



Town of Ogunquit  
Planning Board  
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**OGUNQUIT PLANNING BOARD  
PUBLIC HEARINGS and REGULAR BUSINESS MEETING  
MINUTES  
DUNAWAY CENTER MAIN AUDITORIUM  
APRIL 8, 2019**

**PUBLIC HEARINGS**

**ELIVIA, LLC / Ken Holmes – 12 Hoyts Lane – Map 7 Block 66-A – GBD1 – Design Review Application to construct a small retaining wall in front of a pre 1930 structure.**

Mr. Wilkos asked if there was anyone who wished to speak for, or against, this application, or had any questions for the Applicant. There was no one and the Public Hearing was closed at 6:05 p.m.

**GRAHANELLI REALTY LLC – 724 Main Street – Map 11 Block 6 – GBD2/R/SLC/RP – Application to Amend a Site Plan which was granted by the Ogunquit Planning Board on September 26, 2016.**

John Wilson the President of the Sunrise Terrace Condominium Association (718 Main Street) expressed concern on several levels:

- Sunrise Terrace would like input on the type and location of the fence the Applicant installs;
- Sunrise Terrace is concerned over the proposed hours of operation. They want the hours to be set at 8:00 a.m. to 10:00 p.m.;
- Sunrise Terrace does not want any outside music and/or speakers;
- Sunrise Terrace wants the Board to limit the number of trolleys which are parked overnight on the property.

Jerry Dehart, Coastal General Construction (also at 718 Main Street) informed the Board that the Molly Trolley Corp has been very respectful good neighbors, and he has no complaints or concerns about the proposed amendments.

Applicant Jamie Bradish responded that the hours of operation will be 8:00 a.m. to 10:00 p.m. just as they are now with no change.

Any use of outside music will abide by the Town Noise Ordinance. He anticipates approximately six trolleys being left behind the building at night and there will not be any maintenance of the trolleys on site.

Mr. Wilkos asked if there was anyone else who wished to speak for, or against, this application, or had any other questions of the Applicant. There was no one and the Public Hearing was closed at 6:11 p.m.

**ASHTON ARMS LLC – 123 Riverbank Road – Tax Map 9 Block 69 – SLR/RP – Building permit to demolish existing Single family dwelling and associated sheds; and construct a new single family house.**

Jackie Mandyck (8 Beach Plum Lane) stated that she lives behind the proposed development. She feels the proposed project is beautiful and she supports it; however she is opposed to having the new structure moved slightly to the north.

Peter Kahn (3 Tern Street) expressed confusion regarding the location of the Resource Protection Zone (PR). He noted that a construction permit was recently issued by the Land Use Office for property at the end of Tern Street and the intersection of Ocean Street. The Town Map clearly indicates the Tern Street property was in the RP. At the recent ZBA Meeting it was stated that the map is what we have to go by; and when he (Mr. Kahn) looks at that map he believes the property under discussion is in the RP. It is Mr. Kahn's opinion that the Town is using two sets of criteria to determine the boundaries of the RP; and he does not believe this to be defensible; and it is time for the Town Attorney to opine as to which one is controlling. He asked the Board to obtain a legal opinion before moving forward with this application.

Len Pierce (10 Beach Plum Lane) responded to Mr. Kahn's comments. Mr. Pierce stated that the Town already has an opinion from legal counsel on this point. That legal opinion was obtained as a result of the appeal to his (Mr. Pierce's) building project last August. That legal opinion stated that there is only one criteria for resource protected and if Mr. Kahn looks at that criteria in the Zoning Ordinance he will see that neither that house nor the proposed house at 123 Riverbank is in the RP. Mr. Pierce recommended Mr. Kahn review that language and reminded him that he (Mr. Kahn) lost that appeal at the Zoning Board of Appeals.

Mr. Wilkos asked if there was anyone else who wished to speak for, or against, this application, or had any other questions of the Applicant. There was no one and the Public Hearing was closed at 6:16 p.m.

**REGULAR BUSINESS MEETING**

**A. ROLL CALL –**

Members Present: Steve Wilkos (Chair)  
Rusty Hayes (Vice Chair)  
Jackie Bevins  
Muriel Freedman  
Mark MacLeod  
Priscilla Botsford (1<sup>st</sup> Alternate)  
Brian Aromando (2<sup>nd</sup> Alternate)

Also Present: Scott Heyland, Code Enforcement Officer  
Lee Jay Feldman, SMPDC Town Planner  
James Katsiaficas, Esq. Planning Board Attorney

**B. PLEDGE OF ALLEGIANCE -**

**C. MISSION STATEMENT** – The Mission Statement was read by Mr. MacLeod.

**D. MINUTES** – March 25, 2019 Minutes were unavailable.

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

Mr. Wilkos asked if anyone wished to be heard on any matter not on this meeting’s agenda. He also reminded everyone that public input comments are normally limited to 3 minutes or less, if possible.

Peter Kahn (3 Tern Street) reiterated that the Planning Board and the Zoning Board of Appeals are using two different criteria and he suggests to the Town that they get together and use the same criteria.

Mr. Wilkos asked if there was anyone else who wished to be heard. There was no one.

Mr. Wilkos reviewed three e-mails which were sent to the Planning Board regarding “pre-meeting meetings”. Mr. Wilkos also noted that this item was brought up at the last Select Board Meeting.

Mr. Wilkos reviewed an e-mail from Town Attorney Mary Costigan regarding Planning Board Chair and/or Vice Chair meeting with the Code Enforcement Officer and/or Town Planner before a Planning Board Meeting.:

*“This situation triggers two aspects of the Freedom of Information Act: 1) whether the meeting is a public meeting; and 2) whether the discussion would be considered ex-parte and thus required to occur at the full board meeting, in public.*

- 1) FOAA requires that meetings of three or more board members be noticed and open to the public. Because only one or two board members attend the pre-meeting it is not a public meeting that is required to be noticed or open to the public.*
- 2) Discussions among board members or between the board members and town staff should be limited to non-substantive issues, such as setting the agenda, scheduling meetings, etc. All substantive discussions regarding specific applications should occur in public....”*

Ms. Botsford stated that “we had a substantive pre-meeting regarding the Zoning Map / the RP. It was before the last one which was down in the RP last year. Mr. Wilkos, Mr. Feldman and Mr. Heyland were there and the discussion involved how the DEP interprets their Chapter 1000. It was before a regular meeting; Mr. Wilkos had her (Ms. Botsford) go and have a pre meeting with him. She (Ms. Botsford) had a question for both Mr. Wilkos and the Land Use Office at that

time.” Ms. Botsford referenced Mr. Kahn’s request for a legal opinion.

Mr. Aromando noted that a meeting requires three or more Board members be present; if that meeting was only attended by Ms. Botsford, Mr. Wilkos and Town Staff it does not qualify as a “meeting”.

Ms. Botsford responded that the discussion was substantive and was between Board members and Town Staff.

Attorney Katsiaficas added that the Board doesn’t want to have substantive discussion (that is something which is on the agenda ) outside of a Board Meeting. If the discussion involves a technical question about how the zoning map is interpreted in general; that does not rise to the level of discussing an application outside of a public hearing.

Ms. Botsford responded that the discussion she referred to did involve an application which was there that night.

Attorney Katsiaficas responded that this is the situation everyone is trying to avoid.

**F. UNFINISHED BUSINESS –**

Mr. Wilkos stated that Attorney Katsiaficas asked the Board to move Item 7 to the front of the Agenda.

