

**Town of Cape Elizabeth
Minutes of the June 23, 2015
Zoning Board of Appeals Meeting**

Present:

Josh Carver
Michael Tadema-Wielandt
Stanley Wisniewski

Matthew Caton
Joanna Tourangeau

Aaron Mosher
Michael Vaillancourt

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 May 26, 2015. Mr. Tadema-Wielandt moved to approve minutes, seconded by Mr. Wisniewski. All were in favor. Vote: 7 – 0.

D. Old Business: None.

E. New Business:

1. To hear the Superior Court Remand of an administrative appeal by the Shore Acres Improvement Association, represented by James Morra, of the Code Enforcement Officer's issuance of Building Permit number 120177 and specifically the Livingstons' Site Plan Drawing to allow the Livingstons to keep a newly constructed deck based on its location being outside the owner's property, and within the deeded right of way and within the restricted shoreline setback area at 29 Pilot Point Road, Tax Map U12, Lot 69.

Attorney Richard Bryant, of Van Meer & Belanger, PA, Portland, representing the Shore Acres Improvement Association and Barbara Freeman, came to the podium. The association is a volunteer organization that protects the interests of members of the Shore Acres subdivision. Among the rights it endeavors to protect are the rights in Surfside Avenue, which is a paper street adjacent to the Livingston property, the subject of this appeal. Their goal is to prevent any legal or practical obstacles to their members exercising their rights over the Surfside Avenue easement. That means challenging the illegal construction of a nonconforming structure within the Surfside Right of Way, that is outside the Livingston lot and that is in violation of the 75-foot Shoreland setback.

Ms. Freeman lives at 24 Pilot Point Road, across the street from the Livingston property. She is a member of the association. She participated in the first Zoning Board of Appeals hearing on this matter in 2012 and joined in the appeal and became a party to the appeal to Superior Court when the ZBA denied the original appeal based on untimeliness. She also holds an express deeded interest in Surfside Avenue.

Ms. Freeman's goal is to insure the Ordinance is followed and that abutters, like her, have a right to be heard on matters affecting their property rights.

Timeliness issues were addressed in a letter Mr. Bryant submitted a couple weeks ago, which is in the packet. Timeliness issues were also addressed in Superior Court hearing on the "good cause" exception rule. He offered to answer any questions.

Mr. Bryant described the timeline as follows:

The Livingstons applied for the permit in November 2011. The application was to replace an existing 1 by 20 foot rock wall with riprap and to replace an existing bridge and deck structure with a new 12 by 30 foot deck.

Shortly after the permit was issued by the CEO, the Livingstons carried out the work under the permit.

The next summer the DEP inspected the site and determined the permit was improperly granted by the CEO. The DEP found that the deck was nonconforming under the 75-foot Shoreland Zoning Ordinance because it was within 50 feet of shoreline. They found that the CEO had failed to seek the required ZBA approval for reconstruction of a nonconforming structure within the Shoreland setback that was removed to 50 percent of its value; in this case it was 100 percent.

The DEP found that the new deck could have been relocated beyond the 75-foot Shoreland Zone setback. The DEP's memo on that site visit, which was conducted in conjunction with the CEO at the time, included an acknowledgement by the CEO that he had violated the Ordinance.

The association filed its appeal within three weeks of finding out about the issuance of the permit. Which they otherwise would have had notice of had it gone through proper channels and been presented to this board for determination of whether the structure could be relocated outside the Shoreland Zone.

This board denied the appeal of October 23, 2012, on untimeliness grounds. The association and Ms. Freeman appealed to the Superior Court. In December of 2013, over a year later, the Court found that the "good cause" exception to timeliness applied in this case because the town was found to have violated its own ordinance, which precluded the association and Ms. Freeman from timely notice of the violation until August 2012, and that the appeal to the ZBA was filed promptly after actual notice.

The Livingstons appealed that Superior Court determination, which remanded to the ZBA, and the law court dismissed the Livingstons' appeal of the Superior Court decision. So now we are back to the Superior Court remand to this board to hear the merits of the association's appeal.

