

Town of Cape Elizabeth  
Minutes of the April 23, 2019  
Zoning Board of Appeals Meeting

Present:

Matthew Caton  
Colin Powers

Kevin Justh  
Michael Tadema-Wielandt

Aaron Mosher  
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:** Mr. Justh moved to approve the minutes of February 26, 2019; seconded by Mr. Tadema-Wielandt. The minutes were approved by a vote of 5 – 0. The Chair abstained, as he was not present at the February meeting.

**C. Old Business:** Tabled from the October 23, 2018, meeting:

To hear the request of Kent Shomaker, owner of the property at 600 Preble Street, Map U2 Lot 5, to expand a nonconforming single family dwelling by adding a roof deck based on Section 19-4-3.B.4 of the Zoning Ordinance.

The CEO said that the application was lacking some information for the Zoning Board to make a decision in October. The applicant is back with needed information that the Zoning Board requested, mostly the information on accurate elevation drawings and what the deck would look like from adjacent properties.

Mr. Shomaker stated that the application has been updated with construction plans and a boundary survey. The house was built in 1924 with a porch, which was enclosed in over the years. He would like to reconstruct that room and build a roof deck above it that would be accessed from the second floor. Upon request, Mr. Shomaker explained the photographs in the application.

Mr. McDougal said he had not received any comments concerning this application.

One member of the public asked to see elevation plans. The CEO provided him with a copy.

Members were pleased that Mr. Shomaker supplied the additional, helpful information. Members discussed potential impact on views. There was no public concern expressed.

Mr. Justh moved to approve the request of Kent Shomaker, owner of the property at 600 Preble Street, Map U2 Lot 5, to expand a nonconforming single family dwelling by adding a roof deck based on Section 19-4-3.B.4 of the Zoning Ordinance. Mr. Mosher seconded. All were in favor. Vote: 6 – 0.

The CEO said that the applicant would be bound to build according to the plan submitted if the application was approved.

**Findings of Fact:**

1. The property is a nonconforming lot in the RC zone. There is an existing single family dwelling on the property, which is a nonconforming 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 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.

4. The applicant has demonstrated compliance with the requirements in Section 19-4-3.B.4 of the Zoning Ordinance.

Mr. Mosher moved to approve the Findings of Fact and the Additional Findings of Fact; All were in favor. Vote: 6 – 0.

**D. New Business:**

Kevin Justh stated for the record, that he is the owner of Lot 51. He felt he did not have any conflicts and did not need to recuse himself from hearing the next application.

1. To hear the request of Robert Barrett, representing the property owners, John and Sarah Brownell, at 6 Spoonrift Lane, Map U36 Lot 41, to expand a nonconforming single family dwelling by adding a story over a portion of the house based on Section 19-4-3.B.4 of the Zoning Ordinance.

The CEO stated a representative from Barrett Made, a local builder, contacted him several weeks ago about doing an addition at this property, going straight up on the existing footprint. A small portion of that building's footprint does not meet the current setback of 25 feet, to the front; therefore, they need Zoning Board approval to expand upward on that small portion of the house.

Robert Barrett said they are adding a story over the footprint of the house, mainly over the garage, for a master suite.

In response to board questions, Mr. Barrett said that the house was on the public sewer system; there were no septic systems.

The CEO did receive one letter from Gerald and Elizabeth Mylroie, 5 Spoonrift Lane, across the street; they are in support of this application.

There was no public comment. Chairman Vaillancourt closed the floor to public comment.

There was a brief board discussion. Board members agreed that the application met all requirements of Section 19-4-3.B.

Mr. Tadema-Wielandt moved to approve the request of Robert Barrett, representing the property owners, John and Sarah Brownell, at 6 Spoonrift Lane, Map U36 Lot 41, to expand a nonconforming single family dwelling by adding a story over a portion of house based on Section 19-4-3.B.4 of the Zoning Ordinance. Mr. Powers seconded. All were in favor. Vote: 6 – 0.

**Findings of Fact:**

1. The property is a nonconforming lot in the RA zone. There is an existing single family dwelling on the property, which is a nonconforming 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 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.

4. The applicant has demonstrated compliance with the requirements in Section 19-4-3.B.4 of the Zoning Ordinance.

Mr. Justh moved to approve the Findings of Fact and the Additional Findings of Fact; Mr. Tadema-Wielandt seconded. All were in favor. Vote: 6 – 0.

