

March 5, 2008

Chair Mary Ann Lynch
and Members of the Cape Elizabeth Town Council
Town of Cape Elizabeth
320 Ocean House Road
Cape Elizabeth, ME 04107

Re: Proposed Amendment to Ordinance to Allow Display of American Flag

Dear Chair Lynch and Members of the Cape Elizabeth Town Council:

This letter is written on behalf of Holland and Charles Filliettaz, of 900 Shore Road, to request the Town Council amend the Cape Elizabeth Zoning Ordinance to allow the American flag to be displayed on a flagpole at any location in a resident's side or rear yard, so long as neither the pole nor its waving flag extend beyond the lot line.

Last summer Mr. and Mrs. Filliettaz installed a flagpole on the shoreland portion of their property, approximately 9.5 feet from their side yard lot line. As do other owners of shoreland properties in Cape Elizabeth and throughout Maine (please see a few illustrations, as attached, including a picture of the Filliettaz property and their flagpole), Mr. and Mrs. Filliettaz wish to be able to display the American and state flags.

Before they installed the flagpole, Mr. Filliettaz and his contractor contacted the Code Enforcement Officer, Mr. Bruce Smith, to inquire whether a permit was needed. Mr. Smith advised that no permit was required because a flagpole was not considered to be a structure and could be placed anywhere on the property. Mr. Filliettaz also checked in with his neighbor, Mr. Bruce Nelson, who raised no objection to the Filliettazes displaying the flag and installing a flagpole.

After installing the flagpole, however, Mr. Nelson called the Cape Elizabeth CEO, Mr. Smith, to object to the placement of the flagpole, asserting that it qualified as a regulated "structure" as that term is defined by the Cape Elizabeth zoning ordinance, and that as a regulated "structure", it had to be set back at least 20 feet from side yard lot lines. Mr. Smith accepted Mr. Nelson's interpretation of the Ordinance definition of "structure" as technically including flagpoles, and did not find that flagpoles qualified as exempt accessory structures. Mr. Smith therefore reversed his earlier, unwritten direction and wrote Mr. Filliettaz, advising him that, given Mr. Nelson's objection, the flagpole would have to be removed, or a notice of violation would have to be issued.

DOUGLAS S. CARR
PHILIP C. HUNT
JOHN S. UPTON
PEGGY L. MCGEEHEE
MELISSA HANLEY MURPHY
JOHN H. RICH III
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OF COUNSEL
THOMAS SCHULTEN
OWEN W. WELLS
ANDREW A. CADOT
JULIANNE C. RAY
CATHERINE O'CONNOR

In response to Mr. Smith's letter, Mr. Filliettaz agreed not to fly the flag, and to lay the flagpole flat on the ground while seeking to reach a mutual resolution with Mr. Nelson. Mr. Nelson had earlier suggested to Mr. Filliettaz that Mr. Filliettaz buy a strip of abutting land from Mr. Nelson's lot. Such a purchase would bring the flagpole into compliance with the 20 foot setback asserted by Mr. Nelson. Mr. Nelson's proposed purchase price was \$1.25 million, however. After Mr. Nelson objected to the placement of the flagpole, Mr. Filliettaz did make a substantial (market accurate) offer to purchase the strip, but Mr. Nelson would not agree to this amount.

Mr. Nelson therefore is still objecting to the placement of the flagpole, and Mr. and Mrs. Filliettaz are now in the position of having to remove the flagpole or become subject to a notice of violation.

Mr. and Mrs. Filliettaz still very much would like to fly the flag at its current location, rather than in the middle of their yard, in keeping with the tradition of property owners in Cape Elizabeth and elsewhere in Maine. It appears that Cape Elizabeth has traditionally allowed flagpoles to be placed by residents at locations that best suited the residents, including locations within 20 ft. of side yard and rear yard lot lines, as indicated by the location of a number of flagpoles in the community. It is also worth noting that the Maine Department of Environmental Protection does not prohibit flagpoles from being installed within the DEP's 75 foot shoreland setback requirement (both Mr. Smith and undersigned counsel had verified this with the DEP, in independent telephone calls).

