

Town of Cape Elizabeth
Minutes of the June 26, 2018
Zoning Board of Appeals Meeting

Present:

Matthew Caton
Aaron Mosher

John Craford
Michael Tadema-Wielandt

Kevin Justh

Timothy Lunney
Michael Vaillancourt

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

A. Call to Order: Chair Michael Vaillancourt, called the meeting to order at 7:00 p.m.

B. Approval of Minutes: As there were a few blanks to fill in (missing names from video transcription), Mr. Lunney moved to table the minutes of May 22, 2018, until the next meeting; seconded by Mr. Mosher. All were in favor. Vote: 7 – 0.

C. Old Business: None.

D. New Business:

Agenda Item 1. To hear the Administrative Appeal of Phil Kean and Brad Grosberg, owners of the property at 2 Garden Circle (Map U5 Lot 43), regarding the Code Enforcement Officer's decision not to allow the expansion of a deck.

Chairman Vaillancourt asked the CEO to review this request. Mr. McDougal said Mr. Kean asked about expanding the deck on the ocean side of his house at 2 Garden Circle. The CEO explained that Shoreland Zoning was pretty limiting and the deck would not meet the 75 feet setback to the ocean so it didn't seem possible. When Mr. Kean asked about his different avenues of relief with the Zoning Board, the CEO explained the variance procedure and the administrative appeal procedure. Mr. Kean decided to file an administrative appeal to get a zoning interpretation on whether his proposal constitutes a structure from the Zoning Board.

Phil Kean stated that when Mr. McDougal said he couldn't expand the deck, he came up with the idea of arranging tables so that the surface could be used like a deck, but still be tables. The CEO told him that arrangement would be considered a structure. Mr. Kean looked at the definitions of furniture and structures. Separately they would be tables; however, when put together they become something different. This deck would be sitting on an existing pervious patio that has been there since the house was built so it wouldn't be encroaching but would make better use of the yard.

Mr. Kean explained they have aging parents who visit and he would like to make it more useable for his mother who cannot walk up and down stairs, so that she could walk out directly from the living area. Recently they added an elevator and a ramp in the garage for accessibility. Mr. Kean stated he thought this hinged on the interpretation of the use

of the tables, whether they are furniture or a structure. The tables could be moved into the garage when not being used and put out when needed for an expanded deck area. Currently the deck is fairly small; it holds a table and a couple of chairs. He said that if it weren't in the setback, it wouldn't be an issue at all; he could put patio furniture or Adirondack chairs in the yard. It's just the interpretation of whether it is a violation of the code or something that could be done, especially since it is all movable, all temporary. Even though the CEO said it couldn't be done, Mr. Kean thinks it's a brilliant idea that would make the beautiful view more accessible for his family.

A board member questioned Mr. Kean on the theory of his application since the Ordinance language includes temporary structures. Mr. Kean explained what he proposed to do and how the definitions of furniture and structure applied. He was hoping this was the means to do something different and make his plan happen. The existing patio is very steep. He feels the 75-foot rule was intended to protect the shoreline and the patio is already there, so there is no more impervious area affected by this.

The discussion continued stating the definitions and the strictness of the Shoreland Zoning. Questioning the avenue chosen, administrative appeal vs. variance.

Brad Grosberg, co-owner of the house, came to the podium and questioned whether the tables and chairs would be allowed if they were put out in the yard. A board member replied "yes." Mr. Grosberg stated if the deck tables were the same in number sections, in the yard, they would be allowed. And if they are not creating anymore impervious situations, he said he was trying to understand the difference between use of tables and using tables as a deck and the reason why when you use the word 'deck' it becomes problematic.

Chairman Vaillancourt stated that the board's job was to interpret the Ordinance and in this appeal we are asked to interpret the meaning of the term 'structure.' That term is defined in the Ordinance and a "deck – an open platform" is clearly intended to be included in that definition. That is the concern before the board.

There was discussion with the applicants about other options they had considered. Definitions, purpose, safety and building codes were discussed.

Mr. McDougal stated he received one email, from someone in the neighborhood, supporting his decision.

