

MINUTES OF THE PLANNING BOARD
TOWN OF CAPE ELIZABETH

October 15, 2019

7:00 p.m. Town Hall

Present: Josef Chalot, Chair Peter Curry
 Daniel Bodenski Carol Anne Jordan
 Andrew Gilbert Jonathan Sahrbeck

Absent: James Huebener

Also present was Maureen O'Meara, Town Planner.

CALL TO ORDER

Mr. Chalot called the meeting to order and asked for the approval of the minutes of September, 2019. The minutes were approved as presented, 6-0.

OLD BUSINESS

Munz v. Town of Cape Elizabeth/Birlem/DeLuca remand - The Planning Board will discuss at the direction of the Superior Court the application of Maggie Birlem and Noelle DeLuca for a private road review to establish frontage for a lot located at 8 Aster Ln (U49-42), Sec. 19-7-9, Private Road Review.

Mr. Curry said he has become a resident of Cottage Brook, which is adjacent to the area where this property exists. He is 300-400 yards away for the property in question. Also he was not at the last meeting, but has watched the video and believes the executive session was a repeat of an earlier session for the members. He feels he is competent to consider this issue. There were no objections from the Board.

John Wall, Town Attorney, said he sent to the Town Planner the draft findings for the Board to consider. He also sent copies of that document to the attorney for the applicants and the attorney for the Munzes. He said he had a couple of emails from the attorney for the Munzes stating that it was their understanding from the wording of the agenda that the Planning Board was just discussing the matter, not necessarily taking a vote. Her clients are out of town. She also had some disagreements with some of the points in the document. The Munzes have not asked for a continuance of this matter. He believes the vote at the last meeting was reasonably clear the matter would be taken up for discussion of the proposed language and a vote. He will give the Board copies of the emails from the Munzes attorney and the points she raised this afternoon.

Mr. Chalot asked if it is the responsibility of the Board to state that they will or will not take a vote at the next meeting.

Mr. Wall thinks that unless the matter is up for completeness, that it is implicit that the matter would be concluded. He thinks it was relatively clear that a vote was included in what was going to happen tonight.

Mr. Gilbert asked if there was anything new in the emails.

Mr. Wall said the one specific item Ms. McGehee mentions the gate.

Mr. Curry asked if the results will be open to challenge on the issue of notice.

Mr. Wall said he thinks proper notice was given based on the vote from the last meeting.

Mr. Sahrbeck asked if they had stated that new information had been found as to the private accessway being recorded. He thinks there was adequate notice given.

Mr. Wall said there was no new information.

Mr. Chalot opened the public comment period.

Scott Anderson, Attorney for Maggie Birlem and Noelle DeLuca, said he agreed with some of the comments that have been made, that John was going to draft the findings and a decision was going to be made. Everybody had the opportunity to exercise their due process rights at the last meeting. He has no doubt the Board permitted everyone in this proceeding to make comments and present any relevant information. He hopes the Board will make a decision tonight. The points raised about the gate are not valid. Because the Court vacated the prior order, you have to go through the process of reissuing the earlier approval. The gate was declared an "orphan gate" and is not an issue.

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

Mr. Sahrbeck said there is nothing new in the emails and the gate has been litigated exhaustively. He would ask that those two emails be entered into the record.

Mr. Gilbert said he supports the fact that there was adequate notice.

Mr. Sahrbeck stated that the agenda and notice of the meeting were clear as to what was planned.

Mr. Curry thinks it was adequate notice.

