6 Church Street, Gardiner, Maine 04345

CITY OF GARDINER
BOARD OF APPEALS

REGULAR MONTHLY MINUTES

November 23, 2004

Roll Call: Present:

Peter Johnson
Michael Eldridge
Kendall Holmes
Andrew MacLean

Absent:

Rebecca Malinowski
Judith Skehan
Frank Hillman

Also present:

William Najpauer, Kennebec Valley Council of Governments (KVCOG), Staff to the Board of Appeals
Erik Stumpfel, City of Gardiner Solicitor
Dorothy Morang, Recording Secretary
Scott Kaufman
Arlene Emery Kaufman
Debby Willis, Gardiner Planning Board
Rebecca Fuller
Kenneth Gardiner
Hazel Ferland
Gary Quintal

1.) The meeting was called to order at 6:05 PM by Peter Johnson, followed by the Pledge of Allegiance.

2.) Roll call was taken.

3.) Consideration of the Minutes from the November 3, 2004 was tabled at this time.

OLD BUSINESS

4.) Administrative Appeal by Scott & Arlene Kaufman of a Planning Board decision to grant a Site Plan Review Permit for a change of use to operate a business: Sunspot, Owner Hazel Ferland, within a 2-family dwelling. The property, located at 73 Cobbossee Avenue, is within a Planned Development/Shoreland Overlay Zoning District, City Tax Map 22, Lot 35A.

Chair Johnson reinforced the process for the meeting as it related to addressing the Board.

Board members discussed each of the 9 items addressed in the appeal letter. They asked if the Applicant had asked for a waiver of the items in the Appellant's # 8 item, topography and water flow. Bill Najpauer said that all of those items were to be included in the application unless the Applicant had asked for a waiver and it did not appear that she did. Reference item # 9, the Applicant, Hazel Ferland contacted each of the Planning Board members, urging them to support her project. Deborah Willis, a Planning Board member said that she had spoken with the City's Solicitor and he had instructed her to have each of the Planning Board members disclose what was said and if they felt they were prejudiced and she did. Kendall asked about item # 4, an additional business being conducted out of the residence. Deborah Willis said that she knew about it personally, but it was not before the Planning Board. It would require a CEO permit not the Planning Board. Andrew suggested that there were 3 substantive items, # 1, 2, and 8 that would be appropriate for the Board of Appeals to address.

Gary Quintal asked to be heard. Peter Johnson said if it's not germane, he's not going to. Gary asked Peter if he knew his name. Peter said it didn't matter, he's only going to be listening to those in the appeal unless directly quoted. Gary said he was directly quoted. His name was directly quoted in the appeal. Peter said not at this time.

Bill Najpauer clarified the previous question about whether or not topography and drainage were addressed on the site plan. The Applicant's Site Plan Review Application is marked N/A on topography. The direction of existing surface water drainage flow across the site and drainage-way information is marked yes it was included on the Application, so it would be important to ask the Planning Board if they reviewed it or discussed it. Deborah Willis said the Planning Board members didn't have them and they didn't ask for them.

Mike Eldridge said that there appears to still be contention regarding the survey to the lot and how can the City say this is fine in this area when the boundaries are not concise and set yet. He is concerned because the necessary buffers constrict the size of the lot and the boundaries have not been set yet.

Erik Stumpfel, City of Gardiner's Solicitor said on that factual issue, the Board of Appeals' responsibility in reviewing this record is to review the record. If there are approval criteria,

