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Town of Cape Elizabeth

Minutes of the January 2, 2013

Zoning Board of Appeals Meeting

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Members Present:

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Josh Carver	Matthew Caton	Barry Hoffman
Jeffery Schwartz	Christopher Straw	John Thibodeau
Joanna Tourangeau		

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Also present was the Town Manager (Interim Code Enforcement Officer), Michael McGovern.

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A. Call to Order – The meeting was called to order by Chairman John Thibodeau at 7:00 pm.

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Michael McGovern introduced Matthew Caton as a new Zoning Board of Appeals member, nominated by the Town Council. Mr. Caton is an attorney with experience in the United Kingdom and locally; he replaces David Johnson, who served six years, two terms on the Zoning Board.

Mr. McGovern also announced that the Town Council just approved the appointment of Benjamin McDougal as the new Code Enforcement Officer effective January 22. Mr. McDougal is currently the Code Enforcement Officer for the town of York. He is also their shoreland resource officer. Prior to that he worked for Sweet Associates in Falmouth, where he provided environmental consulting services including wetland delineation, and other environmental permitting. He is a resident of Scarborough.

B. Approval of Minutes

1. **October 23, 2012** – Chairman Thibodeau commented that Mr. Straw had modified those minutes. A motion to approval of the minutes as modified was made by Mr. Thibodeau; seconded by Mr. Carver. All were in favor.

2. **November 27, 2012** – Chairman Thibodeau had a correction to the minutes: at the beginning of paragraph B, Approval of Minutes, Thibodeau should replace Johnson. Ms. Tourangeau motioned to approve the minutes; seconded by Mr. Schwartz. All were in favor.

C. Election of 2013 Officers: Chair and Secretary

1. Mr. Straw nominated John Thibodeau as chair; seconded by Mr. Carver. All were in favor.

2. Mr. Schwartz nominated Christopher Straw as board secretary; seconded by Ms. Tourangeau. All were in favor.

1 **D. Review of Zoning Board of Appeals Rules and Regulations** - Chairman
2 Thibodeau asked if there were any questions. There were none.

3
4 **E. Communications** – Chairman Thibodeau asked if there were any comments
5 concerning the proposed communication to the Town Council regarding notification of
6 the issuance of building permits. There was discussion about the letter.

7
8 **F. Old Business** – None.

9
10 **G. New Business**

11
12 1. To hear the request of a variance on Map U44, Lot 26, at 195 Fowler Road
13 from Barbara Kenney for a side setback of 27 feet from the required 30 feet for an
14 existing garage that was found to be non-conforming. This request was withdrawn.

15
16 2. Request for a variance on Map U03, Lot 114, at 825 Shore Road from Maria
17 S. Chambers to construct a garage with a rear setback of six feet, a side setback of four
18 feet and a setback of 16 feet from Stonybrook Road.

19
20 Mr. Carver stated that he lives on Stonybrook Road. He is not an abutter; he lives
21 further down the road. He feels he can be impartial and this should not create any
22 conflict.

23
24 Ms. Chambers came to the podium and stated she lives at 825 Stonybrook Road, at the
25 corner of Shore Road and Stonybrook. It is a long and narrow lot. There are three
26 similar lots close together. 821 and 823 both have existing garages. She would like to
27 build a garage in the back right corner, just over the property line. This would be a
28 garage very much like her neighbors have, with similar setbacks. If a garage were to be
29 built within the restrictions, it would degrade the neighbors' views, and look awkward.

30
31 There was discussion about location, size, and where the driveway would go. There
32 was a previous garage on the property at one time.

33
34 She included, in the package, letters from neighbors stating they were in favor of this
35 location vice building within the restrictions. Ms. Chambers stated she has not had any
36 negative feedback to this proposal.

37
38 Mr. Straw stated the criteria of the Ordinance must be met before the board can grant a
39 variance. He asked Ms. Chambers to address the specific criteria. There was
40 discussion about the unique circumstances of the lot, and practical difficulty. Chairman
41 Thibodeau suggested that the applicant discuss the criteria with the new Code
42 Enforcement Officer.

43
44 Town Counsel, John Wall, addressed the options for the applicant to provide
45 supplemental information to the variance request to meet the criteria of the Ordinance.

