

Town of Cape Elizabeth
Minutes of the January 26,2016
Zoning Board of Appeals Meeting

Present

Josh Carver, Chair

Aaron Mosher

Michael Tadema-Weilandt

Matthew Caton

John Craford

Michael Vaillancourt

Code Enforcement Officer (CEO), Benjamin Mcdougal was also present.

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

B. Approval of Minutes: The minutes of the December 9, 2015 meeting were approved 5-0.

C. Old Business: none

D: New Business:

1. To hear the Administrative Appeal of Mary Otulakowski, owner of the property at 172 Two Lights Road, Map U15 Lot 5, of the Notice of Violation issued by the Code Enforcement Officer for using an accessory structure as a rental unit.

Matthew Caton recused himself since he knows both Ms. Otulakowski and Mr. Wagner.

CEO McDougal said this started last August when he was doing routine enforcement of the short term rental ordinance. He saw an advertisement on AirBNB for the subject property. He contacted the owner and said she cannot use the structure as a rental unit. She was persistent that she wanted to continue renting the unit. On AirBnB, a couple of months later, he discovered that she had rented the unit many times since our contact. He then issued a written notice of violation. Subsequently he met with the owner and Attorney Wagner. They came to no agreement on how to cure the violation. This use of an accessory structure is

not consistent with the home stay provisions of the Zoning Ordinance. The subject property is a nonconforming lot in the RA Zone. The lot is + or - 13,000 sq. ft. where the minimum lot size is 80,000 sq. ft. The structure is a 14 X 20 ft. accessory structure located a few feet to several feet from Two Lights Road. Until 2009 the Tax Assessor characterized the structure as a shed. The issue for him is: can an accessory structure be refinished and rented like a motel unit? The Zoning Ordinance requires that an accessory structure must be clearly incidental to the principal use of the property. The nightly rental of this former shed is clearly not incidental to the primary use of the property as a single family dwelling.

There was a discussion of whether this should be a de novo review or an appellate review, and CEO McDougal said the Town Attorney feels it should be an appellate review. In clarification it was said that the Zoning Board is only to consider the evidence that was there at the time of the decision, and not additional evidence.

Attorney Wagner said that any of the additional evidence, such as letters from neighbors is not relevant to the issue of law before us. He is in favor of a de novo review, but either way he believes the CEO made an error of law.

Attorney Wagner then began his presentation. He feels this is a simple case. The issue is whether pursuant to the home stay provision of the Cape Elizabeth Ordinance, Ms. Otulakowski can rent a bedroom in the additional living space that is accessory to the single family dwelling in which she resides. And whether the certificate of occupancy provided to the appellant by Bruce Smith would permit her to use it in a home stay capacity.

Mr. Wagner said he had several exhibits. First was the septic capacity. It was permitted in 2000 by both the former CEO and the state. The appellant specifically said it was for a sump pump to run plumbing up to septic. The permit was issued on September 11, 2009 giving the appellant permission to refinish the existing garage unit as an accessory structure, but not to be rented as a separate single family dwelling. We have already conceded that you can't have this as a separate single family dwelling. You cannot have two single family homes on that size lot. But you can have a home stay. As for the septic, the CEO at that time did not ask for a new septic permit in 2009. The reason he did not ask for one is that you are only required to get a new HHE-200 if there is an increased usage of the septic

system and current wastewater flow is equal to or less than the wastewater design flow at the time of the installation of the system.

At this point Mr. Tadema-Weilandt asked if Mr. McDougal had this at the time of his decision. It was decided that they would still discuss this information.

Mr. Wagner said the current use of the property is the appellant, her daughter and the one person who is renting the accessory structure. Three people, three bedrooms.

Mr. Chapman raised the issue that the CEO approved the accessory structure, but specifically stated that it was not to be rented out as a single family dwelling. The certificate of occupancy says it is not to be utilized as a rental unit.

Mr. Wagner repeated that the septic system was adequate to handle the current use. Both the Former CEO and the current CEO agree that an accessory unit can be used as a bedroom. Mr. McDougal has given permission for a property on Sunrise Drive to use a separate unit as a bedroom.

