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

**May 27, 2003**

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

Present: David Backer, Chair  
Jay Chatmas  
Joseph Guglielmetti  
Jack Kennealy  
Gib Mendelson  
Michael Tranfaglia

Absent: Steve LaPlante

Also present was Bruce Smith, Code Enforcement Officer.

David Backer called the meeting to order and asked for comments on the minutes from the previous meeting. With no corrections noted, motion was made by Mr. Guglielmetti to approve the minutes as submitted. Motion was seconded by Mr. Mendelson 4 in favor 0 opposed 2 abstained ( Mr. Kennealy and Mr. Tranfaglia were not present for the April meeting)

**OLD BUSINESS**

None

**NEW BUSINESS**

To hear an administrative appeal by **Cross Hill, LLC of the Code Enforcement Officers 2/04/03 decision to withhold certificate of occupancies for Lots 26 & 27 of Tax Map U58 and Lots 20,21, & 25 of Tax Map U59 until after the second floors are finished for use as additional bedroom(s).**

Mr. Backer asked Mr. Smith to confirm that the matter had been resolved by agreement and so was withdrawn from the agenda. Mr. Smith confirmed.

Mr. Backer went on to the next order of business.

To hear the administrative appeal of **Charles M. Sexton of the Code Enforcement Officers April 11, 2003 denial of building permit #030521 for a s/f dwelling on property at 51 Woodland Road, Tax Map U01, Lot 60.**

No one came forward to present the second agenda item and Mr. Backer moved on to the third agenda item.

To hear the application of **Brenda Simpson, 8 Susan Road, Tax Map U43, Lot 36 for a conditional use permit to operate a home business.**

1 Teresa Simpson of 70 Pike Street, Biddeford, introduced herself as the daughter-in-law  
2 of the applicant and was speaking as her representative. She stated that she had no  
3 formal presentation, but was prepared to field questions from the Board.  
4

5 Mr. Backer asked whether Mrs. Simpson was familiar with the location of the business  
6 and the road associated with the property. She replied that the road was a cul-de-sac  
7 and dead end. She did not work at the business, but her husband was employed there  
8 by his parents. In response to other questions, Mrs. Simpson stated that a portion of the  
9 basement at the property is dedicated to supplies and roughly 12% of the residence  
10 constitutes storage and office equipment for the business. She explained that the  
11 business was strictly mail order with no retail sales and that one UPS pick-up/delivery  
12 per day served the trade. She considered the vehicular activity on the street minimal  
13 during the day.  
14

15 Mr. Backer commented that he had visited the property on a prior day and seen a truck  
16 parked along the road and pieces of flagpole piled further up on the lawn. Mrs. Simpson  
17 explained that the truck is used to install flagpoles and is usually parked in the driveway  
18 of the residence. What Mr. Backer had seen were shipping casings for flagpoles which  
19 had recently been installed. Mrs. Simpson stated that the debris is not typically seen at  
20 the property, but had not yet been disposed of.  
21

22 Mr. Backer questioned the number of sales generated by visits to the property. Mrs.  
23 Simpson replied that their customer base is generally commercial and very minimal  
24 sales are made on site.  
25

26 Mr. Kennealy questioned the frequency of use of the company truck. Mrs. Simpson  
27 replied that the bucket vehicle was a bucket truck and used exclusively for the  
28 installation of flagpoles. The frequency of use was only once or twice per month with  
29 variations depending on the season.  
30

31 Mr. Kennealy addressed the issue of the 2% allowance of increased vehicular activity  
32 pursuant to a home business and asked Mrs. Simpson if she could constitute the traffic  
33 count on the street. Residential homes would have to generate fifty trips per day in  
34 order to support the one UPS visit to the business. He explained that traffic study  
35 engineers compute that a residential neighborhood averages 10 vehicular  
36 trips/day/household. Susan Road has six residential homes and so constitutes 60 trips  
37 per day, so would make allowance for a 2% increase for the home business.  
38

39 Mr. Tranfaglia requested a layout of the business relative to the home square footage  
40 and Mr. Guglielmetti asked whether or not the business had plans for expansion.  
41 Mrs. Simpson replied that the business has grown in terms of financial volume but with  
42 regards to square footage, she could not determine what the applicants might have in  
43 mind.  
44

