

**Town of Cape Elizabeth
Minutes of the May 26, 2015
Zoning Board of Appeals Meeting**

Present:

Josh Carver
Michael Tadema-Wielandt

Matthew Caton
Joanna Tourangeau

Aaron Mosher
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 April 28, 2015. Mr. Tadema-Wielandt moved to approve minutes, seconded by Mr. Wisniewski. All were in favor. Vote: 6 – 0.

D. Old Business: None.

E. New Business:

1. To hear the request of Andrew and Danielle Currier, who reside at 17 Ocean View Road (Map U3, Lot 77), to add a second story to their house based on Section 19-4-3.B.3 of the Zoning Ordinance.

Andrew and Danielle Currier came to the podium. Mr. Currier stated they wanted to build an addition to their home. All but two homes on the 13 lots in the immediate vicinity of their home are over 2,000 square feet. Their home is one of the smaller homes at 1,100 square feet. They would build a modest addition to add 650 square feet to that. They have two young children and need more space. They love where they live and would like to build up adding a total of 5 feet 7 inches in height. It would be one-half story - just enough vertical height to make the existing attic area livable. The addition would only add height; it would not increase the footprint of the house in any way.

Mr. Currier described how close their home was to the nearest house. The distance between foundations is just 7 feet, 6 inches. He stated the closeness was one of the things they loved about the neighborhood. The kids play outside.

Mrs. Currier said the addition would bring the total square feet to 1,750.

When asked about how they ended up applying for this permit under Section 19-4-3.B.3, for reconstruction and relocation, Mrs. Currier replied that the CEO had explained the process. Mr. McDougal emailed information on the section of the Ordinance to pursue when they arrived at that step in the application and asked for guidance.

In response to a question, Mr. Currier replied the row of trees (hemlocks) on the neighboring property is 3 feet 6 inches from the property line and the adjacent structure is about 34 feet.

Mary Costigan, an attorney with Bernstein Shur, Portland, came to the podium. She stated she was there on behalf of two neighbors, Mark Abbott and Rebecca Bloch, who reside at 19 Ocean View Road, which directly abuts 17 Ocean View Road. Ms. Costigan submitted a letter dated May 22 that addresses their concerns. They believe this application is being reviewed using the wrong section of the Zoning Ordinance. This is an undersized lot with an existing principal structure and when you have that a specific provision applies. It is Section 19-4-3-A.2.a. It gives some relief for buildings that are located on undersized lots. It allows them to enlarge and gives them some relief from the setbacks of their zone. But even with that relief, the Curriers cannot meet the setbacks of 15 feet to rear and 10 feet to side. Because they can't meet these dimensional standards, they should be applying for a variance.

Mark Abbott, 19 Ocean View Road, came to the podium and handed out notebooks of visual aids to board members. Chairman Carver told Mr. Abbott the documents would not become part of the record.

Mr. Abbott said they strongly object to the project at 17 Ocean View Road. 17 Ocean View is a great house, perfectly designed for its site; it's a shame to make such a drastic change to it. They object because of the negative effects that the project would have on their life and home. Number 17 was built just a few feet away from Number 19, because it was initially a quest house. Both houses were on a single property. The proposed expansion would drastically limit the sunlight their backyard receives. Their views are also at risk; the proposed expansion would take them away. Mr. Abbott said they are concerned about their privacy. Windows on the first floor overlook the "public" areas; however, the proposed expansion would add windows that would not only tower over their yard, but would provide close, direct and unobstructed views into bedrooms and bathrooms. They love their house and neighborhood. They would not have purchased Number 19 had it had a two-story house so close. He requested the board not to force this unneeded and disruptive change on their neighborhood and home.

Rebecca Bloch, 19 Ocean View Road, explained the photos in the notebooks Mr. Abbott handed out. She said she was a conflict adverse person and had never opposed a project proposed by a neighbor. The houses were built by a single owner on one property. Many years ago the property was divided with a zigzag property line between the two houses. Although the distance between the two houses in the permit proposal is listed as eight feet, the actual distance to the setback is 36 inches, less if you take into account the roof overhang. The rooflines of the properties align. An increase in height would lose that symmetry and aesthetic effect. The increase in height would reduce the sunlight in their backyard and compromise their landscaping.

Ms. Bloch stated another significant impact of the proposed renovation would be a loss of personal privacy. Currently, the two houses share views of each other's common living spaces (kitchens, living rooms, dining areas). If someone is in one of these areas, there is little privacy; this has not been an issue. However, a second floor and the

proposed dormer windows would have views that are quite close and include their master bedroom, their son's bedroom and both bathrooms on their second floor. They believe with the loss of aesthetic appeal, effects on sunlight in the back yard and loss of privacy the value of their home will significantly decrease. They would not have purchased this property had the enlargement been there. They can sympathize with the needs of a growing family, but they do not believe it should cost their views, property value and privacy. She would like the board to deny this permit.

