

1 **Town of Cape Elizabeth**  
2 **Minutes of the October 23, 2012, Zoning Board Meeting**  
3

4 **Members Present:**

5  
6 Josh Carver Barry Hoffman David Johnson  
7 Jeffery Schwartz Christopher Straw John Thibodeau  
8 Joanna Tourangeau  
9

10 **A. Call to Order** – The meeting was called to order by Chairman David Johnson at  
11 6:58 pm.  
12

13 **B. Approve the Minutes of September 25, 2012** – A motion to approve the minutes  
14 was made by Mr. Johnson; seconded by Ms. Tourangeau. All were in favor.  
15

16 **C. Communications** – None.  
17

18 **D. Old Business** – To continue the hearing an administrative appeal by Maynard and  
19 Deborah Murphy of the Code Enforcement Officer's August 31, 2012, issuance of  
20 Building Permit #130072 for replacement of a 50 by 25 foot concrete patio with a 20 by  
21 20 foot stone patio and the construction of a retaining boulder wall at 29 Pilot Point  
22 Road, Tax Map U12, Lot 69.  
23

24 Chairman Johnson stated that most of the board did a site walk early this month, which  
25 was helpful to see where things lay on the lot. Chairman Johnson reopened public  
26 comment, limited to the Livingston plot.  
27

28 André Duchette, of Taylor, McCormack & Frame, for the Murphys, came to the podium.  
29 At the last meeting we discussed the standing of this appeal, but never got to the merits  
30 of the appeal. He submitted additional paperwork on October 16, 2012, and Mr.  
31 Shumadine has submitted additional material. He asked in which vein the board wished  
32 to continue.  
33

34 Chairman Johnson motioned that public comment be closed to discuss the issue of  
35 standing. Seconded by Mr. Straw. All were in favor.  
36

37 Mr. Carver made a motion that the Murphys have standing in the appeal. Seconded by  
38 Mr. Straw. All were in favor.  
39

40 Chairman Johnson reopened the hearing for discussion on the merits.  
41

42 Mr. Duchette stated the Murphys filed this appeal for three reasons. One, we contest  
43 the starting point from where the 75' buffer was taken; two, the lot coverage; and three  
44 the procedure for the initial site plan was deficient, setbacks and boundary lines weren't  
45 properly established. In the initial plan there was no mention of the right of way. The  
46 75' setback was from the mean normal high water line not the top of the bank, which  
47 Cape Elizabeth uses for the starting measure for the 250' Shoreland Zone. You can't  
48 pick an chose which measurement to use.  
49

1 Discussion to determine what was actually at issue focused on the patio attached to the  
2 house that is within 75' from the top of the bank, not the mean high water line. Mr.  
3 Duchette stated they put the mean normal high water line about 50' out from the top of  
4 the bank. He stated they were not allowed to survey the property to certify this. It is not  
5 up to the Murphys to prove the site plan is accurate. He stated none of the Livingston's  
6 site plans were accurate because the measurement was taken from the mean normal  
7 high water line. The plans were not certified.

8  
9 Ms. Tourangeau clarified the argument as: the Murphys contend that the patio,  
10 attached to the house, and the boulder wall are within the 75' Shoreland Zone, are  
11 therefore nonconforming and therefore to the extent there was any relocation or change  
12 in those nonconforming structures within the Shoreland Zone, they needed to come to  
13 the (Zoning Board of Appeals) ZBA in order to determine whether the work that was  
14 done was as compliant as possible with setback requirements. Mr. Duchette agreed.

15  
16 Mr. Duchette added that the existing structures were already over the 20% coverage  
17 rule. Sometimes, under certain circumstances, structures can be rebuilt.

18  
19 Ms. Tourangeau asked for documentation of TRI (Title, Rights and Interest). Mr.  
20 Duchette and Mrs. Murphy produced documents from a separate appeal within the  
21 Shore Acres Improvement appeal.

22  
23 Town Counsel, John Wall, noted they may present whatever evidence they feel is  
24 pertinent.

25  
26 Mr. Duchette stated it was up to the board to decide TRI. He referred to page two on  
27 the release deed, third paragraph, which talks about preserving the natural setting.

28  
29 Ms. Tourangeau asked if the Murphys contend a boulder wall is not keeping with the  
30 natural setting. Mr. Duchette agreed. He also said the Murphys were concerned not  
31 only with the work that was done, but that the process wasn't followed, plans with  
32 inaccurate information were submitted.

33  
34 Discussion followed on whether the wall was built on the boundary as requested on the  
35 permit; what is the avenue to take if the structure was not built as permitted; where is  
36 the high water mark and whether the structures are nonconforming.

37  
38 John Shumadine, of Murray, Plumb and Murray, representing the Livingstons came to  
39 the podium. He stated he didn't hear anything in the Murphy's argument that the permit  
40 was not allowed. Whether the structure is conforming or not is irrelevant. What was  
41 done was removing impermeable surface, regrading, reseeding and putting in a  
42 retaining wall outside of the right of way. The survey, prepared by Northeast Civil  
43 Solutions, to show existing conditions was presented. The retaining wall was built  
44 outside the right of way. If the Murphys contend the permit was violated they need an  
45 enforcement action. The survey is an existing conditions survey. To the extent that the  
46 retaining wall is not outside the right of way is an issue for enforcement or private  
47 action.

48  
49 Board examined the survey.

1 Members of the board asked how the high water line was determined on the survey.  
2 Mr. Shumadine said there were two parts to determine that, the Legal and the Factual.  
3 First the legal part of it comes from the Shoreland Zone in the Ordinance. It says it is a  
4 75' setback from the normal high water line of other water bodies and tributary streams.  
5 It is section 19-6-11, second page of the chart, number 3. The definition section is  
6 19-1-3. "Normal High Water Line Of Coastal Waters" reads: "That line on the shore of  
7 tidal waters which is the apparent extreme limit of the effect of the tides, i.e. the top of  
8 the bank, cliff or beach above high tide."  
9

10 There are ways to determine the "apparent extreme limit of the effects of the tides":  
11 one, visual means, another is establishing elevation. Those who did the site visit would  
12 agree that if the water ever reached the top of the bank, Cape Elizabeth would have  
13 huge problems because a good portion of Broad Cove would be under water. The tide  
14 just doesn't reach there. Mr. Shumadine then asked expert Jim Fisher of Northeast  
15 Civil Solutions to the podium.  
16

17 Mr. Fisher stated his engineering and surveying firm is licensed in all New England  
18 states. The vertical datum that is accepted by the Department of Environmental  
19 Protection and the town of Cape Elizabeth is from North Atlantic Vertical Datum. It is  
20 what was used on this plan; the first plan was mislabeled using flood elevation data.  
21 That was corrected using the highest annual tide, and that is predicated on an actual  
22 elevation using laser instruments and an established, known elevation point by U.S.  
23 Geological Survey and National Oceanic and Atmospheric Administration (NOAA). We  
24 used that reference point, 6.5', on that cliff face. From that point, we off set that 75'.  
25 That is shown on the plan.  
26

27 The highest annual tide is typically the Spring Equinox, not a storm tide. Points on the  
28 survey were discussed. Mr. Fisher said that Mike Morris of the Department of  
29 Environmental Protection (DEP) agreed with the measurement on the plan. The  
30 retaining wall was not built at the time the measurement was taken.  
31

32 Discussion continued on what the definition of the high water mark actually is and how  
33 to consider the apparent extreme limit of the effect of the tides. Citing and discussing  
34 Mack vs. Town of Cape Elizabeth, 1983. Top of the bank elevation being 39'. Salt-  
35 water tolerant vegetation can be found away from the immediate coast, depending on  
36 conditions.  
37

38 There was more discussion about conforming and nonconforming structures. Mr. Straw  
39 stated the intent of the Ordinance to limit changes to nonconforming structures and to  
40 protect the Shoreland Zone.  
41

42 Upon questioning from Mr. Thibodeau, Mr. Fisher responded that the high water mark  
43 was pretty darn close to where those who were on the site visit saw the staining on the  
44 rocks.  
45

46 Chairman Johnson asked Mr. Turesky, who was there for another appeal, to come to  
47 the podium, because one of his primary arguments has to do with the same issue.  
48 Marshall Goldman, 27 Pilot Point Road, came to the podium and said that this would be  
49 a matter for his landscape architect, John Mitchell.

