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

September 24, 2002

7 P.M., Town Hall

Present: David Backer, Chair
Jay Chatmas
Jack Kennealy
Steven LaPlante
Michael Tranfaglia

Absent: Penelope Jordan-Barthelman
Catherine Miller

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 July 23, 2002. Mr. Kennealy made a motion to accept the minutes. Motion was seconded by Dr. Chatmas 3 in favor 0 opposed 1 abstained – Mr. LaPlante was absent at the July meeting. Mr. Transfaglia arrived after the vote was taken.

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. Backer made reference to a letter which the Board had directed Bruce Smith to send to the Solomans regarding the status of their application. Mr. Smith had not received a response from the applicants, and therefore, the Board opted to drop the item from the agenda. The Solomans can reapply for a variance in the future.

NEW BUSINESS

Mr. Backer introduced new business to hear the request of **Ted and Evie West, 22 Reef Road, Map U-13, Lot 89, to appeal the Code Enforcement Officer's decision of denial of building permit #030126 dated 9/11/2002.**

Bill Plouffe of the law firm Drummond, Woodsum & MacMahon, stepped forward to represent Mr. and Mrs. West, who were also present. He also introduced Joseph Waltman, the designer of the proposed addition to the West's home. Mr. Plouffe stated that the proposed addition was within shoreland zoning setback requirements and did not exceed the 30% expansion limit of volume required in the same ordinance. He was of the understanding that Mr. Smith's denial of the building permit was based on a previous finding by the Board with regard the Caputo case. Mr. Plouffe did not agree with those findings and wished to argue an interpretation in favor of the Wests. He made reference to

1 a case of Lewis vs. Rockport in which an interpretation of the zoning language by the
2 Supreme Court denied any expansion of a nonconforming structure. Mr. Plouffe felt that
3 the Rockport decision had influenced the Board's ruling in the Caputo findings. He argued
4 that the language in the Cape Elizabeth Shoreland Zoning Ordinance does allow limited
5 expansion in the shoreland zone for a non-conforming structure as long as the expansion
6 goes no closer to the water. He asked the Board to revisit the interpretation regarding the
7 Caputo case and consider the interpretation presented by the DEP with regard to
8 shoreland zoning.

9
10 Mr. Backer stated that he, Mr. Kennealy, and Mr. LaPlante were involved with the decision
11 on the Caputo ruling. He explained that the difficulty in making that ruling was the same as
12 exists today with trying to satisfy or balance two different ordinance provisions; one being
13 the standard against increasing the volume of any nonconforming structure, and second,
14 an allowance to expand up to 30% in a nonconforming structure set within setback
15 requirements. The Board could find no avenue to superimpose one ordinance over the
16 other and had asked advice from the Town Attorney. At that time, Mr. Hill stated that the
17 ordinances were too ambiguous and he could not provide any legal counsel, and so
18 interpretation was left to the Board. A later Board hearing concerning the relocation of a
19 house on the Sprague property produced a letter from Mr. Hill to the Code Enforcement
20 Officer dated July 19, 2001. Mr. Backer read the letter, which referred to a May 2001 law
21 court ruling regarding the expansion of a non-conforming structure within a setback area.
22 The case involved the city of Rockland vs. Rockport Plaza Realty and the same conflicting
23 language presented with the Caputo case. The Law Court ruled that the more specific
24 provision allowing limited expansion within a setback and with all considerations met,
25 would take precedence over the more vague language regarding nonconforming
26 structures. Mr. Backer was of the opinion that if Mr. Hill was given the opportunity to advise
27 the Board at this juncture, he would follow the findings of the Law Court and rule in favor of
28 the West appeal.

29
30 Mr. Kennealy quoted a paragraph from the Maine Municipalities Assoc. Board of Appeals
31 Manual referencing a Supreme Court ruling on a case of nonconforming structures. The
32 manual states that unless municipalities are very specific in their definition of "no more
33 conforming" and adopts more liberal provisions, the more constrictive language still
34 controls. Mr. Kennealy stated that the decision in the Caputo matter was based on that
35 information.

36
37 Mr. Plouffe responded that in the case exemplified in the MMA manual, the municipality did
38 not have a provision for expansion within a shoreland setback. Because that provision
39 does exist in Cape Elizabeth, the Board can defer to the more specific language in the
40 Shoreland Zoning Ordinance.

41
42 Mr. Plouffe debated that the City of Rockland vs. Rockport Plaza Realty case carried the
43 findings further than the Lewis case which was cited in the MMA manual. He also noted
44 the weight of the authority of the DEP with regard to their interpretation of shoreland
45 zoning ordinances and the fact that the Town Attorney supported that interpretation.

46
47 Mr. Kennealy held that there was still too much ambiguity involved with the language of the
48 conflicting ordinances, and supported a conservative approach. He felt the more
49 constrictive language should apply.

