

TOWN OF CAPE ELIZABETH  
MINUTES OF THE PLANNING BOARD

July 16, 2013

7:00 p.m. Town Hall

Present: Victoria Volent, Chair  
Josef Chalot  
Peter Curry

Carol Anne Jordan  
Elaine Falender  
Henry Steinberg

Absent: Liza Quinn

Also present was Maureen O'Meara, Town Planner.

Ms. Volent opened the meeting and called for the approval of the minutes of the June 18, 2013 meeting. The minutes were approved as presented, 5-0 (1 abstain).

Town Planner's Report: Ms. O'Meara said she would not comment on the Town Center Planning Committee, but would leave that to Mr. Curry, who is a member of that committee. The Conservation Commission is continuing to work on the Greenbelt Plan. They have finished the public forum phase and are getting to the final stages, and then will send it to the Town Council.

Mr. Curry gave an update on the Town Center Planning Committee. He said they have had a detailed site walk and have had an extensive brainstorming session. They hope to have their goals and priorities in place in August. They also want to schedule a meeting with the Library Committee.

NEW BUSINESS

**10 Clinton Rd Private Accessway Permit Amendment-** June O'Neill is requesting an amendment to the previously granted Private Accessway Permit to move the utility connection and allow a garden in the southwest corner of the lot located at 10 Clinton Rd, Sec. 19-7-9, Private Accessway Permit Amendment Public Hearing.

Ms. O'Meara outlined the procedure for full site plan review and how an amendment to an approved site plan differs. She said in this case if the Board chooses to review it as an amendment, then they can review only the pertinent information. The Board can choose to treat this as a full site plan review.

Steve Mohr of Mohr and Seredin Architects spoke on behalf of Ms. O'Neill. They have two requests. One is to show a garden area 90 ft. x 45 ft. outside the building envelope. The second is to run the utility lines over an easement that goes to Oakwood, rather than in the driveway. Mr. Mohr noted that none of what they are proposing affects the

issues that the Board focused upon in their review of the original plan. i.e. the driveway and the location of the house. He requests an amendment, not a full site plan review.

The Board agreed that they would review this application as an amendment.

Ms. Falender asked where it says there will be no structures in the garden area. She would like note 11 on the plan to say no structures or other impervious surfaces will be constructed in the garden area.

Mr. Mohr said he was in agreement with that note.

Ms. Falender said she was glad they are getting this back as an amendment. She said creating a garden is not the same as leaving an area undisturbed.

Mr. Steinberg asked about pumping the utilities uphill. If the pump breaks, will that flood anyone else?

Mr. Mohr said there is a seal chamber and a storage tank connected, so it won't flood.

Ms. Volent would like the book and page of all the recorded documents to be on the plan.

Mr. Mohr agreed to that.

Ms. Falender made the following motion:

#### Findings of Fact

1. Ms. June O'Neill is requesting amendments to the previously approved Private Accessway Permit for 10 Clinton Rd, lot A, to relocate utility connections and install a garden outside the building envelope, which requires review under Sec. 19-7-9.
2. The proposed amendments should be added to the previously approved plan to create one set of approved plans.
3. Construction details of utility connections in the road should be included on the plans.
4. This approval supplements the prior approval and all requirements except for installation of utilities in the driveway and the addition of a garden still apply.

5. The application substantially complies with the Private Accessway Provisions, Sec. 19-7-9.

THEREFORE BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of June O'Neill for an amendment to the previously approved Private Accessway Rd for 10 Clinton Rd be approved, subject to the following conditions:

1. That the plans be revised in accordance with the Town Engineer's letter dated July 10, 2013;
2. That the amendments (1) relocating the utility connections for the new home from the driveway to the utility easement connecting to Oakwood Rd; and (2) allowing a garden as shown outside the building envelope be added to the previously approved plans. Town staff shall review the plans to confirm the amendments.
3. Note 11 on the plan as presented to the Planning Board shall be amended such that the second sentence of Note 11 shall read: No structures or other additional impervious area shall be constructed in the garden.
4. References in Notes 3, 8, and 12 to recorded documents shall be amended to include the recording book and page.
5. That there be no issuance of a building permit, nor alteration of the site until the plans have been revised, signed by the Planning Board and recorded in the Cumberland County Registry of Deeds.

Ms. Jordan seconded the motion and it was approved, 6-0.

**Strout Tower FAA Site Plan Amendments** - The Strout family, represented by SBA Network Services LLC, is requesting an amendment to the previously approved site plan to add 2 concrete pads to support utility and communication equipment for an additional antenna to be added to the tower, Sec. 19-9, Site Plan Amendment Public Hearing.

