

**Town of Mount Desert Planning Board
Meeting Minutes
6:00 PM, February 10, 2021**

This meeting was held virtually and was recorded.

Public Present: John Gordon, Greg Johnston, John Lowe, Kathy Miller, Teresa Ball, Millard Dority, Stephanie Reece, Katrina Carter, Jerry Miller, Nellie Bly, Lydia Kimball, Winnie, Bob, Dick Broom, Lincoln Millstein, Timothy Murphy, Mary Costigan, Mollie Seyffer, Nancy Ho, David Perkins, Andy Hamilton, William R.

Board Members Present: Meredith Randolph, Tracy Loftus Keller, Dave Ashmore, Joanne Eaton, Christie Anastasia

Tracy Loftus Keller is an Alternate, non-voting Member.

I. Call to order 6:00 p.m.

Ms. Randolph called the meeting to order at 6:01PM.

Ms. Randolph noted that Chair Bill Hanley was not in attendance.

MS. EATON MOVED, WITH MS. ANASTASIA SECONding, APPOINTING VICE CHAIR MEREDITH RANDOLPH AS ACTING CHAIR IN MR. HANLEY'S ABSENCE.

VOTE:

JOANNE EATON: AYE

CHRISTIE ANASTASIA: AYE

DAVE ASHMORE: AYE

MOTION APPROVED 3-0.

MS. EATON MOVED, WITH MS. ANASTASIA SECONding, TO MAKE ALTERNATE MEMBER TRACY LOFTUS KELLER A VOTING MEMBER FOR THE MEETING.

VOTE:

JOANNE EATON: AYE

CHRISTIE ANASTASIA: AYE

DAVE ASHMORE: AYE

VICE CHAIR MEREDITH RANDOLPH: AYE

MOTION APPROVED 4-0.

II. Approval of Minutes

January 27, 2021:

MS. EATON MOVED, WITH MR. ASHMORE SECONding, APPROVAL OF THE JANUARY 27, 2021 MINUTES AS PRESENTED.

VOTE:

1 JOANNE EATON: AYE
2 DAVE ASHMORE: AYE
3 CHRISTIE ANASTASIA: AYE
4 TRACY LOFTUS KELLER: AYE
5 VICE CHAIR MEREDITH RANDOLPH: AYE
6 MOTION APPROVED 5-0.
7

8 January 13, 2021:

9 MS. EATON MOVED, WITH MS. ANASTASIA SECONDING, APPROVAL OF THE JANUARY 13,
10 2021 MINUTES AS PRESENTED.

11 VOTE:

12 JOANNE EATON: AYE
13 CHRISTIE ANASTASIA: AYE
14 DAVE ASHMORE: AYE
15 TRACY LOFTUS KELLER: AYE
16 VICE CHAIR MEREDITH RANDOLPH: AYE
17 MOTION APPROVED 5-0.
18

19 **III. Subdivision Application(s):**

20 Sections 4.4 Completeness Review and 4.5 Public Hearing: - 6:05PM

21 **Subdivision #002-2020**

22 **A. OWNER NAME(S):** Mount Desert 365
23 **APPLICANT(S):** College of the Atlantic
24 **AGENT(S):** John Gordon, Architect

25 Gregory Johnston, G.F. Johnston & Associates

26 **LOCATION:** 141 Main Street, Northeast Harbor

27 **TAX MAP:** 024 Lot: 078

28 **ZONING DISTRICT:** Village Commercial (VC)

29 **PURPOSE:** A division accomplished by sale, lease, development, buildings or
30 otherwise. The term "subdivision" also includes the division of a new structure or
31 structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period,
32 **the construction or placement of 3 or more dwelling units on a single tract or parcel of**
33 **land** and the division of an existing structure or structures previously used for commercial
34 or industrial use into 3 or more dwelling units **within a 5-year period.**

35
36 CEO Keene confirmed adequate public notice. Abutters were notified.
37

38 Vice Chair Randolph recalled that the Completeness Review was not completed.
39

40 CEO Keene summarized that at the January 13, 2021 Planning Board Meeting
41 Completeness was deemed contingent upon four items submitted to the Town Office by
42 January 22, 2021. Items have been submitted and distributed to Planning Board
43 members. CEO Keene suggested the Board review the submittals to determine they are
44 complete to the satisfaction of the Planning Board. If the submittals are deemed

1 satisfactory, the Board may then proceed with the Public Hearing.

