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TOWN OF CAPE ELIZABETH

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October 18, 2019

Margaret Birlem
8 Aster Lane
Cape Elizabeth, Maine 04107

Re: 8 Aster Lane Private Rd review

Dear Ms. Birlem:

At the October 15, 2019 meeting, the Cape Elizabeth Planning Board approved the following findings and conclusions and motion:

1. Margaret Birlem has applied for an eighty (80) foot private road extension off the public portion of Aster Lane to create the road frontage and access necessary to obtain a building permit with regard to a parcel of land identified as 8 Aster Lane and depicted as lot 42 on Cape Elizabeth Zoning Map U49.
2. Under the Town's Ordinances, the Planning Board reviews Ms. Birlem's application under Section 19-7-9 and applicable standards for a local road as set forth in Chapter 16, Subdivision Regulations, subject to the Board's authority to grant waivers.
3. The Planning Board deemed Ms. Birlem's application complete on April 23, 2018 and held a site walk on April 30, 2018.
4. The Planning Board addressed the merits of Ms. Birlem's application at a hearing on May 15, 2018 and, after considering all of the evidence presented, voted to approve the application with conditions.
5. Christopher and Julie Munz took an appeal of the Planning Board's decision to Superior Court pursuant to Maine Rule of Civil Procedure 80B.
6. On March 12, 2019, the Cumberland County Superior Court issued a Decision and Order affirming most of the Board's decision, but also remanding the case to the Planning Board to make the findings and conclusions with regard to the following: "to determine whether the private accessway [claimed by the Munzes] is valid, and if so, whether the

private accessway and maintenance agreement should be considered under the application.”

7. On July 3, 2019, the Cumberland County Superior Court issued an order of clarification that vacated the Planning Board’s May 15 decision and remanded the case to the Planning Board to make the findings and conclusions referenced above and to enter a decision on the application in light of those additional findings and conclusions.
8. As expressly authorized by the Superior Court’s July 3, 2019 order, the Planning Board conducted a hearing on September 17, 2019 to address the Superior Court’s remand order and to receive any evidence on the issues identified in the remand order and any other issues pertinent to the application.
9. After a discussion by the Board at the close of the public portion of the hearing, the Board voted to table this matter and authorized the Town attorney to prepare draft findings and conclusions based on the Board’s discussions about this application and the evidence presented relevant to the application for the Board to adopt, reject, modify, or augment as the Board sees fit.

Approval Standards for New Private Roads

10. The property that is the subject of Ms. Birlem’s application is owned by Ms. Birlem and Noelle C. DeLuca pursuant to a quitclaim deed dated October 24, 2017 and recorded with the Cumberland County Registry of Deeds at book 34414 and page 113.
11. The property that is the subject of Ms. Birlem’s application was recognized as a joinder of two lots pursuant to a corrective and confirmatory release deed dated to Ms. Birlem and Noelle C. DeLuca dated December 15, 2017 and recorded with the Cumberland County Registry of Deeds at book 34544 and page 304.

Conclusion:

12. Based on the above findings, Ms. Birlem has demonstrated sufficient right, title, or interest to construct a private road for access to and frontage for the property at Map U49 lot 42.
13. The proposed construction of 80 feet of private road off the end of the public portion of Aster Lane is not located in a floodplain and the applicant is not proposing any subsurface waste disposal as part of the construction.
14. The applicant has incorporated the slope of the land into her stormwater management plan and no direct discharge into a stream is proposed.

15. The proposed construction is not expected to generate undue water pollution.
16. Based on the above findings, the Board concludes that the proposed project meets the pollution standard.
17. The applicant has submitted a letter from the Portland Water District that indicates that the lot that would receive its necessary frontage and access through the proposed private road extension can be served by public water.
18. Based on the above finding, the Board concludes that the proposed project meets the potable water standard.
19. The applicant has submitted plans that include an erosion control plan, which identifies placement of silt fencing and installation of check dams to slow stormwater from the road following construction.
20. Based on the above finding, the Board concludes that the proposed project meets the erosion standard.
21. The applicant submitted a traffic study in support of her application performed by Traffic Solution.
22. The traffic study indicates that the applicant's proposal to remove a chain gate and construct a private road extending 80 feet off the end of the public portion of Aster Lane will likely have a minimal impact on the volume of traffic on South Street.
23. The applicant has submitted a road maintenance agreement that provides for the maintenance of the proposed private road to allow for access by public safety vehicles.
24. The proposed private road will improve an existing gravel area to private road standards, subject to certain requested waivers, which is desirable under the Town's Comprehensive Plan.
25. The proposed private road will make the applicant's lot a buildable property by providing necessary frontage and by providing an access route.
26. The proposed private road will make the applicant's lot a buildable property in an area with other adjacent homes, which is desirable under the Town's Comprehensive Plan.
27. The proposed private road will connect to a public road accepted by the Town and constructed to provide access to an approved subdivision.

