

[Meeting Agenda](#) (Jan. 28, 2002)

Draft Minutes ([Sept. 24, 2002](#))

([Oct. 22, 2002](#))

## **AGENDA**

### ZONING BOARD OF APPEALS AGENDA

TUESDAY, JANUARY 28, 2003

TOWN HALL

WORKSHOP 5:45 PM

WILLIAM JORDAN CONFERENCE ROOM

Mike Hill, the Town Attorney, will be present to do an overview of the Boards' responsibilities for the benefit of the new members and as a refresher course for the rest.

REGULAR MEETING 7:00 PM

COUNCIL CHAMBERS

A. Call to Order

B. Annual Election of Officers

C. Approve the Minutes of September 24, 2002 & October 22, 2002

D. Old Business

E. New Business

1) To hear the administrative appeal of David Wennberg & Anne Carney of the Code Enforcement Officers decision to issue certificate of occupancy #030034 for a "structure addition" on Lot 5 of Map U41, 133 Two Lights Road.

2) To hear the application of Leslie Evans & Ronnie Sellers, 133 Two Lights Road, Tax Map U41, Lot 5 for a conditional use permit to relocate an existing home business.

F. Communications

G. Adjournment

## **DRAFT MINUTES**

Town of Cape Elizabeth, Maine

Minutes of Zoning Board of Appeals

September 24, 2002 7 P.M., Town Hall

Present: David Backer, Chair

Jay Chatmas

Jack Kennealy

Steven LaPlante

Michael Tranfaglia

Absent: Penelope Jordan-Barthelman Catherine Miller

Also present was Bruce Smith, Code Enforcement Officer

David Backer called the meeting to order and asked for approval of the minutes for the previous meeting of July 23, 2002. Mr. Kennealy made a motion to accept the minutes. Motion was seconded by Dr. Chatmas 3 in favor 0 opposed 1 abstained - Mr. LaPlante was absent at the July meeting. Mr. Transfaglia arrived after the vote was taken.

#### OLD BUSINESS

Mr. Backer addressed the request of Steven & Sarita Soloman, 4 Kettle Cove Road, Tax Map U16, Lot 7A for a front property line variance of 9' - 0" from the required 25', a left side property line variance of 5' - 0" from the required 25', and a right side property line variance of 15' - 0" from the required 25'-0' replace the existing ranch with a 1½ story cape with attached porch.

Mr. Backer made reference to a letter which the Board had directed Bruce Smith to send to the Solomans regarding the status of their application. Mr. Smith had not received a response from the applicants, and therefore, the Board opted to drop the item from the agenda. The Solomans can reapply for a variance in the future.

#### NEW BUSINESS

Mr. Backer introduced new business to hear the request of Ted and Evie West, 22 Reef Road, Map U-13, Lot 89, to appeal the Code Enforcement Officer's decision of denial of building permit #030126 dated 9/11/2002.

Bill Plouffe of the law firm Drummond, Woodsum & MacMahon, stepped forward to represent Mr. and Mrs. West, who were also present. He also introduced Joseph Waltman, the designer of the proposed addition to the West's home. Mr. Plouffe stated that the proposed addition was within shoreland zoning setback requirements and did not exceed the 30% expansion limit of volume required in the same ordinance. He was of the understanding that Mr. Smith's denial of the building permit was based on a previous finding by the Board with regard the Caputo case. Mr. Plouffe did not agree with those findings and wished to argue an interpretation in favor of the Wests. He made reference to

a case of Lewis vs. Rockport in which an interpretation of the zoning language by the Supreme Court denied any expansion of a nonconforming structure. Mr. Plouffe felt that the Rockport decision had influenced the Board's ruling in the Caputo findings. He argued that the language in the Cape Elizabeth Shoreland Zoning Ordinance does allow limited expansion in the shoreland zone for a non-conforming structure as long as the expansion goes no closer to the water. He asked the Board to revisit the interpretation regarding the Caputo case and consider the interpretation presented by the DEP with regard to shoreland zoning.

