

Town of Cape Elizabeth
Minutes of the March 22, 2016
Zoning Board of Appeals Meeting

Present:

Josh Carver
Michael Tadema-Wielandt

Matthew Caton

Aaron Mosher

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: Approval of the minutes for February 23, 2016, was tabled until the next meeting.

C. Old Business: None.

D. New Business: To hear the request of Scott and Cheryl Joys, owner of the property at 10 Star Road, Map U22 Lot 7, for a variance to Section 19-6-3.E of the Zoning Ordinance. A two-story house addition that was permitted and constructed in 2003 is now found to be 15.5 feet from the front property line while the Zoning Ordinance requires the addition to be 20 feet.

Scott Joys came to the podium and stated the addition was permitted on April 1, 2003. In January of that year they started looking at hiring contractors, their second son was to be born two months later, the home wasn't big enough so they wanted to expand it. We decided we could not afford the contractors, they were asking \$120 - \$130,000 which was outside of their budget. So he contracted local people. He spoke with Peter Palanza, of Cape Cottage Homes, who helped him draft plans that would be aesthetically pleasing to the neighborhood. They decided to put the Farmer's Porch on the front of the house to blend in the addition – it was an afterthought that Peter mentioned, which appealed to us at the time. Unfortunately, that is why we are here today because it ended up bringing the house forward further than we needed.

Peter came out and did the measurement of the property. A formal site survey was not done. They did find a monument pin at the front of the property that was about three feet from the road. Mr. Joys would like to show the board that pin; however, the telephone pole in front of the house was knocked down about ten years ago. When they pulled the pole out the pin came out with it.

When we sent the permit in Bruce Smith, the prior Code Enforcement Officer, came out to the house to visit. He walked the property line and took measurements. Mr. Joys told Mr. Smith at that time he would be general contracting this himself. The only question Mr. Smith asked was in reference to the right side setback on the property toward neighbors at 14 Star Road. We checked the measurement several times and were confident we would be about 12 feet back, which worked out well with the site survey and is well within limits on the right side. The front setback never come up in

the conversation. We were 24' 6" back from the road at that point in time. We saw that monument pin and thought we were in pretty good shape. Bruce had never mentioned the front setback as a concern. We completed the addition. Additional measures were taken after the foundation was laid. In October 2003, it was permitted and we pushed through. We have been living there ever since. Earlier this year, in March, we entered into a purchase and sale agreement. When a real estate survey was done they found the home to be 14 feet from the road. Mr. Joys said he was confounded by that information, he believed they were 24 feet from the road.

Mr. Joys called CEO McDougal who came over and told him he would have to get a survey done. So we purchased a certified land survey. It determined the house was 15.5 feet from the front property line. We are still 23' 10" away from the road, there is a 9-foot setback from the road that we never anticipated. Surveys of other houses on the street show only three and four foot setbacks. Mr. Joys didn't know why his property would be so different, but it is. The CEO suggested going to the ZBA for an after effect variance. Mr. Joys stated he knows this is rare. He looked over 20 years of minutes and only found a couple of examples (he has copies). The Zoning Ordinance was amended this year to require a survey for someone building an addition in excess of \$10,000 and within five feet of a setback.

Mr. Joys stated that would have been easier. They have incurred expenses getting the survey done and consulting with an attorney; they have lost the purchase and sale agreement. They are purchasing another home, which puts them in the awkward situation of having two mortgages. He has reached out to his neighbors. Many were in attendance. He said their support means a lot. Mr. Joys said he did not know of any negative comments, everyone was in support. In the attachments to the package there are homes that are closer to the road on the same street. They were built that way a long time ago, so it's not the same thing. It's not out of character for the neighborhood. This is not a home that stands out; it is very similar to multiple homes within six to seven houses to his home. It is very similar to homes in the area.

Mr. Joys asked for the board's help. He never intended for this situation to happen.

In response to board members questions Mr. Joys discussed that the addition was built 24' 6" from the road as per the original application blueprint. The CEO explained the blueprint to the board. Mr. McDougal stated that they most likely assumed that the edge of the pavement was the property line when they did the site plan. At the time an actual site survey was not required; it is now. The Town Council asked for the Ordinance change due to other instances similar to this.

The position of the front monument pin, which was in line with the back pin and along the fence line, was about 3' 6" back from the road. It was within inches of the telephone pole that has been replaced. Using that marker, they would be in compliance of the 20-foot setback. Mr. Joys mentioned the difference of the setback on the purchase survey of the house across the street. He doesn't know why his property's setback is so different.

Mr. Joys didn't know how the lender survey determined the front property line. He thought that maybe they went from the back property line forward. They gave him a rudimentary drawing; Mr. Joys gave a copy to Mr. McDougal. The Joys were skeptical of the angles shown on that drawing.

The Joys were living at the home in 1999 when they purchased it from his mother-in-law. It was not surveyed at that time.