Ms. O'Meara: The process for an amendment is usually to make a finding for completeness and then a site walk and a public hearing for the next month. The Board had agreed to expedite this and it was contingent on the applicant submitting at the end of the month, but that did not happen. No site walk has ever been scheduled. The structure for tonight is as you have requested. A public hearing has been advertised. You can make a finding of completeness, but no site walk has been held, and if you approve the application you cannot hold a site walk.

Justin Strout represents the tower owner. They are making an amendment to an existing 180 ft. tower. They want to add two slabs, one to hold a propane tank and one to hold the equipment and a generator. They want to add an area of 16ft X 10ft. to an existing fenced area. There will be no affect on the storm water because there is no impervious surface there now. It is an impervious surface now; it is a ledge outcropping.

As to the lighting, there is a 100 watt floodlight that will be mounted to face the equipment. This light is on a rotational timer with a maximum of 30 minutes. We are not adding roads. They may add a different transformer in its existing location.

Mr. Chalot said they are not considering the addition of the antennas on the tower, only the concrete pads.

Ms. O'Meara said the only thing triggering site plan review is the support buildings at the base of the tower. They are non residential structures.

Ms. Falender asked if the antenna affects the height of the tower.

Mr. Strout said it does not.

Ms. Volent opened the public comment on the completeness. Since no one came forth to speak she closed the public comment.

Mr. Steinberg made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Justin Strout, representing the Strout family, for an amendment to the previously approved site plan to add an equipment cabinet, generator and fuel cylinder to the area at the base of an existing tower located on Strout Rd be deemed complete.

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

Ms. Volent opened the public hearing. No one came forward to speak, so the public hearing was closed.

Mr. Strout showed pictures of the site and where the proposed additions would be.

Ms. Volent had a question about where the detail for the 10 X 13 slab was located in the 28 pages of the submission. She asked about details of the plans that were referenced. She would like the name of the plan being referenced.

Ms. Falender noted that this is a site plan amendment but there is no title box and no reference to the original site plan. She feels we need a formal title block on this plan. She said it seems that the material before them is beyond the scope of the areas the Town Engineer has anything to do with. She is concerned that the Planning Board and the Town not be deemed to have approved the technical details of what we have been given. She would like to be able to say that the only things we have reviewed are the technical issues within the scope of the site plan requirements, and not anything beyond that.

Mr. Steinberg said as long as they have the assurance of the agency that would review that issue, we are okay.

Mr. Curry said we are only approving the concrete pad.

Ms. Falender said the plans might indicate otherwise to someone who looked at them.

Mr. Chalot said it seemed to him that they could have submitted this on one sheet.

Ms. O'Meara said she had suggested that, but what they have submitted is a standard FAA package.

Mr. Strout said they are not asking for approval of the construction drawings.

Ms. Jordan asked for a location of the propane tank.

Ms. Falender asked if they can add a standard condition about issuance of a building permit only after all conditions are met. She also wants the reference to the original plan and any amendments to that plan.

Mr. Curry said we have a de minimus change to an existing plan.

Ms. Falender is concerned that if they do not insist on the reference to the original plan and any amendments, they will lose all reference to what it is they are amending. She does not feel the Town should have the burden of accepting anything this messy for a project that has this level of technical detail.

Mr. Strout said that he is many layers down from the people who have drawn up this packet.

Mr. Steinberg thinks you could just make a drawing of what you are adding.

Ms. O'Meara said there are two problems here. One is the surplus of information and the other is that the Code Officer needs to be able to refer to the original plan and any amendments that have been made to that plan. This is a brand new set of plans that has no reference to the original set.

Ms. Falender said she would have preferred a different approach, but that would not get approval tonight. She thinks they have enough to approve tonight, but they will not be able to get a building permit until there is a sheet stamped by the engineer with the reference to the original plan that is being amended.

The Board decided they did not need a site walk.

Ms. Falender made the following motion:

#### Findings of Fact

1. Justin Strout, representing the Strout family, is requesting an amendment to the previously approved site plan to add an equipment cabinet, generator and fuel cylinder to the area at the base of an existing tower located on Strout Rd, which requires Site Plan Review under Sec. 19-9.
2. The project will be served by electric power.
3. The applicant has submitted substantial information beyond the scope of the site plan review. Any action by the Planning Board is limited to the information on the plans directly related to Site Plan Review.
4. The application substantially complies with Sec. 19-9, Site Plan Regulations.

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Justin Strout, representing the Strout family, for an amendment to the previously approved site plan to add an equipment cabinet, generator and fuel cylinder to the area at the base of an existing tower located on Strout Rd be approved, subject to the following conditions:

1. That the applicant provide a letter from Central Maine Power confirming an adequate supply of electricity to serve the project.
2. That a title block or index sheet be added as the first sheet of the amended site plan referencing the name and date of the original site plan approval and any amendments to that original site plan. Town staff shall review the identification information to confirm the references to existing site plans and any prior amendments.

