

1  
2  
3  
4  
5  
6  
7  
8  
9

# Town of Cape Elizabeth Minutes of the March 25, 2014 Zoning Board of Appeals Meeting

10  
11  
12

**Present:**

13  
14  
15  
16

Josh Carver	Matthew Caton	Michael Tadema-Wielandt
John Thibodeau	Michael Vaillancourt	

17  
18  
19  
20

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

21  
22

**A. Call to Order:** Chairman Josh Carver called the meeting to order at 7:00 p.m.

23  
24

**B. Approval of Minutes:**

25  
26  
27  
28  
29

**1. Approval of the Minutes for February 25, 2014** - A motion to approve the minutes was made by Mr. Thibodeau; seconded by Mr. Vaillancourt. All were in favor. Vote: 5 – 0.

30  
31

**C. Old Business:** None.

32  
33  
34  
35  
36

**D. New Business:**

37  
38  
39  
40  
41

1. To hear the request of Harold and Mary Friedman of 36 Surf Road to appeal the Code Enforcement Officer's decision to grant a Temporary/Partial Certificate of Occupancy for the project at 40 Surf Road, Map U5, Lot 42, that is being constructed under Building Permit #109994.

42  
43  
44  
45  
46  
47

Martha Gaythwaite of Verrill Dana representing Harold and Mary Friedman of 36 Surf Road came to the podium. She stated they were here a year ago appealing the issue of the permit. She reviewed the history of the building process at 40 Surf Road. Zoning Board of Appeals (ZBA) minutes of November 27, 2012, pertain. The administrative appeal by Harold and Mary Friedman was denied as a result of it being untimely pursuant to Ordinance Section 19-5-3. That matter is still pending in Superior Court.

In November a Temporary/Partial Certificate of Occupancy was issued for this project. We filed a timely appeal of the certificate and are challenging it on two grounds: First, for the reasons we were challenging the permit to begin with and secondly, the issuance of the Certificate of Occupancy.

The Friedmans originally tried to get information on the project when the former CEO, Bruce Smith, was on administrative leave. The file contains little information about how Mr. Smith issued the permit. Mr. Smith was deposed and testified in Superior Court concerning this matter. When the Certificate of Occupancy was issued in November, they went back to the town office to see what was on file now. There is a building permit application. She handed out page 2 of that application. The board's packet of

1 information contains the other pages. The application stated that the building would  
2 stay within the existing footprint and that there would be no addition of bedrooms. A  
3 permit was issued referring to a permit application that is not in the town files. There is  
4 confusion concerning a reference to permit #1200319 and permit #434.

5  
6 Attorney Gaythwaite said that what is out there now is different then what the town's  
7 files say is authorized. There is now a new porch that is outside the existing footprint.  
8 There is a new stair tower and foundation built that is outside the existing footprint. The  
9 Certificate of Occupancy issued by the town is allowing two new bedrooms, which is  
10 different from the application.

11  
12 In addition this is a nonconforming structure on a nonconforming lot that does not meet  
13 the minimum standards of the ordinance because the setback is nine feet vice ten feet.  
14 The CEO did not have the authority to issue the building permit – but that is before  
15 Superior Court.

16  
17 Attorney Gaythwaite passed out photos of the builder, building into the nine-foot setback  
18 with a dormer-like structure. She explained the photo with the overhang. The  
19 Friedmans have a lot of issues concerning the issuance of the permit. They believe this  
20 project exceeds the limitations set by the Shoreland Zoning Ordinance. However, that  
21 substantive issue is before the Superior Court. The main issue tonight is that the town  
22 files do not accurately describe the work that is out there. There is no basis for a  
23 Certificate of Occupancy for something that is not properly permitted.

24  
25 Attorney Gaythwaite continued stating the property is too close to the property line,  
26 within the 75 feet Normal High Water Mark, on a lot where there is more coverage than  
27 allowed by the Shoreland Zoning Ordinance, it exceeds the 30 percent limitations for  
28 volume and square footage, it increases the existing footprint, and the permit refers to  
29 an application that is not on file. They believe the CEO improperly issued the Certificate  
30 of Occupancy on November 13, 2013.

31  
32 John Bannon of Murray Plumb & Murray representing Baird and Leah Mallory of 40 Surf  
33 Road came to the podium. Tonight was the first time he had heard an allegation that  
34 the building permit refers to an application that does not exist or cannot be found in the  
35 town's files. There are repeated references to a permit number that is repeated in  
36 materials from both sides. They also don't know anything about a dormer within nine  
37 feet of any boundary line. The "dormer" that Attorney Gaythwaite referred to was  
38 purposely stepped back from the nonconforming setback of the first floor so that it did  
39 not encroach into the setback.