Mr. Bryant highlighted the documents (mentioned above) in the packet. He supplemented the packet today with the Superior Court's decision. Also included was the Livingston's Building Permit application, which includes a sketch plan of the lot, which is

inaccurate and false. Also included is a plot plan by Bruce Bowman, which was produced months before the Livingstons' sketch plan, which accurately details the property lines of their lot, and is inconsistent with the Livingstons' sketch plan. There is a copy of the Shore Acres subdivision plan and a blow-up of where the Livingstons' lot is. There are additional letters and photos of both the old and new structures.

Mr. Bryant continued with the substantive issues. He stated we know that the structure that was on this site under Ordinance Section 19-6-11.E.2, The Shoreland Zoning Space and Bulk Standards, because it was within the 75 foot Shoreland Setback. The DEP Shoreland Zone Officer inspected the premises and determined the structure was only 50 feet from shoreline; that is in the Morris memo in the packet. The CEO was at that inspection and he concurred with that determination.

The permit issued by the CEO indicates that there is a nonconformity there and that no Zoning Board review was needed. The basis of the Superior Court granting the "good cause" exception was because the structure was nonconforming. The recent Livingstons' submission to the board argues that relocation is not practical (one of the standards under the Ordinance).

The CEO's issuance of the permit violated Section 19-4-4.B.3, dealing with nonconforming structures in the Shoreland Zone. That section allows for reconstruction or replacement of a nonconforming structure if greater than 50 percent of the value is damaged, but only if it complies with setbacks to the greatest extent practical as determined by the ZBA.

The permit application called for a complete replacement of the deck/bridge structure and the photos show that the entire structure that was there before had been removed and a new deck structure has been placed there. The DEP memo from Mike Morris states that no ZBA hearing was held. That memo also states, "that the structure could easily have been reconstructed in a location that would comply with minimum shoreline setback requirements."

CEO admitted to the DEP the permit should not have been issued without a hearing before the ZBA. The Superior Court held that the town violated 19-4-4.B.3 when it granted the "good cause" exception.

The Livingstons should remove the deck because they violated the ordinance. The Livingstons, although they spent money and built the deck, do not have vested rights in that deck because vested rights accrue under a valid permit. Mr. Bryant mentioned *Thomas vs Bangor ZBA*. There are no equitable grounds for allowing a violation to continue. The Livingstons violated Ordinance Section 19-3-3.C by submitting a Building Permit application with a site plan that did not accurately represent the relationship between the proposed structure and all property lines to demonstrate compliance with the setback requirements.

The site plan does not show the shoreward boundary of 29 Pilot Point Road; it does not show the 20-foot rear yard setback. It does not include a scaled depth of the lot, which is noted on that plan as approximately 219 feet. The actual depth shown on that map is

the 219 feet plus the entire width of Surfside Avenue - so, it is more like 250 feet. That map does not show the existence of Surfside Avenue Right of Way or the 75-foot Shoreland Zone setback. The Ordinance says the applicant must present an accurate site plan. Mr. Bryant mentioned several maps that show the Livingstons' property ends at Surfside Avenue. On July 5, 2011, Bruce Bowman prepared a mortgage loan inspection plan that accurately shows that their property ends where Surfside Avenue starts.

In response to Ms. Tourangeau's questions, Mr. Bryant replied the easement was from the developer of the property, Shore Acres Land Company. The fee interest still resides in that company or its shareholders. The fee ownership remains in the developer. The fee has never been conveyed out to a property owner. Easements have been granted to a large number of lots owners within the Shore Acres subdivision. Implied easements benefiting all lot owners under the subdivision exists under state law and the Town of Cape Elizabeth has a right for a public way over that paper street. The fee is not owned by the Livingstons.

The chair asked if building something on property that is not yours, is not a law suit issue. Mr. Bryant replied it is a ZBA issue because the CEO issued a permit saying they could build there.

In this case there is not prima facie evidence that the Livingstons own anything beyond their property line. The only document that suggests that they own or have an interest is the hand drawn sketch plan the Livingstons submitted for this building permit.