2. To hear the Administrative Appeal of Yam Yams LLC, Michael Friedland, Manager, regarding the Code Enforcement Officer's determination that his proposal for the property at 287 Ocean House Road, Map U22 Lot 76, requires a Site Plan Review from the Planning Board prior to receiving other permits and commencing operation.

The CEO said the first time he spoke with Mr. Friedland was January 22<sup>nd</sup>. He explained that he would need a Site Plan Review. About a week or so later, Mr. Friedland met with him and the Town Planner to discuss the process. Mr. Friedland then applied to the Planning Board and got on the agenda for a workshop. Then Mr. Friedland's attorney sent a letter to the Town Planner, Maureen O'Meara, presenting an argument that he wouldn't need to be on the Planning Board agenda. Mr. Friedland then requested to be removed from the Planning Board agenda. Ms. O'Meara then sent his attorney's letter to our town attorney for a legal decision. They requested a formal determination from me (as CEO), where I cited the town attorney's letter. The CEO stated he did not have Mr. Friedland's business plan when he made his decision. Items in that plan include the solar panels, which is an exterior change on the building, which would trigger a site plan amendment. Mr. Friedland also expanded the proposed use to include classes and creating things on site, which adds another dimension that could push it to cottage industry/manufacturing or educational use.

Paul Bulger, Esq. of Jewell & Bulger, P.A., Portland, passed out photos of the existing property and sketches of the planned renovated building to board members and held up larger copies that were displayed on an easel. Michael Friedland stated that he was under contract to purchase the property at 287 Ocean House Road, the old "Cumby's." His objectives are to create a business that enhances the community, helps the environment, and improves the lot. It's been a vacant lot for five and one-half years. There are restrictions that "Cumby's" put on the deed, when they moved and there are limitations from the town, so it is very limited what can be on that lot.

Mr. Friedland said he was not going to change the building. And if solar panels trigger Site Plan Review he will not add them. He thought about having horses there, but not if they trigger Site Plan Review. The main goal of the business is to be a mini boutique, hipsteresque lumberyard – a new model for today's consumers, who want a quality, local product. He wants to move his home repair business there. He has a van and a truck, so he'll need two parking spaces. He would like to stock wood that he uses for his home repair business and sell that same local, milled stock to customers. This would help the environment and the community. He would offer cutting and local delivery. Everything would be inside the building. It would not create noise; there would not be that much cutting. We would bring life to an empty lot.

Mr. Friedland referenced an article from 2013 that mentioned the loss of the hardware store and changes to the Cape Town Center. He would like Cape to follow the national trend – small businesses, changing traditional business models: like the microbreweries, micro gourmet cheese producers – and he would like to be a part of it. Mr. Friedland read a relevant section from the Town Center Plan: "The committee

acknowledges that many of the properties in the town center are privately owned, as a result the town must sometimes react to the decisions of private property owners and cannot dictate the disposition of private property that otherwise complies with town regulations.”

Chairman Vaillancourt reminded Mr. Friedland that the reason for this board was not to decide if this business was a good idea but to determine whether this need to go through Site Plan Review per the language of the Ordinance.

Mr. Friedland said he was not trying to subvert the process. He went through Site Plan Review with his office building because he felt it was required. Reading the code it is clear if you are not changing the building, not changing the lot, you're going to a lesser use; you do not need Site Plan Review. Site Plan Review is expensive on a small business; he doesn't have loads of dollars to get this business approved for this lot.

Mr. Friedland said he's been a member of this community for over 20 years. He owns property in Cape, works in Cape, recreates here, his kids attend school here. This is his community and it means a lot to him.

Paul Bulger stated that the board had a detailed opinion letter from his office that was the result from an exchange with Maureen and Mr. McDougal and John Walls as described by Mr. McDougal.

Mr. Bulger described his involvement with this property. He was involved with the purchase of the property by a dentist for a dental office building, but he decided not to go forward with that plan. At the time of his acquisition, it was a relatively low price. He negotiated restrictions with Cumberland Farms. This property is restricted; there is not to be any competition with their store across the street: no gasoline, no convenience food, no fast food, no schools, no nurseries, no churches, anything where children are involved because of potential petrochemical exposure. They did get a clean bill of health from the DEP, did 41 test pits, removed the tanks. They applied to the town, five years ago to remove their canopies. The canopies were removed.

