TOWN OF KITTERY
PLANNING BOARD MEETING

APPROVED

Thursday, October 13, 2005 Council Chambers

Meeting called to order at: 6:18 p.m.

Present: Chairman Russell White, Janet Gagner, Scott Mangiafico, Ron Ledgett, Doug Muir, Megan Kline
Also Present: Mark Eyerman, Planner Jim Noel, Councilor Dennett, Councilor Schwaery, Councilor Guy, Earldean Wells, Town Manager Jon Carter, James Austin

1. ROLL CALL

Roll call noted.

2. WORKSHOP DISCUSSION WITH TOWN COUNCIL: 6:20-8:30

See Action Items 10-13-05.

3. PUBLIC COMMENT ON NON-AGENDA MATTERS (20 MINUTES)

Caroline Hanson is here with her husband, Ed, and they live in Kittery Point. She would like to know if we plan to address the issue of conflict of interest before or during the Briers presentation.
Chairman White says that this is an agenda related item that probably should be addressed.
There is no public comment on non-agenda matters.

4. SKETCH PLAN: ATTAR ENGINEERING, INC. FOR DDS LAND HOLDINGS, LLC, KITTERY, ME. APPLICANT IS PROPOSING A MIXED USE DEVELOPMENT PLAN CONSISTING OF A HOTEL, RETAIL STORES, RESTAURANTS, AND A CONVENIENCE STORE. MAP 60, LOT 24, ZONED MIXED USE.

Chairman White introduces the application.
Ken Wood and David Sowerby, the owner, will present their application.
David Sowerby would like to make a brief presentation for the development of the Homestead land. It has been tied up in referenda and has gone through court proceedings all the way through Maine Supreme Court. The U.S. Supreme Court declined to hear the case. Now there are new zoning ordinances. He has tried to put things on the property that fit within the zone. He thinks tonight will be pretty explanatory.
Ken Wood is here from Attar Engineering. It is nice to be back here again. He has a sketch plan that shows a parcel owned by David. This is a piece of one of the parcels that was proposed for the Kittery Marketplace development. It is about 29.74 acres. It is mixed use in the mixed use zone. He designed the project to be in keeping with 16.12.130.e.8 - the creation of an area in which no use predominates. In the development, they have proposed two retail buildings, which

will consist of 7,500 sf on each floor, and there will be two floors. There will also be a 10,000 sf restaurant and convenience store and a hotel that is a special exception. This project requires 35% open space and the lot has that. Retail use is limited to 15% of the project size. It may not be retail by the time they submit the plan. Mr. Sowerby has been having conversations about having it be medical offices instead. If the offices were 1,000 sf offices, this would be the same as the parking calculations for the proposed restaurant. He felt that it was best to put the sketch plan in front of the Board before going to a preliminary plan to see what the Board's comments or feelings are.

Chairman White asks for Board comment.

Mr. Mangiafico asks about secondary access for this. Do we need to see that?

Chairman White does not know.

Mr. Mangiafico asks about a fire lane and fire access because there is only one main access road into the proposed development.

Mr. Wood says that is fairly easily addressed since Mr. Sowerby owns all the way to Adams Road. He could also share a secondary means of access with another development.

Mr. Ledgett thinks that this may require a wetland crossing.

Ms. Kline and Mr. Wood show where it can be done without a wetland crossing.

Mr. Mangiafico asks about parking area and the figures 20, 20 and 20. Is that landscape?

Mr. Wood says yes, the 20's are. The small numbers are the counts for the parking spaces. On the sketch plan, he did not show that level.

Mr. Ledgett asks about stormwater management for impervious surfaces.

Mr. Wood says that they have not gotten to that level of detail yet. They tried to leave adequate room for detention basins.

Mr. Sowerby says this is a considerably smaller project than before.

Mr. Ledgett says that there are new regulations though.

Chairman White asks if he is going to ZBA first.

Mr. Wood plans to go once or twice to ZBA.

Mr. Mangiafico asks if in the last development, there was a requirement for a light out there.

Mr. Wood does not know if this project would meet the state warrant. It would then be up to this Board to determine whether the Town wants to suggest putting a light in. He asks for input from Ms. Wells, but she declines at this time. Mr. Wood would like to meet with the Conservation Commission at one of their meetings.

