Town of Cape Elizabeth
Minutes of the April 28, 2015
Zoning Board of Appeals Meeting

Present:

Josh Carver	Matthew Caton	Aaron Mosher
Michael Tadema-Wielandt	Joanna Tourangeau	Michael Vaillancourt
Stanley Wisniewski		

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

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

B. Approval of Minutes:

1. Approval of the minutes of December 10, 2014. Mr. Vaillancourt moved to approve minutes, seconded by Mr. Caton. The three board members present at the December meeting voted 3 – 0 to approve the minutes.

2. Approval of the minutes of February 24, 2015. Mr. Wisniewski, moved to approve minutes, seconded by Ms. Tourangeau. All members present at the February meeting were in favor. Vote: 6 – 0.

D. Old Business: None.

E. New Business:

1. To hear an administrative appeal by Stephen and Jennifer Haines of the Code Enforcement Officer's decision to require a vacant nonconforming lot on 28 Woodland Road (Tax Map U01 Lot 24C) to receive a Private Accessway approval from the Planning Board prior to the issuance of a building permit.

Chairman Carver asked the CEO for a summary. Mr. McDougal stated this is a non-conforming lot in the RC zone. It is approximately 14,370 square feet and has approximately 40 of street frontage on Woodland Road. On July 26, 2012, the former Code Officer wrote a letter in response to a property owner's request. In that letter, he stated that a Private Accessway approval would be required prior to the building permit being issued. Mr. Haines and the CEO discussed different aspects of the Zoning Ordinance and realized that the Zoning Ordinance is not crystal clear on this subject. Mr. Haines stated then that he did not think he needed a Private Accessway permit based on Section 19-4-3. That section conflicts, somewhat, with Section 19-7-9, the section on Private Accessways. Appeal rights were not stated in the letter of 2012; therefore, Mr. McDougal thinks this request is timely.

The CEO continued saying that the letter was a formal determination of the Code Officer. Additionally, there is past precedence that the Planning Board review such lots for Private Accessways. Mr. McDougal stated that he thought the lot is a buildable lot because it is a legally nonconforming lot, which are allowed to be built on. The question is whether it first needs a Private Accessway approval from the Planning Board or is the CEO authorized to issue the permit based on Section 19-4-3.

Attorney Bob Danielson, who lives in Cape Elizabeth, came to the podium. Mr. Danielson stated that he represented Stephen and Jennifer Haines. Jennifer was there, however, Stephen Haines is a Merchant Marine at sea and could not be there. They were there for an interpretation of the Zoning Ordinance as to whether a building permit for this lot could be issued without the requirement of a Private Accessway. As the CEO stated, this is a legally existing nonconforming lot. The Zoning Ordinance addresses legally existing nonconforming lots in Section 19-4, specifically vacant non-conforming lots in Section 19-4-3. If you look to the language of the Ordinance, 19-4-3 governs the use and modification of nonconforming lots in all areas of the town except for Shoreland Performance and Resource Protection districts. This is not in either of those districts. This is in an RC district solely. 19-4-3 states vacant lots maybe built upon "even though they do not meet the minimum lot area, net lot area per dwelling unit street frontage, or similar requirements as long as the requirements of the chart below are met." The chart is on page 35 of the Zoning Ordinance.

Mr. Danielson said just before the chart it says: "The Code Enforcement Officer may issue a building permit and related permits and approvals for a principal structure and related accessory buildings and structures that do not comply with the setbacks and other Space and Bulk Standards that would otherwise be required in the district in which it is located as long as the following standards are met:" Those standards are: Front setback, Side setback, Rear setback, Minimum lot area and Maximum building coverage. The applicant wants to design a building that would meet those setback requirements and has been told by the CEO that they need a Private Accessway, which does not show up anywhere in Section 19-4-3 of the Ordinance.

