

Town of Cape Elizabeth
DRAFT Minutes of the August 25, 2020
Zoning Board of Appeals Meeting
Zoom Webinar ID: 966 8739 6812

As a result of the COVID-19 virus, the Zoning Board conducted the meeting via Zoom meeting remote access, as provided by Maine law. Zoom allowed all Zoning Board members, applicant, and members of the public to hear all discussion and hear votes, which were taken by roll call, as required by law. Information to access the meeting by video/audio or audio only was provided to the public in advance.

Participating Members of the Board:

Joseph Barbieri	Matthew Caton	Kevin Justh
Colin Powers	Michael Tadema-Wielandt	Michael Vaillancourt

The Code Enforcement Officer (CEO), Benjamin McDougal, participated in the webinar. The Recording Secretary, Carmen Weatherbie, was logged on.

A. Call to Order: Chair Michael Vaillancourt called the meeting to order at 7:05 p.m.

B. Approval of Minutes: Approval of the Minutes for July 28, 2020: A motion to approve the minutes was made by Mr. Justh, with a correction of the spelling of Thrasher Road on the first page; seconded by Mr. Vaillancourt. Minutes were approved by a roll call vote: 6 – 0. (Note: Approval occurred after business item.)

C. Old Business: None.

D. New Business: To hear the request of Janet Darling, owner of the property at 21 Forest Road, Map U03 Lot 43, to create an Accessory Dwelling Unit (ADU) within an existing single-family dwelling based on Sections 19-5-5 and 19-7-5 of the Zoning Ordinance.

Chairman Vaillancourt asked CEO McDougal for the background.

The CEO stated Ms. Darling spoke with him about finding extra income from her property to sustain it. She talked about being able to rent as a home stay and being able to get some income as an apartment. The CEO advised her of this procedure understanding that it is friends and family members that she was allowed to rent to. She has an existing space that she has rented as a home stay in the past, but wants to rent it as a whole unit instead of just a room. She is on a nonconforming lot in the RC Zone with 14,430 square feet. She wants to convert space in the bottom floor of her house; it is approximately 420 feet of living space.

The CEO said he did not receive any correspondence concerning this application from the public.

Janet Darling said over the years she has had a boarder in the main part of her house, so it is not really changing the use in terms of traffic or people. Over the years she has had a boarder or two. It's just herself there now. She would like someone to stay living there so that she would not be alone.

Mr. Justh asked if this space already existed? Ms. Darling stated since 1930 it has existed; it is not the same quality as the house. Her son stayed there during college. It is a space that lends itself for an ADU. It has a separate entrance. It was refinished so that her daughter would live there; although she never did. She said it was time to find someone who would like to live there for a longer time.

In response to an inquiry from Mr. Barbieri, the CEO stated it was his understanding that a living room, bedroom and bathroom are already there and a kitchen would be installed to turn it into an independent living space.

Ms. Darling does not have a close personal friend or family to live there. She thought that she would advertise on Facebook marketplace. The door from the space goes straight to the kitchen; it is an intimate setting. She would be careful whom she lets into her house. She will have a close relationship with whomever lives there. If it were an ADU she would have more privacy.

Mr. Caton explained the friends and family phrase in the ordinance to Ms. Darling stating that there should be a close personal relationship; parents and children would meet that restriction. Mr. Caton did not feel that it was incumbent upon the board to limit an ADU; the burden would be on her to meet the requirement. There seemed to be a conflict here, but Ms. Darling is on notice regarding this provision in the ordinance. In a discussion about bedrooms, Ms. Darling stated she does not want to rent space in the house other than the one bedroom in the proposed ADU.

The chair recognized members of the public logged in to the webinar.

Elizabeth (Betsy) Knauff, who lives on Elmwood Road, they share a back border. Ms. Knauff knew of paid renters over the years, some have had pets. Ms. Darling said she's had boarders over the years. Some have been students or someone just starting out. There has always been an intimate relationship with those people and she charged them for living there. She has had boarders from 1994 to the present, off and on, depending on family circumstances. If family were staying there, there were no boarders.

In response to a question, Ms. Darling stated the space would be within home, no additions. Ms. Knauff stated she was not current on Cape Elizabeth's regulations with Air B&B type rentals. She said this is family-oriented neighborhood and voiced her concern about transient renters. Ms. Knauff said she was not against renters; there is a duplex next door with long-term renters. She just didn't want a change to character of the neighborhood.

Ms. Darling stated she wants a long-term renter; she has no interest in short term. She mentioned other ADUs in the neighborhood, so it is in the character of the neighborhood.

The CEO stated the property could not be rented for the short term once it has this approval. As it sits today, this property could be rented short term as a home stay. Once it is approved as an ADU, it has to be rented to close friends and family, it precludes the property being used as a short-term rental.

Mr. Caton expressed concern about the relationship between the owner and the occupant of the ADU. The relationship should be a relation or a close friend. He wanted to be sure Ms. Darling understood the purpose of the ADU. Ms. Darling said she thinks she understands. She stated that the house is small. It is not conducive to have someone here that she does not have a close relationship to. She said she was 77 years old and needs to have somebody else there. She's often thought that if she had an ADU, it would be available for someone who would care for her in her later years.

Mary Beth Touchier stated she lives next door to the property; she wanted confirmation that short-term renters would be prohibited. The CEO assured her that would be the case, if the ADU were approved.

There were no other public comments.