Public comment: Terry Garmey, a neighbor, stated he was in support of their use. He said temporary and moveable were two different ideas. He felt that assembled tables would not offend the spirit of the land use intended in the Zoning Ordinance. It is not going to diminish the Shoreland, it's not going to interfere with anyone else's use, and has no environmental impact.

Chairman Vaillancourt closed the floor to public comment.

The board discussion commenced with questions to the CEO about whether the board could consider other options not requested in the application, like the original request to build a deck. The CEO replied the only thing within the board's purview was the application before the board. When questioned about other options, the CEO explained the variance option, the requirements and sections of the Ordinance that would pertain. Board members commented on the creativity of the idea but tied the language of the Ordinance to the noncompliance of this request.

Mr. Lunney moved to affirm the Code Enforcement Officer's decision not to allow the expansion of a deck of Phil Kean and Brad Grosberg, owners of the property at 2 Garden Circle. Mr. Justh seconded. All were in favor. Vote: 7 – 0.

Agenda Item 2. To hear the Administrative Appeal of 1226 Shore Road LLC, represented by Natalie L. Burns, Esq., Jensen Baird Gardner & Henry, regarding the Code Enforcement Officer's denial of Building Permit Application (Permit Number: 180537) for 1226 Shore Road (Map U11 Lot 14). Chairman Vaillancourt recused himself. Aaron Mosher stepped in to chair.

Natalie L. Burns, Esq., from Jensen Baird Gardner & Henry, representing 1226 Shore Road LLC, stated they were appealing the decision of the Code Enforcement Officer to deny a building permit for the redevelopment project that is proposed at that location. It received a site plan approval October 10, 2017. It is to be a mixed-use development. It is two buildings; the front building will be referred to as Building 1 and the rear building will be referred to as Building 2. There were conditions of approval imposed by the Planning Board; Exhibit 2 of the application. On January 23, 2018, the Town Planner sent a letter to 1226 Shore Road LLC, the property owner; it is Exhibit 3.

In summary the letter states: The plans that were submitted were not consistent with the Planning Board approval. That revised plans needed to be submitted showing the full lay out of Building 2 and parking calculations needed to be provided as required by the Planning Board. The letter also states there is a full kitchen in Building 2, a bathroom and living space. The letter expressed a concern that Building 2 was a dwelling unit and also that there was a dwelling unit in the basement of Building 1. Another concern raised, was that the building was larger than approved in a prior site plan.

Ms. Burns stated that at the time that both the front building and the back building were built my client was not the owner of those properties and not responsible for the size of those buildings and Building 2 has been in existence since at least 2004.

So in response to this letter, the property owner did submit additional plans showing the full layout of Building 2, providing the measurements being done as set forth in the Town Planners letter also required by the Zoning Ordinance and also setting forth the parking calculation. The parking calculation shows that the requirements for the Zoning Ordinance for both buildings was met and the plans also show the use of Building 2 as office and storage, which was Condition 3 of the Planning Board approval. These plans

were submitted on March 2, 2018, and they are in the packet. On May 14, 2018, the property owners submitted a Building Permit Application to construct a 1,500 square feet mixed-use commercial retail on the first floor and apartments and condos on the second floor of Building 1. On May 25 the Code Enforcement Officer denied the permit and that denial letter is Exhibit 1.

The basis of the denial was the failure to comply with the Planning Board's conditions of approval as discussed in the Town Planner's January 23, 2018, letter. It is our position that the plans that were submitted and are included in the exhibits comply with the specific conditions of approval imposed by the Planning Board, specifically Conditions 2, 3 and 4. They show parking requirements, use of the basement in Building 1 and that it's not residential, and floor plans of both floors of Building 2. They also show the use of Building 2 is office and storage – not residential.

The property owner is not seeking, at this time, to have a residential use in either of those buildings. The Planning Board did not include a limitation on the size of the building. It is our position that the Planning Board knew what the size of the building was – it might not have had specific measurements for it – but we've asked to reuse a specific building.

