

OGUNQUIT PLANNING BOARD
PUBLIC HEARINGS and
REGULAR BUSINESS MEETING MINUTES
DUNAWAY CENTER MAIN AUDITORIUM
MONDAY MARCH 13, 2017

PUBLIC HEARINGS

1. PROPOSED ORDINANCE AMENDMENT TO:

Article 2 – Definitions – “Bureau” and “Forest Management Activities”

Table 702.1 – Land Uses for “Forest Management Activities” and “Timber Harvesting”, and associated notation regarding “Reviewing Authority”

Article 9.21 – Forest Management Activities.

Article 2 – Definitions:

Vending or Buyer Operated Retail Device

...pay telephones, and automated multispace parking meters, are exempted from this definition, and therefore are not regulated by section 9.19.

Article 8.7.D and E - Lighting

D. All lighting shall be steady and not contain any intermittent or flashing light source, excluding traffic control devices.

E. These guidelines shall apply to all residential and non-residential properties.

Mr. Heyland explained that the proposed Ordinance Amendments regarding Forrest Management are intended to bring the Town of Ogunquit in line with the State of Maine Forestry Division.

The language regarding the parking meters will be included so that they do not violate the outdoor sales and services ordinance. The lighting language is to clarify existing language; and came out of an earlier workshop.

Mr. Wilkos asked if there was anyone who wished to be heard on any of the proposed Ordinance Amendments. There being no one the Public Hearing was closed at 6:05 p.m.

2. **ALMOST FAMOUS TATTOO AND PIERCING / AARON KARP – 731 Main Street Unit 101 – GBD2 – Map 12 Block 10-A. Site Plan Review for a post 1930 structure. Application for change of use from office space to service tattoo and body piercing and jewelry retail.**

Mr. Wilkos asked if there was anyone who wished to speak for, or against, this application.

Jackie Connerty (46 Woodland Hills) noted that there is a question regarding tattoo parlors on the current Comprehensive Plan Survey and she suggested that the Board should wait until the survey results come in and the opinions of people are known.

Mr. Wilkos responded that this application falls under the current Comprehensive Plan and the Current Zoning Ordinance. If the town does not want this type of business it will require a change to the Ordinance.

Mr. Heyland agreed.

Mr. Wilkos asked if there was anyone else who wished to be heard. There was no one and the Public Hearing was closed at 6:07 p.m.

3. 10 and 12 BEACH PLUM LANE REALTY TRUSTS – 10 and 12 Beach Plum Lane – Map 9 Blocks 66A and 66B – R/RP. Site Plan Review Application for a post December 31, 1930 structure. Application to construct a 4’x190’ fixed walkway and 5’x30’ pier connected to a 3’x26’ seasonal ramp and 10’x20’ float for access to the Ogunquit River; to serve both residences.

Mr. Wilkos asked if there was anyone who wished to speak for, or against, this application.

Tim Forrester, the Applicant’s representative addressed the Board and gave a brief summary of the proposed plan and the Site Visit.

Mr. Wilkos confirmed that a Site Visit had been held earlier in the day. He noted that the Harbor Master, Shellfish Warden, and Conservation Commission Chair were all there and spoke at the Site Visit.

Everett Leach, Ogunquit Shellfish Warden addressed the Board. Mr. Leach noted that he is a resident of Ogunquit, a tax payer, and a registered voter. He referred to his November 7, 2017 Memo to the Planning Board in which he noted the “King’s Grant” which allows people to fish fowl, and navigate in the intertidal area unhindered. His concern is that this access be kept open year round; not only during the clamming season. His other concern is for a timeline for when the float and ramp will go into the water and when it will come out; and who will enforce that it is done.

Bill Baker, Chair of the Conservation Commission addressed the Board. Mr. Baker stated that they have a number of concerns:

Mr. Baker noted a recent submission from the Applicant’s landscape architect, Stephen Mohr wherein Mr. Mohr implied that the proposed pier, ramp, dock system will be similar to other structures already in place on the Ogunquit River. Mr. Baker stated that none of the existing season docks and piers on the river are comparable in length and height or visual impact to the proposed structure. He also noted that none of the existing docks and/or piers are on this part of the river. Further downstream where the river is wider there are a few smaller ones.

None of the existing docks and piers are within a three minute walk to the Footbridge Boat Launch which is currently being upgraded. The original application appears to say that the main point for constructing this structure is so that the Applicant will have a place for his kayak. Mr. Baker reiterated that with a kayak cart the Applicant could launch from the Footbridge Boat Ramp. He (Mr. Baker) has often launched his kayak and canoe from the beach and the boat ramp.

Mr. Mohr also noted the most comparable structure to the proposed plan is at one of the widest parts of the river and is about 2.5 times shorter than the proposed 256' project.

Most of the existing docks and piers appear to be seasonal and not almost entirely permanent as is the Applicant's which will cover approximately 1200 square feet of the marsh grass.

Bill Lee another Conservation Commission Member addressed the Board. Mr. Lee is a wildlife biologist and registered Maine Guide. Mr. Lee noted that salt marshes are highly valuable ecological resources with their own assemblage of plants and animals. They protect the shoreline from erosion and storms, they trap sediments, and they are highly regarded for their aesthetic value.

Mr. Lee agreed with Mr. Baker that a 256' structure crossing the marsh grass has nothing to compare it with except perhaps the footbridge which doesn't cross the marsh. The footbridge goes from a parking lot to the backside of the dunes. However in length the Applicant's proposed structure is most closely related to the footbridge.

A concern for biologists is "habitat fragmentation" which has always been a concern for people who manage and care about natural resources. The impact on natural communities from habitat fragmentation is well know and has been well documented. The proposed project is a classic case of fragmentation which will split up and disrupt a natural resource.

The Journal of Wildlife Management, a highly regarded scientific, peer reviewed publication contained a paper on the "Effects of Long Piers on Birds in Tidal Wetlands" (*Alison Banning, Jacob Bowman, Bruce Vasilis 2009*). This paper focuses on a wetland in Delaware which contains an environment with similar vegetation and bird species as the Applicant's site. Some of the impacts include: Habitat Fragmentation, loss of vegetation, increase in colonization of invasive species, erosion, and impact on aesthetics.

