

October 10, 2022

Dear Planning Board Members,

Attorney Siviski has made a submission on our behalf regarding the remand order before you. Please also consider this supplemental submission of our Board's perspectives.

The Building Permit

In September of 2021, the Boothbay Harbor Code Enforcement Officer notified Waterfront Preservation that our project had not been reviewed for conformance with Shoreland Zoning regulations and that a return to the Planning Board for a Shoreland Zoning building permit was required. Six weeks later, on November 11, 2021, at the commencement of the "park and marina building permit" approval process, Planning Board Chair Churchill stated:

"I want to start by prefacing that this is the first time since I've been on the Planning Board for a number of years that we have done a building permit approval so this is a new process for this board and it's not going to be quite as easy for us because we're not sure how things are going to go but we have Town Attorney John Cunningham and Code Enforcement Officer Geoff Smith here to help us through this process. We want to do it right and to make sure that everybody understands the process, including us. That might be a challenge because we've never done one before."

Waterfront Preservation asked Town Attorney Cunningham why we needed this building permit in light of Freedom of Access Act (FOAA) material we received clearly documenting that our site plan was reviewed for Shoreland Zoning conformance in 2020. Attorney Cunningham replied on July 25, 2022:

"In this case, the waterfront park project required a permit to undertake its proposed uses of the site, including the construction of its proposed structures and improvements. The requirement for such a permit is set forth in the Table of Land Uses in the Shoreland Zone, which is Attachment 7 to Section 170 of the Land Use Code. As shown on that table, the waterfront park project required a permit issued by the Planning Board."

The Table of Land Uses referenced by Attorney Cunningham requires Planning Board approval for 13 uses in our Limited Commercial/Maritime District alone. "Single family residences" are one of them. Our abutter also received site plan approval in 2020. Should the abutter also have returned to the Planning Board for a Shoreland Zoning "building permit" in addition to their site plan? Both our abutter and the CEO have alleged that there was no "documentation" of our Shoreland Zoning review. Our 2020 site plan "findings of fact" are virtually identical to that of our abutter. Why was Waterfront Preservation the only entity ever required to seek approval of a building permit from the Planning Board? Was this an extreme case of selective enforcement of the ordinance?

An alternative explanation is that Waterfront Preservation, our abutter and others met the land use table permit requirement to which attorney Cunningham refers with our approved site plans. Our site plan was approved in October, 14 2020 and the window to appeal it expired thirty days later on November 13, 2020.

Materials received through the FOAA confirm that our project's uses and setbacks were reviewed for Shoreland Zoning compliance by BOTH your Board and Maine DEP prior to our site plan approval in 2020. Your former Chairman's 10/15/21 email to the Code Enforcement Officer is conclusive in documenting that review (Attachment 1). The DEP also reviewed and commented on Waterfront Preservation's existing and proposed uses (Attachment 2). The DEP document was an email attachment to the Code Enforcement Officer from the DEP on 5/8/2020 as part of an extensive thread with the Code Enforcement Officer and a Waterfront Preservation representative.

Waterfront Preservation was inappropriately referred to the Planning Board in 2021 for a park and marina building permit that is redundant to our site plan. To assert otherwise is to discredit the detailed notes of your former Chairman, DEP Shoreland Zoning and the extensive, documented record. A return to the Planning Board for a building permit approval after site plan approval has NEVER been required of other applicants.

The Pavilion

Our 2020 site plan approval includes an open-air pavilion structure for Park visitors to seek refuge from the sun and rain. We have been told we cannot completely rebuild the pavilion unless it is moved back to the greatest practical extent because it is not a "functionally water dependent use." (Attachment 3)

Both DEP standards (Chapter 1000) and our local ordinance, however, include "public shorefront parks" and "uses that provide general public access to coastal waters" as functionally waterfront dependent uses (Attachment 4).

Furthermore, in 2020 the DEP found the Park and its components, including the pavilion, to be a single use (Attachment 2, page 3):

Proposed Uses

5. Outdoor conservation and recreational uses not operated for profit (12 spaces)

NOTE: This is the park and all the park components including lawn and landscape areas, the pavilion on the north pier, the north pier, the public restrooms on the north pier, the splash pad, and other park amenities, in total.

- ***DEP Shoreland Zoning Comment Park and its component are one use.***

In addition, your Board determined the pavilion to be an accessory structure to the Park.