2
3 Vice Chair Randolph confirmed the Board's receipt of:

- 4 - Architectural views from Tracy Road
5 - Structure elevations
6 - Information on performance bonding relative to the project and the sanitary sewer
7 line on the property and a plan for protection of the line, approved by the Public
8 Works Department. The Applicant notes in their submittals that they anticipate no
9 Town costs associated with the project. Additionally, the Public Works Department
10 sees no risk of cost to the Town or need for a Performance Bond. Contractors will
11 carry insurance for the project.

12
13 Ms. Eaton pointed out that nothing was submitted addressing parking, as requested by
14 the Board.

15
16 Mr. Johnston stated the parking plan consists of a shuttle service, three on-site parking
17 spaces, and a van left on site and available for use. This parking plan was part of the
18 original Application submittal and has remained unchanged. The Board must determine
19 whether the plan submitted is acceptable. The Applicant continues efforts to obtain
20 additional offsite parking.

21
22 Vice Chair Randolph asked whether there were questions or concerns among the Board
23 about the four items requested.

24
25 CEO Keene suggested reviewing the submissions received to ascertain that the
26 submissions are satisfactory. If the submissions are found satisfactory, the Application
27 can be found to be complete. The Board cannot proceed to the Public Hearing without
28 finding the Application complete.

29
30 A review of the submittals commenced.

31
32 Views from Tracy Road submittals were deemed to be Complete.

33
34 Elevations submitted were deemed to be Complete.

35
36 Performance Bond research submitted was deemed to be Complete.

37
38 Regarding the question of parking, Mr. Dority reasoned that the Planning Board
39 requested nothing specific with regard to parking. The Applicant offered to explore the
40 possibility of locating five or six additional parking spaces. Mr. Dority has done this. He
41 has nothing new to report on the subject. Mr. Dority maintained that a parking plan is
42 included in the original Application. While the parking plans submitted may be
43 determined to be insufficient, they do satisfy the question of completeness.

44

1 Ms. Eaton agreed. The Application can be determined to be complete. Mr. Dority added
2 that there were more than enough parking spaces available on the Bar Harbor COA
3 campus for any needs the Northeast Harbor site will have. The search for additional off-
4 site parking in Northeast Harbor is continuing. Mr. Dority felt confident enough spaces
5 could be found to satisfy the Board before the project is done. Mr. Johnston concurred.
6 He noted the LUZO states that “adequate” parking must be found. The Applicant looks
7 to the Planning Board to provide a number they would deem “adequate” for parking.

8
9 MS. EATON MOVED, WITH MS. ANASTASIA SECONDDING TO FIND THE APPLICATION
10 COMPLETE.

11 VOTE:

12 JOANNE EATON: AYE

13 CHRISTIE ANASTASIA: AYE

14 DAVE ASHMORE: AYE

15 TRACY LOFTUS KELLER: AYE

16 VICE CHAIR MEREDITH RANDOLPH: AYE

17 MOTION APPROVED 5-0.

18
19 The Public Hearing ensued.

20
21 Mr. Dority summarized that the building will provide 15 beds for students. Students using
22 the building will be chosen based on their role within the Town of Mount Desert
23 community, whether it be working with the elementary school, or the Seacoast Mission,
24 or other roles. The lot on which the building is planned is currently vacant. College of the
25 Atlantic is excited to become a part of the community.

26
27 Engineer Greg Johnston shared a Site Plan with those in attendance. To the South of the
28 lot is The Colonel’s Restaurant. To the North is The Kimball Shop. The lot itself is vacant.
29 There is a roughly six-foot drop from the Main Street sidewalk to the interior of the
30 property. Utilities for the lot were stubbed in as part of the Main Street project. There is
31 a four-inch water line for the purposes of fire suppression. The building is proposed to
32 have a full sprinkler system. The Town’s public sewer main runs through the property.
33 The Town has no easement on the line. The Applicant is willing to commit to installing a
34 “sewer vault” providing access to the sewer main for Town personnel for maintenance
35 purposes. The main will come in through the foundation and remain exposed.

36
37 The Applicant intends to take all stormwater roof runoff and direct it into the gutter
38 system built as part of the Main Street project. Additionally, smaller yard drains can be
39 routed to the Tracy Road stormwater system. There will be solar arrays on the roof.
40 Parking access is on the driveway already in place and paved. There are three parking
41 spots planned.

42
43 Architect John Gordon shared the building design with those in attendance. The ground
44 level on the Main Street side of the building will be basement. On the Tracy Road end of

1 the building, the ground level will be a five-bedroom apartment. There is a hallway
2 connecting the apartments to the Main Street side of the building. On the Tracy Road
3 end is a covered, primary entrance to the apartments.