**Ms. Freedman made a motion to move Item 7 on this agenda to be heard first.  
FREEDMAN/BEVINS 5:0 UNANIMOUS**

- 7. THE TRAP / JASON EVANS – 117 Perkins Cove Road – Map 3 Block 75 – SGD2 – Site Plan Review for a pre 1930 structure. Change of Use from Type 1 to Type 2 Restaurant with outdoor service.**
- **Originally Approved by Planning Board Granted on July 24, 2017.**
  - **Rule 80B Complaint Appeal filed on September 8, 2017.**
  - **Justice O’Neil Remanded the Application back to the Planning Board on August 21, 2018.**

Attorney Katsiaficas provided a verbal summary of the standing of this application as well as the Court’s reasons for remanding it back to the Planning Board; and what the Court is requiring the Board to consider (*see Attorney Katsiaficas’ Memo to the Ogunquit Planning Board dated April 4, 2019 which will be maintained in the Applicant’s Planning Board file at the Ogunquit Land Use Office; and will be attached to these minutes as part of the record.*)

Attorney Katsiaficas recommended the Board hear from the Applicant first because they have the burden of proving that they are entitled to the permits and because it was remanded for them to make their presentation; and then allow the abutter to present his case and rebut the testimony.

Attorney Bruce Read addressed the Board as the representative for the Applicants: Jason and April Evans, owners of The Trap. Also present at this meeting were Melissa Stapleton and Amy Brown owners of the property.

*(see Attorney Read's Letter to the Planning Board dated March 25, 2019 which will be maintained in the Applicant's Planning Board file at the Ogunquit Land Use Office; and will be attached to these minutes as part of the record.)*

Attorney Read confirmed that the Planning Board's original decision was not overturned or vacated. Justice O'Neil only remanded two extremely limited items, including a letter from the Ogunquit Fire Chief (*date stamped March 1, 2019*) back to the Planning Board; which Attorney Read has provided in writing to the Board.

Attorney Read noted that Mr. Holmes has submitted a large volume of information to the Board; he (Attorney Read) noted that they are not here to re-litigate the application which was heard two years ago.

Attorney Read suggested that much of Mr. Holmes' argument involve things which should be expected in Perkins Cove which is one of the busiest locations in Ogunquit.

Attorney Read introduced Jim Fisher from Northeast Civil Solutions who provided his report regarding the impact of a conversion from a Type 1 to a Type 2 Restaurant, particularly under the Ogunquit Zoning Ordinance Section 3.3.H.4.

*(see Mr. Fisher's Report dated October 29, 2019 which will be maintained in the Applicant's Planning Board file at the Ogunquit Land Use Office; and will be attached to these minutes as part of the record.)*

Mr. Wilkos asked if there were any questions from the Planning Board members. There were none.

Attorney John Bannon addressed the Board as the representative of appellant Ken Holmes. Attorney Bannon suggested that the primary issue is the difference between a Type 1 and a Type 2 Restaurant; and the effect of patrons consuming food inside a restaurant vs. outside on a deck.

Attorney Bannon stated that the applicant is implying that the difference is a restaurant where patrons were eating outside on a deck without the benefit of wait service vs. the proposal for patrons to eat outside on a deck with the benefit of wait staff. He suggested the situation is much more involved than this. He stated that the Ordinance doesn't draw a distinction between where the wait staff is, but between where the food and beverages are consumed. The emphasis is on where the patrons are consuming the food and beverages. Section 3.3 of the Ordinance requires the Board compare a restaurant where patrons eat indoors; not one where people eat outdoors as well and don't have wait staff.

Ken Holmes, 115 Perkins Cove Road asked to review issues which are relevant to OZO Article 3.23.H.4 which was vacated from the Superior Court Judge; and the issues regarding fire safety

in the back of the building. He asked to give a video presentation of the material he submitted to the Planning Board.

Mr. Wilkos agreed to allow the presentation.

Mr. Holmes stated that he has tried to be a good neighbor.

Attorney Bruce Reed, representing Jason and April Evans, objected to the Board allowing Mr. Holmes' presentation. Attorney Reed argued that this presentation is prejudicial to his clients. He asked Mr. Holmes to stick to the facts and the issues at hand. He, and the Board have seen this material; and 90% of it is irrelevant to the issues remanded by the Court; the issues before this Board.

Attorney Katsiaficas responded that when the Superior Court looks at what this Board does with this remand proceeding it will be looking to see if the Board's decision is supported by substantial evidence in the record; substantial relevant evidence is such as a reasonable mind might accept as adequate to support a conclusion. The conclusion the Board is being asked to make is whether the new use will have no greater impact on the water body, tributary stream or wetland, on the subject property or adjacent properties and resources. To do this the Board needs written documentation regarding probable affects on public health and safety, erosion and sedimentation, water quality, fish and wildlife habitat, vegetative cover, visual and actual points of public access to waters, natural beauty, flood plain management, archaeological and historical resources, commercial fishing and maritime activity, and other functionally dependant water dependant uses.

That, and the number of seats on the deck and the measurements of the deck by the fire chief are the relevant items before this Board.

There has been an objection made to the submission of the presentation. The Board must make a determination as to whether any of Mr. Holmes' material is relevant to what Attorney Katsiaficas stated above.

Attorney Katsiaficas added that a remand is telling the Planning Board to make a decision again on two of the criteria before them. The Board needs to decide whether the information Mr. Holmes wants to present is relevant to the issues at hand.

Attorney Bannon stated that the arguments have been submitted to the Board in writing, and Mr. Holmes will continue with that portion of his presentation which is relevant to the appeal and Section 3.3.H.4 of the OZO.

Mr. Holmes stated that his presentation would begin with fire safety and then move onto Section 3.3.H.4 of the OZO.

*At this time Mr. Holmes gave a presentation including slides and other images from his written submission to the Board.*

Attorney Reed again objected that the information Mr. Holmes was presenting was irrelevant.

Attorney Katsiaficas responded that it was his understanding that the discussion would involve the Fire Chief's measurements of the deck; now Mr. Holmes is talking about window and exhaust fans. All of these things have already been litigated. This is not an opportunity for re-litigation.

Mr. Wilkos asked Mr. Holmes to limit his presentation to those two items which were remanded back to the Planning Board by the Judge.

Mr. Holmes responded that the fire safety was vacated and is relevant; given that the deck was reconstructed and the size changed. In 2012 the Fire Chief had an issue with the situation because there is a residence above the restaurant.

Attorney Katsiaficas stated that the fryer is irrelevant and he noted that the question is the size of the deck. Attorney Katsiaficas referenced the Court Order requiring the Evans' submit a revised letter from the Ogunquit Fire Chief that takes into account the actual dimensions of the deck in determining the proper seating capacity. The Board should then make a new finding addressing whether the requested number of seats would pose a hazard to life limb or property because of fire created by reason of use.

The Ogunquit Fire Chief has submitted a letter which Mr. Holmes is entitled to rebut.

Mr. Holmes responded that the issue is the different size deck. The deck was approved as a 16x20 deck, the Fire Chief then signed off on a 17x10 deck, now a new fire chief is signing off on a larger deck. In the spring of 2018 the deck was rebuilt, it was totally destroyed and rebuilt and is now even larger; this being done with no issued building permit.

Mr. Heyland stated that the only thing he can confirm is that he has an undated letter from the Fire Chief who went to the site, measured the deck, and determined an occupancy load of 20 seats.

