

**FINAL  
APPROVED  
1 FEBRUARY 2022**

**The Zoning Board of Appeals  
Minutes for June 30<sup>th</sup>, 2021  
Via Zoom**

<https://livestream.com/rockportmaine/events/9727456>

The meeting began at 5:30 pm on June 30<sup>th</sup>, 2021

**Board Present:** Chair Geoffrey C. Parker, Vice-Chair W. Kevin Olehnik, Robert Hall, Maxwell MacCoole, Kimberlee Graffam, Terri Mackenzie, Thomas Kennedy

**Board Absent:**

**Staff Present:** Planning and Development Director Orion Thomas  
Videographer Bruce Hilsmeier

**The Board** met to address the appeal as outlined here:

Consideration of an Administrative appeal of the order or decision of the Planning Board or Code Officer pursuant to Section 702 of the Land Use Ordinance. This appeal is for Building Permit #6843 issued by the Code Enforcement Officer to 20 Central Street LLC on March 10, 2021, on the grounds that the building permit application and plans differ from the Planning Board's site plan approval. The following persons submitted the appeal: David Barry, David Kantor, John Priestley, Mark Schwarzmans, and Winston Whitney.

**Kimberlee Graffam** Recused herself on the advice of Leah.

**Attorney Leah Rachin** identified the board's priorities during this meeting, listing three threshold issues that the board must address to move forward. These included the following:

1. The jurisdiction of the Zoning Board of Appeals, namely, does the board have the authority to hear the appeal the decision made by the Planning Board or the Code Enforcement Officer.
2. Does *Section 707* of the *Land Use Ordinances* preclude the hearing of the appeal by the board?
3. Will the board be able to establish standing on behalf of any of the appellants?

The appeal put forth during this meeting was a De Novo appeal. Therefore, during this meeting, the board could not consider prior documents and were only able to use those documents which the parties provided for the June 30<sup>th</sup> meeting. Attorney Rachin also reminded the board to limit discussion to only the new items and issues provided.

**Attorney Kristen Collins**, Counsel for the appellants, stated that she believed the board had the authority to hear the appeal but could not establish jurisdiction without further discussion of the issue.

**FINAL  
APPROVED  
1 FEBRUARY 2022**

**The Board**, under the guidance of Attorney Rachin, decided to approach the various issues in the following order:

1. Standing of one or more parties.
2. Preclusion under *Statue 707* of the *Land Use Ordinances*.

**The Board** discussed the criteria needed for standing to be granted to the appellants. They examined the evidence provided by the appellants to determine which appellants if any, had standing for the appeal. There was some debate as to whether appellant John Priestley had proper grounds for standing.

**Robert Hall** made a motion to grant standing to Mr. John Priestly in the Appeal of building permit #6843 provided by the Code Enforcement Officer to 20 Central St. LLC. Due to his adjacency to the lot

**Terri Mackenzie** Seconded the motion.

No Discussion.

**Carried 6-0-1**

**The Board** then decided whether the appeal was precluded based on the parameters outlined in *Section 707* of the *Land Use Ordinances*. The counsel for the appellants stated that there were proper grounds for appeal as:

1. There were significant changes made to the applicant's plan as presented to the planning board versus the approved permit granted by the Code Enforcement Officer, that is:
  1. Changes made concerning parking, specifically shared parking and the ownership of the Sandy Way parking lot located at 20 Central St.
  2. Violation of *Section 1003* of the *Land Use Ordinances*.
  3. Violation or nuisance standards since the applicants changed or misrepresented their plans for the fourth-floor restaurant or rooftop bar.
2. There was an error of law made by the Planning Board as outlined in *Section 601.1* and *Section 1302* of the *Land Use Ordinances*:
  1. The Planning Board oversaw issues not delineated in *Section 1305 Performance Standards* of the *Land Use Ordinances*. Counsel argued that the language of *Section 1305* is very limiting, and therefore, the Planning Board usurped the authority of the Code Enforcement Officer.

