

St George Board of Appeals

November 16, 2017

Public Meeting – Executive Session – Meet with Attorney for Legal Advice

The meeting was called to order at 6:10pm with Appeals Board members Steve Miller (Chair), Bill Reinhardt, Fred Carey, and Richard Cohen present. Also present were Town Manager Tim Polky, Attorney Amanda Meader, and Bob & Anita Siegenthaler.

The Chair stated that there was a quorum. On a motion by Reinhardt, seconded by Cohen, it was voted 4-0 to go into executive session for legal discussion with the attorney. The Board then adjourned to another room at 6:11pm for executive session. Appeals Board member Crystal Tarjick joined the Board while in executive session.

The Board came out of executive session at 6:55pm and returned to the Fire Station Meeting Room for the public hearing. Joining the Board of Appeals was member Mark Bartholomew.

Board of Appeals Hearing – Wyeth Reading Room, Linda L Bean/Applicant

The hearing was called to order at 7:00pm with the above mentioned present, plus approximately twenty (20) more people.

The Chair asked if there were any conflicts of interest, to which Mark Bartholomew responded that he did and that he wished to recuse himself. He then left the hearing. Richard Cohen stated that he had had some business dealings with Linda Bean in the past, but that he felt there was no conflict.

Alternate Appeals Board member Crystal Tarjick was raised to regular member voting status by the Chair. The Chair stated that a quorum of the Board did exist.

The Chair noted that there were six (6) appeals filed against the Planning Board decision regarding the Wyeth Reading Room on Horse Point Road in Port Clyde, and that the Board was going to hear all six appeals at the same time. The Chair asked if that was agreeable to all parties. Attorney Paul Gibbons, representing Linda Bean, stated that it was agreeable. Scott Sullivan, representing Michelle Graham & Scott Sullivan responded with a “yes”. Sandra Dickson Coggeshall, speaking for her and Jonathan Coggeshall, responded in the affirmative. Jeffrey Riedl, representing him and Christine Riedl, responded that it was agreeable to them. Robert Hughes, representing him and Patricia Hughes, responded yes to the question if it was agreeable to address all six appeals together. Anita Siegenthaler, after receiving clarification that she would be allowed to present her point of view, agreed to the process. Attorney Patrick Mellor, representing the Horse Point Road Group, also confirmed acceptance of the process.

By general agreement, the Board of Appeals felt they have jurisdiction to hear the appeals.

In discussing standing, the Chair noted that those parties that have standing would be the only ones present allowed to present testimony.

In determining parties to the action, it was noted that the six appellants were parties to the action, as well as the Planning Board members and possibly other municipal officials.

Testimony – (comments were summarized when written comments were provided)

- Patrick Mellor, an attorney representing the Horse Point Road Group, said that it was generally agreed by the appellants that he would start the testimony phase of the hearing, and that the other appellants would follow. Testimony by Mellor was:
 - o a written handout for the Board of Appeals
 - o Mellor does not believe the Board of Appeals has the complete record of the Planning Board proceedings, stating that would be addressed later.
 - o Mellor noted that the court reporter, who was present at Planning Board meetings on behalf of Linda Bean, did not provide a copy of the transcript to appellants, and argued that it should have been made available.
 - o Mellor said that there were multiple errors of law:

- Mellor said that on page 3 of the Findings of Fact the Planning Board used MDOT standards to make their safety decision. He said that the Site Plan Review Ordinance states that its purpose is to avoid unreasonable impact on the health, safety and welfare of the community. He said that 36 letters were presented to the Planning Board regarding safety of the road and that Linda Bean even called the road unsafe. Mellor also said that Sheriff's Deputy John Hansen provided unsolicited testimony before the Planning Board, stating that the location is asking for trouble – "a nightmare". Mellor said that the Planning Board should have used common sense versus MDOT standards.
 - Mellor stated that the Planning Board acknowledged safety issues and provided for a condition whereby use of the reading room would be by appointment only and that one of the six parking spots would always be available. Mellor asked how is that condition enforceable. He said that it is an error of law – that you cannot have a condition that is meaningless. Also, there are no penalties if this condition is not met. Mellor said common sense was not applied by the Planning Board.
 - Mellor said that procedural due process was not complied with. He referred to US Supreme Court case of *Pelkey vs Presque Isle*. He noted that Planning Board member Michael Jordan, who joined the Planning Board during the application process, did not receive all material on this case. Mellor said that Jordan provided an affidavit of what material from the case that he had reviewed, and that the affidavit did not include seven (7) significant items submitted to the Planning Board by opponents to the project. Mellor said this was an error of law.
- Attorney Meader said that the Code Enforcement Officer was not present, but asked Planning Board member Michael Jordan about the material he reviewed. Jordan replied that his affidavit was accurate, that it lists what he was given and reviewed, and if there was any other material other than what is in his affidavit, then he did not review it.
- Jeffrey Riedl, then spoke on behalf of he and his wife, Christine. He read from a written statement that was provided to the Board of Appeals. Riedl said that he purchased property in St George in 2012 and that he and his wife became permanent residents in 2014. He said that he felt that the decision of the Planning Board is unsupported by the record because the safety decision is not supported by competent testimony. Riedl said that his testimony would focus on reports and testimony of so-called experts. He said he had been a lawyer for 44 years and then mentioned his credentials and experience. Riedl said that he felt the Planning Board was swayed by testimony of traffic experts using standards, statistics, etc., and that what was provided does not satisfy the burden of proof. He said that traffic reports focused on traffic and never related to the issue of public safety, hence, not relevant or material. Riedl said that the traffic experts' credentials were based on traffic, not on public safety, therefore, not making them qualified to opine on public safety. Riedl said that the testimony of Deputy Hansen, who is qualified in public safety, was ignored, and that the residents of the area are more qualified on public safety. He asked that the decision be reversed and that the permit be rescinded.
- Sandra Coggeshall then spoke on behalf of her and her husband, Jonathan, who live on Horse Point Road. She distributed copies of her testimony and then read from her written comments. She said her focus was on two (2) basic issues – the need for a proper pedestrian and bicycle safety study, and local knowledge. Coggeshall said that only vehicular traffic was considered, not pedestrian and bicycle, and that the Planning Board should not have taken action without that study. Regarding local knowledge, Coggeshall stated that local knowledge shows that some situations defy safety standards. She also stated that the record provided to the Board of Appeals was incomplete, that the packet contained only 3 of the 4 letters provided to the Planning Board by her and her husband. Coggeshall then ended her testimony saying that Code Enforcement Officer Terry Brackett asked Linda Bean about re-locating the project to Glenmere Road, and that

Bean responded that would be possible only if the Planning Board turned her down, therefore she was asking the Board of Appeals that the permit be denied, or at least be remanded to the Planning Board so safety issues can be addressed.

- Anita Siegenthaler was the next appellant to provide testimony. She said that she has been a resident of Horse Point Road for 27 years, was a summer resident of Owls Head for about 20 years before that, so she is familiar with the State of Maine. Siegenthaler stated that a goal of the Reading Room project is to highlight the Wyeth property known as Eight Bells. She referred to testimony before the Planning Board by Linda Bean saying that the mile long Horse Point Road is very fragile and it would be nice to see a sidewalk, or even a trolley, to Eight Bells. Siegenthaler went on to say that the traffic report deals only with the site, not with all of Horse Point Road. She also said that the Planning Board ignored other DOT documents dealing with bicycle and pedestrian traffic. She also said the Planning Board did not address local input on safety concerns, and should have looked beyond the impact on the site. She again said that the Planning Board did not consider local public input. In summary, she said that the adverse impact on the municipal road system could be significant. Her written comments were provided to the Board.
 - Scott Sullivan was the next appellant to speak. He began by distributing copies of his written comments. Sullivan said he and his wife live on Horse Point Road, not far from the proposed site, so they are familiar with the location. He said they have some serious questions on public safety that have not been addressed, and he described the road as not meeting standards. He then referred to the traffic engineer's testimony before the Planning Board in response to a question as to whether the road was dangerous. Sullivan said the engineer responded that dangerous would be evident by crashes, and that dangerous has no meaning. Sullivan noted that the Site Plan Review Ordinance requires a review for traffic issues, not for public safety issues expressed by the public. He said that the Planning Board should have asked for a public safety review, not a traffic safety study. Sullivan then asked the Board of Appeals to err on the side of caution, send the application back to the Planning Board and have them ask for a holistic review of the safety issues.
 - Robert Hughes was the final appellant to provide testimony. He said he has visited Port Clyde for 25 years, and that they have owned property on Raspberry Lane for 13 years. He said his complaints are about the process. Hughes said he feels that the Planning Board is under the belief that if an application is filed, it must lead to the granting of a permit, assuming all boxes have been checked. He said this is more evident by reviewing the application for an appeal. He said the boxes to be checked mention the denial of a permit, as though that is the expected outcome. He said there is no box to check to appeal the granting of a permit in error. Hughes said that the Board of Appeals must reverse the decision of the Planning Board and revoke the building permit for the following reasons:
 - o The record maintained by the Town is incomplete
 - o The Planning Board failed to exercise its reasonable judgement
 - o The Planning Board made errors of common sense
 - o The Planning Board made serious procedural errors
 - o The Planning Board made fundamental errors in commissioning a new traffic study, and
 - o The Planning Board made serious errors in accepting the new study – it should have been a safety study, not a traffic study
- Hughes then provided copies of his written comments.
- Attorney Mellor did a quick summary saying that the testimony showed that the Planning Board needed to over the issues of safety, not traffic, and that a Planning Board member did not look at the submissions provided by the opposition to the project.

