

**MINUTES
PLANNING BOARD
TOWN OF DAMARISCOTTA
May 1, 2017
7:00 PM**

MEMBERS PRESENT: Jonathan Eaton, Shari Sage, Bruce Garren, Stephen Cole, and Wilder Hunt

STAFF PRESENT: Anthony Dater, Town Planner

PUBLIC PRESENT: Meagan Hamblett, CLC YMCA; Tor Glendinning, Architect for CLC YMCA; Jan Wiegman, Engineer for CLC YMCA; Dennis Anderson, CLC YMCA; Marilee Harris, Stepping Stone Housing, Inc.; John Scribner, Developer for Damariscotta DG, LLC; Austin Turner, Engineer for Damariscotta DG, LLC; Rod Craib, DRA subdivision; Jesse Ferreira, DRA Subdivision; Robert Hunt, NC Hunt Application; Steven Hufnagel, DRA Subdivision; Zachary Daws, interested citizen; Roger Panek, interested citizen; Sandi Day, interested citizen; Bernadette Gerhard, interested citizen; Rich Raber, interested citizen; Don Nash, interested citizen; Elizabeth Nash, interested citizen; Gina Hamilton, Reporter, Wiscasset Newspaper; Maia Zewert, Reporter, Lincoln County News.

CALL TO ORDER: Chairman Eaton called the meeting to order at 7:00 pm.

PUBLIC HEARING:

TECHNICAL CHANGES TO THE EXISTING SHORELAND ZONING ORDINANCE TO BRING IT INTO COMPLIANCE WITH THE TOWN VOTE OF JUNE 10, 2015 – REMOVING THE TOWN FROM OVERSEEING TIMBER HARVESTING AND SUBSTITUTING THE MAINE FOREST SERVICE. ANOTHER TECHNICAL UPDATE IS TO BRING THE ORDINANCE INTO COMPLIANCE WITH THE STATE MODEL FOR REPLACING THE FOUNDATION OF NONCONFORMING BUILDINGS WITHIN THE SHORELAND ZONE.

Dater told the Board the DEP reviewed the ordinance – it is not a substantive change – just removing any reference to the Town overseeing timber harvesting. The Board reviewed a copy of the ordinance with the changes highlighted. Garren noted a typo in punctuation – Dater to correct.

There was no public comment on this public hearing.

On motion Hunt / Garren to approve changes as submitted with Garren's punctuation correction & forward to the Board of Selectmen for Town Meeting approval.

VOTE: 5-0 IN FAVOR

REGULAR MONTHLY MEETING FOR MAY:

A. MINUTES

March 6, 2017 meeting – there were no minutes available for the Board to review.

April 8, 2017 meeting – There were no minutes available for the Board to review.

April 25, 2017 site visit meeting –

On motion Garren / Hunt to approve the 04/25 site visit meeting minutes as submitted. **VOTE: 5-0 IN FAVOR**

The Board signed the minutes.

B. OLD BUSINESS

1. DAMARISCOTTA DG, LLC – POOLE PROPERTY – 508 MAIN STREET (CORNER OF BISCAY RD / RT. 1B) – LOT 8/16-1, HIGHWAY COMMERCIAL C2 DISTRICT – FINAL SITE PLAN APPLICATION FOR TWO RETAIL STORES.

There was a question on the validity of a vote at the April meeting. Due to the Chairman of the Board not voting, the official vote on this project was 2-1 in favor. After consulting the Town Attorney, it was determined that the vote may not be valid. (Attorney Villeneuve's letter & email attached) In accordance with the Town Charter, section 4.04(B)(1); it was decided that the Planning Board should re-vote the application.

Hunt stated that he did not abstain from the vote as noted in the Attorney's letter.

The Board agreed with him.

Hunt stated his vote should be in favor, not abstain.

Austin Turner was present. He told the Board that they have since received the MDOT driveway permit & will get it submitted to the Town for the record.

Eaton wanted to talk more about the traffic. He asked Turner what the trip count was again.

