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Town of Cape Elizabeth Minutes of the September 24, 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

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The Code Enforcement Officer (CEO), Benjamin McDougal, and the Recording Secretary, Carmen Weatherbie, were also present.

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

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B. Approval of Minutes for August 27, 2013 - A motion to approve the minutes was made by Mr. Straw; seconded by Mr. Carver. All were in favor. Vote: 6 – 0.

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C. Old Business – There was discussion as to whether both appeals by the Murphys should be heard tonight as the notice references only the remand of the administrative appeal. The Goldman’s attorney, Mary Costigan, did not object. Mr. McDougal said that the Murphys administrative appeal of June 3 is substantially part of the Superior Court remand. Chairman Thibodeau said that both appeals would be heard unless there was an objection.

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To hear the administrative appeal of June 3, 2013, of Maynard and Deborah Murphy that the Code Enforcement Officer’s determination of the Shoreland Performance Overlay District Boundary is inconsistent with the Zoning Ordinance and the Zoning Map and past practice of the Town.

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Chairman Thibodeau said he sees three issues: whether the Murphys have standing, the location of Natural High Water Mark, and in defining the Shoreland District are we using the Natural High Water Mark as the starting point or does the Zoning Map come into play.

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Chairman Thibodeau asked the Murphys to address the standing issue. Mrs. Murphy said their attorney had not yet arrived and was a few minutes away. Chairman Thibodeau decided to proceed with the second agenda item.

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D. New Business –

1. To hear the request of Gayle M. Hickok, of 181 Fowler Road, Map U44, Lot 32, for a home business conditional use permit to operate a canine rehabilitation business.

Ms. Hickok came to the podium and stated the pool was opened last year, in the middle of the summer. She apologized that she did not know a home business

1 permit was required. The traffic for a business day is that one animal at a time
2 comes, generally no more than four to six clients a day. There is a photo in the
3 packet of the turnaround in the driveway so that cars may drive out. This past
4 August a famous photographer did a photo shoot using the pool. This was a one-
5 time event, not part of the business, and will not be repeated. There has not been
6 any complaint, other than that day. Direct abutters at 179 and 183 have written
7 letters of support.

8
9 Mr. Straw recommended reviewing the criteria for a Home Business:

10
11 In response to questions, Ms. Hickok said there are no other employees, the
12 average daily traffic will be less than 10 trips a day. Clients park in the driveway
13 not on the street. There is no sign, no outdoor storage. The pool is a family
14 recreational pool as well as an animal therapy pool. Only one dog is seen at a time.
15 She does have three dogs of her own. There has not been any external alteration
16 of the building or site, besides the pool, for this business. Only lifejackets are
17 stored outside. It is a seasonal business.

18
19 Half of the garage, 266 square feet, is used for the business. The house is 45 feet
20 by 24 feet. So it is below the 20% of the overall structure.

21
22 Ms. Hickok said that the dogs that visit are very old, quiet and leashed. They do
23 not interact with her dogs, which she has owned for eight years. Waste is always
24 cleaned up immediately. She has personal liability insurance.

25
26 Mr. Straw stated he thought that a home business would have less impact to the
27 neighborhood if operational during the week and thought that weekend days should
28 be minimized. If restricted Ms. Hickok stated Sunday would be her choice to be the
29 closed day.

30
31 The chairman asked for public comment.

32
33 Mr. Byron Castro of 185 Fowler Road, two houses down, came to the podium. He
34 has never heard any noises from the dogs, but is concerned about this business
35 becoming an overnight or boarding kennel.

36
37 Ms. Hickok returned to the podium and stated she had no interest in boarding dogs.

38
39 The board discussed conditional use limitations.

40
41 Mr. Straw made a motion to grant a conditional use permit for a home business subject
42 to the conditions that the business be open from the hours of 10 – 5, five days a week,
43 one may be a weekend day; no overnight boarding of animals; no signage; no more
44 than two client vehicles at anytime in the driveway. Mr. Carver seconded motion.

