



December 15, 2009

Town of Southwest Harbor BOARD OF APPEALS MINUTES

Southwest Harbor Fire Station Meeting Room

1. Call to order: The call to order was at 6:00 p.m. Present: James Geary, Chairman, Lunn Sawyer, Ted Fletcher, Charles Morrill, excused: Gretchen Strong

Mr. Geary thanked the parties for the ability to re-schedule the meeting from last week during the storm. The meeting will end at 10:00 p.m. Protocol for the meeting was reviewed with attendees: Appellant will present information; The Board and property owner will be allowed to ask questions; the property owner will be able to present their side of the case; questions will be taken; the public hearing will be closed and the Board will deliberate and make their decision.

2. Applications:

- I. Applicant: Agent: Lynne Williams, for Mark Kryder & Craig Patterson. Administrative Appeal of: The decision made by the Southwest Harbor Planning Board on July 16, 2009 to rescind the decision made by the Southwest Harbor Planning Board to deny the Subdivision Permit application of the Village at Ocean's End on June 18, 2009. Chair noted that the appeal was filed about 3 months after the due date, and asked to address that first.

Attorney Williams spoke, representing the appellants. She said the appeal "turns on" the decisions at the July Planning Board meeting, to rescind the decision of the June Planning Board meeting. Referring to Section 6 in the reply memorandum of the Kryder Appeal, page 8, she said the attorney for the appelee himself said the ruling is tentative and preliminary until all criteria is reviewed. She argued that while the Planning Board made decisions on certain criteria, the process was continuing, and her client has as much right to appeal the decision as Mr. Patterson and his clients have to appeal the decision on November 17, 2009. It was William's contention that after the decision in July the Planning Board went on to reach a final

decision in November, and therefore her clients have the right to file a timely appeal looking at that November date.

Mr. Hamilton, for the appellee, clarified his words saying that what constitutes finality is a denial. At the SWH Planning Board meeting of June 18, 2009 that vote constituted a denial, even characterizing that as interim, so a denial even at a preliminary plan stage is considered in the court as a final decision. The June 18 decision was given as final, even though there was no subdivision review. His words that were quoted by Williams were spoken in the context of a sub-division review.

Williams said, in terms of the denial, it might have been a final decision. This appeal is for the motion to rescind that was made. Her clients are not appealing a final decision, but the motion and decision to rescind the June decision. The July vote on the motion to rescind was not a final decision since the Planning Board activity continued many months hence.

Hamilton: there is a distinction to be considered. A motion to reconsider and a motion to rescind are two very different things. The Planning Board decided to wipe the slate clean and conduct a full blown subdivision review and a full planning board review. The June 18 decision and the motion to rescind was a final action with respect only to the June 18 decision. Focusing on the July 16 decision – the LUO says if the decision is made the appeal must be brought within 30 days.

Fletcher asked where in the Board of Appeals Ordinance it refers to Roberts Rules. Hamilton said it does not, but does show in the LUO and in the Planning Board By-laws. The Board agreed to hear comments from visitors who were directly involved in this appeal.

Anna Demeo argued that as a former Planning Board member, and after listening to Board tapes of the approval of the VOE subdivision, Mr. Hamilton said ‘this is a completely fluid process from the application date to now’, and submits into the record the minutes of the May and July minutes, again stating it is one fluid process. The new Planning Board decided to start their review process from “compliance”, and therefore it is all one process.

Mr. Hamilton provided a time line document specifically related that was an illustrative exhibit, and he reviewed those with the Board. He pointed out that Demeo and Johnson filed an appeal within 30 days, and for lack of standing, withdrew their appeal. Hamilton said this indicates that they understood the time line required. Fletcher asked Hamilton if it were

possible that the Planning Board might have decided after July 16 to review the decision to rescind? Hamilton said that taking action on a motion to rescind is final action, according to the Town Attorneys. Geary said that since Roberts Rules appear in the LUO and in the PB by-laws is it appropriate that they be considered during this session.

Hamilton said that Chad Smith and James Collier were heard first by the Planning Board, and the Planning Board action to rescind was taken on advice of the attorneys.

