



TOWN OF WELLS, MAINE ZONING BOARD OF APPEALS

208 Sanford Road Wells, Maine 04090

Website: www@wellstown.org

June 22, 2020

Hall Family Realty Trust
20 Grasshopper Lane
Wells, Maine 04090

APPEAL:

On March 2, 2020, the Zoning Board of Appeals of Wells, Maine held a public hearing for an appeal submitted by Gene R. Libby, Esq., agent for abutter The Hall Family Realty Trust, as allowed under Wells Land Use Ordinance § 145-67.A.1 as to whether there is an error in any written order, requirement, decision or determination made by the Code Enforcement Officer (“CEO”) to:

- (1) Determine the proper reviewing authority for a site approval application pursuant to § 145-74A(1);
- (2) Determine whether or not the proposed use in a site plan approval application is a permitted use and meets the requirements of Wells Land Use Ordinance Article V pursuant to § 145-74A(1); or
- (3) A notice of violation, pursuant to 30-A M.R.S. § 2691(4), which states that decisions of the code enforcement officer to issue notices of violation are reviewable by local boards of appeal absent an express provision in the municipal’s [sic] charter or land use ordinance.

The property subject to the appeal is located at 444 Drakes Island Road and is further identified as Tax Map 142-021-EXE.

Deliberations and discussion took place following close of the public hearing.

BOARD MEMBERS AND OTHERS PRESENT:

Board Members: Robert Lavoie, Chairman, Michael Findley, Jason Heft and Carol Kingston were present at both the March 2, 2020 public hearing and deliberation; Board Member Tom Pulsifer was recused; the Board was represented by Tom Danylik, Esq.

Jodine Adams appeared on behalf of the Code Enforcement Office, which was represented by Amy Tchao, Esq.

The Hall Family Trust appeared and was represented by Gene R. Libby, Esq.

Other abutters and/or interested citizens were also present and testified and/or submitted written testimony.

FINDINGS OF FACT:

1. The subject property is owned by the Town of Wells and is further identified as Tax Map 142-021-EXE.
2. The Hall Family Realty Trust owns property at 20 Grasshopper Lane, further identified as Tax Map 142-024-A, which is adjacent to the subject property.
3. The subject property is located in the Residential D (“RD”) District, Shoreland Overlay (“SO”) District and Resource Protection (“RP”) District.
4. In March 1973, the Town voted to purchase the subject property, also authorizing the Selectmen to charge for parking at the subject property to amortize the purchase price and to defray costs of building and maintaining parking facilities.
5. The Town purchased the subject property in 1973 for use as a municipal parking facility and expanded a then existing parking area located on a portion of the subject property over the next few years.
6. The portion of the subject property operated by the Town of Wells as a municipal parking facility (“MPF”) is located within the RD and SO Districts.
7. The March 11, 1950 Zoning Ordinance was the applicable ordinance in effect when the subject property was purchased by the Town. This Ordinance remained in effect until 1976.
8. Under the 1950 Ordinance, the subject property was located in the Residence District “A” (“RA District”).
9. Permitted uses in Section 5.B(1)(C) of the 1950 Ordinance in the RA District included “museums, art galleries, libraries, golf courses, parks, playgrounds, and parking areas not conducted for profit.”
10. The establishment of the MPF and its expansion, as established by a May 11, 1976 site plan prepared by Dow & Coulombe, Engineers, occurred before the Town adopted its first Site Review Ordinance in November 1983.

11. Section V(A)(f) of the 1983 Site Review Ordinance (“SRO”) states that “Site Review shall not apply to existing buildings or premises legally established prior to” November 1983.
12. The Town enacted a revised Zoning Ordinance on March 8, 1985.
13. The 1985 Ordinance provided that a “Municipal Facility” was a permitted use in the RA District.
14. The Town’s current Land Use Ordinance was adopted November 2, 1993; the subject property is therein and thereafter located in the Residential Drakes Island (“RD”) District.
15. An April 16, 1999 amendment to the 1993 current Ordinance (hereafter the ordinance) provides that “uses created, altered or enlarged between March 11, 1950 and November 2, 1976 and subject to zoning enacted on March 11, 1950 shall be considered to be in compliance with any Land Use Ordinances in effect during the time periods from March 11, 1950 and November 2, 1976. (Ordinance § 145-11(B).
16. Municipal facilities are a permitted use in the RD District with site plan review, if applicable. (Ordinance § 145-23(C)(3).
17. The Ordinance defines “Municipal Facility” as “[a] use undertaken by the Town of Wells.” (Ordinance § 145-10).
18. The Ordinance defines “Parking, Commercial” as [a] business providing outside storage of registered motor vehicles and “Business” as “[a]ny use or activity conducted for financial gain or any use or activity in which fees are charged, other than municipal, religious or community-based nonprofit organizations.” (Ordinance § 145-10).
19. On November 19, 2019, Mr. Libby sent a letter to Jodine Adams, Code Enforcement Officer (“CEO”) on behalf of Howard J. Hall requesting a written determination from the CEO as to whether the Drakes Island Road parking lot was an unpermitted, unlawful use in the RD District.
20. On December 20, 2019 the CEO responded to Mr. Libby stating that she had determined that the Drakes Island municipal parking lot facility is a “lawful, pre-existing municipal use that, when established, was a permitted use under the zoning ordinance then in effect.”
21. On January 16, 2020, Mr. Libby filed an appeal of the CEO’s determination on behalf of the Hall Family Realty Trust.

