

TOWN OF CAPE ELIZABETH
MINUTES OF THE PLANNING BOARD

February 26, 2007

7:00 p.m. Town Hall

Present: Barbara Schenkel, Chair
Paul Godfrey
James Huebener
Beth Richardson

Scott Collins
Peter Hatem
Jack Kennealy

Mrs. Schenkel called the meeting to order. She summarized the responsibility of the Planning Board to follow the land use codes, and balance private property rights with public comments. She explained that the Planning Board holds public hearings when they are scheduled and that written comments can be submitted at any time to the Town Planner, who will distribute them to the Planning Board.

The minutes were amended and a motion was made by Mrs. Richardson and seconded by Mr. Godfrey to approve the amended minutes. The motion passed 7-0.

Mrs. Schenkel noted an announcement for the Great Pond Winter Festival.

NEW BUSINESS

Wells Rd Private Accessway Amendment - Request by Edward MacColl and Sunrise Island LLC, represented by Len Gulino, to amend the Private Accessway Permit granted for 78 Wells Rd to swap land between lots and amend the building envelope for Lot B, Sec. 19-7-9, Private Accessway Permit.

Mr. Edward MacColl, 78 Wells Rd, introduced the project. A private accessway permit has previously been granted to Sunrise Island LLC for this lot. The lot was divided from 78 Wells Rd and has no frontage on Wells Rd. Mr. MacColl is concerned with protecting his marsh view and limiting the building on Lot B. He and the owner of Lot B, Sunrise Island LLC, have agreed to a land swap that improves view and access to the marsh for Lot A and conveys ownership of the driveway to Lot B. He disclosed that easements and prescriptive covenants have been added to both lots. One result is that the size of the building envelope for Lot B has been reduced in size. He would like the Town to not become involved in the easements in order to preserve flexibility for the lot owners if they wish to change the easements in the future. He does not want to revise the building envelope for Lot B, but rather leave the building envelope to include the easements that prohibit building construction. He noted that he and Mr. Gulino, representing Sunrise Island LLC, have expended funds and time to get the plans drawn and do not want to make further changes. Mr. MacColl said that keeping

the easements private and separate from the Private Accessway approval is consistent with the ordinance.

Mrs. Schenkel opened the public hearing and, with no one wishing to speak, closed the public hearing.

Mr. Hatem asked what is going on the record for restrictions. Mr. MacColl said that everything would be on record because he would record both the Planning Board approved plan and the detailed plan showing the easements.

Mr. Huebener asked if the view easement is private? Mr. MacColl said the town has no role in the view easement. The view easement is a private arrangement that shrinks the building envelope further.

Mr. Kennealy confirmed that this is a private deal but that the easement would be recorded.

Mr. Godfrey asked if the applicant would answer yes or no, will the recorded building envelope take into consideration all the easement restrictions? Mr. MacColl said the Planning Board recorded plan takes into consideration lot lines and setbacks only. A second plan would also be recorded which shows the "practical" building envelope.

Mrs. Schenkel asked about the easement on Lot A for the septic system for Lot B. Mr. MacColl said Lot B currently owns land that would be conveyed to Lot A. One of the test pits for the Lot B septic system is in that area. The proposal reserves an easement on Lot A for the benefit of Lot B for a septic system.

Mr. Huebener asked about the alternate location for the Lot B septic system. Mr. MacColl thinks there is an alternate location.

Mr. Huebener asked the Town Planner to comment. Ms. O'Meara noted that the existence of private easements was questioned by an abutter the last time this was approved, highlighting the need to have this kind of information on the plan on file in the Town Hall. This is a complex arrangement for the level of knowledge of a typical lot buyer. Town staff would be held responsible for explaining the approved building envelope and the "practical" building envelope. This may be understood when the home is originally built, but 5 years later, with different parties involved, a deck addition could be approved without consulting the "practical" building envelope, with resulting problems. Ms. O'Meara also noted that an HHE-200 form with the septic system design had not been prepared and approved for the alternate septic system location. The only confirmed septic system location would be located on another lot with an easement.