46
47 Ms. Chambers stated she would like to withdraw this request and resubmit at the later
48 date.

1 3. Administrative Appeal from George W. Foley III, Suzanne R. Lindsay, Della
2 Hitchcox, Betsy French, Gerald French, Steven Sutton and Kimberly Cripps asking the
3 board to override the Code Enforcement Officer's approval of Building Permit number
4 130152 at Map U 12, Lot 071, at 25 Pilot Point Road.

5
6 Mr. Straw stated that he and his wife know the Leopolds and that he has nominated Mr.
7 Leopold for a position on a board of a non-profit organization. He stated he didn't think
8 this would warrant his recusal but sought the consent. A vote was taken; no one was in
9 favor of Mr. Straw recusing himself.

10
11 George Foley, 9 Pilot Point Road, came to the podium and stated he was the
12 spokesperson for the group. The application, submitted by the authorized agent, is a
13 request to expand and remove the roof and the first floor, and to replace the first floor by
14 adding a first and second floor. They want to add three bedrooms to the existing five for
15 a total of eight. The proposed height listed in the permit is 23 feet 7 13/32 inches. The
16 property is entirely within the 250 foot Shoreland Performance Overlay District, which
17 make it subject to Sections 19-6-11 and 19-8-2 and the Maine State Revised Statutes
18 Annotated (MRSA) Title 38, Article 2B, Mandatory Shoreland Zoning. The actual
19 building height is 45' 9". The Cape Elizabeth Zoning Ordinance Section 19-10-1,
20 Conflict With Other Provisions states: "Whenever a provision of this Ordinance conflicts
21 with or is inconsistent with another provision of this Ordinance or any other ordinance,
22 regulation or statute, administered by the Town the more restrictive and specific
23 provision shall control." Cape adopted the State statute as the minimum standard.

24
25 Mr. Foley continued. Section 19-6-11 does not include a definition for the method of
26 measurement. Section 19-10-1 allows the DEP (Department of Environmental
27 Protection) to approve the Ordinance as written. This property is located in the RA
28 District and is entirely within the 250' Shoreland Performance Overlay District as shown
29 on the Section 19-2-2 Zoning Map. The purpose of the Shoreland Performance Overlay
30 District is stated in Section 19-6-11 A. "In order to maintain... to protect visual... to
31 conserve natural beauty" that we have in our town. "All land use activities within the
32 Shoreland Performance Overlay District shall conform to the applicable land use
33 standards in Sec. 19-8-2, Shoreland Performance Standards. This district is established
34 in accordance with the provisions of 38 M.R.S.A. §435 et seq."

35
36 Ms. Tourangeau interrupted for clarification. Mr. Foley said he would get to the
37 explanation. He referred to several dictionary definitions of "in accordance" and "et
38 seq." Ms. Tourangeau said the State allowed the towns discretion to change certain
39 provisions in their own ordinances. Mr. Foley said the State requirements are the
40 minimum; the town can make them more restrictive. There was discussion concerning
41 how the height impacts shoreland zoning.

42
43 Mr. Foley continued by reading the State statute (7A) concerning measuring height. He
44 said both the State and Cape Elizabeth said the maximum height was 35 feet. There
45 was discussion about how to calculate height, whether DEP considered this method
46 substantive. Mr. Foley continued reading text, which said the towns must adopt the
47 state standards at a minimum. There was more discussion concerning standards. The
48 DEP, Chapter 1000, Section 17, defines the height of a structure. Mr. Foley continued
49

1 reading about requirements concerning minimum municipal ordinances. There was
2 more discussion about requirements on how to calculate height.

3
4 Mr. Foley stated the town does not have a permit issued by DEP on file for this property.
5 He also said the Code Enforcement Officer did not cite the provisions of the Ordinance
6 that apply in making his decision. Ultimately, the property owner is responsible for
7 compliance.

8
9 Ms. Tourangeau asked what the height of the structure was.

10
11 Debra Murphy, 24 Pilot Point Road, came to the podium and stated she had been
12 asked to assist. She cited Ordinance 19-6-11, "... This district is established in
13 accordance with the provisions of 38 M.R.S.A. §435 et seq." Again, Ms. Tourangeau
14 asked what the height of the structure was using the method in our ordinance. Ms.
15 Murphy said she was not sure. Mr. Straw stated he thought one of the emails said it
16 was below 35 feet.

