

ANTHONY ARMSTRONG et al.

v.

TOWN OF CAPE ELIZABETH et al.

Submitted on Briefs May 29, 2001
Decided June 14, 2001

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY,
ALEXANDER, and CALKINS, JJ.

MEMORANDUM OF DECISION

Anthony and Julie Armstrong appeal from the judgment of the Superior Court (Cumberland County, *Crowley, J.*) affirming the decision of the Cape Elizabeth Zoning Board of Appeals, granting a building permit to Daniel and Diane Caputo. Contrary to the Armstrongs' contentions, the Superior Court did not err when it denied their motion to exclude certain documents from the 80B record. *See* M.R. Civ. P. 80B(e). Also contrary to their contentions, the Board did not (1) deprive them of their due process rights, *see Fichter v. Bd. of Env'tl. Prot.*, 604 A.2d 433, 436-38 (Me. 1992); (2) improperly place the burden of proof on them instead of on the Caputos, *see Lewis v. Town of Rockport*, 1998 ME 144, ¶ 15, 712 A.2d 1047, 1050; or (3) err as a matter of law or make factual findings unsupported by the record when it agreed with the CEO's determination of the "normal high

water line,” see *Mack v. Mun. Officers of Cape Elizabeth*, 463 A.2d 717, 721-22 (Me. 1983).

The entry is:

Judgment affirmed.

For plaintiffs:

Anthony and Julie Armstrong
32 Lawson Road
Cape Elizabeth, ME 04107

Attorneys for defendants:

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(for Town of Cape Elizabeth)

John McVeigh, Esq.
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P O Box 9546
Portland, ME 04104-9546
(for Daniel & Diane Caputo)



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TOWN OF CAPE ELIZABETH

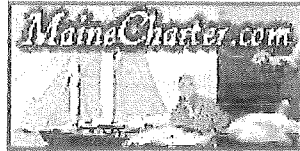
Code Enforcement Office
P. O. Box 6260
320 Ocean House Road
Cape Elizabeth, Maine 04107-0060

Phone: 207-799-1619
Fax: 207-799-5598
Email:
cecodes@maine.rr.com

January 25, 2000

To: Zoning Board of Appeals
From: Bruce Smith, Code Enforcement Officer
Re: Admin. Appeal of issuance of B.P.#000238

Attached are photos of the oceanfront adjacent to the Caputo property along with a tide chart for the month of January. Last Friday, the 21st, there was an astronomical high tide, which prompted a return to the site today at 8:00 am and to snap the attached photos. The yellow highlighted lines added to photos #1 and #2 clearly show that the normal high water line previously determined is well above a normal high tide of 10' - 0" NGVD and the higher Friday astronomical high tide of 11' - 6". Photos #3, #4 and #5 were snapped for you to visualize, with the aid of the snow line, the large amount of area above the affect of the tides. The snow line shown has not changed since Friday, as we have had no new snow until later this morning after the photos were taken.



