MINUTES OF THE PLANNING BOARD
TOWN OF CAPE ELIZABETH

May 16, 2023 7:00p.m. Town Hall

Present: Jonathan Sahrbeck, Chair; Matthew Caton; James Huebener; Alton Palmer; Daniel Bodenski; Andrew Gilbert; Derek LaVallee

Also present was Maureen O'Meara, Town Planner and Lucy Bauer, Minutes Secretary

CALL TO ORDER

Mr. Sahrbeck called the hybrid meeting (in-person and virtual) to order at 7:00p.m. Mr. Sahrbeck reviewed the agenda and noted the absence of any remote participants.

Mr. Sahrbeck called for approval of the minutes of April 18, 2023. With no further discussion, Mr. Huebener motioned to approve the minutes, seconded by Mr. LaVallee. The minutes were approved with a vote of 5 in favor, none in opposition, two abstentions. (Mr. Gilbert and Bodenski abstained due to their absences at April's meeting.)

Mr. Sahrbeck called for approval of the minutes of the May 2, 2023 Planning Board Workshop on LD 2003 Amendments. With no further discussion, Mr. Huebener motioned to approve the minutes, seconded by Mr. Bodenski. The minutes were approved with a vote of 7 in favor, none in opposition.

BUSINESS OF AGENDA

Solar Array Cape Elizabeth Landfill - ER Cape Elizabeth Solar, LLC is requesting a site plan amendment to install a 0.9 MW solar array at the Cape Elizabeth Landfill located at 21 Dennison Dr. (R05-10), Sec. 19-9, Site Plan Public Hearing.

Mr. Sahrbeck noted that the application was deemed complete at the April 18, 2023 Planning Board meeting, and that a site walk was completed on April 24, 2023. Mr. Sahrbeck invited applicant Jeff Read to the podium to provide a final site plan review.

Mr. Read provided a brief outline of the project involving the installation of a 0.9MW solar array on the closed municipal landfill off Dennison Drive. The landfill was closed in 1997. The array will be constructed within a 198 acre parcel of land in which 6.5 acres will be leased for the project. The project falls within Residential Zone A, "essential services" (utilities). The project meets all zoning requirements for setbacks and heights and includes a 7-foot perimeter fence around the installation, per electrical codes. The fencing and foundation will be constructed within the limits of waste and with minimal disturbance to the existing landfill cap. The array will consist of 2,796 solar modules. The project will require some additional permits which are in process. The project has been reviewed by town staff and the town engineer. All comments have been addressed.

Mr. Sahrbeck opened the meeting to public comment. Mr. Sahrbeck noted that no one was in attendance virtually. No members of the public attending the meeting offered comment. Mr. Sahrbeck closed the public hearing.

Further Discussion

Mr. Palmer requested clarification from Ms. O'Meara on item 13, p. 3 of the Memorandum of 5/16/23, Solar Array Cape Elizabeth Landfill Site Plan Amendment. This item describes Site Plan Review Standard "Technical and Financial Capacity." Ms. O'Meara stated that she spoke with the Town Manager and confirmed that final paperwork for a new lease has been signed and notarized and that the Town is ready to proceed. Ms. O'Meara confirmed that the Town Manager agrees that the applicant has met the standard for demonstrating financial capacity.

Mr. Sahrbeck asked for clarification on the discussion during the site walk pertaining to moving the fence around the array. Mr. Read responded that ER Solar reviewed the comments from the site walk, ran numbers, and redesigned the fencing plan in consideration of recommendations from the Town & Planning Board, and existing electrical codes. Mr. Gilbert asked for clarification on how far the fencing would be pulled in. Mr. Read responded that the fencing was pulled in approximately 30 to 40 feet, essentially as far as possible to allow for a stable installation.

Mr. LaVallee stated that the Conservation Committee had previously supported relocation of the existing trail system and asked if the current plan was the one the Committee approved. Mr. Read stated that the approval was based on the original site plan. He reviewed changes based on the recommendations made during the site walk. Mr. LaVallee asked if an assumption was made that, because the revised plan is more conservative, the Committee would approve it. Mr. Reed replied, "yes." Ms. O'Meara stated that she staffs the Conservation Committee and had informed the committee that the plan had changed and that less trail would need to be moved. She stated that the committee had no further comments on the plan.

Mr. Sahrbeck asked if concerns about sound levels had been addressed. Jay Reynolds, Director of Public Works, had requested an impact analysis of the sound of the transformer pad. Mr. Read replied that sound levels were measured at the office building and Swap Shop of the Recycling Center and reported that Mr. Reynolds was satisfied with the results of the analysis.

With no further questions from the Board, Mr. Huebener made a motion on the Findings of Fact.