1 Mr. Shumadine said that these two appeals have to rise or fall on their own merits. He  
2 objected to co-mingling the two cases.  
3  
4 Mr. Straw said that the decision depends on the definition of the normal high water line  
5 for coastal waters. That depends on how do we define tide and how do we define it's  
6 effects.  
7  
8 Ms. Tourangeau agreed with Mr. Shumadine to the extent the board would want to be  
9 clear on what came in on which appeal.  
10  
11 Chairman Johnson asked the board to vote concerning having Mr. Goldman and his  
12 representatives testify only during their appeal. All were in favor.  
13  
14 George Foley stated that Maureen O'Meara, the town planner, told him that top of the  
15 bank was where the measurement was taken from in Cape Elizabeth. She said there  
16 had been a case on it.  
17  
18 The board concurred that the case mentioned was the Mack case, but thought that it did  
19 not hold to the top of the bank.  
20  
21 Mrs. Murphy come to the podium and stated she had also spoke with the town manager  
22 and Maureen and they both confirmed that in Cape Elizabeth the top of the bank is the  
23 starting point of the coastal wetlands setback and the 250' Shoreland Zone. (Mrs.  
24 Murphy then showed some papers to the board members.)  
25  
26 Ms. Tourangeau stated her concern was that there was no plan that shows what on the  
27 property is within 75' of the top of the bank. (Mrs. Murphy showed her laptop computer  
28 screen to the board.) Mr. Straw informed Mrs. Murphy that any evidence needed to be  
29 submitted for the record.  
30  
31 Mrs. Murphy then used a site plan to describe where her measurements were taken on  
32 August 1st with Mr. Smith, Mr. Murphy, and the builder present. She referred to page 3  
33 of the DEP Information Sheet: Establishing the starting point for measuring of the  
34 Shoreland Zone and related setback determination. There are several methods, visual,  
35 elevation, and salt tolerant vegetation. The line formed by the more restrictive  
36 observation must be used.  
37  
38 There was a discussion concerning salt tolerant vegetation.  
39  
40 Mrs. Murphy passed out copies of the zoning map showing the 250' zone. She said the  
41 West property and the Goldman property used top of the bank. She also stated that the  
42 boulder wall created more impervious surface on the lot.  
43  
44 Mr. Straw stated that the setback would be dispositive for the lot coverage issue. Mr.  
45 Thibodeau agreed with reaching a conclusion for the setback.  
46  
47 Mr. Shumadine commented that Cape Elizabeth is using a standard definition for mean  
48 high water mark (using the word extreme) as in a Superior Court case involving  
49 Kennebunkport.

1 Mr. Fisher commented that using the term top of the bank is a very subjective idea.  
2 Using a uniform mathematical measure for annual high tide establishes a uniform set  
3 level. The top of bank is considerably different depending on which property is looked  
4 at.

5  
6 Ms. Tourangeau had Mr. Fisher clarify and confirm that the definition of normal high  
7 waterline in the Cape Ordinance is consistent with the DEP standard language and the  
8 elevation of the maximum spring tide level and that method was used as the HHT on  
9 Exhibit D-1, Page 3, of the Murphy appeal.

10  
11 Mr. Foley stated that the height (of the top of the bank) was not what mattered in this  
12 case but the distance horizontally way to offer protection from pollution.

13  
14 Mr. Duchette said they were not contending that the top of the bank was the starting  
15 point of the measurement for all of Cape Elizabeth. But it is the top of the bank in this  
16 case and in the Mack case. On another survey in the area, the top of the bank was  
17 used. Cape Elizabeth, unless it wants to, cannot pick and choose which starting point  
18 to use.

19  
20 Mr. Wall presented an email from Bruce Smith, Code Enforcement Officer, on how he  
21 made his determination. He distributed copies.

22  
23 Chairman Johnson closed the public discussion on the normal high water line of coastal  
24 waters.

25  
26 Ms. Tourangeau said it was important for the board to maintain focus on the appeal of  
27 the Code Enforcement Officer's issuance of a permit based on a plan which shows, on  
28 the last page of the Murphy appeal, that the wall and the patio are outside the 75'  
29 Shoreland Zone and she hasn't seen evidence in the record to indicate that there wasn't  
30 substantial evidence supporting the Code Enforcement Officer's issuance of a permit  
31 based on this documentation and the subsequent survey.

32  
33 For clarification, Mr. Wall said this was a quasi de novo review, because it's an appeal.  
34 Normally you wouldn't take evidence, but because there is this procedure in place, you  
35 need to take evidence that wasn't necessarily before the Code Enforcement Officer.  
36 The standard that you decide under is whether the decision appealed, in this case, the  
37 issuance of the permit, was clearly contrary to the Ordinance, and unsupported by  
38 substantial evidence in the record. Using the record that was developed here.

39  
40 Board discussion:

41  
42 Mr. Straw said that the decision turns on the definition of "Normal High Water of Coastal  
43 Waters", what is meant by "tides", and what is meant by the "extreme limit of the effect  
44 of the tides." Mr. Straw stated that he believed the "i.e." in the definition was intended to  
45 be an "e.g." based in part on his familiarity with the ordinance and other mistakes in the  
46 ordinance. Mr. Straw further stated that any purported hearsay statements from the  
47 Town Manager and Town Planner regarding interpretation of this section of the  
48 Ordinance are entitled to no deference beyond that given to any person's opinion  
49 regarding the ordinance. Mr. Straw said he looks at the term "tides" to determine what

1 type of tide is intended, a storm tide, a tsunami tide, a normal tide. Mr. Straw said he  
2 believes “tides” means “normal tides.” Mr. Straw said next the “extreme limit of the  
3 effects” of this tide needs to be determined. Mr. Straw stated that the “top of the bank”  
4 at this location is not formed by the normal tides and is not an effect of the tide. Mr.  
5 Straw stated that the normal high water line lay somewhere beyond the top of the bank,  
6 but that he was not certain of its exact location on the rocks beyond the bank.

7  
8 Mr. Carver said he was also wrestling with this, noting that he believed the normal high  
9 water line was not the top of the bank, but that he also believed it is not the mean high  
10 water mark.

11  
12 Ms. Tourangeau stated the Board should look at the mechanism the CEO stated that he  
13 used to determine the normal high water line of coastal waters and his reason why to  
14 determine if his decision was a legitimate one.

15  
16 Mr. Carver stated that the CEO indicated in his email to the Board that he used the  
17 surveyor.

18  
19 Mr. Straw stated that the argument would then be that there are different approaches  
20 that could be used to determine the Normal High Water Line, including the use of a  
21 surveyor to determine the spring high tide line.

22  
23 Chairman Johnson indicated he believed that the Board needed to determine whether,  
24 based on that determination by the CEO, the issuance of the permit was clearly contrary  
25 to the ordinance and unsupported by substantial evidence in the record. Chairman  
26 Johnson indicated that he believed the decision was not clearly contrary to the  
27 ordinance and that the decision was supported by substantial evidence in the record.

28  
29 Mr. Carver stated that “clearly contrary to the ordinance” is a hurdle that needs to be  
30 reached.

31  
32 Mr. Thibodeau stated that he believed the CEO had a basis for his decision and made,  
33 based on the evidence in the record, a good faith effort to establish in compliance with  
34 the ordinance.

35  
36 Ms. Tourangeau stated that the CEO’s actions were consistent both with the Town  
37 Ordinance and background documentation provided by the State.

38  
39 Mr. Straw stated Ms. Tourangeau made a very good point and stated that at the end of  
40 the day, average citizens need to be able to operate within the Ordinance. To the  
41 extent the DEP has issued guidelines that are not contrary to the language of the Town  
42 Ordinance, this information sheet provides the Board guidelines for reaching a  
43 conclusion. Mr. Straw further stated that the language in the State guidelines relating to  
44 salt water tolerant vegetation did not encompass the present situation because the  
45 State Guideline contemplates situations where the salt tolerant vegetation exists by  
46 virtue of the tide soaking the ground, resulting in salt tolerant vegetation, which was not  
47 the case here.

48  
49 Mr. Straw further thanked counsel for their presentations, which he described as very

1 helpful.

2  
3 The Board proceeded to findings of fact.

4  
5 **Findings of Fact:**

6  
7 1. Maynard and Deborah Murphy own and reside at 24 Pilot Point Road, directly across  
8 the street from the subject property, and as such are abutters. All were in favor.

9  
10 2. On August 31, 2012, a Building Permit Application for 29 Pilot Point Road, to replace  
11 an existing 50 by 20 foot concrete patio with a 20 by 20 foot stone patio and construct a  
12 retaining boulder wall was submitted by owner of the same. The application was  
13 assigned Building Permit #130072. All were in favor.

14  
15 3. On August 31, 2012, a Building Permit #130072 was approved and issued as  
16 applied for. All were in favor.

17  
18 4. On September 12, 2012, an administrative appeal of the Code Enforcement Officer's  
19 issuance of Building Permit #130072 was submitted by Maynard and Deborah Murphy.  
20 All were in favor.

21  
22 5. The patio and retaining wall are both more than 75' beyond the normal high water  
23 line of coastal waters. All were in favor.

24  
25 After additional discussion by the board. The floor was reopened to discuss lot  
26 coverage.

27  
28 Mr. Murphy came to the podium.