**FINAL  
APPROVED  
1 FEBRUARY 2022**

- i. The Planning Board did not have the authority to rule on *Section 1003 Architectural Review Standards* or nuisance standards
2. The Code Enforcement Officer failed in his obligation to review the entire ordinance in granting the new permit
3. The site plan was not the final approval for every substantive provision of said ordinance.

**Attorney Andre Duchette**, Counsel for the applicant, stated that:

1. Issues with *Section 1003 Architectural Review Standards* regarding the planning board's authority have already been heard by the Zoning Board of Appeals and cannot be presented again.
2. *Section 1305* is the minimum requirement, and it in no way limits the Planning Boards' purview in additional elements they may decide to examine.
3. The nuisance issues are essentially the same as was already brought before the board.
4. Parking concerns were a known issue which the appellants had the opportunity to present at the last appeal but chose not to. He, therefore, concluded that the appellants should not be allowed to submit this as a new issue as outlined in *Section 707*. The counsel for the applicant recommends that this issue not be brought forward and that the board should dismiss these claims and focus on the remaining new claims.

**Phil Saucier** disputed the idea that an Error of Law was a novel idea and was never presented before the Planning or Zoning Board of Appeals previously. He stated that It was never raised that the Planning Board nor the Zoning Board has no jurisdiction. HE also pointed out that *Section 1304 Sub Section 4 Site Plan Contract* of the *Land Use Ordinance* gives the Planning Board the ability to consider *Section 1003 standards*. The Planning Board is also mentioned throughout *Section 1000* as having the ability to make determinations or waivers on said requirements.

**Ms. Mackenzie** and other board members expressed concerns about the assertion that there was an error of law regarding how the Planning Board interpreted and used the ordinances. Terri also raised the question of who would have the authority to rule on architectural review if not the Planning Board.

**Attorney Duchette** stated that the parameters laid out for the planning board in *Section 1304* are the minimal requirements of the Planning Board but that the Planning Board is by no means limited to looking at only these standards.

**Mr. Hall** motioned that since this is the second appeal affecting the same premises and requesting similar decisions, I move that the current appeal is not timely under *Section 707* of the *Land Use Ordinances*, which allows appeals only six months after the prior appeal has been denied.

**FINAL  
APPROVED  
1 FEBRUARY 2022**

Secondly, I move that should the appellants file a timely appeal; it should be limited to whether the building permits application and plans materially and adversely differ from the planning board site plan approval as alleged in the April 9<sup>th</sup>, 2021, letter which accompanied the appeal. **Ms. Mackenzie** seconded the motion.

**The Board** discussed the merits of this motion and heard again from the appellants.

**Attorney Collins** restated the appellant's concerns reasserting that new issues to be heard would allow the board to go forward without waiting the time stated in the motion.

**Attorney Rachin** recommended as the current appeal was technically already untimely, that the board should amend or withdraw the motion.

**Mr. Hall** agreed to withdraw his motion.

**The Board** then decided to hear the appellant's full presentation to understand their case better and determine which, if any, were new issues.

**Attorney Collins**, on behalf of the appellants, presented evidence to establish that appeal complied with *Section 707* of the *Land Use Ordinances*, including:

- I. The jurisdiction of the Zoning Board determines the validity of legislative enactments. Stating that the town meeting is the legislative body.
- II. The purpose of the fourth floor or rooftop bar and restaurant and what use was established on the permit.
  - a. As well as alleged changes to the roof design not presented to the planning board.
- III. The issues involved with parking, whether 20 Central St. LLC intended to use shared parking as their intentions were unclear. As well as the number of parking spots required for the Hotel.
- IV. Significant material changes made to the façade of the building as approved by the site plan then are in the permit approved by the Code Enforcement Officer
- V. The capacity of both the fourth floor and ground floor restaurants.

**Attorney Rachin** recommended that after the appellant's presentation, the board had sufficient new evidence to decide if there are grounds to go forward with the appeal if:

- I. There is substantial new evidence or:
- II. There has been an error of law.

