

PHIPPSBURG PLANNING BOARD

Town of Phippsburg, Maine

IN THE MATTER OF:

- ❖ A remand by the Board of Appeals of the Lesser Buffer Permit granted the business, Popham Beach Club, owned by Bruce Poliquin, Jane Way, Popham Beach, Tax Map 14, Lot 43
- ❖ Decision of the Planning Board

PROJECT DESCRIPTION AND FINDINGS OF FACT:

- ❖ Referenced ordinance sections are from the Town of Phippsburg Land Use Ordinance (LUO). The Shoreland Zoning Ordinance is not referenced as the Lesser Buffer activity is outside the Zone.

The applicant was granted a permit on April 19, 2006, under Sec. 2.3 New Business Permit, for a private club with membership dues to be called Popham Beach Club. The existing business on the parcel is the rental of cottages, which will cease for implementation of the proposed Club.

One cottage (built in 1971 per Town records) is 20' +/- from an abutting residential lot line. The applicant will remove this cottage, as well as the second cottage on the parcel, and replace them with one new structure to house Club activities. The applicant proposes to build the new structure 65' +/- from the mentioned easterly residential lot line.

Sec. 1.6 requires a commercial use to have a 100' buffer zone between its buildings, including parking lots, and a residential lot line. Sec. 1.7 allows the Planning Board to permit a Lesser Buffer when the topography of the land, the nature of the vegetation or building provides screening that is equal in protection to the required width of the buffer. A Lesser Buffer may also be approved when the character of the neighborhood is predominantly commercial.

A question had been raised at the public hearing for the New Business Permit as to whether the Planning Board still had this Lesser Buffer permitting authority considering the 2004 Sawyer v. Cape Elizabeth court ruling. The Board sought advice from the Town's attorney and from Maine Municipal Association and held a subsequent public discussion workshop on April 27th. MMA had provided wording of Title 30-A, MRSA,

Sec. 4353 (4.C) enacted September 17, 2005, in response to the Sawyer case, which clarifies authorities under certain conditions. It was the consensus of Selectman Everett Perkins, Planning Board members and telephone agreement of then Chairman of the Board of Selectmen, Michael Rice, that the Planning Board had not lost its authority to grant Lesser Buffer Permits.

The Popham Beach Club's New Business Permit was conditioned on acquiring a Lesser Buffer Permit from the Planning Board. Mr. Poliquin applied for this permit and supplied supporting data at a regular Planning Board meeting on May 16th. The Board considered all data and concluded that the applicant had demonstrated that Ordinance purposes and standards were met. The Board voted on May 16th to approve the application for a Lesser Buffer, with the Club building to be 65' +/- and one parking area to be 20' +/- from the easterly abutting residential lot line. The lot abutting the lesser buffer area is owned by Terry P. Wyman.

Mr. & Mrs. Wyman appealed the Planning Board's decision through their attorney, Roger Therriault. The Board of Appeals (BOA) subsequently met twice to consider all aspects of the appeal. An item of serious concern to the BOA was that of abutter notification. Even though the Planning Board's meeting had been advertised in THE TIMES RECORD and by other local methods, there was no attached listing of the Agenda, and, also, the abutters were not given personal notice. On August 3rd, the BOA concluded that under Sec. 2.3 abutters had been entitled to receive personal notice of the May 16th Planning Board meeting. The BOA voted to uphold the Wymans' appeal and to remand the matter to the Planning Board for further proceedings.

On August 29th, the Planning Board held a public hearing to address the remand. There was no change in Mr. Poliquin's original application. Testimony, both oral and written, was taken from the applicant and the appellant and their witnesses as well as other interested parties. The hearing was immediately followed by a meeting in which the Board deliberated the submissions. The Board voted 5-0 (unanimous) to grant with conditions a Lesser Buffer Permit under Sec. 1.7 of the Land Use Ordinance.