Mr. Holmes responded that an earlier letter from the fire chief determined a load for the deck at 12 persons. Mr. Holmes stated that he has photographs to show that the deck was made larger.

Mr. Heyland suggested the Board look to the most recent Fire Chief's memo which was prepared at the Court's request. Whether or not three years ago a different fire chief measured it differently is irrelevant. The current Fire Chief has measured the deck and provided the information.

There was additional discussion regarding the history of the documented measurements of the deck.

Mr. Heyland reiterated that the current Fire Chief's Memo is a result of the Court's remand and that is what he (Mr. Heyland) is going to go by.

Attorney Bannon responded that Mr. Holmes is arguing that Mr. Heyland reviewed a particular deck; and the Fire Chief's letter which has been submitted due to the remand relates to a different deck which was built without a building permit. Thus the Fire Chief's opinion about a new deck, which was built without a permit, is relevant as to whether a legal deck there meets the fire safety requirements.

Jason Evans from The Trap responded that the deck is the same size. It was damaged in a storm about a year ago. The landlord came down and removed sand from beneath the deck and accidentally damaged the decking boards; which were replaced. The current frame is the same frame that has been in place for decades. The deck was not enlarged. There is a canvas enclosure which comes down and is smaller than the overall deck. When that canvas is down it eliminates some of the seating on the deck. This is used only when it is raining or in high wind conditions. The measurements in the Fire Chief's letter are correct; and the deck has not been expanded in any way.

Mr. MacLeod suggested that the Judge was asking the Applicants to get a letter from the Fire Chief that confirms that the existing deck will hold the number of people which the Planning Board previously approved.

Mr. Wilkos reviewed the Fire Chief's memo (a copy of which is attached to, and made a part of this record.

At this time Mr. Holms completed his presentation.

Mr. Bannon suggested that, Mr. Fisher is very good at what he does, and in the conclusion of his report Mr. Fisher stated that the addition of wait staff to serve patrons on the deck is a minor and benign change. This is not the issue under consideration. Attorney Bannon reiterated that the point of comparison is a legal Type 1 use where consumption occurs only indoors compared to another type of use where patrons consume food outside the building.

Attorney Katsiaficas asked if the Board would allow rebuttal from the other parties.

Attorney Reed asked the Board to apply common sense; and apply the facts to the specific items which were remanded back by the Judge.

Mr. Wilkos asked if there was any additional comments.

Attorney Bannon responded that he had nothing further.

Melissa Perkins, owner of the building, informed the Board that Mr. Evans is an outstanding, responsible, professional restaurant owner and tenant.

Mr. Wilkos asked if there was anyone else who wished to be heard. there being no one the Public Hearing on the Remand was closed at 7:39 p.m.

Mr. Wilkos noted the length of this meeting's agenda and he asked the Board members if they wanted to deliberate at this meeting.

The Board unanimously agreed to table this hearing.

Attorney Katsiaficas asked if there was any objection from the parties to continuing the hearing to May 13, 2019. There were no objections.

Mr. Hayes Moved to postpone THE TRAP / JASON EVANS – 117 Perkins Cove Road – Map 3 Block 75 to Monday May 13, 2019; and that the Record is closed.

HAYES/MACLEOD

Mr. Wilkos asked if there was any further discussion, there being none he called for a vote on Mr. Hayes' motion:

**Mr. Hayes Moved to postpone THE TRAP / JASON EVANS – 117 Perkins Cove Road – Map 3 Block 75 to Monday May 13, 2019; and that the Record is closed.**

**HAYES/MACLEOD 5:0 UNANIMOUS**

Mr. Wilkos noted that Jerry DeHart, representative for Duffy Enterprises Inc has a very small application and has asked to moved up on the agenda.

**Mr. MacLeod made a motion to move the application for DUFFY ENTERPRISES INC / AUBERGE – 50 Riverside Lane – Map 3 Block 100G – SGD2. Application to Amend a Design Plan which was granted by the Ogunquit Planning Board on February 26, 2018. Application to relocate one window and add a second window forward on this meeting's agenda.**

**MACLEOD/HAYES 5:0 UNANIMOUS**

Jerry DeHart gave a brief summary that the applicant is asking to amend a previously approved Design Review to move one window and add another window to give the building better symmetry.

Mr. Wilkos commended Mr. Dehart for doing things the correct way and following the Board's protocol for amending a previously approved plan.

The Board determined that no Site Visit or Public Hearing would be required.

**Mr. MacLeod Moved to Find the Application for DUFFY ENTERPRISES INC / AUBERGE – 50 Riverside Lane – Map 3 Block 100G complete.**

**MACLEOD/HAYES 5:0 UNANIMOUS**

**Mr. MacLeod Moved to Approve the Application for DUFFY ENTERPRISES INC / AUBERGE – 50 Riverside Lane – Map 3 Block 100G.**

**MACLEOD/HAYES 5:0 UNANIMOUS**

1. **FINDINGS OF FACT FOR ABALONIA/ELIVIA III – 268 Main Street – Tax Map 7 Block 66 – GBD1. Site Plan Review Application for a pre 1930 Type 4 Hotel / Motel. Application to construct an in-ground hot tub with privacy fence, which will not be visible from a public way.**

**Ms. Freedman Moved to Approve the Findings of Fact for FINDINGS OF FACT FOR ABALONIA/ELIVIA III – 268 Main Street – Tax Map 7 Block 66 – GBD1 as Submitted. FREEDMAN/HAYES 5:0 UNANIMOUS**

2. **DICAMILLO ASSOC. LLC / GRASSHOPPER INN – Tax Map 8 Block 40 – GBD2. Site Plan and Design Review Application to remove a single family dwelling; and construct a new 7 room Bed and Breakfast ~~9-room inn~~ with caretaker's unit.**

Chris Vance from Vance Architects gave a brief presentation of the new site plan which contains changed based upon comments from the last planning Board Meeting.

Mr. Wilkos noted that the Public Hearing had been closed; however the Board did receive a letter from abutter David Levitt (*a copy of which will be maintained in the Applicant's Planning Board File*).

Mr. Feldman noted that Mr. Levitt's comments have been addressed at previous meetings.

Mr. MacLeod asked about the light along the rear wall.

Mr. Vance responded that the lights will be on 16' tall poles and will be directed downward so that no light leaves the property. In addition there will be a large tree placed to further shield the abutter from light pollution.

Mr. MacLeod noted that Drawing C1 indicates a "no left turn" sign. He believes the sign should be "left turn only".

Ms. Freedman asked about the "no beach access" "turn around here" sign locations.

Mr. Vance responded that it will be moved closer to Route One and the turnaround will be the Applicant's driveway.

Mr. Vance added that there will only be one car check-in/drop off spot.

Mr. MacLeod noted that the light illuminating the sign needs to be directed so it will not affect vehicle drivers.

Mr. Vance agreed.

Ms. Botsford asked if there was a limit to how many square feet guest rooms can be.

Mr. Heyland responded that it is 650 sf.

Ms. Botsford asked if Mr. Heyland had personally checked the square footage on the 2<sup>nd</sup> floor.

Mr. Heyland responded that he will confirm the size during the building permitting process .

Mr. Vance confirmed that the 2<sup>nd</sup> floor rooms will not be any larger than 650sf.

Ms. Botsford asked if the traffic study included a trip count for the entire of Grasshopper Lane and was it done during “the season”. She also asked if the proposed project would “overburden” that road.

