

MINUTES OF THE PLANNING BOARD
TOWN OF CAPE ELIZABETH

September 17, 2019

7:00 p.m. Town Hall

Present: Josef Chalot, Chair James Huebener
 Daniel Bodenski Carol Anne Jordan
 Andrew Gilbert Jonathan Sahrbeck

Absent: Peter Curry

Also present was Maureen O'Meara, Town Planner.

CALL TO ORDER

Mr. Chalot called the meeting to order and asked for the approval of the minutes of August 20, 2019. The minutes were approved as presented, 6-0.

NEW BUSINESS

Executive Session - The Planning Board will hold an executive session for consultation with its attorney concerning Christopher Munz and Julie Munz v. Town of Cape Elizabeth and Margaret Birlem and Noelle C. DeLuca, Title 1, Chapter 13 Public Records and Proceedings, Sec. 405, 6, E, State of Maine Statutes.

The Board Voted 6-0 to go into executive session. They returned from executive session and voted 6-0 to end the executive session at 7:30 p.m.

Since Mr. Bodenski was not present for the application, he was asked to state how he had prepared for this item. He said he had reviewed the report, the application, the drawings and the video.

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

Mr. Gilbert said he lives in the neighborhood of the applicant, but he does not abut the applicant, and he feels he can be impartial.

The Board agreed that both Mr. Bodenski and Mr. Gilbert could continue to consider this application.

John Wall, Town Attorney, said this matter was previously the subject of a hearing and a vote by the Board on an application for a private road. That decision was appealed to the Superior Court. The Superior Court issued two orders. It was affirmed in part and remanded for two specific items. The Board can consider all the information that was previously submitted as part of the application process and other documents which will be submitted, that the Board can consider today. The two specific issues for the remand are; whether the private accessway of the Munz's is valid; and if the private accessway and the maintenance agreement are valid, should be considered as part of the application for the private road.

Mr. Chalot opened the public comment period.

Scott Anderson, Attorney at Verrill Dana, is here on behalf of Maggie and Noelle to talk about the issue for this remand proceeding. He will limit his comments to the two issues; is the private accessway valid, and if so, what effect if any does it have on the decision that the Board made on behalf of Maggie and Noelle last May. The Court has looked at the record of your decision and that you have applied all the standards that apply to a private road. The gate is not an issue, the Court has said that what you did about the gate was supported by evidence.

Is the accessway valid? He said it is not valid. When you obtain approval (in 2004) for a private accessway, you need to record it and the plans showing the private accessway in the Registry of Deeds within 90 days. If you don't record it within 90 days your private accessway is null and void. He had a real estate paralegal do a search in the Registry of Deeds from 2004 to the present and the road maintenance agreement is recorded, but the private accessway and plan are not recorded. There is only one way to create a private accessway and that is to come to the Planning Board and obtain approval. The Munzes have submitted documents, including a certificate of occupancy, and made other allegations that statements from the Town somehow revived this accessway and made it valid again. Those permits should not have been issued, but they were. Those permits do not revive the accessway approval. There is no conflict with the accessway and the private road. The private road approval granted by the Board last year has actually benefitted the Munzes because they now have the frontage they need. It cures the lack of recording of their private accessway.

Peggy McGehee of the law firm Perkins Thompson is here with her clients Julie and Chris Munz. She has sent a letter to the Board. She is not going to restate the whole thing, but just some of the points. She said the Court had remanded the issue of whether this is a private accessway. The second issue is that they have a maintenance agreement. They have complete obligation and responsibility to that, and as part of that we have a right to put up a gate. This case is about the gate. It's because the gate was permitted to be taken down by

this Board in approving and then being taken down by the applicants. We tried to put it back up and it was taken down again and they sued us. It is because of the safety issue. It is for the safety of a child who wanders into the road without regard to the traffic. All that construction that's beyond Aster Lane is coming through. Because of that safety issue, they were compelled to leave their home. This is not a minor matter, not a minor appeal.

15 years later they are saying this is an invalid home, this is an invalid private accessway. What they have done is submit an affidavit from a paralegal saying she couldn't find it. That is something to be considered, but we have some evidence from the Code Enforcement Officer, who submitted in 2004 a certificate of occupancy. Under the terms of the Ordinance it cannot be issued if every aspect of the approval that is not complied with. What we have is a Code Enforcement Officer issuing something that says it is valid, being taxed, being lived in, being conveyed to the Munzes. The evidence we have that is most compelling comes from the Town itself as to its validity. We do not need to accept the say so of the paralegal who couldn't find it.