In another permit appeal, that was not taken to Superior Court, there was evidence that the CEO informed the Livingstons of a 20-foot setback from the property line on the tax map that needed to be met.

Mr. Wisniewski asked how did the prior nonconforming structure get there? Mr. Bryant said he did not know the history other than a letter Mr. Livingston had written about the purpose of the structure for the prior owner.

Mr. Bryant said in October 2012, Northeast Civil Solutions did a survey that is not in the file. So, the Livingstons had evidence to property lines prior to permit.

In response to Mr. Wisniewski's question about the prior structure, Mr. Bryant said the association had not objected to it being there. The home structure was built in 1962, before Shoreland zoning. No one is challenging that original nonconforming structure. It was beyond the property line, in the right of way. The new structure is in the same spot.

Ms. Tourangeau asked if this was a legally existing nonconforming structure, had Mr. Bryant made his case as to why this could not be replaced. Mr. Bryant said it was an interesting legal point that the town violated the Ordinance; there should have been a ZBA hearing. The burden in the ZBA hearing would have been for the property owner to determine that the structure could not have been built anywhere else. The burden should not be on the association.

Mr. Bryant thought that a separate portion of this hearing should be the Livingstons saying: no harm, no foul, we couldn't have been built it anywhere else, even if we had come to the board back then.

In response to questions Mr. Bryant replied the DEP said it was a town issue because the Livingstons had a permit. DEP was not taking action. Mr. Bryant continued saying the permit was void from the start. That structure should be removed. He quoted Ordinance Section 19-4-4.B.3 concerning Change of Use.

The memo from Mike Morris of the DEP stated it could have been relocated outside the Shoreland setback.

In response to Mr. Caton's questions Mr. Bryant said there were vested rights in the permit. The Livingstons own the deck. The Ordinance wording about percent of repair does not apply because 100 percent was torn out. The Ordinance says you need a building permit to do the work.

Mr. Bryant said the new structure created other violations of the Shoreland Zone. Section 19-4-4.B.4 is concerned with change of use. Previously it was a bridge with a small deck attached. It is not a bridge now - it is a large deck for entertainment and enjoyment, which is a change of use of the structure. The Livingstons' recent letter to the board states the purposes of the structure are to prevent erosion and to cover the ravine for safety. Mr. Bryant said the new deck is for entertainment, just like any deck, and can be placed anywhere on their property. The new riprap under the deck is to control erosion. The safety reason does not make sense; the deep gully is no steeper than the surrounding steep shoreline. Width of Surfside Avenue allows for plenty of room for anybody walking, to walk around the gully.

Photographs submitted by Mr. Livingston show a 12 by 30 foot bridge-deck structure. Looking at photograph #4 Mr. Bryant determined dimensions by measuring the blocks pictured using standard block measurements. Six blocks are an 8-foot stretch. It is likely 24 or 25 feet wide. Photograph #2 of underneath the old deck shows 4 X 4 posts supporting the bridge. Mr. Bryant estimated that it was about 9 or 10 feet wide not 12 feet wide. Mr. Bryant said expansion of nonconforming structures is prohibited per Section 19-4-4.B.1. Mr. Livingston built something larger in its place.

Mr. Bryant continued with general points for the boards review. The goal of the Ordinance is to reduce and eliminate nonconforming uses. Mr. Bryant mentioned duties under Section 19-5-2.A, to determine if the CEO's decision was in conformity with the Ordinance. The court has found it was wrong. Section 19-10-1 states the more restrictive provision controls.

Mr. Bryant closed saying the remedy they request is to declare that permit void, and order removal of the illegally constructed structure from Surfside Avenue Right of Way. The burden of proving where to relocate the structure is upon the Livingstons.

Jim Morra, Vice President of the Shore Acres Improvement Association, stated he was the President of the association in 2012 when the original appeal was brought before

this board. He is a resident of 5 Waumbek Road. He owns Lot 95 of the Shore Acres subdivision plan in Plan Book 12, page 45, Registry of Deeds and as such he has an implied right to use all paper streets in the neighborhood including Surfside Avenue.