29  
30 Chairman Johnson asked Mr. Duchette to point to what were the relevant parts of the  
31 code related to this issue before Mr. Murphy started. Mr. Duchette said the relevant  
32 section was 19-6-11. We requested to conduct our own survey; that wasn't allowed.  
33 Within the 250' Shoreland Zone, you can't have more than 20% of the lot coverage. If  
34 you do, it is considered a nonconforming structure, and any renovations need to come  
35 before the Zoning Board of Appeals.

36  
37 Mr. Murphy stated that his wife was the civil engineer. She did some calculations using  
38 Google Earth images, and conservatively estimated the lot coverage for the Livingstons  
39 was 31%. I did the same calculations and came up with 33% before construction  
40 began. Mr. Murphy explained how he calculated the lot coverage both before and after  
41 construction using graph paper and cutouts.

42  
43 Upon questions from the board Mr. Murphy believed the pavers allowed grass to grow  
44 through. Mrs. Murphy stated the driveway pavers were impervious. Mr. Murphy  
45 continued saying the lot coverage after construction is less than before because the  
46 west side of the driveway was removed and the new patio is smaller. After adding the  
47 impervious driveway turn around and the boulder retaining wall with stairs, the new  
48 coverage is about 24%.

1 Mr. Shumadine came to the podium and stated the point he was struggling with was  
2 figuring out why this matters. I don't think they have managed to provide any argument  
3 as to why it matters because I don't think they can. They've said it is nonconforming  
4 because it is over 20% so it has to go before the ZBA, but they don't cite anything for  
5 that. They don't cite the Ordinance or how it applies. If you look at 19-4-4,  
6 Nonconformance within the Shoreland Performance Overlay District, and we assume  
7 this is nonconformance, assume that they are right. Nonconforming buildings and  
8 structures: there's a section on enlargement, relocation, reconstruction or replacement,  
9 change of use of a nonconforming structure. The closest one that might apply is  
10 enlargement – but we are not enlarging. That is a Code Enforcement Office decision,  
11 not a ZBA decision.

12  
13 Mr. Straw asked if it could be considered a reconstruction. Mr. Shumadine said okay,  
14 let's assume that and use that section. One paragraph talks about it being destroyed by  
15 more than 50% of the market value – that doesn't apply.

16  
17 Discussion on structure: Is the patio a separate structure from the building?

18  
19 Mr. Shumadine continued saying, the second paragraph the nonconforming structure is  
20 less than the required setback for the water body. Doesn't apply because we found out  
21 it's not. But if it did, even that section states it may be reconstructed in place with a  
22 permit from the Code Enforcement Officer within one year. What has happened here is  
23 the Livingstons have made their property less nonconforming. That's what they just  
24 testified to. There is less lot coverage today.

25  
26 If they say this should have gone before the ZBA, they need to have an argument from  
27 the Ordinance that says this is how it has to go based on facts. There has not been  
28 anything that says what we are doing falls under one of the categories that requires a  
29 ZBA approval. The only conclusion you can reach is that the Livingstons are entitled to  
30 do what they got the permit to do and the Code Enforcement Officer was correct to  
31 issue it. Ultimately it doesn't matter the percent lot coverage. This is a grandfathered  
32 legal nonconformity and they reduced it. They need to make an argument citing a  
33 specific section of the Ordinance. They don't know why it goes to the ZBA. And I don't  
34 think there is anything in the Ordinance that says it has to.

35  
36 Mr. Duchette stated there are parts of the Ordinance you can read that when you have  
37 a nonconforming structure and activity is being performed whether reconstruction,  
38 expansion, removal or anything along those lines, when you have that activity being  
39 performed it requires site plan review by the ZBA under Section 19-9-2. This was  
40 indicated in the Murphys' appeal. If this was going in front of the Zoning Board certain  
41 things would come out like your moving structures closer to the Shoreline Zone, like the  
42 retaining wall, that was never there before. Those procedures weren't followed and  
43 weren't implemented correctly and were based on false information.

44  
45 Members of the board asked which subsection is invoked. Mr. Schwartz quoted Section  
46 19-9-2 B.: Activities Not Requiring Site Plan Review, the first subsection seems to fall  
47 squarely with what we have here. "The construction, alteration or enlargement of a  
48 single family or two-family dwelling unit, including accessory buildings and structures..."

49



1 Mr. Duchette quoted a nonresidential section. He could not point to the reference.

2  
3 Mrs. Murphy called the board's attention to state guidelines Chapter 1000, Section 15B,  
4 Page 17, concerning grandfathering. Ms. Tourangeau injected that once there is a local  
5 Ordinance, you look to that Ordinance.

6  
7 Members of the board asked appellants to identify a provision of the Ordinance that  
8 triggers review by the Board or the CEO when a property owner reduces the existing lot  
9 coverage or shrinks the size of an existing patio, which section applies to reducing the  
10 footprint. Mr. Duchette replied there was none that he had found.

11  
12 Chairman Johnson moved to close public comment. Seconded by Mr. Straw. All were  
13 in favor.

14  
15 **Findings of Fact:**

16  
17 6. The overall lot coverage was rendered less nonconforming by the reduction in size of  
18 the pre-existing patio. All were in favor.

19  
20 7. The record contains no evidence indicating Code Enforcement Officer error in  
21 issuing the permit to allow the Livingstons to complete work reducing nonconformity of  
22 the property. All were in favor.

23  
24 **Conclusions:**

25  
26 1. Issuance of Permit #130072 was not clearly contrary to the provisions of the Cape  
27 Elizabeth Ordinance. All were in favor.

28  
29 2. Issuance of Permit #130072 was supported by substantial evidence in the record.  
30 All were in favor.

31  
32 Chairman Johnson motioned that the administrative appeal by Maynard and Deborah  
33 Murphy of the Code Enforcement Officer's issuance of Building Permit #130072 be  
34 denied. Mr. Straw seconded. All were in favor.

35  
36 Chairman Johnson called for a three minutes break.

37  
38 **E. New Business**

39  
40 1. To hear an administrative appeal by Maynard and Deborah Murphy of the Code  
41 Enforcement Officer's issuance of Building Permit #130056 for an additional accessory  
42 structure at 27 Pilot Point Road, Tax Map U12, Lot 70 as this structure will add over 250  
43 square feet of impervious surface to this lot within the 250' Zone.

44  
45 Mr. Duchette came to the podium and stated many of the same arguments apply to this  
46 appeal. The right of way is there. Some differences: this particular request is an  
47 expansion, it is a change of use, this isn't a replacement structure. There was a  
48 Titcomb survey, which set the 75' setback from the top of the bank. That plan also  
49 discusses the percentage of use. The rebuttal argument is the 250' Shoreland Zone

1 measurement is inaccurate; we need to take it from another point. The 250' line in the  
2 Zoning Ordinance starts from the top of the bank. If you look at the Goldman's lot, it is  
3 all within the 250' Shoreland Zone. They are now saying: don't use that, use something  
4 different, change that. Those are the two reasons we are saying this permit was issued  
5 in violation of the 75' setback as well as the increase in the lot coverage percentage.  
6

7 When asked to repeat the argument with respect to the 75' setback, Mr. Duchette  
8 replied the 75' setback is based on the top of the bank. This is consistent with the plan  
9 and early permitting process in which the Goldmans were making some additions to  
10 their property.  
11

12 Mr. Schwartz asked for clarification on the new map submitted by the Murphys. There  
13 was discussion about the point used for the measurement. All board members did not  
14 have copies of the permit. Chairman shared his copy.  
15

16 Mr. Straw said the paper document submitted by the Goldmans set the line at the cliff.  
17 If set at the cliff, all of their lot would be in the 250'. But as we covered on the prior  
18 appeal, the line is not at the cliff but somewhere further out. If the line is further out the  
19 end of the lot is no longer in the 250' zone. He believed that was the Goldmans'  
20 argument.  
21

22 Mr. Duchette said if you look at what is being constructed, it is in the 75' setback. The  
23 big survey (larger in size) was a prior survey. That document was submitted to the  
24 Code Enforcement Officer. Mr. Duchette said there seems to be a new standard that is  
25 being applied with respect to where you start the 75' setback from. He maintained two  
26 things: one, back in 2005, Bruce Smith applied one standard and is now applying a  
27 different one, number two, we have an expansion of lot coverage. Even if you want to  
28 move the 75' setback line, you can't move the 250' line because that had already been  
29 set by the Ordinance.  
30

31 Discussion on reading the surveys.  
32

33 Mr. Duchette stated the permit was applied on wrong information and should not have  
34 been granted.  
35

36 Discussion on the Code Enforcement Officer relying on plans submitted with an  
37 application and what is required by the Ordinance. More discussion on the high water  
38 line and the 250' zone.  
39

40 Mrs. Murphy responded to questions about increase in impervious surface, stating it  
41 increased 292 square feet.  
42

43 Mrs. Murphy further stated that the Zoning Map is part of the Ordinance and the Board  
44 cannot amend the Zoning Map. According to Mrs. Murphy, the lot at issue is entirely  
45 within the Shoreland zone according to the Town Ordinance and the Board cannot  
46 move the boundary of the zone within the lot because the boundary has already been  
47 established as outside the lot. In Section 19-2-2, the Zoning Map is part of the Ordinance  
48 and in Section 19-2-5 mentions location of resource protection district boundaries.  
49 Section 19-2-5 B. talks about what to do when a boundary is disputed.