Issues as to whether there is a permitted or unpermitted use of the building, refers to things that happened before my client owned the building. Ms. Burns went on to talk about what constituted a dwelling unit, stating there certainly wasn't one there now. There is a kitchen, which predates her client's ownership. There is a bathroom, which predates her client's ownership. And there is a statement that there is living area; which is not defined in the Ordinance. Dwelling unit is defined in the Ordinance, which she read. She stated there are no sleeping facilities and it's not used at all for living facilities. Banking, professional and business office spaces are not prohibited from having kitchen and bathroom facilities in the town code. Other entities that have kitchen and bathroom facilities include churches, schools, daycares and the community center.

The violations of residential use mentioned in the Town Planner's January 23rd letter occurred prior to her client's ownership. There are no dwelling units in either building. When her client gets a building permit there will be newly constructed dwelling units in Building 1. The Site Plan approval establishes the uses that are allowed and the owner will continue to comply with that approval. If there were violations, there is nothing that authorizes the town staff to turn down a building permit because of the zoning violations. That's to be dealt with as per Ordinance Section 19-3-6, which requires a notice of violation.

Ms. Burns stated that Steve Bushy, the engineer for the project, was present if the board had questions about plans.

In response to a board member's question as to whether a compliance letter was requested from the town by her client prior to purchase of the property, Ms. Burns

stated she did not know. The CEO stated he did not get such a request. Ms. Burns said there was not a notice of violation in the files.

There was discussion as to the timing from January until now. Site Plan approval with conditions was received last October. Plans were submitted. The Town Planner came back with a letter stating X, Y, and Z were not met; Ms. Burns concurred. New plans were prepared in March. Ms. Burns stated she was not aware of any further communications. Mr. Justh felt like there was a timing gap, where new information was prepared but whether it was submitted and to whom, is in question. The CEO's letter states there were conditions, but he hadn't seen evidence that the conditions had been cleared by the Town Planner, and that is the basis of the denial. Ms. Burns replied that the revised plans were submitted on March 2 to the Town Planner; they are Exhibit 4. No one was aware of additional correspondence.

Mr. Craford asked about procedures concerning the conditional approval, how does that work, and when there are conditions, who decides whether they are met? There is no guidance found in the Ordinance; but how does it end up before the Zoning Board and not the Planning Board. There is this discretionary issue about what happened after the Planning Board meeting, what information was available, and who discussed it. The CEO's denial is based upon the Planning Officer stating the conditions weren't met.

There was discussion about issuance of conditional approval and why is this matter before this board. The CEO stated he did not have answers to all the questions; he was not intimately familiar with Planning Board procedures. Ms. Burns stated it was not unusual for planning boards to impose conditions for approval and they did not challenge those conditions of approval. When plans were submitted they were found not to be acceptable and so new plans were submitted. There was no response to the new plans. So at that point her client applied for a building permit. The denial of a building permit does come before this board.

Mr. Craford stated that the CEO's letter of denial is based on the Planner telling him the conditions had not been met. Ms. Burns continued by saying the January letter predates the additional plans submitted in March. She restated the timeline and agreed that it was confusing.

In response to questions about additional information used as the basis for denial, the CEO replied that he did not look at the conditions or compliance with the conditions before denying the building permit. Mr. McDougal said planning boards often put conditions on approvals; every approval he has seen has conditions. It is the Planner's jurisdiction, although he could not point to the specific language. Usually the Planner would give the CEO the green light to issue to the building permit based on the conditions; he did not receive it on this one. The CEO was aware of additional communication, since the letter; however, he stated he did not know the details of it. The Planner continued to say they had not met the conditions, it was not good enough yet (for a building permit), and she stood by her letter, which is the basis for the denial.

Mr. Tadema-Wielandt stated that something was missing, maybe from a communication breakdown. He asked if anyone had a conversation with the Planner since the plans were resubmitted to understand why she still feels the conditions haven't been met. Ms. Burns said she started to have a conversation with the Town Planner and was told she needed to talk with the Town Attorney. She did talk to the Town Attorney and he said that he didn't know much about it but that the building was larger than what was approved. Ms. Burns said that should have been an enforcement thing. Neither she nor her client knows the full history of the building.

