

MINUTES OF THE PLANNING BOARD
TOWN OF CAPE ELIZABETH

August 15, 2023

7:00p.m.

Town Hall

Present: James Huebener, Acting Chair
Matthew Caton
Derek LaVallee

Daniel Bodenski
Andrew Gilbert
Alton Palmer

Absent: Jonathan Sahrbeck

Also present was Maureen O'Meara, Town Planner

CALL TO ORDER

Mr. Huebener called the hybrid meeting (in-person and virtual) to order at 7:00p.m.

Mr. Huebener offered edits on the meeting minutes of July 18, 2023. Mr. LaVallee moved to approve the minutes as amended, and Mr. Caton seconded. With no further comments, the amended minutes were approved by a vote of 6 in favor, none in opposition.

OLD BUSINESS

4 Balsam Rd Resource Protection Permit & Subdivision Amendment – David and Stacy Calabrese are requesting a Resource Protection Permit to alter 3,965 sq. ft. of RP2 wetland to construct a single family home located at 4 Balsam Rd, and a Subdivision amendment to reflect merger of lots, Sec. 19-8-3, Resource Protection Permit Public Hearing, Sec. 16-2-5 Amendments to previously approved subdivision plans.

Peter Biegel, landscape architect with Landscape Design Solutions in Cumberland, Maine, addressed the Board, representing the applicants. Mr. Biegel noted that a waiver for the use of existing two-foot contours instead of the proposed one-foot contours was granted at the July 18, 2023 Planning Board meeting. He stated that comments from the Town Peer Review Engineer have been incorporated into the plans. These include the incorporation of a swale to the outlet area on the grading plan, and the use of three-inch diameter stone on the drip edge of the building. A maintenance and operation plan for the rain garden has been sent to the Town Peer Review Engineer for comment. The stormwater management report has been updated. The subdivision plan has been amended to combine lots 1 and a portion of lot 2. A draft easement for the hammerhead and driveway has been submitted to the Town.

Mr. Biegel noted the recommendation to include, in the maintenance and operations plan for the rain garden, a requirement for approval from the Town Code Enforcement Officer for any alterations to the rain garden or plantings within the rain garden. Mr. Biegel requested an exception to the requirement for approval for removal or addition of plantings given the relatively small scale of the site, the fact that the rain garden is a focal point for the property, and the uncertainty of knowing what plants would thrive. He suggested language that would ensure that the area remained vegetated while allowing the owners the ability to replace plantings as needed or desired. Mr. Huebener asked the Board to comment on the request. No comments were offered.

Mr. Huebener opened the meeting for public comment on the project. With no public comment, either in person or virtually, Mr. Hubener closed the public hearing. With no comment from the Board, Mr. Bodenski made a motion on the Findings of Fact:

Findings of Fact:

1. David and Stacy Calabrese are requesting a Resource Protection Permit to alter 3,965 sq. ft. of RP 2 wetlands to construct a home at 4 Balsam Road and an amendment to the Two Lights Terraces Subdivision, lots 1 and 2, to reflect a historic lot division/merger change, which requires review for compliance with Sec. 19-8-3 Resource Protection Permit and Sec. 16-2-5, Amendment to a Previously Approved Subdivision.
2. The application was deemed complete July 18, 2023 and a public hearing was held August 15, 2023.
3. The Two Lights Terraces Subdivision has been previously approved by the Cape Elizabeth Planning Board to be in compliance with the Subdivision Ordinance, and the findings and decisions of that approval which is not altered by the proposed amendment remain in effect.
4. The wetland alterations will not materially obstruct the flow of surface or subsurface waters across or from the alteration area;
5. The wetlands alterations 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;
6. The wetland alterations 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;
7. The wetland alterations will not result in significant damage to spawning grounds or habitat for aquatic life, birds or other wildlife;
8. The wetland alterations will not pose problems related to the support of structures;
9. The wetland alterations will not be detrimental to aquifer recharge or the quantity or quality of groundwater;
10. The wetland alterations will not disturb coastal dunes or contiguous back dune areas;
11. The wetland alterations will maintain or improve ecological and aesthetic values;
12. The wetland alterations and the single family structure/development are integrated into the site, so there are no opportunities for naturally vegetated, onsite buffers and a buffer is not required for RP2 wetland districts;

13. The wetland alterations 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;
14. The wetland alterations 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;
15. The wetland alterations are not located in a floodplain.
16. The subdivision is compatible with the applicable provisions of the Comprehensive Plan and town ordinances.
17. The application is substantially in compliance with Sec. 19-8-3 Resource Protection Permit and Sec. 16-2-5 Amendments to a Previously Approved Subdivision.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of David and Stacy Calabrese for a Resource Protection Permit to alter 3,965 sq. ft. of RP2 wetlands to construct a home at 4 Balsam Road and a Subdivision amendment to the Two Light Terraces Subdivision lot 1 and 2 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 August 8, 2023;
2. That a commitment to maintain the stormwater maintenance system on the property as shown on the approved Planning Board plan be recorded with the lot deed;
3. That there be no issuance of a building permit or alteration of the site until the above conditions have been satisfied.