Turner explained how the trip count number is achieved. It is an average after monitoring similar sized stores for a 2-hour peak period. In their study, they found the following:

Dollar General = 22-24 trips
Sherwin Williams = 10-15 trips

Eaton told the Board that he checked into the previous tenant's trip count & found it interesting by comparison. Wasses Hot Dogs stated that they had approximately 80 customers a day – Eaton determined 2 customers per vehicle on average = significantly more than the new use is proposing.

Eaton also told the Board that they'd received a letter from the Police Chief & he had no concerns about the proposed project.

Eaton said he personally feels better about the traffic questions after watching the area and receiving the additional information.

Cole asked about the sidewalk agreement, now that the Town knows the costs involved.

Dater stated that the cost estimate just came in earlier today. It could be part of the conversation.

He told the Board they had this opportunity to re-review the substantive items in the application if they wished to.

Garren stated the Board had already reviewed the items once.

Turner stated that the applicant has agreed to a contribution of a mutually agreed upon amount. A formal agreement would need to be drafted, specifically outlining different parts; there was property easement language required as well as a specified amount & timeline. This type of agreement could be a condition of approval & not hold up the project.

Cole clarified that the Town was not losing out on the opportunity with the sidewalks because the actual building permit would not be issued without a formal sidewalk agreement.

Steven Hufnagel was in the audience and asked why the Board had previously issued the waiver on the parking location.

Eaton explained that according to their site plan, the parking seemed to be screened and front parking made more sense considering the contours of the property at the rear.

Garren stated that the rest of the businesses on that side of the street park at the front & they didn't feel that it was a big change to the area.

Bernadette Gerhard was in the audience and questioned how this small community can support another dollar store & another paint store.

Eaton explained that the Board doesn't get to pick & choose what comes to town or what development goes on a commercial property – they are required to follow the ordinances of the Town. If an application meets the requirements of the ordinances, the Planning Board can't decide against a certain type of business.

On motion Garren / Sage to approve the site plan application as submitted with the conditions that the applicant obtain & submit the required permits from MDOT and DEP; a letter on the project from the Fire Chief, and an enforceable agreement with the Town on sidewalks.

**VOTE: 4-1 IN FAVOR
(COLE)**

Cole indicated that he would be in support of the project if it had been an 'enter only' access at Main Street.

Turner asked about the Notice of Decision.

Dater told him it could be a month.

Turner stated that he needed it for the lender on the project and requested it be expedited if at all possible.

2. **GRIFFIN – 60 MAIN STREET – LOT 6/26 – C1 DOWNTOWN COMMERCIAL DISTRICT AND COMMERCIAL SHORLAND ZONE – FINAL MULTI-UNIT RESIDENTIAL SITE PLAN FOR THIRD DWELLING-UNIT ON PROPERTY; REVIEW OF FIRE CHIEF LETTER.**

No one was present on this project – Dater told the Board that the conditions had been met.

On motion Hunt / Garren to approve the application as submitted.

VOTE: 5-0 IN FAVOR

1. **N.C. HUNT LUMBER COMPANY – 769 MAIN STREET (RT 1B) – LOTS 3/58 & 59 – C2 HIGHWAY COMMERCIAL & RURAL DISTRICTS – PRELIMINARY PLAN FOR AMENDED OUTDOOR STORAGE OF SALES GOODS ON THE 2010 APPROVED SITE PLAN.**

Rob Hunt was present & showed the Board an updated site plan. He also submitted a letter from abutter Phillips stating that he would not require any fencing. Hunt further told the Board that they plan to move the outside storage back to the required 50' setback from U S Route 1 and screen with shrubbery. He pointed out an area where they are storing culverts etc, to the North of the store, and indicated that they would like to gravel the area in. The Code Enforcement Officer looked the area over and did not indicate that he saw any problems.

The Board reviewed the updated site plan.

