

**Town of Mount Desert Planning Board
Regular Meeting Minutes
6:00 PM, June 24, 2020**

This meeting was held virtually and was recorded.

Public Present: Matthew Morehouse, Greg Johnston, Rob Putnam, Teresa Ball, Matthew Baird, Roger St. Amand, Katrina Carter, Donna Reis, Heather Evans, David Perkins, Willie Granston, Irene Driscoll,

Board Members Present:

Chair Bill Hanley, Meredith Randolph, Tracy Loftus Keller, Christie Anastasia, Joanne Eaton, Dave Ashmore

Tracy Loftus Keller is an Alternate, Non-voting Member.

I. Call to order 6:00 p.m.

Chair Bill Hanley called the meeting to order.

II. Approval of Minutes

June 10, 2020 –

MS. EATON MOVED, WITH MS. LOFTUS KELLER SECONDING, APPROVAL OF THE JUNE 10, 2020 MINUTES AS PRESENTED.

VOTE:

CHRISTIE ANASTASIA: AYE

MEREDITH RANDOLPH: AYE

DAVE ASHMORE: AYE

JOANNE EATON: AYE

TRACY LOFTUS KELLER: AYE

CHAIR BILL HANLEY: ABSTAINS

MOTION APPROVED 5-0-1 (HANLEY IN ABSTENTION)

March 11, 2020 –

MS. RANDOLPH MOVED, WITH MS. LOFTUS KELLER SECONDING, APPROVAL OF THE MARCH 11, 2020 MINUTES AS PRESENTED.

VOTE:

CHRISTIE ANASTASIA: AYE

MEREDITH RANDOLPH: AYE

TRACY LOFTUS KELLER: AYE

CHAIR BILL HANLEY: AYE

JOANNE EATON: ABSTAINS

DAVE ASHMORE: ABSTAINS

MOTION APPROVED 4-0-2 (EATON AND ASHMORE IN ABSTENTION)

Reorganization of the Agenda was discussed. It was agreed to address Item V. first, and then Item III.B and the rest of the items in order as the Agenda places them.

Discussion ensued regarding the proposed reorganization of the Agenda.

MS. ANASTASIA MOVED, WITH MS. EATON SECONDING, APPROVAL OF REORGANIZING THE AGENDA ITEMS AS PRESENTED.

VOTE:

CHRISTIE ANASTASIA: AYE

MEREDITH RANDOLPH: AYE

JOANNE EATON: AYE

DAVE ASHMORE: AYE

CHAIR BILL HANLEY: AYE

MOTION APPROVED 5-0.

III. Nonconformity – Sections - 4.3.6 & 4.3.5 Non-conforming Structures – Reconstruction or Replacement.

A. OWNER(S): Irene Driscoll

AGENT(S): William Hanley, WMH Architects

LOCATION: 6 Wildberry Way (formally 50 W.I. Pojereno Road), Mount Desert.

TAX MAP: 009 **LOT(S):** 044 **ZONE(S):** Shoreland Residential Five

PURPOSE: Sections 4.3.6 & 4.3.5 Reconstruction or Replacement of a Non-Conforming Structure. Amendment to a previously approved application on March 28, 2018.

SITE INSPECTION: 4:45PM

Continuation from June 10, 2020, Planning Board Meeting.

B. OWNER(S): Lapsley Family, LLC

AGENT(S): Matthew Baird, Matthew Baird Architects

Greg Johnston, G.F Johnston & Associates

LOCATION: 11 Barnacles Way, Mount Desert

TAX MAP: 023 **LOT(S):** 002-002 **ZONE(S):** Shoreland Residential One (SR1)

PURPOSE: Reconstruction or Replacement of a Non-conforming structure. Existing Residential Dwelling Unit.

This Item is a continuation from the June 10, 2020 discussion, and therefore Public Notice and abutter notification was not necessary.

No Conflict of Interest was found.

Ms. Randolph inquired whether Chair Hanley would be voting on the item, as he was not at the June 10, 2020 meeting. Chair Hanley confirmed he had read the Application and read through the June 10, 2020 Minutes.

Architect for the Applicant, Matthew Baird stated the Applicants do not have a conflict with Chair Hanley's participation.

The Board agreed this was acceptable.

Mr. Baird summarized that the Application was presented on June 10, 2020. At that meeting, the question arose regarding the setback non-conformity to an adjacent property, and whether that setback is a pre-existing non-conformity. The Item was tabled at that time in order to research the question.

1 Research has determined the original building footprint proves the setback is indeed a pre-
2 existing, non-conforming setback. Because of that, no waiver of the setback is required from
3 the current adjacent property owners.

4
5 Maximum allowable height for the proposed structure was questioned during the June 10, 2020
6 discussion. Notes and diagrams clarifying the issue have been distributed. The notes share the
7 calculations used in the height determination.

