

STATE OF MAINE
Knox, SS.

SUPERIOR COURT
Docket No. CV-2021-0002
AP-2021-0002

Friends of Rockport,)
John Priestley,)
Mark Schwarzmann,)
and Clare Tully,)
Plaintiffs,)

KNOX COUNTY COURT
DEC 2 2021 AM 9:39

v.)

Order and Judgment

Town of Rockport,)
Defendant,)

and)

20 Central Street LLC,)
Party-in-Interest.)

John Priestley, David Barry)
David Kantor,)
Mark Schwarzmann,)
and Winston Whitney,)
Plaintiffs)

v.)

Town of Rockport,)
Defendant,)

and)

20 Central Street, LLC,)
Party-in-Interest.)

Introduction

In these two related cases, substantially overlapping sets of plaintiffs challenge the approval and construction of Party-in-Interest 20 Central Street, LLC's hotel in the

historic downtown of Defendant Town of Rockport. The history of the events giving rise to both matters has been recounted in detail in this court's previous orders and is updated below.

Plaintiffs' challenges to the hotel project relate to its size, its appearance, its placement on the lot it occupies, the number of guest rooms it will contain, and the parking burdens that will attend its operation. The two cases are unusual in their configuration; not only is there a free-standing AP action, the CV matter contains a count for relief brought pursuant to M.R. Civ. P. 80B.

The plaintiffs in the independent AP case seek to overturn the approval of 20 Central's site plan application. As they have at every stage of the proceedings, they challenge whether the plan as approved complies with Rockport's Land Use Ordinance (LUO) requirements for parking, maintenance of scenic views, and architectural harmony with the surrounding downtown.

In a Second Amended Complaint filed in CV-2021-002 on March 30, 2021, the other set of plaintiffs seeks to apply certain amendments to the Town Charter that were passed after 20 Central's site plan application was approved but before the building permit was issued. These amendments would, were they to apply, limit the hotel to 20 rooms and require certain traffic and parking studies to be completed. Specifically, the civil action seeks the following relief:

Count I: a declaratory judgment pursuant to 14 M.R.S. § 5953, ruling that the amendments to the Town Charter apply to 20 Central Street's hotel project;

Count II: entry of an injunction, rescission of the building permit, and prohibition of further work on the hotel pending compliance with the amendments; and

Count III: appellate relief via M.R. Civ. P. Rule 80B, reversing the Code Enforcement Officer's issuance of the building permit for the hotel and its approval *de novo* by the Zoning Board of Appeals. This count seeks two forms of relief: primarily, a remand for reconsideration in compliance with the amendments to the Town Charter and, secondarily, a remand to consider inconsistencies between the site plan as approved and the building permit.

No party requested a factfinding hearing in Superior Court. The parties agreed on an extensive record that included printed documents, photographs, and recordings

of meetings before the relevant town bodies. After extensive oral argument on October 4, 2021, both cases are in order for decision.

This case is emotionally charged. It involves issues of home, community life, local history, and divergent senses of esthetics, all of which could lead less genteel litigants and lawyers to provoke one another. That has not occurred. Thus, as the court again acknowledges counsel's professionalism in marshaling and presenting this complicated material, it commends everyone involved (including the chair of the Planning Board, who exercised considerable patience in presiding at meetings) for their forbearance and gentility. The court also notes the admirably clear and detailed decisions of the municipal boards and officials involved.

Events and Filings

October 8, 2019: 20 Central submitted a pre-application package to the Rockport Planning Board in which it sought approval for a 35-room hotel with two restaurants.

October 24, 2019: The Planning Board held a meeting on 20 Central's application.

November 12, 2019: 20 Central submitted its formal site plan application.

November–December, 2019: The Planning Board held at least two meetings in which it reviewed the application and received public comment regarding the project.

February 14, 2020: 20 Central submitted a revised site plan application in light of the public comments. The revised application contemplated a proposed hotel with the same footprint, but reduced the number of rooms from 35 to 26.

February 27, 2020: A public hearing was held in which the Planning Board reviewed and deliberated over 20 Central's revised site plan application. The Board voted to approve the application to construct the 26-room proposed hotel and issued various findings of fact. The Planning Board agreed to review and approve its findings of fact at a later meeting.

February–early March, 2020: Plaintiff Tully and several others circulated two citizens' petitions—Petition A and Petition B—pursuant to 30-A M.R.S. § 2528(5).