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January Tide Chart

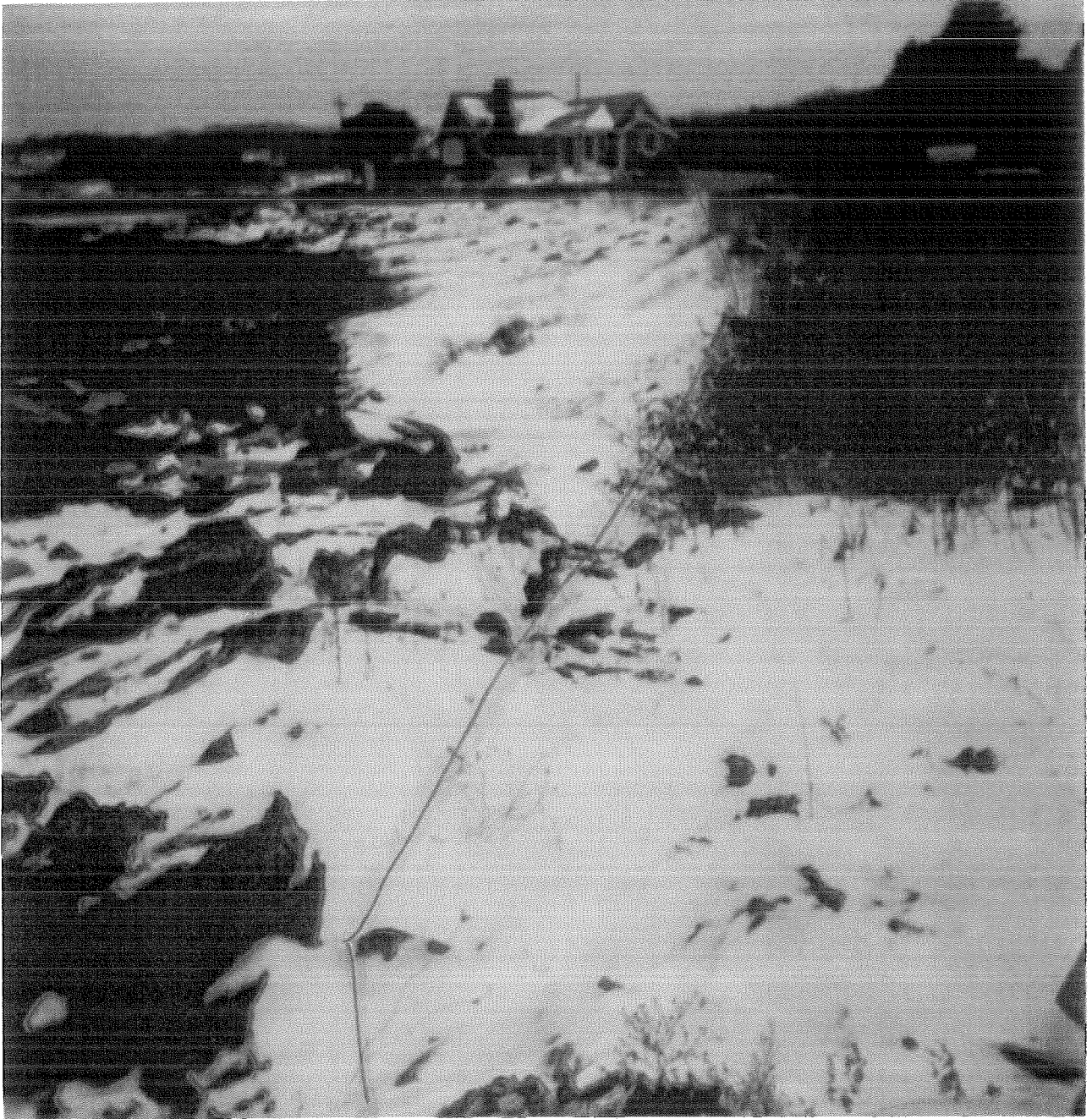
PORTLAND HARBOR



Portland Harbor 43°39'27"N 070°14'28"W

2000

DATE		HIGH				LOW				 rise set	
		AM	hgt	PM	hgt	AM	hgt	PM	hgt		
1	Sat	7:16	9.2	7:47	8.4	12:56	0.8	1:37	0.6	7:15	4:15
2	Sun	8:06	9.3	8:39	8.4	1:48	1.0	2:29	0.5	7:15	4:16
3	Mon	8:51	9.4	9:25	8.4	2:35	1.0	3:15	0.3	7:15	4:17
4	Tue	9:32	9.5	10:07	8.5	3:18	1.0	3:57	0.1	7:15	4:18
5	Wed	10:10	9.6	10:46	8.5	3:58	1.0	4:35	0.0	7:15	4:19
6	Thu	10:46	9.7	11:22	8.5	4:34	1.0	5:11	0.0	7:15	4:20
7	Fri	11:21	9.7	11:57	8.5	5:09	0.9	5:45	0.0	7:15	4:21
8	Sat	11:55	9.7	-	-	5:44	0.9	6:18	0.0	7:15	4:22
9	Sun	12:31	8.5	12:31	9.6	6:20	0.9	6:53	0.0	7:15	4:23
10	Mon	1:07	8.6	1:09	9.5	6:58	0.9	7:29	0.0	7:14	4:24
11	Tue	1:44	8.6	1:50	9.4	7:39	0.9	8:09	0.1	7:14	4:25
