

1 **Town of Cape Elizabeth**
2 **Minutes of the December 28, 2010, Zoning Board Meeting**
3

4 **Members Present:**

5
6 Peter Black Peter Howe
7 Jay Chatmas Thomas Kinley
8

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

12 **A. Call to Order** – Meeting was called to order by Acting Chairman Jay Chatmas at
13 7:09 pm. There were four Zoning Board members present; enough for a quorum. The
14 item on the agenda was an administrative appeal. For passage of an administrative
15 appeal there needs to be a simple majority of the members present.
16

17 **B. Approve the Minutes of September 28, 2010** – A motion to approve the minutes
18 was made by Mr. Kinley; seconded by Mr. Black. All were in favor.
19

20 **C. Old Business – None.**
21

22 **D. New Business** – To hear the administrative appeal of David and Tracey
23 Weatherbie, 14 Stonegate Road, Tax Map U50, Lot 24 of the Code Enforcement
24 Officer's decision to approve an amendment to the Stonegate Subdivision and the
25 issuance of a building permit (permit #110181 issued on November 1, 2010 for a single
26 family dwelling at 6 Stonegate Road, Tax Map U31, Lot 9D.)
27

28 Chairman Chatmas asked Mr. Smith to provide some background information. Mr.
29 Smith stated that Patricia Dunn, was representing him on behalf on the town and she
30 would give an overview.
31

32 Patricia Dunn, an attorney with Jensen, Baird, Gardner and Henry of Portland, stepped
33 to the podium. She stated she was representing the Code Enforcement Officer in this
34 administrative appeal. The appeal was filed pursuant to the issuance of a building
35 permit by the Code Enforcement Officer for a parcel of land known as 6 Stonegate
36 Road. The appeal was filed within the requisite 30-day period. The appellants have
37 raised several issues. One is whether this property should be subject to subdivision
38 review. Within this last week, concerns have been raised about subdividing the original
39 lot into three lots in the future. We are here tonight concerning the issuance of a permit
40 for one lot; nothing has been requested or issued for a third lot. Whether there will need
41 to be subdivision review for a possible third lot is not yet an issue. We are here for the
42 issue of issuing a building permit for one lot that was carved out of another property on
43 Mitchell Road, which abuts Stonegate Road.
44

45 Chairman Chatmas stated that one board member, Peter Howe, would like to make a
46 statement about an association with the property owner.
47

48 Mr. Howe stated that Mr. Pillsbury is both a neighbor of his and in his role as a real
49 estate broker has represented Mr. Howe as a buyer's broker, although he has not found

1 Mr. Howe a property yet. Mr. Howe has read the statutory and case law tests
2 pertaining to conflict of interest and stated he can serve without bias in this matter and
3 he meets the criteria for no conflict of interest under both of those statutes. He just
4 wanted this affiliation on the record.

5
6 Chairman Chatmas stated that in a small town, it is not uncommon for board members
7 to have an association with someone relevant to an agenda item. The chairman asked
8 if anyone present would like to make a statement. Hearing none, Chairman Chatmas
9 called David or Tracey Weatherbie, or their representative, to the podium to present
10 their administrative appeal.

11
12 Hugh Campbell who resides, with his family, at 24 Stonegate Road stated that David
13 and Tracy Weatherbie asked him to speak on their behalf, since they were out of town
14 on a prior commitment. Mr. Campbell stated he was also here as a property owner in
15 Stonegate, as were many others in the audience. This appeal comes as no surprise to
16 the neighborhood. They decided it was best for David and Tracey to file the appeal,
17 due to their location next to the property. He thought they also had a unique
18 perspective, a neighborhood perspective, which he thought was supported by law in this
19 case. He agreed with Mr. Smith's attorney that there were many issues. He said he
20 would try to clarify them into three issues:

21
22 First whether or not an illegal subdivision was created at 370 Mitchell Road, which is the
23 property that borders the Stonegate entrance, the south entrance.

24
25 The second issue is whether the buffer property between the two-acre property and
26 Stonegate Road is intended to be a buffer for the Stonegate subdivision.

27
28 And the last issue would be whether, if it is not intended to be a buffer, whether
29 subdivision review is required as an amendment to the Stonegate subdivision because
30 the driveways come on to Stonegate Road and cut through the buffer.

31
32 Speaking to the first issue, whether the lot at 370 Mitchell Road is in the subdivision.
33 From the neighborhood perspective, when someone wants to put two houses next to
34 your house and clear the lot, you would expect the town or the neighbor to talk to you
35 about what is happening and what are your concerns and how can we make this work.
36 He thought that was what the law supports. In this particular case, Mr. Wovkonish, who
37 owned the two-acre property with a single-family residence, on September 13th, cut
38 three deeds to himself. He split the property into an approximate half acre property with
39 the residence that existed on that property and two more properties, one about one-half
40 acre and one about one acre, that border the entrance to the subdivision. Two days
41 after Mr. Wovkonish split this property he deeded it to the developers and subsequently
42 they applied for the building permit. At the same time driveway permits were issued.
43 One of the neighbors, Mr. Stier has brought a procedure before the Town Council to
44 review that decision. There were similar issues between the two appeals. The building
45 permit was issued for 6 Stonegate, but all three deeds were submitted, as he
46 understood the public records. The whole buffer has been cleared and the acre lot has
47 been cleared. He was not sure how the one-acre lot was cleared if the building permit
48 was issued for only 6 Stonegate.

1 The town's reason that a subdivision review was not required was because there was a
2 residential exemption. The definition under the law requires that one of the lots must be
3 a single family residence, that has been the subdivider's principal residence, for a
4 period of at least five years immediately preceding the division of property. During the
5 course of searching public records, we came upon a letter from the town assessor
6 which appears to have been requested by Mr. Wovkonish, which states that a year
7 before he split the property Mr. Wovkonish was a resident of Sarasota, Florida. The
8 letter is dated September 24, 2009. Again, the statute required uninterrupted primary
9 residence at the property.

