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Town of Rockport, Zoning Board of Appeals
c/o Leah Rachin, Esq.
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RE: 20 Central Street, LLC Appeal

Dear Attorney Rachin:

Thank you for providing the parties, including the Applicant, an opportunity to respond to the recent written submission by Joe Sternowski, Chair of the Planning Board. We would appreciate the Board's consideration of this response to the questions raised at the most recent December 1st hearing, and please confirm that it will be circulated to the members of the ZBA prior to the next meeting.

There are only two arguments being put forth by the appellants[1] as relate to the issue of the proposed off-site parking lot (hereinafter the "Hoboken Lot.") The first argument is that the Hoboken Lot may only be used by the Applicant if the Planning Board finds that certain performance standards related to landscaping have been met. The second argument is that it was not proper for the Planning Board to find that the Hoboken Lot constitutes designated parking as opposed to "shared parking." Both arguments will be addressed in turn below.

1. **There is competent evidence in the record to support the Planning Board's conclusion that the Hoboken Lot has an existing use as a parking lot, and therefore landscaping performance standards are irrelevant.**

At 1:29 from Item 3 of the Vimeo record, the Planning Board read onto its record the ZBA's own finding of fact, not law, (4th Finding) that the "submittal of the site plan labeled C-1 by the applicant shows 45 parking spaces, which exceeds the 34 requested for remote parking for the 20 Central St. hotel by the Planning Board at its 12/19/19 meeting." (See ZBA Findings, dated January 22, 2020).

[1] For ease of reference, the Applicant refers to the appellants in the plurality, but would note that only one person, Mr. Priestly, was determined to have the requisite standing to pursue this appeal and the Applicant objects to the arguments or positions put forth by any person or party lacking the standing to do so, as previously found by the ZBA.

The referenced C-1 submission from the applicant's expert, as previously discussed, contains an explicit notation that such parking spots at the Hoboken Lot constitute an existing use, not some planned, proposed, or future use. The ZBA, in its own findings, confirmed this submission and found as fact that such submission "shows 45 parking spaces."

As a result, the Planning Board in its own review, examined the same C-1 submission, examined the ZBA's own factual findings of existing use, heard further presentation from the Applicant, and made the same finding as the ZBA, namely, that the Hoboken lot has an *existing use* of 45 parking spots. Of course, it was acceptable for the Planning Board to rely upon the ZBA's own factual findings.

Questions were raised at the December 1st ZBA hearing as to whether the evidence of an existing use, presented to the Planning Board, was too "thin" to meet the standard of "competent evidence," and whether the ZBA should find the Planning Board erred in its determination that the Hoboken Lot has an existing use as a parking lot. In light of the ZBA's prior examination of the same evidence, and its own factual finding that the C-1 submission showed an existing use of "45 parking spaces," such questions contradicted the ZBA's own prior findings. It would be a strange turn of events for the ZBA to find in its own hearing that such existing use was in place as *fact*, transmit that factual finding to the Planning Board, and then find that the Planning Board erred in in reliance upon the ZBA's own findings and other evidence when making the same finding.

Respectfully, we submit that the more relevant inquiry is *was it reasonable for the Planning Board to consider the same evidence the ZBA considered as to existing uses, and rely upon the ZBA's own finding that the existing use of the Hoboken Lot shows 45 parking spaces?*

The standard of review applied to the Planning Board's findings of fact is clear error. Clear error is a deferential standard, especially when a lower body or court has the burden of evaluating the credibility of evidence and witnesses.[2]

Here, the Planning Board had before it: (1) the same C-1 submission showing an existing use of the Hoboken Lot that the ZBA considered, submitted by the Applicant's expert; (2) a lease agreement related to a commitment for further parking-lot use; (3) the representations and testimony of the applicant that the Hoboken Lot was currently a parking lot (which the Planning Board found credible); and most importantly; (4) it had the ZBA's own factual finding as to existing use as a parking spot.[3] In applying the clear error standard in an appellate proceeding, "the factual findings are not to be altered or overturned simply because an alternative finding also finds support in the evidence." *Minot Sch. Comm. V. Minor Educ. Ass'n*, 1998 ME

[2] In its most basic iteration, clear error only exists to overturn a finding of fact if "(1) there is no competent evidence in the record to support it; or (2) it is based on a clear misapprehension by the lower body of the meaning of the evidence; or (3) the force and effect of the evidence, taken as a total entity, rationally persuades to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case." *Remick v. Martin*, 2014 ME 120. 103 A.3d 552.