The increase in human activity leads to an impact on birds which disrupts the habitat and significantly reduces the quality of the habitat which has been fragmented. It also provides an easier access for predators into a high quality habitat. Mr. Lee noted that there are a lot of "obligate marsh birds" which spend most of their time in the marsh. The study states that the long pier will impact these birds relative abundance and the diversity of species.

Mr. Lee noted that there was one positive effect. There are some species of birds which spend some, but not all, of their time in the marsh, particularly gulls. Mr. Lee suggested that gulls may not be a high quality species particularly in an environment which includes Piping Plover nesting areas.

Mr. Lee referenced a 2nd study “Environmental Impacts of Docks and Piers on Salt Marsh Vegetation Across Massachusetts Estuaries – a Quantitative Field Survey Approach” (*John Logan, Amanda Davis, Kathryn Ford: June 2015*). Mr. Lee noted that this study involved a multi-year study of an area with the same type of vegetation, salt marshes, and estuaries. Mr. Lee wanted to know about the long term impact of these types of docks, so he contacted the lead author Dr. John Logan, who works for the Massachusetts Division of Marine Fisheries. Dr. Logan informed Mr. Lee that after three years their field study revealed that intermediate height docks set to match the 1:1 height: width guideline had a significant loss of vegetation biomass compared with unshaded marsh. Mr. Lee reminded the board of the “orientation effect”. Dr. Logan stated that an east/west orientation had the highest impact and the north/south orientation had the least impact. The Applicant’s proposed structure is an east/west orientation which may be out of his control.

Mr. Wilkos asked if there was anyone else who wished to speak for or against this application. There being no one the Public Hearing was closed at 6:27 p.m.

REGULAR BUSINESS MEETING

A. ROLL CALL –

Members Present: Steve Wilkos (Chair)
Rusty Hayes (Vice Chair)
Muriel Freedman
Jackie Bevins
Mark MacLeod

Also Present: Scott Heyland, Code Enforcement Officer
Maryann Stacy, Recording Secretary

B. PLEDGE OF ALLEGIANCE –

C. MISSION STATEMENT – Ms. Freedman read the Board’s Mission Statement.

D. MINUTES – February 27, 2017 Public Hearings, and Regular Business Meeting.

**Mr. Hayes Moved to Accept the Minutes of the February 27, 2017 Minutes as Amended.
HAYES/FREEDMAN 4:0 (Ms. Bevins was not in attendance at the February 27, 2017 Meeting)**

E. PUBLIC INPUT – For any matter NOT already on this Agenda.

Marsha Northrop (2 Fieldstone Lane) suggested the Board consider either a new ordinance or a change to an existing ordinance, giving the Board more power to stop and fine any builder who disregards approved plans without notification. She noted that an investigation of the Wells and York Ordinance language, concerning this matter, might be used as a reference point.

Mr. Wilkos noted that the Board held a workshop regarding Single Family Home Rentals, and anyone who rents their home weekly needs to see the Code Enforcement Office for a business registration form.

The results of the workshop are that life safety items will be included in the application.

Mr. Heyland confirmed that a new business registration form will be forth coming which will be specific to single family home rentals. It will include a certificate for posting in the rental unit and it will contain additional information for renters.

F. UNFINISHED BUSINESS –

1. FINDINGS OF FACT FOR:

DAVID GIARUSSO– 655 Main Street – Map 13 Blocks 49&50 – GBD2 – Site Plan Review to “Add public parking use for when Angelina’s Restaurant is not open”. Approved on February 27, 2017

**Ms. Freedman Moved to Approve the Findings of Fact for DAVID GIARUSSO– 655 Main Street – Map 13 Blocks 49&50 – GBD2.
FREEDMAN/HAYES 4:0 UNANIMOUS**

2. OGUNQUIT SEWER DISTRICT – 80 Marshview Lane – Map 10 Block 54 – SGD1- Design Review and Site Plan Review for a post 1930 structure. Application to add a second story and new access stairwell to existing garage. Also, internal modifications and ADA entrance improvements to existing control building.

Phil Pickering, Ogunquit Sewer District Superintendent addressed the Board. He noted that the project engineer, Travis Prior and the District’s attorney were also in attendance.

Mr. Wilkos reviewed a letter to the Planning Board from Town Attorney Natalie Burns wherein she stated that:

“If the Zoning Ordinance says that a use is permitted, the Comprehensive Plan cannot be as a basis to deny the use; the two should be consistent, defined as being “in basic harmony.” As to site plan review, you are correct that the Planning Board is to apply the review standards set forth in Sec. 6.7. Those standards do not include a determination of consistency with the Comprehensive Plan. This question may have come up because the Subdivision Regulations (and State law) contain a standard that a subdivision must be “in conformance with a duly adopted subdivision or other applicable project regulation or ordinance, comprehensive plan, development plan or land use plan...” Sec. 1.1.9 (emphasis added). This standard would be used to determine if the development as proposed is consistent with the plan and not whether the use was allowed. However, there is no similar standard in the Site Plan Review provisions and for that reason the Board is not to utilize the Comprehensive Plan in its review of a site plan application.” (February 23, 2017 e-mail to the Town of Ogunquit Code Enforcement Officer)

Mr. Heyland added that he asked for guidance from the town attorney as to whether or not the Board can base an application denial or approval upon language in the Comprehensive Plan.

Mr. MacLeod disagreed with Attorney Burns; he noted that there are times when an ordinance has gray areas which may leave the Board confused as to how the ordinance should be interpreted in a particular situation. In that case the Board should look for guidance to the Comprehensive Plan which expresses the feelings of the community. He noted that the Supreme Court looks to the Federalist Papers for guidance on the Constitution. They have looked to the Federalist Papers in over 100 rulings over the years. When the interpretation of a law is not clear the Board should be able to use the Comprehensive Plan for guidance.

Ms. Bevins asked Mr. MacLeod what his objection is.