Geary said his ultimate concern is that the Board might allow an untimely appeal to be heard, and it would open up the Board to future appeals. Fletcher said it is a murky area, and dealing with unrepresented applicants adds to that. He said the board asked Patterson to wait, and it is possible that the Board might have re-visited the decision. Hamilton said that Roberts Rules supplies a framework, section 35, page 296, relating to rescind: a negative vote on these decisions can be reconsidered, but not an affirmative vote. The PB was bound. Williams argued that the motion was inappropriate. Sawyer said he has the same fear of opening up future appeals, but agrees that there is a lot of ambiguity. Geary cautioned that to open up what appears to be a final decision of the Planning Board after 90 days sets a precedent. He feels the Planning Board made a final decision, and actions taken by others to file an appeal within the 30 day time period, were taken although they never got to the final stage. Johnson said it did appear at the time to be the appropriate, but within the time framework, and the withdrawal was only due to lack of standing. She felt that as the application proceeded, it became obvious that it was one long process. Hamilton referred to the factual statement in the timeline presented, saying that no other parties were substituted for the appeal made by Johnson and Demeo within the 30 day timeframe, although there was plenty of opportunity to gain standing by doing so. Demeo said the Town Attorneys did not speak to the Planning Board members.

Chairman Geary asked the Board to make a decision.

Williams said the message to her through the two clients was that they should appeal at the end.

Hamilton said the decision that was made was to rescind, and it was not a motion to reconsider. He said this is a final action and should be entitled to the protection of the property owner's rights.

Geary closed the public hearing at 6:55 p.m. The Board was instructed to deliberate on the timeliness of the appeal. Geary feels this was a final decision of the Planning Board, and the action to appeal that decision by Johnson and Demeo within the 30 day window suggests that there was legitimate concern that that was when it should be appealed. He expressed concern for opening up other unlimited appeal periods.

Sawyer said if the Board were to hear the appeal, and if they were to lose, and if they went to a law court, it would appear that they might kick it back and say the BOA had no right to hear the appeal.

Morrill said based on the finality of the decision, as explained in Roberts rules and referenced in the LUO, the BOA has little choice.

It was moved Fletcher and Seconded Sawyer that the decision of July 16, 2009 of the Southwest Harbor Planning Board to rescind its' prior vote of June 18, to deny the application of VOE, was the final decision to which an appeal needed to be made in 30 days, and therefore the appeal by the Patterson Trust et al is untimely and will not be heard by the Southwest Harbor Board of Appeals Vote 4- 0. Motion carried.

Fletcher asked if Hamilton or Williams wanted to submit reference to the findings of fact. Hamilton will submit a draft of findings for the Board's consideration.

Break at 7: 00 pm – Reconvene at 7:10pm

BOARD OF APPEALS
Application #2
December 15, 2009

The meeting was reconvened at 7:15 p.m. by the Chairman.

II. Applicant: Agent: James E. Patterson, for Ruth S. Brunetti, Mark & Sandra Kryder & Craig & Anne Patterson. Appeal of: The decision(s) of the Southwest Harbor Planning Board to approve the Final Subdivision Plan submittal from the Village at Ocean's End on October 22, 2009.

Chairman Geary reviewed the rules of the hearing to be conducted. He said there is an issue to address immediately: whether it is a de novo or an appellate appeal. Patterson said the Chair has substantial authority to make a decision, and unless the Town clearly states it is appellate, it defaults to de novo. While he does not agree, he is here prepared to review this as an appellate appeal. He is not prepared to hear this as de novo. Mr. Hamilton also said he was not prepared to conduct a de novo review. He referenced cases that clarify this and said the ordinance is clear referring to the decision of the law court citing Yates vs. the Town of Southwest Harbor. The Board of Appeals determined they would hear this application as an appellate appeal.