The Doyle attorneys have argued and the DEP agrees that only uses that cannot function away from the water qualify as functionally water dependent uses. We agree.

BOTH DEP standards and our ordinance have specifically identified public parks as such a use that cannot function away from the water (Attachment 4).

The Park and its components, including the pavilion, are a single functionally water dependent use.

Permitting difficulties and delays related to the pavilion have been particularly frustrating to Waterfront Preservation as we have seen in recent years a restaurant/bar completely rebuilt over the water in our district with no requirement to move back to the greatest practical extent despite extensive options to do so.

Please formally note that our Park is a functionally water dependent use in order that we may submit an application to build the pavilion.

Notices of Violation

The Park permitting process has been driven by repeated letters from our abutter alleging violations and prompting the Code Enforcement Officer to action. We suspect the recent notices of violation and stop work order were also prompted by such letters. We are currently being told by the Code Enforcement Office that we need to amend our site plan because the retaining wall that is part of the foundation of our approved parking lot is a “new structure” not delineated on the site plan but only in supporting documents. The new retaining wall is located where a fill foundation under pavement previously existed. The pre-existing pavement is confirmed by a DEP shoreland visit referenced on page 2 of Attachment 2.

As the DEP commented:

5. Accessory use or structure

NOTE: This is the use / structure between Atlantic Boat Works and the southern hotel building. This structure has supporting infrastructure as well as storage for the existing uses.

- *DEP Shoreland Zoning Comment: not sure what this is. I did not see a structure in this location during field visits other than pavement*

The retaining wall is less impactful to the shoreland than was the previous fill only foundation. Foundations may be constructed without being considered an expansion of a structure per town code. How can the foundation of our approved parking area be considered a “new structure” altogether?

§ 170-83 Nonconforming structures.

D. (1).

Construction or enlargement of a foundation beneath the existing structure shall not be considered an expansion of the structure, provided that the structure and new foundation are placed such that the setback requirement is met to the greatest practical extent as determined by the Planning Board, basing its decision on the criteria specified in Subsection **E**, below, that the completed foundation does not extend beyond the existing dimensions of the structure and that the foundation does not cause the structure to be elevated by more than three additional feet within shoreland areas.

The Appeal

Our Town ordinance is clear that the Board of Appeals has jurisdiction over appeals of both Code Enforcement and Planning Board decisions. The ordinance states that appeals are of Code enforcement decisions except that appeals of site plan and subdivision reviews are from the decision of the Planning Board to the Board of Appeals.

§ 170-108 Board of Appeals.

D.

Power and duties.

(1)

Appeals shall be from decisions of the Code Enforcement Officer to the Board of Appeals except that, for site plan review and subdivision review, the appeal shall be from the decision of the Planning Board to the Board of Appeals

The current appeal does not concern a site plan or a subdivision. It is the appeal of a building permit. Therefore, per the ordinance, it is an appeal of the Code Enforcement Officer decision to issue a park and marina building permit. He did so on 11/11/21 after participating in extensive Planning Board review with public hearings. The appeal currently under consideration was filed on 12/16/21. That was beyond the 30-day appeal window.

To refresh your memory, on 11/10/21 the Planning Board concluded its review of the building permit with the exception of a pavilion floodplain issue which required research and so the formal vote was delayed a week and took place 5 minutes into the 11/17/21 public hearing. Attorney Cunningham was clear that the building permit did not pertain to the pavilion structure. The Planning Board discussed and approved the structures relevant to the building permit on 11/10/21 (parking area and children's splashpad). The Code Enforcement Officer had full authority to issue the building permit - which he did on 11/11/21.

Waterfront Preservation has the only Boothbay Harbor Code Enforcement Officer issued building permit also subsequently approved by the Planning Board. A Planning Board vote of approval is not a requirement for a building permit to be issued. In our case, it simply affirmed the CEO decision to issue the building permit.

Conclusions

The Planning Board review of our both our 2020 site plan and the building permit under appeal was complete and thorough. Your attention to detail in interpreting the ordinance and arriving at a consensus view has been laudable. The Waterfront Preservation Board remains grateful for your service to our town.

This year-long park and marina building permit and appeal process, however, has been unnecessary and prejudicial. It has cost Waterfront Preservation substantial professional fees, thousands of hours of volunteer time and has damaged our reputation. It is time for the town of Boothbay Harbor Code Enforcement Office to acknowledge that the Waterfront Preservation Park project was extensively reviewed for Shoreland Zoning compliance in 2020 and that the park and marina building permit currently under appeal was a requirement made in error. This process was flawed at its foundation and should be brought to an immediate conclusion.

