

1 **Town of Cape Elizabeth**
2 **Minutes of the November 27, 2012, Zoning Board Meeting**

3
4 **Members Present:**

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

9 Also present were the Town Manager (Interim Code Enforcement Officer), Michael
10 McGovern and Recording Secretary, Carmen Weatherbie.

11
12 **A. Call to Order** – The meeting was called to order by acting Chairman John
13 Thibodeau at 7:03 pm.

14
15 **B. Approve the Minutes of October 23, 2012** – Chairman Thibodeau commented that
16 Mr. Straw had just handled out revisions to the minutes. Mr. Straw provided a summary
17 of his revisions. A motion to table the approval of the minutes was made by Mr.
18 Thibodeau; seconded by Ms. Tourangeau. All were in favor.

19
20 Chairman Thibodeau stated that New Business Item 2 on the Agenda was withdrawn
21 by Glenn and Rachel Reeves. There was discussion on which agenda item to begin
22 with.

23
24 Chairman Thibodeau asked Town Counsel, John Wall, to brief the board on the appeal
25 process. Mr. Wall came to the podium. Following the meeting last month he did some
26 additional research to verify the standard of review the Board employs when reviewing
27 administrative appeals pursuant to Article V, Section 19-5-2.A of the Town Ordinance.

28
29 In particular, he wanted to respond to some questions by the Board members as to
30 what deference, if any, needed to be accorded the decision of the Code Enforcement
31 Officer. The following is quoted from a memo Mr. Wall sent to the board.

32
33 “Much of this issue is dependent upon the specific language of the
34 Ordinance, and the Maine Law Court’s various decisions interpreting other
35 ordinances have some tension with each other. For example, the Court
36 has construed seemingly similar language in ordinances to effect different
37 outcomes. However, having completed my research, I have reached
38 certain opinions that I would like to provide the Board.

39
40 While the Cape Ordinance does refer to the Board determining
41 “whether the decision of the Code Enforcement Officer is in conformity
42 with the provisions of the Ordinance,” I continue to believe that the Board
43 is required to conduct a de novo review. Such a review requires the Board
44 to receive evidence and evaluate the challenged activity (such as a
45 request for a building permit) for compliance with the Ordinance.

46
47 Moreover, my research has revealed that when de novo review is
48 employed (as the Board has done in its recent meetings) the Maine Law
49 Court has indicated that a local board is generally not required to accord

1 any deference to the original decision-maker. The “clearly contrary”
2 language that I have discussed with the Board at prior meetings appeared
3 in reference materials that relied on older authority. More recent decisions
4 clarify that deference is not required in most instances.
5

6 Therefore, it is my opinion that when the Board conducts its de
7 novo review of a decision by the code enforcement officer, it is not
8 required to accord any deference to the code enforcement officer’s
9 decision, such as applying a “clearly contrary” standard. Rather the Board
10 should base its decision on its own assessment of the evidence as
11 developed in the record before it and determine for itself whether a
12 challenged action (such as permit request) complies with the ordinance.

13
14 There was discussion for clarification. Mr. Wall said that timeliness is a different matter
15 for the board to determine. Last month’s conclusions could be revisited if the board
16 decided. Mr. Straw motioned to reconsider the vote that was 4 to 3 on the permit,
17 where it was upheld, relating to the steps; seconded by Mr. Carver. Two were in favor:
18 Mr. Straw and Mr. Carver. Four opposed. For completeness, Mr. Straw motioned to
19 reconsider the 7 to 0 vote on the reduction in size of the patio; seconded by Mr. Carver.
20 Two in favor: Mr. Straw and Mr. Carver. Four opposed.

21
22 Board discussion on standards, that may or may not have been, overly deferential.
23

24 **C. Communications** – Notice of a Superior Court 80B Appeal of Government Actions
25 by Maynard J. Murphy and Deborah N Howe Murphy vs. Sandra and Brian Livingston
26 and Zoning Board of Appeals.

27
28 **D. Old Business** – To hear an administrative appeal by the Shore Acres Improvement
29 Association, represented by James Morra, of the Code Enforcement Officer’s issuance
30 of Building Permit #130072 that allows the construction of a boulder wall and deposit of
31 fill within the Shore Acres Community deeded right of way at 29 Pilot Point Road, Tax
32 Map U12, Lot 69

33
34 Chairman Thibodeau asked to hear from the representative for the Shore Acres
35 Improvement Association. Richard Bryant, of Van Meer & Belanger, came to the
36 podium and stated he was representing the Shore Acres Improvement Association,
37 which is a non-profit organization which represents the interest of lot owners of adjacent
38 properties of the Shore Acres subdivision. Members have easement rights over Surf
39 Side Avenue, which is a paper street that the town holds incipient rights to as well. The
40 street is shown on the 1911 subdivision plan. Mr. Bryant had packets of photographs
41 and a map for board members.

