**ZONING BOARD of APPEALS PUBLIC HEARING**

**Wednesday, July 26, 2017 at 6:00 p.m.**

**Griffin Meeting Room, Harwich Town Hall**

**MINUTES**

On Wednesday, July 26, 2017 at 6:00 PM, the Harwich Zoning Board of Appeals held a Public Hearing in the Griffin Meeting Room at the Harwich Town Hall, 732 Main Street to hear the following cases.

Members present: Kathleen Muller, Dean Hederstedt, David Ryer, John Burke, Franco Previd and Al Donoghue.

**Case #2017-04 (Continued)** Habitat for Humanity of Cape Cod, Inc. c/o Attorney Warren H. Brodie, applied for a Comprehensive Permit pursuant to MGL Chapter 40B Sections 20-23 and 760CMR 56.00, to create an eight lot subdivision to provide for 6 new single family affordable homes, 2 “market rate” lots and a cul-de-sac. The property is located at 93 and 97 Route 28, Harwich, Map# 10, Parcels #W3-B and W5 located in the R-L Zoning District.

Appearing for the applicants were Leedara Zola, Land Acquisition and Permitting for Habitat for Humanity of Cape Cod (“Habitat”), Andrew Singer of Singer & Singer Law, representing HECH and Paul Haverty of Blatman, Bobrowski & Haverty, LLC. Attorney Haverty asked if each of the members had received updated material from Habitat and all answered in the affirmative.

Mr. Hederstedt then asked if the Board of Selectmen and the Department of Housing and Community Development had full knowledge of the complexities of the application with 2 Applicants and a “sale back” agreement between Habitat and HECH and Ms. Zola, Attorney Singer and Attorney Haverty all said that they did. Mr. Hederstedt then asked for assurances that lots 7 & 8 (#’s 93 and 97 Route 28) would remain residential in perpetuity. Attorney Haverty answered that express conditions in the comprehensive permit would not allow for commercial use and all deeds will reference the comprehensive permit.

Mr. Ryer felt there was some ambiguity between that assurance and the wording of item M of the Declaration of Trust and page 3 of the Declaration of Covenants discussing “home occupation” businesses. Attorney Singer added that allowing for “home occupations” is the same level of rights as for any residential property.

Mr. Ryer said that he felt that the Applicants had done a great job of incorporating the changes requested by the Board into the revised documents. He said he would also like to see some notation in A-6 about working with the Conservation Commission and the Historic Commission regarding the historic preservation of the façade of the Chase House and the barn as well as a note that the Historic Preservation will be recorded prior to the issuance of a Certificate of Occupancy. Andrew Singer clarified that A-6 relates to process while D-2 concerns timing. Mr. Ryer asked for some additional clarifying changes to the language regarding the recording of the deeds with references to all of the conditions of the Comprehensive Permit. He also noted that the landscape screening on lots 7 & 8 are not subject to the maintenance provisions of the covenants and asked if the Trustee could be granted an easement limited to caring for the landscaping. Ms. Zola answered that the Declaration of Protective Covenants, Item O covers that and that the Landlord of Lot 7 will be responsible for that. Mr. Ryer wants a statement that the owners of Lot 7 will be in charge of maintaining the vegetative screening. Ms. Zola agreed.

Mr. Burke wanted to know if the Project Eligibility Letter would be updated and was told that it would not.

Mr. Previd asked if there was clear timing on the reversal of ownership on lots 7 & 8. Ms. Zola explained that the closing will be simultaneous with all of the controlling documents.

Ms. Muller wanted a restatement of the ownership and construction schedules for #’s 93 and 97 Route 28 and a statement regarding the waiving of zoning requirements for those lots.

PUBLIC DISCUSSION Mr. Ryer asked that comments be limited to new concerns.

Ralph Diamond of 103 Route 28 asked that additional screening be added to the landscape plan to cover any vegetation cleared as a result of the installation of the leaching field next to his property. Mr. Ryer noted that although Mr. Diamond’s rights were no greater than any neighbor next to a house upgrading their septic system, the Board would like a condition in the Comprehensive Permit that the Applicants will agree to re-vegetate whatever will be removed as from the edge of the leaching field to Mr. Diamond’s property line. Attorney Singer agreed to a statement of intent to limit the disturbance to the extent that is necessary to clear the soil absorption field and that the Applicant will add a condition to that affect.

