

TOWN OF CAPE ELIZABETH
MINUTES OF THE PLANNING BOARD

January 21, 2014

7:00 p.m. Town Hall

Present:	Victoria Volent, Chair	Carol Anne Jordan
	Josef Chalot	Liza Quinn
	Peter Curry	Henry Steinberg
	Elaine Falender	

Also present was Maureen O'Meara, Town Planner.

Ms. Volent opened the meeting and called for the approval of the December 17, 2013 minutes. The minutes were amended and approved, 7-0.

Election of Officers: Mr. Steinberg nominated Ms. Volent for Chair, and was seconded by Mr. Curry. Ms. Volent was elected 7-0. Mr. Steinberg nominated Ms. Quinn as vice-Chair, and was seconded by Ms. Jordan. Ms. Quinn was elected 7-0.

OTHER BUSINESS

Normal High Water Line Zoning Amendment - The Town Council has referred to the Planning Board a request to review the normal high water line definition, Sec. 19-10-3, Zoning Ordinance Amendments Public Hearing.

Ms. O'Meara gave a brief overview. She said the recommendation is to replace the current definitions of normal high water line of coastal waters and normal high water line of inland waters. The recommendation is to replace those with a normal high water line definition that is for the most part, the State definition. They are also proposing a new definition of coastal wetlands. The original proposal was to adopt the State definition, and after a public hearing last summer there was a lot of concern that the State definition weakened the Town's current definition. The Board has come back with a proposal that uses the Highest Astronomical Tide rather than Highest Annual Tide. There is more stability to that number because it is an average over 19 years and does not fluctuate widely from year to year. The second part is to address the concern that they are weakening the current definition. They heard from Peter Slovinsky of the Maine Geology Survey, and decided to use Highest Astronomical Tide plus 3 feet of vertical elevation as the definition.

Ms. Volent opened the public hearing.

George Foley of 9 Pilot Point Road feels the new proposal would change our Zoning over time without recognition on the part of the Town. He proposes using the Current

GIS system and install our current maps in the GIS system. The City of Lewiston uses it extensively, as do most of the towns in the state. It would increase efficiency, better communication etc. If we take our current existing maps and load them into a GIS system it effectively eliminates Ben's (Code Officer) issues on the ground. He could look at a map and get the coordinates and then go out with a GPS and locate the exact location. He talked to Ben today and was told that this system is in the works for the Town. So Mr. Foley said there is no need to change anything.

Richard Bryant of 55 Spurwink Avenue said he has spoken before the Planning Board before. His points then were:

- 1: The State's definition is based on a theoretical still water line which ignores the effects of the tides.
- 2: Sloping exposed rocky ledges are not addressed.
- 3: It would shift the Shoreland Zone oceanward.
- 4: He thinks mapping is really important to project the changes proposed.
- 5: A one size fits all definition does not work for all situations.

He then addressed the changed proposal and noted the following points:

- 1: A change in Shoreland Zone will require DEP approval.
- 2: This appears to limit the baseline and will modify the Shoreland Zone.
- 3: Mapping is critical to the recommended definition.
- 4: He thinks that if this proposal shifts the Shoreland Zone oceanward, then the Code Officer should stick with the top of the bank.
- 5: Exposed rocky ledges are still not adequately accounted for. It will shift the Zone seaward.
- 6: He would add a definition of exposed rocky ledges to the proposal. He would like to add the use of the top of the bank for those areas.

Mr. Chalot said thank you for your presentation. His understanding is there is no a priori definition of Shoreland Zoning until the Code Officer goes out and makes a determination. He feels that it is shaky ground to suggest that this definition will shift the Zone one way or another.

Mr. Bryant said he disagrees with that. The Town Council adopted the current map as the official map of the Shoreland Zone. If your proposal shifts the zone 25 ft. it will change the zoning. Let's clarify and use the top of the bank.

Eric Martin of 45 Royalsborough Road, Durham, NH spoke as the GIS consultant to the Citizens Environmental Coalition of Cape Elizabeth. He showed a map of the existing Shoreland Zoning. He then showed the map as it would appear if mapped from 250 ft. from the proposed definition. He showed how there would be some large differences in some areas. He also contends there would be additions to the Zone that are not now part of it.

In response to a question from Mr. Chalat, he said he took the existing map from data provided by Judy Colby-George. He also noted that Ms. Colby-George said the data were not exactly quantifiable in places. He did vouch for his data using HAT + 3 ft. A site survey would be more precise in all cases.

Ms. Quinn wanted to see more detail about the areas where we don't have cliffs.

