeal of plan revisions approved by the City planner, see *Desfosses v. City of Saco*, 2015 ME 151, 128 A.3d 648.)

**So, in short, the proposed condition of approval must have a basis in a review standard in the ordinance, there must be a connection between the condition and the impact of the proposed development, and the condition must be roughly proportional to the impact of the proposed development.**

**That's pretty much what I would have to say in an executive session on the subject.**