40  
41 There are two decisions by the Maine Supreme Court that are directly on point. The law  
42 court has said twice that an appeal from granting of a Certificate of Occupancy is not a  
43 substitute for an appeal in the granting of the building permit. Therefore if there is no  
44 proper appeal in the granting of the building permit itself, the legitimacy of the building  
45 permit is not before the board or the court on the granting of the Certificate of  
46 Occupancy. Essentially you must assume the validity of the building permit. What you  
47 can decide is whether the work that the Mallorys did on their house complies with the

1 application materials they submitted to Bruce Smith in 2012. These materials CEO  
2 McDougal has as well.

3  
4 Attorney Bannon asked what was the database for determining whether what the  
5 Mallorys built complies with the building permit. There is not just one source of  
6 information. The building permit application requires that somewhat detailed plans be  
7 submitted. The Mallorys architect submitted 24 or 25 pages of architectural drawings  
8 and renderings of the proposed project. There has been nothing presented tonight that  
9 departs from the building of those plans. The plans show what bedrooms were going to  
10 be built. The plans showed a bump out for one small portion of the house for a  
11 stairwell. The Mallorys built that stairwell in compliance with the plans. The plans also  
12 showed a vestibule or porch on the front of the house. The Mallorys built that in  
13 accordance with the plans.

14  
15 In regard to what Attorney Gaythwaite refers to as the “dormer,” as the project was  
16 getting underway Bruce Smith was careful enough to consider the fact of whether  
17 constructing a second story addition above a nonconforming wall was allowed or not.  
18 He took the position that the second floor could not encroach if the first floor was  
19 nonconforming and that they needed to step it back to the point where it conformed. So  
20 they did. The architect submitted a new set of plans in November, showing the exact  
21 setback he had requested.

22  
23 The written materials that have been submitted by both sides provide no evidence that  
24 what was built was not in compliance with the plans. If the application was the most  
25 prominent document, you would expect that it would be posted on site. Instead the  
26 building application states that the approved plans or permit must be displayed until the  
27 final inspection.

28  
29 Attorney Bannon continued by saying that this was the third time that the Friedmans  
30 have challenged the Mallory’s building permit. He continued to recount the history  
31 making this actually the fourth occasion. He mentioned the DEP (Department of  
32 Environmental Protect) found that the Mallory project conformed with local Cape  
33 Elizabeth Shoreland Zoning Ordinance. The Friedman’s did not appeal the Superior  
34 Court’s judgment to that effect; therefore the decision is final and binding. It is too late  
35 to do it now.

36  
37 Chairman Carver asked CEO McDougal for a brief update.

38  
39 Mr. McDougal stated the permit was issued seven months prior to his employment here  
40 so he cannot speak to how the permit was issued or what the materials were. When he  
41 started work on January 22, 2013, there was a set a plans for this project, which he  
42 assumed to be the approved plans for the project. On May 1, 2013, he inspected the  
43 framing, the plumbing and the electrical work; it all passed inspection and was  
44 consistent with the approved plans. On May 14, 2013, he inspected the insulation and  
45 the insulation met code requirements. In November 2013, Craig Cooper of Rainbow  
46 Construction called and requested a Partial Certificate of Occupancy so that two  
47 bedrooms could be moved into the newly finished space and the old bedrooms would  
48 become part of a work area for the next phase of the project. It is not uncommon to

1 issue a Partial Certificate of Occupancy (CO) when a family is trying to continue living in  
2 the house during the renovation. The work conforms to the approved plans and all  
3 related building, electrical, plumbing and energy codes.

4  
5 In response to questions Mr. McDougal replied: The full plan set is dated January 20,  
6 2012, and partial plan set was revised September 24, 2012. Both sets were used when  
7 making the inspection. There was one set of rolled plans in the Code Office that said  
8 Mallory on them with the Map and Lot and address; they are too big for the file cabinet.  
9 The revised plans were in the building permit code file. There are no other plans that  
10 the CEO is aware of. The revised plans were after the building permit. When they  
11 realized the second floor was encroaching on the setback they revised the plans,  
12 pushing the second floor in a foot so that it meets the 10-foot setback. The CO that Mr.  
13 McDougal issued is consistent with the plans that the town has.

14  
15 Attorney Gaythwaite returned to the podium and said when her client went to the town  
16 office in early October the only plans on file were some folded up sketch plans that dealt  
17 with Normal High Watermark (HWM) issues. Those sketch plans have a stamped date  
18 on them to show when they were received by the town office. In the town file there is a  
19 red florescent 3 X 5 card dated October 24, 2012, that refers to the rolled up plans. The  
20 plans provided to us had no date stamp to show when they were received by the town.  
21 A Freedom of Information Act request was filed to obtain the plans. The plans dated  
22 January 2012 were not provided per that request. Attorney Gaythwaite stated there is  
23 no record of which plans Mr. Smith had relied on. During the deposition, Mr. Smith's  
24 daily computer records, that the town keeps, did not show any meeting with architects.  
25 There was a meeting with Dr. Mallory and Mr. Combs involving the sketch plans and the  
26 HWM in May 2012. There is no other reference to plans. The application on file is  
27 clearly dated and says there will be no change to the footprint. Should the application  
28 be ignored?

