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

July 23, 2002 **7 P.M., Town Hall**

Present: David Backer, Chair
Jay Chatmas
Jack Kennealy
Penelope Jordan-Barthelman
Catherine Miller

Absent: Steven LaPlante
Michael Tranfaglia

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 June 25, 2002. Mr. Backer requested that the individual elements required for the approval of a variance be included in the minutes. Mr. Kennealy made a motion to accept the minutes. Motion was seconded by Ms. Miller 4 in favor 0 opposed 1 abstained - Ms. Jordan was absent at the June meeting.

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' replace the existing ranch with a 1½ story cape with attached porch.**

Mr. Smith had still not received a completed application from the Solomans. He contacted Northeast Civil Solutions who is doing the work for the Solomans and they are waiting for paperwork to complete the packet. Mr. Smith suggested writing a letter to give notice to the applicant that unless the agenda item was carried forward, the item would be dropped and the applicant would then have to reapply. The Board accepted that suggestion.

NEW BUSINESS

The first two items, **requests by David B. Ginn, 5 Sea Barn Road, Tax Map U08, Lot 44**, had been withdrawn.

Next item **to hear the appeal of Kevin L. and Lisa M. Huttman, 10 Prouts Place, Tax Map U53, Lot 33C, for a right side property line variance of three (3) feet from the required (30) feet to construct an attached garage. (This is an after-the-fact variance application to correct an existing setback violation.)**

David Jones, an attorney at 11 Main Street, Kennebunk, introduced himself as representing the Huttmans, and explained that they are in the process of moving out of state and so couldn't attend the meeting. The property involved in the appeal is under contract for sale and the issue warranting the variance came to light as a result of a title search and plot plan being done. A property survey shows the corner of the garage at 27.4 feet from the property line as opposed to the reguired 30 feet.

Mr. Jones asked to hand out some fact sheets to the Board in addition to materials included in the application packet. Mr. Backer granted his request. A fact sheet was presented to substantiate a comparable footprint to properties located within the subdivision. A list of square footages showed the Huttman residence to be within the range of other neighboring homes and smaller in some instances. Also presented was a letter from the Town to Gordon Duckett dated April 30, 1993, which indicates that the Planning Board amended the building envelope for the adjacent lot to reduce the setback from 30 to 24 feet. Mr. Jones wanted to make the point with his submissions that the appellant's request was not inconsistent with the neighborhood. He also made mention of an after the fact variance which was granted in 1995 for a property at 5 Park Circle in the same neighborhood, where a setback violation had also occurred. He felt that since the standards were more rigid in the past, the 1995 case showed a precedence that might make allowance for an unintentional violation.

Mr. Jones emphasized that the setback error was entirely unintentional and had occurred despite the fact that great effort was taken to meet the requirements. The lot is very long and narrow and documented points were difficult to locate. Despite the error, Mr. Jones maintained that there was no detriment to any of the surrounding properties. An abutting neighbor had submitted a letter supporting the Huttman appeal. The closest structure on the abutting property is 40 feet. Mr. Jones explained that alternative solutions to the violation are not feasible since they would involve removal of the back portion of the building and concrete foundation, or approaching the Planning Board for a relocation of the property line and amended approvals.

Mr. Backer questioned Mr. Jones on the after the fact variance that he had made reference to in his presentation. Mr. Jones explained that the Zoning Board had granted a variance on April 25, 1995 to a property at 5 Park Circle, Map U-54, Lot 15C. His purpose in referencing the case was that he felt the level of standards much more restrictive in 1995 than now. The documentation shows that there is a precedent for an after the fact variance, and with the change in criteria from 1995, the appeal from the Huttmans is not inconsistent with that ruling.

Craig Cooper of Rainbow Construction and the builder of the Huttman residence, came forward to discuss the error with regard to the setback. He produced a plot plan showing the long narrow configuration of the lot and pointed out the difficulty in determining a footprint within that area. Stakes located on the back portion of the lot were used to measure the building envelope and figures were carefully scrutinized to maintain a fair margin within those setbacks. He remembered that great pains were taken to adhere to the building envelope, but unfortunately the violation had still somehow occurred. Mr. Cooper then made reference to the Cross Hill Subdivision which is located a quarter mile away, and the fact that the approved setbacks for those lots are 20 feet. He asked the Board to be indulgent in their ruling.

