

1 it abuts the Fog property, and lot 11 where it abuts the Sawyer property. The variance
2 appeal pertaining to lot 12 remained as written.

3
4 Mr. Frustaci in rebuttal to previous statements presented by Mr. Crawford, ascertained
5 that open space zoning is not restricted to moderate or low-income housing. A variance in
6 the side setback would allow him better opportunity to build a type and size of dwelling
7 that would be comparable to surrounding neighborhoods. The necessity of the twenty-
8 foot drainage easement, which he collaborated with Town Engineers, increases the
9 importance of side setback variances with relation to the size of those building envelopes.
10 Mr. Frustaci maintained that in order to incorporate the best return for the cost
11 consideration of the individual lots, an enhanced building envelope is necessary to
12 support a structure representative of surrounding properties.

13
14 Mr. Crawford argued that reducing setbacks caused a condensing of the open spaces
15 within the subdivision that would encroach on the peripheral neighborhoods. He
16 encouraged the Board to adhere to the 50' setback ruling originally adopted in the zoning
17 ordinance. He argued that Mr. Frustaci had options with respect to the development of the
18 lots and placement of building envelopes that he had not pursued.

19
20 Mr. Backer raised the question of jurisdiction with regard to establishing building
21 envelopes - whether it was a function of the Planning Board or the Zoning Board. Mr.
22 Crawford stated that the setback regulation alone prescribed a building envelope, but Mr.
23 Backer argued that the Planning Board uses broader criteria to determine those decisions.
24 He introduced attorney Derward Parkinson, representing the Town, to help clarify some
25 rulings with regard to towns caught between ordinance requirements. Mr. Parkinson
26 noted the case of Perkins vs. Ogunquit which dealt with the issue of jurisdiction between
27 Planning Board and Zoning Board with regard to granting variances. The case placed the
28 burden of granting variances with the Zoning Board. Mr. Parkinson also stated that one
29 town need not consider the ordinances adopted by another town and advised against it,
30 suggesting instead that individual towns stick with their self-designed ordinances.

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32 Mr. Crawford urged the Board to look again at the purpose statement for the general
33 standards that apply to the open space zoning criteria. He made the point that at issue was
34 the adherence to the articles proposed with regard to open spaces and not discrepancies
35 between town's interpretations of ordinances. Mr. Crawford also felt that with regard to
36 practical difficulties, Mr. Frustaci had not presented sufficient evidence to satisfy an
37 argument for precluded use or economic difficulty. He held that the plan was not yet
38 accepted and therefore could be adapted to accommodate established provisions. He saw
39 nothing unique in the situation of the development or economic hardships involved that
40 might support a variance.

41
42 Mr. Backer referred to a recorded plan of the abutting South Portland neighborhoods
43 which Mr. Frustaci had enclosed in the application packet to the Board. He had included
44 the plan to depict the side and rear setbacks of those abutting properties in South
45 Portland. Mr. Crawford was not aware that the plan had been submitted to the Board and
46 upon review related that the referenced plan had in fact been amended because the

1 setback literature was incorrect. Mrs. Sawyer, an abutting property owner on Charlotte
2 Street and whose husband is a member of the South Portland Planning Board, ascertained
3 that the plan had been drafted at the request of the abutting properties and that an
4 amended plan had been recorded. The plan was drafted to record the building envelopes
5 of the respective properties in hopes that the setbacks would be a consideration when
6 reviewed by the Cape Elizabeth Planning Board.
7

8 Mr. Backer, for the record, verbally described the remaining documents pertaining to the
9 setback variance provided in his Zoning Board packet. Since some of the material had not
10 been reviewed by Mr. Crawford, a ten-minute recess was called. During that period, the
11 amended South Portland lot plan was retrieved. Mr. Crawford presented the plan to the
12 Board and read the corrected setback provisions.
13

14 Mr. Haddow once again emphasized the fact that Mr. Frustaci had withdrawn his request
15 for variance on rear line setbacks. He also reiterated the advice given by attorney
16 Parkinson of the necessity of separating Cape Elizabeth's consideration of building
17 envelopes from those adopted by South Portland. He emphasized the issue for side
18 setback variance to enhance the feasibility of a plan in keeping with the outlying
19 neighborhoods. Hardship lies in economic loss should the subdivision not be developed
20 to its full potential –building potential supports lot price.
21

22 Mr. Backer closed the public comment portion of the hearing and initiated discussion
23 among Board members by suggesting that they focus on the application as submitted with
24 the withdrawal of the rear setback request. He did not feel that the Board should deal with
25 the issue of the 50' setback for envelopes, that instead their function involved the
26 granting of variances on the side line setbacks and the arguments raised by Mr. Crawford
27 would be better directed to the Planning Board. Several Board members spoke in
28 agreement, Mr. Kennealy making the statement that although he recognized the concerns
29 being raised by the abutting property owners, he felt the subdivision plan very consistent
30 with the surrounding neighborhoods.
31

32 Dr. Chatmas asked for Attorney Parkinson's recommendation with regard to the Zoning
33 Board making any ruling on a plan that was still in a proposed state. Mr. Parkinson
34 advised that if approval was granted by the Board it should be stated in the Findings of
35 Fact that the setback variance was contingent upon the lots remaining as configured in the
36 original subdivision plan.
37

38 It was Mr. Backers opinion that the subdivision plan as submitted was consistent with the
39 open space zoning ordinance and met the various elements of practical difficulty
40 standards. Mr. Tranfaglia and Mr. LaPlante concurred. Mr. Backer then read through the
41 elements required for approval of variance and asked Board members for a show of hands
42 for each article. All items passed with unanimous approval.
43

44 Mr. Backer moved that the application for the variance be approved with the
45 understanding that the issue is pending additional Planning Board approval to, among

1 other things, establish the building envelopes. Applicant was also instructed to provide
2 the Town with an amended plan, which would clearly designate the side line setbacks.

