TOWN OF FALMOUTH Board of Zoning Appeals Minutes Tuesday, July 26, 2011

MEMBERS PRESENT – Fred Jay Meyer (Chair), Dennis Keeler (Vice-Chair), Stan Given, Jonathan Berry (Associate), Don Russell (Associate)

MEMBERS ABSENT - Willie Audet, Jim Thibodeau

STAFF PRESENT – Justin Brown, Acting Code Enforcement Officer

1. Call to order:

The meeting was called to order at 6:35 pm.

2. Discussion and adoption the minutes of the previous hearing(s).

Jay Meyer had a minor change to the minutes which would be changed. Don Russell moved to adopt the minutes with the change; Stan Given seconded. Motion carried 4-0.

3. Discussion and finding that all applications presented for this hearing are complete.

The Board determined that all applications were complete.

4. Applications

a. 4 Edgewater Rd, Elizabeth V. Franklin- Conditional Use under Section 5.22.1 for an Accessory Dwelling. Parcel U09-008, zoned RA.

Beth Franklin said the owners of 4 Edgewater were on their boat and had given her permission to speak on their behalf. She had a purchase and sale agreement that she passed out to the Board members. She said there was an apartment that existed in a different place. It currently existed in one of the garages and was part of the main houses. Behind the house there was a separate workshop and a two-car garage. She was proposing to turn the existing apartment back into a two-car garage, and convert the existing two-car garage and workshop into an accessory dwelling unit.

Public comment opened; no public comment.

Stan Given asked if there was any change in the footprint. Ms. Franklin said there was not.

Dennis Keeler abstained because he had just come in.

Jon Berry said the current apartment was going away. Ms. Franklin said it actually had gone away. The current owners had been living in it.

Jon Berry said the old approval was going away and this was a new one. Ms. Franklin said that was right and Justin Brown said it didn't exist anymore.

Jay Meyer said they should possibly add as a condition of approval that the existing apartment had to be discontinued and the new one would take its place. He asked Justin Brown if he had any qualms with the calculations, since they were close to the 30% limit.

Justin Brown said he didn't because typically they went on a rough estimate from the tax card. He thought that her numbers were above the ones on the tax card.

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Jay Meyer asked if he thought there should be a condition where Ms. Franklin would verify the numbers.

Justin Brown said that he thought she had done well with the calculations, but it wouldn't hurt to have a condition since the tax card wasn't very helpful with the square footage.

Stan Given moved to approve the application with the condition that the square footage thresholds haven't been exceeded and the existing apartment is no longer in use; Jon Berry seconded. Motion carried 4-0.

b. 30 Lowell Farm Rd, Michael Tranfalia & Jamison Tranfalia - Conditional Use under Sections 6.2 & 6.11 to construct a deck. Parcel HL7-001, zoned RBm/LR.

Lou Tranfalia, Michael and Jamie's father, said they were petitioning to put in a deck. The original deck size was 35x14 feet to include a 20 foot screened in porch. The deck had been reduced to 41 feet wide for a total of 502 sq. ft. With the 12 foot deck it was 105' 9" from the water. There was a problem with the setback because the tip point of the garage was at the 20 foot setback and the building was askew of the property. With the change they saved that and no trees were involved.

Public comment opened.

Bill Flay, owner of the property next to Mr. Tranfalia's, wanted to say he was in favor of the deck and thought that it would enhance the neighborhood. He said that he was the only neighbor who might be impacted from it and didn't have a problem with the addition. He said the previous owners put the house there because they had wanted to put a deck there but were unable to for financial reasons.

Joanna Tranfalia, the applicants' mother, said Don Clayton had done a water survey for them. They were well within the parameters.

Public comment closed.

Jon Berry said the supplemental material answered his questions.

Dennis Keeler wanted to clarify the discrepancy between two measurements on the setback.

Mr. Tranfalia said that it was a mean number because the deck wasn't straight on the property; it was kitty-cornered.

Dennis Keeler asked if it would be 20 feet from the property line.

Mr. Tranfalia said yes it would be a lot more than 20 feet. It was closer to 25 feet.

Dennis Keeler asked Justin Brown if they had anything in the file on that.

Justin Brown said he didn't and had no actual verification of that for an exact measurement, but he had met with the applicant about it.

Mr. Tranfalia said when Mr. Clayton did the measurements it was 20 feet.