4
5 The second floor will have a five-bedroom apartment identical to the ground level
6 apartment on the Tracy Road end of the building. Retail space will face the Main Street
7 end of the building.

8
9 The third floor will have a five-bedroom apartment identical to the two below it on the
10 Tracy Road end of the building. Above the retail space will be a two-bedroom apartment,
11 planned for staff or faculty use. Mr. Gordon shared elevation drawings from the point of
12 view of neighboring buildings. The building on the side next to The Kimball Shop is
13 proposed to be built to the property line, therefore no apartment windows will be on that
14 side.

15
16 The goal has been to construct a building and façade that is a good fit for Main Street and
17 considered compatible with other buildings in the vicinity. The height of the building is
18 limited by the maximum building height allowed. Siding is proposed to be clapboards.
19 Below the windows on the Main Street end of the building a granite base is proposed.

20
21 Mr. Gordon shared views from the Tracy Road and pointed out the driveway. He pointed
22 out trees on the neighboring lots. The building was not easily visible from Tracy Road,
23 due to the other buildings on neighboring lots and the trees.

24
25 Vice Chair Randolph inquired about the trees. Would trees be removed to install the
26 parking spaces? Mr. Gordon stated the trees were on neighboring properties.

27
28 Mr. Gordon reported on the sustainability of the proposed building. The building has
29 been calculated to use significantly fewer kilowatt hours per year than the national
30 average for buildings similar in size, and less than the College's own sustainability goals.
31 This does not include the solar panels planned for the roof. Factoring the solar panels in
32 the building is modeled at 357 kilowatt hours per year: almost net zero. The building will
33 have a very well insulated, airtight building envelope, due in part to the wood fiber
34 insulation proposed to be used. The national average for carbon creation for a building
35 from cradle to grave is estimated at 367 tons. This building is estimated to be 126 tons
36 of carbon creation.

37
38 Vice Chair Randolph asked for questions or comments from the Planning Board. There
39 were none.

40
41 Vice Chair Randolph opened the Public Hearing and asked for questions or comments
42 from the public. There were none.

43
44 Ms. Anastasia asked how many people can be transported in the shuttle proposed for the

1 site, particularly with regard to Covid. Mr. Dority reported that due to Covid, he is unable
2 to run shuttles for the college. The vans, when in use, hold 7 to 14 passengers. Mr. Dority
3 did not anticipate the building being ready for use before the summer of 2022. It was
4 their hope that the challenges posed by Covid would be behind them by that time.

5
6 Mr. Dority noted that COA students use bicycles year-round. He has seen some motorized
7 scooters and skateboards. The school's shuttle buses are a popular option for the
8 students when they are in use. Mr. Dority reiterated that what the school has not seen is
9 a rise in vehicles on campus. The current school term has the largest student body at the
10 school ever. Mr. Dority added that once the buses can be used in Northeast Harbor, they
11 will be open for residents to use, as available.

12
13 Stephanie Reece asked whether there was any way to screen the students to allow only
14 those without vehicles to use the building. Mr. Dority noted the college has ample parking
15 to accommodate any cars the students at the building might have. The students can be
16 offered safe parking at the Bar Harbor campus and a way to come back and forth, via the
17 shuttle. Mr. Dority has explored several options in his search for more off-site parking for
18 the residents of the building.

19
20 Vice Chair Randolph asked for any other questions or comments. There were none.

21
22 Vice Chair Randolph closed the Public Hearing. Planning Board deliberations began.

23
24 Ms. Eaton stated her belief that parking would be an ongoing issue. It was noted that
25 determining a specific number of parking spaces deemed adequate would be helpful for
26 Mr. Dority.

27
28 Mr. Ashmore wondered what could be used as a guide to determine that number. Mr.
29 Dority noted he was a Planning Board Member in the Town of Bar Harbor. Bar Harbor's
30 ordinance states that one parking space per dwelling unit must be provided. Per Bar
31 Harbor's ordinance, the building as planned would be required to have four parking
32 spaces.

33
34 Vice Chair Randolph noted that a dwelling unit typically does not have as many bedrooms
35 as these apartments. Ms. Eaton agreed. She added that a typical dwelling unit does not
36 usually consist of every member in the dwelling being of driving age. Ms. Eaton's feeling
37 was that 10 parking spaces would be appropriate. Ms. Anastasia felt it difficult to set a
38 number; the Town does not have a standard addressing the specifics. Ms. Anastasia
39 agreed with Ms. Eaton's assessment. A typical dwelling unit is a mix of adults and
40 children. Everyone using these apartments will be of driving age. Vice Chair Randolph
41 noted that the apartment dedicated to faculty or staff housing may be a family, and may
42 not be able to live in town using only a bus system. One car at least will be required for
43 that unit. As for the other apartments, perhaps one car per five-bedroom unit might
44 suffice? Vice Chair Randolph suggested five cars, one for each apartment, plus a spare.

