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July 30, 2020

Maureen O'Meara, Town Planner  
Town of Cape Elizabeth  
320 Ocean House Road  
Cape Elizabeth, Maine 04107-0060

Re: Two Penguin Properties, LLC  
14 Hill Way  
Site Plan Review

Dear Maureen:

You have asked for our legal opinion with respect to whether the Planning Board can consider the above-referenced Site Plan Application during the Short Term Rental Permit Moratorium. The facts as we understand them are as follows. Two Penguin Properties, LLC ("**Two Penguin**") has submitted a Site Plan Review Application and a Minor Subdivision Amendment. The subdivision amendment is not relevant to this discussion. Two Penguin seeks approval of a mixed-use building complex on Lot 3 of the Tarbox Triangle Subdivision which would have a nonresidential use on the first floor and residential use on the second and third floor. The property is located in the Town Center District ("**TC District**"). The application proposes a short term rental ("**STR**") unit on the first floor, which under the current ordinance is considered a nonresidential use. The minimum lot size for a single family residence in the TC District is 80,000 square feet. Lot 3 has approximately 14,810 square feet. There is no minimum lot size for a mixed use building, so the application will meet the minimum lot size so long as there is a nonresidential use in the first floor.

The Town Council passed a Short Term Rental Permit Moratorium ("**STR Moratorium**") in order to give the Council time in which to revise the STR ordinance without new STRs coming on the market. The concern raised by the STR Moratorium is its impact on Two Penguin's application, or if approved, the site plan approval, if the STR ordinance is revised such that an STR is no longer a permitted, nonresidential use in the TC District. This could result in the approved structure not being able to be used as designed or approved.

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The STR Moratorium bans the issuance of new STR permits as of June 1, 2020. The moratorium is silent on whether the Planning Board is prohibited from reviewing or approving a site plan application which has an STR as a component of the project. Therefore, we are of the opinion that the moratorium does not apply to the Planning Board's review of Two Penguin's application. However, the applicant proceeds at its own risk with the site plan approval because if the Planning Board approves the site plan application, the applicant may not be able to comply with the Planning Board's approval and may end up with a building for which an STR permit is unavailable and then might not have the ability to obtain a certificate of occupancy because the uses would not meet the TC District requirements.

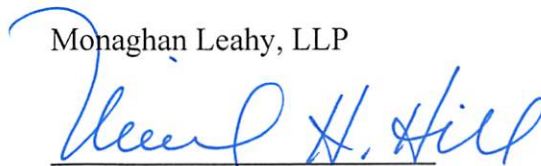
If the site plan application is approved, the Planning Board could condition its approval on the requirement that the first floor always contain a nonresidential use. That way, prior to Two Penguin obtaining an STR permit, if the amendments to the STR ordinance preclude an STR in the TC District as qualifying as a nonresidential use, then Two Penguin would have to have another nonresidential use occupy the first floor of the structure in order for the structure to meet the mixed-use requirement of the TC District and be able to take advantage of the minimum lot size being "None."

In our opinion, Two Penguin would not acquire vested rights to have an STR in the first floor. The process to get an STR permit is completely separate from the site plan application, so obtaining site plan approval does not entitle Two Penguin to an STR permit. Furthermore, in our opinion, Two Penguin would not be able to obtain a certificate of occupancy if it did not have a nonresidential use in the first floor of the structure.

Please let me know if you have remaining questions.

Best regards,

Monaghan Leahy, LLP



By: Michael H. Hill, Esq.

MHH/kbf

cc: Matthew E. Sturgis, Town Manager  
Benjamin McDougal, Code Enforcement Officer