Mr. MacLeod responded that he objects to Attorney Burns saying that the Board can't use the Comprehensive Plan. He agreed that any final ruling must be based on the Ordinance however when a particular interpretation of that ordinance is unclear then the Board should be looking at the will of the people in drafting that ordinance.

Bill Sawyer, Chairman of the Board of Trustees for the Sewer District addressed the Board. He noted that the District's attorney agreed with the Code Enforcement Officer and Attorney Burns' interpretation that the Comprehensive Plan is not to be used. Mr. Sawyer pointed out that there are areas of the Comprehensive Plan which go the other way and actually support the Sewer District's Application. Section 6 Article C.9 Flood Plain Areas states that "it is the policy of the Town of Ogunquit to encourage the flood proofing of as many uses and activities located in the flood plain areas as possible". Mr. Sawyer noted that a good bit of the application involves flood proofing.

Comprehensive Plan Section 6 Article C.6 Ground Water Resources "to protect the quality of its ground water resources from adverse impact; one of the recommended activities is to continue to upgrade the sewer system.

Mr. Sawyer noted that there are many areas in the Comprehensive Plan which reflect exactly what the Applicant is attempting to do. That is why he asks the Board to judge the application based upon the Zoning Ordinance and not the Comprehensive Plan which, he suggests is too ambiguous.

At this time the Board reviewed the Design Review requirements as outlined in Article 11.7.C of the Ogunquit Zoning Ordinance and found that all the requirements were either not applicable or met.

A. Does this review involve a structure built prior to December 31, 1930?

The Board determined that it does not.

B. Review the specifics of the proposed application for compliance with Article 11.7.C of the Ogunquit Zoning Ordinance as follows:

1) **Scale of Building** – Is the scale of the building visually compatible with the site and neighborhood as to the relationship of the open spaces around it and the size of doors/windows/porches/balconies?

The Board determined that this is not applicable because it is not located in a neighborhood.

2) **Height** – Is the height of the building visually compatible with the heights of the buildings in the neighborhood?

The Board determined that this is not applicable because it is not located in a neighborhood.

3) **Proportion of Front Façade** – Is the relationship of the width to the height of the front façade visually compatible with that of its neighbors?

The Board determined that this is not applicable because it is not located in a neighborhood.

4) **Relationship of Solids to Voids in Front Façade** – Is the pattern of solids and voids in the front façade visually compatible with that of its neighbors?

The Board determined that this is not applicable because it is not located in a neighborhood.

5) **Proportions of Openings Within the Facility** – Is the relationship of the height of windows and doors to their width visually compatible with the architectural style of the building and with that of its neighbors?

The Board determined that this is not applicable because it is not located in a neighborhood.

6) **Roof Shapes** – Is the shape and proportion of the roof visually compatible with the architectural style of the building and with those of neighboring buildings?

The Board determined that it is compatible.

7) **Relationship of Façade Materials** – Are the facades of a building, particularly the front façade, visually compatible with those of other buildings around it?

The Board determined that this is not applicable because it is not located in a neighborhood. And that the facades of the building are compatible with the other buildings on the site.

8) **Relationship of Spaces to Buildings on the Street** – Has the rhythm of spaces to buildings been considered when determining visual compatibility, whether it is between buildings or between a building and the street?

The Board determined that this is not applicable because it is not located on a street.

9) **Site Features** – Is the size, placement, and materials of walls, fences, signs, driveways, and parking areas visually compatible with the building and neighboring buildings?

The Board determined that it is compatible with the other buildings on the site.

10) **Architectural, Historical or Neighborhood Significance** – Have the construction, reconstruction, maintenance, or moving of pre-1931 buildings been done in a manner which is visually compatible with the architectural, historical or neighborhood significance of buildings existing in 1930.

The Board determined that this is not applicable because there are no pre 1931 buildings.

Mr. Hayes Moved to Approve the Design Review for the OGUNQUIT SEWER DISTRICT – 80 Marshview Lane – Map 10 Block 54 – SGD1. HAYES/BEVINS 4:1 (Mr. MacLeod Dissenting)

At this time the Board reviewed the Site Plan Review requirements as outlined in Article 6.7 of the Ogunquit Zoning Ordinance and found that all the requirements were either not applicable or met.

A. Does this application involve a pre-1931 structure?

The Board determined that it does not involve a pre 1931 structure.

Has the application been reviewed by the OHPC?

The Board determined that this is not applicable.

B. Has the Application been submitted for review by all Applicable Town Department Heads?

The Board determined that it had.

C. The Planning Board shall review the specifics of the proposed application for compliance with Article 6.5 of the Ogunquit Zoning Ordinance as follows: The Board shall approve the above-noted application if the Applicant can prove that the proposed use or structure:

1. Will allow the orderly and reasonable use of adjacent properties.

The Board determined that it will.

2. Will not adversely effect the safety, the health and the welfare of the Town.

The Board determined that it will not.

3. Will not create an undue increase of vehicular traffic congestion on public streets or highways.

The Board determined that it will not.

4. Includes adequate and proper public or private facilities for the storage, treatment, handling, use of, removal, or discharge of sewage, refuse, hazardous material or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use.

The Board determined that it does.

5. Materials incidental thereto or produced thereby will not give off noxious gases, odors, smoke or soot.

The Board determined that they will not.

6. Will not cause disturbing emission of electrical discharges, dust, light, vibration, or noise.

The Board determined that it will not.

7. The operations in pursuance of the use will not cause undue interference with the orderly enjoyment by the public of parking or recreation facilities, existing, or proposed by the Town or by other competent governmental agencies.

Mr. MacLeod expressed concern that the new rooftop will be visible from the beach. He suggested there will be a negative impact for people on the beach unless the applicant can do something to mitigate the look.

The Board determined 3:1 that the operations will not. Mr. MacLeod disagreed.

8. Contains adequate, off-street parking in compliance with this Ordinance.

The Board determined that it does.

9. Does not create a hazard to life, limb or property because of fire, flood, erosion created by reason of use, or by the structures to be used therefore, or by the inaccessibility of the property or structures thereon for convenient entry and operation of fire and other emergency apparatus or by the undue concentration or assemblage of persons upon such plot.

