

**Minutes**  
**Bar Harbor Board of Appeals**  
**Tuesday, March 10, 2020 — 7:00 PM**  
**Council Chambers, Bar Harbor Municipal Building — 93 Cottage Street**

Vice-chair Roger Samuel, Secretary Robert Webber and Member Kay Stevens-Rosa were present. Chairperson Ellen Dohmen and Associate Member Mike Siklosi were both absent. Board attorney Dan Pileggi was present and sat with the board during the meeting. The fifth regular member seat on the board is presently vacant.

Town staff present were Planning Director Michele Gagnon, Code Enforcement Officer (CEO) Angela Chamberlain, Deputy CEO Patrick Lessard and Assistant Planner Steve Fuller.

There was no one present to represent the applicant for agenda Item V-A (Attorney Arthur Greif, for the applicant, made his position on the matter known in writing before the meeting; this was reinforced by his law partner Attorney Charles Gilbert, also in writing, prior to the meeting). Present for the appellee (BHAPTS, LLC) on that agenda item were Attorney Andy Hamilton, Eben Salvatore and Perry Moore.

**I. CALL TO ORDER**

Vice-chair Roger Samuel called the meeting to order at 7:00 PM. He said in the absence of Chairperson Ellen Dohmen, he would serve as chairman. He noted only three members were present, a minimum quorum. The board's rules call for any action taken by the board to be done by a majority of the total board (five seats, making three the minimum for a majority). Chairperson Samuel said therefore, a unanimous vote would be required for any action the board might take. Attorney Andy Hamilton, representing the appellee, indicated he understood.

**II. ADOPTION OF THE AGENDA**

**Member Robert Webber moved to adopt the agenda.** Chairperson Samuel noted there was one change, that being that under Item IV, Approval of Minutes, that the minutes from the February 11, 2020 meeting were not yet available and would instead be addressed at the board's next meeting. **There was no opposition to adjusting the agenda. Member Kay Stevens-Rosa seconded the motion. The vote in favor of the motion was unanimous (3-0).**

**III. EXCUSED ABSENCES**

Chairperson Samuel noted Chairperson Dohmen was out of town for medical reasons, and that Associate Member Mike Siklosi was also out of town. He reiterated that the three members present constituted a quorum.

**IV. APPROVAL OF THE MINUTES**

- a. February 11, 2020 (*see explanation above in Item II, Adoption of the Agenda*)

**V. REGULAR BUSINESS**

**a. Reconsideration Request: AB-2019-01 — Administrative Appeal**

**Applicant:** Elizabeth Mills Trustee of the Collier Family Trust

**Project Location:** The property is located at 25 West Street Extension, Bar Harbor, Tax Map 103, Lots 048-000 and 049-000 within the Village Residential zoning district

**Application:** The appellee (BHAPTS, LLC), under §125-106 of the Bar Harbor Land Use Ordinance, requests that the Board of Appeals meet to reconsider Finding #2 in its written decision dated February 13, 2020, said finding having been made at a public hearing and meeting held two days earlier. The February 11, 2020 hearing and meeting was held on AB-2019-01, an appeal filed by Elizabeth Mills (Trustee of the Collier Family Trust) which challenged the Planning Board's 2019 approval of a Planned Unit Development application (PUD-2017-02) from the appellee (BHAPTS, LLC) for the property located at 25 West Street.

**Chairperson Samuel introduced the agenda item by reading it in its entirety. He opened a public hearing at 7:04 PM. He asked Attorney Hamilton if he wished to make a presentation, and Attorney Hamilton said he did. There was agreement that 10 minutes should be sufficient.**

Attorney Hamilton introduced himself. He said he and his client understood that all the board could do that evening was whether to entertain the request for reconsideration and to set a date for a public hearing. He said he would limit his remarks to that scope. Attorney Hamilton said a request for reconsideration is a serious consideration, one that is rarely done. He shared a quote from Judge Henry Friendly, who in 1964 noted that "no good purpose is served by requiring the parties to appeal to a higher court... when the [board] is equally able to correct its decision."

Attorney Hamilton said the appellee filed its request very narrowly, only taking issue with one of the board's findings from its February 11, 2020 meeting. He said it was not the dispositive issue that resulted in the project being remanded back to the Planning Board. Therefore, he said, regardless of how the board voted that night the appellee would go back to the Planning Board.