Findings of Fact:

1. ER Cape Landfill Solar (Ralph Meima) is requesting site plan amendments to the Gull Crest Site plan to install a solar array on the landfill located at 21 Dennison Drive, which requires review under Sec. 19-9, Site Plan Regulations.

2. The application was deemed complete at the April 18, 2023 meeting, a site walk was held of April 24, 2023 and a public hearing was held May 16, 2023.

3. The plan for the development reflects the natural capabilities of the site to support development.

4. Access to the development will be on roads with adequate capacity to support the traffic generated by the development. Access into and within the site will be safe. Parking will be provided in accordance with Sec. 19-7-8, Off-Street Parking.

5. The plan preserves a system of pedestrian ways within the development.

6. The plan does provide for adequate collection and discharge of stormwater.

7. The development will not cause soil erosion, based on the erosion plan submitted.

8. The development does not require potable water or sanitary wastewater disposal. The development will be provided with access to utilities. The development will provide for adequate disposal of solid wastes.

9. The development will not adversely affect the water quality or shoreline of any adjacent water body.

10. The development will provide a vegetative buffer throughout and around the site and screening as needed.

11. The development will provide for adequate exterior lighting without excessive illumination.

12. Signs will meet the requirements of the Sign Ordinance.

13. The development will not substantially increase noise levels and cause human discomfort.

14. No exterior storage of materials is proposed.

15. The applicant has demonstrated adequate technical and financial capability to complete the project.

16. The application substantially complies with Sec. 19-9, Site Plan Regulations.

THEREFORE BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of ER Cape Landfill Solar LLC (Ralph Meima) for site plan amendments to the Gull Crest Site plan to install a solar array on the landfill located at 21 Dennison Drive be approved, subject to the following conditions:

1. That the plans be revised to address the comments of the Town engineer in his letter dated 5/9/2023.

2. That there be no alteration to the site or issuance of a building permit until the plans have been revised to address the above condition and submitted to the Town Planner for review.

Mr. LaVallee seconded the motion. With no further discussion, the motion passed 7-0.

Mr. LaVallee asked if there would be any signage advertising the Cape Solar Array. Mr. Read responded that a small placard listing emergency contacts would be placed at the entrance gate.

NEW BUSINESS

LD 2003 Zoning Ordinance Amendments – The Town Council has referred to the Planning Board for review and recommendation LD 2003 Amendments, Sec 19-10-3, Amendments Public Hearing.

Mr. Sahrbeck read the following introductory statement from the Memorandum on LD 2003 Amendments: "At the April 10, 2023 meeting, the Town Council referred to the Planning Board a package of amendments crafted by the Ordinance Committee to comply with LD 2003, "An Act to Implement the Recommendations of the Commission to Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restrictions." The Planning Board will review the amendments in accordance with Sec. 19-10-3."

Mr. Sahrbeck stated that the amendments were reviewed at the Planning Board Workshop, referred to the approval of the minutes from the Workshop at the beginning of this meeting, and cited the opening paragraph of the Workshop minutes: "Chair Sahrbeck stated that the amendments are predominantly policy driven and the final decision on policy is the Town Council. Board members noted they had reviewed LD 2003 materials including the law, DECD Guidance documents, and rules."

Mr. Sahrbeck asked Ms. O'Meara to introduce the amendments. Ms. O'Meara stated that the amendments are similar to those presented at the Workshop of May 2, 2023. She stated that the Town attorney, Mary Costigan, had reviewed the amendments and provided some revisions. Ms. O'Meara reviewed the revisions with the Board members.

On p. 13, lines 12-13, is that the word, "unit," be deleted. Mr. LaVallee noted that the word, "unit" is not deleted on the first line above lines 12-13. Ms. O'Meara stated that there is no proposal to change line 1 from "Single family dwelling unit" to "single family dwelling." She stated that the Board could make the recommendation to make this change. Mr. Sahrbeck noted the use of the word, "unit" throughout the zoning amendments document. Ms. O'Meara stated that the language within Section 19-6-5, Business District, may be slightly different from other sections. She stated that the use of the word, "units," is pertinent to the section defining the "maximum number of dwelling units per area" because this is specific to density whereas the section defining the "minimum lot area" is more generic and specific to use. Ms. O'Meara stated that the Board did not have to accept the attorney's revisions. Mr. Sahrbeck asked if Ms. Costigan had offered a legal opinion on the deletion of the word, "unit." Ms. O'Meara replied, "no." Mr. Huebener suggested that the word, "unit," remain in the document for the sake of consistency. Mr. Caton recommended that the original text of the document remain intact. Ms. O'Meara noted the Board's recommendation not to adopt the revision deleting the word, "unit," as a consensus item.

On p. 19, line 41, is for the word, "an," to be deleted. There was consensus among the Board members to adopt this revision.