Mr. Gilbert seconded the motion. Mr. Huebener noted a numbering error on the Findings of Fact Memorandum, resulting in a total of 17 findings of fact. He offered a friendly amendment for the correction which was accepted by the Board. With no further discussion, the motion passed 6-0.

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 Review and Sec. 19-8-3, Resource Protection Permit.

Mr. Gilbert recused himself from the business of the agenda item.

Bill Gerrish of Northeast Civil Solutions addressed the Board, representing the co-applicants on the Carr Woods project. Mr. Gerrish provided a summary of changes since the last meeting of the Planning Board.

Regarding the recommendation for further assessment of the trees located close to the tree protection barrier, the applicants met with Jeff Tarling, the Town Tree Warden, and walked the perimeter of the barrier. Mr. Tarling identified trees that were in decline or were at risk of being damaged during construction.

Mr. Gerrish stated that the plans have been amended to reflect the additional tree removal based on recommendations from Mr. Tarling. In total, an additional 28 trees either on or outside the clearing limits, 5 trees in the retaining wall area, and 8 trees on the southerly boundary would be removed. Mr. Gerrish also stated that the Town tree warden felt that there was adequate space for the proposed plantings and that some of the areas would revegetate naturally. He felt that the landscaping plan was feasible.

The changes to the tree removal plan were reviewed by the landscape architect for the project who felt that no additional plantings would be needed.

Mr. Gerrish stated that a note has been left in the plan allowing the tree warden to review the site again prior to construction.

Mr. Gerrish then spoke to the comments of the Conservation Committee. The applicant is amendable to all five recommendations, to include a 10-ft buffer around the wetlands within the non-alteration areas and the addition of .55 acres to the public open space parcel. The condo plat, parcel descriptions, and deeds have been updated to reflect these changes.

Regarding comments from the last Planning Board meeting on pedestrian safety, Mr. Gerrish stated that the applicants were previously advised that a crosswalk would be addressed within a different Town project. The applicants acknowledge that the ordinance is clear about pedestrian safety and are committed to meeting the standard. Mr. Gerrish stated that a traffic engineer assessed the site for potential alternatives, one of which is to provide a crosswalk directly at the Deep Brook Road sidewalk to the sidewalk on the other side of the road. The site distance at this location is not great, however, the traffic engineer felt that the minimum DOT standards would be met. Given this reasonable alternative to the previously suggested \$50,000 security in the event the Shore Road Improvement Project is not completed, the applicant requests a condition of approval to work with Town staff to arrive at a good solution for the concern.

Regarding discussion at the last Planning Board meeting on Casino Beach, information has been provided on the proposed drainage design for the development. The plan initially included a stormwater system that reduced peak flows for the two, ten and 25-year storms to slightly below predevelopment levels. The Town Public Works Director requested additional detention that would further reduce the flows even though the standard has been met. Mr. Gerrish reviewed the areas in the development that would drain to Casino Beach. He outlined all the offsite areas that impact Casino Beach and noted that 15.5 acres of the offsite areas drain onto the Carr Woods property. Mr. Gerrish acknowledged that the run-off volumes will increase once the property is developed; however, the stormwater system will store more volume in the detention storage areas than the projected increase in run-off volume. The erosion at the beach is an existing problem that is the result of a structure that cannot handle the peak flow. The stormwater drainage system for the Carr Woods project has met the standard for the project and provides some offsite improvement as well.

Mr. Gerrish then provided an update on the feedback that the tax map did not match deed descriptions, stating that the Easement and Conveyances Plan has been updated to reflect all the areas represented by the various deeds. The areas represented include the public open space parcel, the condominium parcel, the Carr lot, the road (Deep Brook Road) within the public right-of-way portion, and the two smaller parcels being conveyed to abutters. Mr. Gerrish stated that it is common for tax map areas to differ from an accurate boundary survey. A draft road maintenance agreement has been included in the plans; the applicant acknowledges that the Carr lot and the parcel located at 973 Shore Rd. will need to have deeded access rights to the road.