Eaton stated that he wasn't sure the letter from the abutter will have any bearing. The ordinance states "... shall be screened from ordinary view....where abuts residential property...by suitable fence, wall or plants..." Eaton went on to say that the fence doesn't have to be a 6' stockade across the whole front... just on the side where Phillips has a view.

Garren read the planned plantings.. "7 maple trees 6' in height & 18" shrubs..."

Eaton asked Hunt if he would increase it to 8 6' high trees evenly spaced.

Hunt told him he would do that.

The Board indicated they would much prefer greenery to a fence, if possible.

Eaton asked Hunt about his timeline.

Hunt stated 6 weeks +/-

Eaton asked if it would be completed by the end of Summer?

Hunt told the Board it would.

On motion Garren / Cole that the application was complete as submitted.

VOTE: 4-0-1 IN FAVOR
(HUNT)

On motion Garren / Sage to approve the application for site review as submitted, to include screening of 8 trees, where previously stated 7, 6' in height; to be completed by Labor Day.

VOTE: 4-0-1 IN FAVOR
(HUNT)

The Board signed the site plan.

C. NEW BUSINESS

1. 44° NORTH ARCHITECTS – CENTRAL LINCOLN COUNTY YMCA (CLC YMCA) – 525 MAIN STR. (RT. 1B) – LOTS 3/11 AND 12-3 – C2 COMMERCIAL AND RURAL DISTRICTS – SKETCH AND PRELIMINARY PLAN REVIEW FOR AMENDED SITE PLAN FOR EXPANDED FLOOR SPACE, SWIMMING POOL AND ADDITIONAL PARKING.

Jan Wiegman of Wright Pierce Engineering and Tor Glendinning of 44° North Architects was present representing this project. Wiegman reviewed the project with an updated site plan presentation. This phase will include a new lobby & entrance, locker rooms, fitness area, and expanded parking. They plan to bring the site up to and in excess of DEP stormwater standards. A similar project received DEP approval in 2013 – they've filed an amendment for this project that is currently under DEP review.

Wiegman told the Board that they plan to hook up to water with GSBSD, upgrading the existing water service and the new building will be sprinkled.

Glendinning explained the building design – they plan to increase windows, it will be a vertical metal siding mixed with clapboard.

Cole asked what color the new building would be.

Glendinning told him that hasn't been decided yet – but definitely not the current blue & white stripe.

Dater asked about the proposed vegetation. Wiegman submitted a landscaping plan.

Sage asked about sidewalks on Main Street.

Wiegman told her that it was not in the plans.

Sage commented that considering the nature of their work, it would be a family friendly gesture to include sidewalks on Main Street.

Wiegman told her that the YMCA does not own any property frontage on Main Street, they only have an easement access. He went on to say they do have in this plan to greatly improve the pedestrian way between GSB School and the YMCA and the majority of the foot traffic comes by way of the field, not Main Street.

Garren asked Dater if there were any size limitations in the Town ordinances that would affect this project.

Dater stated that there really wasn't anything specific – section 12 in the site plan review speaks of Large Scale Development, but that won't all apply to this project. The Board could review that section if they wished.

Garren asked Wiegman about his reference to Phase I.

Wiegman told him that at this point, this was the only phase – there may be other hopes & wishes in the future.

Wiegman told the Board that they will not be near any boundaries with the scope of the project and therefore they request a waiver from a boundary survey.

Wiegman told the Board that they did have letters from lenders that he felt shows financial capacity.

Dater told him that a letter doesn't completely show financial capacity.

Meagan Hamblett, CEO of the YMCA told the Board that they hope to have a financial letter of intent by May 16th that will be more specific.

Dater told Wiegman that the Board will need a letter from GSBSD on the water capacity.

Wiegman told the Board they were still waiting on a letter from the Fire Chief.

Wiegman told the Board that they were not planning any new lighting, just rearranging the poles they have to better cover the parking lot.

Wiegman said they are proposing 100 parking spaces, the ordinance requires them to provide 89.

Cole told Wiegman that the existing parking lot feels very dangerous to pedestrians, the new parking lot really needs to direct pedestrians safely to the entrance.