Mr. Danielson looked at how Section 19-4-3 interacts with Section 19-7-9.C, which is Private Accessways in the Ordinance. He quoted from 1929 case law (Peace vs. Forks) that words and phrases should be construed according to the common law meaning of the language. Statues should be read to the natural and most obvious import of the language. In 2012, when the CEO's letter said they needed a Private Accessway, the Haineses said they didn't know if they could afford that then and it didn't make sense for them. Recently they revisited the issue and would like to build their house on the lot. Mr. Danielson talked with the CEO the results are documented in their latest correspondence.

Attention was directed to Section 19-7-9 that talks about tools that the Planning Board can utilize to assist further development in the town. It is very permissive, but it says the purpose is to incorporate tools into the Ordinance that will better enable the town to implement its policies, while respecting the rights of property owners. This property owner has complied with the nonconforming section of the Ordinance, which is totally exclusive of a Private Accessway. It appears that if the minimum street frontage, on an

otherwise conforming lot, is not available, the Planning Board has the ability to grant a Private Accessway to assist them in obtaining the building permit. It says the Planning Board *may allow* this to facilitate development. It is not obligatory language.

Mr. Danielson stated nonconforming lots do not need to meet the space and bulk requirements of Article VI. Article VII says when you can't meet the space and bulk requirements of Article VI we are going to help you. These sections are not inconsistent; they are mutually exclusive. If you overlap them, you are taking them out of context and basically doubling up on requirements. If it is not prohibited in a Zoning Ordinance it is permitted.

Mr. Danielson referred to the language of the Ordinance citing a 2003 case of Prentice vs. Cape Elizabeth where an *"and"* was replaced by an *"or"* between to different sections of the Ordinance with conflicting requirements. The court said when interpreting the statute, the court examines the plain meaning of the statutory language and construes the language to avoid absurd or illogical results.

The final comment that the building inspector raised in his letter was that Section 19-4-3 and 19-7-9C were in conflict because they both require things relating to the driveway. Section 19-10-1 states where provisions are inconsistent, the more restrictive and specific shall apply. Mr. Danielson said the CEO stated that Section 19-7-9.C was the more restrictive.

Mr. Danielson respectfully disagreed for the following reasons: The two sections are mutually exclusive; they are not inconsistent. The whole purpose of Article IV is dealing with nonconforming lots. Article VII is meant to be a Planning Board tool. Article IV is much more restrictive because it states it "shall govern the use and modification of nonconforming lots." A nonconforming lot may be built upon as long as the requirements of the chart (on page 35) are met and above the chart reads the Code Enforcement Officer may issue a building permit as long as the following standards are met. It is telling you it is exclusive by twice repeating a building permit maybe issued based upon the following criteria. Section 19-7-9.C is different because it allows the Planning Board to approve the development of an individual lot lacking the required street frontage. The Planning Board may approve the creation and/or development of one lot, if it finds the lot compiles with the standards of Section 19-7-9.D.4, which is a litany of sections. So, the result of Section 19-7-9.C is more onerous than the result of Section 19-4-3. The impetus of 19-4-3 is much more significant based on Maine Statutory Law, MRSA 71-9A, *shall* and *must* are terms of equal weight in indicate mandatory duty or action. *May* indicates authorization or permission to act. The stricter sections of the Zoning Ordinance are the ones with the *shall* – not the ones with the *may* – and clearly there are a lot of *shalls* in Article IV, and very few in Section 19-7-9.

Therefore, Mr. Danielson said based upon the foregoing the applicant requests this board modify the decision of the CEO to remove any requirement that the appellant obtain a Private Accessway permit prior to qualifying for a building permit.

Ms. Tourangeau questioned Mr. Danielson's argument, stating that the provisions of Article IV provide and set forth all of the standards applicable to the construction on

nonconforming lots in that they provide space and bulk standards. And therefore those provisions in Article IV are mutually exclusive of the provisions in Article VII, which are entitled General Provisions. Which include provisions, such as the one at issue for accessways, but also for corner clearances, off street parking, creating of accessory dwelling units, and creation of temporary structures. So, if we were to agree with Mr. Danielson's argument, the construction on nonconforming lots would be subject to far fewer standards, just space and bulk standards, not even height restrictions, which all other normal construction in the Town of Cape Elizabeth is subject to.

