

1 TOWN OF CAPE ELIZABETH  
2 ZONING BOARD OF APPEALS

3  
4 SEPTEMBER 25, 2001

5  
6 MEETING MINUTES

7  
8 Present: David Backer, Chair Absent: None  
9 Jay Chatmas  
10 Joseph Frustaci  
11 Jack Kennealy  
12 Steve LaPlante  
13 Catherine Miller  
14 Michael Tranfaglia  
15

16 Also present was Bruce Smith, Code Enforcement Officer  
17

18 Mr. Backer opened the meeting and informed the Board that Joseph Frustaci had submitted  
19 a letter of resignation citing that with his pending applications before the Planning and  
20 Zoning Boards, it would be in the best interest of all that he resign. The resignation was  
21 accepted with regret and Mr. Frustaci was thanked for the service that he has rendered to  
22 the Zoning Board of Appeals over the years.  
23

24 The next item of business, August 28, 2001 meeting minutes was introduced and Mr.  
25 Backer asked for comments from Board members. Comments received follow:  
26

27 Page 2 Line 23 Beginning on Line 22: "Since the addition would be no closer than the  
28 existing is at present..." there appears to be a word missing. The word  
29 "house" should be added after existing."

30 Page 3 Line 33 "There was much some discussion introduced by Mr. Kennealy..." It  
31 was suggested that "some" be deleted.  
32  
33

34 Mr. Kennealy made a motion to accept the minutes as amended and Mr. LaPlante  
35 seconded the motion.  
36

37 **The motion carried 5 in favor 0 opposed 1 abstained.** Mr. Backer wanted the Minutes to  
38 reflect that Ms. Miller did not sit as a member at a portion of the August 28 Meeting.  
39

40 The next item on the agenda was Old Business. The only item raised by Mr. Backer was  
41 that the minutes do reflect that there was discussion at the last meeting about holding a  
42 **workshop** to discuss the feasibility, practicality, legality of the Board imposing conditions on  
43 variance approvals.  
44

1 Mr. Smith asked if Monday, **October 15 at 6 p.m.** would be all right with the Board. Mr. Hill  
2 indicated that he would be available also. This time was accepted for a workshop and Mr.  
3 Smith will send out a notice of the location.

4  
5 The next item on the agenda was New Business.

6  
7 **To hear the appeal of Glen & Marguerite Prentice aggrieved from the decision of Code**  
8 **Enforcement Officer Bruce Smith to issue building permit #020020 to Paul Vose for**  
9 **construction of a foundation for a single-family dwelling at 20 Ocean Avenue, Tax**  
10 **Map U17, Lot 7A.**

11  
12 Mr. Backer asked if the Prentices were present. Mr. Haddow rose and stated he was the  
13 attorney for the Prentices and that Dr. Prentice was in attendance.

14  
15 Mr. Backer at this time indicated that he would like to recuse himself and make a couple of  
16 disclosures personally on this matter before it is heard. Under Section III A 6 of the Board's  
17 rules it says that if the question of possible conflict of interest is raised, the member with the  
18 potential conflict shall make full disclosure. Mr. Backer stated that he did not personally  
19 know Mr. Vose. Mr. Backer is a member of the law firm of Hopkinson Abbondanza &  
20 Backer and Mr. Vose has in the past sought legal advice from the firm related to this matter,  
21 but before Mr. Backer became a partner with the firm.

22  
23 Mr. Backer turned the meeting over to the Secretary, John Kennealy, for this portion of the  
24 meeting.

25  
26 Mr. Kennealy also wanted to make known that Mr. Vose was a partner with the contractor  
27 that built his house three years ago. This had been an arms length relationship and Mr.  
28 Kennealy did not personally think this would influence him at all, but left this decision up to  
29 the Board.

30  
31 The Board agreed unanimously that this would not be a problem.

32  
33 Jim Haddow came forward to represent the Prentices and referred to the letter from his law  
34 firm regarding this matter that was included in the Board's packet. He wanted to address  
35 two issues raised by Mr. Hill.

