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May 6, 2022

Zoning Board of Appeals
Town of Rockport
101 Main Street
Rockport, ME 04856

RE: Appeal filed by Friends of Rockport and John Priestley

Dear Members:

Please allow this letter to serve as a response to Attorney Collins' April 11, 2022 letter to the ZBA. Attorney Collins' letter was submitted to supplement the arguments raised in the Appellants' appeal of the Planning Board's approval on remand regarding 20 Central Street, LLC. While this letter was submitted after the deadline provided in your Ordinance with respect to submissions before the ZBA, to the extent that the ZBA intends to consider the arguments raised in her letter now that the meeting was postponed and rescheduled, please allow this letter to serve as 20 Central's response thereto.

1. The Planning Board did not improperly consider new evidence as to architectural harmony.

First and foremost, the Superior Court did not retain jurisdiction and did not speak to the Planning Board's limitations on remand. That being said, the Planning Board took great pains to revisit the pre-existing record without reference to any newly submitted evidence or materials provided or obtained after remand in order to make its determinations on whether substantial evidence exists to support its findings on parking requirements and architectural harmony.[1] The Planning Board's primary Findings and Conclusions entered on remand were based solely on the record that existed prior to remand. Only after entering that decision, did the Planning Board, in an abundance of caution, make Additional Findings and Conclusions based on the new material submitted to the extent to which the Superior Court's Orders may be construed as allowing the submission of new evidence and materials. This appears to be the focus of Appellant's objections, but one not even need to go there as it was clear in the record before the Planning Board that there was already substantial evidence on which to base their decision. For instance, the Planning Board

[1] It is not lost on the applicant, 20 Central, that the Appellants submitted materials prior to the January 27, 2022 hearing on remand that were not apart of the original record, but now argues that the Planning Board improperly considered new evidence. By way of example, Appellant John Priestly, submitted a diagram of a proposed 20-room hotel for consideration by the Planning Board. In addition, Appellants now appear to raise new arguments that they did not raise before the Planning Board back in May of 2020.

specifically makes reference to "Picture 5" dated 10/7/19 from materials submitted by the Applicant in support of its application for Site Plan Review, which depicts the wrought-iron balcony directly across the street from the hotel at 23 Central Street that is owned by the Appellant John Priestly.[2]

The Planning Board both properly and effectively were able to sparse the Planning Board's findings on remand to separate the former record from the new evidence. To suggest otherwise is an insult to the Planning Board.

2. <u>The Planning Board did not err in determining that the 2012 approval for Union Hall did not rely upon the 25 spaces then being added to Sandy's Way by the developer.</u>

The Appellants have taken great pains to redefine the definition of "waiver" and appeal the decision of the 2012 Planning Board. The Planning Board on remand was asked by the Superior Court whether or not "the waiver was complete, such that there were no spaces in Sandy's Way dedicated to Union Hall and all of those spaces were available to 20 Central's patrons." This is **exactly** what the Planning Board did on remand and determined that when the Planning Board in 2012 waived the parking requirements down to zero spaces, it intended to do exactly that. "After considering the parking, the then Board Chair Mr. Leichtman noted that '**waiving** the parking requirements would be the smartest thing to do' and then Board voted 5 to 0 to 'waive the parking space regulations for this project."' There is no other way to interpret the meaning of "waiver" in this context, especially considering that neither party at the time (2008 or 2012) had rights to the Sandy's Way parking spots. The spaces were never "assigned" to another use.

3. <u>The Planning Board did not fail to apply the Town's parking standards</u>.

The Appellant appears to be stating that the Planning Board had more on remand before it other than the two issues identified by the Superior Court, namely architectural harmony and parking. In regards to parking, the Planning Board once again determined that 20 Central was not requesting any shared parking, so that analysis under the ordinance did not come into play. The Planning Board has no requirement to apply a shared parking analysis when one is not being requested and when it is entirely not applicable. The Planning Board clearly determined, based upon the facts in the record that the Sandy's Way Lot was not oversubscribed, stating that "[t]he Planning Board finds that the Sandy's way Lot is not a shared lot under the Land Use Ordinance definitions because this provision is implicated only when distinct parties or businesses (not under common ownership) formally propose to concurrently use a parking facility, a case that is not present here." 20 Central's generosity in allowing the public to use the Sandy Way Lot is now somehow being used against them, a standard that should not be promoted, as good stewardship among the community should be something that is revered.

