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**Town of Cape Elizabeth, Maine  
Minutes of Zoning Board of Appeals**

**May 29, 2002**

**7 P.M., Town Hall**

Present: David Backer, Chair  
Penelope Jordan-Barthelman  
Jay Chatmas  
Steven LaPlante  
Catherine Miller  
Michael Tranfaglia

Absent: Jack Kennealy

Also present was Bruce Smith, Code Enforcement Officer

David Backer called the meeting to order and asked for approval of the minutes for the previous meeting of March 26, 2002. The following amendments were requested:

Page 2; Line 41 – correction to read “That Mary Anne & John Doherty’s conditional use ...”

Page 2; Line 42 – correction to read “conditional”

Page 3; Line 38 – correction to read “ variance of 10’ from the required 20’ “

With no further comments, Ms. Jordan made a motion to accept the minutes. Motion was seconded by Mr. Tranfaglia 6 in favor and 0 opposed.

**OLD BUSINESS**

Mr. Backer addressed the request of **Steven & Sarita Soloman, 4 Kettle Cove Road, Tax Map U16, Lot 7A for a front property line variance of 9' - 0" from the required 25', a left side property line variance of 5' - 0" from the required 25', and a right side property line variance of 15' - 0" from the required 25'-0" to replace the existing ranch with a 1½ story cape with attached porch.**

Bruce Smith explained that the Solomans were not yet prepared to act on their request but wished to be carried on the Agenda as Old Business. They anticipated having their presentation completed by the next calendar meeting. The Board agreed to table the item and moved on to new business.

**NEW BUSINESS**

Item one: **To hear the administrative appeal of Michael Richard & Susan Barnicle, 1 Maiden Cove Road, Tax Map U05, Lot 40 of the Code Enforcement Officers denial of building permit # 020531 on May 13, 2002.**

Joseph Mazziotti introduced himself as counsel to the appellants and established the location of his practice as 555 Forrest Ave. He explained that the basis of his client’s appeal was a letter dated 1969 from the Cape Elizabeth Zoning Board granting a hardship variance to construct a single family dwelling at 1 Maiden Cove Road. His clients currently reside at that property and wish to expand the living area of the house by altering the attic space. The

1 language of the ruling granting that hardship variance from 1969 refers to a “ one story  
2 house”. The variance letter dictates a height limitation placed on the building per  
3 consideration of an abutting property owner who was concerned about his view. The existing  
4 dwelling was built in accordance with the 1969 ruling and its present configuration is accepted  
5 by the Town. The exterior changes include two dormers which will not alter the height or the  
6 footprint of the original structure. The request being presented is that the Board review the  
7 language used in the original variance and re-interpret its intent. By not altering the existing  
8 height and footprint of the building, the applicants hope that the Board will make allowance  
9 for an interior expansion.

10

11 Ms. Miller asked about the opinion of the neighbors. Mr. Mazziotti said that comments had  
12 been agreeable. The applicants had sent out letters to abutting property owners explaining  
13 their intent. Bruce Smith stated that the Town had mailed notices to surrounding property  
14 owners informing them of the appeal. Three letters were received, none of which had  
15 negative comments.

16

17 Mr. Backer noted that it was not incumbent upon the applicant to poll the neighborhood for  
18 their opinion. When the Town sent out notices to surrounding properties, it was incumbent  
19 upon those individuals to voice their consent or concerns.

20

21 Mr. Tranfaglia questioned the time frame with regard to the appeal and the denial of the  
22 building permit. Bruce Smith explained that the applicant was informed prior to submitting his  
23 permit that it would be denied and encouraged the applicant to complete the zoning  
24 application for their appeal in order to make the May agenda.

25

26 Mr. Tranfaglia inquired of the ordinances regarding expansion percentages and septic  
27 requirements. Mr. Smith explained that the project would not ascribe to any of those  
28 regulations.

29

30 Mr. Backer asked whether anyone in the audience would like to present their opinion. With no  
31 one coming forward, he closed the Public portion of the hearing and opened discussion to the  
32 Board.

