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

**JUNE 22, 2004**

**7:00 p.m., TOWN HALL**

Present: Gib Mendelson (Acting Chair)  
Steven LaPlante  
Jim Walsh

Len Gulino  
Joseph Guglielmetti  
Michael Tranfaglia

Also present was Bruce Smith, Code Enforcement Officer.

Mr. Mendelson called the meeting to order and asked for comments on the previous meeting's minutes.

Mr. Mendelson asked to delete the "h" from his name. Also on line 43 he asked that "to be present" be deleted and on page 7, line 15, in between "could" and "acceptable" to add the word "be".

Mr. Gulino asked that line 26, Page 7, be changed to "two" trips daily.

Mr. Mendelson asked for a motion.

Mr. Gulino made a motion to approve minutes with amendments. Mr. Guglielmetti seconded the motion 6 in favor, 0 opposed, 0 abstained.

**NEW BUSINESS**

To hear the request of Thomas F. Jewell, manager of Drew, LLC, to appeal the decision of the Code Enforcement Officer to require the height of the structure located at 52 Shipwreck Cove Road, Tax Map R03, Lot 10A to be lowered by a minimum of fourteen (14) inches.

Mr. Mendelson asked Mr. Smith to give a brief overview of the history of this request.

Mr. Smith stated he went to the site and by using a pop-level he took site elevation 6-7ft from the foundation on what appeared to be original grade. He determined the building height to be approximately 15" higher than what the ordinance allows of 35 ft. Owen Haskell, a surveying company, visited the site and found it 14" in excess height. They used the Oest method, a methodology the Town has used for several years to determine original grade. Mr. Smith gave an overview of the methodology for determining original grade.

Mr. Mendelson asked the representative for the applicant to approach the podium.

1 Mr. Paul Bulger, Attorney for Drew Friedman, stated the Oest methodology is not part of  
2 the Ordinance. He said there wasn't a topographical map submitted with the building  
3 plans, as it is not required and, therefore, Owen Haskell was trying to interpolate what  
4 was original grade. He had two affidavits. One was from Skip Murray, the excavation  
5 contractor and one from Dana Sterling, the foundation contractor. They both agreed that  
6 on the easterly side the foundation footing was 3 inches below grade and on the  
7 northwesterly side it was 24 inches below grade. Mr. Bulger also wanted to point out that  
8 there was no variation in plan submitted and what was built. He said that the building  
9 height was not the issue, it was finding original grade.

10  
11 Mr. Gulino asked where he received the definition of the mid-point.

12  
13 Mr. Bulger stated that it was from the Zoning Ordinance.

14  
15 Mr. Smith concurred and said it was in the BOCA Codes as well.

16  
17 Mr. Bulger deferred further questioning to Johann Buisman.

18  
19 Johann Buisman, Vice President of Northeast Civil Solutions and Professional Land  
20 Surveyor, looked at the data provided and tried to determine best way to find original  
21 grade and use the information provided in affidavits.

22  
23 The Board asked for copies of affidavits to review.

24  
25 Mr. Buisman stated he had to go 7ft to 20ft outside the building to try to determine  
26 original grade. He discussed the different areas where they had taken site shots and gave  
27 an overview of their determination of the data and the data that was provided by Owen  
28 Haskell. Skip Murray had provided information in the affidavit that stated there was a  
29 stump that sat away from the house that was untouched that would be original grade.

30  
31 Mr. Mendelsohn asked if there was datum or a methodology that is better or more  
32 acceptable.

33  
34 Mr. Buisman stated no, in this particular instance it wouldn't have mattered.

35  
36 Mr. Walsh asked if Owen Haskell information supported his information.

37  
38 Mr. Buisman stated they do corroborate each other.

39  
40 Mr. Bulger stated that they were using the information provided by Owen Haskell and  
41 with their data they were looking to see if there was a deminimus violation or no  
42 violation at all.

43  
44 Mr. Walsh asked why the stump had not been referenced in the Owen Haskell plan.