Mr. Burke moved and Ms. Muller seconded the motion to continue the case until 8/15 at 7PM. The Board voted unanimously in favor.

**Case #2017-17 (Continued)** David J. Rome and Lori R. Rome applied for a Special Permit for additions to their pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich §325 54.A.2 and §325 Table 2, Area Regulations and Table 3, Height & Bulk Regulations as set forth in MGL Chapter 40A §6.The property is located at 35 Pleasant Street in the RM-1 Zoning District.

**Members voting:** Ms. Muller, Mr. Hederstedt, Mr. Burke, Mr. Previd and Mr. Donoghue

Appearing with the applicant was Attorney William Crowell who noted that the revised plans had been handed to each of the Board members. He pointed out that the site coverage was now in compliance with the removal of the farmer’s porch. He added that he believed that the Gale Case applied in that there was an intensification of existing non-conformities but no new non-conformities and no substantial detriment to the neighborhood.

Mr. Hederstedt moved and Mr. Burke seconded the motion to GRANT the Special Permit for additions to a pre-existing, non-conforming single family dwelling according to the plans submitted dated 4/27/17, revised 5/30/17 and revised again on 7/20/17 finding that the Gale Case does apply in that there will be an intensification of existing non-conformities, no new non-conformities and no substantial detriment to the neighborhood. The Board voted unanimously in favor. 5-0-0

**Case #2017-18 *(RESCHEDULED TO 10/25/2017)*** Jeffrey Rego and Joseph H. Rego III through their agent, Attorney Charles M. Sabatt seek a decision of the Board overturning the Building Commissioner’s denial of a request for enforcement under MGL Chapter 40A §7. Applicants contend that the operation of “sand pit” is prohibited under §325 Table 1–Use Regulations and/or requires a permit under §325-102 and that travel to access the subject pit over a private way, a portion of which crosses the Applicants’ property, is an unlawful extension of an unpermitted industrial and commercial use into a residential zoning district in violation of Massachusetts Case Law. The property is located off of Jay Z Drive, Assessor’s Map MISC, Parcel 4054001 in the RR Zoning District.

At this point, the remaining cases were heard out of order by agreement of all the parties and the Board.

**Case #2017-20** Thomas M. Kelly & Cathryn A. Kelly through their agent, Attorney William Crowell applied for a Special Permit or in the alternative, a Variance to construct a sun room addition and deck onto their pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich §325-54.A.2 as set forth in MGL Chapter 40A §6 and §10. The property is located at 2 Trout Brook Road, Map 26, Parcel C1-13 in the RM Zoning District.

**Members voting:** Ms. Muller, Mr. Hederstedt, Mr. Burke, Mr. Previd and Mr. Donoghue

Appearing with the applicants was Attorney William Crowell who thanked the Board and Attorney Shealey for being flexible and allowing the change of order. He noted that the home’s proximity to Uncle Venies Road was a pre-existing non-conformity which the owners looked to intensify with the proposed project. Attorney Crowell argued that the Gale Case applied in that there was an intensification of an existing non-conformity but no new non-conformities and no substantial detriment to the neighborhood. He asked the Board to grant the requested Special Permit.

Ms. Muller asked if there was any new non-conformity and Attorney Crowell replied that there wasn’t. Mr. Ryer proposed limiting the exterior construction to dates before June 30 and after Labor Day of 2017 and 2018.

Mr. Hederstedt moved to close the public hearing and Mr. Burke seconded the motion. The Board voted unanimously in favor.