[3] The Planning Board did not have before it, and properly did not consider, submissions by the Appellants made months later and following the Planning Board's vote and findings. Any submissions made by the Appellant following such time, including any letters with attached photographs, should be disregarded and completely stricken from the record and any consideration as a part of this appellate proceeding.

21, 717 A.2d 372. The Planning Board had before it competent evidence in the record to support its finding that the Hoboken Lot, as the ZBA previously found as fact, shows an existing use of 45 parking spots.

In short, it was reasonable for the Planning Board to make the same finding of fact on the Hoboken Lot that the ZBA had previously found after considering the credible evidence presented.

2. The Planning Board did not need to apply Landscaping Performance Standards to the Hoboken Lot.

Appellants argue that the Hoboken Lot "will become a parking lot," and therefore trigger performance standards related to landscaping. (See 5/18/20 Correspondence to the ZBA from Attorney Collins, at III(B)(3)(c).[4] The Planning board discussed this issue and determined that the Hoboken Lot will not "become" a parking lot, but rather already exists as a parking lot.

Section 1001 of the LUO clearly articulates that performance standards, including landscaping requirements, identified in Section 1002, are mandated only for changes of use and new commercial development. *See* Section 1001, "Applicability and Purpose." Therefore, contrary to the Appellant's argument, the Planning Board did not need to consider the landscaping performance standard after it made the reasonable finding that the Hoboken Lot has an existing use and "shows 45 parking spaces."

Questions have been raised as to whether the Planning Board was required to make a separate finding that the performance standard related to landscaping of the Hoboken Lot was rendered moot due to its existing use as a parking lot. When an appellate body reviews a decision to determine whether competent evidence exists to support an outcome, the reviewing body looks not only at the record but also all "reasonable inferences that may be drawn from the record, in the light most favorable to the [fact finder's] judgment to determine if the findings are supportable by competent evidence." *Garrison City Broad, Inc. v. York Obstetrics and Gynecology, P.A.*, 2009 ME 124, 985 A.2d 465.

Here, the ZBA has reviewed the minutes and discussion from the February 27, 2020 Planning Board meeting. As previously discussed, the Planning Board heard concerns and considered questions related to whether a landscaping requirement was necessary --- either because the Hoboken Lot is already a parking lot or because the Hoboken Lot's separate owner would be submitting a site plan on a subsequent date as part of that owner's obligations. What is self-evident from the record and discussion is that the Planning Board, by virtue of approving the Hoboken parking lot without a separate landscaping requirement, found persuasive the evidence of its existing use as a parking lot. Even if this rationale was not readily apparent, the reasonable inference to be applied to the Planning Board's findings, is that the landscaping performance standard was not required.

The Planning Board made a finding (Finding # 7) that the 56 parking spaces required were satisfied by the 21 existing spots allocated at the Sandy's Way Lot and "the 35 off-site parking spaces served by valet service to be located at [the Hoboken Lot.]" Implicit in this finding, and explicit in the record, is the Planning Board's considerations as to existing use and the unnecessary landscaping performance standard does not apply.

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[4] The Appellants, in the same submission, concede that the performance standards at issue only apply to "new construction." See 5/18/20 Corr. To the ZBA from Attorney Collins, III(B)(3)(D).

3. **There is no issue of "Shared Parking" at the Hoboken Lot (or Sandy's Way)**

At the December 1, 2020 ZBA hearing, counsel for the appellants articulated (1:06:00) the appellants' contention that the Hoboken Lot "is being used by different businesses." This contention is not correct and not supported by any evidence in the record.