10
11 Second argument is the deed to the buffer property (area identified on map) was part of
12 the subdivision. The property has been maintained by private funds from the
13 neighborhood for over two decades. That area is now cleared and two driveways run
14 through it. The deed specifically made the grant of the Stonegate Road subject to the
15 covenants and restrictions of Stonegate neighborhood. As part of those covenants and
16 restrictions there is the Stonegate Homeowner's Association, which is charged with
17 maintaining that buffer. If you look to the subdivision law, it requires that buffers be
18 created where there is a subdivision. That entrance is vital to the 65 families that live in
19 Stonegate. One family would go by that entrance 1,000 times a year. So it is a very
20 vital, important part of the neighborhood. The association treasurer, for the last three
21 years has a budget of 10 to 12 thousand dollars that we use on all the property, buffers
22 and landscaping in the neighborhood to continue the aesthetics. The town right-of-way
23 to maintain the roads is probably about 10 to 15 feet on that parcel and the remainder of
24 the property is the buffer created under subdivision law.

25
26 Lastly, if you do not find that this property was for the use and benefit of the
27 neighborhood and maintained as such, we submit this is an amendment to the
28 subdivision of Stonegate to have two driveways coming out onto Stonegate Road which
29 encompasses the subdivision. Let us know if you don't think this property was to be a
30 buffer for the neighborhood.

31
32 These are our three issues. There are many residents from the neighborhood here
33 tonight. Mr. Campbell asked if there were any questions.

34
35 Chairman Chatmas had some questions. Regarding the first point, it was his
36 understanding that Mr. Wovkonish lived on the property for a number of years. Mr.
37 Campbell responded the deed is dated 1972. Dr. Chatmas said that it was his
38 understanding that Mr. Wovkonish lived there until just prior to the sale. Mr. Campbell
39 said they initially thought the intent of the statute was not being met because he was not
40 planning to continue to live there. Then they came upon the assessor's letter, which
41 clearly states he was a resident of Sarasota, Florida, a year before that. The statute
42 says uninterrupted for five years.

43
44 Chairman Chatmas stated that he was not sure what the residency requirements are for
45 Florida; but for Maine, if he resided in Maine for six months and one day; he would be
46 considered a resident of Maine. But we don't know that; we could ask him for an
47 affidavit of residency. That is not the issue for tonight. For clarification, if he was a
48 resident of that property, he would have a right to split off two additional lots from his
49 homestead. This only becomes relevant if he was not a resident for six months, in that

1 the third lot would not be eligible to be created. He could only take his one lot and split
2 off another lot, as long as that lot was conforming. Apparently these three lots are all
3 conforming. All have 100 feet of frontage on a town road and meet the square feet
4 requirements. The issue before us tonight is whether the building permit was issued
5 properly. Whether he was or was not a resident, the building permit appears to be valid.
6

7 As far as whether clearing can begin on a site without a building permit, that is not our
8 jurisdiction.
9

10 The second point: the developer has apparently put in a construction drive access to
11 get to the site to start construction.
12

13 There was discussion about clearing of the third lot and the width of Stonegate Road
14 (about 30 feet). Mr. Smith said that the deeded area was 135 feet wide, with 50 feet of
15 right-of-way, and was 80 feet from the property line. Mr. Campbell stated trees and
16 brushes were removed; however, there was a selection process with the Director of
17 Public Works being involved. More discussion about the vegetation removed concluded
18 it was mostly natural with maybe a few rhododendrons.
19

20 Chairman Chatmas asked if there were any restrictions recorded for a buffer for
21 decorative or restrictive purposes when the road and right-of-way was deeded to the
22 town. Mr. Campbell replied the language of the deed states that it is subject to the
23 Declarations of Covenants, Conditions and Restrictions recorded in the registry, which
24 are the Stonegate Covenants and Restrictions. They were also reliant upon the
25 Subdivision Regulations, Section 16-3-1 Subdivision Design. Article 3 of the Covenants
26 of the Stonegate Association states that the association is responsible for maintaining,
27 repairing and replacing the stonewalls and landscaping within the road right-of-way and
28 such maintenance is not the responsibility of the Town of Cape Elizabeth. Article 5
29 states the provisions of Article 3 shall not be amended without the approval of the Cape
30 Elizabeth Planning Board. The practice, for the last twenty years has been for the
31 homeowners' association to maintain the vegetation throughout the development.
32

33 Dr. Chatmas said he understood that driveways can traverse city owned land.
34 Since the lot is accessed from Stonegate Road and the buffer is owned by the town, the
35 property owners have the right to traverse that area.
36

37 Mr. Campbell said they maintain that the Subdivision Regulations should have more
38 weight because this area is a buffer for the development.
39

40 Mr. Black asked if the buffer was described on Exhibit A of the subdivision plan
41 submitted by Rachel Stamieszkin. Mr. Campbell did not know. Mr. Black asked if any
42 stonewalls or landscaping were removed by the construction project. Mr. Campbell
43 replied, that the stonewall is still there. As far as exactly what vegetation was removed,
44 others would need to be consulted.
45

46 Mr. Black asked if anybody had looked at the deed to see if there were any deed
47 restrictions on the deed granting the right-of-way. Mr. Campbell replied that the
48 restrictions were subject to the covenants of the neighborhood and the subdivision law
49 that applies to buffers.

1
2 Mr. Kinley asked: Are you saying that because they are cutting a driveway across the
3 buffer, then the whole parcel of land that they are developing should have been part of
4 the covenant as well? Where did they violate the covenant by putting a driveway across
5 it? Mr. Campbell replied by destroying the landscaping in the buffer. And you have two
6 houses that are not subject to the covenants and restrictions as the other 65 houses.
7 Also the destruction of uniformity sought to be created by the subdivision. This area is
8 an integral part of the neighborhood.

9
10 Mr. Howe remembered that when the subdivision initially began, the developer stripped
11 the property and then landscaped the lots as part of the development process. Couldn't
12 this developer do the same thing to make this fit in with the neighborhood? Mr.
13 Campbell said the lots that were stripped were intended to be developed and were
14 subject to the covenants and restrictions. This lot was intended to be a buffer. The
15 town helped plan this development and this is the opposite – it is not being planned. He
16 submitted that it is not appropriate to strip this land because of its intended purpose. Do
17 we have to go before the Planning Board, so that we're not responsible to maintain it?
18 He saw it as essentially becoming part of their front yards.

