

Town of Southwest Harbor

Planning Board Minutes September 3, 2020
6:00PM

Roll Call – Eric Davis, John Williams, Chris Blain, Lee Worcester, Jack Ksionzyk, Ken Salvatore, Michael Levesque absent. Also present CEO John Larson and Deputy CEO Jesse Dunbar.

Adoption of agenda for tonight's meeting.

Motion: Eric Davis made motion to accept minutes of August 27, 2020, seconded by Lee Worcester. Motion passed 4-0-2 with Ken Salvatore and Chris Blain abstaining and Mike Levesque absent.

Eric Davis opened the Public Hearing at 6:11 PM.

Andrew Hamilton of Eaton Peabody, attorney for John Clark and John Carroll, direct abutters of 126 Clark Point Road, spoke on behalf of the abutters and submitted a document at the meeting entitled "CONDITIONS" for the Planning Board's review, seeking adoption of the 12 conditions proposed in the document. John Clark and John Carroll had submitted written materials through their attorney prior to the Planning Board meeting addressing their concerns with the proposed restaurant. Attorney Hamilton, the abutters, and other members of the public raised their concerns with the Planning Board regarding the proposed restaurant during the public hearing

Nicholas Sayre and Joe DeBeck spoke on behalf of MDI Lobster.

Eric Davis closed the Public Hearing at 7:33 PM.

Old Business:

MDI Lobster, Inc
Map 4, Lot 21
126 Clark Point Road
Book 2154, Page 59

Note: MDI Lobster, Inc request approval to operate food truck, tent and storage shed for take-out kitchen to service up to 135 seats.

FINDINGS of FACT

Applicable Performance Standards:

A. Landscaping/Buffering

Commercial use requires buffering. Planning Board must determine level of buffering per Section VI, sub A. Applicant proposes solid fence along abutting residential properties. (Height to be determine by Planning Board)

1. Planning Board to determine level of buffering
2. Planning Board to approve/deny/modify above applicant buffering requirements.

Motion By: Lee Worcester

Second By: Ken Salvatore

Motion: This criteria has been met based on buffering plan submitted to include existing 6' fence and Clark Buffer exhibit, Section 2 of conditions.

Motion Passed: 6-0-0

B Clearing or Removal of Vegetation Standards Other Than Timber Harvesting

A strip of land extending 75' from any water body, tributary stream, or the upland edge of a wetland shall be preserved as a buffer strip of vegetation, except to allow for the development of permitted uses.

Motion By: Eric Davis

Second By: Jack Ksionzyck

Motion: This parcel is located in Commercial Fisheries/Maritime Activities zone and food truck/restaurant is an allowed use with Planning Board approval. This standard is met based on there is no representation that there is vegetation to be removed within 75' setback.
(see exhibit 1)

Motion Passed: 6-0-0

C. Driveway and Driveway Opening Standards

Non-Residential Driveway minimum width 18'

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard is met based on existing driveway indicated on the plan is 20' wide. The minimum width for increased traffic for ingress and egress onto Clark Point Road should be 20-24' wide; the driveway is setback six feet from property lines as indicated on plan.
(see Exhibit 1)

Motion Passed: 6-0-0

D. Erosion/Sedimentation Controls

All activities which involve filling, grading, excavation or other similar activities which result in un-stabilized soil conditions shall require a soil erosion and sedimentation control plan in accordance with current Maine Erosion & Sedimentation Control BMP's.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard is met based on submittal of soil erosion and sedimentation control plan in accordance with current Maine Erosion & Sedimentation Control BMP's. The development is designed to fit with topography and soils of the site. (see Exhibit 2)

Motion Passed: 6-0-0

E. Exterior Lighting

Exterior lighting shall be designed to minimize the adverse impact on neighboring properties and the traveling public. Exterior lights shall be appropriately shielded to prevent direct light from be visible outside the property line.