Mr. Backer stated that he, Mr. Kennealy, and Mr. LaPlante were involved with the decision on the Caputo ruling. He explained that the difficulty in making that ruling was the same as exists today with trying to satisfy or balance two different ordinance provisions; one being the standard against increasing the volume of any nonconforming structure, and second, an allowance to expand up to 30% in a nonconforming structure set within setback requirements. The Board could find no avenue to superimpose one ordinance over the other and had asked advice from the Town Attorney. At that time, Mr. Hill stated that the ordinances were too ambiguous and he could not provide any legal counsel, and so interpretation was left to the Board. A later Board hearing concerning the relocation of a house on the Sprague property produced a letter from Mr. Hill to the Code Enforcement Officer dated July 19, 2001. Mr. Backer read the letter, which referred to a May 2001 law court ruling regarding the expansion of a non-conforming structure within a setback area. The case involved the city of Rockland vs. Rockport Plaza Realty and the same conflicting language presented with the Caputo case. The Law Court ruled that the more specific provision allowing limited expansion within a setback and with all considerations met, would take precedence over the more vague language regarding nonconforming structures. Mr. Backer was of the opinion that if Mr. Hill was given the opportunity to advise the Board at this juncture, he would follow the findings of the Law Court and rule in favor of the West appeal.

Mr. Kennealy quoted a paragraph from the Maine Municipalities Assoc. Board of Appeals Manual referencing a Supreme Court ruling on a case of nonconforming structures. The manual states that unless municipalities are very specific in their definition of "no more conforming" and adopts more liberal provisions, the more constrictive language still controls. Mr. Kennealy stated that the decision in the Caputo matter was based on that information.

Mr. Plouffe responded that in the case exemplified in the MMA manual, the municipality did not have a provision for expansion within a shoreland setback. Because that provision does exist in Cape Elizabeth, the Board can defer to the more specific language in the Shoreland Zoning Ordinance.

Mr. Plouffe debated that the City of Rockland vs. Rockport Plaza

Realty case carried the findings further than the Lewis case which was cited in the MMA manual. He also noted the weight of the authority of the DEP with regard to their interpretation of shoreland zoning ordinances and the fact that the Town Attorney supported that interpretation.

Mr. Kennealy held that there was still too much ambiguity involved with the language of the conflicting ordinances, and supported a conservative approach. He felt the more constrictive language should apply.

Mr. Plouffe responded that the rule is that when there is ambiguity that involves restriction on private property rights, the ambiguity is generally resolved in favor of the property owner.

Mr. Backer read a paragraph from the Ordinance titled "Conflict with Other Provisions" which lent support to Mr. Kennealy's argument that the more restrictive of conflicting provisions shall control. Mr. Backer stated that he had reviewed the case of Rockland vs. Rockport Plaza, and still had questions of how closely it could be applied to the conflicting provisions with the Town's ordinances. He felt the burden of interpretation still rested with the Board.

Mr. Plouffe was of the opinion that in order for the Board to hold with the findings in the Caputo case, they should "meat out" the provision allowing for 30% expansion and make the ruling more specific. Mr. Backer replied that the Caputo ruling was specific to volume but also specific to the existing footprint. The property owner could add volume up to a second floor, while not increasing the footprint of the nonconforming structure.

Joe Waltman of Anastos & Nadeau, Inc., Yarmouth, stepped forward and introduced himself. He stated that to his knowledge the shoreland setback established in 1989 was 25 feet and was written prior to shoreland zoning. He felt the discrepancy of the language in the two ordinances was a product of the timing and overlay of circumstances at the time the provisions were drafted.

Mr. Plouffe expounded on Mr. Waltman's point by reviewing the chronology of the provisions and the modifications that created ambiguity within its language.

Jack Kennealy voiced concern for maintaining consistency with regard to rulings so as not to appear arbitrary and capricious. He felt that consistency lent value to interpretation of the ordinances and was not of the opinion that the ruling in the Caputo application was invalid.

Mr. Plouffe responded by saying that the Board would not be held to task by any Court for changing their findings on the Caputo case given the subsequent Law Court rulings and later council received from the Town Attorney.

Mr. Backer opened discussion to the public.

