**TOWN OF HARWICH**

**ZONING BOARD of APPEALS**

**WEDNESDAY, AUGUST 31, 2022**, **7PM**

**TOWN HALL – GRIFFIN ROOM**   
**MINUTES** 

**Board Members Present**: G. Brian Sullivan, Al Donoghue, David Ryer, Chris Murphy, Timothy Bailey, David Nunnally

**Board Members Absent:** Joe Beasley

**I.CALL TO ORDER:**

Meeting was Called to Order at 7:00 PM by Brian Sullivan, Chair. Mr. Sullivan read opening remarks regarding the purpose of the meeting to hear and decide applications before the Board of Appeals and the Recording Notice.

**II. PUBLIC HEARINGS**

**Case No**. **2022-26 22 Ocean Ave LLC**, c/o William D. Crowell, Esq., 466 Route 28, Harwich Port, MA 02646, owner of the property located at 22 Ocean **Ave**, Assessors’ Map 6B, Parcel L10, in the RH-2 Zoning District. The Applicant seeks a Special Permit, or in the alternative a Variance, to demolish and replace a pre-existing, nonconforming single-family dwelling, pursuant to the Harwich Zoning By-laws §325-52 and -54 and MGL Chapter 40A Sections 6 & 10.

Attorney William Crowell introduced himself and requested a continuance of the case to permit more time for the applicant to review the project with abutters and resolve any differences between surveys.

Motion was made by Mr. Ryer and seconded by Mr. Nunnally to allow the continuance until the September 28, 2022, meeting. The Board voted unanimously to approve. An ‘Agreement for Continuance’ was prepared and signed by Attorney Crowell and assented to by Brian Sullivan, Chairman.

**Case No. 2022-27 Dale M. & Susan E. Shaw**, c/o William D. Crowell, Esq., 466 Route 28, Harwich Port, MA 02646, owner of the property located at 45 Christopher Way, Assessors’ Map 108, Parcel X3-20, in the RR Zoning District. The Applicant seeks a Special Permit, or in the alternative a Variance, to construct an addition and retaining wall on a pre-existing, nonconforming single-family dwelling, pursuant to the Harwich Zoning By-laws §325-52 and -54 and MGL Chapter 40A Sections 6 & 10.

Al Donoghue, Clerk read into the record a notice by the Harwich Board of Health that the proposed project meets setbacks to the current septic system which had passed a Tittle Five Inspection in August 2013 designed for three bedrooms. The Board of Health will require a complete floor plan of the entire dwelling be submitted with the Building Permit Application to determine bedroom count for final approval of the proposed project.

Mr. Sullivan, Chair assigned the members voting on the Case: Al Donoghue, David Nunnally, Chris Murphy, David Ryer and Timothy Bailey.

Attorney William Crowell introduced himself and first presented two documents to the Board.

Mr. Donoghue, Clerk, read into record the letter by Dan Perpall, an immediate abutter at 41 Christopher Way, Harwich, which stated he had examined the plans for the Shaw’s addition and replacement of their retaining wall and had no issue with the project nor the retaining wall being closer to his property line instead of a 20’ setback. Mr. Perpall’s letter encouraged the Board of Appeals to issue a variance because it would improve the appearance of the property and enhance the value of the neighborhood.

The other document was a statement by the Applicant as to why they have retired to Harwich and submitted the building application for the project.

Attorney Crowell discussed relevant portions of the case, noting the applicants are seeking a Special Permit to construct an addition to the rear of the subject property and retaining wall as per the Certified Plot Plan by TS Land Surveying, Inc. dated June 13, 2022, and Elevation Plans by Muldoon Architects dated June 3, 2022. In the alternative the Petitioners request a Variance for the same.

Attorney Crowell reviewed that the proposed addition would eliminate approximately half of the existing deck and will contain additional habitable space on the first floor with garage under as shown on plans submitted. Although the addition will meet applicable setback and building coverage requirements, the existing site coverage will increase from 27.5% to 34%. However, in accordance with findings of the Gale Case and existing nonconformity can be intensified by Special Permit and will not constitute a substantial detriment to the entire neighborhood.

In addition, the Applicant seeks to expand the driveway to allow for sufficient width and turning radius for the garage under the addition, replace an existing deteriorating retaining wall and construct a retaining wall 15 feet from the northwest boundary. Attorney Crowell addressed the opinion of the Harwich Building Commissioner in his June 15, 2022, letter that regarding the replacement of the retaining wall that a variance from the Board of Appeals would be required. Attorney Crowell stated it is the Petitioner’s contention that in accordance with Section 325-17F of the By-law that the retaining wall is structure under 4 feet in height which would reduce the required setback from 20 feet to 10 feet. The proposed retaining wall will be 15 feet from the said lot line and therefore would not require relief from the Board. However, if the Board believes that a Variance is required for the retaining wall the Petitioners contends that the property has a unique “slice of pie” shape as well as unique topographical features in that it drops off approximately 4 feet from the northwest lot line down to the proposed retaining wall. If a Variance is not granted, a hardship due to the possibility of the banking not holding without a retaining wall needed to expand the driveway to accommodate both turning radius and ease of use by the Petitioner. Attorney Crowell requested that a Special Permit be granted for the addition and regarding the retaining wall that a Variance be granted if the Board feels one is required.

