

## MEMORANDUM

TO: Cape Elizabeth Planning Board  
FROM: Maureen O'Meara, Town Planner  
DATE: September 15, 2020  
SUBJECT: 14 Hill Way Site Plan, Subdivision Amendment

### Introduction

Two Penguin Properties LLC is requesting site plan review of a mixed use building with a 1,920 sq. ft. Short Term Rental (STR) on the ground floor and one residential unit on the main and second floors and amendments to the Tarbox Triangle Subdivision, located at 14 Hill Way (U22-74-3), which require review under Sec. 19-9 Site Plan Regulations and Sec. 16-2-5, Amendments to a Previously Approved Subdivision.

### Procedure

- The Board should begin by having the applicant introduce the project.
- The Board then allows public comment on completeness of the application.
- The Board should then make a finding of completeness. If the application is deemed incomplete, Board members should identify the information needed to make the application complete and no substantive discussion of the application should occur. If the application is deemed complete, substantive review may begin.
- The Board should decide if a site walk and/or a public hearing will be scheduled.
- At the close of discussion, the Planning Board has the option to approve, approve with conditions, deny or table the application.

### Summary of Completeness

The comments of the Town Engineer and the completeness checklists are attached. Below is a summary of possible incomplete items.

### *Site Plan Review*

- e. Existing conditions. The plan shows the proposed lot 2/3 boundary line instead of the existing line.
- h. Traffic access and parking. The proposed parking lot should meet the parking requirements for a mixed use building. Sec. 19-7-8, Off-Street Parking, requires that a single family home must be provided with 2 spaces and a Short Term Rental 1 space per 2 tenants with a minimum of 2 spaces. Subsection 2 states "Where multiple use of a lot occurs or where the use involves more than one activity (i.e. an ice cream shop that includes a gift shop), off-street parking shall be provided *for each use* in accordance with this section."

The proposed short term rental includes a bedroom, sunroom and livingroom. Under the current STR regulations, maximum capacity is 2 persons per bedroom plus 2 (assumes a pull-out couch) for a possible capacity of 6 tenants in the proposed short term rental. The site plan shows 2 garage spaces, presumed for the single family home, and 3 parking lot spaces, presumed for the STR.

Sec. 19-7-8 also requires that parking lots meet ADA requirements. The parking lot must include a van accessible ADA space. Sec. 19-7-8 (B) states "Handicapped parking shall be provided in compliance with the Americans with Disabilities Act and applicable State requirements." No handicapped parking is provided.

The parking lot access drive is 9.8' wide, which does not allow for two-way traffic that is standard for commercial and mixed use buildings. Sec. 19-7-8 (B) requires that "Each parking space must be sited to allow access and exit without obstruction."

Subsection 3 states "Travel and queuing aisles associated with off-street parking, drive-in facilities and motor vehicle fuel pumps shall be provided and shall not interfere with the use of or be part of the required off-street parking."

Lot 2 was approved with a parking space on the lot which is proposed to be removed. The parking space needs to be replaced.

- i. Stormwater. Some of the stormwater from lot 3 will be discharged onto lot 2 and lot 1. Easements for these discharges should be submitted and easement locations labeled on the plans.
- l. Landscaping. No buffer is proposed for the parking lot.
- m. Lighting. The applicant has not provided a plan showing lighting levels at the property line. Nine lights are shown on the site plan mounted to the building. Lighting should be added to the site plan legend. Fixture details indicate that lighting levels will likely not exceed .5 footcandles at the property line. The applicant should include this analysis in the application for the record.
- o. Noise. No generator is shown on the plan. If the applicant will be installing a generator for the mixed use building, it should be added to the plan and corresponding noise level analysis provided.

#### *Subdivision Amendment*

- 9. Solid waste. In order to comply with the solid waste disposal requirements under Site Plan Review, the applicant is proposing to use the dumpster

located on lot 1. Access and disposal easements should be shown on the subdivision plan over lots 1 and 2 for the benefit of lot 3.

17. Stormwater. Portions of lot 3 are designed to drain onto lots 2 and 1. Drainage easements should be shown on the plans.

### Discussion

Beyond the level of completeness, the Board may want to discuss the following items. In addition to the Site plan and subdivision requirements, the project is subject to the Town Center Design Standards, Sec. 19-6-4 (D).

1. **Hill Way Right-of-Way.** The Tarbox Triangle Subdivision has significant frontage along Hill Way, which at one time was the original alignment of Ocean House Rd. The original Tarbox Triangle subdivision approval assumed a 50' wide Hill Way right-of-way.

In order to finalize the Town's reconstruction of Hill Way, the Town asked the Town Attorney in May, 2020 to research and confirm the width of Hill Way. Research completed in June discovered plans recorded in the Registry of Deeds showing Hill Way (then Ocean House Rd) with a 66' wide right-of-way and no recording that later reduced the right-of-way to 50'. For this reason, the applicant's June submission was deemed incomplete by the Planning Board Chair due to a lack of right, title or interest in the property depicted on the plans.