PRELIMINARY ISSUES

1. Right Title and Interest: The Application Packet prepared by the Board of Appeals requires the applicant to provide a “deed, sales agreement, lease or intent to lease.” The Appeal Application submitted by Mr. Libby did not include any of these documents. The Board voted to allow Mr. Libby to supplement the Application by delivery of a copy of the deed for the Hall Family Realty Trust to the Board by close of the following business day. The deed submission occurred on March 3, 2020 to The Wells Code Enforcement Office and was submitted into the record.
2. Jurisdiction:
 - A. The first two appeal items presented were:
 - (a) Determine the proper reviewing authority for a site approval application pursuant to § 145-74A(1); and
 - (b) Determine whether or not the proposed use in a site plan approval application is a permitted use and meets the requirements of Wells Land Use Ordinance Article V pursuant to § 145-74A(1).

The Board questioned whether they had jurisdiction to review these first two items as there was no site plan approval application before them. Upon agreement between Ms. Tchao and Mr. Libby, Mr. Libby agreed not to get into testimony about kiosks, bathrooms and an alleged encroachment (“site review issues”) unless the Board later voted, based on the jurisdictional questions, that they wanted to hear this testimony. After hearing testimony, the Board voted 3-1 that they did not want to hear testimony on the “site review issues”.

Also at the request of Mr. Libby, the Board agreed to defer a decision on whether the Board had jurisdiction to hear and make a decision on the first two items presented in the appeal until the close of testimony.

After closing the public hearing, the Board voted unanimously that the Board did not have jurisdiction to consider the first two items.

- B. The remaining appeal item was:

A notice of violation, pursuant to 30-A M.R.S. § 2691(4), which states that decisions of the code enforcement officer to issue notices of violation are reviewable by local boards of appeal absent an express provision in the municipal’s [sic] charter or land use ordinance.

The Board determined that it did have jurisdiction to hear this item as the Maine Supreme Judicial Court has extended this statutory provision to include appeals from a determination by a CEO that there has been no violation.

CONCLUSIONS

The appeal before the Board was whether the CEO had erred in her determination that the Drakes Island municipal parking facility is a permissible conforming use. The burden is on the Appellant, Hall Family Realty Trust to provide evidence that the use is nonconforming. Following consideration of the evidence and testimony provided by the Appellant's attorney/agent, the Code Enforcement Officer and her attorney and the submitted and oral testimony from members of the public, the Board concludes that:

- a) The Drakes Island municipal parking facility was a "parking area not conducted for profit" as contemplated in Section 5.B(1)(C) of the 1950 Ordinance and was therefore a conforming use when the Town purchased the property in 1973, established it as a municipal parking facility and expanded it between 1973 and May of 1976;
- b) There was no Site Plan Review required for the use or expansion of the Drakes Island municipal parking facility as there was no Site Plan Review Ordinance in Wells prior to 1983.
- c) The current Land Use Ordinance provides that:
 - i) Structures and uses created, altered or enlarged between March 11, 1950, and November 2, 1976, and subject to zoning enacted on March 11, 1950, shall be considered to be in compliance with any land use ordinances in effect during the time period from March 11, 1950, to November 2, 1976. (§ 145-11(B));
 - ii) "Municipal facilities" are a permitted use, with site plan approval (if applicable) in the Residential D District;
 - iii) A "municipal facility" is defined as: "A use undertaken by the Town of Wells" (§145-10); the Drakes Island parking facility is therefore a municipal facility;
 - iv) A "parking lot, commercial" is the only parking lot category in the Ordinance and is defined as: "A business use providing outside storage of registered motor vehicles." (§145-10);

- v) A “business” is defined as “any use or activity conducted for financial gain or any use or activity in which fees are charged, other than municipal, religious or community-based nonprofit organizations”; the Drakes Island parking facility is therefore not a “business” and therefore not a “parking lot, commercial”. (§145-10).

The Board concluded that the subject parking lot is a permitted parking facility that is maintained by the Municipality for the benefit of Wells residents and visitors, and that charged fees does not change its status as a municipal facility.

The Board further concludes that the Appellant has not met its burden that the CEO was correct in her determination that pursuant to the Town of Wells Land Use Ordinance, the Drakes Island municipal parking facility is a conforming use and that the Administrative Appeal should therefore be *denied*.

DECISION

Based on the above Findings of Fact and Conclusions, the Wells Zoning Board of Appeals decided on June 22, 2020 by a vote of 5 to 0 grant/deny the Administrative Appeal.

Sincerely

Robert Lavoie

Robert Lavoie
Chairman Zoning Board of Appeals

6/26/20

Date

State of Maine
County of York

Personally appeared the above named Robert Lavoie and acknowledged the foregoing instrument to be his free act and deed in his capacity as Zoning Board of Appeals Chairman.

Jessica Keyes
Notary Public

6-26-2020

Date



Jessica Keyes
Notary Public, State of Maine
My Commission Expires:
September 14, 2020