CONCLUSIONS OF LAW:

Sec. 1.1 - Purpose

The purpose of this section and the standards of the Land Use Ordinance have been considered by the Planning Board in making its decision on this Lesser Buffer application. The right of a landowner to use his land without causing unreasonable disturbance to nearby landowners has been addressed throughout the decision process.

The applicant has provided a professionally-designed plan for a fence and a vegetated buffer along the easterly residential property line that has been formulated to equate to the same capability as a 100' buffer space. The applicant's data shows there will be no unreasonable disturbance or damage to nearby landowners. In making its decision the Board considered supportive data submitted with this application as well as supporting data submitted for the April 19th New Business Permit. (The applicant had submitted data for both applications in one packet.) The Board had conducted three site walks on the parcel in April and Mrs. Wyman participated in two of them. All data has been available to the appellants.

The Board concludes that the applicant has met a balance that will not cause undue disturbance, damage or degradation to the abutters or to the surrounding landowners.

Motion by Smith Vote: 5 Yes ___ No ___ Abstain

Sec. 1.2 - Validity, Severability, and Amendments - Does not apply.

Sec. 1.3 – Grandfathering Clause

The applicant has grandfathering rights under this section because his rental cottage business was established prior to Land Use laws. The oldest cottage was built in 1937 and the cottage that is 20' +/- from the abutting residential lot line was built in 1971.

The Board concludes that the applicant has grandfathering rights under Sec. 1.3.

Motion by Thayer Vote: 5 Yes ___ No ___ Abstain

Sec. 1.4 - Non-Conforming Use

Does not apply as there is no prohibition against a private club.

Sec. 1.5 – Standards

The applicant has provided maps of the entire parcel that clearly show the Shoreland Zone line. The entire Lesser Buffer area is located outside Shoreland Zoning restrictions. Furthermore, Title 30-A MRSA Sec. 4353 (4-C.F.) as cited in Atty. Therriault's presentation, pertains to shoreland areas so, therefore, does not apply to LUO Sec. 1.5. Sec. 4-C.F. also pertains to variances (in the shoreland area) but still does not apply because a lesser buffer does not fall under variance criteria. The

applicant met the standards of this section on April 19th by obtaining a New Business permit for the establishment of the Popham Beach Club.

The Board concludes that a business permit has been secured and all related Ordinance criteria has been met. The Board further concludes that the Lesser Buffer area is outside the Shoreland Zone.

Motion by Hewell Vote: 5 Yes ___ No ___ Abstain

Sec. 1.6.a & b - Buffer Zones

A requirement for a new business use, including buildings and parking lots, is a 100' buffer along a residential lot line unless exempted under Sec. 1.7 (or 1.8 Home Business which does not apply).

The Board concludes that the lesser buffer requirement in Sec.1.6 is superseded by Sec. 1.7 and that no action is required under Sec. 1.6.

Motion by Hewell Vote: 5 Yes ___ No ___ Abstain

Sec. 1.7 – Lesser Buffers

A condition of the applicant's April 19th New Business Permit was to secure a Lesser Buffer Permit from the Planning Board; this was done on May 26th. Abutter, Terry P. Wyman, appealed the decision. The Board of Appeals, on hearing the case, remanded the matter to the Planning Board because abutters had not each received personal notification of the May 26th meeting.

At the remand hearing, Mr. Poliquin's attorney, James Hopkinson, and the Wymans' attorney, Roger Therriault, presented differing opinions on the Board's authority to grant Lesser Buffer Permits, with Atty. Therriault saying that based on "Sawyer" and Title 30-A, MRSA, Sec. 4354 (4-C), the Board has no authority. Atty. Therriault feels a Lesser Buffer is a variance which requires approval from the Board of Appeals. This section has been in the Town's LUO since at least 1993. The Board investigated Atty. Therriault's objection when he first presented it at the applicant's New Business public hearings and ruled that the wording of Sec. 1.7 of the Town's LUO is still valid, lesser buffers are not a variance issue, and Sec. 1.7 does allow the Planning Board to grant permits for Lesser Buffers.