29  
30 Attorney Gaythwaite further discussed the picture she handed out earlier to the board.  
31 She said it was just a guess as to what plans Mr. Smith approved. There has been a  
32 vestibule and a stair tower built outside the footprint. They have not been allowed on  
33 the property to view the seaward side. They believe there have been a number of  
34 extensions of the footprint in violation of what has been represented to the town as part  
35 of the application process. She mentioned the case of Bracket vs. Rangeley where the  
36 law court said you have to look at the application to see what was permitted.

37  
38 Attorney Gaythwaite talked about what was happening with the Superior Court case on  
39 the merits of the first appeal. This appeal was filed so that somebody would not say  
40 later that an appeal should have been filed for the CO.

41  
42 In response to questions Attorney Gaythwaite replied Mr. Smith said the plans should  
43 be stamped; he didn't know why they weren't stamped. Mr. Smith did not have any  
44 calculations for the lot. How Mr. Smith applied the rules for the HWM was mentioned.

45  
46 Attorney Bannon returned to the podium and refocused on this issue before the board:  
47 Have the Friedmans shown that the Mallorys built anything in their addition that was  
48 contrary to the plans that were approved for this project? The Friedmans object that

1 there is not absolutely perfect certainty that the plans are the plans. In response to  
2 questions Attorney Bannon said the dates of the plans were January and September  
3 24, 2012. The Mallorys didn't seek a variance because they didn't need one.

4  
5 There was no public comment. Chairman Carver closed the floor to public comment.

6  
7 The board discussed the setback. In response to questions Mr. McDougal said the  
8 second floor was stepped in and the 45-degree angle piece was so that the house  
9 doesn't fill with water. He said that the over-hanging few inches to shed rain water  
10 for a healthy structure was normal in Cape Elizabeth. Setbacks are measured from  
11 the edge of the siding. Mr. McDougal explained the steps he used to issue the CO.

12  
13 There was discussion concerning the process and what exactly was before the  
14 board at this time.

15  
16 Mr. Thibodeau motioned to deny the administrative appeal of the Temporary  
17 Certificate of Occupancy issued on November 15, 2013, permit number 109994;  
18 Mr. Vaillancourt seconded. All were in favor. Vote 5 – 0.

19  
20 **Findings of Fact:**

21  
22 1. This is an Administrative Appeal of the Code Enforcement Officer's decision to  
23 issue a temporary Certificate of Occupancy for a building project at 40 Surf Road  
24 (Map U5, Lot 42).

25  
26 2. The appellants are Harold and Mary Friedman, who reside at 36 Surf Road,  
27 which abuts the subject property.

28  
29 3. On June 6, 2012, a building permit application for 40 Surf Road was received to  
30 add an addition on the second floor above a preexisting roof and for a new  
31 mudroom.

32  
33 4. The application was assigned Permit #120434.

34  
35 5. A permit was granted on June 8, 2012, with the Permit #120434 assigned with  
36 a building permit placard having the number 109994.

37  
38 6. On November 5, 2012, an administrative appeal was filed on behalf of Harold  
39 and Mary Friedman questioning the authority of the Code Enforcement Officer to  
40 issue the June 8, 2012, permit.

41  
42 7. On November 27, 2012, the Zoning Board Appeals denied the administrative  
43 appeal as a result of it being untimely. (The Friedmans have appealed this decision  
44 to Superior Court and the matter is still pending a final decision.)

45  
46 8. On November 15, 2013, the Code Enforcement Officer issued a  
47 partial/temporary Certificate of Occupancy so that the homeowner can transition  
48 the use of 2 bedrooms into the newly constructed space in order to continue the  
49 construction project into previously occupied space.

1 9. The CEO relied on the plans dated January 2012 as revised on September 24,  
2 2012 for purposes of issuing the Certificate of Occupancy.

3  
4 10. On December 13, 2013, Harold and Mary Friedman submitted an application  
5 for Administrative Appeal to appeal the Code Enforcement Officer's decision to issue  
6 a partial/temporary Certificate of Occupancy.

7  
8 All were in favor. Vote 5 – 0.

9  
10 2. To hear the request of Austin Chadd of 191 Fowler Road (Map U44-28) to appeal  
11 the Code Enforcement Officer's denial of a building permit to construct an agricultural  
12 building that is intended to be used as part of the applicant's existing produce business  
13 which is located at a different site.

14  
15 Chairman Carver asked CEO McDougal for the general background.

16  
17 Mr. McDougal said he truly wants Austin and Mary Ellen's produce business to thrive in  
18 Cape Elizabeth. He wants them to be successful farmers here. The Chadds want to  
19 grow vegetables on their property to supply their produce business. He told them in  
20 November that the use is allowed but it requires a site plan approval from the planning  
21 board. They disagree with this interpretation. In the rebuttal to the building permit  
22 denial, the Chadds make some well founded points regarding the application. It would  
23 be nice if the ordinance was clearer on this subject. Ultimately, this decision has far  
24 reaching implications for Cape Elizabeth and the CEO felt the town is better served to  
25 have the Zoning Board make the decision.