1
2 Mr. Plouffe responded that the rule is that when there is ambiguity that involves restriction
3 on private property rights, the ambiguity is generally resolved in favor of the property
4 owner.

5
6 Mr. Backer read a paragraph from the Ordinance titled “Conflict with Other Provisions”
7 which lent support to Mr. Kennealy’s argument that the more restrictive of conflicting
8 provisions shall control. Mr. Backer stated that he had reviewed the case of Rockland vs.
9 Rockport Plaza, and still had questions of how closely it could be applied to the conflicting
10 provisions with the Town’s ordinances. He felt the burden of interpretation still rested with
11 the Board.

12
13 Mr. Plouffe was of the opinion that in order for the Board to hold with the findings in the
14 Caputo case, they should “meat out” the provision allowing for 30% expansion and make
15 the ruling more specific. Mr. Backer replied that the Caputo ruling was specific to volume
16 but also specific to the existing footprint. The property owner could add volume up to a
17 second floor, while not increasing the footprint of the nonconforming structure.

18
19 Joe Waltman of Anastos & Nadeau, Inc., Yarmouth, stepped forward and introduced
20 himself. He stated that to his knowledge the shoreland setback established in 1989 was 25
21 feet and was written prior to shoreland zoning. He felt the discrepancy of the language in
22 the two ordinances was a product of the timing and overlay of circumstances at the time
23 the provisions were drafted.

24
25 Mr. Plouffe expounded on Mr. Waltman’s point by reviewing the chronology of the
26 provisions and the modifications that created ambiguity within its language.

27
28 Jack Kennealy voiced concern for maintaining consistency with regard to rulings so as not
29 to appear arbitrary and capricious. He felt that consistency lent value to interpretation of
30 the ordinances and was not of the opinion that the ruling in the Caputo application was
31 invalid.

32
33 Mr. Plouffe responded by saying that the Board would not be held to task by any Court for
34 changing their findings on the Caputo case given the subsequent Law Court rulings and
35 later council received from the Town Attorney.

36
37 Mr. Backer opened discussion to the public.

38
39 Robert Armitage, 18 Reef Road, stated that he was neither for nor against the West
40 application. He was concerned more with the permit process with the DEP for shoreland
41 zoning. He felt that the Town should require DEP approval for any project within shoreland
42 zoning and local ordinances would then pertain.

43
44 Bruce Smith explained that the DEP requires permits only in some instances of
45 construction related projects.

46
47 Mr. Kennealy stated that at one time the DEP required notice of all Board of appeal
48 application regarding shoreland zoning, but that is no longer the case.

1 Mr. Smith wanted to state for the record that his denial of the West application was based
2 purely on the Board's ruling on the Caputo application. He did not agree with the
3 interpretation of the ordinance which resulted in that ruling and would not defend his denial
4 of the West's building permit. He felt that the language of the ordinance needed to be
5 tightened up.

6
7 Mr. Backer agreed with Mr. Kennealy's concern for consistency in Board rulings, but was
8 inclined to follow the advise of Counsel Mike Hill, who granted the less constrictive
9 interpretation of the ordinance to be valid.

10
11 Mr. Transfaglia felt that the Board had made a valid decision with regard to Caputo,
12 although a conservative one. In reviewing the West application, he could not determine the
13 request to be unreasonable.

14
15 Dr. Chatmas presented questions to Mr. Waltman regarding the West residence and
16 proposed structure. Mr. Waltman stated that there was no living area in the basement of
17 the house. A survey determining the top of the bank for setback requirements was defined
18 in conjunction with the Code Enforcement officer. The elevation of the proposed addition is
19 lower than the elevation of the existing house and the roofing material will be the same. A
20 one-story deed restriction exists for the house. Dr. Chatmas noted a correction necessary
21 in the calculations for expansion. Mr. Waltman apologized for not having the corrected
22 calculations on the submitted plans and confirmed that the figures had been amended.

23
24 Mr. Backer asked for any further discussion from the Board. Hearing none, Mr. Backer
25 requested a motion.

26
27 Michael Transfaglia made the following motion:

28
29 **In the matter of the administration appeal of Ted and Evie West regarding the Code**
30 **Enforcement Officer's denial of their building permit #030126 dated 9/11/2002, I**
31 **move that the Board approve the administrative appeal.**

32
33 Motion was seconded by Mr. LaPlante 5 in favor and 0 opposed.

34
35 **Communications** was the next item on the agenda. Mr. Smith had nothing to submit.

36
37 Mr. Backer asked for a motion to adjourn. Motion was made by Mr. LaPlante and
38 seconded by Mr. Kennealy 5 in favor and 0 opposed.

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40 Meeting adjourned at 8:45PM

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43 Respectfully submitted,

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45 Barbara H. Lamson, Minutes Secretary

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