



Town of Barnstable
Zoning Board of Appeals
Draft Minutes

December 10, 2008

A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday, December 10, 2008 at 7:00 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was not met. Also present were Art Traczyk – Principal Planner and Carol Puckett – Administrative Assistant.

Laura Shufelt	Present
James McGillen	Present
Michael Hersey	Present
Craig Larson	Present
William Newton	Present
Alex Rodolakis	Present
Nikolas Atsalis	Present
Brian Florence	Present
George Zevitas	Present

Laura Shufelt opens the hearing at 7:03 PM. She reads a summary of the appeals into the record. She then calls the Cunniff appeal and reads it into the record.

Appeal 2008-069

**Cunniff
Variance Family Apartment Provisions**

Richard M. Cunniff and Pauline A. Cunniff have applied for a Variance to Section 240-47.1.A Family Apartments. The applicants are seeking to develop and use an existing detached barn located on the property for a family apartment. The variance is requested to allow for the apartment unit to be detached and to be located in the existing structure that is nonconforming with respect to the minimum required front yard setback from Old Neck Lane. The property is addressed 2275 Main Street (Route 6A)

West Barnstable, MA and is shown on Assessor's Map 237 as Parcel 033. It is in the Residence F-2 Zoning District.

Members assigned: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

Attorney Benjamin Losordo from Sandwich is representing the applicant. Also present were Bruce Devlin the designer and Bill Hughes, the builder. Mrs. Cunniff's mother-in-law will be the occupant and has financial interest in the building. Pauline and Richard Cunniff are also here. Attorney Losordo gives a brief history of the building. He indicates that they have been through historic and it has been approved. The apartment will exactly be 800 square feet. The property has a 4 bedroom septic. The house currently has 3 bedrooms and the barn will make it 4. He explains the relief they are seeking is because the existing structure to house the apartment is detached and that they require a variance from the front yard setback. He indicates that they have a signed affidavit from the family which he submits to the Board.

William Newton asks Attorney Losordo to explain how this meets the variance 3 prong test. Attorney Losordo indicates that it would be a financial hardship if the mother-in-law couldn't move in. He indicates that they investigated moving the barn but it couldn't be moved because of the slope it is on and would destroy the historic barn. William Newton asks if there is any provision that would prevent them from building something attached to the dwelling.

Bruce Devlin indicates that the house has many rooflines and to add something that would match the rooflines would be expensive and doesn't want to change the scope of the house.

Attorney Losordo indicates that someone would view it as a house and a barn and not two dwellings.

William Newton is concerned also with how close it is to the road and the potential for safety problems. Attorney Losordo indicates it is not a throughway but a driveway and that they have a right-of-way over it.

James McGillen indicates that the integrity of the buildings are highly protected and they have a desire by historical to preserve the ones already in existence. He thinks there are variance conditions and that the building can be preserved. Bruce Devlin reiterates that they have approval from Old Kings Highway.

Laura Shufelt asks where the driveway access is and parking for the in-law apartment. Bruce Devlin indicates that they don't want to change any of the landscaping and will not be accessing it from Old Neck Road.

Laura asks if there is anyone here from the public that would like to speak either in favor or in opposition. No one speaks.

Craig Larson asks if the applicants are aware of all that is required as far as an in-law apartment and that when the family member moves out they will need to take out the kitchen. Attorney Losordo indicates that they are aware of that.

Brian Florence asks Bruce Devlin about the topographical issues. Bruce indicates that they would have to bring in fill and doesn't think that it would be a pretty site.

James McGillen makes positive findings:

Richard M. Cunniff and Pauline A. Cunniff have applied for a Variance to Section 240-47.1.A Family Apartments. The applicants are seeking to develop and use an existing detached barn located on the property for a family apartment. The variance is requested to allow for the apartment unit to be detached and to be located in the existing structure that is nonconforming with respect to the minimum required front yard setback from Old Neck Lane. The property is addressed 2275 Main Street (Route 6A) West Barnstable, MA and is shown on Assessor's Map 237 as Parcel 033. It is in the Residence F-2 Zoning District.

The variance requests using a building already in existence. In the Town there is an interest of a historical nature to keeping historical buildings. The variance would encourage an under utilized and in poor condition structure that would encourage new construction.

- **owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district and historical in which it is located;**
- **a literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner, and letters of support submitted to the file**
- **desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning**

Vote:

AYE: Craig Larson, Michael Hersey, James McGillen, Laura Shufelt

NAY: William Newton

Laura reads the letter in support from Roberta L. Cass and Mark Lapire.

James McGillen asks Attorney Losordo if he is aware of the conditions as outlined in the staff report. Attorney Losordo indicates that he has seen them.

Craig Larson wants to make an amendment to the conditions. Laura Shufelt indicates that he will be able to amend once the conditions are read.