26  
27 This issue comes down to the definition of nonresidential use and how the Ordinance  
28 intends it to be applied. The Ordinance can be read two different ways. The Chadds  
29 contend that their use is resource related and therefore does not require site plan  
30 review. In the CEO's opinion, the ordinance intends new uses that are not residential to  
31 obtain site plan approval.

32  
33 To support of his decision, the CEO cited the following:

34  
35 1. In section 19-8-1. Buffering of Nonresidential Uses: this states that  
36 buffers are *required on the side and rear yards of nonresidential uses,*  
37 *except agriculture (Effective June 10, 2010)*

38 Why would the ordinance specifically exclude agriculture from this  
39 nonresidential requirement if the term nonresidential does not include  
40 agriculture in the first place?

41  
42 2. In the site plan review section, 19-9-2.B, certain types of agricultural  
43 buildings are exempt from site plan review. Why would these exemptions  
44 exist if site plan review doesn't apply to agriculture? If my interpretation is  
45 wrong, it renders this whole section of the ordinance meaningless.  
46 Someone could build a three or four thousand square foot agricultural  
47 building anywhere in town with a simple building permit. I believe that the  
48 ordinance intends these exemptions to apply to existing farms, and still

1 expects new nonresidential farming operations to obtain site plan  
2 approval.

3  
4 3. Lastly, in our definitions section, it states that: *All words not defined*  
5 *herein shall carry their customary and usual meanings.* Nonresidential is  
6 not defined in the zoning ordinance so I would contend that we should use  
7 the customary and usual meaning of the word, which to me is anything  
8 that is not residential.

9  
10 Austin Chadd came to the podium and stated that John Green and Jay Cox from the  
11 Cape Farm Alliance were with him for support. The summary of his position is as  
12 follows: First, the current use of the lot at 191 Fowler Road is that of a single family  
13 dwelling, which is a permitted residential use under Section 19-6-1.B.2.a. (page 56). An  
14 allowable accessory use to a residential use is that of an accessory building listed under  
15 19-6-1.B.4.a. (page 56). The Definition of an accessory building found on page 2,  
16 includes an agricultural building. The construction of a single-family dwelling or  
17 accessory building does not require site plan review as stated in Section 19-9-2.B.1  
18 (page 224). More specifically a greenhouse under 2,000 square feet does not require  
19 site plan review under Section 19-9-2.B.3.c.

20  
21 Secondly, the proposed use of the accessory building to perform agriculture which  
22 includes growing, harvesting, and selling of crops as the definition states on page 2. A  
23 permitted resource related use found in Section 19-6-1.B.1.b. (page 56) and therefore  
24 not listed as a nonresidential use. Additionally the Zoning Ordinance specifically states  
25 that nonresidential uses of property require site plan review per Section 19-9-2.A.2.  
26 (page 224).

27  
28 Mr. Chadd continued stating the ZBA has ruled that resource related uses of property  
29 do not require site plan review as stated in their minutes of July 26, 2011, page 2, line 1  
30 though 2. And finally within the denial letter for building permit number 140031, the  
31 CEO classifies the proposed use as a nonresidential agricultural use. Such  
32 classification does not exist within the Zoning Ordinance. The only agricultural use can  
33 be found under resource related use. Miscategorizing the proposed use of the property  
34 in requiring site plan review as a nonresidential use is incorrect. Its use is a resource  
35 related use and does not require site plan review according with the ZBA.

36  
37 In response to questions from board members, Mr. Chadd replied that a greenhouse is  
38 a nonpermanent structure; it does not have a foundation. The structure will be there  
39 year round. The farm stand is 40 seconds down the road. Buyers or vendors will not  
40 be coming to the home property. The farm stand is located at Greenberg Farm, which  
41 is located at 316 Fowler Road. This will be their fifth year in that location. On  
42 December 20, 2013, they bought the residence at 191 Fowler Road. They did not seek  
43 a site plan review because they believe it does not apply. Agriculture is a different,  
44 separate category from a home business.

45  
46 Chairman Carver opened the floor for public comment.

