

Town of Cape Elizabeth
DRAFT Minutes of the January 23, 2024
Board of Zoning Appeals Meeting
A Hybrid Meeting

Present:

Joseph Barbieri
Kevin Justh
Doreen Blanc Rockstrom

Diana Chapman
Katherine Kerkam

Adam Foster-Webster
Colin Powers

The Code Enforcement Officer (CEO) Benjamin McDougal was present.

A. Call to Order: Chairman Justh called the meeting to order at 7:00 p.m. The Chair reviewed the procedures on how to participate remotely and the protocols based on the Maine Municipal Association Board of Appeals Manual.

CEO McDougal called the roll of board members. A quorum was declared.

B. Approval of Minutes: Approval of the Minutes for December 6, 2023: A motion to approve the minutes was made by Ms. Chapman; seconded by Ms. Rockstrom. The motion carried.

C. Old Business: None.

D. New Business:

1. Elect Chair and Secretary for 2024.

a. A motion to elect *Kevin Justh as Chair* was made by Mr. Foster-Webster; seconded by Mr. Barbieri. The motion carried.

b. A motion to elect *Katherine Kerkam as Secretary / Vice Chair* was made by Mr. Powers; seconded by Mr. Foster-Webster. The motion carried.

2. To hear the Administrative Appeal of Scott Perkins, who resides at 530 Spurwink Road, regarding the accessory structure recently constructed by his neighbors, Erik and Leah Lippman, at 528 Spurwink Road, Map U43 Lot 6.

Chairman Justh asked CEO McDougal for the background. The CEO stated that he had been communicating over the past two to three months with Mr. and Mrs. Perkins. They do not feel that the accessory structure built by their neighbors is consistent with what was approved by the Zoning Board and what was on the building permit. This project was approved by the Zoning Board roughly two years ago. The Perkins wish to be heard here at the Zoning Board of Appeals. It is a bit of an odd case, so town attorney Mary Costigan is here to answer any questions the board has about this process.

Scott Perkins came to the podium and stated this was not a comfortable situation. Chairman Justh verified that the board received Perkins's package of information, correspondence from the Lippmans' attorney, and some public comments. Mr. Perkins read from his packet of information. They have been following the process. He brought the issue to the CEO in March. On September 18 he observed variations between the ZBA-approved original design and what was built. It's a different building, a different location, a different height, and they are using it for a different use. Mr. Perkins said they are asking the ZBA for a transparent, independent, objective, end-to-end review and audit of the processes and details related to the Lippman building at 528 Spurwink Avenue. This was supposed to be a shed for storage with small windows. A full dormer with large windows is what was built and they are using it as a home office, not a shed. The building was built to an 11-foot setback instead of the 13-foot requested on the ZBA application. The building is 7 inches higher than the documented 20 feet. The Lippmans are occupying it full-time for a home business, Spurwink Custom Design.

Mr. Perkins said the Code Enforcement Officer did not conduct a detailed audit of the ZBA-approved design and approved a building permit with material differences from the ZBA-approved design. He did not measure the setback, although the property line pin was less than 40 feet away. The Lippmans hired a surveyor and knew where the pin and line were. Occupancy is occurring without a Certificate of Occupancy being issued. The difference in stated use has not been addressed.

There has been no follow-up investigation with the surveyor or the plumber, Mr. Perkins continued. A plumbing permit was issued after our initial challenge. The plumbing permit was issued by the CEO on October 11, 2023. The Perkins feel an injustice has been done; they do not feel they were protected by Code Enforcement.

Mr. Perkins said he had built a shed too close to the setback line and Mr. McDougal had him move it. Mr. Perkins also relayed a story about when he had L.P. Murray put in a septic system and placed the tank in the wrong location. The CEO told Mr. Perkins that he had to tell the contractor to build to the design. Mr. Perkins felt that put him under pressure.

In conclusion, Mr. Perkins said each project should be reviewed as being built to design and to the setbacks. They feel they were taken advantage of by having their neighbors build a different design than approved. He hoped the ZBA would take the case into review.

The Chair stated that the CEO had passed along some public comments to the board. The CEO stated he had not received anything else. Chairman Justh then asked for public comment. Finding no public comment in the chamber or online, Chairman Justh closed the floor.

Chairman Justh stated that Section 19-5-2 is for administration appeals. He asked the Town Attorney, Mary Costigan, to help the board understand that section as to the board's responsibilities, duties, and limitations.