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Ms. Anastasia wondered about how such a number requirement would be enforced. Mr. Johnston suggested the Board determine the appropriate number of parking spaces; the Applicant must then provide proof they can provide that number. Anyone in the building choosing not to use the appropriate parking may find themselves facing consequences. If any changes to that number are deemed necessary, the Applicant would have to return to the Board for an amendment.

Ms. Anastasia was inclined to agree with Ms. Eaton’s proposed number of 10 parking spaces. Vice Chair Randolph wondered if residents weren’t likely to park on Water District land. Mr. Dority reported that he’s spoken with the Water District. The building is used 24/7. If residents park there they will be towed. Mr. Dority noted that the estimate of 10 cars far exceeds the percentage of cars on site at any of the college’s residences. Ms. Anastasia pointed out the difference was that living on campus in Bar Harbor does not require a car to get to a class. It was noted there is no parking on Main Street overnight in the winter due to snow and snowplow use.

Vice Chair Randolph wondered if the college could have an agreement that students would not house more people with cars on the property than there were available parking spaces. Mr. Johnston noted that limiting students by whether or not they bring a car could be deemed discriminatory. He hoped the Planning Board would be willing to impose a number of parking spaces required for the building that the Applicant could work towards. Mr. Dority reiterated that the College of the Atlantic has adequate parking on their Bar Harbor campus for every student living in the proposed building. Whatever number of parking spaces the Planning Board requires the building to have in Town, COA will do everything within their power to provide that number of parking spaces. Anyone living in the building will be told how many parking spaces are available for their use.

Mr. Ashmore inquired what the Applicant felt was an appropriate number of spaces. Mr. Dority felt six or seven spaces would be adequate, based on the statistics available on typical car usage for COA students. This would be in addition to a van dedicated for that property’s use. Mr. Johnston asked whether Mr. Dority’s estimated six or seven spaces were in addition to the three spaces on the site. This would total the number ten, a number the Planning Board has mentioned. Mr. Dority confirmed this was his intent.

Vice Chair Randolph asked CEO Keene for her thoughts. The building is a subdivision, and the parking spaces are not yet in hand. Should such an Application be approved contingent on parking? Does parking become a requirement for issuance of a certificate of occupancy?

CEO Keene noted that occupancy is based on building structure and the code. Parking would have to be included on the site plan and recorded at the Registry of Deeds. Vice Chair Randolph noted that if a condition of parking were set, it may take the Applicant another year to find the space. She wondered what would happen should the building

1 be constructed, but parking is not in place. Some sort of timeline was required.
2

3 Ms. Anastasia believed the Applicant was willing to adaptively manage the situation. A
4 shuttle may be implemented but not used. There may in the future be a reason the
5 residents require their cars nearby. Any number the Planning Board sets as a requirement
6 may not be a permanent requirement. There are a lot of factors that could affect the
7 situation. The College seems willing to stay in touch with the Town about their needs as
8 they develop and change.
9

10 Mr. Ashmore felt that if a number was included on the subdivision plan, any changes
11 would require a new plan to be created and recorded.
12

13 Mr. Johnston noted the Planning Board has the power to grant approval and set
14 conditions. Having the parking included on the plat will mean that any modification will
15 require the Applicant to return before the Board. Perhaps requiring parking prior to the
16 issuance of the building permit was an option. The Applicant won't invest in building
17 construction without required parking in place.
18

19 MD365 Director Kathy Miller asked about the long-term implications of such a condition.
20 There are many apartments along Main Street in buildings a century old. As the Town
21 tries to attract new residents as stated in the Comprehensive Plan, there must be options
22 created to accommodate residents moving in. The Parking and Traffic Committee is
23 looking at this issue. If options are created in the future that alleviate parking, would this
24 project be held to requirements created today? She pointed out that if the Gray Cow
25 parking lot could be approved for overnight parking, there would be adequate parking for
26 at least as many occupants as this building could hold.
27

28 Vice Chair Randolph felt that a change to parking would be a change to the subdivision,
29 and therefore change would have to be approved by the Planning Board. If after a year
30 or two of occupancy the College realizes the plans in place should be modified, they can
31 come back to the Board.
32

33 Ms. Eaton felt seven parking spaces, in addition to the three on-site should be adequate.
34 She noted the subdivision ordinance clearly addresses how changes to the original
35 subdivision plans are referred back to the Planning Board.
36

37 Discussion ensued regarding whether six or seven parking spaces were the better choice.
38 Mr. Dority acknowledged that of the three on-site parking spaces, one will be dedicated
39 for ADA parking, and one will be designated for the van with an electrical outlet.
40

41 The Planning Board agreed on requiring seven parking spaces, in addition to the three on-
42 site parking spaces provided in the plans. Mr. Ashmore suggested as part of the condition
43 that the Applicant must present documentation or proof confirming the right to use the
44 spaces.