Mr. Sullivan questioned that the retaining wall would be under 4’ in height. Based upon his onsite observations he noted that the rear portion of the existing retaining wall was already close to 4’ in height and that given the slope of the property, if the retaining wall was moved/rebuilt closer to the lot line that its height at that location would be over 4 feet. Therefore, a Variance would be required.

The Applicant, Mr. Shaw, asked to address this with the Board and agreed that at the location specified by Mr. Sullivan, the retaining wall would be about 5 feet in height but at that location the portion of the wall which will be over 4’ in height would be set back 20’ or more from the lot line. Portions of the retaining wall that would be within the 20-foot setback would not exceed a height of 4 feet

Mr. Ryer commented that granting a Special Permit for the addition, in this Case, was consistent with the findings of the Gale Case and that the project would be an intensification of an existing nonconformity and not be a substantial detriment to the neighborhood. Regarding the retaining wall Mr. Ryer agreed with Attorney Crowell that 325 17F provides that certain structures under 4’ in height can project into one half the setback and the proposed retaining wall is such a structure and therefore The Board can approve as a matter of right.

Mr. Shaw stated that he has not had an excavator contractor look at the site and expressed that it might be worthwhile to obtain a variance, so if the contractor recommends a portion of the wall under the 20’ setback needs to be above 4’ then approval would be in place.

Mr. Ryer stated his opinion that the retaining wall would not qualify for a Variance as a hardship cannot be created by the applicant.

Mr. Murphy reviewed his opinion that given the topography of the lot and limitations of driveway use that a Variance was warranted for the retaining wall if required. But does agree if the wall is under 4’ they can build it by right.

Mr. Donoghue stated that a Special Permit for the addition could be granted. Regarding the retaining wall if under 4’ in height should be approved as a matter of right or granted a variance if requested.

Mr. Bailey agreed that the retaining wall as shown on the plan can be done by right, but commented that if a Variance is granted and the wall was above 4’ and less than 20’ from the setback, the location of the wall could not be change from location as shown on the plot plan

Mr. Ryer pointed out that the Applicant is obliged to give The Board final plans, especially when applying for a variance. We should not approve a carte blanche Variance. The retaining wall can be approved by right and if the wall will be higher than 4’ then come back to The Board.

Attorney Crowell asked if The Board could approve a maximum of 5’. Mr. Sullivan stated that he agreed with Mr. Ryer and final plans would be required to consider a Variance.

Discussion amongst the Applicant, Attorney Crowell, and Board Members regarding approval of the Special Permit for the construction and declaration that the wall could be built as shown under 325 17F. Therefore, construction could commence and if the excavator determines the wall within the 20’ setback will exceed 4’in height than come back to The Board, which would require another filing fee.

Mr. Sullivan opened the meeting for any Public Comment and given there was none asked for a motion to close the Public Meeting.

Motion to close the Public Meeting made by Mr. Ryer and second by Mr. Donoghue. Mr. Sullivan asked for Vote to close the Public Meeting. Vote: 5-0-0. Motion carries.

Mr. Sullivan asked for additional comments by members of The Board as well as the Applicant.

Attorney Crowell commented that the Applicant would like to request a continuance until the September 28, 2022, meeting and will pursue plans confirming the location of the retaining wall and height.

Mr. Sullivan asked for a motion on the Case.

Mr. Donoghue made the following motion to continue **Case No. 2022-27 Dale M. & Susan E. Shaw**, c/o William D. Crowell, Esq., 466 Route 28, Harwich Port, MA 02646, owner of the property located at 45 Christopher Way, Assessors’ Map 108, Parcel X3-20, in the RR Zoning District. The Applicant has been granted a continuance until the September 28, 2022, meeting of the Harwich Appeals Board. Motion was seconded by Mr. Murphy. Vote: 5-0-0. Motion carries; case continued.

**PUBLIC MEETING:**

The Chair provided a handout for the remaining items on the meeting agenda

**III. APPROVAL OF MINUTES**

Mr. Sullivan reviewed that he was informed that the meeting of July 27, 2022, was not recorded although based upon the light, the equipment appeared to be operating. Therefore, he prepared the minutes as presented.

Mr. Murphy moved to approve the Minutes. Mr. Donohue seconded. The Board voted unanimously in favor. Motion carries; minutes approved.

