**HARWICH ZONING BOARD of APPEALS PUBLIC HEARING**

**Wednesday, June 26, 2019 at 7:00 p.m.**

**Griffin Meeting Room, Harwich Town Hall**

**MINUTES**

On Wednesday, June 26, 2019 at 7:00 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: David Ryer, James Hilliard, Dean Hederstedt, Kathleen Muller, Al Donoghue, Mike Cupoli and Jamie Anderson

Call to Order – 7PM Chairman Ryer noted that the meeting was being video recorded.

**Case #2019-18**

Gregory M. Soares and Barbara L. Soares, through their agent, Attorney William Crowell, have applied for a Special Permit (or in the alternative, a Variance) to demolish and replace a pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich, §325-54, §325 Table 2, Area Regulations, and §325 Table 3, Height and Bulk Regulations as set forth in MGL Chapter 40A §6 and §10. The property is located at **7 Sea Breeze Ave**, Map 6B, Parcel E1-18 in the RH-2 Zoning District.

Members voting on this case:

Mr. Hilliard, Ms. Muller, Mr. Hederstedt, Mr. Donoghue and Mr. Armstrong

Mr. Hilliard read into the record comments from the Health Director stating that the Health Department had no objections to the proposed plan but that the applicants will need to show that the proposed workshop will not be used as a bedroom.

Mr. Hilliard also read brief notes from the Harwich Historic District and Historic Commission (the HDHC) saying that at their 6/19 meeting, the HDHC had imposed a 365 day demolition delay onto this project.

Attorney Crowell presented the case for the applicants and introduced himself and Dale Nikula of Encore Construction.

Mr. Ryer asked Attorney Crowell if the Petitioners wanted to move forward given the HDHC’s 365 day demolition delay and Attorney Crowell answered that they did.

Attorney Crowell presented the case and said that the project is to raze and replace the house in the “Campground” neighborhood of Harwich Port. The footprint will be essentially the same with a slight intensification of the pre-existing, non-conforming site coverage. There will be no increase in noise, odor, fumes, traffic, congestion or the like and no substantial detriment to the neighborhood. Attorney Crowell asked the Board to grant the requested Special Permit.

Mr. Hederstedt made a motion to close the public hearing with a second by Ms. Muller.

The Board discussed the details of the case and all agreed that it fit the requirements of the Gale Case with intensifications of existing non-conformities, no new non-conformity and no substantial detriment to the neighborhood. Mr. Ryer suggested that the Board impose a condition limiting construction during the summer months.

Mr. Hederstedt moved and Mr. Armstrong seconded the motion to GRANT the requested Special Permit to demolish and replace a pre-existing, non-conforming single family dwelling for the property at **7 Sea Breeze Ave** according to the plans provided, the Board having found that the project will intensify existing non-conformities, add no new non-conformity and will not be a substantial detriment to the neighborhood. The Board has imposed the following conditions: There shall be no substantial demolition, exterior construction nor new landscaping between June 30 and Labor Day of either 2019 or 2020.

**Case #2019-19**

Mary T. Moran, through her agent, Attorney William Crowell, has applied for a Special Permit (or in the alternative, a Variance) to construct additions to a pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich, §325-54 and §325 Table 2, Area Regulations as set forth in MGL Chapter 40A §6 and §10. The property is located at **30 Grey Neck Lane,** Map 11, Parcel X8-4 in the RH-1 Zoning District.

Members voting on this case:

Mr. Hilliard, Ms. Muller, Mr. Hederstedt, Mr. Donoghue and Mr. Cupoli.

Attorney Crowell presented the case for the applicants and introduced himself and the builder, Dave Veelenturf. The Petitioners are looking to add a deck to the rear of the house and square off the front corner. The project will intensify existing non-conformities, create no new non-conformity and pose no significant detriment to the neighborhood. He added that there will be no increase in noise, odor, fumes, traffic, congestion or the like and no substantial detriment to the neighborhood. Attorney Crowell asked the Board to grant the requested Special Permit.

Ms. Muller made a motion to close the public hearing with a second by Mr. Hederstedt.

The Board discussed the proposal and all agreed that the plan will intensify existing non-conformities, create no new non-conformity and add no substantial detriment to the neighborhood. Mr. Ryer suggested that the Board place a condition on the Special Permit limiting construction during the summer months.

Mr. Hederstedt moved and Mr. Cupoli seconded the motion to GRANT the requested Special Permit to construct additions onto a pre-existing, non-conforming single family dwelling for the property located at **30 Grey Neck Lane** according to the plans provided**,** the Board having found that the project will intensify existing non-conformities, add no new non-conformity and will not be a substantial detriment to the neighborhood. The Board has imposed the following conditions:

There shall be no substantial demolition, exterior construction nor new landscaping between June 30 and Labor Day of either 2019 or 2020.