such as the parking area layout, buffers and those sort of things that depend on what the total dimension of the lot is, and the Planning Board found that those requirements were met, the Board of Appeal members need to look at that record to see if there was some evidence on which the Planning Board could have made that determination. There might be conflicting evidence on both sides, but it is not the Board of Appeals role in this appeal since it is purely an appellant review. It's not the Board of Appeal's role to find the facts new, but to see if there was support in the record for the facts that were found by the Planning Board. If there was, the Board of Appeals should uphold the Planning Board's factual determination, setting aside how they interpreted the Ordinance, which may raise other issues. If there is evidence in the record that would support the Planning Board's factual finding, the Board of Appeals should uphold that even if there was conflicting evidence on the other side. If there was no evidence at all, or if all the evidence was contrary, then - that factual finding - the Board of Appeals ought to consider reversing it because it is the Applicant's burden at the Planning Board level and if the Applicant presents no information or if all the information presented is contrary to the Planning Board's factual finding – that's the only circumstance in which the Board of Appeals can reverse a factual finding. So specific to the boundary question, the Board of Appeal's task is to determine what evidence is presented as to the lot dimensions and the line locations and determine if there was some evidence that would support the Planning Board's factual determination.

Peter Johnson asked if the record, dated September 28, 2004 is where the conditions were laid out? Dorothy said that the Review Criteria was voted on in the September 15, 2004 meeting with Review Criteria L having a condition placed on it by the Planning Board. The September 15, 2004 meeting was continued to September 28, 2004 where the final vote was taken and additional conditions were added.

A long discussion followed concerning what evidence there was to support the Planning Boards factual findings. The discussion continued concerning off-street parking, buffer areas, driveway width and 1-way vs. 2-way. Kendall asked Erik Stumpfel asked if there was any other reference to driveway width in the Ordinance beside that in Section 3. A? Erik said that that was the one reference he was aware of. Erik referred them to the Definitions Section of the Ordinance where there are definitions to driveway and entrance that is the threshold determination for determining which of the entrance or driveway standards apply in Section 3 of the Performance Standards. Erik said he would have preferred to have seen the Planning Board express findings on what is required with this particular site development – is it a driveway vs. an entrance. He said that although he suspects the 12' figure is in the application materials, it would have been helpful if the Planning Board's decision or at least the vote had indicated that the width was in fact 12 feet. I don't see anything in the Planning Board's record that determines that there was a 12-foot width there. Based on the appeal letter, it appears that you can take those as predicate facts that were determined by the Planning Board. If this is the case, than the Board of Appeal's task is to determine whether or not that 12-foot driveway width satisfies the requirements of the Ordinance. The Kaufman's position is that that minimum width only applies to a 1-way driveway and cannot

be applied to a 2-way driveway. The Board of Appeals needs to look at the Ordinance and determine if the Kaufmans are correct or not in their interpretation.

Peter Johnson read the definitions from the Ordinance. Erik Stumpfel said there are some references in the minutes to a vehicle per day figure which was supplied January 15th. There is not anything that he sees in the minutes as to whether that figure was proofed in accordance with the definition on 10-9 – unless the applicant demonstrates in accordance with the Trip Generation Manual, 6th addition, published by the Institute of Traffic Engineers that the use generates 50 vehicle trips per day. It may be in the transcript that that was how that per day trip number was generated. It would have been helpful to have the factual finding stating that. More detail would have been helpful in the Planning Board findings, particularly some predicate facts. Based on the appeal letter, the appeals letter seems to assume that those predicate facts were found. It becomes an interpretation issue on the Board of Appeal's part as to whether or not the Planning Board interpreted the Ordinance to say that 12 feet is wide enough whether it's 1-way or 2-way and the question is whether you agree with that. There is also no finding you can point to that this was in fact intended to be a 2-way drive. You have to infer that as well from the application materials. Erik said he assumes if there is only one driveway, it must be a 2-way drive, but there is nothing in the record that says that either way.

Kendall asked if the Ordinance says that the driveway has to be at least 12 feet wide, and everyone is apparently agreeing that the driveway is 12 feet wide, whether any of us personally think it should be 50 feet wide, it doesn't matter. The Ordinance says the driveway has to be at least 12 feet wide. Andrew asked where in the Ordinance it gives direction on whether it should be a 1-way or 2-way and whether it effects the widths?