David Cimino, 12 Island View Road, the home directly behind 17 Ocean View Road, stated the trees were on his property. The distance between their home and his garage is about 20 to 24 inches with the roof overhang; therefore the distance from their house to the property line is a matter of inches not three feet, six inches. He expressed concern about tree damage during construction. He said they were 20-foot tall trees that most likely could not be replaced if one was to die. As a general contractor, Mr. Cimino felt this construction would not be possible to do without harming the trees. For that reason he hoped the board would consider not approving the application.

Tim Soley, of 644 Shore Road, commented on the character of the nearly century old neighborhood of Mountain View Park where he has lived for 22 years. This is a small house for a reason – so that it would be harmonious on that lot. He thought that dividing the properties would not be allowed today. He opposed the expansion.

Danielle Currier said the properties are two lots and had been for a while. In the past it had been a rental and at times a summer home. This addition would add to the stability of the neighborhood by being able to house a family with two kids. It would be modest at 1,750 square feet and still much smaller than homes in the neighborhood. They are staying within the existing footprint. The vertical modification would be to about 30 feet, within the 35-foot rule. The nonconformity would not increase.

Mrs. Currier mentioned that in 2008, 15 Ocean View Road obtained two building permits (one for dormers and to finish attic space and one for a 6' X 22' story addition) without ZBA approval or variances.

Andrew Currier returned to the podium and said they have had a cordial relationship with Mark and Becca the six years that they have been neighbors and he hopes that continues. Mr. Currier then went on to discuss the light in the backyard. He stated that he used to be an architectural designer, so he did a full CAD model of the houses to show the shadows on the lot. It collaborated with the photos he took on April 22. At 8:18 A.M. it is half in shadow. By 10:45 A.M. there is no shadow for the rest of the day from their home. The house sits to the Northeast of their yard, which would minimize the effect. Any shadows later in the day are from the Abbott/Bloch home. As far as views, they are about 1,000 feet from the ocean. There are many trees and houses between the house and the ocean that obstruct actually seeing the ocean.

Mr. Currier feels their plans honor the original architect's plans. He showed the board a 5 foot 7 inch dowel to visualize the height of the addition.

In response to questions, the Curriers did not know when the house lot was divided. Their contractor said no vegetation or trees would have to be removed.

Mr. Abbott said he was not concerned about the character of the neighborhood in regard to this house being occupied by transients and renters. Typically a young family will occupy the home until they outgrow it. The people at 15 Ocean View Road bought property from their neighbor to be able to make that change to their home. He stated that sunlight changes throughout the year. He showed the shadows on Family Fun Day, which would significantly effect their outside activities. Views are subjective, there are photos in their package; he stated they can currently see the ocean from their house.

In response to questions from board members, Ms. Bloch thought that the property had been divided prior to 1986. Mr. Abbott said there were no deed restrictions on either home. They have lived there for 10 years. In that time they remodeled the kitchen and enclosed the back porch to make it a mudroom.

Finding no additional public comment, the floor was closed.

Board discussion began with which section of the Ordinance applies. Chairman Carver recalled applying Section 19-4-3.B.3 in similar circumstances. If this section applies, you don't get to the surrounding houses. Previous cases and setbacks were discussed.

Code Enforcement Officer McDougal believes using Section 19-4-3.B.3 is the proper interpretation of the Ordinance and the board has heard five or six of these in his brief tenure. The nonconforming structure section is more specific. The section on nonconforming lots is more broad-based concerning the lots.

The board discussed light, shade and privacy. If something were to happen to the home, the homeowner could rebuild up to 35 feet. Language of the Ordinance was discussed in relation to this addition. B.2 mentions impact on views. Setbacks were not going to change. There was discussion on why a variance request was not the correct avenue.

Ms. Tourangeau moved to approve the request of Andrew and Danielle Currier, of 17 Ocean View Road, Map U3, Lot 77, to reconstruct a nonconforming structure based on Section 19-4-3.B.3 of the Zoning Ordinance. Mr. Mosher seconded. All were in favor. Vote: 6 – 0.

Findings of Fact:

1. This is a request of Andrew and Danielle Currier, of 17 Ocean View Road, Map U3, Lot 77, to reconstruct a nonconforming structure based on Section 19-4-3.B.3 of the Zoning Ordinance.
2. Andrew and Danielle Currier are the owners of record of the subject lot.
3. The subject lot is a nonconforming lot in the RC zone.