1 Mr. Bulger said that Ellen Brewer, from Owen Haskell, had asked Skip Murray  
2 specifically how high the hill was that he had to take down. Mr. Murray told her the best-  
3 fixed point was the stump that was still standing. Mr. Murray stated that Ms. Brewer said  
4 that made sense.  
5  
6 Mr. Gulino asked if they had looked at any prior photos from when cottage was present.  
7  
8 Mr. Buisman stated yes, however it was difficult to ascertain grade because of angle the  
9 photo was shot at but said the land appeared to slope off.  
10  
11 Mr. Smith stated that there were photos that showed the cottage and land.  
12  
13 Mr. Bulger said the photos were a good shot of where the building was from a height, but  
14 it does not show where the foundation is now and a good portion of the new foundation  
15 would not be included in photographs.  
16  
17 Mr. Gulino asked if the data he used included the recollection from the excavator.  
18  
19 Mr. Buisman stated yes, and he has to rely on the data supplied to him to be correct.  
20  
21 Mr. Gulino asked if the photos were taken into account.  
22  
23 Mr. Buisman said yes, and it shows positive drainage, which makes sense.  
24  
25 Mr. Smith asked how many points he used to determine drainage.  
26  
27 Mr. Buisman said 1 at the Southwest corner, 2 at the Northwest corner and one at the  
28 Southeast corner.  
29  
30 Mr. LaPlante stated that since this was so close in height, they should have identified  
31 what the original conditions were.  
32  
33 Mr. Buisman stated that it should be required for applicants to do that.  
34  
35 Mr. Gulino asked if one was to keep removing grade, could they keep increasing height.  
36  
37 Mr. Smith said once original grade is set, that is where you measure. He also wanted to  
38 clarify that he saw original grade on plans and assumed there had been benchmarks  
39 established. This did not occur.  
40  
41 Mr. Gulino asked what the maximum foundation height is.  
42  
43 Mr. Bulger said they know it is 48 inches.  
44  
45 Mr. Walsh asked for timeline of when foundation was dug and poured.  
46

1 Mr. Bulger stated that the foundation was poured on April 29<sup>th</sup> and the violation was  
2 determined two weeks ago.  
3  
4 Mr. Mendelson stated he was still wrestling with the opinion of Owen Haskell.  
5  
6 Mr. Bulger stated that Owen Haskell was called in and told to use the Oest method of  
7 finding grade. They were clear that this is not exact but an interpolation of data.  
8  
9 Mr. Mendelson asked if Owen Haskell was retained to show original grade, why are they  
10 suggesting the applicant talk to contractors.  
11  
12 Mr. Bulger stated they were hoping that by getting information in as soon as possible the  
13 stop work order would be lifted because of an acceptable tolerance.  
14  
15 Mr. LaPlante asked if he was saying there should be a tolerance for grade level and  
16 height.  
17  
18 Mr. Bulger stated the ordinance is not clear as to where height measurement is derived  
19 form exactly.  
20  
21 Mr. Gulino asked for the size of new building versus the old building.  
22  
23 Mr. Bulger stated the new building is 54ft x 48ft. The old cottage was 18ft x 30ft.  
24  
25 Mr. Friedman stated that when Mr. Murray was preparing land to remove cottage, it  
26 could not be done because it would hit a hill. It was cut down and Mr. Murray had told  
27 Mr. Friedman that the height of the hill was the same elevation of the previously describe  
28 tree stump.  
29  
30 Mr. Mendelson asked if the applicant had any other testimony.  
31  
32 Mr. Bulger stated no, however they would be available for any questions.  
33  
34 Mr. Smith stated that the Oest method of measuring original grade is viable and works.  
35  
36 Mr. Mendelson called for a 5-minute break before starting the Public Hearing.  
37  
38 Mr. Mendelson stated that the Board appreciates public concern and the willingness to  
39 support meetings. He said this item has created a lot of controversy and public attention.  
40 He asked that comments be limited to the issue before the Board. That being said, he  
41 asked if anyone who would like to approach the podium.  
42  
43 Penny Pollard, representing the Peabbles Cove Association and resident of 3 Peabbles  
44 Lane, read a letter from Carolyn Tucker, owner of the leased land of Peabbles Cove  
45 Association. Ms. Pollard, speaking for herself, wanted to say that the maximum height  
46 from original grade was 59 inches on the southeast corner. She said the pictures she