The topography of the land is flat. There are no existing buildings that will provide screening.

Terrence J. DeWan (a certified Landscape Architect of Terrence J. DeWan & Associates, Landscape Architects, Yarmouth, Maine), presented maps and stated that

the reduction of the 100' buffer along the Wyman boundary line will be resolved by an 8' high by 275' +/- long stockade fence, and a designed 20' buffer of existing oak and pine trees and vegetation coupled with the planting of an added mix of trees, including evergreens, and bayberry bushes and other native plants. This dense buffer equates to the ability of a 100' open buffer space in countering lights, noise and fumes.

The Wymans' witness, Susan Carter (a landscape designer of Gnome Landscape and Design, Falmouth, Maine) disputed the proposed lesser buffer plan and stated that more information is needed to prove that the plan will provide adequate effectiveness in the abatement of nuisances.

The applicant provided a map and photos showing abutting and nearby commercial entities: Ocean View Park Campground and Ocean View Park Cottages on the entire west boundary and two separate lots of Kennebec Cottages on the east beyond the Wyman lot. The Board acknowledged other businesses in the Popham area and the adjacent State Park.

The Board concludes that the proposed lesser buffer plan is adequate to equate to 100' of buffer space and further concludes that the area is predominantly commercial.

Motion by Howell Vote: 5 Yes ___ No ___ Abstain

Sec. 1.8 and 1.9 - Home Business; Apartments, Condominiums, and Cluster Developments

Do not apply; the application is for neither.

Sec. 2.1 - Purpose (General Building Requirements)

The Board considered the *purpose* standards throughout the entire decision making process.

The Board concludes that findings under Ordinance sections cited herein assure safe, sanitary and healthy living conditions and appropriate implementation of the standards will prevent unreasonable adverse impact on adjacent properties.

Motion by Hebert Vote: Yes ___ No ___ Abstain

Sec. 2.2 - Permit Required

The applicant will secure any Building Permit that is required under this section. The application does not require a Plumbing permit.

The Board concludes that the applicant will secure all necessary permits.

Motion by Newell Vote: 5 Yes ___ No ___ Abstain

Sec. 2.3 – New Business Permit

The application is for a Lesser Buffer Permit. The applicant was granted a New Business Permit for the Popham Beach Club on April 19, 2006.

The Board concludes that the applicant has previously secured a New Business Permit.

Motion by Thayer Vote: 5 Yes ___ No ___ Abstain

Sec. 2.4 – Standards for Commercial and Industrial Uses

The standards for commercial use were adequately addressed under the New Business Permit. Evidence in the Lesser Buffer application shows a plan designed to prevent unreasonable nuisance to nearby properties, parking on adjacent public roads, danger to children, unsanitary waste disposal, noise, vibration, smoke, fumes, dust, noxious odors, heat, glare or radiation that exceeds conditions previously detectable at lot boundaries of other properties in the general area.

The Board concludes that commercial use standards have been met.

Motion by Herbert Vote: 5 Yes ___ No ___ Abstain

Sec. 2.5 – Lot Size - Does not apply.

Sec. 2.6 – Temporary Residential Uses - Does not apply.

Sec. 2.7 – Construction Standards - Does not apply. Describes dwellings.

Sec. 2.8 – Solar access - Does not apply. There are no solar access devices in the area.

Sec. 2.9 – Mobile Homes - Does not apply.

Sec. 2.10 – Buildings on Non-Conforming Lots of Record - Does not apply. The lot is a conforming lot.

Sec 2.11 through 3.7 – Existing Structures on Non-Conforming Lots; Debris from Destroyed buildings; Occupancy Permit; Structure Demolition or Removal Notice; Agriculture; Campgrounds; Earth Moving Activity; Mobile Home and Mobile Home Parks; Multi-Family Dwelling Units, Sanitary Standards (Subsurface Waste Disposal – Overboard Discharge – Privies); Sign - Do not apply.

Sec. 3.8 – Water Quality Protection

The buffer and surrounding area will not be treated with any material that will cause damage to any surface or ground water. The applicant will keep a list of operating procedures.

