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September 10 , 2019

Via Electronic Mail

Town of Cape Elizabeth Planning Board
c/o Maureen O'Meara, Town Planner
Town of Cape Elizabeth
P.O. Box 6260
Cape Elizabeth, ME 04107

Re: Maggie Birlem and Noelle DeLuca
Remand Proceeding/Proposed Findings

Dear Members of the Planning Board:

Please accept this submission on behalf of Maggie Birlem and Noelle DeLuca.

As you know, on March 12, 2019, and in response to the appeal filed by Christopher and Julie Munz, the Maine Superior Court remanded to the Planning Board the question of whether the Board adequately considered the validity and/or relevance of the alleged "private accessway" and related maintenance agreement the Munzes claim provides access and road frontage for their residence on South Street.¹

Subsequent to that remand order, the Town sought clarification from the Superior Court on whether the Planning Board could accept new evidence during the remand proceeding. On July 3rd the Superior Court clarified the remand and it is my understanding that the Board's plan is to hold a remand hearing during its September meeting, and to accept new evidence on the existence and/or relevance of the Munzes' alleged "private accessway."

Summary

In summary, with regard to the validity of this alleged private accessway, assuming the Planning Board did approve a private accessway for the Munzes' predecessor in title, Philip and Darleen Nedwell, the Nedwell's failed to record the plan associated with the approved private accessway as required by the Town's Zoning Ordinance. As such, and as provided by the Zoning Ordinance, any approved private accessway is null and void. Zoning Ord. § 19-7-9(D)(5)(b).

¹ A copy of the Court's remand order is attached at Exhibit "A."

With regard to the relevance of any alleged private accessway, even if the accessway was valid, it is not relevant to the Board's approval of Ms. Birlem and Ms. DeLuca's private road because the existence of any alleged private accessway does not have any impact on whether Ms. Birlem and Ms. DeLuca met the applicable Town standards for a private road. Further, any concerns the Munzes may have regarding any impact to any private right they claim they hold is a private matter, and does not concern the Town.

Finally, the Munzes have benefitted from the private road improvements made by Ms. Birlem and Ms. DeLuca. Because the Munzes' private accessway has long been null and void, the only reason the Munzes have legal frontage for their house is because Ms. Birlem and Ms. DeLuca installed the new private road. Thus, even as a private dispute, the Munzes have not been harmed, but have benefitted, from the Board's approval of this new private road.

Discussion

1. The Munzes Private Accessway is Not Valid.

The Court's remand order focused on two questions. First, is the Munzes alleged private accessway valid? In order to hold a valid private accessway, the Munzes would need to show two things: (1) that the Planning Board approved a private accessway benefitting the Munzes' property; and (2) any approved plans for a private accessway were recorded in the Cumberland County Registry of Deeds within 90 days of any Board approval. Zoning Ord. § 19-7-9(D)(5)(b).

Ms. Birlem and Ms. DeLuca have no information regarding the first issue. As the party alleging that such a private accessway exists, the burden is on the Munzes to produce evidence that the Planning Board approved a private accessway that provides frontage for the Munzes property.

Even if the Munzes can show that the Board once approved a private accessway, no plan for a private accessway providing frontage to the Munzes' property has been recorded in the Registry of Deeds. *See* September 9, 2019 Affidavit from Sharon Bowler, ¶ 10.² Thus, as provided in the Town's Zoning Ordinance, the failure to record the plan for the private accessway means that any "approval of the Planning Board shall be void." Zoning Ord. § 19-7-9(D)(5)(b). Thus, any alleged approved private accessway is null and void and is not "valid."

When this issue was raised previously with the Town, the Munzes responded that a "road maintenance agreement" was recorded by the Munzes' predecessors, the Nedwells. The Ordinance, however, requires both the maintenance agreement and the original plan to be recorded. If the "plan and agreement" are not recorded, the Planning Board approval is void. Thus, recording of the agreement, even if timely, is insufficient.

The Munzes also have argued that if the private accessway is void, the Town is now "barred," 15 years later, to take any enforcement action against the Munzes. The Town's decision regarding how to exercise its enforcement discretion is not relevant to whether the private accessway is valid in the first place. Moreover, the reason the Town may be precluded

² Ms. Bowler's Affidavit is attached at Exhibit "B."

from taking enforcement action against the Munzes is because Ms. Birlem and Ms. DeLuca's new private road may "cure" the Munzes' frontage problem. Attached at Exhibit "C" is a site plan showing, in green, the location of a portion of the front and side boundaries of the Munzes' property. Ms. Birlem and Ms. DeLuca's property boundaries are shown in purple. In orange, and stretching for a distance of 100 feet, is a portion of the improved section of Aster Lane and, in dashed lines, the improved private road approved by the Planning Board. The combination of these improved areas provides legal frontage both to Ms. Birlem and DeLuca and the Munzes. Ironically, therefore, even though the Munzes oppose the permit granted in this proceeding, it is that permit that has resolved the Munzes legal troubles.

In response to the Court's first question, therefore, the private accessway the Munzes allege is being "interfered with" by the permitted private way is not valid, does not exist, and has no relevance or bearing to the Board's prior approval of the private road for Ms. Birlem and Ms. DeLuca.³

2. The Munzes' Claims About a Private Accessway are Irrelevant to the Board's Approval of the Private Road.

The section of South Street and/or Aster Lane that exists between the Munzes' lot and the lot owned by Ms. Birlem and Ms. DeLuca is a portion of a private right-of-way (the "Private ROW") originally laid out on a September, 1925 subdivision plan entitled "Plan of South Portland Estates, and recorded in the Cumberland County Registry of Deeds at Book 16, Page 52. To this day, this Private ROW has remained private, and has not been accepted by the Town of Cape Elizabeth as a public road.

The essence of the Munzes' argument is that, if the Private Accessway exists, the Board's approval of Ms. Birlem and DeLuca's private road was illegal because the private road somehow interferes with the Munzes' Private Accessway. This argument is invalid due to both legal and factual errors.