The deck on the Surfside Avenue paper street was brought to the attention of the Shore Acres Improvement Association Board of Directors in September 2012. The Board of Directors agreed this was a risk of neighbors' right of way and filed an appeal to the deck permit granted to 29 Pilot Point Road.

At the association's annual meeting in November 2012, 69% voted yes to taking legal action to protect the right of way. Based on this response the Board of Directors followed the appeal process to the Superior Court, Supreme Court and now back to the ZBA.

The permit needs to be voided due to numerous errors on the permit application. These include: 1. Scale is not shown on the plan. 2. The deck is outside the lot boundary. 3. The old bridge structure was not on a foundation; the new deck is on concrete foundation tubes. Ordinance Section 19-4-4.B.1 requires new foundation structures to meet setback requirements to the greatest practical extent. 4. Change of use from bridge to deck not stated in permit application. Ordinance Section 19-4-4.B.4 requires Planning Board approval for change of use of a nonconforming structure.

Mr. Morra concluded saying any resubmission of the deck permit needs to place the deck on the owner's property.

Deborah Murphy, President of the Shore Acres Improvement Association, said she was Vice President when the appeal was brought to the town. She had pictures to hand out to the board. She said Mr. Bryant had mentioned an appeal concerning some boulders on the landward side of deck. The town was notified and there was a work stoppage issued. The boulders were moved to the property line. Ms. Murphy explained the colored lines on the photos she had handed out. The boulders show where the property line is.

If the decision is made for the deck to be relocated, unlike 27 Pilot Point Road, the Livingstons' property is loaded with impervious surface. She described between what lines the deck could be relocated. Clearly it is within the 75-foot setback. One picture shows the "safety deck" covered with furniture as well as the patio next to it.

Mrs. Murphy has been exercising her rights since moving in in 1998. She saw the prior bridge structure. No one knows who put the bridge there. She never used it, except when the previous owner told her she could take pictures from the bridge's nice arch. It was not a flat deck you could put furniture on. Mrs. Murphy stated she feels uncomfortable walking there if someone is on the deck.

John Shumadine of Murray Plumb & Murray, Portland, representing the Livingstons came to the podium. He said he'd hoped this would be simpler; however, he now needed to discuss the legal issues that Mr. Bryant brought up and explain why they don't matter.

The first issue is who owns the property. That's not the board province, the board is not entitled to determine who owns or doesn't own this. It is purely a matter of right, title and interest. Have we shown sufficient right, title and interest to show we are entitled to a permit whether it's by the CEO or the ZBA? Attorney Bryant's presentation established that we have. Mr. Bryant conceded that deck existed since 1962. Which means the deck was in place well over 20 years, which means we have an adverse possession claim and the courts have said an active adverse possession claim is sufficient to prove right, title and interest. But that's not all.

Although Mr. Bryant talked about the deed, he failed to mention the statute. That statute is 33 M.R.S.A. Section 469A, which establishes what happens when you have property that is bounded upon a paper street, like Surfside Avenue. It establishes that first you look to see if the original grantor reserved their rights in the right of way. The original grantor did not reserve rights in Surfside Avenue. They did reserve rights in other parts of the subdivision. Under the statute, the fee ownership passes to the abutting landowner. Furthermore, the statute says if you are on the edge of the subdivision, fee ownership goes to boundary of the subdivision, which in this case is the water. By statute this fee has passed to the Livingstons and they own it. This is on the Livingstons' property; it is in the same location as the other deck. We have shown sufficient right, title and interest. That should be the end of the board's jurisdiction.

Mr. Shumadine said the second issue concerns the idea that the board make a ruling for the Livingstons to remove the structure. He's not sure why that has been suggested; Mr. Shumadine said that is not what the board does. The board's responsibility is to say whether the permit was properly issued or whether a permit should be issued. If it is decided that it was not properly issued, then it is an enforcement decision for the town. ZBAs do not order removal of something; they rule on the application before them whether the permit is granted or not granted. The only issue today is should the permit be issued or not.