Mr. Sahrbeck made the following motion:

I. Draft Findings and Conclusions – General

1. Margaret Birlem has applied for an eighty (80) foot private road extension off the public portion of Aster Lane to create the road frontage and access necessary to obtain a building permit with regard to a parcel of land identified as 8 Aster Lane and depicted as lot 42 on Cape Elizabeth Zoning Map U49.
2. Under the Town's Ordinances, the Planning Board reviews Ms. Birlem's application under Section 19-7-9 and applicable standards for a local road as set forth in Chapter 16, Subdivision Regulations, subject to the Board's authority to grant waivers.
3. The Planning Board deemed Ms. Birlem's application complete on April 23, 2018 and held a site walk on April 30, 2018.
4. The Planning Board addressed the merits of Ms. Birlem's application at a hearing on May 15, 2018 and, after considering all of the evidence presented, voted to approve the application with conditions.
5. Christopher and Julie Munz took an appeal of the Planning Board's decision to Superior Court pursuant to Maine Rule of Civil Procedure 80B.
6. On March 12, 2019, the Cumberland County Superior Court issued a Decision and Order affirming most of the Board's decision, but also remanding the case to the Planning Board to make the findings and conclusions with regard to the following: "to determine whether the private accessway [claimed by the Munzes] is valid, and if so, whether the private accessway and maintenance agreement should be considered under the application."
7. On July 3, 2019, the Cumberland County Superior Court issued an order of clarification that vacated the Planning Board's May 15 decision and remanded the case to the Planning Board to make the findings and conclusions referenced above and to enter a decision on the application in light of those additional findings and conclusions.
8. As expressly authorized by the Superior Court's July 3, 2019 order, the Planning Board conducted a hearing on September 17, 2019 to address the Superior Court's remand order and to receive any evidence on the issues

identified in the remand order and any other issues pertinent to the application.

9. After a discussion by the Board at the close of the public portion of the hearing, the Board voted to table this matter and authorized the town attorney to prepare draft findings and conclusions based on the Board's discussions about this application and the evidence presented relevant to the application for the Board to adopt, reject, modify, or augment as the Board sees fit.

Findings:

10. The property that is the subject of Ms. Birlem's application is owned by Ms. Birlem and Noelle C. DeLuca pursuant to a quitclaim deed dated October 24, 2017 and recorded with the Cumberland County Registry of Deeds at book 34414 and page 113.

11. The property that is the subject of Ms. Birlem's application was recognized as a joinder of two lots pursuant to a corrective and confirmatory release deed dated to Ms. Birlem and Noelle C. DeLuca dated December 15, 2017 and recorded with the Cumberland County Registry of Deeds at book 34544 and page 304.

Conclusion:

12. Based on the above findings, Ms. Birlem has demonstrated sufficient right, title, or interest to construct a private road for access to and frontage for the property at Map U49 lot 42.

13. The proposed construction of 80 feet of private road off the end of the public portion of Aster Lane is not located in a floodplain and the applicant is not proposing any subsurface waste disposal as part of the construction.

14. The applicant has incorporated the slope of the land into her stormwater management plan and no direct discharge into a stream is proposed.

15. The proposed construction is not expected to generate undue water pollution.

16. Based on the above findings, the Board concludes that the proposed project meets the pollution standard.

17. The applicant has submitted a letter from the Portland Water District that indicates that the lot that would receive its necessary frontage and access through the proposed private road extension can be served by public water.

18. Based on the above finding, the Board concludes that the proposed project meets the potable water standard.

19. The applicant has submitted plans that include an erosion control plan, which identifies placement of silt fencing and installation of check dams to slow stormwater from the road following construction.

20. Based on the above finding, the Board concludes that the proposed project meets the erosion standard.

21. The applicant submitted a traffic study in support of her application performed by Traffic Solution.

22. The traffic study indicates that the applicant's proposal to remove a chain gate and construct a private road extending 80 feet off the end of the public portion of Aster Lane will likely have a minimal impact on the volume of traffic on South Street.

23. The applicant has submitted a road maintenance agreement that provides for the maintenance of the proposed private road to allow for access by public safety vehicles.

24. The proposed private road will improve an existing gravel area to private road standards, subject to certain requested waivers, which is desirable under the Town's Comprehensive Plan.

25. The proposed private road will make the applicant's lot a buildable property by providing necessary frontage and by providing an access route.

26. The proposed private road will make the applicant's lot a buildable property in an area with other adjacent homes, which is desirable under the Town's Comprehensive Plan.

27. The proposed private road will connect to a public road accepted by the Town and constructed to provide access to an approved subdivision.

28. According to the Town fire chief, the proposed private road with the chain gate removed will provide enhanced access for emergency vehicles.