What is property useful for given these restrictions? Maybe fine dining because that would not compete with the store across the street, or professional offices not involving children.

Follow-up meetings and exchange of emails with the Town Planner and CEO that lead to the back-and-forth about where in the Ordinance they were talking about. Ms. O'Meara said they were talking about a change of use. Which is a less intensive use under a very detailed Ordinance provision for Village Retail. Because the canopies were removed this creates a change of use from the original site plan that requires a Site Plan Review.

Under Site Plan Review, the ZBA should be looking at traffic, drainage, buffering, noise, light, that affect neighbors and where the structures are located on the lot. How does

this use affect the community? Mr. Bulger compared drawings of the projected use compared to the original building. Mr. Friedland plans to paint the building, replace the roof and windows. The planes of the building are the same, except for the solar panels he wanted to put on the roof. Mr. Bulger displayed the original Site Plan Review by Cumberland Farms in 1984 when the canopies were proposed. The property would remain the same, except for the removal of the canopies. The town issued a permit for the removal of the canopies.

If Mr. Friedland submitted a plan for Site Plan Review it would be the same as the one submitted in 1984. The Cape Elizabeth Ordinance has clear language. His first argument against Site Plan Review is that this is clearly de minimis. Which is defined under 19-9-6.B. cited in Mr. Walls opinion letter as a “minor deviation from the approved plan.” Mr. Bulger said that this proposal is the very essence of minor deviation. The town already has a plan in its files that contains all the information required for a Site Plan Review, as it is all the same except for being a less intensive use, Village Retail.

Mr. Wall concludes that removal of the canopies is a material change, which does not exempt this current proposal from Site Plan Review. Mr. Bulger said the town must have considered that change de minimis since they did not require site plan approval.

This proposal meets all the requirements under Section 19-6-4.E.3. The building on the current use category is approved, it is less intensive use, there are no exterior changes, and no multi-family. The change is limited to signage and Mr. Bulger hoped that Mr. Friedland would be allowed to install solar panels. All materials are to be stored inside. The canopies have legally been removed.

In conclusion, Mr. Bulger submits the decision of the Code Enforcement Officer be reversed for the reasons he stated.

Mr. McDougal stated a number of email submissions were received and forwarded to the board members. The Chair said the emails covered a spectrum from support to opposition and will be made part of the record. Before opening the floor to public comment, the Chair reminded those wishing to speak, that the sole purpose for this board was to determine whether this needed to go through Site Plan Review, per the language of the Ordinance, and on to the Planning Board; and not to decide if this business was a good idea.

#### Public Comment:

Paul Sideman, stated he was Cape resident. He learned of this proposal and the possible obstacle. He learned more tonight. He said this sounds a good fit and an appropriate use for the space. He encouraged the board to support the project.

Howard Cheney, 27 Murray Drive, said he liked to vouch for Michael’s integrity and reputation. He is very attentive to detail. He sticks to his commitments. He will work very well with whatever decision this board or the Planning Board come up with.

Andy Landes, 52 Stonegate Road, stated he was not familiar with the Ordinance but what he learned tonight was that we have two sites, the Cumby's site has sat vacant for 5 ½ years or so. The dentist could not make this work and now another potential person wants to help our community. To make it tougher for that person is not what we want; we don't want to frighten people away from bringing business to Cape Elizabeth.

Victoria Volent, 58 Cottage Farms Road, said that the CEO's decision is correct. This is not a minor deviation of the approved Cumberland Farm's Project. It is a brand new plan; not a de minimis change. The proposal solar panels are a change. The current use is stated as a gas station, but she argues that the current use for the past 5 ½ years is an abandoned building. Site plan approval is necessary just giving all the changes to the Ordinance since 1984. There is now a Town center plan. There was no housing in back as there is now. A lot has changed from 1984. She was concerned about buffering for noise from the sawing and the lighting. With no canopies, she expressed concern about the traffic flow and the parking plan. She stated this should go to Site Plan Review; the board should support the CEO.

Doug Jones stated that when the permit was issued without Site Plan Review, that's the under pinning of the entire board, when you pick and choose. If you permitted a deck, but the next owner had to under go Site Plan Review you are creating a precedent. The precedent with the permit on this site implied there was not an issue. He would not be surprised to see this property labeled as a problem property. Site Plan Review is expensive. By reversing precedent, he thought this would be something the board will deal with for a long time.

