

1 **Town of Cape Elizabeth**
2 **Minutes of the April 27, 2010, Zoning Board Meeting**
3

4 **Members Present:**

5
6 Peter Black Peter Howe
7 Jay Chatmas John Thibodeau
8 Leonard Gulino
9

10 Also present were the Code Enforcement Officer, Bruce Smith, and Recording
11 Secretary, Carmen Weatherbie.
12

13 **A. Call to Order** – Meeting was called to order by Acting Chairman Jay Chatmas at
14 7:02 pm. At the start of the meeting, there were four Zoning Board members present;
15 enough for a quorum. (Leonard Gulino arrived ten minutes after the start of the meeting
16 bringing the total to five members.) The Code Enforcement Officer informed the Acting
17 Chairman that all members present must vote in the affirmative for the variance to past.
18 The decision must be based on the majority of the Board not just the members present.
19 Mr. Smith informed Mr. Duddy that he had the right to table his request until a time
20 when more Zoning Board members would be present or hear what the members had to
21 say and table the request if he felt it didn't sound like the decision would go in his favor.
22 Mr. Duddy agreed to continue.
23

24 **B. Approve the Minutes of March 23, 2010** – A motion to approve the minutes was
25 made by Mr. Howe; seconded by Mr. Thibodeau. All were in favor.
26

27 **C. Old Business** – To hear the modified request of Michael and Jennifer Duddy,
28 11 Crescent View Avenue, Tax Map U16, Lot 41 for a right sideline variance of thirteen
29 (13) feet from the required twenty five (25) feet to replace a single car garage with a
30 mudroom and two car garage with family room above at twelve (12) feet from said
31 property line. Acting Chairman Chatmas stated that was the original request. Peter
32 Black was not at the last meeting, so relevant points will be recapped for him, as well as
33 for the audience at home and other board members.
34

35 There was extensive discussion at the last meeting and the general feeling was that the
36 comparable issue, as defined by the ordinance for significant economic injury, seemed
37 to raise some doubt whether the requirements of the ordinance were met. It was
38 agreed that the request be tabled for further review and possible modification by the
39 Duddys.
40

41 Acting Chairman Chatmas asked Mr. Duddy to step to the podium, give an overview of
42 his request as well as present the modifications.
43

44 Mr. Duddy stated that they were applying for a variance to assist in constructing an
45 addition off the right side of their house. To recap, Mr. Duddy stated they were asking
46 for a variance for the side line and one to do with size. The addition they would like to
47 build includes a two-car garage and a mud room on the first floor with a family room
48 above. At last month's meeting we were talking about a large family room over the
49 entire structure, though we are modifying it this month. We are requesting a variance

1 down to 12 feet on the right side line. With the data gathered we are able to show that
2 over half of the neighborhood has a primary structure that is as close to or closer to the
3 side line than 12 feet. So there was little discussion that we would have a problem
4 meeting the side line requirement because we could show 12 or 13 houses met that.
5 The issue, as Mr. Duddy understood it, had to do with the resulting overall size of the
6 structure with a two-car garage and a mud room on the first floor and living space over
7 the entire garage on the second floor, which would have made the house the second
8 largest in the neighborhood.

9
10 Mr. Duddy mentioned that he advanced several points of view that the Zoning Board of
11 Appeals was not comfortable accepting which lead to his request to postpone the
12 decision. At the last meeting, Mr. Duddy had no drawings. Tonight he has several to
13 show the modified request.

14
15 Acting Chairman Chatmas said that was I good review of what happened. As the key
16 point in the discussion deals with comparable property, the board has historically used
17 the Zoning Ordinance definition of significant economic injury as stated: “Placing the
18 applicant for a variance at a disadvantage in the neighborhood by applying zoning
19 ordinance standards which would prevent the applicant from having a structure or
20 accessory structure comparable in size, location and number to those of other lot
21 owners in the immediate neighborhood but in no case fewer than 10 of the nearest
22 property owners.”

