

MINUTES OF THE PLANNING BOARD
TOWN OF CAPE ELIZABETH

June 20, 2023

7:00p.m.

Town Hall

Present: Jonathan Sahrbeck, Chair
Matthew Caton

Daniel Bodenski
James Huebener

Absent: Alton Palmer, Andrew Gilbert, Derek LaVallee, and Lucy Bauer, Minutes Secretary

Also present was Maureen O'Meara, Town Planner

CALL TO ORDER

Mr. Sahrbeck called the hybrid meeting (in-person and virtual) to order at 7:00p.m., established a quorum and began the meeting by asking for comments or edits on the meeting minutes of May 16, 2023. Mr. Huebener moved to approve the minutes and Mr. Caton seconded. With no further comments, the minutes were approved by a vote of 4 in favor and none in opposition.

Ms. O'Meara noted the absence of the Meeting Secretary and stated that the minutes of the meeting would be transcribed by the Minutes Secretary from the CETV videotape.

Mr. Sahrbeck noted the presence of remote participants and briefly reviewed the rules for public comment, to include a three-minute time limit for all in-person and remote participation.

NEW BUSINESS

CELT 2023 Boardwalks Resource Protection Permit – The Cape Elizabeth Land Trust is requesting a Resource Protection Permit to install boardwalks at Hobstone (U30-6), located off Hobstone Rd, and reconfigure boardwalks at Robinson Woods (R02-1, U9-2-1), located on Shore Rd, Sec. 19-8-3, Resource Protection Permit Completeness and Public Hearing.

Mr. Sahrbeck requested that the applicant's representative introduce herself and describe the project.

Ardath Dixon, Stewardship Manager for CELT, stated that the proposal is for two boardwalk installations for muddy sections on existing trails within two parcels, the first being Hobstone Woods. For this parcel, CELT is seeking a resource protection permit regardless of the fact that the application does not include an official wetland designation. Ms. Dixon explained that the project in Hobstone Woods addresses three muddy spots. One spot has an existing boardwalk that needs to be upgraded. The other two spots are high traffic areas that continue to be muddy. For these areas, boardwalks would be installed resulting in a reduction of net impact to the trails. Ms. Dixon projected charts illustrating the areas for consideration. In addition, she requested waivers for "description of soil," "description of vegetative cover by a botanist," "stormwater runoff plan," "delineation of building envelope," and "one-foot contour maps." She explained that the project would result in a net gain of 204 square feet of wetland area.

With regard to Robinson Woods, Ms. Dixon stated that both an official wetland delineation and ecological survey had been completed. She reviewed the topographical map associated with the

proposal, illustrating areas where boardwalks would be both removed and installed. The central focus of the proposal is to move the Pond Trail further upland, installing one pond crossing, one wetland boardwalk, one wetland-adjacent boardwalk, and one spot for dirt fill in order to move the trail upland. The proposal would also remove six boardwalks, maintain connectivity with the Cross Town Trail, and address high trail use. Ms. Dixon reviewed two designs for boardwalks, indicating CELT's preference for the design wide enough to allow for universal access while allowing water to flow underneath.

Mr. Sahrbeck opened the floor for public comment on the issue of completeness of the application. With no comments, either in person or virtual, Mr. Sahrbeck closed the public hearing. With no further comment from the Board, Mr. Huebener made a motion for completeness of the application.

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Cape Elizabeth Land Trust for a Resource Protection Permit to install boardwalks in Hobstone Woods, located at 465 Mitchell Rd., and realign trails and boardwalks in Robinson Woods, located on Shore Rd, be deemed complete. A determination of completeness shall include waivers from submitting the following information:

1. Topographic contours at 1' intervals and labels;
2. Description of wetland soils;
3. Description of wetland plants;
4. Stormwater management plan.

Mr. Caton seconded the motion.

Mr. Sahrbeck noted, for the record, a letter from the town engineer validating the low impact of the CELT proposals and, therefore, lent support for the requested waivers for the application.

Mr. Caton asked Ms. Dixon about signage; Ms. Dixon replied that new signage would be installed.

With no further discussion, the motion passed, 4-0.

Mr. Sahrbeck opened the floor for public comment on the merits of the CELT application. With no comments, either in person or virtual, Mr. Sahrbeck closed the public hearing. With no further comment from the Board, Mr. Huebener made a motion for approval on the Findings of Fact.

