

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

Present:

Joseph Barbieri  
Colin Powers

Matthew Caton  
Michael Vaillancourt

Kevin Justh

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. Chair Vaillancourt recognized Joseph Barbieri, a new board member.

**B. Approval of Minutes:** The minutes of the June 25 meeting were deferred until the next meeting.

**C. Old Business:** None.

**D. New Business:**

1. To hear the request of Liz Delacaris, owner of the property at 5 Hillcrest Drive, Map U10 Lot 8, to build a screen porch on an existing deck based on Section 19-4-3.B.4 of the Zoning Ordinance.

The CEO stated that a couple months ago the builder submitted a building permit to turn an existing 12 X 12 foot deck into a screened-in porch with roof and walls. This is a nonconforming lot with a nonconforming structure on it. The house is currently six feet from the side property line. The existing deck is 18 feet from that same side property line. The setback for an open deck in that zone is 15 feet but an enclosed deck is 25 feet. So the current deck was permitted three years ago because it met the setback. Now, that's it is going to have a roof it needs Zoning Board approval for expansion of a nonconforming structure.

Ms. Delacaris said that her first building permit said no railings. Notices were sent to the abutters, although only one is relevant; no-one has an issue with it. She stated she just wants to build a screened-in porch.

In response to board questions, Ms. Delacaris said the footprint is to remain the same. She would like a summer enclosure to keep the mosquitoes away. If the deck didn't already exist, she would not put an enclosed deck elsewhere due to location of septic and access to the kitchen door. The deck was permitted in 2016 by a building permit.

The CEO stated he did not receive any comments.

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

There was a brief board discussion.

Mr. Justh moved to approve the request of Liz Delacaris, owner of the property at 5 Hillcrest Drive, Map U10 Lot 8, to expand a nonconforming single family dwelling by adding a screen porch over an existing deck based on Section 19-4-3.B.4 of the Zoning Ordinance. Mr. Barbieri seconded. Vote 5 - 0.

### **Findings of Fact:**

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

### **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.

### **Conclusion:**

The proposed enlargement meets the setback to the greatest practical extent based on the physical condition and type of foundation present, in addition to the criteria in Section 19-4-3.B.2, Relocation.

Mr. Justh moved to approve the Findings of Fact, the Additional Findings of Fact and Conclusion; Mr. Powers seconded. All were in favor. Vote: 5 - 0.

### **New Business cont'd:**

2. To hear the request Mary June Casey, co-owner of the property at 9 Channel View Road, Map U38 Lot 10, for a Conditional Use Permit for a Home Day Care based on Sections 19-8-8 and 19-5-5 of the Zoning Ordinance.

The CEO stated that it was brought to his attention a couple of months ago that a day care was being operated at 9 Channel View Road. Mr. McDougal drove to the property

and met with Mr. Jeff Preble, a co-owner of the property, and explained the zoning. Mr. Preble submitted an application based on Section 19-8-8 of the Zoning Ordinance. It is an interesting process; this is the first time it has come before the Zoning Board in the six and one-half years he's been here. Mr. McDougal explained how the process works per Section 19-8-8.A: After he receives an application for a Conditional Use Permit he sends a notice to abutters. He received feedback from three neighbors who had concerns, so it was brought before the board.

In response to board member's questions Mr. McDougal said he has been speaking with the state; the state respects local zoning and the local process.

Mr. P. Andrew Hamilton of Eaton Peabody, introduced Mary Casey. Her husband, Jeff Preble was also present. They have been in a process of state day care licensing. Mr. Hamilton stated that both he and Ben have talked with Kathy from state day care licensing. Kathy had not been contacted in the past by this day care operation. Both the state and local officer have treated them very well. Mr. Hamilton had a Power Point presentation that was a summary of what has been submitted. He asked for a show of hands from supporters in attendance. Mr. Hamilton said this application was consistent with the town's Comprehensive Plan. Copies of Power Point slides were handed out. Copies of the 27 emails in support were also available.

Mary Casey stated she was the teacher at Primary Focus. Ms. Casey stated she wants to keep the school small and in her home. The school started as a playgroup for her daughter and two of her friends to help prepare them for kindergarten in a fun way. Before she had her own children she was a public school teacher in Los Angeles for 10 years; she loved that job and missed it. So this little playgroup evolved into a little home school that she adores. The school is focused on reading, printing and math.

Ms. Casey reviewed the Power Point slides. The primary focus and goals are described on Page 2.

Page 3 - Explained the benefits Pre-K programs.