42
43 The permit was issued August 31 to the Livingstons at 29 Pilot Point Road, Tax Map
44 U12, Lot 69, for the replacement of a 50 by 25 foot patio attached to the house with a 20
45 by 20 foot patio attached to the house. In addition it said there would be “regrading to
46 restore grass/vegetation in disturbed areas. Temporary erosion control measures
47 include a silt fence. Permanent erosion control measures including a retaining boulder
48 wall to prevent further erosion and water runoff over crumbling ledge on East side.” on
49 the second page of the permit.

1
2 Mr. Bryant mentioned several site plans. Jim Fisher of Northeast Civil Solutions could
3 not be here. Mr. Bryant agreed with how he reached the still water datum and won't
4 challenge how that datum was reached.
5

6 John Shumadine, of Murray, Plumb and Murray, representing the Livingstons came to
7 the podium and stated that all Jim Fisher's statements from the last meeting would be
8 accepted and carried over for this proceeding.
9

10 Mr. Bryant stated that the application for the permit doesn't comply with the Ordinance.
11 Section 19-3-3A requires a building permit for any structure. A structure is anything
12 built for the support of any kind, constructed or erected with a fixed location on or in the
13 ground. Section 19-3-3B requires that no building permit be issued without compliance
14 with all the provisions of the Ordinance. Section 19-3-3C requires that a permit
15 application include a site plan showing structures, property lines and compliance with
16 setbacks. Those should all be included in the application; but were not.
17

18 The appeal was timely filed on September 25. Included in the appeal packet was a
19 recreational easement deed that was conveyed in 1991 over Surf Side Avenue from the
20 Shore Acres Land Company, which was the original developer of this subdivision in
21 1911. The Livingstons will contest this deed. That deed is not the only basis on which
22 members of the association have rights over Surf Side Avenue. There are three ways
23 to obtain private rights: one is by implication, two is statutory, and three is actual
24 deeded conveyance. Those rights are in the chain of title of each of those deeds.
25

26 Ms. Tourangeau stated that the discussion should be limited on underlying title issues to
27 the extent that they pertain to the standing issue. Ms. Tourangeau also stated that she
28 was a resident of Shore Acres, but not a member of the association. She asked how
29 Right, Title, and Interest flowed to the association.
30

31 Mr. Bryant stated that he was an agent for members of the association to take action for
32 the better interest of its members.
33

34 There was a discussion about how one would be a member of the association - by
35 being a resident and paying dues to the association; and how Mr. Bryant came to
36 represent the association – officers of the association engaged him. Membership is
37 voluntary and no Zoning Board of Appeal members present are members of the
38 association.
39

40 Mr. Straw asked if the Livingston's deed was specifically listed in the release deed. Mr.
41 Bryant was not sure it was. Chairman Thibodeau noted he did not see it listed. The
42 Livingston's deed, Lot 69, Tax Map U12, is different from the Shore Acres Plan Lot
43 numbers 3 and 18 and a part of Lot 2. Mr. Straw stated the board would continue as if it
44 was not listed. Chairman Thibodeau asked Mr. Bryant to continue, staying away from
45 land issues and address why there is standing.
46

47 Mr. Bryant stated members of the association, including board members here, have
48 easement rights over all of Surf Side Avenue.
49

1 Mr. Straw said the Livingston's property was not on the release deed and didn't see how
2 in impacts them.
3
4 Mr. Bryant said the conveyance by the Shore Acres Land Company to the predecessors
5 and interests to the Livingstons conveyed Lot numbers 3 and 18 and a part of Lot 2. It
6 did not convey to them Surf Side Avenue. So title to Surf Side Avenue remained with
7 Shore Acres Land Company and that was the entity that conveyed out the easement to
8 various lot owners under that release deed.
9
10 Mr. Straw said that from that perspective it is irrelevant that the Livingston's
11 predecessors and interests aren't on it.
12
13 Mr. Bryant said he has a deed, from a current board member that shows the Shore
14 Acres Land Company conveyed a specific deeded easement right over all of Surf Side
15 Avenue. And that, that pertinent right to their Lot number 38 carries on down to the
16 current owner. That appears to be the case for all the lots. He has not seem anything
17 releasing that right back to the Shore Acres Land Company. So he can establish
18 standing for members of the association.
19
20 Ms. Tourangeau asked if there were any members of the association here that use that
21 area. Mr. Bryant replied, yes, he believed so.
22
23 Mr. Shumadine came to the podium. He said the deeds are not relevant. Mr.
24 Shumadine said there was no standing here. He is not challenging the validity of the
25 1991 deed.
26
27 Mr. Shumadine mentioned a statue where a landowner who conveyed property in a
28 subdivision and retained title on a road had to record such within two years to be
29 retained. The Shore Acres Land Company did that for a numbers of roads in the
30 subdivision but not for Surf Side Avenue. Title then goes to the water, in this case.
31
32 Mr. Shumadine displayed a plan with the meets and bounds of the 1991 deed shown.
33 The Livingston's property was not included. So the deed is irrelevant.
34
35 Mr. Straw asked if any abutters to the property were present. (None appeared.)
36
37 Mr. Shumadine contended that the association has to sue on its own rights. No right of
38 this property flows to the Shore Acres Land Company. The release deed flowed to the
39 property owners not the association. The Livingstons are dues paying members of the
40 association. The association is taking sides in a private dispute between private
41 landowners.
42
43 Mr. Shumadine passed out correspondence signed September 5, 2007, from the State
44 of Maine, stating that the Shore Acres Improvement Association was administratively
45 dissolved for failure to file the 2007 Annual Report. They have no rights to file this
46 appeal.
47
48 Mr. Bryant stated this was not an uncommon occurrence and the documents were to
49 have been filed last week to put the association back in good standing.

