

Minutes — Bar Harbor Planning Board
Wednesday, August 4, 2021 at 4:00 PM
Council Chambers in the Municipal Building - 93 Cottage Street

Present were Planning Board members Tom St. Germain, Joe Cough, Millard Dority, Ruth Eveland and Elissa Chesler.

Present for town staff were Planning Director Michele Gagnon, Code Enforcement Officer Angela Chamberlain, Deputy Code Enforcement Officer Mike Gurtler and Assistant Planner Steve Fuller. Attorney Tim Pease was present as town attorney.

Also present were Andy Hamilton, Eben Salvatore, Perry Moore and Patrick Lyons (all for BHAPTS, LLC), and Mike Rogers for Island Housing Trust. Attorney Arthur Greif and abutter Elizabeth Mills were both present via Zoom, for the BHAPTS, LLC agenda item.

I. CALL TO ORDER

Mr. St. Germain called the meeting to order at approximately 4:00 PM.

II. ADOPTION OF THE AGENDA

At the request of applicant for Jones Marsh, Mike Rogers, **Mr. Dority moved to adopt the agenda with the amendment that the order of 7A and 7B, as originally presented, be reversed. Mr. Cough seconded, and the motion carried 5-0.**

III. EXCUSED ABSENCES

As all five Planning Board members were present, there were no absences to excuse.

IV. PUBLIC COMMENT PERIOD

Mr. St. Germain opened the public comment period at 4:02 PM. As no one came forward to speak, the comment period was subsequently closed.

V. APPROVAL OF MINUTES

a. July 7, 2021

Mr. Dority suggested a change on page 12 of the draft minutes under Peter Jeffrey's comments, changing the word "ballast" to "bollards" which he believed to be correct. **Mr. Cough moved to approve the minutes with Mr. Dority's suggested change. Mr. Dority seconded. The motion carried 3-0, with Ms. Eveland and Ms. Chesler abstaining, as they were not members of the board nor present at that meeting when it occurred.**

VI. ELECTION OF OFFICERS

a. Chairman

Mr. Cough nominated Mr. St. Germain. Mr. Dority seconded. There were no other nominations. The motion for Mr. St. Germain then carried, 5-0.

b. Vice-chairman

Mr. Dority nominated Mr. Cough. Chairman St. Germain seconded. There were no other nominations. The motion for Mr. Cough then carried, 5-0.

c. Secretary

Chairman St. Germain nominated Mr. Dority. Vice-chairman Cough seconded. There were no other nominations. The motion for Mr. Dority then carried, 5-0.

VII. REGULAR BUSINESS

- a. **Amendment to decision for PUD-2021-02, Jones Marsh Affordable Housing, matching modification of standards (relating to setbacks) in decision to those listed in the application and changing the date by which plan must be submitted for signing**

Mike Rogers explained why the change was necessary, noting there had been a conflation of numbers in the written decision at the July 7, 2021 meeting relating to setback distances. The change was discussed during the meeting but there was a typing error. The proposed motion before the board at this meeting (August 4) also included revised information on the timeframe for submitting for signing, said Planning Director Gagnon. The board had no questions and there was no discussion.

Ms. Eveland moved to amend PUD-2021-02, Jones Marsh Affordable Housing decision, dated July 7, 2021 to set the date of plan submission to the Planning Director to August 21, 2021 instead of August 3,[2021] for signing by the Planning Board at its September 1, 2021 [meeting] instead of the August 4, 2021 meeting, consistent with the §121-75 A., and to allow for a minimum rear setback of 20 feet and side setback of 10 feet consistent with the application per the amendment to the July 7, 2021 decision for the PUD-2021-01 memorandum from the Planning Director dated July 27, 2021.

Vice-chairman Cough seconded with one minor change, that the section referenced (121-75 A.) should be §125-75 A. Ms. Eveland was amenable to that correction. Chair St. Germain asked for clarification from staff and noted that the PUD number is PUD-2021-01 rather than PUD-2021-02. After brief discussion, there was agreement that the correct number was PUD-2021-01. Ms. Eveland said she wished to change the initial reference in her motion to PUD-2021-01, and Vice-chairman Cough was agreeable to that change. The motion, as corrected, then carried unanimously (5-0).

- b. **Compliance Review for PUD-2017-02 (limited to §125-67 X. of the Bar Harbor Land Use Ordinance, per Business and Consumer Docket #BCD-APP-2021-05)**
Project Location: 25 West Street Extension (Tax Map 103, Lots 48 and 49) encompassing 1.54 acres of land in the Village Residential district.
Owner: BHAPTS, LLC, 1000 Market Street, Building One, Suite 300, Portsmouth, NH 03801
Application: To convert four existing buildings on the site from 16 dwelling units to eight dwelling units, and to add three new buildings with eight total dwelling units in those, for a total of seven buildings and 16 dwelling units.

Chairman St. Germain opened with a review of procedural matters. He noted that the board was asked to have representatives from the abutters joining via Zoom, acknowledging their presence on the wall-mounted screen. He asked for the board's opinion on the matter, and noted the board did have an attorney (Attorney Pease) present to advise them.