The Chair called for a short break at 8:32pm, returning to session at 8:41pm.

Rebuttal

- Attorney Gibbons spoke on behalf of the applicant, Linda Bean. He spoke about the phrase “unconstitutionally vague”, saying that reviews must be conducted using standards, and that the words safe and dangerous have no meaning unless standards are applied. Gibbons said that the Reading Room is a quiet place, nothing is sold, and therefore, it is non-commercial. He said that traffic standards for a museum was used for the traffic study, and that a reading room would have less traffic than a museum. He said the Planning Board had a good idea when they proposed that the use would be by appointment only and that no more than five (5) spaces could be used at once. And, he noted, that it was enforceable because ordinances do have fines. Gibbons continued saying that by traffic standards, Horse Point Road is safe – only 2 accidents in the area of the project within the last 10 years. He also noted that the accidents did not involve pedestrians or bicycles. Gibbons said that the testimony by appellants that the road is unsafe is based upon their own opinions, not on standards. However, he said, the ordinance does require a traffic study. Gibbons said that it was ridiculous to think the Reading Room would make the road unsafe. He called it “wild speculation and fear”. He said that if he lived on the road, like the appellants, he would probably not any more traffic. However, he said, the road is not private, it is a public road. Regarding speeding, the traffic study showed that only 5 people were speeding in any one day, and that 4.5 of those speeding events took place between 4am and 7am. Gibbons repeated that the appellants don’t want more traffic on the road, but that the Site Plan Review Ordinance requires the Planning Board to use standards, not opinions. He also said that it is nonsense that a deputy is an expert on traffic and safety, and that his opinion is similar to others who live on Horse Point Road because they use their own standards to define safe. Gibbons also felt that the notion that everyone’s application will be approved is nonsense. He said that the ordinances set out standards for approval, and that he felt you would probably want a town to be fair to everyone. Regarding the record, Gibbons commented on the use of the stenographer and called word-for-word transcripts “boring”. On the issue of Planning Board member Michael Jordan not seeing everything, Gibbons said that the Planning Board did discuss every single standard, and that it would be difficult for any board to function if someone who missed a meeting were not allowed to participate. In conclusion, Gibbons said that there are long-standing standards for roads, and that the Planning Board decision should be upheld.
- Attorney Mellor then spoke, saying that the meaning of safety is broad, not unconstitutionally vague. He said there is guidance and common sense in determining safety. There was then a back and forth between Attorneys Gibbons and Mellor concerning the court reporter and the transcript. Mellor then said that the traffic numbers were not provided by the appellants, rather by the applicant, Linda Bean. He also said that you can not rely on historical data regarding traffic accidents because the project provides a new situation. Mellor also said that he feels that a deputy sheriff is an expert on public safety.
- Attorney Gibbons spoke saying that there seemed to be a confusion of the Wyeth Gallery at the Port Clyde General Store location versus the Reading Room project.
- Sandra Coggeshall asked if a person driving down Horse Point Road looking at the view and in the middle of the road was safe.
- Anita Siegenthaler said that she feels that the Reading Room is part of a bigger setting that Linda Bean has for businesses in Port Clyde – that it is a package.
- Robert Hughes mentioned a letter regarding criteria for a safety study that was not part of the Board of Appeals packet. A discussion followed of items not in the packet.

Chair Steve Miller ended testimony at 9:24pm.

Discussion by the Board

- Chair Miller explained the remaining process.

- Appeals Board member Carey asked the Town's attorney if there should be some concern that the Board is allegedly missing items from the record, to which Attorney Meader responded in the affirmative.
- Carey then asked "what is the procedure to correct this?"
- Attorney Meader said that the procedure would be to stop the appeal process and to get the record in order.
- Appeals Board member Reinhardt asked if the subject letter was in the record, to which Meader responded that it had been submitted to the Planning Board.
- Reinhardt then asked if the 36 letters of opposition had been submitted to the Planning Board, with Meader responding with a "yes".
- There was then a general discussion about the need to sort out the record.
- Attorney Mellor asked if the procedural issue concerning Planning Board member Michael Jordan could be decided tonight.
- Appeals Board member Tarjick said that she felt the Board needs the record first before making a decision.

There was a general discussion about continuing the hearing to another time, and what day/time would be best. On a motion by Cohen, seconded by Tarjick, it was voted 5-0 at 9:39pm to adjourn the meeting to Tuesday, December 5th, at 6:00pm.

On Tuesday, December 5th, the hearing was called back to order at 6:00pm with Appeals Board members Crystal Tarjick, Fred Carey, Bill Reinhardt, Steve Miller and Richard Cohen present. Also present were Attorney Amanda Meader, Code Enforcement Officer Terry Brackett and Planning Board Chair Anne Cox. Also in attendance were about 25 others.