8
9 Planning Board members confirmed their receipt of the additional information.

10
11 Regarding the question of setback, Mr. Baird explained that the diagram shared is essentially the
12 site plan submitted as drawn. Underlaid on the plan presented is the original inspector's survey,
13 dated 1995. Mr. Baird pointed out the area encroaching into the setback between the Applicant
14 and the Graces. This setback is confirmed by the 1995 survey as existing prior to the Ordinance
15 taking effect. It is a grandfathered non-conformance and abutter release is not required.

16
17 Regarding the question of height, the diagram Mr. Baird presented to the Board shows height
18 calculations. The points on the corners of the structure on the downhill side and the sum of the
19 dimensions above sea level were figured and the data included on the survey. The mean was
20 determined from that data. Within Zone 2, which is downhill 75 feet, 20 feet in height may be
21 added to the base height. The Applicant's proposal shows a building height under the allowed
22 20 feet in Zone 2. In Zone 3, 35 feet in height may be added to the base height. The Applicant's
23 proposal shows a building height under the allowed 35 feet in Zone 3.

24
25 Mr. Baird added that a portion of the non-conforming section of the footprint is slated for
26 removal in the proposal. The section to be removed was pointed out. This removal reduces the
27 nonconformance in the Shoreland Buffer Zone and also in the setback area along the South
28 property line. Additionally, Mr. Baird shared the tax assessor's survey provided by the Town.
29 The assessor's survey confirms the existing non-conforming footprint. The 1995 survey shows
30 the residence was built on the footprint of the original house built in 1965 and is visible on the
31 1965 tax card. This shows the addition has always been there and has never been added to and
32 the nonconformance has never been increased in any way.

33
34 Agent for the Applicant Greg Johnston added that the earlier permit application includes a note
35 from Town officials stating that the 1995 reconstruction is not more nonconforming than it was.
36 He pointed out that the building dimensions for the 1965 building and the 1995 reconstruction
37 are exactly the same.

38
39 Regarding the height diagram, Mr. Baird explained the points he used to determine the
40 allowable height were from the water side – that being the downhill side. Datapoints were
41 taken from each intersection of the building footprint on that side. He chose not to take points
42 from newer construction that was higher. Higher datapoints would have increased the overall
43 average and allowed for a taller building. Mr. Baird pointed out the downhill side of the building
44 from which the datapoints were taken.

45
46 The diagram showing the maximum height allowed compared to the proposed building height
47 was shared. The proposed building is three inches under the maximum height allowed in the
48 Zone 3 portion of the building. He pointed out the Zone 2 portion of the building in the diagram,

1 and the maximum height allowed compared to the proposed building height, which is also
2 lower. The only portion above the Zone 2 maximum height is a railing, which is a permitted
3 obstruction of the height requirements.

4
5 For the record, Chair Hanley read the definition in the Ordinance on height of a structure:

6
7 *"The vertical distance between the mean original (prior to construction) grade at the*
8 *downhill side of the structure and the highest point of the structure, excluding*
9 *chimneys, steeples, antennas, and similar appurtenances that have no floor area."*

10
11 Mr. Johnston noted the project was before the Planning Board to determine whether or not it
12 met the setbacks to the greatest practical extent. Regarding other setbacks and slope of the
13 land, options for relocating the building are limited. Part of the nonconformity is being
14 removed. The building is not moving any closer to any abutter that hasn't given permission to
15 do so.

16
17 The Board had no further questions.

18
19 Chair Hanley asked for public comment.

20
21 Attorney for the Graces, David Perkins, stated that the letter from Mr. Baird states the intent is
22 to demolish a residence 3123sf in size, and to replace it with a building 4031sf in size, and that
23 new building would exist mostly within the footprint of the demolished building. Therefore,
24 Attorney Perkins asserted the proposal is to build a new structure. In the case of a new
25 structure, the Planning Board must refer to Section 4.3 of the LUZO, addressing Non-conforming
26 Structures. Section 4.3.2 states that all New Structures in the Shoreland Zone must meet all
27 applicable shoreland setback requirements. Attorney Perkins surmised that the Applicant is
28 unable to build a new structure, as proposed, on the lot, under Section 4.3.2.

29
30 The 75-setback line from the water, as well as the 25-foot setback line that runs further West
31 were pointed out on the plan. The high-water line is approximately 35 feet from the structure.

32
33 Per Mr. Baird's calculations, the maximum allowable height is 57'9", and the height of the
34 proposed building will be 57'6". The proposed building will be approximately 7 feet taller than
35 the existing building. Sections of the building will be lower than the existing. The roof will be a
36 green roof, which will be of environmental benefit. Ms. Ball noted the area is a single-pitch roof.
37 Only a small portion of the building reaches the maximum height noted.