The Board concludes that no activity will cause contamination, pollution or harm to surface or ground water.

Motion by Newell Vote: 5 Yes No Abstain

Sec. 3.9 through 4.3 – Driveways and Other Private Ways; Codes Enforcement Officer; Codes Enforcement Officer Permits - Do not apply.

Sec. 4.4. a. through j – Permits Issued by the Planning Board

Adequate evidence and testimony has been provided and which the Board has considered and used in voting on the application.

The Board concludes that in the foregoing sections all issues were covered and the applicant is in compliance with the Land Use Ordinance. The Board further concludes that the proposed lesser buffer: (a) will maintain safe and healthful conditions, (b) will not cause water pollution, erosion or sedimentation, (c) will not have the need for disposal of wastewater, (d) will not have an adverse impact on aquatic life, bird or other wildlife habitat, (e) will not affect a waterbody's ability to store water, (f) will conserve vegetation, (g) will not harm visual points of access to waters as viewed from public facilities, (h) will conserve the lot's point of access to the water, (i) will conserve natural beauty, and (j) comply with all pertaining standards and requirements of the Land Use Ordinance.

Motion by Thayer Vote: 5 Yes ___ No ___ Abstain

Sec. 4.5 – Conditions

Any conditions prescribed under this section will be reasonable and will conform to the purposes and provisions of the Ordinance.

The Board concludes that conditions imposed will be reasonable and will conform to the Land Use Ordinance.

Motion Hebert Vote: 5 Yes ___ No ___ Abstain

Sec. 4.6 – Variances

A lesser buffer is not a variance issue and the subject has been adequately evidenced in forgoing sections.

The Board concludes that this section does not apply.

Motion by Hewell Vote: 5 Yes ___ No ___ Abstain

Sec. 4.9 – Enforcement - Does not apply.

Sec. 5 – Construction of Language and Definitions

This section was used by the Board throughout the deliberation process and the Board referred to Webster's Dictionary once on the word "commercial."

The Board concludes that it has adhered to the scope of this section during the deliberation and decision-making process.

Motion by Hewell Vote: 5 Yes ___ No ___ Abstain

THEREFORE, the Phippsburg Planning Board hereby APPROVES WITH CONDITIONS the application of Bruce L. Poliquin for a Lesser Buffer at his business, the Popham Beach Club. Be it known that in granting approval, the Board considered all comments and documents received during the public hearing and meeting process. Approval of this application will not unreasonably compromise the comfort,

convenience, safety, health and welfare of the people, year-around and seasonal, of Phippsburg.

CONDITIONS OF APPROVAL

1. The applicant shall not use any material on Popham Beach Club property that will harm water quality as described in Land Use Ordinance Sec. 3.8. The applicant shall maintain a list of operating procedures.
2. Vegetation in the 20' buffer shall be maintained and any dead vegetation replaced.
3. Berms may be used to gain height of vegetation, if practical.
4. The applicant shall have installed a minimum of an 8' high by 275' +/- long stockade fence along the Wyman boundary line. The fence may drop to 6' high within 20' of Route 209.

MOTION by Thayer to approve in its entirety the Findings of Fact and Conclusions of Law contained in this document.

Vote: 5 Yes No Abstain

The Planning Board has hereby answered the remand of the Board of Appeals in the matter of a Lesser Buffer permit for the Popham Beach Club.

Dated at Phippsburg, Maine, November 8, 2006

PLANNING BOARD:

Marie Varian, Marie Varian, Chairman
Marion Hebert, Marion Hebert
Stephen W. Thayer, Stephen Thayer
Clifford D. Newell, Clifford Newell

Robert Smith, Robert Smith

_____, Joshua Bate, Alternate

_____, Mark Hawkes, Alternate

Handwritten notes on this document were recorded by the Recording Secretary on this same date of November 8, 2006.

Signed: Marion J. Hebert Marion Hebert
Recording Secretary