Mr. Vance responded that these questions were raised during the traffic study and the subsequent peer review, and he believed everything met the Town’s standards.

Mr. Heyland responded that there were two peer reviews done, the first was to review the best location for the entrance and exit of the proposed inn, he did not believe the study covered the impact on the rest of Grasshopper Lane; and that the proposed project did not raise to the level of requiring that extensive a study.

Ms. Botsford asked if the traffic study was done around Christmas Time; she asked if it was a good traffic study if it was done in the off season.

Mr. Feldman responded that the DOT uses “seasonal factors” for the Ogunquit area.

Mr. Hayes stated that Ms. Botsford has raised this question before, about the time of year a traffic study was done. It is his recollection that the DOT did use a formula to calculate traffic impact.

Mr. Heyland noted that there has been a change to the north elevation because the first parking stall is now open where before it was a closed area.

At this time the Board reviewed the Design Review requirements under Article 11.7.C of the Ogunquit Zoning Ordinance and found all standards to be satisfied compared to other businesses along Route One.

**Mr. MacLeod Moved to Approved the Design for DICAMILLO ASSOC. LLC / GRASSHOPPER INN – Tax Map 8 Block 40 – GBD2. Site Plan and Design Review Application to remove a single family dwelling; and construct a new 7 room Bed and Breakfast with caretaker’s unit.**

**MACLEOD/BEVINS 5:0 UNANIMOUS**

At this time the Board Reviewed the Site Plan Review standards as noted under Section 6.7 of the Ogunquit Zoning Ordinance and found all standards to be either not applicable or satisfied.

Mr. Feldman noted that the Applicant will need to provide a cost estimate.

**Mr. MacLeod Moved to Approved the Site Plan for DICAMILLO ASSOC. LLC / GRASSHOPPER INN – Tax Map 8 Block 40 – GBD2. Site Plan and Design Review Application to remove a single family dwelling; and construct a new 7 room Bed and Breakfast with caretaker’s unit with the following conditions:**

- **“No Beach Access” sign to be posted.**
- **Final Plan shall correct the “no right turn” notation.**
- **Final Plan shall include dark sky friendly lighting used on sign.**
- **Construct manhole on Grasshopper Lane to tie in with 24” pipe.**
- **Restaurant service shall be for patrons staying on site; and not open to the public.**
- **Dark sky friendly lighting to be used on site.**
- **Outdoor dining may be for breakfast, lunch, and dinner.**
- **Exterior rear balcony lighting shall be downward facing dark sky friendly lighting.**
- **Outdoor music may only be used on the Route One side of the property.**
- **Provide a cost estimate for the tie in to the public water, sewer, and stormwater utilities; and a letter of credit, bond, or other surety prior to the issuance of a building permit.**

**MACLEOD/FREEDMAN 5:0 UNANIMOUS**

*[The question was raised at the April 22, 2019 Meeting as to whether the verbiage of Mr. MacLeod’s Motion to Approve included more than four conditions of approval. Mr. MacLeod stated that he only included four conditions:*

- *“No Beach Access” sign to be posted.*
- *Final Plan shall correct the “no right turn” notation.*
- *Restaurant service shall be for patrons staying on site; and not open to the public.*
- *Provide a cost estimate for the tie in to the public water, sewer, and stormwater utilities; and a letter of credit, bond, or other surety prior to the issuance of a building permit.*

*And the other noted “conditions” were agreed to by the applicant and were not part of the official motion.*

*Also, at the April 22, 2019 Meeting there was a question raised as to whether or not there was discussion regarding the service of dinner.*

*The Motion language was not amended at the April 22, 2019 Meeting however the Approval of the Findings of Facts was tabled to the May 13, 2019 Meeting.]*

**3. COSO ENTERPRISES LLC / DWAIN UNDERWOOD / BLACK BOAR INN – 277 Main Street – Map 7 Block 13-1 – GBD1 – Application to Amend a Previously Approved Site Plan. Request to add a Type 1 Restaurant, as an accessory use to an existing Type 3 Transient Accommodation – Inn.**

Mr. Underwood confirmed that he had provided a deed to the Board.

Mr. Wilkos noted that the Board had received a memo from the Ogunquit Chief of Police who confirmed that there have been no complaints for this property going back to June 2017.

**Mr. MacLeod Moved to Find the Application Complete for COSO ENTERPRISES LLC / DWAIN UNDERWOOD / BLACK BOAR INN – 277 Main Street – Map 7 Block 13-1 – GBD1 – Application to Amend a Previously Approved Site Plan. Request to add a Type 1 Restaurant, as an accessory use to an existing Type 3 Transient Accommodation – Inn. MACLEOD/BEVINS 5:0 UNANIMOUS**

The Board agreed that a Site Visit would be helpful and that a Public Hearing is required.

**Mr. MacLeod Moved to Table the Application. MACLEOD/FREEDMAN 5:0 UNANIMOUS**

The Board agreed that the Site Visit would take place at 4:30.

**4. ELIVIA, LLC / Ken Holmes – 12 Hoyts Lane – Map 7 Block 66-A – GBD1 – Design Review Application to construct a small retaining wall in front of a pre 1930 structure.**

Mr. Wilkos noted that a Site Visit had been held earlier in the day and that a Public Hearing was held earlier this evening and no comments had been made.

Mr. Wilkos noted that the application indicates a “retaining wall” however the plan indicates two walls and a fire pit.

Mr. Holmes responded that it should say “Walls” plural. Mr. Holmes also stated that he would like to have a fire pit but does not want that to derail this application.

Mr. Heyland responded that outdoor fire pits require input from the Fire Chief.

Mr. Holmes stated that he does not want to wait, he wants to put the wall in.

Ms. Freedman suggested the Board approve the fire pit subject to the Fire Chief’s approval.

Mr. Aromando asked what happens if the Fire Chief doesn’t approve it.

Ms. Freedman responded “then he doesn’t do it”.

Mr. Aromando summarized that the Board would approve the fire pit at this meeting with the condition that the Fire Chief deems it appropriate.

Mr. Wilkos expressed his reluctance to approve the application with that type of condition. He does not want something to be on a Final Plan which the Board approved; and is then not allowed.

Mr. Holmes agreed to removed the fire pit from the Final Plan and come back to the Planning Board with a separate application if he wants to move forward with the fire pit.

The Board reviewed the Design Review Standards under Article 11.7.C of the Ogunquit Zoning Ordinance and found all standards to be satisfied.

**Mr. MacLeod Moved to Approve the Design Review Application for ELIVIA, LLC / Ken Holmes – 12 Hoyts Lane – Map 7 Block 66-A – GBD1 – Design Review Application to construct 2 small retaining walls in front of a pre 1930 structure, with the condition that the fire pit be removed from the Final Plan.  
MACLEOD/HAYES 5:0 UNANIMOUS**

**5. GRAHANELLI REALTY LLC – 724 Main Street – Map 11 Block 6 – GBD2/R/SLC/RP – Application to Amend a Site Plan which was granted by the Ogunquit Planning Board on September 26, 2016.**

Jamie Bradish addressed the Board as the representative of Molly Trolley.

Ms. Freedman reviewed correspondence from Sunrise Terrace unit owner Karen Sachs asking the Board to deny this application because it will negatively impact the abutters' ability to enjoy the peace and quiet of their pool area etc.

Mr. Bradish responded that he will abide by the Town's Noise Ordinance and will be shutting down at 10:00 p.m.