Vice-chairman Cough said his understanding of both Town Council policy and state guidelines dictated that until the board specifically adopted a policy on it the board could not hold a mixed-medium (in-person and Zoom) meeting with regard to voting. He said in his mind, that also carried over to input/participation. He said he felt the board should discuss and decide whether to allow any public input on this particular matter.

Chairman St. Germain said Vice-chairman Cough had raised a relevant point regarding participation. Mr. Dority said his understanding was that Attorney Greif (attorney for Ms. Mills, both present via Zoom) was not considered public input so much as he was there to speak for the opposing side in this matter. Chairman St. Germain noted a public hearing had been held, and subsequently closed, when this matter was last before the board.

Vice-chairman Cough asked whether the new members felt they were up to speed to participate in this review. Ms. Eveland said she had read through the material provided to her but had not watched video recordings of the prior meetings. She said she felt comfortable making a decision on the limited nature of the request before the board but did not feel comfortable going beyond that. Ms. Chesler said she, too, had read the information provided to the board and was prepared to discuss the issue.

Mr. Dority noted he had received an email from Sargent M. McCormick Collier (who was present in the audience at the meeting) suggesting that Mr. Dority recuse himself from this agenda item. The suggestion was made due to Mr. Dority's affiliation with College of the Atlantic (COA), where he is Director of Campus Planning, Buildings and Public Safety, and COA's ownership of properties in the area. Mr. Dority noted that subsequent to that email, he had seen an email go out to the whole Planning Board from Mr. Collier requesting two other members to recuse themselves. Mr. Dority asked for the input from the board, and Chairman St. Germain sought guidance from Attorney Pease. Chairman St. Germain said he thought the recusal requests should be dealt with individually.

Attorney Pease said the new members should feel comfortable participating, given their statements they had reviewed and read the relevant materials. He then addressed the question of one of the parties being able to participate electronically by video. Post-COVID, Attorney Pease explained, there is an expectation that meetings can move back in-person or that each board make a policy regarding remote participation. He said it was in flux at the moment as boards go through the process. The board should adopt a clear policy, Attorney Pease advised. In this specific case, he continued, one of the parties indicated ahead of time a desire to participate electronically (remotely). [*Note: that party was Attorney Grief, who said in advance he would be out of town the date of the meeting.*] Attorney Pease said his understanding was that that party was given the green light to do so, and that as such, that would be OK in this case. He said while the board is in flux with developing a policy, it should be cognizant of fairness and due process and not exclude anyone who came to the meeting believing they could participate remotely.

Vice-chair Cough asked how that had happened, stating it was a chairman and board prerogative whether and how to allow public input.

The issue Mr. Dority brought up, said Vice-chair Cough, was a possible conflict the board should act upon one way or another. Vice-chair Cough said he'd been "politely approached" by a person who suggested Vice-chair Cough recuse himself because of a neighborly relationship with him

(the requester of the recusal). [Note: that requester was the same individual who had made the request of Mr. Dority, Sargent M. McCormick Collier]. Vice-chair Cough elaborated.

Chair St. Germain said he intended to address that as another discussion, but asked for clarification on the status of Attorney Grief and whether allowing him to comment would be a “de-facto public hearing.” Attorney Pease said it was not a surprise that folks were in the room and also on Zoom in relation to the matter before the board. He said he understood the decision had been made to invite parties from both sides of the matter to attend the meeting and make comment. He said he agreed that they are parties to the case, and that as such, it was not simply a matter of public comment. “A higher level of participation is expected and entitled,” he concluded.

Chair St. Germain suggested laying out ground rules regarding presentation and rebuttal. He said he did not feel it should be opened for a public hearing, as one had been previously held and closed. Discussion should be limited to project representatives and abutters, said Chair St. Germain. Mr. Dority agreed, and Ms. Eveland said it seemed reasonable. She said it was a “narrow discussion” with a “specific legal point to be dealt with,” and that hearing from the legal representatives on each side would be appropriate. Mr. Dority said he was uncomfortable discussing the agenda item any further until the question of his possible recusal was settled.

Chair St. Germain asked whether a motion was needed to keep going. Vice-chair Cough said a motion was needed to open and close a public hearing but not in the absence of one. Attorney Pease agreed and said he did not perceive it as reopening a public hearing.

Members of the audience who were holding signs began to speak. Chair St. Germain said he would not tolerate any outbursts and that the signs had been noted and were quite a bit of a distraction. Mr. Collier, who was standing with a sign and refused to sit, said he understood but added, “We are tired.”

Chair St. Germain said the board would proceed without a public hearing. Chair St. Germain said he had also been asked to recuse himself. Mr. Dority, who is employed by COA, explained some of the history of Acadia Landing, which is owned by COA. Mr. Dority said he had spoken with Mr. Collier several times about that property but that he couldn’t see any way in which it was a conflict of interest for him to participate in the discussion. He noted that he had no fiduciary interest in the Acadia Lane right-of-way.

Vice-chair Cough felt it was a narrow issue and that Mr. Dority did not have a conflict.

Vice-chair Cough moved that Member Dority did not have a conflict. Chair St. Germain seconded. There was chattering in the audience from Mr. Collier. Chair St. Germain said to Mr. Collier that outbursts would not be tolerated and that he would be asked to leave after another incident. **The motion carried 4-0, with Mr. Dority not voting.**

Vice-chair Cough explained that he was accused of having a neighborly relationship. He explained that he has a home in a different zone than the opponent’s property. He said he did not think he had a conflict.