38
39 Attorney Perkins stated his clients believe the Town of Mount Desert has a requirement that
40 front doors must not face abutting properties in the way this one is proposed to be. CEO Keene
41 stated there is no such requirement in the Land Use Zoning Ordinance.

42
43 Attorney Perkins declared that the proposed project is not an addition; it is a new structure. It is
44 therefore in violation of the Land Use Zoning Ordinance; in that it violates setback requirements.

45
46 Chair Hanley offered some context to reviewing the Application, the process, and the Sections
47 to be considered. This is the consideration of a reconstruction of a non-conforming structure.
48 Specifically, the Board is reviewing the Application under Sections 4.3.5 and 4.3.6 of the LUZO.

1 The Board has reviewed a number of this type of Application. As the Planning Board reviews the
2 Application, Section 4.3.6 is reviewed first, to determine whether the Board has jurisdiction to
3 hear the Application. Once jurisdiction is established, a review of Section 4.3.5 is made. Section
4 4.3.5 provides the criteria with which to review the Application.

5
6 Within Section 4.3.5, several criteria are included, with which the Board will review the
7 Application. Chair Hanley read the review section of Section 4.3.5:

8
9 *"In determining whether the building relocation meets the setback to the greatest*
10 *practical extent, the Planning Board or Code Enforcement Officer shall consider the*
11 *size of the lot, the slope of the land, the potential for soil erosion, the location of*
12 *other structures on the property and on adjacent properties, the location of the*
13 *septic system and other on-site soils suitable for septic systems, and the type and*
14 *amount of vegetation to be removed to accomplish the relocation."*

15
16 The Application must first be determined to be within the Planning Board's purview to hear it.
17 Chair Hanley read from Section 4.3.6:

18
19 *"Any non-conforming structure which is located less than the required setback from*
20 *a water body, tributary stream, wetland and which is removed, or damaged or*
21 *destroyed, regardless of the cause, by more than 50% of the market value of the*
22 *structure before such damage, destruction or removal, may be reconstructed or*
23 *replaced provided that a permit is obtained within eighteen (18) months of the date*
24 *of said damage, destruction, or removal..."*

25
26 Such a determination – whether or not 50% of the market value of a structure has been
27 removed, damaged, or destroyed, is usually made through the receipt of an appraisal. Chair
28 Hanley read more of Section 4.3.6:

29
30 *"An appraiser must make the determination of market value, as defined, of the*
31 *structure. In no case shall a structure be reconstructed or replaced so as to increase*
32 *its non-conformity."*

33
34 *"Any non-conforming structure which is located less than the required setback from*
35 *a water body, tributary stream, or wetland and which is removed by 50% or less of*
36 *the market value, or damaged or destroyed by 50% or less of the market value of the*
37 *structure, excluding normal maintenance and repair, may be reconstructed in place*
38 *if a permit is obtained from the Code Enforcement Officer within eighteen (18)*
39 *months of such damage, destruction, or removal. An appraiser must make the*
40 *determination of market value, as defined, of the structure."*

41
42 Chair Hanley felt it clear that the existing building was being proposed to be "removed,
43 damaged, or destroyed" by more than 50% of the appraised value. Therefore, the Planning
44 Board has jurisdiction to hear the Application.

45
46 Attorney Perkins pointed out the Section refers to "any non-conforming structure which is
47 located less than the required setback from a water body, tributary stream, or wetland...". CEO
48 Keene affirmed the building in question was located less than the required setback from the

1 ocean.

2
3 Mr. Baird pointed out that when the Land Use Zoning Ordinance was passed by the Town and
4 deployed across many lots that existed prior to the LUZO's existence, it rendered many buildings
5 non-compliant under the Ordinance. It would have been unfair to those property owners to be
6 penalized should their property require repair or replacement. The process currently being used
7 essentially preserves the value of the structure that exists and allows an owner to recreate it as
8 long as it does not create further non-conformity in the area. It can't be made worse, but it can
9 be replaced. The Ordinance protects the property owner so they may preserve the full property
10 value of the original structure.

11
12 Attorney Perkins read from Section 4.3.6:

13
14 *"If the reconstructed or replacement structure is less than the required setback it*
15 *shall not be any larger than the original structure, except as allowed pursuant to*
16 *Section 4.3.2 above..."*
17

18 Attorney Perkins stated this Section requires new structures to comply with setbacks.

19
20 Chair Hanley felt Section 4.3.2 alluded to State Shoreline guidelines that regulate the allowable
21 area of expansion. In the Town of Mount Desert, a non-conforming structure within the 75-foot
22 shoreland setback is allowed expansion of up to 30% of the original area of the structure.