Erik referred Andrew to two provisions that apply. One is in Section 5. Q. 4, Traffic Access and in Section 3 there are specific provisions in the general Performance Standards. Those Section 3 Performance Standards form the Planning Board's determination as to whether these approval criteria in Section 5 have been met. Section 3 standards on driveway or entrances just has a figure there, 12 – 22 feet. There's nothing in that standard to inform the decision-makers whether it should be 12 or 22 or something in between that. That's something the Planning Board evaluates against the Traffic Access standards of Section 5. Q. 4 as to whether with respect to a given application, 12' is enough. We don't have specific findings here that 12 feet was enough so I don't know how you can examine that finding. That is the sort of determination that is fact based, so the Board of Appeals can't go outside the record and substitute their judgment for the factual judgment of the Planning Board. Those are the sections the Planning Board looks to and what the Board of Appeals has to look to in determining whether the Planning Board correctly decided this issue – whether the Planning Board was clearly erroneous in deciding it the way they did. That is the actual standard of review that is in front of you.

Andrew said that in Section 5. 2. 4. b. it requires that vehicular access to and from a development must be safe and convenient. Some factual specifications in the Planning

Board decision would have been helpful but if the Planning Board made the judgment that it is safe and convenient and that 12 feet is enough in this instance than there's not a lot of basis in this record to second guess it. Erik said that the interpretation point that is relevant in this issue is whether the Performance Standard requirement of 12 feet of a 12 foot wide driveway applies only to a 1-way drive.

Peter asked if the Ordinance states that. If it doesn't, it's a moot question. He asked the Kaufman's where specifically in the Ordinance does it talk about a 1-way driveway? Mr. Kaufman referred to page 3-33 of the Performance Standards, Section 7, specifically the aisle widths, which is a continuation of the drive.

Erik said the Board of Appeals needs to determine if you can require more than 12 feet where you have two-way traffic in the driveway and whether the Planning Board was clearly erroneous in determining that this does not require more than 12 feet. Kendall asked if anyone had made a determination that this isn't a 2-way driveway? Mike said it has been blocked off on one end so it is obviously a 2-way. Peter said the Planning Board defined it as a driveway. Aisle width doesn't determine driveway width to him, that is within the parking area itself. We are not a court of law so we can't interpret these things beyond the scope of what they say.

Erik says he agrees with that. He referred them to the general approval criteria back in section 5. Traffic Access. As an example, if the Planning Board had, in it's judgment had said the minimum standard is 12 feet, but based on what you had presented to us, we don't think that's going to be adequate and we're going to require a wider width to meet the standards of 5. Q 4 about safe and convenient access, it would have been within their discretion to determine it as a factual finding. But the question before you is whether they were required to require a greater width than 12 feet.

The Board members moved on to discuss parking. Andrew indicated that in the Site Plan Review Criteria, it doesn't appear that parking is directly addressed in that portion of the Ordinance, but there is the same kind of general language suggesting Section 5, 4 d, Internal Vehicular Circulation has to provide for safe movement. – the same kind of standard as applied above that layout and design of parking areas must provide for safe and convenient circulation of vehicles throughout the lot. Peter read the Applicant's response to this issue. Mr. Kaufman said that the Site Plan had been changed since then and the turn-around had been removed.

Mike Eldridge spoke to the issue of parking. He quoted Debby as saying she thought the parking was doable but one parking spot was up against the house. Did the Planning Board say yes, we have 7 parking stalls and that is all that is necessary or should the Planning Board take it further and say are they usable, do they make sense. Is there enough room to drive in and back out of there? Looking at Internal Circulation, page 3-35, which says "parking areas for non-residential uses must be designed to permit each motor vehicle to proceed to and

from the parking space provided for it without requiring the moving of any other motor vehicles.

Andrew said he would like to see the Planning Board go back and take a look at specific sections of the Performance Standards and the Site Plan Review Criteria and make some findings of fact that would help the Board of Appeals.

Board members discussed each of the nine items to determine if they are appropriate for the Board of Appeals to deal with. Bill Najpauer said that the Site Plan notes surface water flows and he suggested that they might want to ask the Planning Board member there if that was discussed specifically. Mike said it also asks for contours.