- 36  
37 1. First, in Mr. Hill's material was a letter from the Planning Board that makes  
38 a couple of findings in relation to the lot in question. The application was  
39 for a Public Access Waiver, not for a building permit and the finding of the  
40 Board was whether or not this was a legal lot, but that it was part of an  
41 approved subdivision, as recorded, at one time; but that it was granted a  
42 waiver by the State for minimum lot size purposes. Those two facts are  
43 true but not proof positive of whether this lot is legal or not.
- 44 2. Second, he wanted to point out that at the time the lot was owned by Mr.  
45 Tinsman, the abutters were a different group of people, and no action was  
46 ever taken on the Public Access Waiver.

1  
2 Because the ownership of the original lots has changed, this can't be rectified by remerging  
3 these lots and issuing new deeds today to comply with the new ordinance amendment.  
4 Without reconfiguration of these lots, Mr. Haddow believes the lot remains illegal.

5  
6 Michael Hill, Town Attorney, Monaghan & Leahy, representing the Town came forward to  
7 respond to Mr. Haddow's comments.

8  
9 Mr. Hill stated that his reference to the Planning Board decision was to point out that it was  
10 a lot in an approved subdivision and it had received the State's approval for a minimum lot  
11 size waiver and it was not to establish that it was a buildable lot. Mr. Hill also pointed out  
12 that there is no time limit on a public access waiver as there is on a building permit. Mr. Hill  
13 agreed with Mr. Haddow that a building permit would have become null and void. Now the  
14 ordinance has changed.

15  
16 Ms. Miller asked for clarification of Section 19-4-3A, (that would allow this conveyance  
17 today) and Mr. Hill made reference to the ordinance, top of page 35: "If a developed  
18 nonconforming lot abuts an undeveloped nonconforming lot held in the same ownership the  
19 lots may be separated and owned independently.

20  
21 Mr. Hill then responded to Mr. Haddow regarding his reference to the Planning Board  
22 Decision by saying that the lot was an approved lot in an approved subdivision and had  
23 received the State's waiver for minimum lot size. The Code Enforcement Officer would not  
24 have sent this to the Planning Board if in his opinion the lot was not a buildable lot. Mr. Hill  
25 pointed out that the public access waiver had no time restraints but the building permit  
26 becomes null and void if action is not taken within the time-frame specified in the Ordinance.

27  
28 Mr. Hill distributed copies of the old Section 19-3-2, of the old ordinance for the Board's  
29 review.

30  
31 Mr. Kennealy asked Mr. Hill if it was his advice that this is a legally existing nonconforming  
32 lot and Mr. Hill responded yes.

33  
34 Mr. Kennealy asked Mr. Smith if a building permit had been granted earlier, if it would have  
35 influenced his decision and Mr. Smith's response was no it would not. He had denied a  
36 permit to Mr. Vose under the 1999 ordinance prior to this most recent application.

37  
38 Ms. Miller asked about Section 19-4-3A 2c. Mr. Hill referred to the top of page 35 "...If a  
39 developed nonconforming lot abuts an undeveloped nonconforming lot held in the same  
40 ownership the lots may be separated and owned independently..." Therefore the Tinsman  
41 lot with a building on it was a nonconforming lot that didn't meet the current square footage  
42 requirement. The Vose lot was a vacant undeveloped nonconforming lot held in common  
43 ownership. If the Tinsmans owned these lots today, they could sell off the nonconforming  
44 lot. The very same transaction that took place in 1996 could take place today and in Mr.  
45 Hill's opinion allowed in 1996 as well.

46

1 Mr. Kennealy asked if anyone else would like to speak and Paul Vose came forward and  
2 introduced himself as the owner of the lot being discussed. Mr. Vose stated that he was  
3 confident that the process of separating the lot was done correctly in 1996 because he was  
4 part of that process from 1993 until 1996.

5  
6 Ms. Miller asked what type of structure was going to be built. Mr. Vose responded that this  
7 hadn't been determined as yet and that the permit was for a foundation only.

8  
9 Mr. Kennealy asked when Mr. Vose had first applied for a permit and he was told it was  
10 either July or August of this year. Mr. Vose offered that there is a permit application in the  
11 building file but it was never acted upon in 1995 or 1996.