19
20 Mr. Black asked if the driveways had gone out to Mitchell Road, would there be a
21 problem with the building permit? As he saw it, this does not appear to be a building
22 permit issue but a driveway permit issue. The Code Enforcement Officer was presented
23 with a valid driveway permit that he does not have jurisdiction over. He just needed to
24 see whether the developer's building application was proper. So, isn't your issue with
25 the placement of the driveway? Isn't that what you need to challenge?

26
27 Mr. Campbell replied yes, this is a little messy. This is our issue, it's attached to the
28 building permit file, it is part of the site plan, it's part of the driveway permit. He
29 understood about the duties of check and balances and the duties of each department.
30 But the Planning Board created this neighborhood and he submitted this should be
31 consistent with the plans for the neighborhood.

32
33 Chairman Chatmas stated his personal opinion, as a resident, not as a board member,
34 it would aggravate me if a developer came in and took down trees and disrupted my
35 previous natural entrance to my neighborhood. That personal opinion aside, as the
36 board, we are representing you, trying to make the appeal work; we are on your side.
37 We are not running defense for the Code Officer. We are here to hear your appeal and
38 if it works we want it to work. He was having trouble finding a legal reason that the
39 permit was issued incorrectly. Residency status and the number of lots allowed do not
40 affect the building permit in any way. The lot that is being built on meets all state and
41 local code requirements for a conforming lot. Regarding the right-of-way, since that 134
42 feet was deeded to the town, it was his understanding that a lot owner has the right to
43 get to his lot and if that requires putting a driveway through a previously vegetative area
44 that is perfectly acceptable in our town. He would certainly expect any developer to
45 dress up his front yard to sell the property. Again, that does not apply to the building
46 permit and that's our only object here. Was the building permit issued in error? So far,
47 he did not see any evidence that it was.

48

1 The last point, to be made by Mr. Campbell, would be an amendment to the subdivision.
2 This has to do with Section 16-2-5 of the town ordinance. Significant changes to the
3 buffer could be addressed by the Planning Board and this should trigger Planning Board
4 review.

5
6 Chairman Chatmas asked the town's lawyer, Mr. John Wall, to step to the podium to
7 comment.

8
9 John Wall of Monaghan Leahy LLP, said he was here to represent the Zoning Board of
10 Appeals in this matter. It was his opinion that in absence of express restriction in either
11 the deed or the covenants, if they are incorporated, that prohibits the town from acting
12 with this parcel, as it would otherwise act with any other deeded parcel to the town.
13 That the town has the right to, among other things, allow the driveway opening, with
14 regard for this particular lot. Otherwise what you are doing with it is a conveyance,
15 which is subject to rights, which are reserved by the owners of the subdivision. They
16 have the right to go in and do certain things and the town does not have the
17 responsibility perhaps to maintain. But there is nothing in either that provision or the
18 deed itself, which says that the town is restricted from either opening a portion of the
19 vegetation to allow a driveway or some other type of action.

20
21 Mr. Campbell asked for clarification on whether this was an amendment change that
22 would trigger Planning Board Review.

23
24 Mr. Smith stated that he did quite a bit of research of the subdivision. The map on the
25 right shows buffers, wetland buffers, and open space, but it does not show any
26 protection for the right-of-way. He thought that 134+ feet that are shown here was
27 probably part of the original configuration of the lot and he imagined the developer did
28 not find any practical use for that, so he deeded the whole 134 feet instead of having a
29 strip of land that was not for other uses. Although, he could not find the minutes, he
30 could not find anything in the plans that even mentions this 134 feet. If you look at the
31 first page of the covenants, they state that "Now therefore, declarant hereby declares
32 that the property described above, excepting Lot No. 52, that area shown as "Common
33 Open Space" on the Plan, and those areas shown as roads on the Plan shall be held,
34 sold and conveyed subject to the following easements, restrictions, covenants, and
35 conditions..." It was clear to him that the road system did not have anything to do with
36 the covenants. It would be very unusual for a road that is to be turned over to the town
37 as a public way to be included in the covenants. If it were a private road, the
38 association would have taken that on when the developer left.

39
40 As far as Mr. Mally's reliance on me for driveways, Mr. Smith said, he does ask if it is
41 clear of any other approvals before he issues a driveway permit. He asked if there
42 needed to be any kind of review by Planning Board and Mr. Smith replied no. He
43 issued a driveway permit on this right-of-way, just as he would have done on any right-
44 of-way, just as he has done thousands of times. It just happens to be a wide right-of-
45 way, and that's where the concern is. The town would not get into a situation where
46 they would have to rely on somebody else to grant authorization to maintain the area
47 unless it was agreed to in the deed. Mr. Smith said he did not see that.

48

1 As far as vegetation being cleared on the lot itself, anybody has a right, regardless of
2 division, to take all the vegetation off their own property. There is no law saying they
3 can't, unless there is a wetlands issue or some other issue that disallows that. So, Mr.
4 Smith said, he didn't think it was an issue.
5

6 There is a landscape plan that clearly shows the areas adjacent to Mitchell Road where
7 the signage and a rock wall are. Mr. Smith said, it really doesn't cover anything beyond
8 the rhododendron that is on the end; and that is still there. He didn't believe the
9 landscape plan had been violated at all.
10

11 Chairman Chatmas asked about Lot No. 52, whether it coincides with the 134 feet. Mr.
12 Smith said he wasn't sure what Lot 52 was; it may have been property outside the
13 Stonegate realm. Mr. Campbell added the covenants were recorded two years before
14 the deeds of the town. So the deeds are a subsequent expression of the party's intent.
15 The covenants say this is excluded, but you have deeds years later that say they are
16 subject to the covenants. He submitted that they are subject to the covenants; it is
17 clearly in the deed. So, it must mean something. What does the town think it means?
18