James McGillen makes a motion to grant the relief requested according to the conditions in the staff report:

1. **The family apartment shall comply with, and be maintained, in full compliance with all other requirements of Section 240-47.1 for a family apartment as-of-right as well as all conditions in this decision.**

2. ***The family apartment shall be developed and maintained as a one-bedroom unit as shown in a plan submitted to the Board entitled "Barn Renovations – Cunniff Residence 2275 Route 6A, Barnstable, MA", as drawn by Bruce Devlin Designs, and dated July, 2008.***
3. ***The applicant shall apply for all applicable building permits for the unit. All requirements of the Building Division shall be fully complied with to assure that the unit and building meet all applicable codes, including building, fire, and health.***
4. ***Improvements to the structure shall be in full compliance with the Barnstable Old Kings Highway Historic District Committee's Certificate of Appropriateness.***
5. ***The buildings located on the property shall not be further expanded nor bedrooms added until the family apartment is discontinued and there is no longer a need for this variance. At that time, this variance shall cease and the applicant or property owner shall be responsible for the removal of the kitchen and use of the building as an independent living unit. A building permit for the removal of the unit shall also be shall be required at that time.***
6. ***All parking shall be on-site and screened from the both Route 6A and Old Neck Road.***
7. ***Occupancy of the family apartment unit is restricted to family members of the property owners who shall also be required to reside in the principal dwelling on the property. Occupancy of the family apartment unit shall not exceed two persons. There shall be no renting of the apartment unit to non-family members and no renting of rooms (lodging) permitted during the life of this variance.***

***Craig Larson wants to amend. Condition #6 to read "using existing single driveway".
Seconded.***

Vote:

Aye: Craig Larson, Michael Hersey, James McGillen, Laura Shufelt

NAY: William Newton

GRANTED WITH CONDITIONS

Laura Shufelt then calls the Piggot appeal and reads it into the record:

Appeal 2008-068

**Pigott
Special Permit Demo/Rebuild**

Prudence Pigott has petitioned for a Special Permit pursuant to Section 240-91 H(2) Nonconforming Lot - Developed Lot Protection. The petitioner is seeking a Special Permit to allow for the demolition of the existing dwelling and to rebuilding of a new, 1,990 sq.ft., single-family dwelling on the undersized lot of less than 10,000 sq.ft. of upland. The location of the proposed dwelling does not conform to the required minimum yard setbacks, however they are more conforming than the established yard setbacks of the existing structure. The subject property is addressed 71 and 0 Sunset Lane, Barnstable, MA and is shown on Assessor's Map 301 as Parcels 024 and 023. The property is in a Residence B Zoning District.

Members assigned: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

Attorney Kenney is representing the applicant. Also present is Steve Cook from Cotuit Bay Designs. Attorney Kenney gives a brief history of the property and indicates that they have also been before historic. He is not certain of where the cottage came from and indicates that there is no insulation and that it was not well maintained as it was used for a beach shack. There are many other cottages in the area. He gives a summary of relief requested.

Steve Cook gives indicates that he designed the structure to fit the guidelines outlined. He indicates it will be a small 2 story home with attached garage in the front. It will consist of 3 small bedrooms and 2 small baths and was designed to meet Old King's Highway guidelines and this style fits the criteria of that area. He indicates that there is a small cupola in the middle of the roof. On the rear of the building there are double sliders on the first and second floors taking advantage of the views. The house runs from Sunset Lane to the ocean and runs front to back and not side to side. The total width of the house is only 24 feet wide.

Brian Florence references section 2 of Attorney Kenney's memo and comments that they are cutting it close as far as the floor area ratio. He asks Attorney Kenney if they would have objection to a condition that says that they would certify to the Building Commissioner's satisfaction that they haven't exceed that.

Attorney Kenney agrees.

William Newton asks Steve Cook for clarification of the total square footage. Steve Cook clarifies the measurements.

Michael Hersey asks Mr. Cook what is the purpose besides the obvious view and walkout from the bedrooms of the covered porch with what he assumes would be a rubber roof and a fenced off deck and asks if it is just for aesthetics. Mr. Cook indicates that it is a roof deck facing east above the screened porch and is off a hallway.

Steve Cook verifies that the 1300 square feet includes the garage, porch and first floor.

Laura Shufelt asks if there is anyone here from the public that would like to speak either in favor. No one speaks.

William Newton makes a motion to do findings of fact:

- 1. Relative to appeal 2008-068, a request by Prudence Piggott for a special permit to Section 240-91.H(2) to demolish the exiting building at 71 and 0 Sunset Lane and reconstruct a new dwelling.**
- 2. The proposal fits with the requirements of Section 240-91.H(2) for a special permit to raze the existing dwelling and construct a new single family home. The dwelling as proposed would conform to the general appearance and style of existing dwellings in the immediate area.**
- 3. The new dwelling does not comply with current setback requirements but will improve the nonconforming yard setbacks now in place for the existing dwelling as required.**

4. **Lot coverage is to be maintained at 20% and the applicant's proposed drawings for the new dwelling indicates that the requirement has been met.**
5. **The maximum floor area ratio of point .30 is required and the proposal of 29.9 will be provided.**
6. **The building height for the area is 30 feet and this will be met by the new dwelling which is proposed at 19.5 feet.**

They discuss Brian Florence's earlier comment regarding a letter addressed to the Building Commissioner and agree that it will be a condition.

James McGillen makes an amendment to the findings that:

The application falls within a category specifically excepted in the ordinance for a grant of a special permit

After evaluation of all the evidence presented, the proposal fulfills the spirit and intent of the zoning ordinance and would not represent a substantial detriment to the public good or the neighborhood affected as the proposed new dwelling would not be substantially more detrimental to the neighborhood than the existing dwelling.