4. The nonconforming structure is a single-family dwelling connected to public sewer.

Additional Findings of Fact:

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

2. The proposed structure will not increase the nonconformity of the existing structure.

3. The proposed structure is in compliance with the setback requirement to the greatest practical extent.

All were in favor of the Findings of Fact. Vote: 6 – 0.

Chairman Carver announced it was approved.

2. To hear the Superior Court remand of the administrative appeal by Maynard and Deborah Murphy of the Code Enforcement Officer's issuance of Building Permit #130056 for an additional accessory structure at 27 Pilot Point Road, Tax Map U12, Lot 70, as this structure will add over 250 square feet of impervious surface to this lot within the 250-foot Shoreland Zone. Additionally, the Murphy's are appealing the Code Enforcement Officer's determination of the location of the Shoreland Performance Overlay District.

Attorney Richard Bryant, of Van Meer & Belanger, PA, Portland, representing the Murphys came to the podium. He passed out material and photographs to board members. Chairman Carver told Mr. Bryant the documents and photos that were not already part of the record would not be included because of the late submission. Mr. Bryant said the photographs were not already part of the record; they would be merely illustrative. The appellants presented the other documents to the Superior Court from the three previous hearings before the Zoning Board of Appeals (ZBA) going back to 2012. Mr. Bryant provided one copy of Cumberland County Superior Court documents for docket AP 12-260 and docket AP 13-67.

Mr. Bryant provided a procedural background of the matters before the board, which began with the CEO's Building Permit #130056, on August 17, 2012, for construction of a new accessory structure at 27 Pilot Point Road, Tax Map U12, Lot 70. The following June the new CEO issued a determination of a slightly different Normal High Water Mark setback, which affected the 75-foot setback and the 20% impervious surface limitation on the Goldman lot. This hearing was required by the most recent Superior Court order, last year, which remands for a de novo hearing. The Superior Court has said the Murphys have standing and the board should hear the merits of their case concerning the Goldmans' stairs building permit.

On the Murphy original appeal on October 23, 2012, Mr. Bryant said, the board unanimously found Findings of Fact that the Murphys and Goldmans ownership of their lots and that the Goldmans' lot is entirely within the Shoreland Zone and that more than 20% is covered with impervious surface and that the stairs, that were greater than four feet in width, would increase the impervious surface.

Mr. Bryant referred to the Zoning Map at the time (2012) and said it was the same as the current Zoning Map on the wall. The Goldmans, at that time, had submitted a calculation by John Mitchell of impervious surface, which depended upon a shoreward shift of the Shoreland Zone of approximately 60 feet. The Top of the Bank definition was not followed by Mr. Mitchell or the previous CEO. In 2005, for the construction of the Goldman residence, John Titcomb did a survey that showed the Top of the Bank to be the start of the Shoreland Zone.

For the issuance of the Building Permit the CEO determined that the Normal High Water Mark was some 60 feet down the rocky slope. He also determined that the Shoreland Zone would be shifted a similar 62 feet toward the ocean. In effect causing a change to the Zoning Map without authority. The Murphys argue that only the Town Council has the authority to change the Zoning Map and the CEO was wrong in his determination of the Normal High Water Mark and wrong that it had the consequence of moving the inland area of Shoreland Zone. Because the previous board in, October 2012, had unanimous finding on those critical facts concerning the Shoreland Zone and the impervious surface this board should reach the same findings.

That board of October 23, 2012, also found, by a less than unanimous vote, that the Murphys had standing to appeal and that the issuance of the permit was clearly contrary to the Ordinance. That board went on to deny the Murphys' appeal anyway. After conferring with counsel, that board discussed reconsidering the decision and voted again that the permit was clearly contrary to the Ordinance by a 3 to 4 vote. Which provided consistency to the findings of the board. The Superior Court overturned that decision as illogical for the board to have the findings they did and deny the permit.

When the Murphys came back to hear that appeal on remand, they also filed a separate administrative appeal of the determination of the new Code Enforcement Officer that set a different standard for the location of the Normal High Water Line. This time 67 feet toward the ocean. The board never heard the merits, because they determined that on both of the appeals the Murphys had no standing, despite being an abutter. Once again, Mr. Bryant said, the Murphys went to Superior Court and now we are here to hear the merits of this appeal.

The Murphys say that the CEO issued the building permit in violation of Section 19-3-1. "The Code Enforcement Officer of the Town shall interpret and enforce the provisions of this Ordinance and shall require compliance with its requirements and restrictions." It is also a violation of Section 19-3-3.B. which says "No Building Permit shall be issued until the proposed construction or alteration complies with the provisions of this Ordinance or with a decision rendered by the Zoning Board of Appeals and with any approvals of the Planning Board."