As a matter of law, to the extent the Munzes allege that Ms. Birlem and Ms. DeLuca's actions or omissions in constructing the Private Road, in compliance with the May 17th Decision, are in conflict with any rights or obligations held by the Munzes, or any other person or entity, such claims concern a private dispute between private property owners with regard to a private right-of-way, and are not impacted by the May 17th Decision. Nor is the Town a proper arbiter of alleged private rights or conflicts. *Whiting v. Seavy*, 159 Me. 61 (1963). If one property

³ The site plan at Exhibit C also shows the prior location of the gate that existed at the end of the improved section of Aster Lane. In the remand order, the Court noted that if the Munzes' private accessway was not valid, the Board was "authorized to permit the removal of a gate on the private road extension..." Decision and Order at 7, n. 1. Although Ms. Birlem and DeLuca contend that they had the private right to remove the gate, and the Board's permitting decision did not "authorize" this action, the Private Accessway is null and void and thus the Court's question has been answered. Further, as shown on the plan at Exhibit C, the gate was located within the public right-of-way, as the public Aster Lane jogs in for a short distance between the lots owned by the Munzes and Ms. Birlem and DeLuca. As such, even if the private accessway was valid and existed, the gate was not located on the private accessway and so the Munzes never had a right to the gate.

owner alleges that another's permitted development violates some privately-held right, the only option is for the parties to seek redress in the courts. No one can approach the municipality that permitted the otherwise lawful activity and ask the municipality to resolve the private dispute.⁴

As an issue of fact, the Munzes' argument is nonsensical. Under the Town's Ordinance, the requirements for private roads exceed that for private accessways. As the Munzes have repeatedly noted, a private accessway may only serve a single home, while Ms. Birlem and Ms. DeLuca's private road may provide legal frontage to many homes. Thus, in constructing a private road "on top" of some portion of the Munzes' alleged private accessway, Ms. Birlem and Ms. DeLuca have improved the Private ROW in front of the Munzes property.⁵ What once was a minimally improved private accessway, subject to damage and more expensive to maintain, there is now an improved private road. The Munzes cannot, therefore, complain that the permitted private road has harmed them—just the opposite is true.

With regard to the Munzes road maintenance agreement, as the private accessway is null and void so is the Munzes' road maintenance agreement. Even if the Munzes' road maintenance agreement was valid, and the Munzes have some obligation to maintain a portion of South Street in front of their property, the approval of Ms. Birlem and Ms. DeLuca's private road means the Munzes will now have help maintaining this section of the Private ROW. Indeed, if the Munzes elected to sit back and do nothing to maintain the road in front of their home, Ms. Birlem and DeLuca are obligated to maintain this section of the Private ROW. Again, the Board's approval of this private road has benefitted, not harmed, the Munzes.

As such, even if the Munzes' private accessway was valid, the Board's approval of Ms. Birlem and Ms. DeLuca's private road does not adversely impact the Munzes, nor does it impose any new obligations on the Munzes. In fact, Ms. Birlem and DeLuca's construction of a private road has provided a benefit to the Munzes, by resolving their frontage problem, improving the Private ROW that the Munzes use to access their home, and by taking responsibility for the maintenance of this new and improved section of road. To the extent the Munzes disagree, and they persist in their absurd contention that this improved roadway has "harmed" them, that is a private dispute that should be resolved in court, not before this Board.

Conclusion

The Superior Court remanded this matter to the Board so that the Board could (1) consider the validity of the Munzes alleged private accessway and (2) determine whether approval of Ms. Birlem and DeLuca's private road affected the private accessway. We respectfully request that the Board find that:

⁴ In this case there is, in fact, a civil lawsuit pending in Cumberland County Superior Court, between the Munzes and Ms. Birlem and DeLuca, regarding these alleged private infractions. (Docket No. CV-18-299). It is in that court proceeding, and not before the Cape Elizabeth Planning Board, that the Munzes' concerns should be addressed.

⁵ In addition to solving the Munzes' legal problem that their predecessor never recorded any plans showing a private accessway in this area.

September 10, 2019

Page 5

- A. The Munzes private accessway, as permitted by their predecessors the Nedwells, is not valid, and is null and void, due to the fact that the Nedwells failed to record a copy of a plan showing the private accessway within 90 days of approval, as required by the Ordinance;
- B. Even if the Munzes' private accessway, and road maintenance agreement, were valid, *the Board's approval* of the new private road does not impact any private rights held by anyone. To the extent any construction or improvements caused by Ms. Birlem and Ms. DeLuca has harmed the private rights of the Munzes or any other person, that is a private matter to be resolved by the parties; and
- C. As a matter of fact, the construction of the new private road has improved the condition of the Private ROW that exists between the property owned by the Munzes and Ms. Birlem and DeLuca and, therefore, the permitted activity appears to have provided the Munzes with a benefit.

I have enclosed a more comprehensive set of proposed Findings of Facts and Conclusions of Law at Exhibit "D" for the consideration of the Board.

Thank you for your consideration of this information. We look forward to meeting with the Board to provide any additional comments on this matter.

Very truly yours,



Scott D. Anderson

SDA/mtt

Enclosures

cc: (via electronic mail)
John J. Wall III, Esq., Town Counsel
Peggy L. McGeHee, Esq.

EXHIBIT A

mev

STATE OF MAINE
Cumberland, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-18-20

CHRISTOPHER AND JULIE MUNZ,

Petitioners

v.

DECISION AND ORDER

TOWN OF CAPE ELIZABETH,

and

MARGARET BIRLEM AND
NOELLE C. DELUCA,

Respondents

STATE OF MAINE
Cumberland ss Clerk's Office
MAR 13 2019 9:07AM
RECEIVED

Before the court is petitioners Christopher Munz and Julie Munz's Rule 80B appeal of respondent Town of Cape Elizabeth's May 15, 2018 approval of respondents Margaret Birlem and Noelle C. Deluca's private road extension application. For the following reasons, the case is remanded to the respondent Town of Cape Elizabeth Planning Board for further findings of fact consistent with this decision and order.

I. Background

Petitioners Christopher and Julie Munz are owners of 5 South Street, Cape Elizabeth, Maine. (R. 2, p. 2.) Respondent Town of Cape Elizabeth is a Maine municipal corporation located in Cumberland County, Maine, with offices located at 320 Ocean House Road, acting through its Planning Board. (R. 8, p. 13.) Respondents Margaret Birlem and Noelle C. Deluca are owners of 6 South Street and 8 South Street, Cape Elizabeth, Maine, which were consolidated into a single parcel and renamed 8 Aster Lane, Cape Elizabeth, Maine. (R. 3, p. 12-18.)