Robert Armitage, 18 Reef Road, stated that he was neither for nor against the West application. He was concerned more with the permit process with the DEP for shoreland zoning. He felt that the Town should require DEP approval for any project within shoreland zoning and local ordinances would then pertain.

Bruce Smith explained that the DEP requires permits only in some instances of construction related projects.

Mr. Kennealy stated that at one time the DEP required notice of all Board of appeal application regarding shoreland zoning, but that is no longer the case.

Mr. Smith wanted to state for the record that his denial of the West application was based purely on the Board's ruling on the Caputo application. He did not agree with the interpretation of the ordinance which resulted in that ruling and would not defend his denial of the West's building permit. He felt that the language of the ordinance needed to be tightened up.

Mr. Backer agreed with Mr. Kennealy's concern for consistency in Board rulings, but was inclined to follow the advise of Counsel Mike Hill, who granted the less constrictive interpretation of the ordinance to be valid.

Mr. Transfaglia felt that the Board had made a valid decision with regard to Caputo, although a conservative one. In reviewing the West application, he could not determine the request to be unreasonable.

Dr. Chatmas presented questions to Mr. Waltman regarding the West residence and proposed structure. Mr. Waltman stated that there was no living area in the basement of the house. A survey determining the top of the bank for setback requirements was defined in conjunction with the Code Enforcement officer. The elevation of the proposed addition is lower than the elevation of the existing house and the roofing material will be the same. A one-story deed restriction exists for the house. Dr. Chatmas noted a correction necessary in the calculations for expansion. Mr. Waltman apologized for not having the corrected calculations on the submitted plans and confirmed that the figures had been amended.

Mr. Backer asked for any further discussion from the Board. Hearing none, Mr. Backer requested a motion.

Michael Transfaglia made the following motion:

In the matter of the administration appeal of Ted and Evie West regarding the Code Enforcement Officer's denial of their building permit #030126 dated 9/11/2002, I move that the Board approve the administrative appeal.

Motion was seconded by Mr. LaPlante 5 in favor and 0 opposed.

Communications was the next item on the agenda. Mr. Smith had nothing to submit.

Mr. Backer asked for a motion to adjourn. Motion was made by Mr. LaPlante and seconded by Mr. Kennealy 5 in favor and 0 opposed.

Meeting adjourned at 8:45PM

Respectfully submitted,

Barbara H. Lamson, Minutes Secretary

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Town of Cape Elizabeth, Maine

Minutes of Zoning Board of Appeals

October 22, 2002 7 P.M., Town Hall

**Present:** David Backer, Chair

Penelope Jordan-Barthelman

Jay Chatmas

Catherine Miller

**Absent:** Jack Kennealy

Steven LaPlante

Michael Tranfaglia

Also present was Bruce Smith, Code Enforcement Officer

David Backer called the meeting to order and noted that two of the four attending Board members had not been present at the September meeting. Without the quorum necessary to approve the minutes of the previous meeting, the vote would be tabled until the next regular meeting. Dr. Chatmas made a motion to defer the vote to accept the minutes of September 24, 2002. Motion was seconded by Ms. Jordan 4 in favor 0 opposed.

#### OLD BUSINESS

With no old business to address, Mr. Backer proceeded to new business.

#### NEW BUSINESS

To hear the appeal of Scott & Lorie Dorrance, 10 Elmwood Rd. (U03-22), for a variance of 1.9% from the allowable 25% maximum building coverage to construct a 110 sq.ft. addition.

Mr. Backer advised Mr. Dorrance that since the Board had only four of its seven members present, the appellant had the option of tabling his appeal until the next meeting. In order for the appeal to be granted, the vote would have to be unanimous in favor. A larger compliment of Board members would give the application a better margin for approval. Mr. Dorrance declined the right to table and proceeded with his appeal.

Bruce Smith explained that although the advertisement for the appeal stated a variance of 1.9% from the allowable 25% maximum building coverage, the true amount would be .8%. The lot was considered non-conforming at the time the ordinance was adopted and 1.1% was subsequently grandfathered. For legal purposes, the advertisement had to state the full percentage.