The Murphys can demonstrate that just like the CEO's original determination that the Normal High Water Line, reflected on the Mitchel impervious surface plan, was improperly decided based on the language of the Normal High Water Line under the Ordinance at the time. A similar determination can be made about the current CEO's subsequent determination finding the Normal High Water Line somewhere at the base of a cliff vice the Top of the Bank. Mr. Bryant said the Goldmans want the line shifted so that the stairs are no longer in the 75-foot Shoreland Zone setback and so that only a portion of the lot is subject to the 20% impervious surface requirement. The Murphys contend that the CEO misread the Ordinance and has a fundamental misconception as to how the Shoreland Zone boundary is determined.

Mr. Bryant described the nonconformities on the Goldmans' lot, giving street frontage, setbacks, lot coverage, etc. The structures on the Goldman's lot are nonconforming structures by the definition in 19-1-3. Per the 2005 Site Plan, the allowable 20% impervious surface was 3,506 square feet. The structures add up to 3,504 square feet. The stairs increase that by 292 square feet. These figures depend on whether the entire lot is in the Shoreland Zone or not.

Mr. Bryant said the measurement used in the site plan were foundation measurements that did not take into consideration the substantial eaves of the structures. There were also two sets of granite and stone steps that already existed on the property that were not shown on the site plan. Mr. Bryant explained the photographs. He stated the photos show that the house is stepped out from the foundation, obviously exceeding impervious surface by at least 250 feet. Even if you shifted the zone, by Mr. Bryant's calculations there is an additional 286 square feet of impervious surface beyond what Mr. Mitchel calculated as meeting the 20% requirement.

Section 19-2-2 states, "The zoning districts are defined as shown on the official copy of the "Zoning Map of Cape Elizabeth, Maine" and "The Zoning Map is hereby made a part of this Ordinance." The Ordinance in effect at the time with respect to the textual description of the Shoreland Zoning Ordinance that is all land within 250 feet of the horizontal distance of the upland edge of a coastal wetland, including all areas effected by tidal actions such as rocky ledges. At the time Section 19-3-1 read the Normal High Water Line was the apparent extreme limit of the effect of the tide. i.e. the top of the bank, cliff or beach above high tide.

Mr. Bryant spoke of the CEOs using the stain line to determine the Normal High Water Line. He said the stain line was not the extreme limit.

Mr. Bryant mentioned the case of Mack vs. Town of Cape Elizabeth in 1983, which noted that the Ordinance in Cape Elizabeth presumes that the Normal High Water Line is located well above the tide line.

Section 19-10-1, for conflicts, states that the most restrictive ruling should prevail. The CEO should use the Top of the Bank. Section 19-10-3 states any changes to the Zoning Map should be passed by the Town Council after a specific process and be reviewed by the Department of Environmental Protection (DEP) if it affects the Shoreland Zone.

Mr. Bryant said there was considerable case law on how the zoning map controls over the zoning ordinance language. He discussed Summerland's Cottage vs. Town of Scarborough, Nardi vs. Kennebunk, and Veerman vs. Town of China to stress this point.

Mr. Bryant read part of Ordinance Section 19-2-4 which states "...Where district boundary lines are shown approximately on the location of existing property or lot lines and the exact location of the boundaries of the district is not indicated by means of figures, distances or otherwise described, the property or lot lines shall be the district boundary lines." Ms. Tourangeau asked Mr. Bryant to continue reading. "In cases in which the location of boundaries is not defined by detailed description at the time of enactment, such locations shall be determined by the distances in feet, when given upon the map, or when distances are not given, by the scale of the map." Mr. Bryant said Cape Elizabeth's was a scalable map so the Shoreland Zone would stay in the same place relative to the property line.

Ms. Tourangeau asked Mr. Bryant to talk about the uncertainty clause "Where uncertainty exists as to the location of any zoning district boundary, the property owner so affected may request, in writing, that the Code Enforcement Officer make a formal, written determination." Mr. Bryant said the CEO could decide where the Normal High Water Line is to determine the 75-foot setback. Zoning Districts are determined by where they are on the map until the Town Council decides otherwise.

The Town Council amended the definition of Normal High Water Line; they did not change the Zoning Map. The Shoreland Zone cannot be shifted. Adjusting the 75-foot setback allowed for the steps to be installed. If the Normal High Water Line had remained where it was originally the steps would not have been permitted. That is a separate issue from the 20% impervious surface.