Mr. Patterson said no new evidence will be accepted in an appellate review. Patterson said that storm water management is a big issue; the applicant does not take issue with the final plan, but with: the timing, since the day zero plan has various stages: first stage houses 1 – 4, second stage houses 5 – 9 and where the final retention plan is located. He said on October 22, the ponds that were in place were not retention ponds, but sediment ponds. The October 14, 2008 document is an entrance permit, and refers to catch basins on the Village at Ocean's End (VOE) land, but did not approve the VOE design as far as highways are concerned, and they referred only to the retention devices on the VOE property. He said the Planning Board's (PB) responsibility in granting subdivision approval should have addressed all of these issues as of October 22. Secondly, regarding the right of way of Western Way Condominium (WWC), on the plans, there is a landscaped boulevard running along the south side of the VOE property, and for some distance covers the right of way (ROW) that

WWC has, and that raises concerns that they “can’t get there from here”. Not addressed adequately by the PB was how WWC would retain their rights. The Land Use Ordinance (LUO) draws a distinction between road and driveway. He said the decisions ignore the fact that the landscaped boulevard accesses two lots, the VOE lot and also accesses the WWC lot. There has been reference made that the attorneys at Maine Municipal Association (MMA) have blessed the project. Patterson said the WWC right of way was not addressed in correspondence to MMA. Patterson said concerning the concept of common foundations, referring to the October 22, final meeting of the Planning Board, that the Planning Board accepted the Board of Appeals (BOA) ruling for “one project”, allowing the multi-unit. Patterson said he asks first that the BOA look at the multi-unit concept and reconsider that. What did the adoption of the SWH LUO mean when that definition was adopted? Patterson expects that Hamilton will present the “common” foundation, which is only a raceway, and unusable by the owners. The opinion of MMA was that the drawing depicted a two family dwelling. Mr. Patterson made the following requests of the Board of Appeals:

1. Make a determination that the PB decision on October 22 was in fact contrary to the provisions of the Ordinance and the facts presented to that Board;
2. Grant the appeal and remand the matter back to the PB with the following provisions:
 - a. require VOE to complete final retention basins and ponds before *any* houses are built in phases 1 and 2;
 - b. instruct the Planning Board on remand that VOE comply with the 40,000 sf required in zone C;
 - c. instruct the PB to provide that WWC’s ROW is fully protected and available for full use by the residents.
 - d. the PB be asked to obtain evidence from Maine DOT or Johnston /McCullough that the outlet structures on Route 102 are acceptable. Is the water going into that concrete box going to exit with such velocity as to damage WWC property across Route 102?
 - e. declare that the landscaped ROW is a road and not a driveway and subject to road standards.

Hamilton thanked the Board for reviewing all the materials, saying that Mr. Patterson has taken the Board off course with his comments on appellate review. Standard review is when an applicant is trying to seek to overturn the Planning Board decision; the party seeking appeal bears the responsibility of proof of damage. Does the evidence sufficiently support the findings of the Planning Board? He said the PB has thoroughly reviewed this application, and did their job, and the Board has the record. Scope is limited: only allowing questions relating to Sections 5 and 6C of the LUO, and definitions of multi-unit and driveway. Hamilton said that Andrew McCullough was brought in by the PB to review the storm water run off issues at the request of WWC. The law court stated they review the findings of the Board. Concerning the driveway decision, the standards within the LUO are separate and apart from the Road Ordinance, and testimony was received by the PB from Johnson that the driveway was designed to road standards and there was no attempt to under design the access way. Regarding density, Hamilton said the density of the VOE project would be the same as that originally approved for WWC. The ROW provides access to a shed, and not a lot, and the PB in two different reviews (tabs 9 & 13 of the transcript notebook), on page 10 under tab 13, indicates the finding of the PB concerning the driveway. Regarding private property rights issues, only 3 owners have come forth on this issue. Hamilton said that Mr. Patterson is raising an issue of the ROW. Hamilton showed the BOA the plat indicating the right of way. The final subdivision plan shows that the depressed curve is similar to a handicapped ramp, allowing access to the ROW without going up over a curb. Collectively there is nothing to obstruct WWC to enter or exit their right of way.

Regarding multi-unit dwellings, first: what is the definition? The PB discussed the issue at least five times, and the final decision on the preliminary plan application and final decision on the final plan application for multi-unit was evidenced in the Finding of Facts regarding multi-unit. The question is whether the PB decision is contrary to the LUO. Was there an error of law in the application of these decisions? The Planning Board made a decision to rescind the decision to deny and to start over fresh. The question is did they break any laws of the LUO. He referenced all the decisions of the Planning Board re multi-unit.