45 Vote: 6 – 0. All were in favor.

1 **Findings of Fact:**

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3 1. This is a request for a Conditional Use Permit for a Home Business at 181 Fowler
4 Road, Map U44, Lot 32.

5
6 2. Robert and Gayle Hickok are the owners of record for Map U44, Lot 32.

7
8 3. The proposal is consistent with the definition of Home Business found in Section
9 19-1-3 of the Town of Cape Elizabeth Zoning Ordinance.

10
11 4. The proposal satisfies the requirement of Section 19-5-5 (Conditional Use
12 Permits) of the Town of Cape Elizabeth Zoning Ordinance.

13
14 Conditions:

15
16 1. The business may be open five days a week; one may be a weekend day, from the
17 hours of 10 A.M. and 5 P.M.

18
19 2. No overnight boarding of animals.

20
21 3. No more than two client vehicles at anytime in the driveway.

22
23 All were in favor of the Findings of Fact with the above Conditions. Vote 6 – 0.

24
25 The board continued with the Murphys.

26
27 2. To hear the Superior Court remand of an administrative appeal by Maynard and
28 Deborah Murphy of the Code Enforcement Officer's August 17, 2012 issuance of
29 Building Permit #130036 to Pilot Point LLC for construction of a new accessory
30 structure at 27 Pilot Point Road, Tax Map U12, Lot 70.

31
32 Attorney Richard Bryant, of Van Meer & Belanger, representing the Murphys came
33 to the podium. He passed out two documents: a plan of Shore Acres from the
34 Registry of Deeds and a copy of the original deed from the Shore Acres Land
35 Company for Lot 38, the lot the Murphys own. This has specific language about an
36 easement. Addressing the standing issue, Mr. Bryant said the Murphys were not
37 direct abutters, but kitty-corner across Pilot Point Road from the Goldmans. In
38 additional to having a deed in the Shore Acres subdivision, which includes an
39 easement to all the paper streets, the Murphys also have a grant of an appurtenant
40 easement over Surf Side Avenue, which distinguishes them from all other lot
41 owners in Shore Acres, in that they have a specific deeded right to Surf Side
42 Avenue. The standard for standing, the Superior Court notes, is a very low bar to
43 meet. The Murphys, as property owners, are adjacent and down slope of the runoff
44 from the Goldmans' property. They are direct abutters.

45
46 There was discussion concerning the location of each lot on the map. Mr. Bryant
47 explained that appurtenant easements are passed to each successive property
48 owner by virtue of title law.

1 Mr. Straw asked Mr. Bryant to describe, using the language from the Superior
2 Court's opinion, the nature of the injury suffered by the Murphys. Mr. Bryant said
3 that the Superior Court's order says the Zoning Board of Appeals (ZBA) has already
4 found that the Murphys have standing to contest the issuance of the permit. The
5 vote was 4 -3 last time – a majority vote. Mr. Straw said that the court asks that
6 the nature of the injury be further developed. Mr. Bryant said that the nature of
7 the injury is that they have a specific deeded interest in a right-of-way which is
8 down slope from a property which they contend is violating the Shoreland Zoning
9 maximum impervious coverage regulations which will result in additional runoff and
10 pollutants flowing from the Goldman property across their deeded right-of-way.
11

12 Mr. Straw asked if that would impinge, in anyway, their ability to travel on that
13 right-of-way. Mr. Bryant said it was a matter of degree. It may and it may not.
14 Mr. Bryant said the Murphys' interest in that property is entirely distinct from the
15 public at large. If the Goldmans pushed waste over the edge of their property and
16 onto that right-of way, they would have a right to sue for trespass. Other injuries
17 would be esthetic concerns, part of the Shoreland Zoning talks about visual access
18 along the shore and by replacing some discreet steps with large and imposing steps
19 which are beyond the limitations that are set in the Shoreland Zoning Ordinance for
20 steps leading down to the shore.
21