Therefore, the board would need to determine if the evidence laid out:

- a) Would require the board to make a similar decision from that which had already been made during the previous appeal.
- b) Would be required, although it may be the same premises and need a similar decision, to factor this into their ruling

**FINAL  
APPROVED  
1 FEBRUARY 2022**

- c) or if there was an error of law, mistake, or misunderstanding in reference to:
- i. the architectural standards
  - ii. The Nuisance issues
  - iii. And parking

**Mr. Hall** moved that the issues pertaining to the architectural standards were old matters, and did not need to be reviewed again.

**Ms. Mackenzie** seconded the motion.

**Attorney Rachin** requested the motion be made clearer, which was taken into consideration.

**Mr. Hall** amended the motion, stating that there was no substantial new evidence nor was there a mistake of fact pertaining to the architectural standards, and as these are old matters, should not be reviewed again.

**Ms. Mackenzie** seconded the amended motion. Terri believed the planning board was well within their power and that the ordinances do not have the scope of power to dictate changes made to the façade of the building.

**Attorney Rachin** recommended that the board state on the record whether they feel that the planning board lacked authority or not. The board could either decide that the appellants no longer have grounds to make such a case against the planning board. Or that the board has authority to consider site plan and performance review standards.

**The Board** discussed the merits of the argument that the Planning Board did not have authority and concluded that they did indeed have the authority to rule on these issues.

**Carried 6-0-1**

**Mr. Hall** moved that no substantial new evidence was brought forward and that no error or mistake of law or misunderstanding of fact has been made regarding section c. pg. 6, nuisances, and this item was therefore precluded under *Section 707*.

**Maxwell MacCoole** seconded the motion.

No discussion.

**Carried 6-0-1**

**FINAL  
APPROVED  
1 FEBRUARY 2022**

**Kevin Olehnik** moved that no substantial new evidence was brought forward and that no error or mistake of law or misunderstanding of fact has been made regarding parking. This item was therefore precluded under *Section 707*.

**Thomas Kennedy** seconded the motion.

No Discussion

**Carried 6-0-1**

**The Board** then moved on to new issues to determine whether these items would be precluded under *Section 707*.

**Tyler Smith** laid out the parameters of the fourth floor and ground floor restaurants and explained the capacity limits, which are on the building permit issued by the Code enforcement officer. He stated that the capacities differ depending on which standard is being used. The applicants intend to have no more than 24 persons on the ground floor and 60 persons on the fourth floor. He clarified that the maximum occupancy permitted by the fire marshal was 283 persons on the top floor and is purely based on the footprint of the space and the number of exits. The applicant assured the board that they intended to have no more than 60 occupants on the top floor as laid out in the permit. However, the applicant did indicate that they may intend to use the fourth floor for an unspecified event limited to no more than 60 persons in the future.

**Attorney Collins** stated that any gathering or event held on the fourth-floor restaurant that was not in alignment with the permit would cause new concerns related to parking and traffic. Specifically, any event that would facilitate a large gathering, such as a conference or wedding. In addition, she asserted that such a gathering would violate the permit given by the Code Enforcement Officer. Kristen also raised concerns about the nature of the fourth-floor restaurant as to whether it was a rooftop bar. The appellants claimed that either the applicant misrepresented or later added changes to the roof, making it a rooftop bar rather than a fourth-floor restaurant. The appellants believed the applicants had not brought this matter before the Planning Board.

**Mr. Smith** Then stated that the plan was to include removable roof panels from the beginning and that they had in no way tried to mislead the Planning Board nor misrepresent their plans to the board.

**The Board** discussed how to move forward with this evidence and discussed the idea of reviewing the previous Planning Board meeting to ascertain whether the planning board fully understood the applicant's plan.

**FINAL  
APPROVED  
1 FEBRUARY 2022**

**Emily**, a complainant, testified about her concerns about the light and noise disturbances caused by the project and how they would affect the neighborhood and her family.