Mr. Kaufman noted that the storm water flows in a southwesterly direction and there are no arrows on the plan. His home is southwest of the property and this was done after the grading of the driveway. He went over each of the nine items. He said driveway access came out of the MDOT Access Management Standards handbook and 12' is not a 2-way driveway. The Planning Board took it upon itself to redesign the parking area at the last minute and put one parking spot in the buffer area. The land surveyor was asked technical questions out of his arena and shouldn't have been relied on for those answers. He's not a traffic engineer. Hours of operation was a contention. The survey was after the re-grading of the driveway. Kendall asked Mr. Kaufman to explain # 1 again – driveway. Mr. Kaufman said it's 2-way traffic and should have required a wider driveway. Andrew said while the Planning Board wouldn't be bound by MDOT standards, they could have used them.

Hazel Ferland said there have been 4 separate meetings and at each meeting the Planning Board made a different request. One was to put in new application, which she did. Another to have a new inspection with the fire chief and the code enforcement officer coming up. They came up and requested certain changes, which she did. The next month she was asked to have a survey done. She paid for a certified surveyor to do a survey. The next month they wanted her to change the parking and put it in a different location. She did that. The next month they wanted her to have a Site Review Plan. When they came up, the parking areas were filled with drivers available so she could show how they could move if they wanted her to. She keeps trying to do what they want her to do. This is a business that is allowed in this zone. It is not a new structure. It's not an industrial/commercial business. They went through everything with a fine tooth comb. She feels that the parking layout is feasible, there is a turning area and 1 parking area is not in the buffer zone. She asked to see proof that she received a certified letter from the Kaufman's appealing within 14 days, which falls under the Appeals procedure # 2, page 4 – 15. Peter said as far as we know all of those letters were sent out on time. Hazel said that was from the Town. Under the appeal section it says that she is supposed to receive a certified letter from the Kaufman's, the Applicants who are appealing this under section d under the appeals procedure section 2. Hazel said, to sum it up, she keeps doing everything that everyone keeps asking her to do and it just keeps

going on and on and on and on. And if you send it back to the Planning Board it will probably keep going on and on and taking up a lot of everybody's time.

Andrew asked what specifically was she referencing– that the applicant shall notify by certified mail all abutters? Are you're claiming you are an abutter? The decision we made last time was for the City to send them. Dorothy said the City, as has previously done, sent the certified letters to the abutters for both Appellants - Mr. Kaufman and Ms. Ferland. Peter said we have the receipts here and the notice from the newspaper, all sent within the required time. Dorothy noted that Hazel is not an abutter, she is the property owner.

Hazel said she is the property owner, but somebody's appealing against her so she took it as she has a right to personally get a certified letter from the people who are appealing against her. Andrew said there has been more than 14 days notice. He thinks there has been sufficient notice of the appeal. Kendall agreed. He said you clearly know about this and everyone else who were parties to this knew about this meeting. Hazel said she is looking for whatever isn't being followed just like they are looking for what isn't being followed. If it's a procedure that I'm supposed to get a certified letter from the Kaufman's themselves - Andrew said he doesn't see that in the Ordinance. Peter agreed. Erik read a portion of the Appeal procedure found in Section 4 G 2. d. 2. b. He said he believes the reason that burden is put on the applicant is to relieve the City of that administrative burden, but here the City's undertaken that burden. It is not a due process violation that the notice comes from the City rather than the Applicant. In fact there is more than two weeks notice. (A note for clarification: *Although Ms. Ferland is not an abutter, a certified letter was sent to her also. The certified letter to Ms. Ferland was returned to the City after two attempts to deliver it to Ms. Ferland at her Post Office Box were made. The Post Office noted the letter as unclaimed. The first attempt was 11/6/2004, the second 11/12/2004 after which it was returned to the City, mailed 11/21/04 and received the day after this meeting)*

Peter noted that the vote is a majority of those here and voting.