17
18 Ms. Murphy read a letter she wrote to Michael McGovern, Interim Code Enforcement
19 Officer, asking for the building at 25 Pilot Point Road to be stopped.

20
21 Attorney John Shumadine, of Murray, Plumb and Murray, came to the podium. He is
22 representing the Leopold's. He stated he would also like the answer to Ms.
23 Tourangeau's question. And would like clarification as to whether the appellants could
24 confirm that they have an argument. If the height definition in the Ordinance applies, do
25 they argue that the height requirement, in that definition, has been exceeded? If they
26 have an argument, he'd like to hear it. There was more discussion about whether the
27 appellants believe the height of the structure complies with the Cape Elizabeth
28 Ordinance. Was there an actual dispute?

29
30 Mr. Foley returned to the podium and stated they had not calculated the height in
31 accordance with the Cape Elizabeth Ordinance standard. He quoted the height of 23
32 feet 7 13/32 inches in their application and said that was not the correct measurement
33 because it used the highest point of the land. When asked, he said they were disputing
34 the Ordinance's 35 feet height requirement.

35
36 Mr. Shumadine sent a letter to the board explaining how the height was calculated, as
37 measured as required in the Ordinance, using, Exhibit B, the Russ Doucette building
38 plan as by verified Sebago Technics. Ms. Tourangeau asked would the height of the
39 structure be over 35 feet using these same numbers with the State statutory method?
40 Mr. Shumadine did not know. He said the State statute was irrelevant; their whole
41 argument is irrelevant. It stems from a fundamental misunderstand of shoreland zoning.

42
43 Under Section 19-10-1, Conflict With Other Provisions the key language is "...statue,
44 administered by the Town." The mandatory Shoreland Zoning Act, what is the State
45 statue, is not administered by the town. It is administered by the DEP. The way that
46 the statue works is simple. It says we are going to have mandatory shoreland zoning,
47 and we are going to do that at the local level. So we are going to require that every
48 municipality have mandatory shoreland zoning, but we are not going to do it by statue
49 because we recognize that every municipality has differences, so we are going to

1 require that every municipality enact its own zoning ordinance, that is a Shoreland
2 Zoning Ordinance. But we want them to satisfy certain standards, so we are going to
3 require that every one of those ordinances that a municipality enacts, get approved by
4 the Commissioner of the DEP. And that's how this all works. The DEP is administering
5 that statute because it is the one who is reviewing the ordinances for all the
6 municipalities, approving them or not approving them. Or when a municipality refuses
7 to enact one or enacts one that is way off the charts, it enacts the Chapter 1000, the
8 moral guidelines, for those municipalities.

9
10 Mr. Straw asked about going below a minimum guideline, so that it isn't called out by
11 the DEP. Mr. Shumadine stated that's an issue for the DEP to raise. The DEP will take
12 it up with the municipality if there is a problem. But once the DEP has given the town its
13 blessing, and it has done so in Cape Elizabeth on the height definition since, at least,
14 1992. Once it's done that, you are done with the guidelines, you are done with the
15 statutes, you are not talking about those things anymore, you're talking about the
16 ordinance and only the ordinance.

17
18 Ms. Tourangeau pointed out this exact situation was brought before the DEP and there
19 is a letter in the record that says: "As discussed above the town must apply its legally
20 effective and locally adopted ordinance, since it has been approved by the Department."

21
22 Mr. Shumadine continued to explain how the MRSA statute is directed at municipalities
23 and the ordinance is directed at property owners. There was discussion about which is
24 applicable for this appeal. Mr. Shumadine said that if there is a definition section in an
25 ordinance it applies to the entire ordinance. The Code Enforcement Officer must follow
26 and comply with the Cape Elizabeth Ordinance.

27
28 Mr. Foley came to the podium and read a definition concerning flat roofs and hip roofs.
29 He then used the building plan to address the height issue to the board.

