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

Present:

Josh Carver	Matthew Caton	Aaron Mosher
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 June 23, 2015. Mr. Vaillancourt moved to approve the minutes with correction of the spelling on page 5, line 2 to "foul" instead of "fowl," seconded by Mr. Mosher. All were in favor. Vote: 5 – 0.

D. Old Business: None.

E. New Business:

1. To hear the request of Leslie Fissmer, owner of the property at 20 Cunner Lane, to appeal the Code Enforcement Officer's decision to approve building permit #150401 for a new single family dwelling at 19 Cunner Lane, Map U14, Lot 26-1.

John Shumadine of Murray Plumb & Murray, Portland, representing the Leslie Fissmer came to the podium. He said Mrs. Fissmer owns the property that abuts the project for which the building permit was granted and once the building is constructed it will obstruct her view.

Mr. Shumadine mentioned a settlement agreement that the applicant submitted to prevent this appeal. There are a number of drafts to this agreement but there is not a signed copy. Mrs. Fissmer never signed this agreement. There is nothing to enforce.

Secondly, even if there were a signed agreement, it would become void as soon as the trustee, who was the applicant's predecessor in title, abandoned the Public Access Waiver. Mr. Shumadine referred to an undated letter from David Smith in which he states he abandoned the Public Access Waiver. Although the letter uses the word "subdivision," there was no subdivision at the time – only the Public Access Waiver.

Lastly, it is a settlement agreement and the only one that can enforce it is a court of law, not the Zoning Board of Appeals.

Mr. Shumadine continued stating the CEO did not know of the abandonment. The two lots are now one. That means the Public Access Waiver does not exist anymore and

therefore you have to follow the current ordinance. Under the old ordinance, in order to get a building permit, you had to have road access. They did the first part, but they didn't do the second part of getting the building permit. Mr. Smith didn't divide the property until 2010 and didn't ask for the building permit until this year. The ordinance has changed and there are no vested rights.

Mr. Shumadine said Mr. Smith never got the approval needed with the Public Access Waiver in 1997. That provision does not exist anymore because the ordinance has changed.

The new ordinance has two requirements. The first we do not dispute, that the road is adequate for fire and emergency access. The second is the requirement for a legally enforceable maintenance agreement. There is nothing in the records to satisfy that standard. What is in the record is a maintenance agreement with one person in it, who is David Smith, which only applies to the portion of the road that abuts his property.

Mr. Shumadine referred the map included in his letter. There is only one way to interpret the provision of a legally enforceable maintenance agreement. Mr. Smith can only show for half of the road, where it abuts his property. There are informal agreements to maintain Cunner Lane and it has been maintained, but that's all informal and not legally enforceable. Therefore the building permit was issued in error.

Alan Atkins of Alan R. Atkins & Associates, LLC, representing David Smith stated Mrs. Fissmer does not have standing. He quoted from the 1985 Maine Supreme Judicial Court case of Harrington vs. the Town of Kennebunk, which states the abutters do not have standing to maintain their action based on the same claim. Specifically: "In terms of evidentiary propriety the potential for obstruction of view as an improper subject for judicial notice. Whether a structure when constructed will obstruct the abutter's view sufficiently to rise to the level of a particularizing injury is clearly neither a matter of uncontested common knowledge nor capable of certain verification."

Mr. Atkins continued saying Mrs. Fissmer attempts to revisit the validity of a Public Access Waiver granted to the Monks Trust in 1997. Under the rule of Crosby vs. the Town of Belgrade the issuance of the validity of a Public Access Waiver is subject to administrative collateral estoppel. There was a public hearing, a vote and written findings provided by the Planning Board as well as an appeal to the Superior Court by the Snows, abutting neighbors of Mrs. Fissmer.

Mrs. Fissmer's attempt comes 15 years too late, as she could have attended the public hearing and joined the Snows in an appeal of the approval of the Public Access Waiver in 1997. She had her opportunity.

Mrs. FIssmer attempts to treat the Public Access Waiver as a building permit. These are two distinct issues and are treated under the Zoning Ordinance. A Public Access Waiver does not expire; nothing in the ordinance says it does. A building permit is limited to six months.

Under the Somer case, Mr. Atkins continued, the Cape Elizabeth Zoning Ordinance need not explicitly state that a Public Access Waver, a private access way, is to have a limited duration and the Zoning Ordinance not contain that language.

Mr. Atkins provided some history. The Monks Trust was the prior owner of the land purchased by Mr. Smith in 1998. Prior to the sale, the Monks Trust went through the process of obtaining the Public Access Waiver from the Cape Elizabeth Planning Board under 19-4-2 of the Zoning Ordinance to slit the property into two lots. Certain criteria needed to be met. The road maintenance agreement is in the package signed by Mr. Smith. The public hearing that was held allowed Mrs. Fissmer to express her concerns. By a vote of four to two (4 – 2) the Planning Board granted the Public Accessway in February 1997 because it complied with the Zoning Ordinance. The town has recognized the property as Map U14, Lot 26, as the larger lot and Map U14, Lot 26-1 as the smaller lot. This was done for tax purposes.