19 Mr. Smith said a buffer usually serves some kind of purpose, such as a site plan
20 shielding a business from a light, or parking area. If there is a buffer in a subdivision it
21 should serve some purpose. He was not sure why the Planning Board would be
22 concerned about a buffer to a vacant area that is not unlike what was there to begin
23 with. He could understand the landscape area, that is typical. There is no indication in
24 the files, that he had reviewed four times, to show that's what the Planning Board
25 wanted.
26

27 Chairman Chatmas asked if putting a driveway from Stonegate Road to a lot requires
28 Planning Board approval. Mr. Smith responded not on a public right-of-way. If the
29 developer had put in even a three foot strip of land as a walking path, that he wanted to
30 hold on to control of or pass along to the subdivision, then we would have to deal with
31 him because he owned the strip. But there is nothing to indicate that was intended.
32 Chairman Chatmas asked if there were no restrictions, then Planning Board review is
33 not necessary to put in a driveway; is that correct? Mr. Smith replied that planning
34 boards do not have to review driveways on right-of-ways.
35

36 Chairman Chatmas inquired of Mr. Campbell from what you have indicated to us, other
37 than the term buffer, there appears to be no other restrictions on that land; is that
38 correct? Mr. Campbell referred back to Section 16-2-5; why is running a driveway onto
39 Stonegate Road, not an amendment to Stonegate under Section 16-2-5, which
40 addresses a public way. Section 16-2-5 says amendment to the subdivision requires a
41 Planning Board review.
42

43 Mr. Smith said he believed the reason that wording was there, was to clarify what a de
44 minimus change was from what would require something more than a de minimus
45 change; so that there was clear guidance as to what a de minimus change was, and no
46 more than that.
47

1 Mr. Campbell contended that this is not a de minimus change but a significant change
2 because the guidance is we're just putting in a driveway and chopping down a couple
3 trees. He felt this was not a de minimus change and required a Planning Board review.
4

5 Chairman Chatmas asked Mr. Smith if there were any restrictions for a developer
6 clearing trees on town property. Mr. Smith said it was pretty much common practice,
7 over the years, for individuals to do what they want, as long as it is not a safety, sight
8 distance, or where to put the snow issue. As long as none of that has been
9 compromised, people put up fences, rock walls, vegetation, and maintain that area
10 knowing the town may ask them to undo whatever they've done. Usually the area is
11 only 15 or 20 feet, here there is 80 feet.
12

13 Mr. Campbell asked if any other subdivision in town has a driveway running through
14 their entrance. He feels this requires different analysis.
15

16 Mr. Smith replied that the Planning Board is very sensitive when they make lots that
17 may be beyond the subdivision that the lot has a right to come off that road with a
18 driveway. They did not do that here because the frontage was already there. If that lot
19 had been a back lot without frontage, there could have been a requirement that a 50-
20 foot area be set aside access for future development.
21

22 Mr. Campbell asked if they wouldn't be sensitive to a change in the subdivision under
23 Section 16-2-5.
24

25 Mr. Kinley asked Mr. Campbell if he felt that the building permit made changes to the
26 subdivision. Mr. Campbell replied yes. Mr. Kinley asked if the building permit gave the
27 driveway permit. Mr. Campbell said that was a legal issue. Mr. Kinley asked if the
28 buffer, driveway issue was before the Town Council right now. Mr. Campbell said it
29 was. Mr. Kinley pointed out that that was a separate issue from the building permit.
30 Mr. Campbell was asking this board to say that there was a violation of the subdivision
31 because of the building permit, when the lot that the building permit was given to has
32 nothing to do with the subdivision.
33

34 But the access does, replied Mr. Campbell. Mr. Kinley stated that the building permit
35 did not give access to the lot, which takes it out of our jurisdiction. Mr. Campbell said if
36 you take the access away, the lot is outside the subdivision.
37

38 Mr. Smith recapped the three issues: One is the lot division, two, the issuance of a
39 building permit, and three, the amendment to the subdivision.
40

41 After some discussion of the above, Mr. Black summarized the task before the board
42 was to determine if adding the two driveways was a change from Exhibit A, the original
43 Subdivision Plan for Stonegate, filed by Rachel Stamieszkin.
44

45 It was agreed that the Section 16-2-5 was applicable.
46

47 There was discussion about Lots 9 A, B, C on town map U50.
48

1 Mr. Campbell stated that this did not have anything to do with the covenants. It has to
2 do with access off of Stonegate Road.
3
4 The board discussed how an amendment, if needed or not needed, would impact the
5 building permit. Mr. Campbell drew the board's attention to paragraph 12 (b) of the
6 Weatherbie's appeal.
7
8 Chairman Chatmas asked the town attorney his interpretation of Section 16-2-5 (b) (2)
9 and about the rule of adverse possession as far as the homeowner's right concerning
10 putting a driveway across that strip.
11
12 John Wall took the podium and said that he did research on this point expecting to find
13 clear law on what constitutes a change to a final subdivision plan, in the context of an
14 abutter to a subdivision requesting entry into a public road; whether that request
15 constitutes a change to an approved final subdivision plan. Finding none, it would be
16 his opinion that such a request by an abutter to a subdivision, would not implicate a
17 change to a final subdivision plan. Therefore, the issue being raised is obviated
18 because we are not talking about a change to a subdivision plan.
19
20 Mr. Wall continued by saying that adverse possession issues or prescriptive use do not
21 apply against municipalities. Since we are talking about the right to access a lot that is
22 outside the subdivision, attempting to access a public roadway, he did not see that it
23 was changing any legal rights with respect to the public way. Therefore it would not be
24 precluded as a non-de minimus change.
25
26 Chairman Chatmas asked for clarification as to whether an amendment was required.
27 Mr. Wall said he believes it would not. Dr. Chatmas surmised that it would make sense
28 that an owner of a buildable lot of record would be able to have access to that lot from a
29 public right-of-way. Mr. Wall replied that was a fair observation.
30
31 Mr. Howe offered that he would find it strange that the town could actually give up a
32 taxpayer's rights on a taxpayer-supported street to a private association. It seems the
33 association wants it both ways: They want the taxpayers to pay for and maintain the
34 road while maintaining their own restrictions on that road. That just doesn't seem right.
35
36 Chairman Chatmas asked if there were any additional comments from board members.
37 Finding none. Dr. Chatmas said he'd like to take comments from the audience; first,
38 those in support and then those in opposition to the administrative appeal.
39
40 Bob Stier, of 9 Rock Crest Drive, just around the corner from the entrance of Stonegate,
41 wanted to revisit what is wrong with issuing the building permit. Put aside the issue of
42 the driveway, which is the subject of his own appeal before Town Council. The
43 residents of Stonegate simply want their expectations to be honored, that the law will be
44 followed. Maine Statute, Title 30A, Section 4406, Subsection 1 says no person may
45 sell, lease, develop, build upon or convey for consideration or offer or agree to lease,
46 sell, develop, build upon or convey for consideration any land or dwelling unit in a
47 subdivision that has not been approved by the municipal reviewing authority. Was this
48 in a subdivision? There can be no doubt that the land that Wovkonish had was divided

