MINUTES OF THE PLANNING BOARD
TOWN OF CAPE ELIZABETH

September 19, 2023 7:00p.m. Town Hall

Present:	Jonathan Sahrbeck	James Huebener
	Daniel Bodenski	Derek LaVallee
	Matthew Caton	Alton Palmer
Absent:	Andrew Gilbert	
Also present:	Maureen O'Meara, Town Planner	
	Mary Costigan, Town Attorney	
	Lucy Bauer, Minutes Secretary	

CALL TO ORDER

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

Mr. Huebener called for approval of the minutes of August 15, 2023. Mr. Huebener moved to approve the minutes, and Mr. LaVallee seconded. With no further comments, the minutes were approved by a vote of 5 in favor, none opposed. Mr. Sahrbeck abstained because he was not present at the August meeting.

Mr. Sahrbeck reviewed the rules of the hybrid meeting, citing incidences of "Zoom bombs" at Town meetings in other communities. Ms. O'Meara reminded the audience that anyone attending virtually must provide a name in order to be admitted to the meeting.

OLD BUSINESS

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.

Andrew Carr, Debra Carr, Ena Hanson and Shore Road Development Partners LLC are representing the applicant. The application was deemed complete at the June 20, 2023 meeting, and public comment has been scheduled for this evening.

Mr. Sahrbeck stated his understanding from communication with the Town Planner that there would be a request to table the business of tonight's meeting.

Kristin Collins, attorney for Shore Road Development Partners LLC, addressed the Board and requested a continuance based on the volume and timing of public comment on the project. Extra time is requested to allow for a fair response to the comment. In addition, Ms. Collins stated that Mr. Goddard was unable to attend tonight's meeting. Ms. Collins identified that most of the comments submitted are related to Mr. Goddard's technical capacity to complete the project; therefore, his presence is necessary. The request for a continuance will also allow the applicant to revise the construction management plan to reflect a broader and longer role for Shinberg Consulting in the project. Finally, Ms. Collins asked the Board when the record would be closed and requested clarification for future public comment in order to avoid being in the position of not having enough time to respond fairly.

Mr. Sahrbeck asked if any members of the Board had questions for Ms. Collins.

Mr. Sahrbeck clarified that information received from both the public and the applicant has raised questions that have required further deliberation. He explained that the Board has not immediately moved to table the business of tonight's meeting because of the request made at last month's meeting for guidance from the Town attorney. This is business that can be completed tonight.

Mr. Caton stated that he would like the Town attorney to clarify the difference between evidence that applies to the applicant as an entity vs. an individual or other entities associated with an individual. He requested that the Board seek a response from the applicant to an email query submitted by one of the Board members. He asked for clarification on both public comment and how the Board would close the record to determine if the application can go forward or not.

Mr. Sahrbeck stated that, from a procedural point of view, tonight's public comment period would be limited to 15 minutes.

Ms. Collins addressed the Board, stating that the majority of the public comment received in advance of tonight's meeting was related to the Cottages at Pine Meadows in Saco. This development was not developed by Ron Goddard; he was involved in the project as more of a general contractor. Ms. Collins stated that Mr. Goddard would be working on the Carr Woods project in a different capacity as the developer.

Mr. Sahrbeck opened the floor for public comment, reminding virtual participants of the need to identify themselves before they can be admitted to the meeting.

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. Citing language from both Title 38 MRS, Section 4404 and Cape Elizabeth Subdivision Ordinance 16-3-1, he stated that the applicant has not met the required prerequisite for demonstrating financial and technical capacity to complete the project. The intent of the ordinance is to demonstrate a present ability to complete a proposed project. The ordinance also requires that an applicant provide a performance guarantee prior to any sale of lots, issuance of building permits or commencement of site work. A draft escrow agreement that does not illustrate where the funds are coming from does not prove financial capacity. He cited case law from Maine courts that establish rules governing the nature of proof necessary for an applicant to demonstrate adequate financial capacity. He stated that the letter from Titan is not a commitment and is partially based on the pre-sale of the homes on the Carr Woods project. The letter does not explain where the funds are coming from.