Page 4 - Shows Exercises and games.

Page 5 - Is photos of the school - throughout her home.

Page 6 - Describes the Calendar. It is about the same as Pond Cove. Some children stay half day others full day. She stated that she also drives some children home.

Mr. Hamilton, continued reviewing the slides:

Page 7 - This is not a commercial activity; it is a four bedroom house. There are a small amount of children aged 4 - 5. Mr. Hamilton talked about the noise created by children versus other types of noises in a neighborhood. He talked about the town's Comprehensive Plan and said that the hardest thing to do today was find day care.

Page 8 - Day cares are necessary. Because of its size, a small group of less than six students, it's not a heavy use.

Page 9 - Explains why it is compatible with the neighborhood.

Pages 10 - 15 - Address the five standards for conditional use in Section 19-5-5 of the Zoning Ordinance.

Mr. Hamilton stated that in Cape Elizabeth there is no minimum area per student and no fencing is required. A turnaround circle helps with traffic flow and that sessions may have staggered start times, 15 minutes apart. Water balloons were unfortunately left behind from closing activities. Claims concerning property values invite speculation; recent sales imply no issues. No construction is planned. All activities take place within the four-bedroom house, deck, and yard.

Page 16 - The operating hours are narrow. The fenced play area conforms to minimum number of square feet per child.

Pages 17 - 19 - Proposed Conditions for lighting, play area, exterior of house, noise, drop-off and pick-up areas and sessions, and outside activities.

Page 20 - Contains contact information for Mary Casey.

In response to questions from the board Mr. Hamilton replied the state licensing for home day care has three steps. The site review was last week. It needs a visit by state Fire Marshall's office. The final licensing is deferred until the Zoning Board of Appeals acts. Septic or public sewer was questioned. It was determined that they are on public water and sewer.

Mary applied for licensing for the day care on June 20. Licensed as a Family Child Care Program, it can have from three to twelve children. As a condition, Mary will not have more than six children, even though she is in a broader state category. This home day care has never been licensed or inspected by the state in the past 12 years. Ms. Casey explained that she thought the house, with a staircase and without a play structure, would not be acceptable for state licensing. Parents never asked about state licensing - just about her credentials. So she thought it was all right to continue the way it was. The recent state inspector liked the setup. Six or less children is exactly what Mary wants. Mary has been operating this school for 12 years.

Mr. Hamilton said there is one other day care in town just licensed as a new day care. Mary and Jeff are now getting into compliance with the conditional use application and state licensing.

Board members asked about insurance for this use. Mr. McDougal said it is not a requirement of the town. Mr. Hamilton said insurance is not a requirement for the state.

Board members asked why it is restricted to six children when it could be up to 12? The CEO replied that the Cape Elizabeth Ordinance caps permitting of home day care to six.

Mr. Hamilton replied when questioned that the phrase "Primary Focus" is a DBA, "Doing Business As."

When ask if the school has a written contract with the parents? Mr. Hamilton stated there are no issues as to consent of parents. A written contract is not a requirement by the state. There was a discussion about who would be sued if there was a claim by a parent. Board members were troubled with the business side of the day care.

Mr. Hamilton said the fence is the rail around the deck. Page 247 of the Ordinance deals with fencing. The deck is approximately 1,100 square feet. Kathy (of state licensing) thought the home setting was safe. Conditions on Page 16 of the Power Point refers to wood decking versus grassy area. Mr. Hamilton said there might be more noise if play was permitted in the yard right next to the neighbor who has concerns about the noise.

Mr. Hamilton thinks that state licensing will resolve all noncompliance issues of the last 12 years. He believes permitting issues in Cape Elizabeth have been met. There was only one recent formal complaint over the 12 years; that complaint lead to this processing. There was a conversation years ago with Jeff and a neighbor who asked "What about a permit?" Jeff replied to the effect, "I need a permit for kids to play together at my house?" Mr. Hamilton stated Jeff was not trying to be deceptive. The CEO said he had no documentation of a prior complaint.

Jeff Preble addressed what they were willing to do to reduce and minimize noise. Kathy Paglia (state) has discussed with them how a home day care shall be operated. They must have a document, per state requirements, that states operating conditions and have parents sign it. That document amounts to a contract.

The Chair stated that copies of all emails submitted are on file for the record.

Public comment:

Alison McLaughlin, 321 Spurwink Avenue, spoke in support of Primary Focus and the confidence her two children gained at Mary's school. She commented positively on several focuses of the school, traffic and property values

Tina Rodda, 2 Masefield Terrace, a neighbor whose children were part of the first playgroup, commented on the strong learning foundation her twins gained at the school. They lived behind Mary and Jeff, through the woods, and never any traffic issues.