12  
13 As there were no others wanting to comment, Mr. Kennealy closed the Public Hearing.

14  
15 During discussion, the Board determined that today's ordinance reinforces the transactions  
16 that occurred. Also, the building application shows that the foundation does meet the  
17 setbacks. No building plans were available in the packets because this action was  
18 anticipated.

19  
20 Mr. Tranfaglia made the following motion: **In the matter of the Administrative Appeal by  
21 Glen and Marguerite Prentice referencing building permit number 20020 for  
22 construction of a single family dwelling at 20 Ocean Avenue, Map U17, Lot 7A, that  
23 the aforementioned appeal be denied.**

24  
25 Mr. LaPlante seconded the motion.

26  
27 Mr. Kennealy said the motion to deny the Administrative Appeal of Glen and Marguerite  
28 Prentice had been made and seconded and asked for a show of hands.

29  
30 Mr. Hill stepped forward to suggest that the Board add reasons as to why the appeal is  
31 being denied: mootness, setbacks, minimum lot size requirement, etc. as a finding.

32  
33 Mr. Tranfaglia offered: **In the matter of the Administrative Appeal of Glen and  
34 Marguerite Prentice with reference to the issuing of building permit number 20020 for  
35 construction of a foundation for a single family dwelling at 20 Ocean Avenue, Map  
36 U17, Lot 7A be denied after the following Findings of Fact: This Board found that the  
37 building permit contained factual information in setbacks within present statute as  
38 well as the lot was a legal nonconforming lot at the time of transfer as well as today.**

39  
40 Mr. Laplante seconded this amended motion.

41  
42 Mr. Kennealy said the motion to deny the Administrative Appeal of Glen and Marguerite  
43 Prentice had been made and seconded and asked for a show of hands.

44  
45 **The amended motion to deny was approved 5 in favor 0 opposed.**

46

1 Mr. Backer resumed his seat on the dais and introduced the following appeal:

2

3 **To hear the appeal of Joseph Frustaci of 8 Rosewood Drive Tax Map U34 Lot 22-4 for**  
4 **rear and sideline variances of 5' from the required 20' for lots within the proposed 19**  
5 **lot Blueberry Ridge subdivision.**

6

7 Mr. Frustaci came forward and introduced himself and Richard Manthorne, his surveyor and  
8 Mr. Haddow, his attorney.

9

10 Mr. Backer interrupted Mr. Frustaci to make note of a few items that were received as of this  
11 evening to make sure that Mr. Frustaci and his attorney were aware of them.

12

13

14

15 Received was: A letter dated September 24, addressed to Mr. Backer from a Ms. Lee  
16 Bumsted;

17

18 A letter dated September 24, addressed to Mr. Backer from a Mr. Thomas  
19 Peterson that has a one-page attachment to the two-page letter;

20

21 A letter received just prior to the meeting dated September 25 from Mr. Robert  
22 Crawford as attorney for David and Elizabeth Sawyer, Marian and Tom  
23 Peterson, and Yolande Fogg. This was an eight-page letter with a one-page  
24 attachment.

25

26 Mr. Frustaci stated that he and his attorney, Mr. Haddow had received copies of those  
27 letters referenced.

28

29 Mr. Smith asked for a copy of the Sawyer's letter because he had not received a copy.

30

31 Mr. Backer stated that he had an extra copy and gave same (letter from Bernstein, Nelson &  
32 Shur) to Mr. Smith.

33

34 Mr. Kennealy pointed out that he had not had time to read these letters and it was  
35 determined that the rest of the Board had not read them either.

36

37 Mr. Frustaci began by explaining that the Planning Board wanted all the variances in place  
38 before they reviewed a new subdivision.

39

40 The first item before the board was the side and rear setbacks. Mr. Frustaci explained that  
41 he was present because of a long history of situations he had experienced. He indicated  
42 that he purchased the property in 1991 and got approvals for phase 1 in 1992. In 1994 he  
43 started phase 2, which was basically going to access land on the South Portland side for 16  
44 acres he was planning to develop using existing roads that accessed the land. This plan  
45 was devised in 1996 and presented to the Planning Board workshop at that time.