They have raised new arguments, for the first time tonight. One is the change in use. There was a curved bridge area with a deck. We are replacing that with a deck. I don't think that is a change in use and Mr. Shumadine urged the board to dismiss that argument. The second argument is that there is an expansion. To the extent that they are arguing that we violated our permit, that is an enforcement action that goes to the town not this board. Their attempt to argue that we've expanded the use by using photographs as evidence to attain measurements should be rejected by the board. There are not two photographs in the record with a graphic scale. The only photos that show a graphic scale are by the DEP. The two structures are relatively the same size if you do the math. Their expansion of use argument is not relevant and should not be considered.

With respect to the boulders, we did not move them as a concession as to where the boundary line was. We moved them to resolve an issue. The boundary line goes to the water so it is a non-issue.

The appeal was granted on the good cause exception. They have never shown any basis for that. We are not conceding that part of the case. One of the issues is whether

the CEO should have issued the permit or should it have gone before the ZBA. We will concede that issue. The issue tonight is will the ZBA grant this permit. That comes under Section 19-4-4, which requires that relocation conforms to all setback requirements to the greatest practical extent. Mr. Shumadine said that Deb Murphy conceded that this is moved back to the greatest practical extent since she said if we were to move it we would have to move it up to Pilot Point Road outside the Shoreland Zoning area.

Bryan Livingston, 29 Pilot Point Road, came to the podium. He wanted to clarify a couple things that he heard. First, Mr. Bryant had said their intent was to block rights. Mr. Livingston stated that is not and never has been a reason for this reconstruction. To address what the DEP actually stated in their memo, Mr. Livingston said the specific verbiage was that the Livingstons have no Shoreland Zoning violations and therefore are not going to be required to move the deck. Another issue mentioned was that the deck was too big. At the Shore Acres Improvement Association meeting in November 2012, Mr. Bryant said that Mike Morris told him that the deck was larger and therefore an issue. If that were the case the DEP would have taken an action. Mr. Livingston read an email from Mike Morris from November 28, 2012, for the record. It reads: In my conversation with Mr. Bryant I made no conclusions and did not offer any opinion as to whether the deck was significantly larger than the original structure but the town allowed you to combine. If anything, after using the measuring tools and reviewing my field measurements, when on the telephone with him, I recall mentioning that the current structure was pretty close to the original size.

The last issue was about the boulders. Mr. Livingston said you could look in the record – there was never any stop work order and we were not required to move any boulders.

Mr. Livingston displayed a photo from 1992 that he had previously emailed to show what they were working with. The first four photographs in the packet show the original structure that was there when they purchased the property. The concrete block wall especially is shown in photos #3 and #4. There was a large gap in between the bridge/deck structure and the ground and there was a significant bow in the ground and the blocks were crumbling. We had young kids when we purchased the home and saw that as a liability. Our first issue was to try to address that both from a safety standpoint and also an environmental standpoint. The intent behind the reconstruction was to improve the safety, address the safety hazard and also to improve the environmental integrity of that area and to stop the erosion from continuing further back.

We obtained permits from the appropriate permitting authorities and DEP and the town in 2011 and completed construction in 2012.

Mr. Livingston said the heart of the issue is that it is absolutely in the Shoreland Zone, which is why we got the DEP permit. We never said it was not in the buffer zone; we are fully aware that it is in the buffer zone. We are also aware that the Ordinance allows you to reconstruct a structure within the 75-foot buffer zone. The issue to reduce the nonconformity over time and balance that with homeowners' rights creates a middle ground. That middle ground is for the board to decide. Yes, you can reconstruct it here, but are you doing it as far back as practical? In making that determination, what is

the primary function of the structure? How would moving it change its primary function? And what will be the secondary effect of moving it?

Mr. Livingston said the reason they did this was to make it a safer place for their family and with the riprap wall improve environmental integrity there and to prevent erosion. We have had furniture there; it could be removed.