1 into three parcels. Under the law that was a subdivision. And a subdivision must be
2 approved before it can be built upon.

3
4 Chairman Chatmas stated that we have already established that in the State of Maine a
5 homeowner that has established five years of residency on the property can split off two
6 lots. No one challenged that statement.

7
8 Mr. Stier said there were some nuances to that. Nearly a year before Wovkonish split
9 his lot, he asked the town to remove his homestead exemption, as he was a resident of
10 Sarasota, Florida. Chairman Chatmas said that was already addressed. Again, we are
11 just addressing the building permit.

12
13 Mr. Stier stated that there are exceptions to the definition of subdivision. Title 30A
14 Section 4401 was mentioned, concerning residency for five years.

15
16 There was a discussion concerning number of lots and whether the exception applies.
17 Mr. Stier contended Planning Board review was required before a building permit could
18 be issued.

19
20 Joe Stevens of 7 Granite Ridge Road addressed Town Ordinance Section 16-2-5 (a)
21 Scope: Any change in an approved final subdivision plan goes back to the Planning
22 Board. Accessing Stonegate Road constitutes "any" change to the subdivision plan.
23 He also believes that removing the landscaping and buffering constitutes "any" change.
24 Stonegate Road, though deeded to the town, is part of the original subdivision, clearly is
25 any change to the approved plan. De minimus changes can also go before the
26 Planning Board and with such interest maybe its not a de minimus change. Mr. Stevens
27 did not think case law could provide an answer to issue. The statue says "any" change
28 should go before the Planning Board. He voiced that this should.

29
30 Mr. Wall responded to a question brought by the Chairman, that these lots were not in
31 the original subdivision plan. Mr. Smith agreed. Exhibit A does not show the lots
32 included.

33
34 Piotr Stamieszkin of 5 Granite Ridge Road questioned whether the two new lots were
35 part of Stonegate. He noted that the developer has marketed the properties as a new
36 development in Stonegate. Consequently, if it is marketed as a new development the
37 intention is that it is a part of Stonegate; therefore it is an amendment to the subdivision.
38 Therefore it should go to the Planning Board. If they had just been marketed as just two
39 lots an argument would not exist.

40
41 Carolyn Homa of 4 Rock Crest Drive stated that this change will adversely affect her
42 investment in Cape Elizabeth. Each lot in the subdivision was carefully planned, giving
43 a park like feel with the green belt wrapping around between the properties. She said
44 the residents are prohibited from removing trees greater than eight inches in caliper.
45 They are also prohibited from cutting within 15 feet from another lot or 30 feet from a
46 streetlight. Article 5 says these restrictions should not be amended without the approval
47 of the Planning Board. She feels like the town is not here to protect us.

48

1 Chairman Chatmas said that the restriction on cutting trees was part of a subdivision
2 requirement and that does not apply town wide unless you are in a shoreland protection
3 zone.

4
5 There was a discussion about cutting trees.

6
7 Patricia Brigham of 34 Rock Crest Drive asked how can issues like this be resolved?
8 She attended the Town Council meeting that adjourned to get more information. The
9 residency status still is not clarified. This is a change to the entrance. We did not get
10 notification that this was happening. If the driveway could have been off Mitchell Road
11 we would be home by now. We have been paying to maintain town owned property
12 with private funds. The property is being marketed as part of Stonegate. Ms. Brigham
13 suggested everybody work/talk together.

14
15 Chairman Chatmas repeated that the appeal to the Zoning Board was to determine if
16 the building permit was issued appropriately.

17
18 Daryl Negele of 35 Rock Crest Drive stated the entrance is absolutely ruined and she
19 was embarrassed this holiday season when her guests commented on the entrance.
20 The town has destroyed the entrance and she is disappointed. Whatever house is built
21 should conform to the standards of Stonegate. She thinks this is unfair.

22
23 Chairman Chatmas observed three side issues that were brought up, and have been
24 mentioned before, none of which pertain to the issue before the board tonight; however,
25 they are points: Why were more trees than needed to create a drive taken down?
26 Second, why are these being marketed as Stonegate properties? And third, why was
27 the driveway put off Stonegate Road, not Mitchell Road? If he were a homeowner, he
28 would also ask those questions. The Zoning Board does not have jurisdiction over any
29 of those, because that is not the issue. The issue is one, singular item, was the building
30 permit issued correctly or incorrectly.

31
32 Thomas Brigham of 34 Rock Crest Drive asked for this to be looked at with some
33 common sense. Once you turn onto Stonegate Road and pass the Stonegate sign,
34 these properties are being positioned as being part of the Stonegate Subdivision. They
35 look like they are part of the Stonegate Subdivision. They ought to be treated that way.
36 They were not part of the original subdivision plan so they should be looked at as if they
37 are an amendment to that plan, whether technically part of the plan or not. This should
38 have been considered prior to issuing the building permit.

39
40 After finding no additional speakers in support of the appeal, the Chairman called, at
41 9:40 PM, a five-minute adjournment.