Wiegman told him that the new parking areas will be separate from the main entrance for just that reason. There will be a specific flow for pick-ups & drop offs.

Garren asked Dater for his opinion on the completeness of the application & submissions.

Dater told him it was quite complete. They are missing:
Letter from Fire Chief
DEP final approval on amended filing
Financial statements proving capacity to complete project
GSBSD letter of capacity

Garren asked the applicant if it will greatly impede they process if the Board doesn't approve until next month.

Glendinning told the Board that the construction schedule is supposed to officially start this month.

On motion Hunt / Sage to approve the applicant's request for waiver from supplying a boundary survey. **VOTE: 5-0 IN FAVOR**

On motion Hunt / Garren to accept the application as complete, pending the receipt of a letter from the Fire Chief, Final approval from DEP on the amending filing, Financial statements, letter from GSBSD. **VOTE: 5-0 IN FAVOR**

On motion Hunt / Garren to approve the application as submitted with the condition that the Board receive; a letter from the Fire Chief, Final DEP approval of the amended filing, financial statements, and a letter from GSBSD. **VOTE: 5-0 IN FAVOR**

D. OTHER

1. QUESTIONS FROM THE PUBLIC.

FREEMAN SUBDIVISION

Damariscotta River Association (DRA) recently purchased the Freeman property that goes from Castner Brook to Oyster Creek, approximately 19 acres. The lot in question is part of an existing, approved subdivision. DRA told the Board that they plan to divide that lot into 2 lots, 1) 9.26 acres in the area of Round Top Farm to retain and create expanded public hiking trails & picnic area; and 2) 9.82 acres containing existing farmhouse & outbuildings to be sold with resource & conservation protections.

Dater told the Board that technically this would be a revised subdivision.

Craib agreed, stating that they were splitting an existing subdivision lot and putting part of it with an adjacent lot not part of original subdivision.

Garren asked Dater what the procedure would be for this.

Dater told him to vote it a complete application and hold a public hearing.

Garren stated that before the Board moved on an amendment, he would like to see the original subdivision plan that's being amended.

Board agreed with Garren.

Item will be placed on the June Agenda as a preliminary review.

HEATER ROAD SUBDIVISION

John Mann was present to update the Board on the progress. He reviewed with the Board the steps so far; March application for 6 lots, Board granted requested waivers, Board voted the application complete pending the Road Association Agreement.

Mann told the Board that the plan has changed some because 2.4 acres of one of the lots has been conveyed to an abutter. He requested to be placed on the June

Planning Board agenda as an amended application with 7 lots, and not have to start the whole process over again.

Dater stated that he believed that would be appropriate since the Board did not act on the approval. He further told Mann that a Road Association Agreement would be vital with 7 lots, Mann agreed with him.

Sandy Day was in the audience and asked for clarification on the location of the subdivision. She reviewed a copy of the new plan.

Dater offered to get sample Road Association agreements to the Board for review prior to the next meeting. Board agreed this might be helpful.

2. HOUSEKEEPING ITEMS

1. Chairman sign IAW's NOD.

Hunt was acting Chair when Inn Along the Way's Notice of Decision was approved so he signed this.

2. Review and approve addendum to IAW's NOD on maximum number of dwellings.

The Board reviewed the addendums. Dater told them it was for documenting procedure, to be included in the file. Garren noted incorrect language, Dater agreed and will make the changes for the Board to review and have the Chairman sign.

On motion Garren / Hunt to approve addendums with changes noted to correct the language. **VOTE: 5-0 IN FAVOR**

3. Sign Abbie Lane Subdivision plan.

The Board signed Mylars and copies of the official subdivision plan that they approved at a previous meeting.

4. Review and possible approve SSHI condition of approval on landscaping plan with neighbor.

Marilee Harris, representing Stepping Stone Housing, Inc. submitted a landscaping plan & agreement for the screening to the abutter, as requested. The agreement stated that SSHI would plant 7 hemlock trees, between 8-10' in height, evenly spaced across the 120-foot span of the abutting property line. SSHI also agreed to remove the mobile home that sits on the property line by September 30, 2018.