Mr. Hamilton addressed storm water issues and referenced Nestle Waters vs. Town of Fryeburg, allowing for the PB to rely on testimony of their peer review consultant. This Planning Board was asked by Mr. Diehl of WWC to hire a 3rd party consultant to perform an engineering peer review of the storm water drainage plan. The Planning Board did that. The review was performed and the engineer for VOE incorporated all the recommendations made into the final plan for review by the Planning Board. The 3rd party reviewer also addressed the post development peak flow at Route 102 and the record is clear. The DOT entrance permit indicates approval. Concerning the day zero plan, McCullough said the day zero plan is suitable, and the phasing plan makes sense. There is no evidence presented to the contrary.

Chairman Geary called for a recess at 8:40p.m. The meeting was called to order again at 8:50 p.m.

Hamilton summarized that the PB findings were consistent with the LUO. He said there is competent and substantive evidence in the record to support the finding. Mr. Hamilton reviewed each of the requests made by Mr. Patterson. The decision and findings are not contrary to the LUO, there is no abuse of the law, and the final review exceeded expectations. Mr. Hamilton concluded by saying that the appellant has failed to provide evidence that supports the appeal.

Mr. Fletcher asked Hamilton if it was the client's opinion that the BOA's opinion that their decision in January of 2009 concerning Multi-unit dwellings was irreversible. Hamilton said there was a 6 – 1 finding of the Planning Board that it was a multi-unit dwelling. The PB did not rely on the decision of the BOA, but made their own review of the definition.

Mr. Patterson was asked if he had comments. Regarding the storm water, he said there was a rain event last fall that did substantial damage to WWC. The developer did not repair that, said Patterson, and there was damage to the property across the road. Patterson said the issue with the right of way and the curbing has changed. Geary asked if there was any access that was limited. Patterson said access to the 16 acres in the back are unavailable.

Geary informed both Hamilton and Patterson that it was clear the BOA knew the project was headed for 40 units at the meeting in January when they ruled on the multi-unit concept.

Sawyer pointed out that the findings of the peer review cover the day zero requirements and it is not up to the BOA to determine if it will work. He said that would appropriately be a civil suit.

Chairman Geary asked Mr. Patterson about the storm event in 2008, and if that was the only event. Patterson said that was the major event, but there have been ongoing events. Fletcher asked what the applicant feels is deficient in the day zero plan. Patterson said the concern is the retention basins. Fletcher asked what Patterson thought was wrong with the BOA and the Planning Board definition of structure? He feels the definition was applied inappropriately.

Demeo asked if there would be an opportunity to speak to the public record. The BOA allowed her public comment as long as it pertained to the current discussion. She said there was extensive debate about the issue of multi-unit while she was a Planning Board member. The definition is only 3 years old, and was crafted to allow for affordable housing. Johnson said there was nothing provided to give purpose to the structure. Lee Worcester, current Chairman of the Planning Board said there was significant discussion at every phase of the VOE application of the multi-unit definition. There is no problem with the definition of structure.

Demeo said the difference between a driveway and a road is the fact that a road must be taken into consideration when calculating lot coverage. Worcester read the definitions of driveway and road and said the Planning Board, after extensive deliberation, determined the access way at VOE was a driveway, within one lot. The road giving access to the lot is Route 102. Hamilton reminded the Board that appellate review standard should be considered. He said the issue is can you find an error of law in the Planning Board's deliberation and decision? He reminded the Board that in the event of ambiguity the MMA manual recommends finding for the applicant. WWC access is defined as a driveway. Patterson contended that there is more than one lot served by the right of way, as the "shed" sits of 14 acres. |

Hamilton said when the two different groups of the Planning Board came to two different conclusions on roads vs. driveway, it shows that the terms are ambiguous, and the tie breaker is that the decision goes in favor of the applicant in those circumstances. Again he reminded the Board this was an appellate review.

Geary said there is more work for the Appeals Board to do on this application and January 6 is the next scheduled meeting. Because of conflicts in individual schedules this application will be re-schedule to January 5th, 2010 at 6:00 pm. Location of the January 5th meeting will be announced on Wednesday, and participants will be notified by e-mail.

The Board of Appeals Meeting of December 15, 2009 was adjourned at 10:16 p.m.