Mr. Bryant read the impervious surface definition from the Ordinance. He feels the existing stone walkways on the sides of the house need to be included as impervious surface. The eaves on the house are impervious surface, so you have to add at least a couple of feet to the foundation of the house. The grass landings for the stairs are not counted – just the stone itself. Under Section 19-6-11.E.2.f there is a provision for stairs. "Notwithstanding the requirements stated above, stairways or similar structures may be allowed to provide shoreline access in areas of steep slopes or unstable soils, with a permit from the Code Enforcement Officer provided that the structure is limited to a maximum of four (4) feet in width; that the structure does not extend below or over the normal high-water line of a water body or wetland upland edge (unless permitted by the Maine Department of Environmental Protection pursuant to the Natural Resources Protection Act, 38 M.R.S.A. §480-C); and that the applicant demonstrates that no reasonable alternative exists on the property." Two alternatives already exist – the stone granite strips on the right side and the stones on the left. The plans do not comply with this section of the Ordinance because they are more than four (4) feet wide.

Mr. Bryant concluded by saying the board should void the building permit that was improperly granted by the CEO and they should order the removal of those steps. The board should void the CEO's determination of the location of the Normal High Water

Line. The board should confirm that the proper interpretation and application of the Ordinance dictates that the Goldman lot lays entirely within the Shoreland Zone as reflected on the Shoreland Map until such time as the Zoning Map is amended by the Town Council and is therefore subject to the 20% impervious surface standard.

Mr. Tadema-Wielandt commented that the Northeast Civil Solutions survey based the 250-foot mark from the Normal High Water Line. Mr. Bryant said that the 250-foot mark could only be determined by the Zoning Map and Section 19-2-4 states to use the property line when district boundary lines are uncertain.

Board members asked questions of Mr. Bryant for clarification of setbacks and calculations of impervious surface using whole and partial lot in the Shoreland Zone. Mr. Bryant had one copy of the Summerland and Nardi opinions for the board.

Deborah Murphy, 24 Pilot Point Road, came to the podium and thanked the board for their efforts. Mrs. Murphy discussed the wording of Section 19-2-4 concerning the uncertainly clause. She said the zone could not be moved. The map has been ignored by the CEOs and Northeast Civil, but it wasn't ignored by Titcomb. Mrs. Murphy insists that the scale of the map must be used. Start at the road property line and measure 250 feet toward the ocean and you arrive at the top of the bank.

Mrs. Murphy stated that she did not miss one workshop or meeting that lead to the new definition of September 11, 2014. The Planning Board did not want the map to change and it did not change. Mrs. Murphy referred to the Goggle Earth photo based on data from Judy Colby-George (the yellow section) that established our Shoreland Zone. It was based on a hand drawn Shoreland Zone and it is accurate. The Town Council never meant to make our Shoreland Zone less restrictive with the new definition. To shift the zone seaward makes it less restrictive and they did not update the map.

Mrs. Murphy explained where properties were on a map. Mrs. Murphy mentioned pipes for storm water runoff.

Maynard Murphy came to the podium and stated most of what he had to say had already been said. Chairman Carver asked Mr. Murphy to be brief covering material the board had already heard. Mr. Murphy said the building permit was for a set of exterior stairs located on a steep slope on the southerly side on the residence. New stairs, 12 by 19 feet, exceed the maximum width of four feet per Section 19-6-11.E.2.f. There are stairs on the easterly side of the lot providing access to the same area therefore satisfying the reasonable alternative requirement.

The lot did not have any lot coverage value to use and the Ordinance does not support a permit that would increase lot coverage on a nonconforming lot, which this is. Mr. Murphy continued to quote sections and definitions from the Ordinance to restate their case. Specifically Sections 19-4-1, 19-4-4.B.5, 19-1-3, 19-6-11.E.2 and charts, 19-2-2, 19-2-4, and 19-2-6.

Mary Costigan, an attorney with Bernstein Shur, Portland, came to the podium on behalf of Cathy and Marshall Goldman, the owners of 27 Pilot Point Road. Ms. Costigan

addressed the following questions in order. First: Where is the Normal High Water Line? Second: Are the steps located within 75-feet of that Normal High Water Line? Third: Where is the boundary of the Shoreland District as it relates to 27 Pilot Point Road? And fourth: Does the impervious coverage on that portion of the lot within the Shoreland District exceed 20%?

Ms. Costigan said it comes down to those four basic questions. There is a lot of information and three years have gone by. Her letter dated September 17, 2014, contains a timeline. There is also a letter dated September 17, 2013. Where is the Normal High Water Line? Mr. Bryant left out one very important finding of the board of October 23, they agreed with the Code Enforcement Officer's finding that the Normal High Water Line was as depicted on the map. Bruce Smith, the CEO, made a visual determination of where the Normal High Water Line was at the time.