23
24 Attorney Perkins asserted that non-conformance is not a favored condition. He asserted the
25 court system would likely liberally and strictly construe the rule to encourage the end to the
26 non-conformance. It was his determination that Section 4.3.6 does not, in fact, allow the
27 proposed building to become larger.

28
29 Chair Hanley clarified that Section 4.3.6 determines whether or not the Planning Board has
30 jurisdiction to hear the issue, based on the valuation of the reconstruction or replacement,
31 relative to the existing value of the structure. Once a determination has been made on Section
32 4.3.6, criteria in Section 4.3.5 is reviewed, and the burden is on the Applicant to show setbacks
33 have been met to the greatest practical extent, as well as other criteria. The building can be
34 built bigger; however, the Applicant must demonstrate that any increase in the building's size is
35 conforming to the rules set forth in the LUZO to the greatest practical extent.

36
37 Ms. Randolph pointed out that within the context of this building's size increase, the part of the
38 building getting larger is outside the setback area. The section of building within the setback
39 area is decreasing in size.

40
41 Mr. Johnston added Section 4.3.3 of the LUZO does say that if the building cannot be relocated
42 behind the setback, then it will be no larger than the original, except as allowed pursuant to
43 Section 4.3.2. Mr. Johnston suggested proceeding with the review of the Application in relation
44 to Sections 4.3.6 and 4.3.5. This would provide more information on the Application being
45 proposed.

46
47 Attorney Perkins asked for clarification on whether Section 4.3.5 of the LUZO applies to the
48 issue. Chair Hanley confirmed it did. He restated that Section 4.3.6 establishes whether or not

1 the Planning Board has purview to hear the Application. Once purview is established, Section
2 4.3.5 provides the criteria which the Applicant must meet in order to be approved. CEO Keene
3 confirmed the process outlined.

4
5 Attorney Perkins reported that Section 4.3.5 states that a non-conforming structure may be
6 relocated. Because the old building is being torn down, he stated there was no reason to repeat
7 any setback violation with a new structure. He interpreted Section 4.3.2 to demand the new
8 structure be conforming.

9
10 CEO Keene pointed out that Section 4.3.5 states that if a building can be relocated to meet
11 setbacks to the greatest practical extent, then it must be done. However, there is nowhere this
12 building can be relocated on this lot to meet setback requirements. Attorney Perkins stated the
13 building then must decrease in size.

14
15 Mr. Johnston read the LUZO definition for "Non-Conforming Structure":

16
17 *"A structure which does not meet any one or more of the following dimensional*
18 *requirements; setback, height, lot coverage or footprint, but which is allowed solely*
19 *because it was in lawful existence at the time this Ordinance..."*

20
21 The structure's non-conformity has been determined. This definition of Non-Conformity clearly
22 states the building is allowed because it existed prior to when the LUZO Amendment took effect.
23 Per the clear definition in the LUZO, the building is a legally existing non-conformity. Mr.
24 Johnston suggested proceeding with the review of the Application.

25
26 Chair Hanley reiterated that one of the first review criteria addressed in Section 4.3.5 is Size of
27 Lot. In the context of that criteria, the Planning Board is tasked with looking at ways to achieve
28 reduction in non-conformity, specifically whether the lot in question is such that a building could
29 be relocated outside setbacks; can the building be constructed in a manner that makes it
30 completely conforming? In this case, it's clear the lot is constrained and building parameters
31 limit the flexibility of the building footprint. There have been Applications where buildable
32 space outside setbacks was confirmed, and the Planning Board has required buildings be moved
33 when possible.

34
35 Chair Hanley asked for any further comment from the public. There was none.

36
37 A review of Sections 4.3.6 and 4.3.5 was made and the Sections reviewed are attached to these
38 Minutes.

39
40 Attorney Perkins asserted that if there is a question of contiguous lots, then it raises other
41 points to consider under Section 4.5, regarding Contiguous Lots and the Board must consider
42 those points. CEO Keene stated there was no requirement to merge the lots. Mr. Baird
43 confirmed there were no plans to merge the lots.

44
45 Regarding size, Mr. Johnston noted the lot size is 0.48 acres. The addition planned within the
46 conforming area of the lot will be over an existing gravel area. Because this section is being built
47 over already-developed surfaces the lot coverage can remain the same.

48

1 Ms. Randolph pointed out the allowable lot coverage is a maximum of 20%. The current lot
2 coverage is 26%. She suggested encouraging the Applicant to stay as close to 20% lot coverage
3 as practical. Mr. Johnston felt that according to the LUZO, non-conformities may lawfully exist.
4 Non-conformities existing prior to the LUZO may continue. It was noted the gravel is parking
5 area. The addition planned for the area is a garage. The proposed use of the area is essentially
6 the same as the current use.