Chair St. Germain moved that Vice-chair Cough did not have a conflict; Mr. Dority seconded. The motion carried 4-0, with Vice-chair Cough not voting.

Chair St. Germain said he'd been notified via email of two possible conflicts, the first being that his restaurant was financially dependent on the applicant's businesses. The suggestion came with no evidence, said Chair St. Germain, adding that he owns all of the stock in his business. He said he does not have any financial relationships with Ocean Properties or anyone associated with them. The second possible conflict was that Chair St. Germain is a board member of a local nonprofit that refused to write a letter of support. Chair St. Germain said he did not know of a request for such a letter, and said even if there was a request, he was not sure that it would have represented a conflict.

Vice-chair Cough moved that Chair St. Germain did not have a conflict. Mr. Dority seconded. Ms. Eveland noted that she was part of the Council that developed part of the Ethics Ordinance. This is a small town, she said, where relationships can be intertwined at many levels. The intent of the ordinance was to disclose potential conflicts and then determine whether those would affect decision making. Both of these conflicts, said Ms. Eveland, are awfully tenuous and do not speak to specific interests that are mentioned in the ordinance around the concept of conflict of interest. Vice-chair Cough mentioned that he was a part of that Council as well. **The motion carried 4-0, with Chair St. Germain not voting.**

Chair St. Germain asked for suggestions on ground rules for discussion. The information provided by the involved attorneys, said Vice-chair Cough, should "substantially say what they came to say." He suggested limiting comments to five minutes for the applicant and the applicant's attorney to start, then three minutes for anything else. Mr. Dority suggested increasing the time to 10 and six minutes, respectively, instead.

Chair St. Germain asked whether equal time should be given to both the applicant and abutter. Attorney Pease said both sides were given the opportunity to provide written comments. He suggested giving equal time to both sides. He cautioned that this is a narrow issue and that the longer attorneys are given to speak, with respect to his colleagues, the more they may stray from the issue.

Chair St. Germain laid out the suggested format, with 10 minutes allotted to each side for arguments to start, and followed by six minutes for rebuttals. Vice-chair Cough asked whether the board would be hearing additional public comments. Chair St. Germain's understanding was that the public hearing was closed. There was some discussion around technical issues. Chair St. Germain asked if there were any questions on the format. There were none. Chair St. Germain invited representatives to speak.

Attorney Hamilton began the discussion. He turned the board's attention to page 21 of the court's order dated June 7, 2021. In conclusion, the court stated, the court affirmed the Planning Board's February 6, 2019 and May 8, 2020 decisions on all but one issue: Undue adverse effect on historic sites in the area, including specifically on the adjacent trust property. The matter was remanded to the Planning Board to make a finding on that one issue consistent with this order.

Attorney Hamilton read part of the remarks in the record. He noted that, according to the minutes of July 7, 2021, Planning Director Gagnon said she would seek the advice of the town's attorney as to how to proceed. Attorney Hamilton said Mr. Fuller's memo was clear that no new evidence was to be introduced. New evidence would be beyond the scope of the directions given by the town attorney and staff. He said the Planning Board had a pretty decent run at the finding, even on

the impact of historic sites because it wasn't clear that "in the area," which related to natural areas, was meant to describe historic sites. There was a reasonable interpretation by the Planning Board, said Attorney Hamilton, that the board is not looking at all historic sites in the area but historic sites on the property. The judge questioned historic sites on the property, said Attorney Hamilton. The farmhouse and garden are the only two features considered historic sites in the opinion of Maine Historic Preservation Commission. The farm building and gardens are what's under discussion, said Attorney Hamilton. He noted that there had been a recent demonstration of profanity at two of his client's locations. He objected to both. Attorney Hamilton said looking through his client's property he could not see the gardens or vegetation. It's 240 feet from that property line to the closest point of the garden or the house, said Attorney Hamilton, two-third of a football field. The property also has screening on both ends. "What does the standard 'undue adverse effect on historic sites' mean?" he asked. They won't see conditions on this property from their property, said Attorney Hamilton. They have not brought evidence or testimony from experts indicating that the redevelopment would affect the views. The test is not how the occupants see it, but whether it will have undue adverse impact on historic sites.

Attorney Hamilton referenced the Hancock Building in Boston, which he said damaged an historic church and was considered an undue adverse effect.

Attorney Hamilton pointed to pages 4-5 of the Eaton Peabody memo addressed to the board and dated July 28, 2021. Attachments A-L provide 11 documentary exhibits from the record, said Attorney Hamilton, adding that the other side had not presented documentary evidence. He highlighted several points on the memo.

Mr. Moore said one issue the judge mentioned was whether new evidence would be presented. "I don't believe there is a need for new evidence," said Mr. Moore. There have been ample opportunities to demonstrate undue effect, said Attorney Hamilton, which must physically alter the historic item. He discussed screening and the leafing out of trees in the summer. In his own mind, said Mr. Moore, the record is complete. The view has been screened for light and noise and an erosion issue has been dealt with.

