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# Town of Cape Elizabeth Minutes of the March 26, 2013 Zoning Board of Appeals Meeting

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## Members Present:

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

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Also present were the Code Enforcement Officer (CEO), Benjamin McDougal, and the Recording Secretary, Carmen Weatherbie. Routine training with Town Counsel, John Wall, was held immediately prior to the meeting. All parties mentioned above were in attendance.

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**A. Call to Order** – The meeting was called to order by Chairman John Thibodeau at 7:05 pm.

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**B. Approval of Minutes for January 29, 2013** - A motion to approve the minutes was made by Mr. Straw; seconded by Ms. Tourangeau. All were in favor. Vote: 6 – 0.

**C. Old Business** – None.

**D. New Business** – Chairman Thibodeau requested to reverse the order of agenda items due to having to recuse himself from the Flock’s application. There were no objections.

1. To hear the request of Muhammed Nasir Shir of 41 Ocean House Road, Map U28, Lot 10-4, for approval to expand the second floor of a house into a nonconforming area. Mr. Shir will be represented by his contractor, Jeffrey Averill.

Chairman Thibodeau asked Code Enforcement Officer (CEO) for background on this application. Mr. McDougal said the permit was issued prior to his tenure to expand his house vertically. Per that application, roughly two-thirds of the house is expanding vertically due to the setback line. Subsequent to that, a surveyor measured the nearest two abutting properties. The Zoning Ordinance says if you take the average of the nearest two principle structures you can reduce the front setback. That turns the setback to 21.75, which is one foot shy of allowing the whole house to add a second story. The Code Enforcement Office has the authority to issue a permit for 96% of this house to vertically expand. To get that additional foot, it requires board approval to be able to have a full second floor.

Chairman Thibodeau asked contractor, Jeffrey Averill, to come the podium. Mr. Averill said the paperwork that was provided to the board shows that they are looking for a two by four foot triangle section to make this house a conforming home. The setback slices through the back Northeast corner. We would like to just square off the corner. We would like to change that setback from 21.75 to 19.8 to make a conforming, square home. Mr. Averill referred to the plans to show the corner. Responding to board

1 questions, Mr. Averill said the existing first floor is already at the 19.8 foot mark. They  
2 are just requesting a vertical rise over the existing footprint. The project turns a 50 by  
3 26 foot raised ranch into a colonial. The approved permit was for 40 by 26, and then we  
4 looked at the rules and found we could go to the average setback. The reason we are  
5 applying for the variance is so that we don't end up with an odd, nonconforming look.  
6 We want a conforming, square house. The area is just a small two by four foot section.  
7

8 Chairman Thibodeau asked if the abutters had raised any objections to this. Mr. Averill  
9 said no they haven't. Some construction has started.

10  
11 Mr. Shir came to the podium and said he wanted the variance for the aesthetics. He  
12 said the lot is large enough to build this additional as an "L" shape to his house, but  
13 building more basement would be costly. That's why the expansion went up vertically -  
14 for budgetary reasons.

15  
16 Finding no public comments, Chairman Thibodeau closed the floor to public comment.

17  
18 The CEO pointed out that most of the factors in Finding of Fact number 3 were not  
19 germane to this application because it is not a footprint expansion.

20  
21 Mr. Straw made a motion to accept the application; it was seconded by Mr. Hoffman.  
22 Vote 6 – 0. All were in favor.

23  
24 **Findings of Fact:**

25  
26 1. This is a request to reconstruct and expand a single family dwelling per Section  
27 19-4-3.B.3 of the Zoning Ordinance at Map U28, Lot 10-4, 41 Ocean House Road.

28  
29 2. Muhammed Nasir Shir is the owner of record of the property at Map U28, Lot 10-4,  
30 41 Ocean House Road. The authorized applicant is Jeffrey Averill.

31  
32 3. The Zoning Board of Appeals has considered the size of the lot, the slope of the  
33 land, the potential for soil erosion, the location of other structures on the property and  
34 on adjacent properties, the location of the septic system and other on-site soils suitable  
35 for septic systems, the impact on views, and the type and amount of vegetation to be  
36 removed to accomplish the relocation.

37  
38 4. The proposed structure will not increase the nonconformity of the existing structure.

39  
40 5. The proposed structure is in compliance with the setback requirement to the greatest  
41 practical extent.