42
43 The meeting reconvened at 9:46PM.

44
45 The Chairman called for those in support of the appeal.

46
47 Tom Auger of 388 Mitchell Road, on the corner of Mitchell and Stonegate, came to the
48 podium. His house is directly across from the one being built. His backyard faces that
49 house directly. Three years ago he had a natural buffer on the Stonegate Road side of

1 his property that was 200 feet long, 20 feet wide, and 8 feet high during the summer,
2 which isolated his yard. He was approached by a person from Stonegate, who asked if
3 they could selectively cut out the bittersweet. After a discussion, he said he was OK
4 with the removal of just the bittersweet; he did not want his buffer destroyed. He came
5 home from work a week later to find that a bulldozer had run down the entire length of
6 his yard, totally wiping out that buffer. So he asked how they could not care about his
7 buffer, but the buffer across the street was very important.

8
9 He said no reason was given and that they acted very surprised that a bulldozer had
10 been bought in. He was very angry. He called the police department and filed a police
11 report. To be a good neighbor, he talked to them about putting up a stockade fence.
12 They said they wanted it to be left natural. So he said he'd buy some trees; which he
13 did. They said they would buy some trees. He spent about \$1,000 putting in several
14 trees and bushes, but feels he'll never get his buffer back. They told him they'd put
15 some trees in; they put in about 15 small plants, which do not help the buffer. They told
16 him they would put down some mulch; it's been left like that for two years. This buffer
17 was on town land. The bulldozer cut up some of his lawn and that was never repaired.

18
19 Rachel Stamieszkin of 5 Granite Ridge Road stated she was the person who knocked
20 on Tom's door to ask if they could clear the invasive bittersweet because it was killing
21 the trees. Tom thought that was fine. We hired a contractor who came in with a
22 bulldozer, which was a little surprising. He encroached on Tom's property about two
23 feet long and one foot wide. We worked with Tom to replant. We spent more than
24 \$2,000 on those replantings. We could not afford anymore; we had depleted our funds.
25 So it wasn't until the next year that we mulched. We planted with many rhododendron
26 plants, eight-foot high hemlocks, we all donated lilacs into that area.

27
28 The two substantive things Mrs. Stamieszkin heard tonight about building permits are:
29 It seems that building permits are not to be issued on subdivided properties before
30 going to the Planning Board if there are three properties that constitute a subdivision.
31 There are actual deeds recorded for each of those three properties. The building permit
32 should not have been issued until the legality of the properties was substantiated.
33 Second, she thinks that the changes made at the entrance with the two new lots and the
34 driveways and trees cut down do constitute a change to our subdivision. The road, the
35 entranceway and the buffer were all approved as part of the subdivision and we would
36 ask that this be sent to the Planning Board as a subdivision change.

37
38 Chairman Chatmas asked Mr. Smith to respond to the first point. Mr. Smith said if we
39 find that he didn't meet the standards, there is no question, it will go before the Planning
40 Board. The building permit can still be issued regardless if the issue has to go before
41 the Planning Board or not. The attorney has already gone on record stating that fact.

42
43 Patricia Dunn stated that the fact that there may be an issue with the third lot, does not
44 preclude the issuance of a building permit on one lot, because there is a right to
45 establish one lot. Until we get to the issuance of a building permit for the third lot there
46 is not an issue to be addressed. Yes, the deeds may have been assigned, but at this
47 point there is only one lot for which a building permit has been requested. The owner
48 has the right to cut off one lot. The ultimate configuration is dependant upon what Mr.
49 Smith's investigation determines. Ultimately, this may be just two lots or may be the

1 requirements have been met to meet the exemption under the statute, that is three lots
2 that don't require subdivision. She believes there is case law to that effect.

3
4 David Lourie of 189 Spurwink Avenue in Cape Elizabeth, an attorney representing Early
5 Bird Group, that is Steve Richard and Rusty Pillsbury, came to the podium and said we
6 are here to answer your questions. The degree of cutting was overstated; there may
7 have been six to eight actual trees taken out. Most of what was taken out was
8 bittersweet and other invasives, which should be removed.

9
10 Buffers are typically to protect the neighboring property from development. Wovkonish
11 lived on this property for about 35 years. He is in Thailand right now so he is not
12 available to answer your questions or give an affidavit. We did get a statement from his
13 lawyer about his residency. He said he continued to live there until September 30,
14 2010. That's when he packed up his wife and family and vacated the residence for the
15 first time. He never actually lived in Florida in 2009. He brought property down there,
16 but never actually moved until 2010. When we need a third building permit we will
17 supply whatever paperwork is required. After purchasing the Sarasota property, to
18 avoid any state law conflicts, Mr. Wovkonish withdrew his Cape Elizabeth homestead
19 exemption. He never resided in Florida until his arrival in October 2010.

20
21 Before the Stonegate development went in, Wovkonish had a nice wooded lot, until the
22 road was built behind, opening up his land, in a negative sense. It put a major
23 intersection very close to his existing driveway. Because of sight distance, you cannot
24 put a driveway to this new lot off Mitchell Road without destroying the old Wovkonish
25 residence. Long before homes were built in Stonegate, Mr. Wovkonish had the
26 reasonable expectation that he could divide his lot up and connect to this new road.

27
28 The courts do not read into deeds for intent. Restrictions must be spelled out and they
29 are interpreted narrowly, in favor of the use of property. This is an appeal. The
30 appellants have the burden of proof. Mr. Lourie read a statement faxed from
31 Wovkonish dated September 24, 2010, stating that he had lived at 370 Mitchell Road as
32 his principal residence from August 4, 1972 until September 30, 2010. After purchasing
33 the Sarasota property, to avoid any state law conflicts, he said he withdrew his Cape
34 Elizabeth homestead exemption. He never resided in Florida until his arrival in October
35 2010. In creating two additional lots for his Cape Elizabeth residence he worked closely
36 with town officials and took only steps that had been reviewed by the town.