Attorney Greif spoke next. He was not aware until the hearing that anyone had raised the question of a conflict of interest of board members. He took no part in that. He took no part in profanities and said that was outside the record. This case is not about individual people, said Attorney Greif, but about a unique historic property and garden. He described the history of the property, which is a "rare survivor" of the 1947 fire, he said. The farmhouse is iconic and people stop and take pictures of it, he said. Emera Maine, when renovating the substation on Prospect Street, blended it with "this unique historic property." The place has been a gathering for visits from universities and corporations, he said.

There is not a thick growth of trees on the property, said Attorney Greif. Two-hundred and forty feet is 80 yards, less than a 100-yard dash, which Chair St. Germain could cover in less than 10 seconds, he said. The garden hosts between 1,500 and 3,000 visitors every three years in June who have an enormous economic impact on the community. The garden has been the source of an evening fundraiser that raised \$1 million for a local hospital. Attorney Greif said none of the testimony provided had ever been rebutted. There was testimony that noise from crews getting off shift was problematic. The suggestion that noise be controlled by an on-site security service was

rejected, he said. The letter from the Maine Historic Preservation Commission hoped that Ms. Mills and BHAPTS, LLC could work out issues regarding the viewshed.

Since that, said Attorney Greif, the buildings had been moved to Ms. Mills' back lot. The building design now includes an occupied attic, when it was once proposed to be unoccupied. The effect on the viewshed will be pronounced, he said. When you're holding an evening fundraiser you don't need to have the lights coming on from the second and third story which are only protected by a 6-foot fence, he said. The building is 35.9 feet high but sits higher than the property line, almost 46 feet, he said, protected by a 6-foot stockade fence.

Having the viewshed for this iconic building is critical, he said. He said testimony regarding the adverse effects on the viewshed, on light pollution and on noise were unrebutted. A fence would do nothing to prevent light coming in at night. There was no rebuttal to evidence of trespassing and liquor bottles found on Ms. Mills' property, Attorney Greif claimed.

Attorney Greif said the question of what is undue is something that could otherwise be avoided. These could be avoided if Ms. Mills' complaints were taken seriously, he said. Instead, the response has been to say we will take care of invasive species on our own land. There is a common law duty to avoid surface runoff to a neighbor's property, he said. The ultimate burden of proof lies with BHAPTS, LLC, he said, which has the burden to demonstrate there will be no adverse effect. If there is a tie, they lose, said Attorney Greif.

Mr. Moore gave a rebuttal and said that Attorney Greif was factually incorrect on several issues. Mr. Moore pointed to Exhibit 9.1 of the letter sent to the State Historic Preservation Office. There were three buildings on the property line, said Mr. Moore. After the applicant received tacit approval from the board in December 2019 they met with Ms. Mills on site the next morning, who requested the applicant move one of the buildings. They moved it at her request, said Mr. Moore. Compare that to Exhibit 9.1.2, where there are only two buildings on the property line. As for screening, said Mr. Moore, §125-67 H. is the section that's argued and has been resolved and that dealt with all of the visual impacts and included lighting. "That's not on the table." Noise is addressed by the noise ordinance, said Mr. Moore. The claims regarding trash and noise were not corroborated by the police, he said, and if it did happen, it was dealt with.

Attorney Hamilton pointed to pages 8-11 of the Judge's decision and said that what Mr. Moore said is absolutely the case. Noise, buffering and open space issues were dealt with. The Court found against Attorney Greif. He wants to reargue those points, said Attorney Hamilton, who said it would be inappropriate to do so. Remember that those issues have been addressed and the Judge upheld the board's decision, said Attorney Hamilton. The Court found for the board on the buffering standard, he said. Mr. Moore interjected and described the buffering.

Attorney Hamilton continued. Having no effect on views cannot be the standard, he said. Ms. Mills never obtained a view easement. The standard is undue adverse impact. We're not saying there's no chance we'll have any effect on the garden or building, said Attorney Hamilton. But the test is not what the occupants see. There's no negative view easement. There will not be excessive unreasonable adverse effects. The Planning Director and Public Works Director both participated in ensuring the applicant mitigated for those issues. Two-hundred and forty feet is a long way, said Attorney Hamilton, however long it takes to run. If Attorney Greif is correct, the Wonder View

Inn, directly across the street, would have a more excessive impact on Ms. Mills' property. Although Attorney Greif said it's not personal, it has become personal, said Attorney Hamilton.

We're subject to the standards of the ordinance and only the standards of the ordinance, said Attorney Hamilton. This is in the nature of a housekeeping adjustment. The other issues were decided by the Court.

Mr. Salvatore said he protested some of the falsehoods and dishonest allegations made about employees. That's not an accurate representation of our workers, he said, adding that he was fairly aggressive in my rebuttal and the comments are in the records. The fact that they were from Jamaica, he said, that was the one that was over the top.

Mr Greif gave his rebuttal. He said the farmhouse property refers to the entire property, not just the building itself. It includes very few trees. There is a clear view of the development from the farmhouse, he said. The Judge did not address the issue of noise in his decision, he said. The issue of buffering was only in the context of PUD process. The contention that the buffering was adequate for the historic preservation aspect is not accurate, he said. The baseline of the buildings is higher than the back line of the farmhouse, he said.

