**HARWICH ZONING BOARD of APPEALS PUBLIC HEARING**

**Wednesday, June 24, 2020 at 7:00 p.m.**

**VIA REMOTE ACCESS**

**MINUTES**

The Harwich Zoning Board of Appeals held a public hearing **via remote access** as noted below to hear the following cases.

**This meeting was by REMOTE PARTICIPATION ONLY. THERE WAS NO IN-PERSON ATTENDANCE OF MEMBERS OF THE PUBLIC.** Call in instructions were posted on the meeting Agenda on the Board of Appeals web page.

Members present: David Ryer, James Hilliard, Al Donoghue, Jamie Armstrong, Chris Murphy and Brian Sullivan.

Mr. Ryer opened the meeting and read the following statement into the record.

Pursuant to Governor Baker’s March 12, 2020 order Suspending Certain Provisions of the Open Meeting Law, G.L.c30A Sec18 and the Governor’s March 15, 2020 Order imposing strict limitations on the number of people that may gather in one place, this meeting of the Town of Harwich Board of Appeals on Wednesday, May 27, 2020 at 7pm will be conducted via remote participation to the greatest extent possible. Specific information and the general guidelines for remote participation by members of the public and/or parties with a right and/or requirement to attend this meeting can be found on the Town of Harwich website at [www.harwich-ma.gov](http://www.harwich-ma.gov).

For this meeting, members of the public who wish to watch the meeting may do so in the following manner on Channel 18 or by watching the simulcast at:

https://harwich18.dyndns.org/cablecast/public/Live. aspx?ChannellD=1

Mr. Ryer disclosed that he had a professional association through Meals on Wheels with one of the Condo Association members in the following case but that he did not believe that he had any bias.

**Case # 2020-18**

Andrew Hall, Successor Trustee of the Emulous Hall Realty Trust, through his agent, Attorney Andrew Singer has applied for a Variance from the provisions of Section 325-9 and Table 1 of the Zoning Bylaw in order to redevelop a previously disturbed and commercially-used portion of property located in 2 zoning districts in connection with a seasonal, miniature golf course. The application is pursuant to the Code of the Town of Harwich, §325-52 and Table 1, Use Regulations as set forth in MGL Chapter 40A §10. The property is located at **346 Route 28 and 0 Sisson Road,** Map 21, Parcels N2-0 and N1-0 in the CH-1 and RM Zoning Districts.

Members voting on this case: Mr. Ryer, Mr. Hilliard, Mr. Donoghue, Mr. Armstrong and Mr. Murphy.

Attorney Andrew Singer introduced himself, Suavi Osev, Dan Croteau and Shannon Goheen. He presented the case noting that the applicant had reformatted the plans after the decision to withdraw without prejudice the previous submission.

The lot is split between a commercial zoned portion and a residential zoned portion. The new plan is to use 17,700 square feet of the residential zoned area instead of the previously requested 34, 850 square feet. 67% of the project will be in the commercial zoned area with only 33% in the residential zone. There will only be one 18-hole mini golf course instead of the previously proposed two 18-hole courses. The residential zoned area is already been partially stripped and denuded.

Attorney Singer and Mr. Osev showed photos of the present state of the area noting that there will be no reduction of trees in the thickly vegetated portion of the residential zone. The trailers and boats will be removed. The Applicant has already been before the Conservation Commission where they received approval of the plan as proposed. The wooded buffers will be retained in their natural state and augmented with native plantings. The plan will improve and enhance stormwater drainage and protect the environment. The curb cut on Harold Street will be removed and another will open onto Sisson Road. Parking spaces will be shared with Bud’s Go Carts and remain green. The entire operation will be seasonal with the hours of operation timed with the adjacent Go Cart operation. The lighting will comply with all Code regulations.

Applicants are looking for a Special Permit under Section 325-52 and for a Variance under MGL Chapter 40A Section 10. Attorney Singer spoke of the standard of hardship which has been used in Massachusetts Case law and quoted from some of those cases to support his argument. He added that in similar cases, the hardship can and has included a residentially zoned lot’s proximity to a commercial zone and how that has reduced the value and the viability of residential use of the lot. Additionally, the property is within the flood plain and moving the course construction away from the flood plain closer to the residential area to protect the environmentally sensitive area is another factor in the soil condition and topography of the lot causing hardship.

Attorney Singer added that the conditions that establish hardship are diverse and are unique to this lot. It is not economically feasible or even desirable for the lot to be developed in the manner allowed for the residential zone. He added that the proposal before the Board will clear less of the landscaping, be less dense and be used only seasonally as opposed to any potential residential use which would be more dense and year-round. He read a number of letters from local businesses and abutters in support.

Shannon Goheen explained more details from the landscaping plan and spoke about the trees that will buffer the project from the Beach Plum Condos to the east. All of the plantings will be native and will include 30 white pines, viburnum and juniper mixing deciduous plantings with the evergreens. She said the plan will enhance what is already there and offer a habitat to wildlife as well as a buffer for the neighbors. Mr. Ryer asked if the trees could be treated to prevent pine borers and Ms. Goheen said that they could.