Gary Quintal asked to address the Board. He said his name is Gary Quintal and he was the code officer during this as the kind of finalization of it. He wasn't here during the site review but he was certainly here from the time the City required Hazel to turn in a survey up to the point of where the Planning Board had gone through the Review Criteria and passed all the Review Criteria. Under the appeals procedure he wanted to know who is the code officer representing that part of the City? He referred to page 4-16 # 4. Peter Johnson said it says or his designee shall attend all hearings and may present to the Board of Appeals all plans, photographs, and other materials he deems appropriate for an understanding of the appeal. Gary said his question is who is the person that consulted him to confer with the Board of Appeals? Since he was the one who was the code officer at the time, his information should be related to somebody else to present to the Board if they have questions. Bill Najpauer said he might be referencing a variance appeal. This appeal procedure in this section puts together all types of appeals and actions that the Board of Appeals hears.

Erik said that his opinion is that the code enforcement officer is the person holding the position at the time of the Board of Appeals hearing and right now it's not Mr. Quintal. You have to read this in the context of how the Ordinance splits out appeals. If the decision being appealed is a decision made by the code enforcement officer where there has been no prior hearing, the Board of Appeals does a full review. You hear the facts and make a factual determination and in that setting the code enforcement officer certainly presents his side of it. As to this appeal where there's been a prior agreement before the Planning Board, you are here purely in an appellant role. The code officer does have a role, but it is primarily in presenting a record that was developed at the Planning Board level so that you have all the record that was produced at that level. Gary said, and that's exactly his point - is that he was not allowed to present the record during the appeal process. Erik replied that again, his interpretation is that it is the role of the code enforcement officer and Mr. Quintal is not currently the code enforcement officer. Gary Quintal said that he has to differ with the attorney certainly but you have to recognize that the powers to be at that time made the decision at that time and for somebody to underestimate what his decision was without at least conferring with him that any information that you receive could be tainted.

Peter Johnson said we're going to move on. He appreciated Mr. Quintal's comments. Erik noted that neither of the parties to this appeal has raised the question about whether the record in front of you is complete or not.

Erik recommended that the Board take each issue separately and have a discussion and have the motion incorporate the basis for whatever is being suggested in the motion.

After a brief discussion of driveway width, entrance and parking:

Andrew MacLean moved to remand the 1st issue of the driveway width for further consideration by the Planning Board to address specifically the Access Management Section of the Performance Standards specifically item 3. a, driveway width, giving their conclusions for the width between 12 and 22 feet and in addition to Access Management Standards, also consider the Traffic Access Standards section of the Site Plan Review Criteria and specifically the provision that says access to the site has to be safe and convenient.
Mike Eldridge seconded the motion.

Peter asked if everyone feels he can make a genuine, honest decision without any feeling that we have made a conflict of interest. Mike Eldridge made a statement for the record that he does know Mrs. Kaufman from a previous marriage years and years ago but that will have no bearing at all on his findings.
Vote: 3 in favor. 1 opposed (Kendall Holmes). Motion passed

Andrew MacLean moved to remand # 2 for further consideration of the parking issues, specifically looking at sub-section S of the Performance Standards "the off-street parking and loading requirements" the section that includes the parking stalls and Section 4, Traffic Access section of the Site Plan Review Criteria, specifically item D 3, Internal Vehicular

Circulation where it says the layout design of parking areas must provide for safe and convenient circulation of vehicles throughout the lot. Would like to see some specific findings of fact of what they see meets the standards.
Kendall Holmes seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

3. Andrew MacLean moved that we deny.
Kendall Holmes seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

#4. Andrew MacLean moved that we deny.
Mike Eldridge seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

5. Andrew MacLean moved that we deny.
Kendall Holmes seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed

6 Kendall Holmes moved that we deny.
Andrew MacLean seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed

7. Andrew MacLean moved that we deny.
Mike Eldridge seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed

8. Peter asked for a clarification as to whether a waiver was asked for. Bill Najpauer said according to the application, there was no request for a waiver.

