

**Town of Cape Elizabeth
Ordinance Committee Minutes**

May 24, 2012

8:00 a.m. Town Hall

Present: Jim Walsh, Chair
Kathy Ray
Dave Sherman

Staff: Michael McGovern
Maureen O'Meara
Bruce Smith

Mr. Walsh opened the meeting. Mr. McGovern noted an email received from a citizen supporting lighting regulations that support dark sky principles. Mr. McGovern responded with information regarding current regulations and changes the town has made to reduce lighting.

Mr. Walsh said he would check with Town Council Chair Sara Lennon, but was not inclined to pursue ordinance amendments. The other Ordinance Committee members agreed.

Mr. McGovern said he would review the town ordinances and bring back a recommendation for an ordinance to review/update.

Mr. Walsh introduced the current item reviewing survey requirements for building permit applications. The item grew out of a controversy before the Town Council a few months ago where an addition was built in violation of the setback, and then discovered when the house was being sold. Mr. Walsh invited committee members to begin their discussion with an agreement on the problem and any constraints to be applied to possible solutions.

Committee members agreed that the earlier setback violation triggered this review. Mr. Sherman mentioned the integrity of the ordinance requirements. All were sensitive to added costs for homeowners, but noted that curing a setback violation can be much more expensive, and stressful, than conducting a survey to avoid a problem later.

Mr. Smith said that this is always a touchy issue. The Zoning Ordinance says you "have to depict an accurate setback." Applicants know what they are getting into. He doesn't recommend using a mortgage inspection plan, but will accept it and many use it because they have it without added cost. If the setback is close, he recommends but does not require either a sketch plan or survey. Even with a

survey, you need field verification. He distributed a 1999 letter from DesLauriers Associates proposing to require a sketch plan, which is better information than a mortgage inspection plan but less costly than a survey.

Mrs. Ray asked who does a sketch plan. Mr. Smith said it is typically done by a surveyor.

Mr. Walsh asked if there is field verification? Mr. Smith said he can require that but ...

Mr. Walsh asked if the town has liability? Mr. McGovern replied that the town can always be sued but has immunity under the Maine Tort Claims Act. The problem is more of a public relations issue for the town. It is a huge problem for property owners trying to close on their home sale, and it often has a domino effect on other closings.

Mr. Sherman supports an ounce of prevention/pound of cure approach. It is better to incur some costs up front than much higher costs when there is a problem. Once a building permit issued, citizens think they are in the clear and when they are not, the town looks bad. However, the costs for a survey are daunting and if the costs for a sketch plan are less, perhaps that is an option.

Mr. Smith said sketch plans cost around \$550.

Mr. Sherman suggested that there should be a trigger that requires a sketch plan, such as within a number of feet from the setback. Then, if you get a permit and still have a problem, you can petition the town for a waiver.

Mr. Smith noted that some towns also have a fine if there is a problem.

Mr. Sherman asked if a sketch plan will address the problem. Mr. Smith said that it will most times. The last time this was considered, the Town Council did not want to adopt it. We had changed the Variance standard from "hardship" to "practical difficulty." At that time, the Town Council also adopted the restriction that no variance can be granted for a setback of less than 10'. If this provision is eliminated, then the Zoning Board can handle these situations with a variance.

Mr. Sherman wants to preserve the integrity of the setback provisions. If someone wants a new addition and the setback is in question, they should get a sketch plan done rather than a setback waiver later on.

Mr. Smith noted that sometimes the applicant only uses a mortgage inspection plan and then the neighbor does a survey and discovers the problem.

Mr. Walsh asked about title insurance. Ms. O'Meara noted that the insurance still does not cure the problem.

Mrs. Ray said she agreed with Mr. Sherman that we should do something in advance to prevent the problem rather than rectify it later, when it costs more and is more stressful. \$550-\$600 is not huge compared to the potential problem.

Mr. Smith noted that for anything prior to 1977, he can sign off on the violation. Maybe that date should be moved up.

Mr. McGovern said that we may need to review that section again in light of recent court decisions. Mr. Smith mentioned the Ogunquit ZBA case.

Mr. Sherman asked if an improperly placed structure is exempt? Mr. Smith said that a recorded document for the building is prepared.

Mr. Sherman asked if an applicant could get a sketch plan, get it recorded, and then you are more secure.

Mr. Smith said you need to show that the building was misplaced.

Mr. Walsh noted that process addresses errors in the past. What about going forward?

Mr. Sherman said he is more interested in going forward. Not sure we need to propose regulations for prior bad actions.

Mr. Smith said that it comes out when I see it or the neighbor comes to me.

Mrs. Ray is not sure why we would move up the 1997 date another 10 years.

Mr. Walsh said it would have cleaned up the last situation because it could be handled administratively.

Mr. McGovern said that the problem with handling it administratively is that it is not transparent. The neighbors don't know.

Mr. Smith said that once the structure is there 10-15 years, the neighbors are ok.

Mr. Walsh said the neighbors can come out of the woodwork.

Mr. McGovern said the 1997 date is 20 years after the 1977 adoption of Zoning. Ms. O'Meara said 1997 was when the new Zoning Ordinance was adopted. . Later, when the restriction against granting variances for a less than 10' setback was adopted, it was also proposed to reduce the setback for these existing, nonconforming neighborhoods. Several existing neighborhoods have been made nonconforming when they were rezoned RA. The Town Council did not support that change. The question is if the town now feels differently about its setbacks.

Mr. McGovern said that the town has always wanted to preserve space, even in its compact neighborhoods. You can see the difference between Cape and the adjoining South Portland neighborhoods.

Mr. Walsh said he does not hear any willingness to extend for another 10 years the administrative waiver. Instead, we should go forward. A sketch plan may get kicked to a full survey.

Mr. Sherman said you could also change your building plan.

Mr. Smith said that if you go with a sketch plan for building permits, you should add that to variances as well.

It was agreed that Mr. Smith would prepare a definition of a sketch plan. He said he would also check that at least 2 surveyors prepare these type of plans.

There was general consensus that any structure valued at \$10,000 or more would trigger the sketch plan requirement if it was proposed to be located less than 5' from the minimum required setback. The sketch plan requirement would also be added to variances.

Mr. Sherman said he is not willing to revise the ban on variances for less than 10' setbacks. He also supports requiring a boundary survey if a sketch plan cannot be done.

Mr. McGovern said he also wants this to be reviewed by the town attorney, which is standard when new ordinances are under consideration.

The Ordinance Committee agreed to meet next on June 7th at 8:00 a.m. and then adjourned.