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2 CEO Keene suggested wording for the Board's position on parking.

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4 MS. EATON MOVED, WITH MS. ANASTASIA SECONDING, THE APPLICANT SHALL PROVIDE
5 EVIDENCE THAT IT HAS SECURED THE LEGAL TITLE, RIGHT, OR INTEREST TO PROVIDE
6 SEVEN ADDITIONAL PARKING SPACES.

7
8 Vice Chair Randolph noted parking is essentially a condition of the property becoming a
9 subdivision. Can construction be started without it being approved as a subdivision? Mr.
10 Johnston felt a time could be set on the condition and that condition can be submitted
11 prior to requesting an occupancy inspection. Requiring parking prior to the occupancy
12 inspection will satisfy the requirement. Vice Chair Randolph noted the Applicant could
13 not get their occupancy without that parking.

14
15 CEO Keene agreed parking should be in place before the Applicant receives their
16 occupancy allowing them to occupy the building.

17
18 Mr. Ashmore asked if the Applicant should be required to maintain the parking spaces, or
19 is it understood. CEO Keene noted if parking were included on the plat the Applicant
20 would have to maintain it.

21
22 Vice Chair Randolph felt that parking set as a condition means the subdivision cannot be
23 enacted until that condition is fulfilled. Mr. Johnston suggested that the building is a
24 subdivision because three or more dwelling units are being built. However, they cannot
25 be considered dwelling units until people can move in.

26
27 Vice Chair Randolph noted that the Board signs subdivision plats. Is that the point at
28 which it becomes a subdivision? Perhaps the Planning Board should refrain from signing
29 the plat plans until the parking spaces are required. CEO Keene clarified that the
30 condition the Board is requiring will be on the plat. It will be signed and recorded at the
31 Registry. The Applicant will have 90 days from the date the Planning Board approves the
32 plat plan to record it. She recommended the parking requirement for securing title, right,
33 or interest in the spaces be tied to the occupancy inspection and issuance.

34
35 Amended Motion:

36 MS. EATON MOVED, WITH MS. ANASTASIA SECONDING, THE APPLICANT SHALL PROVIDE
37 EVIDENCE THAT IT HAS SECURED THE LEGAL TITLE, RIGHT, OR INTEREST TO PROVIDE
38 SEVEN ADDITIONAL PARKING SPACES PRIOR TO ISSUANCE OF ANY CERTIFICATE OF
39 OCCUPANCY PERMIT.

40
41 Vice Chair Randolph agreed with Mr. Ashmore that wording regarding the requirement
42 of maintaining the parking spaces should be included.

43
44 Amended Motion:

1 MS. EATON MOVED, WITH MS. ANASTASIA SECONDING, THE APPLICANT SHALL PROVIDE
2 EVIDENCE THAT IT HAS SECURED THE LEGAL TITLE, RIGHT, OR INTEREST TO PROVIDE AND
3 MAINTAIN SEVEN ADDITIONAL PARKING SPACES PRIOR TO ISSUANCE OF ANY
4 CERTIFICATE OF OCCUPANCY PERMIT.

5
6 CEO Keene did not feel including maintenance was required on the plat. Vice Chair
7 Randolph asserted that the wording only suggests acquiring the space but includes
8 nothing regarding maintaining the spaces. CEO Keene felt the requirement of the parking
9 spaces included the ability to keep them, unless a request to change that was brought
10 before the Planning Board. Vice Chair Randolph and Mr. Ashmore concurred the word
11 “maintain” should be included in the Motion.

12
13 Amended Motion:

14 MS. EATON MOVED, WITH MS. ANASTASIA SECONDING, APPROVAL OF THE APPLICATION,
15 ON CONDITION THAT THE APPLICANT SHALL PROVIDE EVIDENCE THAT IT HAS SECURED
16 THE LEGAL TITLE, RIGHT, OR INTEREST TO PROVIDE AND MAINTAIN SEVEN ADDITIONAL
17 PARKING SPACES PRIOR TO ISSUANCE OF ANY CERTIFICATE OF OCCUPANCY PERMIT.