Attorney Greif continued, stating Mr. Moore had a selective memory regarding conversations with Ms. Mills. Mr. Salvatore is not competent to say whether there is late night noise, said Attorney Greif, as he does not live there. The question is, could these adverse effects be controlled? Of course, they could, said Attorney Greif. He made some suggestions. Attorney Greif then raised the question as to what was sent to the Maine Historic Preservation Commission on September 6, 2016. The Commission did not give its blessing, he said, but advised working out differences with Ms. Mills. There's no question these are adverse effects because most of them could have been avoided, he said. He thanked the Planning Board for its time. This is not personal for me but is about a unique historic property, said Attorney Greif.

Chair St. Germain resumed control of the meeting at 5:12 PM. Vice-chair Cough asked whether the proposed motion had the stamp of an attorney. Attorney Pease said he'd seen it but that his office had not participated in its drafting. Was it run by your staff? asked Vice-chair Cough. Attorney Pease said the board was given two choices by the Judge: take new evidence or decide whether the record was sufficient and that no new evidence was necessary. The board should decide that first, he said. There is a proposed decision, which is fairly common, he said.

Attorney Pease said that, reading the decision, he wondered whether there was enough reference to the evidence the board considered for the particular finding. It would be more helpful and foolproof for the board to identify information in the record supporting its conclusion that a particular standard has been met or not met.

Ms. Chesler asked whether there had been a site visit to look at the view from the garden, rather than the view of it. She cited the example of carriage roads, which include the view from the road as part of the design of the road. What is the nature of this garden - is the vista outside part of the garden? she asked.

Chair St. Germain said he took her point but that typically site visits are to the site and not the other way around. He recalled an example of when balloons are floated for cell towers. Otherwise

site visits are just site visits. Recently, the board was suggested not to park on neighbors' private roads, as it was suggested the site visit be confined to the site. Vice-chair Cough agreed.

Mr. Dority moved that the board had enough information to make a decision. Vice-chair Cough seconded. Chair St. Germain agreed there was adequate information in front of the board. **The motion carried 4-0; there was a question regarding Ms. Chesler's vote.** Ms. Chesler felt there the information lacking is potentially the visual impact from the garden. We can see it's a formal garden she said, and there is aerial photography. Given the fact there is aerial photography, she said, there is enough information. **Ms. Chesler voted in favor, making the vote 5-0.**

Mr. Dority said he found the issue "the most confusing." This was not his first stint on the board, he said, and recalled earlier viewshed issues. He referenced the example of the Hancock Building in Boston. "I'm confused about being so far away — how could it possibly have an adverse effect on the garden?"

What's the upper limit? asked Vice-chair Cough. Could there have been an argument about the substation, or the moose next door? What is the range that we can effect and justify in our ordinance? Clearly there's an upper limit somewhere, he said, and it's not, in my view, that far away.

Vice-chair Cough referred to Attorney Pease's suggestion about the ordinance. He said §125-67 X. should be referenced in the motion and asked if that was what Attorney Pease was suggesting.

Attorney Pease said it's a judgement call but that should be referenced in the motion, as well as what the board considers being historic sites and what are the facts around that distance.

Chair St. Germain noted that §125-67 X. talks about aesthetic areas and undue adverse effects of the aesthetics, not what Attorney Greif referenced (lighting, noise or alleged trespass). "I found the argument by the applicant tonight to satisfy the requirements of §125-67 X."

Ms. Eveland had attended an event at the garden years ago, which is a formal garden space. It's "technically possible" you might be able to see something if you're standing on the site, she said, but "we're still in the downtown Bar Harbor. Any property is going to have something next to it." She felt there was space between the critical part of the property. "From my point of view there's adequate attention been paid to the process that got us here," she said.

Mr. Dority agreed. A "garden is a pretty inward looking space," he said. Ms. Eveland said that, to Ms. Chesler's point, some gardens are designed for the outward view. This is not that kind of garden, she said. She said she has lived on a property with the Beatrix Farrand garden. It looks like this garden was meant to be appreciated from within, said Ms. Chesler.

Vice-chair Cough moved per the Supplemental Decision to the Planning Board decisions on PUD-2017-02 (dated January 16, 2019 and signed February 6, 2019 and dated April 29, 2020 and signed May 8, 2020), dated August 4, 2021, that based on the documents received on July 28, 2021 that include, but are not limited to, the 240-foot distance between the proposed buildings and the garden, and the evidence that shows a two-foot berm and six-foot fence on top, and the photographs showing the view from the Mills property looking back at the property with leaves off from evidence from Mr. Moore, and Attachment A Exhibit 9M, and

the evidence in the record, and accepting the work of the professionals who prepared the documents and evidence, at a meeting on August 4, 2021, the Board finds that in satisfaction of the requirements of Section 125-67 X. of the Bar Harbor Land Use Ordinance, the proposed development — to convert four existing buildings on the site from 16 dwelling units to eight dwelling units, and to add three new buildings with eight total dwelling units in those, for a total of seven buildings and 16 dwelling units — will not have an undue adverse effect on historic sites in the area, including specifically on the adjacent Trust [Mills] property. Mr. Dority seconded. Chair St. Germain opened the floor for board discussion. [Mr. Collier was escorted from the audience and out of the meeting after being disruptive and using profanities.] Mr. Dority added the language “the 240-foot distance between the proposed buildings and the garden, and the evidence that shows a two-foot berm and six-foot fence on top, and the photographs” as shown in the above motion. **Chair St. Germain called the vote. The motion carried, 5-0.**