1  
2 Ms. Tourangeau asked Mrs. Murphy, assuming that the lot is entirely within the  
3 Shoreland Zone and the lot coverage was increased 292 feet, to provide the Section of  
4 the Ordinance that says the Code Enforcement Officer can't approve a permit to expand  
5 a nonconforming structure. Ms. Murphy stated that in this instance, it is not a reduction  
6 in impervious surface, but an increase in impervious surface.  
7

8 Mrs. Murphy stated that Section 19-2-2 states that the Zoning Map must be certified and  
9 is part of the Ordinance. Mrs. Murphy further stated that 19-2-5.B describes the  
10 process for disputing certain district boundaries and that the Board lacks the ability to do  
11 this. Mrs. Murphy then stated that there was a prior expansion of lot coverage in this  
12 instance that took the lot coverage well beyond 20% and that there is now even more  
13 expansion being proposed, meaning that there was an expansion of a nonconforming  
14 structure.  
15

16 Ms. Tourangeau asked Mrs. Murphy to explain why the CEO could not permit this to  
17 occur and asked Mrs. Murphy to identify an applicable section of the ordinance that  
18 prevents the CEO from authorizing the proposed work. Mrs. Murphy stated you cannot  
19 make a non-conforming structure more non-conforming.  
20

21 Board members discussed Section 19-4-4 C.1. ~~and 19-4-4 B.~~, which states "A  
22 nonconforming structure may be added to or expanded after obtaining a permit from the  
23 Code Enforcement Officer, ~~provided that such addition or expansion does not increase~~  
24 ~~the nonconformity of the structure..." Ms. Tourangeau stated that this is what happened~~  
25 ~~in this circumstance. Chairman Johnson stated that this provision applies "provided that~~  
26 ~~such addition or expansion does not increase the nonconformity of the structure."~~ Mr.  
27 ~~Straw stated that the structure at issue is also an accessory structure. When Ms.~~  
28 ~~Tourangeau~~ asked what the nonconformity of the structure was and, Mrs. Murphy said it  
29 was the lot coverage. Ms. Tourangeau disagreed saying the impervious surface applied  
30 to the nonconformity of the lot ~~not the nonconformity of the structure. Mrs. Murphy~~  
31 ~~referenced a document from the DEP. Ms. Tourangeau and~~ asked to be shown the a  
32 reference in the Ordinance.  
33

34 Mr. Straw pointed to 19-4-~~5-4~~.B.5 and asked if it was Mrs. Murphy's opinion that the lot  
35 at issue was a non-conforming lot. Mrs. Murphy read definitions from the DEP  
36 regarding non-conforming structures. Ms. Tourangeau ~~She was~~ directed Ms. Murphy  
37 back to the Ordinance, stating the DEP definitions do not apply under the Town  
38 Ordinance and that the Board instead must look at the definitions under the Town  
39 Ordinance. Mr. Duchette asked Ms. Tourangeau if she was saying that lot is different  
40 from structure. Ms. Tourangeau stated that lot and structure are defined separately.  
41 Ms. Tourangeau referred to the definitions of nonconforming building and structure in  
42 the Cape Elizabeth Ordinance page 15 and asked the Murphys to explain their  
43 argument for why the decision of the CEO should be overturned. Mr. Duchette stated  
44 that non-conforming lot includes a lot that does not meet "other similar lot requirements  
45 of the district in which it is located" such that a nonconforming lot factors in all structures  
46 on the lot.  
47

48 Mr. Straw summarized Mr. Duchette's argument that it is a nonconforming lot under this  
49 definition by virtue of lot coverage, at a minimum, if not other criteria. Because it is a

1 nonconforming lot ~~coverage~~ he referenced Section 19-4-4 B.5. Mr. Straw stated that  
2 Mrs. Murphy had argued that the Official Zoning Map is the Official Zoning Map. What it  
3 sets as inside of the zone is inside of the zone. Under that argument, subsection 5 is  
4 triggered and ~~it~~ could be argued that this is a nonconforming accessory structure on a  
5 nonconforming lot of record. Section 19-4-4 B.5 Which states: “On a nonconforming lot  
6 of record on which only a residential structure exists, and it is not possible to place an  
7 accessory structure meeting the required water body, tributary stream or wetland  
8 setbacks, the code enforcement officer may issue a permit to place a single accessory  
9 structure, with no utilities, for the storage of yard tools and similar equipment.” Mr.  
10 Straw stated that the Board would then need to look to see if the criteria in Section 19-4-  
11 4.B.5 are met in order to determine if the permit was properly granted. Ms. Tourangeau  
12 stated that there is no requirement under that provision that the decision come before  
13 the Board. Mr. Straw stated that the Board had jurisdiction to hear the appeal because  
14 it has the ability to determine if a decision of the CEO is in compliance with the Zoning  
15 Ordinance. Mr. Straw then stated that the issue before the Board is whether the CEO  
16 could grant a permit under Section 19-4-4.B.5 or any other provision.

17  
18 Discussion followed. Mr. Straw asked what provision of the Ordinance permits the  
19 introduction of an additional accessory structure where the lot coverage limit is already  
20 exceeded. Mr. Carver stated that it is permitted in only very narrow circumstances. Mr.  
21 Johnson stated it was permitted basically in instances of a backyard shed. Mr. Carver  
22 stated that such a situation was not present in this case. Ms. Tourangeau stated there  
23 are Ordinance provisions permitting adding onto or enlarging non-conforming structures  
24 based on a CEO permit. Mr. Straw stated that these apply to pre-existing structures,  
25 but in this situation there is the introduction of a new standalone structure that did not  
26 previously exist that was placed closer to the water than any previously existing  
27 structure.

28  
29 Ms. Tourangeau ~~The board~~ asked again Ms. Murphy under what provision was the  
30 Murphy’s argument. Ms. Murphy stated that the lot coverage cannot exceed 20%.  
31 Board members Ms. Tourangeau said a property can exceed the 20% in certain  
32 circumstances under referenced Section 19-4-4 and asked which provision of Section  
33 19-4-4 was violated ~~which allows nonconforming lots and structures to be enlarged.~~  
34 Ms. Murphy stated there are very strict exceptions for doing something other than what  
35 the ordinance allows. Ms. Murphy stated that Section 19-6-11 is very specific in  
36 prohibiting expansion. Chairman Johnson noted that Section 19-4-4 did not appear to  
37 have a provision permitting new structures ~~It was noted and~~ this was a new structure  
38 and ~~not a replacement or an expansion.~~ Mr. Carver noted there was the previously  
39 discussed accessory structure provision, which Mr. Johnson stated very likely did not  
40 apply here. ~~probably did not fall under the accessory structure previously mentioned.~~

41  
42 John Mitchell, Mitchell and Associates, Landscape Architects, came to the podium and  
43 stated he represented the Goldmans. He described the process they went through to  
44 arrive at the documentation, including meeting with Bruce Smith two times. Section  
45 19-6-11 E.2.f. states: “...stairways or similar structures may be allowed to provide  
46 shoreline access in areas of steep slopes or unstable soils, with a permit from the Code  
47 Enforcement Officer provided that the structure is limited to a maximum of four (4) feet  
48 in width;...” Upon questioning, Mr. Mitchel said the stairs did not meet all those  
49 requirements.

1  
2 Mr. Mitchell stated he went out to the site with Mr. Smith to confirm where the starting  
3 point was for the 250'. We identified where the normal high tide mark was and  
4 determined where the 250' line was. Then we calculated the lot area within the 250',  
5 not the total lot, but only that lot area. The lot area equals 14,000 square feet. You then  
6 take the 14,000 square feet and determine the 20%, which is 2,800. Which is the total  
7 allowable lot coverage.

8  
9 Mr. Mitchell said he then placed the proposed set of stairs in the location we propose to  
10 locate it. And then calculated the total impervious surface, which includes the house,  
11 stonewalls, the stone patio, the steps, the driveway, drip strips, etc. The entire  
12 impervious surface area is 2,392 square feet. I then calculated the area for the  
13 proposed set of stairs as 292 square feet and added the two together for 2,684 square  
14 feet And that leaves a balance of 116 square feet additional impervious surface, which  
15 could be added at a later date. Mr. Mitchell stated he has done this in many similar  
16 situations in Cape Elizabeth. In only two cases did he have to use the top of the slope,  
17 when there was more of a vertical slope and the high tide had gone to the bottom of the  
18 slope, never when the high tide was well out from the top of the slope.

19  
20 Mr. Schwartz asked if we calculated the impervious surface on the entire legal lot would  
21 it be greater than 20%. Mr. Mitchell said it would be.

