

TOWN OF CAPE ELIZABETH
MINUTES OF THE PLANNING BOARD

May 15, 2007

7:00 p.m. Town Hall

Present: Barbara Schenkel, Chair
Paul Godfrey
James Huebener

Scott Collins
Beth Richardson
Jack Kennealy

Absent: Peter Hatem

Also present was Maureen O'Meara, Town Planner.

Mrs. Schenkel called the meeting to order and welcomed the members of the public in attendance. She reminded them that the Board has a need to balance private property rights with the public good. They need to follow the Zoning Ordinance of the Town of Cape Elizabeth.

Mrs. Schenkel called for comments or corrections of the minutes of April 23, 2007. Mr. Godfrey made a motion to accept the minutes and Mr. Kennealy seconded. The minutes were approved 6-0, without amendment.

Mrs. Schenkel reviewed the list of correspondence. The request to table to the June meeting re: Bothel, was tabled with no objection from the Board.

CONSENT AGENDA

High School Dugouts-The Town of Cape Elizabeth is requesting Site Plan Review of dugouts to be constructed at Holman and Capano Fields at the Cape Elizabeth High School, located off Ocean House Rd, Sec, 19-9, Site Plan Amendment.

This application has been placed on the Consent Agenda. If a Board member would like to have a substantive discussion of the application, a motion should be made to move the application to the regular agenda. Otherwise, a motion for approval is in order.

Mrs. Schenkel asked if the Board had any discussion of this item.

Mr. Collins said he had a couple of questions.

Ms. Samantha Perkins of Oest Associates came forward and said she could answer questions about the project.

Mr. Collins asked why the benches would be moved and then reused.

Ms. Perkins said they are just wooden benches that are not permanently affixed, and they will be able to be used again once construction is complete.

Mr. Collins was concerned about vandalism and asked what precautions were taken in that regard.

Ms. Perkins said that the doors will be locked and the windows will not have glass panes in them. They will be locked wooden panels that can be opened when in use.

Mr. Collins had no other questions and the rest of the Board had no questions.

Mr. Kennealy made the following motion, seconded by Mr. Collins:

BE IT ORDERED that, based on the plans and materials submitted, the application of the Town of Cape Elizabeth for an amendment to the previously approved site plan for the school campus, located off Ocean House Rd, to construct dugouts at Holman and Capano Fields be approved as a Consent Agenda item.

The Motion was approved 6-0.

OLD BUSINESS

Thompson Rd Private Accessway Permit-Kenneth Ray is requesting a Private Accessway Permit to create one lot located behind 1151 Shore Rd, with access on the paper street recorded as Thompson Rd. The application will be reviewed for compliance with Sec. 19-7-9, Private Accessway Standards.

Mr. Kennealy recused himself from the consideration of this permit.

Mr. Rick Licht introduced the discussion on behalf of the applicant. He introduced the new landscaping plan and outlined some of the minor changes to the plan since the last meeting. He also noted that there have been several meetings with the abutters in order to come to an agreement on where to place the buffer plantings.

Mr. Licht also said that he had comments from Ms. O'Meara suggesting that any plantings ought to be on the very outside five feet of the Thompson Road right of way, in order not to violate the intent of the right of way in case of future development.

Mr. Licht also said during his discussion with the Fire Chief and it was agreed that the T part of the turnaround did not need to be paved. The new plan also shows the fencing has been replaced with plantings.

Ms. Schenkel requested that Mr. Licht review the size and location of the plantings before opening the public hearing. She wanted the abutters to have the information so they will know what is proposed.

Mr. Licht then gave a more detailed description of the sizes and placement of the plantings

Mrs. Schenkel then opened the Public Hearing.

Lisa Mainella of 9 Beach Bluff Terrace spoke first. She said that she feels she has just lost 15 feet off the back yard of her house in the last few minutes. She knew that the plantings were to be moved to the edge of the right of way, but she had thought they would be moved to the north, not to the south edge of the right of way.

Mrs. Schenkel asked if the plantings have been moved 15 feet? She is aware of discussions involving what would be a right of way.