Seconded.

Vote:

AYE: Craig Larson, James McGillen, William Newton, Laura Shufelt

NAY: Michael Hersey

Michael Hersey indicates that his personal opinion is that this is within the guidelines but is not within the spirit of the zoning ordinance.

William Newton makes a motion is to grant the relief requested with the following conditions as set forth by staff and to add the condition as previously stated by Brian Florence.

Seconded.

Vote:

AYE: Craig Larson, James McGillen, William Newton, Laura Shufelt

NAY: Michael Hersey

GRANTED WITH CONDITIONS

Motion is made to go into executive session for pending litigation and to resume hearing once they come back.

Seconded.

Vote:

AYE: George Zevitas, Nik Atsalis, Brian Florence, Alex Rodolakis, Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

NAY: None

Motion is made to come back from executive session and to resume hearing.

Seconded.

Vote:

AYE: George Zevitas, Nik Atsalis, Brian Florence, Alex Rodolakis, Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

NAY: None

Back from Executive Session at 8:04 PM. Laura calls hearing back in session.

Laura Shufelt reads the Oyster Harbors appeal.

Appeal 2008-008 – Continued

**Oyster Harbor Club
Expand/Alter Nonconforming Use**

Oyster Harbors Club, Inc. has petitioned for Special Permits pursuant to Section 240-93.B Alteration and Expansion of a Nonconforming Buildings or Structures Not Used as Single or Two-Family Dwellings; and Section 240-94.B Expansion of a Preexisting Nonconforming Use. The petitioner seeks to remodel an existing 573 sq.ft., children’s play center and to add another accessory building consisting of 1,096 sq.ft., to also be used as a children’s play center. The buildings and use is accessory to the principal nonconforming use of the property as a Club House. The subject property is located as shown on Assessor’s Map 053 as Parcel 012 Lot 001, addressed as 170 Grand Island Drive, Osterville, MA 02655, in a Residence F-1 Zoning District.

Laura Shufelt indicates that there is a letter from Attorney Douglas Murphy asking that this be continued to March 25th at 7:30

Motion to continue this to March 25, 2008 at 7:30 PM

Vote:

AYE: George Zevitas, Nik Atsalis, Brian Florence, Alex Rodolakis, Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

NAY: None

Laura Shufelt then calls the Vages appeal:

Variance Nos. 2007-092 & 097

**Vages
Request for 6-Month Extension of Variances**

By letter received November 24, 2008, Thomas and Dona-Maria Vages are requesting a 6-month extension for Variance Nos. 2007-092 and 097 issued to property addressed 293 Old Craigville Road, Hyannis, MA. The subject lot is shown on Assessor's Map 247, as parcel 104-001. The variance was issued to legalize undersized lots created by an Approval Not Required plan recorded June of 2006 and allow demolish of a cottage on Lot #1 of that plan and rebuild a new one-bedroom single-family dwelling.

Members assigned: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt.

Dona-Marie Vages is present to answer any questions from the Board.

Laura Shufelt indicates that the variance issued needs to be recorded by December 18, 2008 or it will expire and any extension granted will also be recorded.

Laura Shufelt asks for a motion to extend this variance for six months with the condition that the variance be recorded before December 18, 2008 as required in the original variance.

Motion moved.

Seconded.

Vote:

AYE: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

NAY: None

GRANTED WITH CONDITIONS FOR SIX MONTHS

Laura Shufelt then calls the Crocker appeal and reads it into the record.

Appeal 2008-036

**Estate of Charles F. Crocker, Jr.
Appeal of Building Permit for 68 Pilots Way**

Priscilla Dreier as Executrix of the Estate of Charles F. Crocker, Jr., has appealed the issuance of a building permit to develop a single-family dwelling at 68 Pilots Way, Barnstable, MA. The subject property is a

2.13 acre lot owned by Katie E. Gruner. It is shown on Assessor's Map 237 as parcel 007-001. The property is in a Residence F Zoning District.

Members assigned: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

Sarah A. Turano-Flores from Nutter McClennen and Fish is representing the applicant. Eliza Cox hands out memo and exhibits. Ms Florez gives summary of relief being sought. She indicates that it is their contention that Ms. Gruner does not have rights over Pilot's Way which runs along their properties easterly boundary and that they own the 100% fee interest in Pilot's Way and are asserting that Ms. Gruner and predecessor's in title have never been deeded a legal and valid deed tile and interest and therefore have no legal frontage as defined in the Town's bylaw. She indicates that Ms. Gruner, prior to purchasing the property in 2008, took out title insurance and that title insurance council has now defended this litigation and were hoping to settle this but has not been resolved as of yet. Attorney Florez then gives a PowerPoint presentation ([see attached](#)) and a brief history of Pilot's Way. She indicates that the Crocker homestead has been in the family for over 100 years.

William Newton asks how they determined that they could do an ANR without access.