The Board reviewed the agreement. Eaton stated that he didn't think it was an unreasonable request, much better than a fence. The Board agreed.

On motion Sage / Hunt to accept the screening plan & agreement as submitted. **VOTE: 5-0 IN FAVOR**

3. PLANNER'S REPORT.

None

E. ADJOURNMENT

On motion Hunt / Garren to adjourn the meeting at 9:30 pm.

VOTE: 4-0 IN FAVOR

Respectfully submitted by:

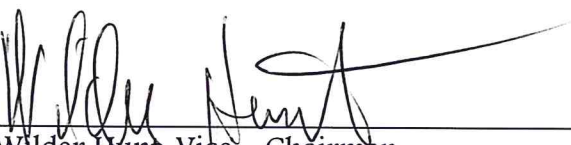


Rebecca J. Bartolotta, Deputy Clerk

We, the undersigned, do hereby approve the minutes of the May 1, 2017 Planning Board meeting:

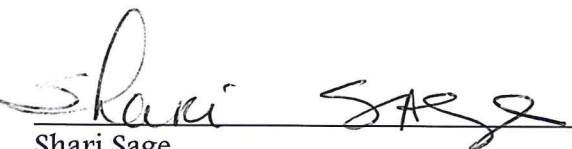


Jonathan Eaton, Chairman



Wilder Hunt, Vice - Chairman

Stephen Cole



Shari Sage

Bruce Garren

Dated: 07/10/2017

GALLAGHER, VILLENEUVE DEGEER PLLC

Jennifer G. Villeneuve, Attorney
PO Box 247 -181 Main St. Damariscotta, ME 04543
p: 207.563.5828 f: 207.563.5819
email jenny@gvdlaw.com

April 25, 2017

ATTORNEY CLIENT COMMUNICATION

Planning Board
Town of Damariscotta
23 School Street
Damariscotta, Maine 04543

RE: April 3 Vote: DG Damariscotta, LLC

Dear Board Members:

As I understand, at a meeting on April 3rd the Planning Board reviewed the Site Plan Application of Damariscotta DG, LLC. Based on my discussions with the Town Planner, it sounds as though the board voted to accept the application as complete (3-0) and also voted to approve the waivers as requested/presented. It then voted 2-1 on the question whether to approve the site plan application with various conditions (state permits, fire approval, town sidewalk easement). At the meeting there were 4 board members in attendance. The Chair was not in attendance at the meeting. The acting Chair (Wilder Hunt) abstained from voting per an unwritten practice of the chair not voting unless required to break a tie.

The Damariscotta Planning Board presently operates under authority granted by the Town Charter, establishing an appointed 5 member Planning Board and the basic jurisdiction of the Board. See Charter Section 4.04(B)(1). The Charter provision does not specify the number of members constituting a quorum or establish voting rules or procedures. Additionally, the Planning Board does not presently have by-laws. Generally, where no specific rule or ordinance exists addressing these issues, the Planning Board can establish its own procedures so long as they do not contradict any other ordinance or law. Although some local Boards may have a rule that an action may pass on the vote of "a majority of those present and voting", in the absence of such a written ordinance or rule, it is appropriate to defer to the general rule as set forth in 1 MRSA Section 71(3). Although I do believe the Planning Board may act/exercise jurisdiction with just 3 members as a quorum, 1 MRSA Section 71(3) and the related cases, as well as parliamentary rules, would indicate that in order for a vote to pass, a majority of the entire board would be required. In this case, that would mean that all 3 acting member at the April meeting would have had to vote in the affirmative for the action item to pass. This rule appears to be the default interpretation when an ordinance or charter is silent on the subject.