At that same meeting there was an application for a neighboring property, so there was a long discussion of the Mean High Water Line. Mr. Smith had made the same determination for the two neighboring properties. The board agreed then that the Top of the Bank was not a default and that the CEO has the discretion under the Ordinance to make a determination as to what the furthest effect of the tide was. Ms. Costigan referred to two posted plans. One from the original plan submitted with the application of 2012 where the Bruce Smith found the Normal High Water Mark. Ms. Costigan said they were not bound by the 2005 survey. This was a different application and a different survey. There was a lot of uncertainty in that definition, because of that the town made a decision to change that definition and make it more certain.

Ms. Costigan said Mr. Bryant referred to the law case of Mack vs. Cape Elizabeth. She noted the court specially found in that case there was a typographical error in the definition where "i.e." should have been "e.g." and that Top of the Bank was only an example and the Normal High Water Line could have been lower than the Top of the Bank. In this case Mr. Smith found so.

The October 2012 board discussion was when someone found that the 250 feet as measured from the Normal High Water Line does not match up to the Zoning Map, you have to go to the CEO and request an opinion as to what the actual boundary was. So following the October 2012 decision, they sent a letter to Ben McDougal after Jim Fischer of Northeast Civil Solutions, did a determination of the Normal High Water Mark. Jim measured 250 feet from that mark. Mr. Fischer is well aware of the rules. You measure 250 feet from the Normal High Water Mark and that is how you get the Shoreland Zone.

The town, last year, not only amended the definition, it added a provision in Section 19-6-11.A that states "The Town has prepared a zoning map showing the Shoreland Performance Overlay District based on the best available information at a town wide scale. The actual boundaries of this district, however, shall be determined by the physical features present on the site that are included in the Shoreland Performance Overlay District as defined above." So you have to go out into the field and determine where the starting and end points are. That is how it works everywhere in the state.

Ms. Costigan referred to the posted plans and discussed the differences in the CEOs determinations. Mr. McDougal's line was more angular, went landward and added more of the garage into the 250-foot zone.

The interim CEO, Mike McGovern, wrote an email in November 2012, which also confirmed the location of the Normal High Water Line and the Shoreland District is measured 250-feet from that line. So there are three Code Enforcement Officers telling us Normal High Water Line is a visual interpretation and the line of the Shoreland Zone is measured 250 feet from there.

Ms. Costigan said as the definition stands today, the stairs are not within 75 feet of the Normal High Water Line. Ms. Costigan said the Normal High Water Line, as determined by the CEO, was on both submissions in September 2013 and September 2014.

Question 2: Where is the boundary of Shoreland District as it relates to 27 Pilot Point Road? The definition was "All land within 250 feet horizontal distance of the upland edge of a coastal wetlands including all areas effected by tidal actions such as cobble and sand beaches, mudflats and rocky ledges." It does not say as depicted on the map.

Cape Elizabeth does not have a separate Shoreland Zoning Ordinance it has a Zoning Ordinance. When it mentions districts, it is about all the districts; the residential, commercial districts are measured from road to road and property boundaries. The boundaries make sense with those districts. The Shoreland District is different. 250 feet is a precise measurement and should be treated as such.

Actual measurements were taken (with John Mitchell, Ms. Costigan, Mr. Goldman and Mr. McDougal on site) after Mr. Bryant submitted his measurement chart the day of the hearing in September 2013. The result of those measurements was presented in a box on the plan submitted last year. 19.6 % was impervious surface. There were areas of disagreement from the chart; the garage measured 332 square feet (Mr. Bryant's chart 374.6), the actual roof eaves measured 194 square feet as apposed to measuring the gravel strips, which are wider and pervious, and the stairs, having grass landings, measured 181 square feet (chart 295). Taking all numbers into account they have 58.2 feet before the 20% impervious surface is met.

John Mitchell of Mitchell Associates came to the podium to respond to questions. The stone ledge stairs on the left and granite stairs on the right were included in the measurements for impervious surface coverage. Mr. Mitchell described the sources (the as built site plan, the architectural plans for the home, the construction documents for the set of stairs and field measurements) used to calculate the impervious surface on the property. Mr. Mitchell described how it was misleading to use the plan Mr. Bryant presented.

Mr. Mitchell said he had not done the calculation for the lot being entirely within the Shoreland Zone; however, he thought it would be over the 20% because the entire driveway would be included.

In response to questions as to how the law cases mentioned by Mr. Bryant would apply in locating Shoreland zones, Ms. Costigan said she had not read the Summerland case recently but did not recall it being directly on point. The other case dealt with Resource Protection Zones, which are not the same; they are more about defining habitats. Ms. Costigan went on to say under the law the Shoreland Zone is an exception because the definition is very clear in the Cape Elizabeth Ordinance and has a metes and bounds, which is 250 feet from the Normal High Water Mark. The CEO can make an interpretation as to where the lines are. Other zones such as a commercial zone use streets for boundaries.