Jon Fetherston of 98 Heritage Avenue, Ashland, MA addressed the Board. He identified himself as an owner of one of the homes at the Cottages at Pine Meadows in Saco. He also identified that he holds two Governor-appointed positions in MA; specifically, he has been appointed to the Massachusetts area planning council and to the position of a housing commissioner in MA. Mr. Fetherston disputed the earlier statement that Mr. Goddard was not the developer of the Cottages at Pine Meadows. He stated that Mr. Carr had placed an advertisement in the newspaper identifying Ron Goddard as the developer of the project. Mr. Fetherston referenced a previous planning board meeting where the applicant stated that the process for the development is consistent across projects. He then described multiple issues with his Saco home to include, within the first day of occupancy, a fire resulting from a stove that was not converted to the appropriate fuel source, a flood resulting from improperly installed A/C units, stacked laundry units that fell over causing damage to the floor, and a bedroom door that held nine differently sized screws.

Leonard White of 13 Rocky Hill Rd addressed the Board. He expressed concern that the applicant's stormwater management plan does not acknowledge that the stormwater system at Casino Beach is broken. He questioned why the Board would allow a project to put more stormwater through a system with known risks and referenced his previous written submissions to the Board. He expressed an additional concern regarding the complexity of the project which includes wetlands, ledge, steep grades, tight margins to the abutters, trees, and vegetation issues. He questioned whether the materials submitted by the applicant include evidence demonstrating technical capacity for the complexity of the project. The closest example provided by the applicant is the Cottages at Pine Meadows, a project that did not have site conditions that mirror those at Carr Woods.

Karen Glennon of Saco, Maine addressed the Board identifying herself as an owner of a home at the Cottages at Pine Meadows, a development brought to market by Ron Goddard and Andrew Carr. She described multiple hardships ranging from poor communication for the closing to the need to engage outside contractors to make her home livable. She stated that items listed on the executed Purchase & Sales agreement were not delivered, leaving her with the options of either taking the developer to small claims court or losing her $15,000 deposit by walking away from the agreement. She stated that a water line was compromised during the construction of a foundation of an adjacent property, resulting in the loss of water flow in her home. She described other issues with siding, doors, and caulking in bathrooms.

Richard Blake of 2 Ivie Road addressed the Board. He referenced a letter he had submitted to the Board identifying an exhibit illustrating that the applicant deeded back the declarant rights for the construction of the project, he believes, in Saco. He stated that this is an unusual transaction and may represent a deed-in-lieu-of-foreclosure transaction. This would demonstrate a lack of financial capacity on the part of the applicant to complete the project.

Erik Johansson of 2 Rocky Hill addressed the Board expressing concern over the consideration of tabling the business of the agenda. He referenced public comment that counters the applicant's assertion that Ron Goddard was not the developer for the Cottages at Pine Meadows. He urged the Board to vote on the application tonight.

Noting that the 15-minute window for public comment had been reached, Mr. Sahrbeck closed the floor for further comment. He stated that, in the absence of response from the applicant to the public comment, he would ask the Town Attorney to address questions that were raised at the August 15, 2023 meeting. Mr. Sahrbeck stated that he would entertain a motion from the Board to enter an executive session with the Town Attorney, clarifying that he did not feel this was necessary. Hearing no motion, Mr. Sahrbeck asked Ms. Costigan, Town Attorney, for clarification on the definition of technical ability pertaining to site plan review as specified in Town ordinances.

Mary Costigan, Town Attorney, addressed the Board stating that the question posed is broad in nature noting that the concept of technical capacity is different for every project and that, essentially, it means that the "applicant demonstrates that they can actually complete what they are telling you they are going to do." She stated that the applicant does not have to demonstrate that they can complete a perfect project without problems; rather, they must demonstrate that they have a team with the technical expertise to complete the proposed project.

Mr. LaVallee, referencing the August 15, 2023 Planning Board meeting, asked Ms. Costigan for clarification on the objective standard to be met, given his opinion that both the evidence presented and response from the applicant to questions from the Board were inadequate. He asked if the standard should be applied to the original application or to subsequent submissions, excluding the most recent public comment. Ms. Costigan replied that decisions should be based on the record, to include the original application, subsequent submissions to the Board, and public comment.

