

TOWN OF MINUTES OF THE PLANNING BOARD
CAPE ELIZABETH

May 18, 2021

7:00 p.m. Remote meeting

Present:	James Huebener, Chair	Carol Anne Jordan
	Daniel Bodenski	Mary Ann Lynch
	Andrew Gilbert	Jonathan Sahrbeck

Absent: Alton Palmer

Also present was Maureen O'Meara, Town Planner.

As a result of the COVID-19 virus, the Planning Board will conduct the meeting via remote access as provided by Maine law. The Planning Board will use Zoom meeting to conduct the meeting and to allow the public to remotely attend and participate. Zoom will allow all Planning Board members, applicants, and members of the public to hear all discussion and hear votes, which will be taken by roll call, as required by law.

CALL TO ORDER

Mr. Huebener called the meeting to order, then called for approval of the minutes of March 21, 2021. The minutes were amended and approved 5-0 (one absent). The minutes of the May 4, 2021 special meeting were amended and approved, 5-0. The revised minutes of the March 16, 2021 meeting were approved as presented, 5-0.

NEW BUSINESS

Town Farm Trail Resource Protection Permit - The Town of Cape Elizabeth is requesting a Resource Protection Permit to construct 1,100 sq. ft. of boardwalk on the existing Town Farm Trail (R5-11, 13), Sec. 19-8-3 Resource Protection Permit Completeness.

Mitch Wacksman, Conservation Committee Chair, presented the project. He showed photos of the area they propose to put the boardwalk on the Town Farm open space, and said it is a very muddy existing trail. There is erosion as well. Two eagle scouts have volunteered to help with the project. He spoke about what they would build, 4X4s on the ground with decking above. He showed a plan of the area with their proposed boardwalk. He said the Conservation Committee is in full support of the project.

Mr. Huebener opened the public comment on completeness. No one indicated a desire to speak, so the public comment was closed.

Ms. Lynch said she has a concern about waiving requirements when it's the town asking to waive town requirements. She said she will be supporting the

project, but she thinks the town should be held to a higher standard. She wants consistency about the waivers.

Mr. Sahrbeck said he is in agreement about consistency, but for this project there is minimal change to the trails, so he is comfortable with these waivers.

Mr. Wacksman said there is a lot of erosion and it needs to be fixed.

Mr. Sahrbeck made the following motion:

BE IT ORDERED that, based on the plans and materials submitted for a Resource Protection Permit to alter 1,100 sq. ft. of RP1 and RP2 wetlands to install boardwalk on the existing Town Farm Trails, located at the Town Farm on Spurwink Ave (R5-11, R5-13) be deemed complete.

Ms. Jordan seconded the motion and it passed, 5-0.

Ms. Lynch said she would have moved to approve the application tonight. She does not think a public hearing is needed.

Mr. Sahrbeck is concerned about setting a precedent on this issue.

In response to a question regarding requirements, Ms. O'Meara said a public hearing is not required for a Resource Protection Permit.

Ms. Jordan said if Ms. Lynch has an issue with the waivers, they will be included if we approve this tonight.

Mr. Wacksman wants to get it done as soon as possible.

Ms. Lynch wants to approve it now.

Mr. Sahrbeck said we have no findings of fact before us.

Mr. Sahrbeck made the following motion:

BE IT ORDERED that, based on the plans and materials submitted for a Resource Protection Permit to alter 1,100 sq. ft. of RP1 and RP2 wetlands to install boardwalk on the existing Town Farm Trails, located at the Town Farm on Spurwink Ave (R5-11, R5-13) be tabled to the June 15, 2021 meeting of the Planning Board, at which time a public hearing will be held.

Ms. Jordan seconded the motion and it was approved, 4-1

71 Beach Bluff Terrace Private Accessway Amendment - Peter Weare is requesting an amendment to the previously approved private accessway for the lot located at 71 Beach Bluff Terrace (U10-37) to replace the public water supply with a private well, Sec. 19-7-9, Private Accessway Completeness and Public Hearing.

