

**Town of Rockport Zoning Board of Appeals
PUBLIC HEARING
Wednesday, February 24, 2010 – 7:00 p.m.
Rockport Opera House Downstairs Meeting Room
Meeting Televised on Channel 22**

Present: George D. Benson, Chairman
Stephen Bowen
Michael P. Galgano
David C. Gordon

Also Present: Thomas Ford, Planning Director
Scott E. Bickford, Code Enforcement Officer
Nancy Ninnis, Recording Secretary

AGENDA

NEW BUSINESS

1. **Peter Giustra**, 693 Vaughn's Neck Road, Warren, ME 04864
Request: Administrative appeal under the provisions of Section 703.2 alleging that there was an error in the Code Enforcement Officer's decision under the requirements of Section 904.5 (side yard setback) to deny a building permit application for a structure (hunting camp) bisecting parcels.
Property: Francis Road – Tax Map 17, Lots 65-11 and 65-12
District #904 – Residential District

OTHER BUSINESS

2. Review and Approval of Minutes

The meeting was called to order at 7:02 p.m.

I. PETER GIUSTRA

Representation: **Peter Giustra**
693 Vaughn's Neck Road, Warren, ME 04864
Tel: 207-273-2202
Re: Francis Drive – Map 17, Lots 65-11 and 65-12
District #904 – Residential District

Request: Administrative appeal under the provisions of Section 703.2 alleging that there was an error in the Code Enforcement Officer's decision under the requirements of Section 904.5 (side yard setback) to deny a building permit application for a structure (hunting camp) bisecting parcels.

Chairman Benson: In an effort to conduct this meeting in an open, honest and fair manner, I feel it is necessary to inform the applicant and my fellow Board members of the fact that in the course of preparation for this meeting, I have had a series of conversations with various people, including the Town's Code Enforcement Officer, the Town Planner, the Assessor, the Chairman of the Planning Board and Attorney Suzanne Pilgrim at the Maine Municipal Association Legal Services Department. It is because of the complexity of the issues involved with this application, and in an effort to be thoroughly prepared for this meeting that I felt it necessary to have these conversations, both via email and in person, with the individuals mentioned. I believe that my fellow Board members can attest to my attention to detail, and I personally guarantee that I will approach this application with an open mind and with a commitment to being fair and impartial to all parties involved. If anyone here has an issue with my participation in this hearing, or if any of my fellow Board members have any potential conflicts of interest, I would like to give them the opportunity to express those concerns before we begin this hearing.

Mr. Bowen: Do you have any information not available to other Board members that would impact the Board's decision?

Chairman Benson: I agree that I could not make a decision based on information other Board members do not have access to, and that will not be the case. With regard to the question of jurisdiction over the issues within this application, Section 703.1 of the Town of Rockport Land Use Ordinance gives the Zoning Board of Appeals the responsibility to interpret provisions of the Ordinance which are called into question, and Section 703.2 places the responsibility with the Zoning Board of Appeals to hear and decide where it is alleged there is an error in any order, requirement, decision or determination made by the Code Enforcement Officer or the Planning Board. The Board's jurisdiction extends only to performing a de novo review of this application. I refer to the minutes of the Planning Board meeting of April 19, 2006 and have the following questions for the applicant. The first item on the agenda of that meeting references you as "Trustee/Brook Crossing Estates" and states that you were represented by Gartley & Dorsky at that meeting. Is this correct?

Peter Giustra: Yes.

Chairman Benson: Referencing a building permit application dated January 7, 2010, is it correct that this permit application was filed with the Code Enforcement Officer with the express purpose of building a 10'x20' hunting camp?

Peter Giustra: Yes.

Chairman Benson: It would appear that the location where you want to build this hunting camp, according to your application, is centered over what appears to be a property line that measures 398.26 feet and is between what appears to be two parcels that are referenced as 17-065-11 and 17-065-12. Is that correct?

Peter Giustra: Yes.

Chairman Benson: Referencing the Code Enforcement Officer's permit denial dated January 13, 2010, it would appear that the application was denied by the Code Enforcement officer because, "The application plan, as shown, does not meet the fifteen (15) foot setback as required in the Rockport Land Use Ordinance 904 District." Is this correct?

Peter Giustra: Yes.

Chairman Benson: Referencing the Zoning Board of Appeals application dated January 18, 2010, in the ZBA Appeals Application it says you are requesting an appeal for ordinance interpretation. On the second page of that application you state that, “Subdivision Ordinance Article 13 requires a performance bond at the time of subdivision application.” You subsequently claim that, “such bond was not submitted.” Accordingly, for the record, are you saying that neither you, nor anyone representing you, have submitted anything that would represent a performance guarantee as defined in Article 13?