45 Dr. Chatmas asked what incident had prompted the application for the conditional use  
46 permit. Mrs. Simpson explained that the company had received a certified letter from  
47 the Code Enforcement Officer citing the absence of a conditional use permit. The action  
48 by Mr. Smith was prompted by a newspaper article profiling the business. Mrs. Simpson

1 stated that there is a telephone listing for the business but was unsure whether or not a  
2 physical address was also given. She said that much of the sales were referrals from  
3 other companies and retail sales were not a consideration. In response to other  
4 questions from Dr. Chatmas, Mrs. Simpson replied that her husband Edward is the  
5 applicant's son and only employee and drives the bucket truck. He is at the business  
6 every day, but the truck is not put into service every day. Operating hours are eight  
7 hours per day and no weekends. She confirmed that expansion to an off site area has  
8 been discussed by the business owners, but within no timeframe at this point.

9  
10 Mr. Backer opened the floor to public comment.

11  
12 David Dalessandri, 7 Susan Road, came forward in favor of the application. His home is  
13 directly across the street from the applicant and he considers the business a  
14 wholesome operation which generates no negative impact on the neighborhood. He has  
15 lived in the neighborhood for two years and not witnessed any significant increase of  
16 traffic with regard to the Simpson home business. He also supported the fact that  
17 customers do not frequent the house.

18  
19 Mr. Backer asked if Mr. Dalessandri had some input regarding the vehicular activity  
20 within the neighborhood and he considered that the street might average 60-80 trips per  
21 day.

22  
23 With no one coming forward, Mr. Backer closed the public forum and directed  
24 discussion to the Board.

25  
26 Mr. Tranfaglia was concerned with the square footage encompassing the business and  
27 the current practice of storing materials and equipment on site. Mr. Smith stated that  
28 outside storage of materials and equipment at a home business is not allowed in the  
29 Ordinance. Board members held a discussion and determined that the truck should in  
30 fact be considered equipment since it was a physical asset of the business and had the  
31 specialized use of installing flagpoles for the business.

32  
33 Dr. Chatmas revisited the issue of the traffic count and 2% allowance for a home  
34 business. He considered that although the business was well established and had in  
35 fact shown no indication of an adverse increase in vehicular activity, the tables sided  
36 against its location on a residential, dead end street. He considered the merit of a traffic  
37 study. Mr. Smith commented that the Ordinance was in the process of changing with  
38 regard to the standard for the 2% allowance, implementing instead a flat 10 trips/day for  
39 a home business.

40  
41 Mr. Trafaglia cited the problems of attempting to retroactively fit an existing business  
42 into the existing Ordinances in order to approve an otherwise acceptable application. He  
43 was still concerned with the use of the property and the overall volume of business  
44 regards the home.

45  
46 Mr. Backer asked regarding storage of flagpoles prior to installation. Mrs. Simpson  
47 replied that the poles are typically 30' in length and installed within a week of delivery.  
48 Poles are currently held on the lawn prior to installation or under the back deck.

1 Discussion ensued as to whether to table the application until technical issues could be  
2 discussed with the business owners. Mr. Backer was inclined to make a determination  
3 on the application pending conditions. He considered that the applicant could either  
4 adhere to those conditions or take the business off site. Mr. Smith supported that  
5 directive and felt that the Board could establish a set of conditions amenable to the  
6 business operations.

7  
8 Dr. Chatmas stated that the would like the Board to consider the following restrictions to  
9 be imposed:

- 10 1. The bucket truck not be parked on site.
- 11 2. No outside storage of materials or equipment.
- 12 3. No retail sales on site.
- 13 4. No signage

14  
15 Dr. Chatmas felt that the restrictions would satisfy the Ordinance with regard to any  
16 detrimental impact on the character of the neighborhood.

17  
18 Mr. Backer noted the fact that the application was presented with regard to a mail order  
19 business, and now a determination was made that there also existed a service aspect to  
20 the company. He asked Mrs. Simpson to explain the full scope of the business. She  
21 responded that the majority of their orders are received by mail, fax, or phone and are  
22 primarily for flags, but also they ship 6" and 8" poles. Occasionally a customer will  
23 request installation of a flag pole, but those are 25' and 30' poles. She could not give a  
24 percentage of the business representing flag installation, but stated the amount of  
25 service only comprising about six installations in a year.