Respectfully,

Board of Directors
Boothbay Harbor Waterfront Preservation

WRH Comments 10/15/21

DRAFT

Comments on letters to the Planning Board

The day before our October 13th scheduled meeting and again on the day of our meeting, the BHPB received letters from Scott Anderson representing the Doyles, arguing that the Boothbay Harbor Waterfront Preservation application(s) should not be approved. Below are my initial comments on those letters.

The October 12th letter.

In the first paragraph under Background the letter states that BHWP “sought approval for two land uses: a public park, and a single residential dwelling.”

This is not correct. I have extensive notes, dated emails and written communications that show multiple uses previously existed on the site and that multiple uses were sought by BHWP.

In the second paragraph the letter states “The Planning Board did not review the project under the Town’s shoreland zoning standard”. I can attest and have notes to confirm that I reviewed relevant sections of the shoreland zoning standard in reviewing the application, in particular the sections on pre-existing non-conforming structures and uses.

The third paragraph reiterates that the park did not seek a permit under the town’s shoreland zoning standards. To my knowledge there is no “Shoreland Zoning permit” rather the site plan review ensures that the proposed plans meet all of the town’s land use codes (as evidenced by the fact that the site plan review **requires** the shoreland setbacks be included on the submission).

The fifth paragraph states “BHWP doubled the number of residential dwellings.....also added a “neighborhood grocery store” to the structure”
This is not correct. These elements were present from the very beginning. The paragraph also states “no information was provided in the Amended Application regarding.....signage, lighting, anticipated traffic impacts, parking requirements...” This information was provided in the original application.

The sixth paragraph states “the Planning Board acted on the application, again reviewing the project only under the Town’s site plan review standards, with no review regarding compliance with the shoreland zoning requirements.”

Again, not true. See comments above.

Section 2. BHWP’s Shoreland Zoning Application

I will note that the application is not a “Shoreland Zoning Application”; it is a building permit (for a location in the the shoreland overlay district). The letter goes on to note a lack of narrative discussing the impacts of the proposed uses. These had already been supplied (and approved) in the original submission.

Section 3 Shoreland Zoning Standards

The arguments in this section (for denial) hinge on the premise that BHWP is adding uses to the site. **This is not true.** From the beginning they sought to change some existing non-conforming uses to new non-conforming uses (that have far less impact on the property and surrounding area).

One particularly egregious statement is that the proposed parking is new. The existing site (as a motel) was mostly parking! As a preexisting non-conforming structure it is allowable to be moved, and the “new” parking is smaller and much farther from the water than the prior parking structures.

Finally the letter states that a soil erosion and sedimentation control plan was not submitted. **This is not true.** Plan L-6 entitled “Stormwater, Sedimentation & Erosion Control Plan” was submitted early in the process.

The October 13th letter

1. **Minimum Lot Standards/20% Lot Coverage Standards**

The second paragraph argues that the existing uses were permitted uses and therefore do not fall under the nonconforming uses shoreland ordinances and therefore any new uses must meet the 20% lot coverage standards. But existing uses were nonconforming precisely because they did not meet the lot coverage or required area provisions of the code. Thus the applicant is permitted under the code to change those uses to other, nonconforming uses, provided the new uses have no greater adverse impact.

Note the PB had extensive discussions regarding both the existing and proposed uses, and uniformly applied the precedents and definitions developed in prior decisions.

The third through sixth paragraphs present a lengthy argument that the applicant should not be permitted to have "new and different" structures. Without speaking to the validity of this argument I note the letter fails to name what structures are new and different with the exception of parking. As previously mentioned, calling parking structures "new and different" is absurd. The prior development was mostly parking! The proposed parking structures are smaller, more compliant, and have far less adverse impact on the property.

The reminder of the letter cites "missing information" that is not, in fact, missing (e.g. the board asked for and received the calculations for sizing the parking areas, the board has an erosion and sedimentation plan, the plans included signs and lighting, etc.)

Conclusion: The preponderance of errors, incorrect assumptions and misinformation in these letters make it difficult to view them as a serious attempt to justify why the BHWP should not proceed.