23
24 Over the years the board has defined comparable as the median average of the
25 neighborhood. Because of all the dictionary synonyms, the board has used the average
26 to address the midpoint. As presented last week, the Duddys’s plans clearly did not
27 satisfy that historic definition of comparable for the square footage. The Duddys
28 certainly are comparable with side line set backs. Mr. Chatmas asked Mr. Duddy to
29 address the comparable square footage aspect of the modification.

30
31 Mr. Duddy showed the drawings of the original design for the requested addition and
32 drawings of the reduced structure which would make the house smaller than six other
33 structures out of the neighborhood’s 24, making it more comparable in size. There was
34 discussion about the variance that was approved for the Duddys in 2003 (No
35 construction was ever initiated.) in regard to size and standards. Mr. Duddy spoke
36 about the size of lots and sizes of houses in the neighborhood. His lot is one of the
37 eight smallest. The homeowners with larger lots could, if they wanted, increase the size
38 of their structure without needing a variance – due to larger lot size. Mr. Duddy noted
39 that those homeowners can do in the present, what he can’t do without a variance.

40
41 Acting Chairman Chatmas stated the Mr. Duddy’s argument was a novel and valid
42 approach. Mr. Chatmas said he liked the new design and new approach. Mr. Chatmas
43 asked Mr. Duddy why the variance that was approved in 2003 was not acted upon. Mr.
44 Duddy responded that there were structural issues that had to be corrected before the
45 addition could be realized and they didn’t want to spend the additional money. Now
46 that they are ready to move ahead, building a two car garage is the best economic
47 decision.

1 Acting Chairman Chatmas commented that he was personally disappointed that the
2 Zoning Board could not approve the request last month. By the board's interpretation of
3 the ordinance on the square footage, we were unable to. Mr. Chatmas feels
4 comfortable with the proposal as it stands today and he hoped the Duddys felt
5 comfortable with these modifications.
6

7 Acting Chairman Chatmas asked for comments/questions from other board members.
8 Mr. Howe stated he concurred with the chairman and stated that the new interpretation
9 of what is comparable makes sense. To take into consideration what could happen
10 without a variance is a measurement that is acceptable.
11

12 Mr. Gulino asked Mr. Duddy to articulate his theory as to why this passes.
13

14 Mr. Duddy said focusing on the definition of practical difficulty that says significant
15 economic injury is "Placing the applicant for a variance at a disadvantage in the
16 neighborhood by applying zoning ordinance standards which would prevent the
17 applicant from having a structure or accessory structure comparable in size, location
18 and number to those of other lot owners in the immediate neighborhood ..." the
19 argument is that other lot owners in our neighborhood now because of the more
20 capacious size of their lot, can without a variance or without coming to this board, build
21 structures on their property as large or larger than what we are seeking to build.
22 And because of that, our argument is we are held at a disadvantage because of what
23 the other neighbors can do in that neighborhood because they have larger lots.
24

25 There was a discussion about density, zoning, and placement of homes on lots, and
26 greater opportunity by virtue of having a larger lot.
27

28 Code Enforcement Officer Smith commented that Mr. Duddy would be deprived of
29 something that either exists in the neighborhood or that can be done, so that he hasn't
30 the opportunity to do what others have or can do. His is a unique approach.
31

32 There was a discussion about this area being zoned a Residential "A" District. Every
33 one of these lots is grandfathered because there probably isn't an 80,000 square foot
34 lot. They are all legal, nonconforming.
35

36 Mr. Thibodeau expressed his hesitancy to approve this request because this argument
37 could be raised by any homeowner in any neighborhood of this town. I'm not sure you
38 can apply the same standard in this neighborhood that you could in another
39 neighborhood. He wondered if this board is becoming somewhat inconsistent in its
40 application of the zoning standards.
41