Petition A requested an ordinance amendment mandating that an independent traffic study be submitted prior to the approval of any off-site parking, shared parking,

or waiver of parking requirements. It applied to “all land uses and all off-site parking facilities that ha[d] not received final approval as of 45 days prior to” the amendment’s enactment.¹

Petition B requested an ordinance amendment placing a 20-room cap on the number of allowable rooms within a single hotel. It was expressly made retroactive to all hotels that had not received final approval and all building permits as of March 1, 2020.²

¹ Specifically, Petition A sought the following amendment to Section 803.1(3):

Location of Off-Street Parking: Required off-street parking in all districts shall be located on the same lot as the principal building or use, except that where off- street parking cannot be provided on the same lot, the Planning Board Board of Appeals may permit such off-street parking to be located a reasonable distance from the principal building or use, measured along the line of public access. If serving a business or industrial use, such parking area shall be in a business or industrial district. Such parking areas shall be held under the same ownership or lease. The Planning Board Board of Appeals may approve the joint use of a parking facility by 2 or more principal buildings or uses where it is clearly demonstrated that the parking facility will substantially meet the intent of the requirements by reasons of variation in the time of use by patrons or employees among such establishments. 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. § 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.

² Specifically, Petition B sought the following amendment to Section 917(G):

No more than 40 (forty) rooms, in the aggregate, shall be permitted at Inns/Hotels in the 913 zoning district. No single inn or hotel, nor any combination of such uses located on the same lot, shall have more than 20 guest rooms.

Notwithstanding 1 M.R.S. § 302, this amendment shall apply to all hotels and inns that have not received final approval and all building permits as of March 1, 2020.

Both petitions were submitted and accepted by the Town of Rockport for inclusion on the warrant for the June 9, 2020 annual town meeting.³

March 18, 2020: The Governor signed into law “An Act To Implement Provisions Necessary to the Health, Welfare and Safety of the Citizens of Maine in Response to the COVID-19 Public Health Emergency” (COVID response act). The legislation included provisions allowing municipal officers to postpone the date of a scheduled municipal secret ballot election or referendum. See P.L. 2020, ch. 617, available at <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0789&item=2&snum=129>.

March 23, 2020: The Rockport Select Board held a meeting in which it discussed the COVID response act and the secret ballot vote on Petitions A and B. The Select Board opted to postpone the town meeting and secret ballot vote (then scheduled for June 9, 2020) to a date uncertain.

April 10, 2020: Governor Mills signed an Executive Order moving Maine’s primary election from June 9, 2020 to July 14, 2020 and adjusting other dates associated with the primary. Exec. Order No. 39 (April 10, 2020).

May 21, 2020: The Planning Board voted to approve its findings of fact and decision regarding 20 Central’s application for site plan approval.

May 26, 2020: Due to the pandemic, the Select Board voted to reschedule the town meeting and referendum vote on the petitions to August 18, 2020. It further scheduled a public hearing for July 27, which included consideration of Petitions A and B.

June 9, 2020: This is the date on which the town meeting and vote on the petitions would have taken place, had it not been rescheduled due to the pandemic.

June 16, 2020: The Planning Board issued a notice of decision regarding the hotel’s application.

³ The Rockport Town Charter contemplates that the annual town meeting be held on the second Tuesday of June each year, which fell on June 9, 2020.

June 22, 2020: Plaintiffs David Barry, David Kantor, John Priestly, Mark Schwartzmann, and Winston Whitney (collectively, the “AP Plaintiffs”) appealed the May 21, 2020 Planning Board decision to the Rockport Zoning Board of Appeals (ZBA).

July 5, 2020: A period of 45-days elapsed from the date of the Planning Board’s site plan approval on May 21, 2020.

July 27, 2020: The Select Board held a meeting and public hearing on the items to be presented to the annual town meeting, including Petitions A and B.

August 18, 2020: The town meeting with secret ballot vote on the petitions was held. Both petitions were approved by Rockport voters.

August 19, 2020: Counsel for 20 Central submitted a letter to the town arguing that the two petitions could not be applied to the proposed hotel because, pursuant to 30-A M.R.S. § 3007(6), they were passed more than 45 days after the Planning Board’s May 21, 2020 approval decision.

August–December, 2020: 20 Central obtained several permits for excavation, fill, and other preparatory work for the hotel.

January 7, 2021: Friends of Rockport, John Priestly, Mark Schwartzmann, and Clare Tully (collectively, the “CV Plaintiffs”) filed a verified complaint seeking a declaratory judgment that the August 2020 ordinance amendments apply to 20 Central’s project. Plaintiffs also sought injunctive relief to prohibit Rockport from issuing a building permit for the hotel that does not conform to the terms of the amended ordinances. In an accompanying motion for temporary restraining order (TRO) and preliminary injunction, Plaintiffs asked the court to (1) enjoin the town from granting any building permit to 20 Central for the proposed hotel, and (2) enjoin 20 Central from engaging in any construction activities.