Mr. Hederstedt moved and Mr. Donoghue seconded the motion to GRANT the Special Permit to construct a sun room addition and deck onto their pre-existing, non-conforming single family dwelling according to the plans provided including the certified plot plan by Demarest Land Surveying dated 6/21/17 and building plans by Thomas A. Moore Design Company dated 6/13/17 with the condition that no substantial exterior work be allowed between June 30 and Labor Day of 2017 and 2018. The Board voted unanimously in favor. 5-0-0

**Case #2017-21** Roger Keane, Executor of the Estate of Gwendolyn A. Keane, through his agent, Attorney William Crowell has applied for a Special Permit or in the alternative, a Variance to demolish and replace a single family dwelling. The application is pursuant to the Code of the Town of Harwich §325-54.A.2 as set forth in MGL Chapter 40A §6 and §10. The property is located at 6 Summer Lane, Map 13, Parcel Z14-3 in the RH-2 Zoning District.

**Members voting**: Ms. Muller, Mr. Hederstedt, Mr. Burke, Mr. Previd and Mr. Donoghue

Attorney Crowell presented the case on behalf of the applicants. He introduced the builder, David Handren and noted that the home is in the Campground area of Harwich Port. The Applicant is looking to demolish the existing structure and rebuild the single family dwelling maintaining the distance from Summer Lane but intensifying the southern and western setbacks. He said the Board of Health has approved the plan for a 2 bedroom house. Attorney Crowell then asked for the Board to grant the Special Permit saying that the new dwelling will not be a substantial detriment to the neighborhood.

Mr. Ryer said he wanted a condition saying that no demolition or exterior construction occur between June 30 and Labor Day 2017 or 2018.

Mr. Burke asked if the applicants were limited to 2 bedrooms and Attorney Crowell answered that there was a deed restriction to that affect. Mr. Burke also asked where any vehicles would park. Mr. Keane answered that there were sufficient spaces on the lot and that he intends to add stone to the driveway. Mr. Previd asked for and received assurances that the height would not exceed the 30’ limit.

Mr. Hederstedt moved to close the public hearing and Mr. Donoghue seconded the motion. The Board voted unanimously in favor. 5-0-0

Mr. Hederstedt moved and Ms. Muller seconded the motion to GRANT the Special Permit to demolish and replace a single family dwelling according to the plans provided including a certified site plan by Moran Engineering dated 3/3/17 and building plans by Zibrat & McCarthy dated 10/28/16 finding that there would be an intensification of existing non-conformities and no substantial detriment to the neighborhood with the condition that no substantial exterior demolition, construction or landscape construction occur between June 30 and Labor Day of 2017 and 2018 noting that no relief is granted regarding the building height requirements of the Code of the Town of Harwich. The Board voted unanimously in favor. 5-0-0

**Case #2017-22** Heather Swartz and Jeffrey Swartz through their agent, Attorney William Crowell have applied for a Special Permit or in the alternative, a Variance to construct an addition including second floor habitable space to their pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich §325 54.A.2 as set forth in MGL Chapter 40A §6 and §10.The property is located at 12 Satucket Road in the RH-1 Zoning District.

**Members voting**: Ms. Muller, Mr. Hederstedt, Mr. Burke, Mr. Previd and Mr. Donoghue

Attorney Crowell presented the case along with the builder, Dale Nikula of Encore Construction. He told the Board that the project proposes to add second floor living space that will be no closer than the existing porch to the sidelines. He said that the Gale Case applies in that the Applicants are seeking to intensify an existing non-conformity while adding no new non-conformity and causing no detriment to the neighborhood. There will be no increase in traffic, noise, odor fumes or the like.

Ms. Muller asked for and received assurance that the house will be within the 30’ limit. Mr. Ryer said that he wanted a condition that there be no substantial exterior construction between June 30 and Labor Day of 2017 and 2018. Mr. Burke said that he considered it a benefit that the proposal eliminates one of the non-conformities in the rear of the house.

There were no public comments.