Findings of Fact

1. The Cape Elizabeth Land Trust is requesting a Resource Protection Permit to install boardwalks in Hobstone Woods, located at 465 Mitchell Rd, and realign trails and boardwalks in Robinson Woods, located on Shore Rd, which requires review for compliance with Sec. 19-8-3, Resource Protection Regulations.
2. The Planning Board deemed the application complete at the June 20, 2023 meeting.
3. The trail improvements will not materially obstruct the flow of surface or subsurface waters across or from the alteration area;

4. The trail improvements will not impound surface waters or reduce the absorptive capacity of the alteration area so as to cause or increase the flooding of adjacent properties;
5. The trail improvements will not increase the flow of surface waters across, or the discharge of surface waters from, the alteration area so as to threaten injury to the alteration area or to upstream and/or downstream lands by flooding, draining, erosion, sedimentation or otherwise;
6. The trail improvements will not result in significant damage to spawning grounds or habitat for aquatic life, birds or other wildlife;
7. The trail improvements will not pose problems related to the support of structures;
8. The trail improvements will not be detrimental to aquifer recharge or the quantity or quality of groundwater;
9. The trail improvements will not disturb coastal dunes or contiguous back dune areas;
10. The trail improvements will maintain or improve ecological and aesthetic values;
11. The trail improvements will enhance wetland buffers;
12. The trail improvements will be accomplished in conformance with the erosion prevention provisions of Environmental Quality Handbook Erosion and Sediment Control, published by the Maine Soil and Water Conservation Commission dated March, 1986, or subsequent revisions thereof;
13. The trail improvements will be accomplished without discharging wastewater from buildings or from other construction into Wastewater Treatment Facilities in violation of Section 15-1-4 of the Sewage Ordinance;
14. The trail improvements will also comply with Section 6-6-6- of the Floodplain Management Ordinance;
15. The application substantially complies with Sec. 19-8-3, Resource Protection Regulations.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Cape Elizabeth Land Trust for a Resource Protection Permit to install boardwalks in Hobstone Woods, located at 465 Mitchell Rd, and realign trails and boardwalks in Robinson Woods, located on Shore Rd, be approved subject to the following condition:

1. That the Maine Department of Environmental Protection be contacted to confirm any required permitting.

Mr. Bodenski seconded the motion.

Mr. Sahrbeck noted, for the record, a memorandum from the Conservation Committee in support of the CELT application.

With no further discussion, the motion passed 4-0.

Carr Woods – Shore Road Development Partners LLC is requesting final subdivision review and a Resource Protection Permit for Carr Woods, a 16 unit condominium and 1 single family home lot located on Deep Brook Drive (U6-91, 91A, 92, 94A, 95), Sec. 16-2-4 Final Subdivision Completeness and Sec. 19-8-3, Resource Protection Permit Completeness.

Mr. Sahrbeck provided the following introduction: Andrew Carr, Debra Carr, Ena Hanson and Shore Road Development Partners LLC are requesting Final Subdivision Review and a Resource Protection Permit for Carr Woods, a 16 unit condominium and 1 single family home lot located on Deep Brook Drive (U6-91, 91A, 92, 94A, 95), Sec. 16-2-4 Final Subdivision Completeness and Sec. 19-8-3, Resource Protection Permit.

Attorney Gordon Smith, representing the interest of the landowner applicants Andrew Carr, Debra Carr and Ena Hanson, addressed the Board and introduced both attorney Kristin Collins of Preti Flaherty, counsel for the co-applicant Shore Road Development Partners LLC and Bill Gerrish, Civil Engineer with Northeast Civil Solutions, for the project.

Ms. Collins addressed the Board, noting that the purchasers were present at the meeting and stating that, in terms of completeness, information has been submitted demonstrating the purchasers' technical and financial capacity for the project, to include a letter from their potential lender.