Peter Weare wants to address the quantity and quality of the water for the proposed well. He spoke of wells that are in this town. He has done 18 wells, and every one has passed, as far as quantity and quality. On the site, there is a septic bed revision and that puts it 15 ft further from the well.

Mr. Huebener opened the public comment period. No one indicated a desire to speak, so the public comment was closed.

Ms. Jordan made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Peter Weare for an amendment to the previously approved Private Accessway for 71 Beach Bluff Terrace (U10-37) to replace the public water supply with a private well be deemed complete.

Ms. Lynch seconded the motion and it passed, 5-0.

The Board does not want a site walk.

Mr. Huebener opened the public hearing. No one indicated a desire to speak, so the public hearing was closed.

Ms. Jordan noted that the third proposed finding of fact is not valid. It was struck from the motion.

Ms. Jordan noted that the plan being shown tonight is the original plan. There needs to be an updated plan as a condition of approval.

Ms. Lynch made the following motion:

Findings of Fact

1. Peter Weare is requesting an amendment to the Private Accessway granted for the lot located at 71 Beach Bluff Terrace (U10-37) to replace a public water service with a private well, which requires review for compliance with Sec. 19-7-9, Private Accessways.

2. A Private Accessway Permit for 71 Beach Bluff Terrace has been previously approved by the Cape Elizabeth Planning Board to be in compliance with the Zoning Ordinance, Sec. 19-7-9, and the findings and decisions of those approvals which are not altered by the proposed amendments remain in effect.
3. A building envelope is depicted wherein the house and accessory buildings will be located on the lot demonstrating conformance with the setback requirements of the district in which it is located and any natural constraints and that the house site will be buffered from abutting residential properties.
4. The application substantially complies with Sec. 19-7-9, Private Accessways, and Sec. 19-8-3, Resource Protection Regulations.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Peter Weare for an amendment to the previously approved Private Accessway for 71 Beach Bluff Terrace U10-37) to replace the public water supply with a private well be approved, subject to the following conditions:

1. That the plans be revised to address the comments of the Town Engineer in his letter dated May 10, 2021;
2. That there be no issuance of a subsurface wastewater disposal permit until the plans have been revised to satisfy the above condition and submitted to the town planner.

Ms. Jordan seconded the motion and it was approved, 5-0.

Mr. Gilbert has arrived.

287 Ocean House Rd Site Plan Amendment - Michael Friedland is requesting amendments to the previously approved site plan for 287 Ocean House Rd (U22-76) to delete the finish paving coat, revise the outdoor storage and expand the outdoor display hours, Sec. 19-9 Site Plan Completeness.

Brandon Binette of Northeast Civil Solutions will present the project. He said attorney Jamie Wagner is also here as well as Michael Friedland. He showed the plan, and said they want to make some changes. They have added an 8 ft. stockade fence to be used for lumber storage. This eliminated a few parking spots, but they still have twice as many parking spots as required. In the back of the lot there is another stockade fence next to the handicapped parking space. This is for storage of ladders etc. that are not for the public.

They have moved the bike rack. They want to leave goods stored in front such as mulch, sand, seasonal items etc out there 24 hours a day. There is a triangular area that they want to use for potted plants which they want to leave out 24 hours a day. They will still have the ADA compliant walkway.

Mr. Binette spoke about the pavement. He said a layer of paving has been added to what was gravel before. They have gotten estimates for the additional paving and it will be about \$24-25 thousand to add the top layer. He does not think the top layer will be needed.

Jamie Wagner, attorney, of Cape Elizabeth said he appreciates an entrepreneur's spirit that brings new energy to the town. He would like to have the requirement for a top coat of paving removed from the final approval. It is expensive, it's not necessary and there is nothing in the town's ordinance that requires it. He explained how the subdivision standard should be interpreted not to include a parking lot because parking was not explicitly included in the paving standards table. He thinks the expense should be considered by the Planning Board. He quoted the Comprehensive plan about the survey of residents who strongly support commercial development. He said it is an owner's maintenance responsibility, not the town's to require.

Mr. Huebener opened the public comment period on completeness. No one indicated a desire to speak, so the public comment was closed.