Regarding the memo specific to the foot bridge, the applicant has spoken with the abutter who stated that this structure can remain in place. The applicant is willing to draft a formal agreement, if necessary.

Mr. Huebener opened the meeting for public comment.

Richard Blake of 2 Ivie Rd addressed the Board. He referenced the letter he sent to the Board. He offered two comments. He expressed concern for the destruction of the buffer between the Carr Woods project and the Oakhurst area and Sherwood Forest. He also asked if the DEP Clean Water permit for Trout Brook included Casino Beach. Ms. O'Meara stated that the Trout Brook watershed does not include Casino Beach. Mr. Blake questioned whether the Town's MS4 agreement with the State includes Casino Beach. He expressed concern about the runoff and potential pollution at Casino Beach. He stated his opinion that the applicant should address this issue.

Lise Pratt of 32 Wood Rd addressed the Board. She expressed concern about the risk to the abutters for the potential damage from blasting. She referenced the Performance Standard 19-8-5D13. She stated that a generic blasting plan was included in the May, 2021 packet but is not included in the current plan. Ms. Pratt expressed concern about the lack of information on post-blast damage. She requested clarification on the process for submitting claims for post-blast damage. She also requested more detail on the calculation for the extent of blasting on the project. She requested a condition of approval for a blasting plan that specifies how damage claims will be handled as well as the scope of the anticipated blasting.

Katie Blackburn of 14 Rocky Hill Rd addressed the Board. She reiterated concerns regarding the financial and technical capacity of the applicants. She requested clarity on the additional removal of trees. She acknowledged that the concerns specific to Casino Beach are not wholly created by the applicant and that the problem, which has existed for many years, has not been addressed. She questioned whether the Town should approve the Carr Woods project when the run-off resulting from the project could compound the existing issues.

Hannah White of 13 Rocky Hill Rd addressed the Board virtually. She offered comments about the Casino Beach stormwater system. She referenced standard 16-3-1c of the subdivision ordinance and standard 19-8-3b of the zoning ordinance. She stated her opinion that existing issues at Casino Beach should be addressed before further development is approved by the Town.

With no further comment from the public, Mr. Huebener closed the floor for public comment.

Mr. Gerrish addressed the Board. He stated that the stormwater detention areas will undergo quality treatment for both the development and existing areas. He stated that the blasting plan addresses the appropriate standards. He noted that the excavation of the site will include conventional means of rock

removal. The quantity of blasting will be relatively small. All appropriate measures to protect the public will be in place.

Mr. Huebener opened the floor to the Board for discussion.

Mr. LaVallee requested clarification on Attachment 4, the supplemental technical capability documents. He stated that he had hoped to receive past project plans of similar size and scope. He referenced a cover letter and a generic project plan. The letter describes a 32-home project in Saco (Cottages at Pine Meadows) and a 12-unit subdivision in North Yarmouth. He requested an update on the North Yarmouth project. Laurie Bachelder of Shore Road Development Partners addressed the Board. She stated that the North Yarmouth project has not started. The Saco project is complete.

Mr. LaVallee referenced letters to the Board describing problems with the Cottages at Pine Meadows project, to include grievances submitted to the Office of the State Attorney General. Discussion ensued about the development. Mr. Goddard clarified that he was responsible for 24 units. The remaining units were sold by the developer, GenX Capital Partners. Mr. Goddard stated that he has no affiliation with GenX. The grievances on record were directed at GenX Capital Partners.

Mr. LaVallee expressed disappointment at the lack of evidence for demonstrating the applicant's technical and financial capacity to complete projects of similar size and scope to the Carr Woods project.

Ms. Bachelder suggested that the negative information in the letters sent to the Board from the public has not been verified. She further explained that, from a monetary perspective, the Carr Woods project is a larger project; however, the development process is the same.

Mr. Huebener redirected the conversation, asking Ms. Bachelder to address the negative comments specific to the Cottages at Pine Meadows. Ms. Bachelder was unaware of Mr. LaVallee's comments.

Ms. O'Meara read an email written by Mr. LaVallee and sent on July 20, 2023 to Bill Gerrish with a copy to the Planning Board. Mr. LaVallee expressed concern about the applicant's apparent lack of technical capabilities and requested that the applicant provide additional background information, to include plans demonstrating technical expertise. The applicant responded to this email in the materials submitted in the application packet on July 31, 2023.