Ms. Burns stated she did not know what else to do to obtain a building permit and that's why they submitted the appeal to this board. There is urgency because of time limits; her client has one year, from the October approval, to start construction. In response to questions, Ms. Burns stated Exhibit 4 contains the measurements of building. The architect was not in attendance to address this issue. Ms. Burns was not involved in the Planning Board process; however, she said the plan as resubmitted meets the parking requirements for both buildings.

Mr. McDougal replied to questioning that the previous owner illegally installed a kitchen in Building 2 (rear building), without permits or approvals. It is something that needs to be resolved; however, that is not the basis of the building permit denial. Ms. Burns stated that her client is willing to get any plumbing or electrical permits required. When asked if her client has thought about returning to the Planning Board as the Planner suggested, Ms. Burns replied, her client does not want to return to the Planning Board because of the time that would be lost. She also said that there would be a significant cost to remove the kitchen (and items such as the stove) and bathroom.

In response to questions from Mr. Caton concerning the October 20, 2017, letter from the Planning Board to the Engineer, Stantec, Ms. Burns replied that her client had no dispute with the conditions of approval to be met within that letter. Mr. Caton read the following from that letter:

“9. That there be no issuance of a building permit nor alteration of the site until the above conditions have been satisfied and a performance guarantee has been provided to the town.”

Ms. Burns was not sure if her client had provided the performance guarantee to the town as instructed in that letter. She said that if that were the only thing standing in the way of getting a building permit, her client would get the performance guarantee in.

Mr. Caton mentioned the opportunity, cited in the last paragraph of the January 23, 2018, letter from the Town Planner to Stantec, for the applicant to appear at a workshop on February 6, 2018, by notifying the Town Planner by the January 30 deadline, if they wished to be on the agenda. Ms. Burns said it did not happen because her client was not seeking any changes to the Planning Board approval.

Mr. Caton queried Ms. Burns, as to why this application is right before the board? He asked her to help the board find jurisdiction for this matter, to override the Town Planner's approval. Ms. Burns cited Ordinance Section 19-3-2.C which requires a building permit determination from the Code Enforcement Officer and is appealable under Section 19-5-2.A as an administrative appeal. Mr. Caton replied those two sections apply to an action by the Code Enforcement Officer; however, we are at a loss for a provision that deals with requiring the Town Planner to act or not act. Whether the board can override a non-action by the Town Planner.

Mr. Caton stated this is a 'chicken and egg' problem because we have a condition precedent that has not been satisfied. There is a set of conditions the Town Planner has maintained, through correspondence with the Code Enforcement Officer, that have not been satisfied. So, we are tracing back to the original set of conditions.

Mr. Justh stated he was struggling with the same issue and asked if it would be appropriate to go before the Planning Board as a means to satisfy the conditions. Ms. Burns stated she didn't think they were allowed to do that and the Town Planner would not meet with them to discuss why the plans aren't satisfactory.

Mr. Craford stated that we (the Zoning Board) are in the middle between the Planning Board and the Planner as to whether the conditions have been met. There were two planning meetings that you decided not to attend. But instead go to the Zoning Board to appeal. Mr. Craford said he was very uncomfortable being asked to approve something that the two professionals involved haven't approved. Ms. Burns commented that the Planning Board process would take two months and you don't go back to the Planning Board if you are meeting the conditions of approval. They have been unable to get an answer as to how the plans don't meet the requirements.

The board members commented that they continued to struggle with the lack of communication and unwillingness to go back before the Planning Board in the last six months. Ms. Burns stated when plans were resubmitted in March, they were referred back to the conditions imposed in the January letter. Her client doesn't know what is unsatisfactory and the only answer provided is to go back to the Planning Board to amend an approval her client doesn't want to amend. Ms. Burns said that her client is entitled to have this board act upon the denial of the building permit application.

Mr. Lunney referred to emails, in the application, in which the Town Planner asked the CEO about the property. The CEO's reply states,

"The area meets the definition of a dwelling unit. The kitchen was installed without the required permits or inspections."

Which, when questioned, the CEO agreed is an active violation. Ms. Burns said it couldn't be a dwelling unit if you are not using it as one. There was further discussion about the existing conditions, lack of permits and what Ms. Burns said her client wanted – no designated dwelling unit. Mr. Lunney said he was familiar with the property and

knew that the previous owner used it as a dwelling unit. Ms. Burns expounded upon why any existing violation shouldn't apply to her client.