Mr. Martin then showed the Alewives Brook area, and then said it would all now be part of the Shoreland Zone.

A short discussion ensued about whether the brook is tidal or not and whether it would be considered part of Shoreland.

Debra Murphy of 24 Pilot Point Road wants to talk about the mapping. She homed in on Surfside and Pilot Point Roads. If you look you will see that there would be a 111 Ft. difference at one point on the map. It would be outside the Shoreland Zone. She then talked about the maps and read parts of Chapter 1000 of the DEP guidelines and the CEO training manual. She also read parts of the official Shoreland Zoning Map and Maine Law and many other sources.

She said the current map has to be adhered to. It took a citizens group to provide you with a map. Peter Slovinsky offered to provide you with one, but you did not take him up on that. Thirty years ago the Town chose not to go with the state minimum standard, and if you move that you will move the boundaries out toward the water. We want to protect what we have now.

Sheila Mayberry of 30 Trundy Road thanks Mr. Bryant and Ms. Murphy. She said the Board has not had the opportunity to view the impact of the proposed definition. Changing the high tide definition will change the boundary of the district. The Shoreland Overlay District Boundary was created based upon the data points that are easily accessible by GPS or GIS. It takes into account the extreme limits of the tide. The new HAST + 3 will have an impact on how setbacks are measured in the Zoning District. There is no reason to find where the normal high tide- high water line of coastal waters is because it is already established by the overlay map. The map prevails. She then cited the DEP Guidelines Chapter 1000.

What about the new flood maps? How would they overlay this new map? She does not think this is ready to go before the Town Council due to these serious issues that have not been addressed very well. There is no need to change the definition. It exists in the map and the map prevails.

Jim Morra of 5 Waumbek Road said one of the reasons houses are not allowed in the setback from the high water line is to limit household cleaners from getting into the water. They upset the balance of the ocean environment. TSP, tri sodium phosphate can cause algae blooms. The setback area allows the TSP to become incorporated into plants. He said most of the shore in Cape Elizabeth is ledge which has no plants to absorb TSP. He does not support the proposed definition change from using the top of the bank as the starting point.

Maynard Murphy of 24 Pilot Point Road just wanted to add to Mrs. Murphy's remarks. He said Peter Slovinsky offered to locate the top of the bank for you. He wants to ensure that Cape's Shoreland Zoning is not replaced by anything that would be less restrictive. 30 years ago Cape Elizabeth chose to adopt one of the most restrictive and protective shoreland zoning ordinances in the State of Maine. He believes the recent appeals of the Zoning Board are because the Code Officer did not use the top of the bank, but instead used HAT to determine where the zone starts. He cited the case of Mack vs. the Town of Cape Elizabeth as establishing the use of the top of the bank as a starting point. He also cited several properties with plans where the top of the bank was used.

Kim Krips of 10 Pilot Point Road is concerned with having the zone moved oceanward. With rising tides why would you put more houses in harm's way by making this less restrictive. You hear other towns becoming more restrictive, so why should we allow more houses in a less restrictive area.

Bruce Nelson of 890 Shore Road is confused. He has met with the Code Officer to see how this affects his property and it is difficult to conclude what it does as it has been presented. In his area it is totally developed. It seems that we have two Cape Elizabeths here. Everything from Bug Point to Portland Head Light is up high. The good thing about this project is that you are coming up with a line that doesn't change with a Code Enforcement officer's interpretation or a resident's review. The other half of Cape Elizabeth is not up on high rocks. He likes the idea of an absolute line that the State agrees to and that Cape Elizabeth agrees to. He wants the Board to consider having two different areas since it has no affect on his area, but maybe on the other area of town.

Mr. Chalot had a question for the top of the bank people. Do any of you have an idea about the difference in elevation between the top of the bank and the Highest Astronomical Tide?

Mr. Bryant said there is no clear answer. It varies with the property. He did say that along Pilot Point Road there are site specific surveys that show the top of the bank. He thinks there is a significant difference between the Zoning map and what you have with HAT.

Ms. Murphy said it does vary and would depend on the property. She did not know that the Town was going to GIS mapping. You can go to the GIS map and get the coordinates. One size fits all with an elevation does not fit well in the Cape because of our varied topography at the shore line. At 25 Pilot Point Road the difference is 62 ft. towards the water. She does not know the elevation.

Eric Martin said the edge of his map that used HAT + 3 is consistent all the way around, but lower edge of the current zoning using the top of the bank is not consistent. It will be different for every parcel.

No one else came to speak, so the public hearing was closed.