Mr. Moore commented that the size of the lot written as 1.54 acres, is incorrect. It should be 1.96 acres, he said. Planning Director Gagnon said she would check; sometimes there are discrepancies between the survey and tax records. [*Note: A check of town records shows the two parcels which constitute the subject property have a total combined acreage of 1.54 acres.*]

VIII. OTHER BUSINESS

- a. Discuss exempting roof top parking from height requirement (request of Chair St. Germain)

Chair St. Germain introduced the item and noted it was an item he had brought up for discussion before. He said he wondered if it could be included in a future round of Land Use Ordinance amendments. He said there are exemptions to height requirements in the LUO, he said. He said the idea of rooftop parking had been suggested to him by someone else but said he was indifferent to the idea personally. He said the Planning Board had brought up good suggestions about this idea in the past, including that any use of the provision would be subject to the Design Review Board.

Ms. Eveland asked if there were any plans for rooftop parking that he knew of. Chair St. Germain said it was a suggestion made to him and that it would be almost certainly applicable only to new development. It would not be practical for renovation projects as it is quite expensive, he said.

Ms. Chesler asked whether this kind of parking would be feasible within the ordinance. There was some discussion. Ms. Eveland recalled previous discussions around height and confirmed that Chair St. Germain was suggesting allowing the full number of stories allowed under the ordinance, plus parking. He said yes, but said he hadn't thought about it for a few months.

- b. Next three months - clean up some of the long-standing errors, omissions, formatting issues in the Land Use Ordinance; and finalize Chapter 31 Boards and Committees and Planning Board bylaws

Chair St. Germain introduced the item and said §125-9 could use some reordering and should be a priority. He also noted there was mention of how other bodies (Design Review Board, Board of Appeals) could bring forward amendments. Chair St. Germain mentioned a section not on the list, §125-103, Administrative Appeals, noting that an applicant filing an appeal must produce and/or obtain a written transcript. The town is spending the money for a video record (Town Hall

Streams), said Chair St. Germain, and a written transcript can cost thousands of dollars. Vice-chair Cough added that a transcript provides an antiseptic record, while a video shows inflection.

Planning Director Gagnon said that could be a hurdle in certain cases, due to the cost. Planning Director Gagnon reviewed a document titled “Sections of the Bar Harbor Land Use Ordinance That Could Use Further Consideration” dated August 4, 2021. *[Note: that document is appended to these minutes for ease of reference, reflecting changes/additions made during this meeting.]* She went through each item, noting that some are lower-hanging fruit and some are higher priority than others.

A – Planning Director Gagnon explained that when the Town Charter changed, it allowed for minor, non-substantive amendments that would go through a shorter process than standard Land Use Ordinance amendments (one which would not require a vote at town meeting). There is no provision in the Land Use Ordinance for when such a Council-approved change would become effective, she said. She said this change itself might be able to go through that new process.

B – Planning Director Gagnon said staff would like to get rid of this requirement as staff do not do that as a matter of present practice. She said staff at the Registry of Deeds office in Ellsworth do not want the document, either (the Land Use Ordinance). She said staff would continue to file copies with the Town Clerk’s office, as is done now, as it is a repository for such records.

C – Regarding amendments, Planning Director Gagnon said there was a lot that could be done to make it easier for the board, staff and the public to understand how that process functions.

D – This is a “big thing that we think that needs attention,” said Planning Director Gagnon. There are 40 zoning districts in Bar Harbor, which is “somewhat excessive.” They are described and organized in an inconsistent manner, she said, in the Land Use Ordinance. Overhauling and standardizing how the districts and their respective requirements are formatted would help comparing zones in relation to revising the town’s Comprehensive Plan as well, she said.

E – There should be one standard way to notify abutters about development projects as soon as possible, said Planning Director Gagnon. She said it is “all over the place” right now. She said people want to be notified as soon as possible, and said there is a lot of room for improvement.

F – This proposed change would mirror in writing what is already done in practice, said Planning Director Gagnon.

G – Planning Director Gagnon noted how the need for housing has been discussed, and how the town only really has jurisdiction over 20 square miles of the total land within its borders (due to the National Park, and also large areas of wetlands where nothing will be able to be built). She said that land that is developable needs to be used in a judicious manner. She said asking for a double-setback is excessive.

H – Code Enforcement Officer Chamberlain explained why this is a problem, how the front setback is measured from different places in different districts. She said this could wait until an overall review of the districts and the dimensional standards within each one. “It is something that it would be nice to be consistent,” she said, “that it’s measured the same everywhere.”

I – Planning Director Gagnon said she just wanted to make a note that this is an issue. She said looking at actual changes to be made could probably wait until a new comp plan is in place.

J – Floor Area Ratio is something usually applied on an individual lot area, Planning Director Gagnon said. In Bar Harbor, however, it has been applied across a zoning district. It can be manipulated so easily, said Code Enforcement Officer Chamberlain: “It’s all over the place, it’s crazy.”