The Snows brought an appeal against the town and the Monks pressed challenges of the issuance of the building permit and division of the property. The action was dismissed with prejudice by the parties, relinquishing their right to raise that issue again. Mrs. Fissmer's name appeared on the settlement agreements. She may not have signed it; but she was part of the negotiations to lead to that.

Bruce Smith, CEO at that time, confirmed the Public Access Waiver and added that David Smith would need to comply with the current code of the Zoning Ordinance, Section 19-7-9. Mr. Smith conveyed out the smaller lot Map U14, Lot 26-1, on April 20, 2010. He then took the necessary steps to be in compliance with the current Zoning Ordinance.

Mr. Atkins stated that Mr. Shumadine has made a lot out of a friendly letter that Mr. Smith wrote to Mr. Snow. That letter was merely an expression of kindness, from one neighbor to another. They had a tense relationship because of the appeal. Mr. Smith wanted Mr. Snow to know he had no immediate plans of building anything on the lot. Mr. Atkins does not know how Mrs. Fissmer obtained a copy of the letter; she is not a party to the letter. She has no right to rely on it or to summit it to the board for consideration. Mr. Snow has since left the property. That letter is hearsay.

Based on the above, Mr. Atkins hoped the board would uphold the permit that was issued.

Mr. Shumadine returned to address a couple of points: First, the quote about judicial notice in regard to standing. He thinks there are cases out there that say obstruction of a view is sufficient. But if there is not, because she is so close to the property, being right across the street Mrs. Fissmer will suffer injury from the construction noise, dust, etc. Secondly, the building is 150 feet wide. It will obstruct view. That confers standing in this case.

Mr. Shumadine doesn't think administrative collateral estoppel applies in this case. Mrs. Fissmer was not a party to the initial action; therefore it does not apply.

Mr. Shumadine asked does this provision has any validity under today's ordinance given that nothing was ever done on it for 10 years – since they divided the property? He said the Public Access Waiver is tied with getting a building permit. It is not meant to last through time.

The letter to Mr. Snow shows he abandoned it. Under rules of evidence the letter is not hearsay. Mr. Shumadine read the letter and said we should rely on it because it was to be dispersed to everyone. The letter doesn't say that he is not building right now – it says he is abandoning it. Most people would say, "I'm not building right now." There are so many other factors; Mr. Smith has to comply with the current ordinance. The building permit issuance should be reversed.

Mr. Atkins return to say attention to the letter, almost twenty years later, is mystifying. The purpose of the letter was to make amends with a neighbor, trying to overcome some ill will that might have developed over a lawsuit. It is what we expect from people who live next to each other and hope to avoid contentious arguments. Mr. Snow is not here. Mr. Smith would like to address what he meant when he wrote that letter. Mr. Smith is not a lawyer. The word "abandon" was not meant to carry the meaning Mr. Shumadine attaches to it. He did not take a two million dollar property and say I'm going to give it up. What he meant to say was he was not going to develop it today, don't worry about it. It may be developed several years down the road; but you don't have to worry about it today.

David Smith came to the podium and provided background as to how he purchased the property. He did not know anything about the property when it was shown to him in 1997. The sales brochure said it was a subdivided lot and you could build two houses on it. He thought it was a great real estate deal – a place to build a second home for his kids. He engaged Alan Atkins to represent him. Before the closing date they became aware of some litigation on the property about someone not wanting the property developed but the town had already approved it. Mr. Atkins didn't think there was any legal basis to overturn the decision. Mr. Smith decided he needed to talk with Mr. Snow since he was the moving party.

Mr. Smith described how the conversation probably went as he remembered it. Saying that the fight with the Monks family about development would be transferred and continue with him. Mr. Smith closed on the property. A couple weeks later with no further conversation between them, Mr. Snow dropped the litigation. Mr. Smith was not aware of the history of discussion between the families involved until a few weeks ago.

During the process of gutting the existing house, Mr. Smith became aware by virtue of a survey he had done to build a stonewall, that Cunner Lane is directly over the property he just acquired. Mr. Smith wrote to Doug Snow about this discovery and said they would have to have a discussion on how they would deal with it. In the next paragraph of that letter, Mr. Smith gratuitously said to Doug you don't have it worry about anything, my kids aren't of age, I'm not going to develop the property. But after that Mr. Snow moved. The letter was to reduce fiction between the two, nothing more. There is no mention of the access waiver process; it was a legal thing Mr. Atkins dealt with. The notion that he would abandon a million dollar property is absurd. There was no chance

that would happen. He was young, at that time, and had no plans to do anything until he could turn over the property to his kids. The letter was completely gratuitous; it had no meaning other than we are not doing anything. They took no action based on that letter. If he were to abandon it, he would have donated it to the environmental trust.

The only thing Mr. Smith did do was ask the town to transfer the taxes from the second lot to the first lot because he didn't plan to develop it in the near future. Mr. Smith thanked the town for reducing the taxes on the undeveloped land.

Chairman Carver asked for public comment; hearing none, the floor was closed. Board discussion began. Matthew Caton stated he lives on Hannaford Cove Road, at the north end. He stated he did not know either party or anyone who had spoken; he only knew one individual present. He felt he could be impartial.

