

Town of Cape Elizabeth
Minutes of the December 26, 2017
Zoning Board of Appeals Meeting

Present:

Josh Carver Matthew Caton Aaron Mosher
Michael Vaillancourt

The Code Enforcement Officer (CEO), Benjamin McDougal, and Recording Secretary, Glynis O'Meara, were also present.

A. Call to Order: Chairman Carver called the meeting to order at 12:00 p.m.

B. Old Business: None.

C. New Business: To hear the Superior Court remand of 5 Birch Knolls, Map U05 Lot 15, originally heard at the Zoning Board meeting on May 23, 2017.

Town Attorney John Wall, in response to a request by the chair, gave a summary of the purpose of the meeting. He stated that the decision made by the board at the May 23rd meeting had been appealed to the Superior Court, and sent back to the board with a remand for the board to make more explicit findings. Mr. Wall clarified that all new findings should be based on the evidence previously provided at the May meeting.

The Chair stated that all members present had also been present for the May 23rd meeting in question, and a quorum was present. The Chair opened discussion of factual findings.

Mr. Vaillancourt proposed reading through and editing where necessary the proposed findings submitted to Mr. Wall for consideration by the board by David Kallin, an attorney for the owners of the property in question. There being no objections, chairman Carver commenced reading the proposed findings.

There were no objections made to proposed findings one through eight.

The board found 9.a acceptable. Issue was taken with 9.b because the use of adjectives implied advocacy rather than basic fact, and upon suggestion by Mr. Caton, the word “drastically” was stricken.

Similar changes were made to remove bias from 9.c; the word “unnecessary” was stricken and the phrase “an immense amount of fill” was changed to “the use of fill” in sentence one; and the word “far” was stricken and the word “minimizing” was replaced with “lessening the” in sentence 3.

The wording of 9.d was changed to ensure that all the information in the findings matched what was presented at the May 23rd meeting; the word “every” and the phrase “actually projecting less toward the water than many of the other dwellings” were stricken from sentence one; and the first half of the second sentence was changed to read “Relocating the structure would obstruct the views of the immediately adjacent abutter...”.

Proposed finding 9.e was found acceptable. Discussion was had on the necessity and clarity of the information in 9.f, and the following changes were made. The sentence “The board has considered the impact on views which is incorporated into section 19-4-4 B.3 by reference to the criteria set forth in 19-4-4 B.2, which includes impact on views.” was added to the beginning of the section. In the now second sentence, the phrase “Ken Piper at 3 Birch Knolls,” was inserted between the phrases “would obstruct the view of” and “the abutter adjacent.” The final sentence was changed to read “The new roofline will change the views of the rear abutters, including the condo owners, located over 200’ feet away from the ocean. However, the impact on the rear abutter’s views will be less than the impact on the abutter adjacent to the proposed dwelling, Ken Piper at 3 Birch Knolls,” with everything not included within that stricken.

Mr. Caton raised a concern that there was not enough clarity in the findings regarding the criteria the board was using to consider height. The following sentence was added to proposed finding six; “The board considered the applicable sections in the zoning ordinance

relating to height (19-6-11(e)(2), the shoreland performance overlay district, and 19-6-3(e)(2), the RC district)".

The rest of proposed finding 9 was found acceptable.

Proposed findings 10 through 13 were found acceptable.

The chair began to read the proposed Conclusions of Law, and stopped with questions of their necessity. A conclusion was reached by the board that as the Superior Court remand only requested more specific findings of fact, the proposed Conclusions of Law were not needed.

Mr. Wall was asked by the board if they had met the request of the court remand, and answered that they had, should they accept their modified findings of fact.

Bill Dale asked the board if they planned to ignore his prior arguments regarding the statute of height? The board answered that their sole purpose at that meeting was addressing the court remand, and Mr. Caton clarified that they were only there to supplement previous findings of fact, and not to modify any decisions made by the board.

Mr. Caton moved that the board accept the modified findings that the board has discussed earlier that morning that supplement the findings of fact from the May 23rd 2017 meeting, and as a part of that to not change any legal result from the May meeting.