Ms. O'Meara said the Board has not seen this latest plan of the plantings. She said that all the plantings that had been proposed to be placed in the center of the right of way have been moved in response to a comment she made. She had said the right of way was not an appropriate place to plant the buffer. The applicant has responded by pulling all those plantings to the southern edge of the right of way.

In response to questions from the board, Ms. O'Meara said the number and size of the plantings has not changed, just the location. She also said they could be on the north or south edge of the right of way, but placing them in the center would not preserve the right of way.

Mrs. Richardson asked if members of the Board are allowed to ask questions of the residents who are addressing the Board.

The reply was that it is appropriate to ask questions of an abutter, but not to get into a protracted discussion of the issues.

Mrs. Richardson then asked Ms. Mainella what she means by losing 15 feet of her back yard.

Ms. Mainella responded that it was an emotional loss since they had not had the property surveyed when they bought the house and they had believed their line was further back than it is. She had thought the plantings would be moved north, not south.

Mrs. Schenkel noted that no decision on the plantings has been made. That is why they are hearing the abutters, so the Board can balance the needs of the neighbors and the applicant. Nothing's been decided yet. State your case and we will decide later.

Mr. Huebener noted that for clarification, it's your perception of your back yard that has lost 15 feet, but the property line has not been moved.

Ms. Mainella responded that she had thought the buffer trees would be on the north side of the right of way and enable her to keep the garden she has been working on for five

years. She knew she needed to allow people to walk through her yard, but no one has done so in the time she has lived there.

Clara Cohan of 15 Beach Bluff Terrace spoke next. She said she has actually lost 2 feet from her property. The new survey located the line 2 feet south of a pin that has been there for many years. She also wants to know if the change in the turn around will affect the drainage from the earlier plan. And will it affect the number of trees they need to take down.

Ogden Williams of 5 Beach Bluff Terrace is concerned about the driveway in the proposed project. He says it points straight at his house, and he is worried that the lights of the cars will shine right into his windows. He wants adequate trees to screen those lights.

Wayne Daniels of 21 Beach Bluff Terrace wondered about the status of the paper Road after this project is done. Will the property back beyond this project still be accessible by the paper street in the future?

Maren Robinson who abuts the project on the other side spoke about her concern about allowing development on the edge of open land. She feels that you permanently ruin habitat when you allow development in such an area. She feels the balance of retaining open space and habitat, and allowing development needs to be considered.

Sybil Emmons of 35 Beach Bluff Terrace noted that she has lived on that street off and on for most of her life. She's concerned about the environmental impact of all the development that has happened during her lifetime in that area. She's also very concerned about the lack of safety in getting on to Shore Road. She feels it is very hazardous there in that area.

Peggy Williams hopes the Planning Board will pay special attention to the emails that have sent. She has sent emails with specific point and hopes the Board takes these very seriously.

Mr. Godfrey asked Ms Williams if the plan presented this evening addresses her concerns, specifically about the plantings.

Ms. Williams replied that she had called Skillins Greenhouses and asked about the planting distances. She was advised that the trees could be 8 ft apart, rather than the 10ft now proposed. She would like more hedge-like plantings for better screening. She is also concerned about a watering plan for these new plantings. Who will maintain them? She feels it is the responsibility of the landscaper to provide maintenance for these new trees. And she wants to be notified when they come in to clear-cut and bulldoze, because they might want to save some trees along the property line.

Since there were no further comments, Mrs. Schenkel closed the Public Hearing. She then called for questions from the Board.

Mr. Huebener then asked if there will be a maintenance contract for the plantings.

Mr. Licht responded that there will be a one year maintenance contract with the landscape company. They will want to keep the trees in good health because there is a significant investment in the plantings.

Mr. Godfrey wanted to make a couple of points. It's been the policy of this Board that we don't put things in the right of way. We recognize that everyone wants to keep things as they are, but it is a paper street and a right of way, and keeping things out of the right of way is appropriate.

Mr. Licht responded that they have tried to make as little impact on the existing neighborhood as possible. They have been using this as their lawns, so the applicant tried to disturb as little as possible. If they have to take the trees out of the right of way, it makes a much different picture. He suggested an indemnification by the homeowners so that if anyone needs to use the right of way in the future, that there is an indemnification by them to take out the trees at the homeowners' expense.