When asked about the CEO being provided that discretion only when it's unclear, Ms. Costigan replied when it is inconsistent with what is shown on the map and the definition. The exact Ordinance language is "when uncertainly exists as to the location of any zoning district boundaries." The map does not change. The Ordinance changes and then the map is amended to follow that. In this case we could ask the town to do that but it doesn't say we need to do that. When they don't go hand-in-hand you go to the CEO to make a determination as to what the boundary is.

In response to questions Ms. Costigan said that Mr. McGovern's email was part of the package in 2012. Remedy in this case is interesting because it has been three years, the stairs are in place, and the Zoning Ordinance has changed. There are a lot of pieces to the puzzle, but none of them add up to the stairs being removed. We believe we are within the 20% rule, but you could put pervious pavers in the driveway. So from a remedy perspective it is not about removing the stairs it is about impervious coverage. Voiding the building permit goes to the passage of time and what that actually means and we really don't have to take out the stairs to meet the 20%. There are new standards in place. There is clear guidance in the new Ordinance that the 250-foot measurement is measured in the field and we don't go by the Zoning Map. There is plenty of impervious coverage to play with.

Marshall Goldman came to the podium and said he'd be happy to answer any questions. He stated they have lived here for 15 years. His wife is from the area that's why they are here. He is in the construction business and he is familiar with dealing with cities. He's also been on a city council so he appreciated what the board was dealing with.

Mr. Goldman said at the first hearing, the Livingstons were heard first. It was made clear where the line of the ocean was. The attorney for the Murphys said it was a moot point now with respect to how close the steps were to the ocean. The impervious surface issue came after that for reasons Mr. Goldman did not know. Mr. Goldman said he has always been willing to work to make this right. He waited until after this board upheld the permit and contacted the city manager about 15 days later as to whether construction could start. Each time an appeal was issued it was the day before the deadline. He said there were four stones in a path that they placed when they bought the property. They would be happy to take them out if it would make somebody happy. This is a puzzlement to them. They would just like to move forward.

Mr. Bryant returned to the podium. There was a discussion about how many times the Murphys had appealed decisions of the board, delays and Superior Court remands. Mr. Bryant said the Murphys were just trying to enforce compliance of the Ordinance. Mr. Bryant said the map defines the Shoreland Zone.

Chairman Carver closed the floor for public comment and opened board discussion.

CEO McDougal stated he had a memo that is contrary to a statement made by Mrs. Murphy that Judy Colby-George created the Shoreland Zone Line and it is accurate. The memo is "To Maureen O'Meara, Town Of Cape Elizabeth, From Judy Colby-George dated January 16, 2014. Re: Origin and Accuracy of Shoreland Zoning GIS Data." It reads:

"I am writing this memo in response to your questions about the origins and accuracy of the Town of Cape Elizabeth's shoreland zoning GIS data layer. First, I should state that I did not create this data layer, it was created by Kris Sommers at GPCOG" (Greater Portland Council of Governments) "sometime around 1994. All I can speak to is what I know in general about how GPCOG (and most everyone else) created data at that time period. The base layer upon which the shoreland zoning was developed was the parcel data created from the town's tax maps and fit to the USGS 7½" (minutes) "Quad Sheets for road centerlines and water bodies. These parcels were created on uncontrolled aerial photography meaning that the scale and accuracy of the data changed across the photo depending on elevation shifts and tilts of the plane when the photography was taken. Each individual tax sheet was then updated for any number of years without any control. These individual tax sheets were fit together into a single composite to the best of the cartographer's ability. But, overall, the accuracy of the parcel data was unknown and unknowable; it varies across the town depending on many factors. Once the parcel basemap was created, the shoreland zoning was created using a series of data sets, including Cumberland County Soils, FEMA Flood Zones, and buffers from the parcel edges. It is my belief that at the time of the creation of the Cape Elizabeth shoreland zoning map, all of these data layers were created from existing paper maps and also fit to the basemap."

"Understanding the limitations of the data is very important to using it appropriately. Some data layers have specific accuracy. For instance the USGS 7½" Quad sheets adhere to National Map Accuracy Standards, which state that 90% of the features must be within 40 ft. of their location on the earth and 90% of vertical features, must be within ½ contour interval of their actual elevation. Data layers compiled from multiple and unknown sources it is impossible to list a specific accuracy standard. Taking paper maps and making them digital does not increase their inherent accuracy. It does create the ability to print the data at a variety of scales, which often provides a false sense of accuracy. Any map which shows a variety of layers cannot really be considered more accurate than its least accurate

data layer. I cannot provide a specific accuracy representation of the data because I believe it is of variable accuracy.”