22  
23 Mr. Schwartz read the definition of "Lot: A parcel of land with ascertainable boundaries  
24 described in a recorded deed or shown on an approved subdivision plan and meeting  
25 zoning requirements at the time it was created." He asked doesn't that mean you have  
26 to use the entire lot, not just 250' from the high water line. Mr. Mitchell stated he  
27 believes just the area in the 250' not the entire lot.

28  
29 Mr. Straw stated that the ~~very end of applicable maximum coverage standard of the~~  
30 ~~Ordinance, where maximum coverage is mentioned in the Ordinance, applies to says~~  
31 ~~the total footage of or~~ the portion "located within the district," ~~including land area~~  
32 ~~previously developed.~~ According to Mr. Straw, the question is what portion of the lot is  
33 within the district. The resolution of this question according to Mr. Straw turned on ~~But~~  
34 ~~then there is~~ the point the Murphys brought up, which Chairman Johnson stated was  
35 that is the entire lot appears to be in the district.

36  
37 ~~Discussion about the zoning map and which provision applied to the stairs.~~ Mr. Straw  
38 stated that there is both the Zoning Map and the factual measurement of 250 feet from  
39 the high water mark. Mr. Straw asked Mr. Mitchell to address the Murphys' argument  
40 that irrespective of where the 250 feet point actually lies, the Zoning Map as adopted in  
41 the Ordinance defines the Shoreland Zone as encompassing the entirety of the lot at  
42 issue. Mr. Straw further noted that the Murphys argued that the Board lacks the  
43 authority to revise the Zoning Map. Mr. Mitchell stated that the Zoning Map is a general  
44 map and that a certified survey is used to determine where the 250 foot line lies. Mr.  
45 Mitchell mentioned wetland mapping, which is generalized, and you need a field survey.  
46 Mr. Straw said, as the Murphys observed (whether right or not) the Ordinance defines  
47 where the zones are. If someone disagrees with the location of the boundary there are  
48 provisions and steps that must be followed to alter those boundaries.

1 Mr. Mitchell referred to Section 19-6-11: “The Shoreland Performance Overlay District  
2 applies to all land within two hundred fifty (250) feet, horizontal distance, of ...” and then  
3 it lists three different.... Mr. Straw agreed but further noted that said the map itself  
4 shows the location of the district boundaries and the Ordinance has provisions for  
5 modifying the boundaries where the broader map is inaccurate. Chairman Johnson  
6 cited Section 19-10-1: “Conflict With Other Provisions: Whenever a provision of this  
7 Ordinance conflicts with or is inconsistent with another provision of this Ordinance or  
8 any other Ordinance, regulation or statute, administered by the Town the more  
9 restrictive and specific provision shall control.” Chairman Johnson noted that the 250  
10 foot distance is more specific yet less restrictive than the Zoning Map in this instance.  
11

12 Chairman asked Mr. Wall for guidance. Mr. Wall stated first you need to determine if  
13 there is a conflict. Can the Murphys point to the provision, incorporating the map, that  
14 states the 250’ is measured from the top of the bank instead of the normal high water  
15 mark?  
16

17 Mr. Straw mentioned Section 19-2-4 “Where uncertainty exists as to the location of any  
18 zoning district boundary, the property owner so affected may request, in writing, that the  
19 Code Enforcement Officer make a formal, written determination.” Mr. Straw noted that  
20 one could argue that the CEO’s decision could be viewed as an implicit determination.  
21

22 David Turesky came to the podium, proposed to incorporate Jim Fisher’s earlier  
23 testimony into the record. He stated, from surveys done, the top of the bank is even  
24 higher on the Goldmans’ lot, then the Livingstons’, therefore farther removed from the  
25 normal high water mark. Mr. Turesky asked that the board adopt the same finding, as  
26 in the previous case, that the line is as John Mitchell indicated the mean high water  
27 mark is well below the top of the cliff. As Mr. Mitchell pointed out, the definition of the  
28 district as set fourth in the gird on page 139 and the term of total footprint of 20%  
29 standard would be within the Shoreland Zoning District.  
30

31 Ms. Tourangeau asked for clarification about the stairway being allowed solely under  
32 subparagraph f or were other criteria submitted. Mr. Mitchell said they wanted to go  
33 with stairs wider than four feet and this was discussed with the Code Enforcement  
34 Officer. They are clearly outside the 75’ setback. So the approved permit would allow  
35 us to do that.  
36

37 Discussion on applicability and location of stairs on steep bank with stable soil.  
38

39 Mr. Turesky said they have been seeking to revise the earlier Titcomb survey with Mr.  
40 Mitchell’s survey. Mr. Turesky mentioned Mr. Smith’s email stated he was not focused  
41 so much with the line as long as the house set back from the cliff.  
42

43 Discussion about stairs, area of lot coverage, boundaries and which provision applies.  
44

45 Marshall Goldman, 27 Pilot Point Road, came to the podium and stated the steps are on  
46 their property – not in the easement – so they could get down to the ocean. They did  
47 everything they could to do things properly: met with Bruce, surveyed the property;  
48 construction has not started. He stated the Murphys cannot even see the steps from  
49 their house and questioned how this damages them. The lot coverage was calculated

1 by the traditional method, which is done in Cape Elizabeth. We would be willing to  
2 cooperate with the city in any way, but don't think it would be fair at this point. He did  
3 feel a case had been presented.

4  
5 George Foley came to the podium and said the building was 15' too high. The size is  
6 way too big; the lot coverage is there. The entire lot is shown on the map within the  
7 250' zone.

8  
9 Discussion with the board about variances, appeals, and what decision is before the  
10 board.

11  
12 Mr. Duchette quoted Section 19-4-4 C.1. "Expansion: Expansions of nonconforming  
13 uses are prohibited, except that nonconforming residential uses may be expanded  
14 within existing residential structures or within expansions of such structures as  
15 permitted in Sec. 19-4-4.B.1, Expansion, after obtaining a permit from the Zoning Board  
16 of Appeals." We have a nonconforming use here and are expanding on that.

17  
18 Discussion with the board.

19  
20 Mr. Duchette then mentioned Section 19-4-4 B.1. "Enlargement: A nonconforming  
21 structure may be added to or expanded after obtaining a permit from the Code  
22 Enforcement Officer, provided that such addition or expansion does not increase the  
23 nonconformity of the structure..." We don't have that here. We have an increase of the  
24 nonconformity, because of expansion of impervious surface and a structure going up  
25 within the 75' setback.

26  
27 Clarification discussion of the board. Mr. Straw mentioned Section 19-4-4 B.5. Non-  
28 conforming Accessory Structures.

29  
30 Mr. Turesky stated that Mr. Smith's decision was not clearly contrary to the Ordinance.  
31 None of the neighbors can see or have access to the stairs. This will enhance living for  
32 the Goldmans but have no adverse effect to the neighbors.

33  
34 Bob Cronin, 7 Avon Road in Shore Acres, stated he had served on the board. He  
35 spoke to the issue of top of the bank and extreme effect of the tides. The top of the  
36 bank is coincidental with the extreme effect of the tides but the top of the bank has not  
37 eroded away. There is erosion beneath the bank. There is not a difference between  
38 extreme effects of the tides and top of the bank.

39  
40 Mr. Turesky cited the Mack case of the Maine Supreme Court and stated it did not apply  
41 here.

42  
43 Mrs. Murphy explained why you don't want to increase impervious surface beyond 20%.  
44 She called the board's attention to 250' as defined on the Zoning Map.

45 Mr. Murphy reiterated that two active town officials and one former planning board  
46 member stated that the starting point of measure of the Shoreland Zone and coastal  
47 wetlands setback is at the top of the bank, always has been, always will be.

48  
49 Chairman Johnson moved to close public comment. Mr. Schwartz seconded. All were

1 in favor.

2  
3 Discussion on the late time (almost 11 pm) and continuing. Board continued discussing  
4 this appeal.

5  
6 Mr. Straw stated that the decision turns on where the boundaries of the Shoreland Zone  
7 are defined to lie in order to determine what constitutes 20% coverage. Mr. Straw  
8 indicated that he agreed with the Murphys regarding the purpose of the ordinance—the  
9 Shoreland Zone lot coverage limitations exist to prevent runoff into the adjacent water  
10 body. Neither the State nor the Town has a method to determine precisely the amount  
11 of runoff that will occur on every particular lot. So instead a rough tool—the 20%  
12 limitation—is used in an attempt to ensure water absorption into the soil and to limit  
13 runoff, such as phosphates, into the water body. According to Mr. Straw, the reason the  
14 appeal was before the Board is because the lot coverage is not at 5% or 10%, but it is  
15 somewhere close to the 20% coverage limit such that the boundary locations mattered.  
16 Mr. Straw stated that he agreed with the Murphys that Section 19-2-4 states that the  
17 boundaries are as shown in the Zoning Map. Mr. Straw recognized the argument that  
18 the Zoning Map is not very granular, but stated that nevertheless the boundary as  
19 shown on the Map lies within the street and encompasses all of the lot at issue.

