

### 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 17<sup>th</sup> Decision”).

9. The May 17<sup>th</sup> 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 17<sup>th</sup> Decision determined that the proposed Private Road complied with all applicable local ordinance requirements and standards.

11. The May 17<sup>th</sup> Decision did not require the Munzes, or any other person other than the applicants, to take or not take any action. The May 17<sup>th</sup> 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 17<sup>th</sup> 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. Birlen and Ms. DeLuca's actions or omissions in constructing the Private Road, in compliance with the May 17<sup>th</sup> 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 17<sup>th</sup> 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 17<sup>th</sup> Decision. The Board further finds that, even if the Private Accessway does lawfully exist, the Town's May 17<sup>th</sup> Decision does not alter or impact any private rights held by the Munzes.