Attorney Florez indicates that in 1973, Mr. Crocker created the 40 foot wide subdivision way on his own property with this plan and it has always been and is private to this day. She indicates that it is a 40 foot subdivision way held in private ownership. Prior to the 1973 subdivision plan, In 1972 James Crocker Jr. received a deed from the then owner, the Helen B. Miller property at that time owned by Charles Kimball. In 1972, Charles Kimball and Charles Crocker exchanged confirmatory deeds and are in Tab 4 of the handout she gave out this evening. She indicates that the intention at the time was to confirm the bounding descriptions as they had been passed down in the Crocker family for so many years not shown on a plan of land and that bounding line became very important. The boundary line consisted of stone walls and the boundary line of the way. In 1973 they obtained approval from the Planning Board for this subdivision..

She indicates that prior to this subdivision in 1965 Mr. Crocker's mother deeded the land to the north to one William H. Lewis and that deed is in Tab 5 of the handout. At that time in 1965, this 10 foot right-of-way extended from the north above the railroad right-of-way out to 6A and in the deed for the title for the property to the north, Charles Crocker's mother granted William Lewis a right-of-way all over her remaining property, the Crocker Homestead, out to the King's Highway. She indicates that she thinks that this deed, although set forth as a conveyance, is a confirmatory deed to confirm the boundary lines between the two properties.

James McGillen indicates that it not noted as a confirmatory deed and makes no reference to a prior deed and asks if this title at one time in the Crocker's? Attorney Florez answers no but the title to the west of the Gruner parcel has always been in the Crocker family for over 100 years the title to the east has never been in the Crocker family. She indicates that in 1983, Mr. Crocker was before the Planning Board for approval for the creation of 3 lots. This ANR approval was subject to the condition that prior to the development or conveyance of any of these lots the road be fully constructed in accordance with the Subdivision Rules and Regulations. The covenant is in Tab 6 of the handout. In 1985, the land which Charles Crocker's mother had conveyed out to William Lewis

in 1965 was conveyed to Thomas Shields and BWC Ellis. The land is more accurately shown on Tab 7 in the handout. In the deed from Lewis to Shields & Ellis you will see that he conveyed the land shown on Tab 7 together with a right-of-way to and from the granted premises over King's Highway which is the same language when Charles' mother conveyed it to Mr. Lewis. However, between 1965 and 1985, Pilot's Way had transformed from a 10 foot wide right-of-way to a 40 foot right-of-way and traversed property which was not owned by the Crocker estate and therefore the new owners of another lot sought to confirm they had right-of-way over the 10 foot wide cart path and Pilot's Way all the way out to King's Highway and obtained 3 deeds of easement which they recorded and are contained in Tab 9 of the handout. They were recorded on the same day but subsequent to the deed itself. It is the 3rd of these easements which leads them to the trouble in this case. It is a 1985 deed of easement from Charles F. Crocker to Thomas Shields and BWC Ellis for a right-of-way. She reads the deed. She indicates that it is Ms. Gruner's contention and her attorney that this was a personal easement and not an easement appurtenant to the land that Ellis and Shields bought on that day and therefore they claim that Ellis and Shields had a further right to convey out an easement over Pilot's Way to any third party. She indicates that it is their contention that this is not support by case law in Massachusetts or common sense. In Massachusetts easements are presumed to be appurtenant and not personal, i.e, they are presumed to run with the land and not to individuals who can deed them to 3rd parties. If/when an easement is created it is primarily useful or beneficial to the owner of a particular piece of land then the easement is strongly presumed to be appurtenant to that piece of land and not to be considered a personal easement. Furthermore, the nature and extent of an easement is determined by the language of the grant construed in light of the attending circumstances surrounding the conveyance. (see page 11 of PowerPoint presentation). She then goes onto pages 12 and 13 of the PowerPoint presentation.

Craig Larson asks for clarification of how Pilot's Way was created. In 1973 Attorney Florez indicates that Pilot's Way was created in 1973 and was not constructed to its full width. She indicates that the 1973 subdivision plan and the subsequent 1983 subdivision plan did not require that the road be constructed unless it was further subdivided which is another indication to her that the 2005 ANR endorsement was incorrect because obviously there was a further subdivision, not of this property, but the property next door increasing the use of Pilot's Way and should've been constructed at that point and wasn't. She indicates that the 1983 plan had a covenant on it that requires the construction of the ways and solicitation of municipal ways prior to the lot being built upon or conveyed.

James McGillen asks for clarification where the Kimball's property is and that Kimball had no rights to it?.

Attorney Florez points it out and indicates that she doesn't believe it was an ancient way and has never been established as an ancient way.

Alex Rodolakis asks about standing. Attorney Florez indicates that when Mr. Crocker died and under his will it would be equaled out in 3 shares and the executrix has authority under the will and has consent of two other siblings.

