

Minutes
Bar Harbor Board of Appeals
June 18, 2018
Council Chambers - Municipal Building
93 Cottage Street
7:00 PM

I. CALL TO ORDER

The Chair called the meeting to order at 7:03 PM. Members present: Ellen Dohmen, Chair; Kay Stevens-Rosa, Member (arriving at 7:25PM); Michael Siklosi, Member; Robert Webber, Member; and Linda Martin, Secretary.

Also present: Janna Richards, Planning Director; Angela Chamberlain, Code Enforcement Officer; and William Kelly; Attorney for the Appeals Board.

Ms. Dohmen welcomed Ms. Richards as the new Planning Director and Mr. Robert Webber as a new Board member.

II. ADOPTION OF THE AGENDA

Ms. Martin moved to adopt the agenda as prepared. Mr. Siklosi seconded the motion and the Board voted 4-0 to approve the motion.

III. EXCUSED ABSENCES

Mr. Samuel was an excused absence.

IV. APPROVAL OF MINUTES

a. September 12, 2017

The Board did not have a quorum to act on the minutes from the September 12, 2017 meeting. Ms. Martin moved to table the consideration of the September 12, 2017 minutes to the next meeting. Mr. Siklosi seconded the motion and the Board voted 4-0 to approve the motion.

Ms. Dohmen did note an amendment to be incorporated into the minutes - to change "Chair" to "Acting Chair" for clarification purposes. This modification has been noted for the record but will not be changed until the minutes are acted upon at the next meeting.

V. REGULAR BUSINESS

a. **Public Hearing:** AB-2018-01 – Administrative Appeal

Applicant: Jack Russell's Steakhouse and Brewery

Project Location: 102 Eden Street, Bar Harbor, Tax Map 101, Lot 010-000

Application: The applicant requests that the Appeals Board hold a public hearing for an administrative appeal of the Planning Board's written decision of an approval for a Major Site Plan, application SP-2018-01, on April 18, 2018 pursuant to section 125-103 of the Bar Harbor Land Use Ordinance.

Mr. Tom St. Germain, owner of Jack Russell's Steakhouse and Brewery, and Mr. Dan Pileggi, represented the applicant before the Board.

Ms. Dohmen indicated that a document relevant to the application was brought to her attention by the Board's Attorney, Mr. William Kelly, prior to the meeting. She asked that Mr. Kelly discuss the document, without getting into its particulars, for the Appeals Board to understand if they should consider remanding the decision back to the Planning Board to give them the opportunity to consider the information contained in the document.

Mr. Kelly explained that he reviewed the record of the subject lot and found a document, which appears to be germane to the issue of calculating gross leasable area and determining parking, that was not introduced at the Planning Board meetings where application SP-2018-01 was reviewed. Mr. Pileggi noted that prior to the Appeals Board meeting he had spoken with Mr. Kelly who had advised him about the document. Mr. Pileggi then discussed the document with Mr. St. Germain, again, prior to the meeting, who indicated that the Planning Board was made aware of the document and disregarded the document because it did not pertain to the current ordinance. Mr. Pileggi inquired with Ms. Chamberlain as to whether or not she recalled the document being addressed during any of the Planning Board meetings where the application was reviewed. Ms. Chamberlain responded that she did not recall the Planning Board receiving the document for them to address it at a meeting. Ms. Dohmen asked the same question of Ms. Richards and Ms. Richards responded that, from reading the Planning Board minutes from the meetings where this application was discussed, there is no indication that the Planning Board was aware of the information contained in the document.

Mr. Pileggi requested a recess to speak with Mr. St. Germain. Mr. Kelly asked Mr. Pileggi and Mr. St. Germain during which Planning Board meeting Mr. St. Germain recalled the document being addressed by the Board and Mr. St. Germain stated that it was at the April 4, 2018 Planning Board meeting.

Ms. Dohmen called a recess at 7:17 PM.

The Board reconvened at 7:24 PM.