Peter Giustra: Yes.

Chairman Benson: Have you ever had any document showing the creation of the lots for the Brook Crossing Estates Subdivision recorded at the Knox County Registry of Deeds?

Peter Giustra: No.

Chairman Benson: Your application then suggests that you believe that the Brook Crossing Estates Subdivision should be declared incomplete, and that if this Board finds that the subdivision is declared incomplete because no performance bond was submitted, then you contend that the permit to build a hunting camp should be granted. Is this correct?

Peter Giustra: Yes.

Chairman Benson: At this time I would like to give the applicant the opportunity to present any further evidence or oral testimony that he believes will aid this Board in reviewing the application.

PRESENTATION:

Peter Giustra: I purchased what was an undeveloped wood lot many years ago. In 2005 a family member approached me about developing it, so I said I would finance the development of the subdivision. The process went through and when the subdivision was approved, I was unaware that every lot would be assessed as an undeveloped lot and the assessment went up three-and-a-half times. There are no separate deeds for any of the lots, so I applied for a tax abatement at various times, but was denied. I thought I could have the subdivision declared incomplete because of the lack of a performance bond under Article 13. I sought a lawyer’s opinion and he agreed with me. I never got an answer from the Town Attorney as to the interpretation of this Article. Finally, the Town Attorney wrote back that I should go back to the Zoning Board of Appeals, but the Town said that I had nothing to go before the ZBA for. I had to have something to be denied, so I applied for a building permit for a hunting camp. Article 13 is not ambiguous, and because I did not fulfill its requirements, I feel the subdivision should be declared incomplete. There is no way I would go forward with developing the subdivision in this economic climate. Usually applicants want subdivisions approved, but I want this one disapproved. The Ordinance states unequivocally that a performance bond has to be provided like any other requirement at the time of subdivision approval. This requirement was not fulfilled and I ask the Board to declare the subdivision as incomplete. I see no reason why this can’t be done or any harm in it, as the property would still be an empty wood lot.

BOARD QUESTIONS:

Mr. Galgano: Do you ever intend to reactivate the subdivision?

Peter Giustra: I am not really sure. If I keep it intact, I will keep it for a couple of years to see if the market turns around enough to make development worthwhile. I have no intention of doing so in the near future.

Mr. Galgano: Do you intend to use the hunting camp if it is approved?

Peter Giustra: No.

Code Enforcement Officer Bickford: The applicant did exactly as he said. He said he needed some place the hunting camp would be located, and I denied the building permit application because it was located on the property line.

Mr. Bowen: I am intrigued by the concept of an incomplete subdivision. Something either is or isn't a subdivision.

Planning Director Ford: That is correct.

Mr. Bowen: I don't see anywhere in the Ordinance a definition of an incomplete subdivision.

Peter Giustra: The subdivision approval process goes through several steps, and the process of the application at some point is incomplete until everything has been submitted, and I did not submit everything.

Chairman Benson: The matter before the Board is the building permit that was denied. The Planning Board decision to approve the subdivision was made in 2006 and the timeframe for appeal has passed. There are Ordinance issues we will have to deal with. Subdivision Ordinance Article 8.3.B states: "Any subdivision not recorded in the Registry of deeds within two years of the date upon which the plan is approved by the Board shall become null and void." Accordingly, this Board could find the subdivision null and void and the applicant could not develop it in the future without repeating the subdivision review process.

Peter Giustra: I understand that, but with regard to your first statement, both the Town Attorney and the Town said I should come to the Zoning Board of Appeals. The Town Attorney never addressed Article 13, but just gave me some vague answers. He says submission of the performance bond is a voluntary thing, but I am saying it is not. It is a requirement that I have to do. I disagree with the statement that I have the option of complying with the performance bond requirement, and I did not comply with it, so I feel it is still a planning process that is not complete. The fact that the Planning Board gave me erroneous approval is not my fault. They never mentioned or waived Article 13.

Chairman Benson: But the time for appeal with regard to that issue has passed.

Mr. Galgano: The root of the issue is that you applied to the Planning Board and the Planning Board can impose conditions of approval. The fact that you did not complete it does not make the plan null and void. If you really wish to abandon the subdivision, the simplest thing to do is to write a letter to the Planning Board with that request.

