

City of Augusta, Maine
DEPARTMENT OF DEVELOPMENT SERVICES

AUGUSTA STATE AIRPORT
CODE ENFORCEMENT
ECONOMIC DEVELOPMENT



ENGINEERING
FACILITIES & SYSTEMS
PLANNING

Memo

To: Board of Zoning Appeals

From: Matt Nazar, Director of Development Services and City Planner
Gary Fuller, Code Enforcement Officer

Date: April 16, 2013

Re: Appeals for Planning Board Decision related to C.N. Brown

The BZA received two separate appeals to the Planning Board's decision related to C.N. Brown. Each appeal will need to be decided separately. The BZA responsibility in the case of an appeal of a Planning Board decision is to determine if the Planning Board made an error.

The appellants both have standing to appeal. They met the requirement of submitting their appeals within the required 30 days from the date of the Planning Board Chair's signature on the decision letter and they participated in the original hearing.

An appeal of a Planning Board decision is considered an Administrative Appeal

6.6.2.1 - Administrative Appeals.

To hear and decide appeals where it is alleged there is an error in any order, requirement, decision, or determination made by, or failure to act by the Code Enforcement Officer or Planning Board in the enforcement of this ordinance or to affect any variation in the application of this ordinance from its stated terms... The board may modify or reverse any ruling or decision of the Planning Board or Code Enforcement Officer if the board finds that such ruling or decision is contrary to the specific provisions of this ordinance. The board is authorized to hear and decide appeals where it is alleged that due process, as outlined in this ordinance and, in the case of appeals of Planning Board decisions, as outlined in City of Augusta Code of Ordinances Chapter 6, Article III, Division 2, has been violated. In regard to allegations that specific findings of fact are in error, the Board of Appeals is empowered to modify or reverse a Planning Board finding only if such finding is found to be clearly erroneous.

In short, the BZA must review the Planning Board decision and determine if the Planning Board made an error in its application of the ordinance to this project. If the BZA believes they did not make an error, the Planning Board decision stands. If the BZA believes they did make an error, and that their decision is contrary to the specific provisions of the ordinance, then the BZA is empowered to modify or reverse the Planning Board decision such that it complies with the specific provisions of the ordinance. The Augusta LUO makes it clear that the BZA review and decision are based on the Planning Board proceedings and transcript, and that the BZA hearing is not a de novo – from the beginning – hearing.

Please note the following sections of the LUO related to the BZA proceedings:

6.6.2.4 - Burden of Proof.

In any proceeding before the Board of Appeals, the burden of proof shall be upon the applicant to establish the application/use is in compliance with the requirements of this ordinance.

6.6.2.6 - Filing of Appeals.

In all cases, a person aggrieved by any decision of the Code Enforcement Officer or Planning Board shall commence his or her appeal within thirty (30) calendar days after the date the official written decision is signed by the Code Enforcement Officer or Planning Board Chair. If the 30th day falls on a non-business day for the City, the final date for filing an appeal shall be the end of the next business day for the City.

Such appeal shall be commenced by filing with the Board of Appeals a written notice of appeal which includes:

- (1) A concise written statement indicating what relief is required [requested] and why it should be granted.
- (2) A sketch drawn to scale showing lot lines, location of existing buildings and structures and other physical features of the lot pertinent to the relief sought.

Upon being notified of an appeal from a decision of a Code Enforcement Officer, the Code Enforcement Officer shall transmit to the Board of Appeals all of the papers constituting the record of the decision appealed from. Upon being notified of an appeal from a decision of the Planning Board, city planning staff shall have prepared and transmitted to the Board of Appeals a written certified transcript of the Planning Board proceedings from which an appeal is being taken.

6.6.2.7 - Public Hearing.

Before making any decisions or taking action on any appeal, the Board of Appeals shall, within thirty-five (35) days of its receipt of an appeal request, hold a public hearing. The Board shall notify the appellant, the Code Enforcement Officer, the Planning Board, the Municipal Officers, the Kennebec Journal and owners of abutting property at least ten (10) days in advance of the hearing specifying the nature of the appeal and the time and place of the hearing.