As noted by Ms. McKenzie at the December 1, 2020 ZBA hearing, there is no remaining issue or ambiguity related to whether the Hoboken Lot constitutes "shared parking." At 1:18:49 from Item 3 of the Vimeo record, the Planning Board discussed this very issue and articulated a clear understanding of "shared parking, so defined. Shared parking, as noted by the Planning Board, is when one parking spot may be designated for multiple uses by multiple parties. Here, both the Sandy's Way lot and the Hoboken Lot, constitute the opposite of "shared parking" --- these spots are specifically designated for use by the applicant only, and the Planning Board was correct to find that such specifically *designated* parking spots satisfy the 56-spot requirement mandated for the project.

4. **There is competent evidence in the record to support the Planning Board's findings that the Application met all remaining performance standards.**

The appellants argue the following: (1) that the proposed hotel is not "located and configured in a visually harmonious manner," and (2) that the Planning Board should have felt differently about the impact this project could have on views from the main road and/or Goodridge Park and/or abutting structures. See 5/18/20 Correspondence to the ZBA from Attorney Collins, III(2).

Again, the list of alleged flaws are not requirements of the ordinance. The only relevant inquiry in an appellate review is did the Planning Board have competent evidence upon which a reasonable person could find that the project met the following performance standards:

> "Proposed development shall be located and configured in a visually harmonious manner with the terrain and vegetation of the parcel and surrounding parcels. Structures shall impede as little as reasonably practical, scenic views from the main road or from existing structures and nearby undeveloped areas."
>
> "The architectural design of structures and their materials and colors shall be visually harmonious with the overall appearance of neighboring structures."
> *See* LUO Section 1003(1)-(2).

Appellants argument that the Planning Board did not properly account for the scenic view presumes that the only view that is scenic or of value is of the ocean and that the view of a stretch of downtown buildings is somehow not. Currently, the subject property is an open scar on the downtown where a building once stood. As the Planning Board was well aware, in Section 913.3 of the Land

Use Ordinance, Rockport specifically allowed these specific lots to have complete lot coverage with no setbacks, this is clearly indicative of the town's desire to have a cohesive stretch of buildings in its downtown.

A review of the Planning Board's minutes, both from the final review hearing and earlier review hearings, reveals that the Planning Board was presented with "historic photos and graphic representations" of what the building and area has looked like "under past development." See 11/21/19 Minutes. The record reflects that the Planning Board spent considerable time, at multiple reviews, discussing and asking questions related to Section 1003, including but not limited to, discussion about balconies, lighting, viewsheds, and the Town's Comprehensive Plan. Indeed, following concerns related to these topics, the Planning Board requested revisions to the Applicant's plans (see 12/19/19 review hearing) and the Site Plan was amended by the Applicant, including a substantial reduction in the size of the building itself.

The Planning Board, at the 2/27/20 final review, concluded, in part, the following:

- The amended application "reflects a building that lines up, floor to ceiling, with the Shepard Building." See 2/27/20 minutes.
- The iron posts that supported the deck were replaced with brick "to better compliment the Shepard's building." See 2/27/20 minutes.
- The size of the proposed decks was reduced, brick was added between windows and doors, and an entire floor was eliminated "to better match the existing block of buildings." See 2/27/20 minutes.

The Planning Board heard extensive public comment, both in support of and in opposition to, the Applicant. The Planning Board heard the appellant's desire that the project should be reduced to allow "some view sheds" around the building. See 2/27/20 minutes. The Planning Board, having expert submissions before it, historical photos and graphic representations, and with the benefit of significant public participation, made the finding that the Applicant had met the "Section 1000 Performance Standards." See 2/27/20 minutes.

This conclusion may not be the same conclusion reached by the appellants but it is certainly a conclusion based upon "competent" evidence in the record. As a result, the Planning Board did not err in its findings and it unanimous vote that the application met the standards set forth in the Rockport land use ordinances.