On March 29, 2018, respondents Birlem and DeLuca submitted an application for minor subdivision review to extend a private road pursuant to respondent Town's ordinance. Subdivision Ordinance for Private Road Standards, § 16-2-3. (R. 3.) On April 23, 2018, the Board conducted a hearing to assess the completeness of the application, determined the application was complete, and scheduled a site visit. (R. 8.) The Board conducted the site visit on April 30, 2018. (R. 13, p. 7.)

On May 15, 2018, the Board held a hearing and received evidence both for and against the application. (R. 14-15.) Respondents Birlem and DeLuca submitted a boundary and topographic survey, engineering plans, and a traffic analysis report in support of the Application. (R. 3, R. 10, R. 11.) Respondent Town's engineer analyzed the plans, (R. 5, R. 12) respondent's town planner provided summaries of the project to the Board, (R. 7, R. 13) and the respondent Town's fire chief commented on the plans. (R. 4, R. 14, p. 5 (minutes).) Petitioner Christopher Munz spoke against approval of the application on both April 23, 2018 and May 15, 2018. (R. 8, p. 4 (minutes), R. 14, p. 4 (minutes).) On May 15, 2018, the Board made findings of fact and voted to approve the application with eight conditions. (R. 14, p. 6-9 (minutes).) The Board confirmed the findings and conditional approval by letter dated May 17, 2018. (R. 15.)

II. Procedural History

Petitioners filed a petition for appeal of government action pursuant to Rule 80B on June 13, 2018. M.R. Civ. P. 80(B). The petitioners claim that the Board's approval of the application was an error of fact and law, an abuse of its discretion, arbitrary and capricious, and unsupported by substantial evidence in the record. Petitioners filed their brief in support of their Rule 80B petition on September 7, 2018. Respondents Birlem and DeLuca filed their brief in opposition to

the Rule 80B petition on October 22, 2018. Respondent Town filed its brief in opposition to the Rule 80B petition on October 22, 2018. Petitioners filed a reply brief on November 5, 2018.

III. Discussion

Petitioners argue that the Board erred in approving the application as it was contrary to Town Zoning and Subdivision Ordinance provisions, is unsupported by required findings of fact, and violated the Munzes' contract and property rights. Respondents Birlem and DeLuca argue that the Munzes do not have standing to appeal the Board's decision, the decision is supported by record evidence, and the decision is adequate for appellate review. Respondent Town argues petitioners have not preserved all issues for appeal, the decision was supported by record evidence, the decision is supported by facts that are obvious or can be inferred, that no amendment process was required, and that petitioners' arguments are not germane to the appeal.

1. Standard of Review

When the Superior Court acts in its appellate capacity pursuant to Rule 80B, the court "directly examine[s] the record developed before the Board . . . for abuse of discretion, error of law, or findings unsupported by substantial evidence in the record." Lane Constr. Corp. v. Town of Washington, 2008 ME 45, ¶ 29, 942 A.2d 1202; M.R. Civ. P. 80B. The court will "neither embark on an independent and original inquiry, nor . . . review the matter by implying the findings and grounds for the decision from the available record." Appletree Cottage, LLC v. Town of Cape Elizabeth, 2017 ME 177, ¶ 9, 169 A.3d 396 (quotations omitted). "The fact that the record before the Board is inconsistent or could support a different decision does not render the decision wrong." Duffy v. Town of Berwick, 2013 ME 105, ¶ 22, 82 A.3d 148 (quotations omitted). Petitioners bear the burden of persuasion on appeal because they seek to vacate the Board's decision. See Fitanides v. City of Saco, 2015 ME 32, ¶ 8, 113 A.3d 1088.

2. Standing

“Any party may take an appeal, within 45 days of the vote on the original decision, to Superior Court from any order, relief or denial in accordance with the Maine Rules of Civil Procedure, Rule 80B.” Sahl v. Town of York, 2000 ME 180, ¶ 8, 760 A.2d 266. An abutting owner is an owner of land which abuts or adjoins;” the close proximity definition has been applied to an abutting landowner. Sahl, 2000 ME 180, ¶ 9, 760 A.2d 266 (quotations omitted). Abutters need allege only “a potential for particularized injury to satisfy the standing requirement.” Sproul v. Town of Boothbay Harbor, 2000 ME 30, ¶ 6, 746 A.2d 368 (quotations omitted). A landowner directly across the street is an abutter for standing purposes. See Sahl, 2000 ME 180, ¶ 10, 760 A.2d 266.

The relevant inquiry to determine the petitioners’ standing is land ownership rather than residence. Furthermore, the “threshold requirement for an abutter to have standing is minimal.” Sproul, 2000 ME 30, ¶ 7, 746 A.2d 368. “[A] minor adverse consequence affecting the party’s property, pecuniary or personal rights is all that is required for the abutting landowner to have standing.” Sproul, 2000 ME 30, ¶ 7, 746 A.2d 368. Because petitioners allege particularized injuries and are owners of land that abuts the road extension in question, petitioners have standing. (See Pet. ¶¶ 27-34.)

3. Record on Appeal

A. Minor Subdivision Review for Private Road Extension Application

Petitioners argue the Board abused its discretion and erred as a matter of law in approving the application because it failed to address or meet town subdivision ordinances, specifically traffic standards, stormwater standards, road construction requirements, and waiver provisions. Petitioners also argue the Board’s decision was unsupported by substantial evidence in the record.

Finally, petitioners argue respondent Town did not have the authority or jurisdiction to permit removal of the gate.

i. Traffic Standards

Petitioners argue that the Board failed to address or meet Town Subdivision Ordinance traffic standards. The Board made a factual finding that the respondents Birlem and DeLuca substantially addressed the standards of the private road review and the subdivision ordinance, and this finding is supported by substantial evidence in the Record. (R. 14, p. 7 ¶ 8 (minutes).) The applicants submitted a traffic assessment report prepared by William Bray, P.E., in support of the application. (R. 11.) The traffic assessment report provided that approval of the road extension “will very minimally increase the volume of traffic on South Street.” (R. 11, p. 2.) No competing engineering analyses were submitted. The Board also conditioned its approval on the addition of traffic signs. (R. 14, p. 7 ¶ 4 (minutes).) The Board’s determination was supported by substantial evidence in the Record.