Mrs. Schenkel asked if the rock wall is going to be removed at this time.

Mr. Licht said they have no plans to remove that rock wall.

Mrs. Schenkel then asked if they could move some of the trees to the north side of the road and make a staggered row of trees.

The response is that there is a drainage ditch on that side of the right of way.

Mr. Godfrey asked if they had ever done an indemnification before.

Ms. O'Meara said she did not think we have ever done that before, and to keep in mind that this is a right of way that every person who owns a lot on the subdivision plan has rights in the right of way. You are proposing to place the buffer trees in the exact place where they could be cut down.

Mrs. Richardson has a concern that is greater than trees on one side of a right of way or another. The applicant owns a significant amount of land past the building envelope we are discussing. That land would be serviced by the right of way we are discussing. Is there contemplation of future development back there? If there is to be future development there would need to be a significant upgrade of the road to 50 ft and then sheds would go, rock walls would go because you need to get back there.

Mr. Licht addressed that. He said the sheds and structures are going to go. There is a note on the plan that the structures need to be outside the right of way. To extend the right of way, for development of the back land is something he cannot see happening. There are wetlands and the topography of the land makes it almost impossible. Plus you

need to upgrade the right of way and that will make this new lot non-conforming. The abutters could purchase parts of the back parcel to enlarge their lots.

Mrs. Schenkel asked if there was any thought about preserving that land in perpetuity and getting a tax benefit for it.

The reply was that it's been discussed.

A member of the public then asked if they could ask a question.

Mrs. Schenkel then said the public hearing was closed, but they could ask a question, not voice an opinion. Mr. Godfrey added that it needed to be a question that had not been previously raised.

Clara Cohan then asked what if the back land was deeded to a trust, or someone can't extend that road, would there be an easy way for the Town to abandon that road?

Ms. O'Meara replied that the rights in paper streets are regulated by state law. State law says that once a subdivision plan is recorded in the Registry, the paper street is created. The only way to vacate the paper street is also set down in law. All the lot owners, mortgagees and others need to be notified and it is a long and tedious legal process involving much time with lawyers.

Mrs. Schenkel noted that if the Board approves a Private Accessway, it pretty much negates anything else beyond that accessway. All that gives the right to, is one lot. A future Planning Board would have to undo everything we are doing. It seems to me that to extend this right of way seems to be impossible or next to impossible. She then asked if Ms. O'Meara agreed with her.

Ms. O'Meara said she would never say that.

Mrs. Schenkel noted that they could not entertain too many questions from the public. She's opened Pandora's Box. She would like to let the Board ask all their questions and then the public may ask another question or two.

Mr. Licht requested that he be able to address some of the concerns raised by the public. He then talked about planting distances and screening. The drainage will be the same as previously planned, and will not change because of the lack of paving on the turnaround. He also wanted the record to reflect that the applicant has a wetlands report from Albert Frick which identifies the soil types on the site.

Mr. Collins wanted to be sure that the conditions from the Town Engineer were all addressed.

Mrs. Schenkel wants to discuss the building envelope. She'd like to know where it is now, and discuss it.

Ms. O'Meara addressed Mr. Collins' concern about the latest memo from Oest Associates. She said it will be a condition of the final plan, if the Board approves the project, that all conditions of the engineer will be met.

Mr. Licht replied that the conditions will be met. He then spoke about the building envelope and why it encompasses an area in the back beyond some wetlands. It is in case someone wants to build a barn back there. He said no such plans are proposed, but if someone wanted a barn or shed, it would be an ideal spot for it.

Mrs. Schenkel suggested a buffer of 25 ft. for the wetland. Mr. Godfrey wants the buffer to be physically marked so there is no inadvertent filling occurring.

There was a brief discussion of what markers to use. It was agreed that the applicant and the Town Planner will work out an acceptable method of marking the wetlands.

Mr. Godfrey raised the topic of the structures in the right of way, and the method and responsibility for removing them. The plans say it is the owners' responsibility to move them. What happens if nothing is done?