Planning Director Ford: The applicant has raised a valid issue. I have the original signed copy of the approved subdivision plan. There were four meetings starting in 2005 culminating in approval on April 19, 2006. This was a major subdivision with a three-stage approval process. Gartley & Dorsky did a very professional job of presenting the application information. The Planning Board took a site walk

on April 10, 2006 and determined that they had received a complete application. The Chairman raised two issues:

1. There was no bank letter and the Town should hold the plan until it was provided.
2. Per Article 11.10, Gartley & Dorsky provided a written spread sheet of costs. The Public Works Director agreed with the figures, so the Board made the determination that the applicant had the capacity to meet the financial requirements to complete the infrastructure. The Town would hold the original plan until such time as the infrastructure was completed and, accordingly, the applicant did not have to submit a performance guarantee.

I still have the signed Mylar in my office. At the end of the meeting, the Planning Board determined that it had a complete application and gave final approval. Any appeal of that decision has to go directly to the Superior Court, not to the Zoning Board of Appeals. So as of April 19, 2006, there was a complete and approved subdivision. As of April 1, 2007 the Assessor assessed every subdivision in Town as individual lots, but discounted these lots because they were not developed, which was consistent with how every subdivision in Town was treated.

Mr. Bowen: So as far as the Town is concerned these became individual lots with the Planning Board's approval.

Chairman Benson: That is the issue we are dealing with tonight. Just because they are lots for tax purposes that is not the same as lots for development.

Planning Director Ford: The Assessor did not split out the individual lots until April 1, 2007.

Mr. Galgano: The Subdivision Ordinance requires that the Mylar be recorded within two years, but all conditions were not complied with and the plan was not recorded, so I think it is possible the subdivision is null and void and the applicant should write a letter requesting that it be declared null and void.

Peter Giustra: You're telling me that even though this requirement wasn't met that the plan could be approved?

Chairman Benson: The plan has been approved.

Peter Giustra: But the minutes don't address Article 13 and the Planning Board was allowed to sign its approval even though all requirements were not submitted.

Mr. Galgano: The Planning Office's job is to make sure all requirements are met.

Peter Giustra: Why am I before the Zoning Board of Appeals?

Chairman Benson: Because the Zoning Board of Appeals handles appeals of Code Enforcement Officer decisions – in this case, of your building permit application. That is the only decision we are legally allowed to review. A de novo review only allows us to take on the role of the Code Enforcement Officer in review of your building permit application.

Peter Giustra: But if the subdivision was incomplete?

Chairman Benson: The Zoning Board of Appeals does not have the authority to declare the subdivision incomplete, but if we move forward, we will be dealing with Article 8.3.

Peter Giustra: I got caught in the Brower decision because the Town Attorney was wrong. No one ever told me there was a two-year moratorium on this and the Planning Director told me I didn't have a timeframe. This is the only piece of property not recorded in the Registry of Deeds. I know when I'm beat.

Chairman Benson: Are you withdrawing your application for appeal?

Peter Giustra: It's academic.

Mr. Galgano: I don't think that's the appropriate question. Does the applicant want to petition the Planning Board to abandon the subdivision?

Chairman Benson: By moving forward with the application here the applicant would be abandoning the plan anyway.

Peter Giustra: If I go by the language of the Ordinance, which states unequivocally that if the Mylar is not recorded within two years the subdivision is gone, I don't have to do anything.

Planning Director Ford: The applicant and I have talked at length about Article 8.3. The Zoning Board of Appeals can make a determination whether the subdivision is null and void.

Chairman Benson: If the applicant withdraws the application, are we done?

Planning Director Ford: If the applicant wishes to withdraw, the Board should accede to his request and none if this ever happened. The applicant and I talked about the April 1, 2010 date for lot assessment and the possibility that this hearing could result in looking at Article 8.3 and making the decision that the subdivision is null and void. Under State law the Zoning Board of Appeals is the only board with the authority to interpret the Ordinances, and should also look at Article 13. The April 19, 2006 Planning Board decision clearly indicates that the Planning Board reviewed the issue of financial capability and made the determination to delegate to the Planning Office the responsibility of obtaining from the applicant a sufficient performance guarantee, and there were good financial reasons for doing so. So there is no need to amend Article 13.

Mr. Galgano: For the record, if the applicant really wants to do away with the subdivision plan, I strongly suggest that he write a letter to the Planning Board abandoning the plan and that the Zoning Board of Appeals act on it tonight.

Chairman Benson: If we move forward tonight the result will be exactly that.

