

**Town of Boothbay Harbor
BOARD OF APPEALS Meeting via Zoom
Thursday, January 13, 2022 Meeting Minutes**

Board of Appeals Executive Session

Chair Wolf called the Board of Appeals Meeting to order at 5:05 p.m.

Members Present: R Bourette, R Cohen, L Rebel, W Wolf (Chair)

Town Staff: Geoff Smith, Code Enforcement Officer; John Cunningham, Town Attorney

It was moved and second (Rebel/Cohen) to go into Executive Session with Town attorney John Cunningham under Title 1, Chapter 13, Section 405(E) to discuss the powers and duties of the board with the Town attorney. The motion passed unanimously (4-0).

At 5:50 pm it was moved and seconded (Rebel/Bourette) to come out of Executive Session. No decisions were made.

Board of Appeals Administrative Hearing

Chair Wolf called the Board of Appeals Hearing to order at 6:00 p.m.

Members Present: R Bourette, R Cohen, L Rebel, W Wolf (Chair)

Town Staff: Geoff Smith, Code Enforcement Officer, John Cunningham, Town Attorney

Others: Attorney Scott Anderson, Verrill Dana, representing Joseph and Jill Doyle; Attorney Joe Siviski, Perkins Thompson, representing Boothbay Harbor Waterfront Preservation.

The Chair confirmed the presence of a quorum with 4 members in attendance.

OLD BUSINESS

1. Approval of December 16, 2021 minutes: It was moved and seconded (Bourette, Rebel) to approved the minutes. Motion passed (3-0) with one abstention (Mr. Cohen was absent).

NEW BUSINESS

1. Administrative Appeal Request to the Appeals Board:
An application was submitted December 16, 2021 by abutters Joseph and Jill Doyle, represented by Scott Anderson, Verrill Dana LLP, One Portland Square, ME regarding the property at 65 Atlantic Avenue (Map 16, Lot 24 in the Limited Commercial/Maritime Zoning District), Boothbay Harbor, ME requesting an administrative appeal of the November 17, 2021 Planning Board decision.

The Chair noted the authority for the Appeals Board review is pursuant to Code §170-108(D)(2)(a) and pursuant to the Shoreland Zoning Code §170-101-11(H)(1)(a).

Notice of hearing was published in Boothbay Register on December 23 and 30, 2021.

Scope of the Review: The Appeals Board will review whether the Planning Board findings to approve the building permit under the Shoreland Zoning ordinances are supported by evidence.

Initial Matters: The Chair asked the following initial questions:

- Do any members have a pecuniary interest or conflict of interest in the appeal? Chair Wolf reiterated her status as a donor to the waterfront park. Members did not feel this constituted a conflict. There were no other issues.
- Can members be fair and impartial in this matter? Each member affirmed they could.
- Notification of abutters by certified mail was confirmed by the CEO under §170-109(c).
- The appeal was filed properly [§ 170-109(A)].
- The appellate has standing in this appeal.

The Chair noted that the town and members of the Appeals Board recently received additional correspondence from the Maine DEP as well as from Attorneys Anderson and Siviski regarding the BHWP building permit request and the subsequent Planning Board decision. Since this information was not available to the Planning Board, this more recent correspondence is not part of the active record and cannot be considered as part of this administrative appeal review.

Presentation by the Parties:

- Attorney Scott Anderson, Verrill Dana LLP, representing Joseph and Jill Doyle. Mr. Anderson introduced Kristin Collins from Preti Flaherty. Mr. Anderson indicated that the issue before the Appeals Board is whether the Planning Board made any errors in its review. He noted there were several issues that should lead the Appeals Board to vacate the decision.
 - Since it is in the shoreland zone, this project must comply with the 20% cap on impervious surface as specified in the ordinance. Mr. Anderson questioned the applicant's interpretation of the lot being grandfathered as the rationale to exceed the 20% cap, particularly since they are proposing new structures and new uses.

- He argued that any new use within the park must comply with the minimum lot size.
- The main issue raised by the appellate is the new parking lot, which does not meet the 75 foot set back. Mr. Anderson indicated that in an October 13, 2021 email, Colin Clark from the Maine DEP outlined his concerns about the location of the parking lot, and indicated this structure needed to meet the shoreland zone setback requirement. Mr. Anderson noted that this email was part of the Planning Board record.
- Mr. Anderson also raised questions about pier safety.
- In summary, Mr. Anderson stated there are aspect of the BHWP project that do not comply with the town's shoreland zoning requirements. The Maine DEP email indicates the Planning Board has made a mistake in issuing this permit. He asked the Appeals Board to grant the Doyle's appeal and vacate the decision by the Planning Board.