Mr. MacColl noted that, in the instance of a violation of the view easement, the town is not responsible for enforcement. The easement will be shown on the other plan. It is not the job of town staff to enforce the view easement.

Mr. Kennealy stated that municipal government needs to be knowledgeable of the building envelope. Mr. MacColl noted that the Zoning Ordinance requirements of the building envelope are correct. If someone builds in the view easement, recourse is to go to court, not go to the town for relief.

Mrs. Schenkel pointed out that both parties are currently lawyers. Some one who is not a lawyer may buy this lot. This is complicated. Some buyers may not understand this and a lawsuit results. We should be prudent.

Mr. MacColl said he has lived in Cape Elizabeth 23 years. Your Zoning Ordinance is crazy. There are just two of us selling land. A buyer would be nuts if he doesn't talk to me before buying the lot.

Mr. Hatem said he saw some value in preserving flexibility. He understands the problems that could be created for town staff. Are there test pits for the alternative site? Does the Town have authority to alter the building envelope beyond zoning setback requirements?

Ms. O'Meara responded that town staff will work with whatever is approved. Even when the town is not responsible, however, residents expect to get answers to questions about building envelopes. They don't take it well when they are directed to the registry to do their own research. This lot does not meet the Zoning requirements because it does not have the required 125' of frontage on Wells Rd. The ordinance allows the lot to become buildable only if a private accessway permit is issued by the Planning Board. The private accessway standards do give the Planning Board the authority to review the building envelope configuration and sanitary waste disposal.

Mr. Hatem asked if there are lots where the septic system is located on another lot with an easement. Ms. O'Meara stated that this arrangement is not typical on lots with this much land.

Len Gulino, Managing Partner of Sunrise Island LLC spoke about 3 points. First, he understands that the situation is more complicated with two plans recorded. He said the building envelope was previously approved. Changing the building envelope to reflect the private agreements functionally expands setback requirements for ministerial convenience. It is just as easy to have both plans on file in the Town office. I will deliver both copies from the registry to the Code Enforcement Officer. Second, flexibility is important because it gives the parties an opportunity to work things out. If, in ten years, a deck is proposed and the parties can work it out privately, the lot owner should not also have to come

back to the Planning Board. Third, some test pits have been drilled in the alternate area. The proposed septic system location has been preserved with an easement. Since the building envelope is being reduced in size, it may be difficult to fit the house and the septic in the alternate location, so we have provided a written septic system easement. We will record plans and deeds with explicit descriptions. Very few people buy a house without a title company review so there will be full disclosure for everybody. This proposal comports with the Planning Board's goal, which should be to preserve views and minimize visual impacts.

Mrs. Richardson appreciates having flexibility with the easements, but she is concerned with the integrity of the Planning Board process to sign a plan that does not reflect the burden on the property. Perhaps there could be a note on the plan that the Planning Board signs referring to the other plan that restricts building envelope.

In response to concerns that a note would also require further Planning Board review, it was suggested that the note would state for informational purposes only. Mr. Gulino said the notation may add confusion. Mr. MacColl supported the suggestion and recommended "Other private agreements may restrict building envelope further."

The Planning Board asked the Town Planner to comment. Ms. O'Meara respectfully stated that she remained concerned with the possibility of confusion. Not all lot buyers hire an attorney when they buy a lot.

Mr. Hatem supported limiting the responsibility of the Town and the Code Enforcement Officer.

Mrs. Schenkel expressed concern that some of the building envelope is not buildable by private agreement. Why doesn't the building envelope abut the 250' wetland buffer? Is that land unacceptable to build upon?

Mr. MacColl said the building envelope does not include a conservation easement. Mr. Gulino said the building envelope was drawn to give the town an additional setback from the conservation easement. It was a reasonable location for the building envelope and it is pretty wet further toward the wetland.

Mrs. Schenkel asked about the no build area on the north side of the building envelope? Mr. Gulino said that the private restriction pushes the building envelope away from Lot A with the intent to put it in the most unobstrusive spot.

Mrs. Schenkel stated that, in reality, the building envelope proposed is smaller than what you could have shown under the Zoning Ordinance limitations.