Motion By: Ken Salvatore

Second By: Eric Davis

Motion: No outdoor lighting proposed. This standard has been met based on 2 LED lights on west side and 2 LED lights on east side of food truck. Only shielded lighting allowed and to be a condition of approval. (see exhibit 5)

Motion Passed: 6-0-0

F. Fill and Excavation Standards

A fill or excavation permit is required for the moving of 100 cubic yards or greater of inert fill if the operation is not associated with permitted construction.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard has been met based Permit #3270 issued on July 6, 2020 for 170 cubic yards fill to establish gravel pad.

Motion Passed: 6-0-0

G. Fire Protection Standards

Plans for transient accommodations, marinas, nursing homes, convalescent centers, multi-family developments, hospitals, schools, theaters, mercantile developments over 3000 sq. ft, business occupancy of 2 or more stories, etc. shall be approved by the State Fire Marshal's Office.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard is not applicable based on the fact it does not meet standard's requirements.

Motion Passed 6-0-0

H. Flood Hazard Area Standards

A Flood Hazard Development Permit must be obtained from the Town before any change caused by individuals or entities to improve or unimproved real estate begins within any areas of special flood hazard identified on the Federal Insurance Rate Maps for Southwest Harbor.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard is not applicable based on the fact no part of the proposed development is in the Flood Zone as evidenced by flood zone delineation on plan. (see exhibit 1)

Motion Passed: 6-0-0

I. Handicapped Access Standards

Plans for public accommodations and public housing shall be approved by State Fire Marshal's Office.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard does not apply based on no permanent structure proposed. The plan shows two handicap parking spaces with signage.(see exhibit 1)

Motion Passed: 6-0-0

J. Heavy Commercial or Industrial Pollutant Standards

Dust, dirt, fly ash, gases, fumes, radiant heat and glare shall not be emitted so as to endanger public health and safety, enjoyment of other property, or as to constitute air pollution.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard is not applicable, Proposed food truck will not produce dust, dirt, fly ash, gases, fumes, radiant heat or glare.

Motion Passed: 6-0-0

K. Noise:

No noise which is objectionable due to volume, intermittence, beat frequency or shrillness shall be transmitted outside the lot.

The Planning Board reserves the right to determine if noise from a proposed project or an expansion of a use will be "objectionable". A majority vote of the Board is required for this determination.

1. Will there be any objectionable noise transmitted outside the lot?
2. If there is noise that may be objectionable, the Board must determine by majority vote.

Motion By: Lee Worcester

Second By: Eric Davis

Motion: This standard has been met based on no "objectionable" noise will be generated from food truck or operation of restaurant with picnic tables, and provided that the noise be periodically monitored by the Code Enforcement Officer.

Motion Passed: 4-2-0

L. Parking and Loading Standards.

Planning Board to determine the above as acceptable.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard has been met based on site plan indicates thirty two (32) spaces: 135 seats require 22 spaces in the shore land zone (1 space per six seats); there are eight (8) berths which require two (2) spaces; proposed eight (8) employees require 4 spaces and three (3) handicap spaces. (see exhibit1)

Motion Passed: 6-0-0

M. Road Standards

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard is not applicable as no new road is proposed. The existing driveway is 20' wide at Clark Point Road and six feet or more from property line. (see exhibit 1)

Motion Passed: 6-0-0

N. Sewerage Disposal Standards

Existing public service is available. A condition of for cooking facilities requires a grease trap be installed as part of the plumbing requirements.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard has been met based on letter from water and sewer district stating adequate capacity exists for this use. (see exhibit 3)

Motion Passed: 6-0-0

O. Sign Regulation Standards

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard has been met based on existing sign met requirements of Ordinance which states any sign which was lawfully in existence prior to June 29, 1992 is exempt from the provisions of this Ordinance.

Motion Passed: 6-0-0

P. Soil Standards

All land uses shall be located on soils in or upon which the proposed uses or structure can be established or maintained without causing adverse environmental impacts, including severe erosion, mass soil movement, improper drainage, and water pollution whether during or after construction.