1 Chairman Thibodeau pointed out that would have been after September 25.

2
3 Mr. Bryant stated the association was acting in the general good of its members. There
4 was a quorum at the annual meeting and they were acting to protect the membership

5
6 Mr. Schwartz asked if any of the members executed an assignment of claims to the
7 association to bring this on their behalf? Mr. Bryant said not that he was aware of. The
8 application itself is signed by a member who holds easement rights.

9
10 Ms. Tourangeau asked Mr. Bryant to speak to the issue of an individual member be to a
11 named party where the appeal was signed by that person and brought in the name of
12 the association. Ms. Tourangeau said she finds the association confusing on the issue
13 of standing. Does this flow through individual named members curing the standing of
14 the association?

15
16 Mr. Bryant said it is an extremely low bar. The association has standing and any person
17 who participated in this hearing would have standing. Any one of those parties could go
18 to Superior Court and say they have an interest and could pursue the appeal.

19
20 Ms. Tourangeau asked if that would apply to any commenting party. Mr. Bryant said
21 any commenting abutter could pursue the claims in court.

22
23 Mr. Shumadine said that was a confusion of parameters.

24
25 Mr. Wall addressed Ms. Tourangeau's and Mr. Straw's inquires. He thought that maybe
26 there were two different issues. He said he was not sure that substituting names was
27 an appropriate step for a zoning board de novo review. If that request was made, it may
28 be that individual members of the association have already brought an appeal with
29 regard to this particular permit. Then is there a preclusive effect in bringing multiple
30 appeals of people who are already similarly situated? It is not an issue he had
31 researched. It wouldn't be a standing issue. The question is whether the association
32 entity has an ownership interest in an abutting lot such that the usual analysis of what
33 standing should be applied for abutters pertains. He stated he didn't know if substitution
34 could occur and go forward. I believed the legitimate issue to be raised is whether the
35 appellant in this situation has sufficient interest, in and of itself, to prosecute an appeal
36 particularly if the standing issue is whether someone is an abutter or not. If not an
37 abutter, it is a higher threshold.

38
39 Mr. Straw asked if the board could move on to the substance of the appeal without
40 deciding standing. Mr. Wall replied it comes down to whether you have the ability to
41 render a decision if the party filing the appeal does not have standing. It could be a
42 voidable decision if there is no appropriate standing.

43
44 There was discussion about the association being a viable entity and the applicable
45 laws pertaining. The burden being on the association, or the individuals signing, to
46 show standing and it hasn't.

47
48 Mr. Wall said generally an appellant is required to have an interest. So that may be a
49 principal you can apply to make a decision. Chairman Thibodeau asked about a lapsed

1 corporation's standing once dissolved. Mr. Wall stated a corporate board could go back
2 and ratify actions taken during a period of suspension and thereby cure any problems
3 that exist. He didn't know whether the state would consider those interim actions valid
4 or invalid

5
6 Mr. Bryant didn't know if annual reports had been filed. He stated this board has
7 continued to meet and act. In response to questions, Mr. Bryant said standing flows to
8 the association by virtue of it being an agent of its members. Its members have
9 collective interest and filed this appeal for the benefit of their members as a whole.

10
11 Discussion continued about the appeal being brought by an association and not by any
12 landowner(s) of the town. What is the injury to any party and who uses this area.

13
14 Barbara Friedman, 22 Pilot Point Road, came to the podium and stated she was a
15 board member at the time the vote was taken to pursue action on this matter. She
16 stated she lives one house away from being directly across from the Livingston
17 property. She had wanted to use this area and has wondered about her rights to it.
18 She is not a regular walker across what will now be the Livingston's back yard.