The Board determined that it will not.

10. Will be sensitive to adjacent historic properties in compliance with Article 11.

The Board determined that this is not applicable because there are no adjacent historic properties.

11. Has a plot area which is sufficient, appropriate and adequate for the proposed use and the reasonably anticipated operation thereof.

The Board agreed that it does.

12. Will be adequately screened and buffered from contiguous properties.

Mr. MacLeod reiterated his concern about the new structure's visibility from the beach. He suggested that there can be no buffering between the beach and the new structure.

Mr. Pickering responded that they attempted to plant trees behind the seawall and none of them survived. He noted that erosion is a problem in that location; and that most people on the beach are looking toward the ocean and are not sitting facing the sewer treatment plant.

Mr. Heyland referred the Board to Section 8.3 of the Zoning Ordinance which states that

“A non-residential use which abuts an existing or potential residential use shall maintain a buffer strip along the side and rear yards for the purpose of eliminating any adverse effects upon the environmental or aesthetic qualities of abutting properties or any type of nuisance effecting the health, safety, welfare and property values of the residents of Ogunquit. Where natural vegetation cannot be maintained or due to varying site conditions, the buffer area may consist of fences, walls, tree plantings, hedges or combinations thereof. The buffering shall be sufficient to minimize the impacts of any kind of potential use such as: loading and unloading operations, outdoor storage areas, vehicle parking, mineral extraction, waste collection and disposal areas. An area no less than one half the width of the side and rear yard setback shall be maintained as a landscaped vegetative buffer and not be paved or used for parking. The permitting authority may require that the buffer effectively screen the commercial use from view from the residential property by a continuous vegetative barrier or stockade fence not less than six feet in height.”

Mr. Heyland noted that it is his interpretation that this ordinance involves commercial abutting residential which does not apply in this case.

Mr. MacLeod responded that his concern is that if there is a super-storm the town isn't shut down for an undetermined amount of time that could be months and months. It is important that the work of this application is done however he wants to protect the beach goes.

Mr. Pickering suggested they might paint the new structure a color which makes it less visible such as buff or sky blue.

The general consensus was that a light tan would work and that the Applicant would talk to the architect to select a color that is best for buffering.

The Board agreed that this requirement has been met.

13. Will be constructed with adequate landscaping in compliance with this Ordinance, and provision for a storm water drainage system in compliance with the Ogunquit Subdivision Regulations.

The Board agreed that this does not apply because it does not involve a subdivision.

14. Will provide for adequate pedestrian circulation.

The Board agreed that this item does not apply.

15. Anticipates and mitigates potential nuisance created by its location.

The Board agreed that it will.

16. Complies in a satisfactory manner with all applicable performance standards criteria contained in this Ordinance.

The Board agreed that it will.

Ms. Freedman Moved to Approve the Site Plan for the OGUNQUIT SEWER DISTRICT – 80 Marshview Lane – Map 10 Block 54 – SGD1, with the condition that the color to be determined by the architect.

FREEDMAN/MACLEOD 5:0 UNANIMOUS

3. ALMOST FAMOUS TATTOO AND PIERCING / AARON KARP – 731 Main Street Unit 101 – GBD2 – Map 12 Block 10-A. Site Plan Review for a post 1930 structure. Application for change of use from office space to service tattoo and body piercing and jewelry retail.

Mr. Wilkos noted that a public hearing had been held and that a question was raised regarding the ongoing comprehensive plan survey questionnaire which contained a question about whether or not the town wanted tattoo parlors.

Mr. Heyland summarized that the proposed use is defined in the current Zoning Ordinance as a “service establishment” similar to a hair salon, which is allowed in the GBD2 Zone. The ongoing comprehensive plan survey did have questions regarding this type of use however this question will have to be handled at a future time, assuming there is a desire to change the current ordinance. The pending application has to be looked at under the current ordinance and it is an allowed use in that GBD2 zone.

At this time the Board reviewed the Site Plan Review requirements as outlines in Article 6.7 of the Ogunquit Zoning Ordinance and found that all the requirements were either not applicable or met.

A. Does this application involve a pre-1931 structure?

The Board determined that it does not involve a pre 1931 structure.

Has the application been reviewed by the OHPC?

The Board determined that this is not applicable.

- B. Has the Application been submitted for review by all Applicable Town Department Heads?

The Board determined that it had.

- C. The Planning Board shall review the specifics of the proposed application for compliance with Article 6.5 of the Ogunquit Zoning Ordinance as follows: The Board shall approve the above-noted application if the Applicant can prove that the proposed use or structure:

1. Will allow the orderly and reasonable use of adjacent properties.

The Board determined that it will.

2. Will not adversely effect the safety, the health and the welfare of the Town.

The Board determined that it will not, as long as the Applicant obtains all necessary State and Federal Permits.

3. Will not create an undue increase of vehicular traffic congestion on public streets or highways.

The Board determined that it will not.

4. Includes adequate and proper public or private facilities for the storage, treatment, handling, use of, removal, or discharge of sewage, refuse, hazardous material or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use.

The Board determined that it does.

5. Materials incidental thereto or produced thereby will not give off noxious gases, odors, smoke or soot.

The Board determined that they will not.

6. Will not cause disturbing emission of electrical discharges, dust, light, vibration, or noise.

The Board determined that it will not.

7. The operations in pursuance of the use will not cause undue interference with the orderly enjoyment by the public of parking or recreation facilities, existing, or proposed by the Town or by other competent governmental agencies.

The Board determined that they will not.

8. Contains adequate, off-street parking in compliance with this Ordinance.

The Board determined that it does.

9. Does not create a hazard to life, limb or property because of fire, flood, erosion created by reason of use, or by the structures to be used therefore, or by the inaccessibility of the property or structures thereon for convenient entry and operation of fire and other emergency apparatus or by the undue concentration or assemblage of persons upon such plot.

The Board determined that it will not.

10. Will be sensitive to adjacent historic properties in compliance with Article 11.

The Board determined that it will.

11. Has a plot area which is sufficient, appropriate and adequate for the proposed use and the reasonably anticipated operation thereof.

