

Town of Cape Elizabeth  
Minutes of the July 25, 2017  
Zoning Board of Appeals Meeting

Present:

Josh Carver  
Aaron Mosher

Matthew Caton  
Michael Tadema-Wielandt

John Craford

The Code Enforcement Officer (CEO), Benjamin McDougal, and Recording Secretary, Carmen Weatherbie, were also present.

**A. Call to Order:** With a quorum present, Chairman Carver called the meeting to order at 7:02 p.m.

**B. Approval of Minutes:**

1. Approval of the minutes of May 23, 2017, was tabled until the next meeting.
2. Approval of the minutes of June 27, 2017, was tabled until the next meeting.

**C. Old Business:** None.

**D. New Business:**

1. To hear the request of Ethan Rhile, owner of 1035 Sawyer Road, Map U47 Lot 12, to replace and expand a portion of the existing nonconforming structure on the property based on Section 19-4-3.B.4.

Ethan Rhile identified himself as a professional engineer. He stated that the portion of the house he would like to replace and expand was originally the woodshed and is now being used as the laundry room. There is current no foundation in this area; the plan is to have a crawl space. An existing wood deck is to be removed and access to the crawl space placed there.

Responding to board members' questions, Mr. Rhile stated he is keeping the same footprint – unmodified – and going up to two stories. First floor will be a new kitchen and the second floor a bathroom. Mr. Rhile explained the proposed preferred and alternate locations for the crawl space entrance.

There was no public comment. CEO McDougal did not receive any correspondence relating to this request.

Board members concurred the application was in good order. Mr. Tadema-Wielandt moved to approve the request of Ethan Rhile to replace and expand a nonconforming portion of his house based on Section 19-4-3.B.4. of the Zoning Ordinance. Mr. Mosher seconded. All were in favor. Vote: 5 to 0.

**Findings of Fact:**

1. Ethan Rhile is the owner of record of the property at 1035 Sawyer Road, May U47 Lot 12.
2. The subject lot is a nonconforming lot in the RA Zone.

**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 soil suitable for septic systems, the impact on views, and the type and amount of vegetation to be removed to accomplish the expansion.
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 and Additional Findings of Fact. Vote: 5 – 0.

**D. New Business cont'd:**

2. To hear the request of Lucas Holden, who is under contract to purchase the property at 45 Alewife Cove, Map R3-1 Lot 3-A-1, to replace and expand the existing nonconforming structures on the property based on Section 19-4-4.B.3.

Chairman Carver asked CEO McDougal for a summary. Mr. McDougal stated this property is very complex and complicated, as it is in an area that has archaeological resource potential as identified in the Comprehensive Plan because it is within two hundred fifty (250) feet of Alewife Brook and it is also in the Shoreland Performance Overlay District because it is within two hundred fifty (250) feet of the ocean. Per Ordinance Section 19-4-4.B.3. the Zoning Board must determine if the reconstruction/ replacement meets the setback requirements to the greatest practical extent possible. Currently this is a seasonal home that maybe reconstructed as a year-round home. Due to the location of this parcel of land the Zoning Ordinance states the town can't issue permits until an historical review has been done. Mr. McDougal said he contacted Arthur Spiess, Senior Archaeologist at the Maine Historic Preservation Commission in Augusta. Mr. Spiess concurred that the Zoning Board of Appeals (ZBA) can adapt a condition on approval based on certain language, which the CEO read. The ZBA could hear the application concerning where the house could be rebuilt to meet the setback requirements to the greatest practical extent.

Mr. McDougal discussed possible requirements with board members and answered their questions as follows: Depending upon what is found in an historical review there might be a requirement to have building oversight by a licensed archaeologist. There may need to be a negotiation between the landowners and the Maine Historic Preservation Commission (MHPC). All provisions of the Zoning Ordinance apply. This application made no mention of historic preservation requirements. A letter was submitted to MHPC on July 19, 2017.

Chairman Carver cited a paragraph in Attorney Mary Costigan's (Bernstein, Shur) letter that refers to Cape Elizabeth Zoning Ordinance Section 19-8-6, which states:

“No activity which disturbs the ground such as trenching, grading, or excavating shall be commenced and *no municipal permit or approval shall be issued* within any of the following archaeological resource potential areas until the Maine Historic Preservation Commission has been notified of the nature of the proposed activity in writing by the owner of the property, a copy of the notice is provided to the Code Enforcement Officer, and a reconnaissance level archaeological survey is conducted, unless the Maine Historic Preservation Commission notifies the owner in writing that such a survey will not be needed.”