Attachment 2

The DEP Shoreland Zoning Comments below are based on Chapter 1000 "Guidelines For Municipal Shoreland Zoning Ordinances" and correspondence with Boothbay Harbor Codes Officer Geoff Smith. These comments relate to Shoreland Zoning rules only not the Natural Resources Protection Act which is a separate set of laws administered by the DEP.

Existing Uses

1. Marina

NOTE: The marina is not an accessory use to the hotel or restaurant

2. Pier, docks, and wharves

NOTE: the southern pier is used for trap storage, working waterfront parking, low tide bottoming out of vessels for repair, and access to lobster boats and other fisheries vessels.

- *DEP Shoreland Zoning Comment: # 1&2 are combined one use and can remain that way*

3. Boat Building and repair, commercial operations

NOTE: Atlantic Boat Works is on the first floor of the structure on the south pier

- *DEP Shoreland Zoning Comment: documentation of this use being legal*

4. Hotel

NOTE: The hotel use includes the two hotel buildings, the hotel office in the lower level of the historic home, the three hotel rooms in the historic home, and the room attached to the restaurant, in total.

- *DEP Shoreland Zoning Comment: Hotel and its components are 1 use*

5. Accessory use or structure

NOTE: This is the use / structure between Atlantic Boat Works and the southern hotel building. This structure has supporting infrastructure as well as storage for the existing uses.

- *DEP Shoreland Zoning Comment: not sure what this is. I did not see a structure in this location during field visits other than pavement*

6. Restaurant

NOTE: This is the restaurant on the north pier.

- *DEP Shoreland Zoning Comment: 1 use this includes the associated bathrooms*

7. Accessory Use or structure

NOTE: This is the bathrooms on the north pier that are an accessory use to the

restaurant, marina, and hotel use.

- *DEP Shoreland Zoning Comments: this is part of the restaurant not an accessory*

8. Single-Family Dwelling

NOTE: This is the dwelling unit above Atlantic Boat Works

- *DEP Shoreland Zoning Comments: this dwelling was not a legal dwelling and therefore can't be a use. This item has been discussed during the fields visits as well as the office meeting credit can not be given for a violation*

9. Single-Family Dwelling

NOTE: This is the dwelling unit on the top floor of the historic home

- *DEP Shoreland Zoning Comment: 1 use*

Proposed Uses

1. Marina expansion (7 spaces)

NOTE: For clarity of permitting as recommended by the Planning Board, the marina attached to the southern and northern piers are being proposed as one use even though the northern marina is for recreational boaters and the southern marina is for commercial fisheries. Both marinas will be owned and operated by the non-profit BBHWP.

2. Pier, docks, and wharves (7 spaces)

NOTE: the southern pier is used for trap storage, working waterfront parking, low tide bottoming out of vessels for repair, and access to lobster boats and other fisheries vessels.

- *DEP Shoreland Zoning Comment 1 & 2 are considered 1 use*

3. Boat Building and repair, commercial operations (1 space)

NOTE: Atlantic Boat Works is on the first floor of the structure on the south pier.

- *DEP Shoreland Zoning Comments if this use as described is to continue then documentation of this use being legal should be supplied. If this use is found to be not part of Atlantic Boat works and deemed to be part of the hotel maintenance area, then*

is could continue as an accessory use to the park. However, it could not be changed to another use that is not water dependent given it is located over the resource

4. Accessory Use (1 space)

NOTE: The marina office is proposed as an accessory use to the Marina expansion above Atlantic Boat Works, replacing the legally non-conforming dwelling unit.

- *DEP Shoreland Zoning Comment the Dwelling was not a legally exiting use therefore could not be counted. The building for the most part is located over the resource and this proposed use is not water dependent*

5. Outdoor conservation and recreational uses not operated for profit (12 spaces)

NOTE: This is the park and all the park components including lawn and landscape areas, the pavilion on the north pier, the north pier, the public restrooms on the north pier, the splash pad, and other park amenities, in total.

- *DEP Shoreland Zoning Comment Park and its component are one use. The removal of the restaurant would have to be done in such a way that no more than 50% of the value of the structure is removed. However, the Pavilion could be looked at as a new structure by the Municipality and would not be allowed on a pier. The Municipality would have to make that distinction in this case. Additionally, if it is determined that it is not a new structure and less than 50% of the value is removed then this change of use would have to be approved by the Planning Board and deemed to have no greater adverse impact than the existing use*

6. Neighborhood grocery store (4 spaces)

NOTE: The neighborhood grocery store is proposed in the location of the existing hotel office on the lower level of the historic home.