Mary Costigan stated that the first issue before the board is what is being appealed. Specifically, Ordinance Section 19-5-3, addresses that there are 30 days to appeal the decision that is being appealed. It is her understanding that what is being appealed is the building permit that was issued in 2021. So certainly, that is greater than 30 days ago. That is the decision for the board. What is being appealed? What decision of the Code Enforcement Officer is being appealed?

Board members asked Ms. Costigan questions they needed clarification on. Ms. Costigan answered as follows: The time to appeal a design is within 30 days of the date the building permit was issued. The 30-day time limit is an absolute time limit. It can be forgiven by a court if proven it was appealed immediately upon finding out and that there is a reason they didn't know about it. For example, someone who wintered in Florida came back to find some new building they had no knowledge of or notice of.

As far as the difference in setbacks, Ms. Costigan replied that it's her understanding that this board is not the Planning Board. This board makes certain determinations and in this case this board made a determination that a nonconforming structure could be replaced and that the new structure could be built on the same footprint as the one being replaced. At the time of the application, that applicant believed the structure was 13 feet away from the side setback. At some later date when there was an actual survey, the survey showed that same setback to be 11 feet. According to the landowner, it is on the same footprint, which is consistent with the approval by the Zoning Board. The Planning Board can grant site plan approvals with a specific design. This board did not approve a specific design; this board approved generally a replacement of an existing structure and providing that the building permit didn't vary from the reasons why you approved it, same location, etc. There can be design changes at the building permit stage.

Chairman Justh clarified the following with the CEO: that the board approved the replacement and expansion as long as it didn't increase the nonconformity. So if it were in the same footprint and didn't increase the nonconformity, whether there are three or four windows, shiplap siding, we weren't approving a specific design we were approving the location and the bulk. The CEO replied the board approved an expansion in the same footprint. It was a one-story structure and the applicant asked to have some loft space. The CEO said he believes it is in the same footprint as the old structure. Height requirements are specified in the Ordinance.

Ms. Costigan said the 30-day appeal limit is so that the receiver of the building permit can trust it and move forward. What needs to be appealed is an actual, usually written, decision of some kind. Ex parte communication to the board should be ignored.

Regarding this structure being used as an office, the CEO replied that this structure is approved to be a residential accessory structure; it's not approved to be a home office. The property owners are aware that it is not approved to be a home office; it is only allowed to be used as a residential accessory structure.

Ms. Costigan said there is a difference between working from home and having a home business. In regard to home businesses, the Chairman said there is a change coming in mid-February. The CEO said Zoning Board Approval would be required.

Mr. Perkins asked how he could have known what the building permit said. The Chairman said what the board approved was an expansion or replacement of a nonconforming structure, in accordance with Section 19-4-3. Mr. Perkins found it hard to believe they had no recourse. There was more discussion as to the side setback change.

Katie Perkins of 530 Spurwink Road came to the podium and said she walked the property line with a surveyor that they paid for. She said Erik Lippman told her they had found the pin, so they were not doing an expensive survey. Mrs. Perkins described how the site was prepared for the construction. She addressed the issue of ex parte communication, saying when they talked with Mr. McDougal in early December, he said they needed to send an email that he would share with the board. She did not believe the CEO would send their email to the board, so she called board members to check.

CEO McDougal stated that he never lied when he told the Perkins he sent the email to the board, he did send it. The CEO read from the record that this foundation went in the ground in 2021, for the perspective of a timeline. This structure was completely framed over two years ago. This issue arose this past September over a fence dispute. Measures were taken to see that the new structure was in the same footprint as the old one, and the CEO believes it is in the same footprint as it was and as it was intended to be.

Mrs. Perkins said they got a full boundary survey in March to put up a fence and put in landscaping.

Board members agreed that there was no remedy with this board. It is well outside the 30 days. The mandates for the board are clear.

Chairman Justh moved to deny the Administrative Appeal of Scott Perkins, who resides at 530 Spurwink Road, regarding the accessory structure recently constructed by his neighbors at 528 Spurwink Road, Map U43 Lot 6, because under Ordinance Section 19-5-3, the appeal was not received within 30 days of either the issuance of the building permit, which was May 3, 2021 or the issuance of any decision regarding foundation placement, which occurred on or about August 18, 2021 (the date of the foundation inspection). Mr. Powers seconded. The motion carried. Vote: 7 to 0.