The other point is, the Judge asked you to consider the evidence. You now have the evidence, the certificate of occupancy. Once you have that evidence from the Code Enforcement Officer, you do not have the authority to overturn it. You are bound to accept the evidence of the Code Enforcement Officer. The only board in this town that can contradict that is the Zoning Board of Appeals. Under your ordinance it has exclusive jurisdiction. Even if you found that you believed what the applicants are saying, it's not your call. It's not the applicant's call and it's not your call. Once you have that evidence from the CEO it's a valid accessway. If it's a valid accessway, then does this maintenance agreement that you had the applicants sign affect the Munz's maintenance agreement? The Town Planner had told Mr. Munz that his maintenance agreement would affect the applicant's. And Maine law provides that a private way can have gates. Now the property owners on South Street have formed a road association by statute. And by statute they have the right to regulate that private road as to liability, as to maintenance and they can gate it so the public can't come up there and tear up the road. They have this right by law. We are not asking that they tear down the house. We are asking that this Board decline to approve or require that the gate go down, that this is a valid private accessway, and that the maintenance agreement issued at the prior time have the priority.

Chris Munz of 5 South Street said he is a 15 year resident, we got married here, we had three wonderful boys and were very involved with the schools. Since this has all transpired, really we got screwed. My wife and I have had to leave our house because of the safety of our children. More importantly for my son, Easton, who has epilepsy and has no sense of awareness of danger, that gate is very important. I wouldn't stand here fighting this if I didn't think it wasn't

important. You guys have erred in your judgment. We've had to move. We'd love to come back to this town, but I can't risk the safety of my son. All it takes is one car. It's not just my kid, but other kids that live on the road as well. You guys should take that into account with your judgment on top of -if it wasn't a private accessway, why are we here.

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

Ms. Jordan said she had reviewed the meeting of May 2018. The Planner clearly stated gates are not precluded on private roads and private accessways. they are not the purview of the Town. It is not up to this board to decide whether a gate goes up or comes down. It is part of that road association's decision and not ours. But it cannot be on Aster Lane. It must be on a private road, it must be on South Street.

Mr. Chalot said that was a point made over and over again at the May 2018 meeting. You can put a gate on a private road. There was no evidence that that gate was on a private road. It was 14 ft. into a public way.

Mr. Sahrbeck said the Board heard that it was put up by the Cape Elizabeth Police Department and taken down by the Cape Elizabeth Police Department. It was not an issue for this Board to consider.

Mr. Huebener asked who is responsible to make sure something is recorded in the Registry of Deeds.

Ms. O'Meara said it is the applicant's responsibility. She said there have been instances where approvals have not been recorded, and were declared null and void. The applicants returned to the Planning Board for a reapproval and then plans were recorded.

Mr. Sahrbeck asked Ms. O'Meara if she knows of approved private accessways that have not been recorded.

She said she would not know.

Mr. Sahrbeck asked if a recorded maintenance agreement can ever substitute for the recording of a private accessway.

Attorney Wall said the ordinance said the obligation is on the applicant to record the approval and the plan.

Mr. Chalot asked Attorney Wall if there is a requirement to consider the presence of a private accessway in a private road application.

Attorney Wall said he is not aware of any such requirement.

Ms. Jordan asked if there have been other private accessways that have been upgraded to private roads. It is fairly common when someone wants to build another house in the area where someone has a private accessway.

Ms. O'Meara said it was never intended that a private accessway was an opportunity to close off any other rights that a private property might have to access property they own.

Mr. Chalot asked if there was a finding in the Planning Board approval that an accessway did or did not exist.

Ms. O'Meara looked at the official record of the decision and cited each of the findings of fact. She said there was no finding relating to the private accessway relating to 5 South Street.

Mr. Gilbert asked if you can have multiple maintenance agreements that pertain to the same sections of a road.

Ms. O'Meara said yes, it is not unusual for that to happen.

Mr. Gilbert said there is evidence that the private accessway was not recorded. If it's not recorded, it's not valid. If the private road is approved, there is legal access. In his opinion, the board made the right decision.

Mr. Chalot asked Mr. Wall for his opinion whether or not the private accessway is valid.

Attorney Wall said statements made by lawyers are for the benefit of their clients. He said the Board has heard the evidence and it is up to them to decide.

Ms. Jordan said she believes the private accessway is not valid since it has not been recorded.