Attorney Albert Schulz speaks and indicates that he is representing Katie Gruner and her husband. Andrew Polick. He indicates that this is currently before the land court and wither the easement is

in gross or appurtenant. Ms. Florez referred to the intent but it is what the court is going to decide. It is their position that Mr. Shields and Ellis received an unambiguous easement with rights over Pilot's Way. In the easement there is no language that states that it is appurtenant to any particular piece of property. He reads the easement. Under Massachusetts General Law, you don't have to state in a deed how you are deeding an appurtenant right and thinks it is important language. Also, if looking at the deed from William Lewis to Ellis & Shields there is no mention of the easement in that instrument and indicates that they already had an appurtenant statement in the deed. This is an easement in gross and thinks this is not the proper forum for this. The suit is pending and as far as tonight's hearing, Ms. Drier, as the executrix of the estate of Charles Crocker, does not have standing to appear before the ZBA. She brought it solely as executrix of the estate and does not hold title to any real estate. The executrix's power is to sell the property under the license or under the will and does not have any legal title and would suggest to the Board that she is not a party aggrieved. He would take issue that there is a conflict in the administration of the estate. First, she does not have standing and shouldn't be here. Secondly, his clients have an unambiguous easement that grants them rights over Pilot's Way to their property. He indicates that in 2005, Mr. Toennes, previous owner, appeared before the Planning Board in connection with seeking an endorsement of an ANR plan. At that time presented to the Planning Board, they discussed it and the Crocker family was there to object, was referred to Town Council, the opinion came back that it was worded strangely but that Mr. Toennes probably had access over Pilot's Way. The Planning Board then voted unanimously to endorse the plan. He indicates that the Crocker's could have opposed the grant of that plan and did not. In 2007, the Toennes estate signed an agreement with Ms. Gruner to sell one of the lots, Lot #2, to her and believes that agreement was in the summer of 2007 and that shortly thereafter Ms. Gruner filed plans with OKH and appeared at several hearings. Again, the Crocker family attended and objected to her plans. In September, OKH issued and approved a certification of appropriateness. The Crocker family has allowed the building permit to issue. The Building Commissioner issued a building permit, the house has been constructed, an occupancy permit has been issued and his clients have moved into the property.

Brian Florence asks if the appeal of the Building Commissioner's issuance of a building permit was done in a timely fashion. Attorney Schulz indicates yes..

Attorney Schulz indicates that this revolves around the fact that the Crocker's want to subdivide their property and are under a mandate from the old approval in 1973 that they have to improve Pilot's Way. Prior to his clients purchasing the property, they were invited to a meeting with Mr. Butler on several occasions where the Crocker family demanded that they contribute \$100,000.00 to the construction of Pilot's Way and that demand has continued to the present time. He suggests that they don't have standing and suggests that this Board uphold the Planning Board's endorsement but also the Building Commissioner's of the permit in March of 2008.

Board member Michael Hersey asks if there has been any injunctive relief sought.

Attorney Schulz indicates there has been no injunctive relief sought in the Land Court case.

Laura Shufelt asks if there is anyone here from the public who would like to speak. No one speaks.

*Attorney Florez responds and indicates that the title to the property is in his estate under his will and his children are the three children are the **devidees?** Once the distribution becomes finalized and therefore that Ms. Dreier has standing. She indicates that she wrote 3 cease and desist letters*

pending the construction. They filed suit shortly after filing this building permit appeal fully intending and in fact, the complaint does contain a prayer for injunctive relief. The cease and desist letters pull them on full notification and others came from her office indicating that if they proceed it would be at their own risk. She indicates that once they filed suit the insurance company got involved and it was through an agreement that they didn't pursue a motion for preliminary injunction. At a status conference held at the end of November they agreed that no settlement would be forthcoming. She is preparing the motion for a preliminary injunction and they are prepared to come forward and move this appeal this evening. She indicates that it is not true they are looking for money or demanded the money to line their pockets, this is a trespass and these people have no rights or interest across the property. The money is reflective not of the construction cost but of the deeded easement. They haven't come anywhere close to terms.

Board member Brian Florence comments that as a Building Commissioner, when they issue a building permit they need to see that there is frontage on a way but they don't need to know who has right title of ownership or who has the ability to use that they just have to make sure that what they have done is that they have frontage. Also, they do not need to know who has rights to an easement with its detail. He thinks the Building Commissioner acted properly and thinks it should be upheld and doesn't believe it belongs here.

Michael Hersey indicates that because of received the materials just recently and because this is a complex case and is uncomfortable with making any kind of decision tonight.

William Newton is in agreement with Michael Hersey and suggests it be continued in order for council to look at this.

James McGillen believes it is a legal way and the question is whether they have access to it.

Attorney Florez indicates that the way itself is legally laid out on the subdivision plan but this is a zoning determination.

James McGillen indicates that he believes that this is a legally laid out way and the issue of whether or not they have access or legal rights is to be determined by the Land Court and would uphold the Building Commissioner's determination on this matter.

Laura Shufelt asks for a motion to either uphold or continue.

William Newton makes a motion to continue to get input from council and staff.

Seconded.

Vote:

AYE: Craig Larson, Michael Hersey, William Newton, Laura Shufelt

NAY: James McGillen

Continued to January 28th at 7:00 PM

Craig Larson asks about the Ancient Way. Attorney Schulz explains.

Ruth Weil asks the Board to frame their questions they will pose to the legal department.

Attorney Schulz asks that the question of standing be answered.

Laura Shufelt asks what their prevue in reviewing the Building Commissioner's opinion and whether that gets into frontage and access.

William Newton Bill wants to know what was given to the Building him in order to

Michael: Hersey asks what reasonable knowledge is required of the Building Commissioner in determining legal access before issuing a permit.

Michael Hersey also asks, in the opinion of the Town Attorney if the party has standing.