42  
43 6. The proposed structure is a vertical expansion within the existing footprint.

44  
45 Mr. Straw made a motion to accept the amended Findings of Fact; seconded by Mr.  
46 Carver. Vote 6 – 0. All were in favor.

47  
48 Chairman Thibodeau turned the meeting over to Chris Straw to chair.

1           2. To hear the request of Jennifer and Kevin Flock of 243 Spurwink Avenue,  
2 Map U27, Lot 19, for a Conditional Use Permit for a Home Business.

3  
4 Mr. Straw asked the CEO to summarize the issue. Mr. McDougal stated that Jennifer  
5 and Kevin Flock came into the office with a business proposal. The avenue for approval  
6 within the Ordinance is for a Conditional Use Home Business that requires approval  
7 from the Zoning Board.

8  
9 Mr. Straw asked the applicants to come to the podium.

10  
11 Jennifer Flock came to the podium and stated their home is in the RC Zone. They live  
12 on a road that has residences and businesses already. There are Purpoodock Golf  
13 Club, the medical building, and an attorney. Their neighbor has a home therapy  
14 business (she is a counselor) and sees customers all day long. What we are proposing  
15 is to use our back room as an office for an e-mail, web-based store. It would be part-  
16 time, and meets the standards of Ordinance Section 19-5-5.

17  
18 Mrs. Flock addressed each condition. She stated they would not be creating hazardous  
19 traffic; Spurwink is a busy road already. Many cars use the road, they will not be adding  
20 to that. They would not even use the ten trips per day they are allowed to have; some  
21 days it would be zero trips. The proposed use will not create anything unsanitary.  
22 Nothing is going to be outside so it will not adversely affect adjacent properties. For  
23 design, we are putting a door on our back room.

24  
25 Mr. Straw asked if she was sure if the property was in RC3 not RP2? Mrs. Flock said  
26 she believed it was in RC.

27  
28 The CEO said it does have an RP overlay over the RC.

29  
30 Mr. Straw described the districts. RP being a resource protection district. Some are  
31 overlays and some one stand-alone districts.

32  
33 Mr. Flock asked if the neighbor that has the home counseling business have the same  
34 status. Mr. Straw said it would depend where that neighbor's property lies. Mrs. Flock  
35 said it didn't really matter. People in the neighborhood already have businesses; we are  
36 just asking to have a home office.

37  
38 Mr. Hoffman asked about the state's requirement for the authorization for a wine/liquor  
39 business. Mrs. Flock said she needed this change for the business. She has already  
40 talked with the state and wouldn't have applied for the authorization if the state wasn't  
41 going to allow her to sell wine.

42  
43 Mr. Flock said the only requirement the state had was to block off the existing door.  
44 Mrs. Flock said they were required to have an outside door to the room.

45  
46 Mr. Hoffman asked why they didn't rent a store. Mrs. Flock said that this was the most  
47 economic way. She said the only reason why she was doing this was because she has  
48 a lot of old clients, who are asking to purchase wine and she is constantly telling them to

1 go somewhere else to buy it. So she thought it would be economically beneficial to get  
2 a liquor license and sell to them herself. At some point she would love to get a store.  
3 She has a full-time job; this would just be a part-time thing because she loves it.  
4

5 Mr. Straw asked about the location labeled storage on the drawing. Mrs. Flock said it  
6 was inside the house; nothing would be outside.  
7

8 Mr. Straw said the Zoning Board did not have the authority to grant a Conditional Use  
9 permit because home businesses are out rightly permitted under RP2. So it would  
10 depend on how the board viewed the zoning map.  
11

12 Mrs. Flock said that several of their neighbors have commented about traffic. She  
13 understands and has two small children and two dogs. Spurwink is a busy road and  
14 what we are anticipating is not going to add a significant amount to be to concerned  
15 about.  
16

17 The CEO stated that Mr. Straw raised a valid point. There is some ambiguity in the  
18 Ordinance. However, there is no permitting authority in the Ordinance for him to grant a  
19 home business permit. Mr. McDougal believes the intent of the chart is for the ZBA to  
20 hear this application.  
21

22 Mr. Hoffman asked if this is approved does it carry over to the next buyer of the house.  
23 Mr. Straw could not provide a definite answer.  
24