28. According to the Town fire chief, the proposed private road with the chain gate removed will provide enhanced access for emergency vehicles.
29. The proposed private road with the chain gate removed will eliminate an impediment to access to a development or neighborhood.
30. According to the Town fire chief, gates slow the emergency vehicles down.
31. The chain gate the applicant proposes to remove is an "orphan gate," meaning it is not sanctioned by the Town. There is no evidence of a plan submitted to the town that shows the gate or provides a justification for the gate under the town's ordinances.
32. According to the survey submitted, the existing gate is in the public right of way, and not on the south street right of way.
33. Section 19-7-16, which pertains to creation of a short cut via a developed residential street, is not applicable because a short-cut between two separate points of an arterial, collector, rural connector or feeder street will not be created.
34. As indicated by the traffic study, the low volumes of vehicular traffic anticipated on the proposed road are not expected to create a safety hazard.
35. Given the existing gravel in the area of South Street, there is little opportunity to vary the location of the proposed road.
36. The applicant has asked the Board to waive the minimum requirements for road width, position in the right of way (i.e., centering), shoulder, and underground enclosed drainage system.
37. The applicants seek a waiver of the 22-foot minimum road width requirement so that the private road would flow seamlessly into the existing graveled portion of South Street.
38. According to the applicant's plans, the private road would taper from a width of 22 feet (where it connects to the public portion of Aster Lane) to a width of 18 feet (where it connects with South Street).
39. Similarly, the applicants seek a waiver of the standard that a road be centered within a right of way to account for the fact that South Street is not centered.
40. According to the applicant's plans, the private road would be centered where it connects to the public portion of Aster Lane and veer slightly to the east to match up with the center of South Street.

41. The applicant has requested a waiver of the shoulder width standard to match South Street, which has no shoulders.
42. By keeping with the existing constructed shoulder widths there would not be any additional impacts to the culverts and ditch on the left side of the street.
43. The applicant is seeking a waiver of the enclosed drainage system requirements.
44. The proposed waiver of the enclosed drainage system requirements will make the private road consistent with South Street and minimize disruption of existing improvements.
45. Overall, the applicant's requests for waivers of certain road construction standards are designed to integrate the private road with the existing graveled portion of South Street.
46. As indicated by the Town engineer, the requested waivers do not adversely affect the functionality of this low speed and low volume roadway.
47. The Subdivision Ordinance authorizes the Board to grant the requested waivers when practical difficulties would arise from strict compliance with the standards. Subdivision Ordinance Section 16-3-5.
48. Based on the findings above, the applicant has demonstrated that the waivers she has requested for road width, position in the right of way (i.e., centering), shoulder, and underground enclosed drainage system are justified as practical difficulties would arise from strict compliance with the standards.
49. Based on the findings above, the applicant has demonstrated that the proposed private road is designed so that it will provide safe vehicular and pedestrian travel and traffic patterns.
50. Consistent with a letter from the Town sewer superintendent, the applicant's proposal to connect to the public sewer system will be permitted.
51. Based on the finding above, the applicant has met the sewer disposal requirement.
52. The site of the proposed private road is not located in a vista or view corridor.
53. There is no indication that the site of the proposed private road affects any significant wildlife habitats.