K – [Note: the reference in the document should be 125-67 D., and not 125-22 B. as was shown.] Code Enforcement Officer Chamberlain said this was possibly an error that was compounded by the Bracale lawsuit, which brought a lot of information back into the Land Use Ordinance that had been intentionally removed. She said that created a mish-mash of uses and standards.

L – There should possibly be parking requirements for restaurants, said Code Enforcement Officer Chamberlain. “That would be a popular one,” quipped Chair St. Germain.

M – Planning Director Gagnon said one of the goals is for the town to eventually have a smaller number of zoning districts.

N – Planning Director Gagnon outlined a vision where PUD-V would be more of a project served by water and sewer while PUD-O would be everything else. Although retaining open space is a good goal, and should remain, affordable housing should be the ultimate goal.

O – Planning Director Gagnon said staff has had requests from businesses to do such projects in districts where the uses are not presently allowed.

P – The town’s shoreland zoning is presently “grossly not in compliance” with state law, said Planning Director Gagnon. Revising it would be a big undertaking.

Q – Similar to B, Planning Director Gagnon said the Registry of Deeds office does not want Mylar copies, which are both obsolete and expensive.

R – Code Enforcement Officer Chamberlain explained conflicts between language relating to setbacks for roads and setbacks for driveways. “There are very different requirements for those two,” she said. She explained how the definitions can apply in different circumstances. She said the goal would be to make it very clear what the standards are in each case. Applicants aren’t able to maximize return on the number of dwelling units on a property because dimensional requirements are so cumbersome and complex, said Planning Director Gagnon.

S – This is not a pressing issue but the language in the Land Use Ordinance at present is “definitely outdated,” said Planning Director Gagnon.

T – Planning Director Gagnon said that prior to coming to Bar Harbor, she had never heard of a community asking for nitrate calculations. She said she was not saying it wasn’t an important issue, but rather, if the intent is to keep this requirement to understand why, what it means and how it is applied.

Vice-chairman Cough chimed in: “If the goal is to develop or bring development in, these expenses kill them.” Planning Director Gagnon said septic systems have improved in recent decades, and that there has to be recognition of that. She said the importance of wetland complexes needs to be recognized, but added, “it does not mean we have to be restrictive or almost injurious.” That part of the ordinance is a big unknown and a big red flag, she said.

U – There are too many types of lodging uses, said Planning Director Gagnon., describing it as a bit of a mess. “We can do better for ourselves,” she said.

V – It’s not helpful, said Planning Director Gagnon, if there is a reference to another section of the Land Use Ordinance that no longer exists or has been moved. She said a disclaimer about cross-references could also be added to the beginning of the ordinance, as a precaution.

W — The Design Review Board has asked staff to look at shifting the overlay district from one tied to zoning districts to instead one that is tied to road frontage. She said staff will pursue that.

Planning Director Gagnon said the board is not here to decide on this tonight, it’s just to bring it up. She brought up the consideration of a 7-member board. “That’s something you may want to consider.”

Chair St. Germain asked if there were questions. Vice-chair Cough suggested being flexible about the number of paper copies applicant have to submit. Chair St. Germain said digital transmission is “a great idea.” He asked if there would be a way to notify abutters digitally.

Vice-chair Cough said the Council is looking at remote participation meeting option. He said he assumed the Planning Board would be allowed to make its own decision, he said, but the board should be prepared to weigh in so there’s little lag between the board and Council policies in the event they differ.

Planning Director Gagnon suggested that packages could be submitted electronically and that members be given a computer device (but staff could still make paper copies of plans available). Many municipalities do this, she said. Board members shouldn’t be expected to have their own computer, she said. Making several paper copies are expensive, she said: “It is sometimes a waste of money for the applicant.” This seems normal now after COVID, said Chair St. Germain. This would likely be a cost savings in the long run, said Mr. Dority. Ms. Eveland said that would be a better way of managing information.

Chair St. Germain asked about item D. Article III, Land Use Activities and Standards. Has there been an attempt to do that before? he asked. Planning Director Gagnon made a graphic with roughly half the districts, she said. It’s not complete, though. Is a template possible? asked Chair St. Germain, given the way the allowed uses are listed. We’ll find a way, said Planning Director Gagnon.

Chair St. Germain asked about item K. (parking for lodging). Should that be in reference to §125-67? Yes, said Planning Director Gagnon. The big one, he said, might be N., PUDs. It should build in incentives for people to do it, rather than have people dreading it. We created the concept with the idea it would be desirable, said Ms. Eveland. It doesn’t match the terrain, said Vice-chair Cough.

Regarding item A (effective date for minor amendments), Chair St. Germain asked whether there would be a way to do small ordinance changes. Vice-chair Cough said he was “shocked” by Town Attorney Ed Bearor’s earlier interpretation of what is substantive/not. There was a discussion on the process.

There was a discussion on PUD. Ms. Eveland asked if there were places in town “ripe” for PUD-V. Any subdivision should attract them, said Planning Director Gagnon. The idea is to give them a reason to pay the same amount of money for their infrastructure but get more return because they’ll get more lots. It doesn’t have to be complicated, she said. Vice-chair Cough said he wanted to do a PUD-V but with 200 feet of road frontage “you’re screwed.” “It’s a really hard thing to accomplish,” he said. Creating a variety of housing options is a “really critical piece” of this, said Ms. Eveland.