Additional Findings:

1. This is the application of Alan and Mara DeGeorge to demolish and then re-construct a single family house at 5 Birch Knolls Road (Town Tax Map U05; Lot 15). The application is brought under Zoning Ordinance § 19-4-4.B.3 (Reconstruction or Replacement in the Shoreland Performance Overlay Zone) which also permits expansions of 30% or less pursuant to 19-4-4.B.1.
2. The lot is located in both the RC and the Shoreland Performance Overlay Zoning Districts. The former structure

was constructed around 1900 and is nonconforming as to sideline setbacks on the southeast and northwest sides, and nonconforming as to the water setback on the northeast. The lot is nonconforming as to size and maximum lot coverage.

3. Demolition of the entire structure would result in the structure being destroyed by the applicant by more than 50% of the market value of the structure before such demolition.
4. The replacement structure will be in the same location as the former structure and is entirely within 75' of the high-water mark of the Atlantic Ocean, as shown by the measurements on the plan labeled "Site Plan" for Alan and Mara DeGeorge prepared by Northeast Civil Solutions dated 5-18-17 (hereafter the "Site Plan").
5. The replacement structure will result in a building floor area increase of 16.69%, a building volume increase of 5.5% from what existed as of January 1, 1989 as detailed on the applicant's application form and further shown on the attachments including the table labeled "Lot Calculations" on the Site Plan.
6. The height and dimensions of the proposed structure are shown on the scale drawings prepared by Kevin Brown Architects labeled DeGeorge Residence, sheets A1.0, A1.1, A1.2, A2.1, A2.2, A3.1, A3.2, S1.1, S1.2, S2.1. As shown on those drawings, the height of the proposed structure is in excess of thirty feet (30') but does not exceed thirty five feet (35'). The board considered the applicable sections in the zoning ordinance relating to height (19-6-11(e)(2), the shoreland performance overlay district, and 19-6-3(e)(2), the RC district)
7. Testimony of abutters to the project included the following:
 - a. Ken Piper of 3 Birch Knolls, the abutter to the back end of the building, testified that moving the house back would annihilate their view and have a huge negative impact on the value of their home.

- b. Nancy Morino, 4 Birch Knolls, has lived there since 1986 and testified that their view has been the funny little house on the corner that had been a mess and was a hazard that should have been torn down a while ago. She approves of their design and hopes it goes forward.
 - c. The Cape Shore House Condominiums on Shore Road owns abutting property at Town Tax Map U05; Lot 15, and participated in the hearing through its attorney, Bill Dale, and its representative Constance Jordan. Their primary objection was the impact on their view caused by the change in height from the old structure to the new structure. Their arguments included statements that: “[The applicants] are not entitled to make [the house] one story taller.”; “If the building were rebuilt as it is, as the basement, the first and second floors, rather than adding the third floor as well, it wouldn’t block our view, and we’re sort of indifferent...”; and “What has not been said here tonight is, while the DeGeorges may have a good plan to replace the house that was there, they don’t necessarily have a good plan to add an additional story. They’re not entitled to add an additional story. They may be entitled, depending on your perspective, to fix up this one and, and indeed, as their application suggests, tear it down and replace it completely. But ... not to add a third story on top.”
8. The Board has considered the size of the lot, the slope of the land, the potential for soil erosion, the location of the structure 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, the type and amount of vegetation to be removed, and the type of foundation present.
9. In considering these factors, including the information provided by the applicant on its application form with attachments, the Board finds as follows:

- a. **The size of the lot:** the locus parcel is a 5,397 Square Foot “L-Shaped” Lot. The proposed dwelling will be located within the same footprint of the existing structure.
- b. **The slope of the land:** the slope of the land features a 17’ drop in elevation from the southwest lot line to the high water line, relocating the structure behind the 75’ water setback would cause the structure to be 10’ higher in elevation, and it would rise higher than the surrounding dwellings causing harm to the character of the neighborhood.
- c. **The potential for soil erosion:** relocating the proposed dwelling would result in blasting and the use of fill to fill the existing foundation. This may cause erosion due to loose fill in close proximity to the water. The proposed dwelling to be located on the existing footprint would be far less disruptive to the site, lessening the risk of erosion.
- d. **The location of the structure on the property and on adjacent properties:** The former structure was in line with other structures along the beach. Relocating the structure would obstruct the views of the immediately adjacent abutter, eliminating his view toward the grassed area of the locus parcel
- e. **The location of the septic system and other on-site soils suitable for septic systems:** The property is served by public water and sewer so no septic system exists on site. However, all existing utility lines serving the house in its current location can be reutilized if the reconstructed house remains in its current footprint. Relocating the house would result in additional excavation to relocate utilities.
- f. **The impact on views:** The board has considered the impact on views which is incorporated into section 19-4-4 B.3 by reference to the criteria set forth in 19-4-4 B.2, which includes impact on views. The relocation of the proposed structure outside the 75’ setback would obstruct

the views of Ken Piper at 3 Birch Knolls, the abutter adjacent to the proposed dwelling. The relocation would cause the dwelling to increase 10' in height, ultimately obstructing the views of the dwelling behind the parcel as well. The current location preserves view for abutters to the greatest extent possible. The proposed expansion of 16.69% floor area and 5.47% in volume would cause approximately one half of the roofline to rise 7 feet above the former height of the structure. The proposed height of this half of the roofline is less than the maximum building height of 35 feet provided by the Zoning Ordinance § 19-6-11(e)(2). The new roofline will change the views of the rear abutters, including the condo owners, located over 200' feet away from the ocean. However, the impact on the rear abutter's views will be less than the impact on the abutter adjacent to the proposed dwelling, Ken Piper at 3 Birch Knolls.

- g. The type and amount of vegetation to be removed:** Relocation of the proposed dwelling would result in almost 100% of the vegetation on the site to be impacted. Due to the amount of disturbance from blasting and fill, virtually all vegetation around the perimeter of the property would be removed. Reconstructing in the same footprint will minimize the removal of vegetation.
 - h. The type of foundation present:** The existing structure has a concrete full foundation that is cracked and dilapidated in spots. Due to the small size and shape of the existing lot, proper repair and replacement of that foundation could not safely be performed without demolition of the former structure. The replacement foundation will not extend beyond the exterior dimensions of the old foundation and will be at the same height as the old foundation.
10. The proposed structure will not increase the nonconformity of the existing structure.

11. The proposed structure is in compliance with the waterbody setback requirement to the greatest practical extent.
12. The total amount of floor area and volume of the original structure cannot be relocated beyond the waterbody setback requirement for a new structure.
13. Designs and information shown on the above-referenced submissions of the applicant are incorporated in these findings of fact.
14. The application meets the Zoning Ordinance requirements of section 19-4-4.B.3 (Added per discussion)

Mr. Mosher seconded. Vote: 4-0 in favor.

Mr. Wall suggested that the proper procedure for the board, having accepted these findings, would be to notify the applicant and all interested parties in writing of the conclusions reached by the board. The CEO will do this.

The board discussed how the new findings would relate to the old findings. Mr. Wall suggested not striking the May 23rd findings of fact, and instead adding the new findings in supplement to the old findings.

Mr. Caton motioned to separate the findings of fact to reflect the two hearing dates and the findings thereof. Mr. Vaillancourt seconded. Vote: 4-0 in favor.

David Kallin, attorney for the applicant, made a point of order requesting that a decision be issued in writing by the board stating that the application in question meets the requirements of the ordinance.

Mr. Caton motioned to include the following sentence as paragraph 14 of the findings of fact: "the application meets the Zoning Ordinance requirements of section 19-4-4.B.3"

Mr. Vaillancourt seconded. Vote: 4-0

D. Adjournment: With no further business to conduct, the chair adjourned the meeting at 1:11 p.m.