26  
27 Mr. Backer reviewed proposed conditions to impose upon approval. Dr. Chatmas felt  
28 strongly with regard to restricting retail sales and signage. Mr. Mendelson concurred,  
29 citing that walk-up sales could be a viable area of abuse. Mrs. Simpson stated that no  
30 signage has ever existed at the location. Mr. Smith reiterated the fact that outside  
31 storage of materials and equipment are already denied per the Ordinance. He  
32 maintained the decision of the Board that the bucket truck constituted equipment.

33  
34 Mr. Backer asked the Board to vote on the following standards:

### 35 **Finding of Facts**

36  
37 The appellant seeks a conditional use permit for a home business, specifically a mail  
38 order business.

39  
40 Brenda & Walter Simpson are the owners of a property at 8 Susan Road.

41  
42 The property is located in the Residential A District, Tax Map U43 Lot 36 containing  
43 17,480 sf.

1  
2 **CONCLUSIONS**  
3

- 4 1. The proposed use will not create hazardous traffic conditions when added to  
5 existing and foreseeable traffic in its vicinity.  
6 6 in favor, 0 opposed, 0 abstained  
7
- 8 2. The proposed use will not create unsanitary conditions by reason of  
9 sewage disposal, emissions to the air, or other aspects of its design or operation.  
10 6 in favor, 0 opposed, 0 abstained  
11
- 12 3. The proposed use will not adversely affect the value of adjacent properties.  
13 6 in favor, 0 opposed, 0 abstained  
14
- 15 4. The proposed site plan and layout are compatible with adjacent property  
16 uses and with the Comprehensive Plan.  
17 N/A  
18
- 19 5. The design and external appearance of any proposed building will constitute  
20 an attractive and compatible addition to its neighborhood, although it need not have a  
21 similar design, appearance or architecture.  
22 N/A  
23

24 Motion was made by Mr. Mendelson to approve the application of **Brenda Simpson, 8**  
25 **Susan Road, Tax Map U43, Lot 36 for a conditional use permit to operate a home**  
26 **business, specifically Alan Flag Co., as a mail order business with the following**  
27 **stated conditions:**  
28

- 29 **1. No exterior signage advertising the business.**  
30  
31 **2. Walk-up or drive-up sales are prohibited**  
32

33 Motion was seconded by Mr. Kennealy 6 in favor and 0 opposed.  
34

35 Mr. Backer returned to the first item on the agenda.  
36

37 To hear the administrative appeal of **Charles M. Sexton of the Code Enforcement**  
38 **Officers April 11, 2003 denial of building permit #030521 for a s/f dwelling on**  
39 **property at 51 Woodland Road, Tax Map U01, Lot 60.**  
40

41 Charles Sexton introduced himself and referred to a cover letter which was enclosed in  
42 the submission packet and summarized the argument for appeal. Mr. Sexton stated that  
43 in 1983 he purchased from the Town of Cape Elizabeth a parcel of land containing  
44 79,000 sq/ft and including the old Cottage Farm School. He then obtained an approval  
45 from the Planning Board and Zoning Board in 1984 to convert the building into  
46 apartments. The Ordinance, at that time, required 5000 sq/ft for each unit and eight  
47 units were requested and approved.