Mr. Gerrish addressed the Board and presented an historical overview of the project with specific focus on the changes since the preliminary approval of the project. The application was initially submitted and reviewed at the May, 2021 Planning Board meeting. The application was deemed complete on 8/17/2021. In response to comments and further review, the applicants returned to a Planning Board Workshop in January, 2022 and subsequently submitted proposed changes. By June, 2022, the remaining issue for preliminary approval was open space. A revised open space plan was presented at the August, 2022 Planning Board meeting, and preliminary approval was granted with conditions. The open space plan included trail networks around the perimeter of the plan and connecting open space blocks. Based on feedback, both from the Conservation Committee and the Planning Board, the trail network was removed from the plan. A number of other changes were made in order to enhance the open space plan.

Mr. Gerrish provided a brief review of the changes made since preliminary approval. The changes included removal of a duplex project, redesign of "Detention Area #1", and redesign of "Under-drained Soil Filter #2." He then presented an illustration of the revised open space plan includes 47% of undisturbed open space and, overall, greater than 60% of open space which is more than the minimum requirement.

Regarding completeness items, Mr. Gerrish explained that a standard boundary survey of the site was provided in the final application. There is an area in the SW corner of the site that has been identified as a deed overlap area. Mr. Gerrish requested that the Board consider accepting the boundary survey as a "complete" boundary survey. Counselor Smith, referencing the Planning Board memo for the agenda item, added that the recording of the subdivision plan does not create a property boundary and that the

deeds of abutting lot describe property down to the boundary of the plan. Ms. O'Meara requested that Mr. Gerrish delineate the boundaries of the public open space that would be dedicated to the Town. Mr. Gerrish validated that the area of the deed overlap would not be donated to the Town. Ms. O'Meara explained that, ownership of the deed overlap remains to be resolved because, if owned by the Carrs, the area, without frontage on a town-accepted road and short of the required minimal lot size, would represent an illegal lot once the open space is donated to the Town. Attorney Smith acknowledged that conveyance of the overlap area to either the Carrs or abutters requires resolution.

Regarding local regulations, Mr. Gerrish identified Units 3 and 4 as moderate income affordable. These are delineated as such on the building plan elevations.

Regarding the deed and restrictions on the open space, Mr. Gerrish stated that both draft deed area descriptions and draft condominium documents have been submitted and requested that these items be deemed complete.

Regarding the recording plat, Mr. Gerrish stated that the condominium plat was intended to represent the recording plat, and the title of the document has been changed to "Condominium Recording Plat." The plat includes the required note regarding a performance guarantee.

Mr. Sahrbeck requested comment about the applicant's financial capacity. Ms. Collins addressed the Board, acknowledging receipt of written public comment and clarifying that the comments should not be deemed substantive in determining the completeness of the application. Ms. Collins stated that the applicants are prepared to address all comments and, for purposes of addressing the completeness of the application, documents have been submitted demonstrating financial and technical capacity of the applicants.

Mr. Sahrbeck opened the meeting for public comment on the issue of completeness and not the merits of the application.

Attorney Brandon Mazer of Perkins Thompson, representing Erik and Jennifer Johansson of 2 Rocky Hill Road, Cape Elizabeth, as abutters to the project, addressed the Board. Attorney Mazer argued that the financial and technical capacity of the applicants has not been demonstrated, citing the addition of a new co-applicant as of May 15, 2023, a lender based in Boca Raton who has not demonstrated a previous relationship with the principals. The lender relies on the fact that many of the homes will be presold, thereby funding construction, a position which, Counselor Mazer suggests, does not meet the definition of financial capacity. In addition, Counselor Mazer suggests that the Irrevocable Letter of Credit in the application is incomplete and should be required before the application is deemed complete. Counselor Mazer requested that the Board consider how they would enforce the line of credit with the lender if there is a default on the project. Finally, while Counselor Mazer suggested that there does not appear to be any issue with right title and interest between the co-applicants, he pointed out that the Letter of Intent to Purchase is nonbinding and makes vague references to financing by Titan. If the project is to be sold outright to Shore Road Development Partners LLC, the Town should have full disclosure of the terms of the agreement. Attorney Mazer closed with asking the Board to deem the application incomplete.

Richard Blake of 2 Ivie Rd Cape Elizabeth addressed the Board and referenced his written letter to the Planning Board expressing his concerns about the project. He expressed concern about who the applicant really is. Based on prior discussions, Mr. Blake believes that Andrew Carr has an interest in the

new Shore Road development and would be paid the two million dollar price that he was asking when the neighbors tried to purchase the parcel. Mr. Blake understands that Mr. Carr walked away from the original vision, leaving the remaining two partners, about whom nothing is known. Mr. Blake questioned the completeness of the application. Mr. Blake referenced a statement from the applicant that documents demonstrating financial capacity had been submitted to the Town Manager. Mr. Blake suggested that the Town Manager may not be the appropriate arbiter of the requirements of financial capacity.