19
20 Mr. Bryant said Ms. Friedman's statement got them over the bar of standing.

21
22 There was more discussion on substitution of individuals. The Bylaws were not
23 available. (A 1989 copy was later presented.) Chairman Thibodeau asked the board
24 how they wanted to proceed given the clarification needed on legal issues. Board
25 members discussed issues, opinions and options.

26
27 Mr. Shumadine said individuals have rights. The association does not have rights and
28 therefore no standing. He stated they objected strongly to substituting names for the
29 association. Mr. Bryant argued the association has rights because it represents the
30 interests of its members and thus has standing.

31
32 Ms. Tourangeau asked how has the issuance of the permit caused injury to the
33 association or members thereof. Mr. Bryant stated because the improvements made by
34 the Livingstons violate the Shoreland Zoning Ordinance and potentially violate the state
35 ordinances because they affect the areas these members have pass and repass. The
36 sloping fill affects the ability to pass over that land. Mr. Straw commented that the
37 regrading, that was not permitted, and increased run off creates an injury for the Shore
38 Acres Association membership. Mr. Bryant said the town's Ordinance has not been
39 enforced. That's wrong and an injury to the members of the association.

40
41 Mr. Wall suggested the process for the board would be first to vote to see if there is
42 sufficient information to decide the standing issue; if there is enough to vote on
43 standing. If there is not sufficient information, the board could vote to table the appeal
44 or receive evidence and then close the record. So that if at that next meeting, standing
45 is decided, the board could make the determination based on the merits.

46
47 Mr. Wall stated it's the appellant's burden to present sufficient evidence to make a
48 determination on standing. Standing means the parties have sufficient injury and they
49 expect some redress from the board because they stand to suffer if it is not corrected.

1 Responding to board questions, Mr. Wall continued. For abutters that standard is very
2 low. But they do have to meet a burden of establishing that injury, as apposed to the
3 general public. Mr. Wall suggested to table the decision if it comes down to substituting
4 names, because then it becomes a procedural issue for board. If the board determines
5 it has sufficient information, both factual and legal, to determine whether this particular
6 party has demonstrated standing.

7
8 Board discussion on a multi-tiered motion by Ms. Tourangeau.

9
10 **Conclusions:**

11
12 Ms. Tourangeau restated the motion: To find that the Shore Acres Improvement
13 Association does not have standing because it was not a legitimate entity as of the date
14 of the appeal and because it is not a named easement holder therefore and they did not
15 present evidence sufficient to establish their interest in the property or that the permit
16 caused particular injury to the association. Mr. Schwartz seconded the motion.
17 Discussion. Vote: Four in favor; two (Mr. Straw – obtaining for lack of sufficient
18 information and Mr. Carver) opposed.

19
20 Ms. Tourangeau restated the second part of motion. That those individuals that were
21 present at the last meeting, Mr. Morra, as president of the association, and Dr. Serrage
22 to step into the appeal to move it forward. Mr. Straw seconded. Discussion and
23 consultation with Counsel Wall. Vote: One (Mr. Straw) in favor; five opposed.

24
25 Chairman Thibodeau asked for a vote on the administrative appeal by the Shore Acres
26 Improvement Association, issuance of Building Permit #130072 that allows the
27 construction of a boulder wall and deposit of fill within the Shore Acres Community
28 deeded right of way at 29 Pilot Point Road, Tax Map U12, Lot 69. Vote: All were
29 opposed.

30
31 Chairman Thibodeau called a three-minute recess.

32
33 **E. New Business**

34
35 1. To hear a request for a variance from Jackie and Geoff Dennis from the provision of
36 Article IV, Section 19-6-1 to reduce the site setback to 17 feet on the east side of the lot
37 and 20 feet on the west site from the required 25 feet. This is at 5 Ironclad Road Tax
38 Map U8, Lot 6.

39
40 Anne Callender, Architect, of Whipple-Callender Architects, Portland came to the
41 podium on behalf of Jackie and Geoff Dennis. Because of the strange lot configuration
42 we are here to get a side yard setback variance. They have a single car garage and
43 would like to have a double car garage. To achieve that, with the least impact on the
44 site, would be to add five feet to the front of the garage and infill under an existing roof
45 to the rear of the garage to create a tandem parking situation. The area at the back
46 would be infilled. It is a conforming lot, not in the Shoreland zone, that doesn't conform
47 to the setback requirements. It is only 55 feet wide and has a unique jog at the street.