Chairman Carver questioned the board: Can we get to the application or can we get to this issue at all without MHPC review. It was decided to hear to statements from the parties gathered then decide if the board could move forward.

Attorney Natalie Burns with Jensen Baird Gardner and Henry, representing Lucas Holden, said that the language in Attorney Costigan's letter states that this board can't grant an approval unless work has been done or there was a communication from the MHPC. The board has something in between because the MHPC has said that the board can hear this tonight and it (MHPC) will determine if additional work is required. She believes that is what the Ordinance requires for this particular application. This is not an undeveloped site; the house was built there years ago, so resources would have been impacted in the past and the likelihood of finding anything further is relatively low. Therefore the applicant is willing to go ahead with conditional approval. Ms. Burns said the applicant has contacted MHPC in writing.

John Mitchel from Mitchell Associates said as soon as he found out about this requirement, he initiated contact with MHPC. That was last week. They responded the same day the FedEx package was delivered. The following day MHPC said they would do an archeological survey, which we agreed to do.

Chairman Carver quoted Zoning Ordinance Section 19-8-6 again. Mr. Mitchel concurred with the Chair that MHPC has not notified the owner in writing that such a survey is not needed. The Chair didn't see how the ZBA could move forward given the language of the Ordinance. Mr. McDougal was copied on the MHPC email. Chairman Carver said the board must follow the Cape Elizabeth Zoning Ordinance and therefore

cannot move forward at this time. Mr. Mitchell said an archaeological survey could take weeks. Mr. Mitchell thought that their action thus far met the requirements. Mr. Craford commented that an archaeological survey, since this is an historical site, might possibly find something that could affect what they could do on the site. Isn't that the object of the survey?

Chairman Carver said the order of sequence of events it is very clearly spelled out in the Ordinance. The ZBA does not have the leeway to go outside the Ordinance when the language of the Ordinance is very clear. Mr. Mitchell said that was unfortunate since a whole team of consultants was there. They would like to present their work to the board.

Chairman Carver opened the floor for public comment pertaining only to Section 19-8-6.

Marilyn Kristiansen of 40 Alewife Cove Road said Professor Nathan Hamilton of USM, has done a lot of work in Alewife Cove. He can confirm this is a site of significance. Ms. Kristiansen commented that MHPC has not said an archaeological survey was not needed and she believes it very much will be needed and is worth waiting for.

Nathan Hamilton, a Professor Archeology at the Muskie School of Public Service, said he had identified 523 historic sites in Casco Bay. He was the one who excavated the site on the adjacent piece of property in 1988. He stated he was here on behalf of the Ready's, who had owned the archaeological site beside this parcel, and as an expert witness relative to the archaeology. He spoke with Arthur Spiess this afternoon. Professor Hamilton's concern is that the adjacent property is significant as a deed stratifying prehistoric site based on a survey grant provided MHPC in 1988. We have continued to work on the adjacent property and marsh with the archeology class through 2015. The concern is with the subsurface construction, the foundation and the septic system that may impact an existing site. When the Ready's owned the adjacent site, we found a site that would be easily eligible for the National Register of Historic Places but we only tested up to the original property line of the property the board is looking at today. The owner of the property must consult with MHPC. Professor Hamilton stated he had done 159 contracts for limited testing and monitoring in areas where foundations and septic tanks are placed; that's where we need to look.

John McLellan of 35 Alewife Cove, asked Why rush? He advised to slow down and do it right.

Fred Ready, owner of Lot 2 on Old Mill Road, which is adjacent property just across the brook, said he was fortunate to work on the site with Nathan Hamilton 20 plus years ago. He quoted a requirement from the Cape Elizabeth Ordinance, Section 19-8-2.O.1. (below) and asked if that had been done.

"Any proposed land use activity involving structural development or soil disturbance on or adjacent to sites listed on, or eligible to be listed on the National Register of Historic Places, as determined by the permitting

authority shall be submitted by the applicant to the Maine Historic Preservation Commission for review and comment, at least twenty (20) days prior to action being taken by the permitting authority.”