Mr. Godfrey expressed support for modifying the building envelope to show the restrictions and have one plan. He is concerned that the town may have some liability if the Code Enforcement Officer grants a permit and the information is changed.

Mrs. Schenkel agreed.

Mrs. Richardson said that she preferred everything on the plan, although she understands the desire for flexibility.

Mr. Godfrey supports flexibility, but not when it impacts where the building can be built.

Mrs. Richardson noted that there could be a missing link between the plans here in the town office and what is recorded. The Code Enforcement Officer cannot be expected to do a full title search.

Mr. Kennealy said that the burden should be on the applicant if changes are desired.

Mrs. Schenkel emphasized the need for a formal septic system easement.

Mr. MacColl agreed that it would be acceptable to revise the building envelope to exclude easement areas, but that he would prefer not to include the various easements as part of the approval.

Mr. Hatem agreed that would be acceptable.

Mrs. Schenkel confirmed that the building envelope would be changed so it does not include any easements and that a septic system easement would be included in the approval.

Mrs. Richardson said that no note would be needed on the plan.

Mr. Hatem made the following motion, seconded by Mr. Godfrey:

Findings of Fact

1. Ed MacColl and Sunrise Island LLC would like to amend a previously approved Private Accessway Permit for a new lot located south of an existing home located at 78 Wells Rd, which requires a Private Accessway Permit under Sec. 19-7-9.
2. The septic system designed for Lot B would be located on Lot A with an easement for Lot B.

3. When a building permit application is submitted for Lot B, the Code Enforcement Officer will likely consult the Planning Board approved plan to confirm building envelope location.
4. The application substantially complies with Sec. 19-7-9, Private Accessway Permit.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Ed MacColl and Sunrise Island LLC to amend a previously approved Private Accessway Permit for a new lot located south of an existing home located at 78 Wells Rd be approved, subject to the following conditions:

1. That the septic system easement for Lot B located on Lot A be submitted;
2. That the building envelope be redrawn on the approved plan so that no area that is restricted from building construction is included within the envelope; and
3. That there be no issuance of a building permit, nor recording of this approval for either Lot A or B until plans and materials have been submitted to comply with the above conditions.

The motion was approved 7-0.

OTHER BUSINESS

Eldercare Zoning Amendments - The Planning Board will consider amendments to the Zoning Ordinance that increase the density of eldercare facilities in the RC District and increase the floor area and volume expansion for nonconforming structures in the RP1 Wetland Buffer that are served by public sewer, Sec. 19-10-3, Zoning Amendments Public Hearing.

Owens McCullough, Sebago Technics, and representing William Morris Architects and Canyon Creek Development, is requesting these amendments as part of a proposal to redevelop the Viking property located at 126 Scott Dyer Rd. The site includes an abandoned facility. The owner is proposing 55 assisted living beds and 40 independent units. The 1970's wing would be removed and a 2 story building rebuilt, housing the independent units.

The redevelopment proposal requires 2 zoning amendments. The first amendment would increase the eldercare density allowed from 1

unit/3,500 sq. ft. to 1 unit/2,500 sq. ft. and 1 bed/2,500 sq. ft. to 1 bed/2,100 sq. ft.

An amendment to the wetlands regulations is also requested to allow greater expansion of a nonconforming structure. The proposal includes replacing a 1-story wing with a two-story wing, where the overall building footprint will not expand and may decrease.

Mr. McCullough noted that the process would require the Planning Board to make a recommendation to the Town Council on the amendments. If the Town Council adopts the amendments, he would return to the Planning Board for Site Plan Review.

Mrs. Schenkel opened the public hearing and, with no one speaking, closed the public hearing.

Mr. Huebener made the following motion, seconded by Mr. Kennealy.

BE IT ORDERED that, based on the draft text, the Planning Board recommends the eldercare density amendment and wetland nonconformance amendment to the Town Council for adoption.

The motion passed 7-0.

Mr. Godfrey made a motion to adjourn.

The meeting adjourned at 8:20 p.m.

Respectfully submitted,

Maureen O'Meara,
Acting Planning Board Secretary