3. To hear the request of Matthew Ahlberg, representing Alissa and John Kanwit, owners of the property, at 10 Lighthouse Point Road (Map U15 Lot 48), to enlarge their house based on Section 19-4-3.B.4 of the Zoning Ordinance.

Chairman Justh asked CEO McDougal for the background. The CEO stated that Matthew Ahlberg presented a proposal to do a small addition on this house. It is a

nonconforming lot in the RA zone. It has a funny property line. It looks like it was an old hammerhead from a subdivision plan, which causes this issue. They are turning a very small piece of deck into interior living space. It is only a few square feet that they are asking for.

Matthew Ahlberg stated that what they want to do is replace a deck with a pergola adjacent to the existing driveway, approximately 95 1/2 square feet with a modest addition of 67 1/2 square feet, decreasing the existing footprint of the building by about 30%. As Mr. McDougal noted, it's a relatively small square footage. The plan is to stay within the existing footprint of the deck as you can see on the third page of the application. An area that is currently 21 feet by 4 1/2 feet would be reduced to roughly 15 feet by 4 1/2 feet. The pergola structure and the deck structure become a portion of the lower level of the enclosure. The layout of the floor plan is not circular. Meaning you can't get from one side of the house to the garage on the lower level. So as part of a renovation project, they are asking to add this addition to add better circulation within the existing footprint.

The CEO clarified his remarks by stating there are only a few square feet within 25 feet of the front property line. If that setback was drawn as an arc, it would only clip a very small portion of the area shown in red.

The CEO stated he received just one public inquiry. They were fine with the proposal.

The chair asked for public comment. Finding no public comment, Chairman Justh closed the floor.

Board comments: No plumbing is involved. A deck counts as structure. It does not increase the nonconformity.

Mr. Ahlberg said the foundation would be a frost wall within the same footprint. The building will be within the same footprint.

Mr. Foster-Webster moved to approve the request of Matthew Ahlberg, representing Alissa and John Kanwit, owners of the property at 10 Lighthouse Point Road, Map U15 Lot 48, to expand the house based on section 19-4-3.B.4 of the Zoning Ordinance. Mr. Barbieri seconded. The motion carried. Vote: 7 to 0.

Findings of Fact:

1. The property is a nonconforming lot in the RA zone. The property contains a single-family dwelling.

The existing house does not meet the front or side property line setbacks. The owner is requesting to convert an area of deck into interior living space.

Additional Findings of Fact:

1. The Zoning Board of Appeals has considered the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the condition of the existing foundation, the proposed new foundation, and the impact on views.
2. The proposed structure will not increase the nonconformity of the existing structure.
3. The proposed structure is in compliance with the setback requirement to the greatest practical extent.
4. The building reconstruction meets the setback to the greatest practical extent based on the criteria in Section 19-4-3.B.2 and B.4 in the Zoning Ordinance.

Mr. Foster-Webster moved to approve the Findings of Fact and Additional Findings of Fact; Mr. Powers seconded. The motion carried. Vote: 7 to 0.

4. To hear the request of Lawrence DuPerre, owner of the property at 17 Meadow Way (Map U21 Lot 157), to reconstruct and enlarge the front deck to become a farmer's porch based on Section 19-4-3.B.3 & B.4 of the Zoning Ordinance.

Chairman Justh asked CEO McDougal for the background. The CEO stated that Mr. DuPerre was seeking a building permit to construct a farmer's porch. He thought he had plenty of room on the front to build it. The application shows that the front property line is pretty far back from the pavement. The CEO explained the odd nature of the neighborhood and that he would need to get a survey. Mr. DuPerre did get the survey and he is just barely shy of getting the farmer's porch with a simple building permit. Therefore, he needs Zoning Board approval to build a farmer's porch.

Mr. DuPerre said he would like it a little wider in order to put a rocking chair on the porch. The foundation will be four new footings. No vegetation is being removed.

The CEO said he received a voicemail from Linda Mathews, 13 Meadow Way, expressing full support of the project.

The chair asked for public comment.

Andrew Swayze, 19 Meadow Way, right next door, said he had a vested interest in his neighbor's request being approved because within the next year he is thinking of building a farmer's porch as well. So he is fully in favor of this porch, which will beautify the neighborhood.

Mr. Justh moved to approve the request of Lawrence DuPerre, owner of the property at 17 Meadow Way, Map U21 Lot 157, to expand the front porch based on section

19-4-3.B.4 of the Zoning Ordinance. Mr. Powers seconded. The motion carried. Vote: 7 to 0.