1 Mr. Sexton explained that the parcel square footage would have sufficed up to fifteen  
2 units, but he had decided that a better application would be to convert the building to  
3 eight units utilizing only 40,000 sq/ft, and save the remainder of the parcel for a single  
4 family lot. That was the proposal he claims went before the Boards, however, his files  
5 are incomplete and cannot produce the documentation to support the approval of a  
6 single family lot. Mr. Smith had also searched the Town records from that time to glean  
7 any facts. Statements from the archives recognize a square footage of 40,000 sq/ft+ but  
8 make no reference to the entire parcel of 79,000 sq/ft. Mr. Sexton stated that after the  
9 1984 approval, the apartments were outfitted, but then a fire destroyed the building. He  
10 came back to the Planning Board for approval to construct a new building, but basically  
11 presented the same application. A survey was done in 1884 after the approval and  
12 depicts the single lot laid out in conjunction to the apartment units. The plan was never  
13 registered with the single lot sectioned out, Mr. Sexton explained, because he did not  
14 then want to incur the tax burden of two lots. Now Mr. Sexton would like to separate the  
15 lots, make a small adjustment to the boundary lines, and sell off the single family lot.  
16 Mr. Sexton applied for a building permit for a foundation in order to establish the single  
17 family lot, but the permit was denied by the Code Enforcement Officer because the  
18 square footage does not comply with the current Ordinance. Mr. Sexton maintains that  
19 the subdivision of the lots was his intent all along and was presented as such when he  
20 went for Planning Board approval in 1984. He contends that the approval in 1984 was  
21 inclusive of that intent and the division of the parcel should be sanctioned. He stated  
22 again that, unfortunately, there is no documentation available that can support the  
23 approval of the single lot.

24  
25 Mr. Backer commended Mr. Sexton on the amount of material he was able to compile  
26 for his submission given the time elapsed since the ruling in 1984.

27  
28 Mr. Smith presented the reasons for the permit denial which prompted Mr. Sexton's  
29 appeal. He stated that the primary problem in the matter was that no site plan has been  
30 found originating from the Planning Board approval and therefore no documentation to  
31 support the case for a separate single lot being inclusive of that approval. A site plan  
32 would have been a requirement of the Planning Board approval. Mr. Smith had gone  
33 back through the Town records for the Planning Board and Zoning Board and pieced  
34 together information regarding Mr. Sexton's parcel. The lot description entered on the  
35 original Zoning Board application for the eight apartments referenced Map U01 Lot 60  
36 and not a portion thereof. The square footage noted on the application was 69,000 plus  
37 sq/ft and not quite the full 79,000 square feet which was determined on a later survey.  
38 Mr. Smith read from the minutes taken from the Zoning Board of Appeals meeting in  
39 1984 where Mr. Sexton was asked of his plans for developing the lot beyond the eight  
40 units. Mr. Sexton responded that he might consider additional units in the basement of  
41 the building. Mr. Smith found no reference of a separate lot to be carved out of the  
42 parcel. Mr. Smith interpreted the connotations of 40,000sq/ft plus with regard to the  
43 application, to indicate that there was sufficient area within the entire parcel to satisfy  
44 the ordinance requirements at that time.

45  
46 Mr. Sexton made the argument that the map and lot number assigned on the application  
47 was correct with respect to the assessor's map and location of the parcel. He  
48 maintained that the "40,000 sq/ft plus" entered as the size of the parcel was to ascertain

1 that there was sufficient land to support the eight unit project. A later entry on the  
2 application notes 69,000 sq/ft as the size of the parcel, but Mr. Sexton did not think it  
3 should be interpreted that the application meant to involve the surplus of land beyond  
4 40,000 sq/ft necessary for approval.

5  
6 Mr. Sexton was surprised with his response quoted from the minutes regarding a lack of  
7 further plans for the parcel. Mr. Smith felt that any reference or plan for a separate lot to  
8 be carved from the parcel would have raised comment or questions from the Board. He  
9 could find no evidence that the separate lot was ever presented.

10  
11 Mr. Backer was inclined to believe that the intent of the Board in 1984 was to approve  
12 the eight unit apartment project given the fact that the parcel contained sufficient land to  
13 satisfy the required 5000 sq/ft /unit. He didn't think that the surplus of 39,000 sq/ft was  
14 of consequence and constituted a conforming lot size for the RC District. Mr. Smith  
15 argued that the current ordinance requires five acres for a multi-family use. He had  
16 consulted with Town Attorney Mike Hill. Mr. Hill agreed with the findings and advised  
17 that for the lack of a site plan, the Board would have to prove original intent with regard  
18 to the Zoning and Planning Board approvals in 1984. With no documentation to support  
19 that a single family lot was ever established on the master plan, Mr. Smith stated that he  
20 could not now recognize a separate parcel. He added that a lot could not be arbitrarily  
21 taken from a surplus of land. The boundaries would have to be established by a  
22 recorded deed or shown on an approved subdivision plan and meet zoning  
23 requirements at the time it is created.