- *DEP Shoreland Zoning Comment This would be 1 use and BBH allows retail use in LC with PB approval*

7. Duplex (4 spaces)

NOTE: The historic single-family home to become a duplex. The existing top floor apartment will remain. The three middle floor hotel rooms will be combined into one dwelling unit. The lower level that is currently the hotel office is proposed as the neighborhood grocery store.

- *DEP Shoreland Zoning Comment The top floor can remain as a dwelling and as a use. But combining the 3 hotel rooms into another dwelling it would require the dimensional requirement for that dwelling BBH requires 10,000 sq ft if this can be met then it would be an allowed use but by my calculation another use would have to be given up based on*

the size of the lot and existing uses. The illegal dwelling unit on the south side above the maintenance area would not count given it was not legally existing.

Attachment 3

From: Clark, Colin A <Colin.A.Clark@maine.gov>
Sent: Wednesday, February 17, 2021 2:39 PM
To: Baker, Sue <Sue.Baker@maine.gov>; 'Geoff Smith' <gsmith@boothbayharbor.org>
Cc: Ellen Stevens Newton <rnewton7@roadrunner.com>
Subject: RE: Waterfront park

Good Afternoon

Thank you for that information Sue to go along with that here is the perspective from shoreland zoning in terms of Chapter 1000, please keep in mind the local ordinance can be more restrictive than the information provided but not less.

Option #1- the building is renovated or improved, but remains in the same place, and turned into a pavilion. Roofing, siding, windows and doors are replaced, the kitchen is removed, and the bathrooms currently in the building are renovated. If more than 50% of the market value is removed then the building would have to be relocated to the Greatest Practical extent and in this case would it would likely be back closer to the road than the water. If the windows, siding, doors and roofing is being replaced most of that would be maintenance under shoreland zoning removing the structural components of the restaurant could be counted towards the 50% removal as well as taking down walls and other items

Option #2- The building is taken down and rebuilt. Ideally, the group would like to have it relocated on the pier, I believe about 8' to the right.

If the building is taken down or again removed by more than 50% it could not be relocated on the pier since it is not a functionally water dependent use it would have to be moved back to the greatest practical extent which would have it placed up above the proposed splash pad close to the road.

I hope this information is helpful feel free to contact me with any other questions

Colin A. Clark
Shoreland Zoning Coordinator in the Bureau of Land Resources

Maine Department of Environmental Protection
Tel (207) 441-7419

www.maine.gov/dep

Attachment 4

State of Maine, Department of Environmental Protection Chapter 1000: GUIDELINES FOR MUNICIPAL SHORELAND ZONING ORDINANCES, page 12:

The following notes are applicable to the Land Uses Table on the following page:

NOTE: The term "functionally water-dependent use" as defined, includes a very diverse group of uses ranging from large, industrial facilities that receive shipments by water or use water for cooling, to traditional commercial fishing enterprises, **and public shorefront parks**. Communities are encouraged to define the functionally water-dependent uses which are to be allowed and which are prohibited in each CFMA district, based on considerations of prevailing existing uses, desired future uses, available support facilities, site suitability and compatibility with adjacent uses. A municipality can narrow the range of allowed uses by precluding certain functionally water-dependent uses, or by adopting conditional uses for certain functionally water-dependent uses that it determines would only be compatible with its plan for the waterfront under certain conditions.

Town of Boothbay Harbor:

§ 170-113 Words and terms defined.

FUNCTIONALLY WATER-DEPENDENT USES

Those uses that require, for their primary purpose, location on submerged lands or that require direct access to, or location in coastal waters and cannot be located away from these waters. These uses include but are not limited to commercial and recreational fishing and boating facilities (excluding recreational boat storage buildings), finfish and shellfish processing, fish storage, retail and wholesale fish marketing facilities, waterfront dock and port facilities, shipyards, boat building facilities, marinas, navigation aides, basins and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of water for cooling or processing water that cannot reasonably be located or operated at an inland site, **and uses which primarily provide general public access to marine or tidal waters**. Functional water-dependent uses do not include recreational boat or boat equipment storage buildings.

[Amended 5-5-2003 by ATM Art. 20; 5-3-2019 by ATM Art. 5]