Additionally, January 7th is the day 20 Central submitted its application for a building permit.

January 12, 2021: CV Plaintiffs filed an amended verified complaint in the CV action.

January 19, 2021: The court, having previously granted CV Plaintiffs’ request for a TRO on an *ex parte* basis, vacated the TRO after a hearing. The court explained: “[i]f

the court vacates the TRO and the code enforcement officer issues the building permit, Plaintiffs will be able to return to court for further relief before 20 Central takes irrevocable steps in the project.”

January 21, 2021: The ZBA issued a decision upholding the Planning Board’s May 21, 2020 site plan approval of the proposed hotel.

March 8, 2021: AP Plaintiffs filed a rule 80B appeal challenging the Planning Board’s decision, as affirmed by the ZBA.

March 10, 2021: The Town of Rockport Code Enforcement Officer (CEO) issued a building permit for a “new 26 room hotel with restaurant and associated use as Planning Board Approved with off-site satellite parking.” The permit indicated that it was “subject to the Land Use Ordinance Dated June 12, 2018 since this is the date that the Planning Board was going through for their review.” There was no condition requiring 20 Central to reduce the number of rooms to 20 or submit to the planning process for guest parking, as required by the amended ordinances passed by referendum in August, 2020.

The same day, AP Plaintiffs filed a motion asking the court to issue a stay (1) preventing construction of the hotel pending decision on its rule 80B appeal; and (2) precluding the town “from issuing any further permits or approvals, including but not limited to any building permit for the hotel, for activity on the property that is predicated on Planning Board’s May 21, 2020 approval.”

March 17, 2021: CV Plaintiffs moved for a TRO and preliminary injunction seeking to prevent any construction on the proposed hotel authorized by the building permit.

March 29, 2021: Rockport and 20 Central filed motions opposing the stay and opposing the TRO and preliminary injunction.

March 30, 2021: CV Plaintiffs requested leave to file a Second Amended Complaint, seeking to add a Rule 80B claim in light of the issuance of the building permit.

On the same day, the court conducted oral argument on the second motion for a TRO.

April 9, 2021: Plaintiffs David Barry, David Kantor, John Priestly, Mark Schwartzmann, and Winston Whitney timely appealed the issuance of the building permit to the ZBA.

April 20, 2021: Rockport and 20 Central filed oppositions to CV Plaintiffs' motion for leave to amend.

April 22, 2021: The court issued an order denying CV Plaintiffs' motion for a TRO and AP Plaintiffs' motion to stay.

May 25, 2021: Plaintiffs filed a renewed request for a TRO and a stay.

June 15, 2021: Rockport and 20 Central filed oppositions to Plaintiffs' renewed motion for a stay/TRO.

June 21, 2021: Rockport moved to dismiss the First Amended Complaint in the CV case, including the declaratory judgment and injunctive relief counts. 20 Central later joined this motion.

June 30, 2021: The ZBA held a de novo hearing on Plaintiffs' appeal of the building permit.

July 8, 2021: The ZBA approved findings of fact and voted to deny all issues in the building permit appeal.

July 9, 2021: The ZBA issued a final written decision in which it upheld the issuance of the building permit for the proposed hotel.

July 14, 2021: The court issued an order (1) denying Rockport's motion to dismiss; (2) granting CV Plaintiffs' motion for leave to amend and accepting CV Plaintiffs' Second Amended Verified Complaint (which added a rule 80B claim); (3) consolidating the CV and AP cases for purposes of briefing; and (4) setting a schedule for briefing on the merits.

August 12, 2021: Plaintiffs filed their brief on the merits.

August 26, 2021: Rockport and 20 Central filed responding briefs on the merits.

September 7, 2021: Plaintiffs filed their reply brief.

October 4, 2021: The court heard oral argument in the matter.

Standard for Decision

80B appeal of site plan approval decision. As noted, Plaintiffs appealed the Planning Board's May 21, 2020 site plan approval decision to the ZBA. Because the ZBA acted only in an appellate capacity, it is the Planning Board's decision and not the ZBA's that is the operative decision for purposes of review. The court will therefore review the Planning Board's site plan approval decision directly. *Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 4, 757 A.2d 773 ("If . . . the Board acted only in an appellate capacity, we review directly the decision of the Planning Board, or other previous tribunal, not the Board of Appeals").