22 In response to questions from Mr. Caton, Mr. Bryant replied they had walked on the
23 easement prior to the steps being replaced. The nature of Surf Side Avenue
24 changes as you walk along it; some places are overgrown and other places it is an
25 open lawn, and some places it is a cliff because the ocean has eroded into Surf Side
26 Avenue. The Murphys were also involved in the abutting property, which was also
27 was the subject of several very long ZBA hearings, with respect to improvements
28 that were placed within Surf Side Avenue by that abutter. There was discussion on
29 the location of that property, also across Pilot Point Road from the Murphys. Mr.
30 Bryant handed out copies of a Google map with an overlay. Mr. Bryant stated that
31 when someone affects that right-of-way it impacts the value of the Murphys'
32 property.
33

34 Mr. Straw questioned the peacefulness of the area, mentioned in the SJC case cited
35 by the Superior Court. Mr. Bryant said the presence of that new construction has
36 affected their enjoyment of the easement. It has affected the relationships with
37 their neighbors and when they are exercising their rights (walking in that area),
38 property owners regularly challenge them.
39

40 Vegetation in photos and access along the paper street were discussed.
41

42 Mr. Schwartz asked if the injury was hypothetical or an actual sustained injury. Mr.
43 Bryant replied actual sustained injury in the decreased value of their property, the
44 deprivation of the enjoyment of the Surf Side Avenue right-of-way because of the
45 esthetics having to pass by the stairs and finally there is ill will in the neighborhood
46 associated with their attempts to exercise their rights on Surf Side Avenue.
47

48 Mr. Hoffman asked how the decreased value of the property was established. Mr.
49 Bryant said it had not been appraised but under Maine law owners have the ability to
50 give a value of opinion on their property.

1 Attorney Mary Costigan with the firm Bernstein Shur, representing Cathy and
2 Marshall Goldman, came to the podium. She said, on the issue of standing, first
3 you need to be an aggrieved party. You need to show a particularized injury. She
4 had not heard anything tonight that was an injury or a particularized injury. The
5 Murphys claim to have a unique standing among the neighborhood by having this
6 easement across a paper street. Anyone in that subdivision has the same rights.
7 The easement language in their deed reads "a right-of-way in common with
8 others." That is not unique. There is also an easement in the neighborhood that is
9 a recreational easement that actually provides even more access than just a right-
10 of-way. It is the right and easement in common with another to travel by foot and
11 use for passive recreation over Surf Side Avenue. That easement applies to 71 lots
12 in the neighborhood; the Murphys' is not one of them. They do not have any
13 unique use of this paper street easement. In addition to the private rights over the
14 paper street there is the public right of incipient dedication, where the Town of
15 Cape Elizabeth could build a road there. Ms. Costigan said she had just as much
16 right to access that road as they do. That was for the particularity of their injury.
17

18 Now, to talk about their injury in general, as they claim. Ms. Costigan showed two
19 photos picturing the vegetation on Surf Side Avenue. Property owners are not
20 obligated to maintain that area for access. The stairs do not impede access to Surf
21 Side Avenue; they are more than 20 feet away. The street, in its entirety, cannot
22 be clearly accessed; it is obstructed in places.
23

24 Ms. Costigan showed a photo of the Goldmans' house and stairs. She stated that
25 the Murphys allege that somehow the stairs are visually offensive and will decrease
26 a property value of a property that is diagonally across the street. Ms. Costigan
27 strongly disagreed that there would be any injury as a result of the stairs. If you
28 are looking at the stairs, your back is to the ocean. So if you are out there to enjoy
29 the ocean, you are not looking at the stairs.
30

31 Ms. Costigan agrees standing is a low threshold. There is no injury that could be
32 alleged from the steps. We are not talking about any hypothetical pollution pour.
33 We are not talking about an obstruction to the easement area.
34

35 Chairman Thibodeau asked why is standing such a low standard in a case such as this.
36 Ms. Costigan said that the law courts word it as an abutter you need to show "a
37 reasonable allegation of a potential for a particularized injury." Your typical abutter
38 concerns are things like traffic and noise; things like that - that come from some sort of
39 more invasive construction other than a set of steps.
40

41 Mr. Straw said that they were attempting to enforce what they believe is a violation
42 of the Shoreland Zoning Ordinance. They are kitty-corner abutters - if they can't
43 attempt to enforce a mistake or an oversight, who can? Ms. Costigan said they still
44 need to show an injury. She was just as injured by any violation as they are
45 because it has no impact on their property or on them or on the easement.
46

47 Chairman Thibodeau inquired about her belief, because they have a deeded right-of-
48 way, does the existence of the granite steps negatively impact their property values.