Mr. Chapman addressed the Property on Sunrise Drive and said the unit was a 12X12 ft. cube that was specifically designed to be used as a bedroom and no plumbing was allowed in the unit. The concern on the Board at that time was that it might be used as a rental unit. Exactly the opposite of the situation we have before us. This is a cottage and it is advertised as such.

Mr. Wagner said that the home stay permits the rental of one or two bedrooms. It uses the words bedrooms and it uses the words for rent. It uses the words for one or more nights. It does require that the home stay rental be operated by the person who permanently resides in the house. We have checked that box. It requires on site parking and we have checked that box. We have already taken down the advertisement as requested. What we are asking is to rent it out, pursuant to the occupancy permit, as a bedroom as part of a home stay arrangement. There is nothing in the ordinance to prohibit her from renting out the bedroom.

Mr. Craford said this is a cottage. It is not just a bedroom.

Mr. Vaillancourt asked if the current occupant has a lease.

Mr. Wagner replied that she does not have a lease.

Mr. Carver said the certificate of occupancy said it cannot to be a rental unit, but that is what it is being used as.

Mr. Wagner said he had advised the appellant to remove the refrigerator and the microwave so there are now no kitchen facilities. It is just used as a bedroom, and that is what they are asking for.

Mr. Tadema-Weilandt asked for some clarification of the process by which the former CEO decided not to ask for a new HHE-200.

Ms. Otulakowski came to the podium and said that the 2009 permit was to replace the plumbing and electrical that was already there. She said the way this cottage was explained to her was that it is dependent on the main house. You have to come into the main house to cook your meal, to do your laundry or to use the barbeque in the back yard. This is like a room in my home. It is a bedroom and a bathroom. It is rented as a room.

There was no public comment.

The Board discussed the language in the certificate of occupancy as specifically prohibiting use as a rental unit. They also were not discussing the use of the property after the notice of violation and what might be the future use of the property. They stayed with the notice of violation and what was present at that time.

The Board voted to uphold the Code Enforcement Officer's notice of violation dated November 9, 2015 by a vote of 5-0.

Findings of Fact:

1. November 9, 2015, the Code Enforcement Officer issued a Notice of Violation regarding the use of an accessory structure at 172 Two Lights Road, Map U15 Lot 5.
2. The subject lot is a nonconforming lot in the RA zone.

3. The current use of the property is *Single Family Dwelling*.
4. Building Permit #100117 was approved to refinish the interior of the garage for additional living space accessory to the single family dwelling.
5. The Certificate of Occupancy, dated March 1, 2011, states that the space “may now be occupied as additional living space accessory to the single family dwelling, cannot be utilized as a rental unit.”

The Findings of Fact were approved 5-0.

2. To hear the request of Daniel Buckley, owner of the property at 5 Orchard Road, Map U21 Lot 132, to reconstruct and expand a garage on his property based on Section 19-4-3.B.3 of the Zoning Ordinance.

CEO McDougal said Mr. Buckley wants to rebuild a garage which is only a few feet from his property line. He advised Mr. Buckley that he could rebuild the garage, but not expand it higher than the original garage. He says that anything higher than 5 feet above the ceiling joists would be a second floor, and not permitted in this case. Mr. Craford asked Mr. McDougal why the 5 ft. limit. Mr. McDougal said anything over 5 ft. would allow you to walk up there and he would call that usable floor area, which is not permitted in this case. Mr. Buckley wants to go to 8 ft.

Mr. Buckley came to the podium and said the garage had collapsed several years ago. Bruce Smith had told him the new one would be grandfathered if he put in a foundation, which he did. Now he wants a gambrel so he can walk around up there and not have to bend over when he stores things up there. He also gave several examples of neighboring garages.

Matthew Caton asked how he would get into the rafters. Mr. Buckley said he would use one of those pull down staircases. He was asked how tall his house is, and he said it has a second story on it.

Mr. Tadema-Weilandt asked if the garage would obstruct any views. The response was that there really isn't any view. Just the neighbors' houses.