Attorney Kristin Collins clarified that the applicant has completed a project of similar size to Carr Woods but not budget. She stated that technical capacity is demonstrated by the projects that have been completed by Mr. Goddard. A list of these projects was included in the initial packet of information introducing Shore Road Development Partners. These projects include subdivisions of multiple units.

Ms. O'Meara identified the information that was submitted by the applicant for the June, 2023 Planning Board meeting regarding technical and financial capability. This information includes a list of the projects completed by Mr. Goddard.

Attorney Collins cited the project at Deacon Hayes in North Yarmouth, explaining that the project involves the construction of 12 units on a small lot and has required demonstration of significant technical capacity to obtain approvals from both the Town and the State. This project has not broken ground because it is under appeal.

Ms. Collins then clarified that she is not the attorney representing the Saco project; however, she stated that a complaint to the Attorney General's office is not a finding of wrongdoing. Further, the outcome of the complaint is unknown. She reiterated that Mr. Goddard was the contractor, not the developer of the Cottages at Pine Meadows project.

Andrew Carr addressed the Board, identifying himself as both the owner of Carr Woods and one of the brokers for the Cottages at Pine Meadows development. He stated that he handled 13 of the sales and was aware of the complaints to the Attorney General. He reviewed and addressed the list of complaints.

Mr. Palmer asked Mr. Goddard who was responsible for the infrastructure (roads, utilities) on the Cottages at Pine Meadows development. Mr. Goddard stated that JMH excavation of Gray, Maine was the developer for the infrastructure for the Cottages at Pine Meadows.

Mr. Palmer stated that, from a technical capacity standpoint for the Carr Woods project, the Board should be reviewing both the development of the infrastructure and the construction of the individual units. He stated that information demonstrating the technical capacity for the development of the infrastructure appears to be lacking. He explained that, per the ordinance, the Board must understand the ability of the developer to complete the project which includes hiring of contractors. Mr. Goddard clarified that New England Earthworks would be contracted to complete the infrastructure, and that a list of projects completed by New England Earthworks was submitted to the Board. Mr. Goddard then provided examples of his experience managing infrastructure elements as well as construction on past projects. He stated that he has 15 years of excavation experience. Ms. Bachelder added that Shore Road Development Partners owns an excavation company and performs site work for others. Mr. Palmer asked Mr. Goddard to provide information on projects where Shore Road Development Partners was the developer of infrastructure valued on the order of 2.5 million dollars. Mr. Goddard replied that he has not completed infrastructure projects of this size. Mr. Palmer asked for a list of infrastructure projects, with relative values, that Mr. Goddard has completed.

Mr. Palmer asked for clarification of how surety for the project would be provided. Attorney Collins responded that, as with any project approved by the Planning Board, the form of surety would be approved by the Town Manager and Town Attorney. She explained that, for the Carr Woods project, a draft escrow agreement for the full amount of the infrastructure has been provided. This would give the Town full access to the funds if any portion of the project was not completed. Mr. Palmer stated that financial capacity and technical ability are separate concerns. Differentiating each component is important because the need for the Town to exercise the surety would likely be dependent on the technical capacity of the developer. Ms. Collins stated that the development team on the Carr Woods project has experience in site work, construction of large-scale single-family homes, and developing subdivisions under approved plans involving significant infrastructure. She stated that part of technical capacity is hiring and overseeing subcontractors. And, while Mr. Goddard has not completed an infrastructure project of comparable size to the Carr Woods project, he is hiring a subcontractor who has experience with projects of similar size.

Mr. Caton directed a question to Ms. Collins, referencing the requirement in the subdivision ordinance that the "applicant shall demonstrate adequate technical and financial capability to complete the project as proposed." He asked for her insight on the meaning of the word, "adequate." She replied that it means that there is adequate evidence in the record that demonstrates that the particular proposal by the particular applicant is viable. She further stated that this is a low-level requirement. Mr. Caton then

asked Ms. Collins to define the word, “shall” in the standard. Ms. Collins replied that the word, “shall” means that the applicant holds the burden of demonstrating that they have met the standard. Discussion ensued about the summary of evidence that has been provided to the Board for the purpose of demonstrating technical and financial capability.

Mr. Huebener asked Mr. Bachelder to review the funding for the escrow. Ms. Bachelder stated that private capital would be used for the escrow.