1 Ms. Costigan replied not at all; it may even increase their property values because it is
2 so well maintained. It depends on who the buyer is.

3
4 Mr. Straw mentioned the wording about potential for a particularized injury. Ms.
5 Costigan said the stairs would not cause erosion. They are minimal. They are steps
6 with grass landings.

7
8 There was a discussion about ownership of paper streets and who maintains them and
9 why there hasn't been a declarative judgment. Mr. Caton cited page 4 of the Superior
10 Court document, where it asks the board to consider the easement rights. Ms. Costigan
11 said the Murphys have a deed that gives someone an easement and that there is a
12 subdivision plan that has Surf Side Avenue laid out. However, in order to affirmatively
13 resolve that issue, it is not this board's purview, it's for declarative judgment action. Mr.
14 Caton continued saying we are making assumptions and even with those assumptions
15 they don't have standing.

16
17 Mr. Bryant returned to the podium and stated that the Zoning Board of Appeals job
18 is to review the decisions of the Code Enforcement Officer and get to the merits of
19 this case. He believes for standing the Murphys need only show a reasonable
20 allegation of potential for particularized injury and he has established that. He said
21 the Murphys have used the whole of Surf Side Avenue. The previous owners, the
22 Camps, had kept the vegetation down and maintained a path. There was
23 discussion about whether others in the subdivision had also had unimpeded use of
24 the entirety of Surf Side Avenue and the right to do so.

25
26 Mr. Bryant passed out the Google map with a transparent overlay to board
27 members. He noted that the Murphys' house was sited to take advantage of the
28 view over the Goldman lot.

29
30 Mr. Caton asked who owns Surf Side Avenue. Mr. Bryant replied that he believed it
31 may still be Shore Acres Land Company. He agrees with Ms. Costigan that the
32 paper street issue is still an open question. There was a discussion about the
33 possible remedies and merits.

34
35 Mr. Straw asked for bullet points of the Murphys particularized injury. Mr. Bryant
36 said: the proximity of the Murphy's residence, separated only by Pilot Point Road
37 (Mr. Straw injected that proximity was not an injury), the views from their house,
38 as designed, overlooks the Goldman property – they see the Goldman property
39 every time they look out their windows (Mr. Straw questioned if they could see the
40 steps from anywhere on their property. Mr. Bryant replied they cannot see the
41 stairs, as the slope is too great to do so.). The second aspect is their rights in Surf
42 Side Avenue, which abuts and is down stream from the Goldman property. The
43 Murphys are concerned about the excess impervious surface and excess runoff. Mr.
44 Schwartz mentioned that the runoff was hypothetical. There was discussion about the
45 runoff and coverage on the lot.

46
47 Mr. Bryant continued with his points. One would be economics - the part of the value of
48 the Murphys' property would be the rights along Surf Side Avenue and whether it is a
49 relatively green, scenic area or whether there are large structures immediately adjacent

1 to Surf Side Avenue. He compared the quality of the view experience to Old Orchard
2 Beach as opposed to Reid State Park.

3
4 Mr. Hoffman asked what would the Murphys like the Goldmans to do. Mr. Bryant
5 replied they would like the Goldmans to comply with the Cape Elizabeth Ordinance by
6 removing the excess impervious surface from the lot that borders their easement. Mr.
7 Bryant continued in detail about permitting.

8
9 Ms. Costigan returned to the podium. She stated their position on standing was still the
10 same. But because this has gone a little bit beyond, she wanted to note that if there is
11 too much impervious coverage, it doesn't mean that the stairs would have to be
12 removed. It just means we would have a meet impervious coverage.