24  
25 Mr. Kennealy noted that the original total square footage was entered on the application  
26 as 69,000 sq/ft, which would have left 29,000 sq/ft for consideration as a separate  
27 single lot. Mr. Sexton responded that the full measure of the parcel was not calculated  
28 until a year later when a survey was done. He maintained that his intent was the same  
29 despite the discrepancy in numbers. Mr. Smith argued that regardless of the size of the  
30 proposed lot, no mention exists in the archival documents of a single lot being set aside  
31 from the required 40,000 sq/ft for the eight apartment units.

32  
33 Mr. Sexton had submitted a survey plan depicting a separate lot laid out adjacent to the  
34 apartment complex, however, the plan was dated after the approval. Mr. Backer,  
35 nonetheless, felt it strong evidence that the separate lot was conceived at the time of  
36 the original approval.

37  
38 Dr. Chatmas referenced the recent building permit submitted by Mr. Sexton and denied  
39 by the Code Enforcement Officer and, the subsequent application submitted for an  
40 appeal of Mr. Smith's decision. He noted that the permit was submitted with regard to a  
41 single family lot on the parcel designated as Map U01 and Lot 60. He asked Mr. Sexton  
42 how he could rectify the fact that he was adding a structure to a lot which already  
43 contained a structure and then consider that parcel separated when it has the same  
44 designation. Dr. Chatmas had the opinion that the lot would need to be separated and  
45 recorded in order to establish itself before a building permit would be applied for a  
46 dwelling on that lot. He maintained that the lot by the current ordinances would be  
47 considered non-conforming and supported the denial issued by Mr. Smith.

1 Mr. Smith pointed out that the question the Board needed to establish was whether or  
2 not Mr. Sexton acquired in 1984 an approval for a separate single lot on the square  
3 footage of the parcel in excess of the 40,000 plus square feet required for the eight  
4 apartment units. He maintains that the lot was never established.

5  
6 Dr. Chatmas explained that Mr. Sexton was in error in allowing too much time to elapse  
7 before acting on a separation of the lot. The laws had changed with regard to the  
8 standards required in the Ordinance and the Zoning Board did not have the authority to  
9 override those standards. Mr. Smith replied that he had the authority to determine  
10 whether or not a lot could be divided into two. By the current Ordinance, Mr. Sexton's lot  
11 did not have the required square footage to carve off a separate single family lot.

12  
13 Mr. Backer read from the Ordinance with regard to the Zoning Board ruling on a non-  
14 conforming lot. The Ordinance stated that the Zoning Board did not have the authority to  
15 make a non-conforming lot more non-conforming.

16  
17 Mr. Sexton asked if the Board couldn't simply make a decision on whether or not the  
18 original approval in 1984 established a separate lot. Mr. Smith agreed that if the Board  
19 did make that determination, the single lot could still be separated out today regardless  
20 of the change in the Ordinance. He explained that his argument stems from the fact that  
21 no documentation is available to support any approval of that separate lot. He felt that  
22 the Board was obligated to determine whether or not the 1984 Planning Board approval  
23 granted Mr. Sexton a lot on the surplus of land beyond the 40,000 sq/ft required for the  
24 apartment units.

25  
26 Mr. Tranfaglia had the opinion that because of the considerable surplus of land beyond  
27 the required 40,000 sq/ft for the apartments, it was a logical assumption that a separate  
28 lot would have been planned.

29  
30 Mr. Mendelson asked Mr. Smith the minimum square footage requirement for a lot by  
31 the standards in 1984. He replied 20,000 sq/ft.

32  
33 Dr. Chatmas revisited the response documented in the Zoning Board Minutes in 1984  
34 when Mr. Sexton stated that he had no plans for further development aside from  
35 additional units in the schoolhouse basement. He was inclined to think the reply unusual  
36 given an intent to create a separate lot. Mr. Smith commented that the numbers would  
37 not work to support a separate lot if Mr. Sexton, in fact, had plans to add more  
38 apartment units and thereby commit further square footage from the total lot.

39  
40 Mr. Backer interrupted the proceedings to advise the last applicant, Michael Duddy, item  
41 3 on the agenda, that the Board would not be able to hear his application that evening  
42 and so would carry the item to the next meeting.