Ms. Kline would like to know whether at this point they are required to have secondary access.

Planner Noel thinks that Mr. Rossiter, Chief O'Brien, and the State need to be involved re: secondary access. If it were necessary, it would need to come from Adams Road. This needs to be discussed and worked out.

Ms. Kline is mentioning it because it might influence the travel way. If the applicant is going to use the previously designed crossing, she is not sure what they would think of this. It might impact them.

Mr. Wood says that he will send the plan to the department heads to see what Dave O'Brien and Rick Rossiter think of it.

Ms. Kline thinks that he should do that because it can effect where he will put the buildings.

Chairman White says that is all for tonight.

Mr. Wood and Mr. Sowerby thank the Board for the opportunity to come before the Board on this.

5. SKETCH PLAN: ATTAR ENGINEERING, INC. FOR SEACOAST CRANE CO., INC., KITTERY, ME. APPLICANT IS PROPOSING TO CONSTRUCT A 5,000 SQUARE FOOT GARAGE SPACE, MAINTENANCE AREA, AND OFFICE AREA. MAP 28, LOT 19-1, ZONED COMMERCIAL.

Chairman White introduces the application.
Mr. Wood says this is a request for site plan approval for Seacoast Crane. This is located on Route 236 up by the Kittery-Eliot line. They have owned it for 15 years and use it for storage. They received Planning Board approval for this in 2001. They were so busy with other things that the permit lapsed. It was resubmitted in 2004 and got caught in the moratorium. It was again resubmitted. It involves a 5,000 sf building that Seacoast Crane would build on that site. It would have an office and maintenance area. They could move some cranes indoors and do repairs. They are looking for approval of the plan that the Board approved back in December 2001 that the applicant never constructed.
Chairman White asks if minor changes have been made to conform to the ordinance changes.
Mr. Wood says that in 2001, they had put landscaping in adjacent to the wetland. Now there is a 20' landscape building buffer between the building and Route 236. It is difficult to do because they have parking and a proposed wastewater system. He did add parking to the south to buffer also. That was the only minor change to the plan.
Ms. Kline says our sketch plan shows it as one size, but she cannot reconcile it.
Mr. Wood says it is 3,750 sf plus 1,250 sf.
Ms. Kline says in the building it says 6,000 – 4,500 and 1,500.
Mr. Mangiafico says that she is looking at the old plan.
Ms. Kline apologizes.
Mr. Wood says it should be revised through 7/28/05.
Mr. Mangiafico has a question on the wall packs. Has he looked at the new lighting standards?
Mr. Wood has not, but the Board could condition approval on meeting the new lighting standards. He is not sure he even saw them before submitting the application. He made the Planner keep the plan and the check so that he would be in the queue.
Ms. Kline would like to know where the proposed garage will be.
Mr. Wood shows the doors under the lights in the garage area.
Chairman White asks if we need a site walk.
Mr. Ledgett thinks so.
Chairman White says we should schedule one. The plan has been fairly well looked at, but we need to pay attention to the changes in the ordinance.
Ms. Gagner asks if it is going to technical review.
Planner Noel says yes.
Ms. Gagner asks if the waivers still apply.
Mr. Wood says yes.
Chairman White says that we want to do the site walk before daylight savings time ends. It will be a short site walk because of the size of the site.
Ms. Kline will not be back until the 27th of October.
Mr. Wood says that she can go anytime she wants.

- The site walk is set for Thursday the 20th at 4:30 to meet there.

6. PUBLIC HEARING: FIRST STEP LAND DEVELOPMENT, INC. THE BRIERS

AT MEAD FARM, WHIPPLE ROAD. PROPOSING TO AMEND AN APPROVED SUBDIVISION WITH THE ADDITION OF A COMMUNITY PIER, DOCKS, AND FLOAT SYSTEM. MAP 17, LOT 43, ZONED URBAN RESIDENCE.