20  
21 Mr. Straw said that as discussed earlier, a mechanism exists for disputing where a  
22 boundary is drawn that entails obtaining an opinion from the CEO. Mr. Straw stated that  
23 he nevertheless did not believe that the CEO had made such a determination in this  
24 instance, even implicitly. Instead, according to Mr. Straw, the CEO had determined  
25 where 250 feet from the high water mark was, which is a somewhat different issue than  
26 determining where the boundaries of the zone lie on the zoning map. Mr. Straw stated  
27 that the Board determines what lies in the zone using the Zoning Map. Using the  
28 Zoning Map, the entire lot is within the Shoreland Zone. According to Mr. Straw, there  
29 was no decision from the CEO finding otherwise before the Board. Mr. Straw stated he  
30 accordingly believed the lot coverage exceeded 20% and the permit should not have  
31 been granted.

32  
33 Mr. Carver raised the “clearly contrary” standard and stated that the map and the  
34 measurement were clearly at odds and stated the issue is which is operable in this  
35 instance. Mr. Carver stated that the CEO’s decision cannot be clearly contrary to the  
36 ordinance when the ordinance can be read either way.

37  
38 Mr. Thibodeau noted that the CEO stated he was relying on the survey in reaching his  
39 conclusion.

40  
41 Mr. Carver stated that there was support for the CEO’s decision in the Ordinance.

42  
43 Ms. Tourangeau stated section 19-2-4 covering the location of district boundaries states  
44 that the specificity of the zoning map applies to situations where the location of the  
45 boundaries are defined by a detailed description. According to Ms. Tourangeau, the  
46 Shoreland Zone was somewhat different from other Zones in that it is defined to be 250  
47 feet from a point that is somewhat uncertain. Because this starting point can change,  
48 Ms. Tourangeau believed it was hard to reach a conclusion that the decision was  
49 “clearly contrary.”



1 Mr. Thibodeau stated it was an administrative appeal and our job is to determine if the  
2 CEO's actions were correct. The CEO made his decision based on a survey and had a  
3 basis for his decision, even though we have conflicting data. Because the CEO had a  
4 basis for his decision, Mr. Thibodeau believed it was difficult to overturn the CEO's  
5 decision. But Mr. Thibodeau believed the lot was probably in the Shoreland Zone and  
6 had an issue with taking only a part of the lot and calculating the 20% coverage instead  
7 of taking the whole lot. Mr. Thibodeau stated that he believed the entire lot needed to  
8 be taken into account in determining the coverage. Mr. Thibodeau noted that Mr.  
9 Mitchell stated that doing so brought the lot coverage over 20%.

10  
11 Chairman Johnson noted that the first sentence of Section 19-2-4 states that the  
12 boundaries of the districts are as shown on the Zoning Map. Accordingly, Chairman  
13 Johnson believed that issuance of the permit was clearly contrary to the Ordinance.  
14 According to Chairman Johnson, the entire lot needed to be included in the calculation.

15  
16 Mr. Carver noted Section 19-6-11, which states the Shoreland Zone applies to land  
17 within 250 feet of the high water mark. Mr. Carver and Chairman Johnson indicated  
18 they were both struggling with whether Section 19-6-11 is in conflict with 19-2-4.

19  
20 Mr. Schwartz asked whether the decision was supported by substantial evidence. Mr.  
21 Schwartz stated one provision of the Ordinance fits the decision while the other does  
22 not. One provision goes one way while the other is a default. Mr. Schwartz asked  
23 whether the decision can be seen as unsupported by substantial evidence.

24  
25 Chairman Johnson stated that the provisions of the Ordinance can be harmonized. In  
26 particular, Section 19-2-4 states that the Zoning Map controls whereas Section 19-6-11  
27 sets a minimum baseline for the Shoreland Zone of 250 feet from the water body. As  
28 shown on the Zoning Map, the Shoreland Zone can be larger.

29  
30 Mr. Carver asked the Chair if he was reading language into the Ordinance that was not  
31 there. Ms. Tourangeau pointed again to the last sentence of the first paragraph of 19-2-  
32 4 that she had raised earlier. According to Ms. Tourangeau, the description of the  
33 Shoreland Zone is 250 feet from the high water line and that is what is shown on the  
34 Zoning Map. Ms. Tourangeau indicated that the Zoning Map governs for clearly defined  
35 boundaries, but for instances such as 250 feet from the mean high water line, a case by  
36 case analysis is required.

37  
38 The Chairman indicated that although there are instances where the Shoreland District  
39 boundary is less clear, the lot at issue is entirely within the boundary as shown on the  
40 Zoning Map.

41  
42 Mr. Carver raised again the difficulty of applying a quasi-de-novo review while also  
43 looking to whether the decision was clearly contrary.

44  
45 Ms. Tourangeau stated that she was struggling to find an Ordinance provision that the  
46 decision clearly violates or clearly fits.

47  
48 Counsel advised the Board again as to the appropriate standard of review.  
49

1 Mr. Carver stated that under this standard, he has difficulty stating the issuance of the  
2 permit was improper.

3  
4 Chairman Johnson proposed that a vote be taken.

5  
6 Mr. Straw reiterated the Chairman's comments that the ordinance can be harmonized  
7 by interpreting the Shoreland Zone as setting a baseline in feet while the Zoning Map  
8 can further include additional area in the Zone beyond this distance.

9  
10 Mr. Carver noted that the language of the Ordinance specifically says the Shoreland  
11 District is within 250 feet of the water body.

12  
13 Mr. Straw stated that the Ordinance states that the Shoreland District "applies to all land  
14 within two hundred fifty (250) feet", but it does not say that it applies to only land within  
15 250 feet.

16  
17 The Chairman then proposed findings of fact.

18  
19 **Findings of Fact:**

20  
21 1. Maynard and Deborah Murphy own the property at 24 Pilot Point Road and they  
22 reside there. The Murphys' property is almost directly across the street from the subject  
23 property. All were in favor.

24  
25 2. On August 17, 2012, Pilot Point LLC filed an application for a building permit with the  
26 Code Enforcement Officer seeking a permit for construction of a new accessory  
27 structure at 27 Pilot Point Road, Tax Map U12, Lot 70. All were in favor.

28  
29 3. On August 17, 2012, the Code Enforcement Officer issued Building Permit #130056  
30 to Pilot Point LLC for construction of a new accessory structure at 27 Pilot Point Road,  
31 Tax Map U12, Lot 70. All were in favor.

32  
33 4. On September 17, 2012, the Murphys filed with the Code Enforcement Officer an  
34 appeal to the Zoning Board of Appeals challenging the issuance of Building Permit  
35 #130056. All were in favor. That was timely filed because the 30<sup>th</sup> day fell on a  
36 Sunday.

37  
38 5. The Murphys have demonstrated the required quantum of harm on standing to  
39 object to the issuance of this permit. 4 in favor (Chairman Johnson, Mr. Carver, Mr.  
40 Straw, Mr. Hoffman), 3 opposed (Mr. Schwartz, Mr. Thibodeau, Ms. Tourangeau).

41  
42 6. The proposed accessory structure is greater than 75' from the normal high water line  
43 of coastal waters. All were in favor.

44  
45 7. The entirety of U12, Lot 70, lays-lies within the Shoreland Zoning District overlay. All  
46 were in favor.

47  
48 8. The entirety of impervious areas on the lot in their current form are greater than 20%.  
49 All were in favor.

1  
2 9. The proposed accessory structure would increase the total area of impervious  
3 surface. All were in favor.

4  
5 10. The proposed stairs in the current design are greater than four feet in width. All  
6 were in favor.

7  
8  
9  
10 **Conclusions:**

11  
12 1. The issuance of the permit, Permit #130056, was clearly contrary to the Ordinance.  
13 4 in favor (Chairman Johnson, Mr. Straw, Mr. Hoffman, Ms. Tourangeau), 3 opposed  
14 (Mr. Schwartz, Mr. Thibodeau, Mr. Carver).

15  
16 2. The issuance of the permit, Permit #130056, was unsupported by substantial  
17 evidence in the record. 3 in favor (Chairman Johnson, Mr. Straw, Mr. Hoffman), 4  
18 opposed (Mr. Schwartz, Mr. Thibodeau, Ms. Tourangeau, Mr. Carver).

19  
20 Counsel advised that if you determined that the incorrect standard was applied then  
21 from necessity any conclusions drawn would be invalid. The Code Enforcement Officer  
22 would have to be applying the correct standard in order to get to a result that is  
23 consistent with the Ordinance. So any facts and findings made to substantiate the  
24 incorrect standard would be an annulity. So you don't have to go that route if the  
25 criterion is not met.

26  
27 **Decision:**

28  
29 To granting the Murphys' appeal. 3 in favor (Chairman Johnson, Mr. Straw, Ms.  
30 Tourangeau), 4-3 opposed (Mr. Schwartz, Mr. Thibodeau, Mr. Carver).