**Case #2019-20**

John J. McCarthy and Paula A. McCarthy, through their agent, Attorney William Crowell have applied for a Special Permit (or in the alternative, a Variance) to demolish and replace a pre-existing, non-conforming single family dwelling. The application is pursuant to the Code of the Town of Harwich, §325-54 and §325 Table 2, Area Regulations as set forth in MGL Chapter 40A §6. The property is located at **96 Miles Street**, Map 22, Parcel X1-2 in the RL Zoning District.

Members voting on this case:

Mr. Hilliard, Ms. Muller, Mr. Hederstedt, Mr. Donoghue and Mr. Armstrong.

Mr. Hilliard read into the record comments from the Health Director stating that the Health Department did not have objections to the proposed plan but that an inspection would be required.

Attorney Crowell presented the case for the applicants and introduced himself and Dave Handren of Handren Brothers Construction. He noted that the plan is to demolish and replace an existing non-conforming single family dwelling and reiterated details of the application noting that only the easterly setback non-conformity will be intensified.

Attorney Crowell argued that the project fits the Gale Case with an intensification of an existing non-conformity, no new non-conformity and no substantial detriment to the neighborhood and asked that the Board grant the requested Special Permit.

Mr. Hederstedt made a motion to close the public hearing with a second by Ms. Muller.

The Board discussed the proposal and all agreed that the plan will intensify existing non-conformities, create no new non-conformities and add no substantial detriment to the neighborhood. Mr. Ryer said that he believed that the proposal fits the requirements of the Gale Case and §325-54 and suggested that the Board place a condition on the Special Permit limiting construction during the summer months.

Mr. Hederstedt moved and Ms. Muller seconded the motion to GRANT the requested Special Permit to demolish and replace a pre-existing, non-conforming single family dwelling for the property located at **96 Miles Street** according to the plans provided**,** the Board having found that the project will intensify existing non-conformities, add no new non-conformity and will not be a substantial detriment to the neighborhood. The Board has imposed the following conditions:

There shall be no substantial demolition, exterior construction nor new landscaping between June 30 and Labor Day of either 2019 or 2020.

**Case #2019-21**

541 Main Street, LLC, Justin R. Brackett and Jared G. Brackett, Managers, through their agent, Attorney Raymond H. Tomlinson, Jr. are appealing a non-enforcement by the Building Official regarding an encroaching, non-conforming structure at the abutting property known as “Perks”, 545 Route 28. The application is pursuant to the Code of the Town of Harwich, §325-45, §325-48 and MGL Chapter 40A §7. The property in question is located at **545 Route 28**, Map 14, Parcel U8 in the CV Zoning District.

Members voting on this case:

Mr. Ryer, Mr. Hilliard, Mr. Hederstedt, Ms. Muller and Mr. Donoghue

Mr. Hilliard read into the record comments from the Health Director stating that the Health Department had no corrections to the history as stated in the application but had no comment on the validity of the appeal of non-enforcement by the Building Official.

Mr. Ryer noted that there were 3 attorneys with this case and requested that each attorney address any questions to him and not to each other.

Attorney Ray Tomlinson presented the case for the Applicants who own and manage the Port Restaurant and Bar directly west of the property in question. He passed out photos to the members of the Board showing a variety of angles of the bar and surrounding areas at 545 Route 28. He said that he believed that the bar was erected without a permit and that the back portion (referred to as the “TV stand”) was also erected without a permit while his clients had been required to go through Site Plan Review for their outdoor bar. He later admitted that his clients had built their bar without a permit but eventually remedied that. He agreed that although a part of his original argument included a statement that the bar was encroaching on his clients’ property, that is not now the case.

Attorney Tomlinson argued that contrary to what the Building Commissioner found, the “TV Stand” is actually a structure needing a permit with associated setback requirements (5’) and asked that the Board overturn the Building Commissioner’s finding.

Mr. Hilliard said that it appeared there was a disagreement as to the definition of the wall in question. He asked Attorney Tomlinson if he believed that the Building Official had defined the rear portion of the bar according to the Code of the Town of Harwich. Attorney Tomlinson said that he felt that the Commissioner was using a “tortured extension of the word ‘fence’ to define a structure” and wanted it to be moved 5 feet to comply with the Town’s setback requirement for structures.

Ms. Muller asked if the question was whether the TV Stand/Wall was permitted or properly described. Attorney Tomlinson answered that it was whether the Commissioner’s determination based upon his definition was wrong. Ms. Muller also asked if the problem was really one of business competition. Attorney Tomlinson said that it was not.