Ms. O'Meara noted that the abutters are not the ones who have a responsibility for the conditions of approval, the applicant does.

A discussion ensued as to the responsibility of the removal and who should bear the expense.

Mrs. Schenkel and Mrs. Richardson both brought up the fact that the abutters are encroaching on land they know is not theirs. They feel it should be the responsibility of those owners to remove those encroachments.

Mr. Collins then wondered how you can make it a condition for an applicant when they have no ability to enforce it.

Ms. O'Meara noted that the structures will not get moved, and if the Board allows the encroachments, the new owner of lot 2 can come in and build another structure since the prior encroachments have been allowed to stand. She is concerned that you are setting a tenor for the rest of the neighborhood, and setting up a potential for legal arguments between neighbors.

Mr. Godfrey proposed that the applicant should be the one responsible for moving the structures so we don't get into a situation where nothing gets done.

Mrs. Richardson agreed. We only have the ability to require the applicant to do it, not anyone else.

Ms. O'Meara proposed that a time limit be placed on the removal. If the owners want to move them, they may do so, otherwise, the applicant will move them.

Mrs. Schenkel then directed the discussion back to the trees and the rock wall.

Mr. Collins and Mr. Licht then discussed the quantity and location of the buffer trees. Mr. Licht said the applicant is agreeable to leaving the trees in the right of way, or moving them to the southern edge of that way. He feels it would be tight to put them in on the north side of the right of way because of the drainage pipe. He said it would be difficult to move the pipe to the north. Even though the board feels it is setting a precedent, he would like to leave the trees in the right of way, because these people have lived here for years and it hasn't been an issue. If someone put a barn back here he thinks the driveway would not be a problem. It could all be worked out. He doesn't think an indemnification agreement is even needed, as long as everyone knows that if anyone wants to utilize the right of way, the trees would need to be cut down.

Mrs. Schenkel noted that it would be possible to move the trees to the northern side of the right of way without interfering with the drainage pipe.

A member of the public then wanted to make a comment.

Mrs. Schenkel allowed her to phrase it as a question.

She wants to know if they could move the pipe and the trees 7 ft from the right of way, instead of 5 ft. She wants to move the trees even further from the north edge of the right of way.

Mrs. Richardson was fine with moving the trees and pipe on the northern edge as long as it did not cost the applicant another engineering study to do so. She feels the applicant has been very accommodating of the abutters concerns.

Mr. Licht has just consulted with the applicants and they are concerned about putting the trees on the north side. They would have to re-engineer the drainage. They would prefer to put the trees in the right of way, or on the southern edge of the right of way.

Mrs. Schenkel commented that if the brick wall is not going to be removed, she doesn't see a problem with having the trees there too.

Mr. Godfrey noted that common sense says that, but what about the next project down the line.

Mrs. Schenkel doesn't think that will be a likely case for the next project.

Mr. Huebener asked if there is a precedent issue here, even though there is little likelihood of another Thompson Road project. He asked Ms. O'Meara if this would be referred to later on.

Ms. O'Meara replied that every decision you make is referred to later on. You have asked me if this has been done in the past.

Mrs. Richardson asked if there is any conventional wisdom regarding stone walls.

Ms. O'Meara replied that most stone walls have been there for a long time. To dismantle it you just take them away one stone at a time and they are gone. It is different than planting brand new trees in a right of way. Probably when the stone wall was built, it was not intentional that it would be in a right of way some day.

Mrs. Schenkel said she would still prefer the trees in the middle of right of way. Precedent or not, I think in this situation the likelihood of anything happening beyond what is happening now is so remote that we should make the best decision we can.

Mr. Licht again made an argument for keeping the trees in the right of way, with the proviso that if anyone wanted to exercise their rights in the right of way, then the trees would have to be cut down.

Mr. Collins asked why the applicant would be interested in having the trees in the center of the right of way, if that's going to be the potential access to a barn or shed. How would you get back there.

Mr. Licht feels that meandering a driveway through those trees will not pose a problem. The best access way would be across the wetland.

He was then questioned about the idea that the best way to get to the back land is through the wetland.