3
4 Ms. Miller made the motion, which was seconded by Mr. LaPlante. The motion was
5 approved 6 in favor and 0 opposed.

6
7 At 9:25PM, Julie Horr , 175 Fowler Road, who had submitted an application for the
8 current meeting, was called to the podium. Given the Board rule that no new business is
9 heard after 10:00PM, Ms. Horr was told that she had the option of remaining and perhaps
10 having her request heard, or leaving, in which case her business would be addressed at
11 the next scheduled Zoning Board meeting. She chose to stay.

12
13 Mr. Backer introduced the next item on the agenda **to hear the appeal of Joseph A.**
14 **Frustaci, 8 Rosewood Drive, Tax Map U34, Lot 22-4, for a setback variance of forty-**
15 **five (45) feet from the required seventy-five (75) feet from the building envelope of**
16 **lot 12 of the proposed Blueberry Ridge subdivision to Charlotte Road.**

17
18 Mr. Haddow opened by clarifying the actual setback request on the application as a
19 variance of twenty five (25) feet rather than forty five (45) feet from the required seventy
20 five (75) from the building envelope. He further stated that without the granting of the
21 setback variance, lot 12 on the proposed subdivision plan would be rendered unbuildable.

22
23 Mr. Frustaci elaborated on Mr. Haddow's statements by demonstrating to the board the
24 difficulty in reconfiguring his subdivision plan to accommodate the building limitations
25 involved with lot 12.

26
27 Mr. Kennealy suggested the option of the parcel becoming green space. Mr. Frustaci
28 argued that the open space would then exceed what is allowed in open space zoning. He
29 also declared that losing one buildable lot would render the development economically
30 unfeasible. Mr. Kennealy rebutted by pointing out that, by his calculations, the open
31 space would not exceed what is allowed.

32
33 Mr. Crawford questioned the Board's consideration of the appeal with regard to lot 12
34 because he was of the opinion that the Board had collectively agreed to defer issues with
35 regard to building envelopes to the Planning Board. He felt that the petition before the
36 Board dealt specifically with that issue. He again felt that Mr. Frustaci's request did not
37 meet any practical difficulty test nor suggest anything unique which might warrant a
38 variance. He also did not feel that Mr. Frustaci had explored any feasible alternatives.

39
40 Mr. Backer concurred with Mr. Crawford's opinion that the issue before the Board was in
41 fact dealing more with placement of building envelopes than with the granting of any
42 variance. He once again requested input from Mr. Parkinson with regard to the Zoning
43 Board's position and it was decided that the application be considered premature and that
44 procedurally the issue should first be taken to the Planning Board for approval. Questions
45 of procedure were then raised with regard to dealing with the application at hand. Mr.
46 Parkinson suggested the Board deny the application but with specifics as to the reasoning

1 therein. Mr. Haddow also was concerned with language involved with any denial from
2 the Board and wanted it stated that the denial was based on the procedural nature of the
3 request rather than it's merits. Withdrawal of the request by the applicant was also
4 suggested and Mr. Haddow asked for a five-minute recess to consider that option.
5

6 Mr. Backer declared a five-minute recess. At the end of the recess, the applicant had
7 decided not to withdraw the request and discussion again ensued with regard to options
8 for dealing with the application. Dismissal was ruled out by Mr. Parkinson. He felt that
9 some action was necessary whether it be denied or approved by the Board or withdrawn
10 by the applicant.
11

12 Mr. Backer then asked for a motion to deny the application of Joseph A. Frustaci, based
13 on the fact that the Cape Elizabeth Zoning Board of Appeals doesn't have the authority to
14 place a building envelope and that the authority and the responsibility for placing the
15 building envelope on lot 12 lies with the Cape Elizabeth Planning Board; and it being
16 clear that the denial by this Board is not on the merits of this application, but rather based
17 on the procedural posture of it being before the Zoning Board of Appeals rather than the
18 Planning Board.
19

20 Mr. Kennealy made a motion, which was seconded by Mr. Laplante. Motion passed 5 in
21 favor and 1 opposed. Application denied.
22

23 Per rules of the Board, no New Business was addressed because of the time.
24

25 Item E., the **Communication** line on the agenda brought no discussion.
26

27 Mr. Backer asked for a motion for adjournment. Mr. Kennealy made the motion, which
28 was seconded by Mr. Tranfaglia. Motion passed 6 in favor and 0 opposed.
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30 Meeting was adjourned at 10:25PM.
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33 Respectfully submitted,
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35 Barbara H. Lamson
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