Petitioners argue that the Board erred as a matter of law and abused its discretion in failing to meet the requirements of Town Subdivision Ordinance, section 16-3-1(d)4, which states a proposed use must “provide safe vehicular and pedestrian travel and traffic patterns.” (R. 21, p. 19 (ordinance).) The Board made a factual finding that the applicant substantially addressed the standards of the private road review, and this finding is supported by substantial evidence in the Record. (R. 15, p. 2, ¶ 8.) As discussed, the traffic impact report provided by respondents Birlem and Deluca in support of the application found a very minimal increase in the amount of traffic on South Street. (R. 11, p. 2.)

At the Board meeting on May 15, 2018, citizens expressed concern that removal of a chain barrier on the road extension, between Aster Lane and South Street, would impact their safety. (R.

14, p. 2-4 (minutes).) The record shows the chain is an “orphan gate,” meaning it is not sanctioned by the Town. (R. 14, p. 5 (minutes).) The Town Fire Chief stated “as a rule they do not like anything that impedes their access to any development or neighborhood . . . [th]e gate is not a problem for him . . . gates slow them down.” (R. 14, p. 5 (minutes).) The Board’s determination was supported by substantial evidence in the record.

ii. Stormwater Standards

Petitioners argue that the Board failed to address or meet Town Subdivision Ordinance stormwater standards, which require an application to “provide for adequate stormwater management.” (R. 21, p. 22 (ordinance).) Respondents Birlem and DeLuca submitted an engineering assessment, which was reviewed by the Town’s engineer. (R. 5, R. 12.) They then revised their application to address the Town engineer’s comments. (R. 10.) The Town’s engineer agreed no formal stormwater report was required given the “minimal net gain impervious area.” (R. 12, p. 2.) The Board’s determination was supported by substantial evidence in the Record.

iii. Road Construction Requirements and Waivers

Petitioners argue that the Board failed to address or meet Town Subdivision Ordinance road construction requirements pursuant to section 16-3-1(d).11, and by reference, section 16-3-2, that a private road be built with wider dimensions than a private accessway. (R. 21, p. 20 (ordinance); Resp. Town Brief, App’x 1, p. 25-29 (ordinance).) Petitioners also argue that the Board erred as a matter of law in waiving the standards for a private road, pursuant to Town Subdivision Ordinance section 16-3-5, including the minimum requirements for road width, shoulder, center line, and stormwater requirements. (R. 21, p. 34 (ordinance).) The Town Subdivision Ordinance authorizes the Board to grant waivers including the minimum requirements for road width when “practical difficulties . . . may result from strict compliance with this

Ordinance.” Subdivision Ordinance § 16-3-5. (R. 21, p. 34 (ordinance).) The Board found that “the waivers from the road width, shoulder, center line and enclosed stormwater requirements are consistent with the Waiver provision, Sec. 16-3-5, Subdivision Ordinance.” (R. 15, p. 1, ¶ 3.) The application was reviewed by the Town Engineer, who deferred to the Board for deciding whether to grant the waivers, because the “waivers do not adversely affect the functionality of this low speed and volume roadway.” (R. 12, p. 2.) There is substantial evidence in the record that shows a practical difficulty, which supports the Board’s determination.

iv. Authority to Permit Removal of Gate

Petitioners argue that the Board had no authority or jurisdiction to permit removal of the gate. As discussed above, the respondent Town Planner determined the gate had not been requested by the police chief and was an “orphan gate” and not sanctioned by the town. (R. 14, p. 5 (minutes).) The Board made a factual finding that removal of the gate “will enhance access for emergency vehicles,” which adheres to the Town Subdivision Ordinance Section 16-3-1(d), requiring the Board to address safety. (R. 15, p. 1, ¶ 4.; R. 21, p. 18-19 (ordinance).) This finding is supported by respondent Town Fire Chief’s statements that “gates slow them down.” (R. 14, p. 5 (minutes).) Because the gate is not sanctioned by the town, and the town made factual findings based on substantial evidence in the record that removal of the gate would enhance safety, respondent Town acted within its authority to permit removal of the gate.¹

B. Private Accessway and Maintenance Agreement

Petitioners argue that the Board’s approval results in requiring a private accessway to serve more than one lot, which violates the Town’s Zoning Ordinance, section 19-7-9. (R. 22, p. 196-

¹ As discussed below regarding the private accessway and maintenance agreement, if no valid private accessway agreement and accompanying maintenance agreement exists, the Board was authorized to permit the removal of a gate on the private road extension and pursuant to their determination that removal “will enhance access for emergency vehicles.” (R. 15, p. 1, ¶ 4.)

202 (ordinance).) Respondent Town argues this issue was not preserved for appeal, but even if it was, that the private accessway approval is null and void because its approval was not recorded. (Resp. Town Brief, 18-20.)

In order to preserve an issue for appeal, a party must “raise any objection to the agency to ensure the agency, and not the court, has the first opportunity to pass upon the claims of the parties.” Wells v. Portland Yacht Club, 2001 ME 20, ¶ 5, 771 A.2d 371. “An issue is considered raised and preserved for appeal if there is sufficient basis in the record to alert the court and any opposing party to the existence of that issue.” Wells, 2001 ME 20, ¶ 5, 771 A.2d 371

At the April 23, 2018 meeting, petitioners’ attorney stated, “his clients’ property exists under a private accessway that is limited to one lot.” (R. 8, p. 4 (minutes).) At the May 15, 2018 meeting, petitioner Christopher Munz said, “We live on an accessway and it is not a private road. What will happen to us? Will we be part of an Aster Lane maintenance agreement?” (R. 14, p. 4 (minutes).) Because petitioners raised this issue before the Board, and the Board had an opportunity to address the claims, petitioners preserved this issue for appeal.