Mr. Hederstedt moved to close the public hearing and Mr. Previd seconded the motion. The Board voted unanimously in favor. 5-0-0

Mr. Hederstedt moved and Mr. Burke seconded the motion to GRANT the Special Permit to construct an addition including second floor habitable space to their pre-existing, non-conforming single family dwelling according to the plans submitted including a certified plot plan from Moran Engineering Associated dated 6/19/17 and building plans from Encore Construction dated 5/18/17 with the condition that no substantial exterior demolition, construction or landscape construction occur between June 30 and Labor Day of 2017 and 2018 noting that no relief is granted regarding the building height requirements of the Code of the Town of Harwich. The Board voted unanimously in favor. 5-0-0

**Case #2017-23**  Stephen P. Ford and Patricia W. Ford through their agent, Attorney Michael Ford have applied for a Special Permit or in the alternative, a Variance to demolish and replace a non-conforming detached garage. The application is pursuant to the Code of the Town of Harwich §325-54.A.2 as set forth in MGL Chapter 40A §6 and §10. The property is located at 7 South Street, Map 14, Parcel N4 in the CV and RM Zoning Districts.

**Members voting:** Ms. Muller, Mr. Hederstedt, Mr. Burke, Mr. Previd and Mr. Donoghue

Attorney Ford introduced the homeowners who are his brother and sister-in-law and explained the details of the proposal to the Board. The Applicants had razed and replaced the original dwelling a number of years ago and had moved the new home further from the street to be in compliance with setback requirements. The detached garage which Attorney Ford says was built sometime in the 1940’s is run-down and in serious disrepair. The Applicants hope to raze and rebuild it but cannot keep it in the same footprint as it would be impossible to turn a car into it now that the house has been set back from the road so far. The new encroachment onto the rear setback would only affect the parking area of the Augustus Snow House.

Ms. Muller pointed out that there would be a new non-conformity with the rear setback and that would require a Variance. Attorney Ford said that different Board interpret things differently and that some Boards agree with him in that the garage is already non-conforming and changing the amounts and locations of those non-conformities shouldn’t remove it from Special Permit Consideration. The Board disagreed and asked Attorney Ford to argue the case for a Variance.

In asking for a Variance, Attorney Ford reiterated the 3-prong test of Chapter 40A §10 and then said that the Applicant’s lot was unique because of the placement of the structures thereon creating a hardship in that the owners are unable to use their garage. It will not fit in any other location on the property. He added that there would be no detriment to the public good and that issuing a Variance would not derogate from the intent of the bylaw.

Mr. Ryer said that he felt that the hardship was self-imposed by the design of the house. Attorney Ford said that moving the house away from the street was beneficial and removed that non-conformity.

Mr. Burke believed that a Variance wouldn’t be unreasonable as a dimensional variance and that there would be a benefit in moving the garage away from the Port O’ Call and closer to the parking lot of the Augustus Snow House. Mr. Donoghue said the garage was in deplorable condition and that he would be inclined to approve the Variance. But Mr. Hederstedt and Ms. Muller said they did not see the hardship.

Attorney Ford asked for a straw poll where Mr. Burke and Mr. Donoghue voted in the affirmative but Mr. Hederstedt and Ms. Muller said they would vote in the negative. Attorney Ford, after consultation with his clients then asked to withdraw without prejudice.

Mr. Hederstedt moved and Mr. Previd seconded the motion to allow a withdrawal without prejudice for Case # 2017-23. The Board voted unanimously in favor. 5-0-0

**Case #2017-19** Clifford A. Daluze, John Z. Daluze, Jr. and Margaret Weigand through their agent, Attorney Frank J. Shealey appealed a Cease and Desist Order issued by the Building Commissioner on 5/23/17 to halt “any and all commercial activity” at a “sandpit” located off Jay Z Drive until Applicants obtain “appropriate zoning relief” and an Operations Permit from the Harwich Planning Board. Applicants claim they have a “pre-existing, non-conforming status” under MGL Chapter 40A §6 and §325-26 of the Harwich Zoning By-Laws. The property is located off of Jay Z Drive, Assessor’s Map MISC, Parcel 4054001 in the RR Zoning District.

Members voting on this case: Kathleen Muller, David Ryer, John Burke, Franco Previd and Al Donoghue. Dean Hederstedt recused himself from the case.

