

Town of Barnstable
Zoning Board of Appeals
Minutes
May 6, 2009

A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday May 6, 2009 at 7:00 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was met. Also present were Art Traczyk – Regulatory Review Design Planner and Carol Puckett – Administrative Assistant.

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

Laura Shufelt opens the hearing at 7:02 PM. She reads a summary of appeals being heard tonight. She then calls Najarian appeal.

Appeal No. 2009-033 - New

**Najarian
Modification of Special Permit 1985-54**

Robert A. Najarian, Trustee of Najarian Nominee Trust has petitioned for a modification of Special Permit 1985-54. The petitioner seeks to modify that condition of the permit that restricted the use of a second floor apartment unit to that of the property owner only. The proposed modification requests that use of the apartment be allowed to a person who holds an ownership interest in the licensee of the restaurant located on the first floor of the building. The property is addressed as 167 Sea Street, Hyannis, MA and is shown on Assessor’s Map 307 as parcel 046. It is in a Residence B Zoning District.

Members assigned: Craig Larson, James McGillen, William Newton, George Zevitas, Laura Shufelt

Attorney Steven J. Pizzuti is representing the applicant. Attorney Pizzuti indicates that the applicant purchased the property in 2005. He indicates that it is a small restaurant with a two bedroom apartment

on the second floor which the previous Zoning Board had allowed with the exception of a caveat that it had to be occupied by the owner, the question became what owner. He indicates that the building inspector had interpreted it that the owner of the property had to occupy the apartment. In 2007, Dr. Robert A. Najarian brought a modification of the special permit before the Zoning Board and what he sought was to modify the special permit to include the property owner or lessee or owner of the restaurant. He indicates that during that meeting a motion was made and the person who made the motion decided to exclude any employees of the restaurant from residing in the apartment. Three of the members decided to vote against it as they found it too restricted. Those three members brought a motion forward to allow the owner of the restaurant to utilize the apartment. The parties that wanted the restriction had thought it would allow employees to utilize the apartment and they voted against it. It was clear that the Board wanted the owner of the restaurant to utilize it but they got caught up in semantics. Currently, he is seeking to allow "/and owner of the licensee" and the family members of course, which is not in the original petition, but is willing to restrict it to 3 persons.

Brian Florence asks if this has been before the Planning Board.

Attorney Pizzuti answers not for the modification.

James McGillen indicates that it is his opinion as there has been a question of whether this is a repetitive petition, as he reads the previous vote, he finds that it is not an unfavorable vote. They had 2 people on a positive motion voting no because it was too restrictive. He indicates that it is not the standard by which you would vote no on a special permit. He asks if the petitioner, at the previous hearing, get a fair hearing and was the original petition ever before the Board? He doesn't think that what they asked for was before the Board. He indicates that when the conditions were presented it then became a problem. He would make a motion that this is not a repetitive petition and that they can go forward tonight.

Seconded.

Laura Shufelt asks if there are any more questions from the Board.

William Newton asks if the question is to transfer from the owner of the building to whoever is leasing the business?

Attorney Pizzuti indicates no, that they are focusing on the licensee of the restaurant and/owner of the licensee can occupy the apartment on the second floor. He doesn't think it is repetitive, as the original petition specified the lessee of the premises, who might not be the licensee of the restaurant. It said the owner which could be the owner of the property or the restaurant. He wants to make it clear and to the taxpayer. He indicates that currently it is vacant and the building inspector had determined that it should be the owner of the property.

James McGillen asks if the restaurant is in operation now?

Attorney Pizzuti indicates no, but Dr. Najarian is in the process of executing the lease and understands that this will be open year round.

Laura Shufelt asks if there is anyone here from the public who would like to comment.

James McGillen makes a motion that this is not a repetitive petition and that it is an initial petition and that they can act on it tonight for the reasons that he has stated
Seconded

Vote:

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

NAY: None

Laura Shufelt asks for findings or any comment to changing the condition to allow for the owner/licensee of the restaurant to occupy.

William Newton asks what ownership interest is as it sounds like to him that it is open to whomever is willing to buy into some piece of that and therefore it opens it up to a wide range of whoever. It becomes basically a rental unit and has concerns about that. He is wondering whether something in terms of a person who owns or holds a majority ownership interest would be a compromise that they would consider. An interest, as he can see, is undefined.

Attorney Pizzuti comments that this is a small mom and pop operation and is it possible that they could have several children that might have a 10th or 20th percent interest or 5 people that each has a 20% interest who could occupy the apartment with their spouse and their child or children, it is possible. That 20% interest holder would not have a majority. He comments that it certainly maybe someone having more than 10 or 20%, or something along those lines. He doesn't want to foreclose for the future, a family coming in with children.