29. The proposed private road with the chain gate removed will eliminate an impediment to access to a development or neighborhood.

30. According to the town fire chief, gates slow the emergency vehicles down.

31. The chain gate the applicant proposes to remove is an “orphan gate,” meaning it is not sanctioned by the Town. There is no evidence of a plan submitted to the town that shows the gate or provides a justification for the gate under the town’s ordinances.

32. According to the survey submitted, the existing gate is in the public right of way, and not on the south street right of way.

33. Section 19-7-16, which pertains to creation of a short cut via a developed residential street, is not applicable because a short-cut between two separate points of an arterial, collector, rural connector or feeder street will not be created.

34. As indicated by the traffic study, the low volumes of vehicular traffic anticipated on the proposed road are not expected to create a safety hazard.

35. Given the existing gravel in the area of South Street, there is little opportunity to vary the location of the proposed road.

36. The applicant has asked the Board to waive the minimum requirements for road width, position in the right of way (i.e., centering), shoulder, and underground enclosed drainage system.

37. The applicants seek a waiver of the 22-foot minimum road width requirement so that the private road would flow seamlessly into the existing graveled portion of South Street.

38. According to the applicant’s plans, the private road would taper from a width of 22 feet (where it connects to the public portion of Aster Lane) to a width of 18 feet (where it connects with South Street).

39. Similarly, the applicants seek a waiver of the standard that a road be centered within a right of way to account for the fact that South Street is not centered.

40. According to the applicant’s plans, the private road would be centered where it connects to the public portion of Aster Lane and veer slightly to the east to match up with the center of South Street.

41. The applicant has requested a waiver of the shoulder width standard to match South Street, which has no shoulders.
42. By keeping with the existing constructed shoulder widths there would not be any additional impacts to the culverts and ditch on the left side of the street.
43. The applicant is seeking a waiver of the enclosed drainage system requirements.
44. The proposed waiver of the enclosed drainage system requirements will make the private road consistent with South Street and minimize disruption of existing improvements.
45. Overall, the applicant's requests for waivers of certain road construction standards are designed to integrate the private road with the existing graveled portion of South Street.
46. As indicated by the town engineer, the requested waivers do not adversely affect the functionality of this low speed and low volume roadway.
47. The Subdivision Ordinance authorizes the Board to grant the requested waivers when practical difficulties would arise from strict compliance with the standards. Subdivision Ordinance Section 16-3-5.
48. Based on the findings above, the applicant has demonstrated that the waivers she has requested for road width, position in the right of way (i.e., centering), shoulder, and underground enclosed drainage system are justified as practical difficulties would arise from strict compliance with the standards.
49. Based on the findings above, the applicant has demonstrated that the proposed private road is designed so that it will provide safe vehicular and pedestrian travel and traffic patterns.
50. Consistent with a letter from the town sewer superintendent, the applicant's proposal to connect to the public sewer system will be permitted.
51. Based on the finding above, the applicant has met the sewer disposal requirement.
52. The site of the proposed private road is not located in a vista or view corridor.

53. There is no indication that the site of the proposed private road affects any significant wildlife habitats.
54. The proposed road construction will occur almost entirely in an existing gravel area.
55. The site of the proposed private road does not impact any farmland.
56. Based on the above findings, the applicant's proposal satisfies the requirements pertaining to aesthetic, cultural and natural values.
57. The proposed road construction is consistent with the Comprehensive Plan - particularly to the extent the proposal will promote street connectivity.
58. Two nonconforming lots have been merged to create one lot that exceeds the current minimum lot size of 20,000 square feet.
59. There is no evidence in the record to suggest that the proposed road construction does not conform to the Town's ordinances.
60. Based on the above findings, the proposed road construction conforms to the Town's ordinances.
61. As indicated by a communication from the Town Manager, the applicant has adequate financial and technical ability to complete the proposed project.
62. Based on the above finding, the applicant has demonstrated adequate financial and technical ability to complete the proposed project.
63. The proposed road construction does not involve a significant aquifer recharge area.
64. Based on the above finding, the applicant has met the ground water requirement.
65. The proposed project is not located in the floodplain.
66. Based on the above finding, the applicant has met the flood areas requirement.
67. The proposed project does not involve the alteration of any wetlands.