42 Mr. Smith advised that the board needs to ask Mr. Duddy how he knows that those
43 homes could be added onto without a variance, because that is important. Mr. Duddy
44 needs to show evidence to substantiate the basis that those homes could be added
45 onto.
46

47 Mr. Duddy mentioned that the measurements for the lots are noted in Exhibit 6. He
48 walked around the neighborhood looking at the houses, with a surveyor's measure in

1 hand. He looked at where the house was situated vis-à-vis its set backs and asked if it
2 was 25 feet from the side, could the house go up over its footprint without a variance.
3 That is the nature of his evidence.
4

5 Mr. Duddy expressed his ideas about density, open spaces and the town's
6 comprehensive plan. Mr. Smith explained the single family density theory of the town.
7

8 Mr. Duddy noted that nobody in the neighborhood has objected to his addition. The
9 neighbor on the side where the addition would be is very supportive.
10

11 There was discussion about the houses in the neighborhood that could be expanded
12 due to their lot size. Paragraph 10 in the request contains a listing; Lot 35A and Lot 54
13 were mentioned specifically. There are approximately six houses in the neighborhood
14 that have two car garages. The garage space is counted in the total square footage.
15

16 Acting Chair Chatmas surmised since the square footage does not meet the strict
17 standards of the ordinance; the non-variance view, however does – that people could,
18 without variance, expand. Mr. Duddy would meet that standard. Mr. Smith was asked
19 to comment on this approach and his interpretation of the ordinance – does this violate
20 the intent of the ordinance?
21

22 Mr. Smith stated that it was a matter of that part of it not really being in the ordinance;
23 but, if the board could write the findings of fact to support their reasoning, the board
24 could approve the request.
25

26 There was discussion that concluded: This would not apply to sideline set backs
27 because the ordinance has clear guidelines. This would only apply to square footage
28 without a variance. The footprint of a structure can not occupy more than 20 percent of
29 the lot and there is also a height restriction.
30

31 There were no further questions for the applicant from members of the Zoning Board.
32

33 Peter Hatem of 18 Crescent View Avenue came to the podium and stated he and his
34 wife live across from the Duddys; the back of their house faces the front of the Duddys,
35 half a street over. Mr. Hatem and his wife support the Duddys's application. He also
36 expressed the interest of his brother-in-law, Matthew Reale, and his wife at 17 Crescent
37 View Avenue. They are among the smallest lots in the neighborhood. Mr. Hatem
38 stated that he had personally measured both of these homes and knew that without a
39 variance they can get to the size that Mr. Duddy and his wife are proposing. So he
40 echoes the sentiments that they could get to that size without a variance. Mr. Hatem
41 also mentioned the directive of the comprehensive plan to favor density of existing
42 neighborhoods. This is the type of density the town should be encouraging. Mr. Hatem
43 urged the board to approve the application.
44

45 Acting Chairman Chatmas thanked Mr. Hatem for his comments. Seeing no one else in
46 the audience, the public discussion was closed.
47

48 Mr. Chatmas voiced his personal, subjective observation, as far as his understanding of
49 the ordinance that a side line set back or height alteration would be a significant

1 change, whereas a square footage enlargement has probably the least impact in the
2 nature of the neighborhood. Mr. Chatmas stated that he did not have a problem with
3 the application; however, he was concerned about opening up the situation for abuse.
4 He was also interested in Mr. Smith's comments, that he did not see this as a potential
5 infringement of the intent of the ordinance. Because Mr. Smith has historically been
6 very concerned and very restrictive on impact to the ordinance, as well as, opening up
7 significant issues that he would have to monitor. It's not Mr. Smith's decision to make;
8 it's ours, the Zoning Board's decision. As it stands now, Mr. Chatmas said he felt
9 comfortable with the application.

10
11 Mr. Howe said that he continues to feel comfortable, especially in regard to significant
12 economic injury that no applicant should be at a disadvantage to other homeowners in
13 the neighborhood. He thinks that this meets that standard and is in favor of the
14 application.