13
14 Chairman Thibodeau asked for public comments.

15
16 Imad Khalid, 19 Pilot Point Road, came to the podium. His property is two lots from the
17 Goldmans. He has no problem with the stairs. He can walk though their land if he
18 wants to. The stairs do not bother him whatsoever.

19
20 Deborah Murphy, 24 Pilot Point Road, came to the podium. She stated she feels
21 that the value of her property is diminished by the fact that there is far too much
22 impervious surface on the Goldmans' lot, particularly the stairs. The previous
23 owners knew they had to keep the paths open and they did. It was lovely. Now
24 you walk down there and there is this huge thing that doesn't look natural. As a
25 property owner she feels it diminishes the value of her property.

26
27 Angela Adams, 25 Algonquin Road, in Shore Acres, came to the podium. She said
28 the house that the Goldmans tore down, before they built theirs, was a piece of
29 crap. They put up a beautiful home. It has only added value to the neighborhood.
30 It has increased the Murphys' property (value) hugely. You cannot see the stairs
31 from the road. She walks the road everyday; you cannot see the stairs. There is
32 no impact whatsoever to the neighborhood.

33
34 Ms. Murphy returned to the podium to comment on their property value. Before
35 the Goldmans' house went up they had a view of the lighthouse, which they no
36 longer have.

37
38 There was no further public comment.

39
40 Mr. Carver suggested poling the board on the position of standing. He was inclined
41 to say there was standing. There was discussion concerning the wording of the
42 law: "a reasonable allegation of a potential for a particularized injury."

43
44 Mr. Caton raised the question of whether the Murphys are an abutter to the Goldmans
45 without the easement. There is not a definition for abutter in the Ordinance. There was
46 discussion concerning how the law applies to abutters, both direct and indirect.

47
48 Chairman Thibodeau did an informal pole of board members; there was no consensus.
49 Chairman Thibodeau asked town counsel, John Wall, to address the abutter definition.

1 Mr. Wall came to the podium and said the law court has held that in the context of these
2 type of standing cases, an abutter is usually a fairly broad interpretation. There have
3 been cases where people who are not physically contiguous to a subject property are
4 found to have been considered abutters and persons across the street have been
5 considered abutters. So physical contact with a property that is the subject of a dispute
6 is not required. Although that is typically what is meant when you talk about an abutter.
7 It is somebody physically touching. In this context the law court says we are not going
8 to have such a rigid construction of the term, we are going to have a little broader
9 concept.

10
11 Mr. Schwartz asked if Mr. Wall could cite any case law where the residence across the
12 street could actually see issues. Mr. Wall said they are usually for apparent issues for
13 somebody that is in their situation. Mr. Wall did recall a case about a front set back that
14 was evident from two lots away. Mr. Straw asked if Mr. Wall could recall any decisions
15 where an esthetically unappealing structure or building in any way caused an economic
16 injury by diminishing property value such that it created a basis for standing to challenge
17 some aspect. Mr. Wall said yes; it was Forrester vs. the City of Westbrook, a law court
18 decision. The rationale was that the esthetic was considered a negative and therefore
19 negatively impacted their property values.

20
21 The board continued discussion concerning standing.

22
23 Mr. Wall replied when questioned, that at least four members must find standing to
24 move on.

25
26 Mr. Carver made a motion to find that there is standing. Mr. Straw seconded it.
27 Vote 3 – 3. Mr. Schwartz, Mr. Hoffman, and Mr. Caton dissenting.

28
29 Chairman Thibodeau said that in light of the vote, the Murphys do not have standing
30 and their administrative appeal is denied, therefore there is no reason to proceed with
31 the other aspects of the appeal. No consensus was reached by a majority of the board
32 members to establish standing.

33
34 **Findings of Fact:**

35
36 1. Maynard and Deborah Murphy own the property at 24 Pilot Point Road and they
37 reside there. The Murphys' property is almost directly across the street from the subject
38 property.