7
8 Within the shoreland zone, all non-vegetative surfaces are considered lot coverage. In prior
9 projects areas of non-vegetative lot coverages have been adapted for other purposes.
10 Technically, the gravel drive, and the proposed garage in place of the gravel drive are both
11 considered structure.

12
13 Mr. Baird noted the portion of the structure within the 75-foot setback area will have a grass
14 roof. Such a roof will theoretically catch water and benefit the environment within the 75-foot
15 setback.

16
17 It was clarified that lot coverage comes under the consideration of the CEO.

18
19 Mr. Baird pointed out that the house cannot be moved any closer to the Grace lot. It cannot be
20 moved further into the sideyard setback. And it cannot be moved closer to the water. There is
21 no other place on the lot to put the footprint of this house. As a plus, new ground will not be
22 used for the rebuild; the construction will happen on the site already built upon.

23
24 Attorney Perkins reported that the Graces feel the house does not need to be bigger. His
25 interpretation of Section 4.3.6 is that the house cannot be made bigger unless the standards of
26 Section 4.3.2 are met. This Application does not meet those standards.

27
28 Mr. Baird disagreed. The Applicant is allowed to expand the footprint up to 30%. The proposed
29 expansion is under 30%.

30
31 Attorney Perkins disagreed. Such an expansion is not allowed when the building is being torn
32 down.

33
34 Mr. Baird maintained the footprint can be preserved and expanded up to 30%. He reiterated
35 the footprint within the setback area is being reduced. Size increase is occurring only within the
36 buildable lot area. CEO Keene noted the issue is explained under Section 4.3.2.D.3.

37
38 Attorney Perkins disagreed. That rule only applied to a building being renovated. It did not
39 apply to a building being completely reconstructed. Mr. Johnston reiterated the allowance is
40 allowed under Section 4.3.2.

41
42 Ms. Randolph inquired about the construction of a full basement and the impact on the land it
43 will cause. Mr. Baird noted that a full basement will not be built, due to the need for blasting.
44 The basement will be limited to an area that comprises approximately a third of the surface area
45 of disturbed lot coverage; half the footprint of the house. There is already a full foundation.
46 The chimney will be built in the same location. Piers extend under the house. There is an
47 existing foundation support structure for the existing house. A new foundation is proposed to
48 be constructed in the location of the existing. The existing structure is on partial piers and

1 partial frostwall. Outside of the proposed full basement area, the foundation will be crawlspace
2 with a perimeter frostwall.

3
4 Mr. Johnston noted that with regard to the potential for soil erosion, installing piers requires
5 scraping down to bare ledge, which involves moving more soil. Overdig on piers promotes the
6 potential collection of silt. The basement will likely require some blasting. There is no way to
7 know how much blasting will be needed. He did not believe a basement hole increases the
8 potential for erosion.

9
10 Mr. Baird noted that the area where the basement is planned is the footprint of the area where
11 the proposed green roof will be. Erosion-causing rainwater will theoretically be caught by the
12 roof and will evaporate from there. A green roof should mitigate erosion in the area. Mr.
13 Johnston added that the wooded buffer in that area will handle any runoff that does occur from
14 the green roof.

15
16 Ms. Randolph felt that in keeping with allowing a building to be rebuilt within a setback the
17 intent is to protect the land within the shorezone. Putting a full basement in the setback zone is
18 not in keeping with the spirit of the code, however there is no wording within the LUZO giving
19 the Planning Board authority over such an issue. Ms. Randolph did not feel the basement was in
20 keeping with the spirit of the LUZO's intent.

21
22 Mr. Baird noted that the weight of a green roof is significant. To support that weight on
23 columns can be done, however numerous piers must be used for support. This requires
24 scraping down to the ledge. Right now, the Applicant has a disturbed, un-vegetated piece of soil
25 under the house. If we were to expose that area to the elements, it would cause erosion
26 because there is no vegetative mass to hold it in place. There is nothing within the soil that can
27 prevent erosion. By buttressing the soil that does have root mass and by installing a green roof,
28 erosion within the shoreland zone should be mitigated and improved by a significant amount.

29
30 The structure is eight feet, and twelve feet above the high-water line. Construction there
31 precludes the potential for erosion caused by close proximity to the water.

32
33 Attorney Perkins stated that with regard to the height of the structure, Section 4.3.2.D.2 states
34 that structures located less than 75 feet from the normal high water line of a water body, the
35 maximum height of any structure may not be greater than 20 feet or the height of the existing
36 structure.

37
38 Mr. Baird explained that within Zone 2, the area below 75 feet and above 25 feet, the project is
39 compliant because the proposed structure will be less than 20 feet above the established base
40 height. In Zone 3, the area above 75 feet, the project is compliant because the proposed
41 structure is below 35 feet above the calculated base height.