The Board did not make a factual finding on this issue and there is no evidence in the record to show whether the Board considered petitioners’ private accessway, and if valid, whether the private accessway or maintenance agreement was affected by the application. Without sufficient findings of fact, the “reviewing court cannot effectively determine if an agency’s decision is supported by the evidence, and there is a danger of judicial usurpation of administrative functions.” Appletree Cottage, LLC v. Town of Cape Elizabeth, 2017 ME 177, ¶ 9, 169 A.3d 396. When the agency tasked with fact-finding “does not make the necessary findings, the facts found are not obvious, and facts cannot be inferred from stated conclusory facts, the remedy . . . is a remand to the agency for findings that permit meaningful judicial review.” Mills v. Town of Eliot, 2008 ME

134, ¶ 20, 955 A.2d 258. Based on this record, the Board did not consider or make a finding regarding the private accessway.

The Town now asserts that no private accessway approval nor plan was recorded, which voids the private accessway according to the approval letter and by statute. (See R. 1, p. 2 (“The original plan(s) and maintenance agreement shall be recorded in the Cumberland County Registry of Deeds within ninety (90) days of approval by the Planning Board . . . If the plan and agreement are not recorded within this period, the approval of the Planning Board shall be void.”); R. 22, p. 201 (ordinance)). Neither a recorded private accessway approval nor plan was included in the record.

On this record, the court cannot determine whether the Board should have considered the private accessway issue. Because the court will not “embark on an independent and original inquiry nor review the matter by implying the findings and grounds for the decision from the available record,” the remedy is a remand to the Board to determine whether the private accessway is valid, and if so, whether the private accessway and maintenance agreement should be considered under the application. Town of Elliot, 2008 ME 134, ¶ 19, 955 A.2d 258 (original quotation omitted).

C. Subdivision Plan Amendment

Petitioners argue the Board erred as a matter of law when it failed to adhere to subdivision plan amendment requirements pursuant to respondent Town’s Subdivision Ordinance Sec. 16-2-5. Respondent Town argues this issue was not preserved for appeal, but even if it was, that the Board’s approval did not alter the provisions of any previously-approved subdivision because petitioners misinterpret the meaning of the ordinance. (Resp. Town Brief. 6-8.) Petitioner Christopher Munz testified before the Board on May 15, 2018, stating that respondents Birlem and

DeLuca's land are "part of the South Portland subdivision. They were not part of the Cottage Brook Subdivision, nor were they added in an amendment to that subdivision." (R. 14, p. 4 (minutes).) This general statement does not sufficiently raise the argument that in approving the application, the Board failed to adhere to subdivision plan amendment requirements. Petitioners did not preserve this issue for appeal.

D. Procedural Due Process of Law

Petitioners argue that the Board denied their right to due process of law when it approved the application after substantial changes were made. In their brief, petitioners do not argue the substance of this claim. See Mehlhorn v. Derby, 2006 ME 110, ¶ 11, 905 A.2d 290 ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quotation marks omitted)).

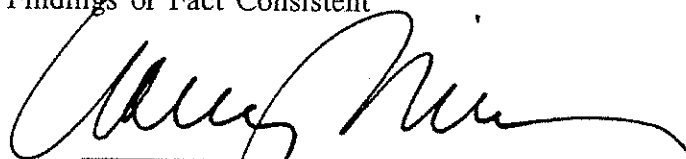
IV. Conclusion

Respondent Town's Planning Board did not adequately consider the validity of the private accessway and whether the application would affect the private accessway and maintenance agreement.

The entry is

This case is REMANDED to the Respondent Town of Cape Elizabeth Planning Board for further Findings of Fact Consistent with this Decision and Order.

Dated: March 12, 2019



Nancy Mills
Justice, Superior Court

Entered on the Docket: 3/13/19

mc ✓

EXHIBIT B

AFFIDAVIT OF SHARON BOWLER

I, Sharon Bowler, being duly sworn do hereby depose and say as follows:

1. I am a real estate paralegal at the Law firm Verrill Dana, LLP in Portland, Maine.

I make this affidavit in support of materials and information being submitted to the Cape Elizabeth Planning Board pursuant to a Decision and Order, dated March 13, 2019, in the matter *Christopher and Julie Munz v. Town of Cape Elizabeth, et al.*, Docket AP-18-20.

2. I have been a real estate paralegal at Verrill Dana for fifteen years where I am involved in various aspects of real estate conveyancing and abstracting title to real estate.

3. For twenty years prior to employment at Verrill Dana, I did real estate title work for other law firms and for First American Title Insurance Company in both Maine and California.

4. I make this affidavit on the basis of my own personal knowledge and from my research and examination of the online indices and instruments of the Cumberland County Registry of Deeds.

5. I have reviewed all instruments, recorded in the Cumberland County Registry of Deeds, from the present day back to January 1, 2004, for the parcel of land located at 5 South Street, and owned by Christopher and Julie Munz pursuant to a deed recorded in the Cumberland County Registry of Deeds in Book 31775, Page 75.

6. In this search, I have reviewed documents referencing the approval of a “private accessway,” so-called, purportedly approved by the Cape Elizabeth Planning Board at some time during 2004.


7. I located a Road Easement and Maintenance Agreement, executed by Philip and Darlene Nedwell (the "Nedwells"), and recorded on March 29, 2004, in Book 21026, Page 135, in the Cumberland County Registry of Deeds ("Nedwell Road Maintenance Agreement").

8. Attached hereto at Exhibit "A" is a copy of the Nedwell Road Maintenance Agreement as recorded in the Registry.

9. The Nedwell Road Maintenance Agreement references a January 9, 2004 plan, last revised February 26, 2004, entitled "The Private Accessway Plan."

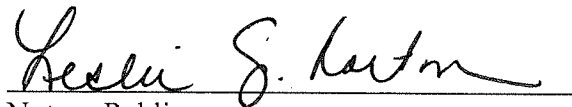
10. No copy of the Private Accessway Plan has been recorded in the Cumberland County Registry of Deeds.

Dated: September 10, 2019


Sharon Bowler

STATE OF MAINE
Cumberland, ss.

Personally appeared the above-named Sharon Bowler and made oath and swore to the truth of the statements contained in the above affidavit by her signed.