80B appeal of issuance of building permit. Plaintiffs also appealed the CEO's issuance of the building permit to the ZBA. In this appeal, however, the parties agree the ZBA reviewed the CEO's decision de novo. Because the ZBA acted in a de novo capacity, the ZBA's July 9, 2021 decision affirming the issuance of the building permit is the operative decision, and the court will review that decision directly. *Id.* ("If the Board of Appeals acted as a tribunal of original jurisdiction, that is, as factfinder and decision maker, we review its decision directly.").

Both decisions—the site plan approval and the permitting decision—will be reviewed "'for error of law, abuse of discretion or findings not supported by substantial evidence in the record.'" *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024. The party seeking to overturn the decision bears the burden of persuasion. *Id.* To the extent this case involves the interpretation of an ordinance, such an interpretation involves a question of law that the court will review de novo. *Id.*; *Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 13, 760 A.2d 257, 260.

Factual findings, meanwhile, must be reviewed with deference, and the court "may not substitute its own judgment" for that of the applicable local board. *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 17, 868 A.2d 161. A "'decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it.'" *Id.* Further, a "'demonstration that no competent evidence supports the local board's findings is required in order to vacate the board's decision.'" *Id.*

Discussion

Standing

The town and 20 Central appear to have foregone their challenges to standing in each case so the issue need not be addressed in detail. To the extent either the town or 20 Central maintains a challenge, the court disagrees; at least one plaintiff of each set demonstrably has standing to mount the challenges presented in these cases. *See, e.g., Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1282 (1st Cir. 1996) ("we [have] held that the court need not determine the standing of all plaintiffs if at least one plaintiff has standing to maintain each claim."); *Ramsay v. Inhabitants of Limington*, Nos. CV-96-204, CV-96-318; 1997 Me. Super. LEXIS 169, *1-2 (August 27, 1997) (finding standing where at least one plaintiff was an abutter).

AP-2021-002

To evaluate Plaintiffs' challenges to the Planning Board's approval of 20 Central's site plan application it is first necessary to situate the property within the town. Rockport Village lies on the western shore of Penobscot Bay. Central Street runs roughly east and west and extends for a long block at the heart of Rockport's tiny downtown. The block of buildings at issue in this case is situated on the south side of Central Street. Below Central Street to the south is a parking area known as "Sandy's Way." Farther down the hill is Rockport Harbor.

As a viewer stands on Central Street facing south, the block of buildings appears as follows: to the far left (east) is a building variously referred to in the record as the "Shepard Block" or the "Shepherd Block." (20 Central's site plan application uses the former name but the latter appears in most other references; for that reason, "Shepherd Block" is adopted in this decision.) The Shepherd Block is at 18 Central Street on a plot designated as Map 29, Lot 291. To the right (west) of the Shepherd Block is 20 Central's property, designated as Map 29, Lot 293. To 20 Central's right is the Martin Block at 22 Central Street, Map 29, Lot 295; to the right of the Martin Block at 24 Central Street, Map 29, Lot 297, lies the Carleton Brick Block. The Carleton Brick Block includes an area known as "Union Hall." All of these properties are now held in common ownership.

A. Parking

Parking in the Downtown or Harbor Village area is regulated by Section 803.1 of the LUO. This detailed protocol specifies the number of parking spaces that must be available to various types of establishments, including hotels, restaurants, and entertainment venues. It contains provisions for shared parking based on rolling requirements such as mealtimes at restaurants and showtimes at entertainment venues. To the extent parking cannot be provided as required, an applicant can seek certain accommodations. *See* LUO § 803.1.

The parties agree 20 Central's hotel requires 56 spaces (28 for the hotel as configured with 26 rooms and 28 for the two onsite restaurants). 20 Central applied for and received a waiver from the ZBA allowing it to provide 21 spaces in the Sandy's Way lot and 35 spaces in a lot at 310 Commercial Street in Rockport.

Whether and where the spaces approved actually exist to be used is a matter of contention among the parties. To summarize briefly, Plaintiffs believe a series of permits and waivers has resulted in oversubscription of available spaces downtown, notwithstanding the partial waiver and approval for offsite parking. 20 Central and the Town argue that 56 spaces were specifically identified as available to this project and that any past irregularity in permitting of other properties cannot undermine the Planning Board's approval in this case.

Petitioners' argument requires review of a series of approvals that began in 2008. In that year, the owners of 18 Central Street (the Shepherd Block) applied for and received approval to change the property's designated use from residential to commercial. This change required assignment of 28 spaces, all of which were to be found in the Sandy's Way lot. The application further noted overflow parking could be accommodated by 45 spaces on the street in the immediate area. PB 146. The attribution of 28 spaces in Sandy's Way (albeit not under that name) was reaffirmed the next year when the owners of the Shepherd Block applied for and received a special exception for establishment of a restaurant in their building. PB 150.