1 Mr. Straw asked what was the pertinent section of the Ordinance. Ms. Callender
2 mentioned Section 19-5-2B. Variances.

3
4 The jog in the property was pre zoning. The average side setback in about 11 feet for
5 neighboring properties. Ms. Callender said it was just a small single story garage. She
6 referred to the site plan. When asked why the garage couldn't just be built to the back.
7 She said it gets closer to an adjacent garage the further back you go.

8
9 Mr. McGovern stated he received a phone call from Mr. Arnett of the Arnett Family
10 Trust; he had no objection to this proposed structure. He is the abutter to the south.

11
12 Board discussion.

13
14 Ms. Tourangeau made a motion to approve the request for a variance from Jackie and
15 Geoff Dennis from the provision of Article IV, Section 19-6-1 to reduce the site setback
16 to 17 feet on the east side of the lot and 20 feet on the west site from the required 25
17 feet, at 5 Ironclad Road Tax Map U8, Lot 6. Seconded by Mr. Schwartz.

18
19 **Findings of Fact:**

20
21 1. Anne Callender on behalf of Jackie and Geoff Dennis, the owners of 5 Ironclad
22 Road, has filed an application for a variance to add to the front and rear of an existing
23 garage. All were in favor.

24
25 2. The required side setback in the RA zone is 25 feet. All were in favor.

26
27 3. The plan submitted requests a variance to reduce the side setback on one side to 17
28 feet and to reduce the side setback on the opposite side to 20 feet. All were in favor.

29
30 4. Compliance with the Ordinance would create practical difficulty as defined by 30
31 MRSA Section 4353, 4-C. All were in favor.

32
33 5. The need for the variance is due to the unique circumstances of the property not to
34 the general conditions of the neighborhood. All were in favor.

35
36 6. The granting of the variance will not produce an undesirable change in the character
37 of the neighborhood and will not unreasonably detrimentally affect the use or market
38 value of abutting properties. All were in favor.

39
40 7. The practical difficulty is not the result of action taken by the applicant or a prior
41 owner. All were in favor.

42
43 8. No other feasible alternative to a variance is available to the petitioner or owner. All
44 were in favor.

45
46 9. The granting of a variance will not unreasonably adversely affect the natural
47 environment. All were in favor.

1 **Conclusion:**

2
3 We had a motion to approve the request for a variance from Jackie and Geoff Dennis
4 from the provision of Article IV, Section 19-6-1 to reduce the site setback to 17 feet on
5 the east side of the lot and 20 feet on the west site from the required 25 feet, at 5
6 Ironclad Road Tax Map U8, Lot 6. Seconded by Mr. Schwartz. All were in favor.
7 Chairman Thibodeau said the variance is approved.

8
9 2. To hear an administrative appeal by Harold and Mary Friedman of the Code
10 Enforcement Officer issuance of Building Permit #120434 for an expansion of a
11 structure of 40 Surf Road Tax Map: U05, Lot 42, regarding the area and volume of the
12 structure, the building footprint and the building height.

13
14 Ms. Tourangeau disclosed to the board that she rented property to the Mallorys seven
15 to ten years ago. Not even in Cape Elizabeth.

16
17 Mr. Straw recused himself. His daughter is a friend of the Mallory's child. It could
18 create the appearance of bias.

19
20 The board voted unanimously to allow Mr. Straw recuse himself. There were no
21 objections to Ms. Tourangeau remaining after her disclosure.

22
23 Ms. Martha Gaythwaite, of Friedman, Gaythwaite, Wolf, Leavitt, came to the podium.
24 She stated she was representing Harold and Mary Friedman who live at 36 Surf Road.
25 They have lived there since 1988. On October 11, Mary woke up, opened her bedroom
26 curtain to find workers on the roof of the house next door, a few feet away.

27
28 Attorney John Bannon, representing the appellees, Baird and Leah Mallory, interrupted
29 and came to the podium. He stated there is an issue whether this appeal is timely. He
30 objected to the board excepting evidence over the issue of timeliness.

31
32 Ms. Gaythwaite continued saying this was a shock to Mary. Even though the
33 Friedmans had been in regular contact with the Mallorys and their family, they never
34 knew of this proposed construction until October 11. She showed the board a photo of
35 the houses. Ms. Gaythwaite said Mrs. Friedman went to talk to the Mallorys. Finding
36 them not home, she asked the workers to please stop and called Baird Mallory and
37 stated she objected to the construction. Then she went to the town office to inquire
38 about the permit, because she had no notice of a permit. She was given permits that
39 dated back to 2009; there were no recent permits provided to her though she was told
40 she had the complete file on 40 Surf Road.

41
42 Mr. Schwartz asked about claims filed in Superior Court. Ms. Gaythwaite said they
43 have raised a nuisance claim, a trespass claim, failure to get a proper permit and have
44 also claimed that because the Mallorys did not give notice of the permit and they were
45 deprived of the opportunity to be heard with respect to that permit when it was issued.