The Board members agreed that there shouldn't be a problem as long as the Applicant abides by the noise ordinance and treats the neighbors with respect.

The Board also suggested that it would revisit this application in six months.

Mr. Bradish responded that the Board is making up a rule and he doesn't see it in the Ordinance.

The Board responded that they have agreed to revisit several other applications: Angelo's Bandito's and Food for Thought and that they would be revisited after the season.

Mr. Wilkos asked about live music.

Mr. Bradish responded that he can't say there won't be live music.

The Board noted that live music requires an Amusement License from the Select Board and is not the purview of the Planning Board.

Mr. Wilkos asked what the Applicant's Hours of Operation will be.

Mr. Bradish responded that he will be open 8:00 a.m. to 10:00 p.m. year round.

Mr. Wilkos asked for the number of trolleys and the number of trips per day.

Mr. Bradish responded that he currently has three trolleys and he would like to expand up to six.

Mr. Bradish stated that that signage has been posted to prevent trespassing onto the Rachel Carson Reserve.

Mr. Wilkos reviewed a Memo from the Police Chief confirming that there have been no complaints involving this property over the last three years.

Mr. Aromando asked where the trolleys left on site will be stored. He noted the proximity of the coastal wetlands and the Ogunquit River.

Mr. Bradish responded that in 2015 a complete water system was installed; and all water, from the entire lot, goes directly to that treatment area. Mr. Bradish also confirmed that there will be no maintenance done to the trolleys onsite.

Mr. Feldman stated that the only thing he can see, that hasn't been addressed is that the Applicant has not supplied a reason why he is asking to have the original conditions of approval changed.

**Mr. MacLeod Moved to Approve the Application for GRAHANELLI REALTY LLC – 724 Main Street – Map 11 Block 6 – GBD2/R/SLC/RP with the Condition of Approval that the Planning Board will revisit the Application, with respect to outside music, in September of 2019.**

**MACLEOD/HAYES 5:0 UNANIMOUS**

Mr. Bradish was informed by the Code Enforcement Officer that the Site Plan dated 3-8-2019 may need to be updated for the Planning Board members' signatures.

**6. ASHTON ARMS LLC – 123 Riverbank Road – Tax Map 9 Block 69 – SLR/RP Building permit to demolish existing single family dwelling and associated sheds; and construct a new single family house.**

Mr. Wilkos noted that the Board held a Site Visit earlier in the day, and a Public Hearing earlier during this meeting.

Norm Chamberlin from Walsh Engineering addressed the Board on behalf of the Applicants; and noted that he has no presentation other than the site plan presented to the Board.

Mr. Chamberlin confirmed that the driveway has been modified so that it will encroach no further than where it originally was.

Mr. Heyland asked about the Conservation Commission's comments regarding surfacing.

Mr. Chamberlin responded that he will present the Applicant with several options. However he is recommending a rain-garden beside and off the end of the driveway, which will include vegetation which will allow for water to drain back into the ground. It is his opinion that only

using a “gravel” driveway will not be as effective. This will also allow for the use of pavers in the driveway.

Ms. Botsford asked about the location of the RP vs. SLR.

Mr. Chamberlin responded that it doesn’t matter whether they are in RP or not because there is an existing house on the lot which the applicant is replacing and relocating.

Mr. Heyland agreed and noted that the section of “nonconformance in Shoreland Zoning” in the Ogunquit Zoning Ordinance states that when structures are located in the RP it’s a similar criterion. Furthermore, he (Mr. Heyland) has deemed that the proposed location of the new structure will not be in the RP. The Board recently reviewed a different application, very similar to this one; and at that time the Town Attorney confirmed his (Mr. Heyland’s) determination.

Mr. Heyland reminded the Board that they are only looking at a “greatest practical extent” and it is his (Mr. Heyland’s) reasonability to confirm that the structure is in the appropriate zone when he issues the Building Permit.

Ms. Botsford asked if he can show them on the map.

Mr. Heyland responded that the Ordinance clearly states that the map is only illustrative; and that there are field determinations made on each parcel. The Board held a similar conversation during the Play House review. The RP designation is determined by field measurement; and there is no map which can follow that. The Highest Annual Tide (HAT) is an annual measurement which moves; and in order for the map to be the standard it would have to be changed every season to match the natural HAT movement.

Ms. Botsford noted that the RP line on the current map is across the street; and runs through the Homes located there. She asked Mr. Heyland to confirm that this is merely illustrative.

Mr. Heyland agreed and noted that areas in the “Flood Zone” as well as areas below the HAT are areas which are regulated as RP. A few years ago when the new FEMA Flood Maps were due to come out the Town Map was created to mirror them. Consequently the FEMA Flood Maps were tabled which resulted in a situation where the Town Map differed, and was more strict, than the FEMA Flood Maps.

Ms. Botsford asked if the Town Map is the one voted on in 2015.

Mr. Heyland responded that it is; and the criteria currently used is established in the Ordinance and does not follow the line on the 2015 Town Map. That line is illustrative.

Mr. Wilkos noted that there was an abutter who was opposed to having the proposed structure moved further from the north line.

Mr. Heyland responded that there is a very small amount of space for the new house to be moved on that side: perhaps about six feet. He also reminded the Board that there are other things to

consider. Changing the proposed location might require removal of additional vegetation which may not be the best situation. It is the Board's job to determine the "greatest practical extent" which involves several factors.

At this time the Board reviewed and discussed the Ogunquit Zoning Standards in Section 3.3 Non-conforming Structures, Section H, additional requirements in the Shoreland Zone.

The Board determined that :

The lot is small in size; and the proposed structure's relocation will be conforming on three sides; and will be less non-conforming on the east side setback to the water.

The slope of the land is basically flat.

Potential for soil erosion is minimal because the lot is basically flat; and the Applicant has provided a sedimentation erosion control plan.

The location of other structures on the property, and on adjacent properties, will not be impacted enough to require the Applicant to alter the proposed plan. The existing shed on the property will be removed; and the proposed new location of the structure will meet the setbacks to other properties.

The location of the septic system and other on-site soils suitable for septic systems is acceptable because the proposed new structure will be connected to Town Sewer and Town Water.

The type and amount of vegetation to be removed to accomplish the relocation will be minimal because the proposal does not call for removal of existing trees or other substantial vegetation; and there will be a rain garden installed on the east and south sides of the driveway.

The proposed foundation will be sufficient to support the proposed structure.

**Mr. MacLeod Moved to Approve the Application for ASHTON ARMS LLC – 123 Riverbank Road – Tax Map 9 Block 69 – SLR/RP; and to confirm that the reconstruction or replacement will be in compliance with the water body, tributary streams or wetlands setback requirements to the greatest practical extent.**

**MACLEOD/HAYES 4:0 UNANIMOUS (Ms. Botsford had left the meeting).**

**7. THE TRAP / JASON EVANS – 117 Perkins Cove Road – Map 3 Block 75 – SGD2 – Site Plan Review for a pre 1930 structure. Change of Use from Type 1 to Type 2 Restaurant with outdoor service.**

- **Originally Approved by Planning Board Granted on July 24, 2017.**
- **Rule 80B Complaint Appeal filed on September 8, 2017.**
- **Justice O'Neil Remanded the Application back to the Planning Board on August 21, 2018.**

*(See discussion and decision as noted above)*

**G. NEW BUSINESS –**

- 1. DUFFY ENTERPRISES INC / AUBERGE – 50 Riverside Lane – Map 3 Block 100G – SGD2. Application to Amend a Design Plan which was granted by the Ogunquit Planning Board on February 26, 2018. Application to relocate one window and add a second window.**

*(See discussion and decision as noted above)*

**H. CODE ENFORCEMENT OFFICER BUSINESS – None**

**I. OTHER BUSINESS –**

Mr. Wilkos noted that this meeting was excessively long. Discussion followed regarding ways the Board might keep future meetings to a reasonable length.