Dr. Chatmas inquired whether or not the abutting homes on either side had been constructed prior to the Huttman residence. Mr. Cooper concurred that both of those homes had been completed. The Huttman house was completed in 1998.

John Whipple approached the Board and introduced himself as an architect at 47 Thomas Street, Portland. He had worked with Craig Cooper on the Huttman residence and stated

his surprise at the error. He noted that all three site plans which had been utilized in the project indicated a comfortable fit for the building including the overhangs. He stressed that the error was entirely unintentional.

Dr. Chatmas referenced an easement that was indicated on the survey plan and whether or not the setback violation constituted any encroachment upon those easements. Mr. Jones explained that there is a conservation easement and a view easement established with the Town, and that there is no involvement.

Dr. Chatmas inquired as to how the error impacts the title insurance. Mr. Jones explained that the lender requires title insurance which would cover any matters of survey. In the process, a mortgage loan inspection plan must be completed to verify that the building does meet the setback requirement. In the event of an error the Title Company could refuse insurance to the mortgage holder for any liability or loss resulting from the violation. The action could result in the mortgage company backing off from granting a mortgage on the property.

Mr. Backer asked what options are available to the appellant should the Board not grant a variance. Mr. Jones replied that one alternative is to approach the Town Council with a landuse prosecution for the Huttmans and hope that the ruling not require the removal of the building but some other resolution of the violation. The other alternatives are the removal of the building, or an application to the Planning Board to move the boundaries of the lot by amending an approved subdivision plan.

Mr. Kennealy was curious whether the Board had ever granted an after the fact variance and Mr. Smith advised that such rulings had occurred but could not be specific.

Mr. Backer had reservations about making a precedent for granting after the fact variances. He cited a case in Portland where a harsh stand was taken against violations and a ruling which stated that economic hardship and the prohibitive costs of correcting a violation was not reason for granting a variance. He felt that if the Board had been approached prior to construction of the Huttman residence and had then been asked for a variance of the setbacks, by the same criteria, the variance would be denied.

Ms. Jordan had the same concerns with regard to setting a precedent of after the fact rulings. With the volume of new construction, she felt that too much leniency toward errors might create recurring problems.

Mr. Jones maintained that the error at issue was unintentional and not a situation which would be unique to the Town either in the future or in the past. He again referenced the precedent of the Duckett case and noted that in conversations with Bruce Smit,h had determined that other setback situations had been settled with a variance ruling and not gone to the council for consent decrees. He felt the violation of a minor degree and hoped that a practical solution would be found rather than creating an impractical difficulty.

Mr. Backer asked Mr. Smith whether the issue was in fact Planning Board or Zoning Board related. Mr. Smith stated that the options to approach the issue rested with the appellants. He had informed the Huttmans of the various avenues they could pursue, including a consent agreement from the Town Manager. Mr. Smith felt, however, that the Town

Manager would respond by stating that before considering a consent agreement, the appellants would have to exhaust other options. The Planning Board cannot rule to change the building envelope because of the setback limitations which are the Zoning Board's jurisdiction.

Ms. Miller suggested a land conveyance to accommodate the property line, but Mr. Jones explained that the driveway of the abutting property owner runs along that line.

Dr. Chatmas made note of the Code Enforcement Officer's ability to reduce sideline setbacks typically from 30 feet to 25 feet, and questioned why it could not serve to resolve the issue at hand. Mr. Smith explained that those setback reductions are granted in the ordinance pertaining only to non-conforming lots of record. Dr. Chatmas asked how the ordinance determines the measurement of the setback with regard to the building construction. Mr. Smith replied that the measurement is taken from the property line to the foundation wall.

Mr. Backer opened the meeting to the public. With no one coming forward, he closed public discussion and directed attention to the Board.

Board Members took into consideration that the violation was unintentional and minimal. They agreed that the error would have been averted had it been known at the time of construction and served no purpose otherwise. Neither the homeowner nor the builder had anything to gain with the error and good effort was made to insure against any violation.