On p. 21, line 22 pertains to ownership of accessory dwelling unit. Ms. O'Meara stated that Ms. Costigan was validating that the citation of the Maine Condominium Act, 33 MRS 31 is correct.

On, p.21, Requirement # 4 does not specifically address new construction of an accessory dwelling unit. The Town attorney recommends additional language stating that the new structure would need to meet the setbacks of a single-family home rather than setbacks for an accessory structure. Ms. O'Meara stated that the Ordinance Committee's goal was to create amendments that comply with LD 2003 and not go beyond the minimum requirements. They have referred additional items to the Housing Diversity Study Committee with the hope that this committee may make recommendations that go beyond LD 2003.

Mr. Caton noted a formatting error on p. 20, specific to placement of the letter, "B."

Mr. Caton asked a clarifying question around language on p. 21, lines 15 and 22. He noted the uses of "primary dwelling unit" and "single family dwelling" in reference to accessory dwelling units. He asked if there is a difference between the two concepts. Ms. O'Meara stated that a distinction must be made between the primary dwelling and the accessory dwelling unit. "Accessory dwelling unit" is the defined term. Mr. Caton suggested that the language on line 22 be changed from "single family dwelling" to "primary dwelling." Following further discussion on the use of "primary dwelling," the members agreed with Mr. Caton's suggested change.

Mr. Palmer requested clarification on the use of the date, July 1, 2023 on p. 21, line 6. He asked if this applies to structures existing as of this date. Ms. O'Meara stated that the intent was to capture existing accessory structures and that the date aligns with the date the LD 2003 amendments take effect. The date was chosen by the Ordinance Committee.

Mr. Sahrbeck requested clarification on the date of January 1, 2023 on p. 21, line 16. Ms. O'Meara stated that the intent of this date is to clearly capture structures existing as of this date in order to prevent any circumvention of the intent of the rules. Mr. Sahrbeck questioned whether the date on line 6 should be January 1, 2023 to avoid a rush for new construction to be completed by July 1, 2023. Mr. Sahrbeck then noted that the two dates were part of the document reviewed at the May 2, 2023 workshop and did not recommend any change.

Mr. Caton noted a formatting error on p. 21, line 26 specific to a "rogue number 2."

On p. 23, Section 4.a.3.5, Ms. O'Meara stated that the standard practice of the town is to round up, but also that parking requirements are a recognized barrier to creating affordable housing. The language in the draft amendments document mirrors that in the LD 2003 rule and contains language for both rounding up and down. The Town attorney recommends making the language consistent with standard practice, i.e., rounding up. Ms. O'Meara stated that any amendments cannot be more restrictive. Mr.

Sahrbeck asked if the work "may" on line 20 should be changed to "shall." The word, "may," allows for discretion while "shall" does not allow for discretion. Discussion ensued regarding making the language in Section 4 less confusing. Mr. Sahrbeck suggested that the Board make a red flag tag on this section for the Town Council to consider in making a policy decision on this section. The decision was made to leave the language unchanged with a note for consideration by the Town Council to make the language in the section more clear and include examples of the necessary calculation.

Mr. Sahrbeck opened the meeting for public comment, noting that there were no virtual attendees.

Tim Thompson of 6 Pine Ridge Rd addressed the Board in light of his role as Vice Chair of the Housing & Diversity Committee. He anticipates that the recommendations of the Planning Board will eventually be considered by the Housing & Diversity Committee and asked if the Board's recommendations will go back to the Ordinance Committee and then to his committee. Mr. Sahrbeck explained that the Town Council has tasked the Planning Board with reviewing the amendments for purposes of understanding how they align with the Town's zoning ordinance. The Planning Board's recommendations will go to the Town Council and what the Council does with the recommendations will be at their discretion. Mr. Thompson expressed concern about how all the recommendations and changes will be completed by the July 1 deadline set by the Ordinance Committee and with time to allow for public comment. Mr. Thompson stated that an ADU expert attended the Housing & Diversity Committee meeting of May 15, 2023 to provide information on size limits. The ADU expert suggested that the "sweet spot" for these units is 600-800 sq. feet. Mr. Thompson noted the Board's discussion of the Ordinance Committee's goal to comply with the minimum requirements of LD 2003 and, in allowing a maximum size of 1800 sq. feet, three times the current limit of 600 sq. feet, it seems the recommendations are, in fact, going beyond the minimum requirements of the rule.