Board discussion: Mr. Powers questioned the definition of a close personal relationship in Section 19-7-5. One criterion is persons who live together in the same residence – which is a circular argument. Mr. Caton interprets that phrase to mean the relationship has to be preexisting. Advertising does not match up. The wording of the ordinance is problematic. What happens to this suite of rooms if a family member no longer lives there, may it be rented? Occupancy is not tenancy. Again, it's a circular argument. We made the point with applicants, that if an ADU is vacant for 12 months, the permit expires. Mr. Berbieri stated he thought this would be for someone for whom you would not charge rent. The ordinance states occupancy not tenancy. It is designed for a close personal relationship. Mr. Tadema-Wielandt stated he understands those points; however, this meets all the technical requirements and falls on the CEO for the relationship test of who is living there. Its purpose is for living very closely. Use by a caretaker is an excellent use.

Board members were sympathetic to applicant's situation. The Chair stated this was not the normal situation encountered with the application for an ADU, but felt it was not the board's position to police the relationship to the owner. The application does meet the technical requirements of the ordinance.

The board discussed adding a condition to the approval pertaining to the close personal relationship requirement.

Ms. Darling stated most of her family has passed away, with the exception of her daughter. Good friends have also passed away. Ms. Darling stated that she felt she

was being discriminated against because she has no family. She asked who these rules were made for.

The CEO responded to Ms. Darling stating that the Zoning Board isn't imposing anything that isn't required by ordinance. As you (Ms. Darling) said, you wouldn't have anyone move into that space that you did not have a close personal relationship with. So, there is nothing preventing you from meeting someone, forming a close enough personal relationship with them and then renting the space to them. The Zoning Board does need to protect the integrity of the ordinance. The CEO said he has talked with the Town Planner about the adoption of this ordinance and it was intended to help people and to be a moneymaker – to have tenants and provide income – that was discussed when the council adopted this. This is not a foreign concept, based on the intent of the council when it was adopted.

Mr. Powers moved to approve the request of Janet Darling, owner of the property at 21 Forest Road, Map U03 Lot 43, to create an Accessory Dwelling Unit (ADU) within an existing single-family dwelling based on Sections 19-5-5 and 19-7-5 of the Zoning Ordinance. Mr. Tadema-Wielandt seconded the motion. The roll call vote was: 4 – 2. The motion carried. Mr. Caton and Mr. Berbieri dissented.

Mr. Berbieri moved to add a condition that the ADU be only occupied by one or two people who have a close personal relationship with the residents of the main dwelling. There was discussion. Several board members thought that the Town Council should review this cumbersome, fuzzy language. Mr. Caton added an amendment to the motion to quote the actual language of the condition in the ordinance. Mr. Caton seconded. The roll call vote was: 2 - 4. The motion for the added condition failed. Mr. Justh, Mr. Powers, Mr. Tadema-Wielandt and Mr. Vaillancourt dissented.

Findings of Fact:

1. This is a request for a Conditional Use Permit to create an Accessory Dwelling Unit in an existing single-family dwelling based on Sections 19-7-5 and 19-5-5 of the Zoning Ordinance.
2. The subject property is located at 21 Forest Road, Map U03 Lot 43. It is a nonconforming lot in RC Zone.
3. Janet Darling is the applicant and owner of the property.

Additional Findings of Fact:

1. The proposed use will not create hazardous traffic conditions when added to existing and foreseeable traffic in its vicinity.
2. The proposed use will not create unsanitary conditions by reason of sewage disposal, emissions to the air, or other aspects of its design or operation.

3. The proposed use will not adversely affect the value of adjacent properties.
4. The proposed site plan and layout are compatible with adjacent property uses and with the Comprehensive Plan.
5. The design and external appearance of any proposed building will constitute an attractive and compatible addition to its neighborhood, although it need not have a similar design, appearance or architecture.
6. The applicant has demonstrated compliance with the requirements in Section 19-7-5.b of the Zoning Ordinance.
7. The owner shall prepare and file a deed with the Registry of Deeds combining the two nonconforming lots.

Mr. Caton inquired about the purpose of the last finding. The CEO said there are, or were, two nonconforming lots that need to be merged/combined in order to be the lot size required to have an ADU. The survey submitted by Ms. Darling shows the two lots as combined; however, the CEO stated he has not seen a deed that formally combines the lots. Therefore, he added it as a finding, because it is a requirement to have a lot over 12,000 square feet to have an ADU. The lots need to be permanently combined for this ADU to happen. Mr. Caton stated if we are going to allow this application to be approved, there should be a condition that the applicant provide a copy of the deed to illustrate the condition the CEO described. The CEO stated that the current deed states that there are two parcels: one's around 8,000 square feet and the other parcel is around 6,000 square feet. The council has considered reducing the lot size requirement to 7,500 square feet for an ADU. The CEO stated that he asked Ms. Darling and her surveyor to permanently combine the lots, he's seen some evidence of that but not complete evidence of that, so that is why the addition Finding of Fact was added.

There was discussion about the deed to meet the requirement.

Ms. Darling said she consulted with three different lawyers, they said the lots did not need to be combined, it had to do with the town zoning. The Chair said that would be a topic for her and her attorneys to discuss. It appears the board is inclined to impose that as a condition for approval. There was more discussion between Ms. Darling, the Chair, and CEO.

Mr. Tadema-Wielandt moved to approve the Findings of Fact and Additional Findings of Fact; Mr. Powers seconded. Motion was approved by a roll call vote: 6 – 0. All were in favor.

E. Communications: None.

F. Adjournment: Chairman Vaillancourt adjourned the meeting 8:27 p.m.