Chairman White introduces the application. Before the presentation starts, we may have a couple of procedural items to deal with. As a threshold matter, different members of the public have submitted letters for the record addressing a conflict of interest issue. Is Mr. Ledgett to step down for this item?
Mr. Ledgett says that he will after we discuss the conflict of interest issue.
Chairman White asks if Mr. Mangiafico will be stepping down for this item.
Mr. Mangiafico was not planning to step down.
Chairman White says he has received letters from Caroline and Ed Hanson, and another. He has a copy of procedure 16.04.040 governing conflicts of interest. Paragraph 9 indicates that any question shall be decided by a majority vote of the members except the member that is being challenged. It does not indicate here who challenges a member. He believes, reading from the text, that it would have to be a member of this Board and not a member of the public.
Mr. Ledgett makes that challenge as to Mr. Mangiafico. Mr. Ledgett wants to walk through what he has walked through for himself. He could have spent a good deal of the Board's time on this. When you get to the end of the road, it is not likely that Paul Hollis will conclude that Mr. Ledgett does not have the appearance of a conflict of interest. He directs the Board to Attorney McEachern's letter of April 2005. It references members with real or apparent conflicts of interest. This is the difficulty he ran into. He could make a good case for his having no conflict and the ability to make an unbiased decision. At the end of the day, would it have that appearance? Also, the letter makes reference to whether a Board member has some personal stake in the outcome. If we read the letters submitted, it is clear that should the Briers pier application prevail, it would set a precedent that would potentially benefit any waterfront in the urban residential zone. The letter points out that Mr. Mangiafico owns a waterfront property in UR that he is trying to develop. The Town Attorney's letter goes on to talk about a Maine Supreme Court case and says that it is difficult for a Board member to appear impartial when that Board member has taken a pre-Board position - it is difficult to appear fair and impartial. The difficulty that has arisen here is that Mr. Mangiafico had the ability to remain neutral, but later chose to become an advocate for the pier. Chairman White has already pointed out that to deal with this problem requires that we vote on it. The difficulty he had for himself was the appearance of a conflict and he believes that Mr. Mangiafico clearly has the appearance of personal benefit and personal advocacy.
Chairman White asks Mr. Mangiafico for a response.
Mr. Mangiafico has reviewed the letters. He does not have anything eloquent to say. With respect to the appearance that he has taken a pre-Board position, as a member of the Kittery Planning Board, he sits on the Kittery Port Authority. In the original review, the Port Authority had a quorum, and he abstained. Unfortunately, if he abstains, he cannot give his knowledge to the rest of the Board. The second time, the Port Authority did not have a quorum. The Port Authority needed input to follow the code and needed him for a quorum. He owns the property next to the Briers. It will be on the market shortly. He does not think that puts him in conflict. As for personal benefit to his own property, he knows there are at least two members on this board with waterfront property. On the Kittery Port Authority, six of seven have waterfront

property. His personal project has expired and he is building a residential pier at the site. He had to make a stance. He believes his comments were based on Kittery regulations and the Land Use and Development Code and not pre-discussed outside of that public forum. He is not out there as an advocate for or against this particular project. The questions he looks at are: What are the rules and does this applicant meet them? There was a lot of talk about the fact that the Port Authority is working on definitions for community pier and whether that makes him an advocate for it. It has nothing to do with whether he applies the Land Use and Development Code. That is work that the Kittery Port Authority has done and the Kittery Planning Board will need to do when it works on the shorefront and waterfront.

Mr. Ledgett would make the point that what Mr. Mangiafico said is what he would have said. The difficulty is, when you ask the people in the audience at the end of the day, whether there is a conflict. We need to be careful here that we are dealing with the advice that Attorney McEachern has given. He is concerned that if we don't handle this cleanly, we will compromise the integrity of the Board and this may not end here.

Chairman White asks if Mr. Ledgett was a party in some litigation involving the application.

Mr. Ledgett says that the litigation was as to whether the Kittery Port Authority followed its own rules and regulations. That was corrected to some degree in the renewal.

Mr. Mangiafico says that in the initial review with the Kittery Planning Board, he stepped down. He actually questioned whether he might have his own litigation as an abutter. He decided not to move forward with that, as it did not seem that others wanted to move forward with it. He is not an advocate on either side. He strives to interpret the laws with the guidance of counsel and the Board as to what the rules say can be done and cannot be done.