54. The proposed road construction will occur almost entirely in an existing gravel area.
55. The site of the proposed private road does not impact any farmland.
56. Based on the above findings, the applicant's proposal satisfies the requirements pertaining to aesthetic, cultural and natural values.
57. The proposed road construction is consistent with the Comprehensive Plan – particularly to the extent the proposal will promote street connectivity.
58. Two nonconforming lots have been merged to create one lot that exceeds the current minimum lot size of 20,000 square feet.
59. There is no evidence in the record to suggest that the proposed road construction does not conform to the Town's ordinances.
60. Based on the above findings, the proposed road construction conforms to the Town's ordinances.
61. As indicated by a communication from the Town Manager, the applicant has adequate financial and technical ability to complete the proposed project.
62. Based on the above finding, the applicant has demonstrated adequate financial and technical ability to complete the proposed project.
63. The proposed road construction does not involve a significant aquifer recharge area.
64. Based on the above finding, the applicant has met the ground water requirement.
65. The proposed project is not located in the floodplain.
66. Based on the above finding, the applicant has met the flood areas requirement.
67. The proposed project does not involve the alteration of any wetlands.
68. Based on the above finding, the applicant has met the wetlands requirement.
69. The applicant's revised construction plans reflect provisions for stormwater management, including measures to protect the downslope areas and riprap protection off the edges of the road where stormwater was discharging at the end of the curb along Aster Lane.

70. The Town Engineer is recommending replacement of a section of silt fence or haybales with additional check dams.
71. The applicant's revised construction plans reflect that all but two feet of an existing paved berm would be retained and that removal of that portion will cause gutter drainage to flow off pavement to new easterly ditch.
72. The features reflected on the revised construction plans will act to attenuate stormwater runoff velocities which will protect against erosion and mitigate the drainage generated from the roadway improvements.
73. The retention of the existing paved berm at the end of the paved section of Aster Lane and the additional rip rap protection in its receiving ditch will help to protect against the gravel areas beyond the end of the paved section of Aster Lane from being washed out during intense rainfall events.
74. The applicant's proposed project will result in a minimal net gain of impervious area.
75. Based on the above findings, the Board concludes that no formal stormwater management report is necessary.
76. Based on the above findings, the applicant has demonstrated that the project will provide adequate stormwater management.
77. The proposed project is not within the watershed of a great pond.
78. Based on the above finding, the applicant has met the wetlands requirement.
79. The applicant has made provisions for the underground installation of utilities – including water, electric, telephone and cable TV.
80. Based on the above finding, the applicant has met the utility access requirement.
81. The following standards are inapplicable to the applicant's proposal: solid waste disposal; surface waters; impact on adjoining municipality; land subject to liquidation harvesting; access to direct sunlight; open space impact fee; and phasing.
82. Based on all of the foregoing findings and conclusions, the applicant has substantially addressed the standards of the Private Road review, Zoning Ordinance Section 19-7-9 and Subdivision Ordinance Section 16-3-1.
83. Christopher and Julie Munz, as owners of 5 South Street, are successors-in-interest of Philip and Darlene Nedwell.

84. By an approval issued on March 16, 2004 and confirmed by a letter dated March 17, 2004, the Planning Board granted a request by the Nedwells to create a private accessway on South Street to make 5 South Street a buildable lot.
85. Pursuant to the express terms of the approval granted to the Nedwells, the Nedwells were required to record the approval with Cumberland County Registry of Deeds within 90 days, which the approval identified as June 14, 2004.
86. Pursuant to the express terms of the approval granted to the Nedwells, the approval "will be null and void" if not recorded within 90 days.
87. The Cumberland County Registry of Deeds has no record of a "private accessway plan" pertaining to the approval granted to the Nedwells.
88. The Munzes have not presented any evidence that the approval for the private accessway granted to the Nedwells was ever recorded with the Registry of Deeds.
89. The approval for the private accessway granted to the Nedwells was not recorded within 90 days of the approval.
90. Pursuant to the terms of the private accessway approval granted to the Nedwells and the pertinent provision of the Town's Zoning Ordinance (Section 19-7-9(D)(5)(b)), the approval was null and void as of June 15, 2004 due to the failure to record the approval within 90 days of the approval being granted.
91. The building permit granted to the Nedwells in December of 2004 by the Town's CEO does not assist the Board in resolving the issues on remand because: one, the building permit was issued more than six months after the approval to the Nedwells was rendered null and void; and two, there is no evidence in the record that the CEO specifically determined that the approval was properly and timely recorded.
92. The comments by the Town's CEO in 2013 and 2018 do not assist the Board in resolving the issues on remand because: one, the comments were made several years after the approval to the Nedwells was rendered null and void; and two, there is no evidence in the record that the CEO had specifically determined that the approval was properly and timely recorded when he made the comments.
93. For the purposes of this application, and to satisfy the terms of the Superior Court's remand order, the Board finds that the asserted private accessway affiliated with 5 South Street is not valid.