Mr. Danielson replied that may be correct, but he was taking the Ordinance at face value. He reviewed his previous statements, saying that was all the Ordinance requires.

Mr. Wisniewski asked how Mr. Danielson would explain the reference in the 19-4 chart that refers to 19-6 standards. Mr. Danielson replied that pertains to setbacks, nothing else. Mr. Wisniewski continued stating they are therefore not mutually exclusive. Mr. Danielson's argument would lead to looser standards. Section 19-6 has a maximum building height standard - there is no standard in 19-4. So could the appellants build a 100-foot tall building under his argument? Mr. Danielson replied the Zoning Ordinance has to be read according to what the Zoning Ordinance says. The CEO can interpret that. Maybe the Zoning Ordinance needs to be changed to address it.

Ms. Tourangeau mentioned the long-standing body of case law stating that one of the primary roles of zoning is to work to eliminate nonconformity. One of the primary reasons that ordinances contain provisions regarding nonconformance is to be very specific regarding the instances in which they may be allowed. It is a general principle of ordinance construction, that provisions in the nonconformity section are supplemental to the other provisions of the Ordinance, particularly where those provisions are labeled general provisions applicable as the Planning Board may see fit and as the town may see fit.

Mr. Danielson questioned then why does Section 19-4-3.A.1 say the Code Enforcement Officer shall issue a building permit … as long as the following standards are met?

Chairman Carver asked if under this argument a 100-story building could be built on that lot. Mr. Danielson replied he had no idea what could be built on that lot. He was not interpreting the Ordinance – just reading it.

Mr. Caton questioned whether this interpretation would allow further nonconformance. Mr. Danielson replied that was correct.

Mr. Caton asked how Mr. Danielson's client has standing to bring this particular action today, as to what happened in 2012. With the lapse of time - what is new in this current process that would allow standing? Mr. Danielson said 2012 was an informal request. The CEO's letter was in response to that request; it was not a decision with 30 days to appeal. They weren't required to do anything. They are now completing the process, which is within their rights to do. When they met with Mr. McDougal, he asked them to make it formal. They are now appealing his determination within 30 days.

Mr. Tadema-Wielandt asked for an example where the Private Accessway standards would apply. Mr. Danielson replied a lot that otherwise met the zoning requirements, but had a shortage on frontage, because of other third party action.

Chairman Carver opened the floor to public comment. Six neighbors spoke; none were in favor. Each expressed difficulty of this confrontation, having to speak against a plan of a neighbor.

Brad Norris of 26 Woodland Road, directly behind the property, passed out a multi-page document of his speaking points to the board. He said he has maintained the part of the property that would be the accessway that is beside his house for several years. At the time he purchased his property, this lot was available for sale; however he did not consider it a buildable lot. At one point a group of neighbors were thinking of buying the lot to keep it wild.

Mr. Norris stated he works with fire protection codes daily and all the codes apply, you can't pick and choose which codes to follow. Article I, 19-1-2 states to prevent overcrowding of real estate, to promote a wholesome home environment and to conserve natural and cultural resources, and to enhance the value of property. The intent of Article VII, 19-7-1, which the attorney referenced often, is to preserve open space and rural character. Article IV, Nonconformance, states the intent of this Ordinance to promote land use conformities. This is not conforming; this building would be in the backyards of 11 different properties. Where else in Cape Elizabeth do you see something like that?

Mr. Norris said that leads to Article V, Zoning Board of Appeals, Powers and Duties, that reads they may grant variances from the terms of this Ordinance provided that there is no substantial departure from the intent of the Ordinance. This is not in keeping with the intent. Section 19-5-2.B.1.b. states the granting of a variance will not produce an undesirable change in the character of the neighborhood. This would totally change it. It is an absolute resource for our neighborhood, a place for children to play. It goes on to say it will not unreasonably detrimentally affect the use or market value of abutting properties. Mr. Norris said his property value would decrease substantially once there was a building in his backyard. The article further states: of eliminating the privacy of an adjoining property without an effort to mitigate the lost privacy. We will be looking out our back windows into their windows. He did not know what plan would mitigate that.