Chairman White is looking at this and Mr. Mangiafico has no direct financial interest, no direct benefit. He might at some uncertain time in the future, as may another property owner in the zone. Mr. Mangiafico does not receive a direct benefit from the outcome. In terms of being an advocate, no one has provided evidence in the letters that Mr. Mangiafico has advocated in a forum other than his official capacity as the Planning Board delegate to the Kittery Port Authority and so Chairman White would have difficulty saying that if Mr. Mangiafico felt he was acting on another Board observing their rules, if he is in those parameters and not outside of that setting, that this would somehow be considered advocacy in the sense that the Pelkey decision seems to define it, which is campaigning for a particular result.

Mr. Ledgett says that, as he understands the issue from the letters, as Mr. Mangiafico has been on the Kittery Port Authority decision, the choice is there for Mr. Mangiafico to recuse himself. The issues will be many of the same. The perception problem that we are running into here and that we are running into in the eyes of people that submitted letters is that clear arguments have been made and no movement has been made in considering their arguments and points of view. A hard line was taken and there is a perception of prejudgment by Mr. Mangiafico on issues before this Board. The issues that we are wrestling with here is that if there is a clear appearance in the minds of the participants of a conflict, then at the end of the day when the Board makes the decision, the parties will not be satisfied that decision was made in a fair way. Attorney McEachern told him that it is far better to err on the side of stepping down than to err by staying on. That is why he has decided, personally, to step down. He thinks that it would taint any action or decision of this Board. He thinks these letters say that having Mr. Mangiafico take part in this decision would taint the decision also.

Mr. Mangiafico says that as the representative of the Planning Board to the Kittery Port Authority, most if not all on the Board would have the same prejudgment stance made against

them when they had to remind everyone what they had to go by. We cannot just go out there and say we do not like a project. He repeats himself and gets very animated. He took a hardline stance on some of the issues. Everyone here on the Board does not have to deal with that. He is sure that after it is all said and done, members of public can say that we have a preconceived notion here.

Ms. Kline says the fact that the KPA discussion occurred would not be an issue for her. She is struggling with the fact that she knows that even if he had not stepped down from the Kittery Port Authority discussion, he could have kept his vote at just being present.

Mr. Mangiafico says that is what he did in the original review of the application.

Ms. Kline says that she fully supports that decision. She is troubled by his actions at the second review. The fact that he did vote and he did have the option not to, all other issues aside, knowing that this was coming up for additional review – he has voted on this and should we repeat that vote again?

Mr. Muir would like to say something. As we are looking to the possibility of losing two members and the most knowledgeable ones on our Board, he is somewhat dismayed. He wonders if the Board would consider having Mr. Ledgett reconsider because he thinks that the Board would benefit from having both of them take part in the discussion. He is not particularly impressed with the potential conflicts that have been discussed here. Maybe he is not enough of a lawyer to take it as finely as Attorney McEachern does.

Ms. Gagner says that whenever either Mr. Ledgett or Mr. Mangiafico have addressed issues on a Board level, they have done so independently and it would not be bad to have either of them here. Mr. Mangiafico is always tough on projects and has been tough on this one from the start. He handled it the same as any other project she could see. She feels he is on the Kittery Port Authority to tell us what the rules are. It is tough, but she thinks we need to have their information.

Chairman White asks if the Board needs more discussion or needs to call a vote.

Ms. Kline says Mr. Muir brought up having both of them remain on. Do we need to deal with the challenge?

Chairman White says that we need to address the challenge. Mr. Ledgett says he is stepping down of his own accord. Mr. Ledgett also believes he could be fair if he remained on the Board, but feels that there is a perception issue. Chairman White knows that in his profession, perceived conflicts are acted on just as much as actual conflicts. Courts want to preserve the appearance of integrity. We could apply that same standard here. We're not lawyers or judges and essentially we try to follow our ordinances or rules and try to create a record and have a decision.

Mr. Muir would like to know what Mr. Ledgett thinks about his proposal before voting.

Mr. Ledgett says he would remain if the Board clearly agreed with that by consensus or vote.