3. That there be no issuance of a building permit, nor alteration of the site until the plans have been so revised and approved by Town staff.

Ms. Jordan seconded the motion and the motion passed, 6-0.

#### OTHER BUSINESS

**Building Permit Notification Amendment** - The Town Council has referred to the Planning Board a proposed amendment to the Zoning Ordinance that would require that a public notice be mailed when some building permits are issued, Sec. 19-10-3, Amendments to the Zoning Ordinance Public Hearing.

Ms. O'Meara said this item was brought forward by the Ordinance Committee with the agreement of the Zoning Board of Appeals. An appeal to the Zoning Board of Appeals could not be heard because the 30 day appeal period had expired before someone learned that a building permit had been issued. There has been an attempt to balance the public's right to know and not unduly burden government if we want our Code Enforcement Officer to spend more time doing enforcement and inspections in the field.

This creates a notice requirement for building permit issuance. It has nothing to do with whether you can get approval of a building permit. If the activity for which the permit is issued is located within 125 ft. of the normal high water line, or within 10 ft. of the setback, it would trigger a notice to everyone within 50 ft. of property where the building permit is being issued. You would be getting notice approximately 20 days before the appeal deadline.

Ms. Volent opened the public hearing.

George Foley of 9 Pilot Point Road said the Shoreland Zone is 250 ft., and he is opposed to creating another zone of 125 ft. Why wouldn't we stay with the 250 ft. to notify abutters. We are only going to notify people within 50 ft. of the lot, he thinks more people than that would be interested. He'd like a wider notification.

Deb Murphy of 24 Pilot Point Road supports this amendment. She was invited to look at the GIS mapping system and she feels that a 60 ft. radius works better.

Baird Mallory of 40 Surf Road is curious as to why this has to do with waterfront and not neighbors. Why have you selected only those people close to the water.

Since no one else came forward to speak, the public hearing was closed.

Ms. O'Meara addressed the question of why not 250 ft. from the water. The current Code Officer was asked for his input, and he said the most controversy occurs in the first 125 ft. from the water. This is the number used by another town and the Board could certainly choose 250 ft. if they want to.

The 50 ft. area of notice is an attempt to balance the desire to notify people with the staff time and effort to do so. As the numbers go up the more notices go out and the more time we spend in doing that.

As to why is it waterfront and not neighbors, it seems that the most controversy is among people who have waterfront lots. We also have this requirement that any structure that is within 10 ft. of a setback line will trigger a notice.

Ms. Falender asked if there is a band of 125 ft. within the Shoreland Zone that is not covered.

Ms. O'Meara said that is correct.

Ms. Falender asked what other notices would be issued for property in the Shoreland Zone.

Ms. O'Meara said no other notices would be sent. If an issue has to go to the Planning Board or the Zoning Board, you would get a notice of that.

Mr. Curry said there is a balancing act here. We are balancing between no notice and trying to cover what has been a problem.

Mr. Steinberg asked if blocking a view of the water is one of the problems.

Ms. O'Meara said that has been a problem in many cases, and she stressed that the sending of a notice is not a prohibition of blocking a view.

Mr. Steinberg asked if instead of sending notices, could they just put it on the notice board on the website.

Ms. O'Meara said that it was a concern that people would not find out in time to make an appeal. She said there were concerns that people would not check out on a regular basis whether a permit had been issued.

Mr. Steinberg asked if there could be a sign placed on the property.

Ms. O'Meara said they would have to make it weatherproof etc. and it seems to be more effective to send a notice.



Ms. Volent said this is the first time this is being tried and it has been a balancing act. This item will go to the Town Council for its consideration.

Mr. Chalot asked how often is a building permit challenged and revoked by the Zoning Board of Appeals.

Ms. O'Meara said she does not know the answer to that. She said this is before us now because the Town has three lawsuits pending regarding building permit issuance. The intent was that if those people had found out about the building permit in time to appeal to the Zoning Board, it might not have gone to a lawsuit.

Mr. Curry made the following motion:

BE IT ORDERED that the proposed Building Permit Notification Zoning Amendment be recommended to the Town Council for consideration.

Mr. Chalot seconded the motion and it was approved, 6-0.

**Normal High Water Line Definition Zoning Amendment** - The Town Council has referred to the Planning Board a proposed amendment to replace the current Normal High Water Line definition with the standards state definition, Sec. 19-10-3, Amendments to the Zoning Ordinance Public Hearing.

Ms. O'Meara began by saying the definition of the high water line is important because that is what determines what is in the Shoreland Zone. The definition of normal high water line is unique to Cape Elizabeth; it is not the standard definition that the State provides us with. The Code Enforcement Officer is recommending that we replace our definition with the State standard definition. His main reason for that is that he is concerned that the current definition is vague and requires him to make a case by case determination with insufficient specificity.