42
43 Attorney Perkins disagreed. He asserted the LUZO states 20 feet or the height of the building,
44 whichever is higher. Mr. Baird agreed that this was true for the section of the structure in Zone
45 2. He restated the building height within Zone 2 is below 20 feet above the base height. Chair
46 Hanley agreed there are different levels of compliance in the different Zones, with the
47 restrictions growing as the structure gets closer to the water. Zone 2 height requirements are
48 more restrictive than Zone 3 height requirements.

1
2 Attorney Perkins stated this did not fit with the language of 4.3.2.D.2. There is no language
3 suggesting the requirement is broken up by Zone.
4

5 CEO Keene noted the LUZO states that a structure 0 to 25 feet from the setback is limited to 15
6 feet in height, or if a taller building is currently there, a reconstructed building can be built to
7 the height of the existing building, whichever height is greater. A structure 26 feet to 75 feet
8 from the setback is limited to 20 feet in height, or if a taller building is existing, a reconstructed
9 building can be built to the height of the existing building, whichever height is greater. A
10 structure 76 feet to the lot depth, 35 feet in height is allowed.
11

12 Attorney Perkins disagreed with the CEO's and Planning Board's assessment. He asserted the
13 LUZO language says that a structure within 75 feet of the setback is allowed a maximum height
14 of 20 feet or the height of the existing structure. The proposed building exceeds the height of
15 the existing structure. He admonished the Board to ignore past practice and follow the
16 Ordinance. The entire building must comply with the shoreland setback requirements.
17

18 Mr. Baird stated that the concept of the limitation is a stair-step up from the shoreland. The
19 closer the structure gets to the shoreland, the lower the structure is required to be. This
20 concept has been the basis of fact in all shoreland zoning construction proceedings he's ever
21 been a part of. You cannot apply stricter shoreland regulations to upland areas. To do so would
22 render most buildings within the shoreland zone non-compliant. The rocky shoreline and steep
23 topography in the area would render any second story impossible.
24

25 Attorney Perkins stated that this did not matter. He reminded the Board that the Purpose
26 section of the LUZO states the Board shall not increase non-conformance. Making this building
27 higher simply because buildings have been allowed to be built higher in the past is wrong.
28

29 Mr. Johnston stated that Shoreland Zoning regulations come from the State of Maine. The
30 interpretation the Town is using is consistent with many case tests of the State Regulations and
31 DEP requirements. There would be no reason to define the different zones of a structure and
32 the different heights otherwise. The intent is to minimize the massing within the 75-foot
33 setback. The section of building inside Zone 3, which is outside the 75-foot setback, is
34 conforming. The height definitions are being misconstrued in an area that is completely
35 compliant. Everything outside the setback is conforming. Following Attorney Perkins' direction
36 would result in applying requirements for inside the Zone outside the Zone, which is incorrect.
37

38 Attorney Perkins argued that an existing non-conforming building is being replaced by a larger,
39 higher, more impactful non-conforming building. This is in violation of the Statute.
40

41 Mr. Baird reiterated that the non-conformance of the structure is being reduced. Looking at
42 where the Grace building is, the view from their house will be improved through the reduction
43 of the non-conformance. Attorney Perkins stated the Graces did not consider it an
44 improvement.
45

46 Mr. Baird reiterated that non-conformity within the Zone 2 is being removed. The non-
47 conformity is not being increased.
48

1 Attorney Perkins stated the Graces are concerned with light impacts, the building being larger
2 and higher, the position of the garage and the placement of propane tanks, and the increase in
3 size of the building and its impact on them. Additionally, they are concerned with construction
4 during the summer season.

5
6 Mr. Baird admitted that construction can be a disturbance and the Applicant is sensitive to that.

7
8 Regarding the lights and site design, the current site design for the existing house is such that
9 the cars are parked facing the adjacent lot. The new design intends that cars will be parked
10 facing a different direction, with parking in a garage being an option. These changes will reduce
11 headlights aimed toward the Grace lot.

12
13 Regarding outdoor lighting, the Application is dark-sky compliant. This means the use of
14 exterior lights is limited, and lights pointing upward are restricted, per code requirements in the
15 Town of Mount Desert.

16
17 Mr. Baird pointed out a thick evergreen wall that provides some buffering.

18
19 Attorney Perkins suggested that maintaining or perhaps improving the buffering would be
20 helpful.

21
22 Chair Hanley agreed. As much natural buffering between the properties as practical would be
23 important. He asked if the Applicant was considering increasing the buffering.

24
25 Mr. Baird reported that discussions have been held and the Applicant supports better buffering
26 between the properties. Mr. Ashmore suggested the Board make more buffering a
27 requirement.