The lot is a nonconforming lot with a larger portion, beyond the 20 percent, of impervious surfaces. Currently the deck is suspended over granite ledge. Right now it is an impervious structure over an impervious surface so there is a benefit there. Moving it back onto lawn would be violating the Ordinance, by making our lot more nonconforming.

Those would be the two questions that need to be addressed. Mr. Livingston stated the structure is as far back as practical.

Mr. Livingston concluded by saying it was an integrated structure. He explained the construction of the two-part structure saying there is a riprap wall with timber framing that is pinned into the ledge. There are no concrete sonotubes as someone had mentioned. The top deck aids to prevent further erosion.

In response to Ms. Tourangeau's inquiry about unclean hands allegations Mr. Bryant posed about the site plan, Mr. Livingston said he hired Piers Spencer, from Waterman Green. He is the one that filed the permit applications; Mr. Livingston did not see the site plan. He realizes that it doesn't show a lot of things; he doesn't know if it needs to, if that would be relevant. This was just a structure that was being reconstructed to make a better structure. The CEO came out and looked at it. There was no intention to mislead.

Mr. Livingston used the patio as an analogy of something that could be moved and serve the same purpose. The stairs could not be reconstructed somewhere else because they are serving a function where they are, the same as this structure.

In response to Mr. Caton's question about where in the papers is the statute that was cited mentioned; Mr. Shumadine stated he was not sure it was cited in the papers before the board. Mr. Shumadine said it does apply, he thought it was cited in the appeal before Superior Court. Ultimately the only issue before the board is if they have shown sufficient right, title and interest.

Mr. Caton stated there was some uncertainty in the exertion of ownership in the portion of land that goes from the property line to Surfside Avenue. Mr. Shumadine replied the Livingstons ownership of land includes fee interest in Surfside Avenue. Mr. Shumadine explained the principal with the law school teaching about property with the bundle of sticks idea of rights. Each stick is a type of right. He further explained easement rights as a non-possessive right. Only issue before the board is right, title and interest. Mr. Shumadine was not offering an opinion on access rights. Pass and repass over that land is a separate issue. The statute says we own the fee and have a right to go forward with the permit.

Mr. Shumadine mentioned an adverse possession case, which found right, title and interest was a low standard. He said we have met it here. Maine applies concept of tacking. We own the fee because we are abutters.

Mr. Bryant returned for rebuttal questioning whether the property line is on deed, tax maps, zoning maps or is it a fee interest all the way to the ocean? The companion appeal required the patios to be setback 20 feet from the mortgage inspection plan. That's where the town says the property line is. Town has been consistent with Shore Acres subdivision property lines.

The plan that the Livingstons submitted doesn't show the Shoreland setback, which is critical to the determination.

Mr. Bryant stated the ZBA makes interpretations of the Ordinance; they make decisions that guide the CEO in performance of duties to enforce/remove the deck. The primary use is different now – it is used for entertainment, just like anybody else's deck. The riprap for erosion control replaces the block wall. With regard to expansion, the photos certainly can show size difference and you can reasonably conclude the Livingston's application was not in compliance with the Ordinance.

Ms. Tourangeau asked about the permit by rule from the DEP and whether the DEP came out and determined that it was similarly sized. Mr. Bryant replied he was asking the board to substitute their own judgment in viewing the photos over an email by the DEP. He said the DEP based their determination on a photograph taken at a different angle than the photographs the board had before them. Mr. Bryant urged the board to read Mike Morris's memo.

Mr. Caton asked Mr. Bryant to comment on the Statute. Mr. Bryant said the Shore Acres subdivision was created well before that statute existed. The rights are common law rights and if you read the deeds, a considerable number of those reserve rights of the Shores Acres Land Company in the streets within the subdivision. He disagrees with the premise that the fee goes automatically to the adjacent property owner. The board does not have to decide; that could be argued in court.

Mr. Caton asked who else has an interest in Surfside Avenue. Mr. Bryant referred to the bundle of sticks analogy and said the town had public easement rights over the paper streets.