Craig Larson asks if he would be happy with the same entity maintaining one lease for the apartment and the restaurant downstairs. Attorney Pizzuti motions to Dr. Najarian and then indicates that he would agree to that. Craig Larson clarifies that it would mean that the licensee of the restaurant, whether he owns 10% or 99%, would be the apartment owner and the manager would be the tenant of the apartment, correct? He comments that it would be much more controllable because they have a license to lose. He comments that they can skip the ownership and just stick with the licensee. Craig Larson asks Attorney Pizzuti if that is fair. Attorney Pizzuti asks Dr. Najarian who agrees.

Craig Larson indicates that they could change the language of the condition. Craig comments that it could read that the licensee would be the same entity that would run the restaurant would have the apartment.

William Newton comments that there was a question in the past regarding employees and how are they dealing with that.

Craig Larson comments that he believes they are going to have one lease.

Dr. Najarian speaks and indicates that he wants to lease the whole building and has someone right now that wants to run a family-style restaurant and he is actually by himself right now but

has a 16 year old daughter that might come and live with him. It all hinges as to whether he can live up there or not, if he can't, he wouldn't go through with it.

Craig Larson comments that he is comfortable if they can language that in and asks Dr. Najarian if that is fair. Dr. Najarian answers yes

Craig Larson does findings:

It is the findings of this Board that the original conditions were to assure that the commercial use of the property would be respectful of the neighborhood residences by limiting the use of the above apartment to the owner. By extending the use of the apartment to the employees or licensee of the business below would maintain the original intentions of the permit. After hearing the public testimony it is the findings of the Board that the special permit may be modified to include manager/licensee of the business below to occupy the apartment above with the condition of not more than 3.

Laura Shufelt suggests adding that granting of this would not be a substantial detriment.

Craig Larson adds that the granting of this would not be a detriment to the neighborhood or the intent of the bylaw.

Vote:

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

NAY: None

Craig Larson makes a motion to grant the request to modify special permit #2000-003 and to grant to modify the permit to have the conditions, it would be a licensee/manager occupy the apartment and with not more than 3 person to occupy the apartment above.

Seconded.

Vote:

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

NAY: None

MODIFIED WITH RESTRICTIONS

Laura Shufelt then calls Rubin Hyannis, LLC., and read the appeal into the record.

Appeal Nos. 2009-027 & 026

Rubin Hyannis LLC.

Continued for; additional information on parking ratios at other Bernie & Phyl's Furniture Stores, exploring options for employee parking both on- and off-site, and for draft findings and additional condition to assure quality furniture stores and excluding cash & carry outlets.

Members Assigned: William H. Newton, Michael P. Hersey, Craig G. Larson, George T. Zevitas, Laura F. Shufelt Associates Present: Alex M. Rodolakis, Brian Florence

Appeal No. 2009-027 - Continued Modification or New Conditional Use Permit

Rubin Hyannis LLC., has petitioned for a Modification of Conditional Use Special Permit No. 1994-082 issued to John F. Cabana or, in the alternative, a new Conditional Use Special Permit pursuant to Section 240-25.C to allow an expansion of a retail furniture gallery and store. The petitioner proposes to remodel the interior of the existing furniture gallery and convert approximately 6,900 square feet of gross floor area within the basement from storage to a showroom. The property is located at 20 Airport Road, Hyannis, MA and is presently occupied by a Bernie & Phyl's Furniture Store. It is shown on Assessor's Map 294 as Parcel 010. It is zoned BH - Highway Business, B - Business, and Ind - Industrial.

Appeal No. 2009-026 - Continued Modification or New Parking Special Permit

Rubin Hyannis LLC., has petitioned for a Modification of Special Permit No. 1994-081 issued to John F. Cabana or, in the alternative, a new Special Permit pursuant to Section 240-57 - Circumstances Warranting Reduction of Parking Requirements. The petition seeks to maintain 37 on-site parking spaces for the remodeled and expanded furniture gallery retail sales and storage area that would under the zoning ordinance now require 103 on-site parking spaces. The property is located at 20 Airport Road, Hyannis, MA and is presently occupied by a Bernie & Phyl's Furniture Store. It is shown on Assessor's Map 294 as Parcel 010. It is zoned BH - Highway Business, B - Business, and Ind - Industrial.