Kathleen Lalouche, 10 Channel View Road, stated she had lived there for 21 years. When the playgroup evolved into something more, she really didn't know what was

happening across the street. She assumed it was a licensed facility. There is a different group of parents/children every year. She trusted her neighbors to do the right thing.

Brian Rayback, 5 Leighton Farm Road, spoke in support of the application. Two of his children went to Mary's school. He thought Mary meets the Conditional Use standards. He always felt his children were safe when they were there. It is not a big commercial concern, there's limited traffic for the small class size.

Lindsay Marlow spoke as a parent of a currently enrolled student. She said they (other parents) would be willing to comply with any stipulations that the town imposes so that Mary's school could continue. There are only a few parents so car traffic isn't an issue.

Betsy St Germain, 7 Channel View Road, stated she and her husband, Phil live adjacent to Ms. Casey and Mr. Preble. They have lived there over 21 years. On June 20 she met with Ben and then spoke to Kathy Paglia on the phone. Mrs. St Germain does not support this application but did not go into the reasons over the phone. When Ms. Casey and Mr. Preble opened the day care, twelve years ago, they did not communicate their intentions with the St Germain's.

Mrs. St Germain called the Code Enforcement Officer, Mr. Bruce Smith, and expressed her concerns. Mr. Smith was not aware of a home day care at that location. When Bruce contacted her again, he stated that Mr. Preble had said: "My children can't have their friends over to play?" when asked if he had a home day care. The St. Germain's had observed more than three unrelated children over there and believe that this conversation made it clear that Mr. Preble did not want to have any further communication about this matter with anyone. She called Bruce on several other occasions and feels that the town of Cape Elizabeth did not think her concerns were important.

So she welcomed this opportunity to speak out against the application. Points she'd like to highlight are the additional traffic on the road - changes every year - and one year there was even a school bus stop there. There are cars that park on the street. Cars wait on the street for the day care to open. There are more than 6 children present. Trash blows into her yard. With noise of six children's voices they cannot enjoy their front yard; they close doors and windows. They have planted trees to reduce the view of their neighbor's chalk on the driveway and children walking across neighbors' yards. There is a new Broad Cove Shore Home Owners Association and Ms. Casey's home day care does not meet their mission guidelines. They have knowingly avoided state licensing. Mrs. St Germain would like the town to deny this application.

In response to board questions Mrs. St Germain said a dog/balloon incident (she had mentioned) was not reported to Ms. Casey or Mr. Preble, they have not been friendly for

years and they have minimal communication with Mary and Jeff. She asked to be anonymous when talking with CEO Smith.

Rachel Perry, 10 Pine Ridge Road, is an abutter, in back. She has lived there for 35 years. She has found that Mary and Jeff were not approachable; if toys come over the back wall they throw them back. As retired teachers, she and her husband know the value of Pre-K education; however, they oppose the day care at this location. Four abutters have opposed this daycare. Parents of these children don't hear the disruption and disturbance that occurs for the neighbors. The Ordinance states that conditional uses shall not affect adjacent properties. Realtors say a day care will affect home values. In a letter to neighbors Mary has written she admitted her school is a disturbance. Mrs. Perry said she can't read in her back yard, she can hear noise even when indoors. Her yard slopes downward, sliding toward their rock wall. She was concerned about insurance and liability.

Mrs. Perry said other day cares located in town are more appropriately located; this is a close neighborhood with small lots. Her neighbors have not been forthright about the day care.

Edward Perry, 10 Pine Ridge Road, his family brought the property in 1971. Both he and his wife are retired elementary school teachers. He's sure the day care is beneficial to the children. The parents of the children, who have written emails, do not have this day care in their backyards. As next-door neighbors their major concern is the noise.

Mr. Perry spoke with Larry Anderson, of 8 Pine Ridge Road, who is presently in the Viking Nursing Home; Larry asked what is going on? They thought it was already licensed and approved. He was concerned about insurance liability for abutters if kids wander into their yards. Mr. Perry called his insurance agent who said they would be responsible if a child got hurt in their yard. Due to the additional expenses involved with this licensing, he has concerns for an increased number of authorized children to make it profitable and for increased noise.