68. Based on the above finding, the applicant has met the wetlands requirement.

69. The applicant's revised construction plans reflect provisions for stormwater management, including measures to protect the downslope areas and riprap protection off the edges of the road where stormwater was discharging at the end of the curb along Aster Lane.

70. The Town Engineer is recommending replacement of a section of silt fence or haybales with additional check dams.

71. The applicant's revised construction plans reflect that all but two feet of an existing paved berm would be retained and that removal of that portion will cause gutter drainage to flow off pavement to new easterly ditch.

72. The features reflected on the revised construction plans will act to attenuate stormwater runoff velocities which will protect against erosion and mitigate the drainage generated from the roadway improvements.

73. The retention of the existing paved berm at the end of the paved section of Aster Lane and the additional rip rap protection in its receiving ditch will help to protect against the gravel areas beyond the end of the paved section of Aster Lane from being washed out during intense rainfall events.

74. The applicant's proposed project will result in a minimal net gain of impervious area.

75. Based on the above findings, the Board concludes that no formal stormwater management report is necessary.

76. Based on the above findings, the applicant has demonstrated that the project will provide adequate stormwater management.

77. The proposed project is not within the watershed of a great pond.

78. Based on the above finding, the applicant has met the wetlands requirement.

79. The applicant has made provisions for the underground installation of utilities - including water, electric, telephone and cable TV.

80. Based on the above finding, the applicant has met the utility access requirement.

81. The following standards are inapplicable to the applicant's proposal: solid waste disposal; surface waters; impact on adjoining municipality; land subject to liquidation harvesting; access to direct sunlight; open space impact fee; and phasing.

82. Based on all of the foregoing findings and conclusions, the applicant has substantially addressed the standards of the Private Road review, Zoning Ordinance Section 19-7-9 and Subdivision Ordinance Section 16-3-1.

83. Christopher and Julie Munz, as owners of 5 South Street, are successors-in-interest of Philip and Darlene Nedwell.

84. By an approval issued on March 16, 2004 and confirmed by a letter dated March 17, 2004, the Planning Board granted a request by the Nedwells to create a private accessway on South Street to make 5 South Street a buildable lot.

85. Pursuant to the express terms of the approval granted to the Nedwells, the Nedwells were required to record the approval with Cumberland County Registry of Deeds within 90 days, which the approval identified as June 14, 2004.

86. Pursuant to the express terms of the approval granted to the Nedwells, the approval "will be null and void" if not recorded within 90 days.

87. The Cumberland County Registry of Deeds has no record of a "private accessway plan" pertaining to the approval granted to the Nedwells.

88. The Munzes have not presented any evidence that the approval for the private accessway granted to the Nedwells was ever recorded with the Registry of Deeds.

89. The approval for the private accessway granted to the Nedwells was not recorded within 90 days of the approval.

90. Pursuant to the terms of the private accessway approval granted to the Nedwells and the pertinent provision of the Town's Zoning Ordinance (Section 19-7-9(D)(5)(b)), the approval was null and void as of June 15, 2004 due to the failure to record the approval within 90 days of the approval being granted.

91. The building permit granted to the Nedwells in December of 2004 by the Town's CEO does not assist the Board in resolving the issues on remand because: one, the building permit was issued more than six months after the approval to the Nedwells was rendered null and void; and two, there is no evidence in the record that the CEO specifically determined that the approval was properly and timely recorded.

92. The comments by the Town's CEO in 2013 and 2018 do not assist the Board in resolving the issues on remand because: one, the comments were made several years after the approval to the Nedwells was rendered null and void; and two, there is no evidence in the record that the CEO had specifically determined that the approval was properly and timely recorded when he made the comments.

93. For the purposes of this application, and to satisfy the terms of the Superior Court's remand order, the Board finds that the asserted private accessway affiliated with 5 South Street is not valid.