46
47 Mr. Schwartz asked if the issues in the claims overlap this appeal. Ms. Gaythwaite
48 replied they are related. Normally the objections would have been presented here;
49 however, because a Freedom Of Access Request had to be filed to get a copy of the

1 permit file (received on October 29), a Superior Court claim was already filed because
2 we had no legal grounds to do anything else. Communications to the Mallorys failed to
3 produce a permit or stop work.

4
5 Ms. Gaythwaite believes this appeal is timely. If this appeal is untimely, it is solely the
6 result of a conscience and deliberate effort of the Mallorys to conceal the permit
7 issuance to their neighbors.

8
9 Ms. Gaythwaite stated the most analogous law would be interference with an
10 advantageous business relationship. It seems fundamentally unfair for somebody not to
11 let their neighbors know about a project they know their neighbors would object to. And
12 after succeeding in concealing this, say it's too little too late.

13
14 Ms. Tourangeau voiced addressing the timeliness issue first. Ms. Gaythwaite said that
15 within three days of receiving the complete permit file the appeal was filed. She cited
16 three reasons first it really would be an injustice; my clients had no notice of this permit.
17 Second Mr. Mallory knew the Friedmans would object to the project. She discussed an
18 email to the architect that stated they should wait until after the 30-day period had
19 passed to ask about purchasing land from them for the needed setback. Thirdly, it is
20 not required in the Ordinance that neighbors tell neighbors of a permitted project.
21 However my clients found out, they took immediate steps to protect their rights and
22 object to the project. The Friedmans took action as soon as they found out.

23
24 The Mallorys did not commence construction until after the 30-day appeal period.

25
26 Ms. Gaythwaite cited Maine case law in the 2003 Brackett vs. Rangeley case. Where
27 there was a miscarriage of justice, there, as here, because the neighbor did not get
28 notice and did not get an opportunity to be heard, and that the Zoning Board or Planning
29 Board should be able to reach the merits of the appeal.

30
31 Under Ordinance Section 19-5-3 E: "After a decision has been made by the Board, a
32 new appeal or application of similar import shall not be considered by the Board until
33 one (1) year has elapsed following the date of such decision. The Board may consider a
34 new appeal or application within this one-year period if it determines that owing to a
35 mistake of law or misunderstanding of fact an injustice was done, or that a change has
36 taken place in some essential aspect of the case sufficient to warrant reconsideration..."
37 The language is broad enough for the board to decide this case on its merits.

38
39 Ms. Tourangeau asked Ms. Gaythwaite if she wanted "the good cause" exception in
40 Brackett to be applied to this case. Ms. Gaythwaite replied that was part of their
41 argument. Ms. Tourangeau went on to state (*428 the standard of review) that the court
42 decided that application of the good cause exception is a decision to be made judicially
43 rather than administratively to prevent local arbitrariness.

44
45 Ms. Gaythwaite stated that she believed they have a Brackett exception and cited
46 several other cases. There has been a miscarriage of justice; this is not an arbitrary
47 decision. The Mallorys, knowing the Friedmans would object did not let them know of
48 this within the 30-day period. The other part of the argument is more substantive.
49 When you have a permit application, which contains inaccurate information, as this one

1 does, and you can correct that, the 30-day appeal period is only applicable where there
2 is no inaccurate or incomplete information in the application. Under Tab 3 of the packet
3 is deposition testimony of Baird Mallory, on page 159 to 160, where he has admitted
4 that the application that was filed contains inaccurate information. The application that
5 was presented to Mr. Smith said that there was not be any enlargement of the footprint
6 or any addition of bedrooms. Mr. Malloy testified in this deposition that that information
7 is inaccurate and the permit application does not reflect what is actually going on here.
8 In addition, the project is going to end up being closer to the water then it is now. There
9 is going to be a stair tower and a new foundation that is going to be closer to the ocean
10 then the northwest wall of the house is now.

11
12 Ms. Tourangeau asked if the argument is that this is work that couldn't have been done
13 with just a building permit and should have properly gone before the Planning Board?
14 Ms. Gaythwaite said it was. The 30-day appeal period is applicable when you have
15 something clearly within the Code Enforcement Officer's jurisdiction. There is
16 inaccurate information in the application. Those deadlines should not apply in a
17 circumstance like this; the Code Enforcement Officer did not have the authority to
18 render the decision that he did. One of the things we found out, at Mr. Mallory's
19 deposition (pages 104 1nd 105, of Tab 3), was in 2007 or 2008 a Mr. Coombs
20 surveyed the property. The normal high water mark was based on a 1926 plan. In
21 2012, Mr. Coombs determined the actual normal high water mark to be different than
22 the early plan. This is significant because most, if not all of the house, is within seventy-
23 five feet of the water. Mr. Smith then grandfathered the use of the earlier, inaccurate
24 plan.