4. <u>The Planning Board was not required to review a traffic and parking study in considering the demand on parking and traffic</u>.

[2] Appellants appear to argue that this is not a "balcony" but rather a fire escape despite the fact that it has no ladder of which to escape on.

Despite Appellants success to have the amended ordinance apply to 20 Central's project, they are still unhappy with the result. One only needs to look at the **actual** language in the Zoning Ordinance to resolve this issue. Section 803.1(5) states:

> Parking Location: Off-street parking to meet the minimum number of parking spaces set forth in the table above that cannot be provided on the same lot as the principal structure or use may be located at a sperate location subject to the approval of the **CEO** or the Planning Board. The **CEO** or Planning Board shall consider the following factors in making their decision: The separate parking site is a reasonable distance from the principal structure; the principal use will provide access to the separate site such as, but not limited to: walkways, transit bus/vehicle or valet service; and the separate site is held under the same ownership or lease as the principal use or structure. Amendment to 5. Parking Location: No off-site or shared parking, or waiver of parking requirements, shall be approved unless it is supported by an independent traffic study prepared by a qualified professional, hired by the reviewing authority and paid for by the applicant, which establishes that the parking facility is adequate for the proposed use and any shared use(s) will not cause undue burdens on traffic or parking in the vicinity, and will not cause safety concerns. (Notwithstanding 1 M.R.S. section 302, this amendment shall apply to all land uses and all off-site parking facilities that have not received final approval as of 45 days prior to enactment of this amendment)

Nowhere in the above ordinance does it specify that the Planning Board has sole jurisdiction as the reviewing authority. In fact, during the time of application, it was the ZBA that was the reviewing authority in making determinations relative to offsite parking. That authority has not been vested in the CEO **or** Planning Board concurrently.

5. <u>The Planning Board was not required on remand to revisit its site plan approval</u>.

The Superior Court took great pains in concluding that the Planning Board's Site Plan Approval was not vacated and that the Planning Board's approval was separate and distinct from the issuance of the building permit. The Superior Court was clear as to what two matters were being remanded back to the Planning Board for further findings. Neither of these issues, architectural harmony or parking, were related to scenic view. In fact, both of these issues were related to the appellate action and were not related to the civil action brought before the Court. Furthermore, the Court specifically ruled against Appellant's argument related to scenic view and upheld the Planning Board's decision. Appellants are now seeking a second bite at the apple as it relates to the Court's decision on scenic view.

6. <u>The Planning Board was not required to consider the architectural harmony of the harbor side of the hotel, but properly did so anyway</u>.

The Appellants raise for the first time their argument relative to architectural harmony of the harbor side of the hotel. Despite this, the Planning Board did properly consider the harbor side of

the hotel, specifically stating, and reminding everyone, that visually harmonious does not mean that it must be the same. A very subjective standard but noting that each of the three buildings on the block have slightly different features, but together are visually harmonious and that in the rear of the building there are balconies and decks on both adjoining buildings as well as on many buildings facing the water overlooking the harbor. A standard feature for most buildings along Rockport's and Maine's coastline.

7. The Planning Board did not place undue emphasis on residential decks and a fire escape.

As noted above, the balcony across the street is not a fire escape. The fact that Appellants now assert that the only buildings that may be considered with respect to making their analysis are only those on the Central Street block and no others is a completely absurd position and not supported by the Ordinance. Furthermore, the Appellants are now arguing (despite their argument above) that the Planning Board was not allowed to consider decks/balconies on the harbor side of the existing block.[3]

8. The Planning Board was not required to revisit its findings on scenic view.

Again, it is unclear as to what the Appellants' understanding is relative to those matters which the Superior Court remanded. Based on the Court's Order, it was clearly not with regards to scenic view, holding that "the court is unable to overturn the prudential decision by the Planning Board that the comprehensive loss of the harbor view from the street did not offend the [Land Use Ordinance]." Scenic view was not before the Planning Board on remand and therefore, should not be before the ZBA for reconsideration.

Sincerely,

André G. Duchette

AGD/tek
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[3] Appellants also now seem to suggest that the Planning Board on remand should have considered lighting and nuisance factors in making their decision but the Court was clear in its decision that the "Plaintiffs now confine their challenge to the balconies that extend from every guest room on the **front façade** of the hotel."