Dennis Keeler said he didn't mind putting a condition on there that they verify the setback.

Justin Brown said they had a meeting and they could get clarification on that.

Jay Meyer said it looked apparent from the plan that it would be 20 feet from the line but he would support a condition to verify it.

Dennis Keeler moved to approve the request for conditional use with the condition that the applicants supply to Justin Brown verification that the deck met the side setback requirement; Stan Given seconded. Motion carried 5-0.

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c. 82 Middle Rd, Griffin Meara - Conditional Use under Section 6.2a to construct a deck. Parcel U32-023-A, zoned RA.

Griffin Meara said they wanted to build a deck on the back of the house. They had a problem with the fact that it was 75 feet from the road, but they were building it on the other side of the property.

Stan Given said he assumed the deck would line up with the left hand side of the house and it looked like they had enough room. As long as it didn't extend past the side of the house and was in line it should be fine.

Ms. Meara said that it wouldn't go past the house.

Dennis Keeler asked Justin Brown if he was comfortable with everything.

Justin Brown said that they would verify on site as well but he didn't have any problems.

Jon Berry asked Justin Brown if the only reason why it was in front of the Board was the road frontage issue.

Justin Brown said yes.

Jay Meyer said the plot plan showed 20 foot setbacks. He asked if it was their intent to build it in line with the house on the west side. Ms. Meara confirmed that.

Jay Meyer wanted to point out that it was a 40 foot setback on the rear and it looked like they were going right up to that. He warned them to be careful about that.

Dennis Keeler wanted to add that they couldn't go past that side of the house too because it was close there.

Don Russell said the application wasn't signed and dated. Justin Brown said he didn't catch it. Ms. Meara asked if he wanted her to sign it. Justin Brown said that when she came in they could get it squared away.

Dennis Keeler moved to approve the application; Jon Berry seconded. Motion carried 5-0.

d. 100 Winn Rd, Michael Baldwin- Conditional Use under Section 5.22.1 for an Accessory Dwelling. Parcel R06-006-D, zoned FF.

Michael Baldwin said he was looking to have an accessory dwelling for retirement.

Public comment opened; no public comment.

Stan Given said Justin Brown's notes on the tax card regarding it wasn't a separate building lot. They didn't have that tax card in the packet. They had d but he wanted to know if e was where it was occurring on.

Justin Brown said d was the main structure and e was the accessory. He spoke with Assessing and it was the same owner with two separate lots. He didn't think they were combined into one bill because there was no request to do so.

Stan Given said there wasn't a footprint change. It was a reuse of the structure. Mr. Baldwin said that was correct.

Dennis Keeler wanted to confirm that it was just one bedroom. He asked if the septic tank could handle a two bedroom.

Justin Brown said it was a one.

Dennis Keeler said that he would like to see a condition about the septic tank if they wanted to add more than one bedroom.

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Justin Brown said the condition was just a double check.

Dennis Keeler said he just wanted to make it clear for the record in case someone came in a few years later.

Don Russell moved to approve the conditional use application.

Jay Meyer asked if Dennis Keeler wanted a condition.

Dennis Keeler said that he didn't think so; he just wanted to make sure that it was brought up and he would second the motion.

Justin Brown said that the structure was on the e. It looked like, from an outside standpoint, it looked like it was on d.

Dennis Keeler said that it wasn't on a buildable lot.

Justin Brown said that it was a formality that it hadn't been combined, although he didn't want to speak for the Assessing Department.

Stan Given asked if it would make sense to approve as e and d.

Justin Brown said yes at least for the time being.

Dennis Keeler wanted to clarify that it was permitted as an accessory dwelling as an accessory to d.

Don Russell modified the motion; Dennis Keeler seconded as amended. Motion carried 5-0.

e. 1 Providence Ave, Jennifer Libby- Conditional Use under Section 6.2a to construct an addition. Parcel U04-078, zoned RA.

Jennifer Libby said there was an existing 18'x18' garage. They wanted to make it 19'x22'. It met all of the setbacks. She had met with Justin Brown a couple of times. The previous owners received approval to square off the garage. She thought they were going to bring it to 26 feet. They also had a builder change.

Public comment opened; no public comment.

Dennis Keeler said that it appeared the front line along Providence Ave was running parallel to the garage.

Ms. Libby said that was correct.