33

34 Dr. Chatmas had questions for the applicant with regard to the layout of the dormers. Mr  
35 Richard responded that an eyebrow dormer is proposed over the front door and two full  
36 dormers will run along the ridge of the house. Dr. Chatmas' concern was whether the  
37 proposed structures would be visible from Lot 41, which was the property cited in the 1969  
38 variance. Mr. Richard replied that although the dormers would be visible, the elevation would  
39 not be altered.

40

41 Dr. Chatmas had questions about the number of bedrooms, basement living area and the  
42 pitches of the roof. He then asked Mr. Mazziotti whether there was a “typical” ridge height for  
43 a one-story house. Mr. Mazziotti replied that, no, he was not aware that there was any  
44 standard. He then read a definition from Websters Dictionary relative to a one-story house  
45 and a two-story house. He argued that by definition, because an upper level of floor space  
46 already existed, the house was in essence already a two-story dwelling.

47

48 Mr. Mazziotti was of the opinion that the original variance was designed to protect a particular  
49 abutter. He interpreted the variance as more concerned with the structural considerations of

1 the building with regard to height, its physical location, and impact on abutting properties.  
2 There was specific language with regard to one particular abutter to suggest the intent to limit  
3 the height of the dwelling. He argued that the original dimensions of the plans were accepted  
4 by the Town. He did not feel the Town meant to then go further and limit the interior  
5 configuration of the structure.

6  
7 Discussion then ensued with regard to interpretation of the intent of the original variance  
8 wording. The letter cites “a two bedroom, one-story home”. Board members had to  
9 determine whether or not that wording was simply verbiage or a dictate for the specifics of the  
10 dwelling. Mr. Mazziotti felt that the wording was more a “description” of the project at hand  
11 and not a dictation of the interior. Mr. Smith concurred that it would appear to be more typical  
12 of language elicited by the Code Enforcement office.

13  
14 An issue was then raised as to how the Board should deal with overruling the 1969 variance.  
15 Mr. Mazziotti clarified that their appeal was only with regard to the interpretation of the  
16 variance and not to rescind the variance.

17  
18 Mr. LaPlante maintained that the addition of the dormers would in fact change the exterior of  
19 the building. Mr. Mazziotti argued that since there was no alteration of setbacks, structural  
20 footprint, or impervious surface area the dormers were in compliance with ordinance rulings.

21  
22 Mr. Smith stated that if this dwelling was legally built prior to when setbacks were required ,  
23 and not on a non-conforming lot, the dormers would be granted without a variance since no  
24 increase of usable floor space was proposed.

25  
26 Ms. Jordan was of the opinion that the terminology used in the variance letter was more for  
27 descriptive purposes than for an intent to restrict the interior of the building. She did not feel  
28 that the Board should rule on the configured use of existing space.

29  
30 Mr. Backer agreed with that interpretation but cautioned about a way to proceed so as to not  
31 create complications for the homeowner in the future. Mr. Mazziotti once again pointed out  
32 that respective areas of the home could already be considered two story, since the dwelling  
33 had living space in a daylight basement. An argument was made for other building  
34 configurations that can be considered single-story and story and a half. He petitioned the  
35 Board to revisit the implications of the language used and grant relief to the homeowners in  
36 pursuing their expansion.

37  
38 Mr. Smith made a statement with regard to the original ruling. He noted that consideration of  
39 an abutter’s view is not a criteria in current ordinances and would have no influence in the  
40 determination of a variance ruling. Because the property is located in a shoreland zone, the  
41 applicant would be forced to make an appeal for a hardship variance as opposed to an  
42 appeal for practical difficulty. Undue hardship requires very strict findings, which are not  
43 readily apparent in the 1969 ruling.

44  
45 Mr. Backer made a proposal to “interpret by declaration” the intent of the Board in the 1969  
46 ordinance with the understanding that the 1969 decision remain intact. The new interpretation  
47 would allow that the applicant was granted a variance to construct a dwelling with height  
48 considerations meant to protect the view of the abutting property; the dwelling proposed  
49 being described as a two-bedroom one-story house. The interpretation would further assume

1 that given the plans presented at the time, the Board would also have accepted a three or  
2 four bedroom two-story house with the same dimensions.