Subsequent research by the town, supplemented with deed information from the applicant's surveyor, revised the determination in July. The most recent interpretation is that the right-of-way is 66' on the west side of Hill Way, but 50' on the east side fronting along the applicant's property. Town administration accepts this interpretation. The applicant's plans should be updated to consistently depict the right-of-way/property line for the subdivision and site plan.

2. **Short Term Rental.** The Planning Board is aware that the town is in the process of amending short term rental (STR) regulations (initiated in Fall 2019). As part of the amendment process, the Town Council adopted a moratorium on new STRs effective June 1st and expiring January 1, 2021 unless extended. The applicant is proposing a short term rental on the ground floor to meet the non-residential use requirement.

Town Attorney Mike Hill has provided an opinion on how the STR moratorium would impact any Planning Board review/approval that includes an STR. His conclusion is that the Planning Board can approve a STR under site plan review, but the approval does not vest the applicant with an STR once the

moratorium ends. If the STR is not allowed under STR regulations in effect at that time, no certificate of occupancy for the building can be issued.

The applicant has suggested that town delays prevented him from obtaining an STR permit before the moratorium took effect. In order to obtain a STR permit under Sec. 19-8-14, the Code Enforcement Officer must inspect the STR to confirm that required egress lighting, etc has been installed. The building to house the STR has not been constructed, so this inspection could not have occurred and no STR permit could have been issued.

The draft Short Term Rental amendments, if adopted as drafted, will severely limit STRs that are not in a primary residence. To comply with the Town Center permitted uses, the first floor of a mixed use building must be a nonresidential use. For this reason, the first floor cannot be a primary residence. The proposed STR could only be rented if the STR owner lives on the same lot or a lot abutting the STR. STR rentals in the 'Adjacent category' are capped at 105 days a year. For the remaining 260 days, the first floor would need to remain vacant. A "first floor" vacant for most of the year does not seem to support the Town Center District purpose to "encourage an identifiable Town Center that includes a village feeling, mixed retail and residential uses to serve residents, an environment inviting to pedestrians, a common meeting place, visual cohesiveness and enrichment and linkages to the Town's open space and nearby school campus."

3. **First Floor nonresidential use.** The project is located in the Town Center District, where mixed used buildings are encouraged, but the first floor *must* be a nonresidential use. The first floor nonresidential use requirement is intended to preserve commercial activity capacity in the town and especially in the Town Center District. Without some commercial capacity in the town business zones, there will be pressure to locate commercial businesses in residential zones and/or rezone residential zones to commercial zones.

The applicant is proposing a short term rental, which is listed as a nonresidential use in the Town Center at this time.

The Planning Board may want to discuss meaningful commitment to the first floor nonresidential use requirement. If the applicant intends to use the ground floor as an extension of their single family home, located on the "main" and second floors, then compliance with the single family home lot minimum lot size of 80,000 sq. ft will be needed. Note that plans C2.1, C2.2, C2.3, C2.4 and C2.5 all labeled the structure "Proposed House" in the August, 2020 submission. This month, the label has been changed but the building design is the same. The "ground floor" plan also shows a staircase to the "main floor" entering at the entrance to the master bedroom suite. This floor plan feature looks like a stair to the basement of a single family home, not access to a

separate nonresidential space. The most recently submitted plans identify the main floor as the first floor of the residential home.

The "ground floor" elevation is approximately 5' below the sidewalk ground elevation. The ground floor elevation has been artificially created with two 5' high retaining walls. Daylighting a floor is usually proposed when taking advantage of a natural sloping topography. The Planning Board may want to consider how the combination of artificial grading accomplished with retaining walls aligns with the Town Center Design standards for the front yard setback.