The Board agreed that it does.

12. Will be adequately screened and buffered from contiguous properties.

The Board agreed that it will.

13. Will be constructed with adequate landscaping in compliance with this Ordinance, and provision for a storm water drainage system in compliance with the Ogunquit Subdivision Regulations.

The Board agreed that it will.

14. Will provide for adequate pedestrian circulation.

The Board agreed that it will.

15. Anticipates and mitigates potential nuisance created by its location.

The Board agreed that it will.

16. Complies in a satisfactory manner with all applicable performance standards criteria contained in this Ordinance.

The Board agreed that it will.

Mr. Heyland noted that the Applicant will need to have a DHHS License posted on site, and the Ogunquit Fire Department and Code Enforcement Officer will need to conduct an inspection prior to opening.

The Applicant agreed.

Ms. Freedman Moved Approve the application for ALMOST FAMOUS TATTOO AND PIERCING / AARON KARP – 731 Main Street Unit 101 – GBD2 – Map 12 Block 10-A. Site Plan Review for a post 1930 structure. Application for change of use from office space to service tattoo and body piercing and jewelry retail.

FREEDMAN/MACLEOD 5:0 UNANIMOUS

- 4. 10 and 12 BEACH PLUM LANE REALTY TRUSTS – 10 and 12 Beach Plum Lane – Map 9 Blocks 66A and 66B – R/RP. Site Plan Review Application for a post December 31, 1930 structure. Application to construct a 4’x190’ fixed walkway and 5’x30’ pier connected to a 3’x26’ seasonal ramp and 10’x20’ float for access to the Ogunquit River; to serve both residences.**

Mr. Wilkos noted that a Site Visit had been held earlier in the day, and that a Public Hearing was held earlier at this meeting.

Mr. Hayes stated that the Board received a lot of information at the Site Visit, including the construction of the proposed pier and information from the Harbor Master about past storm damage. Mr. Hayes expressed concern about the proposed construction; he asked if the Helix Anchors will go down four feet (4’) and if they could go down as deep as six feet (6’).

Tim Forrester responded that the anchors are set in four foot increments and he can use as many increments as needed to achieve the desired torque required to hold the structure in place, or until they reach refusal. He anticipates that common docks use an eight foot (8’) section to get where they need to be. They usually go down until they hit dense clay which they lock into.

Mr. Hayes asked the Harbor Master how deep the pilings were for the footbridge and Mr. Mayo responded that they go down sixteen feet (16’). Mr. Hayes is concerned about the proposed dock system holding up if there is a bad winter with a lot of ice and snow buildup and if it might come loose and cause damage to the property of the marsh.

Mr. Forrester responded that he researched the permitting for the new footbridge. That bridge was originally constructed in 1949 at a cost of \$4,150. The blizzard of 1978 caused damage from ice and floodwaters; multiple spans broke and were subsequently repaired. It is his interpretation that the bridge was damaged but not destroyed and it was repaired. In 1991 it was reconstructed in kind, in 2009 and 2015 it was inspected and the process was begun to repair it. The most important thing is where the bridge is located. It spans across where the tidal waters happen. It is important for the Board to consider the time, energy, and flow of water throughout the river and when ice is, and is not, a problem. Starting at low tide the water begins to come in, when it is at mid cycle the water is moving at its greatest velocity moving the greatest amount of ice. At high tide the velocity is slowing down and ice doesn’t move as quickly.

The majority of the proposed structure is above mean high water, which means that on most tides it will stop below the water line and the structure won’t be exposed to tidal action and potential ice flows during mean tides, except for the very tip of the pier which is just below mean high water.

Mr. Forrester added that the ability for ice to move and accumulate in the upper intertidal zone is greatly reduced because even during the highest annual tide there is only about one foot (1') of water. He noted that 7/8ths of a piece of ice sits below the water's surface which means that there can only be a piece of ice about one foot before it fetches up. Even if the ice were to accumulate around the pier it would be moving at such a low velocity it wouldn't have the force to do much damage. The pier will also be built with twenty foot (20') spans in between the pilings, which means there would have to be an ice cake greater than twenty feet (20') long in order for it to make contact with two pilings, and it would have to be in one foot (1') of water for it to cause a "dam".

Mr. Forrester added that any ice accumulation will follow the curve of the river and if there is to be any damming action it will probably be at the footbridge itself. It is his belief that because of the design and the way the site works and functions ice will not be an issue. In addition there will be a 3/8" cable bolted to the stringers and onto the Helix Anchors in the upland, so that in the worst case scenario nothing would go anywhere, it will all be tethered together. Even if it fell over it would only land in one foot (1') of water. This is a worst case scenario.

Mr. Heyland asked for the proposed dates of placement and removal of the float and ramp.

Mr. Forrester responded that the DEP and the Army Corp regulate temporary structures; and they cannot be in place for greater than seven (7) months. After reviewing the Ordinance and the shellfish harvesting times; and in a letter he submitted to the Town on January 4, 2017 he stated the Applicant's willingness to abide by a "hard and fast" rule of November 1st to March 31st.

Mr. Heyland asked for the timing of construction.

Mr. Forrester responded that the DEP put conditions in their permit regarding timing. The date is April 15 and that date can be extended through consultation with Inland Fisheries and Wildlife. The proposal generates very little noise which is the primary issue for time restriction; the loudest part will be the installation of the Helix Anchors which can be done ahead of time. The rest of the work will all be done with hand tools. He noted that the reconstruction of the footbridge will probably exceed the same time frame and that they are extending out further, closer to the beach where the bird habitat it located.

Mr. Heyland asked how long the project will take to complete.

Mr. Forrester responded that it should be two weeks start to finish. The installation of the Helix Anchors can be done in a couple of days. The preferred method is to start in the upland, and add stringers for workers to stand on while installing the deck boards.