37
38 Mr. Lourie said he spoke with Mr. Bob Malley who agreed that another driveway could
39 not be put in between the existing driveway and Stonegate Road because of sight
40 distance. Drawbacks of a shared driveway were noted.

41
42 Mr. Smith said Wovkonish and his attorney, Mr. Charles Kahill, knew the requirements
43 before the lot was divided.

44
45 Rusty Pillsbury of 76 Two Lights Road stated he was half of the Early Bird Group.
46 Steve Richard was his business partner. He stated he wanted to clear up a few points
47 mentioned tonight. We barely pulled any shrubs or trees off the first lot, the one that is
48 being constructed. And we did not touch the second lot. We took some trees out of the
49 so-called buffer, at the instruction of Bob Malley. We took approximately six to eight

1 tree downs that were being choked out by the bittersweet. We are not done yet; we
2 pride ourselves on the quality of our properties. We are not done with the landscaping
3 or the driveways. It will look just fine. It is almost offensive for people to say these
4 designs are inferior. He has been a state certified property appraiser for 25 years and
5 does not believe these homes will bring down the value for the other residents. We
6 tried to compromise with the association; they are just being unreasonable. The
7 property was for sale for at least two years. Anyone could have bought it. The
8 association could have bought it and controlled it; they didn't. This property is not part
9 of Stonegate, it is just accessed via a public road, Stonegate Road. We will restore the
10 buffer area with non-invasive landscaping; it will be presentable.

11
12 Mr. Black asked about the MLS listing that refers to Stonegate. Mr. Pillsbury replied
13 that it's just a reference for the neighborhood, like Broad Cove. Mr. Pillsbury said they
14 offered to join the association; the association does not want this house in the
15 association or associated with Stonegate Road.

16
17 Mr. Lourie returned to the podium to say that if his clients had to go through the expense
18 of the subdivision process there is enough property to have four lots not just three.

19
20 Not finding any more comments the public discussion was closed. Chairman Chatmas
21 asked for comments from the board members.

22
23 Chairman Chatmas stated he could see no clear legal reasons why this permit should
24 not have been issued. He understands all the points that were brought up and
25 sympathizes with those present. From the code standpoint/legal standpoint he can see
26 no clear evidence why this appeal should be approved. We can't make decisions based
27 on personal opinions. Based on the arguments of both sides, this building permit was
28 issued properly.

29
30 Mr. Black stated he could see why there was concern about this site. The duties of the
31 board are very limited. We just have to review the Code Enforcement Officer's job for
32 mistakes. Regarding the subdivision issue, it seems that he did a reasonable
33 investigation. He asked around, he consulted town records, he confirmed that Mr.
34 Wovkonish lived on this lot on Mitchell Road since the 70's before dividing into two
35 additional lots. That seemed to be a reasonable amount of evidence to conclude that it
36 was proper to divide these lots without going to the Planning Board. On the buffer
37 issue, the disconnect is looking at the practical reality versus the legal reality. What the
38 ordinance tells us to do is consult the subdivision plan, not the subdivision as it may
39 have existed or developed over the years. When he looks at the subdivision plan, the
40 Wovkonish lot is not in the plans; so it is not part of the subdivision. It may feel that
41 way, but it is not part of the subdivision. The subdivision plan does not refer to any
42 landscaping or easement for a buffer; it just looks like a road. The subdivision plan
43 does not suggest that it should be reserved for landscaping. When he drove to the site
44 today he saw that the signs and the stonewall that are referred to in the subdivision's
45 covenants are still there and the landscaping is still there. There is some natural
46 vegetation that has been removed; but it is not clear to me that that violates the
47 covenants. He does not see that the changes being made are changes to the
48 subdivision plan.

49

1 Finally, Mr. Black said that the Code Enforcement Officer was presented with a valid
2 driveway permit issued by Public Works. There were a lot of issues involved with that
3 decision. The Code Enforcement Officer did not have to rethink the driveway issue.
4

5 Mr. Howe stated that the permit was properly issued.
6

7 Mr. Kinley stated he was looking for an opportunity or a door to be opened that there
8 was a case; however, he does not believe that that occurred. He stated that he
9 believes that the permit was issued appropriately. He doesn't believe the subdivision
10 statue was violated by the two driveways as much as he would like to side with the
11 Stonegate folks; he's not going to be able to tonight.
12

13 There was a discussion about stating motions in the affirmative.
14

15 Mr. Kinley moved to approve the administrative appeal of David and Tracey
16 Weatherbie, 14 Stonegate Road, Tax Map U50, Lot 24 of the Code Enforcement
17 Officer's decision to approve an amendment to the Stonegate Subdivision and the
18 issuance of a building permit (permit #110181 issued on November 1, 2010 for a single
19 family dwelling at 6 Stonegate Road, Tax Map U31, Lot 9D.) Mr. Howe seconded it. No
20 board members were in favor. All board members were opposed. Chairman Chatmas
21 stated that the administrative appeal was denied; we deem the building permit to be
22 valid.
23

24 A ten-minute break was called.
25

26 FINDINGS OF FACT: 27

- 28 1. The current owner of 6 Stonegate Road (Tax Map U31, Lot 9D) (the "Property") is
29 Early Bird Group, LLC ("Owner"). Graham Pillsbury acts as the owner's authorized
30 member.
31
- 32 2. The Property is bounded on its westerly side by Mitchell Road and on its southerly
33 side by the Stonegate Road right-of-way.
34
- 35 3. On October 28, 2010, the Town's Public Works Director approved a driveway permit
36 connecting the Property with Stonegate Road.
37
- 38 4. On November 1, 2010, Code Enforcement Officer Bruce Smith issued a building
39 permit for the Property (Permit No. 110181), for the construction of a single-family
40 residence on the Property.
41
- 42 5. On November 30, 2010, David and Tracie Weatherbie of 14 Stonegate Road (the
43 "Appellants") filed an appeal of the building permit.
44
- 45 6. The Appellants' home is located within the Stonegate subdivision, the plan for which
46 was recorded in the Cumberland County Registry of Deeds in three phases on June 5,
47 1986, September 23, 1986, and November 9, 1992.
48

1 7. Stonegate residents William J. Orcutt of 18 Stonegate Road, Hugh Campbell of 24
2 Stonegate Road, Thomas and Patricia Brigham of 34 Rock Crest Drive, and Jerry and
3 Addy Harkay of 23 Stonegate Road have submitted statements in support of this appeal
4 claiming that the approval of the subject building permit will adversely affect their
5 investment in and reliance upon the Stonegate subdivision approval. Rachel
6 Stamieszkin, President of the Stonegate Homeowner's Association, submitted a detailed
7 statement in support of this appeal.