Ms. Jordan said some items are not complete. She cited the Planner's memo of May 18, 2021.

Ms. O'Meara said the site plan that was approved is not in front of the Board.

Mr. Huebener said they need to dot all the i's and cross all the t's because the Board can be sued if they do not do so.

Ms. Lynch thinks the application is complete because a photo was included in the staff memo.

Ms. Jordan said this is notice to the people who are working on this project that we need more information the next time they submit their project.

Mr. Binette said they would do that.

Mr. Sahrbeck asked why those plans were not part of this application.

Mr. Binette said it was because they did not want to clutter up the plans.

Mr. Sahrbeck asked what has been done so that a top coat is not needed.

Mr. Wagner said a base coat was installed.

Mr. Sahrbeck said when this came up for the original approval, Mr. Friedland said nothing about only doing one coat. This is a commercial use, not a private driveway.

Mr. Huebener asked Ms. O'Meara about the consequences to the Planning Board going forward with this request. Ms. O'Meara said if you grant this request, especially if you grant it for financial reasons, you are setting a precedent for others to use.

Ms. Lynch spoke about parking. In the site plan standards about parking, it addresses the paving.

The Board asked staff about the reference to financial capability. Ms. O'Meara said the site plan standards include financial capability. When the applicant submitted the initial application, he asserted that he had the financial capability to complete the project as approved. The applicant is now saying he does not have the finances to do it.

Mr. Binette said as far as financial capacity is concerned, Mr. Friedland can cover the cost of the top coat, but it is a large burden.

Ms. Jordan made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Yam Yams LLC for amendments to the site plan approved for 287 Ocean House Rd to alter outdoor storage and eliminate a finish pavement coat be deemed complete.

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

Mr. Bodenski would like to see the cost per ton of the paving in question. He would also like to hear from the engineers that the paving in place will be adequate to accommodate the heavy trucks, forklifts etc.

Mr. Binette said they have 4 estimates and all are a very similar price. He also said the gravel underneath the pavement is very strong. He is not worried about the heavy trucks because there have been several over it already without any problems.

Mr. Gilbert said he can appreciate the financial aspect for a small business. He wonders if there is a time frame on this, and maybe they could extend the time to give it more time.

Ms. O'Meara explained that the applicant is operating under a temporary certificate of occupancy, which is good for 6 months. It was issued November 12. As for extending the deadline for the paving, there would be no way to enforce that. You would have to ask the applicant to set aside money now to pay for it.

Ms. Jordan wants to know what is going to be in the space for potted plants in the winter, Fall etc. She just wants to know what they plan to have in that space outside of flower season.

Mr. Binette said it would only be flowers when they are in season. They will add a note to the plan.

Mr. Sahrbeck said they have not complied with the note from the original plan. They said everything would be taken in at night. This whole project is that it's better to ask for forgiveness than to ask for permission. It has deviated from the original plan at least 3 times. He does not think we should throw caution to the wind and go along with what's being asked for when the applicant hasn't gone along with what's been approved, and for no other reason than it would hurt financially. He would like an opinion from the Town Attorney about what happens if we approve something that is substandard for a public business in town. Who would be liable in case somebody gets hurt.

Ms. Lynch said we should take the price of the paving at face value. The ordinance is vague about what is required about paving a parking lot. She said it is reasonable to ask for a change.

Mr. Wagner agrees that the ordinance is vague.

Mike Friedland said the top coat was in the original plan, but in his naivety he did not know it was in there, and excluded it from his construction estimate. If given the option of not paying for something that is not required, he will choose to go down the route of not required. I want to conserve my capital. Site plans are not concrete. They change when situations change. That is the purpose of amendments. He is trying to make a business work. The pavement is beautiful and they have not had any issues.

Mr. Sahrbeck asked about food trucks.

Mr. Friedland said they are not asking for that yet, and have issues with the deed to work out.

Mr. Sahrbeck made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Yam Yams LLC for amendments to the site plan approved for 287 Ocean House Rd to alter outdoor storage and eliminate a finish pavement coat be tabled to the June 15, 2021 meeting of the Planning Board at which time a public hearing will be held.