Mr. Huebener said he agrees with Ms. Jordan.

Mr. Sahrbeck asked Ms. McGehee if there is anything that has been shown that the private accessway has been recorded in the Registry of Deeds.

Ms. McGehee said she has had difficulty before finding plans in the Registry. Sometimes it is difficult to find recorded plans. The evidence is that when the Munz's bought the property they had their title attorney review and go into the Registry of Deeds. Their understanding is that everything was recorded. It is

not the jurisdiction of the Board to overturn the decision of the Code Enforcement Officer. He said it was a private accessway in 2018.

Mr. Sahrbeck said he does not find the private accessway to be valid.

Mr. Bodenski said the Nedwells failed to record the plan, so the private accessway is not valid.

Ms. Jordan said the remedy is for the current owner to resubmit and record the plan. But in this case, someone else came in and improved the road and solved the problem of the private accessway being invalid.

Mr. Chalot moved to the question of whether the private accessway is relevant to the decision. He feels it is not relevant.

Ms. Jordan feels it is not relevant.

Mr. Sahrbeck said it is not relevant.

Other Board members agreed.

Mr. Wall said there is no reason it cannot be upgraded. There is nothing in the ordinance that precludes that.

Ms. Jordan made the following motion:

That the Board table this agenda item and the Town Attorney prepare findings of fact based on the law and the Board's discussion tonight for the board to review and vote on at the next regularly scheduled Board meeting.

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

Hemlock Hill Drainage improvements - The Town of Cape Elizabeth is requesting a Resource Protection Permit and amendments to the Hemlock Hill and Oakhurst Glen Subdivisions to add drainage infrastructure for Hemlock Hill Rd, Sec. 19-8-3 Resource Protection Permit Completeness and Public Hearing, and Sec. 16-2-5, Amendments to previously approved subdivisions Completeness and Public Hearing.

Robert Malley, Director of Public Works is representing the Town of Cape Elizabeth. He introduced Steve Harding of Sebago Technics, Town Engineer.

Steve Harding showed a plan of where the parcel is. He said the Town will purchase the RP-1 wetland. That is in the Oakhurst Glen Subdivision. He showed the proposed drainage improvements in the Hemlock Hill Subdivision.

They will add catch basins in Hemlock Hill Road. He addressed the comments of the Acting Town Engineer and said they pose no problems for the project to adopt.

They have asked for a couple of waivers. One is the vegetated cover description in the wetlands. They have looked at the Hemlock Hill Subdivision submissions and there is a good description there, so they ask for a waiver of that requirement. The other waiver they are asking for is the high intensity soils mapping. The Natural Resource conservation has a description of those soils.

Mr. Chalot opened the public comment on completeness.

Herbert Rau of 2 Hemlock Hill Road said there is a tremendous amount of water flowing off Mitchell Road. He has seen erosion in places on the shoulder of the road. He said he and others shovel 2-3 cubic feet of sand every year when the erosion takes place. He wants to know if they have considered a catch basin where Hemlock Hill Road meets Mitchell Road. He said there is a significant amount of water that runs down the road and goes across the road between 4 and 6 Hemlock Hill Road. Is consideration being given to a catch basin.

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

The Board had no comments or questions.

Mr. Sahrbeck made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Town of Cape Elizabeth for a Resource Protection Permit and amendments to the Hemlock Hill and Oakhurst Glen Subdivisions to construct drainage improvements at the end of Hemlock Hill Rd be deemed complete.

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

Mr. Chalot noted that the Board did have a site visit on September 3, 2019.

Mr. Sahrbeck asked Ms. O'Meara if all the property owners have approved.

Ms. O'Meara said none have objected.

Ms. Jordan asked if the easements in the submission were the final ones.

Mr. Harding said they are still a work in progress. They want to have the Mylar signed and recorded in the Registry before finalizing the documents. He also

addressed the comments from Mr. Rau. He said they are trying to fix the problems at the bottom of the hill. If they put a catch basin at Mitchell Road, they would have to run it all the way down the street and it would be very costly.

Mr. Malley said he agrees with Mr. Harding. The subdivision was built before they had as many requirements for catch basins as they do now. It is not cost effective to put in a catch basin there.

Mr. Gilbert asked if the system could hold an additional catch basin.

The system is large enough, but it is a cost issue.