Chris Scontras, 8 Woods Knoll Drive, he heard the comments of the board. He thinks the board should just do what they said they were going do. The law is the law. Interpret it as its always been interpreted. He has done business with Mr. Friedland; once good, once not so good – but it was made right. He's an outstanding guy and a good businessperson. He asks the board to look at the law and apply it consistently.

The Chair closed public comment.

Mr. Friedland stated he was involved with the Rosemont Project. He bought and renovated the building and brought Rosemont to occupy the space. During a meeting with Ben and Maureen, we said that it was an empty space; a nonconforming residential and we were going to put in Rosemont and they said sure, go for it. At no point did they say wait, the deck is changing to be handicapped accessible, it is a change of use, there were changes to the exterior and at no point did they say Site Plan Review was required. Mr. Friedland said he was familiar with the Ordinance and the Town Center site plan process is the same for shore road, right there. So why does one need Site Plan Review and the other doesn't. Cumberland Farms made changes to the site and Ben approved it. He was not making changes to the site at all. If a precedent is set that painting and a new roof and repaving the lot triggers Site Plan Review, he doesn't

understand it. The rules are very clear in the Ordinance; he doesn't understand this additional requirement.

Mr. Bulger referred to page 4 of his argument, under the second issue, the less intensive use. Section 19-6-4(E)(2) is a very detailed statutory scheme that says that no Site Plan Review is required. The only way this is skirted here is because of the removal of the canopies. Mr. Wall concludes that the "removal of canopies" is a material change, which vacates the exemption. The very Town Center zone changed, that incorporates Section 19-6-4(E)(2). There was a Site Plan Review for an intensive use this is going to a much less intensive use; therefore, the statutory logic is you don't need have the same concerns about, traffic, lighting, buffering, drainage, etc. The question for the board is does the removal of the canopies, four years ago, by application and issuance of a permit – does that means the exemption is voided? Mr. Bulger stated he found that illogical and he doesn't understand it.

Board discussion:

Mr. Justh asked the CEO if the canopies were there today, would this have been just issued a building permit? And assuming there were no solar panels, or classes or anything else, would this be solely about the canopies? That seems to be Attorney Walls contention; is there anything else?

The CEO replied if Mr. Friedland was just proposing a strictly retail operation with no exterior alterations of the site, other than basic maintenance, and the canopies were still there, the parking lot was all the same, everything was all the same, it would not require Site Plan Review.

Mr. Caton asked Mr. Bulger if he had additional procedural information about the removal of the Cumberland Farms canopies on the property. Mr. Bulger said he had not represented Cumberland Farms. The town issued a permit for demolition of the canopies in May 2014. Mr. Caton felt there was some information missing; under Section 19-9-2, Mr. Caton surmised that section must be satisfied before a permit was issued. Mr. Bulger said it was res judicata, after 30 days, if no objections, the permit cannot be undone. Mr. Bulger agreed with Mr. Caton that the "lay of the land" for that lot would then be as of the date of that permit, not 1984.

Mr. Caton asked Mr. Bulger about the current sellers. Mr. Bulger said Jim Fischer of Northeast Civil Solutions was hired to go through plans. Mr. Bulger was not aware of the desired use for the property. The Site Plan Review process was not done; there may have been a plan that was work-shopped.

The property is now Category 6, gas stations, repair, going to Category 3, village retail. The type of permit issued was for demolition of gas station canopies. There was additional discussion about the legal precedent set by the permit, difference if the canopies were not removed, Site Plan Review requirements, lessor use, and de minimis changes. The issue runs with the property not the applicant.



Mr. Tadema-Wielandt moved to deny the Administrative Appeal of Yam Yams LLC, Michael Friedland, Manager, regarding the Code Enforcement Officer's determination that his proposal for the property at 287 Ocean House Road, Map U22 Lot 76, requires a Site Plan Review from the Planning Board prior to receiving other permits and commencing operation. Mr. Mosher seconded. Vote: 3 – 3. With a tie vote the CEO's determination stands; a majority of the board is needed to carry any motion.

**E. Communications:** None.

**F. Adjournment:** Chair Vaillancourt adjourned the meeting at 9:12 p.m.