Notary Public

Print Name: LESLIE G. NORTON

My commission expires:

LESLIE G. NORTON
Notary Public, State of Maine
My Commission Expires July 06, 2026

Exhibit A

03400

Declaration of Road Easement and Maintenance Agreement

WITNESSETH

WHEREAS, Philip Nedwell and Darleen Nedwell, both of South Street, Cape Elizabeth, Maine (herein "Declarants") own property with frontage on or accessed by a private way known as South Street located in Cape Elizabeth, Cumberland County, Maine, which private way is more particularly described and shown on "The Private Accessway Plan" dated January 9, 2004, last revised February 26, 2004, prepared by Sebago Technics, Inc., and recorded in the Cumberland County Registry of Deeds in Book _____, Page _____.

WHEREAS, South Street is improved by an existing gravel road which is not plowed or otherwise maintained by the Town of Cape Elizabeth, which has not been offered or dedicated to the Town and, therefore, shall be and remain a private way or road unless or until Declarants, or their heirs, successors and assigns, may elect to offer South Street to the Town as a public street; and

WHEREAS, Declarants are desirous of entering into and declaring this easement and agreement regarding the maintenance of South Street as a private way and the allocation of the costs necessary to maintain, repair, or improve South Street and with respect to other matters set forth herein. This Declaration is specific to property owned by the Nedwells with frontage on South Street and shall be binding upon their successors and assigns and not purport to be binding upon all owners who have frontage on or access over South Street. Reference is also made to a 2001 Declaration regarding road maintenance of South Street dated February 13, 2001 and recorded at the Cumberland County Registry of Deeds in Book 16037, Page 181;

NOW THEREFORE, in consideration of the premises, Declarants hereby declare and create the within easement in and agreement (hereinafter sometimes called the "Declaration") with respect to the private accessway of South Street as shown on "The Private Accessway Plan" dated January 9, 2004, last revised February 26, 2004, and prepared by Sebago Technics, Inc.:

1. Any person or entity (hereinafter an "Owner") purchasing a parcel of land with frontage on and/or access over South Street and which parcel is expressly conveyed by Declarants together with the benefit of an easement and right-of-way in South Street, shall hold such easement subject to the rights, easements, covenants and conditions set forth in this Declaration.
2. Pursuant to the terms of this Declaration, each Owner agrees to maintain, and the Owners do each further agree that they will not obstruct or otherwise interfere with the use of South Street by any other Owner or their respective heirs, successors and assigns.

3. The Owners herein acknowledge that the private accessway length shall be subject to an easement for and shall be used as a right-of-way appurtenant to all of the lands which abut South Street or which are accessed by South Street, provided any of such lands are conveyed by Declarants together with this easement. The respective right-of-way rights identified or created herein shall be permanent and shall be appurtenant to the lands of the respective Owners, their heirs, successors and assigns in title to such lands.
4. The costs of maintaining, repairing or replacing South Street Private Accessway shall be borne by and maintained by all Owners pursuant to the following criteria. Each Owner who commences the construction of a home or other structure on all or a portion of his or her land which is accessed by said drive shall assume an equal obligation with all other Owners who have built or commenced construction of homes or structures, such equal obligation to be based on the total number of homes or structures on land which is accessed by said drive. By way of example, if there are three (3) homes or structures located on the land, then the equal obligation shall be one-third (1/3) for each owner of each of such homes or structures. Structures, for the purposes hereof, shall be buildings designed for separate use and occupancy.

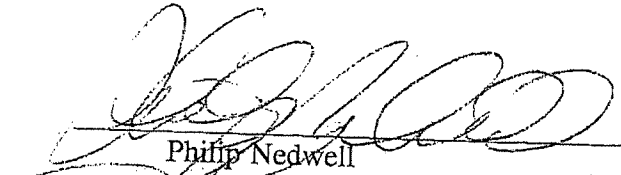
Commencement of a home or structure shall be deemed to occur when: a) a building permit is acquired; and b) actual construction is commenced on the home or structure (such as the digging of a foundation hole, installation of a subsurface wastewater disposal system, well, commencement of actual construction, or the like, whichever first occurs).

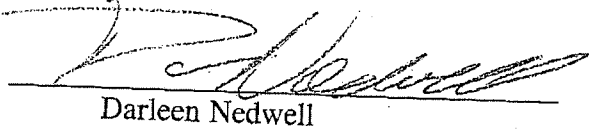
The obligation to pay for and otherwise be responsible for such equal portion of the maintenance, repair or replacement costs shall be binding upon each of the Owners and their heirs, successors and assigns.
5. The term "maintenance", as herein used, shall be deemed to include, but shall not be limited to:
 - a. Maintaining the width and surface of the South Street Private Accessway;
 - b. Maintaining any existing or hereafter installed drainage mechanisms necessary or reasonably convenient to the functioning of South Street;
 - c. The costs of hiring contractors and suitable snowplowing equipment for the removal of snow accumulations;
 - d. The costs of periodic grading of the surface of said right-of-way so as to maintain a reasonably smooth and level surface to a condition suitable for ingress and egress by passenger cars and vehicles.
6. All Owners, whether or not they are required to contribute to the maintenance of South Street Private Accessway pursuant to this Declaration, shall be required to repair any damage caused to said private accessway by them or caused by their agents, invitees, or guests. If any such dispute results in the necessity of the initiation of legal proceedings to enforce this provision, the prevailing party will be entitled to recover his or her costs of suit, together with reasonable attorney's fees.