Chair St. Germain asked about the definition of affordable housing and working on that. The way it’s defined now is “inconsistent” with today’s prices. Is it affordable housing or housing affordability? asked Planning Director Gagnon. It’s housing at all price points. The board should first identify goals and priorities then figure out how to accomplish it. Ms. Eveland said many people have expressed a desire to create a “toy village,” that’s not a real working community. “That ignores the reality of people who are living and working in the community. I think there’s a balance,” she said. Consolidating and putting more housing is necessary. Five acres minimum area per family is “zoning by money,” said Planning Director Gagnon. Lowering dimensional requirements doesn’t mean someone can’t buy five acres. There’s no maximum lot size. Mr. Dority brought up cluster development. That was the whole emphasis, protect open space. Planning Director Gagnon said cluster housing can be both. Fragmentation of habitat is a huge hurdle and a real issue, she said. It’s not a good thing.

IX. BOARD MEMBER COMMENTS AND SUGGESTIONS FOR THE NEXT AGENDA

Planning Director Gagnon asked whether the board would prefer workshops or meetings to discuss the issues. Chair St. Germain was in favor of the workshop format, as was Ms. Eveland.

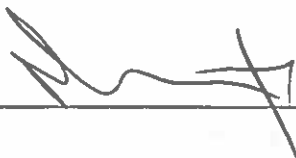
X. REVIEW OF PENDING PLANNING BOARD PROJECTS

There was a discussion of the Maller project (Harbor Lights in Hulls Cove). The next step is completeness review, said Planning Director Gagnon.

XI. ADJOURNMENT

At 6:26 PM, Vice-chair Cough moved to adjourn the meeting. Mr. Dority seconded. The motion carried, 5-0.

Minutes approved by the Bar Harbor Planning Board on September 29, 2021:

 10.1.21

Date Millard Dority
Secretary, Bar Harbor Planning Board

(please see following two pages for document referenced near the top of page 11)

**Sections of the Bar Harbor Land Use Ordinance
that could use further consideration**
(this is not an exhaustive list, nor is it in priority order)

- A. **125-8A** - Consider providing an effective date for a minor amendment (one adopted by Town Council instead of by town meeting, per recent changes to the charter)
- B. **125 – 8B** - Consider deleting the requirement to record the LUO at the registry of deeds, as we do not do that. The Town Clerk’s office serves as the repository of such documents.
- C. **125-9 Amendments** – Provide a path forward for the DRB and BOA to submit amendments, review how the Town Council brings amendments to the PB and bring consistency regarding notification requirements.
- D. **Article III. Land Use Activities and Standards** – Create consistent formatting across all 40 districts so people can more easily navigate this section.
- E. **125-58 to 125-61** – Create consistency within this section to create a more efficient process, change deadlines so people can be notified earlier, improve some sections, etc. For example, some areas refer to calendar days some to business days, we cannot send a public notice to abutters earlier than 10 days before the meeting, we should look if the definition of a minor could be improved, and we should look at the timeline for a minor.
- F. **125-63 – Waiver of Submission** – Mirror in writing what is present practice and consider allowing the checklist as a substitute for having the applicant request waivers in writing.
- G. **125-67 B3** - Consider not requiring a double setback between multiple buildings on one lot
- H. **125-67 B2** - Consider consistency on how road setbacks are calculated
- I. **Article III** - Consider changing dimensional requirements that are excessive and beyond health, safety, and welfare (front setback, min lot size, min area per family, etc.)
- J. **125-22** - Consider removing the FAR requirement in Downtown Res
- K. **125-67 B** - Consider requiring parking for all TAs not just TA1 and 3, as well as for B&Bs
- L. **125-67 D** - Review parking requirements for restaurants
- M. **125-21 and 21.1** - Consider merging Downtown Village I and Downtown Village II

- N. 125-69 M, R, and S - Consider making PUDs worth it; linking PUDV to areas with water and sewer and PUDO to all other areas (at least to Town Hill Res and Town Hill Business); make it less about open space and more about affordability; make the affordability requirement less cumbersome; review the definition of affordable housing.**
- O. Article III - Consider allowing SA and ELQ in other districts**
- P. 125-68 - Consider bringing shoreland zoning in compliance with State law.**
- Q. 125-75 - Stop requiring a mylar copy of subdivision plans as the Registry of Deeds no longer requires them**
- R. 125-67 T - Resolve the conflict between driveway and road standards**
- S. 125-69 – Review cell tower provisions**
- T. 125-67 K - Review the nitrate calculations**
- U. Articles III and XII – Consolidate/simplify all lodging uses (there are too many types)**
- V. Review of all cross references to make sure that they are current/correct.**
- W. DRB – Consider adjusting the DRB overlay map by linking it to road frontage instead of districts.**
- X. 125-103 Administrative Appeals – Consider eliminating the requirement for a formal transcript of the record (verbatim record).**

Other

- A. Ch. 31 Board and Committees - (consider 7-member board)**
- B. PB Rules of Procedure –(update how we process applications such as requiring electronic submittals)**