Lise Pratt of 32 Wood Road Cape Elizabeth addressed the Board and identified that her property abuts the project. Ms. Pratt expressed confusion about the identity of the applicant. She noted that the financial capability box on the Memorandum [completeness checklist] had been checked and asked if this was a holdover from the original application. She asked for clarification regarding information required for demonstrating "capability." She asked if there were other documents in the application that were not made public. She suggested that the documents submitted by the applicants do not demonstrate either financial or technical capacity and expressed concerns about the consequences to the applicants' failure to complete the project.

Sheila Wellehan of 24 Rocky Hill Road Cape Elizabeth addressed the Board, expressing concern regarding the lack of demonstration of financial capability for the project. She noted Attorney Collins' description of a "potential" lender. Ms. Wellehan referenced the preliminary approval that was granted in 2021 which included a "signed contract" with a lender. She asked the Board to request a binding contract with the new lender before deeming the application complete. Finally, she stated that she could not find any guidelines specific to a "performance guarantee" which is under the purview of the Town Manager.

With no further comment from the public or from virtual attendees, Mr. Sahrbeck closed the public hearing with regards to completeness.

Counselor Smith addressed the Board to clarify that there was never a signed contract with a prior purchaser, rather, a Purchase and Sale Agreement which was subsequently terminated. Counselor Smith stated that a new agreement between the landowners and the developer was pending finalization. Further, he explained that, at this stage of the project, there would not be any legally binding contract; the lender becomes legally obligated once permitting has been completed and the financial agreement closes.

Ms. Collins reinforced that a new Purchase and Sale Agreement was in the process of being finalized and would be submitted to the Board before the next Planning Board meeting. Ms. Collins stated that the formation of new LLCs commonly occurs with new development projects. While the project is in the permitting stage, there cannot be a commitment toward financing. She suggested that the Board might address "soft commitments" by defining conditions for approval. Ms. Collins stated that the materials in the application identify the members of Shore Road Development Partners. She noted that Town Ordinances do not specify conditions for either the identity or locality of a lender.

Ms. O'Meara addressed the question about the staff memo and an indication that technical capability had been submitted. This was not a holdover from an earlier memo, rather a recommendation from herself that materials had been submitted for the Board to consider regarding technical capability. Ultimately, it is the Board's responsibility to review the materials for completeness. In addition, Ms. O'Meara addressed the question regarding the existence of any non-public documents. Town Ordinance allows for private conversations and review of private financial documents between applicants and the

Town Manager for this final completion phase of the project. Ms. O'Meara spoke with the Town Manager and learned that this option for private conversation has not been used. All available documents are available to the public.

Counselor Smith stated that the applicant is legally allowed to follow the Town Manager process. Hearing that there were concerns, the applicant opted to bring the project before the Board and the public.

Mr. Caton requested clarification from Mr. Gerrish on the portion of land that will be donated to the Town. Specifically, Mr. Caton asked for the setback from the edge of Unit 10 to the property line created on the donation. Mr. Gerrish confirmed a 15-foot setback.

Mr. Huebener commented that, even if the Board deems the application complete, it does not mean that the Board agrees with everything in the package, simply that all materials have been submitted. Mr. Sahrbeck agreed that completeness means that the Board has enough information to make a decision on the project and noted that the Board had deemed the application incomplete in 2021. He reassured the audience that the Board is familiar with the process for both deeming an application complete and for making a decision on an application.

Mr. Bodenski commented on the survey and the deed overlap area. For the record, he stated that he finds it odd that there is a note on the drawing stating, "contact a Title Attorney." He supported the need to resolve the issue of the overlap.