Ms. Volent thanked the people who came out to speak, and then listed all the steps the Board has taken to research this item. She also told of the people they have asked to come before them to speak and give them further information.

Mr. Steinberg said there seems to be a lot of confusion about vertical heights. There are places where the top of the bank is very difficult to find. Highest Astronomical Tide tries to predict where the tide will be in the future. Any drawn map is only accurate on the day it is drawn. We want to come up with a definition that is consistent. How wide is a line on that map when you blow that map up to the size of Cape Elizabeth. How wide is a line on there. It's a line on the map, but it's 50 ft. when you blow it up.

Mr. Curry said we have approached this as not trying to make the Shoreland Zoning less restrictive, or maybe slightly more restrictive. The people who spoke today seemed to put a lot of emphasis on the existing zoning map and the standards in the ordinance.

Ms. O'Meara said there is no map proposal before us. She said the intent was to continue to interpret the map as they have been doing up until this time. The line would be dictated in the field based on the definition in the ordinance. That is what we do with wetland boundaries. We don't use the map and scale it down to identify the boundaries. And we don't use the map and scale it down for shoreland boundaries.

Mr. Curry said if their (the public's) maps are accurate, there is a significant difference in some places.

Ms. O'Meara said she would challenge the accuracy of those maps. She quoted the Cape's GIS consultant as saying that taking paper maps and making them digital does not make them more accurate. Just because we have taken the best information we have available and digitized it doesn't mean that all of a sudden it is accurate.

In response to Mr. Curry's comment about the Alewife Brook area, Ms. O'Meara said she was not saying the GIS consultant for the neighborhood group had not given a quality product, but the quality of the product is tied to the quality of the data. He took the elevation data we have now and projected it onto the map. None of the data we have now is better than an onsite survey. Also, the area he shows as new Shoreland Zone, is already zoned as a Resource Protection Wetland. That area is already subject to very restrictive zoning.

Ms. O'Meara said she wished to correct another statement. The Town is not about to launch a brand new GIS. We have GIS now and we have had it since the 1990's and we use it every day. What we are about to launch is a new software that will allow us to make the information we now have available online to the public.

Ms. Quinn wants to go through and address each person's concerns.

Mr. Steinberg would like to have some more back and forth with the audience. He would like our deliberations to go on longer.

Ms. Falender said we cannot go back and forth with any dialogue tonight, she would like to see the public's comments in writing. She would like to table this issue to workshop.

Ms. Volent said that she has heard a lot about the accuracy of the map. She is not sure you have had access to a memo from Judy Colby-George dated January 16, 2014. She said the scale and accuracy of the data changed across every photo depending on the elevation shift, the tilt of the plane or when the photo was taken. Each individual tax sheet was updated for many years without any controls, so the accuracy of the parcel data is unknown and unknowable. The map could give you a false sense of accuracy. She said that in the case of Shoreland Zoning the data need to be field verified.

Ms. Volent said there will be language added to the ordinance that the determination needs to be field verified. She talked about whether we are becoming less strict. She feels that the definition we are using is building in for the future by adding the 3 ft. to the HAST.

Ms. Quinn made a motion to table to the workshop. Mr. Chalot seconded the motion.

Mr. Chalot asked the public to get their written comments to the Board for their further consideration. He then asked Ms. O'Meara about Mr. Slovinsky's comment that he could map the top of the bank.

Ms. O'Meara said she has discussed this with the Code Officer and his interpretation is that you do not always have to use the top of the bank.

Mr. Curry would like to permit a dialogue with the public at the workshop.

Ms. Falender said the Board can hold another public hearing, but does not think it wise to change the format of the workshop. It sets a precedent.

Mr. Steinberg would like to have written questions before the next public hearing.

Mr. Chalot said he does not want Mr. Slovisky to draw a map of the top of the bank. He would like to see a few key places with a comparison of the top of the bank. He has a hard time with a discrepancy of 62 ft. between the top of the bank and the proposed starting point.

Ms. O'Meara and the Board then had a short discussion about the lack of a definition of the top of the bank.

Ms. Falender said that court cases have been cited, and that it seems that the courts give the Code Officer wide latitude in defining the beginning point of the Shoreland Zone in any given area. What we are trying to do is to reduce that ambiguity. We are trying to develop specific criteria, to avoid that ambiguity and the essential inaccuracy of maps.

Ms. Quinn made a motion to table this to the next workshop, and was seconded by Mr. Chalot. The motion passed 6-1. The next workshop is February 4, 2014.

The board voted unanimously to adjourn at 8:50 p. m.

Respectfully submitted,

Hiroshi Dolliver
Minutes Secretary