Article VII, General Standards, Section 19-7-1, Mr. Norris continued saying he disagrees with the attorney who said these tools are "to assist." Mr. Danielson said that four times. The Ordinance states: "These tools are designed to achieve these goals while respecting the rights of property owners." That is all property owners, not just the ones going for the variance. The tools are to help design them – not to assist them. Section 19-7-9.C states: "…this section allows the Planning Board to approve the development of an individual lot lacking the required street frontage if adequate access is provided to the lot, the development is carried out in a manner that minimizes the impact on adjacent properties, and is consistent with sound neighborhood

development." There is absolutely no way that this is consistent with sound neighborhood development.

Mr. Norris quoted from Code of Maine Rules 06-096 from the Department of Environmental Protection: "Any grading or other construction activity on the site will cause no unreasonable alteration of natural drainage ways." Mr. Norris handled out photographs depicting slope of the land to the board. He stated the property is much lower than all the surrounding areas. He asked where is the water drainage going to go. Mr. Norris said more questions needed to be answered: Is Highland Road a paper street? What about the ancient sewer system? Several homes have had a raw sewerage back-up. Can it handle another home? Who covers the cost if it fails?

Mr. Norris concluded by saying building on this lot would take away open spaces and destroy the rural character of the neighborhood; it would destroy the privacy of every abutting neighbor. It is not sound neighborhood development. It is doubtful that the developed property could ever achieve natural water drainage without adversely effecting neighbors. The property was purchased with these codes in place. The buyer should have done the research before purchasing the property.

Mr. Caton asked if Mr. Norris was adverse to this application. He replied yes. Mr. Caton cautioned that this was a buildable lot, as determined by both CEOs. In response to a question about when he originally looked at purchasing the property, Mr. Norris did not remember if it was listed as one or two lots.

Mark Mersereau, 17 Charles Road, came to the podium. He and the wife, Marie own the property that abuts the south boundary of the property in question. He would like the intent of the Ordinance upheld. Granting this variance would lead to building a house that would be in violation of Section 19-4, Nonconformance, in five ways: It would cause over crowding of real estate, destroy natural resources, take away the open space and rural character, reduce the market valve of abutting properties and eliminate the privacy of adjoining properties. It was his belief that the neighbors, including Jen and Steve Haines, shared a vision of using this common lot as a play area for children, a buffer for peace and quiet, and a common space for neighborhood activities. This intent was spoken about during neighborhood get togethers. It is that vision, which is reflected in the intent of the Cape Elizabeth Zoning Ordinance that he would like to preserve.

Marie Mersereau, 17 Charles Road, pointed out their property on the chart. She would like to see the property values maintained. Building a structure on this property would not enhance community. It will bring down the value of all the abutting properties. She is averse to having this built.

Derek Converse, 11 Charles Road, pointed out his property on the chart. He said most of the issues had been made by the neighbors that had spoken. The lot is the low spot for all the properties surrounding it, so drainage and grading are major concerns. There are times when minor flooding occurs in those areas. Off-site drainage issues would be big concerns. This would be built in everybody's back yard; literally everybody's back yard will be facing this property. He was opposed to this.

Dave Connor, 13 Charles Road, noted the location of his lot on the chart. His parents bought the house in 1979 when it was the last house on the road. He's seen a lot of change. It would be unfortunate to see this last bastion of woods go. Practical issues like property value, drainage, general aesthetics are concerns, but mostly this is an emotional issue. Watching the last bit of woods forever change and not knowing what that will ultimately look like. His kitchen will look directly out at whatever is built and it saddens him to think what it might be.