Mr. Perry reviewed the five conditions. Traffic does not concern him because he's on a different road. This is presented as if it all takes place inside the house, but once the children are outside, things get loud in a quiet neighborhood. He is concerned about property values and someone getting hurt on their stone wall. Mr. Perry stated the day care could use a more appropriate location; don't have it in his back yard where he has to listen to it everyday.

Phil St Germain, 7 Channel Point Road, stated he appreciated the work the board members do; but he cautioned them to be careful about setting a precedent. He addressed the home business aspect of the application, stating that this is in no way personal in nature. This business just doesn't fit into the neighborhood and does not meet the requirements for approval. If this business operates out of Ms. Casey's home the supporters/customers avoid having to pay rent of a facility. The preponderance of weight of the board's decision should be given to the immediate abutters who are affected. On July 18 he submitted a note concerning home values; he expounded on several points. He felt the application does not meet the standard for conditional use

and should not be approved.

Nicole Tackett, 5 Montgomery Terrace, urged the board to set a precedent by making conditions for Mary to meet. She said home day cares are important to our community and our future.

Tina Rodda commented that schools like Maiden Cove are in tight, very small residential neighborhoods. There are a lot of children there and they also make noise. It is an example of children and a family neighborhood working together.

Lindsay Marlow said there are day cares all over Cape Elizabeth. There is one in her neighborhood of Oakhurst with a low stonewall. Everyone knows children make noise. Some people don't want one in their backyard but they provide a valuable service.

Mr. Hamilton said Exhibit B summarizes the pertinent points. Members of the board agreed they did not need a verbal summary. Mr. Hamilton stated he would like the opportunity to clarify any questions that the board may have.

The Chair closed the floor to the public comment.

In response to board members questions the CEO said there were no town fees for licensing. The only fee is the one to appear before this board. The town does not have an inspecting procedure for the 10 existing home day cares in town. It is Mr. McDougal's opinion that this fits the definition of a home day care - if it was a different kind of school, e.g., a tumbling school, it might fit the definition of a personal business. There is a limited number of definitions in zoning; this is the best fit per the Zoning Ordinance.

Mr. Justh stated he was a little annoyed that this has operated for 12 years without a license; but this is here because it is a land use thing going forward. The town has stated in the Comprehensive Plan that Home Day Cares are a public policy goal. They are for the public good. Four or five day cares in town are in tight neighborhoods. He didn't feel traffic was an issue. He does believe there is an issue with noise in the neighborhood - a lot coming from landscaper noise - a greater issue for the town to address. Abutters concerns about property values are taken very seriously here. In response to his question, board members confirmed that this is an "L" shaped deck that faces the circle and back of the house.

Mr. Barbieri remarked on the commendable candor of Ms. Casey concerning why she didn't originally seek licensing. This is a preexisting violation that we would be essentially permitting after the fact. He understands the concerns about getting away with years of not be licensed and understands the neighbors being annoyed at being misled about that. He saw the two biggest issues as the level of children's play and noise generated. The Code contemplates this noise and has built it into the standards. Is noise too excessive? There have been no complaints for the past 6 1/2 years and neighbors haven't expressed their concerns with Ms. Casey. We need to look at the



balance between play versus noise. If this is during the school year — not the prime summer months when people are out, he trying to evaluate the hardship. We need to think about the intent of the statute. After looking at studies done on the impacts of day care on neighborhoods, he was found the information is inconclusive. The real estate values presented here have also been inconclusive and speculative.

Mr. Powers said of the noise issue that children’s noise is not unusual in a residential neighborhood. Having five children playing is probably not unusual in this situation. Traffic is a non-issue and parking can be addressed. Property values are subjective and speculative. A working family with young children in an abutting house may find a day care next door a positive value.

The Chair said perhaps the largest issue is the effect on property values. It could be viewed as a benefit by some. The applicant has proven that there is no impact on property value based upon the limitation of the scope of this, the time during the business day, limited hours of activity outside and the limited number of children. All that being said Ms. Casey didn’t approach this the right way from the start. But that is not at issue here. This is a conditional use for this particular district, this is allowed with some conditions, that have been met by the applicant.

Board discussion continued with possible conditions to be imposed if the application is approved. A Conditional Use Permit runs with the property under Section 19-5-5.

Mr. Caton stated that he agreed that this is not the way to go for this type of application. This is serious; the applicant has been fortunate that there has been no incident. Buffering and screening is an issue. A deck with a railing is not a fence. Concerned neighbors are older and have more free time outside, so there is a sensitivity to them. Fencing may block sound and visibility. The applicant should be as concerned about the business side as the education side.