Following issuance of this special exception, the record of availability and attribution of parking spaces becomes murky. The Planning Board's approval of the

restaurant in the Shepherd Block included a narrative about nearby establishments and their parking needs. In the aggregate, the Planning Board concluded available public parking would be sufficient for the overflow and further welcomed commercial activity and its traffic demands in the downtown. PB 156.

The next specific burden on downtown parking was imposed in 2012, when the owner of Union Hall at 24 Central applied for a change of use from educational to commercial (to include a restaurant and retail grocery). PB 158. The Planning Board approval of this change included a statement that “parking could not be strictly conventional, despite the 25 spaces to be added in the rear.” PB 159. Although the tenor of the decision seems to indicate the Planning Board thought there was enough parking in the area, the board finally decided simply to waive parking space regulations for the project. PB 160–61.

What this waiver meant is not spelled out in the decision or otherwise in the record. Were 25 new spaces constructed? Did the waiver mean, as Petitioners argue, that 25 spaces in Sandy’s Way were allocated to Union Hall (in addition to those previously dedicated to use by patrons of the Shepherd Block), thereby leaving no room in Sandy’s Way for guests of 20 Central? Or did it mean, as the town and 20 Central argue, that 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?

If the issue presented is factual (did the Planning Board assign adequate spaces to 20 Central?), this court’s review is limited—the court may not vacate the Planning Board’s decision unless there is a “demonstration that no competent evidence supports [its] findings.” *Gensheimer*, 2005 ME 22, ¶ 17, 868 A.2d 161 (the court “review[s] factual findings of the Planning Board with deference and may not substitute our own judgment for that of the Board.”).

But even that narrow review is invoked by a decision in which the parties literally cannot agree on the factual predicate of what was actually decided. For a planning board’s decision to be meaningful it has at least to be grounded in some observed set of circumstances that are hardened into specific findings. Not only is there no specific finding as to what requirement was actually waived for Union Hall, there is no evidence of how many people actually patronize that venue, when they are there,

how many cars they come in, and where they actually park. In this court's view, for the Planning Board to make a factual decision on 20 Central's application, it had to consider all the overlapping burdens on the limited parking downtown. It could not simply and out of context attribute a minimum number of spaces to the project.

This approach to interpreting Section 803.1(3) is reinforced by other provisions within the LUO. Section 403, "Conflict with Other Ordinances," states that:

Wherever the requirements of this Ordinance differ from the requirements of any other lawfully adopted rules, regulations, ordinances, deed restriction or covenants, the most restrictive or that imposing the higher standard shall govern.

LUO § 403. Similarly, Section 703.4, "Variance," allows deviation from the LUO only when the strict application of the ordinance would cause undue hardship to the petitioner; "undue hardship" then being described in very restrictive terms:

- 1. That the land in question cannot yield a reasonable return unless a variance is granted.*
- 2. That the need for a variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.*
- 3. That the granting of a variance will not alter the essential character of the locality.*
- 4. That the hardship is not the result of action taken by the applicant or a prior owner.*

LUO § 703.4; MISC046. Although this dispute arises out of conflicting readings of the LUO rather than conflicts between it and another ordinance, the orientation toward restriction explicitly stated in the LUO is suggestive of the way such a conflict must be resolved.

The town appears to have conceded Plaintiffs' argument that the proposed offsite parking lot is subject to the LUO's landscaping and design standards. The court will therefore not address that issue but limits its ruling to the number of parking spaces as discussed above. On that issue, Plaintiffs are entitled to relief.

B. Architectural Harmony

Plaintiffs' next challenge is to the design of the building and the extent to which it complements or conflicts with its surroundings, as addressed in Section 1003.1 of the LUO. In their appeal to the ZBA, Plaintiffs presented a list of objections that appear to reflect close observation and esthetic sensitivity. Recognizing the limited extent to which the court can review the esthetic evaluation of a lay board, however, Plaintiffs now confine their challenge to the balconies that extend from every guest room on the front façade of the hotel.

This issue was presented and contested before the ZBA, but the actual terms of the board's approval were limited. No architect or other professional appeared before the board to offer an opinion as to the extent to which a bank of hotel balconies might "... relate harmoniously to the terrain and surrounding environment, including existing buildings in the vicinity that have a visual relationship with the proposal being entered." LUO § 1301; MISC281. Approval of the proposed design seems instead to have been based on the observation that other buildings "around the corner" have decks of some sort ("a number of large decks"). Recording of Feb. 27, 2020 meeting at 3:23-3:24. There was no discussion of the nature of these "decks," whether they fall within the field of vision of a person standing on Central Street, or how the proposed bank of balconies might blend in with, complement, or clash with buildings adjacent to 20 Central.