Peter Palanza, of Cape Cottage Homes, who passed away about 16 months ago, help draft the plans for the addition. Mr. Joys wished to place no blame on Mr. Palanza.

Mr. Joys responded to questions about the frequency of the CEO's visits to the site. Bruce Smith went to the property prior to permitting, before and after the foundation being poured, at framing, when we did the electrical and plumbing (a pressure test was done) and for the Certificate of Occupancy – so at least four times. On October 20, 2003, Mr. Smith walked through with Matt Sturgis, the Assessor, asked a few questions and signed the certificate.

Mr. Smith came by the property again in 2004 or 2005 when they received a permit for an above ground pool.

Chairman Carver asked for public comment.

Tom Emery, 12 Juniper Lane, came to the podium. He stated he is not an immediate abutter and doesn't live on the same street. He served on the Planning Board for nine years. Based on his years in design he said the house fits into the neighborhood. He commented the original plan's 24' 6" setback and that 4'6" was lost when they added the porch. He asked if the original plan showed both the front property line and the edge of pavement. Mr. McDougal replied it showed only one polygon/square of the property. Mr. Emery stated he was not here to oppose this; but based on his experience he cannot support it. He asked the board to be very clear what standards they have to meet in terms of finding a hardship or being able to grant a variance in this situation. He also thought it would be helpful if the board could speak to what responsibilities, if any, the prior CEO had in terms signing off on the foundation. He wished the applicant good luck.

Marcia Corrandini , 36 Murray Drive, on the corner of Star, about three houses away from the Joys, stated the house fits into the neighborhood, it does not look awkward with the farmer's porch or the garage addition. In fact it brings the house into conformance with more homes in the neighborhood; a lot of homes have been renovated – all of them have been improvements. She said it is easy to take the edge of the road as the property line because you maintain it. Many would be surprised to find the property line is in their lawn. She had no qualms about the board granting the Joys a variance.

Chairman Carver closed for floor to public comment.

The board discussed standard procedures of the CEO with Mr. McDougal. CEO McDougal said the prior CEO carried out his duties appropriately; we rarely know where property lines are when we're out doing inspections. The side setback was within 6" of being legal, so he keyed into that. While the front showed 24'6" it appeared not to be a problem. Among the courses of action, should the board deny this request, would be to petition the Town Council for relief.

In response to questions, Mr. McDougal said the 2001 Ordinance said the front setback was 20 feet from a local or private street. The blueprint dated April 4, 2003, was in the office files. To prevent these situations from happening, Section 19-3-3.C.1 (page 29) was updated around 2013.

The board discussed "The practical difficulty is not the result of action taken by the applicant or a prior owner." language of the Ordinance and how CEOs rely on the applications to be correct.

Chairman Carver reopened the floor for additional comments from Mr. Joys.

Mr. Joys gave board members copies of minutes of October 24, 2006 ZBA meeting, a precedence case (which the board found to be different from tonight's) and a memo dated August 12, 2012, from Maureen O'Meara in support of a zoning amendment for the survey requirement.

The floor was closed and board discussion continued. The board could not find a variance option in the Ordinance for this situation. A possible remedy would be for the applicants to petition the Town Council.

Mr. Tadema-Wielandt moved to deny the request of Scott and Cheryl Joys, for a variance of a two-story addition constructed in 2003 at 10 Star Road, Map U22 Lot 7. Mr. Mosher seconded. All were in favor. Vote: 4 – 0.

Findings of Fact:

1. Scott and Cheryl Joys are the owners of the property located at 10 Star Road, Map U22 Lot 7.
2. The subject property is a nonconforming lot in the RC Zone.
3. The Zoning Ordinance Section 19-6-3.E requires the front setback to be 20 feet.
4. Scott Joys applied for a permit and it was approved to construct a two-story addition 24' 6" from the front property line.
5. The addition received a certificate of occupancy on October 20, 2003.
6. A recent survey shows that the addition is 15' 6" from the front property line.

All were in favor of the Findings of Fact. Vote 4 – 0.

Chairman Carver commented that the language of the Ordinance put the board in this position. This is exactly the type of situation addressed in the memo of August 7, 2012, which led to the revision of the Zoning Ordinance. This would be appropriate for a decree from the Town Council. CEO McDougal mentioned a Superior Court option as well and suggested additional findings.

Mr. Caton made a motion to reopen the discussion for additional findings of fact. It was seconded. All were in favor. Vote 4 – 0.

Additional Findings of Fact:

1. There is a need for a variance due to the unique circumstances of the application before the board and not for 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 unreasonable detrimentally affect the use of market value of abutting properties.
3. The granting of a variance will not unreasonably adversely affect the natural environment.
4. The property is not located in whole or in part within Shoreland areas as described in Title 38, Section 435.

All were in favor the Additional Findings of Fact; Vote 4 – 0.

F. Adjournment: Mr. Tadema-Wielandt moved to adjourn; it was seconded. All were in favor. Vote: 4 – 0. Chairman Carver adjourned the meeting at 8:27 p.m.