39
40 2. On August 17, 2012, Pilot Point LLC filed an application for a building permit with the
41 Code Enforcement Officer seeking a permit for construction of a new accessory
42 structure at 27 Pilot Point Road, Tax Map U12, Lot 70.

43
44 3. On August 17, 2012, the Code Enforcement Officer issued Building Permit #130036
45 for construction of a new accessory structure at 27 Pilot Point Road, Tax Map U12, Lot
46 70.

1 4. On September 17, 2012, the Murphys filed with the Code Enforcement Officer an
2 appeal to the Zoning Board of Appeals challenging the issuance of Building Permit
3 #130036.

4
5 **Additional Findings of Fact:**

6
7 5. The Murphys are an abutter to 27 Pilot Point Road.

8
9 All were in favor of the above Findings of Fact. Vote 6 – 0.

10
11 Mr. Straw made a motion for an Additional Finding of Fact that would read: The
12 Murphys have made a reasonable allegation of a potential adverse economic impact to
13 the value of their property at 24 Pilot Point Road by virtue of the purported excessive lot
14 coverage at 27 Pilot Point Road. Mr. Carver seconded it. Vote 3 – 3. Mr. Schwartz,
15 Mr. Hoffman, and Mr. Caton dissenting.

16
17 **Old Business.** - To hear the administrative appeal of June 3, 2013, of Maynard and
18 Deborah Murphy that the Code Enforcement Officer's determination of the Shoreland
19 Performance Overlay District Boundary is inconsistent with the Zoning Ordinance and
20 the Zoning Map and past practice of the Town.

21
22 Chairman Thibodeau said the question here is the determination that the Shoreland
23 Performance Overlay District is all land within 250 feet of the Normal High Water
24 Line of Coastal Waters. This determination is what is being appealed.

25
26 Attorney Richard Bryant, of Van Meer & Belanger, representing the Murphys came
27 to the podium. He said this is an appeal of the determination of the starting point
28 for the Shoreland Performance Overlay District and the Normal High Water Line of
29 Coastal Waters that was granted by the current Code Enforcement Officer upon the
30 request of the Goldmans' counsel. Our appeal is that the Code Enforcement
31 Officer's determination of the Shoreland Performance Overlay District boundary is
32 inconsistent with the Zoning Ordinance and the Zoning Map and the past practices
33 of this town. Mr. Bryant said this case is inextricably linked with the case that the
34 board just decided they did not have standing upon. From our perspective, we saw
35 the Code Enforcement Officer's determination of shifting the Shoreland Zoning
36 boundary by some 67 feet towards the ocean was effectively a backdoor way of the
37 Goldmans achieving something they were attempting to defend on the appeal of
38 the previous permit, which alleged that the Shoreland Zone 20% impervious
39 surface issue had been violated.

40
41 Mr. Bryant continued saying it is not just a matter that Mr. McDougal is wrong in his
42 determination here, but also that he questions his ability to make that
43 determination at this point while the case is under appeal on the previous Code
44 Enforcement Officer's issuance of a permit, which turned on the issue of compliance
45 with the Shoreland Zone and its limitation of impervious surface among other
46 issues. So there are some distinct issues associated with this but many of the
47 factual issues are similar to those that are at issue in the merits of the other
48 appeal, which the board just denied on the basis of standing.

1 Mr. Bryant said the specific language under which the appeal is made is Section 19-
2 5-2 of the Zoning Ordinance, Powers and Duties of the Zoning Board of Appeals.
3 You have the authority "To determine whether the decision of the Code
4 Enforcement Officer is in conformity with the provisions of this Ordinance, to modify
5 such decision to conform with such provisions, and to interpret the meaning of the
6 Ordinance in all cases of uncertainty." Specifically, there is a provision under
7 Section 19-5-3. Procedures, that reads "Any person aggrieved by a decision of the
8 Code Enforcement Officer or other municipal official, where applicable, may appeal
9 such decision to the Board within thirty (30) days following the date of such
10 decision by filing a notice of appeal with the Code Enforcement Officer." We were
11 timely in filing our appeal. We believe we have established standing because we
12 are an abutting property owner in the broadest sense of the word. This decision by
13 this Code Enforcement Officer cannot be taken without looking at the context of the
14 merits of the other case.