Members assigned tonight: Craig Larson, William Newton, George Zevitas, Alex Rodolakis, Laura Shufelt

Attorney Cox is representing the applicant. Also with her tonight is John Wyatt, Director of facilities at Bernie & Phyl's. She indicates that she submitted a memorandum dated May 1, 2009 with exhibits and walks the Board through that information. She indicates that in Exhibit A is a traffic study by an engineer who had provided the study that they had walked through at the last hearing. Back in 2004 that engineer had done some parking analysis at their Nashua, New Hampshire and Westborough, Massachusetts locations. She gives the figures. She indicates that she had compared those to the Hyannis store figures. Also, she looked at other zoning bylaws from 5 towns on the Cape that range from one space per 800 square feet of gross floor area to one space per 700 square feet of floor space area and if they applied either of those figures to this store you would require either 30 or 34 spaces. She also hands out a site plan that was slightly updated to the Board. She indicates that they had adjusted the plans based on the comments from the last hearing. She indicates that in the northeast corner is a turnaround which isn't required for the operation of Bernie & Phyl's at this location and that they could stack 4 employee's cars there instead if necessary.

Craig Larson and Brian Florence comment that they are happy with the proposed changes.

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

William Newton comments that one of the towns that was left out was Falmouth and that they are similar to Barnstable. He comments that he is happy that they have supplied options but is still concerned about the 38 spaces as they are increasing the showroom and still has reservations

about the future when the economy comes back and people can buy, as it might change. He thinks there could be potential for a spill over but has reservations about the parking.

Attorney Cox indicates that through the GPI reports and ITE parking manuals that it is not appropriate to apply a retail category to this type of use. She indicates that basing this on the one per 200 square feet, when bylaws are more specific to a furniture store use, it is not a retail use, it is a separate use that generates a separate amount of parking unlike going into a retail store where you may go more often and that you don't do it that often for furniture shopping. If need to, they might be able to squeeze in more parking if it was ever a problem.

Laura Shufelt asks if someone wants to do some findings and that Attorney Cox has also submitted some draft findings.

Craig Larson does positive findings:

In this appeal 2009-027, Rubin Hyannis, LLC, owner of the subject property has applied for a new use special permit to Section 240-25(C) of the zoning ordinance to convert approximately 6900 square feet of storage space in the lower level of the existing building to the showroom. Numbers 2 through 21.

Laura Shufelt asks for any amendments or additions to those findings.

Vote:

AYE: George Zevitas, Alex Rodolakis, Craig Larson, William Newton, Laura Shufelt

NAY: None

Craig Larson makes a motion to approve for the special permit appeal #2009-027 with conditions as presented on draft conditions 1 & 2.

Seconded.

Vote:

AYE: George Zevitas, Alex Rodolakis, Craig Larson, William Newton, Laura Shufelt

NAY: None

Craig Larson makes positive findings on 2009-036, special permit of Section 240-57 Reduction of Parking Requirements, he moves to approve 37 on-site parking spots as presented on the plan submitted to the Board.

Findings 1 through 21.

Vote:

AYE: George Zevitas, Alex Rodolakis, Craig Larson, William Newton, Laura Shufelt

NAY: None

Craig Larson makes a motion to approve 2009-026 as presented with conditions 1 through 3.

Seconded.

They discuss condition #4

Craig Larson adds: that #4 in the conditions would be subject to the plan that was submitted by Kelly Engineering Group dated 05-01-09.

Vote:

AYE: George Zevitas, Alex Rodolakis, Craig Larson, William Newton, Laura Shufelt

NAY: None

BOTH APPEALS GRANTED WITH CONDITONS

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

Open	Variance No. 2008-026	Guarino/Trustees for JGMG Realty Trust Request for 6-Month Extension of Variances
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Extension of a variance is provided for in MGL Chapter 40A, Section 10. That section authorizes the Zoning Board of Appeals to grant one extension of a variance for up to 6 months without public notice or a public hearing.

By letter received April 23, 2009, Joseph J. and Claire L. Guarino/Trustees for JGMG Realty Trust have requested a 6-month extension of Variance No. 2008-026 issued to them for property addressed as 31 and 30 Holiday Lane, West Hyannis Port, MA. The subject lot is shown on Assessor's Map 267 as parcel 185 and 186. The variance was issued to permit the development of un-buildable adjoining lots that had merged due to common ownership. The development of the resulting undersized lot was granted to permit the building of a single-family dwelling in accordance with the Residence B Zoning District regulations.

Members assigned: Nik Atsalis, Craig Larson, James McGillen, William Newton, Laura Shufelt,

Laura Shufelt asks if there is anyone here representing the Guarino's. No one comes forward.

Art Traczyk explains that the applicants have a building permit and have started building and that this extension is not needed.

Craig Larson comments that they had asked for it and that it would not hurt if they granted it.

Craig Larson makes a motion to grant the extension

Seconded.

Vote:

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

NAY: None

SIX MONTH EXTENSION GRANTED

Laura Shufelt then calls the Mill Pond Estates appeal and reads it into the record.