Mr. Donoghue said that he believed that the new plan fits the lot well and is compatible with the already commercial nature of the area. He added that the landscape plan will be a good buffer for the neighbors. Mr. Armstrong agreed.

Mr. Murphy asked about the condition of the residential portion of the site and Attorney Singer told him that there is a sand pit and storage of boats and trailers on a part of that and trees on a portion. Those trees will not be removed.

Attorney David Reid spoke on behalf of the Beach Plum Condo Association members and he said that he believed that the flood plain issue in the commercial zone should not prevent the Applicant from using it for the mini-golf course and should not be considered a hardship. He added that there would be a detriment to the neighbors and that granting a variance would be a derogation from the intent of the bylaw which designated portions of the lot as residentially zoned. He said that relying on the argument that the historical use of a lot in a commercial manner should not justify the issuance of a variance. He also disagreed with Attorney Singer’s interpretation of the case law.

Carol Porter of the Beach Plum Condo Association also spoke in opposition to the proposal and added that there is a difference between a natural state and native plantings. She wanted to know if the landscape plan would be a condition of any variance granted and Attorney Singer said that it was an integral part of the plan which would be implemented if a Special Permit or Variance were granted.

Tracy Stewart asked about the height of the lights and if the Applicant would consider swapping out the white pines for Leland Cyprus trees but Ms. Goheen said that the Lelands are not native and the Conservation Commission wants only native plantings. Mr. Osev said that the lights are 12’ high and that all are certified “dark sky” lights. He shared the lighting plan on screen as well as a video from a drone which flew over the area.

Attorney Singer once again referred to the Massachusetts Zoning Manual and the cases discussed (*Cavanaugh v. DiFlumera*, 9 Mass. App. Ct.(1980); and *Boyajian v. Bd. of Appeals of Wellesley,* 6 Mass. App. Ct. 283, 287 (1978) to give weight to his argument that the Board had sufficient legal basis to grant the requested relief.

Mr. Donoghue moved to close the public hearing with a second by Mr. Hilliard. The Board voted unanimously in favor.

Mr. Ryer said that after reading the details of the case law presented, he felt he could support a variance. He agreed that it was not economically feasible to use the residential zone for residential purposes even if someone were interested in doing that and that the proposed project is a good use of the lot. Mr. Donoghue agreed and said that the lot was unique and the proposal would benefit the community.

Mr. Hilliard also agreed with the Chairman’s logic and added that the elevation of the residential portion of the lot would make a residential development extremely improbable because of financial issues. He said that there was statutory and case law to support the granting of a variance. Both Mr. Murphy and Mr. Armstrong agreed.

Mr. Ryer moved to grant a Variance from the provisions of Section 325-9 and Table 1 of the Zoning Bylaw in order to redevelop a previously disturbed and commercially-used portion of property located in 2 zoning districts in connection with a seasonal, miniature golf course pursuant to the Code of the Town of Harwich, §325-52 and Table 1, Use Regulations as set forth in MGL Chapter 40A §10 for the property located at **346 Route 28 and 0 Sisson Road,** Map 21, Parcels N2-0 and N1-0 in the CH-1 and RM Zoning Districts with the following conditions:

1. There shall be no storage of boats, vehicles, trailers, soil or any other materials or items not used in the operation of the miniature golf course in the residential zone;
2. All parking, access, and drainage shall be located within the commercial zone;
3. Sixty-seven percent (67%) of the miniature golf business (including parking) shall be located in the commercial zone;
4. The operation of the miniature golf business shall be seasonal to follow Bud’s Go-Karts also located on the Property, namely, in season (June, July, August) – seven days per week, 10:00 a.m. to 10:00 p.m. (Weather Permitting) and off season (shoulder months) – 10:00 a.m. to 7:00 p.m. any day weather permitting;
5. The flood plain located at the front of the Property along Sisson Road shall be protected and enhanced, and upgraded stormwater management shall be provided;
6. Expanded and enhanced vegetated and forested buffers along Sisson Road, Harold Street, and to the rear abutters shall be provided, and fully-shielded and dark-sky compliant lighting shall be provided. All lighting shall comply with the Harwich Lighting By-Law;
7. There shall be improved access (two curb cuts) on Sisson Road as shown, and the existing curb cut on Harold Street shall be closed and not used;
8. There shall be compliance with all dimensional setback, building coverage, and site coverage requirements of the Zoning By-Law as shown;
9. All water areas of the miniature golf course shall be aerated and/or treated to maintain sanitary and visually-acceptable conditions and to prevent algae growth;

10. There shall be no music on the site on which the miniature golf operation will be conducted, which is shown on the site plan submitted by the Applicant;

1. All existing trees in the residential zone shall remain;
2. Any trees or shrubs which die within the first three (3) years after the commencement of operation of the business shall be promptly replaced, and they shall be maintained and/or replaced as necessary for the life of the miniature golf business; and
3. All construction vehicles shall be parked on the Property and shall not be parked on Sisson Road or Harold Street.

