

Town of Cape Elizabeth
Minutes of the April 27, 2021
Board of Zoning Appeals Meeting
Zoom Webinar ID: 930 0033 6862

As a result of the COVID-19 virus, the Board of Zoning Appeals conducted the meeting via Zoom meeting remote access, as provided by Maine law. Zoom allowed all Zoning Board members, applicants, 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
Aaron Mosher
Michael Vaillancourt

Matthew Caton
Colin Powers

Kevin Justh
Michael Tadema-Wielandt

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

A. Call to Order: Chairman Vaillancourt called the meeting to order at 7:02 p.m. and reviewed protocols based on Maine Municipal Association Board of Appeals Manual.

B. Approval of Minutes: Approval of the Minutes for March 23, 2021: A motion to approve the minutes was made by Mr. Tadema-Wielandt; seconded by Mr. Caton. Motion carried by all present at that meeting by a roll call vote. Vote: 6 - 0. Mr. Powers abstained.

C. Old Business: None.

D. New Business: To hear the request of Todd Gutner, co-owner of the property at 40 Aster Lane, Map U32 Lot 6-47 for a variance to construct a 150 square foot addition based on Section 19-5-4 of the Zoning Ordinance.

Chairman Vaillancourt asked CEO McDougal for the background. The CEO stated that the addition will be close to the side setback line. It is a conforming lot in RC Zone. It was created in 2014 as an amendment to the Mitchell Highlands Subdivision Plan. Mr. McDougal apologized for any miscommunication with Mr. Gutner. The Gutner's application requests to build to five feet from the setback. The Zoning Board cannot approve a variance less than 10 feet to a setback. The application also mentions seven and ten feet from the setback so there were questions about the amount of setback required and if a survey should be done.

The Cottage Brook Subdivision has five-foot side setbacks. The Cottage Brook Subdivision is an open space subdivision that preserves 40% of the land as open space, which allows the Planning Board the latitude to reduce setbacks significantly.

The Gutner's lot comes from the Mitchell Highlands Subdivision, which is based on traditional zoning, with conforming lots and conforming setbacks.

Mr. Gutner was asked if he wished to proceed given the above information. There was discussion about how Mr. Gutner could proceed. Several board members and the CEO discussed how this application was relatively straightforward for a single-floor, 150 square foot box addition, no closer than 10 foot to the property line. Mr. Gutner decided to go ahead with amended application.

Mr. Powers moved to hear the application, amended to a 10-foot setback to the property line. Mr. Justh seconded. There was further discussion about the site. Motion was approved by a roll call vote: 7 – 0. All were in favor.

Mr. McDougal stated he had received no correspondence from the public concerning this application.

Mr. Gutner explained that because of COVID and all the family being home, they decided they needed more living space on the first floor. Erick Hilse, whose lot was split to create this lot, is in favor of the Gutners pursuing this purposed addition. If you look at this house, where it is located and how it is accessed, it really is a part of the Cottage Brook Subdivision neighborhood more than the property that it was split from in the Mitchell Highlands Subdivision. Mr. Gutner stated that he could not even get to that neighborhood without driving two miles. The house looks nothing like that neighborhood. Everything feels and looks like the houses in his Cottage Brook neighborhood. Mr. Gutner included a spreadsheet of first floor square footage of the surrounding properties. If he could add 150 square feet it would put his house in the middle of these properties and more on a par with them. Essentially what he would like to build is a bump out off to the side, similar to neighbor, Chris Inman, across the street. It is a 140 square feet addition that he would like to mimic.

Finding no public comment, Chairman Vaillancourt closed the floor to public comment.

The Board discussed amendments to the Cottage Brook Subdivision. There was a question about impact fees; the board decided that was not relevant. This land was purchased in January 2015. The last substantial amendment to the Cottage Brook subdivision was mid-2015.

The Zoning Ordinance variance checklist, per Section 19-5-2 B.1. a. through f. was discussed. This variance is due to the conditions of property. It is not an undesirable change; it would match houses in the neighborhood. This is not a result of action taken by the applicant or a prior owner. No feasible alternative is available. It will not adversely affect the natural environment; the addition is in a lawn area. This is a condition of the lot. It is not in the Shoreland District. Item c: practical difficulty is usually the hardest standard to meet.

The definition of Significant Economic Injury was discussed. Placing the applicant for a variance at a disadvantage in the neighborhood by applying Zoning Ordinance standards, which would prevent the applicant from having a structure or accessory

structure comparable in size, location and number to those of other lot owners in the immediate neighborhood, but in no case fewer than 10 of the nearest property owners.

No one would ever guess this was part of the Mitchell Highlands Subdivision neighborhood. It looks like a Cottage Brook home. Access to the lot is the same as Cottage Brook neighbors. To use the strict interpretation of the Ordinance sometimes doesn't make sense. This is essentially a Cottage Brook home.

When the Planning Board approved the lot in 2014, they deemed that Lot 46A will functionally become part of the Cottage Brook neighborhood and will have access to Aster Lane.

Practical Difficulty is defined as an occasion where the strict application of the ordinance to a property precludes the ability of the property owner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the property owner. This property is located in the Cottage Brook neighborhood.

Maine statutes would take precedence over town Ordinance. This property is located in a different neighborhood than the zoning. Economic injury is not in Maine statutes. Is Mr. Gutner at a disadvantage because his first floor is smaller than his neighbors? The neighbors have larger first floors because his 10 closest neighbors lots have smaller setbacks. This meets the conditions of Section 19-5-2 B.1. a. through f. in the Ordinance. It will not alter the character of the neighborhood.

Mr. Mosher moved to approve the request of Todd Gutner, co-owner of the property at 40 Aster Lane, Map U32 Lot 6-47 for a variance to construct a 150 square foot addition based on Section 19-5-4 of the Zoning Ordinance, as amended to a 10-foot setback to the side property line. Mr. Powers seconded. Motion was approved by a roll call vote: 6 – 0 Mr. Barbieri abstained.

Findings of Fact:

1. Todd and Rachel Gutner are the owners of the property.
2. The subject lot is a conforming lot in the RC Zone.
3. The applicant purchased the lot and constructed the existing house in 2015.
4. The lot was approved by the Planning Board in 2015 as an amendment to the Mitchell Highlands Subdivision Plan.
5. As a conforming lot, the setbacks are 20 feet on the front, side and rear of the lot.
6. No part of the property is located in the Shoreland Overlay District.

Mr. Tadema-Wielandt moved to approve the Findings of Fact. Mr. Justh seconded. Motion was approved by a roll call vote: 7 – 0. All were in favor.

Additional Findings of Fact:

1. The need for a variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.
2. The granting of a variance will not alter the essential character of the neighborhood.
3. The practical difficulty is not the result of action taken by the applicant or prior owner.
4. No other feasible alternative to a variance is available to the petitioner.
5. The application approval is strictly limited to an up to 150 square feet single-story addition no closer than 10 feet to the property line.

Mr. Tadema-Wielandt moved to approve the Additional Findings of Fact. Mr. Justh seconded. Motion was approved by a roll call vote: 7 – 0. All were in favor.

Conclusion:

There is no substantial departure from the intent of the Ordinance and a literal enforcement of the Ordinance would cause a practical difficulty as defined by 30-A.M.R.S.A. Sec. 4353, 4-C.

Mr. Tadema-Wielandt moved to approve the Conclusion. Mr. Justh seconded. Motion was approved by a roll call vote: 7 – 0. All were in favor.

E. Communications: None.

F. Adjournment: Chairman Vaillancourt adjourned the meeting 8:22 p.m.