5. **Remaining Issues**

At the conclusion of the December 1, 2020 ZBA deliberations, a motion was made (K. Olehnik), and seconded, posing the following "that the Planning Board did not have substantial evidence in the record to determine that the Hoboken Garden off site parking was an existing parking lot."

A vote was taken, resulting in the motion's failure. Respectfully, the Applicant submits that the proper standard of review is whether the Planning Board had competent record evidence before it to conclude that the Hoboken Lot satisfied the additional 35 spaces needed to approve

the Applicant's site plan. In light of the status quo being that the Planning Board has approved the site plan, a failed motion to the contrary results in the Planning Board's decision being affirmed (i.e., if the ZBA cannot conclude that the Planning Board erred, it cannot overturn the Planning Board).

As is customary, the applicant would like to take this opportunity to submit the following Proposed Findings of Fact for the ZBA's consideration:

A. Applicant's Proposed Findings of Fact, Zoning Board of Appeals (Outstanding Issues Only)

I. Contrary to the Appellants' arguments, there is competent evidence in the record to support the Planning Board's findings that the Application meets the General Performance Standards contained in Chapter 800, including: 801.6 (nuisances); 801.7 (lighting); 803 (traffic circulation, access and street design).

II. Contrary to the Appellants' arguments, there is competent evidence in the record to support the Planning Board's findings that the Application meets the Performance Standards contained in Chapter 1000, including 1003 (architectural review standards).

III. Contrary to the Appellants' arguments, there is competent evidence in the record to support the Planning Board's findings that the Application is visually harmonious with respect to building design, materials, colors, and neighboring structures.

IV. Contrary to the Appellants' arguments, there is competent evidence in the record to support the Planning Board's finding that the Application meets the Site Plan Review requirements contained in Chapter 1300, including those standards in Section 1305 (vehicular access, parking and circulation, special features of development, exterior lighting).

V. Contrary to the Appellants' arguments, there is competent evidence in the record to support the Planning Board's finding and conclusion that the Application meets the requirement of providing 56 parking spaces; 21 of which to be provided on-site, and 35 to be provided off-site.

VI. The Planning Board did not err or abuse its discretion when it found, based upon competent evidence in the record, that 35 off-site parking spaces located at 310 Commercial Street, Rockport, Maine, could be used to satisfy the Application's parking requirement without the need for a separate site plan or performance standards triggered by a change of use. The Planning Board had evidence before it, which it considered and found credible, that reasonably demonstrated the off-site lot has an existing use as a parking lot. Such evidence included a C-1 site plan demarcating an "existing use" and showing labeled parking spaces, as well as testimony provided by the Applicant and its experts. Further, it was not an abuse of discretion for the Planning Board to consider the Zoning Board of Appeals' own factual finding that the "site plan labeled C-1 by the applicant shows 45 parking spaces," which was a factual finding made by this Board on January 22, 2020 as to the off-site parking lot.

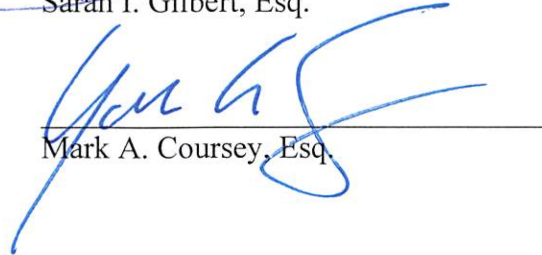
VII. The Planning Board did not err or otherwise abuse its discretion. The Zoning Board of Appeals therefore DENIES appellant's appeal and AFFIRMS the findings and conclusions of the Planning Board.

The Applicants appreciate the opportunity to respond to Mr. Sternowski's recent submission and to comment upon the ZBA deliberation. The most recent iteration of the appellants' argument --- arguing now that the existing use of the Hoboken Lot as a parking lot somehow is negated by it being associated with the new construction downtown --- is an argument without merit and is not supported by any plain reading of the land use ordinances. We respectfully request that Attorney Rachin continue to focus the ZBA's attention on the relevant inquiries.

Very truly yours,

CAMDEN LAW, LLP

Sarah I. Gilbert, Esq.



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