3  
4 Dr. Chatmas questioned whether or not the Board had a right to change or modify a previous  
5 Board's decision. Mr. Smith replied that per the Town Attorney Mike Hill, the only jurisdiction  
6 the Board had was to interpret or reinterpret the intent of any ruling.

7  
8 With no further discussion from the Board, Mr. Backer asked that a motion be presented to  
9 the Board.

10  
11 Ms. Miller made the following motion for the Board to consider:

12  
13 **That the Board move to accept the administrative appeal of Michael Richard and Susan**  
14 **Barnicle, 1 Maiden Cove. Whereby interpreting that the Zoning Board of Appeals**  
15 **decision dated July 23, 1969 expressly stated that a two-story house would cut off the**  
16 **views of the abutting property then owned by Dr. Franklin Fergusson, it is the opinion**  
17 **of this Board that the intent of the Board when issuing this decision in 1969 was not to**  
18 **restrict the construction of a home limited to two bedrooms and one story, but rather**  
19 **to restrict the exterior dimensional configuration to the house as currently**  
20 **constructed. This Board is willing to permit the Code Enforcement Officer the granting**  
21 **of a building permit for construction to finish the attic portion of the house and to add**  
22 **dormers as depicted on the plans submitted as part of the appeal, the existing height**  
23 **of the dwelling not to be exceeded.**

24  
25 Motion was seconded by Ms. Jordan 6 in favor and 0 opposed.

26  
27 Next item on the agenda was introduced **to hear the appeal of Martin & Cynthia Barry,**  
28 **1155 Sawyer Road, Tax Map R04, Lot 55C, for a left side property line variance of 4' -**  
29 **6" from the required 25' - 0" and a right side property line variance of 9' - 3" from the**  
30 **required 25' - 0" to construct a second floor over the existing.**

31  
32 Mr. LaPlante recused himself.

33  
34 Martin Barry, 1155 Sawyer Road, presented his application to the Board. The applicant has  
35 resided at the present address for 16 years and with a growing family, requests to increase  
36 the living area of his home. He pleads economic hardship with regard to purchasing another  
37 home or building lot. Of equal hardship is the cost of relocating a septic system to allow for an  
38 addition as well as the added cost of foundation work. Setbacks, which require him to request  
39 a variance, are the result of zoning ordinances that have occurred since the couple  
40 purchased their home. A comparison of homes in the near vicinity shows that most are two-  
41 story dwellings. Linda Miller, an abutting neighbor on three sides of the applicant, presented a  
42 letter to the Board stating that she is much in favor of the project. Other neighbors were  
43 approached and had no objections. Sebago Techniques had done a septic analysis and  
44 determined the existing system adequate to an expansion. The applicant determined that  
45 adding a second story would be the best and most feasible alternative for increasing the  
46 living area of his home.

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48 Mr. Backer asked for any public response. With no one coming forward, he closed the public  
49 comment portion of the meeting.

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Mr. Tranfaglia felt that the application was very clear and straightforward, and that Mr. Barry's presentation was very conclusive. Mr. Backer agreed and remarked that the application was very similar to a recent application presented and approved. With no further discussion, Mr. Backer asked the Board to vote on the required elements.

**FINDINGS OF FACT**

The appellants are owners of a property at 1155 Sawyer Road, Tax map R04, Lot 55C.

The Property is located in a Residential A District and contains 19650 sq. ft. of land area with 100 ft. of street frontage, and is therefore a non-conforming lot of record.

**CONCLUSIONS**

Eight elements are required. All were approved with a vote of 5 in favor 0 opposed.

**JUDGEMENT**

Ms. Miller made a motion to accept the applicant's request as presented. Motion was seconded by Mr. Tranfaglia 5 in favor 0 opposed.

Next Item on the agenda was Communications. Mr. Smith had nothing to address.

Mr. Backer called for a motion for adjournment.

Ms. Miller made a motion to adjourn. Motion was seconded by Ms. Jordan 6 in favor and 0 opposed.

Meeting adjourned at 8:55PM.

Respectfully submitted,

Barbara H. Lamson, Minutes Secretary