Mr. MacLeod referred the Board to a letter from Attorney Sandra Guay to Mr. Forrester dated March 3, 2017 where in the final paragraph Attorney Guay attempts to interpret Section 9.15.C.4 of the Ordinance. Attorney Guay says that because there is no comma separating the two phrases in the ordinance that the second part is contingent upon the first. Mr. MacLeod stated that the reason there is no comma in that sentence is because it would be grammatically incorrect to put a comma before the "and". It isn't a compound sentence so there shouldn't be a comma there. Mr. MacLeod stated that regardless of the comma it doesn't change the meaning of the word "and".

The two sides of the sentence say “the facility shall be no larger in dimension than necessary to carry on the activity”. Mr. MacLeod agreed that the proposed pier meets the minimum standards and it is not any larger than it needs to be to do the job. The second half of the sentence says “and be consistent with the existing conditions, use, and character of the area”.

Mr. MacLeod argued that it is separate from the first part; it is a two part sentence, and in order for the application to pass it has to meet both clauses.

Mr. MacLeod next referenced an e-mail from Michael Morse to Lisa Vickers dated March 3, 2017 wherein Mr. Morse says “the word “area” is intended to be applied broadly and not to be limited to merely the directly abutting properties. If applying it as intended by the Department, the town would consider the general area of shoreline, say, within a reasonable eyeshot of the subject parcel. Or, within at least a quarter or half mile (if you want a randomly determined distance-certainly not limited to direct abutters though). The Department does not establish a set distance, but I’m sure you see the point of our comments.”

Mr. MacLeod argued that there is no definition of the area that the State or DEP applies to this which leaves it up to the Planning Board to determine what the effected area is.

Mr. MacLeod noted that the applicant’s site plan encompassed $\frac{3}{4}$ of a mile around the subject parcel. Referencing the $\frac{1}{4}$ mile line Mr. MacLeod noted that due south from the footbridge is grassy marshland. It is the only grassy marshland in the Ogunquit River Estuary which is not part of the Rachel Carson Preserve. Mr. MacLeod argued that this $\frac{1}{4}$ mile is the area the Board should be concerned with because it is the only grassy area which will be effected.

Looking at that grassy marshland Mr. MacLeod noted no other piers, docks, or other structures extending out over that grassy marshland and with his research he hasn’t been able to find anything that has been in that location for the past 374 years. This application is a first in the history of Ogunquit to put a pier in that grassy marshland and he doesn’t see it as being in the general use of the area; and it doesn’t meet the criteria of Section 9.15.C.4.

Mr. Forrester responded that Mr. Morse’s letter stated “...or within at least a $\frac{1}{4}$ mile or $\frac{1}{2}$ mile...”. Mr. Forrester stated that $\frac{1}{4}$ mile being the minimum amount of distance the Board should evaluate this in.

Mr. MacLeod disagreed and pointed out that Mr. Morse stated that there is no set distance and that it has to be interpreted by the “area”. That there is no arbitrary number; the Board has to look at what the area is like.

Attorney Sandra Guay responded to Mr. MacLeod’s comments. She noted that the language in her letter addressing the issue of the comma being there, or not being there, is included because of several decisions out of the Law Court where they looked specifically at that issue when they interpret language in an ordinance. She noted that this language was drafted by DEP after a case called Kosalka vs the Town of Georgetown which was similar to this proposal. The Law Court looked at a case that had similar ordinance language, which talked about character of the area and being consistent with the aesthetics of the area; and the Court found that this type of language, without more specific guidance for a municipal planning board, is unconstitutionally

vague and is a delegation of legislative authority that is improperly given to the Planning Board by the municipal body that votes on and enacts the ordinance.

Attorney Guay went on to say that given the DEP's knowledge that this type of language being in a municipal ordinance would be unconstitutionally vague; then writes this language for the ordinance where, in her opinion, reading it without the comma says that the structure shall be no longer than to carry on the activity and to be consistent with existing conditions, use, and character of the area, makes sense to her because of Kosalka. She finds it difficult to fathom that the DEP would write language which would be in a municipal ordinance and would leave the Planning Board exposed to that kind of appeal.

Mr. MacLeod responded that it is not only the Town of Ogunquit; the exact same language is in the State Ordinance.

Attorney Guay went on to say that the Law Court determined that while that type of language is unconstitutionally vague for a planning board to apply, it is not unconstitutionally vague for the DEP, because the statute lays out a lot of specific standards which the DEP can apply which aren't in the ordinance for a municipal planning board and the Court looks at those two reviews distinctly differently.

Mr. MacLeod asked if that case looked at this specific language.

Attorney Guay responded that it referred to aesthetic compatibility, consistency with character, all of the same types of language as are in the Ogunquit Ordinance.

Mr. MacLeod responded that he isn't talking about aesthetics, he is talking about the condition and use of the area which is the only marshy grassland in Ogunquit and that there are no piers in that area and there never have been. Mr. MacLeod stressed that the language says "and" and the comma being there, or not, doesn't change the definition of the word "and". Logically, in order to meet the criteria an applicant has to meet A and B. Not A and/or B, or A in case of B.

Attorney Guay stated that the Court has looked at these types of sentences with "ands" but without commas, specifically to determine whether it's a one or two part requirement; and they have found that they are one part sentences.

Attorney Guay went on to say that the jurisdiction of the Planning Board is to apply what is in the ordinance; and the ordinance doesn't delimit certain areas of town for docks. There is a provision for docks, piers, and wharfs and nowhere does it say "except in these areas".

Mr. MacLeod noted that the ordinance does say that it should be consistent with existing conditions, use, and character of the area. He noted that the State of Maine has a few thousand miles of coastline to deal with, the Town of Ogunquit has about one mile +/- and every inch is an important part of the town and it is critical that the Board gets it right.

Stephen Mohr, Landscape Architect addressed the Board. He has been doing this type of work in Maine for 32 years. Mr. Mohr prepared the memo to the Board to address Section 9.15.C.4. Mr. Mohr prepared the visual impact assessments for this project. Doing so he looked at the site

based upon what he understood about the ordinance, along with his knowledge of DEP standards, and Maine Shoreland Zoning. The leading part of what Mr. Morse said is “within a reasonable eye shot” or at a minimum of ¼ mile out to ½ mile. Typically he looks at the ¼ and ½ mile radius. He has found, from visual impact assessments, that most people can discern form, mass, scale, and color at ½ mile. Beyond ½ mile details become much vaguer to normal eyesight.