Dennis Keeler asked if she felt confident that it was 27 feet across. Ms. Libby said that it was.

Stan Given moved to approve the application; Don Russell seconded. Motion carried 5-0.

f. 55 Thornhurst Rd, Matthew O'Malia, GO Logic, LLC. – Conditional Use under Section 6.11 for an addition. Parcel U06-001-E, zoned RC.

Matthew O'Malia said they had been working with Sebago Technics for a renovation and addition. It was nonconforming because it fell in the shoreland setback. The lot was nonconforming also due to road frontage. The existing structure was constructed before 1960 and had been nonconforming its whole existence. The building would be used in the same way and was near to the end of its life. It needed renovations. The part of the building that was inside the setback toward the water would not be changed. They were expanding away from the water. They were increasing the volume of the house but not the footprint. They would be putting in a new septic system.

Public comment opened; no public comment.

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Dennis Keeler asked if he could walk him through the calculations. Mr. O'Malia started with the site plan and explained what was being proposed.

Dennis Keeler asked if it was essentially a teardown and rebuild.

Mr. O'Malia said that was correct. It was a removal of the existing structure and a building of a new one that would be very energy efficient.

Don Russell said that there would be no basement.

Mr. O'Malia said they didn't intend for one; it would have a slab on grade foundation.

Stan Given said they were eliminating the entire structure and making a new one with a foundation of slab on grade.

Mr. O'Malia said that was correct. The grading around the building would be maintained. They would attempt to preserve the existing trees.

Stan Given asked if the existing grade around the structure would stay the same.

Mr. O'Malia said exactly. There were some reverse grading, but the floor area would probably be raised 8 inches to one foot to address the reverse drainage issues.

Stan Given asked what the height of the existing structure was to the peak, above grade.

Mr. O'Malia said the existing peak was 13 feet from the existing floor elevation.

Stan Given said that it looked like the new one would be 16.5' or so.

Mr. O'Malia said that it would be 16.5 feet exactly.

Stan Given said they had an increase in height. He was looking at 11.b and wasn't sure if that fit in there.

Jay Meyer thought it was saying the change in elevation wasn't more than three feet.

Justin Brown said they had typically dealt with it if a structure was to put in a new foundation. They could raise it no more than three feet before they put it an expansion. For him it did not apply.

Jay Meyer said it didn't comply if it conformed to the 30% limit.

Justin Brown said if it were a cellar for instance, if they kept it less than 3 feet it wasn't considered an expansion.

Jay Meyer said the expansion would meet 11.a, but they were meeting the requirements.

Justin Brown said at that stage he thought it was a moot point.

Jay Meyer said since it was a teardown and rebuild, 6.11 was for the shoreland zone. 6.9 and 6.10 had to do with teardowns. 6.9 gave no problems. He thought they might have a problem under 6.10. The garage may be a problem. His own reading would prohibit them from making the garage larger unless they wanted to go before the Planning Board.

Mr. O'Malia asked if they were to pursue that with the Planning Board that would be a separate application.

Jay Meyer said they would need a separate application for the Planning Board. He read the language of 6.2d for Mr. O'Malia.

Dennis Keeler asked Justin Brown about the difference between nonconforming damage reconstructions and a teardown and rebuild. He read 6.5.4c.

Jay Meyer said 4 would allow reconstruction within a year.

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Justin Brown said if someone came in front of the Board to teardown and rebuild there were a lot of oddities. Under 6.9, it granted more leeway. The two just didn't seem to be on the same page.

Jay Meyer said he would be inclined to approve the residence. He thought the garage was a problem. They could put a condition on it, or make the garage and residence separate.

Jon Berry said as long as they were tearing down the garage, the quick fix seemed to be to move it 30 feet and there wouldn't be an issue. Under 6.10 he didn't think they could approve.

Jay Meyer said if they moved it 30 feet to get it out of the shoreland zone, they still had a teardown and rebuild.

Jon Berry observed that it was then no longer shoreland zoning.

Jay Meyer said it was still nonconforming because of road frontage.

Mr. O'Malia said if they could, they would like to have the house approved, and then they could go before the Planning Board for the garage. Then they could discuss it with the client to see which direction they would like to take it.

Jay Meyer said that was fine.

Justin Brown asked if the Board had approved such a thing. He had never seen a shed expansion like this.