Mr. Pileggi stated that the applicant would like to withdraw the appeal based on the gross leasable area and parking calculations (issue number 1) and requested that the Board consider proceeding with the appeal based on granting a parking credit for being a property located on a regularly scheduled bus route (issue number 2). Ms. Dohmen questioned whether issue number 2 was dependent on issue number 1 and if the Board could consider issue number 2 without considering issue number 1. Ms. Dohmen asked Mr. Kelly to contribute to this discussion. After deliberating, Mr. Kelly came to the conclusion that the two issues could be considered independent of each other and that he had no legal objection to the applicant's proposal to withdraw the appeal based on issue number 1 and proceed with the appeal based on issue number 2.

Ms. Martin confirmed the proposal with the applicant for clarity purposes. Ms. Dohmen closed the discussion to the Appeals Board members only. Mr. Silklosi stated that, after reading the transcript, he did not see how the two issues could be considered independent of each other and that he did not see them as being severable. Mr. Kelly clarified that the Board is still able to utilize the facts in the record before them to consider the second issue of appeal. Ms. Stevens-Rosa and Mr. Silklosi remarked that they saw the two issues as being dependent on each other, but that they would like to have further discussion with the Board on the matter. Mr. Webber indicated that he would consider sending both of the issues back to the Planning Board, that with the document the Planning Board may change their decision, and that there may be no further need for an appeal. Ms. Dohmen agreed that the Appeals Board should consider remanding both issues back to the Planning Board.

Mr. Webber moved to remand both reasons for appeal to the Planning Board. Mr. Silklosi seconded the motion. Before the Appeals Board could vote, Mr. Pileggi stated that the applicant would like to withdraw both of the appeals. Ms. Dohmen allowed Mr. Pileggi to state the basis for why the applicant was withdrawing the appeals. After hearing Mr. Pileggi's argument, Mr. Webber withdrew his motion.

Mr. Silklosi moved to accept the withdrawal of the first reason for appeal related to gross leasable area. Mr. Webber seconded the motion and the Board voted 5-0 to approve the motion.

Mr. Silklosi moved that the Appeals Board hear the second reason for appeal in regard to the bus route. Ms. Martin seconded the motion and the Board voted 5-0 to approve the motion.

Mr. Pileggi noted that the applicant had requested a reduction in parking spaces for being on a regularly scheduled Island Explorer bus route on Site Plan C-1. He cited sections 125-67.D and 125-64 of the Land Use Ordinance and Ms. Dohmen read these sections into the record. Mr. Pileggi also mentioned that in addition to Site Plan C-1, there was testimony at the Planning Board public hearing regarding

the applicant's contribution to the Islander Explorer bus route, including placing a bus stop sign on his property.

Mr. Pileggi argued that the Planning Board did not apply a standard to make the determination that the applicant be granted a parking credit for being on a bus route and that instead they made this determination based on "quid pro quo" for removing the basements from the gross leasable area calculation used to determine the amount of parking spaces. He supported this argument citing Planning Board member comments from the April 18, 2018 Planning Board meeting found in the transcript. Mr. Pileggi instructed the Appeals Board to reverse the decision of the Planning Board and to remand the decision back to the Planning Board with a mandate for a six parking space reduction, meeting Section 125-67.D.

There was discussion between the Chair and the Board's Attorney as to the purview of the Appeals Board. It was determined that the Board would first have to consider whether the record on appeal shows that the decision appealed is clearly contrary to the specific provision of the Land Use Ordinance, and then, second, if they find that the decision is contrary to the specific provisions of the Land Use Ordinance, (1) consider if they will reverse the decision, subject to such terms and conditions it considers advisable to protect the public's health, safety, and general welfare, or (2) consider if they will vacate the decision and remand it to the Planning Board for further proceedings consistent with the Appeals Board's decision.

Mr. St. Germain argued that his business is better off encouraging patrons to come to the restaurant by bus than by asking them to drive and park at the motel next to the property and then walk across the motel's portico to the entrance of the restaurant. He added that his business contributed to the financing of the construction of the bus stop partially on the property, that the Eden Street Route is one of the busiest routes with buses stopping every 15 minutes, and that the general sense of the Town has been to expand the use of the Island Explorer.

Ms. Richards noted that the transcript from the April 18, 2018 Planning Board meeting and the site plan on record indicate that the applicant requested a parking reduction of two parking spaces for the property being on a bus route, not six spaces. Mr. St. Germain contended that the transcript also indicates a request of a reduction of six spaces.