**IV. NEW BUISINESS**

**Chloe’s Path Apartments**

**1. MassHousing Letter of 8/8/22 -** Project Eligibility Letter has been received for Chloe’s Path Apartments. Mr. Sullivan reviewed that all discussion tonight by The Board will be on actions and mechanics only. Mr. Sullivan then reviewed the following items.

a. Comprehensive Permit Application as of today, not filed with Harwich Board of Appeals

b. Attorney Andrew Singer was emailed the new CPA (Comprehensive Permit Application) and receipt was acknowledged. New CPA was also posted on town website.

c. Timetable - When CPA is filed – Public Hearing is required within 30 days of the filing date. Mr. Sullivan asked The Board to refer to handout on all subsequent dates.

d. In anticipation of a potential CPA filing there was a discussion amongst The Board Members regarding availability to attend special meetings late September or early to mid-October Public Hearing. Mr. Sullivan indicated he will discuss late October and November dates at the September regular meeting of HBA.

2. **Request by Board of Appeals to Selectman for legal assistance.**

Mr. Sullivan reviewed that with the PEL for Chloe’s Path Apartments approved he sent a request for legal assistance to the Harwich Board of Selectman which has been approved.

**3. Massachusetts Housing Partnership**

a. Mr. Sullivan stated that he has contacted MHP and provided The Board a handout of the 2022 Chapter 40B Technical Assistance Program Guidelines he received from MHP.

b. Emma McGurren, of MHP has suggested meeting dates with HBOA. Her staff assistant is Katy Lacy.

9/19 Monday 11-2

9/26 Monday 11-2

9/14 Wednesday meeting before 5PM also mentioned but Lecia cannot attend that date

c. At meeting MHP will review submitting application for obtaining a grant for technical assistance from a third-party consultant. Application can be prepared in advance of receipt of CPA but not submitted until after received. Application must be signed by HBOA Chair and Harwich Chief Elected Official.

**4. Email contact of member of HBOA by resident regarding Chole’s Path**

Mr. Sullivan reviewed he had been contacted by email by a Harwich resident expressing their views. In response he replied by email, approved by Town Council, requesting no further contact and informed the resident that Open Meeting Laws would be followed by himself and all Board members. Mr. Sullivan warned The Board that since he had been contacted that he expected other members might be also and if so, requested he be notified. Further reminded members not to engage in any discussion or emails regarding any current or potential case before The Board. If any Board member receives an email then Town Council will approve any reply.

**Updated Chapter 325 Zoning Manual**

Mr. Sullivan asked if all Members had reviewed the updated Zoning Manuals. Mr. Nunnally indicated he had not picked his up yet. There were no corrections or omissions discussed except for the status of Attachments. Members indicated that the Zoning and District Maps were difficult to read and most needed to be updated. Mr. Sullivan informed the Board that per the Town Clerk, in 2023 Attachments/maps etc. will be updated. Mr. Sullivan stated that he has requested with the Town Clerk that when the 325 Zoning Manual on the Town Web site is next updated that the index is properly updated so that it can be printed out, which it can not be with the current version.

Pertaining to Zoning Maps, a review found that the Solar Farm Overlay District Map was missing. As the maps would still be too small to read when sized to fit in Members binders it was suggested that a file of full-size maps be made available for review during meetings.

**Cape Cod Commission letter of August 9, 2022**

Mr. Sullivan reviewed the receipt of a letter from the Cape Cod Commission regarding the Dirtworks Mining operation, Denwich Road, Harwich. The operation is situated on land within Harwich and South Dennis and apparently 60000 to 80000 sf of land has been cleared for mining without proper permitting. As a result of the property being situated on two towns a referral was made to the Cape Cod Commission.

Mr. Sullivan indicated he has contacted CCC to inquire what involvement and responsibility HBOA has currently and any steps our Board should take at this time``. He is awaiting a call back from Jordan Veloza, Chief Regulatory Officer for CCC

**Open Meeting Law Email from KP Law**

Mr. Sullivan reviewed he had received an email regarding Open meeting rules for Harwich as well as regulations on scheduling an executive session. He will send out the information shortly to all Members.

**Procedural Comments**

Mr. Ryer pointed out that regarding cases that were heard which are granted a continuance after the Public Meeting was opened and closed, the Public Meeting is required to be reopened when the case next comes before The Board.

Mr. Bailey inquired if Applicants were informed in advance if due to the number of cases on the agenda that time might run out before their case was called and given the opportunity to schedule their case for another meeting. Discussion by Members confirmed that doing so had been The Boards policy.

**V. ADJOURN**

Mr. Ryer moved to adjourned at 8:43pm. Mr. Murphy seconded. Vote unanimously in favor, Motion carries; meeting adjourned.

Authorized Posting Officer: Lecia McKenna

Board of Appeals Recording Clerk