15
16 Mr. Black stated that he agreed with those comments. It is also important that this
17 project is consistent with what is going on in the neighborhood. He feels that this would
18 improve the neighborhood.

19
20 Mr. Gulino added that he feels this is a unique circumstance where the applicant has
21 put in evidence that is unique to the neighborhood, where he has neighboring properties
22 that are larger in square footage, and he has put in the table in evidence. That
23 establishes, in fact, he asserted the justification of this interpretation and it's not as a
24 matter of right that you hypothetically get the benefit of this concept but only if you can
25 establish the evidence to do so. Based on the limitation and given the fact that from a
26 density perspective and an esthetic perspective it's not a major expansion or out of
27 character with the neighborhood. Mr. Gulino said he was willing to support this
28 application as amended to reflect what is referred to as Supplement 2.

29
30 Mr. Black added that a neighbor, who would be most effected by this, was in support of
31 the application.

32
33 Mr. Thibodeau feels this is a neighborhood in transition. He is sympathetic in keeping
34 old neighborhoods active and vibrant and Mr. Duddy's plans are consistent in wanting to
35 do this. Exhibits 6 and 4 support the amended application. Mr. Thibodeau stated that
36 he was concerned about unintended consequences for the board even though there are
37 height and footprint limitations.

38
39 Mr. Smith stressed that it was important to get the finding of facts right and to show that
40 at least half of the inventoried property has comparable size or can have without a
41 variance and that the property is unique and not a matter of right.

42
43 Procedure and parliamentary rules of order were then discussed.

44
45 Acting Chairman Chatmas than conducted the voting of the Conclusions in regard to the
46 amended application.

47
48 1. The proposed variance is not a substantial departure from the intent of the
49 Ordinance. All were in favor.

1 2. A literal enforcement of the Ordinance would cause a practical difficulty. All were in
2 favor.

3
4 3. The need for the variance is due to the unique circumstances of the property and not
5 to the general conditions of the neighborhood. All were in favor.

6
7 4. The granting of the variance will not produce any undesirable change in the
8 character of the neighborhood and will not unreasonably detrimentally affect the use or
9 market value of abutting properties. All were in favor.

10
11 5. The practical difficulty is not the result of action taken by the applicant or a prior
12 owner. All were in favor.

13
14 6. No other feasible alternative to a variance is available to the petitioner. All were in
15 favor.

16
17 7. The granting of a variance will not unreasonably adversely affect the natural
18 environment. All were in favor.

19
20 8. The property is not located in whole or in part within shoreland areas as described in
21 Title 38, Section 435. All were in favor.

22
23 A motion was made by Mr. Black to approve the application as presented tonight. It
24 was seconded by Mr. Gulino. All were in favor.

25
26 The following are Findings of Fact:

27
28 1. The property in question is subject to the 20 percent limitation for the footprint of the
29 property on the lot,

30
31 2. The property has the usual height restrictions applicable to it.

32
33 3. At least half of the relevant properties have the ability to be expanded beyond that of
34 the subject property's request.

35
36 4. The subject property is unique and not a matter of right.

37
38 5. The subject property's proposed addition is in conformity with the density and
39 character of the neighborhood in general.

40
41 6. The property owner neighbor that will be most affected by the project gave evidence
42 that it was consistent with the neighborhood; that it was comparable.

43
44 7. The subject property is consistent with what the other houses in the neighborhood
45 are like and would enhance the neighborhood.

46
47 Mr. Chatmas informed Mr. Duddy that his variance, as modified, was approved. He
48 added "We hope you will proceed with construction this time."

1 **D. New Business – None.**

2

3 **E. Communications – None.** The next meeting is scheduled for Tuesday, May 23.

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5 **F. Adjournment** – Motion by Mr. Gulino to adjourn; seconded by Mr. Black. All were in
6 favor. Meeting adjourned at 8:17 pm.