Mr. Caton expressed concern about the standard for financial and technical capability because the word, “adequate” is subjective. He noted that members of the public don’t agree that the standard has been met, and that members of the Board do not seem unified on the issue. The evidence presented does not provide complete assurance that the standard has been met, only that the applicant is, more likely than not, able to complete the project.

Mr. Palmer offered a few comments. He stated that he appreciated the effort on behalf of the applicant and Town staff to address concerns specific to the tree removal plan and make improvements to the plan. He asked Mr. Gerrish to confirm the addition of an ADA ramp to the east side of Shore Road to receive the crosswalk coming from Deep Brook Drive. Mr. Gerrish stated that ADA ramps would be included at the end of the sidewalk as well as the other side. Regarding Casino Beach, Mr. Palmer noted that the applicant is exceeding the ordinance relative to the level of stormwater detention required. He expressed concern that improper controls during construction could exacerbate the issues at Casino Beach. He stated that, given the existing issues at Casino Beach, the applicant has more than a low-level burden to demonstrate technical ability to oversee and complete the infrastructure. He is not completely comfortable that the applicant has demonstrated the technical ability to complete the infrastructure.

Mr. Bodenski offered a few comments. He stated that the applicant has done a reasonable job meeting the engineering requirements specific to traffic. He expressed disappointment with the recent submission of evidence demonstrating technical capability. Regarding the stormwater system, he stated that the successful completion of the infrastructure will depend on the management of the excavation contractor, and evidence demonstrating the applicant’s ability to manage subcontractors is insufficient.

Mr. LaVallee made a motion to ask permission of the applicant to postpone the vote in order to give the Board an opportunity to meet with Town legal counsel to better understand the technical standards. Mr. Huebener added that delaying the vote would allow the applicant to provide more information on New England Excavation’s experience. He asked Ms. O’Meara for clarification on an appropriate motion.

Ms. O’Meara stated that, according to the subdivision ordinance, once the public hearing is held, the Board may table the application for 30 days and, beyond that, the application may be tabled further with the applicant’s consent. If the applicant denies consent, the remaining options for the Board are to either approve or deny the project. Mr. Palmer asked if there would be an option to re-open the public hearing. Ms. O’Meara replied that, under Town rules, every Planning Board meeting, outside of workshops, includes the opportunity for public comment. Mr. Palmer noted that this project has been under consideration for more than two and a half years. During this period, the members of the Board have turned over and the developer has changed.

Attorney Smith addressed the Board, consenting to the Board's request for time to meet with Town counsel. He stated that the applicant would welcome the opportunity to respond to concerns that evidence for meeting the standard is not sufficient.

Discussion ensued on both the procedure and purpose for meeting with Town counsel, to include scheduling an executive session. Attorney Collins objected to the idea of an executive session so that the applicant had an opportunity to hear and respond to the review.

Ms. O'Meara offered guidance on an appropriate motion as well as the established process for both submission of application material and public comment.

Mr. Palmer suggested that, in the interim, the applicant could provide information with greater specificity relative to development experience. The information should include projects of relative size and costs as well as more information on New England Earthworks, to include size of projects and their bonding capacity. Discussion ensued regarding the specificity of information that would demonstrate technical capability.

Mr. LaVallee withdrew his motion. Attorney Smith asked for clarification on whether the Board had other issues beyond the applicant's demonstration of technical and financial capability. In response, Mr. Palmer asked Ms. O'Meara if the blasting plan submitted in May, 2021 is part of the record and would be part of the Board's approval. Ms. O'Meara answered in the affirmative on both questions. She stated that the Town has a blasting ordinance that is administered by the Fire Chief. Mr. Palmer stated that the blasting plan includes a pre-blast survey that would address concerns submitted by the public. Mr. Caton questioned whether the retaining wall should include a railing. Ms. O'Meara clarified that the retaining wall is located on a private portion of the site; the group most impacted by the retaining wall is the immediately abutting condominium owners. The height of the wall is a balance between minimizing impact to the buffer or increasing the amount of land associated with the condominium building. Mr. Palmer suggested that the height of the wall is more of an HOA issue than a Planning Board issue.

Mr. LaVallee made a motion to table consideration of the applicant's submission until the September 19, 2023 Planning Board meeting. Mr. Palmer seconded the motion. With no further discussion, the motion passed, 5-0.

With no further public comment, either in person or virtually, Mr. Vallee made a motion to adjourn. Mr. Bodenski seconded the motion. The motion passed, 5-0.

The meeting adjourned at 9:26 p.m.

Respectfully submitted,

Lucy E. Bauer

Minutes Secretary