**Attorney Saucier** cautioned against challenging the decisions or ruling of the planning board.

**The Board** decided that the appellants should come back with further evidence proving that the applicants did not state their intentions to create movable roof panels. They also discussed what to do going forward with this appeal. As well as whether the board had jurisdiction to rule on this appeal

**Attorney Rachin** counseled that the board must exhaust all areas of this appeal before submitting it to the courts.

**Attorney Duchette** asked whether the Code Enforcement Officer was right or wrong in his approval of the permit.

**The Board** then adjourned their meeting with a **continuance** issued at 11:00 pm on June 30<sup>th</sup>, 2021, for **July 8<sup>th</sup>, 2021**.

**-CONTINUANCE-**

**The Zoning Board of Appeals  
Minutes for July 8<sup>th</sup>, 2021  
Via Zoom**

**Board Present:** Chair Geoffrey C. Parker, Vice-Chair W. Kevin Olehnik, Robert Hall, Maxwell MacCoole, Kimberlee Graffam, Terri Mackenzie, Thomas Kennedy

**Board Absent:**

**Staff Present:** Planning and Development Director Orion Thomas  
Videographer Bruce Hilsmeier

**Chair Parker** called the meeting to order at 5:39 p.m.

**Attorney Rachin** made an opening statement listing the items the board would need to address during this meeting; these include:

- I. The issue regarding retractable rooftop, namely whether this constituted a material change from the originally approved plan.
- II. The Jurisdiction of the board concerning state statute
- III. The permitted assembly use of the 4th-floor restaurant or rooftop bar.
- IV. Board review of the finding of fact to be submitted to the courts.

**Chair Parker** recommended that the board first address the assembly use issue and asked that the opposing councils give a brief statement.

**Attorney Collins** restated her earlier claims that the applicants did not have assembly use rights in the given space.

**Attorney Duchette** stated that the proposed findings of fact regarding the assembly use were correct.

**Ms. Mackenzie** made a motion concluding that the assembly use, or in excess of 60 persons, the CEO's issuance of a building permit to 20<sup>th</sup> Central St. LLC. Did not constitute an unpermitted assembly use in violation of section 1306 of the Land Use Ordinance.

**Mr. Hall** seconded the motion.

**Mr. Hall** recommended adding in excess of 60 persons to clarify the motion.

**Carried 6-0-1**



**FINAL  
APPROVED  
1 FEBRUARY 2022**

**Attorney Rachin** then addressed the issue of whether the board would have jurisdiction to rule on the application of state statute. She advised the board that they did not have and authority to rule on the constitutionality or legality of the law. However, the board needed to determine if the August 2020 ordinance change would effectively nullify the issuance of a building permit. The board also needed to determine which ordinance would have applied to the applicant's building permit based on the state statute.

**Attorney Collins** gave a brief statement stating that the August 2020 ordinance is the applicable ordinance in this case. She maintained that the board does not have the authority to decide if the 2020 ordinances can be applied legally. She argued that the board cannot determine the validity of the ordinance based on state statute but must apply it on its face.

**Attorney Duchette** stated that the board was only required to determine if the CEO appropriately issued the building permit. He also stated that local municipalities are not able to ignore state law. The applicant is only asking the board to determine which ordinance was applicable at the time of approval.

**Attorney Murphy** ordinance's validity counsel for the Code Enforcement Officer stated that neither the CEO nor the Zoning Board of Appeals could ignore state requirements. He also believed that the ZBA did have jurisdiction to rule on state statute. As it applies to the applicant's permit.

**Mr. Hall** also believed that the board had jurisdiction over this matter and that the board needed to determine which ordinance must be applied.

**Mr. Hall** moved that the Zoning Board of Appeals had the authority to rule on which ordinance should be applied to this controversy and can be informed by state law on this point.

**Mr. Kennedy** seconded the motion.

No discussion

**Carried 6-0-1**

**The Board** then discussed when final approval was granted to determine which ordinance should be applied to the building permit. There was some deliberation as to which date was the correct date for final site plan approval. Both February 27<sup>th</sup>, 2020, and May 21<sup>st</sup> 2020, and January 2021 were all suggested as potential dates for the final site plan approval. Some board members believed that May 21<sup>st</sup>, 2021, with an extension of 45 days, was the date of final approval. Ms. Mackezie maintained that February 27<sup>th</sup>, 2020, the date of the planning board meeting on which they voted to approve the site plan, was the actual approval date.