Chair Miller noted that Attorney Mellor had presented a list to the Board of Appeals of information that had been presented to the Planning Board. Miller then said that all members at the last hearing date were present tonight and he then began to review the process to date. Miller said that Board member Reinhardt had a question at the last hearing date concerning the availability of the approximately 36 letters from the opposition to the project. Miller asked Planning Board Chair Anne Cox to speak on the issue. Cox said that she had all the letters and assumed they were in the town office and available. Miller then asked Code Enforcement Officer Brackett about the letters, and Brackett said it was all on file in the town office and available to anyone, including the Planning Board. There being no further questions regarding the testimony that was provided at the previous meeting, Miller said the Board would proceed to the discussion phase of the hearing.

Chair Miller said that the Board of Appeals job is not to re-hear the case, but to decide whether or not the Planning Board did their job.

Appeals Board member Cohen said his only question, that had been answered, was if the information presented was available.

Appeals Board member Carey commented about the issue of Eight Bells, saying he felt it did not have a major impact on the traffic study part of the process, noting that he did not see any opposition from the Wyeth family or a representative of the Wyeth family. Carey also noted that he saw no evidence that Tim Polky, who has been an invaluable tool of this community for 25-30 years, had ever been consulted regarding safety issues. Chair Miller commented that with Polky now being Town Manager that it may not be appropriate for him to be involved. Reinhardt commented that Polky is still Road Commissioner and felt it would have been okay for him to be consulted. Attorney Meader reminded the Board that their responsibility was to determine if the Planning Board followed the proper procedure.

Attorneys Mellor and Gibbons then begin a give and take, talking over one another, with the Chair bringing things back to order. Attorney Mellor asked, for the record, if he was not being allowed to speak, and Chair Miller responded in the affirmative.

There was discussion on how to proceed and it was generally felt that the Board should address the issues point by point. Attorney Meader said that the Board should have a good, full discussion before voting. Reinhardt started with:

- 1) It was claimed that the Planning Board did not have a full and complete record. Reinhardt disagreed, saying that the issue of a court reporter hired by the applicant not providing a copy to the opposition was not germane to the case because the town did have a complete record – a written record of the meeting in the form of minutes and there were also complete verbal recordings of the proceedings. Tarjick agreed, saying it was a third party that had the transcript, not the Town.
- 2) It was claimed that a Planning Board member came into the process part way through the process. Reinhardt said the “meat” of the review took place after that member came on board, and that the complete record was available to him. Reinhardt said he did not see that as a reason to overrule the Planning Board. Tarjick said she felt it would not be an error even if a Planning Board member did not read a letter, and that the outcome of the vote would not change.

Attorney Meader then spoke with the Board saying the crux of the appeal is whether or not there was a complete record and if it was available. She said that responsibility of the Board of Appeals is to determine if the Planning Board went through the due process steps. Reinhardt said that it was his opinion that not only did the Planning Board review, but they thoroughly discussed the content of the letters regarding the safety of the road. Tarjick asked about the use of the Site Plan Review Ordinance as the proper tool to review the application. Meader said absolutely. Reinhardt referred to the 20 performance standards as the meat of the review and that the Findings of Fact shows that review process.

- 3) It was claimed that traffic study did not review the safety of access between the site and road. Reinhardt said that the Planning Board discussion on the issue was extensive and belabored the issue of safety. He said that the firms conducting the traffic study are well respected and that the Planning Board took into account the letters of people on the road, plus the comments by the Sheriff’s Deputy. Reinhardt said that the Planning Board adequately weighed the evidence. Carey agreed, saying he thought the Planning Board did a very thorough job. Cohen said he did not see any reason that the process wasn’t carried out correctly. Reinhardt said that safe is an objective term and is not defined in our ordinance, and then read from that particular part of the ordinance that addressed vehicular access. Tarjick said that she felt the Planning Board took into consideration not only the traffic studies but the testimony of others, both sides. Reinhardt said that a requirement was if the road had the adequate capacity to handle extra traffic, and that both studies said it did.
- 4) It was claimed that the condition placed on the project was illogical. Tarjick asked about this condition. Reinhardt said he could not see that it was illogical, that he has seen a lot of permits with conditions, and that they are enforceable. Attorney Meader reminded the Board that it was not the outcome, but that the process was correct.

On a motion by Fred Carey, seconded by Richard Cohen, it was voted 5-0 to uphold the decision of the Planning Board and deny all six (6) appeals.

It was then decided to hold a meeting on December 11, 2017, at 5:30pm, to review and vote on the minutes and Findings of Fact.

On a motion by Tarjick, seconded by Cohen, it was voted to adjourn the meeting.

Respectfully submitted,

John M Falla
Recording Secretary