Mr. Muir says that we can handle that. If Mr. Ledgett withdraws his offer to step down, Mr. Muir will then challenge him. In the alternative, Mr. Ledgett can withdraw his challenge of Mr. Mangiafico.

Mr. Ledgett says that he thinks that the Board needs to make a decision. The record from here will be very clear. He thinks that there is a sensitivity here that needs to be addressed.

Chairman White thinks that Mr. Muir made an excellent point. Often Mr. Ledgett and Mr. Mangiafico disagree and having them go back and forth makes things clearer. This is an application that there is a lot of interest in and we need to do as good a job as possible. He is won over by Mr. Muir's suggestion. Procedurally, if there is a challenge, then the Board needs to vote on it.

Mr. Ledgett will withdraw the challenge, but he would like a formal Board consensus for them staying on so the record is clear.
Chairman White asks for those in favor of Mr. Mangiafico staying for this matter to say aye.
Mr. Mangiafico would like Attorney McEachern to weigh in on this from the legal point of view before voting as to Mr. Ledgett.
Attorney McEachern says the difficulty he has sitting here is that it seems that the Board is bartering as to whether someone has a conflict or not. Either you have one or you don't. The Board can't make an agreement. It's not just the Board's integrity that is at stake. It's the applicant's also. The Board needs to do this individually. The Board and the individual need to look at whether the individual feels he has a conflict. Mr. Ledgett was involved in litigation. There is an opinion from Attorney McEachern as to what constitutes a conflict. Whether Mr. Mangiafico feels it, there is the opinion from Attorney McEachern as to what constitutes a conflict. When you say that when someone votes at the Kittery Port Authority that person cannot vote here, you are saying that a member cannot vote on this Board. This is a hot issue. You can tell by the number of people here. You have to weight these issues as to a reasonable perception of conflict. When someone is on one side or another, they normally perceive the other side as whatever. When people like his opinion, he's the smartest guy going. When they don't, they ask, "Where did the bum come from?" In each case, you need to determine whether this is a conflict. Otherwise, if it is a close vote, it will be back in front of you. You have to follow your rules. Mr. Ledgett has said he is stepping down unless he changes his mind. It seems like the Board is saying that with a vote for and against, it will balance out and then we can take advantage of their expertise. However the chips fall, they fall. This is an important case, not only for this but any other case. If the Board has any questions, he is glad to take them.
Chairman White says that we need to reconsider the way that we were going and look at item 9 that says that it is determined by a majority vote that includes all but the member being challenged.
Mr. Ledgett thinks that he needs to reinstate his challenge and someone needs to challenge him.
Chairman White challenges Mr. Ledgett.
Vote on Mr. Mangiafico staying - Ms. Gagner, Chairman White, Ms. Kline, and Mr. Muir, are in favor.
Mr. Mangiafico and Mr. Ledgett abstained.
Vote on Mr. Ledgett staying - Ms. Gagner, Chairman White, Ms. Kline, and Mr. Muir, are in favor.
Mr. Mangiafico and Mr. Ledgett abstained.
Attorney Paul Cadigan is here and asks whether before the substantive review begins, the Board will deal with the information that came to light before the last board hearing. Attorney Cadigan would question whether this is a complete enough application.
Chairman White asks if he is referring to permits that have expired.
Cadigan says that he is referring to the submerged land lease and DEP permit.
Planner Noel would have to review the preliminary plan check list and see if it asks if all permits be secured or applied for. He does not believe so but will look at it.
The applicant says that he can clarify the status of permits if the Board would like.
Planner Noel does not see anywhere on the check list that is carbon copy of the ordinance that the applicant would be required to have a valid permit of any sort. The Board members and the Planner have reviewed the submittals and found them complete. What is required on the check list and what is requested from the applicant is considered complete.