7. Each Owner shall be entitled to install, maintain, repair and replace, within the limits of South Street Private Accessway, such utility lines, poles, pipes, conduits, and their appurtenant installations reasonably necessary or convenient for the intended use of the properties having rights in South Street. For such purposes, Declarants agree to grant and convey to any public utility a customary easement for such utility installation, if requested by such utility and, provided further, that Declarants shall not thereby incur any expense or liability therefore.
8. The Owners agree that all mortgagees of any property which abuts or is accessed by South Street Private Accessway, and the successors and assigns of said mortgagees (including but not limited to FHA, HUD or VA insured mortgage interest on said properties) shall be considered third party beneficiaries of this Declaration; provided, however, that unless or until said mortgagees have succeeded to the fee title of any such properties by deed, deed-in-lieu of foreclosure, foreclosure, or any other method, then such mortgagees shall not be liable to pay for any costs of ordinary and usual maintenance.
9. The Owners who are or become parties hereto recognize that additional Owners may obtain rights hereunder and assume obligations hereunder in the future due to homes or structures being constructed in the future on properties accessed by South Street and on parcels which have the benefits and burdens of this Declaration and are subsequently divided.
10. The Owners agree that, if any party hereto fails to pay their portion of any maintenance costs or fails to otherwise comply with this Declaration, any of the remaining Owners may bring legal action against the party in breach of this Declaration, in which action the prevailing Owner shall be entitled to recover his or her costs and expenses of suit, including reasonable attorney's fees incurred in enforcing this Agreement.
11. The terms of this Declaration and the rights, benefits and burdens created herein shall be both the personal obligations of the owners and shall, further, be real covenants running with the title to and benefiting and burdening the real properties which are conveyed subject to its terms. Once a parcel or property which has been conveyed by the Declarants together with the benefits and burdens of this Declaration, then thereafter no such property which retains rights hereunder shall be relieved from the burdens hereunder.
12. The Town of Cape Elizabeth shall have the right, but not the obligation, to enforce the maintenance provisions of the agreement to ensure access for emergency vehicles. Any and all costs incurred by the Town of Cape Elizabeth in enforcing this agreement and maintaining the road, including reasonable attorney's fees, shall be the responsibility of the Undersigned and any future lot owners who may join in the execution of the Declaration.

Executed as a sealed instrument on March __, 2004.

WITNESS


Philip Nedwell

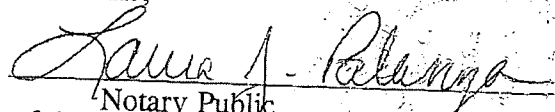

Darleen Nedwell

STATE OF MAINE
CUMBERLAND COUNTY, ss.

March 29, 2004

Personally appeared the above-named Philip Nedwell and Darleen Nedwell and acknowledged the foregoing to be their free act and deed.

Before me,


Notary Public
exp 10/3/2008

SEAL

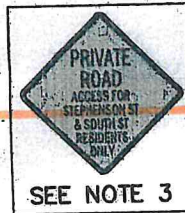
Received
Recorded Register of Deeds
Mar 29, 2004 10:38:57A
Cumberland County
John E OBrien

EXHIBIT C

INTL BUILD EASEMENT
27822, 215

EXISTING STONES TO BE
RESET AFTER DITCH GRADING.
SEE SHEET C-101.

REMOVE EXISTING GATE



RECONSTRUCT EXISTING
PRIVATE ROAD TO MATCH
EXISTING CENTERLINE PROFILE

S55°55'19"W

71.79'

S34°09'06"E

50.00

TURNAROUND
EASEMENT
PLAN REF. 2

PAVED
DRIVE

S55°55'19"W

40.00'

82

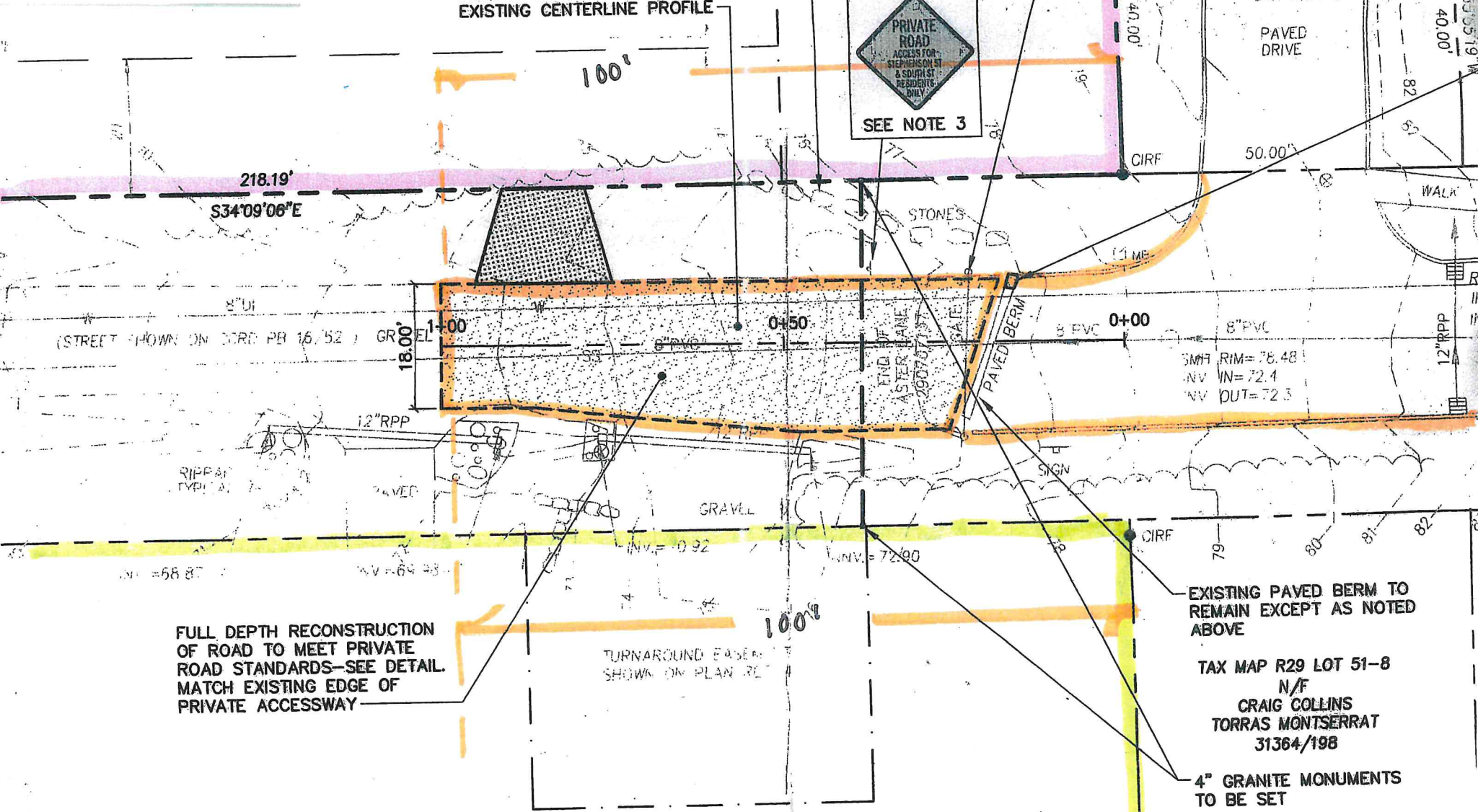
50.00'