Motion By: Eric Davis

Second By: Chris Blaine

Motion: This standard has been met based on gravel pad will not cause adverse environmental impact, soil erosion, mass soil movement, improper drainage or water pollution.

Motion Passed: 6-0-0

Q. Storm Water Runoff Standards

Adequate provision shall be made so that surface waters shall not adversely affect neighboring properties, downstream water quality, potential for soil erosion, or the public storm drainage system.

Motion By: Eric Davis

Second By: Ken Salvatore

Motion: This Standard has been met based on the storm water should not affect abutters due to the downhill slope from Clark Point Road to storm drain noted on plan. (exhibit 1)

Motion Passed: 6-0-0

R. Stream Standards

Existing vegetation within 25' of a stream shall remain undisturbed.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard is not applicable as no streams are located on site.

Motion Passed: 6-0-0

S. Vibration Standards

If inherently and recurrently generated, it shall be imperceptible without instruments at lot boundaries.

Motion By: Eric Davis

Second By: Jack Ksionzyck

Motion: Not Applicable as no vibrations are generated by food truck, restaurant or cooking facilities.

Motion Passed: 6-0-0

T. Water Quality Standards

No activity shall deposit on the ground or discharge to the waters of the State any pollutant that, by itself or in combination with other activities or substances, will impair designated uses or the water classification of the water body, tributary stream or wetland.

Motion By: Eric Davis

Second By: Lee Worcester

Motion: This standard has been met as no pollutants shall be discharged onto the ground or into the waters.

Motion Passed: 6-0-0

U. Water Supply Standards

Motion By: Eric Davis

Second By: Lee Worcester

Motion: Based on E-mail from Southwest Harbor Water and Sewer District stating enough capacity to supply additional water to 135 seat restaurant located at 126 Clark Point Road, this standard is met. (see Exhibit 3)

Motion Passed: 6-0-0

Public Comments?

Planning Board Discussion

Motion By: Eric Davis

Second By: Lee Worcester

Motion: To require a storm water management plan be submitted to the Code Enforcement Officer.

Motion Failed: 2-4-0

Planning Board Decision

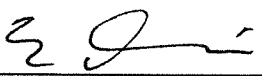
Motion By: Lee Worcester

Second By: Eric Davis

Motion: To approve the application from MDI Lobster, Inc at 126 Clark Point Rd to operate a food truck, tent and storage shed for take-out kitchen to service up to 135 seats, as reviewed and subject to conditions 1B, 2, 3, 4, 5, 6, and 7 outlined in the document titled "CONDITIONS" submitted by Andrew Hamilton of Eaton Peabody on behalf of the abutters and herby attached to and incorporated in these findings.

Motion Passed: 6-0-0

Planning Board Action on September 3, 2020 by a vote of 6 / 0 / 0 to approve.


_____ Chairman

CONDITIONS:

So that we can try to avoid the need for an appeal to the Board of Appeals and any further appeal to the Maine courts in this matter, we should all be diligent in our work before and during tonight's public hearing (September 3). In that regard, the immediate abutters request review during the hearing and action on these requested conditions of any approval by the Planning Board IF the Application meets the Ordinance standards:

1. NOISE. For any uses of the Property that are subject to limitations on noise generated on the Property under Section VI(K) of the LUO, the Applicant shall take measures to identify, measure, abate and otherwise mitigate from the following sources:

- A. Any and all Reefer Units on the Property, including the permanent stationary Reefer on the landward edge of the dock on the Property.
- B. Restaurant Areas. The Applicant shall prevent voluble and loud noise from large patron gatherings during or after reasonable restaurant hours, and the playing of loud music (including after hours) within the Property and particularly within the buffer areas of the Carroll and Clark properties, particularly after reasonable restaurant hours in this quiet neighborhood. Reasonable restaurant hours are established as 11:00 am in the morning to no later than 7:00 pm in the evening. No music will be played by the restaurant or its staff prior to 11:00am or after 7:00 pm in this quiet neighborhood.
- C. Generally, compliance of all sound sources on the Property with the standards for noise under Section VI(K) of the LUO.