The Board agreed to revisit this discussion at a later meeting.

**J. ADJOURNMENT –**

**Mr. Hayes Moved to Adjourn at 10: 15 p.m.**

**HAYES/MACLEOD 4:0 (Ms. Botsford was not present)**

Respectfully Submitted

*Maryann Stacy*

Maryann Stacy

Town of Ogunquit

Planning Board

Recording Secretary

Attached and made a part of the record of these minutes are the following documents:

- Memorandum prepared by Ogunquit Acting Fire Chief Ed Smith, undated but date stamped March 1, 2019.
- Memorandum to the Ogunquit Planning Board prepared by Attorney James Katsiaficas, of Perkins / Thompson dated April 4, 2019;
- Letter to the Ogunquit Planning Board prepared by Attorney Bruce Read of Sheppard & Read dated March 25, 2019;
- Report prepared for Jason and April Evans by Jim Fisher of Northeast Civil Solutions, dated October 29, 2019.

*Note: All Planning Board meetings are video archived, and may be viewed at any time, on the Town of Ogunquit's website at [www.townofogunquit.org](http://www.townofogunquit.org).*

*Approved as amended on April 22, 2019*

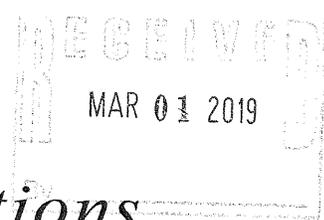


SURVEYING ENGINEERING LAND PLANNING

# Northeast Civil Solutions

INCORPORATED

[www.northeastcivilsolutions.com](http://www.northeastcivilsolutions.com)



41792

October 29, 2018

Jason and April Evans  
"The Trap" Restaurant  
117 Perkins Cove Road  
Ogunquit, ME 03907

Re: Conversion from Type 1 to Type 2 Restaurant ("The Trap," 117 Perkins Cove Road)

Dear Jason:

## INTRODUCTION

On behalf of Jason and April Evans, owners of The Trap Restaurant at 117 Perkins Cove Road, Ogunquit, and Karamel Partners, LLC, which owns the real property where the restaurant is located, Northeast Civil Solutions (NCS) has been asked to review the physical location of the site and municipal criteria for changing the classification of the existing restaurant there from a Type 1 to a Type 2 establishment including, in particular, compliance with Section 3.3.H.4 of the Ogunquit Land Use Ordinance. Our work entailed visiting the site and meeting with the property owner and the restaurant operator, speaking to the Ogunquit Codes Enforcement Officer about the land use ordinance as it pertains to type 1 and type 2 restaurants, and reviewing the proceedings before the Planning Board in 2017 related to "The Trap." We reviewed the applicable sections in the ordinance, as well as the Superior Court Order in "Holmes v. Town of Ogunquit," docket #AP-17-0023, dated 8-20-18. We were asked to determine if the proposed change to a type 2 facility would, in our professional judgement, comply with section 3.3.H.4 of the Ordinance. It is also relevant to note that the court order required consideration of section 6.7.A.9 of the Ordinance (life safety issues), but the municipal fire and police departments have addressed this criteria and have indicated that the facility complies with that section. As such, we have not further reviewed that issue and render our opinion regarding any potential conflicts with the regulations caused by the proposed switch to a Type 2 facility.

## QUALIFICATIONS

NCS is an established engineering, surveying, and permitting firm that works extensively with municipalities, state agencies, and private-sector clients to review regulations, conduct feasibility studies, provide surveying and design engineering services, and assist clients through the permitting process. We also serve as third-party reviewing engineers and as expert witnesses regarding compliance with applicable municipal, state and federal regulations. We have worked extensively in Ogunquit for over 25 years, including a recent study of the entire Perkins Cove area pertaining to the current and historical locations of Josias River. As president of NCS, I meet and/or speak with clients, their representatives, municipal, state and federal agency staff, and prepare the preponderance of feasibility studies and reports regarding any given project. I am ultimately responsible for all aspects of the professional and business operations of NCS, and

in addition to my own work I compile notes and information from our engineers, surveyors, and support staff in order to complete and disseminate, as applicable, this type of report. A statement of my qualifications is attached.

### **PROJECT BACKGROUND**

The property involved in this review supports a small mixed-use structure, the first floor of which supports a small seasonal restaurant catering to patrons who typically consume their meals on the premises. Limited seating is available on a covered back porch that can be open on three sides or temporarily closed-in during periods of inclement weather. This porch is open toward the ocean, and seated patrons have heretofore needed to order and collect their meals inside the building and then proceed to the deck for outdoor seating in order to consume their meals. The proprietors of The Trap would like to expand their level of service to offer patrons seated on the porch the ability to order and be served their meals on the porch instead of being served solely inside of the establishment. Toward this end, their request to the town to be considered a “Type 2” restaurant from its previous designation as a Type 1 establishment was approved by the Planning Board on July 24, 2017. According to the minutes of that meeting, the Evanses did not propose any physical changes to the property, specifically proposing no changes in the location or dimensions of the back porch.

For spatial reference of the property to other parcels in the area, the lot was officially surveyed by Post Road Surveying and the subsequent plan, titled “Boundary Survey Plan Prepared for Karamel Associates, LLC,” is dated 01/02/18. The location of the building on the locus parcel is depicted on the plan, with the previously-mentioned covered porch located beneath the “2<sup>nd</sup> story deck” as labelled on the plan. As a note, the second story of the building is residential, including the second-story deck, and is not directly connected to the operation of the restaurant. All restaurant operations and seating are officially limited to the first floor. The property, identified as lot 75 on municipal tax map 3, is between property N/F of Kenneth Holmes on the north, and N/F the Oarweed Cove Condominium on the south. The lot is zoned SGD-2.

### **COMPLIANCE WITH APPLICABLE STANDARDS**

Given the building’s previous and current operation as a food service establishment, the purpose of this report is to offer a review of the restaurant’s change from a Type 1 to a Type 2 restaurant. We look objectively at the criteria in the municipal zoning ordinance that refers to the myriad classifications of food-service establishments in town, and also review the ordinance with respect to the impact that such a change in classification might have on the environment. A description of the various types of restaurants in the community can be found in the Ogunquit Zoning Ordinance (amended June 12, 2018), Article 2-Definitions. Specifically, the only difference between a Type 1 and Type 2 restaurant, as defined in the Ordinance, is where patrons can be served their food and where they can consume it. A Type 1 establishment is limited to service, seating, and consumption of food solely inside a building; a Type 2 establishment allows service, seating, and consumption of food “either indoor or outdoor...on the premises.” All other restaurant operations and zoning considerations for operating a food-service facility are the same, with the caveat that restaurant advertising, signage, or packaging does not promote consumption of food or beverages off the premises. Given this latter restriction, The Trap does not advertise access to the “beach” from the restaurant, there is no signage indicating access to any off-premises areas for food consumption, no food-packaging materials are printed that tout “beach access,” and the restaurant’s proprietors have created a rope rail or other barrier around the open sides of the porch, and they have trained their serving staff to inform their patrons that

non-emergency access to the “beach” is prohibited to patrons for the consumption of food or beverage. While neither the property owner nor the restaurant proprietors can control access to the beach area by anyone who is not a patron of the establishment, the proprietors and servers can inform their patrons that principal access to and from the restaurant is via the front door only.