28
29 Attorney Perkins agreed to convey the request that the Graces communicate what kind of
30 buffering they would like to see to the Applicant. Perhaps the Applicant could report back with
31 a buffering plan. He inquired what the procedure would be if the Graces did not approve of the
32 Applicant's suggestions. Chair Hanley guessed the Board would likely include a requirement
33 that vegetative buffering is to be employed between the lots. He felt the property owners
34 would have to come to an agreement on what that buffering will look like. Mr. Baird agreed
35 such a requirement was fair.

36
37 Attorney Perkins asked again what happens if the buffering is not worked out to the Grace's
38 satisfaction.

39
40 Chair Hanley explained that if the requirement is included and post-construction evidence that a
41 criterium was not met is found, there are Municipal pathways to pursue compliance. Mr.
42 Hanley added that it's rare when a condition of approval is simply ignored. In such an instance,
43 the Applicant is brought before the Board to ascertain why the Condition has not been met.
44 Compliance can be conditioned further and a deadline for compliance set.

45
46 Ms. Randolph stated a Condition set must be stated as clearly as possible so as to avoid a
47 vagueness that makes compliance difficult.

48

1 Chair Hanley suggested the buffer be an established year-round vegetative buffer. Possibly in
2 combination with fence or wall, so its effectiveness does not decrease, relative to the time of
3 year. Ms. Randolph added that the buffer should be tall enough to disrupt light coming from
4 the Applicant's property.

5
6 Mr. Johnston pointed out there are no LUZO standards for buffers between residential
7 structures. Knowing what's there for tree growth, transplanting large-growth trees may not be
8 beneficial to the already-existing trees. He suggested including screening or buffering or a
9 combination of both. Mr. Johnston noted that for example, if ledge were found in the area
10 causing more work, cost, and impact to install a vegetative buffer, a fence perhaps might be the
11 wiser and more effective choice. Locking into a planting plan without fully studying the area
12 might not be wise. Chair Hanley noted that successful buffers often incorporate both elements.

13
14 Mr. Baird suggested that since the buffer will be mutually beneficial to both property owners
15 perhaps it should straddle the line and be a shared obligation. Ms. Randolph disagreed; the
16 onus is on the Applicant to build an effective buffer. Mr. Baird noted some of the existing trees
17 are on the neighbor's property, some on the Applicant's. The buffer will likely need to
18 incorporate some of the neighbor's trees to be effective. The Applicant will not want to build a
19 buffer, only to have the Grace's remove their trees to increase their yard space.

20
21 Chair Hanley stated the Board could only give direction toward the importance of buffering.
22 This Application is the Applicant's burden to convey compliance. Obligation cannot be extended
23 to others.

24
25 Ms. Randolph disagreed that full-growth trees would be required to obstruct the Applicant's
26 light.

27
28 Mr. Johnston felt buffering would need to be worked out with the neighbors. The ability to
29 enforce buffering is the concern. There is no recommendation or standard in the LUZO to be
30 used in this case. He asked where the Ordinance gives guidance on a standard, and how will
31 installing a buffer be enforced.

32
33 Attorney Perkins stated the Ordinance was being reviewed regarding impact on the neighbor.
34 The neighbors were clear on their dissatisfaction of the light and visual impact of the building.
35 The Board can reject this Standard or set a condition of adequate buffering or shielding to block
36 lighting and visual impact. If the Applicant does what they say they will do, it should not be an
37 issue. He felt it was the least the Applicant can do.

38
39 Mr. Baird stated the Applicant wants to install the buffer. He hoped for some constructive
40 language stating the neighbors would work together proactively to create a green buffer.

41
42 Wording for a buffering condition was discussed.

43
44 Mr. Baird reiterated that the Graces complained about exterior lighting. Those lights will comply
45 with dark sky ordinances. Additionally, the Applicant agrees to work proactively with the Graces
46 regarding a green buffer that provides separation between the two properties and is
47 commensurate with the height of the adjacent structure. But discussion should not extend to
48 interior lighting or window placement.

Chair Hanley noted that exterior lighting is specifically regulated in the LUZO.

Discussion ensued regarding the rest of the agenda to be discussed and the lateness of the hour.

MS. RANDOLPH MOVED, WITH MS. ANASTASIA SECONDING, TO RECESS THE MEETING FOR FIVE MINUTES.

VOTE:

MEREDITH RANDOLPH: AYE

CHRISTIE ANASTASIA: AYE

JOANNE EATON: AYE

DAVE ASHMORE: AYE

CHAIR BILL HANLEY: AYE

MOTION APPROVED 5-0.

There was a five minutes recess.

IV. Conditional Use Approval Application(s):

A. Conditional Use Approval Application #005-2020

NAME: 79 Harborside Road, LLC

AGENT: Greg Johnston, G.F. Johnston & Associates

LOCATION: 79 Harborside Road, Northeast Harbor

TAX MAP: 005 **LOT:** 014-006 **ZONE(S):** Shoreland Residential 2

PURPOSE: Section 6B.8 Fences and walls. Proposed fence exceeds CEO 6' height authority.