Mr. Caton asked Ms. Costigan to clarify the definition of financial capacity. Ms. Costigan stated that, frequently, the demonstration of financial capacity focuses on public improvements. The items that "the Town cares about the most" are generally included in the demonstration of financial capacity. The applicant's performance guarantee represents the demonstration of financial capacity which typically includes a letter from a bank or lender, i.e., evidence that funds are available to cover the public improvements for the proposed project.

Ms. Costigan asked Ms. O'Meara to define the public improvements for the Carr Woods project. Ms. O'Meara stated that the most significant items include vehicular access, to include the private road; the sewer and water lines; the stormwater system; and preservation of the landscape, to include elements of the natural buffer.

Mr. Caton asked Ms. Costigan to explain the difference between technical and financial capacity since technical capacity includes not only public benefit, but also construction of the homes. Ms. Costigan stated that the Board should have a level of confidence that the applicant has a team that will not leave a project in a state where the Town must assume responsibility for it. She suggested that the Board should consider the impact if the project fails.

Mr. Palmer referenced Attorney Mazer's comments on the applicant's financial capacity and, specifically, both Board and legal interpretations of what type of information can be used to either approve or deny an application. He asked Ms. Costigan for an opinion on the type of information that can be used to determine financial capacity. Ms. Costigan replied that the Board would want evidence that funds that are immediately available to complete, primarily, the public improvements if the applicant cannot finish the project. Ms. O'Meara clarified that the Town, as stated in the ordinance, accepts a letter of credit or an escrow account as demonstration of financial capacity. Further, a letter of credit must come from an FDIC-insured institution.

Mr. Sahrbeck asked Ms. Costigan if she could provide any examples of municipal projects that a Board had denied because the evidence of technical capacity was deemed inadequate based on projects within an applicant's portfolio that had not worked out well. Ms. Costigan could not cite any examples of this situation, either from her experience representing municipalities or case law.

Mr. Caton asked Ms. Costigan for an opinion on the evidence the Board should consider given that the applicant is a new corporate entity and that evidence presented is specific to past projects involving one individual. Ms. Costigan replied that the Board should be judging the application based on the applicant and the team the applicant has assembled to complete the project. The project involving the individual was, technically, completed, even if not to everyone's satisfaction.

Mr. Palmer asked Ms. Costigan if the performance guarantee can be extended to provide surety that the team assembled by the applicant will remain involved in the project. Ms. Costigan replied that the guarantee cannot mandate that a team remain involved in any project if the team wishes to be released.

Mr. LaVallee asked Ms. Costigan to clarify if an application should be overwhelmingly clear that an applicant has the technical capacity to deliver the work outlined in a proposal. Ms. Costigan, having stated that the bar for the standard is low, replied that a typical application should include a clear list of both the members of the team and their collective experience.

Mr. Sahrbeck asked the Board if any members had a desire to move to an executive session. Hearing none, he thanked Ms. Costigan for her counsel. He then turned the floor over to the applicant with regard to the request to table the business of the agenda.

Attorney Collins addressed the Board requesting to table the business in order to more comprehensively prepare a response. She requested comment from the Board on the request for continuance.

Mr. Caton asked Mr. Sahrbeck if the Board was being asked to consider tabling the business or, rather, to consider conditions that would be attached to a decision to table the business. Mr. Sahrbeck replied that he would like to consider issues that still need to be addressed. In fairness to the applicant, information only recently submitted should be reviewed, to include the question of liens on the applicant's record. In addition, the applicant has introduced Greg Shinberg as a new member of the project. Mr. Sahrbeck advised the Board on two options for tonight's meeting. Either the Board denies the request to table the business and the proceedings continue or grants the request to table the business.

Mr. Huebener stated that he feels the applicant has not demonstrated technical capacity and does not feel that any further evidence will persuade him otherwise.

Mr. LaVallee asked what additional information would be provided if the decision was made to table the business. Attorney Collins provided examples of evidence that could be provided. Discussion ensued regarding the value of information provided by either a management company or HOA for the Cottages at Pine Meadows. Ms. Cheryl Sarno identified herself as the official representative of the HOA for the development.

Mr. Palmer stated that he was struggling with separating the project from the current proponent. He reviewed the history of the application which has been before the Board since before his term which will end this year. Mr. Palmer asked Ms. O'Meara what would happen if the Board denied the application based on concluding that the current proponent has not met the standard of technical and financial capacity. Ms. O'Meara stated that a new application would follow the process from the beginning which includes a workshop and application for preliminary approval.