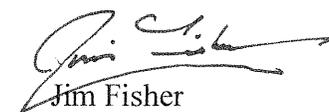
We have reviewed the minutes of the Ogunquit Planning Board meeting for July 24, 2017 at which The Trap restaurant received unanimous approval from the Board to switch from a Type 1 to a Type 2 establishment. We also reviewed the minutes for the August 14, 2017 meeting at which the Board approved the previous month’s Findings of Fact for this project. There is documentation in the minutes from July 24th regarding extensive conversations between Board members and the applicant and abutters (in conjunction with the public hearing for the project) at the meeting. While these conversations and deliberation of the Board regarding the operation of the restaurant in general comprised a significant portion of that meeting, the preponderance of the discussions were not directly related to the actual change in classification of the restaurant from Type 1 to Type 2. As such, this report does not include information or opinions about the type of food prepared and served, the hours of operation, or physical remodeling of the building; it is, again, relevant only to the change in classification.

### CONCLUSION

From an engineering, environmental, and permitting perspective, NCS sees no impact to the town, to the local Perkins Cove area, or to the immediate abutters regarding the change from a Type 1 to a Type 2 restaurant, given the historical and current use of the back porch as a place for food and beverage consumption. In this particular instance, simply allowing direct food service by a professional serving staff to patrons seated outside of the building itself is a minor and benign change. With no other changes proposed by the owners or proprietors there is ostensibly no increase in noise levels, odors, site lighting, or the number of patrons allowed to be seated at any given time. Also, pursuant to the Ogunquit Zoning Ordinance (Section 3.3.H.4-change of use of a nonconforming structure), given that there are no proposed physical alterations to the structure on the lot in terms of expansion, it is my professional opinion that the change in classification to a type 2 restaurant will have no greater adverse impact on the adjacent protected resource (i.e. the Atlantic Ocean), nor on the abutting properties or on the locus itself. And, given the minor change of allowing wait staff to serve patrons food and beverages on the porch (with no other significant changes proposed), there is no greater adverse impact to the public health or to water quality. Nor is there any issue regarding erosion and sedimentation control on the locus and beach areas, no danger to fish or wildlife, no removal of natural vegetation, no exacerbation of flood hazard, no negative impact to water-dependent uses, and no detrimental effect on the aesthetics of the area. It is therefore our opinion that the initial vote of the Ogunquit Planning Board on July 24, 2017 to approve the reclassification of The Trap restaurant to a Type 2 establishment was well-considered and proper, and that this reclassification on its own is copasetic with the municipal ordinance and in keeping with best management practices.

If you have any questions, feel free to contact us at any time.

Sincerely,  
Northeast Civil Solutions, Inc.

  
Jim Fisher  
President



# *Northeast Civil Solutions*

INCORPORATED

## **JIM FISHER** **President**

Mr. Fisher is President and founder of Northeast Civil Solutions, Inc., a full service land surveying, civil engineering and land planning company in Scarborough, Maine. He is responsible for all projects in which NCS is involved, as well as its business development, marketing, and finance. He represents clients before municipal boards and state permitting authorities to present projects and obtain necessary approvals, and works directly with clients for project development. He lends his training and practical experience in surveying, engineering and wetlands science to any project as needed, particularly regarding state and municipal zoning issues, land development, and permitting. He also serves as an expert witness in court cases requiring project review. Mr. Fisher oversees all company operations and business management.

### **Project Experience**

US Navy	US Coast Guard
US Department of Veteran's Affairs	Maine Department of Transportation
City of Portland	Towns of Scarborough, South Portland, et.al.
Maine Medical Center	Maine Turnpike Authority
Bowdoin College	L.L. Bean
Habitat for Humanity	Cianbro Corporation
Residential, Commercial & Industrial Site Plans and Subdivisions for various Communities throughout New England	

### **Teaching/Speaking Experience**

- Instructor, U.S. Military Academy
- Instructor, University of Maryland Extension Program
- Seminars to Maine Bankers Association, MEREDA, Maine and New Hampshire Boards of Realtors
- Numerous presentations throughout New England to federal and state agencies, municipal boards, law firms and private-sector companies
- Court Testimony as expert witness

### **Education**

Monmouth University, Long Branch, NJ – M.S. - 1992  
Oxford University, Oxford, England – Post-graduate study – 1989  
Ripon College, Ripon, WI – B.A. - 1982

Legal Issues of Land Development  
Seminars on business development, engineering, surveying and wetlands science  
New Hampshire Wetlands Delineation (USACoE) Certification







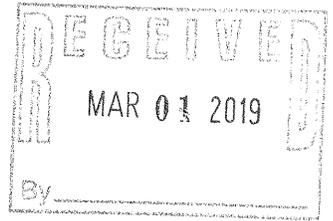






# OGUNQUIT

*Beautiful Place by the Sea*



**OGUNQUIT FIRE DEPARTMENT**  
24 SCHOOL STREET • P.O. BOX 875  
OGUNQUIT, MAINE 03907-0875  
(207) 646-5112 Business  
911 Emergency

---

Scott I met with Jason Evans on Wednesday October 3<sup>rd</sup>. I measured the deck as built, the deck measures 13.25x22.50=298.125 sq ft. Using 15sq ft per person the occupant load for the deck is 20 seats.

A handwritten signature in black ink, appearing to read "Ed Smith".

Ed Smith  
Fire Chief  
Town of Ogunquit Fire Department  
PO Box 875  
Ogunquit, Maine 03907

207-646-5112 office



# Shepard & Read

ATTORNEYS AT LAW

93 MAIN STREET ♦ KENNEBUNK, MAINE 04043

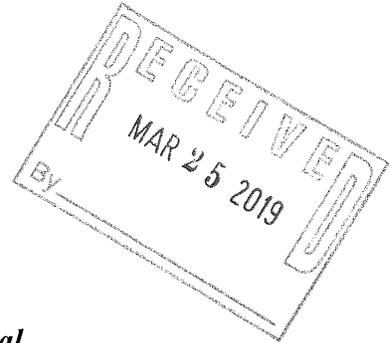
ALAN E. SHEPARD  
BRUCE M. READ

Tel: (207) 985-2291  
Fax: (207) 985-2326  
E-Mail: bruce@shepardandreadlaw.com

***Delivered by Hand***

March 25, 2019

Ogunquit Planning Board  
c/o Maryann Stacy  
Administrative Assistant  
23 School Street  
P. O. Box 875  
Ogunquit, ME 03907



***RE: Kenneth P. Holmes v. The Town of Ogunquit et. al.  
Maine Superior Court Docket No. AP-17-0023  
Remand Hearing Scheduled for April 8, 2019***

Dear Planning Board Members:

I am writing in my capacity as legal counsel to Jason Evans and April Evans, both individually and in their capacities as the sole proprietors of “The Trap” restaurant. In accordance with your town attorney’s scheduling memorandum, this will be our final written submission before the upcoming April 8<sup>th</sup> hearing.