Mr. Caton asked Ms. O'Meara to review the elements of her memo addressing completeness and identify, to her ability, whether or not necessary materials for each element have been submitted. Ms. O'Meara stated that she used the final subdivision review submission list as well as the resource protection list to derive the elements of the Summary of Completeness. She explained that she identifies elements that she feels might be a problem, which does not mean that the Board will feel similarly. Regarding the survey issue, the overlap area is the item of focus. The Town Assessor has asked that the square footage of the two condominium lots be added to the plan. The applicant has clearly identified the units designated as moderate income affordable, and this notation should be added to the plan. In addition, deeds for the open space should be provided to validate what is allowed and not allowed and to validate compliance with Sec. 19-7-2. Regarding the recording plat, the applicant has shown the note about the performance guarantee. For the resource protection permit, nothing has been identified as potentially incomplete.

Mr. Sahrbeck asked the Board for comment on the issue of financial capacity.

Mr. Huebener commented that enough information has been submitted for consideration of the substantive nature of the project. Mr. Sahrbeck agreed with the concern about a scenario where a project is underway and issues arise at a point where the environment is forever changed and the applicant runs out of the capacity to complete it. Mr. Sahrbeck noted that the applicant has submitted materials directly to the Planning Board, circumventing the option to have private conversations with the Town Manager. Mr. Sahrbeck did not have concern with an out-of-State lender. Recognizing that a firm commitment is not possible at this phase of the project, Mr. Sahrbeck commented that having a firm Purchase and Sale Agreement would be helpful.

Counselor Smith addressed the concern about developer declaring bankruptcy. This is addressed by the Town's requirement that there be a letter of credit in the amount of the infrastructure costs. The detailed breakdown of infrastructure cost has been reviewed by Town staff and deemed acceptable. At this point, the Ordinance requires a "form letter of credit," not an executed letter of credit. As a condition of approval, the Board could request an executed letter of credit from a credible source. The Town can draw on this letter in the event the developer defaults. Further concerns expressed by the public will be addressed in a written response that will be submitted ahead of the next Planning Board meeting.

Mr. Sahrbeck commented on a letter in the application that referenced two projects for Shore Road Development Partners LLC that came before the Board, specifically 6 Prout's Place and Cayden's Way private road.

Mr. Caton asked if the Board can place conditions on the issues outlined in the Town memo and which were reviewed by Ms. O'Meara. Mr. Sahrbeck reminded the members of applications deemed incomplete because submission materials were missing elements of information.

Mr. Caton made a motion for Completeness.

BE IT ORDERED that, based on the materials submitted and the information presented, the application of Andrew Carr, Debra Carr, Ena Hanson and Shore Road Development Partners LLC for final Subdivision Review and a Resource Protection Permit for Carr Woods, a 16 unit condominium and one single family home lot subdivision located on Deep Brook Drive be deemed complete.

Mr. Bodenski seconded the motion. With no further discussion, the motion passed 4-0.

Mr. Sahrbeck noted that a site walk had been completed in 2021 but, given the turnover in Board members as well as an application that is different than the original, he suggested that a second site walk be completed. Ms. O'Meara stated that the site walk should occur before the submission deadline of June 30. The site walk was scheduled for June 29 at 5:00 p.m. The group will convene at Deep Brook Road. Ms. O'Meara pushed the submission deadline to July 3 at noon.

Mr. Caton made a motion to table the project.

BE IT ORDERED that the application be tabled to the July 18, 2023 meeting of the Planning Board, at which time a public hearing will be held.

Mr. Huebener seconded.

Counselor Smith asked for clarification on the July 18 Planning Board meeting and whether this would be the first time that any substantive discussion on the project would occur. He asked if it was normal Board practice to hold a public hearing prior to any substantive discussion between the applicant and the Board. Mr. Sahrbeck clarified that the applicant would return to the Board to address the merits of the application. This would be followed by a public hearing on the merits of the application. The Board would possibly vote on the project. Mr. Huebener commented that any information on the applicant's financial capability would go a long way in inspiring confidence in the project.

With no further discussion, the motion passed, 4-0.

Mr. Sahrbeck thanked all who attended for their participation and time.

NEW BUSINESS

Mr. Sahrbeck called for any public comment on new business. He noted the presence of Mr. Gilbert who did not participate in the meeting because he has a conflict of interest in the Carr Woods application.

With no public comment, either in person or virtually, Mr. Huebener motioned to adjourn the meeting. Mr. Gilbert seconded. The motion passed, 5-0.

The meeting adjourned at 8:22 p.m.

Respectfully submitted,
Lucy E. Bauer
Minutes Secretary