CEO McDougal said he had one phone call from a neighbor, who had no objection. There was no other correspondence from neighbors.

There was no public comment.

The Board then considered the criteria for the approval.

The Board approved the request of Daniel Buckley, of 5 Orchard Road, Map U21 Lot 132, to replace and expand a 12 foot by 17 foot garage based on section 19-4-3.B.3 of the Zoning Ordinance by a vote of 6-0.

Findings of Fact:

1. This is a request of Daniel Buckley, of 5 Orchard Road, Map U21 Lot 132, to replace and expand a 12 foot by 17 foot garage based on section 19-4-3.B.3 of the Zoning Ordinance.
2. The subject lot is a nonconforming lot in the RC Zone.
3. A Zoning Board approval is required for because Mr. Buckley is adding second floor space to the structure.

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 relocation.
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.

The board voted 6-0 to approve the findings of fact.

3. To hear the request of Edward and Sybil McCarthy to reconstruct a nonconforming structure within 75 feet of the ocean at 13 Lawson Road, Map U8 Lot 41-A based on Section 19-4-4.B.3 of the Zoning Ordinance.

Stephen Mohr spoke on behalf of the McCarthys, He showed plats of the lot and the structures that are now on the lot. The parcel is in the RA Zone and the Shoreland Overlay Zone. This is one of the smallest lots in this 1939 subdivision. There are some small structures on that small (12,000 sq. ft.)lot. There is a terrace and a fireplace within 25 ft. of the water and a small cabana shed and another shed. The building sits within the side yard setback. There is a wetland edge and there are views to be protected. They are proposing a building that is smaller in square footage than the one they are replacing and that is further away from the sideline. The only comment they have had from a neighbor is that she would like the chimney to be 14 ft. instead of the proposed 15 ft. Mr. Mohr said he will go on record to say that if the project is approved they will lower the chimney to 14 ft. high.

The building is only meant as a place the McCarthys can go down and sit by the water. There will be no bathroom, no interior plumbing and no rental.

Mr. Mohr then talked about the criteria. He said the lot size is tiny and has almost no building envelope when you take all the setbacks into consideration. As for the slopes, this is sitting on the most level part of the land. They will follow the best management practices for erosion control. It was really the views that pushed us to where we are. We wanted to get out of the view corridors for the sake of the neighbors. He passed letters of approval from three of the abutters to the Board. He also addressed the concerns of some of the neighbors that the reason they are before the Board is to make this a buildable lot. For the record they have not tested soils on the back portion of the lot and they are not looking at the sewage etc.

Mr. Vaillancourt stated for the record that although he lived on Lawson Road at one time, he did not own a house there and is not biased in this case.

Mr. Mosher noted that they are decreasing the footprint and increasing the setback, so why are they here.

CEO McDougal said that anytime they have a demolition and rebuild within 75 ft. of the ocean, it brings them to the Zoning Board.

The Board then wanted to talk about the encroachment into the side setbacks. Mr. Mohr said they could have moved the building out of the setbacks but then they would be into the view corridor.

Mr. Carver then read from the Zoning Ordinance section 19-4-4.B.3, that says if the structure can be built to conform to the setbacks it must do so.

Mr. Mohr said it would then be in a view corridor, which is also one of the criteria.

After further discussion between the Board and Mr. Mohr it was suggested that the application be tabled so they could do a more thorough examination to determine if indeed they could rebuild the structure and conform to the setbacks.

Mrs. McCarthy spoke to the Board and said if they had to move the building, they would not want to do it. They would take away their neighbors' views. She was asking for clarification as to why they had to move the planned building. It was explained to her that within the Shoreland Zone they are not allowed to rebuild unless they cannot do so while maintaining the setbacks.

The Board voted 6-0 to table the application.

4. Election of a Chair and Secretary for a one year term.

Mr. Carver was nominated and elected to Chairman by a unanimous vote.

Mr. Tadema-Weilandt was nominated and elected Secretary by a unanimous vote.

The board adjourned at 9:08 p.m.

Respectfully submitted,

Hiromi Dolliver

Recording Secretary