Many citizens have contested that any regulation as to where one can fly the American flag abridges their First Amendment right to display the flag. The recently enacted federal Freedom to Display the American Flag Act prohibits condominium and homeowners' associations from restricting the placement on residential property of the display of the American flag. The federal statute stemmed from a case where a homeowners' association prohibited a landowner from installing a flagpole in his front yard, and limited his display of the American flag to a flagpole installed in brackets on his residence.

Municipal ordinances around the state of Maine and in other states consistently exempt flagpoles from any setbacks, or impose only minimal setbacks (such as 3 feet, 5 feet or 6 feet).

Finally, it appears that Cape Elizabeth residents have traditionally been free to install a flagpole on their property wherever they felt it was most appropriately placed, and that the Town did not intend to confine flagpole placement to within 20-foot setbacks as indicated by the Code Enforcement Officer's former interpretation that flagpoles were not regulated structures.

Mr. and Mrs. Filliettaz therefore respectfully request that the Council amend its Zoning Ordinance as to the RC zone, as follows:

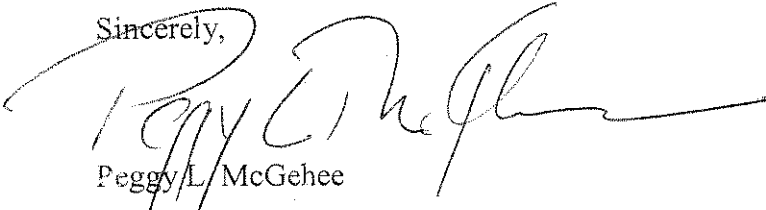
Sec. 19-1-3. ... Structure: Anything built for the support, shelter or enclosure of person, animals, goods or property of any kind, together with anything constructed or erected with a fixed location on or in the ground, exclusive of fences and flagpoles. The term includes structures temporarily or permanently located, such as decks and satellite dishes.

Section 19-6-3.E.2. Flagpole Setback. The side yard and rear yard setback for flagpoles is five feet.

Ordinance Purpose/Legislative Summary: In displaying the flag, citizens express their gratitude to those who fought and died for our country, and remind us of our obligation to preserve the freedom that others won for us. The American flag is an important symbol of our nation's strength and unity. The Town of Cape Elizabeth, Maine, finds no overriding governmental objective for imposing side and rear yard setbacks on the placement of flagpoles beyond a minimal setback to ensure no intrusion on abutting property from the installation of a flagpole and the display of the flag.

On behalf of Mr. and Mrs. Filliettaz and myself, thank you for your consideration of this request.