Mr. Bodenski noted the complexity of the Carr Woods project and asked for clarification on the financial value of the infrastructure for the project. Ms. O'Meara stated that the applicant has provided a performance guarantee for an estimated $2.2 million dollars. She further clarified that any performance guarantee for a project must be current. Mr. Bodenski noted that the largest infrastructure project previously completed by New England Earthworks is $1.25 million dollars. He stated that the scale of the Carr Woods project is larger and asked the applicant if New England Earthworks can demonstrate projects of similar scale to Carr Woods.

Attorney Collins addressed the Board, asking for clarification for Mr. Sahrbeck on the need to address specific concerns given the request to table the business. Mr. Sahrbeck stated that the Board would like to hear information that would warrant granting the request to table. Ms. Collins replied that the applicant is requesting a continuance in order to fully address the concerns raised about liens, provide an improved construction management plan, and respond to specific concerns about the units at the Cottages at Pine Meadows. Mr. Sahrbeck invited Ms. Collins to respond to the question raised about New England Earthworks.

In response, Ms. Collins introduced Greg Shinberg, founder of Shinberg Consulting, a real estate development consulting firm. Mr. Shinberg addressed the Board stating that he was recently hired to participate in the project. He stated that he has advised the owners to consider larger contractors, clarifying that this does not mean that the current contractor cannot complete the project. Mr. Shinberg reviewed a list of projects that he has been involved in completing and stated that he has the technical capability to complete the Carr Woods project.

Mr. Sahrbeck asked Mr. Shinberg to define his role in the Carr Woods project. Mr. Shinberg replied that his role would be to work with the Town (Mr. Jay Reynolds and Mr. Steve Harding), secure the letter of credit, and oversee the hiring of the site contractor. Mr. Shinberg would be present during all phases of the construction and would make sure that the work would be done correctly according to the plans submitted by Mr. Gerrish. He stated that he has experience completing complex projects and provided examples of the oversight that would be required on the Carr Woods project.

Mr. Caton referenced a letter of intent that was submitted by the applicant on September 5, 2023. He asked if there was subsequent evidence of Mr. Shinberg's involvement in the project. Mr. Shinberg replied that he has signed a contract with the applicant which could be provided to the Board. Mr. Shinberg stated that he has no personal experience with Mr. Goddard and was not involved in the development in Saco; therefore, he cannot speak to it.

Mr. Sahrbeck asked Mr. Shinberg when he was brought into the Carr Woods project. Mr. Shinberg replied that he was contacted approximately three weeks prior to tonight's meeting. He signed the contract approximately two weeks ago. Mr. Shinberg stated that he has experience to address problems as they arise and provided descriptions of projects that required his technical expertise. He also described how he would work with Mr. Gerrish and subcontractors to ensure that the work on the Carr Woods project is done correctly. He stated that he has walked the entire Carr Woods property and acknowledges that the site is a very important location that will require careful traffic management. His primary concern on any project is safety and, additionally, quality. He stated that he has no experience with New England Earthworks and has recommended that the owners consider another contractor with more experience.

Mr. Sahrbeck asked Mr. Shinberg if he has reviewed the issues associated with Casino Beach. Mr. Shinberg replied that he has not. He has discussed the issues with Mr. Gerrish and has a general understanding of the stormwater management plan for the project. He acknowledged that he needs to review and understand the details of this component of the project, not least in order to anticipate potential issues.

Mr. LaVallee asked Mr. Shinberg if he had ever held a similar role in a project of similar size to Carr Woods. Mr. Shinberg replied in the affirmative, citing a project for which he was both developer and owner's representative in Freeport in 1988. He stated that he primarily works as an owner's representative providing oversight and quality assurance. He has no ownership interest in the projects and is paid a flat fee.

Attorney Gordon Smith addressed the Board responding to the discussion about the infrastructure experience of New England Earthworks. He asked Mr. Shinberg to provide a description of his experience with large infrastructure projects. Mr. Shinberg stated that the largest project he was involved in was InterMed which had an infrastructure value of $40 million dollars. He has been involved in projects as an owner's representative or project manager that, in total, amount to approximately $400 million dollars. Attorney Smith asked Mr. Shinberg to clarify whether or not an owner of a project should have construction experience. Mr. Shinberg replied that most of his work is for owners who have either minimal or no construction experience; therefore, he is engaged for his experience.