Findings of Fact:

1. The property is a nonconforming lot in the RC zone. The property contains a single-family dwelling.
2. The owner is seeking to replace and enlarge an existing covered front porch.

Additional Findings of Fact:

1. The Zoning Board of Appeals has considered the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the condition of the existing foundation, the proposed new foundation, and the impact on views.
2. The proposed structure will not increase the nonconformity of the existing structure.
3. The proposed structure is in compliance with the setback requirement to the greatest practical extent.
4. The building reconstruction meets the setback to the greatest practical extent based on the criteria in Section 19-4-3.B.2 and B.4 in the Zoning Ordinance.

Mr. Powers moved to approve the Findings of Fact and Additional Findings of Fact; Mr. Barbieri seconded. The motion carried. Vote: 7 to 0.

5. To hear the request of Stewart and Julie Wooden (Owner), residing at 33 Pilot Point Road (Map U12 Lot 67), to enlarge their house by adding a story on the garage based on Section 19-4-3.B.4 of the Zoning Ordinance.

Chairman Justh asked CEO McDougal for the background. The CEO stated that this is a nonconforming lot in the RA zone. The garage is closer than 25 feet to the front property line. The mortgage inspection plan shows that the property line is almost halfway to the house from the edge of the pavement. Similar to Mr. DuPerre, they thought they had the setback when they came in for the building permit but Mr. McDougal thought it was too close. They do not have a standard boundary survey but he didn't think they needed one because they are going straight up over the existing structure. There is nothing a survey would add. They are owning the fact they are within 25 feet of the front property line. It is a single-story addition on top of the garage.

Stewart Wooden said they are requesting a setback variance from the edge of the garage to Pilot Point Road. Since the house was built in about 1950 it's most likely

always not been in compliance. A plan book was submitted with the application. They want to add a couple of bedrooms for grandchildren who visit. They have engaged Mary Gonzalez of F/G Life Services, Cape Elizabeth, who put the book together. What they want to do is demo the garage roof and build a square structure over the existing garage for the two bedrooms and a little family room. That addition would not be higher than any point of the existing house and it should not interfere with anyone's view as the house sits below the grade of the people on the other side of the road. Since it will be on the same footprint, it doesn't change anything.

In response to board questions, Mr. Wooden replied that they are leaving the stone sides of the existing garage and building up. A structural engineer will design foundation posts to ensure the load is carried correctly. He feels no views would be affected as their house sits lower by about 5 to 8 feet. (The CEO looked at the topographic map and found the house sits about 10 to 12 feet lower than the house on the other side of the street.) The new bedrooms would be accessed by the existing upstairs hall.

The Chair asked for public comment. Finding no public comment, Chairman Justh closed the floor.

The CEO said that he had not received any public comment.

The Chair noted this is three bedrooms going to five. The house is on public sewer. For the record, this is not a variance request; it is an enlargement.

Mr. Foster-Webster moved to approve the request of Stewart and Julie Wooden, to expand the house at 33 Pilot Point Road, Map U12 Lot 67, based on section 19-4-3.B.4 of the Zoning Ordinance. Mr. Powers seconded. The motion carried. Vote 7 to 0.

Findings of Fact:

1. The property is a nonconforming lot in the RA zone. The property contains a single-family dwelling.
2. The owners seek to enlarge the single-family dwelling by adding a second story to the existing garage, connecting to the existing second story of the house.

Additional Findings of Fact:

1. The Zoning Board of Appeals has considered the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the condition of the existing foundation, the proposed new foundation, and the impact on views.
2. The proposed structure will not increase the nonconformity of the existing structure.

3. The proposed structure is in compliance with the setback requirement to the greatest practical extent.

4. The building reconstruction meets the setback to the greatest practical extent based on the criteria in Section 19-4-3.B.2 and B.4 in the Zoning Ordinance.

Mr. Foster-Webster moved to approve the Findings of Fact and Additional Findings of Fact; Ms. Kerkam seconded. The motion carried. Vote: 7 to 0.

E. **Communications:** The list of meeting dates is below. The May meeting is on the third Tuesday, not the fourth Tuesday of the month, to accommodate another town meeting. Wednesday, December 4, is a combined November and December meeting.

January 23
February 27
March 26
April 23
May 21
June 25
July 23
August 27
September 24
October 22
December 4

F. **Adjournment:** Chairman Justh adjourned the meeting at 8:39 p.m.

Recording Secretary
Carmen Weatherbie