Mr. Justh asked why they couldn't go back to the Planning Board to say conditions had been met. He stated that would be an outlet to resolve this; he did not see the Zoning Board as that outlet. Ms. Burns restated her position and said that one does not go back to the Planning Board to see if conditions of approval have been met – that is not how it's done – the staff make those determinations.

Mr. Mosher stated that the last paragraph, in the Planner's January 23 letter, lays out a road map on how to proceed. He asked what her interpretation was, on behalf of her client, as to what that paragraph means. Beginning with "The Planning Board will be holding a workshop on February 6 ..." Ms. Burns cited the second sentence in the second paragraph of that letter: "I am recommending to you and to the Planning Board that the application return to Planning Board for amendments to the original approval." Stating that it then sets forth things requiring revision, which includes the submission of the floor plan and it talks about the illegal dwelling unit. Ms. Burns said it is their position that all of those have been satisfied.

Mr. Mosher mentioned the language of the following sentence: "At that time, while not limiting the scope of Planning Board review, I suggest ..." Ms. Burns talked about the denial from the Code Enforcement Officer as being limited to the terms of the letter.

Mr. Craford again mentioned the invitation to the workshop. Ms. Burns replied it's not worked out at a workshop. Their discussion continued as to why Ms. Burns felt progress was considered not possible at a workshop. Mr. Craford thought they had passed up an opportunity and now they want the Zoning Board to deal with it.

Mr. Caton inquired why the deadline is so critical, when the paragraph in the October 18, 2017, letter states you can ask for an extension. Ms. Burns said that her client wants to get started in this building season; if they go back to the Planning Board this building season is not going to happen. Her client doesn't feel an extension is needed or warranted.

Mr. Caton asked if her client had written for a response as to why the conditions were not met. Ms. Burns stated that there is no requirement that the town respond to such a thing and that her client had not done that. The request for a building permit does require a response – that's why her client did that.

Ms. Burns stated she did not know when her client took title to the property but believed he was the owner when he applied to the Planning Board.

Acting Chair Mosher asked for public comment.

David Jacobson stated he has interest in the project because he has a dental practice in Cape Elizabeth. His current lease expires the end of February, 2019, and he was

looking at this space as a potential place to continue his business in town. The owner told him ground would be broke around March so it sounded promising. Now he's not sure it will be available in February.

The CEO said he did not receive any formal comments. He did receive a couple of inquires, but nothing formal.

The Board discussed options to proceed as well as the following: It was not appropriate for the board to offer a conditional approval, where the CEO would act as either the Planning Board or the Town Planner. Once the site plan approval is complete, it is the CEO's job to ensure the project stays in compliance. The applicant was invited to a meeting to resolve this four and one-half months ago but took no action to do that. Issues of communication breakdown were troubling. Because not all parties were present, not all facts are known. The Town Planner was communicating with the Town Attorney, but what was discussed is not known. The board could not determine that conditions of the site plan approval were met. It felt as if the applicant was trying to avoid the correct process with the Planning Board by applying for the building permit.

Mr. Lunney moved to deny the appeal and uphold the decision of the Code Enforcement Officer. Mr. Justh seconded. All were in favor. Vote: 6 – 0.

Findings of Fact:

1. Patrick Tinsman submitted a building permit application on May 14, 2018.
2. In a letter dated May 25, 2018, the Code Enforcement Officer denied the application.
3. The property received a conditional Site Plan Approval from the Planning Board by letter dated October 20, 2017.
4. In a letter dated January 23, 2018, Maureen O'Meara, Town Planner, made the applicant aware that the conditions on the Site Plan approval had not been met.
5. The conditional Site Plan Approval states the following in condition number 9: "That there be no issuance of a building permit nor alteration of the site until the above conditions have been satisfied and a performance guarantee has been provided to the town."

Mr. Lunney moved to approve the Findings of Fact; Mr. Justh seconded. Vote: 5 – 1. Mr. Craford voted no.

E. Communications: None.

F. Adjournment: Chairman adjourned the meeting at 8:50 p.m.