Ms. Volent opened the public hearing.

Baird Mallory of 40 Surf Road strongly endorses the change. It is hard to discern what it is.

George Foley of 9 Pilot Point Road asked if this will increase or decrease our restricted area. The goal is of this is to protect our shorelands and oceans. We now have the top of the bank and that is easy to see. It will be complex to use the State definition because there are actually three criteria. You would have to determine the most restrictive criteria.

Richard Bryant of 55 Spurwink Avenue says this new definition would be a significant erosion of our shoreland protection. By changing the definition you will be shrinking the shoreland protection area. An example of that is Trundy Point, which had any development turned down. The Code Officer used the top of the bank. If the proposed change now in front of you is adopted by the Town, it would have allowed houses to be built on Trundy Point. The mathematical high water mark would be 40 to 50 ft. further down the shore from where the top of the bank is.

The State wetland definition relies on 3 separate criteria for determining where the top of the bank is. There is a big gap because it does not deal with rocky ledges and cliffs. He then listed the three criteria in the State definition. None of them deal with rocky ledges. He thinks the State definition is harder to comprehend than the town's. Every application will have to have a surveyor to determine where that mathematical line is. The reason for this ordinance is not for the efficiency of the Code Officer, but to protect the shoreland. Unless you increase the setbacks in the protected area, you will be losing protection. He understands the Code Officer's motivation for proposing the change. The reason for the recent lawsuits is because the former Code Enforcement Officer did not use the top of the bank, which has been upheld by the courts, but chose to use some other lesser standard.

Debra Murphy of 24 Pilot Point agrees with Mr. Bryant. She said the property across the street from her home could build 62 ft. closer to the ocean if the new standard were in use. That would allow more impervious surface and increased stormwater flow to the ocean. The whole purpose of the Shoreland Zoning Act is to protect the coastal wetlands and other wetlands. She likes that Cape Elizabeth chose to adopt their own language. The State standards are very complex and hard to determine. She then read from a DEP information sheet from 2003.

The cases that have occurred in the past year were due to the previous Code Officer not adhering to the top of the bank. She has watched the videos and read all the appeals back to 2002, and there is not one case in all the years that was caused by adhering to the top of the bank. The appeals in the last year were caused by using HAT (highest annual tide). She does not support this language change because it is a very difficult and complex way to measure. And it will allow my neighbors to build 62 feet closer to the shore.

She also cited the description in the deed to Robinson Woods which uses the top of the bank as a boundary. It is easy to see the top of the bank.

No one else came forward to speak, so Ms. Volent closed the public hearing.

Ms. O'Meara was then asked to reply to the questions raised in the public hearing. She said the Code Officer has not determined whether the change will result in an increase

or decrease of the restricted area. The question of where is the normal high water mark has been determined by the Code Officer on a case by case basis.

The current definition we have of the top of the bank is the definition used in the Mack case. It has been a deliberate decision by the town to retain that definition. The comment she has heard is that there may not be a brilliant top of the bank. Where you don't have a bright line there is some struggle by the Code Officer to determine where to start the determination. Some of the HAT elements have been used in those cases.

Mr. Steinberg asked if they can use the other definition if the top of the bank is not obvious.

Ms. O'Meara said the only definition now is the top of the bank, and if that is not available, where can the Code Officer legally go?

Mr. Steinberg is proposing that if the top of the bank is not ascertained then to go with the National Ocean Service definitions.

Ms. Falender said she agrees with Mr. Steinberg and had not thought the top of the bank was subject to a lot of dispute, but apparently it is. She said they have also heard that the impact of what the Board is doing is to significantly reduce the shoreland protection on rocky ledges. She would like to go back to workshop because there are possible consequences that she had not intended.

Mr. Curry asked about the rocky ledges and how they are measured.

Ms. O'Meara replied that you can measure from the top of the cliff, or you can go down on the rocks and see where they are stained by the tides. She also said the State has agreed that using the top of the bank rather than the State's definition is generally more restrictive.

Mr. Curry noted that it is possible that as you change Code Officers you will get a different interpretation from one to another.

Ms. O'Meara said the goal is to have a clear standard that will not vary no matter who is interpreting it.

The Board agreed to send this item back to a workshop and requested that Mr. McDougal be present as well.

Ms. Jordan made the following motion:

BE IT ORDERED that the proposed Normal High Water Line Definition Zoning Amendment be tabled to the next Planning Board workshop on August 6, 2013.

Ms. Falender seconded the motion and it passed, 6-0.

The Board voted unanimously to adjourn at 9:15 p.m.

Respectfully submitted,

Hiroshi Dolliver  
Minutes Secretary