Attorney Hamilton spoke of the appellee's respect for the Board of Appeals. He said the request for reconsideration was filed because there was "a twist in the proceedings." He said everything leading up to the February 11, 2020 meeting and public hearing was focused on non-conforming lot and non-conforming use. He said Attorney Gilbert, representing the appellant on February 11, instead focused on non-conforming structure. Attorney Hamilton recounted how that meeting played out, and said he had asked during that meeting that the board reconsider its finding on non-conforming structure. He said he did not challenge Chairperson Dohmen's efficiency in conducting that February 11 meeting. He said the finding on non-conforming structure that night would, however, have long-lasting effects on the project at hand.

Attorney Hamilton addressed the board's rules and procedures regarding reconsideration, which he said he saw as illustrative and not exclusive. He said the board has broad authority to entertain

requests for reconsideration beyond those listed in the rules of procedure. He referred to Maine state law, Title 30-A §2691, Section 3 F., the first sentence of which states, “The board [of appeals] may reconsider any decision reached under this section within 45 days of its prior decision.” He said that statute gives the board “broad discretion.” He said the board has the right to read and interpret its own procedures in the way it deems best.

Attorney Hamilton said he saw the operative provision in §125-106 of the town’s municipal code. He said the Planning Office had followed that section of the ordinance well, in scheduling the March 10 meeting. He read from that section to support his position. He said he did not expect the board to delve in to the merits of the request that night, but rather to address whether to grant the request and schedule further proceedings before March 27 (the end of the 45-day window spelled out in both town ordinance and state statute). He said the appellee wanted a unanimous (3-0) vote to schedule a hearing on the request for reconsideration before that date.

Attorney Hamilton reiterated that the sole issue with the decision from the February 11 meeting that the appellee was seeking to have reconsidered was Finding #2. He said the appellee was surprised by the board’s decision on that matter. He outlined what he saw as the ramifications if that decision was not reconsidered and allowed to stand, and said it would affect other properties in town. He urged the board to take the opportunity to reconsider, as provided under state statute.

Attorney Dan Pileggi asked if Attorney Hamilton had “found any legal support” for the “contention that the board may ignore its rules that limit the subject matter of reconsideration.” Attorney Hamilton said there was precedent, and said he would argue it in court if needed but did not want to get into details tonight. He gave an analysis of the rules, looking at both evidentiary (de novo) and administrative appeals. He said in the context of the first one, there would have to be new evidence but said he did not feel “bound by that prong of the board rules.” He said on the appeals side, that re-arguing the appeal was not proper grounds for reconsideration. He paused to ask for Attorney Pileggi’s opinion on what he had just said. Attorney Pileggi offered his interpretation, noting that the rules “explicitly say that restating arguments or positions that were raised in the hearing but rejected by the board does not constitute grounds for reconsideration.”

Attorney Hamilton referred to the February 11 meeting, and Attorney Charles Gilbert’s position that night that he was not arguing that the appellee’s proposed project was a non-conforming use. Attorney Hamilton said he had heard for 18 months that the appellant was claiming just that. He said no one had previously argued it was a non-conforming structure. He said the Board of Appeals may have been beyond its jurisdiction to even take up that argument from Attorney Gilbert (RE: non-conforming structures). Attorney Hamilton said the role of the Board of Appeals is to look at the findings of the Planning Board, and he said the Planning Board had made no findings regarding non-conforming structures. He said “there was nothing to appeal, in that regard.” He said the appeal was neither ripe or well-placed. He said the Board of Appeals “launched into this new area that nobody anticipated.” He called this a “surprise approach” from Attorney Gilbert. Attorney Hamilton said the appellee was not given time during the February 11

meeting to address the types of arguments that they developed as part of the request for reconsideration.

Attorney Hamilton summarized: he said the Board of Appeals was beyond the scope of the appeal because the Planning Board made no findings that the structures were non-conforming, and that Attorney Gilbert's argument that the structures were non-conforming surprised everyone. Attorney Hamilton said he knew at the time (February 11) that that was the wrong path to follow. He said that was because area per family requirements cannot be a structure/dimensional standard, and that they are instead a lot standard. He repeated the quote from Judge Friendly, and that the Board of Appeals could correct its mistake by granting the request for reconsideration. He said the appellee was not given adequate time on February 11 to address the issue at hand.