As I am sure attorney Katsiaticas will tell you (or already has), the scope of your review in this hearing is *extremely limited*. This is not a “re-hearing” on all the various issues already decided upon and appealed. In his 22-page decision, Justice O’Neil took great pains to examine and address all of the voluminous legal arguments made by Mr. Holmes and his attorney. At the end of the day, he agreed with everything this planning board had decided and the manner in which you made those decisions, but requested that two specific items be clarified. The relevant language of the decision is as follows:

*“Consequently, the Court will remand the matter to the Board with the directive to require the Evanses to submit the specified written documentation and to appropriate finding of whether the change in use “will have no greater adverse impact on the water body, tributary stream, or wetland, or on the subject or adjacent properties and resources than the existing use.” The opinion also states: “Because this Court is remanding the case for further testimony in relation to Section 3.3.H.4 of the OZO, the Evan’s should also submit a revised letter from Ogunquit’s Fire Chief that takes into account the actual dimensions of the deck in determining the proper seating capacity.”*



These instructions by Justice O'Neil are very simple and straightforward. He is asking for written evidence on two very specific issues. To that end, we have submitted a revised letter from the Fire Chief and a letter prepared by James Fisher, President of Northeast Civil Solutions, addressing the OZO Section 3.4.H.4 criteria.

Clearly, Mr. Holmes would like a "second bite at the apple" here, but the board's mandate is very limited and straightforward. You are charged with deciding whether the Fire Chief's revised letter and Mr. Fisher's written analysis provide sufficient support for your original decision on the two specific issues flagged by Justice O'Neil. Obviously, the board heard testimony on these issues before issuing the original decision; this is simply additional written documentation as requested by the judge for your review and (hopefully) approval.

As we repeatedly pointed out in our written submissions to the court and then at oral argument, it is hard to believe that Jason and April Evans have been forced to go to these lengths for the simple purpose of allowing their patrons to be served by waitstaff on an existing deck as opposed to bringing their food out and eating themselves. We trust that you will be able to parse through the rambling submissions of Mr. Holmes, dispense with them as not relevant to the issues flagged by the judge, and get April and Jason Evans back on track to run their business.

We look forward to presenting our final arguments to the full board in person on April 8<sup>th</sup>.

Thank you.

Sincerely,

**SHEPARD & READ**

Bruce M. Read, Esq.

BMR/crd

Cc: Jason and April Evans  
James Katsiaficas, Esq.  
Sigmund D. Shutz, Esq.  
John Bannon, Esq.  
Ken Holmes



**MEMORANDUM**

**TO:** Ogunquit Planning Board  
**FROM:** James N. Katsiaticas, Esq.  
**DATE:** April 4, 2019  
**RE:** Holmes Appeal Remand

---

The Planning Board agenda for Monday, April 8, 2019, will include the matters that the Maine Superior Court has remanded back to the Board to address in the matter of *Kenneth Holmes v. Town of Ogunquit, Jason and April Evans and Karamel Partners, LLC*.

**Background, Superior Court Decision**

On August 14, 2017, the Planning Board approved written Findings of Fact, Conclusions, and Decision, granting an application by The Trap restaurant and its owners, Jason and April Evans (“Applicants”), for site plan review of a change of use from a Type 1 Restaurant to a Type 2 Restaurant. Abutter Kenneth Holmes (“Abutter”) filed a Rule 80B appeal to the Superior Court challenging that decision on several grounds. Superior Court Justice John O’Neil issued an Order on August 20, 2018 affirming the Planning Board’s decision in part and vacating it in part, remanding the matter to the Planning Board for further proceedings to determine whether the application complies with Sections 3.3.H.4 and 6.7.A.9 of the Ogunquit Zoning Ordinance (“OZO”). Justice O’Neil directed the Board to “give the Applicants the opportunity to submit further documentation on these issues and issue a corresponding decision on the Application after reviewing these submissions.” Order at p. 22.

**OZO Section 3.3.H.4**

OZO Section 3.3.H.4 provides as follows with regard to a change of use of a structure that is non-conforming as to the water setback:

4. Change of Use of a Non-conforming Structure

- a. The use of a structure which is less than the required setback from the normal high-water line of a water body, tributary stream, or upland edge of a wetland may not be changed to another use unless the Planning Board, after receiving a written application, determines that the new use will have no greater adverse impact on the water body, tributary stream,

or wetland, or on the subject or adjacent properties and resources than the existing use.

- b. In determining that no greater adverse impact will occur, the Planning Board shall require written documentation from the applicant, regarding the probable effects on public health and safety, erosion and sedimentation, water quality, fish and wildlife habitat, vegetative cover, visual and actual points of public access to waters, natural beauty, floodplain management, archaeological and historic resources, and commercial fishing and maritime activities, and other functionally water-dependent uses.

Because the Planning Board neither required the Applicants to submit the information requested in b. above nor made a determination that the proposed change of use would have no greater adverse impact on the waterbody, tributary stream, or wetland, or on the subject or adjacent properties and resources than the existing use, the Superior Court returned this matter to the Board “with the directive to require the Evanses to submit the specified written documentation and to [make the] appropriate finding of whether the change in use ‘will have no greater adverse impact on the waterbody, tributary stream, or wetland, or on the subject or adjacent properties and resources than the existing use.’” Order at pp. 17-18.

#### **OZO Section 6.7.A.9**

OZO Section 6.7.A provides that to the Planning Board shall not grant site plan approval unless it makes written findings that the proposed use or structure meets several criteria, including:

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 Superior Court directed the Evanses, in this remand, to “submit a revised letter from Ogunquit’s Fire Chief that takes into account the actual dimensions of the deck in determining the proper seating capacity. The Board should then make a new finding addressing whether the requested number of seats would pose ‘a hazard to life, limb or property because of fire . . . created by reason of use.’” Order at pp. 19--20.

#### **Submittals for this Meeting**

The Applicants have submitted:

1. On March 1, 2019:
  - a. October 29, 2019 Report by Jim Fisher, President, Northeast Civil Solutions, and

Memorandum to Ogunquit Planning Board  
April 1, 2019

- b. Undated letter of Ogunquit Fire Chief Ed Smith to Ogunquit Code Enforcement Officer Scott Heyland re: results of Oct 3<sup>rd</sup> meeting.

2. On March 25, 2019, a letter from Bruce M. Read, Esq. to Ogunquit Planning Board.

The Abutter has submitted materials on March 13, 2015, including a Cover memo to Planning Board, Summary, Selected portions of correspondence with Town Officials and comments on responses, Argument, and Ogunquit Planning Board 7-24-2017 Meeting Transcription (omits the Part I Public Hearing and differs somewhat from the Transcript that appears as Item 18 in the Rule 80B Record).

### **Advice to Planning Board**

The Superior Court remanded the case to the Planning Board to hear evidence and make findings of fact on the two issues discussed above: 1) whether the use will have “no greater adverse impact in the waterbody, or on the subject or adjacent properties and resources that the existing use,” and 2) whether the requested number of seats poses a hazard to life, limb or property “because of fire ... created by reason of use, or by the structures to be used therefore.”

Those are the **only** issues before the Planning Board. Issues regarding noise, lighting, parties, exhaust fans, and fryolaters were all raised before the Superior Court and the Abutter did not prevail. As counsel to the Planning Board in this matter, I advise the Board to limit its fact finding and conclusions to these two issues specifically remanded to the Board by Justice O’Neil.

Finally, this is not a public hearing where the general public may speak to the matter – it is a hearing on a remand for findings of fact on the two issues discussed above, in which the Applicants may present further documentation and witnesses on these issues and the Abutter may do the same in rebuttal.