In response to a question from Ms. Tourangeau, Mr. Bryant replied he was not certain they have established right, title and interest. All they have shown is a deed to a lot. Whether that easement right included the right to build a structure is the question. Mr. Bryant didn't think you could build a structure that requires a building permit outside of the lot shown on the zoning map.

When Mr. Vaillancourt asked where could the structure be relocated without offending some other provision of the Ordinance, Mr. Bryant replied there was plenty of land on the lot to put it.

The floor was opened to public comment.

George Foley, 9 Pilot Point Road, stated they have lived there since 1964. The original structure was not a party deck. This one is. The original structure was not on the Livingstons' property; it was on the ocean side of Surfside Avenue. They did not own the original deck; it was outside their property. They have no vested right in the structure to begin with. Neither the previous owner nor the Livingstons own ocean front property. They get a discount of 5% for property taxes because it is not ocean front. The original fee for the paper street was never conveyed to anyone; it still resides with Shore Acres Land Company or its heirs. The structure was destroyed 100%, which requires a Planning Board or Zoning Board hearing to rebuild. While they may own the new deck, it is not on their property. They expanded it. Zoning limits what an owner can build. They can relocate it on their property. For safety, they can put a fence up on their own property and not impinge on our rights on Surfside Avenue by building structures out there that make it uncomfortable for us to pass.

Maynard Murphy, 24 Pilot Point Road, committed on the boulder wall. During the construction of it, Mr. Murphy went to Surfside Avenue and it appeared to be over the property line and on the right of way. He had an email conversation with former CEO, Bruce Smith about that. Mr. Smith told Mr. Murphy they had agreed to move it back to the Livingstons' property line.

Bob Cronin, 7 Avon Road, in the Shore Acres area, said the Livingstons have not established that they owned the previous deck, and if they didn't and you find for them, you are saying it is permissible to rebuild a structure you don't own, on property you don't own. That would be a nasty precedent.

Finding no other public comment, Chairman Carver closed the floor.

There was board discussion on how to proceed with the remand.

Mr. Vaillancourt moved to grant the administrative appeal as it relates to the reconstruction of the deck because the Code Enforcement Officer was required by Ordinance to refer the permit to the Zoning Board. Ms. Tourangeau seconded. All were in favor. Vote: 7 – 0.

There was discussion on who owns the property, was there sufficient right, title and interest, and how right, title and interest is defined in the Ordinance.

Findings of Fact:

1. Shore Acres Improvement Association ("Shore Acres") is an association of homeowners who claim an interest in Surfside Avenue, a "paper street" depicted on a "Plan of Part of Shore Acres" recorded in the Cumberland County Registry of Deeds at Plan Book 25, Page 54.
2. The "paper street" Surfside Avenue abuts the Livingstons' property that is the subject of Building Permit #120177, i.e. 29 Pilot Point Road, Tax Map U12, Lot 69.

3. On November 2, 2011, the Livingstons filed an application for a building permit with the Code Enforcement Officer seeking a permit for, in pertinent part, construction of a 12 foot by 30 foot deck to replace a deteriorated 12 foot by 30 foot deck at 29 Pilot Point Road, Tax Map U12, Lot 69.
4. On November 10, 2011, the Code Enforcement Officer issued a Building Permit #120177 to the Livingstons for, in pertinent part, construction of a 12 foot by 30 foot deck to replace a deteriorated 12 foot by 30 foot deck.
5. On September 19, 2012, Shore Acres filed with the Code Enforcement Officer an appeal to the Zoning Board of Appeals challenging the issuance of Building Permit #120177 and particularly the decision to permit the construction of a 12 foot by 30 foot deck to replace an existing deteriorated 12 foot by 30 foot deck at 29 Pilot Point Road, Tax Map U12 Lot 69.
6. On October 23, 2012, the Zoning Board of Appeals decided that the Shore Acres appeal was untimely because it was brought more than 30 days after the permit was issued.
7. On December 13, 2013, in Superior Court Civil Action Docket No. AP-12-62, it was decided that the Shore Acres appeal was timely due to the “good cause” exception.
8. In Docket No. AP-12-62, it was determined that “the Town violated its own ordinance when the CEO failed to refer the matter to the ZBA for approval.”
9. Based on the decision from the Superior Court, the Zoning Board must review the Building Permit application based on Section 19-4-4.B.3 of the Zoning Ordinance, which states “The reconstruction or replacement shall be in compliance with the water body, tributary stream or wetland setback requirement to the greatest practical extent as determined by the Zoning Board of Appeals in accordance with the purposes of this district.”

