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Town of Cape Elizabeth Minutes of the June 24, 2014 Zoning Board of Appeals Meeting

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Present:

16 17 18 19 20 21 22 23 24 25 26 27 28	Josh Carver Michael Tadema-Wielandt Michael Vaillancourt	Matthew Caton John Thibodeau	Aaron Mosher Joanna Tourangeau
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The Code Enforcement Officer (CEO), Benjamin McDougal was also present. Minutes drafted from record by Recording Secretary, Carmen Weatherbie.

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

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B. Approval of Minutes:

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1. Approval of the Minutes for March 25, 2014: A motion to approve the minutes was made by Mr. Tadema-Wielandt; seconded by Mr. Vaillancourt. All who were in attendance on that date were in favor. Vote: 5 – 0.

2. Approval of the Minutes for May 27, 2014: Ms. Tournanguau amended the minutes at Page 6, line 20, by adding “as is essential to falling within the definition of Alternative Tower Structure, an accessory use,” after the words equipment shed(s) and before the word were. A motion to approve the minutes with that revision was made by Ms. Tourangeau; seconded by Mr. Mosher. All who were in attendance on that date were in favor. Vote: 5 – 0.

C. Old Business: To hear the request of Mark Toothaker to re-approve the variance at 2 Wheeler Road (Map U16, Lot 1). This variance was unanimously approved on December 11, 2013, but it was not recorded at the Registry of Deeds within 90 days as required by the Zoning Ordinance. Finding that Mr. Toothaker was not present, this was tabled until the end.

D. New Business:

1. To hear the request of Elizabeth M. Knauff and Marie Ahern for a variance to add a front porch to their house at 8 Elmwood Road (Map U03, Lot 21).

Jeff Herbert came to the podium on behalf on the applicants, Elizabeth M. Knauff and Marie Ahern in connection with their application for a variance to construct a front porch to their property at 8 Elmwood Road. In additional to the application, the board should have a number of plans, sketches, drawings and photos in the materials that depict current condition and proposed porch as well as some of the abutting properties. Currently there are precast concrete steps leading up to the front door with a small four-foot roof that covers the base of the steps. The applicants would like to remove those and construct a new front porch that would extend eight feet from the edge of the house

1 towards the road and extend lengthwise roughly 21 feet. P1 and P2 shows. Because
2 the Ordinance provides for a 20-foot front yard setback, an eight-foot porch would leave
3 15 feet, six inches setback, so a variance is required.

4
5 When the house was being resided evidence of a previous similar porch was found.
6 Photo E1, shows that a porch had existed. They want to reconstruct something that
7 was previously there as opposed to something brand new. The variance is needed due
8 to the unique circumstances of the property because of the configuration of the lot. For
9 some reason the porch was removed and the Zoning Ordinance has changed. They
10 would like to restore this element of the property.

11
12 The granting of the variance will not produce an undesirable change in the character of
13 the neighborhood or detrimentally affect the fair market value of the property. They
14 want to preserve the character of the neighborhood. Both properties, immediately to the
15 east and to the west have eight-foot porches. Each of the porches on these properties
16 has the same setback as what the applicants are requesting.

17
18 There are a number of letters from neighbors in support. Mr. Herbert continued
19 discussion about the unique circumstances of the property and that the construction
20 would adhere to the Ordinance and building codes. The distance of steps from the
21 porch is not given; Mr. Herbert said that the steps would be constructed to be within the
22 10-foot setback.

23
24 Ms. Knauft addressed a question concerning any photos of the previous porch. There
25 are no photos that show it clearly. They worked with the Historical Society but could
26 find none. The porch was probably taken down 40 years ago.

27
28 Mr. Herbert did not know the date of the Ordinance change for the setback. The
29 applicants put together the comparative information on neighboring porch setbacks.

30
31 Mr. Thibodeau thanked the applicants for one of the most complete applications that
32 has been submitted to the board.

33
34 There was board discussion concerning setbacks.

35
36 Mr. Thibodeau moved to approve the variance request to build the proposed porch that
37 is 15 feet six inches from the property line and the stairs from the porch 10 feet from the
38 property line. Ms. Tourangeau seconded. All were all favor. Vote: 7 – 0. The variance
39 is approved.

40
41 **Findings of Fact:**

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43 1. Variance request for Map U3, Lot 21, 8 Elmwood Road, Applicants: Elizabeth M.
44 Knauft and Marie Ahearn.

45
46 2. Elizabeth M. Knauft and Marie Ahearn are the owners of record of the subject
47 property.

1 3. 8 Elmwood Road is a non-conforming lot in the RC district. The required setbacks
2 are 20 feet from the front property line, 10 feet from the side, and 15 feet from the rear
3 property line.

4
5 4. The proposed porch is 15 feet, six inches from the front property line and the stairs
6 from the porch are 10 feet from the front property line. Side and rear setbacks are
7 compliant.