Sincerely,



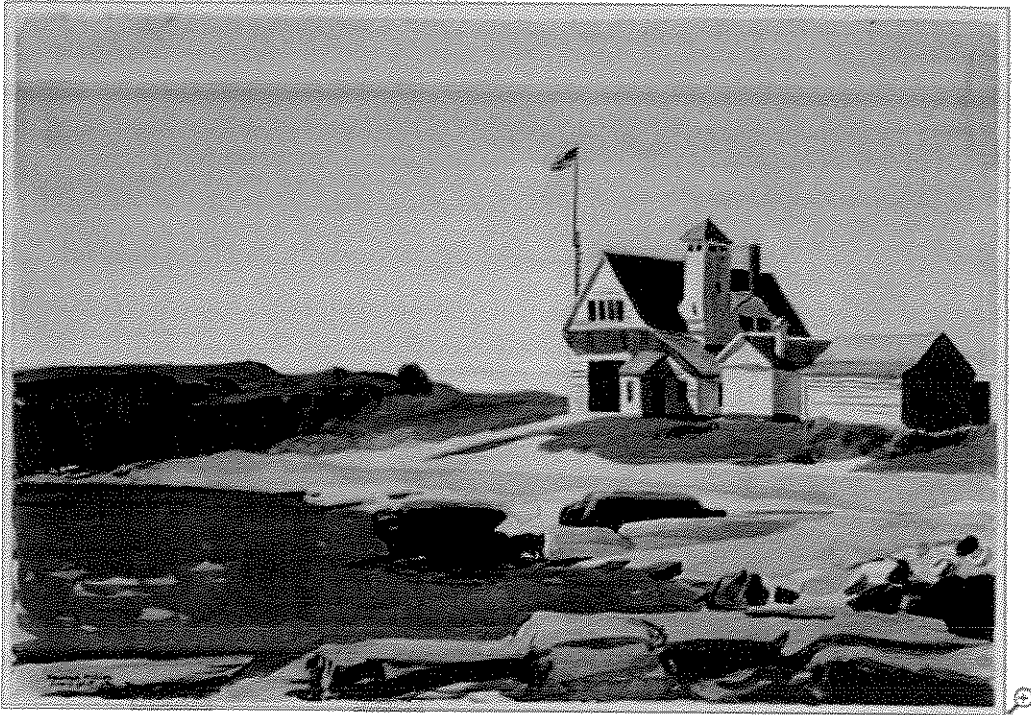
Peggy L. McGehee

PLM/ems

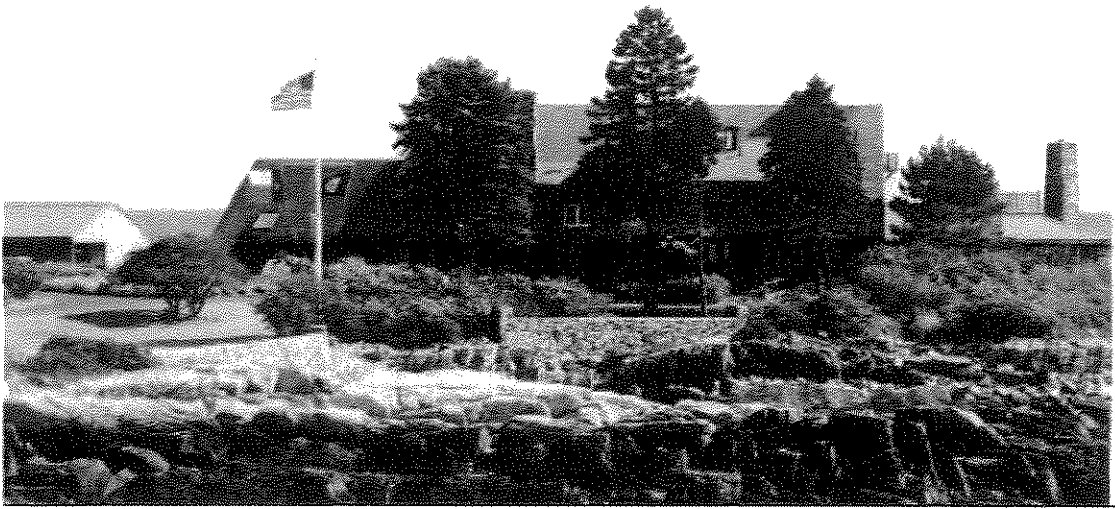
cc: 11 copies with attachments for: each Town Councilor; Chair, Planning Board; Planner;
Town Manager; Code Enforcement Officer



Portland Head Light, Cape Elizabeth, ME



Coast Guard Station, Two Lights, Maine, 1927
Edward Hopper (American, 1882–1967)



Bush Residence, Kennebunkport, Maine



Representative location of display of American flag on residential property



Representative location of display of
American flag on residential
property



07.01.2007



Holland and Chuck Filliettaz property at 900 Shore Road, Cape Elizabeth, showing flagpole to the left of their property.