Mr. Backer stated that he would support the variance in order to avoid an unjust result and to waylay the agony of another long process which would obtain the same resolution. He conceded that he would have to ignore some of the obvious terms of the ordinance in order to make that determination. He felt that the reality of the hardship warranted a practical resolution, but did relent to the fact that prior to the violation, the standards for a variance would not be met. After the fact, the Board was applying a different standard which he felt was at odds with the ordinance.

Mr. Smith advised the Board against overlooking the standards of the ordinance simply because the issue at hand was determined as minimal. He stated that as a judicial board, members had an obligation to review the standards and determine whether they were satisfied.

Mr. Kennealy supported the granting of the variance based on the practical difficulty standard whereby the violation is not the result of actions knowingly taken by the applicant or prior owner.

Mr. Backer agreed that there was an issue with regard to meeting the standards vs. a common sense element. Mr. Smith argued that the Board could jeopardize it's ruling if the standards are not met. If the decision was challenged and went to a higher court, he felt the ruling would be overturned. He felt that the Board should take a more legal route by denying the variance and forcing the option of a Council consent agreement. He maintained that his intent was not to undermine a resolution for the applicant, but he firmly believed that the issue at hand was most importantly whether or not the application met all

the criteria warranting a variance to be granted. By way of judicial process, the application should pass or fail based on the individual elements.

Dr. Chatmas pointed out that the intent of the ordinance to maintain a distance of sixty feet between abutting buildings would still be represented should the variance be granted. The neighboring residence is forty feet from the property line granting more than enough allowance. Mr. Kennealy agreed and stated that the Board was a quasi-judicial entity and had the authority to interpret the intent of the body of Town regulations.

Mr. Backer asked for review of the standards and a vote on each.

FINDING OF FACTS

The appellants are owners of a property at 10 Prout Place, Tax Map U53, Lot 33C.

The property is located in a Residential A District and contains 115,189 sq. ft. of land area with 199.43 ft. of street frontage, and is therefore a conforming lot of record.

CONCLUSIONS

1. The proposed variance is not a substantial departure from the intent of the Ordinance.
   5 in favor, 0 opposed

2. A literal enforcement of the Ordinance would cause a practical difficulty.
   3 in favor, 2 opposed

3. The need for the variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.
   5 in favor, 0 opposed

4. The granting of the variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties.
   5 in favor, 0 opposed

5. The practical difficulty is not the result of action taken by the applicant or a prior owner.
   3 in favor, 2 opposed

6. No other feasible alternative to a variance is available to the petitioner.
   2 in favor, 3 opposed

7. The granting of a variance will not unreasonably adversely affect the natural environment
   5 in favor, 0 opposed

8. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.
   5 in favor, 0 opposed

Mr. Backer asked for a motion to be proposed as follows:

Whereas the Cape Elizabeth Zoning board of appeals has found that the applicant has failed to meet the applicants burden of proof in establishing that all conditions specified in the ordinance are met, the application for Kevin L. and Lisa M. Huttman for the variance as written be denied**.**

Ms. Miller inquired whether or not the Board could decline acting on the judgement until after the applicant approached the Council. That would keep the door open for the applicant to return to the Board and obtain a favorable vote on element #6 with regard to feasible alternatives.

Mr. Jones questioned the process of voting on the variance. He was told at the beginning of the meeting that in order for the variance to carry, it would need a quorum vote. He was confused about a motion presented for denial, expecting instead that the motion would be for a granting of a variance which would fail without that necessary quorum.

Mr. Backer asked **for a motion to approve the application of Kevin L. & Lisa M. Huttman as written.**

Mr. Kennealy made a motion which was seconded by Ms. Miller 2 in favor and 3 opposed

Motion failed.

Mr. Backer made comment to Mr. Jones that he fully expected that the applicant would find a reasonable solution to the issue within the Town, but felt that the Zoning Board was not the correct avenue to address. He then ordered a five-minute recess before moving on to the next item on the agenda.

Mr. Backer reopened the meeting and introduced the next item of business **to hear the request of Raymond & Elizabeth Taylor, 2 Harrison Ave., Tax Map U29, Lot 1, for a conditional use permit to operate a home business, specifically an auto detailing business**.