1 Jim Row, 127 Oakhurst Road stated he served on the town council that sponsored the  
2 Cape Farm Alliance in 2006/7. The town must take every opportunity to preserve and  
3 promote agriculture in this town. There are four reasons for that: 1. Farms create jobs.  
4 2. Farms retain open space. 3. Town has a heritage of agriculture and fishing. 4. We  
5 must sustain local sources of fresh, healthy food. He urged the board to use reason in  
6 its interpretation of the Ordinance and to rule in favor of the applicants.  
7

8 John Green, a member of the Cape Farm Alliance stated he was a member of the  
9 committee that helped draft the Ordinance in relation to agriculture. The intent was to  
10 make agriculture viable and be less restrictive to farming such as microfarms on small  
11 lots in the RC zone. He believed the problematic language in the Ordinance is in  
12 Section 19-9-2.A.2. Applicability that refers to nonresidential change of use. The next  
13 section, 19-9-2.B.3.c. states greenhouses are allowed. Under the definition of  
14 accessory buildings or structures, greenhouses are allowed. This implies agriculture is  
15 compatible with residential areas because it is an accessory use. The Ordinance was  
16 to be as liberal as possible in regards to agriculture. It supports the Chadds having a  
17 hoop house in their backyard.  
18

19 William Bamford, 122 Spurwink Avenue, stated he and his wife own Maxwell's Farm.  
20 His wife, Louis, is the sixth generation of the Maxwell family to be farming in Cape  
21 Elizabeth. He related how the number of farms decreased to a low of six in the 1970's,  
22 due to costs, national agribusiness, and pressures of development. Saving farmland  
23 and the farmers who care for it became increasingly important to the residents of Cape  
24 Elizabeth. As a result there are 16 farms in town today, seven have onsite markets or  
25 stands. Although farmers' businesses and life styles may be different from their  
26 neighbors, they live side-by-side with respect for one another. Agriculture never has  
27 been separate from our residences. It is an important part of our community.  
28

29 Kelly Gordon, 110 Two Lights Road, said the Chadds have met all the criteria to build a  
30 simple hoop house and it should pass. She believes every resident has the right to do  
31 what the Chadds are requesting as the guidelines stand.  
32

33 Penny Jordan, one of the owners of Jordan's Farm at 21 Wells Road stated she is a  
34 fourth generation farmer. The Cape Farm Alliance crafted the definition of agriculture  
35 such that it would ensure diversity of Cape's farming future. Cape Elizabeth needs to  
36 continue the vision of a merged and blended community where residents coexist with  
37 working farms.  
38

39 Nick Tammaro owner of Down Home Farm, 2 Harvest Lane, and Tammaro  
40 Landscaping said he was in the Chadd's position in 2009 when he developed a paper  
41 street and had to go through site plan review to get onto the property to build a house  
42 and a barn. It was very expensive, \$9,000, for site plan review. It is unaffordable for a  
43 new farmer starting out. It could be the difference between being able to afford a walk  
44 behind rototiller or a ride-on tractor with a rototiller. We need to make this more  
45 affordable for young people, or fewer of them will be farming.  
46

47 Pat Salve Bothel, 90 Ocean House Road, owner of Fox Run Farm and Bothel's  
48 Mechanical Repair referred to the July 26, 2011 ZBA meeting minutes of a meeting



1 where she had to be represented by a lawyer to grow blueberries on the land that her  
2 husband's family had owned for 125 years. They spent \$35,000 to grow 300 blueberry  
3 bushes – not just for the lawyer but because there were different kinds of surveyors and  
4 wetlands planners, and mappers. She quoted from the minutes, page 2, line 9:  
5 “Agriculture is neither residential nor nonresidential. Site Plan Review is not required for  
6 resource related use.” Page 2, line 22: “Sec.19-6-1 lists what is permitted in  
7 Residential A District. Agriculture is listed in sub-paragraph B. In Sec.19-9-2, page 219,  
8 Site Plan Review is not required for agricultural use...” Page 3, line 28: Chair Gulino  
9 replied he was relying on the Sec. 19-6-1.B permitted uses, which states the following  
10 are accepted uses, agriculture, and under 4.h, Agriculture Related Use. Mrs. Bothel  
11 said this issue had already been decided; the board should do the right thing.

12  
13 Stephen Bothel, 90 Ocean House Road, said there had been an 8% increase in land  
14 farmed in Maine between 2007 and 2012. We really need to help not hinder people  
15 who want to farm. For their blueberry venture, he stated that had they not had to hire a  
16 landscape architect, a wetland specialist, a land surveyor for topography, a land  
17 surveyor for boundaries and a soil scientist, they would have been able to install drip  
18 irrigation and 700 more plants. It would not be profitable for small farmers to shell out  
19 that kind of money.

20  
21 Ray Shevenell, 189 Fowler Road, said he and his wife Diane have lived in Cape  
22 Elizabeth since 1968. They bought their current property in 1975. It borders the  
23 Chadds property on two sides: East and North. They enjoy the rural character of the  
24 town. On Fowler Road there are many barns and greenhouses. They support the  
25 Chadds' plans for their backyard.