94. Although not strictly within the scope of the remand order, the Board would note that the proposed private road will have the incidental effect of providing necessary frontage to make 5 South Street a buildable lot.

95. Even if a portion of South Street were a valid private accessway, the private road would effect an improvement or upgrade over a length of that accessway that is entirely consistent with the Town's zoning ordinance.

96. The criteria for the creation of a private road does not require the Board to resolve issues pertaining to alleged overlapping road maintenance agreements.

THEREFORE, BE IT ORDERED that, based on the foregoing findings and conclusions, the plans and materials submitted, and the facts presented, the Board approves the application of Margaret Birlem for an 80 foot long private road extension from Aster Lane, a public road, to create road frontage for the lot located at 8 Aster Lane, subject to the following conditions:

1. That the plans be revised to address paragraph #6 in the Town Engineer's letter dated May 9, 2018;

2. That a road maintenance agreement be provided for the 80 foot private section of Aster Lane in a form acceptable to the Town Attorney and Town Manager, signed by the applicant and recorded in the Cumberland County Registry of Deeds.

3. That the approval includes waivers from the road width, shoulder width, center line and enclosed stormwater requirements, consistent with the requirements of Sec. 16-3-5, Waivers.

4. That a MUTCD compliant sign, or otherwise as approved by the Public Works Director, be installed by the applicant in the right of way of Stephenson Street at the intersection of Stephenson Street and Hamlin St and in the right-of-way of Aster Ln/South St at the beginning of the private portion of Aster Ln that states "Private Road, access for Stephenson St and South St residents only."

5. That a note be added to the plan that there shall be no road construction until a performance guarantee has been provided to the town in accordance with Sec. 16-2-6 of the Subdivision Ordinance;

6. That the following note replace note #1 on Sheet C-100:

Activities outside the building envelope are restricted to the installation of a driveway and installation of utilities. The extent of driveway and utility installation within the buffer be shown on the plans, be the minimal amount of disturbance and also limited to no more than 1,300 sq. ft. of disturbed area within the buffer. No structure shall be constructed within 10' of the edge of the building envelope. No vegetation removal other than for the above activities is allowed, except at follows:

Hazard (dead or storm damaged) trees in areas outside of the building envelope may be removed after consultation with the Code Enforcement Officer in compliance with the following conditions. The removal of standing dead trees, resulting from natural causes, or storm damaged trees is permissible without the need for replanting as long as the removal does not result in the creation of new lawn areas, or other permanently cleared areas, and stumps are not removed. The area shall be required to naturally re-vegetate and/or be planted with native plants within one year if natural vegetation has not been established. For the purposes of this provision, dead trees are those trees that contain no foliage during the growing season.

7. That the plans be revised and submitted to the Town Planner for review and approval prior to recording the plan.

8. There shall be no disturbance of the site nor issuance of a building permit until the plan has been signed by the Planning Board and recorded in the Cumberland County Registry of Deeds.

Ms. Jordan seconded the motion.

There was a brief discussion of the language about the gate.

The Board voted 6-0 to approve the motion.

Cunner Lane Private Road review - David Smith is requesting a private road review for a portion of Cunner Lane to relocated a turnaround located on the southwest side of 19 Cunner Ln(U14-26-1), Sec. 19-7-9, Private Accessway and Private Road Review Public Hearing.

Bob Metcalf of Mitchell and Associates said they had a site walk since they were last before the Board. He showed the survey done by Owen Haskell. He pointed out that Cunner Lane as built is partly on Mr. Smith's property. He showed the right of way and the turnaround. He responded to the comments of Mr. Harding. One of the comments concerned the grading and another supported the waiver of the enclosed drainage system.

Mr. Chalot opened the public hearing. No one came forth to speak, so the public hearing was closed.

Mr. Sahrbeck noted that they have received a letter from the attorney for the neighbors. He asked Mr. Metcalf to outline the concerns of the neighbors.

Mr. Metcalf said the concern is whether the right of way for Cunner Lane falls in Mr. Smith's property. The right of way for the private way comes into the paved portion of Cunner Lane because that is the lot line for Mr. Smith's property.