Tim Reiniger of 40 Belfield Rd addressed the Board as the Town's representative with the Maine Municipal Association. Mr. Belfield stated that the Municipal Association was against LD 2003 and stated that there are many interpretations of the new law and expressed his opinion that recommendations from the Planning Board should be offered. He referenced the State Guidance Document that was finalized by the Governor's Office states that zoning ordinances adopted in municipalities should be consistent with both a Town's Comprehensive Plan and LD 2003. He stated that he has observed a divergence of interpretation depending on how a municipality approaches the legal analysis, specifically, the difference between what is permitted by LD 2003 and what is expressly required by LD 2003. He referenced his written submission to the Planning Board explaining independent changes to the amendments. He stated that one big issue is that the new law does not address the definition of multiplex/multifamily structures. Another issue is the interpretation of "four units in growth areas" and the concept of "tear downs." Other issues include the size of ADUs and the implications to the Cape Elizabeth Town center, specifically, density.

With no further comment from the public, Mr. Sahrbeck closed the public hearing.

Mr. Sahrbeck commented that the Planning Board has previously discussed the issue of size limits of ADUs. He stated that setback limits provide adequate protection. Larger ADUs would become primary dwellings and would need to follow restrictions for these structures. Mr. Sahrbeck explained that the role of the Planning Board is to consider implications to zoning ordinances. The Town Council is responsible for Policy decisions.

Mr. Sahrbeck acknowledged concerns around differences in interpretations of LD 2003 and encouraged members of the public to discuss concerns directly with members of the Town Council.

Regarding concerns around multiplex vs. multifamily structures, Mr. Sahrbeck stated that the Planning Board attempts to ensure consistency throughout zoning ordinances, and this work often involves discussion of specific language. He again encouraged members of the public to discuss concerns with members of the Town Council.

Mr. Caton acknowledged concerns regarding the possibility that an owner would tear down a residence to replace with a multi-unit structure and asked if there were safeguards avoiding this scenario. Ms. O'Meara stated that this scenario was discussed by the Ordinance Committee. The committee concluded that the issue is one of property rights and decided not to make any recommendations. Ms. O'Meara stated that the Planning Board can offer policy advice to the Town Council. Mr. Sahrbeck reiterated that the Planning Board recommendations pertain to zoning ordinances and any substantive changes need to be approved by the Town Council. Mr. LaVallee noted that there was no public comment on the Board's recommendations on the LD 2003 amendment outside of the size of the ADUs. In response to a question, Ms. O'Meara clarified that there is a difference between what the current Town ADU provisions require and what the LD 2003 provisions requires. The Ordinance Committee has had extensive discussions around the size of ADUs in response to interest from the public in creating livable space within primary residences, eventually recommending a minimum of 190 sq. feet (State law) to a maximum of 1,800 sq ft set by local ordinance. Setback restrictions remain in place.

Mr. Sahrbeck reminded the Board members that the Draft Memorandum on LD 2003 Amendments would be sent to the Town Council. With no further discussion on the Draft Memorandum, Mr. Sahrbeck recommended that the memo include language stating that the Planning Board noted a potential conflict between the calculation of the number of parking units and the number of dwelling units and that this may need a policy recommendation from the Town Council. A review of the decisions made both in response to the Town Attorney's comments and new changes ensued. No further changes to the Draft Memorandum were offered.

Mr. LaVallee asked if the Board needed to amend the language in the motion. A friendly amendment was made by Mr. Sahrbeck and approved by the members.

Mr. LaVallee made a motion on the Memorandum to the Town Council.

BE IT ORDERED that, based on the materials submitted and the information presented, the Planning Board recommends the LD 2003 amendments to the Town Council for consideration with amendments made at the May 16, 2023 Planning Board meeting and related consensus notes.

Mr. Huebener seconded the motion. With no further discussion, the motion passed 7-0.

OTHER BUSINESS

Project submission ordinance amendments -The Planning Board will discuss seeking a referral from the Town Council to assemble a package of amendments that update submission requirements and deadlines, including but not limited to adjusting deadlines in line with new town hall office hours and formalizing digital material submissions.

Mr. Sahrbeck explained that the Town Hall hours are changing beginning July 1, therefore, new deadlines will need to be considered.

Ms. O'Meara explained that the Planning Board, from a procedural standpoint, may want to request a formal referral from the Town Council to prepare amendments that update project submission procedures. The Planning Board does have the authority to initiate zoning amendments. Ms. O'Meara suggested that it may be time for the Board to review submission deadlines, and to include the Digital Submission Guidelines adopted during the pandemic.

Mr. Palmer made a motion for the Board to consider:

BE IT ORDERED that the Planning Board requests a referral from the Town Council to prepare a package of project submission amendments.

Mr. Bodenski seconded. With no further discussion, the motion passed, 7-0.

Mr. Sahrbeck noted that no members of the public were in attendance, either virtually or in person for comment.

Ms. O'Meara suggested that this agenda item could be placed on next month's Workshop agenda.

Mr. Huebener motioned to adjourn the meeting. Mr. LaVallee seconded. The motion passed, 7-0.

The meeting adjourned at 8:30 p.m.

Respectfully submitted,
Lucy E. Bauer
Minutes Secretary