12	Wed	2:25	8.7	2:35	9.2	8:24	0.9	8:52	0.2	7:14	4:26
13	Thu	3:10	8.9	3:25	9.0	9:15	0.8	9:40	0.3	7:13	4:27
14	Fri	3:59	9.1	4:21	8.8	10:10	0.7	10:33	0.3	7:13	4:28
15	Sat	4:53	9.3	5:22	8.7	11:11	0.5	11:31	0.4	7:12	4:30
16	Sun	5:51	9.7	6:28	8.8	-	-	12:16	0.1	7:12	4:31
17	Mon	6:52	10.1	7:33	8.9	12:32	0.3	1:20	-0.3	7:11	4:32
18	Tue	7:53	10.5	8:36	9.2	1:33	0.1	2:23	-0.9	7:11	4:33
19	Wed	8:52	11.0	9:36	9.6	2:33	-0.2	3:21	-1.4	7:10	4:35
20	Thu	9:49	11.4	10:31	9.9	3:31	-0.5	4:16	-1.7	7:09	4:36
21	Fri	10:43	11.6	11:25	10.1	4:27	-0.7	5:10	-1.9	7:09	4:37
22	Sat	11:37	11.5	-	-	5:21	-0.9	6:01	-1.9	7:08	4:38
23	Sun	12:17	10.2	12:30	11.3	6:14	-0.8	6:52	-1.6	7:07	4:40
24	Mon	1:08	10.1	1:22	10.8	7:08	-0.6	7:43	-1.2	7:06	4:41
25	Tue	2:00	9.9	2:16	10.2	8:02	-0.3	8:34	-0.7	7:06	4:42