James W. Gallagher Jennifer G. Villeneuve Marcia E. DeGeer Timothy J. Kimpton
www.gvdlaw.com

Handwritten signatures:
WW
WW
WW

Although Courts will defer to municipal procedures so long as they are not internally inconsistent or contrary to state law, it appears that the Law Court has inferred, although not directly stated, that a majority of the entire board is the default requirement absent a municipal procedure to the contrary (i.e. majority of those present and voting will pass).

Therefore, it is my opinion that the Board did have a quorum present and acting and therefore could exercise jurisdiction over the application before it. It did have a majority vote (3 affirmative votes) on the complete application issue and the waivers issue. However, it is my opinion that the vote (2-1) on the ultimate site plan approval question did not result in an approval of the site plan. There would have had to be 3 votes in the affirmative to approve the application substantively. The interpretation of the vote as an "approval" was incorrect.

There is significant support in case law for municipal planning boards to correct actions or interpretations. Therefore, it would be my suggestion that the Board inform the applicant via the Town Planner that the application cannot be considered approved due to lack of sufficient votes. The applicant may re-appear before the Board to attempt to garner sufficient votes to obtain Site Plan approval and permitting (with or without conditions). Obviously it would be in the best interest of the applicant to do so as, presently, it does not have approval.

I would suggest that at the May meeting:

- the Board discuss this opinion letter briefly and confirm that the vote on approval of the site plan failed for lack of sufficient votes to pass but that the application was deemed to be complete and the waivers as presented were granted;
- Draft or revise the current draft of the NOD to reflect this;
- As a matter of planning board procedure, I would recommend that the Board discontinue the practice of having the chair abstain from voting as an unwritten policy. The Board should take a vote as to whether to discontinue this practice or not. Ultimately this should be included in any by-laws adopted by the Board. This recommendation is not specific to this particular instance. It is my opinion that it is a general policy that is not particularly helpful. However, the decision is ultimately up to the Board;

The applicant may return to the Board with a revised application in an effort to obtain sufficient votes for an approved site plan. Any future review should be thorough and complete with a public hearing and review of the substantive content of the application under the Site Plan Ordinance. As per your normal procedure, there should be discussion and findings and conclusions as to each applicable provision of the Site Plan Ordinance and votes as to each provision and a final vote to approve or not approve or approve with conditions.

If you have any questions or require further clarification of any of the above, please do not hesitate to contact me.

Sincerely

Jennifer G. Villeneuve

Rebecca Bartolotta

From: Jennifer G. Villeneuve <jenny@gvdlaw.com>
Sent: Tuesday, April 25, 2017 10:57 AM
To: Rebecca Bartolotta
Cc: Anthony Dater; Matt Lutkus
Subject: RE: PB vote on Dollar General

Thanks for the clarification.

Based on this, I would conclude that the first two items passed. The application is deemed complete and the waivers have been approved.

However, the vote to approve the application with conditions failed.

Therefore, I believe the application is still in play with the completeness determination but the applicant will need to return again and there will likely need to be an additional public hearing under the site plan ordinance in order to attempt to obtain sufficient votes for an approved (conditionally or not) site plan.

Thanks,
Jenny

From: Rebecca Bartolotta [mailto:RBartolotta@damariscottame.com]
Sent: Tuesday, April 25, 2017 10:51 AM
To: Jennifer G. Villeneuve
Cc: Anthony Dater; Matt Lutkus
Subject: PB vote on Dollar General

Jenny,

Tony said you were waiting for my confirmation on the actual vote that took place at their April meeting.

They moved/seconded voted 3-0 that the application was complete

They moved/seconded voted 3-0 to approve the waivers as requested/presented

They moved/seconded voted 2-1 (Cole) to approve the application with conditions that the applicant receive and submit to the Board; their DOT, DEP permits, a sidewalk agreement with the Town, and letters from Fire & Police Chief.

Hope it helps! Sorry for the delay it's been a zoo here today!

Rebecca J. Bartolotta
Deputy Tax Collector/Deputy Town Clerk
Town of Damariscotta
21 School Street
Damariscotta, Maine 04543

P: 207-563-5168
F: 207-563-6862
rbartolotta@damariscottame.com