Andrew MacLean moved to remand for reconsideration of whether the surface water flow suggested on the survey of 8/18/04, entitled Preliminary Plan Standard Boundary Survey - whether that satisfies the Stormwater Management & Erosion Control Standards of the Site Plan Review Criteria, Section 5. Q. 8 & 9.
Mike Eldridge made a motion to amend the motion to add contours. Andrew MacLean seconded the motion.
Vote on amendment: 4 in favor. 0 opposed. Motion passed.
Mike Eldridge seconded the motion as amended.
Vote: 4 in favor. 0 opposed. Motion passed.

#9 Kendall Holmes moved that we deny.
Andrew MacLean seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed

5.) Administrative Appeal from Hazel Ferland concerning a Site Plan Review approval granted to Sunspot, Owner Hazel Ferland by the Gardiner Planning Board on September 28, 2004. The property, located at 73 Cobbossee Avenue, City Tax Map 22, Lot 35A, is in a Planned Development Zoning District.

Peter read Hazel Ferland's letter of appeal. He addressed her statement that the Planning Board had granted her her occupancy. He said that the Planning Board members do not have the authority to grant an occupancy permit.

Erik said he guessed the action being appealed is whatever the code officer has done to not issue that permit - whether the code officer was acting properly in not issuing the permit. If it has been withheld and the Board determines that the appeal is valid and you reverse the decision than presumably the code officer would then issue the permit.

Peter asked if the requirement of the 10' buffers was set up by the Planning Board. Debby Willis, Planning Board member said no, it is a requirement of the Ordinance and referred to an email that Erik Stumpfel had sent confirming that requirement. It wasn't a condition by the Planning Board. Peter said the problem is we don't have a code officer at this point or do we? Dorothy asked to explain. Hazel came into the office and asked for her occupancy that the Planning Board had given her and I explained that the Occupancy Permit is given by the Code Enforcement Officer after he inspects to see that everything that was set out by the Planning Board was done. Hazel said she thought she'd be ready the next week, but did not come back for the inspection, but came back with this letter instead. So she had not met with any code officer and we weren't sure whether she was appealing this or the Planning Board decision. Peter said it is a matter of enforcement and not the Board's job. Erik asked if there was an acting Code Enforcement Officer. Peter said we don't have the authority to tell the code officer to do his job. Erik said you don't have the authority to direct enforcement, but the Ordinance does allow appeals of decisions of the code enforcement officer. Peter said that's within 30 days and it's long gone. Dorothy said there is a code enforcement officer but there has been no request to go out and inspect yet. Andrew asked isn't Ms. Ferland's appeal an appeal of the buffer requirements? The Planning Board certainly has the authority to require a buffer and they did. Peter asked Hazel if she asked for a CEO to come out and do an inspection? Hazel said yes she did. Peter said I can't order him to do it and there has been no decision made. He entered into the record that in the interest of all parties that the code enforcement officer, whoever he is, makes a decision.

Hazel asked if they would like to hear her interpretation of why she wrote the letter? She said she wrote the letter because she wanted to appeal the 10' buffer.

Board members read the appropriate sections found in Section 3. 10. d.

Hazel said she doesn't mind putting the screening in the buffer zones, but she feels that through the codes that we have, she is required to have a 5' buffer and she would like a variance of that instead of a 10' buffer for it to be a 5' buffer.

Peter Johnson moved to deny her appeal and tell her that she has to apply for a variance.
Andrew MacLean seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

Peter explained that the variance process is a different process and she needs to get the application from Dorothy. This was filed as an Administrative Appeal not a variance request.

Andrew moved to approve the November 3, 2004 minutes. Kendall Holmes seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

OTHER BUSINESS

Erik suggested that they formalize tonight's decision in a written decision and meet briefly to formalize it. You can get into trouble if it ends up in a court appeal and you are relying just on the minutes rather than a written decision. They decided to all come down and review the written decisions and if any disagreement, they would meet.

Training is scheduled for January 12, 2004 at 6:00 PM in the City Council Chambers.

6.) Adjourn

Mike Eldridge made a motion to adjourn. Kendall Holmes seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.
Meeting adjourned