Mr. Sahrbeck said there are concerns by the neighbors that Mr. Smith will put his stone wall on the other side of the fence blocking the portion of the road that is on his property.

Attorney Atkins said all the improvements are on Mr. Smith's land. The private road extends from the gate eastward to the ocean. There is no impairment of anyone's right to use anything between the gate and the travelled way. Mr. McDonald, in his letter talks specifically that he has no problem with the application, he just wants to be sure that the gate is where it is and the private road does not interfere with that. Mr. Smith has no plans to move the wall. It is entirely on his land and he has no plans to move it.

Mr. Gilbert asked if the wall was moved, would it have to come back to the Planning Board for a site plan amendment.

Ms. O'Meara said that is speculation at this time. She said we are dealing with a private road and private property.

Mr. Gilbert said he is still concerned about the width of the private road. It's narrow. He asked if the Fire Chief specifically addressed travel over the grass shoulder. Is that adequate? If a vehicle gets stuck, are you going to be able to get around it.

The Fire Chief said he is comfortable with the plan as presented.

Mr. Sahrbeck said he is comfortable with the proposal.

Ms. Jordan made the following motion:

Findings of Fact

1. David Smith is requesting a private road review of a portion of Cunner Lane to amend/replace a 1997 Public Access Waiver granted by the Planning Board in which a turnaround was approved on the east side of Cunner Lane. The applicant would like to relocate the turnaround through approval of a private road, which requires review under Sec. 19-7-9.
2. The Planning Board granted a Public Access Waiver for a lot now located at 19 Cunner Lane on February 18, 1997 and the town adopted a new Zoning Ordinance in May, 1997. The new Zoning Ordinance revised the Public Access Waiver provisions into a Private Accessway Permit that may only be issued for access to 1 lot. The Planning Board finds that the portions of the Public Access Waiver not revised remains in effect and the revisions will be reviewed as required in the current Zoning Ordinance. The relocated turnaround is located on a driveway that provides access to 2 lots, so the private road standards will be applied to the proposed amendments.
3. The Planning Board finds that the portion of Cunner Lane located between the original turnaround and the proposed right-of-way of the Cunner Lane Private Road depicted on plans submitted September 25, 2019 is equivalent in road condition to the public access waiver granted in 1997.
4. The applicant and abutters are involved in ongoing litigation regarding Cunner Lane. This Planning Board review is limited to the proposed private road Cunner Lane as shown on the plans dated September 25, 2019 and does not address existing or pending rights that may exist in the existing Cunner Lane.
5. The Planning Board held a site visit at Cunner Lane on Tuesday, October 1, 2019 at 6:00 p.m.

6. The private road will not result in undue water pollution. The private road is not located in the 100-year floodplain. Soils will support the private road. The slope of the land, proximity to streams, and state and local water resource rules and regulations will not be compromised by the private road.
7. The private road will not cause soil erosion, based on the erosion control plan provided.
8. The private road will not cause unreasonable road congestion or unsafe vehicular and pedestrian traffic. The private road provides for road network connectivity for 2 lots while discouraging through traffic. The private road is laid out to conform to existing topography as much as is feasible. The private road is designed to meet town standards, with the exception of waivers granted from locating the road in the center of the right-of-way, from providing a road width of 10' pavers plus 2' loamed and gravel-based shoulders for a total of 14' instead of 22' and from installing an enclosed drainage system.
9. The private road will not have an undue adverse impact on scenic or natural areas, historic sites, significant wildlife habitat, rare natural areas, or public access to the shoreline.
10. The private road is compatible with applicable provisions of the Comprehensive Plan and town ordinances.
11. The applicant has demonstrated adequate technical and financial capability to complete the project.
12. The private road will not adversely impact the quality or quantity of ground water.
13. The private road is not located in the floodplain.
14. The private road will provide for adequate stormwater management.
15. The applicant has substantially addressed the standards of Sec. 19-7-9, Private Road Review.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of David Smith for a private road review of a portion of Cunner Lane to amend/replace a 1997 Public Access Waiver granted by the Planning Board to relocate the turnaround be approved, subject to the following conditions:

1. That waivers are granted to allow Cunner Lane not to be centered in the proposed right-of-way, to reduce the road width from 22' to 10' wide pavers plus a 2' wide loamed and seeded gravel shoulder on each side of the road for a total of 14', and to not require an enclosed drainage system;
2. That a note be added to the plan that there shall be no alteration of the site until a performance guarantee has been provided to the town in accordance with Sec. 16-2-6 of the Subdivision Ordinance; and
3. That the plans be revised and submitted to the Town Planner for review and approval prior to recording the private road plan.