Mr. Ready stated this property is adjacent to a site eligible for the National Register of Historic Places. He read Section 19-8-6 regarding “*no municipal permit or approval shall be issued* within any of the following archaeological resource potential areas until” MHPC can determine if a survey is necessary. He reminded the board that they were there to uphold the Cape Elizabeth Ordinance and to ensure procedures were adhered to.

John Mitchell questioned whether this site was adjacent to the Ready’s. He believed there was a lot in between. CEO McDougal informed Mr. Mitchell that the Ready’s were the previous owners of the Vick property.

Frank Strout, Realtor for Allen Murray, owner of the property, asked what should Mr. Murray do to clear this site so that it may be sold or transferred or so that he can do something with it himself. Does Mr. Murray have to ask to have this site reviewed?

Chairman Carver replied he was not certain, at this point, how the board was going to proceed. Ordinarily when there is an issue that prevents the board from proceeding, the applicant is given the opportunity to withdraw the request or the board denies the request if it does not comply with the Ordinance. The chair did note the language of the Ordinance requires the owner of the property to make the request to MHPC.

Albert Frick, Site Evaluator and Soil Scientist for this project, had comments concerning the amount of soil that would be disturbed. He explained they propose using the existing chamber system for the leach bed, which is ready in the ground and has been there since 1989, which John Malley designed. We propose to use the existing pump line and pump station. The existing septic tank will be removed and a treatment unit would be placed essentially in the same location. The existing tank is 5’ X 8’ and new tank is slightly larger by a few feet. For the most part the soil disturbance would be minimal for the septic system. The existing dwelling is going into the same foundation footprint.

Mark Mueller, Architect, stated that currently there was a concrete/masonry unit (cinder block) foundation. Although the basement has a height of seven feet, there is no basement floor other than a dirt floor.

There was discussion about direction of information to be heard.

John McLellan stated that house was on a foundation the current garage was on posts and had not been excavated.

Marilyn Kristiansen pointed out that on the plans the garage is to be removed and become part of the house. There was discussion about the amount of disturbance to accomplish this.

John Ready, Jr. said he found the original site and noted the new septic system according to the plans will be in a completely different location from the existing one.

Attorney Burns wanted to discuss the language of the Ordinance and what was going to happen. Ms. Burns said MHPC has been notified and they responded. She was not sure this ZBA had ever told someone they had to wait six months for an archeological survey and then come back; that is too long to wait. A conditional approval could be given and revised if necessary. She didn't think waiting was the intent of the Ordinance. The CEO has spoken with the MHPC. This could move forward with the full understanding that no building permits would be granted or work done on site until it is determined if a survey is required. She asked the board to move forward.

Chairman Carver closed the floor to public discussion.

Chairman Carver stated that Section 19-8-6.A.1. is written in clear language. Certain steps have to be taken prior to approval and those steps have not been taken. The applicant must wait anyway. There are a number of requirements in the Ordinance. Mr. Caton remarked there would be no new disturbance since a house is already there and the septic system is about the same size. Waiting is a burden on the homeowner. The dirt floor is a complex issue.

The CEO commented the board had to find that the setbacks were met to the greatest practical extent. There was additional board discussion around that point. Mr. Craford said there is a sequence to be followed, that all the experts missed in the statutes. The Chair said things could be discovered that might change how to proceed. He recognized the time of the participants as valuable. Several board members felt that even a conditional approval is still an approval and were concerned about setting a bad precedent.

After lengthy discussion, the Chair took a poll on whether to move forward: 2 were in favor of moving forward, 3 were opposed.

Mr. Caton asked CEO McDougal if Mr. Spiess was aware of the specific sections of the Cape Elizabeth Ordinance that related to this matter. Mr. McDougal stated specific sections of the Ordinance were not referred to or discussed.

Mr. Mosher moved to table, until all Ordinance criteria are met, the request of Lucas Holden, who is under contract to purchase the subject property, to reconstruct and expand a nonconforming single family dwelling at 45 Alewife Cove, Map R3-1 Lot 3-A-1, based on Section 19-4-4.B.3. of the Zoning Ordinance. Mr. Craford seconded. Vote: 3 in favor, 2 opposed.

**E. Communications:** None.

**F. Adjournment:** Chairman Carver adjourned the meeting at 8:29 p.m.