Additional note and Condition Requested by John Carroll: *Music is often played by staff at the restaurant while setting up for the day and cleaning up at the end of the day. This music has started as early as 6:10 am (Aug. 11) and often is played as late as 9:30 pm. This is a quiet neighborhood area and the music is disruptive. I would request a condition of approval that no music be played by the staff prior to 11:00am and after 7:00 pm.

2. ABUTTER BUFFERS. As part of its ultimate review of the Restaurant Applications (including just the food truck or trailer application OR any future application for a building to house the restaurant kitchen operations), the Board has determined that the Applicant has either agreed to or, in order to meet Ordinance standards, must implement and maintain the following buffers for the two immediate abutters in this quiet neighborhood:

- A. Clark/Nickon Property Line Buffer Plan outlined in the "Buffer Proposal Narrative" and the "Buffer Proposal Landscaping Plan," both dated May 13, 2020, copies of which are included in the Planning Board Decision on the Restaurant Applications.
- B. Carroll Property Line Buffer Plan. As detailed at the September 3, 2020 hearing, John Carroll and/or his counsel have detailed the following:

1. If the planting in 2 below is done, then a Level 3 Buffer consisting of (a) repair of the existing fence and to maintain the fence as a buffer and to prevent patrons or employees of the restaurant from using the Carroll dock or property and (b) the vegetative plantings in B(2) below; otherwise, a solid fence may be necessary.
2. Vegetative plantings of arbor vitae (*nigra arbor vitae*) with plantings of healthy trees at least 6 feet tall (that can grow to 15' of height) and spaced every 6 feet apart for any portion of the property line setback that is behind the trailer and/or building where restaurant operations are conducted for a distance of at least 65 feet and up to 75 feet in total.

Note from John Carroll: Joe has agreed to plant 12 *Thuja Occidentalis Nigra* (also known as Dark American Arborvitae). The trees will be 5-6 feet tall at planting (this is the range for purchasing) and they should be planted 6' apart over the entire 75' or so of the trailer or future facility. This will result in a nice solid hedge in the future. These trees should be part of a landscape plan and they should be replaced if dead.

3. PATRON/EMPLOYEE BREAK SEATING. No picnic tables or seating for restaurant patrons or employee break areas shall be placed on the Dock, or over the water, or within the 75 foot Shoreland or within the 15 foot Property Line setbacks.
4. PARKING/SAFE ACCESS/CLARK RIGHT-OF-WAY. There shall be at least 32 parking spaces on the Property for the Restaurant Use, in addition to parking for vehicles for marine operations on and from the Property, and those parking spaces shall be designed and laid out in compliance with Section VI(L)(4) of the Ordinance and these Conditions. No vehicle shall be parked in the Abutter buffer areas, or within any portion of the Clark/Nickon 12 foot wide right of way shown on the earlier MDI site plan, or in any manner that prevents safe access to the Property by those with the right to access the property, including emergency responders. As with all other conditions in this Decision and Order, any violation of this condition shall be a violation of this Site Plan Decision and be subject to enforcement under the SWH Land Use Ordinance and 30-A MRS Section 4452.
5. PORTABLE TOILETS AND DUMPSTERS ON THE PROPERTY, INCLUDING FOR THE RESTAURANT. Since dumpsters and portable toilets are "structures" under Section XIII of the LUO, the dumpster and any portable toilet shall be located outside the applicable Shoreland, property line, and right of way setbacks, so that no dumpster or other structure is placed within 15 feet of any property line or within 20 feet of any private or public right-of-way. The Applicant shall otherwise manage disposal of garbage, including food waste, by requiring use of authorized dumpster facilities only so that odors (that will otherwise be experienced by the neighbors) in this quiet neighborhood are minimized.