8
9 **Additional Findings of Fact:**

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11 1. The need for a variance is due to the unique circumstances of the property and not to
12 the general conditions of the neighborhood.

13
14 2. The granting of a variance will not produce an undesirable change in the character of
15 the neighborhood and will not unreasonably detrimentally affect the use or fair market
16 value of abutting properties.

17
18 3. The practical difficulty is not the result of action taken by the applicants or a prior
19 owner.

20
21 4. No other feasible alternative to a variance is available to the petitioners.

22
23 5. The granting of a variance will not unreasonably adversely affect the natural
24 environment.

25
26 6. The property is not located in whole or in part within Shoreland areas as described in
27 Title 38, Section 435.

28
29 **Conclusion:**

30
31 There is no substantial departure from the intent of the Ordinance and a literal
32 enforcement of the Ordinance would cause a practical difficulty as defined by 30-A
33 M.R.S.A. Section 4353(4-C).

34
35 All were all favor of the Findings of Fact and Conclusion. Vote: 7 – 0.

36
37 John Thibodeau recused himself from the next agenda item, as he is the President of
38 the Purpoodock Club and the applicant, Mr. Burke, is an employee there.

39
40 2. To hear the request of Philip E. Burke of 220 Fowler Road (Map U44, Lot 6) for a
41 request for a variance to add an 80 square foot shed to his property. A variance is
42 necessary to place the shed 23.5 feet from the front property line, 21 feet from the side
43 property line, and 75 feet from the wetland associated with Great Pond.

44
45 Mr. Burke came to the podium and stated that up until now he had always had a place
46 to store his landscaping equipment. However his parents have vacated the old post
47 office and will be selling the property so he needs a shed. He continued by saying he
48 has lived there since 1997. He followed Ben's recommendation and has removed one

1 impervious flagstone patio and is willing to remove another if necessary for approval.
2 The new shed would be eight by ten feet.

3
4 Mr. Burke explained where he would like to put the shed. It wouldn't be any closer to
5 the road than the house. He provided a sketch with the application.

6
7 Mr. McDougal said he had not received any correspondence pertaining to this request.
8 When contacted, the DEP (Department of Environmental Protection) had no comment
9 for the record. The CEO did visit the property with a tape measure. The wetlands are
10 across the whole back of the property and it is a small lot. Even if the shed were
11 pushed to the road, it would not meet the 100-foot wetland setback.

12
13 In response to questions, Mr. Burke said he would put whatever the professionals
14 recommended under the shed, but he does not want to put in a cement slab. The 8' by
15 10' shed would be up off the ground.

16
17 Mr. McDougal said the applicant would make a swap of impervious surface by removing
18 existing patio area. It would be an even exchange for the 80 square feet. The CEO
19 encouraged the applicant to request the smaller size shed of 80 square feet because
20 there is the exemption in the Ordinance that allows and 80 square foot shed to go from
21 a 250-foot setback to a 100-foot setback. He thought it might be more palatable for the
22 board than a larger shed.

23
24 In response to questions, Mr. Burke replied the lot to the west was the same size as his
25 and the lot to the east is actually two lots combined.

26
27 Finding no additional public comment, Chairman Carver closed the floor.

28
29 There was board discussion around undue hardship factures and Ordinance Section
30 19-5-2.B.2. Ms. Tourangeau explained to the applicant that the undue hardship
31 standard as related to the Shoreland zone is a much higher standard than practical
32 difficulty standard for other lots.

33
34 Mr. Tadema-Wielandt moved to deny the request for variance; Ms. Tourangeau
35 seconded. All were all favor. Vote: 6 – 0. (John Thibodeau recused.)

36
37 **Findings of Fact:**

- 38
39 1. Variance request for Map U44, Lot 6, 220 Fowler Road, Applicant: Philip E. Burke.
40
41 2. Philip E. Burke is the owner of record of Map U44, Lot 6, 220 Fowler Road.
42
43 3. The subject lot is a non-conforming lot in the RA District. The lot is also in Resource
44 Protection 1 – Critical Wetlands (RP-1CW) District, the Shoreland Performance Overlay
45 District and the Great Pond Watershed Overlay District.
46
47 4. The required property line setbacks in the RA Zone for an 80 square foot shed are
48 25 feet front, 10 feet side, and five feet rear.

1 5. The required setback in the Shoreland Performance Overlay District for an 80 square
2 foot shed is 100 feet from the RP-1CW wetland and 250 feet from the Normal High Line
3 of Great Pond.

4
5 6. The required setback in the Resource Protection Zone for an 80 square foot shed is
6 100 feet from the RP-1CW wetland.

7
8 7. The application is compliant with the Great Pond Watershed Overlay District
9 regulations.