They decide to ask the Building Commissioner on standing.

Michael Hersey asks if the Building Commissioner is required to see if there is legal access on a way prior to issuing a building permit.

Brian Florence asks whether or not who has rights to use it and whether or not he is required to know that.

William Newton asks what the Planning Board members used to make their decision.

Continued to January 28, 2009 at 7:00 PM.

**Laura Shufelt calls a ten minute break at 9:13 PM.
Back in session at 9:24 PM.**

Laura Shufelt calls the Nirvana appeal and reads it into the record.

Appeal 2008-066

**Nirvana Coffee Company Inc.
Coffee House Conditional Uses Special Permit**

David Lancaster d/b/a Nirvana Coffee Company Inc. has petitioned for a Special Permit pursuant to Section 240-24.C(1) Conditional Uses in the VB-A Business District. The petitioner is seeking a Special Permit to allow for a coffee house, food-service establishment. The property is addressed 3206 Main Street (Route 6A) Barnstable, MA and is shown on Assessor's Map 300 as Parcel 008. The property is in the Village Business A District.

Appeal 2008-067

**Nirvana Coffee Company Inc.
Reduction In Parking Special Permit**

David Lancaster d/b/a Nirvana Coffee Company Inc. has petitioned for a Special Permit pursuant to Section 240-57 Circumstances Warranting Reduction of Parking Requirements. The petitioner is seeking to provide eight (8) seats within the coffee house without providing the required off-street parking. The property is addressed 3206 Main Street (Route 6A) Barnstable, MA and is shown on Assessor's Map 300 as Parcel 008. The property is in the Village Business A District.

Members assigned: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

Attorney John Kenney is representing the applicant. Also here is David Lancaster, who is the owner of Nirvana Coffee. He gives a brief summary of relief requested. He indicates that the business has been open since June of 2008. The first permit is regarding the conditional use in the business district. He attached a copy of the site plan. David Lancaster shows the entrance and the bathrooms and points out the foot/prep area and the burista area. Attorney Kenney indicates that they want to put in 8 seats and are not looking for tables and chairs. They will be soft chairs and there will be no individual menus or service at the tables, no ordering of special sandwiches, as everything is pre-made. He indicates that they are approved from 6:00 AM to 4:00 PM and gives the hours during the week. He indicates that this is not a destination restaurant and is there for businesses and residents in the village area and that 75% of the business is from walk-ins and about 5% are for sandwich/food delivery. He indicates that the other relief they are requesting is the reduction of parking requirements. He indicates that according to the bylaw they meet two of the critical out of 4. He reads the bylaw. He indicates that you can park on 6A and there is a letter from E. Mark Silinsky indicating that his customers can use the public county parking complex which, since the jail has moved, and that off-site parking is adequate. He indicates that the two apartments and office space are grandfathered and talks about what would be required if the building were to be built today.

He talks about the deliveries and that the majority of deliveries were requested by Mr. Lancaster to be done in the early morning hours. He indicates that there is a petition signed by 372 persons that has been submitted as well as other letters in support submitted to the file.

Board Member Michael Hersey asks where the 4 on-site parking spaces are. David Lancaster points them out. Michael Hersey asks about the previous history of this applicant before the Board. Attorney Kenney gives the history.

Craig Larson asks if they have been before the Village Association. Attorney Kenney indicates that they had not. Craig Larson suggests that maybe they could go there and maybe suggest a 20 minute limitation on parking.

Laura Shufelt indicates that there were letters submitted in favor and reads who they were from (see attached).

Laura Shufelt asks if there is anyone here from the public either in favor or in opposition.

Joseph Ferraro, an abutter to the General Store, indicates that there has been a parking problem for 20 years. He indicates that there is not enough parking and that granting this for 8 seats for people who would sit there longer would be a detriment.

Lindy Carter Shawl represents the Walkers. The family has been there for 80 years. She is in favor and thinks that there are much more people walking in the village than people think.

Bob Kelley represents the Dolphin restaurant and maintains 40 parking spaces. He indicates that if the applicant gets a special permit then he might get a special permit for a liquor license and is against this request as he does not have enough parking.

Bob Medeiros indicates that if you are going from retail to a restaurant it is a change of use. If you have a business where someone gets a coffee and sandwich and people sit for awhile it is not a grab and go. He indicates that Attorney Kenney met 2 out of 4 criteria and those spaces on the street are full 77% of the time. Parking is an issue. With regards to the parking spaces they are required to have 15 spaces, there are 36 and they 77% of the time where are the 15 spaces going to come from to service Nirvana Coffee. People will be parking in his lot. He asks the Board that they not issue the special permit.

Ann Miller of 3026 Main Street is in favor and feels it will add to the feel of the community and will be an asset and a nice addition to the neighborhood. She indicates that because most of the businesses in the area are of a professional nature the coffee shop adds a sense of community.

John Field and Kirsten Barse, owners of the building that houses Nirvana Coffee, are here to support the application on both forms of relief. John Field indicates that he has seen the abutters park their cars parallel in order to prevent people from parking in their lot presumably to go into Nirvana.

Lynn Medeiros, who also owns the Country Store, is in opposition as she feels that there is not enough parking spaces and that people are parking in their parking lot. She believes even with the jail not being there that there is still a parking problem. She is for her rights for her own property.