The court's review of this decision is deferential but not non-existent. Without at least some discussion of the actual appearance of the hotel within its proposed context, as opposed to reference to an unquantified number of undescribed features of unspecified nearby buildings, the court cannot see that the requirements of the LUO were fulfilled. *See Narowitz v. Board of Dental Practice*, 2021 ME 46, ¶ 18, __A.3d__ ("[a] mere finding of ultimate facts, a finding solely in terms of the statute, or the statement of a conclusion, without a finding of the basic or underlying facts on which the administrative agency deems such ultimate fact or conclusion to rest, is, as a general proposition, regarded as insufficient to support a determination"); *Lamarre v. Town of China*, 2021 ME 45, ¶¶ 6, 10, __A.3d__ (remanding where there were no "findings of fact tethered to a reviewable record" and explaining that "[i]t is black letter law that

meaningful judicial review of a decision requires that the decision contain findings of fact sufficient to apprise the reviewing court of the decision's basis and that those findings be based on substantial evidence in the record"); *Sanborn v. Eliot*, 425 A.2d 629, 630 (Me. 1981) ("[T]he agency must state both the reasons for its decision and the underlying facts in order to ensure effective judicial review. . . . Otherwise, we cannot determine whether the Board may have misinterpreted the underlying facts or misconstrued the provisions of the ordinance."). Plaintiffs are therefore entitled to relief on this element of their appeal.

C. Scenic View

The scenic view at 20 Central before the hotel was built existed primarily because the lot had been empty for a half a century. No party asserts the lot was unbuildable for that reason. The dispute before the Planning Board focused on how much view existed before 1970 and the extent to which the LUO requires that at least the pre-1970 historical view be maintained.

The hotel now fills the lot. No view of Rockport Harbor remains to a person looking toward the hotel from at any point on Central Street. How much view existed before 1970 is an issue of fact unresolved in the record: the parties offered varying estimates and the historical photographs are not specifically oriented or spatially legible enough to provide a satisfactory answer. The best evidence in the record may be a diagram of the foundation of the preceding building (ZBA026), which appears to correlate with a map dated 1912 (PB286). This evidence, if the court reads it accurately, shows a not negligible opening on Central Street to the east of the former building that narrowed in an angle as it extended backward but did not entirely efface the view of the harbor from the street.

Had 20 Central designed its building with more modest lateral dimensions it could have preserved at least a substantial sliver of view from the street to the harbor. In doing so it might also have established a more rhythmic line to the sequence of adjacent buildings on the south side of Central Street. The court's evaluation of this foregone option is constrained by its deferential standard of review. It is also limited by

Section 913.3 of the LUO. That section, which is found in a series of standards related to the Downtown District of Rockport, states in relevant part:

913.3 Special District Standards

To encourage patterns of development that are consistent with the historical development on the harbor side of Central Street, the following additional Uses and alternative Standards shall apply to parcels with Map-Lot numbers . . . 29-293 [the map and lot numbers that designate 20 Central].

...

(E) The following alternative Standards shall apply to parcels with street frontage on Central Street within these bounds.

...

(2) There shall be no maximum lot coverage.

LUO § 913.3.

The parties acknowledged this provision and argued about its application to this argument, with Plaintiffs emphasizing that the allowance for maximum lot coverage did not negate the more general standards within the ordinance calling for the preservation of scenic views. (The ZBA also invoked this section in its approval. PB 304.) A more detailed decision from the Planning Board that addressed the options available, the minimum requirements of a hotel (as opposed to a less population-intensive commercial venture), and other elements of its evaluation, would have been helpful to an understanding of the basis for its approval. Given the specific reference to this lot in § 913.3, however, the court is unable to overturn the prudential decision by the Planning Board that the comprehensive loss of harbor view from the street did not offend the LUO.

In sum, the court concludes that AP-2021-002 must be remanded to the Planning Board for further consideration of the issues of off-site parking and architectural harmony as discussed in this decision. Specifically, with respect to off-site parking, remand is necessary for the Board to consider and enter findings of fact regarding the parking requirements that were actually waived for Union Hall and the extent to which the Sandy's Way lot is shared with other establishments and with the general public. (This review will be influenced as well by the court's judgment in the accompanying civil action.)