Mr. Licht then replied that if they could get a permit to cross the wetlands. He reiterated that they have not studied this, just looking at it from a practical standpoint.

Mr. Godfrey noted that while it is his opinion that we should keep any buffer or structures out of the right of way, since the residents have all come forward, that we should stick with the original plan. The abutters need to know that if anyone comes forward to use the right of way, the buffer will be cut down. These circumstances are unique in that it is unlikely anyone will need to use the right of way, so he feels it will be okay to put the buffer in the right of way.

Mrs. Richardson agreed, but also cautioned that the trees could disappear in an instant. The placement of those trees is the best possible resolution. But it does serve to continue the fallacy of a bigger lot than you have. That is a concern of hers, but she agrees that putting the trees there preserves the neighborhood.

Mr. Huebener made the following motion:

Findings of Fact

1. Kenneth Ray is requesting a Private Accessway Permit to create one lot located behind 1151 Shore Rd, with access on the paper street recorded as Thompson Rd, which requires review under Sec. 19-7-9, Private Accessway Standards.
2. The Town Engineer has recommended changes to the plans.
3. Sec. 19-7-9 requires that a maintenance agreement be signed and recorded in the Cumberland County Registry of Deeds.
4. Thompson Rd is a paper street where access rights are held by the subdivision lot owners and the Town of Cape Elizabeth.
5. The building envelope abuts an RP2. The Planning Board's experience is that wetlands immediately adjacent to lots or building envelopes are altered without establishment and maintenance of a natural buffer.
6. The application substantially complies with the standards of Sec. 19-7-9, Private Accessway Standards.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Kenneth Ray for a Private Accessway Permit to create one lot located behind 1151 Shore Rd, with access on the paper street recorded as Thompson Rd be approved, subject to the following conditions:

1. That the plans be revised per the Town Engineer's comments in his letter dated 5/7/07, with the elimination of number 7.
2. That a signed maintenance agreement be submitted to the Town Planner.
3. That Note 9 on Drawing 1 be amended to read that the applicant will be responsible for removing the structures located within the Thompson Rd right-of-way prior to the issuance of a building permit for Lot 2. A copy of this approval shall be mailed by the Town Planner to the property owners located at 9 and 15 Beach Bluff Terrace in the event they wish to make alternate arrangements.
4. That the plantings proposed be as shown on landscape plan dated April 30, 2007.
5. That the building envelope be amended to create a 25' buffer for the RP2 wetland and that there be no alteration, including removal of vegetation or organic matter, of the area within 25' of the wetland, with marking of the wetlands by the applicant by a method approved by the Town Planner.

6. That there be no issuance of a building permit nor recording of the plan until the plans have been revised to address the above conditions and submitted to the Town Planner for Review.

Mrs. Richardson seconded the motion. 5in favor 0 opposed.

NEW BUSINESS

Maskewitz/McMullin Resource Protection Permit-Dianne Maskewitz and Scott McMullin are requesting an after the fact Resource Protection Permit to fill 4,191 sq. ft of wetland and pond for landscaping. The application will be reviewed for compliance with Sec. 19-8-3, Resource Protection Permit.

Albert Frick introduced the proposal by referencing the original subdivision plan showing the wetland area. He showed how the wetlands are now filled and the existing pond has been partially filled.

Mrs. Schenkel started by asking if any Board members have any questions for Mr. Frick. She also wants to make clear in the record that the current owners did not in any way alter this wetland. They bought the property and the alteration had already occurred. Mr. Godfrey made a motion and Mr. Collins seconded:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Dianne Maskewitz and Scott McMullin for an after the fact Resource Protection Permit to fill 4,191 sq. ft. of wetland and pond for landscaping, located at 221 Ficket Street, be deemed complete.

BE IT FURTHER ORDERED that the above application be tabled to the regular June 19, 2007 meeting of the Planning Board, at which time a public hearing will be held.

The motion passed, 6-0.

A site walk was discussed and the Board decided that a site walk was not needed.

Scott McMullin then spoke and noted that it has been a great inconvenience to them and requested that the Board bring this matter to a conclusion tonight.