46 Neighbors in South Portland were concerned about accessing the land from South Portland;

1 there was a boundary dispute as to whether the land was in South Portland or Cape  
2 Elizabeth; the Subdivision Ordinance has been changed. Rosewood II basically terminated  
3 when South Portland vacated the two roads accessing the property. Therefore, Mr. Frustaci  
4 is bringing Blueberry Ridge before the Board that is accessed from Mitchell Road, Cape  
5 Elizabeth and extends its way to the South Portland side of the property.

6  
7 Mr. Frustaci said that he would have Mr. Haddow, his attorney, argue the technical merits of  
8 his appeal for the 5' reduction for the Blueberry Ridge Subdivision.

9  
10 Mr. Haddow came forward and explained that the reason Mr. Frustaci was before this Board  
11 was that they recognized that they would have to come to the Zoning Board first because  
12 the Planning Board did not have the authority to alter the setbacks requested. He stated  
13 that obviously the intent of the ordinance was to allow this reduction to developers under the  
14 Open Spaces section of the ordinance.

15  
16 Mr. Haddow next talked about the practical difficulty requirements. He started first with  
17 significant economic injury to the property owner which is defined as placing the applicant  
18 for a variance at a disadvantage in the neighborhood by applying Zoning Ordinance  
19 standards which would prevent the applicant from having a structure or accessory structure  
20 comparable in size, location and number to the lot owners in the immediate neighborhood,  
21 but in no case, no fewer than ten of the nearest property owners. He indicated that Mr.  
22 Frustaci had supplied the Board with information that the surrounding property owners had  
23 setbacks that are considerably less than the 15' setback being requested.

24  
25 Ms. Miller asked what lots were involved and Mr. Haddow responded that they were lots 1-  
26 19 with the exception of lot 12. Lot 12 would be considered later.

27  
28 The next criterion is the need for the variance due to the unique circumstances of the  
29 property and not the general conditions of the neighborhood. Mr. Haddow stated that Mr.  
30 Manthorne would show by virtue of the land and actions by the City of South Portland, that  
31 there is no practical alternative.

32  
33 The fourth criterion is the character of the neighborhood. The neighborhood in this situation  
34 is South Portland, a densely built neighborhood and therefore the character of the  
35 neighborhood should not be affected negatively. This project will not affect established  
36 views, fire safety hazards, casting shadows on adjoining lots, reduction of appraised values.

37  
38 This problem is not a result of anything Mr. Frustaci has done and at this point there is no  
39 alternative. Because some of the building envelopes are 50' x 50' it gives very little room for  
40 placement of buildings.

41  
42 Mr. Haddow felt that this project met all the criteria under practical difficulty standards.

43  
44 Mr. Kennealy asked how many homes were originally planned and the answer was that the  
45 1996 plan had 14 lots.

1  
2 Mr. Robert Crawford as attorney for David and Elizabeth Sawyer, Marian and Tom and Mary  
3 Peterson, and Yolande Fogg came forward. Mr. Crawford made reference to the practical  
4 difficulty standards and two things should be questioned: first, granting the variance would  
5 not result in a substantial departure from the ordinance. The ordinance has a unique  
6 provision for an open space type project to proceed. The criteria is different for different  
7 types of projects with the idea being that there would be tradeoffs of open space, buffers,  
8 etc. but you also have to be concerned whether you have encroachment on neighbors.  
9 There must be adequate buffers. Second is the practical difficulty test which is statutorily  
10 defined in Title 30A under Section 4350. Therefore, this request is a substantial departure  
11 from the standards prefaced in the ordinance. Mr. Crawford stated that Mr. Sawyer was  
12 going to present a demonstration of shadow impact on adjacent lots for the Board. Mr.  
13 Crawford questions the Board's interpretation to the ordinance. Mr. Crawford pointed out  
14 that there are 16 acres available and if Mr. Frustraci alters some of his lines there would be  
15 no need for a variance. He also thought the distances should be measured from primary  
16 structures rather than accessory structures such as sheds. Mrs. Bumsted has furnished a  
17 list of abutters and distances. Mr. Crawford reminded the Board that Mr. Frustaci had  
18 admitted earlier to being able to live with the 20' setback and didn't feel this appeal met the  
19 practical difficulties standards.