Ms. Jordan made the following motion:

Findings of Fact

1. The Town of Cape Elizabeth is requesting a Resource Protection Permit and subdivision amendments to the Hemlock Hill and Oakhurst Glen Subdivisions as part of a drainage improvement project to be constructed at the end of Hemlock Hill Rd, which require review for compliance with Sec. 19-8-3, Resource Protection Regulations and Sec. 16-2-5, Amendments to Previously approved subdivisions.
2. The Planning Board conducted a site visit at 6:00 p.m. on September 3, 2019 at which the applicant's engineer described the proposed improvements.
3. The drainage improvements will not materially obstruct the flow of surface or subsurface waters across or from the alteration area;
4. The drainage improvements will not impound surface waters or reduce the absorptive capacity of the alteration area so as to cause or increase the flooding of adjacent properties;
5. The drainage improvements will not increase the flow of surface waters across, or the discharge of surface waters from, the alteration area so as to threaten injury to the alteration area or to upstream and/or downstream lands by flooding, draining, erosion, sedimentation or otherwise;
6. The drainage improvements will not result in significant damage to spawning grounds or habitat for aquatic life, birds or other wildlife;

7. The drainage improvements will not pose problems related to the support of structures;
8. The drainage improvements will not be detrimental to aquifer recharge or the quantity or quality of groundwater;
9. The drainage improvements will not disturb coastal dunes or contiguous back dune areas;
10. The drainage improvements will maintain or improve ecological and aesthetic values;
11. The drainage improvements will alter 1,700 sq. ft. of wetland buffer and otherwise will maintain an adequate buffer area between the wetland and adjacent land uses;
12. The drainage improvements will be accomplished in conformance with the erosion prevention provisions of Environmental Quality Handbook Erosion and Sediment Control, published by the Maine Soil and Water Conservation Commission dated March, 1986, or subsequent revisions thereof;
13. The drainage improvements will be accomplished without discharging wastewater from buildings or from other construction into Wastewater Treatment Facilities in violation of Section 15-1-4 of the Sewage Ordinance;
14. The drainage improvements are not located in a floodplain.
15. The subdivision amendments will not cause soil erosion, based on the erosion control plan provided.
16. The subdivision amendments will not have an undue adverse impact on scenic or natural areas, historic sites, significant wildlife habitat, rare natural areas, or public access to the shoreline.
17. The applicant has demonstrated adequate technical and financial capability to complete the project.
18. The subdivision amendments will not adversely impact surface water quality.
19. The subdivision amendments are in compliance with the Town wetland regulations in the Zoning Ordinance.

20. The subdivision amendments will provide for adequate stormwater management.
21. The Oakhurst Glen Subdivision and Hemlock Hill Subdivision have been previously approved by the Cape Elizabeth Planning Board to be in compliance with the Subdivision Ordinance, and the findings and decisions of those approvals which are not altered by the proposed amendments remain in effect.
22. The application substantially complies with Sec. 19-8-3, Resource Protection Regulations and Sec. 16-2-5, Amendments to Previously approved subdivisions.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Town of Cape Elizabeth for a Resource Protection Permit and amendments to the Hemlock Hill and Oakhurst Glen Subdivisions to construct drainage improvements at the end of Hemlock Hill Rd be approved subject to the following conditions:

1. That the plans be revised to satisfy the comments of Acting Town Engineer Todd Gammon's letter dated 9-11-2019;
2. That the remaining 11,582 sq. ft. of lot U33-54B not to be purchased by the Town of Cape Elizabeth be merged with lot U33-55A to create a single lot;
3. That there be no alteration of the site until the subdivision plans have been signed by the Planning Board and recorded in the Cumberland County Registry of Deeds.

Mr. Huebener seconded the motion

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

There was a discussion to ensure that the merged lot U33-55A would be too small to be subdivided. The lot will be less than 40,000 square feet.

The Board approved the motion 6-0.

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

Bob Metcalf of Mitchell and Associates said Cunner Lane starts at the end of Hannaford Cove Road. He showed a plan and an aerial view of the property. He showed a plan of existing conditions. The prior owner had divided this parcel in 1996 and created a public access permit. Cunner Lane as built does not follow the centerline of the right of way as laid out in the plan. The applicant wants to install a water line, but would need easements from private property owners. He has been unable to obtain those easements. The proposed turnaround falls within the right of way except for a small portion, for which he will have an easement. The fire system will be 2 5,000 gal. tanks. There will be a code access gate.

The width of the road will be concrete pavers 10 ft. wide with 2 ft. wide grass shoulders.