Additionally, on remand, the Planning Board should address whether the hotel balconies conform to the architectural harmony requirements of LUO §§ 1301 and

1003.1, and document the underlying factual basis for its decision consistent with the court's discussion above.

CV-2021-002

All three counts in this action seek modification of 20 Central's project based on the amendments to the town charter. Two statutes bear on the issue: first, 1 M.R.S. § 302, "Construction and effect of repealing and amending Acts":

The repeal of an Act, resolve or municipal ordinance passed after the 4th day of March, 1870 does not revive any statute or ordinance in force before the Act, resolve or ordinance took effect. The repeal or amendment of an Act or ordinance does not affect any punishment, penalty or forfeiture incurred before the repeal or amendment takes effect, or any action or proceeding pending at the time of the repeal or amendment, for an offense committed or for recovery of a penalty or forfeiture incurred under the Act or ordinance repealed or amended. Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby. For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing. For the purposes of this section and regardless of any other action taken by the reviewing authority, an application for a license or permit required by law at the time of its filing shall be considered to be a pending proceeding when the reviewing authority has conducted at least one substantive review of the application and not before. For the purposes of this section, a substantive review of an application for a license or permit required by law at the time of application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law.

1 M.R.S. § 302.

Second, 30-A M.R.S. § 3007:

6. Restriction on Nullification of Final Permit. *A municipality may not nullify or amend a municipal land use permit by a subsequent enactment, amendment or repeal of a local ordinance after a period of 45 days has passed after:*

A. The permit has received its lawful final approval; and

B. If required, a public hearing was held on the permit.

For purposes of this subsection, "municipal land use permit" includes a building permit, zoning permit, subdivision approval, site plan approval, conditional use approval, special exception approval or other land use permit or approval. For the purposes of this subsection, "nullify or amend" means to nullify or amend a municipal land use permit directly or to nullify or amend any other municipal permit in a manner that effectively nullifies or amends a municipal land use permit. This subsection does not alter or invalidate any

provision of a municipal ordinance that provides for the expiration or lapse of a permit or approval granted pursuant to that permit following the expiration of a certain period of time.

30-A M.R.S. § 3007(6).

The critical dates upon which these dates operate are May 21, 2020, on which the Planning Board issued its final approval of 20 Central's site plan application; July 5, 2020, on which the 45-day period specified in 30-A M.R.S. § 3007(6) expired; August 18, 2020, on which Petitions A and B were passed and the Town Charter amended accordingly; and March 10, 2021, on which the CEO issued a building permit for the hotel. The critical issue can be phrased as follows:

Did the Planning Board's site plan approval vest in 20 Central the right not only to build a hotel with specified outer dimensions but to build the specific hotel it contemplated, including the interior configuration?

If the answer to the above question is yes, then 30-A M.R.S. § 3007(6) bars application of the charter amendments to the project because to do so would "nullify or amend" the site plan approval. If the answer to the question is no, then no vested right is impinged upon by the amendments.

Before embarking on a consideration of the parties' arguments, the court must address the references to the 45-day limit in its order of April 22, 2021, as "unambiguous." The town and 20 Central now argue that that reading is binding on the immediate decision. The court disagrees. The 45-day limit itself is unambiguous—there is no provision in the statute for alteration or relief from its operation. But the exquisite issue presented above had not been formulated as of April 22 and the court (which is not able to recreate all of its thought processes at that time) cannot reasonably be seen as limiting its capacity in this decision to review considerations not yet articulated when that hearing was conducted.

The court turns first to Chapter 1300 of the LUO, "Site Plan Review." Section 1302 includes a specific cross reference to building permits:

No building permit, plumbing permit or certificate of occupancy shall be issued by the Code Enforcement Officer or Local Plumbing Inspector for any use of development within the scope of this Section until a site plan review of the proposed development has been approved by the Planning Board.

LUO § 1302.

Building permits are addressed in a different chapter of the LUO, Chapter 600, Section 601. No provision of Section 601 refers to the site plan approval that issued before the application for building permit was submitted. The court concludes there is no explicit reference in the LUO that might establish an applicant's vested rights in a particular building plan as of the earlier issuance of site plan approval for the same project.

In the absence of such a definitive cross-reference, the court reviews the two chapters of the LUO for inferences as to how if at all issuance or withholding of a building permit might be constrained by site plan approval. Section 1304 of the LUO, entitled "Site Plan Content," includes three subheadings, "Site Plan," "Written Statement," and (not pertinent to the case at hand) "Revisions to Approved Site Plans." Each of these subheadings includes numerical subparts. Among those required under "Site Plan" are:

(3) Plans drawn to scale detailing total floor area and footprint of each proposed structure and the lot coverage as defined in Section 300 of the Land Use Ordinances.