30
31 Russ Doucette, the builder and designer of the home, came to the podium. He said he
32 had been building in the Cape Elizabeth area since 1980. The mean of the roof, in
33 Cape Elizabeth has always been, the mid-point of the roof. The definition means that.
34 It makes no difference which type of roof (flat or hip or otherwise). This is the same
35 standard used by many municipalities on the coast. Once the Leopolds engaged him,
36 he spoke with the Building Inspector and hired Sebago Technics do give them the
37 guidelines: setbacks, height limits, average height, etc. We did do our due diligence.
38 The average grade is taken from the right side of the garage, the highest point of the
39 garage at ground level and goes all around the building. That gives you an average
40 grade of (I believe) eight feet. That is subtracted from the 35 feet, which is the height
41 limit. Which gives you 27 feet to go to the mean of the roof. That's how Cape Elizabeth
42 and other municipalities do it. Mr. Doucette said he followed the rules to build the house
43 correctly. The type of roof is a Gambrel or gable; there is a small portion that is flat.

44
45 Mr. Foley again used the building plan to address the board away from the podium.

46
47 Mrs. Murphy came to the podium to say the ordinance pertains to only flat and hip roofs.
48 Since this is in the Shoreland Performance Overlay district, MRSA 38, 7a gives you the
49 specifics. Mr. Straw said there is nothing in our Ordinance that says when interpreting

1 this section look to the MRSA. There was discussion about which definitions to use.
2 Ms. Tourangeau said that Maine is a home-rule state; when you look at what applies
3 locally, you look to your local ordinances. There was discussion about the DEP review
4 and which statute, ordinance should apply. Mr. Straw said Section 19-10-1, Conflict
5 With Other Provisions, only applies with ordinances, regulations, and statutes,
6 administered by the town. Mrs. Murphy concluded saying if you don't have an entire hip
7 roof, you have a problem.

8
9 Maynard Murphy, 24 Pilot Point Road, came to the podium. He stated the maximum
10 height of a building in the Cape Elizabeth Ordinance is 35 feet and it's measured from
11 downslope side of a structure inside the Shoreland Zone and outside the Shoreland
12 Zone it's measured from average grade around the structure.

13
14 Jay Chatmas, 5 Wabun Road, come to the podium. He referred to the latest version of
15 the Zoning Ordinance for Cape Elizabeth, dated December 14, 2012. He considered
16 the definition section of the Ordinance one of the most important, because it sets the
17 guiding standards for the rest of the Ordinance. Page 8, "Height, Building: The vertical
18 distance from the average original grade to the top of the highest roof beams of a flat
19 roof," one type of roof "or to the mean level of the highest gable" second type of roof "or
20 slope of a hip roof" third type of roof. The Building Height clearly addresses three types
21 of roofs. The key phrase is "the mean level of the highest gable" or "mean level of the
22 slope of a hip roof." Mr. Chatmas remarked he served on the Zoning Board for a
23 number of years and is quite familiar with how our town interpreted this. The mean level
24 of a sloped roof with a gable is from the roof ridge to the lowest point of the roof, which
25 is in the fascia board, soffit area; the mid point is what determines the mean level for
26 height. That is the mid point from the highest to the lowest shingled area, is how we
27 determine building height.

28
29 Dr. Chatmas continued with the first part of the definition: "...the average of the original
30 grade to the top of the highest roof beam or the mean level of the highest gable or slope
31 of a hip roof." So you're taking the average of the original average grade, and the mean
32 point or the mid point of the sloped roof. In the Shoreland Performance Overlay District
33 Section 19-6-11 E.2. Space and Bulk Standards, and Page 138 under the section
34 "Maximum Building Height (1) Principal and accessory structures and expansions of
35 existing structures is 35 ft." There is one definition of building height in the Cape
36 Ordinance. Not a definition for different sections or districts. Just one building height of
37 35 feet - that has been well established.

38
39 Dr. Chatmas referred to an email correspondence from Barbara Freeman of Pilot Point
40 Road, it was addressed to Michael J. Morse, Maine DEP, where she requested their
41 comments on this construction. On November 26, 2012, five weeks ago, Mr. Morse
42 replied:

43
44 "Dear Ms. Freeman,

45
46 "Thank you for seeking our opinion regarding structure height within the
47 shoreland zone in Cape Elizabeth. I have reviewed the Department's
48 records and it appears that the Department approved the Town of Cape
49 Elizabeth zoning ordinance definition for 'building height' at least as far