Ms. Richards asked to read part of the staff memo into the record. The Chair asked if the applicant and Board had a copy of the memo. Mr. St. Germain and Mr. Pileggi noted that they did not receive a copy of the memo. It was concluded that the email with the memo did get sent to both Mr. St. Germain and Mr. Pileggi on June 14, 2018. It was also concluded that the memo was not being relied upon for any purpose by the Board in their considerations.

The Chair opened the Public Hearing at 8:18 PM.

Mr. Ivan Rasmussen came forward to express that the revenue from the recently approved paid parking plan by the Town would be used to promote the Island Explorer bus service and that the approval of the parking credit, as requested by the applicant, would send a signal from the Town to support a business that encourages the use of the Island Explorer.

Mr. Stephen Coston came forward and disclosed that he is a resident and a Town Councilor, but that he was speaking as a resident. Mr. Coston expressed that there is an issue with an ambiguous standard and that commonly in these situations that any ambiguity is construed against the municipality and in favor of the property owner.

With no one further coming forward, the Chair closed the Public Hearing at 8:21 PM and the Board entered into their deliberations.

Mr. Webber noted that it is the role of the Appeals Board to indicate that the Planning Board made an error in their decision by not adhering to the Land Use Ordinance, but it is not the Appeals Board role to determine the number of parking spaces. Ms. Stevens-Rosa added that she was comfortable stating that the Planning Board should have considered the parking reduction for being on a bus route, but that she was not comfortable trying to attach a number to that determination. Mr. Siklosi agreed that the Planning Board erred in not considering the bus route and that by sending it back to the Planning Board for consideration they could also review safety considerations, which are under their purview, to determine the appropriate number for a parking space reduction.

Mr. Kelly and Ms. Dohmen discussed the possibility of remanding the decision back to the Planning Board with a set number for a parking space reduction, or with the stipulation that the Planning Board must honor the parking reduction credit. Mr. Siklosi determined that the Planning Board did not ignore the consideration of reducing the parking for the property being on a bus route, but that they did not base their reason for denying the credit on health, safety, or welfare, and instead based the decision on granting a reduction of the gross leasable area calculation by excluding the basements.

Ms. Dohmen read from notes she had prepared for the meeting and indicated that the Planning Board did not provide justification for denying the parking credit for being on a bus route. She noted that the Planning Board should consider safety when making this determination. Ms. Martin clarified with Mr. Kelly that the language in the ordinance provision (125-67.D) was permissive in that the Board "may" reduce the number of parking spaces for being on a regularly scheduled bus route and that they did not have to do so. Mr. Siklosi added that there may be certain scenarios where the Planning Board may not allow for the credit to be granted.

Mr. Webber attempted to make a motion, moving that the Appeals Board finds for the appellant on issue number 2, and that they did not consider the bus route credit. Mr. Kelly indicated that the Chair could make the motion.

Ms. Dohmen moved that the Bar Harbor Board of Appeals finds for the appellant, that the Planning Board acted clearly contrary to the Land Use Ordinance in not taking into consideration the advantages of being on a public bus route that are clearly included in the Land Use ordinance Section 125-67.D, where it says that parking requirements may also be reduced if a property is located on a regularly scheduled bus route, and, in dealing with this issue, the Bar Harbor Board of Appeals remands the decision back to the Planning Board as a single issue, independent of gross leasable area, a stand-alone issue, and asks that they make a finding in regard to and in accordance with Land Use Section 125-64, modification of standards, necessary to protect the public health, safety, and welfare, and to address this and the site characteristics. Mr. Webber seconded the motion and the Board voted 5-0 to approve the motion.

Mr. Siklosi moved to waive a future fee in the case that Mr. St. Germain chooses to come back before the Appeals Board due to an unsatisfactory ruling on this standard by the Planning Board. Mr. Webber seconded the motion. Mr. Kelly clarified that the fee was to be waived on this particular application. The Board voted 5-0 to approved the motion.

VI. OTHER BUSINESS


Ms. Dohmen reminded the Board that at the next meeting the Board would need to elect officers.

VII. ADJOURNMENT

Mr. Siklosi moved to adjourn the meeting at 8:52 PM. Ms. Martin seconded the motion and the Board voted 5-0 to approve the motion.



Ellen Dohmen, Chair



Date