Tuesday
~~Monday~~, JAN. 25, 2000

8:00 AM

#1



Tuesday
~~Monday~~, JAN 25, 2000

8:00 AM

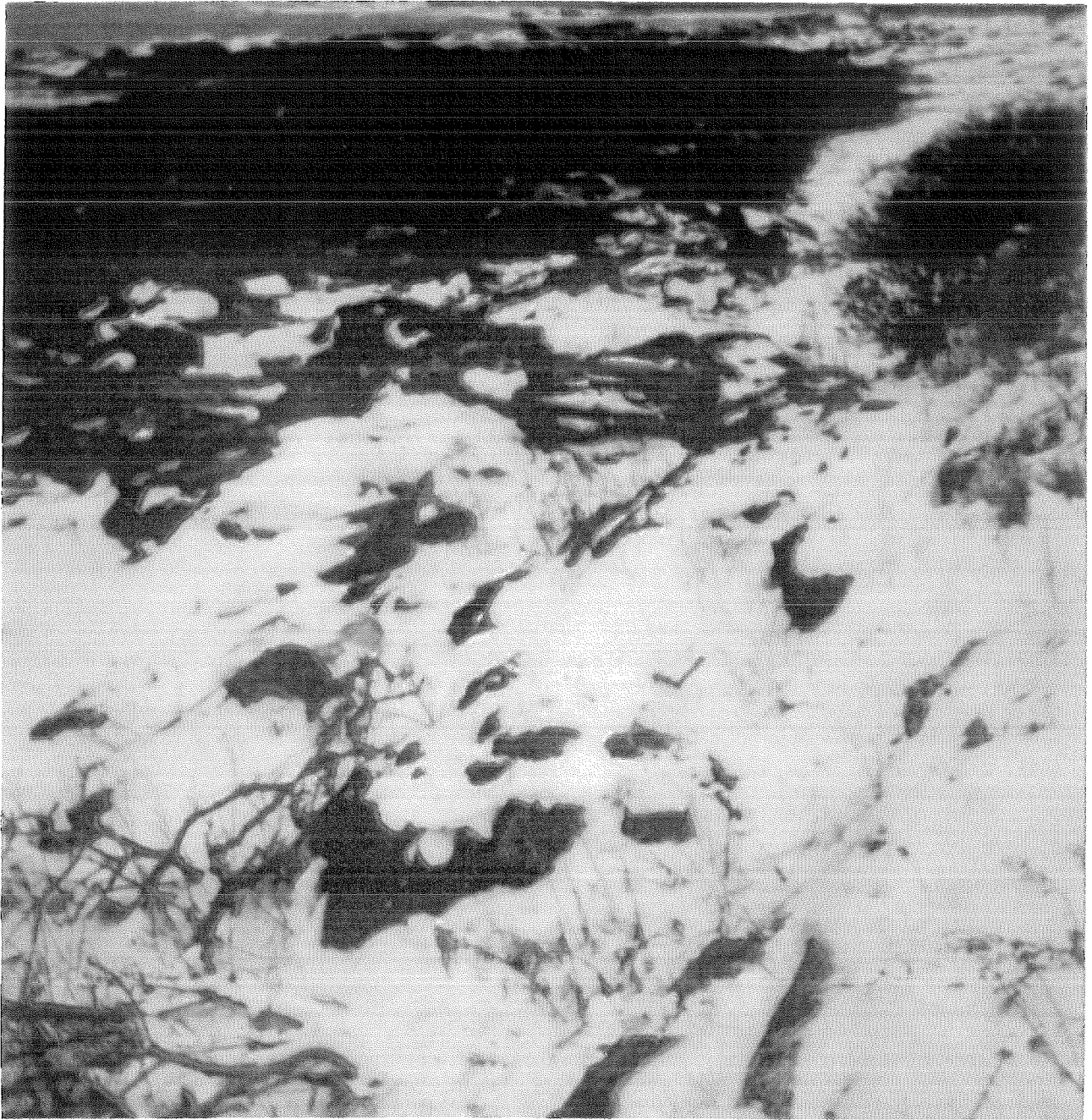
#2



Tuesday
~~Monday~~, JAN 25, 2000

8:00 AM

#3



Tuesday
~~Monday~~, JAN 25, 2000

8:00 AM

#4

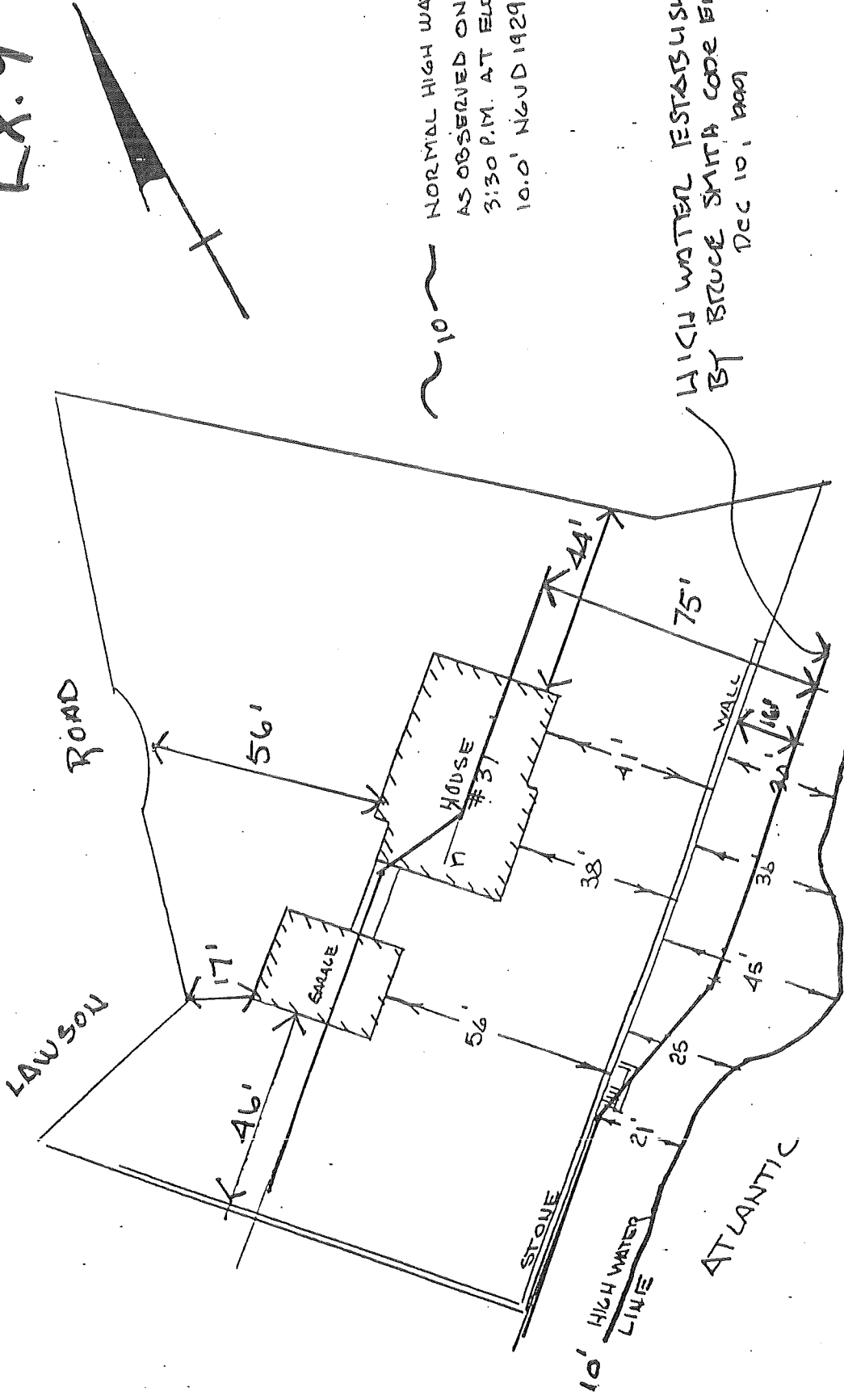


Tuesday
~~Monday~~, JAN 25, 2000

8:00 AM.

#5

EX. 9



~ 10' ~

NORMAL HIGH WATER LINE
AS OBSERVED ON 9-29-99 AT
3:30 P.M. AT ELEVATION
10.0' NGVD 1929.

HIGH WATER ESTABLISHED
BY BRUCE SMITH CODE ENFORCEMENT
DEC 10, 1999

PLAN SHOWING LOCATION OF NORMAL HIGH WATER LINE MADE FOR

DAN CAPUTO
CAPE ELIZABETH MAINE

APPROVED BY:

SCALE: 1" = 40' ±

DATE: 10-11-99

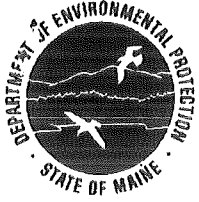
BY: DANIEL J. DAUFONSO
LAND SURVEYOR
SOUTH PORTLAND, ME.

DRAWN BY	
REVISED	

PHONE: 799-5951

DRAWING NUMBER
654

Daniel J. Dufonso



DEP INFORMATION SHEET

ESTABLISHING THE STARTING POINT FOR MEASUREMENT OF THE SHORELAND ZONE AND RELATED SETBACK DETERMINATIONS

issued: October 2003

contact: (207) 287-2111

The Mandatory Shoreland Zoning Act (Title 38 MRSA sections 435-449) requires Maine's municipalities to adopt ordinances regulating land use activities within: 250 feet, horizontal distance, of the normal high-water line of great ponds, rivers, and tidal waters; 250 feet, horizontal distance, of the upland edge of a freshwater or coastal wetland; and 75 feet, horizontal distance, of streams as defined in the law. This document is designed to assist parties working with the law and the various municipal shoreland zoning ordinances in determining the edge of the waterbody or wetland, which is the **starting point** for measuring the shoreland zoning distances and setback measurements. Please note that this document is based on the minimum requirements as contained in the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*. Municipalities may have adopted more restrictive shoreland zoning ordinances.