Attorney Kenney wants to clarify that 75% of the people are in the village already doing business and not necessarily walking. He indicates that regarding deliveries, he has photos which he submits of delivery trucks, UPS trucks, trash pick-up trucks delivering to the Village Store somewhat blocking 6A (see attached).

He doesn't argue their right to their own property but believes it is more about competition than parking issues. He indicates that Nirvana Coffee has done everything upfront and was granted as-of-right. He indicates that his client has been through a lengthy and costly process and that his client's initial application was granted as-of-right and that was planning on putting in the 8 seats and was informed to reduce the seats but then requested to take out the 8 seats. He was informed that if he was going to have a two bathrooms. His client was required to put in the bathrooms because he was told that he could have the 8 seats but then told to come back at a later date for the 8 seats. The retail use got appealed and they are here now for the two special permits and nothing has changed from his client's original application. They will not be back here for a liquor license or additional seats.

William Newton asks if they would be opposed to delaying a decision in talking to the Village Association for working with the neighbors regarding parking.

David Lancaster indicates that he had contacted someone in the village asking if they would be willing to rent him the spaces and was told no. He also indicated that he put up signs to be

considerate of not parking in front of certain spots and has tried to be a good neighbor and has done everything the Town has asked in order to open.

Board Member Nik Atsalis calls point of order and indicates that a previous comment that there has been a parking problem for twenty years doesn't think that it a Nirvana issue.

Mr. Ferraro indicates that if David Lancaster has 8 seats, people will be there longer.

Brian Florence indicates that he believes the traffic is not going to change.

Laura Shufelt comments that she doesn't think that the 8 seats are going to intensify what is there now and asks what the Board's feelings are.

Bill Newton would like to continue this to see if they can come back with additional information.

James McGillen makes a motion for findings:

- 1. In Appeal No. 2008-066, David Lancaster doing business as Nirvana Coffee Company Inc. has petitioned for a Special Permit pursuant to Section 240-24.C(1) Conditional Uses in the VB-A Business District. The petitioner seeks the permit to allow for a coffee house, food-service establishment. The property is addressed 3206 Main Street (Route 6A) Barnstable, MA and is shown on Assessor's Map 300 as Parcel 008. The property is in the Village Business A District.*
- 2. Section 240-24.C(1) states that "Restaurant or other food-service establishment, but not including drive-in restaurants" are a conditional use in the VB-A District, provided that a special permit is first obtained from the Zoning Board of Appeals subject to the provisions of § 240-125C herein and subject to the specific standards for such conditional uses as required in this section:*
- 3. The application falls within a category specifically excepted in the ordinance for a grant of a special permit, as the application and site plan does not include a drive-in/drive-thru facility and therefore qualifies to apply for the special permit being requested for a Conditional Use as a restaurant, food-service establishment pursuant to Section 240-24.C(1).*
- 4. In evaluating the evidence presented: This is a very small operation that involves the reuse of an existing premises of only 990 sq.ft., in an existing mixed use building. The property is located in the traditional village center zoned for business and commercial use, including restaurants by special permit. The property is connected to public water and public sewers. The Barnstable Village Center is identified as a "Village Activity Center" in the adopted Comprehensive Plan. That plan cites loss of retail and service businesses to office uses in the village center and recommends that shift to office use be curtailed. Given these facts, this grant of a conditional use permit fulfills the spirit and intent of the zoning ordinance and would not represent a substantial detriment to the public good or the neighborhood affected nor derogate from the intent of the zoning ordinance.*
- 5. That applicant was before the Site Plan Review Committee on October 23, 2008 and the site plan was found to be approvable. A Site Plan approval letter has been issued.*

Craig Larson wants to add that it mirrors the Comprehensive Plan and is spelled out on Page 6 of that plan

Vote:

AYE: James F. McGillen, William H. Newton, Craig G. Larson, Laura F. Shufelt

NAY: Michael P. Hersey

James McGillen makes a motion to grant the relief requested.

James McGillen will wait for the second vote on conditions at this time.

Seconded.

Vote:

AYE: James F. McGillen, William H. Newton, Craig G. Larson, Laura F. Shufelt

NAY: Michael P. Hersey

Special Permit for Conditional Uses has been Granted.

James McGillen then does findings on 2008-067.

- **The petitioner has also brought appeal 2008-066 (2008-067) seeking parking relief review. Under section 240-57 that there are circumstances warranting reduction requirements on the parking provisions in this zoning district**
- **The use of common parking areas by different uses having different peak hours of demand age or other characteristics of the occupants which reduce auto usage.**
- **There is supplementary parking provided off premises.**
- **Under those circumstances it would not be a detriment to the zoning and that the relief to allow 8 seats within the coffee house without providing the off-street parking should be allowed**

Attorney Kenney comments that the appeal number is 2008-067 and not 2008-066. Correction accepted.

Vote:

AYE: James F. McGillen, William H. Newton, Craig G. Larson, Laura F. Shufelt

NAY: Michael P. Hersey

James McGillen asks Attorney Kenney if he has seen the proposed conditions and if his client is acceptable to the conditions. Attorney Kenney replies his clients have seen them and they are acceptable.