Board members asked for clarification of a statement in Mr. Anderson's materials and he provided an explanation.

- Perkins Thompson attorney Joe Siviski, representing the Boothbay Harbor Waterfront Preservation group.
Mr. Siviski commented on the DEP letter submitted to the town on January 13, 2022, noting that the timing of the letter was unfair. He also summarized the points raised in his January 11, 2022 correspondence.
 - Mr. Siviski presented the intent of the BHWP park and noted that the goal of the park is to create physical and visual public shorefront access. Because this is a water-dependent use, it is BHWP's argument that all features of the park are also water-dependent uses so the setback does not apply.
 - He reviewed the former layout of the lot and noted the placement of the parking area serving the hotels. In his view, the replacement parking lot is a relocated, not a new structure, and noted the ordinance provides for relocation and replacement of a nonconforming structure. That's what BHWP did with the parking lot.
 - With respect to the lot coverage requirement, Mr. Siviski noted the Maine DEP agrees with the current proposed lot coverage, noting that the lot went from 86% impervious surface coverage to 29% coverage.
 - Mr. Siviski noted the BHWP park is classified as an "institutional use" which does not have any lot coverage requirement in the shoreland zone.

The presentation portion of the meeting was closed.

Board deliberation and review of Findings of Fact: The Chair noted that Appeals Board members had received copies of the Planning Board's November 17, 2021 review which outlined the Findings of Fact.

- Mr. Rebel emphasized that the application was for a marina and parking. He asked if the marina approval was for accessory use also.
- Mr. Rebel asked about the US Army Corp of Engineers permit. Mr. Siviski affirmed that the permit was approved.
- Mr. Rebel asked about two separate NRPA permits. He asked if they are still in effect. Mr. Siviski indicated there are two NRPA amendments pending.
- Dr. Wolf asked Mr. Siviski about a statement in his submission that..."the entire park including its accessory features such as the splash pad, seating and the like, is therefore a functionally water-dependent use and accordingly is not subject to the 75-foot shoreland setback...". She disagreed with this statement noting that the park had at one point included a grocery, an apartment and other structures that were not water-dependent. Mr. Siviski indicated that is not what he meant, but he noted that the park itself is a functionally water dependent use.
- Ms. Bourette asked about the site plan L-1 where there is a parking area is labeled "turf overflow parking". She asked if this is new parking. Mr. Siviski indicated this parking area was no longer on the current site plan.

Mr. Anderson requested and was given time for a brief rebuttal to Mr. Siviski's statements.

Board Deliberation: Based on the information presented to the Board and their review of the Findings of Fact, the members outlined their concerns. The Chair noted that the Planning Board Finding of Fact with regard to "G. Parking areas" was not clear since it states that the..."Board finds this standard to be met based on the plans submitted, and the parking on the concrete pier is a nonconformity permitted to continue." This finding only mentions the concrete pier parking but not the other nonconforming parking lot within the 75 foot setback. In addition, the information from the October 13, 2021 email from the Maine DEP raises issues that were not adequately discussed, resolved and then documented by the Planning Board. Mr. Rebel and Ms. Bourette noted concerns about the parking as well noting a lack of clarity about the DEP and NRPA permits. Mr. Cohen agreed that the only parking discussed in the Finding of Fact was the concrete pier.

Mr. Siviski noted that if there were concerns by the Board of Appeals, about the parking, the BHWP could support remanding this back to the Planning Board.

Board Action: Based on the findings above, it was moved and seconded that this shoreland zoning permit decision be remanded back to the Planning Board to provide clarity about parking and the permitting by the DEP and others. There was no additional discussion. The motion passed unanimously (4-0).

Mr. Anderson noted that new evidence has recently been provided by the Maine DEP that could inform the remanded Planning Board review. He suggested the order to remand should specifically include the more recent information submitted by the DEP and others.

Mr. Cunningham suggested that the Board amend or suggest a new motion that on remand, the Planning Board be authorized to consider new evidence.

The Chair proposed a second motion that on remand, the Planning Board is authorized to consider new evidence in their review. The motion was moved, seconded (Cohen, Bourette) and unanimously approved (4-0).

The Chair pointed out that the Appeal is still in effect, pending review of the remanded Planning Board action.

Adjourn: There being no further business, the meeting was adjourned by a unanimous vote.

Respectfully Submitted,
Rosemary B. Bourette
Secretary, Board of Appeals