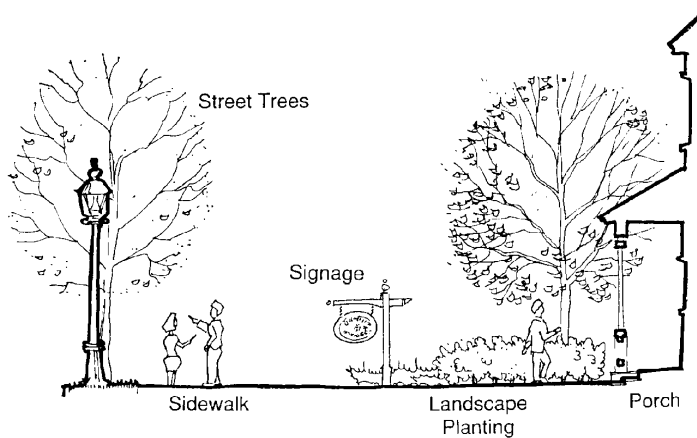
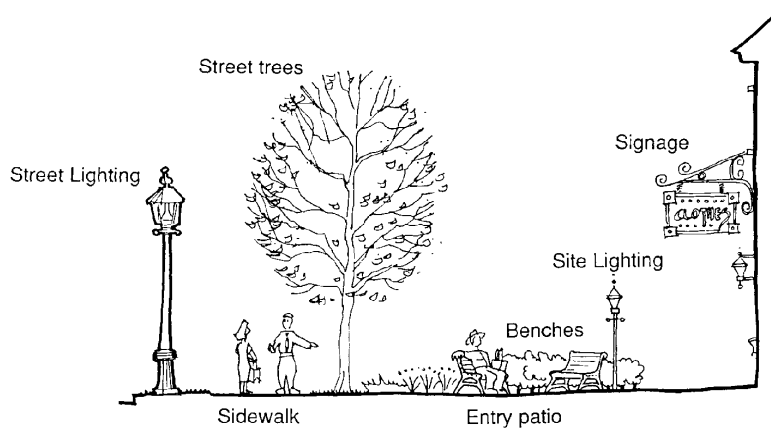
4. **Building Code consistency.** The applicant has eliminated the fire suppression water service because "the character of the building use is residential in nature." (p 2). He references the Code Enforcement Officer. The Code Enforcement Officer was asked if a duplex is required to have a sprinkler, and it is not required. The Fire Chief is recommending that a sprinkler be installed because the first floor is required by zoning to be a nonresidential use and a mixed use building is required to have a sprinkler system.

The same approach has been used for ADA access into the building. The applicant is using the residential building code where ADA access is not required, but for commercial buildings where the public will enter, compliance with ADA requirements is required.

The applicant's avoidance of commercial building code requirements casts doubt that a commercial/residential mixed use building is proposed.

4. **Town Center Landscaping standards.** In addition to the site plan landscaping requirements, landscaping must also comply with Sec. 19-6-4(D)(g). The land in the front yard setback should be designed as a transitional space, pedestrian friendly in scale and access. The front yard should be visible to passing pedestrians, not walled off with landscaping as would be the case with the proposed forsythia/white cedar.

**Front Setback  
Character Illustrations**



Motions for the Board to Consider

**A. Motion for Completeness**

BE IT ORDERED that, based on the plans and the materials submitted and the facts presented, the application of Two Penguin Properties, LLC for site plan review of a mixed use building with a 1,920 sq. ft. Short Term Rental on the first floor and one residential unit on the second and third floors and amendments to the Tarbox Triangle Subdivision, located at 14 Hill Way be deemed (complete/incomplete).

**B. Motion to Table (with public hearing)**

BE IT ORDERED that, based on the plans and the materials submitted and the facts presented, the application of Two Penguin Properties, LLC for site plan review of a mixed use building with a 1,920 sq. ft. Short Term Rental on the first floor and one residential unit on the second and third floors and amendments to the Tarbox Triangle Subdivision, located at 14 Hill Way be tabled to the regular

October 20, 2020 meeting of the Planning Board (at which time a public hearing will be held).

**Site Plan Review Submission Checklist**  
**[Section 19-9-4(c)]**

Date: September 15, 2020

Project: 14 Hill Way mixed use building

Applicant: Two Penguin Properties LLC

- Y a. Evidence of right, title, and interest in the property
- Y b. Written description
- Y c. Name of project/applicant
- Y d. Survey
- P e. Existing conditions
- Y f. Topography
- Y g. Buildings
- P h. Traffic access and parking
- P i. Stormwater
- Y j. Erosion
- Y k. Utilities
- P l. Landscaping
- P m. Lighting
- Y n. Signs
- Y o. Noise
- Y p. Exterior storage
- Y q. Financial and Technical Capability

Y Yes, complete  
N No, not complete  
W Waiver



P Partially complete  
N/A Not applicable

Project: Tarbox Triangle Subdivision Amendments Date: September 15, 2020  
Hill Way  
Applicant: Two Penguin Properties LLC  
Location: 8, 10, 14 Hill Way

**Minor Subdivision Review**  
**Application Completeness Checklist**  
(Subdivision Ordinance, Appendix A)

- Y 1. Right, Title or Interest
- Y 2. Name of Subdivision/Applicant
- Y 3. Survey
- N/A 4. Water Pollution Evaluation: Topography, Surface drainage, Soils, Air
- N/A 5. Potable Water
- Y 6. Erosion
- N/A 7. Traffic
- N/A 8. Sewage Disposal
- P 9. Solid Waste Disposal
- N/A 10. Aesthetic, cultural and natural information
- Y 11. Local Regulations
- Y 12. Financial and Technical Capability
- N/A 13. Surface Waters
- N/A 14. Ground Water
- N/A 15. Floodplain
- N/A 16. Wetlands
- P 17. Stormwater/Phosphorus
- N/A 18. Liquidation Harvesting
- N/A 19. Landscaping
- N/A 20. Open Space
- N/A 21. Utilities
- N/A 22. Phasing
- N/A 23. Related information

Y = Yes, information has been provided  
N = No, information has not been provided  
P = Partial information has been provided  
W = A waiver has been requested from submitting the information

N/A = Not applicable to this application