Mr. Mohr reminded everyone that the discussion so far has focused downstream; however looking in the other direction is the iconic footbridge which is 320’ away. In terms of character he looks at combination of things such as built structures/interventions like the footbridge which spans the entire river. It is necessary for the footbridge to be 340’ long to achieve its function of getting across the river and spanning the tidal area. The dimensional needs are met to meet the function. It also establishes character which includes the 1.5 acre paved parking lot. He doesn’t look at these things in isolation but as part of a continuum.

When he reviewed this project and site he did so in several ways:

What is in close proximity to this site; and what do they look like and what are some of the dimensions? In terms of similar dimension and structure, Mr. Mohr noted that the footbridge is longer; the two boardwalks and their railings, which cross over the dunes, are close too or slightly less than the dimensions of the Applicant’s proposed boardwalk.

Regarding the seasonal docks downstream, because of their function and tidal action in those locations they can be much shorter because they don’t have to reach as far to get into the water. Mr. Mohr proposed that the Applicant’s project is consistent with some of the existing things in that area.

In terms of use, dock and water access occurs all across the area. He noted an intense use downstream which crosses the marsh by foot traffic. He asserted that the proposed project is consistent within about ½ mile of the site which is what they looked at.

Regarding scale, scale is the function and what needs to be constructed to meet the function. Mr. Mohr noted that the footbridge span is 340’ which is needed to achieve its function of spanning the river; the Applicant’s proposed pier needs to span the marsh to protect the marsh grass so it needs to be 190’ plus the seasonal elements. The other existing docks and piers vary according to their locations and what they need to achieve their purpose.

Mr. Mohr responded to Mr. Lee’s comments. He addressed the comments regarding the footbridge and the nearby docks being shorter because they have less to reach over to access the water, and the boardwalks being of similar length in terms of crossing resources.

Mr. MacLeod reiterated that none of the other docks on the river cross over such a significant patch of marsh grassland as the Applicant’s proposal. The other docks are generally at the river’s edge and much of their structures involve stairways down from higher elevations. His concern is with the grassland.

Mr. Forrester noted that he submitted documentation of one of the last dock/pier projects approved by the Town and that structure spans 56' and incorporates the same basic setup as this proposal, however the Applicant's ramp is 4' shorter and the float will be the same at 10'x20'. Looking at some of the existing structures he doesn't believe they would meet the current minimum standards, this includes the most recently approved dock which has a greater square footage of direct impact on salt marsh vegetation than the Applicant's proposed structure, even though the current proposed structure is longer.

Mr. Wilkos asked Mr. Heyland if the Board could have the landscape architect's report peer reviewed.

Mr. Heyland agreed that they could.

Mr. Wilkos asked Mr. MacLeod if his concern is with a legal interpretation.

Mr. MacLeod responded that his concern is a legal interpretation as to what the term "and" means in this context.

Mr. Wilkos suggested the Board should get a legal interpretation from the Town Attorney.

Mr. Heyland agreed that since the Board has heard from the Applicant's attorney, and they feel they want more time in order to confer with the Town's attorney they could table the application.

For purposes of discussion Mr. Hayes Moved to Table the Application until the Board has the opportunity to consult with the Town Attorney.
HAYES/MACLEOD

Mr. Wilkos called for further discussion.

Mr. Wilkos stated that it is been suggested that the memo from Attorney Guay should be reviewed by the Town's Attorney. He asked if there were any Board members who disagreed with this, there were none.

Mr. Wilkos noted discussion about having a peer review of the landscape architect's report and he asked the Board members if they wanted this done.

The Board did not feel this would be needed. It was agreed that the aesthetics are subjective.

Mr. MacLeod expressed discomfort ruling on an application based upon its aesthetic appeal, he prefers to base a decision on the intent of the ordinance.

The Board members agreed with Mr. MacLeod.

Attorney Guay stated that, for the purpose of moving forward at this meeting, if the issue is the comma and what "and" means, the Applicant would be willing to accept that "and" means that there should be a comma there and there isn't. And continue to review the application in this manner with the understanding that it has been raised as an issue for purposes of appeal.

She asked if this is the only issue which is causing the Board to consider tabling the application.

Mr. Wilkos responded that this is an issue which is causing the Board to consider tabling.

Mr. Wilkos asked if there was any further discussion on the motion to table.

Attorney Guay began to speak and was informed by the Chair that there was a motion on the table and the Board was going to vote on the motion.

Mr. Wilkos called for a vote on Mr. Hayes' motion:

Mr. Hayes Moved to Table the Application until the Board has the opportunity to consult with the Town Attorney.

HAYES/MACLEOD 4:1 (Ms. Bevins Dissenting)

Attorney Guay asked for clarity as to what will happen next. She asked if the Board would review the rest of the criteria so the Applicant will know if there are other issues.

Mr. Heyland responded that Attorney Guay's memo would be reviewed by Town Attorney Natalie Burns who would give the Board guidance. It was his opinion that there aren't any other outstanding issues.

Attorney Guay asked about the discussion regarding landscape architect peer review and if that is off the table.

Mr. Wilkos responded that it seems to be off the table.

Attorney Guay asked if the only issue was the legal opinion from the Town Attorney.

Mr. Wilkos responded that it is just the legal opinion.

5. FAIRPOINT COMMUNICATIONS – 488 Main Street (Map 8 Block 8), 622 Main Street (Map 9 Block 82), and 714 Main Street (Map 10 Block 1) - all GBD2. Application to install wireless small cell antennas and related equipment on existing utility poles.

Ben Madden addressed the Board as the Applicant's representative. He provided photo simulations indicating what the poles would look like.

Mr. Heyland reminded everyone that this meeting is only to find the application complete.

Mr. Wilkos noted that the Board's action tonight is determination of completeness, schedule a public hearing, and/or table.

Mr. MacLeod noted that the photo simulation was a photograph of the pole with a drawing of the cell and antenna added in. He asked if the Applicant could provide an actual photograph of a pole with the equipment mounted on it.