Mr. Hederstedt asked about the history of the 2 adjoining properties, specifically what “Perks” had been permitted to do in terms of food service. He later said that his main concern was that if the wall with the TV stand were integrally connected to the bar structure by physical connection or use, it should be permitted like the bar. He said that if the wall were to be permitted, other safety issues would be reviewed.

Mr. Ryer said that on 4/29/19, the Board of Selectmen voted to approve a bar and liquor license for the business in question (“Perks”) and that since the applicants did not file an appeal to that decision, this current request may be moot. He added that the Code basis of the Commissioner’s decision was §325-17, “other enclosures” which gives no further detail or definition. §325-2 does define “structures” but not “other enclosures”. He then asked Attorney Tomlinson why he believed that the Building Official does not have the authority to define according to his own experience and knowledge what isn’t specifically defined in the Code. Attorney Tomlinson said that the definition should be a common sense plain meaning.

Mr. Cupoli asked if the wall in question was a building structure or fixed in some way. Attorney Tomlinson said that a structure can be portable or fixed and that the Building Official should look to how the “structure” is used. Mr. Cupoli said that it is the Board’s duty to determine if the Building Official did his job.

Mr. Hilliard asked if the ice chest stored on the lower part of the wall was actually permanently attached to the wall. Attorney Tomlinson said that it was not.

Mr. Armstrong asked about the size of the overhang on the wall (approximately 2’) and Mr. Donoghue said that it was clear that the Building Official is the Town’s interpreter of the Code on this matter.

Attorney Sara Turano Flores spoke on behalf of her clients, Carol and Ann Novak as well as Taylor Powell and his wife who are operating Perks at 545 Route 28. She asked to review the photos submitted by Attorney Tomlinson. She said that her clients have been in that location since 2005 and had legally expanded their use on a number of occasions since then. She added that the Building Official had visited the location on numerous occasions and that he is the zoning enforcement officer. Attorney Flores added that plans were submitted in 2016 and the bar was permitted. She said that the Applicant, “The Port” has unclean hands because their outdoor bar overhangs Perks and argued that the “TV stand/wall” is not a structure and therefore is not subject to all of the setback requirements of a structure.

Mr. Ryer asked that if the Board determined that the wall was in fact a structure, what would be the hardship to Perks. Attorney Turano Flores said that moving the wall 5 feet would mean having to move the bar as well and that would squeeze off the pedestrian flow because the area is quite small.

Mr. Hilliard said that the issue is whether the Board should uphold the Building Official’s decision that the wall is not a structure. Ms. Muller asked for clarification of the details on the TV Stand and Mr. Hederstedt again suggested that the use of the wall in conjunction with the bar should qualify it for the same restrictions as the bar.

Robert Brackett, the father of the Applicants spoke in support of overturning the Building Official’s decision.

Building Commissioner, Ray Chesley spoke about his decision to use Section 325-17 as the basis for his decision that the TV stand falls under that category as “other enclosures” and said there are other “fences” in Harwich with attached benches and seats and those are also considered enclosures.

Mr. Armstrong asked if there are yearly inspections of the property for safety and code issues and Mr. Chesley answered that the Town inspects the property yearly as part of the Massachusetts State Building Code 100.7, “Certificate of Inspection” requirement.

Mr. Hederstedt moved to close the public hearing and Mr. Donoghue seconded.

Mr. Hilliard said that the Zoning Enforcement Officer (the Building Commissioner) has an inherent ability to make determinations when the Code is silent on a matter and that he should be given the benefit of the doubt. He will go along with the Commissioner’s decision. Mr. Ryer and Mr. Donoghue agreed and Mr. Hederstedt renewed his earlier concerns.

Mr. Cupoli said that unless the Commissioner’s decision was arbitrary or capricious, the Board should support him. There is no evidence or testimony to say that it was.

Mr. Ryer moved and Mr. Donoghue seconded the motion that the Board find that the TV Stand falls under Section 325-17 of the Code and therefore there is no basis for enforcement against Perks and further that the Board will uphold the position of the Building Commissioner as stated in the letter dated 6/20/19 which is incorporated into this decision. Passed 4-1

Voting in favor: Mr. Hilliard, Ms. Muller, Mr. Ryer and Mr. Donoghue.

Voting in opposition: Mr. Hederstedt.

**The Town of Harwich**, through its agent, Christopher Clark, Town Administrator is applying for Variances pursuant to MGL 40A Section 10 and if required, Special Permits for defined “Essential Services” to construct wastewater pumping stations within the setbacks as executed through the Board of Selectmen’s Phase II Sewer and Sewer Pump Station Easements at the following locations:

**Case #2019-22**

The property is located at **24 Church Street**, Map 75, Parcel G7-10, 11 in the RR Zoning District; owners Steven & Laurie Jalbert.