1 distributed to the Board shows the elevation and height of the foundation. She met with  
2 Bruce Smith and he went down to check the foundation size in and he confirmed it was  
3 too high. A stop work order was then issued. Ms. Pollard was home and took pictures of  
4 the Surveyors measuring height from the backfill, not the ground. The post and the beam  
5 measured 41 ft from the top of the deck to the ridge. The mean level of the highest slope  
6 is 35 ft. The ground to the top of the ridge is approximately 46 ft. which, she pointed out  
7 is closer to 50 ft. than to 35 ft. She asked in conclusion that an independent survey be  
8 done.

9  
10 Mr. Gulino asked how she got the measurements.

11  
12 Ms. Pollard stated when the vents were laying flat; she took a tape measure down and  
13 personally measured it.

14  
15 Mr. Bill Greenburg, 1 Peabbles Point Rd and closest abutter new home, stated that there  
16 is an opportunity to find original grade, as there is ground with grass growing on it within  
17 3ft. of the foundation. He also stated that there is another interpretation of building  
18 height in the Zoning Ordinance. He said that it is the mean level of the highest slope of  
19 the roof, which would be halfway from the peak to the 1<sup>st</sup> bridge. He does not believe it  
20 should have been built in the first place.

21  
22 Mr. Richard Baldwin, 15 Reef Road, wanted to point out in 1700's France, a man named  
23 Mansard developed this type of roof to hide the top stories of his building to escape taxes.  
24 He believes the Board should look into this.

25  
26 Mr. Smith asked for a moment to explain how he calculated building height. Building  
27 height is vertical distance from the average original grade to the mean level of the highest  
28 gable or slope or the hip roof. He stated that could be challenged, but the permit was  
29 issued in November and would be a non-issue at this point. He stated that if the  
30 townspeople wish to change that they should contact Town Councilors.

31  
32 Mr. Gillian, 49 Shipwreck Cove Rd, asked if any resident could build a structure and  
33 state they did not have an original grade and go through this same process.

34  
35 Mr. Mendelson said they would accept that as a rhetorical question.

36  
37 Arlene Roffman, 1 Peabble Point Lane, wanted to speak to Mr. Smith's comment on lack  
38 of notice for building permit. They close their cottage for the summer, and had asked Mr.  
39 Smith in October if plans had been submitted. They believe this house violates the spirit  
40 of the Zoning Ordinance, which calls for structures to be compatible with the character,  
41 scenic value and traditional uses of the neighborhood, in which they are built. She hopes  
42 that Mr. Friedman will work with his neighbors for an agreeable compromise.

43  
44 Mr. LaPlante asked Mr. Smith if the entirety of the issue at hand was about grade, and not  
45 roof height.

1 Mr. Smith concurred.

2

3 Wayne Tibbetts, 138 Bridgton St, Westbrook, has summered at Peabbles Cove for the  
4 last 50 years and they were the best years of his life. He was concerned that there would  
5 be a loss of existing beauty. He stated that the cove is unique and once it is gone, it is  
6 gone forever.

7

8 Mr. Mendelson asked if anyone else wanted to speak. Hearing none, he asked Mr.  
9 Bulger if he or his client wanted to address any comment.

10

11 Mr. Bulger stated that the structure measurements are accurate. He stated the height of  
12 the foundation is 48 inches, which is confirmed in an affidavit. The new structure is  
13 within 5–10ft of the existing structure. He stated they have an expert, Mr. Buisman, who  
14 stated they are 34ft., 11 inches, which is compliant with the 35ft height requirement.

15

16 Mr. Mendelson opened discussion to the Board.

17

18 Mr. Walsh asked why not get an actual height of elevation to this building.

19

20 Mr. Bulger stated that it is impossible to get that number with certainty.

21

22 Mr. LaPlante asked what happens if appeal is denied.

23

24 Mr. Smith said they would have to come back with a way to remedy the situation. He  
25 also reminded the Board that motions are made in the affirmative.