Raymond Taylor, 2 Harrison Ave, Cape Elizabeth, introduced himself as the applicant and fielded questions from the Board.

Mr. Backer mentioned two letters which had been received from Mr. Taylor's neighbors, Barbara K. Macdonald and Sheila A. Roy. He then asked Mr. Taylor to briefly discuss the particulars of his business.

Mr. Taylor explained that he maintained an auto detailing business at his residence. Clients would drop off their cars for his service or he at times would retrieve vehicles. He maintains a low volume of vehicles, the number depending on the weather and the season. He has been in the business for about twenty years in commercial locations in Portland and South Portland. He works alone. Mr. Taylor explained that he has a special needs child at home and having his business at his residence allows him to work as well as attend his child. The hours of operation are 8AM to 5PM and the number of cars he has at any given time is usually one or two.

Ms. Miller asked Mr. Taylor to address the issues raised in the letter from Mrs. Roy with regard to the amount of vehicles in the driveway and parking on Harrison Ave. Mr. Taylor replied that he had just widened his driveway to accommodate up to two additional cars besides his own vehicles, and therefore would have no need to use the street for any parking. Mr. Smith confirmed the additional parking made available at the applicant's residence and stated that the Board could make a conditional ruling on the number of cars being serviced at any given time at the Taylor business.

Ms. Miller asked if Mr. Taylor if he was on a septic system or public sewer. He replied that he was on public sewer and had a storm drain at the end of his drive. Mr. Backer asked with regard to the chemicals used in the detailing process, and Mr. Taylor stated that he uses only biodegradable materials.

In response to other questions raised by the Board, Mr. Taylor replied that generally vehicles are dropped off at his property. At times, he will retrieve the vehicles. The average number of cars he services is two per day because of the time involved in completing the job. None of the work would be done after dark, because even suplimental lighting would not be sufficient to do the work. Mr. Taylor was also intent on not creating a commercial look to his property. He preferred to work only on the weekdays, but with the shortness of warm seasons, was driven to take advantage of weekend work at times.

Dr. Chatmas inquired as to how long the applicant had resided at his property and how long he had been servicing cars there. Mr. Taylor replied that he had lived in the house about five years and had been performing the detailing work for about a year and a half. When asked why he now pursued a ruling from the Board, he responded that Mr. Smith had contacted him with notification that a permit was required. Dr. Chatmas asked about advertising and Mr. Taylor responded that he had a single line in the Yellow Pages.

Mr. Backer asked for any public comment.

Peter Cotter, 21 Ocean House Road, stepped forward in support of Mr. Taylor. He has lived in Cape Elizabeth for nineteen years and lives directly across from the Taylor residence. He felt that reasonable conditions could be placed on the conditional use permit which would allow Mr. Taylor to continue his business. He suggested limiting the hours of operation during the week, and workdays to include only one weekend day. He also suggested limiting the number of vehicles in the driveway at any given time. Mr. Cotter had watched the business over a period of time and had no objections to the operation. He had noticed that parking on Harrison Ave. had been curtailed in recent months. As a self-employed contractor, he understood the need for Mr. Taylor to relocate the business in his home. Mr. Cotter made reference to several home operated businesses in the approximate vicinity, and the proximity to commercial enterprises within Cape Elizabeth and South Portland. He complimented the appearance of the Taylor home making note of their well maintained property.

With no one else coming forward, Mr. Backer addressed Mr. Taylor with regard to what concessions he might make to appease his neighbors.

Mr. Taylor maintained that he would limit his hours from 8AM-6PM, but would like to have the option of having a weekend day should a situation arise. He agreed to avoid parking on

Harrison Ave. and was willing to keep the number of serviced vehicles at two. No signage would be installed on the property. Mr. Taylor stated that he does not intend to have any employees.

Dr. Chatmas asked whether or not noise had ever been an issue. Mr. Taylor replied, no. Dr. Chatmas then asked Mr. Smith whether a conditional use permit passed on with a sale of the property. Mr. Smith replied that the ordinance allowed for the conditional use to be passed on to a new owner but only to the same extent, namely an auto detail business. He stated that the Board could make a condition that the conditional use terminate with the sale of the property.