Ms. O'Meara was asked to give some background on the Conservation Commission memo. She said the Commission had met on Tuesday night and were aware that the current owners have not been responsible for the wetland alteration. However they were concerned that the granting of an after the fact permit would set a precedent for allowing an alteration which might not have been granted if it had been requested at the proper time when the wetlands were filled. They were concerned that this would provide an incentive for people to go ahead and fill the wetlands and then come in for an after the fact approval. One of the Conservation Commission members is an attorney and he felt that the fact of the violation being by a former owner was not relevant. He says it is a

private matter between the prior owner and the current owner. The Commission wants to focus on whether the action was appropriate, not on whether or not the current owner was responsible for the act.

Mr. Kennealy said he is sympathetic to what the Conservation Commission has said about setting a bad precedent. He also feels bad for the current owner who has to deal with the violation.

Mrs. Richardson asked how serious was the initial violation?

Ms. O'Meara replied that they basically filled half of the existing pond.

Mrs. Richardson asked if they could have filled any of it?

The reply was, no, they could not have. Without getting a permit there should have been no alteration at all.

Mrs. Schenkel said there seems to be a need to have a public hearing. Someone from the Conservation Commission may well want to come and speak.

The vote was 6-0 in favor of tabling the item to the next meeting.

Mr. Kennealy added that as discomfoting as it may seem, the Conservation Commission should have a major voice in this matter. It is the final decision of the Planning Board, but we should listen very closely to what the Conservation Commission says.

A site walk was decided upon and scheduled for Saturday, June 9, 2007 at 10:00 am.

OTHER BUSINESS

Trout Brook Watershed Joint Resolution-The Cape Elizabeth Planning Board will consider a resolution supporting development of a Trout Brook Watershed Management Plan.

JOINT RESOLUTION

by the

Planning Boards of Cape Elizabeth and South Portland

on the

**Need for a Collaborative Trout Brook
Watershed Management Plan**

Whereas Trout Brook forms a portion of the municipal border between Cape Elizabeth and South Portland; and

Whereas the Trout Brook watershed includes substantial areas of land in both Cape Elizabeth and South Portland; and

Whereas Trout Brook violates Maine's water quality standards and is considered impaired under the Clean Water Act; and

Whereas the South Portland Land Trust in June, 2003, organized a group of citizens, including several from Cape Elizabeth, and conducted a field survey of the Trout Brook–Kimball Brook Watershed to document erosion, undercut banks, and other significant impacts to the streams' water quality; and

Whereas the Maine Department of Environmental Protection (MDEP) included an extensive study of Trout Brook in its February, 2005, report entitled, *Urban Streams Non-Point Source Assessments in Maine*; and

Whereas Trout Brook's inability to meet minimum water quality standards has required MDEP to conduct a Total Maximum Daily Load (TMDL) assessment which will describe stream impairments, pollutant sources, and measures needed to restore the brook; and

Whereas MDEP's draft Trout Brook TMDL calls for the initiation of a strategy for Best Management Practices (BMP) implementation to be directed by a Watershed Management Plan developed by the watershed stakeholders; and

Whereas the Cumberland County Soil and Water Conservation District (CCSWCD) may be able to obtain funding for a watershed management planning effort after the TMDL for Trout Brook is approved; and

Whereas the Planning Boards of Cape Elizabeth and South Portland met in a workshop on April 26, 2007 to discuss land use planning issues of mutual concern; and

Whereas a top priority of the two planning boards resulting from the meeting discussion is that the two communities proceed to work together on a Trout Brook Watershed Management Plan in order to bring Trout Brook back into compliance with the State's water quality standards;

Therefore the Planning Boards of Cape Elizabeth and South Portland jointly encourage and recommend that the legislative bodies and appropriate municipal and conservation officials of each community proceed, time and funding permitted, with the development of a Trout Brook Watershed Management Plan.

Since there was no discussion, a motion to accept the Joint Resolution was made by Mr. Kennealy and seconded by Mr. Godfrey. It was passed 6-0

Mrs. Richardson made a motion to adjourn and seconded by Mr. Huebener. It was approved 6-0. The meeting was adjourned at 9:15 pm.

Respectfully submitted,

Hiromi Dolliver
Minutes Secretary