WALK

218.19'

S34°09'06"E

100'



(STREET SHOWN ON CORP PB 16/52)

18.00' EL

1+00

0+50

0+00

8" PVC
SMF RIM=78.48'
INV IN=72.4
INV OUT=72.3

RIPRAP
TYPICAL

PAVED

GRAVEL

SIGN

FULL DEPTH RECONSTRUCTION
OF ROAD TO MEET PRIVATE
ROAD STANDARDS-SEE DETAIL.
MATCH EXISTING EDGE OF
PRIVATE ACCESSWAY

TURNAROUND EASEMENT
SHOWN ON PLAN REF

EXISTING PAVED BERM TO
REMAIN EXCEPT AS NOTED
ABOVE

TAX MAP R29 LOT 51-8
N/F
CRAIG COLLINS
TORRAS MONTSERRAT
31364/198

4" GRANITE MONUMENTS
TO BE SET

100'

INV=68.87

INV=69.93

INV=70.92

INV=72.00

79

80

81

82

EXHIBIT D

Proposed Findings of Fact

1. Christopher and Julie Munz (the “Munzes”) assert that access to their residential property on South Street is via a private accessway, proposed and permitted by the prior owners of their property, Philip and Darleen Nedwell (the “Private Accessway”).

2. The Munzes assert that this Private Accessway runs from the intersection of South Street and Stephenson Street, along the front boundary of their lot on South Street, and up to the intersection with the public way, Aster Lane.

3. The Munzes have not provided the Planning Board with any evidence that the plan for this Private Accessway was recorded in the Cumberland County Registry of Deeds.

4. Ms. Birlem and DeLuca, by affidavit, have provided evidence to the Board that neither the Munzes nor the Nedwells, nor any other person, recorded a copy of the alleged approved Private Accessway in the Cumberland County Registry of Deeds.

5. The Munzes have not provided the Planning Board with any evidence that the plan for this Private Accessway or the Town’s approval of the Private Accessway required the construction of a gate or other obstruction.

6. A gate (the “Gate”) previously existed near the end of the paved portion of Aster Lane, and located within the public right-of-way. As the Gate was located within the Aster Lane right-of-way, it was not located within the area of the alleged Private Accessway.

7. The Town has no records of any local permitting body, any employee of the Town, or the municipal officers, requesting or requiring the installation of the Gate.

8. On May 17, 2018, the Planning Board approved the application by Margaret Birlem and Noelle Deluca to construct a private road (“Private Road”), commencing at the end of the Aster Lane public right-of-way, and running for a distance of eighty (80) feet (“May 17th Decision”).

9. The May 17th Decision did not require the removal of the Gate, nor did it authorize the removal of the Gate. The Gate was not located within the boundaries of the proposed Private Road or the alleged Private Accessway.

10. The May 17th Decision determined that the proposed Private Road complied with all applicable local ordinance requirements and standards.

11. The May 17th Decision did not require the Munzes, or any other person other than the applicants, to take or not take any action. The May 17th Decision did not alter any rights or obligations the Munzes may or may not have regarding their alleged Private Accessway, or related road maintenance agreement.

Conclusions of Law

1. Because the Gate was located within the Aster Lane public right-of-way, and not

within the boundaries of the alleged Private Accessway or Private Road, the Board's approval of the Private Road did not conflict with any party's rights or obligations with respect to the Gate.

2. Section 19-7-9(D)(5)(b) of the Town of Cape Elizabeth Zoning Ordinance requires that approved plans for all private accessways be recorded in the Registry of Deeds within ninety (90) days of approval by the Town.

3. As there is no evidence that the Munzes predecessors, the Nedwells, or the Munzes, recorded the Private Accessway within this time period, the Private Accessway is, as required by the Ordinance, null and void. As such, the Munzes' Private Accessway does not lawfully exist.

4. Although it appears that the Nedwells recorded a maintenance agreement for a private accessway, the Zoning Ordinance requires that both the maintenance agreement and the plan be recorded, otherwise the Private Accessway is null and void.

5. As the Private Accessway does not legally exist, the road maintenance agreement recorded by the Nedwells is also null and void and does not legally exist.

6. As the Private Accessway and related road maintenance agreement do not legally exist, there can be no conflict between the permitted Private Road and the alleged Private Accessway or related road maintenance agreement.

7. As the Private Accessway was never recorded, it cannot provide the Munzes with legal frontage on South Street. The Munzes' lot does not abut any other public or private road and, therefore, prior to approval of the Private Road, the Munzes did not have legal frontage.

8. The existence of the now permitted Private Road cures the Munzes' frontage problem, and provides the Munzes with legal frontage. As such, not only is there no conflict between the Private Road and the alleged Private Accessway, but the Private Road is necessary for the Munzes to have legal frontage.

9. Under the Town's Zoning Ordinance, the standards for private roads exceed those for private accessways.

10. The May 17th Decision did not impose any obligations or conditions on the Munzes' access to their property, or on any maintenance obligations they might have under any instrument, contract or agreement.

11. To the extent the Munzes allege that Ms. Birem and Ms. DeLuca's actions or omissions in constructing the Private Road, in compliance with the May 17th Decision, are in conflict with any rights or obligations held by the Munzes, or any other person or entity, such claims concern a private dispute between private property owners with regard to a private right-of-way, and are not impacted by the May 17th Decision. Nor is the Town a proper arbiter of alleged private rights or conflicts. *Whiting v. Seavy*, 159 Me. 61 (1963).

12. The Board finds that the Munzes Private Accessway does not legally exist and does not, therefore, conflict with the Town's May 17th Decision. The Board further finds that,

even if the Private Accessway does lawfully exist, the Town's May 17th Decision does not alter or impact any private rights held by the Munzes.