Mr. Sahrbeck seconded the motion and it passed, 6-0.

NEW BUSINESS

Cottage Brook Buffering Amendments - Joel FitzPatrick of Cottage Brook LLC is requesting amendments to the previously approved Cottage Brook subdivision to restore plantings within the buffer and install an approved trail in the Cottage Brook condominium located off Aster Ln, Sec. 16-2-5, Amendment a to previously approved subdivision completeness and public hearing. Mr. Curry recused himself.

Henry Hess of Sebago Technics, landscaper is here on behalf of Joel Fitzpatrick of Cottage Brook LLC. He showed the site plan and spoke of the descriptions of the plants. There are two areas on the plan that have been cleared beyond where they were supposed to be. They are proposing a robust planting of native trees and shrubs. It is meant to be a 1 to 1 replacement of the trees. He spoke about the species of trees and shrubs they propose. The goal of this planting is to create a year round interest and robust screening.

Mr. Chalot opened the public hearing. No one came forth to speak, so the public hearing was closed.

Mr. Sahrbeck made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of FitzPatrick Associates for amendments to the previously approved Cottage Brook Condominiums, located off Aster Lane, to replant buffer areas that were altered in error be deemed complete.

Ms. Jordan seconded and the motion passed, 5-0.

Mr. Sahrbeck asked if the tree warden had been consulted.

Ms. O'Meara said she has not received any comment from him.

Mr. Gilbert noted that there is a wetland on the east side of the property. He wants to know if that has been taken into consideration with the plantings.

Mr. Hess said it does get wet in that area and the willow trees and the clethra adapt to wet conditions.

Mr. Gilbert was concerned about putting plants in the ground that would not survive.

Ms. O'Meara said it has been mapped as a wetland.

After a brief discussion about the plan and the ability for the developer to make small changes in species of plants it was decided to leave the plan as it is.

The Board did not choose to have a site walk.

Mr. Chalot opened the public hearing. No one came forward, so the public hearing was closed.

Mr. Sahrbeck made the following motion:

Findings of Fact

1. FitzPatrick Associates is requesting amendments to the previously approved Cottage Brook Condominiums, located off Aster Lane, to replant buffer areas that were altered in error, which requires review under Sec. 16-2-5, Amendments to Previously approved subdivision plans.
2. The Cape Elizabeth Planning Board has previously found the Cottage Brook Subdivision to be in compliance with the Subdivision Ordinance, and the findings and decisions of those approvals which are not altered by the proposed amendments remain in effect.
3. The amendments do restore a vegetative buffer throughout and around the subdivision and screening as needed.
4. The amendments do restore compliance with the open space impact fee requirement.

5. The applicant has substantially addressed the standards of the Subdivision Ordinance, Sec. 16-3-1.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of FitzPatrick Associates for amendments to the previously approved Cottage Brook Condominiums, located off Aster Lane, to replant buffer areas that were altered in error be approved, subject to the following conditions:

1. That, south of Headland Way, the pine trees be planted so that the edge of the planting is a minimum of 10' from the edge of the trail surface and the summersweet is planted so that the edge of the planting is a minimum of 5' from the edge of the trail surface; and
2. That 10% of the total cost of the plantings and installation be reserved for 1 year from time of planting to be used for replacement if plantings die.

Ms. Jordan seconded the motion and it was approved, 5-0.

The board voted unanimously to adjourn at 8:30 p.m.

Respectfully submitted,

Hiroshi Dolliver
Minutes Secretary