GREAT PONDS, RIVERS AND STREAMS

1. **Great Ponds, Rivers, and Streams, Without Adjacent Wetlands at the Elevation of the High Water Line** – The starting point for the shoreland zone is determined by locating that line which is apparent from visible markings, changes in the character of soils due to prolonged action of the water or changes in vegetation, and which distinguishes between predominantly aquatic and predominantly terrestrial land.
2. **Great Ponds With Adjacent Wetlands** – If a great pond has an adjacent non-forested wetland (attached or connected) the starting point for the shoreland zone is the shoreward point in the non-forested wetland that is at the same elevation as the high-water line of the great pond.
3. **Rivers with Adjacent Floodplain Wetlands** – The shoreland zone begins at the upland edge of non-forested, 100-year, floodplain wetlands (these are considered to be a part of the river).
4. **Streams** – The shoreland zone of a stream begins at the point described in #1 above in all cases, regardless of whether or not there is a floodplain wetland.

FRESHWATER WETLANDS

In order for a freshwater wetland to have a shoreland zone it must:

Be at least 10 acres in size

or

Be adjacent to a surface waterbody of less than 10 acres so that the combined area is 10 acres or more,

and;

1. Not be a forested wetland (dominated by woody vegetation that is equal to or greater than six meters, or approximately 20 feet, in height)

and

2. Be mapped and adopted as a shoreland zone by the municipality.

Determining Non-Forested Freshwater Wetland Size When Working with Narrow Wetlands or Portions of Wetlands – For long, narrow, non-forested wetlands adjacent to, but not part of, a river or stream the following applies: If a wetland narrows to less than 100' for a length of 100' or more, it is effectively ended and another wetland begins where it widens to 100' or more. The municipality's shoreland zoning map should reflect the separation of these wetlands.

Measurement - The starting point for measuring the shoreland zone of a 10 acre or larger non-forested freshwater wetland that is mapped and identified in a municipal shoreland zoning ordinance is:

1. The upland edge of the wetland; or
2. The edge (transition zone) of where the wetland becomes a forested wetland.

Wetlands Adjacent to Small Ponds - If a pond is less than ten acres in size but has adjacent nonforested wetlands such that the pond and the adjacent wetlands total ten or more acres, the pond, together with the adjacent nonforested wetlands, is regulated as a freshwater wetland. The shoreland zone begins at the upland edge of the nonforested wetland. If the pond is greater than 10 acres the wetland would be considered part of the great pond (see paragraph 2 on page 1 above).

Overlapping Shoreland Zones – If a 10 acre or larger non-forested freshwater wetland that is identified in a municipal ordinance as having a shoreland zone is located close enough to a great pond, river or stream, its shoreland zone may overlap that of the great pond, river or stream. In that case, the shoreland zone extends from the edge of the great pond, river or stream to the edge of the wetland. The area of overlap would be subject to the more restrictive standards applicable

to the two resources. Where there is no overlap, the standards for the relevant resource would apply.

COASTAL WETLANDS

1. **Visible Inspection Method** – This is a common method used to make a determination of the starting point for measuring the shoreland zone of a coastal wetland, but may be less precise than the elevation method. The Visible Inspection Method consists of looking for evidence of shoreline scouring, a tidal debris line and/or the presence of salt tolerant vegetation. When visible evidence is not satisfactory to establish a definitive edge, the elevation method can be used to determine the upland edge of the wetland.
2. **Elevation Method** – Where visible evidence is lacking or is unclear, the method for determining the starting point of the shoreland zone for coastal wetlands is the use of Maximum Spring Tide Levels as identified in the tide tables published by the National Ocean Service. This determination requires surveying utilizing appropriate adjustments for site specific elevations. The DEP publishes conversion tables for ease in determining these elevations.