Attorney Frank Shealey, representing Cliff Daluze, et al said he was seeking a release of the Cease & Desist Order which was issued by the Building Commissioner at the behest of Attorney Sabatt who represents the Regos. He added that the dirt road is an ancient way. In 1971, Mr. Daluze’s father applied for and received a Special Permit to operate a sand excavation pit. He had offered a sketch to show the property dimensions. The pit is larger today due to the nature of excavating sand. In 1978, Cliff Daluze had a plan made of the property showing the enlarged pit.

Attorney Shealey said that the cease and Desist letter says the property is in the 6 Ponds Region but because the pit has been in operation since at least 1971, before the designation of the 6 Ponds Region, the business is pre-existing non-conforming. He added that the Regos had placed a locked gate at the end of the dirt road access to the pit which precipitated a law suit by the Daluzes for removal of the gate. The Daluzes prevailed in that suit and the gate was removed. The Daluzes recently met with the Town regarding ownership and taxation issues on the property in question.

Attorney Shealey went on to add that there may be a statute of limitations issue and that if there is any question as to the ownership of the property, adverse possession arguments might apply.

Mr. Ryer noted that there appear to be 6-7 pits now. The Board needs more information regarding the current status of the property and a more current site plan in order to compare with the size of the area that was subject to the original Special Permit. He added that he thought that the original Permit only covers “taking sand and fill from the existing pit”, and nothing outside of the site that existed in 1973. For that, he believes the owners need a new Special Permit.

Attorney Shealey disagreed and said that the nature of a sand pit is to get larger and larger with more and more excavation.

Building Commissioner, Ray Chesley agreed that the problem is defining both the ownership for the property and the size of the pit in relation to what was originally permitted. He added that the 1978 plan was never registered. He said that it looks as though the pit has migrated off the property and thought a ground survey would help determine ownership and where the pit is actually located in relation to lot lines.

Mr. Burke suggested a title abstract to determine what John Daluze owned in 1973. He believes that the original Special Permit only extends to the pit on the property owned by John Daluze at that time and wants Attorney Shealey to research the Registry of Deeds to clarify. Attorney Shealey said that the drawing from Schofield is a research document that can be relied upon. Mr. Burke continued that perhaps an affidavit from Mr. Schofield would help as well as an abstract of title. The Board needs a clearer comparison of how much area was “pit” in 1978 and how much area is a “pit” today.

Mr. Donoghue said that when he visited the site he noted concrete equipment on the property and that the Cease & Desist was directed not only at the sand excavating but also to Jeff Brown Landscaping and Bryan Barrows Excavating. That says that more than just the owners are using the property. Mr. Burke asses that there is more going on than just the removal of sand and fill.

Commissioner Chesley said that landscape processing material is being brought in to the site as well as concrete.

PUBLIC COMMENTS included those from Alan Einhorn of Cranberry Hollow Lane. He shared that the “pit” has creeped closer and closer to his property and that he has concerns about the expansion, the problems with the title and the fact that taxes have not been paid on the property. He wants no unapproved uses and a review of the environmental issues.

Attorney David Reid spoke on behalf of Jeffrey and Joseph Rego. He noted that the 1978 plan is not a recorded plan and with no title references, it does not say that it is the property of the Daluzes. He wanted to know if the Applicants were contending that the Cease & Desist Order is invalid because it does not apply or because the Special Permit gives them the right to continue.

Attorney Shealey said that the use is pre-existing, non-conforming.

David Cavanaugh of the Harwich Real Estate and Open Space Committee said he was a deed researcher and that the Town’s records are incomplete as to the property in question. His research had shown conflicting information and asked that the Board to require the Applicants to prove ownership.

Mr. Ryer thought that the Board needed to continue the case and wait for more current information looking especially for a certified plot plan so that a comparison can be made between that and the 1978 plan.

Mr. Burke moved and Mr. Donoghue seconded the motion to continue the case until August 30, 2017 at 7PM. The Board voted unanimously in favor. 5-0-0

Mr. Hederstedt moved and Ms. Muller seconded the motion to accept the minutes of the 4/6/17 and 4/26/17 meetings. The Board voted unanimously in favor. 5-0-0

Mr. Burke moved and Mr. Donoghue seconded the motion to adjourn the meeting. The Board voted unanimously in favor. 5-0-0