Peter Eastman, 24 Woodland Road, said it would be a shame to put a house in there. It is a good little open space; the kids have enjoyed playing back there. He mentioned the conservation easement on Turkey Hill Farm so it would not be built on. He hopes the lot will stay as is (poison ivy and all).

Attorney Danielson returned for rebuttal. Reference was made to Highland Road, the public way that runs across the street. The town of Cape Elizabeth never acquired any rights in that road. The lots created on Woodland Road were pursuant to a plan of 1898, which provides everyone on that road a right, as a private lot owner, to use that road as laid out on that plan. Maine law also provides that these owners can continue to use that road and that includes putting utilities down that road, so his client plans on using their portion on that road as a driveway and there will be no construction on the part that is still the private way. There are private rights and no public rights. The use by the Haineses will be consistent with those rights.

In response to questions Mr. Danielson said they were there for the very narrow issue of asking whether the driveway to this otherwise buildable lot requires a Private Accessway. Lot owners have the right to continue to cross the paper street and we can't impede that right. There is statutory reference that states they wouldn't need to even own it to improve it; however, they have the title to that 40 feet of frontage on Woodland Road. But if they choose to improve it, they pay the cost to bring the utilities and the driveway down to their house. The same applies to all the other easement holders.

Finding no additional public comment, the floor was closed.

Board discussion began with the finding of standing. All agreed there was standing.

This has the potential to create more nonconformity. The language in the Ordinance is not consistent. To interpret one way could lead to peculiar results. It is totally inconsistent with the Ordinance to interpret the Ordinance to state that all that new construction on a nonconforming lot has to comply with is the space and bulk requirements for nonconforming structures. No height restrictions, as many principal or accessary buildings as you want, would not make sense. The title of Article VII is General Standards, which means it should apply to nonconforming structures, which are, be their very definition supposed to be held to the highest standards.

There was discussion on the wording and application of Ordinance Sections 19-4-3, 19-10-1, 19-7-9 and19-7-9.C. and what would trigger Planning Board review?

Mr. Tadema-Wielandt addressed the public. Public comment referenced "a variance." This application is not for a variance but for a determination as to what standards may apply. Whether this lot should be built on is not what this board is looking at tonight.

Ms. Tourangeau moved to uphold the April 1, 2015, Code Enforcement Officer's decision to require a Private Accessway permit prior to issuance of a building permit. Mr. Wisniewski seconded. After discussion, all were in favor. Vote: 7 – 0.

Findings of Fact:

1. This is an Administrative Appeal of the Code Enforcement Officer's decision letter dated April 1, 2015 regarding a non-conforming lot at 28 Woodland Road (Map U01 Lot 24C).

2. The applicants are Stephen and Jennifer Haines of 31 Warren Avenue.

3. Stephen and Jennifer Haines agreed in 2013 to combine lots 24C and 24D into one non-conforming lot (Map U01 Lot 24C).

4. The subject lot is in the RC zone. It is approximately 14,370 square feet and it has approximately 40 feet of street frontage.

5. On July 26, 2012, Bruce Smith, while acting as the Code Enforcement Officer, wrote a letter in response to a request from Stephen and Jennifer Haines' attorney, stating that a Private Accessway permit is needed from the Planning Board prior to a building permit being issued because the lot does not meet the minimum street frontage requirement in the Zoning Ordinance.

6. On April 1, 2015, the present Code Enforcement Officer decided to require a Private Accessway permit prior to the issuance of a building permit.

Conclusion:

Based on §19-7-9.C, the applicant is required to obtain a Private Accessway permit from the Planning Board prior to the issuance of a building permit.

Decision:

Uphold the Code Enforcement Officer's decision dated April 1, 2015.

All were in favor of the Findings of Fact. Vote: 7 – 0.

Chairman Carver thanked the public for their time.

F. Communications: None.

G. Adjournment: Ms. Tourangeau moved to adjourn. All were in favor. Vote: 7 – 0. Chairman Carver adjourned the meeting 8:09 p.m.