20  
21 The Board asked questions and received answers from Mr. Crawford regarding the abutters  
22 and setbacks. Mr. Backer asked about language in the Town's ordinance that  
23 nonconformities outside of Blueberry Ridge could not be taken into consideration. Mr.  
24 Crawford referred to page 17 of the Land Use Ordinance in the Definition Section: "...nor  
25 shall a variance be granted because of nonconformance in the zoning district or in adjoining  
26 districts." Mr. Crawford indicated that it was too bad that Mr. Hill wasn't present to help  
27 define this issue.

28  
29 Lee Bumsted, 8 Goudy Street, South Portland, came forward to speak about the setbacks  
30 she compiled. She referenced her letter sent to the Board. After reviewing the submitted  
31 material of Mr. Frustaci indicating that she had 15' listed as a setback, she measured the  
32 distance herself to be 26'. She also showed the Board an aerial photograph of the area.  
33 This was to show the differences between Mr. Frustaci's information and hers.

34  
35 There was much discussion in regard to current setback figures and the number of  
36 discrepancies between the lists. It was determined that Mr. Haddow and Mr. Crawford  
37 would work together to come to a consensus regarding their information. Mr. Frustaci said  
38 that Mr. Manthorne could measure the distances of structures on the So. Portland line if he  
39 received permission from South Portland abutters to access their property.

40  
41 Dr. Chatmas questioned whether this application is based on Section 19-7-2, C6 specifically  
42 in reference to building envelopes. If so, it should be looked at more closely in view of the  
43 20' setbacks. Also, he asked for consistency in the use of terms in order to compare apples  
44 to apples. Another question was whether this was requesting a blanket reduction or a lot-  
45 by-lot reduction. He also proposed a uniform site visit by the Board. Dr. Chatmas also  
46 requested that the Board receive counsel from the Town Attorney regarding this.

1  
2 Mr. Backer asked Mr. Smith to have the Town Attorney at the regularly scheduled meeting  
3 in October. He also suggested that people should be discouraged from placing items on  
4 that agenda because of time constraints.

5  
6 It was the general consensus of the Board that everyone would do an individual site visit.  
7 Mr. Frustaci explained to the Board what areas were marked.

8  
9 Michael Hill is not representing the Town on this issue since he felt there may be a conflict of  
10 interest. Reference was made to a copy of a letter dated September 19 and addressed to  
11 Maureen O'Meara, the Cape Elizabeth Town Planner, from Durward Parkinson of Bergen  
12 and Parkinson who has been retained to represent the Towns Boards for this item. Since  
13 Mr. Crawford was not aware of this letter, Mr. Backer said he would see that he received a  
14 copy. Mr. Smith stated that Mr. Parkinson would be attending the October meeting.

15  
16 Mr. Backer asked for a motion to continue hearing the appeal of Joseph A. Frustaci, 8  
17 Rosewood Drive, Tax Map U34, Lot 22-4 for rear and side setback variances from the  
18 required 25' for lots within the proposed Blueberry Ridge Subdivision to continue the receipt  
19 of evidence, argument and the completion of the hearing at our next regularly scheduled  
20 meeting.

21  
22 Mr. LaPlante moved the motion and Mr. Tranfaglia seconded the motion.

23  
24 **The motion was passed unanimously 6 approved 0 opposed.**

25  
26 Mr. Backer introduced the next item as correspondence and Mr. Smith verified that there  
27 was none.

28  
29 The last item on the agenda was adjournment and Mr. Backer asked for a motion.

30  
31 Mr. Kennealy made the motion to adjourn and Ms. Miller seconded this.

32  
33 **The motion was passed unanimously 6 approved 0 opposed.**

34  
35 The meeting was adjourned.

36  
37 Respectfully submitted,

38  
39 Sandra B. Hanscom