Mr. Sahrbeck asked Mr. Huebener if the information presented has persuaded him to change his position on the evidence. Mr. Huebener stated that his position has not changed and would vote against a motion to table the business of the agenda.

Mr. Caton asked that, if there were a motion to table, would this include an organized list of specific issues that the applicant would need to address at the next meeting. He would consider a motion to table with specific instructions to the applicant for a response.

Mr. Bodenski agreed with Mr. Caton and requested additional evidence that New England Earthworks has the capability to handle the infrastructure on the project. He appreciated Mr. Shinberg's presentation; however, the current evidence does not demonstrate technical capacity for the project. He stated that he is in favor of tabling.

Mr. Palmer acknowledged that the process makes it difficult to close the record. Mr. Sahrbeck interjected that, in his experience serving on the Board, the public record is never closed because ongoing public comment is germane to the evidence on which the Board deliberates. Mr. Palmer responded that he would support a motion to table.

Mr. LaVallee stated that he associates himself with Mr. Caton's remarks and would be in favor of a continuance.

Referencing Mr. Caton's request for an organized list of additional information from the applicant, Mr. Sahrbeck stated that the response needs to include information addressing liens against the developer.

Ms. O'Meara clarified for the Board that the Town has a very strong policy about allowing public comment. The time provided for public comment at every meeting is mandated by Town Council rules. Based on Council rules, any effort to close the record would be concerning.

Mr. Sahrbeck stated that he continues to have concerns that many questions have remained unanswered. He stated that Mr. Shinberg's involvement is a positive development in the project and that, if questions remain unanswered at the next meeting, he will vote against the project. The record will not be closed.

Attorney Smith asked for clarification on additional evidence requested by the Board. Mr. Sahrbeck suggested that questions regarding liens and the information shared during the public comment period which raised questions about the applicant's technical and financial capacity to complete the project should be addressed.

Mr. Caton suggested that the Board come to an agreement on seminal points that need to be addressed by the applicant and on which the applicant can provide focused evidence. He also questioned whether the responsibility for the issues at Casino Beach belong to the applicant as opposed to the Town. Ideally, the response from the applicant would allow the opportunity for the Board to vote either in favor or against the project.

Mr. LaVallee asked Mr. Caton if he was suggesting that the Board define the list of seminal points for the application to address prior to any motion on tabling. Mr. Caton replied in the affirmative. Discussion ensued regarding the need to provide specific guidance to the applicant. Mr. Sahrbeck suggested that specific guidance to the applicant does not need to be part of a motion to table. He stated that individual members of the Board should forward specific concerns to the Town planner by Thursday at noon to allow time for the concerns to be forwarded to the applicant. Ms. O'Meara clarified that any requests for response by the applicant that are submitted by members of the Board will be de-identified and become part of the public record. Mr. Sahrbeck reminded the public that any material submitted to the Town Planner is individual in nature. Board members do not discuss the business of the agenda among themselves outside of the Planning Board meetings.

Mr. Caton made a motion to table the consideration of the applicant's submission until the October 17th Planning Board meeting. Mr. LaVallee seconded the motion. With no further discussion, the motion passed with four in favor (LaVallee, Palmer, Bodenski, Caton) and two opposed (Sahrbeck, Huebener).

Mr. Sahrbeck opened the floor for public comment.

Richard Blake of 2 Ivie Rd addressed the Board, stating his opinion that fifteen minutes for public comment is too short considering that the applicant has unlimited time. In addition, he asked why the applicant was not asked about declarant rights which would indicate default as part of a deed-in-lieu-of-foreclosure transaction. He suggested that the Board ask this question of the applicant.

Noting no further comment from the public, either in person or virtually, Mr. Sahrbeck closed the floor for public comment.

Mr. Huebener made a motion to adjourn. Mr. Caton seconded. With no further discussion, the motion passed, 6-0.

The meeting adjourned at 8:39 p.m.

Respectfully submitted,
Lucy E. Bauer
Minutes Secretary