25
26 Mr. Hoffman interrupted stating this was going into the details of the case and we
27 haven't determined whether it was timely. He also stated something was wrong with the
28 system where people can apply for a building permit and not notify the abutters.

29
30 There was discussion about changing notification requirements. And how the
31 circumstances here differ substantially from earlier cases. Chairman Thibodeau cited
32 Section 19-5-3E and asked how that applies to timeliness after an injustice was none.

33
34 Ms. Gaythwaite went on stating there are even more problems with the permit and the
35 Code Enforcement Officer would not have had the authority to issue. There is no
36 information in the file related to how much this structure was going to be increased by
37 square footage or volume. This is in a Shoreland zone, it is a nonconforming structure
38 on a nonconforming lot. Tab 5 is a letter from an architect that states these plans go
39 beyond the 30% limit. Tab 6 shows changes in the calculations over several dates,
40 none of which were submitted to the Code Enforcement Officer. Tab 2, shows that the
41 second floor is indented by a foot to attempt to reach compliance with the setback.

42
43 Ms. Gaythwaite stated there were amended plans submitted last Monday. Our architect
44 must still evaluate the plans as to the changes. She stated the work that is being done
45 at 40 Surf Road is not legal and should be shut down. Tab 4 has before and after
46 photos, where the flat roofs have been changed considerably.

47
48 Chairman Thibodeau stated there were two issues the board needs to resolve. One
49 being the timeliness issue, the other, whether the Code Enforcement Officer exceeded

1 his authority in issuing the permit. It sounds like some of this is Planning Board related.
2 Chairman Thibodeau asked Mr. Wall whether this board has the ability to say this
3 belongs in a different venue, if we find the Code Enforcement Officer exceeded his
4 authority by issuing something that belongs in another venue.
5

6 Counsel Wall said there had been some decisions by the court that suggested that if the
7 challenge to what the CEO did was a collateral attack on the building permit, then the
8 building permit has to stand if its not appealed within a timely fashion. There may be
9 other avenues other than the administrative process that a party could pursue in order
10 to see if a court would grant relief as it being an unauthorized action on the part to the
11 town. That involves different considerations that a court is uniquely postured to deal
12 with in terms of vested rights of the other parties of the appeal. My opinion is that the
13 timeliness issue would still apply.
14

15 Chairman Thibodeau asked about putting the timeliness issue aside, could we still hear
16 the appeal because the permit may not have been issued properly. Mr. Wall replied, in
17 his opinion no. You can't divorce it from the timeliness issue.
18

19 Mr. McGovern, as Interim Code Enforcement Officer, said there was another plan that
20 came in, not accompanied with an application or cover letter, and was filed. It has not
21 been looked at. The building permit that exists and must be adhered to and will be
22 enforced is the one issued in June. The new plan has no standing. There was no
23 application for an amended permit. The code enforcement that would be done will be to
24 enforce the existing permit as approved unless we are instructed otherwise.
25

26 Mr. Schwartz commented that even if the CEO exceeded his authority, the appeal
27 period is 30 days from issuance of the permit, governed under 19-5-3. There was
28 discussion about an incorrectly issued permit does not give the board the ability to
29 review the permit.
30

31 Mr. Wall said it would not be something addressed by an administrative appeal but by
32 some other method that a complaining party would seek readdress from the Superior
33 Court.
34

35 Mr. McGovern said he didn't look at the plan, didn't know why it had come in. They did
36 notify Attorney Gaythwaite. Mr. McGovern was waiting to see how it was resolved by
37 the Zoning Board and didn't want to take any interim action with an appeal pending.
38

39 Discussion evolved around whether the period of time tolled because of deviation from
40 the permit. The only permit applicable is the June 8th permit and those plans should be
41 adhered to. Mr. Wall stated in response to questioning that enforcement of the
42 Ordinance is granted to the CEO and Town Council. Whatever statement the ZBA
43 wanted to append to its decision would be completely advisory.
44

45 John Bannon of Murray, Plumb, Murray, representing the Mallorys, came to the podium
46 and stated there was no reason for the board to think that his clients do not want to
47 follow the law. It is not up to the Friedmans to enforce the Ordinance it is up to the
48 Code Enforcement Officer to enforce the Ordinance. You have not heard anything to
49 support these accusations. He stated he agreed with the board if a permit is granted

1 incorrectly it shouldn't matter how much time has gone by. That was his stand in Wright
2 vs. Kennebunkport and he lost. That's the law and there's nothing he or this board can
3 do about it. There is no case that says this board can determine whether there has
4 been a miscarriage of justice or any aspect of the Good Cause Exception. That's what
5 Brackett and other cases say. If the appeal is untimely, the board dismisses the appeal
6 as untimely and the courts sort it out.