Jay Meyer said he couldn't. The only section he could find was 6.2d.

Don Russell recommended they approve the application without a problem.

Dennis Keeler asked if the garage was a teardown.

Mr. O'Malia said it was. The entire shell would need to be rebuilt. It would be a lot of money to keep something limping along.

Jay Meyer said the only section he had been able to find that dealt with the enlargement of an accessory structure was 6.2d, and that called for Planning Board approval.

Dennis Keeler moved to approve the application with the condition that the detached garage be rebuilt in its existing location and not adding to the footprint, unless the applicant complies with 6.2d.

Jay Meyer said they still could have an enlargement in the existing location. He would track the language.

Dennis Keeler moved to approve the application under 6.11 with the condition that the garage be rebuilt in its existing location, unless the applicant complies with 6.2d.

Jay Meyer said they still could have an enlargement in the existing location. He would track the language in 6.10.

Dennis Keeler amended to say in the existing footprint. Don Russell seconded. Motion carried 5-0.

Jay Meyer said they could go to the Planning Board to seek an expansion.

5. Other Business

22 Providence Ave application:

Jay Meyer said they had one other applicant before them. The property was 22 Providence Avenue. The owner, Nelson, was requesting a special meeting.

No one was present to represent the Nelsons.

Justin Brown said the ZBA previously approved a single-story addition. He erred in issuing a building permit in granting a two-story with a bump out. The applicant's house had ripped out. In the minutes they

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confirmed that it would be one-story. It appeared to meet all the criteria and needed to come back to the ZBA. They had given permission to close in the building at their own risk.

Dennis Keeler asked for clarification. They had applied for a two-story and proceeded to build a two-story.

Justin Brown said it was his understanding that someone in the Code Office said his expansion, as long as it met all the conformities, didn't need to come back the ZBA. This was incorrect.

Dennis Keeler said they had a situation where someone blatantly ignored the approval and proceeded to build something other than what was approved.

Justin Brown said he didn't believe so. Mike Hayes, the builder, said his notes stated he called the office to see if he needed re-approval. He and Patrice Perreault didn't remember the call. It was quite clear in the minutes. He said errors were probably made on both sides. He didn't check the building permit with the approval.

Jay Meyer asked what the earliest was they could have a hearing.

Justin Brown said he believed it was two weeks. They could maybe move the August meeting back for that.

Don Russell asked if they would have any objections from the public.

Justin Brown said he thought there would probably be people there to comment.

Jon Berry said he didn't think they would have a full hearing on the veracity of what happened and whose account. He didn't see the steps of the error. If the applicant asked for a one-story and it was clearly discussed and shown in the minutes. Clearly a neighbor did that and noticed something was amiss. When approval for one-story, he didn't think that all other requirements were waived to come back before the Board. With the facts on the minutes and everything, he didn't believe that was reasonable. How would one believe after applying for approval of a ranch, how could they just think they could add another story without having to come back before the Board. He wasn't inclined to grant a special meeting.

Don Russell said it wasn't the winter either.

Jon Berry said Willie Audet wanted to vote by proxy and say no. He had the voicemail.

Stan Given would agree and so would Don Russell.

Stan Given asked how exposed they were.

Justin Brown said they were well into the project and exposed. He gave him permission to close it off.

Dennis Keeler said Mike Hayes was a professional and should know better. He would be more sympathetic it was just a homeowner and not someone who regularly dealt with such entities.

Jay Meyer said it was interesting how he described the phone call in the letter Mike Hayes wrote.

Stan Given moved to not conduct a special hearing; Don Russell seconded. Motion carried 5-0.

Ordinance Section 8.3e

Jon Berry said based on all of the conversations, ideas, and Bill Plouffe, he had a woman at his firm research the wind turbine regulations, cell phone tower regulations, etc. statewide that really created issues on visual aesthetics and compared them with law court cases to help formulate a definition that was defensible and would ostensibly pass judicial review. Its creation was meant to be a definition without amending 8.3e.

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Jay Meyer said it would be something to suggest to the Town Council for adoption to the Ordinance.

Jon Berry said yes. He wasn't wedded to it. He thought it was a starting point and appreciated it as a shift in reasonable or unreasonable judgment or criteria. As amended by them as a body. His law clerk would be ecstatic and he would be happy to move it to the Council with approval to the Board.

Jay Meyer asked Don Russell what his thoughts were.