18 VOTE:

19 JOANNE EATON: AYE

20 CHRISTIE ANASTASIA: AYE

21 DAVE ASHMORE: AYE

22 TRACY LOFTUS KELLER: AYE

23 VICE CHAIR MEREDITH RANDOLPH: AYE

24 MOTION APPROVED 5-0.

25
26 **IV. Other:**

27 **A.** Remand from the Zoning Board of Appeals to the Planning Board for further
28 findings of facts and conclusion of laws with regards to height and setbacks
29 in the matter of the Otium, LLC (*formerly*, Lapsley Family, LLC) application
30 for the Reconstruction or Replacement of a Non-conforming Structure.

31 **OWNER(S)** Otium, LLC (*formerly* Lapsley Family, LLC)

32 **AGENT(S):** Mary Costigan, Bernstein Shur Esq.

33 **PROPERTY LOCATION:** 11 Barnacles Way, Northeast Harbor

34 **TAX MAP:** 023 **LOT(S):** 002-002

35 **ZONE(S):** Shoreland Residential One (SR1)

36 Vice Chair Randolph stated the Applicant submitted amended Findings.

37
38 Attorney Hamilton opined that the Findings submitted by the Applicant’s Counsel provide the
39 level of detail required by the Board of Appeals to assist them in understanding the basis of the
40 Planning Board’s decision. The Planning Board must determine whether the proposed findings
41 reflect the Board’s decision. The proposed findings appear to be consistent with what the
42 Minutes reflect the prior decision to have been. Attorney Hamilton’s only suggestion was to
43 include wording in response to the question Attorney for the Appellant David Perkins raised
44 regarding whether the proposed structure was new or a replacement.

1
2 Attorney Hamilton felt there was no question that the Planning Board, in its original decision
3 and at the last meeting, found the proposed structure to be a replacement structure. Rule 10
4 in Section 8 of the Ordinance makes reference to terms not defined in the Ordinance, stating
5 that terms not defined are given their common dictionary meaning using Webster's New
6 Collegiate Dictionary. Per the Webster's New Collegiate Dictionary, the term "new" means
7 "having recently come into existence." The term "replacement" means "the act or process of
8 replacing." The term "replace" means "to put something in the place of, or to restore to a
9 former place or position". In the last meeting both Chair Hanley and Vice Chair Randolph stated
10 the proposed building is proposed to be within the same footprint of the existing structure. It
11 therefore meets the dictionary definition of "replacement". Adding a finding explaining Rule
12 10 in Section 8 to the front of the Applicant's proposed findings would clarify the Planning
13 Board's earlier determination that the proposed building is a replacement. Other than this
14 suggestion, Attorney Hamilton felt the findings presented by the Applicant were in order and
15 ready for the Planning Board's review and discussion. Attorney Hamilton did not feel it
16 necessary for the Planning Board to go through the exercise of creating new findings.

17
18 CEO Keene stated for the record that this Agenda Item received adequate public notice.
19 Abutters were notified.

20
21 Vice Chair Randolph asked for comment from the Appellant. Attorney Perkins stated that
22 Section 4.3.6 of the Ordinance clearly states there cannot be any increase in nonconformity.
23 Section 4.3.5 states that the property must conform to the greatest practical extent. The
24 Planning Board must explain how the proposed building does not create more nonconformity,
25 and how is it eliminating nonconformity to the greatest practical extent. Attorney Perkins
26 stated the proposed building is bigger and higher than the previous building. Additionally, the
27 building is encroaching on a new setback. The Planning Board must explain how the proposed
28 new encroachment is not considered a setback violation.

29
30 Attorney Perkins stated that the findings presented don't address the Section 4.3.D.2 height
31 requirements which state that a 20-foot height restriction applies to the entire building.
32 Section 4.3.D.2 states that any structure located within 70 feet of the shore is limited to 20 feet
33 in height. There is no language in that section of the Ordinance that allows a building to be
34 scaled to zones using the various heights allowed. The findings of fact presented are not
35 adequate in providing understanding to the Appeals Board.

36
37 Attorney Perkins stated the findings offer no information regarding the inconvenience caused
38 to the Appellant due to light, building height, or building size increase. The Planning Board
39 offered buffering between the two properties as the only condition on the permit intended to
40 assuage the Appellant's inconvenience. There must be some statement from the Planning
41 Board regarding how the Appellant's concerns will be addressed.