10
11 8. The applicant sought a variance to the front RA Zone setback in order to place the
12 shed 23.5 feet from the front property line.

13
14 9. The applicant sought a variance to be 75 feet from the RP-1 wetland associated with
15 Great Pond, where the Zoning Ordinance requires a 100-foot setback.

16
17 All were all favor of the Findings of Fact. Vote: 6 – 0.

18
19 3. To hear the request for reconsideration of Verizon Wireless for an administrative
20 appeal that was denied by the Zoning Board on May 27, 2014. Subject property is
21 11 Avon Road (Map U12, Lot 12).

22
23 There was consensus that those board members not present at the May 27th meeting
24 would not participate in the decision as to whether to reconsider; but if the
25 reconsideration goes forward then it is de novo at that point and all could participate.

26
27 Procedural issues were discussed. Maine Statute 30-A. M.R.S.A. Section 2691(3F).
28 and Ordinance Section 19-5-3 E. Renewed Proceedings was read and discussed.

29
30 “Renewed Proceedings. After a decision has been made by the Board, a
31 new appeal or application of similar import shall not be considered by the
32 Board until one (1) year has elapsed following the date of such decision.
33 The Board may consider a new appeal or application within this one-year
34 period if it determines that owing to a mistake of law or misunderstanding
35 of fact an injustice was done, or that a change has taken place in some
36 essential aspect of the case sufficient to warrant reconsideration. Any
37 such new appeal or application shall be processed as a new request
38 subject to the procedures set out above.”

39
40 Emphasis was on words “owing to a mistake of law or misunderstanding of fact resulting
41 in an injustice.”

42
43 Attorney Scott Anderson, of Verrill Dana, Portland, representing Verizon Wireless came
44 to the podium to comment on the standard of the board decision to reconsider. He said
45 this should be governed exclusively by the state statute not local ordinance.

46
47 Board discussion continued. The statute states the board *may* reconsider; it is
48 completely discretionary. The board should look to the Ordinance for any

1 misunderstanding of fact or mistakes of law that resulted in injustice being done. The
2 submission does not reference any mistake of law or fact.
3
4 Mr. Tadema-Wielandt made a motion to allow discussion from the applicant and the
5 public. Mr. Caton questioned time limit on discussion as a point of order. Motion was
6 not seconded.
7
8 Chairman Carver said that it was his view, based on the submissions and the board
9 meeting last month that owing to a mistake of law or misunderstanding of fact by the
10 board injustice has not been done.
11
12 Ms. Tourangeau moved to deny the request for reconsideration of the May 27, 2014,
13 Zoning Board decision to uphold the CEO's denial of building permit request to add
14 wireless telecommunications antennas and associated equipment buildings on the
15 Portland Water District property at 11 Avon Road.
16
17 Mr. Anderson spoke again about the standard the board was using.
18
19 The chairman called on the attorney from Brann & Isaacson. Attorney Daniel Nuzzi was
20 not present. The board had his submission.
21
22 The motion to deny the request was seconded by Mr. Mosher. Vote 5 – 0. Mr.
23 Thibodeau and Mr. Vaillancourt abstaining.
24
25 Ms. Tourangeau emphasized and Chairman Carver stated that it was denied pursuant
26 to 30-A M.R.S.A. Section 2691(3F) and add it to the findings for denial.
27
28 The Chair proceeded with the tabled **Old Business**:
29
30 To hear the request of Mark Toothaker to re-approve the variance at 2 Wheeler Road
31 (Map U16, Lot 1). This variance was unanimously approved on December 11, 2013,
32 but it was not recorded at the Registry of Deeds within 90 days as required by the
33 Zoning Ordinance.
34
35 There was no comment from Mr. Toothaker (still not present) or the public.
36
37 Chairman Carver asked CEO McDougal if he had talked with Mr. Toothaker. Mr.
38 McDougal said he had. This was to have been heard last month but due to board
39 turnover the correct members were not present. Mr. Toothaker was told he would be
40 first on this month's agenda. Re-approval is up to the four members of the board who
41 were present December 11, 2013. They are: Josh Carver, Matthew Caton, John
42 Thibodeau, and Joanna Tourangeau.
43
44 Points of procedure were discussed. Mr. McDougal stated the abutters were sent a
45 notice.
46
47 Ms. Tourangeau moved to table Mr. Toothaker's request to the next meeting. Mr. Caton
48 seconded. Vote 7 -0.

1 CEO was asked to follow up with the town attorney for a clarifying opinion on Ordinance
2 Section 19-5-3 E as it relates to re-approval of a variance.

3

4 **E. Communications:** None.

5

6 **F. Adjournment:** Mr. Thibodeau moved to adjourn; Mr. Tadema-Wielandt seconded.

7 Vote 7 – 0. Chairman Carver adjourned the meeting 8:54 p.m.