Mr. Madden agreed to provide this for the next meeting.

Mr. Madden summarized that the antenna is approximately three feet (3') tall by one foot (1') wide. The remote radio head is the brains of the unit and provides power by cutting into the meter, there will also be a meter socket.

Mr. Hayes asked if the sidewalk has to be dug up or if everything is from overhead wires.

Mr. Madden responded that it is all from overhead wiring. The goal is to avoid any ground disturbance. The only reason the meter is at ground level is for ease of reading.

Mr. Hayes asked for the radius of the coverage.

Mr. Madden responded that these are four (4) macro sites and the range is only about one thousand feet.

Mr. Wilkos asked if there are any in Maine yet.

Mr. Madden responded that there are not. There are a lot of rooftop installations that use similar equipment but nothing on utility poles. They have been installed in Massachusetts. If they are installed inside a structure like a cupola it does reduce the coverage by a very small amount.

Mr. Heyland asked if the owner of the antenna pays a fee to the owner of the pole.

Mr. Madden responded that Verizon does, they work out a master arrangement with the property owner. If it was installed in a church steeple they would work out a lease, usually five years, with the landlord.

Mr. Wilkos asked about the health risks and if there have been any reports on this question.

Mr. Madden responded that they put out less than 1% of the allowed radio frequency emissions per FCC standards. There have been studies on RF Emission throughout Massachusetts and he agreed to provide the report.

Mr. Heyland asked if the applicant has looked at other locations in Maine or if this is the first attempt to introduce them here.

Mr. Madden responded that Verizon looks at search rings which are very specific for coverage, and attempts to put the cells on public utility poles which are best located to cover those specific areas of needed coverage.

Mr. Heyland asked what the applicant would do if this application is denied. Would they continue to look for locations in Ogunquit which might be privately owned?

Mr. Madden responded that he thinks they would. Public utility poles are the path of least resistance.

Mr. Heyland summarized that he produced the initial review and at that time he felt it met the wireless communication facility requirements so he moved it along for Site Plan Review. At the last meeting Mr. Feldman expressed reservations which is why it was tabled pending input from the Town Attorney. Attorney Burns has concurred with Mr. Heyland that the application should move forward.

Mr. MacLeod asked if these cells would require a State license.

Mr. Heyland responded that from the Town's perspective it only requires Town approval however the Applicant could be asked to confirm that no State License is required.

Mr. Madden responded that the Applicant is looking to the Town's right of ways so that they won't have to deal with the State or other bodies.

Mr. Heyland noted that Route One is owned and controlled by the State. He suggested the Applicant needs to check with the State to see if approval to place cells on their poles is needed.

The Board agreed that the Applicant needs to contact the State to confirm whether or not a State permit is required.

Ms. Freedman noted that the Board might not be able to find the application complete and schedule a Public Hearing because Item 6.6.C.3.EE State and Federal Permits is not complete.

Mr. Heyland referred to the Ordinance and noted that the only DOT permit required for completion is for traffic movement or highway access. He suggested the Board could find the application complete and require the Applicant to provide something from the DOT, either a permit, or a letter from DOT stating that no permit is required.

Mr. Wilkos informed the Applicant's representative that the Public Hearing would take place on March 27, 2017 at 6:00 p.m. and prior to that Hearing the Applicant needs to provide an RF Emission Report as well as a DOT Permit or a letter from DOT stating that no permit is required. Should the DOT require a permit and refuse to provide one the Applicant would have to withdraw or request the Board table the Planning Board Application.

Ms. Freedman reminded Mr. Madden that all submissions must be in the land use office before March 20th in order for the Public Hearing to go ahead.

Mr. Heyland confirmed that all paperwork has to be submitted to the Land Use Office before March 20th and if that can't be done the Applicant has to notify the Land Use Office and the application will be placed on the agenda for the next meeting (April 10th).

Mr. Madden agreed

Mr. MacLeod Moved to find the Application Complete and Schedule a Public Hearing for FAIRPOINT COMMUNICATIONS – 488 Main Street (Map 8 Block 8), 622 Main Street (Map 9 Block 82), and 714 Main Street (Map 10 Block 1) - all GBD2. Application to install wireless small cell antennas and related equipment on existing utility poles. MACLEOD/HAYES 5:0 UNANIMOUS

Mr. Madden asked if a Maine State DOT Permit was required.

Mr. Heyland responded that this is what the applicant has to determine.

G. NEW BUSINESS – None

H. CODE ENFORCEMENT OFFICER BUSINESS –
(Note: Language proposed to be inserted is indicated by underlining)
Planning Board Action: Approved of verbiage and vote to send to the Select Board for inclusion on the June 2017 Town Warrant.

1. Proposed Ordinance Amendments to:

Article 2 – Definitions – “Bureau” and “Forest Management Activities”

Table 702.1 – Land Uses for “Forest Management Activities” and “Timber Harvesting”, and associated notation regarding “Reviewing Authority”

Article 9.21 – Forest Management Activities.

Article 2 – Definitions:

Vending or Buyer Operated Retail Device

...pay telephones, and automated multispace parking meters, are exempted from this definition, and therefore are not regulated by section 9.19.

Article 8.7.D and E - Lighting

D. All lighting shall be steady and not contain any intermittent or flashing light source, excluding traffic control devices.

E. These guidelines shall apply to all residential and non-residential properties.

Ms. Freedman Moved to Approve the Language for the proposed Ordinance Amendments and submit them to the Select Board for inclusion on the June 2017 Town Meeting Warrant.

FREEDMAN/HAYES 5:0 UNANIMOUS

I. OTHER BUSINESS –

Ms. Freedman noted a recent Face Book Social Media posting which contained false news. She noted that everyone is entitled to say what they want and these types of personal attacks are disgraceful.

J. ADJOURNMENT –

**Mr. MacLeod Moved to Adjourn at 8:45 p.m.
MACLEOD/HAYES 5:0 UNANIMOUS**

Respectfully Submitted

Maryann Stacy

Maryann Stacy

Planning Board Recording Secretary

Approved on March 27, 2017