1 back as July 17, 1992. We recognize that the definition deviates from the
2 State minimum shoreland zoning requirements, however, since we
3 approved the Town's ordinance definition the local ordinance is legally
4 effective and controls. The State's minimum shoreland zoning
5 requirements not apply locally when a municipality has an ordinance that
6 has been approved by the Department.
7

8 “Considering the current State shoreland zoning definition ('height of a
9 structure') within our Chapter 1000 guidelines along with the suggested
10 44.8' structure height for the project you discuss below, it seems clear that
11 the Town's ordinance method for determining structure height in the
12 shoreland zone is less restrictive than the State's. As discussed above,
13 the Town must apply its legally effective and locally adopted ordinance
14 since it has been approved by the Department.”
15

16 This is a direct statement, five weeks ago, from the Maine DEP, which in Dr. Chatmas's
17 opinion, renders this whole appeal mute.
18

19 Kim Cripps, 10 Pilot Point, came to the podium. She asked if the houses that are going
20 up now are in keeping with the neighborhood, using the same standard as the garage
21 request at the beginning of the evening. Original houses no longer have views because
22 the height of new houses.
23

24 Mr. Foley came to the podium and said that he believes the building is too high and the
25 roof does not comply. The highest gable or slope, which is the ten pitch on the left side,
26 from the street. He stepped away from the podium and showed a document to board
27 members. Mr. Shumadine and Mr. Doucette approached the board and looked on.
28 There was discussion and pointing to the document.
29

30 Mr. Foley returned to the podium. He said the 23 feet is the shorter of two measures.
31 He agreed with Ms. Tourangeau that all the numbers were less than 35. He said the
32 vertical distance from the average original grade, which is 9 ½ feet, more than shown on
33 the plan. Mr. Foley explained how he arrived at his number for slope. Mr. Straw
34 discussed the part of the definition concerning when a building faces more than one
35 street. Mr. Foley continued to explain how he got his numbers. Mr. Straw addressed
36 the wording of the definition. Mr. Foley said he was using the paper street as one of the
37 streets. Mr. Straw quoted the street definition from the Ordinance – a paper street does
38 not qualify. He said the average grade should be taken from the street side.
39

40 Chairman Thibodeau closed the floor to public debate.
41

42 Board discussion.
43

44 Ms. Tourangeau moved that the appeal be dismissed. She explained the height
45 definition in the Ordinance is what applies in Cape Elizabeth. No evidence was
46 presented that that height limit was exceeded. Maine is a home-rule state where local
47 ordinances apply. DEP reviewed the Ordinance and in November stated the local
48 ordinance must be applied.
49

1 Mr. Straw commented that the MRS statute applies only as used in that chapter, not in
2 town ordinances that apply. The DEP approved our Ordinance and the way height is
3 calculated in our town.

4
5 Mr. Carver mentioned the DEP email of November 2012, which directs the town to
6 apply its ordinance.

7
8 Mr. Carver seconded the motion to dismiss the Administrative Appeal for Map U 12, Lot
9 071, Permit number 130152, 25 Pilot Point Road. All were in favor.

10

11 **Findings of Fact:**

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13 1. On November 1, 2012, Building Permit number 130152 was issued to David and
14 Cara Leopold for property owned at Map U 12, Lot 071, 25 Pilot Point Road, to remove
15 the roof and all first floor walls, to add a second floor and build all new walls. All were in
16 favor.

17

18 2. The property is in the RA District, and being with 250 feet of the Atlantic Ocean is
19 also in the Shoreland Performance Overlay District. All were in favor.

20

21 3. On November 30, 2012, Appellants George W. Foley III, Suzanne R. Lindsay, Della
22 Hitchcox, Betsy French, Gerald French, Steven Sutton and Kimberly Cripps filed an
23 administrative appeal asking for the Zoning Board of Appeals to review the decision of
24 the Code Enforcement Officer in issuing Permit number 130152. All were in favor.

25

26 4. The height definition in the Ordinance is the methodology that needs to be applied in
27 this instance, as Maine is a home-rule state and the town's shoreland provisions were
28 approved by the Maine Department of Environmental Protection. All were in favor.

29

30 5. There is no evidence in the record that the height limit in the Ordinance is exceeded.
31 All were in favor.

32

33 **H. Adjournment** – Chairman Thibodeau adjourned the meeting 9:42 pm.