26

27 Mr. Mendelson recessed for a 5-minute break.

28

29 Mr. Mendelson resumed meeting and asked for any last comments.

30

31 Ms. Pollard asked if they have enough information to make a decision.

32

33 Mr. Gulino stated they make decisions based on evidence presented.

34

35 Mr. Greenburg stated that there are two sets of competing facts. He believes that  
36 measurements should be made to either corroborate or discredit all evidence put forward.

37

38 Mr. Guglielmetti asked why a predominant amount of foundation is above ground.

39

40 Mr. Buisman said he couldn't really answer that.

41

42 Mr. Bulger stated the location is in the lowest part of the area and if the foundation were  
43 too low, water would be flushing into the garage. There is also a significant amount of  
44 ledge. Backfill should guarantee stability. Mr. Friedman told him if he had the choice,  
45 the foundation would be lower.

46

1 Mr. Guglielmetti read portions of the excavator's affidavit. He stated that it didn't appear  
2 that information was given as to where the level was.

3  
4 Mr. Bulger stated that there was information exchanged between Mr. Murray and Mr.  
5 Friedman. He said that Mr. Murray knew there was an issue on the site and that he did  
6 not know the height of the proposed structure.

7  
8 Mr. Friedman stated he might be able to clarify issues on foundation. Initially he had  
9 wanted a 4ft foundation, however, after talking to the excavator he was told of the  
10 possibility of running into ledge. Mr. Sterling used 4ft 8-inch forms with berms running  
11 around the sides. Mr. Friedman would have conceded to a topo map if it had been  
12 required. He had also confirmed with that Bruce there was no floodplain. He said he  
13 was not concerned with building height; he just wanted 3 comfortable floors to live on.

14  
15 Mr. Mendelson closed the meeting to Board discussion.

16  
17 Mr. Tranfaglia said that they as Board members were charged with enforcing the Zoning  
18 Ordinance. They have to take the best evidence to determine original grade, which relies  
19 on people's memories and assumptions. He said that even if you split the difference the  
20 building is still higher than 35 ft.

21  
22 Mr. LaPlante stated the burden of proof falls on the appellant and there is conflicting  
23 information. He said that he is leaning toward the information supplied by Owen Haskell  
24 because they used more reference points. He believes with a project this large there  
25 should have been a lot more work done to insure they would be in compliance with the  
26 Ordinance.

27  
28 Mr. Walsh said he agrees with Mr. LaPlante, that with a project of this magnitude more  
29 work wasn't done and that there were significant flags that went up early on. He too was  
30 struck by the amount of backfill brought in. He feels there should have been a more  
31 accurate assessment from an engineer and the applicant has not met their burden of proof.

32  
33 Mr. Guglielmetti stated there has been very convoluted methodology and is not  
34 convinced that due diligence has been done. It is unfortunate the structure went up so  
35 quickly without any warning signals like a stick built house.

36  
37 Mr. Gulino stated that beside the Owen Haskell evidence of being in excess of height,  
38 there is also Bruce Smith's determination, and Ms. Pollard's numbers presented. He  
39 thinks there is great speculation around the stump where original grade is supposedly  
40 based due to the amount of ground moved around. He does not believe the application to  
41 meet the burden of proof showing they are less than 35 ft. He also does not agree that  
42 this particular structure could be classified as a de minimus violation because the impact  
43 is so dramatic. He stated that since the building is similar in magnitude as a commercial  
44 building, there should have been a better effort taken by applicant to prove where original  
45 grade was. He does not believe the applicant has met the burden of proof.

1 Mr. Mendelson agreed with the Board and anything he said would be excessive and  
2 repetitive. He asked for a motion.

3  
4 Mr. Gulino made a motion to approve the appeal the order to correct the stop work order  
5 imposed by the Code Enforcement Officer.

6  
7 Mr. Walsh seconded.

8  
9 0 in favor, 6 opposed, 0 abstained.

10  
11 Mr. Mendelson asked for a motion to adjourn.

12  
13 Mr. LaPlante made a motion to adjourn and Mr. Walsh seconded the motion.

14  
15 All were in favor.

16  
17 Meeting adjourned at 10:50p.m.

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21 Respectfully submitted,

22  
23 Laurie Palanza  
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