15
16 Mr. Bryant said they were willing to use the same testimony that they just gave for
17 this appeal as well.

18
19 Mr. Wall stated that based upon the nature of those two appeals being linked, to a
20 certain extent, he did not see any problem utilizing the record from the immediate
21 proceeding.

22
23 Chairman Thibodeau asked why can't the Goldmans get a determination from the
24 Code Enforcement Officer where the High Water Mark is for their own use.

25
26 Mr. Bryant said they could but if they hadn't appealed this determination, and
27 presented their case and the merits before the ZBA, then he thought they would
28 have lost the appeal of the other case. Mr. Bryant wants the board to listen to the
29 merits concerning the impervious surface on the lot and the building of this
30 structure.

31
32 Attorney Mary Costigan representing the Goldmans, came to the podium. She said,
33 there is a provision in the Ordinance where if there is an uncertainty. This is
34 Section 19-2-4: "Where uncertainty exists as to the location of any zoning district
35 boundary, the property owner so effected may request, in writing, that the Code
36 Enforcement Officer make a formal, written determination. The Code Enforcement
37 Officer shall make a written determination within five (5) working days of receiving
38 a request. If the property owner does not agree with the Code Enforcement
39 Officer's determination, the property owner may appeal this decision to the Zoning
40 Board of Appeals as an administrative appeal in accordance with Sec. 19-5-2,
41 Powers and Duties." She said that only the property owner can appeal that
42 decision. It makes practical sense. She agrees with the Chair, looking at this in
43 isolation, they have not demonstrated any harm that would result from a
44 determination of the zoning district boundary. And that is all this letter does. It is
45 not until the property owners do something, the reliance on that determination that
46 could potentially harm somebody else. The determination of the zoning district
47 boundary alone does not cause harm.

48
49 There was discussion on the merits and how the measurements come into play and
50 who can appeal a decision and when.

1 Mr. Bryant returned to the podium and talked about the Planning Board reviewing
2 boundaries and Section 19-2-5 of the Ordinance should apply. He said issues on
3 the merits must be heard.
4

5 Ms. Costigan returned to the podium and said this is not a Resource Protection
6 Zone, this the Shoreland District, so that section does not apply. What is or is not
7 happening at the Planning Board is irrelevant. This board has determined that the
8 Mean High Water Mark is very close to what is in the Code Enforcement Officer's
9 letter and that same determination has been made next door. Again, Mr. Bryant
10 spoke for five minutes without mentioning any harm to the Murphys by this
11 determination of where the Shoreland Zone District boundary is on 27 Pilot Point
12 Road.
13

14 Mr. Bryant returned to the podium to cite Ordinance Section 19-10-3 Amendments
15 and Section 19-2-2 Zoning Map for the record, as they are part of his argument
16 that this is a legislative act for Town Council not the Code Enforcement Officer.
17

18 Chairman Thibodeau closed the floor to public comment.
19

20 Mr. Wall returned to the podium to answer board members questions. It is his
21 opinion that to the extent that they can demonstrate that they are aggrieved by a
22 determination by the Code Enforcement Officer they would have the right to be able
23 to appeal. Of course they would have to demonstrate standing and that would be
24 part of the aggrieved. When you have two provisions that apply, they can be
25 harmonized. As soon as somebody can demonstrate that they have a potential
26 particularized injury you can act on it. Mr. Wall said he has not found a case in
27 which a determination of a boundary location by a Code Enforcement Officer was
28 appealed by an abutter.
29

30 There was board discussion centered upon harm and the nature of a naturally changing
31 shoreline, and how the Natural High Water Mark is determined.
32

33 Chairman Thibodeau made a motion to deny the appeal because the Murphys do not
34 have standing; Mr. Carver seconded. Vote: 6 – 0. The administrative appeal is denied.
35

36 **E. Communications** – None.
37

38 **F. Adjournment** – Chairman Thibodeau adjourned the meeting at 10:50 P.M.