Chairman Carver asked Mr. McDougal on what had he based the issued building permit. Mr. McDougal stated the building permit was based on the Planning Board approval, as well as Bruce Smith's (prior CEO) letters that are in the file. In response to questions, Mr. McDougal said the Public Access Waiver was still valid. He did not review, or have the town attorney review the road maintenance agreement; based on the correspondence on file there was an arrangement. The board discussed the legally enforceable road maintenance agreement. Exhibit 12 in Mr. Atkins' package is a copy of the legal agreement.

The board consensus was there was standing. There was discussion about the language, meaning and weight of the letter.

Mr. Vaillancourt moved to deny the administrative appeal of Leslie Fissmer for building permit #150401 because the Code Enforcement Officer did not err by approving this permit. The motion was seconded. Discussion followed. All were in favor. Vote: 5 - 0.

Findings of Fact:

1. On May 22, 2015, the Code Enforcement Officer approved building permit #150401 to construct a single family dwelling on a vacant lot at 19 Cunner Lane, Tax Map U14, Lot 26-1.

2. On June 19, 2015, Leslie Fissmer submitted an administrative appeal stating that the building permit #150401 violates Section 19-7-9A of the Town of Cape Elizabeth Zoning Ordinance and therefore should be rescinded.

3. On February 18, 1997, the Town of Cape Elizabeth Planning Board approved the creation of the subject lot based Section 19-4-2-(b) of the Zoning Ordinance in effect at that time.

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

2. To hear the request of Joseph Waltman, representing Cunner Lane LLC, to appeal the Code Enforcement Officer's denial of the cupola portion of building permit #150401 at 19 Cunner Lane, Map U14 Lot 26-1.

Mr. Waltman stood, identified himself and informed the board he was withdrawing his appeal.

3. To hear the request of Chris and Scottie Wellins for a variance to increase the building coverage on their lot at 6 Stonybrook Road, Map U3, Lot 117 to 25.02% when the Zoning Ordinance only allows 25%.

Scottie Wellins came to the podium and posted two architectural drawing showing how the change will appear. Before she addressed the board, CEO McDougal stated he recently realized that there was an administrative incorrectness in this request: This is actually two issues bundled into one application. It is for a variance and for reconstruction of a nonconforming structure. The abutters were notified of the request for a variance to increase maximum building coverage, which carries more legal weight. It is a very modest increase in the garage width of 3 feet, to be able to fit two cars reasonably into the garage. That requires a variance for the maximum building coverage. The front of the garage is within the front setback; by expanding 3-feet they are also required to do an application to reconstruction a nonconforming structure without getting closer to the property line. The purpose is not changing and no public response was received.

There was discussion about the noticing of abutters. Both applications would be for the exact same work. Based on that the board proceeded.

Chairman Carver said he and Mike Vaillancourt live on Stonybrook Road. Chairman Carver stated he did not know the Wellins and Mr. Vaillancourt say he did not know them well. Both felt they could be impartial.

Mrs. Wellins referred to the two architectural drawings showing how the change will appear. She said they would like to increase the size of their garage three feet in width and make it a little taller so that there would be room to open car doors and have more than an inch clearance for the car roof rack. The garage has a few issues, a leaky roof, problems with joists and pitch of the floor. It is time to fix these issues and enlarge the garage to make it more practical. All the immediate neighbors understand and approve of the project.

Chairman Carver commented on the completeness of the package and that it included three positive letters from abutters. The three letters mitigate the noticing issue.

Chairman Carver noted there was no public present for comment. There was board discussion.

Chairman Carver moved to approve both the application to reconstruct the nonconforming garage and the variance to exceed the allowed maximum building

coverage by 0.02%. Mr. Wisniewski seconded. Discussion followed. All were in favor. Vote: 5 - 0.

Findings of Fact:

1. Chris and Scottie Wellins are the owners of record of the property located at 6 Stonybrook Road, Map U03, Lot 117.

2. The subject property is a nonconforming lot in the RC zone and it is connected to the public sewer.

3. The Zoning Ordinance Section 19-4-3 allows a Maximum Building Coverage of 25%.

4. The proposed reconstruction of the garage will create a maximum building coverage of 25.02%.

5. The proposed garage will increase in width by 3 feet.

6. The proposed garage will not further encroach into the front setback.

Additional Findings of Fact:

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

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

3. The practical difficulty is not the result of action taken by the applicant or a prior owner.

4. No other feasible alternative to a variance is available to the petitioner.

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

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

7. 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 relocation.

8. The proposed structure will not increase the nonconformity of the existing structure (as it relates to the setback requirements.)

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

Conclusion: There is no substantial departure from the intent of the Ordinance and a literal enforcement of the Ordinance would cause a practical difficulty as defined by 30-A.M.R.S.A. Sec. 4353, 4-C.

All were in favor of the Findings of Fact and Conclusion. Vote: 5 – 0.

F. Communications: None.

G. Adjournment: Mr. Vaillancourt moved to adjourn. All were in favor. Vote: 5 – 0. Chairman Carver adjourned the meeting at 8:17 p.m.