7
8 Mr. Bannon commented that the board has a submission deadline for documentation of
9 14 days before the hearing. He never saw any of the tabs before today. This
10 information should not be before you and should not be considered. Whether my clients
11 have complied with the law is something the Code Enforcement Officer will determine.
12 If they have violated the law they will not get away with it. They have no interest in
13 violating the law or getting away with it. There is no cause for this to go before the
14 Planning Board. The law is if it has gone beyond the 30 days the board of appeals has
15 to dismiss it and let it go to the next step.

16
17 Mr. McGovern said he wrote a letter on November 8 to John Bannon and Martha
18 Gaythwaite, with regard to her request to stop work on the project. It ties into the issues
19 being discussed. It stated:

20
21 "I defer to the ZBA on validity and timeliness questions and deny the
22 request for a stop work order on the existing permit.

23
24 As interim Code Enforcement Officer and as Town Manager, it is my intent
25 to honor all permits issued by Mr. Smith unless the original permit
26 application contains consequential erroneous information upon which he
27 based his decisions. The Town will also be inspecting all permit locations
28 to be sure that permit conditions are being followed.

29
30 If a party believes that construction activities are occurring outside the
31 plans submitted and approved as part of the permit application, the Town
32 will consider enforcement action. In the instance, I am not aware of any
33 allegation involving non conformance with the granted permit."

34
35 Mr. McGovern said no issues had been brought to him since he sent that letter.

36
37 Ms. Gaythwaite said she had not wanted the board to accept what she said on face
38 value. That is why she submitted the packet. Most of the information was not available
39 until the last few days. She received from Attorney Bannon a copy of the plans that
40 were submitted to the town last Monday. She repeated previous arguments.

41
42 Mr. Bannon said he sent Ms. Gaythwaite the plans because he thought it was fair. He
43 wanted to remind the board that this addition had been planned since 2007. The plans
44 were on file at town hall.

45
46 Chairman Thibodeau closed the floor to public debate. He stated that he believed,
47 personally, the board has no discretion around the 30-day appeal period and the appeal
48 should be denied because of the timeliness issue.

1 Mr. Huffman disagreed and asked Mr. Wall to comment. Mr. Wall said he believes this
2 board has limited powers and does not have the inherent ability to grant the kind of
3 Good Cause Exception the law court has talked about. The Good Cause Exception is a
4 judicial function rather than an administrative function. The courts have inherent powers
5 that boards do not have. Mr. Huffman stated maybe we shouldn't hear cases like this
6 because it wastes time hearing them, if there is no discretion in the 30-day period.
7 Ms. Tourangeau wanted more clarity about new information filed. This was discussed.
8 Mr. McGovern said if it amended the permit, the 30 days would start anew from the
9 amended date. He thought they were just beefing up the record with calculations with
10 the plans that came in on Monday.

11
12 Mr. Wall responded to a question stating that if the board did something they should not
13 do, it would be invalid.

14
15 More discussion.

16
17 Mr. Schwartz motioned to deny the administrative appeal by Harold and Mary Friedman
18 as a result of it being untimely pursuant to Ordinance Section 19-5-3. Mr. Carver
19 seconded.

20
21 **Findings of Fact:**

22
23 1. Harold and Mary Friedman reside at and own 36 Surf Road which abuts the subject
24 property. All were in favor.

25
26 2. On June 6, 2012, a building permit application for 40 Surf Road was received to add
27 an addition on the second floor above a preexisting roof and for a new mudroom. All
28 were in favor.

29
30 3. The application was assigned Permit #120434. All were in favor.

31
32 4. A permit was granted on June 8, 2012 with the Permit #120434 assigned with a
33 building permit placard having the number 109994. All were in favor.

34
35 5. On November 5, 2012, an administrative appeal was filed on behalf of Harold and
36 Mary Friedman questioning the authority of the Code Enforcement Officer to issue the
37 June 8, 2012 permit. All were in favor.

38
39 **Conclusion:**

40
41 Chairman Thibodeau repeated the motion before the board to deny the administrative
42 appeal by Harold and Mary Friedman as a result of it being untimely pursuant to
43 Ordinance Section 19-5-3. All were in favor.

44
45 3. Discussion about notification period and how to change procedures in the town.

46
47 **F. Adjournment** – Chairman Thibodeau adjourned the meeting 11:20 pm. The board
48 will meet again Wednesday, January 2, 2013, at 7:00 P.M.