26  
27 Bryon Castro, 185 Fowler Road, said he supports farmlands. His biggest concern about  
28 this being done is wetlands. They bought the home at 185 Fowler Road after looking at  
29 six homes, including the one the Chadds own and found that it had water issues in the  
30 backyard. It is very close to the RP wetlands. Their house at 185 is Shoreland  
31 restricted, Great Pond restricted and RP1 restricted. They had to have a site plan done  
32 just to see about a 30' by 30' garage in the backyard before they closed on the house.  
33 My biggest concern is where the drainage is going. The Chadds' house and the four  
34 around them are the lowest in the area. Mr. Castro posted two maps and explained  
35 water drainage issues. He hopes the best for the farmer but he is concerned about  
36 where all the water is going to go. Mr. Castro stated he was not against the project just  
37 concerned about water runoff issues that should be addressed as part of the  
38 application.

39  
40 The CEO did review the Resource Protection Standards and the Great Pond Watershed  
41 Overlay Standards and the proposal complies with of those standards. Mr. McDougal  
42 did not do any sort of storm water review.

43  
44 Dave Buchannan with the Cape Farm Alliance read a letter of support by Janet Villiotte,  
45 7 Montgomery Terrace. Mrs. Villiotte believes this hoop house is a low impact structure  
46 and urges the board to approve the application. Mr. Buchannan stated he has been  
47 leasing land along Old Ocean House Road for the past seven as a grower. It is a  
48 challenge to find places to grow. He feels the Chadds are an asset to the community.

1 Nate Huckel-Bauer, an attorney representing Wendy and Bryon Tait, 193 Fowler Road,  
2 immediately adjacent to the Chadds' property, stated they are in support of the decision  
3 of the CEO. Without arguing that the use is not permitted, just that a change of use like  
4 this should go through site plan review. One of the concerns that was raised was the  
5 expense of site plan review; Mr. Huckel-Bauer believes some of the requirements can  
6 be waived if the issue is not a big concern. The issue is the impact on the neighbors.  
7 Where is the water going to go? My clients have a backyard with a pool; it has been a  
8 private place. This is a different type use. Whether a golf cart or a tractor, there is  
9 going to be a lot more activity back there. The backyards are small and open for the  
10 four houses. The proposed structure is only about 90 feet from the lot line. They would  
11 like to minimize the impact of all the new activity. Mr. Huckel-Bauer referred to the  
12 Ordinance and said that the Chadds' property was already over the 20% allowed  
13 coverage in the Shoreland Overlay District. Although they did not build it that way, they  
14 shouldn't be allowed to add impervious surface to the lot. He submitted a letter for the  
15 record that closely mirrors the CEO's comments.

16  
17 Louise Sullivan, 72 Two Lights Road, stated it says Journey's End Farm on her barn.  
18 She lives in the middle of the neighborhood and raises sheep. She commented on the  
19 other cost of site plan review: time for the farmer. We need to think about not making  
20 this a long process.

21  
22 Tony Owens and his wife, Beth, Seaview Avenue, have maintained an organic  
23 vegetable and flower garden for over three decades. They are in support of the  
24 Chadds' appeal. The regulations strongly favor the Chadds' interpretation. The town's  
25 comprehensive plan encourages preservation of agriculture within the town as well as  
26 allied organizations like the Cape Elizabeth Land Trust, the Cape Farm Alliance and the  
27 Maine Farmland Trust. Thirdly, during his recent tenure as president of the Board of  
28 Directors of the Natural Resources Council of Maine, a 15,000 member organization  
29 advocating for the protection of the nature of Maine, he became acutely aware of the  
30 conspicuous absence of a younger generation of Mainers committed to a sustainable  
31 future for our state. Absent for many reasons, including the lack of viable economic  
32 opportunities. With the Chadds' application we have a desirable nexus of farmland  
33 protection and retention of the next generation of young, ambitious hardworking  
34 Mainers. For these reasons, Mr. Owens strongly encouraged the board's favorable  
35 review of their appeal.

36  
37 Patty Critzer grew up at 200 Fowler Road, directly across from the Chadds. She stated  
38 this is not a new use. It was farmed by Parker Brown who grew potatoes and carrots for  
39 many years until he sold it in the 70's. There was never a water issue, the fields were  
40 always dry.

41  
42 Alice Grant, 61 Beach Bluff Terrace, spoke in support of the Chadds. She said the  
43 Section 19-9-2.B. does not limit greenhouse use. They should be allowed the permit  
44 without going through a lot of extra costs.

45  
46 Tom Gallagher, 200 Fowler Road, has lived directly across from the Chadds for sixty  
47 years. He said that when the field was farmed there were clay pipes around the field to  
48 drain the water away toward Sprague Hall where it went into Great Pond. When the

1 houses were built, the clay tiles were removed and the water now runs across the street  
2 onto his property. He has three different shades of grass growing in his pasture where  
3 the chemicals from the runoff (fertilizer, beet juice, driveway, road and roof runoff,  
4 gasoline or soap) go and the animals won't eat it. There are two six-inch pipes under  
5 the road. It is wet because there is no place for the water to go because the drain is no  
6 longer there.

7  
8 Beth Angle, Young Lane, said she has a small farm. She is a real estate broker and  
9 from her reading of the Ordinance she would have told clients they could have put up a  
10 hoop house and grown plants. She hopes the Chadds can do this; they are an asset to  
11 our community.