The Chair recommended that the board work though conditions, using the applicant’s Power Point slide pages beginning on page 17, as a helpful starting point. Members discussed aspects and wording of each condition. (Motions and votes on each condition occurred after the motion to approve the application on Page 11.)

Proposed Conditions:

1. Lighting. Other than the exiting lighting above the garage doors and the main entrance of the house, no lighting shall be installed in a manner that would cast any additional lighting into adjacent properties and any lighting that may be installed for the play area shall be down shielded.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

2. Any outdoor play area shall be fenced in with an attached, attractive and compatible

solid fencing of at least six feet in height but not exceeding seven feet in height.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

3. Pupils shall be between three and six years of age.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

4. The operator shall limit outdoor educational activities to the time period between 10:00 a.m. and 12:00 p.m. The operator will make reasonable efforts to limit noise.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

5. Drop-off and Pick-Up Areas and Sessions. To assure that there are no more than three additional vehicles in the driveway on the property at any one time for either the drop off or pick up of students, the operator shall operate the program at the house in two separate staggered sessions at least 15 minutes apart. There shall be no vehicles outside of the owners' vehicles parked on Channel View Drive.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

6. This Home Day Care shall only be operated by a state licensed provider.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

7. It shall be confirmed that the property is on public sewer.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

8. Town of Cape Elizabeth reserves the right for the Code Enforcement Officer or Cape Elizabeth Fire Department to inspect the property once a year.

Chair Vaillancourt moved to approve this condition. Mr. Justh seconded. All were in favor. Vote: 5 - 0.

9. This approval and use is limited to the applicant.

Mr. Barbieri moved to approve this condition. Mr. Caton seconded. Vote: 2 - 3.  
Condition 9 failed.

Mr. Justh moved to approve the request of Mary June Casey, co-owner of the property at 9 Channel View Road, Map U38 Lot 10, for a Conditional Use Permit for a Home Day Care based on Sections 19-8-8 and 19-5-5 of the Zoning Ordinance with Conditions. Mr. Powers seconded. Vote: 5 - 0.

The board then voted on each condition as noted above.

**Findings of Fact:**

1. This is a request for a Conditional Use Permit to permit a Home Day Care in an existing single family dwelling per Section 19-8-8 and Sections 19-5-5 of the Zoning Ordinance.
2. The subject property is 9 Channel View (Map U38 Lot 10).
3. The owners of the property are Mary June Casey and Jeff Preble.

**Additional Findings of Fact:**

1. The proposed use will not create hazardous traffic conditions when added to existing and foreseeable traffic in its vicinity.
2. The proposed use will not create unsanitary conditions by reason of sewage disposal, emissions to the air, or other aspects of its design or operation.
3. The proposed use will not adversely affect the value of adjacent properties.
4. The proposed site plan and layout are compatible with adjacent property uses and with the Comprehensive Plan.
5. The design and external appearance of any proposed building will constitute an attractive and compatible addition to its neighborhood, although it need not have a similar design, appearance or architecture.
6. The applicant has demonstrated compliance with the requirements in Section 19-8-8.C and Section 19-5-5 of the Zoning Ordinance.

**Conditions:**

1. Lighting. Other than the exiting lighting above the garage doors and the main entrance of the house, no lighting shall be installed in a manner that would cast any additional lighting into adjacent properties and any lighting that may be installed for the play area shall be down shielded.
2. Any outdoor play area shall be fenced in with an attached, attractive and compatible solid fencing of at least six feet in height but not exceeding seven feet in height.

3. Pupils shall be between three and six years of age.
4. The operator shall limit outdoor educational activities to the time period between 10:00 a.m. and 12:00 p.m. The operator will make reasonable efforts to limit noise.
5. Drop-off and Pick-Up Areas and Sessions. To assure that there are no more than three additional vehicles in the driveway on the property at any one time for either the drop off or pick up of students, the operator shall operate the program at the house in two separate staggered sessions at least 15 minutes apart. There shall be no vehicles outside of the owner's vehicles parked on Channel View Drive.
6. This home day care shall only be operated by a state licensed provider.
7. It shall be confirmed that the property is on public sewer.
8. Town of Cape Elizabeth reserves the right for the Code Enforcement Officer or Cape Elizabeth Fire Department to inspect the property once a year.

Mr. Justh moved to approve the Findings of Fact, the Additional Findings of Fact and Conditions; Mr. Powers seconded. All were in favor. Vote: 5 - 0.

**E. Communications:** None.

**F. Adjournment:** Chair Vaillancourt adjourned the meeting at 11:04 p.m.