“Accuracy also impacts on the costs of data preparation and maintenance. Sometimes accuracy can’t be improved on a particular data layer because of technological restrictions. More often, the accuracy is determined through balancing the needs of the end user and the cost to product the data. Most communities develop data to an acceptable level of accuracy to accomplish the majority of tasks assuming that there may be site specific needs for more accurate data. In the case of shoreland zoning, especially the RP zone, most of the data needs to be field verified in order to determine the actual distribution of natural resources which the community has agreed to protect. The value of this type of data is for providing planning level information which can be used to provide general guidance to the town and landowners that they should be aware of a specific regulation and engage the proper specialists to map their specific property. This type of data must be used in conjunction with the ordinance in order to determine the site specific boundaries of the regulation.”

On determining the Normal High Water Line, a board member had asked the Murphy’s attorney if the CEO had the authority to set that and he said yes.

The board continued discussion and drafted the Findings of Fact as the discussion progressed.

Mr. Tadema-Wielandt moved to uphold the Code Enforcement Officer’s letter dated June 3, 2013. Ms. Tourangeau seconded. All were in favor. Vote: 6 – 0.

After discussion, Mr. Tadema-Wielandt moved to retract his previous motion that was approved. Mr. Caton seconded. All were in favor. Vote: 6 – 0.

Ms. Tourangeau moved to uphold the Code Enforcement Officer’s written determination regarding the location of the Shoreland Performance Overlay District and the Normal High Water Line of Coast Waters as set forth in his letter dated June 3, 2013. Mr. Caton seconded. All were in favor. Vote: 6 – 0.

Ms. Tourangeau moved to deny the Murphys’ appeal. Mr. Wisniewski seconded. All were in favor. Vote: 6 – 0.

Findings of Fact:

1. Maynard and Deborah Murphy own the property at 24 Pilot Point Road and they reside there. The Murphys’ property is almost directly across the street from the subject property.
2. On August 17, 2012, Pilot Point LLC filed an application for a building permit with the Code Enforcement Officer seeking a permit for construction of a new accessory structure at 27 Pilot Point Road, Tax Map U12, Lot 70.

3. On August 17, 2012, the Code Enforcement Officer issued Building Permit #130036 for construction of a new accessory structure at 27 Pilot Point Road, Tax Map U12, Lot 70.
4. On September 17, 2012, the Murphys filed with the Code Enforcement Officer an appeal to the Zoning Board of Appeals challenging the issuance of Building Permit #130036.
5. Based on the Superior Court decision dated July 3, 2014, Maynard and Deborah murphy have standing to appeal Permit #130036.
6. Pursuant to Ordinance Section 19-2-4 and at the request of the owners of 27 Pilot Point Road the Code Enforcement Officer made a written determination of the location of the Normal High Water Line adjacent to the Tax Map U12, Lot 70, as set forth in his June 3, 2013, letter and as shown on the March 1, 2013, Northeast Civil Solutions survey.
7. The ornamental steps do not violate the 75-foot setback provision as set forth in Section 19-6-11.A.
8. The Ordinance in effect until September 11, 2014, defines the Shoreland Performance Overlay District as all land within 250 feet horizontal distance of the upland edge of a coastal wetland including all areas affected by tidal action such as cobble and sand beaches, mudflats, and rocky ledges.
9. The boundary of the Shoreland Performance Overlay District is uncertain as depicted on the Zoning Map. Section 19-2-4 sets forth the process by which the CEO determines district boundaries when uncertainty exists.
10. Pursuant to Section 19-2-4 and at the request of the owners of 27 Pilot Point Road the Code Enforcement Officer made a written determination of the Shoreland Performance Overlay District boundary as it relates to Tax Map U12, Lot 70, as set forth in his June 3, 2013, letter and as shown on the March 1, 2013, Northeast Civil Solutions survey.
11. The CEO's determination that the Normal High Water Line and the upland edge of the coastal wetland are the same is consistent with the Ordinance use and definition of those terms.
12. With respect to lot coverage calculations, the September 24, 2013, stamped plan as well as testimony from the licensed professional indicate that the lot coverage is less than 20% impervious surface.

All were in favor of the Findings of Fact. Vote: 6 – 0.

F. Communications: None.

G. Adjournment: Mr. Wisniewski moved to adjourn. All were in favor. Vote: 6 – 0.
Chairman Carver adjourned the meeting 12:20 a.m.