Mr. Bodenski seconded the motion and it was passed, 5-1.

Carr Woods Condominium development - Andrew Carr is requesting Major Subdivision Review for creation of a single family lot and 19 condominiums and a Resource Protection Permit for alteration of 11,789 sq. ft. of wetland on combined lots located in the vicinity of 10 Deep Brook Rd ((U6-91, 91A, 92, 94A, 95), Sec. 16-2-4, Major Subdivision Completeness and Sec. 19-8-3, Resource Protection Permit Completeness.

Travis Letellier, Northeast Civil Solutions, represents Andy Carr for the development of a single family lot and a 19 unit condominium. They propose 1,900 ft. of road and 1,000 ft. of that as a private road. The road names are place holders at the moment. The public utilities will be in the road, and they propose a private water and sewer system within the development. He showed the plan and reviewed the completeness summary in the memo dated May 18, 2021. The open space is contained in 3 large blocks, and is 45% of the lot. All the open spaces are connected through the roadway system and sidewalk.

Mr. Huebener opened the public comment on completeness.

Brandon Mazer, attorney at Perkins Thompson, represents an abutter. He said there are substantial issues still outstanding. The right, title and interest and whether they have an easement for drainage. The open space needs clarity. We believe there should be a community impact analysis. The wetland report is not complete and they are requesting a waiver for a high intensity soil survey. It is not complete.

Mylan Cohen of 21 Surf Road said attorney Mazer covered all our concerns.

Andre Duchette, attorney, represents an abutter. Attorney Mazer covered the same items we are concerned with. The Resource Protection application is incomplete. The open space is not to be transferred to the town or the Conservation Commission. Are the existing sanitary waste structures adequate?

Richard Blake of 2 Ivie Road said there are so many outstanding issues, and one of the key ones is the stormwater easement. Do they have permission?

Cole Peters of 1 Ivie Road said the stormwater management report had no reference to water quality. What is on the plan as wetland will drain to the south?

No one else indicated a desire to speak, so the public comment was closed.

Mr. Huebener asked if the community impact study is a requirement.

Ms. O'Meara said the Planning Board usually requires it for a project of this size.

Mr. Letellier said they are required to not increase the stormwater. He said their system will take care of that. We need to look into the easements further. They did a boundary survey and a topo. A high intensity soil survey might identify the depth of the bedrock. There is a lot of volatility of the depth of the bedrock.

Mr. Gilbert said the stormwater gives me pause on this one. The easement issue is a glaring hole in the application, and what are the other options if they don't have the easement.

Mr. Sahrbeck said he agrees with Mr. Gilbert. He said the traffic study was done during the pandemic. Is there any consideration of that?

Mr. Letellier said the traffic engineer got a hold of the numbers from the DOT.

Mr. Bodenski said the Town Engineer said sight distance be measured from 15 ft. behind the edge of the travelled way. The applicant has submitted a medium intensity soil study. He would like the applicant to tell us why he submitted a medium intensity study rather than a high intensity soil study.

Mr. Letellier said the medium intensity study is a good way to model storm water flows and how it infiltrates. A high intensity soil study would find some more areas of rock, but not much they already know about. The traffic engineer will be going out to remeasure that sight distance.

Ms. Jordan talked about the Resource Protection Permit application. The applicant has not requested any waivers, but she is not in favor of a waiver of the high intensity soil study. You submitted 2 ft. contours instead of 1 ft. contours and there is a question about 5 wetlands. It looks like there is alteration in all of them. These are completeness issues that need to be addressed.

Mr. Letellier said he didn't read that the 1 ft. contours needed to be on the existing conditions plan. We can easily revise that. The wetland report does define all the wetlands. All the wetland impacts are identified.

Mr. Sahrbeck asked if they were going to do a community impact analysis. He wants to see one and does not want them to ask for a waiver.

Ms. Lynch said the community impact analysis is not required, but we may want to have it. She thinks the application is incomplete. The right, title and interest, the letters from the utilities need to be there. The waivers they are requesting on the resource protection, are the same as the first item on our agenda. In that case the town was the applicant. Now we are having some concern about granting the same waiver to a private applicant.