Mr. Murphy seconded the motion and all members voted in favor. 5-0-0

Mr. Ryer authorized Shelagh Delaney to stamp the documents and sign the decisions in his stead.

**Case # 2020-19**

Stephen T. McSweeney, Trustee of the McSweeney Family Realty Trust, through his agent, Attorney William Crowell has applied for a Special Permit to demolish and replace a pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich, §325-Table 2 - Area Regulations as set forth in MGL Chapter 40A §6. The property is located at **12 Sea Breeze Ave**, Map 6B, Parcel E1-10 in the RH-2 Zoning District.

Mr. Ryer read the case into the record. Members voting on this case: Mr. Ryer, Mr. Donoghue, Mr. Armstrong, Mr. Murphy and Mr. Sullivan.

Attorney William Crowell introduced himself and restated details of the application adding that the new dwelling will essentially sit in the same location. There will be an increase in habitable space within the setback which is what requires a Special Permit by way of the Gale Case. There will be an intensification of existing non-conformities but no detriment to the neighborhood. The new main house will remove one bedroom and the cottage will now have 1 bedroom but will remain within the septic capacity. The project will be compliant with the septic requirements. Attorney Crowell read into the record a letter of support from an abutter, Ms. Bethany Craig of 16 Sea Breeze Ave.

Each of the voting members agreed that the project fit the requirements of the Gale Case. Mr. Ryer added that he would want a condition limiting summer construction.

Mr. Ryer moved to close the public hearing with a second by Mr. Donoghue. The Board voted unanimously in favor.

Mr. Ryer then moved to grant the requested Special Permit to demolish and replace a pre-existing, non-conforming single family dwelling pursuant to the Code of the Town of Harwich, §325-Table 2 - Area Regulations as set forth in MGL Chapter 40A §6 for the property located at **12 Sea Breeze Ave**, Map 6B, Parcel E1-10 in the RH-2 Zoning District. There is a condition that no demolition, substantial exterior construction nor substantial new landscaping happen between June 30 and Labor Day of any year. The Board voted unanimously in favor. 5-0-0

Mr. Ryer authorized Shelagh Delaney to stamp the documents and sign the decisions in his stead.

**Case # 2020-20**

Ruth Brophy, Lawrence Brophy and Kerrie Brophy, through their agent, Attorney William Crowell have applied for a Special Permit to construct 2 additions onto a pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich, §325-Table 2 - Area Regulations and §325-54(A)(2) as set forth in MGL Chapter 40A §6. The property is located at **13 Gordon Road**, Map 5, Parcel B4-8 in the RH-1 Zoning District.

Mr. Ryer read the case into the record. Members voting on this case: Mr. Ryer, Mr. Donoghue, Mr. Armstrong, Mr. Murphy and Mr. Sullivan.

Attorney William Crowell introduced himself along with the owner, Kerrie Brophy and restated details of the application adding that the house in south of Lower County Road. The Applicants want to remove an existing patio and build an addition there on the northeast side as well as on the southeastern side. These additions will be intensifications of existing non-conformities but will not add any new noise odor, fumes, traffic, congestion or the like to cause any substantial detriment to the neighborhood. He asked that the Board grant the requested Special Permit.

Mr. Ryer agreed that the project fits the requirements of the Gale Case and again suggested a restriction on summer construction. Board members agreed.

Mr. Ryer moved to close the public hearing with a second by Mr. Donoghue. He Board voted unanimously in favor.

Mr. Ryer then moved to grant the requested Special Permit to construct 2 additions onto a pre-existing, non-conforming single family dwelling pursuant to the Code of the Town of Harwich, §325-Table 2 - Area Regulations and §325-54(A)(2) as set forth in MGL Chapter 40A §6 for the property located at **13 Gordon Road**, Map 5, Parcel B4-8 in the RH-1 Zoning District. There is a condition that no demolition, substantial exterior construction nor substantial new landscaping happen between June 30 and Labor Day of any year. The Board voted unanimously in favor. 5-0-0

Mr. Ryer authorized Shelagh Delaney to stamp the documents and sign the decisions in his stead.

Mr. Ryer moved to accept the minutes from the April 29, 2020 meeting with minor changes. The Board voted unanimously in favor.

Mr. Ryer then moved to accept the minutes from the May 27, 2020 meeting with one minor change. The Board voted unanimously in favor.

The Board briefly discussed reorganizing the makeup of the Board. Members agreed to keep Mr. Ryer on in the position as Chair.

Mr. Ryer moved to adjourn with a second by Mr. Sullivan. The Board voted unanimously in favor.

Authorized Posting Officer: Shelagh Delaney, sdelaney@town.harwich.ma.us

Board of Appeals Recording Clerk