31  
32 Mr. Hoffman was asked for his vote. He indicated he voted in favor of the appeal. The  
33 vote was taken again.

34  
35 To granting the Murphys' appeal. 3 in favor (Chairman Johnson, Mr. Straw, Ms.  
36 Tourangeau), Mr. Hoffman stated he was changing his vote. 4 opposed (Mr. Schwartz,  
37 Mr. Thibodeau, Mr. Carver, Mr. Hoffman).

38  
39 Counsel advised the board to reconcile based on findings and conclusions. Mr. Straw  
40 stated the vote that the issuance of the permit was clearly contrary to the Ordinance  
41 needed to be reconciled with the decision to deny the appeal. More discussion.  
42 Counsel noted the determination that the entire lot is in the Shoreland zone, with the  
43 existing conditions exceeding the permissible impermeable surface, that the addition of  
44 the stairs would increase the nonconformity of the lot and would therefore be prohibited  
45 . Mr. Carver asked if this was then a de novo review because the findings carried the  
46 determination. Counsel continued stating, there is a certainly mixing of the records, you  
47 don't start from zero, have you a record prepared by the Code Enforcement Officer and  
48 it is augmented by information from the arguments presented. If the evidence supports  
49 both standards-decisions equally and the correct standard was applied, you are

1 required to affirm the Code Enforcement Officer's decision. In this respect, the Board  
2 This is not a true de novo review. Mr. Hoffman stated that he wanted to reconsider his  
3 votes because he was not in favor of the appeal. Chairman Johnson noted that this  
4 was reflected in the record. Mr. Straw asked Counsel if the Board can revisit the votes.  
5 You Counsel stated the Board can reconsider a decision.

6  
7  
8 Mr. Straw moved that we the Board reconsider our its decision that the issuance of the  
9 permit, Permit #130056, was clearly contrary to the Ordinance. Chairman Johnson  
10 seconded the motion. Discussion followed.

11  
12 All were in favor of voting to reconsider.

13  
14 **Chairman Johnson restated the Conclusion:** The issuance of Permit #130056, by  
15 the Code Enforcement Officer was clearly contrary to the Ordinance. 3 in favor  
16 (Chairman Johnson, Mr. Straw, Ms. Tourangeau), 4 opposed. (Mr. Schwartz, Mr.  
17 Thibodeau, Mr. Carver, Mr. Hoffman).

18  
19 Chairman Johnson suggested the board adjourn. Discussion followed prior to vote.  
20 Decision made to continue after a 2-minute break. All were in favor of continuing.

21  
22 **New Business continued:**

23  
24 2. To hear an administrative appeal by the Shore Acres Improvement Association,  
25 represented by James Morra, of the Code Enforcement Officer's issuance of Building  
26 Permit # 120177, based on the Livingstons' Site Plan Drawing related to a newly  
27 constructed deck based on its location being outside the owner's property, and within  
28 the deeded right of way and within the restricted shoreline setback area at 29 Pilot Point  
29 Road, Tax Map U12, Lot 69.

30  
31 Mr. Shumadine came to the podium. He stated this permit was issued 11 months ago.  
32 He'd like the board to consider the timeliness issue first.

33  
34 Ms. Tourangeau motioned that the board address the timeliness issue and procedural  
35 questions before we get into the substance of this appeal. Chairman Johnson stated he  
36 did not fall under the Shore Acres Improvement Association. He seconded the motion.  
37 All were in favor.

38  
39 Sue Guerette, a property owner, came to the podium stating she had the records of who  
40 has the right of way and whom the property belonged to.

41  
42 James Morra, of 5 Waubek Road, representing the Shore Acres Improvement  
43 Association, which is our neighborhood association, came to the podium to address the  
44 30-day appeal period. He stated we believe since the CEO was without authority to  
45 even consider the permit application, the permit itself is invalid. Therefore the 30-day  
46 time limit does not apply. Only when the ZBA makes the initial determination, does the  
47 30-day period begin to run.

48  
49 Mr. Straw mentioned a similar appeal that came before the board last month with an

1 appeal much closer to the 30 day time period. It was decided at the time that the board  
2 did not have the authority to waive the 30-day window.

3  
4 Mr. Morra continued saying the Ordinance procedures were not followed. The  
5 subdivision was created in 1911 and he displayed a map of that year recorded in the  
6 Registry of Deeds. At the time of creation of the subdivision, Cape Elizabeth had a right  
7 of incipient dedication to all of the paper roads including Surf Side Avenue, which is  
8 highlighted in blue. This can be found in the town's inventory of paper roads. To this  
9 day the town continues to have this right of way. The town planner, Maureen O'Meara,  
10 confirmed this to Sheila Mayberry, one of our neighbors, on October 22, 2012.

11  
12 According to the town's own document on paper roads in the area the owners of lots in  
13 the Shore Acres subdivision continue to have the rights in any paper roads shown in the  
14 subdivision plan. (He then passed out information to the board and Mr. Shumadine.)

15  
16 Mr. Schwartz asked why Mr. Morra didn't think the 30-day time period had started.

17  
18 Mr. Morra said it would be clearly stated. He continued saying Surf Side Avenue runs  
19 along the shore and abuts 29 Pilot Point Road. In 2011 the property was sold to  
20 Livingston. It is located in the shoreland overlay performance district, within a  
21 Residential A district, which is discussed in Section 19-6-11. As such, the lot is within  
22 250' horizontal distance of an upland edge of a coastal wetlands including rocky ledges.  
23 On November 8, 2011, the Livingstons' agent, Peter Spenser, from Waterman Marine  
24 Corporation, submitted an application for a permit to replace an existing deteriorating  
25 rock wall with a brick rock wall and to replace a deteriorating 20 by 20 foot deck with a  
26 new 20 by 20 foot deck. The application included a site plan without dimensions and  
27 inaccurately represented the relationship of the property lines.

28  
29 Mr. Morra asked the board to compare the Inspection of Premises document (In the  
30 package that he handled out.) with the site plan. He indicated that the deck was off the  
31 owners' property. In addition, the deck is within 75' of the high water line and sits  
32 directly on the Surf Side Avenue right of way. Rather than have the ZBA hear the  
33 request for a permit, pursuant to the town's Ordinance Section 19-4-4, the town's CEO  
34 independently approved the permit on November 10, 2011.

35  
36 Chairman Johnson stopped Mr. Morra and read Section 19-4-4 B.3: Reconstruction or  
37 Replacement, which states in part: Any nonconforming structure which is damaged or  
38 destroyed by 50% or less of the market value of the structure, excluding normal  
39 maintenance and repair, may be reconstructed in place if a building permit is obtained  
40 from the Code Enforcement Officer. Isn't that exactly what happened here?

41 Mr. Morra said there was a change of use.

42  
43 Ms. Tourangeau noted that this was a discussion of the substance of the appeal  
44 whereas the Board was focused on the timeliness of the appeal.

45  
46 Discussion followed about timeliness. Ms. Tourangeau noted that the permit at issue  
47 was issued the prior November. Mr. Straw noted that it seemed the argument on  
48 appeal is that the structure was built on property not belonging to the Livingstons.  
49 According to Mr. Straw, if this argument is taken to its final conclusion, the appellants

1 were arguing that the CEO should be required to perform a title search for all permit  
2 applications.

3  
4 Mr. Straw stated that where:  
5 an applicant files a permit application representing to the CEO the boundaries of their  
6 land and that the applicants are building on land they own,  
7 the CEO reviews the application to determine if it complies with the Ordinance; and  
8 it turns out that the applicant misrepresented the location and the structure is built on  
9 someone else's land;

10 the issue does not lie with the Board, but with the Courts. According to Mr. Straw, the  
11 Board's job is not to decide right and title to land, but to determine if the permit is  
12 granted in compliance of the Ordinance. Mr. Straw stated that a person building a  
13 structure needs to have some level of finality. It cannot be that a person can come in  
14 and appeal a permit granted for a structure built a decade ago. There needs to be a  
15 line drawn with respect to timeliness. The Ordinance states the Code Enforcement  
16 Officer can issue a permit. An issue of misrepresentation might better be heard in the  
17 courts. Appeals must be filed within 30 days from when the permit is granted. This  
18 permit was issued last November.

19  
20 Mr. Straw asked how can we possibly say this appeal is timely, especially with the  
21 decision reached the month prior that was almost directly on point? Mr. Morra replied  
22 the Code Enforcement Officer did not follow the Ordinance. Mr. Straw reviewed the  
23 issue of timeliness. Mr. Straw again stated that he understood Mr. Morra's position and  
24 even assuming for the sake of argument that the CEO did the worst job ever in the  
25 history of the world of reviewing the permit, nevertheless the 30 days had run and, as  
26 discussed last month and as advised by the Town's counsel, the Board lacks the  
27 authority to find good cause exists to waive the timeliness requirement.