SITE INSPECTION: 3:45PM

B. Conditional Use Approval Application #006-2020

NAME: Matthew Morehouse

LOCATION: 92 Beech Hill Cross Road, Mount Desert

TAX MAP: 009 **LOT:** 093-001 **ZONE(S):** Residential One

PURPOSE: Section 3.4 – Animal Husbandry (Non-Commercial). The care and Keeping of Livestock/Poultry - Chickens and a Chicken Coop.

SITE INSPECTION: 5:15PM

V. Other COVID-19 Discussion and 2020 Temporary Outdoor Seating Accommodation(s).

NAME: Manchester Bros., Inc.

LEASEE: Jennifer Kelley

D/B/A Seaside Deli and Sweets, LLC

LOCATION: 5 Sea Street/120 Main Street, Northeast Harbor

TAX MAP: 024 **LOT:** 104 **ZONE(S):** Village Commercial

PURPOSE: Discuss and review outside seating proposal for 2020 season. Same amount of seating proposed outside, as inside.

SITE INSPECTION: 4:15PM

No conflict of Interest was found.

CEO Keene confirmed adequate Public Notice and Abutters were notified.

Ms. Eaton reported on the Site Visit. The area is away from the road. There are three tables,

1 and a temporary fence in the back hiding BCM Construction equipment stored nearby. Ms.
2 Eaton's only concern was the need to maintain a six-foot distance between the tables.

3
4 Chair Hanley asked for public comment.

5
6 CEO Keene informed the Board that at the SelectBoard Meeting on June 22, 2020 approval was
7 given for both restaurants and retail businesses to put tables and chairs on the sidewalks,
8 provided a 3-foot sidewalk walking area can be maintained in order to comply with ADA
9 regulations. Any business wanting to do so will be required to apply to the SelectBoard for
10 permission. This action occurred after Ms. Kelley initially appeared before the Planning Board.
11 Because Ms. Kelley is using space in her driveway she will not need to appear before the
12 SelectBoard.

13
14 CEO Keene noted there was no public response to Public Notice/Abutter notification. No
15 abutters attended the Site Visit.

16
17 Donna Reis stated the tables must be six feet apart. Is that not the case with Ms. Kelley's
18 tables? Chair Hanley reported that the two tables in the front appear to be closer to each other
19 than six feet in distance. Ms. Reis restated they must be six feet apart from each other.
20 Because the tables are in a driveway, six feet distance can be easily accomplished.

21
22 MS. RANDOLPH MOVED, WITH MS. EATON SECONDING, APPROVAL OF THE REQUEST FOR
23 OUTDOOR SEATING FOR THE 2020 SUMMER SEASON AS PRESENTED, CONTINGENT UPON
24 THOSE TABLES BEING SIX FEET APART FROM EACH OTHER AND FOLLOWING CDC GUIDANCE FOR
25 OUTDOOR SEATING.

26 VOTE:

27 CHRISTIE ANASTASIA: AYE

28 MEREDITH RANDOLPH: AYE

29 DAVE ASHMORE: AYE

30 JOANNE EATON: AYE

31 CHAIR BILL HANLEY: AYE

32 MOTION APPROVED 5-0.

33
34
35 Chair Hanley noted there are three items remaining on the Agenda; Items III.A., IV.A., and IV.B.

36
37 Ms. Randolph suggested continuing the meeting to a date certain. Mr. Ashmore inquired whether there
38 was any issue on the Agenda that delaying would cause undue hardship.

39
40 Chair Hanley noted he is the Agent for one of the Applicants. That Applicant has an outstanding Notice
41 of Violation. CEO Keene stated the violation has been outstanding since March/April. The Applicant
42 does not have an occupancy to be occupying her building.

43
44 CEO Keene suggested addressing the Applicant with the violation now.

45
46 After some discussion, it was agreed to Continue the Meeting to the following night.

47
48 MS. RANDOLPH MOVED, WITH MR. ASHMORE SECONDING, TO CONTINUE THE MEETING TO THURSDAY,

1 JUNE 25, 2020, 6:00 PM.
2 VOTE:
3 DAVE ASHMORE: AYE
4 MEREDITH RANDOLPH: AYE
5 CHRISTIE ANASTASIA: AYE
6 JOANNE EATON: AYE
7 CHAIR BILL HANLEY: AYE
8 MOTION APPROVED 5-0.

9

10 The Meeting was Continued to Thursday, June 25, 2020 at 6:00 PM.

11

12

13 **VII. Adjournment**

14

15 The Meeting ended at 9:19PM.