Discussion resumed among board members. Member Stevens-Rosa said she did not want to discuss the merits of the case, but to instead stay focused on whether the board would grant the request for reconsideration. **Chairperson Samuel asked if any members of the public wished to speak before closing the public hearing. No one came forward to speak, and the public hearing was closed at 7:21 PM.**

Chairperson Samuel asked Attorney Pileggi to elaborate on the rules the board should be following. Attorney Pileggi said board rules allow for either an applicant or a board member the opportunity to respond, but not the appellee. He said §125-106, however, clearly states that any party has the right to request a reconsideration. Attorney Pileggi explained the Land Use Ordinance would trump procedural rules. He referenced the same part of state law referenced earlier by Attorney Hamilton (Title 30-A §2691, Section 3 F.) and agreed that meant anyone could request reconsideration. Attorney Pileggi said that was why he had taken the position that the board should hold the hearing and hear the appellee's request. He said when they actually considered whether to grant the request, they should follow the board's rules. He read the standards in those rules, regarding reconsideration, aloud.

Attorney Pileggi recounted how he had asked Attorney Hamilton earlier if he had found any law that supported his (Attorney Hamilton's) argument that the board did not need to follow those rules. Attorney Pileggi said he had not found anything that supported that position put forth by Attorney Hamilton. He said the rules might need to be expanded to match municipal ordinance and state statute, but that otherwise, the board needed to determine whether the request before them fell within one of the areas outlined in its rules. He said that was their job at the meeting.

Attorney Hamilton noted the rules said there are "acceptable grounds" for reconsideration, but said his position was that those words did not "limit the board's discretion to hear only those types of decisions." He said he saw those as exemplars, and not exclusive. He noted the board's rules give the chair the authority to dismiss a request without further hearing if it does not meet the criteria listed in the rules, and noted that the board was in fact meeting to consider the request. He said if the board could "entertain the notion that there could be ground outside of

what the rules consider to be acceptable grounds.” He said he agreed with Attorney Pileggi’s position that town ordinance and state statute supersede the board’s rules. He said his view of the rules was that there are clear acceptable grounds for reconsideration, but said he did not see the rules as having the authority to say a request was not allowed. He said if “acceptable grounds” were treated as “exclusive grounds,” that it would be denying process to a party (in this case, the appellee).

**As Mr. Hamilton continued to speak, Chairperson Samuel banged the gavel and noted that the public hearing had been closed.** Attorney Pileggi said the board provided both parties process, and the opportunity to argue their points, in the original hearing (on February 11). He said while Attorney Hamilton might feel his opportunity to argue was inadequate, he did in fact have an opportunity to argue. Attorney Pileggi said both parties involved had opportunities beyond the Board of Appeals to address any issues they wanted to. He elaborated on how the board should make the decision before it that night. He said if they found the request to be outside of the grounds specified in the rules, he did not think the board had the authority to reconsider. He explained why that was important, so that all applicants are treated fairly.

Chairperson Samuel asked for comments from the board. Member Stevens-Rosa said she was struggling to find how the request fell within the criteria the board needed to follow, and that although some of what Attorney Hamilton was saying made sense to her she did not find his argument to be fully supported. She said while she had some empathy for the possibility that there might be imperfections in a given decision, the request before the board felt “a little bit like Monday morning quarterbacking.” While she said she was not completely opposed to hearing the appellee’s argument, she acknowledged that the board choosing to do so that night could set a bad precedent.

Member Webber said he agreed with what Member Stevens-Rosa said. Chairperson Samuel said he believed the board should be following the rules as written. There was no further discussion. Chairperson Samuel said one way to tackle the question was to entertain the motion to reconsider and see how it fared.

**Member Stevens-Rosa moved to reconsider the [February 11, 2020] decision based on the narrow request that was put forth in Attorney Hamilton’s reconsideration request. Chairperson Samuel seconded the motion. No one voted in favor of the motion, and all three members voted against the motion. Chairperson Samuel noted that the motion failed (0-3), and that the board would not reconsider the decision.**

Attorney Pileggi noted the rules talked about dismissing a request for reconsideration. He said the board could do that. **Chairperson Samuel asked for a motion to dismiss the request for reconsideration, and Member Stevens-Rosa moved to that effect. Member Webber seconded the motion. All three members voted in favor of the motion, thereby dismissing the request (3-0).**

**VI. OTHER BUSINESS**

There was no other business to address.

**VII. ADJOURNMENT**

At 7:33 PM, Member Webber moved to adjourn the meeting. Member Stevens-Rosa seconded the motion. It then carried unanimously (3-0), and the meeting adjourned.

Signed and approved:



7-23-2020

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Robert Webber, Board of Appeals secretary

Date