They are asking for waivers of the boundary survey, traffic study (only one additional house is proposed), a storm water management study, the private road standards, because of the width of the road, and the enclosed drainage system.

Mr. Chalot opened the public comment period on completeness. No one came up to speak, so the comment period was closed.

Mr. Sahrbeck asked about the emails that have been received regarding ongoing litigation concerning this area.

Mr. Metcalf said the litigation does not concern the parcel we are proposing to change.

Ms. O'Meara said John Wall, the Town Attorney is still here to monitor this and provide advice to the Board for the next meeting. The road received approval in 1997 for a public access waiver, and now we are trying to bring this to 2019 standards. They are trying to avoid a challenge by the abutters. Cunner Lane is not an approved right of way.

Mr. Gilbert asked for clarification of the plan as to the location of the right of way.

Mr. Metcalf explained where everything was on the plan.

Ms. Jordan made the following motion:

BE IT ORDERED that, based on the plans and the materials submitted and the facts presented, the application of David Smith for a private road review of a portion of Cunner Lane located on the south side of 19 Cunner Ln be deemed complete.

Mr. Huebener seconded and the motion passed 6-0.

Ms. Jordan asked about the survey's validity.

Mr. Metcalf said they used the survey that was done for the prior owner. Owen Haskell will not certify that plan because they had not done the boundary survey. They can certify the limits of the right of way based on the plan from 1996.

Ms. Jordan was concerned about the possibility of there being another lot created. She will approve the road as it is, only if there is a condition that it must be upgraded if another lot is created.

Mr. Gilbert is concerned about the road width. It is way under the 22 ft. requirement. It is now 14 ft. wide with 10 ft. pavers with 2 ft. grass on the sides.

Mr. Metcalf then explained the construction of the roadway and that there is gravel under the lawns on the sides. He said the Fire Chief was satisfied with the turnaround and felt his equipment could turn out there to let other vehicles pass.

Mr. Gilbert said he would like to see a letter from the Fire Chief that he is ok with the width of the roadway.

Mr. Sahrbeck said he is comfortable with the width because there is grass on both sides of the road beyond the right of way.

A site walk was scheduled for 6 p.m. on October 1, 2019.

Ms. Jordan made the following motion:

BE IT ORDERED that, based on the plans and the materials submitted and the facts presented, the application of David Smith for a private road review of a portion of Cunner Lane located on the south side of 19 Cunner Ln be tabled to the October 15, 2019 meeting of the Planning Board, at which time a public hearing will be held.

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

Pond Cove Playground shed site plan amendment - The Town of Cape Elizabeth is requesting an amendment to a previously approved site plan to add a garden shed to the Pond Cove Elementary School Playground located at 12

Scott Dyer Rd, Sec. 19-9 Site Plan Amendment Completeness and Public Hearing.

Sashie Misner, Landscape Architect, presented on behalf of the Town of Cape Elizabeth School Department. She said they are asking for an amendment to the site plan that was approved in 2004 for the Pond Cove Elementary School. They would like to add a shed to their playground. It is an outdoor classroom space. It will be used for storage of classroom materials. The shed is about 7 ft. high, and it will be set on concrete blocks on a stone base. There will be no grading, no traffic, no parking. As they are adding 84 sq. ft. of impervious surface, there are no storm drainage issues. There will be no utilities, no signs, no noise and no external storage.

Mr. Chalot opened the public comment and no one came to speak, so he closed the public comment period.

The Board had no questions.

Mr. Sahrbeck made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Town of Cape Elizabeth for an amendment to the previously approved site plan to install a 7' x 12' wood shed on the Pond Cove Elementary School playground, located at 12 Scott Dyer Rd be deemed complete.

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

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

The board had no comments.

Mr. Huebener made the following motion:

Findings of Fact

1. Town of Cape Elizabeth is requesting an amendment to the previously approved site plan to install a 7' x 12' wood shed on the Pond Cove Elementary School playground, located at 12 Scott Dyer Rd, which requires review under Sec. 19-9, Site Plan Regulations.
2. The application substantially complies with Sec. 19-9, Site Plan Regulations.

THEREFORE BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of the Town of Cape Elizabeth for an amendment to the previously approved site plan to install a 7' x 12' wood shed on the Pond Cove Elementary School playground, located at 12 Scott Dyer Rd be approved.

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

The board voted unanimously to adjourn at 9:30 p.m.

Respectfully submitted,

Hiroshi Dolliver
Minutes Secretary