Whenever an appeal is filed of a decision made by the Planning Board where abutters were notified, all abutters initially notified shall be notified of the upcoming appeal.

In the case of appeals from decisions made by the Planning Board, the public hearing shall be limited to the certified transcript and record of the Planning Board proceedings; no new information shall be considered.

The appellant's case shall be heard first. To maintain orderly procedure, each side shall proceed without interruption. Questions may be asked only through the chair. All persons at the hearing shall abide by the order of the chair.

FACTS RELATED TO THIS CASE

Zoning District – The C.N. Brown proposal is located in the Planned Development (PD) zoning district.

Permitted Use – C.N. Brown’s proposed use was Retail, Convenience. This use is a use “permitted by right” in the PD zoning district. A “permitted use” is one that, by definition, has been determined by the City Council to be compatible with the other uses in the zoning district.

Conditional Uses – A conditional use is one that has been determined by the City Council to be compatible with the other uses in the zoning district provided that the Conditional Use criteria in the Land Use Ordinance can be met. C.N. Brown’s proposed use is not a Conditional Use in the PD zoning district.

In the case of a “permitted use”, Planning Board review occurs only when the triggers for Major Development or Minor Development review are met. In most communities Major Development review is called “Site Plan Review”, which may be a more familiar term to BZA members. Major Development Review is intended to ensure that the proposed site design meets specific criteria in the Land Use Ordinance, including items like: 1) on-site and off-site traffic management; 2) stormwater management; 3) environmental hazard management; 4) bufferyard design to ensure the new use is attractive and the visual impacts are mitigated; 5) and neighborhood compatibility. In the case of this last item, neighborhood compatibility, the Augusta LUO is a little bit confusing because this standard is contained in the Conditional Use Criteria, or Section 6.3.4 of the LUO. That criteria applies to a “permitted use” in a different way than it applies to a “conditional use”.

For a Conditional Use, clearly the criteria of Section 6.3.4 of the LUO are used to determine whether or not the use will be allowed in the district at all. The criteria are used by the Planning Board to

determine whether or not the use should be allowed in the district and under what conditions. For a Permitted Use, which is what C.N. Brown is, the Planning Board use the criteria in Section 6.3.4 to help the new use fit into its specific location better. Because it's a Permitted Use, the Planning Board has very limited authority to deny the proposal. If the applicant fails to meet the very specific standards of the ordinance – enough parking, enough stacking space for the drive through, adequate off-site traffic control measures (as determined by DOT and the City Engineer in this case), appropriate drainage designed by an engineer, etc – then the Planning Board may deny the proposal. With respect to the more subjective standards, such as the neighborhood compatibility standards of Section 6.3.4, the Planning Board uses them to influence on site design to the degree they believe necessary to meet the standard. In this case in particular, the Planning Board used the standard to influence buffer planting requirements, fencing to screen neighboring properties, and limiting the hours of operation.

Chapter 4 of the LUO outline the Planning Board procedure and standards for a Major Development review. That review starts with a “Pre-application” review required by Section 4.4 of the LUO. In the pre-application review, conducted by staff, the applicant is required to provide specific information as outlined in Section 4.4.1, including the “site plan review criteria applicable to conditional uses, section 6.3”. The application review process flows from the pre-application criteria, to preliminary application review, to final plan review. All material required at the beginning of the process becomes part of the final review. Ultimately, Section 4.5.3 requires that the Planning Board decision “satisfy the criteria listed in Section 4.3.1 and 6.3”. Section 6.3 of the LUO includes the “conditional use criteria” found in Section 6.3.4.

So the BZA's task is to determine whether or not the Planning Board made an error in applying the standards of the ordinance to a Permitted Use during a Major Development review. The appellants do not name the specific standards they believe have been incorrectly applied, but the items outlined appear to address the standards of Section 6.3.4 of the LUO. The appellants have alleged an error in the application of those standards. The BZA members need to familiarize themselves with the standards in Chapter 4, Section 6.3.4, and the material that the Planning Board used to assess the C.N. Brown proposal. Finally, the BZA needs to familiarize itself with the transcript of the Planning Board proceedings as they relate to the C.N. Brown application.