The appellant introduced himself and stated that he resided at 10 Elmwood Road. He reiterated the fact that his property was grandfathered 1.8% above the allowable 25% maximum building coverage. His appeal therefore would actually only involve an additional .8% increase for a total of 26.9% building coverage to construct an addition on his home.

Dr. Chatmas inquired as to the number of stories on the house and Mr. Dorrance replied there was one. Dr. Chatmas then asked the appellant to clarify the property lines on the submitted plot plan and state the zoning. Mr. Dorrance explained the plan layout and stated that the property was in the Residential C zone. No setback violations were involved and no impervious surface would be increased. Dr. Chatmas asked whether any stipulations existed that would preclude adding a second story to the residence. Mr. Smith explained that the percentage was based on footprint coverage and therefore building up is of no issue with the ordinance.

Ms. Miller asked of a building comparison with regard to other neighboring lots. Mr. Dorrance replied that of twelve properties considered, three on the street were over 25%. He then identified the comparable lots and stated the percentage of increase for each and explained how he arrived at his determinations. Mr. Backer asked whether Mr. Dorrance had considered for comparison the houses along Forrest Road to the rear of his property. Mr. Dorrance stated that he had and identified two properties that would apply. Mr. Backer asked how the square footage of the Dorrance residence compared with other house situated in the neighborhood. Mr. Dorrance replied that his residence would be on the high end of those considerations, however, he noted that his lot was small in comparison to many in the neighborhood

Ms. Miller asked whether there was an alternative to increasing the living space of the house while still adhering to the ordinance. Mr. Dorrance stated that the 63 sq. ft. that would be allowed would not satisfy the demand for the space, while also costing as much as the 110 Sq. feet desired. Because the addition is wanted to increase the dining and living room area, building up would not provide a solution. Mr. Dorrance said that the basement was wet and so not

an option.

Mr. Backer questioned Bruce Smith whether the applicant had been versed on the standard for economic injury. Mr. Smith replied in the affirmative. Mr. Backer recognized that the request involved a minimal variance from the ordinance, but nonetheless had to meet the standards imposed by that ordinance. He specifically noted the findings with regard to economic injury, and Mr. Dorrance agreed that he had in fact not met that requirement. He stated that Mr. Smith had informed him of the criteria necessary to meet the standard for economic injury, but decided to pursue the appeal regardless.

Mr. Backer closed the public comment portion of the discussion and requested further discussion from the Board.

Board members were sympathetic to the minimal considerations involved in the appeal but agreed on their responsibility to abide by the standards of the ordinance. With no further discussion, Mr. Backer asked for a vote on the individual elements.

-----FINDING OF FACTS

The appellants are owners of a property at 10 Elmwood Road, Tax Map U03, Lot 22.

The property is located in a Residential C District and contains 6000 sq. ft. of land area

with 60 ft. of street frontage, and is therefore a nonconforming lot of record.

CONCLUSIONS

1. The proposed variance is not a substantial departure from the intent of the Ordinance.

4 in favor, 0 opposed

2. A literal enforcement of the Ordinance would cause a practical difficulty.

1 in favor, 3 opposed

3. The need for the variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.

4 in favor, 0 opposed

4. The granting of the variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties.

4 in favor, 0 opposed



5. The practical difficulty is not the result of action taken by the applicant or a prior owner.

4 in favor, 0 opposed

6. No other feasible alternative to a variance is available to the petitioner.

1 in favor, 3 opposed

7. The granting of a variance will not unreasonably adversely affect the natural environment.

4 in favor, 0 opposed

8. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.

4 in favor, 0 opposed

Mr. Backer asked for a motion to approve the application as presented. Motion was made by Ms. Miller and seconded by Ms. Jordan. two of the elements did not carry, motion was denied 0 in favor and 4 opposed.

Communications was the next item on the agenda. Mr. Smith had received none.

Mr. Backer asked for a motion to adjourn. Motion was made by Ms. Jordan and seconded by Ms. Miller 4 in favor and 0 opposed.

Meeting adjourned at 7:55PM

Respectfully submitted,

Barbara H. Lamson, Minutes Secretary

**TOWN OF CAPE ELIZABETH**

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