25 Mr. Straw stated the board had received correspondence from neighbors that would be  
26 made part of the record. He opened the floor for five minutes of public comment.  
27

28 James and Patricia Masi, 320 Ocean House Road, come to the podium. Mrs. Masi  
29 stated they wrote and asked specific questions concerning this request that they would  
30 like addressed by the board.  
31

32 Mrs. Masi stated she has concerns about the amount of traffic and the hours as written  
33 on the application would be by appointment on Sunday and Monday through Saturday  
34 10 a.m. to 7 p.m. That is seven days a week of running a part-time business. If all  
35 online and by email, that may be possible; but with deliveries and customers coming to  
36 the home, she didn't see it as part-time. She stated she was opposed to having a retail  
37 business for alcohol in a residential area.  
38

39 Mr. Masi asked if there was a precedent for this in Cape Elizabeth; is there another  
40 home that is like this, in a residential area. It is important for both sides to know this.  
41

42 Mrs. Masi said this should be a business operated in a business area - a store,  
43 restaurant or bar - not a home.  
44

45 Mr. Masi said this is difficult for them. Having a retail business that deals in controlled  
46 substances worries them. He is worried about the criminal element and break-ins. The  
47 other businesses in the neighborhood are not retail; they are a service. We are worried  
48 about the traffic and about word getting out about the presence of that much alcohol.

1 Frank Hannigan, 233 Spurwink Avenue, came to the podium. He stated he had sent an  
2 email. He didn't know this included beer as well. He is adamant about this; this just  
3 does not seem right. He knows about the therapist who is their neighbor; she had to  
4 make several changes to open her business to her clients and spent a lot of money  
5 doing it. He said "I look at this as a totally different ball game. If this works, I can clean  
6 out my front yard, put in nine parking spots and open a variety store. That's how I'm  
7 looking at it. I've lived here a long time; it's getting a little carried away over there."  
8

9 Mrs. Flock returned to the podium and said it's not going to be a retail store. There will  
10 be no foot traffic. The reason for the hours was for the vendors and distributors.  
11 Delivery would only be by van only one day a week. They are concerned parents; and  
12 are not going to add to the traffic. They are going to be very cautious and cognizant of  
13 their neighbors. People will not be coming to their house to purchase things from their  
14 house. It is not a retail store.  
15

16 Mr. Flock returned to the podium and stated Maine just changed the law, allowing  
17 Internet wine business, so there would not be a precedent. They just want to run a  
18 small wine Internet business where they ship out of their house. Home businesses are  
19 allowed a certain amount of traffic or trips. There is an area in their driveway for vans to  
20 pull in and turn around. Currently all UPS and FedEx trucks park on the street when  
21 making deliveries.  
22

23 Responding to questions from board, Mrs. Flock said the only traffic would be UPS  
24 trucks and distributors making deliveries only at certain times. She said they would be  
25 fine with a limit on trips per day; however, she is concerned about how that would be  
26 calculated. They already have a lot of visitors to their house. Six trips per day would be  
27 acceptable. The name of the company is Flock and Vine, both her and her husband's  
28 name are on the Maine license. There will be no signage or advertising to come to the  
29 house because this is an Internet store.  
30

31 John Thibodeau was going to make a comment; however, after cautioning from Mr.  
32 Straw decided not to speak.  
33

34 Mr. Straw closed the record to public discussion.  
35

36 There was board discussion about which zoning district the Flocks were in and if it was  
37 an overlay or stand-alone district. Ordinance Sections 19-6-9, 19-2-1 and the Zoning  
38 Map were discussed. Planning Board standards are mentioned in 19-8-3. The CEO  
39 said it could be argued that it was in the RC district because there were front setbacks.  
40 All the surrounding lots are RC. RA and RC both permit home businesses.  
41

42 Mr. Hoffman made a motion to reopen the floor for comment from one person; Mr.  
43 Caton seconded. Vote: 5 – 0. All were in favor.  
44

45 Carol Ann Christ, 10 Pleasant Avenue, around the corner, came to the podium. She  
46 said we haven't been able to sell liquor in Cape Elizabeth that long. She was  
47 concerned about where the liquor would be stored. Mr. Straw said under the application

1 it would have to be housed within the building. She felt that having a wholesale liquor  
2 distributor in the neighborhood would not be a good thing.

3  
4 Mr. Straw closed the record to public discussion.