8
9 8. Notice of this appeal was provided to the Owner on December 15, 2010.

10
11 9. Zoning Board of Appeals member Peter Howe disclosed at the outset of the hearing
12 that the current owner of the Property is his neighbor and has worked with him in the
13 past as a buyer's broker. He indicated that he did not believe he had a conflict of
14 interest under Maine's statutes or under the case law. In addition, he indicated that he
15 felt he could be fair and impartial notwithstanding his prior relationship with the owner.
16 The acting Board chair expressed his view that he did not see any reason for recusal
17 and none of the other Board members expressed a different view. The Board chair
18 invited public comment on the issue and no one present objected to Mr. Howe's
19 participation as a Board member or sought his recusal.

20
21 10. The Appellants presented three arguments in support of their appeal: (1) that the
22 Property is part of an illegal subdivision upon which a building permit may not issue; (2)
23 that the changes to the "buffer" prompted by the development of the lot were precluded
24 by the documents that created the subdivision; and (3) that the issuance of the building
25 permit constituted an amendment to the Stonegate subdivision, which requires Planning
26 Board review.

27
28 11. As of September 10, 2010, Peter I. Wovkonish was the owner of a parcel of
29 property located at 370 Mitchell Road (Tax Map U31, Lot 9B) consisting of
30 approximately two acres of land and a single-family house. This property abuts the
31 Stonegate subdivision but was never owned by the developers of the Stonegate
32 subdivision, nor otherwise included within the plans for this subdivision.

33
34 13. On September 10, 2010, Mr. Wovkonish out-conveyed to himself two parts of Lot
35 9B. The first out-conveyance consists of approximately 47,831 square feet, contains
36 200.31 feet of frontage on Stonegate Road, and is currently assigned the street address
37 10 Stonegate Road and Tax Map U31, Lot 9E ("**Lot 9E**"). The second out-conveyance,
38 which is the property at issue in this appeal, consists of approximately 21,938 square
39 feet, contains 117.66 feet of frontage on Mitchell Road and 189.71 feet of frontage on
40 Stonegate Road, and is currently assigned the street address 6 Stonegate Road and
41 Tax Map U31, Lot 9D.

42
43 14. On September 15, 2010, Mr. Wovkonish conveyed the remainder of Lot 9B (370
44 Mitchell Road) to Graham S. Pillsbury and Stephen H. Richard, and conveyed Lots 9D
45 (the Property) and 9E to Early Bird Group, LLC, of which Mr. Pillsbury and Mr. Richard
46 are members.

47
48 15. Lot 9E is currently undeveloped.

1 16. Stonegate Road is a public way conveyed to Cape Elizabeth by Stonegate
2 Associates by warranty deed dated December 5, 1989 and recorded in the Cumberland
3 County Registry of Deeds at Book 9015, pg. 16. Stonegate Associates recited in its
4 deed of Stonegate Road that the conveyance was subject to a Declaration of
5 Covenants, Conditions and Restrictions.
6

7 17. The grant of Stonegate Road by Stonegate Associates to the Town is
8 approximately 135 feet wide from its entrance at Mitchell Road back through area at
9 issue in this appeal. The paved Stonegate Road is approximately 30 feet wide, with
10 vegetation on both sides.
11

12 18. The driveway to the Property is laid over approximately twenty-five feet of the
13 Property and approximately seventy feet of vegetation in the Stonegate Road right-of-
14 way before connecting with the paved road.
15

16 The Board was provided with the following additional testimony and evidence on
17 December 28, 2010: Paragraph 2 of the Stonegate Declaration excludes the roads in
18 the subdivision from the restrictive covenants in that Declaration.
19

20 Mr. Black motioned that the Findings of Fact be approved. Mr. Kinley seconded the
21 motion.
22

23 CONCLUSIONS: 24

25 Based on the record evidence presented to the Board and the Board's findings of fact
26 thereon, the Board concluded as follows:
27

28 A. The Appellants failed to meet their burden of demonstrating that the issuance of the
29 building permit implicated a subdivision that required approval by the Planning Board.
30

31 B. The Appellants failed to meet their burden of demonstrating that the changes to the
32 so-called "buffer" prompted by the development of the subject lot were precluded by the
33 documents that created the subdivision.
34

35 C. The Appellants failed to meet their burden of demonstrating that the issuance of the
36 building permit constituted an amendment to the Stonegate subdivision, such that
37 Planning Board review would be required.
38

39 **DECISION:** Based on these Findings of Fact and Conclusions, and by a vote on
40 December 28, 2010 of 0 for and 4 against on a motion to approve the appeal, the
41 Zoning Board of Appeals denied the appeal of Building Permit No. 110181.
42

43 Any aggrieved party has the right to appeal this decision to the Maine Superior Court
44 pursuant to Maine Rule of Civil Procedure 80B within thirty days after notice of the
45 Zoning Board of Appeals Decision.
46

47 **E. Communications** - Chairman Chatmas ended his final meeting by saying he had
48 enjoyed his 11 years on the board. He thanked the board members and recording
49 secretaries for their support, Mr. Smith for his guidance and the town for the opportunity.

1 Mr. Kinley also stated that this would be the last meeting of his one-year term. He is
2 moving back to Vermont at the end of 2011.

3

4 Mr. Smith thanked them both; the town appreciated their service.

5

6 **F. Adjournment** – Motion by Mr. Howe to adjourn; seconded by Mr. Black. All were in
7 favor. Meeting adjourned at 10:52 pm.