**Case #2019-23**

The property is located at **113 Church Street**, Map 88, Parcel T6 in the RR Zoning District, owners Donald & Sonya Gorman.

**Case #2019-24**

The property is located at **1404 Orleans Road**, Map 86, Parcel M16-1 in the CH-2 Zoning District, owner JP Hattrick, LLC.

**Case #2019-25**

The property is located at **246 Route 137**, Map 96, Parcel A6 in the RR Zoning District, owners Muriel Woodland.

Attorney Amy Kwesell presented the cases for the Town along with Griffin Ryder, the Town Engineer and Mike Guidice of CDM Smith who gave a quick overview of the Phase II Sewer System project which will eventually sewer about 650 homes. Mr. Guidice offered photos and mock ups of the proposed pump houses showing their location in relation to the streets. There will be a total of 6 pump houses (2 will be on town property) to move the flow to the treatment center in Chatham.

Attorney Kwesell said that the municipal use is an exempt use but case law supports this as an “essential use” thereby requiring Special Permits. The placement of the structures requires Variances. The plan is to enclose most of the required mechanicals inside the structures.

The Town has easements over the 4 private properties. Owners were compensated and met with the Town Administrator numerous times.

Griffin Ryder said that the plan is to place the pump houses as close to the roadways as possible to keep them as far as possible from private residences.

Mr. Guidice added that the generators are natural gas powered and will only operate about twice a month.

Each of the locations and structures was described in detail.

Public comments included objections by Scott Morris of 16 and 18 Church Street who wondered why the Town hadn’t chosen to place the 24 Church Street pump house across the street on land under Conservation jurisdiction instead of so close to private residences. His driveway is very close to the proposed pump house. He had questions about who will maintain the systems and potential noise and traffic problems.

Roy Terwilliger of 113 Church Street was concerned about the proximity of the 113 Church Street pump house to the back yard of 8 Marsh View and hoped that the final buildings will look as much like the mock ups as possible.

Mr. Hilliard moved and Mr. Donoghue seconded the motion to close the public hearing.

For Case # 2019-22, 24 Church Street, Mr. Hilliard moved and Mr. Armstrong seconded the motion to grant a Variance to construct a pump house according to the plans submitted, the Board having found that the size, shape and topography of the lot in question are unique and there would be a hardship, financial or otherwise were the Board to deny the Variance, and to grant a Special Permit for the Essential Services Use within the setback at 24 Church Street according to the plans provided. 5-0-0

Voting in favor:

Mr. Hilliard, Ms. Muller, Mr. Hederstedt, Mr. Donoghue and Mr. Armstrong

For Case # 2019-23, 113 Church Street, Mr. Hilliard moved and Mr. Hederstedt seconded the motion to grant a Variance to construct a pump house according to the plans submitted, the Board having found that the size, shape and topography of the lot in question are unique and there would be a hardship, financial or otherwise were the Board to deny the Variance, and to grant a Special Permit for the Essential Services Use within the setback at 113 Church Street according to the plans provided. 5-0-0

Voting in favor:

Mr. Hilliard, Ms. Muller, Mr. Hederstedt, Mr. Donoghue and Mr. Cupoli

For Case # 2019-24, 1404 Orleans Road, Mr. Hilliard moved and Mr. Hederstedt seconded the motion to grant a Variance to construct a pump house according to the plans submitted, the Board having found that the size, shape and topography of the lot in question are unique and there would be a hardship, financial or otherwise were the Board to deny the Variance, and to grant a Special Permit for the Essential Services Use within the setback at 1404 Orleans Road according to the plans provided. 5-0-0

Voting in favor:

Mr. Hilliard, Ms. Muller, Mr. Hederstedt, Mr. Donoghue and Mr. Armstrong

For Case # 2019-25, 246 Route 137, Mr. Hilliard moved and Ms. Muller seconded the motion to grant a Variance to construct a pump house according to the plans submitted, the Board having found that the size, shape and topography of the lot in question are unique and there would be a hardship, financial or otherwise were the Board to deny the Variance, and to grant a Special Permit for the Essential Services Use within the setback at 1404 Orleans Road according to the plans provided. 5-0-0

Voting in favor:

Mr. Hilliard, Ms. Muller, Mr. Hederstedt, Mr. Donoghue and Mr. Armstrong

Mr. Hederstedt made a motion to approve minutes from the May 29, 2019 meeting. There was a second by Mr. Donoghue with unanimous approval.

Mr. Cupoli moved and Mr. Donoghue seconded the motion to adjourn

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

Board of Appeals Recording Clerk