(4) Elevations drawn to scale detailing the proposed siding and roofing materials, sizes of door and window openings and other features which may assist the Planning Board in making appropriate findings related to Architectural Review as noted in Section 1003 of this Ordinance.

...

(8) The size, shape and location of existing and proposed buildings on the parcel.

LUO § 1304.

Under "Written Statement," the ordinance requires:

(2) A description of the proposed uses to be located on the site.

(3) Total floor area and footprint of each proposed building and structure and the lot coverage as defined in the Rockport Land Use Ordinance.

Id.

Section 602.1 similarly requires that applications for building permits include the location and dimensions of the proposed building. Neither in Chapter 600 nor in Chapter 1300 is an applicant required to specify the interior configuration of a proposed building, and neither the Planning Board nor the CEO is directed to evaluate or approve that element of a proposal. The Planning Board's reference to a 26-room hotel appears to have been a repetition of the applicant's description rather than an element of the board's own evaluation under the ordinance.

The court is left with three inferential clues. The first is simply that the two processes, site plan approval and issuance of building permits, though they both address plans for building structures and require specification of external dimensions, are separate. The second is that, as noted above, neither chapter addresses the interior configuration of a building under consideration. The third is found in Section 601.2:

If no substantial start has been made within twelve (12) months of the issuance of the building permit, the applicant may renew the permit without paying the full permit fee, but must comply with the ordinances applicable at the time of the renewal; and if, after twenty-four (24) months from the issuance of the original building permit, a substantial start has not been completed, the permit expires and the applicant must reapply, paying the then-applicable fee.

LUO § 601.2.

From these three indicators, the court concludes that site plan approval for a building proposal does not vest the applicant with rights to a specific building that is thereafter the subject of an application for a building permit. It can be seen on the face of 20 Central's applications in pursuit of its project, first to the Planning Board for site plan approval and then to the CEO for a building permit, that they initiated separate proceedings. See Site Plan Review Application and supporting documents (PB001 et seq.) and application for Building Permit (ZBA009 et seq.). This appearance of separation between the two permitting processes is in accordance with the structure of the LUO described above, in which site plan approvals and building permits are addressed in separate chapters of the ordinance.

The court's conclusion is reinforced by its review of the Law Court's decision in *Larrivee v. Timmons*, 549 A.2d 744 (Me. 1988). In that case, an applicant argued that sequential applications and approvals for a mobile home park constituted a single "proceeding" such that 1 M.R.S. § 302 barred application to the project of certain amendments to the land use ordinance of Town of Windham. The Law Court found that each application, submitted to a tribunal in search of approval, was a separate "proceeding" such that Section 302 did not apply. *Larrivee*, 549 A.2d at 746-47. The conclusion is further reinforced by an observation not offered by the parties but derived from common sense. Imagine 20 Central had reconsidered its plans in view of public opposition and had decided to build a hotel with 20 rooms notwithstanding a site plan approval calling for 26; could there be a plausible argument that that decision was forbidden by the earlier approval?

Because the court has reached its conclusion based on the language and structure of the ordinance, it need not address the constitutional, equitable, and related challenges advanced by Plaintiffs.

Plaintiffs' secondary request for relief in Count III is that the building permit be vacated because it deviates from the terms of the site plan approval. This contention was presented to the ZBA (ZBA 111-13, 122-23) and found to be without merit in its decision. ZBA 199, 204. Plaintiffs' specific arguments concerning assembly usage and the nature of the roof were addressed in detail and cannot now be disturbed. Plaintiffs' further challenges based on changes in the front and back facades were not addressed in any detail in the ZBA's decision. Plaintiffs are entitled to relief on this element of Count III.

Judgment

CV-2021-002

With respect to Count I (declaratory judgment) of the Second Amended Complaint, the court declares that the amendments set forth in Petition A and Petition B, which were passed by referendum vote on August 18, 2020, apply to the 20 Central's application for a building permit.

With respect to Counts II and III, Plaintiffs are entitled to judgment in accordance with the discussion above. The precise scope and elements of that relief will be addressed at a further hearing to be scheduled forthwith.

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This matter is remanded to the Planning Board for its consideration of the issues of parking and architectural harmony discussed above. *See supra*, pages 16–17. As a practical matter, the board may find it impractical to act before final relief is entered in the civil matter but setting its own schedule is of course its prerogative.

The Clerk may incorporate this Order upon the docket by reference.

Dated: December 1, 2021


The Hon. Bruce C. Mallonee
Justice, Maine Superior Court