12  
13 Jay Cox, has a Christmas Tree Farm on Sawyer Road. He spoke about the intent when  
14 the recent changes pertaining to agriculture in the Ordinance were drafted. They had  
15 no intent to require site plan review for beginning new agriculture. He went through site  
16 plan review for his farm and farm stand, but it is a commercial building and the  
17 Ordinance is clear, that requires site plan view. He discussed an October 20, 2009 draft  
18 concerning ancillary activities under the definition of "Agriculture Related Use."  
19 Agriculture is a separate definition under "Resource Related Use" and there was never  
20 any requirement for review prior to commencing. Agriculture is a permitted use in all  
21 zones but the town center. Site plan review is not required for non-sales agricultural  
22 buildings, greenhouses, storage sheds and barns and certain sales buildings are  
23 exempt if used on a temporary basis. The reason the section of 19-9 references  
24 specific agriculture buildings is to separate them from larger more permanent buildings  
25 used for sales that generate traffic and that do require site plan view.

26  
27 The CEO asked Mr. Cox about the language in the 2009 Ordinance where that section  
28 had read "agricultural activities and buildings were exempt." Mr. Cox stated that  
29 redundant language was edited out and any change was not meant to be more  
30 restrictive. That section concerned buildings requiring site plan review.

31  
32 John Green came to the podium and stated that wording was removed because it would  
33 have been redundant. We were focused on what agricultural buildings would have  
34 required site plan review. Agriculture itself was allowed as a Resource Related Use, so  
35 that wording was deleted because it was not dealing with the use, which was already  
36 allowed. It was just what would trigger site plan review for agricultural buildings. It was  
37 worded thusly as not to be redundant.

38  
39 Diane Shevenell, 189 Fowler Road, her husband Ray spoke earlier, said they are  
40 directly next door to the Chadds and they would be thrilled to see a hoop house there  
41 growing vegetables. She does not see a problem with them growing produce there,  
42 putting it in a truck and taking it to markets. She sees no difference than her getting in  
43 her car to go to work to make a living. She thinks this will be an asset and hopes the  
44 board approves their wishes.

45  
46 Finding no further public comment, Chairman Carver closed the floor.  
47

1 In response to questions CEO McDougal said that the application complied with all  
2 other requirements: Resource Protection, Shoreland zoning, Great Pond Water Shed  
3 overlay, and setbacks. It was simply the interpretation of the review authority,  
4 specifically Section 19-9-2.2. Any Nonresidential Expansion or Change in Use.

5  
6 The board referred to Ordinance Sections 19-6-1.B.1., 19-9-2.A.2. and 19-9-2.B.3.c.  
7 There was discussion about the interpretation, intent and wording of the Ordinance.  
8 Agriculture use is different from Home Business.

9  
10 Mr. Thibodeau moved that the administrative appeal of Austin Chadd concerning the  
11 issuance of a building permit dated February 12, 2014, Permit number 140031 be  
12 granted. Mr. Vaillancourt, seconded. All were in favor. Vote 5 – 0.

13  
14 **Findings of Fact:**

15  
16 1. This is an Administrative Appeal of the Code Enforcement Officer's decision to deny  
17 a building permit for an accessory structure at 191 Fowler Road (Map U44, Lot 28).

18  
19 2. The appellants are Austin and Mary Ellen Chadd, who reside at 191 Fowler Road.

20  
21 3. On February 3, 2014, Austin Chadd submitted building permit application number  
22 140031 for an accessory building.

23  
24 4. On February 6, 2014, the Code Enforcement Officer spoke with Austin Chadd on the  
25 telephone and Mr. Chadd stated that he intended to use the proposed accessory  
26 structure for his produce business that is currently operating at a different location.

27  
28 5. On February 12, 2014, the Code Enforcement Officer denied the application for an  
29 accessory structure.

30  
31 6. On March 10, 2014, Austin Chadd submitted an application for Administrative Appeal  
32 to appeal the Code Enforcement Officer's decision to deny the building permit.

33  
34 7. Section 19-6-1. Residence A District (RA), B. Permitted Uses, 1.b. states that the  
35 following resource related uses are permitted in the Residence A District: Agriculture,  
36 provided that no animal or fowl shall be raised for commercial purposes on any lot  
37 containing less than one hundred thousand (100,000) square feet. We are also relying  
38 on 19-9-2.B. Activities Not Requiring Site Plan Review and that includes under B.3.  
39 Agricultural buildings as follows: B.3.c. Any barn, greenhouse, or storage shed with a  
40 building footprint that does not exceed 2,000 sq. ft. in size.

41  
42 8. We heard from two abutters who were in favor of the construction of the greenhouse.

43  
44 All were in favor of the Findings of Fact. Vote 5 – 0.