43  
44 Board members looked through archival documents and dated submissions to try and  
45 glean any information which might make a case for a separate lot. Old subdivision maps  
46 did not help to mete out any boundaries between the lots.



1 Mr. Sexton explained that after the 1984 approval was granted, the project went forward  
2 and just prior to opening, the apartment building burned. He then returned to the  
3 Planning Board with drawings for a new apartment complex. A landscape plan was  
4 presented from that meeting but no site plan. Mr. Sexton also presented a letter written  
5 from that time to his mortgage lender referencing two lots within the parcel.

6  
7 Mr. Backer stated that the survey and letter to the mortgage lender both represented  
8 proof that Mr. Sexton's intent was to separate the lots and both support the fact that he  
9 felt justified in doing so. He recognized the problem as how to impute those intentions  
10 from the approval granted by the Boards.

11  
12 Dr. Chatmas agreed with Mr. Backer that Mr. Sexton's intent to separate the lots  
13 seemed valid. He was concerned, however, with the absence of documentation to  
14 substantiate separation of the parcel. In order to grandfather the non-conforming lot ,  
15 Dr. Chatmas wanted to be certain that the situation first existed. Mr. Mendelson agreed  
16 and also felt at a loss, given the lack of documentation, to ascertain what the Planning  
17 Board and Zoning Board intended in their 1984 approval.

18  
19 Mr. Smith stressed the fact that a basic consideration when processing a building permit  
20 is the information entered with regard to lot size. Both applications submitted by  
21 Mr. Sexton stated the lot size as 69,000 sq/ft. He explained that any code officer or  
22 Board working in conjunction with a project would advise the applicant to follow up on  
23 the terms and conditions relative to the approval. He maintains that if a separate lot was  
24 inclusive of the initial approval then some manner of documentation should exist to  
25 support that fact. He could find no reference in any of the available material to sanctify  
26 the existence of a separate lot.

27  
28 Mr. Backer requested, barring any further argument, a motion from the Board drafted so  
29 that an affirmative vote would support the applicant's appeal. He presented the following  
30 motion for the Board to consider:

31  
32 **Motion to reverse the denial of the Code Enforcement Officer of Permit #030521,**  
33 **based on a finding that the records of the Zoning Board of Appeals and Planning**  
34 **Board with their decisions dated January 24, 1984 and February 14, 1984,**  
35 **respectively, combined with the actions of the applicant, Charles M. Sexton, in**  
36 **the months and years following the decisions of the Zoning Board and Planning**  
37 **Board, support a finding that neither Board required that the entire square**  
38 **footage of tax map U01, Lot 60, be devoted to the eight unit apartment complex at**  
39 **51 Woodland Road; but rather, that no more than 40,000 sq/ft be devoted to the**  
40 **apartment building.**

41  
42 Mr. Kennealy put forth the motion as presented and Mr. Mendelson seconded the  
43 motion 3 in favor and 3 opposed.

44  
45 Without a majority vote, the motion failed and the appeal was denied.

46  
47 Mr. Mendelson addressed Mr. Sexton in stating, for the record, that he did not disallow  
48 what Mr. Sexton believed pursuant to the separate lot.

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**COMMUNICATIONS**

Mr. Backer referenced a copy of a decision from Town Attorney, Mike Hill, regarding the case of Prentice vs. the Town of Cape Elizabeth as decided by the Superior Court.

Mr. Baker announced that he would be relinquishing his position of Zoning Board Chair to assume a seat on the town council. With that, he tendered his resignation and turned proceedings over to Mr. Kennealy as Board Secretary, in order to elect a new chair.

Mr. Kennealy offered his appreciation to Mr. Backer as well as his best wishes. His sentiments were echoed by Board members. Mr. Kennealy then asked for nominations from Board members for the position of Chair.

Mr. Mendelson made a motion to nominate Dr. Chatmas as Zoning Board Chair. Motion was seconded by Mr. Kennealy 6 in favor and 0 opposed.

Dr. Chatmas made a motion to adjourn. Motion was seconded by Mr. Tranfaglia 6 in favor and 0 opposed.

Meeting adjourned at 10:55PM

Respectfully submitted,  
Barbara H. Lamson, Minutes Secretary

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