**FINAL  
APPROVED  
1 FEBRUARY 2022**

**Attorney Collins** believed that final approval was only granted in January 2021, when the applicant's plan had been reviewed by all town boards. She also stated that the final Planning Board approval was on May 21<sup>st</sup> 2020 as this was the date the written findings of fact were published.

**Mr. Hall**, after board deliberation, moved pursuant to state statute that the 2018 Land Use Ordinances were the governing provisions in this case. Otherwise, the Planning town boards had reviewed the applicant's plan Board's final approval would be effectively nullified by the August 2020 amendments.

**Mr. Kennedy** seconded the motion.

**Mr. Hall** stated that as the final approval was at the latest May 21<sup>st</sup> 2020, any changes would be too late to nullify approval of the permit.

**Attorney Rachin** stated that depending on the context, final approval could mean different things.

**Carried 6-0-1**

**Attorney Rachin** recommended that the board focus on the issue of the retractable roof at this time.

**Mr. Hall** stated on viewing the evidence submitted by the applicants that the record clearly showed mention of a retractable roof during the Planning Board's approval. He also cited two timestamps, namely, 52:04 and 58:45, of Oct. 24<sup>th</sup>, 2019.

**Chair Parker** also believed that the applicants had given a reasonable description of the function of the roof.

**Ms. Mackenzie** also cited a timestamp of 1:15:24 on Nov. 21<sup>st</sup>, 2019. She also stated her belief that the applicant clearly showed their intention of including some sort of retractable or opening roof feature to the Planning Board. The applicants had also stated that only acoustic sound would be used on the roof rather than amplified sound.

**Mr. Olehnik** made a motion, concluding that 20<sup>th</sup> Central St. LLC. Did present plans depicting a retractable roof to the Planning Board when it originally approved 20<sup>th</sup> Central St. LLCs site plan review application. As a result, this board concludes that the retractable roof does not constitute a material change from the site plan approved by the Planning Board.

**Attorney Rachin** recommended that Mr. Olehnik amend the motion for clarity.

**Mr. Olehnik** amended the motion at the suggestion of Attorney Rachin. as follows.

**FINAL  
APPROVED  
1 FEBRUARY 2022**

The ZBA moves that the plans approved by the CEO specifically with respect to the designs of the rood did not constitute a material or substantial change from the approved plan based on the evidence.

**Mr. Hall** seconded the motion.

**Carried 6-0-1**

**Attorney Rachin** recommended that the board make a final motion the appeal at this time.

**Mr. Hall** Moved that the board deny the appeal.

**Mr. Kennedy** seconded the motion.

No discussion

**Carried 6-0-1**

**Attorney Rachin** brought forward the written findings of fact to be presented to the court as the last order of business.

**The Board** discussed whether they should review the findings of fact in this meeting or should end the meeting. It was decided that the board should continue with the meeting and make any final suggestions they had about the findings of fact. All board members felt they had adequate time to review the document. The board went through the document in sections and gave any recommendations they had.

- I. Pg. 1-4, Paragraph A. of the overview section, clarify The Land Use Ordinances as the 2018 Land Use Ordinance.
- II. Pg. 7-8, none
- III. Pg. 11 Up to Assembly Usage,
  - a. Add applies to the latest chapter of the challenge, which began with the appeal of the Planning Board approval,
- IV. Pg. 12 adding the three bullet points from 20<sup>th</sup> Century LLC. Findings of fact.

**Mr. Hall** made a motion to accept the written findings of fact as amended.

**Ms. Mackenzie** seconded the motion.

**Carried 6-0-1**

**FINAL  
APPROVED  
1 FEBRUARY 2022**

**Mr. Hall** Motioned to authorize the chair to sign on behalf of the Zoning Board of Appeals.

**Ms. Mackenzie** seconded the motion.

Respectfully Submitted,

Recording Secretary

Regan Elizabeth Crowe