5  
6 The discussion to determine the district continued. Ordinance Sections 19-2-1 and 19-8-  
7 3.A.1 and Table 19-6-9, and were discussed. The CEO recommended that if the board  
8 finds it does not have jurisdiction, it should not go further explaining where the  
9 jurisdiction lies or how that permit is obtained. Ms. Tourangeau and Mr. Caton made  
10 the point that the district on the application is stated as RC. The CEO responded to Mr.  
11 Carver's comments that he fact checked the application and made the determination  
12 that it was in the RC zone. Mr. Caton and Mr. Carver stated that the jurisdiction lies in  
13 the Ordinance where it grants the Zoning Board authority to issue Conditional Use  
14 Permits.

15  
16 Ms. Tourangeau moved that the board consider this application as presented as an  
17 application for Conditional Use Home Business in the RC zone subject to our  
18 jurisdiction; seconded by Mr. Carver. Vote 3 – 2. Mr. Straw and Mr. Hoffman  
19 dissenting.

20  
21 Mr. Straw directed the board's discussion to the merits of the application. Section 19-6-  
22 3.C allows Home Business. 19-1-3 defines Home Business. The board found that the  
23 application met the seven criteria for the definition of a Home Business. Section 19-5-5  
24 governs Conditional Use Permits. Application met requirements per paragraph C.  
25 Conditions of Approval, Section 19-5-5.E, were discussed. Hours of use, vehicle traffic  
26 and other restrictions were mentioned so as not to disturb the neighbors.

27  
28 Mr. Carver motioned to reopen the floor to the applicants; seconded by Ms.  
29 Tourangeau. Vote 4 - 0. Mr. Hoffman abstaining.

30  
31 Mrs. Flock said she and her husband would make deliveries to the greater Portland  
32 area in their personal vehicle. No one else would be working for them.

33  
34 Floor closed for public comment.

35  
36 Ordinance Section 19-5-5.F, Duration of a Conditional Use approval, was mentioned.  
37 Conditions may be imposed; however, duration is not one of them. Section 19-5-5.D  
38 Standards for Conditional Use Approval were discussed. Differences in opinion were  
39 voiced on paragraphs 4 and 5. The CEO stated that due to time constraints of the  
40 position, enforcement was usually reactive, complaint driven. Page 2 of the application  
41 states the Standards for Conditional Use are met.

42  
43 Mr. Straw made a motion that criteria for Section 19-5-5.D.3 and 6 were met; Mr. Carver  
44 seconded. Vote 5 – 0.

45  
46 Ms. Tourangeau stated she would want an access restriction on traffic, per paragraph 2,  
47 if application was approved. Mr. Straw mentioned how he believed this would impact

1 property values. Mr. Carver mentioned the type of business made a difference as to its  
2 impact to the neighborhood.

3  
4 Ms. Tourangeau motioned to grant Conditional Use approval and move into discussing  
5 conditions after the vote; seconded by Mr. Carver. After discussion the motion and  
6 second were withdrawn by each maker.

7  
8 A motion was made by Mr. Straw to deny the Conditional Use application; seconded by  
9 Mr. Hoffman. The vote was 3 – 2. Mr. Carver and Ms. Tourangeau dissenting.

10  
11 **Findings of Fact:**

12  
13 1. This is a request for a Conditional Use Permit for a Home Business at 243 Spurwink  
14 Avenue, Map U27, Lot 19.

15  
16 2. Jennifer and Kevin Flock are the owners of record for Map U27, Lot 19.

17  
18 3. The proposal is consistent with the definition of *Home Business* found in Section 19-  
19 1-3 of the Town of Cape Elizabeth Zoning Ordinance.

20  
21 4. The proposal does not satisfy the requirements of Section 19-5-5 (*Conditional Use*  
22 *Permits*) of the Town of Cape Elizabeth Zoning Ordinance.

23  
24 A motion was made by Mr. Straw to accept the slate of the Findings of Fact; Mr. Carver  
25 seconded. The vote was 3 – 2. Mr. Carver and Ms. Tourangeau dissenting.

26  
27 Mr. Straw informed Mr. and Mrs. Flock their application was denied.

28  
29 **E. Communications** – None.

30  
31 **F. Adjournment** – Mr. Straw adjourned the meeting 9:12 p.m.