There are times when there is little visual evidence of the upland edge of the coastal wetland at a particular location, but at a nearby location a clear upland edge can be found. In those situations it is reasonable to transfer the elevation from the known site to the site that lacks visual evidence.

Note also that where visual evidence, such as the presence of salt tolerant vegetation, extends further inland than the measured tidal elevation, the line formed by the more restrictive criterion must be used.

Additional information can be obtained by contacting the Department's Shoreland Zoning Unit at 287-2111 or by mail at:

Shoreland Zoning Unit
Department of Environmental Protection
State House Station 17
Augusta, Maine 04333

Information can also be found on the Department's shoreland zoning web site at:
www.maine.gov/dep/blwq/docstand/szpage.htm.

SPATIAL ALTERNATIVES, INC.

To: Maureen O'Meara, Town of Cape Elizabeth
From: Judy Colby-George
Date: January 16, 2014
Re: Origin and Accuracy of Shoreland Zoning GIS Data

I am writing this memo in response to your questions about the origins and accuracy of the Town of Cape Elizabeth's shoreland zoning GIS data layer. First, I should state, that I did not create this data layer, it was created by Kris Sommers at GPCOG sometime around 1994. All I can speak to is what I know in general about how GPCOG (and most everyone else) created data at that time period. The base layer upon which the shoreland zoning was developed was the parcel data created from the town's tax maps and fit to the USGS 7 ½ "Quad Sheets for road centerlines and water bodies. These parcels were created on uncontrolled aerial photography, meaning that the scale and accuracy of the data changed across the photo depending on elevation shifts and tilt of the plane when the photography was taken. Each individual tax sheet was then updated for any number of years without any control. These individual tax sheets were fit together into a single composite to the best of the cartographer's ability. But, overall, the accuracy of the parcel data was unknown and unknowable; it varies across the town depending on many factors. Once the parcel basemap was created, the shoreland zoning was created using a series of data sets, including Cumberland County Soils, FEMA Flood Zones, and buffers from the parcel edges. It is my belief that at the time of the creation of the Cape Elizabeth shoreland zoning map, all of these data layers were created from existing paper maps and also fit to the basemap.

Understanding the limitations of the data is very important to using it appropriately. Some data layers have specific accuracy. For instance the USGS 7 ½" Quad sheets adhere to National Map Accuracy Standards, which state that 90% of the features must be within 40 ft. of their location on the earth and 90% of vertical features must be within ½ contour interval of their actual elevation. Data layers compiled from multiple and unknown sources it is impossible to list a specific accuracy standard. • Taking paper maps and making them digital does not increase their inherent accuracy. It does create the ability to print the data at a variety of scales, which often provides a false sense of accuracy. Any map which shows a variety of layers cannot really be considered more accurate than its least accurate data layer. I cannot provide a specific accuracy representation of the data because I believe it is of variable accuracy.

Accuracy also impacts on the costs of data preparation and maintenance. Sometimes accuracy can't be improved on a particular data layer because of technological restrictions. More often, the accuracy is determined through balancing the needs of the end user and the cost to produce the data. Most communities develop data to an acceptable level of accuracy to accomplish the majority of tasks, assuming that there may be site specific needs for more accurate data. In the case of shoreland zoning, especially the RP zone, most of the data needs to be field verified in order to determine the actual distribution of the natural resources which the community has agreed to protect. The value of this type of data is for providing planning level information which can be used to provide general guidance to the town and landowners that they should be aware of a specific regulation and engage the proper specialists to map their specific property. This type of data must be used in conjunction with the ordinance in order to determine the site specific boundaries of the regulation.