Mr. Ledgett refers the Board to pages 317 and 318 of the Code. Items h on 317 and i. H is the Army Corps of Engineers and it says the applicant shall submit proof. I is the DEP and it says the applicant shall submit proof.
Mr. Mangiafico says those are required, but not prior to an application being approved. Typically, this Board does not get permits. The approvals are contingent on these approvals being obtained. It would be impractical to get them ahead of time, but sometimes people do.
Mr. Ledgett asks if the issue is that they are submitted.
Mr. Mangiafico says that we want to see if they are valid.
Mr. Ledgett says that they were submitted and the assertion is that they are not valid.
Mr. Mangiafico says that if they are expired or for some other reason not valid, we need to know that.
Chairman White says that the documentary information shows that they are expired.
Jim Nadeau says that permits are required if the applicant is successful. They are not part of the check list. They are not required now. However, the applicant does have them.
The attorney for the applicant received a copy this week through his client of the e-mail which provided the information in question. The issue as to whether Mr. Mullen could issue that declaration is being investigated through the Attorney General's office. There is an issue as to whether he could make that determination without having told the permittee.
Planner Noel asks the Board to turn to page 366 16.360.60.b. which states that a complete preliminary plan shall include, unless the Board waives them, a copy of all the submissions necessary for an application to be considered complete.
Mr. Nadeau would be willing to provide the status of those forms. The file is complete through that process. The applicant has four general permits. The one issued by the Department of Environmental Protection is current. The one issued by the Department of Army Corps of Engineers is valid through September 2006. They do need to be under contract with a firm to build a dock which they are. They have another permit that they have been told they do not need because it is covered under another. The submerged land lease is current. The payments on it are current. Finally, they have the current Kittery Port Authority permit which they will have to renew with a $60 fee if they do not get approval by January 2006. That is the current status of approvals and permits.
Attorney Cadigan asks if he may offer a point of view with regard to the status of permits.
Chairman White says yes.
Attorney Cadigan says that with the DEP permit, there is a question as to the name. The person on the permit is not the owner of the property. That is the question with regard to that. The Army Corps permit is a question of latitude and longitude. The location of the pier has been modified since the permit was obtained. It is a change of 15-20' which would render the permit invalid. With the submerged land lease, it must be acted upon within a two-year period and that permit is greater than two years old and construction has not commenced. For those reasons, he thinks that is the problem.
Chairman White asks which location the Kittery Port Authority was given - that provided in the Army Corps application or another.
Mr. Nadeau thinks that it is a trick question. Initially, they could not get a determination as to side setbacks. After applying to the Army Corps of Engineers, it was determined that they needed a setback, and the plan was amended to reflect that. He talked to Mr. Howe who said that they just have to notify him as to the amendment. As to the other comments made, he does not accept the premise of the argument.

Chairman White asks again about the Kittery Port Authority permit and whether that depicted the correct location.
Nadeau says they were not specific. Water frontage is being waived. The location is not defined.
Chairman White asks about navigability.
Mr. Mangiafico says that this is not an issue to get into now. We make approvals contingent on them getting these in order. *He moves to extend the meeting until 11:00 pm.*
Chairman White seconds for discussion.
Mr. Mangiafico thinks that given the amount of time that we took discussing our potential conflicts, we should get the presentation and get some public comment. We cannot go beyond 11:00 by our rules, by the charter.
Chairman White asks if the meeting ends by rule, whether this will be continued to the next available time. He thinks that we do not necessarily do our best work between 10 and 11 pm. He thinks this application should be the only thing on the agenda when it is next scheduled and we should give it its full due. If we have gone two hours then and we get to 10:00, then maybe we go to 11:00 then.
Mr. Mangiafico thinks that all these people have come out tonight and may not be able to make the next meeting. He would like to get the presentation out and get the public comment in. It won't be a one-shot meeting with all issues we have to deal with. If we can get some of it out of the way tonight, we should.
2 in favor of extending, Mr. Mangiafico and Ms. Gagner. 4 opposed. Motion fails.
Chairman White says that this will involve a number of meetings.
Mr. Hollis asks that this application be put toward the beginning of the meeting. They spent a lot of time for this. Is there any way to have this start earlier?
Chairman White says that if he was listening, that is what Chairman White asked for.

7. OLD BUSINESS: REVIEW PREVIOUS MEETING MINUTES

N/A

8. PLANNER'S TIME

N/A

9. ADJOURNMENT

Adjourned by rule at 10:00 pm.