James McGillen proposes a motion to grant the special permit subject to conditions listed in the staff report as agreed to Attorney Kenney.

Craig Larson wants to amend two conditions. On #2, he wants to add "unless approved by ZBA". He reads the condition: "This permit is subject to all requirements of special permit 2008-066 and is not transferable to any other business uses on the premises unless further approval from the ZBA". Also, he would like to add a #3 bullet, if agreeable, that because there was a problem with a sign on the side of the building, that there be no signage whatsoever on that side of the building.

Michael Hersey wants to add that people that are using the driveway do not impede the sidewalk and indicates that it refers to condition #4.

Brian Florence comments that on both special permits the language "that the permit is not transferable to a new owner or another location without permission from the Zoning Board of Appeals" He asks that if it is the same use and they transfer ownership why would they bother the ZBA?

Art Traczyk indicates it is there as to prevent it from becoming a chain such as Dunkin Donuts or Starbucks.

William Newton asks if the Board would consider putting a time limit of one year and for them to come back to take a look at the situation and asks Attorney Kenney his opinion on that.

Attorney Kenney indicates that his client has expended a large amount of money and has done everything properly, has had to come here twice already and asks that they not put on and has never heard of this being done.

William Newton asks the Board if they would consider putting a one year limit on this in order for the applicant to show the Board what has happened regarding meeting the Village Association, etc.

Art Traczyk suggests drafting a letter to Growth Management to address the parking issue in the Comprehensive Plan.

Laura Shufelt asks the Board how they feel about adding a one year limit as an amendment.

Craig Larson, Michael Hersey, James McGillen and Laura Shufelt comment that they would not be in favor of it.

Laura Shufelt indicates there is a motion regarding the conditions on the floor. Seconded.

Vote:

AYE: James F. McGillen, William H. Newton, Craig G. Larson, Laura F. Shufelt

NAY: Michael P. Hersey

GRANTED WITH CONDITIONS

Laura Shufelt then calls the TD BankNorth appeal and reads it into the record.

Appeal No. 2008-071

TD Banknorth

Pursuant to Section 240-39.M(1)(a), the Shopping Center Redevelopment Overlay District, TD Banknorth has petitioned for a Special Permit or in the alternative a Modification of Special Permit No.1998-31 issued to the Cape Cod Mall Nominee Trust. The petitioner is seeking to demolish an existing freestanding building of 4,400 sq.ft. and rebuild a new 3,000 sq.ft. bank building with three drive-thru lanes. The subject property is commonly known as a part of the Cape Cod Mall and the building is addressed as 226 Falmouth Road (Route 28) Hyannis, MA. It is shown on Assessor's Map 293 as Parcel 043. It is in the HB, Highway Business Zoning District and in the SCROD, Shopping Center Redevelopment Overlay District.

Members assigned: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

Attorney Michael Ford is representing the applicant and Simon Corporation, owners of the mall. He indicates that with him also are Josh Bolling from Bolling Engineering, Rich Tonsey from Simon Corporation, Leo Fein, Manager of the Cape Cod Mall and Larry Squire who is representing TD Banknorth.

Attorney Ford indicates that the bank is currently in the airport rotary and need to find another location because the Town is expanding the airport. Attorney Ford gives a history and indicates that TD Banknorth needs to move and were able to work out an arrangement by the terms of which TD Banknorth will be leasing this area of the mall where Blanchard's is currently occupying. He indicates that the SCRODD was adopted in 1987 before the mall expanded in 1988 and as part of the SCRODD provisions and it provided that once a special permit was granted to the mall, and the mall exercised those rights, it would be governed by the SCRODD. That created a problem because banks with drive-thrus would not be permitted. They had to got to the Cape Cod Commission and get a modification of the DRI and have received it dated November 12, 2008 and by the terms of the minor modification they have authorized the bank reference to this site plan. They also did a traffic study which indicates that the traffic will be less than what was there.

James McGillen suggests they do a modification of the special permit.

Laura Shufelt asks the Board if anyone has a problem this being a modification of the special permit. No one has.

Attorney Ford has no objection but indicates that in the staff report, suggested condition #5, he would like to change the word "any surface runoff" be stricken and changed to say "during the redevelopment of this area surface runoff associated with the redevelopment area". Another words he didn't want the TD Banknorth project to be responsible for the rest of the mall.

James McGillen indicates that change is so noted.

Laura Shufelt asks to be shown on the site plan the traffic flow. The Board is shown the flow.

William Newton makes findings are listed by staff on Pages 3 and 4. William Newton asks if Attorney Ford has seen the findings. Attorney Ford indicates that he has.

Laura Shufelt indicates that this is a modification of the special permit of 1998-31. Laura asks if anyone has any amendments. No one speaks.

Vote:

AYE: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

NAY: None

Motion is make to grant the modification of 1998-31 with the conditions as provided by staff on page 5 as previously amended by Attorney Ford.

Seconded.

Vote:

AYE: Craig Larson, Michael Hersey, James McGillen, William Newton, Laura Shufelt

NAY: None

MODIFICATION of SPECIAL PERMIT 1998-31 GRANTED.

Motion to adjourn

Meeting adjourned at 11:13 PM.