28  
29 Sheila Mayberry come to the podium and stated that finding the Board cannot review  
30 the permit leaves this was an unfair process, which allows invalid permits to be issued.  
31 Mr. Straw referenced last month's example of the CEO authorizing a twelve story  
32 structure on the lot and that under the Ordinance the Board cannot review such a  
33 decision after the time for appeal had expired and the timeliness issue. She said the  
34 ZBA could do this, take action, on their own. She wanted the board to initiate action.  
35 Mr. Straw explained that the same issue was before the Board the prior month and that  
36 the Town's counsel, as well as the Livingstons, had stated, and Mr. Straw's opinion was  
37 that the Board had reached the same conclusion, that the mechanism that exists for  
38 appealing a permit after the time for appeal had elapsed was to go to a court and argue  
39 to the court that there is good cause to waive the 30 day period. Ms. Mayberry again  
40 urged the board to take action on the appeal. Mr. Straw indicated that he is sympathetic  
41 with her position because he believes that everyone should have an opportunity to have  
42 their arguments heard, but that the Board only can review a permit issued by the CEO  
43 within 30 days of the issuance. Chairman Johnson further stated the Board can only  
44 work with what it has—the Board did not make the rules. She Ms. Mayberry asked that  
45 Mr. Morra be allowed to complete his time issue statement.

46  
47 Ms. Tourangeau stated that the board was open for the timeliness issue alone. She  
48 suggested a time limit to discuss procedure issues.  
49

1 Barbara Freeman, who lives in Shore Acres, came to the podium and stated that she  
2 didn't believe the board was bound to do and had the ability to do was not casted in  
3 stone, based on what she had observed earlier this evening in regard to counsel's  
4 advice.

5  
6 Ms. Tourangeau motioned there be a five minutes time limit, for each party, to discuss  
7 procedure issues. Chairman Johnson seconded. All were in favor.

8  
9 Mr. Morra come to the podium and referenced the memo from Mike Morris, of the DEP,  
10 dated August 30, 2012, which stated the reconstructed deck was +/- 50' from the  
11 shoreline. He also stated the town ZBA, not the Code Enforcement Officer was  
12 required to approve a new structure after other considerations. We had the memo on  
13 the 30<sup>th</sup> and appealed within 30 days of that.

14  
15 Mr. Straw asked Mr. Morra if his position is that the 30 day window is met because the  
16 30 days began to run when the CEO realized his error. Mr. Morra said yes. Mr. Straw  
17 said he was sympathetic to this argument, but the issue with this argument is if a person  
18 brings to the CEO's attention an error made 50 or 100 years ago and the CEO says  
19 "Oh! No one ever realized this! My god! You are the first person to discover it!" the 30  
20 day period cannot begin to run at that point because that is not realistic. People have to  
21 have an expectation of finality with a permit. According to Mr. Straw, in the 30 day  
22 window, it is a balancing act. It says "We are going to grant you this permit. If you start  
23 in the next 30 days and the permit was improperly issued, you will have to incur the cost  
24 of fixing this problem that you created by starting without waiting for the 30 day period to  
25 run." Mr. Straw explained that he understood Mr. Morra's position that the time for  
26 appeal should begin to run from the moment the CEO realized his error, but Mr. Straw's  
27 position was that under the Ordinance it begins to run from the moment the permit is  
28 issued. explained the timeliness of the 30-day window.

29  
30 Sue Guerette, 2 Katahdin Road, Shore Acres, stated that she was a valid owner of the  
31 property and that the permit therefore is invalid. She said the CEO failed her as a  
32 resident.

33  
34 Ms. Mayberry stated the CEO's decision not to act when he knew of the error was a  
35 decision and appeals of any decision of the CEO go to the Zoning Board of Appeals.  
36 Mr. Straw asked Ms. Mayberry to define the CEO's decision that is presently  
37 appealable. Ms. Mayberry stated the decision was the decision not to retract the permit.

38  
39 Mr. Straw explained that in his opinion to Ms. Mayberry's create that argument proves  
40 too much because it would allow anyone to revisit any permit, even permits issued 150  
41 years ago, because if the CEO refused to revoke the permit the decision would become  
42 appealable.

43  
44 Ms. Mayberry quoted Section 19-3-1, "Appeals from decisions of the Code Enforcement  
45 Officer shall be to the Zoning Board of Appeals..."

46  
47 Ms. Tourangeau asked if anyone from Shore Acres went to Mr. Smith the day the DEP  
48 letter came and asked the CEO to decide if he was going to retract the permit or was  
49 Ms. Mayberry just inferring the CEO made a decision? Ms. Mayberry replied he was

1 told. Ms. Tourangeau said ~~her~~ Ms. Mayberry's inference that the CEO did something  
2 was not an appealable decision.

3 Mr. Carver stated that the CEO does not act every day on issues and that appeals do  
4 not ripen based on not acting.

5  
6 ~~Discussion on the CEO's actions.~~

7  
8 Mr. Shumadine came to the podium. He stated everything that they've argued has  
9 come before ~~thea law-Law court-Court~~ and has been rejected. He cited several cases,  
10 including Justice Alexander's opinion in Brackett. Mr. Shumadine stated that the  
11 majority in Brackett stated that the good cause issue ~~This~~ is a judicial decision, not for  
12 ~~this-a decision for the Zoning board-Board~~ to decide.

13  
14 Mr. Straw commented that ~~we the Board haven't hadn't~~ sought any facts from them  
15 (Shore Acres) as to whether the good cause standard had been met.

16  
17 Ms. Tourangeau said any comments regarding the underlying decision on the CEO  
18 were not based on review of the merits of the underlying decision. We are solely  
19 looking at the procedural issue of ~~timeliness-issue.~~

20  
21 Chairman Johnson closed the record.

22  
23 **Findings of Fact:**

24  
25 1. Shore Acres Improvement Association ("Shore Acres") is an association of  
26 homeowners who claim an interest in Surf Side Avenue, a "paper street" depicted on a  
27 "Plan of Part of Shore Acres" recorded in the Cumberland County Registry of Deeds at  
28 Plan Book 25, Page 54. All were in favor.

29  
30 2. The "paper street" Surf Side Avenue abuts the Livingstons' property that is the  
31 subject of Building Permit #130072, i.e. 29 Pilot Point Road, Tax Map U12, Lot 69. All  
32 were in favor.

33  
34 3. On November 2, 2011, the Livingstons filed an application for a building permit with  
35 the Code Enforcement Officer seeking a permit for, in pertinent part, construction of a  
36 12 by 30 foot deck to replace an existing deteriorated 12 by 30 foot deck at 29 Pilot  
37 Point Road, Tax Map U12, Lot 69. All were in favor.

38  
39 4. On November 10, 2011, the Code Enforcement Officer issued Building Permit  
40 #120177 to the Livingstons for, in pertinent part, construction of a 12 by 30 foot deck to  
41 replace an existing deteriorated 12 by 30 foot deck on property located at 29 Pilot Point  
42 Road, Tax Map U12, Lot 69. All were in favor.

43  
44 5. On September 19, 2012, Shore Acres filed with the Code Enforcement Officer an  
45 appeal to the Zoning Board of Appeals challenging the issuance of Building Permit  
46 #120177 and particularly the decision to permit the construction of a 12 by 30 foot deck  
47 to replace an existing deteriorated 12 by 30 foot deck at 29 Pilot Point Road, Tax Map  
48 U12, Lot 69. All were in favor.



1 **Conclusion:**

2

3 The notice of appeal for permit # 120177 is untimely in that it was brought more than 30  
4 days after issuance of the same. All were in favor.

5

6 **Decision:**

7

8 To dismiss the Shore Acres' appeal as untimely. All were in favor.

9

10 Mr. Thibodeau spoke to the residents of Shore Acres. This came to light last month as  
11 well, the Ordinance is pretty clear as far as what we're able to do and not able to do on  
12 administrative appeals. We can't go outside what we're empowered to do. The permit,  
13 once it is issued, just needs to be on the property, it doesn't need to be pasted on the  
14 front window or a front door. That is really the only notice that any of us have that  
15 construction of any sort is going on a parcel of land. I'm all for a modification of that  
16 protocol such that building permits, in the future, are visible for all residents. You don't  
17 know when a permit's been issued and you don't know the 30-day clock is running as a  
18 consequence. He is sympathetic in this regard, many on the board are. But we are  
19 limited to the timeliness issue in the Ordinance. There are procedural things that  
20 citizens can do to change some of those protocols.

21

22 **F. Adjournment** – Motion by Chairman Johnson to adjourn; seconded by Mr.

23 Thibodeau. 6 in favor (Chairman Johnson, Mr. Carver, Mr. Hoffman, Mr. Schwartz, Mr.  
24 Thibodeau, Ms. Tourangeau), 1 opposed (Mr. Straw). Meeting adjourned at 12:10 am.

25 The remaining case will need to be rescheduled next month.