Mr. Backer asked for a show of hands on the following elements necessary to satisfy a finding.

1. The proposed use will not create hazardous traffic conditions when added to existing and foreseeable traffic in its vicinity.
   5 in favor, 0 opposed

2. The proposed use will not create unsanitary conditions by reason of sewage disposal, emissions to the air, or other aspects of its design or operation.
   5 in favor, 0 opposed

3. The proposed use will not adversely affect the value of adjacent properties.
   5 in favor, 0 opposed

4. The proposed site plan and layout are compatible with adjacent property uses and with the Comprehensive Plan.
   5 in favor, 0 opposed

5. The design and external appearance of any proposed building will constitute an attractive and compatible addition to its neighborhood, although it need not have a similar design, appearance or architecture.
   5 in favor, 0 opposed

Mr. Backer stated that the following conditions would also be imposed:

1. Mr. Taylor shall park no vehicles on Harrison Ave.

2. Mr. Taylor will be limited to a maximum of two client vehicles on the property at any one time.

3. There will be no signage advertising the presence of the business on the property.

4. The business will be conducted only between the hours of 8AM and 6PM - seven days per week permitted.

5. Mr. Taylor will have no employees working for him from the home.

6. All cleaning products used will be non-toxic, biodegradable.

Elizabeth Taylor, the wife of the applicant, approached the Board with a concern about the condition of no parking on Harrison Ave. She explained that a physical therapist at times was at the residence and sometimes personal quests. She asked how the street parking restriction would impact those vehicles. Mr. Smith replied that the condition would pertain to only cars being serviced. He stated that it was important that the Taylors keep their own vehicles and the client vehicles in the driveway. There was no issue should the therapist or other guests park on the street since general parking is allowed on Harrison Ave. Discussion ensued over which vehicles should be restricted from parking on the street. Mr. Smith felt the stipulation should be that the Taylors not place their cars on the street to make allowance for cars served by the business. He considered that to be the concern raised by the neighbors. Mr. Backer asked whether there were times when vehicles were left overnight for the detailing service, and Mr. Taylor replied yes. Mr. Backer said at issue was trying to satisfy the neighbors concerns regarding vehicle parking for the business and at the same time not impose a restriction on the Taylors that his neighbors do not share; that being the ability to park on Harrison Ave. He suggested the following amendment to condition #1:

1. No personal vehicles on Harrison Ave. while there are client vehicles in the driveway or in the garage.

All other conditions stand as written.

Mr. Smith was still uncomfortable with the language restricting personal parking on Harrison Ave. He felt that condition #2 limiting the number of vehicles serviced would govern the issue. Ms. Jordan agreed and Mr. Backer again amended condition #1 and reviewed all the conditions as follows:

1. No client vehicles on Harrison Ave.

2. Mr. Taylor will be limited to a maximum of two client vehicles on the property at any one time.

3. There will be no signage advertising the presence of the business on the property.

4. The business will be conducted only between the hours of 8AM and 6PM - seven days per week permitted.

5. Mr. Taylor will have no employees working for him from the home.

6. All cleaning products used will be non-toxic, biodegradable.

Mr. Backer asked for **a motion to approve the application of Raymond Taylor subject to the stated conditions.**

Ms. Miller made the motion which was seconded by Mr. Kenneally 5 in favor and 0 opposed

Communications was the next item on the agenda.

Dr. Chatmas made reference to a direct mailing he had received from an applicant. Mr. Smith said that he had advised the sender against a direct mailing to a Board Member, but they had done so anyway. He had informed the applicant that it was not the proper conduct. Dr. Chatmas asked how they should act on information received in this manor. Mr. Smith explained that the correct process for the reviewing of information would be the material included in the application packet. Board members should not be responsible for sorting through random material and trying to determine what application the information pertained to.

Mr. Backer asked for a motion to adjourn. Ms. Jordan made the motion which was seconded by Mr. Kennealy 5 in favor and 0 opposed.

Meeting adjourned at 10:00PM

Respectfully submitted,

Barbara H. Lamson, Minutes Secretary