94. Although not strictly within the scope of the remand order, the Board would note that the proposed private road will have the incidental effect of providing necessary frontage to make 5 South Street a buildable lot.
95. Even if a portion of South Street were a valid private accessway, the private road would effect an improvement or upgrade over a length of that accessway that is entirely consistent with the Town's zoning ordinance.
96. The criteria for the creation of a private road does not require the Board to resolve issues pertaining to alleged overlapping road maintenance agreements.

THEREFORE, BE IT ORDERED that, based on the foregoing findings and conclusions, the plans and materials submitted, and the facts presented, the Board approves the application of Margaret Birlem for an 80 foot long private road extension from Aster Lane, a public road, to create road frontage for the lot located at 8 Aster Lane, subject to the following conditions:

1. That the plans be revised to address paragraph #6 in the Town Engineer's letter dated May 9, 2018;
2. That a road maintenance agreement be provided for the 80 foot private section of Aster Lane in a form acceptable to the Town Attorney and Town Manager, signed by the applicant and recorded in the Cumberland County Registry of Deeds.
3. That the approval includes waivers from the road width, shoulder width, center line and enclosed stormwater requirements, consistent with the requirements of Sec. 16-3-5, Waivers.
4. That a MUTCD compliant sign, or otherwise as approved by the Public Works Director, be installed by the applicant in the right of way of Stephenson Street at the intersection of Stephenson Street and Hamlin St and in the right-of-way of Aster Ln/South St at the beginning of the private portion of Aster Ln that states "Private Road, access for Stephenson St and South St residents only."
5. That a note be added to the plan that there shall be no road construction until a performance guarantee has been provided to the town in accordance with Sec. 16-2-6 of the Subdivision Ordinance;
6. That the following note replace note #1 on Sheet C-100:

Activities outside the building envelope are restricted to the installation of a driveway and installation of utilities. The extent of driveway and utility installation within the buffer be shown on the plans, be the minimal amount of disturbance and also limited to no more than

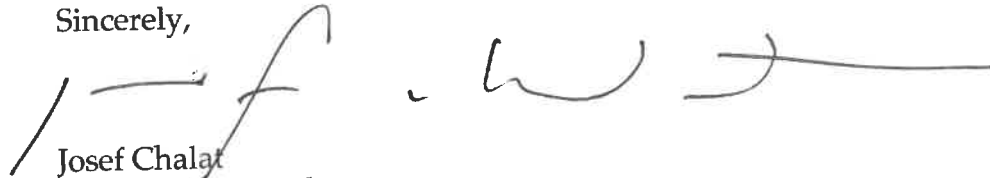
1,300 sq. ft. of disturbed area within the buffer. No structure shall be constructed within 10' of the edge of the building envelope. No vegetation removal other than for the above activities is allowed, except at follows:

Hazard (dead or storm damaged) trees in areas outside of the building envelope may be removed after consultation with the Code Enforcement Officer in compliance with the following conditions. The removal of standing dead trees, resulting from natural causes, or storm damaged trees is permissible without the need for replanting as long as the removal does not result in the creation of new lawn areas, or other permanently cleared areas, and stumps are not removed. The area shall be required to naturally re-vegetate and/or be planted with native plants within one year if natural vegetation has not been established. For the purposes of this provision, dead trees are those trees that contain no foliage during the growing season.

7. That the plans be revised and submitted to the Town Planner for review and approval prior to recording the plan.
8. There shall be no disturbance of the site nor issuance of a building permit until the plan has been signed by the Planning Board and recorded in the Cumberland County Registry of Deeds.

The Private Road approval is valid for 90 days and will expire on January 12, 2020 if the plan is not signed by the Planning Board and recorded in the Cumberland County Registry of Deeds or a request to extend the approval is forwarded to the Planning Board prior to the expiration date. Please contact the Town Planner if you have any questions.

Sincerely,



Josef Chalot
Planning Board Chair

cc: Matt Sturgis
John Wall