Mr. Galgano: But if someone in the future wants to reactivate the subdivision, there will be nothing on record that it was voided.

Chairman Benson: If the applicant withdraws the application, he can at any time write a letter to the Planning Board, and I believe the Planning Board would have to act on it with a public hearing. I am hearing that the applicant is trying to act on this before the April 1, 2010 deadline to lower his property taxes.

Peter Giustra: That's right.

Chairman Benson: I suspect that if the Zoning Board of Appeals declares the subdivision null and void as of April 19, 2008, the applicant could take that decision to the Assessor to request an abatement.

Peter Giustra: You're making a point that is not clear to me that it would be retroactive. The Assessor said I couldn't for last year if you declare it null and void now.

Chairman Benson: The Ordinance says it shall become null and void within two years of the date it is passed.

Planning Director Ford: If this is the decision the Board arrives at tonight, a Notice of Decision will be circulated to the applicant, the Assessor and other Town officials, and the subdivision will be off the tax rolls as of April 1, 2010. If the Board declares the subdivision null and void as of April 19, 2008, the Board can make that determination and it will be binding and valid.

Mr. Bowen: I am interested in the question before us. If the applicant wants to take steps to go to the Planning Board to make the subdivision null and void, fine.

Peter Giustra: There are no directions to a taxpayer how to go about doing that.

Mr. Bowen: There is no question the applicant has a unique situation. There was an appeals process in place for a fixed amount of time. So I am only interested in the question before us.

Peter Giustra: If this subdivision doesn't exist, you shouldn't deny my application and should approve my hunting camp.

Mr. Galgano: If you didn't fulfill all the requirements, the subdivision is null and void.

Chairman Benson: And the lot lines don't exist.

Code Enforcement Officer Bickford: If the property lines don't exist and the subdivision is null and void, as of what date is it null and void?

Chairman Benson: It was my intention to deal with Article 8.3 and determine which date.

Peter Giustra: Do me a favor and declare the subdivision null and void as of the two-year timeframe.

Mr. Galgano: I don't know if we have legal authority over a Planning Board decision.

Chairman Benson: If the applicant wants to write a letter withdrawing the subdivision, is there a process in place for doing that?

Planning Director Ford: The Town Attorney's letter of February 16, 2010 says the Zoning Board of Appeals has the authority to declare the subdivision null and void, and the Planning Board would definitely be amenable to putting it on their March agenda for vacation of the subdivision, as we have done with other subdivisions.

Peter Giustra: I am not opposed, but it would be an extra step.

Mr. Bowen: But the applicant didn't want us to declare the subdivision null and void, but incomplete.

Chairman Benson: Would the applicant like the Board to move forward with the application, or would he like to withdraw it?

Peter Giustra: I am not withdrawing my application. I am convinced the subdivision is incomplete because I did not fulfill all requirements.

Chairman Benson: Are you aware the Board could find the subdivision null and void?

Peter Giustra: As long as you determine a date.

Chairman Benson: The building permit was denied because the application plan, as shown, did not meet the fifteen-foot side yard setback required in the Town of Rockport Land Use Ordinance District 904. In a *de novo* review the Board is required to approach the application as if we were the Code Enforcement Officer, so we need to determine the definition of a lot. In Section 300 the Land Use Ordinance defines a lot as follows: "All contiguous land in parcels in single or joint ownership described on a deed, plot plan or similar legal documents recorded at the Knox County Registry of Deeds, including such open space as is required by the Ordinance and having frontage upon an approved street or private right-of-way. Lots located on opposite sides of a public or private road shall be considered each a separate lot." I would like to poll the Board on whether this definition allows an unrecorded subdivision plan to be used to define the boundaries of a lot.

Mr. Gordon: No.

Mr. Bowen: No.

Chairman Benson: No.

Mr. Galgano: Maybe.

Chairman Benson: Subdivision Ordinance Article 8.3.B states that any subdivision plan not recorded within two years of the date it is approved becomes null and void. Do you believe any action needs to be taken by the Code Enforcement Officer, the Planning Director, the Planning Board or the Zoning Board of Appeals for the subdivision to become null and void?

Mr. Gordon: No.

Mr. Galgano: I think we should have a finding to that effect.

Mr. Bowen: So moved.

Chairman Benson: Does everyone agree that by the date of two years after approval the subdivision became null and void?

Mr. Galgano: I think the Board should make that determination.

Peter Giustra: It should be the date the subdivision was null and void, not the date it was declared to be null and void.