Mr. Carroll would appreciate no dumpster (even the very small one currently there) be placed in the 15' buffer zone and that this be a condition of approval.

6. LIGHTING. All new lighting, including the LED lights on the back of the food trailer, on the Property shall be down shielded to avoid projection of light into the abutting properties.

Note from John Carroll: The trailer has very intense LED lights on the side facing Carroll property. Joe has been very good about trying to keep these lights off at night, but with shift changes, etc. they end up being used again. Whether with the trailer or future structure, we would ask that the lighting in this neighborhood setting be shielded.

7. NO USE OF ABUTTING PROPERTIES. The Applicant shall take measures to assure that patrons and/or employees of the Applicant do not access or otherwise use the abutting properties (or the Carroll dock). Violation of this condition established by any photo of an employee or patron of the Applicant's operation using those abutting properties shall be subject to enforcement under the Ordinance and 30-A MRS Section 4452.

John Carroll note: MDI Lobster should make best efforts with signage, notice on website, etc. to keep restaurant customers off Carroll pier and float. Customers in August have come onto the pier and also have docked at the float. Carroll is concerned about liability issues. Carroll has also installed signage.

8. DRIVEWAY LIMITS. There shall be no driveway for the restaurant within 75 feet of the water line, unless the Planning Board grants an exception down to within not less than 50 feet of the water line.

9. TOILET BUILDING LOCATION. No permanent commercial toilet building shall be installed within 75 feet of water line or within fifteen (15) feet of the property line.

10. ODORS; SMOKING. The restaurant and its employees shall use closed food waste dumpsters and proper receptacles at permissible locations for garbage to control odors. Smoking by restaurant employees and patrons shall be allowed only in designated smoking areas outside of the setback buffer areas to minimize smoke and odor impacts to the abutting neighbors.

Carroll: Some restaurant employees smoke at a break table right along Carroll fence line.

Napier: Hot grease and cooking odors consistently smelled when I am on my deck. (I miss my saltwater/brine and seaweed fragrances, and even the occasional bait smell!)

11. REQUIRED SUBMISSION OF ENGINEER CERTIFIED BUILDING AND FLOOR PLANS. The Local Code Office and the State Fire Marshal will require approved plans on file to enforce any variance from those plans, especially for any gas cooking appliances that must meet NFPA 58 Code requirements.

12. Maximum Seating Capacity / NO SEATING ON or OVER THE WATER:
Carroll would request that the planning board limit the maximum seating to no more than 90. 26 cars (plus the semi) completely fill the parking area. This is documented with photos. The

requested 135 seating (this may be for the future submittal for the permanent restaurant structure) is too large for the parking capacity when one considers Fishing Wharf employees, Restaurant employees, and Fishermen. This is a quiet neighborhood community and the size of the restaurant operation needs to be commensurate with the location.

Note: the current "food trailer" proposal is for 65 or so people.

Napier: No tables or eating on or near the dock. Again, there are food and trash issues re: polluting the harbor waters with debris, thus negatively affecting harbor use and enjoyment by fishermen, harbor and water-related businesses, recreational boaters and town residents. What happens to dropped food, and spilled beverages by customers? Both attract both insect and rodent pests. And also concerns with paper and plastic blowing off tables, since there is always a breeze or even wind, every day blowing off the harbor.

SUMMARY. These conditions will help to assure compliance with Ordinance standards relevant to the Restaurant Application(s) and overall operation by Applicant of the Property; they will also address longstanding and recent concerns of the abutters and the neighbors generally with the After The Fact food truck/trailer operations. The Planning Board should look to apply the foregoing conditions at a minimum in rendering their decision, and may want to add conditions to address other Ordinance standards, including Lot Coverage, Stormwater Management, Parking, Odor, Lighting and Noise Standards