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

The board discussion continued to determine if the reconstruction of the deck is in compliance with the water body setback to the greatest practical extent. There isn't a survey in the record. The merits should start with right, title and interest. All applications for permits shall be signed by an owner of the property; Ordinance Section 19-3-3.C.4 applies.

Mr. Mosher asked if any member of the association would be able to apply for a permit to rebuild. The board reviewed M.R.S.A. Title 33, Section 469.A, Subsection 1 and 6A.

It was concluded that there was sufficient right, title and interest for purposes of acting on the merits. Some of the testimony from the Shore Acres Improvement Association supports that conclusion given that Ms. Murphy did not use the bridge herself, although

she did actively use the right of way, she waited for an invitation from a prior owner before going up on the bridge.

As to whether it is was a reconstruction, the language of Ordinance Section 19-4-4.B.3 was referenced: "If the total amount of floor area and volume of the original structure can be relocated or reconstructed beyond the required setback area, no portion of the relocated or reconstructed structure shall be replaced or constructed at less than the setback requirement for a new structure."

All parties agree the wall is useful for erosion control. There is no engineering assessment in the record. Board members said it looks different than before - but it can serve the same purpose.

The gap in granite, at that point, is more pronounced than any place else pictured. The structure is there for safety; if it were to be removed a hazard would be created. There is a patio near there. Who has liability if someone is injured in the uncovered ravine? Who has responsibility? If this is not a deck, what is the purpose of structure? The association said something else could be put there to ameliorate safety. Board members did not think a fence would be possible at that location.

At the time this was granted, Ms. Tourangeau recalled, there was no notice to abutters or anyone. You just got a permit and things were done. Since then, with support from this board, the Ordinance has been changed, such that abutters get notice of things like that and can have more input into what is going on. But when this happened you just went to the CEO, got a building permit and it was done. There is frustration because procedurally the town erred. It should have gone to the ZBA, there should have been notice, and they should have been heard at that time. Now, unfortunately, we are in a position of correcting that procedural error, but not being able to hear the input that people would have liked to have had because the structure is already built and three years have passed.

They could build a deck somewhere else on the property. The purpose of this structure and the original structure was to cover the gap. You cannot do that further back on the property.

Is it a deck or safety structure? It serves to prevent erosion and deck space is for safety. They both offer a pathway to get from one side to the other. It is not significantly different from the prior structure.

Mr. Vaillancourt moved to approve the Livingston's Building Permit application based on Section 19-4-4.B.3 of the Zoning Ordinance, because the reconstruction or replacement is in compliance with the water body, tributary stream or wetland setback requirement to the greatest practical extent as determined by the Zoning Board of Appeals in accordance with the purposes of this district. Mr. Tadema-Wielandt seconded.

There was board discussion. The vote was 6 – 1. Mr. Wisniewski dissenting.

Findings of Fact:

1. The nine Findings of Fact above are included with these findings.
2. The required setback from the Atlantic Ocean is 75 feet.
3. The Board has considered the size of the lot,
4. Slope of the land,
5. Potential for soil erosion,
6. Location of other structures on the property and on adjacent properties.
7. The location of the septic system is not a factor because the house is connected to public sewer.
8. Impact on views,
9. Type and amount of vegetation to be removed to accomplish the relocation.

The vote for the Findings of Fact was 6 in favor, 1 opposed. Mr. Wisniewski dissenting.

F. Communications: None.

G. Adjournment: Mr. Vaillancourt moved to adjourn. Ms. Tourangeau seconded. All were in favor. Vote: 7 – 0. Chairman Carver adjourned the meeting at 9:40 p.m.