Chairman Benson: I will ask the question again, is any action is required?

Mr. Galgano: I think the Zoning Board of Appeals should act.

Mr. Bowen: No.

Mr. Gordon: No.

Chairman Benson: No. The Board agrees by a vote of 3-1-0 that no action is required.

MOTION – George Benson: The Board finds that the applicant, by his own admission, has not submitted the required performance bond as outlined in Article 13 of the Rockport Subdivision Ordinance.

The Board finds that the applicant has failed to have the Brook Crossing Estates Subdivision recorded at the Registry of Deeds as required by the Rockport Subdivision Ordinance Article 8.3.B.

The Board finds that the applicant has taken actions that are inconsistent with the approved subdivision by submitting a building permit contemplating the creation of a hunting camp that would be located in a position that would bisect a property line created by the Brook Crossing Estates Subdivision between two parcels that are referenced as 17-065-11 and 17-065-12.

The Board finds that because of the applicant's failures, and inconsistent actions, as described above, this applicant is found to have abandoned the Brook Crossing Estates Subdivision and this Subdivision is found to be null and void as of 12:01 a.m. on April 20, 2008.

The Board finds that the definition of Lot in Section 300 of the Rockport Land Use Ordinance, as it is currently written, does not allow any subdivision plan that has not been recorded at the Knox County Registry of Deeds to be used for the purposes of defining the boundaries of a lot.

Finally, the Board remands this application back to the Code Enforcement Officer and directs the Code Enforcement Officer to revisit this application and to take into account the findings of this motion when determining if all applicable requirements of the Rockport Land Use Ordinance have been met.

Peter Giustra: Are you denying the building permit application?

Chairman Benson: We are remanding it back to the Code Enforcement Officer.

Peter Giustra: How can the Town tax these as individual lots?

Chairman Benson: Lot determination for purposes of tax assessment is completely different.

Peter Giustra: If the subdivision is null and void as of April 1, 2008, why not just approve the building permit? Or I can withdraw my application for a building permit.

Mr. Bowen: I have issues with the motion.

Chairman Benson: Is it your understanding that the Zoning Board of Appeals has the authority to declare the application approved in our motion?

Planning Director Ford: Yes, the Board can reverse the decision of the Code Enforcement Officer and direct him to issue the building permit. The applicant does not have to building the hunting camp, and he won't get the building permit if he doesn't pay for it.

Mr. Galgano: Why can't the Board deny the application for a building permit?

Code Enforcement Officer Bickford: The Board is here for the building permit.

Mr. Bowen: I have problems with the motion. I don't think we need to mention the performance guarantee in the first paragraph of the motion, and I don't think we need to establish the precedent in the fifth paragraph. The Board simply finds that the applicant failed to have the subdivision recorded in the Registry of Deeds and it was abandoned as of this date and therefore the building permit is approved.

Chairman Benson: We have to show that the building permit is approved based on the Ordinance.

Mr. Bowen: We have established that the subdivision doesn't exist because of the second paragraph.

Chairman Benson: The application shows the hunting camp on top of the property line and the only way to approve it is if the subdivision is null and void, and it is null and void because it is not recorded in the Registry of Deeds.

Mr. Bowen: The only thing that matters is that the plan was not recorded in the Registry of Deeds. I think the Planning Board would dispute that the performance guarantee was not submitted.

MOTION – Stephen Bowen/SECOND – Michael Galgano: The Board finds that the applicant has failed to have the plan for the Brook Crossing Estates Subdivision recorded at the Knox County Registry of Deeds as required by the Town of Rockport Subdivision Ordinance Article 8.3.B. Therefore, the applicant is found to have abandoned the Brook Crossing Estates Subdivision and this Subdivision is found to be null and void as of 12:01 a.m. on April 20, 2008. The Board remands this application back to the Code Enforcement Officer and directs the Code Enforcement Officer to reverse his decision and issue a building permit for a hunting camp.

VOTE:	George Benson	Yes
	Stephen Bowen	Yes
	David Gordon	Yes
	Michael Galgano	Yes

The motion was passed 4-0-0.

II. OTHER BUSINESS

MOTION – David Gordon/SECOND – Stephen Bowen: To approve the minutes of the Zoning Board of Appeals meeting of September 30, 2009 as presented. The motion was passed 4-0-0.

The meeting was adjourned at 8:20 p.m.

The next meeting of the Zoning Board of Appeals has not yet been scheduled.

Nancy Ninnis
Recording Secretary