Don Russell was disappointed by the workshop they had last month. It was intended as a guideline for the Zoning Board. He thought there should be some significant attempt to define what was significant. One of his neighbors supported turning down the application. Any sliver of water view was significant and to Don Russell that was unreasonable. That meeting was packed with relatives that had no standing.

Jay Meyer asked Don Russell how he felt about the approach of going to the Council for adding a definition, and also how he felt with the standard Jon Berry had brought.

Don Russell said he didn't think it gave real guidance. He was looking for something that was more specific, most likely numeric. Jay Meyer made a point about what was obscure. 10% loss of view of Portland Headlight was different than 40% of the boat launch at the Portland Yacht Club. He was willing to take it to a member of the Planning Board. He had talked to Bill Lunt.

Jon Berry said they looked at defining significant as Don Russell was suggesting. They looked everywhere for something that would stand Council scrutiny. If they were able to persuade the Council to pass something without legal muster, with the challenges that have been made they would do homeowners and abutters no service if it would go to the courts and get kicked back to them. There was no way to have a definition on quantification, or even a scale. Instead of using significant they would change it to unreasonable. It did leave room for judgment on the Cousin's Island power plant or Portland Headlight. They got as close to quantifiable measures without giving an actual number. He didn't think the definition left a lot of room for courtroom packing.

Don Russell said the comments by the public on desirability were unwarranted since the public was not qualified to make a decision on significant. It wasn't a public right of way or something else.

Jon Berry said they had added in typical viewer part. He thought they had achieved the same thing.

Don Russell said under his recommendation, other people may be heard but their comments wouldn't be decisive in judgment.

Jon Berry thought they had achieved the same thing.

Don Russell disagreed.

Stan Given said he would argue they already had that ability. He had a tough time with that part of the argument. He didn't want to make any changes to the Ordinance in respect to public comment.

Don Russell said he thought he could make a case before the Planning Board and Town Council.

Jay Meyer said the only thing before the Board was what Jon Berry had come with.

Dennis Keeler said the Board wanted a little more guidance on how it would be interpreted for section 8.3 before going to the Council. He would support a motion to present to the Council.

Don Russell asked why they couldn't agree internally to use what was discussed before.

Dennis Keeler said he didn't agree with that.

Jon Berry said the Community Planning and Development subcommittee had authority over the zoning ordinances. He didn't believe he should present it as a suggestion that they adopt it verbatim, but it was instructive.

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Dennis Keeler said he wouldn't mind showing up at a meeting.

Don Russell said he would submit it to a Town Councilor and a member of the Planning Board.

Jay Meyer said they could go to Council. The other way they could go they could use it as a standard. If as individuals they said that they found it as a helpful way to analyze it, they could do that without a vote. He didn't think that was the best way. The Council would be better. He suggested that they take two months, and anybody who wanted to could submit anything they wanted to go to the Council. Then the Board would vote on it.

Stan Given asked if an addition to the definitions section would require the same approval process.

Don Russell said he thought they agreed it would be a guideline.

Stan Given said ideally he would like to see the Ordinance changed. It would give them more than they had now.

Jay Meyer said he could say in his mind how he interprets it. As individuals that's what they could do. What the Council did would be out of their hands.

Jon Berry wasn't wedded to anything. He just wanted it put to bed.

Dennis Keeler asked if significant or adverse visual impact were anywhere else in the Ordinance.

Jay Meyer asked if the two month thing made sense. Stan Given thought so.

Don Russell planned to talk to Fred Chase and Bill Lunt to see what their recommendation was. He had sent them both his recommendations. He didn't think they should change the Ordinance but have a guideline. He thought they should do something as a Board and not involve the Council.

Jay Meyer wanted him to report back to the Board if he did that. In the meantime, would he have interest in a proposal for the September meeting?

Justin Brown said there was some other language about significant but they were the same thing. He said they may want to look at c and d in the Ordinance. They were just different ways of saying the same thing for him. He said they may want to look at the as well because the potential was there.

Dennis Keeler said Bill Plouffe thought significant didn't leave room to look at alternatives.

Don Russell mentioned 8.3e and thought other items were disposed of without real scrutiny at the workshop.

Jay Meyer agreed but said they didn't have a lot of time.

Meeting adjourned 8:48pm.

Respectfully submitted,

Jon Planer Recording secretary