45  
46 3. To hear the request of Michael Chestnut, representing Candace Karu of 412 Pulpit  
47 Rock Road, to construct an Accessory Dwelling Unit in a portion of a proposed house at  
48 5 Old Ocean House Road, (Map R2-1, Lot 10-1).

1 Michael Chestnut came to the podium and stated that they are building a new single-  
2 family residence with an attached garage on the lot at 5 Old Ocean House Road. They  
3 are trying to get approval for an Accessory Dwelling Unit above the garage.

4  
5 Mr. McDougal said Section 19-7-5.B. Requirements applies.

6  
7 Mr. Chestnut went through the requirements:

8  
9 1. Minimum Lot size: There is 160,000 square feet, so there is plenty of lot size.

10  
11 2. The floor area of the new structure will be 3,220 square feet, which is over the 1,500  
12 required minimum.

13  
14 3. We are going to be less than 25%, because we are only allowed to go to 600 square  
15 feet. We are at 591 square feet, which is 18.4% of 3,220.

16  
17 4. Mr. Chestnut asked for clarification on #4 because this home was being built at the  
18 same time. Mr. McDougal said since there is no addition to the dwelling unit that would  
19 be zero percent.

20  
21 Mr. McDougal explained that the house and garage, with a bonus room on top, could be  
22 built and then the applicant could come back and ask to build the Accessory Dwelling  
23 Unit with no expansion, just using the space above the garage. The applicant would  
24 feel more comfortable having the approval upfront because this is a big investment into  
25 the lot. There are actually two lots here, there is over 160,000 square feet, they have  
26 plenty of frontage. The CEO stated that the approval of an Accessory Dwelling Unit is a  
27 conditional use approval that only the Zoning Board can grant. It would be less  
28 expensive for them to build it at the same time and the client would be assured that she  
29 could use the property as she wishes.

30  
31 Mr. Chestnut said that the garage is 28 by 24 feet, which is over the 600 square feet  
32 allowed. Mr. Chestnut referred the plans; the stairs up to the apartment and the landing  
33 are not including in the 600 square feet. Mr. Chestnut reviewed where the 591 square  
34 feet came from. The remaining requirements 5 – 8 would be met within the new  
35 construction.

36  
37 Mr. Chestnut said the peak of the roof would be 27.5 feet. The slope of the land and  
38 septic were discussed. CEO said the property is in the RP2 Wetland Zone, which is  
39 common in Cape Elizabeth. The survey shows there is plenty of upland area.

40  
41 There was no public comment.

42  
43 After a brief board discussion, which clarified this is for a three bedroom house, one  
44 bedroom Accessory Unit, Mr. Tadema-Wielandt moved to grant the request for a  
45 Conditional Use Permit to construct an Accessory Dwelling Unit as part of the  
46 construction of a single family dwelling per Section 19-7-5 of the Zoning Ordinance at  
47 Map R02, Lot 10-1, 5 Old Ocean House Road, which property is owned by Candace  
48 Karn. Mr. Thibodeau seconded. All were in favor. Vote 5 – 0.

1 **Findings of Fact:**  
2

3 1. This is a request for a Conditional Use Permit to construct an Accessory Dwelling  
4 Unit as part of the construction of a single family dwelling per Section 19-7-5 of the  
5 Zoning Ordinance at Map R02, Lot 10-1, 5 Old Ocean House Road. The applicant is  
6 Michael Chestnut, Architect.  
7

8 2. Candace Karn is the owner of record of the property at 5 Old Ocean House Road,  
9 Map R02, Lot 10-1.  
10

11 3. The lot at 5 Old Ocean House Road is a vacant conforming lot in the RA Zone. The  
12 Zoning Map shows most of the lot in the Resource Protection 2 (RP-2) District but a  
13 wetland scientist has delineated the area of the RP-2 District on the property. The  
14 resulting RP-2 district is significantly less than what is shown on the Zoning Map.  
15

16 **Additional Findings of Fact:**  
17

18 1. The proposed use will not create hazardous traffic conditions when added to existing  
19 and foreseeable traffic in its vicinity.  
20

21 2. The proposed use will not create unsanitary conditions by reason of sewage  
22 disposal, emissions to the air, or other aspects of its design or operation.  
23

24 3. The proposed use will not adversely affect the value of adjacent properties.  
25

26 4. The proposed site plan and layout are compatible with adjacent property uses and  
27 with the Comprehensive Plan.  
28

29 5. The design and external appearance of any proposed building will constitute an  
30 attractive and compatible addition to its neighborhood, although it need not have a  
31 similar design, appearance or architecture.  
32

33 6. The applicant has demonstrated compliance with the requirements in Section  
34 19-7-5.B. of the Zoning Ordinance.  
35

36 All were in favor of the Findings of Fact and Additional Findings of Fact. Vote 5 – 0.  
37

38 **E. Communications:** None.  
39

40 **F. Adjournment:** Chairman Carver moved to adjourn; seconded by Mr. Thibodeau.  
41 The meeting was adjourned at 10:22 p.m.