42
43 Ms. Eaton noted that if the map is referred to, the footprint closest to the water has been
44 decreased. Changes to the building are for the most part occurring behind that setback.

1
2 Attorney for the Applicant Mary Costigan clarified that the draft findings are based on the
3 original Planning Board's findings. The findings presented were drafted at the request of the
4 Planning Board. The draft findings are written in a more extensive manner and provide more
5 detail to augment the Planning Board's original findings. These findings are not the Applicant's
6 findings. Within those findings Attorney Costigan contends that the issues raised by Attorney
7 Perkins are dealt with extensively.

8
9 The issue of nonconformity is addressed under #4, on page 3. This item addresses all the
10 nonconformity questions raised by the Appellant, including the 75-foot setback from the
11 waterbody, and the property line setback. The new nonconformity alleged by Attorney Perkins
12 is not a new nonconformity, due to the waiver the Applicant has received.

13
14 The issue of height is addressed plainly in the findings as well. Additionally, Attorney Costigan
15 referenced a document from the record; an email from the DEP confirming that the step-up in
16 height increments through the various setback zones is allowed and has been approved by the
17 DEP for other projects.

18
19 Attorney Costigan reported she added, per discussions at the last meeting, reference to where
20 the shoreland zone height of 35 feet is found in the Ordinance. The findings also include
21 citations of how height determinations were calculated.

22
23 Vice Chair Randolph wondered - should the Planning Board determine that the building is
24 limited in its entirety to 20 feet in height per Attorney Perkins assertions - how such a
25 determination would affect all past rulings made by the Planning Board.

26
27 Attorney Hamilton noted there is a body of law known as Takings Litigation. If a new regulatory
28 approach is taken with regard to a property owner that has not been taken to any other
29 property owner prior, and if the Planning Board were to revisit all previous rulings consistent
30 with past practices, Inverse Condemnation and Regulatory Takings may be invoked against the
31 Planning Board.

32
33 The new findings should prove helpful because they confirm and detail what Attorney Hamilton
34 heard the Planning Board discuss at the last meeting. Graduated height is referred to in the
35 findings presented by the Applicant and graduated height is determined in this way across the
36 State of Maine.

37
38 Attorney Costigan pointed out that a decision has already been made regarding the Application
39 at hand. The Board of Appeals remanded the decision made back to the Planning Board for
40 further findings consistent with the decision already made.

41
42 Attorney Perkins disagreed with Attorney Hamilton. Decisions must be based on the Ordinance
43 and not on mistakes made in the past. Attorney Perkins intends to make this argument before
44 the Board of Appeals. Section 4.3.C of the Ordinance uses the term "a building entirely within"

1 which is evidence the drafters of the Ordinance knew how to delineate between “entirely
2 within” and “within”. If the Planning Board intends to state in their findings that they are doing
3 what they’ve always done in the past, or that they’re doing what the DEP has done elsewhere,
4 and not to abide by the language of the statute, they must justify their reasoning for doing so.
5

6 Attorney Hamilton asserted that the Planning Board’s role is to apply the Ordinance to the
7 Application. He pointed out that the Board of Appeals did not reverse the decision; they
8 remanded the issue back to the Planning Board for further findings on the decision made. The
9 Planning Board has experience with this type of Application. Dawn Hurd of the DEP confirmed
10 the Ordinance is based upon the minimum guidelines for shoreland zoning. It is now up to the
11 Planning Board to determine whether the draft findings presented by the Applicant more
12 accurately detail the bases of the Planning Board’s decision. If they do, the Planning Board may
13 adopt them. If they do not, then the Planning Board may proceed with further drafting. It is
14 correct to say the Planning Board must apply the language of the Ordinance, but the Planning
15 Board may also rely on the CEO’s opinion and the opinions of the DEP. Attorney Hamilton felt
16 the next step was to defer to the Planning Board to discuss the draft findings and determine
17 whether they are helpful.
18

19 Vice Chair Randolph felt the Planning Board was directed by the Board of Appeals to provide
20 further definition to the findings previously presented. The question of whether the Planning
21 Board is reviewing the issue properly must be left for the Board of Appeals to determine. She
22 felt the draft findings presented by the Applicant adequately provides the further definition
23 requested.
24

25 Ms. Eaton felt discussion recorded in prior meeting Minutes should prove helpful to the Board
26 of Appeals. The process and the reasoning behind it were fully expounded on throughout the
27 body of the Minutes.
28