Ms. Jordan said it is the size of the project. This is a major, major development and putting in some boardwalks is a totally different animal.

To clarify a question in the staff memo, Ms. O'Meara explained that the applicant in this project has not asked for any waivers, but she had indicated that they could at this meeting.

Mr. Gilbert said there is one waiver about showing all trees over 6 in.

Mr. Huebener said there are so many unanswered questions, he is leaning towards incomplete.

Mr. Sahrbeck made the following motion:

BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Andrew Carr for Major Subdivision Review of Carr Woods, a 19 unit condominium project and 1 single family home lot, and a Resource Protection Permit for 11,789 sq. ft. of RP2 Wetland alteration, located at Shore Rd and 10 Deep Brook Drive, be deemed incomplete.

Ms. Jordan seconded the motion.

Ms. O'Meara requested an opportunity to make a few comments because the applicant may incur significant costs to revise the plans. She suggests the applicant narrate and show the entire path of the stormwater flows from the lot into town infrastructure and confirm there is adequate capacity to handle these flows, not just keep post-development flows at pre-development levels. There is evidence that there is flooding right now and there are ordinance standards that restrict flooding.

Right now you are proposing about 12,000 sq. ft. of wetland alteration. Why did the road move? It appears that a significant amount of wetland alteration is happening because the road moved so providing a calculation of the total

wetland altered under the previous alignment should be added. The standard says that you need to show there is no alternative to altering the wetland. For example, it appears that the wetland alteration in front of condos 4 and 5 is due to moving the road into the wetland to make space for the condo construction. You will need to demonstrate that you have minimized the wetland impact. She also spoke about the 50 ft. open space strips that you suggest can include trails, but they have 2/1 slopes, and even for rustic trails that is too steep.

The motion passed, 6-0.

Edgecomb Road Private Road Amendment - Jay Cox is requesting an amendment to the previously approved Edgecomb Rd private road approval to delete conflicting notes regarding preservation of vegetation located between the lot 2 building envelope and Edgecomb Rd (U26-1), Sec. 19-7-9, Private Road completeness and public hearing.

Jay Cox of KGM, LLC. said in 2020 they received approval to construct Edgecomb Road. There is an error on one of their drawings and they are here to correct that error. He showed the original incorrect plan of Edgecomb Lane. This is the recorded plan. The note to Lot 2 says 20 ft. front setback, see note 11. They would like to change that note so there is no conflict between the other drawings. They would also like to change the side setback to 45 ft. He showed the modified plan. The note that says the do not disturb area in the front has been removed.

Mr. Huebener opened the public comment period on completeness. No one indicated a desire to speak, so the public comment was closed.

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 Jay Cox for amendments to the previously approved Edgecomb Way Private Road to correct conflicting notes regarding activities outside the building envelope for the lot located at 4 Edgecomb Way be deemed complete.

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

Mr. Huebener opened the public comment period. No one indicated a desire to speak, so the public comment was closed.

Mr. Sahrbeck made the following motion:

Findings of Fact

1. Jay Cox is requesting amendments to the previously approved Edgecomb Way Private Road to correct conflicting notes regarding activities outside the building envelope for the lot located at 4 Edgecomb Way, which requires review under 19-7-9, Private Road review.
2. The Edgecomb Way Private Road has 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.
3. The Edgecomb Way amendment is in compliance with the Town wetland regulations in the Zoning Ordinance.
4. The applicant has substantially addressed the standards of the Subdivision Ordinance, Sec. 16-3-1.

THEREFORE, BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of Jay Cox be approved, subject to the following conditions:

1. That Note 11 on the Second Amended Plan of Edgecomb Way be augmented with the statement that "Areas shown on Sheet L-1 in cross-hatch are subject to the "do not disturb" labels, except that the area in cross-hatch which is labeled "utility easement" may be disturbed for utility installation."
2. That the plans be revised and submitted to the Town Planner for review and approval prior to recording the subdivision plat.

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

The Board voted unanimously to adjourn at 9:50 p.m.

Respectfully submitted,

Hiromi Dolliver

Minutes Secretary