29 Vice Chair Randolph wondered about how to present the amended Findings. Attorney
30 Hamilton reiterated that the Board of Appeals remanded the issue back to the Planning Board
31 for further findings of fact and conclusions of law. Minutes of the Planning Board Meeting may
32 also be provided to the Board of Appeals. Crafting new findings will be a cumbersome process,
33 unless the Planning Board deems the draft findings presented inadequate. Attorney Hamilton
34 suggested the Board reflect on whether the draft findings submitted by the Applicant’s counsel
35 are helpful and accurately reflect the Planning Board’s original findings and conclusions. The
36 Planning Board should only use the findings drafted by the Applicant if those findings are
37 deemed adequate in reflecting the Planning Board’s decision. Attorney Hamilton noted the
38 only addition he would suggest would be to add wording regarding the point Attorney Perkins
39 has made with regard the fact that there is nothing in the Ordinance that establishes a
40 definition of what is defined as “new” and what is defined as “replacement”. The plain
41 language of the Ordinance, using dictionary definitions, provides that answer. In all other
42 respects, Attorney Hamilton believed the Applicant’s proposed findings reach the type of detail
43 the Board of Appeals was looking for.
44

1 Vice Chair Randolph asked about Alternate Member Tracy Loftus Keller. She is a voting member
2 for this meeting, in the absence of Chair Bill Hanley. However, she has not been a voting
3 member at previous meetings while the issue has been discussed. CEO Keene confirmed that
4 Ms. Loftus Keller was in attendance at all the meetings during which discussion of the issue
5 occurred and participated in discussion. Attorney Hamilton stated that the basic standard is
6 that a member who may not have voted previously may vote as long as they are familiar with
7 the record.

8
9 MS. LOFTUS KELLER MOVED, WITH MR. ASHMORE SECONDING, TO ADOPT THE PROPOSED
10 FINDINGS OF FACT AND CONCLUSIONS OF LAW AS PRESENTED SUBMITTED BY THE APPLICANT,
11 OTIUM, LLC, AND ALSO INCLUDE THE DEFINITION OF "NEW" AND "REPLACEMENT".

12
13 Attorney Hamilton suggested the portion regarding the definitions of "new" and "replacement"
14 should be inserted after Conclusions of Law, Section A, Applicable Ordinance Provisions.

15
16 After some discussion and guidance from Attorney Hamilton, the Motion was amended to read:
17 MS. LOFTUS KELLER MOVED, WITH MR. ASHMORE SECONDING, TO ADOPT THE PROPOSED
18 FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE APPLICANT, OTIUM, LLC
19 ON JANUARY 22, 2021, AS PRESENTED, AND ALSO THE INCLUSION OF THE DEFINITION OF
20 "NEW" AND "REPLACEMENT" AS STATED UNDER SECTION 8 OF THE LAND USE ORDINANCE,
21 RULE 10 TERMS NOT DEFINED EN LIEU ARE GIVEN THEIR CUSTOMARY DICTIONARY MEANING
22 AS SET FORTH IN WEBSTER'S NEW COLLEGIATE DICTIONARY. THE TERM "NEW" IS DEFINED AS
23 "HAVING RECENTLY COME INTO EXISTENCE." THE TERM "REPLACEMENT" IS DEFINED AS THE
24 ACTION OR PROCESS OF REPLACING." THE TERM "REPLACE" IS DEFINED AS "TO RESTORE TO A
25 FORMER PLACE OR POSITION." THE BOARD CONCLUDES THAT THE PROPOSED STRUCTURE IS
26 A REPLACEMENT STRUCTURE AND NOT A NEW STRUCTURE."

27
28 Vice Chair Randolph asked for further comment from the Board. There was none.

29
30 VOTE:

31 TRACY LOFTUS KELLER: AYE

32 DAVE ASHMORE: AYE

33 JOANNE EATON: AYE

34 CHRISTIE ANASTASIA: AYE

35 VICE CHAIR MEREDITH RANDOLPH: AYE

36 MOTION APPROVED 5-0.

37
38 Attorney Hamilton noted that once the findings have been adopted as voted by the Planning
39 Board, the next step will be to record the findings and return them to the Board of Appeals.

40
41 **V. Adjournment**

42 MS. EATON MOVED, WITH MS. LOFTUS KELLER SECONDING, TO ADJOURN.

43 VOTE:

44 JOANNE EATON: AYE

- 1 TRACY LOFTUS KELLER: AYE
- 2 CHRISTIE ANASTASIA: AYE
- 3 DAVE ASHMORE: AYE
- 4 VICE CHAIR MEREDITH RANDOLPH: AYE
- 5 MOTION APPROVED 5-0.
- 6
- 7 The Meeting adjourned at 8:28PM.
- 8
- 9