Comprehensive Permit No. 2005-013

**Mill Pond Estates - Starboard, LLC
Request for Minor Modifications**

By letter submitted April 29, 2009, from Attorney Michael F. Schulz, Mill Pond Osterville Associates LLC, are seeking to modify Comprehensive Permit No. 2005-013 "Mill Pond Estates" issued to Starboard, LLC for the division of 2.81 acres into a 13 lot subdivision for the development of 11 single-family dwellings at 459 and 449 Old Mill Road, Osterville, MA. Three of the 11 dwellings are to be committed to affordable housing pursuant to MGL Chapter 40B, Section 20-23. The applicant seeks;

- the transfer of the permit to "Mill Pond Osterville Associates LLC",
- amend Condition No. 21(b) to allow the Department of Housing and Community Development (DHCD) to be the Monitoring Agent,
- remove Condition No. 21(c) that requires an escrow account to be created and funded prior to the accounting certification for the development,
- amend Condition No. 40 that requires DHCD approval prior to the issuance of any building permit to provide only for necessary approval from DHCD,
- modify Conditions Nos. 23, 30 and 32 to allow for the building of one 'model home' for the purposes of marketing the development,
- waive Condition No. 31 that requires posting of securities for the completion of the subdivision until a second building permit is sought, and
- modify Conditions Nos. 5 and 6 to permit a change in the three approved home designs.

Members assigned: Craig Larson, James McGillen, William Newton, Brian Florence, Laura Shufelt

Attorney Michael Schulz is representing the applicants: Paul Caggiano and Brian Otey. Attorney Schulz indicates that he submitted a letter dated April 29, 2009 requesting minor modifications. The letter enumerated 7 requests: the first being, transferring the comprehensive permit, and then #'s 2, 3 and 4 making slight changes according to the comprehensive permit to bring them current with LIP guidelines and regulations. He indicates that #5 is to construct the model home and #6 is to the waiver of securities until the second building permit is sought. Also, #7 is for the ability to change the style of the currently permitted homes. He indicates that after reading the staff report he thinks that some things could be handled administratively and namely requests that #'s 2, 3, 4 and possibly #6 could be handled that way and wants the Board's feelings on this and if they concur that they can handle those aspects administratively and handle #7 as a separate issue.

Laura Shufelt indicates that she thinks that this Board needs to see if the request is substantial or insubstantial as it pertains to the comprehensive permit and thinks that the transfer of the permit is typically an insubstantial modification and that the Board can handle that. She believes that #2, 3 and 4 might have to be discussed. She believes #7 would be a substantial modification. She thinks that how she would like to proceed is to have him either go forward as a substantial as they would have to take it as a whole and is her recommendation to the Board. Also, they would set a public hearing date and go forward or it could be his option to modify this request so that they could deal with the insubstantial amendments that he has asked for.

Attorney Schulz asks about bifurcating the issues.

Laura Shufelt indicates that according to regulations for an insubstantial modification they cannot continue the hearing, therefore, they have to make the determination tonight. Either they rule it as substantial or substantial or rule on all the requests as a whole.

Attorney Schulz thinks that in reading the regulations maybe they can modify so that they can hear the transfer and then #'s 2, 3 and 4 requests, 1, 2 3 and 4 as a insubstantial change and then withdraw 5, 6, and 7 without prejudice and have that heard at the next available hearing.

Laura Shufelt indicates that is what she would like to see happen.

Attorney Schulz clarifies with his clients that this is okay.

The Board has no objections.

Art Traczyk clarifies that he is asking to withdraw 5, 6 and 7 now without prejudice.

Craig Larson makes a motion to withdraw request #'s 5, 6 and 7 without prejudice.

Seconded

Vote:

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

NAY: None

Attorney Schulz indicates that request #1 is to transfer the comprehensive permit from Starboard LLC to Mill Pond Osterville Associates LLC. He indicates that a Purchase and Sales Agreement was executed in September of 2008 and that in October of 2008, DHCD approved of the transfer based upon two conditions:

- **that Starboard LLC submit a final cost certification that was approved by DHCD so that they did not exceed the 20% threshold in profit**
- **that the regulatory agreement be recorded within ten days, which it was.**

In March of 2009, the seller was able to submit a final cost certification to DHCD which they reviewed, approved and submitted a letter on March 6, 2009. In April in 2009 the P&S was amended and the price was reduced accordingly. Attorney Schulz indicates that also included in his material is a pro forma, a final cost certification and a chart showing the market rate units that Starboard LLC had listed and what is currently being proposed by the applicant. He indicates that the applicant will abide by all the regulations and this is insubstantial and requests that the Board vote favorably. Attorney Schulz then gives a summary of the rest of the changes being requested.

Laura Shufelt comments that regarding the last request, she would recommend take the funding out and then it would be current.

Laura Shufelt asks if there is anyone here from the public who would like to speak in favor or in opposition.

No one speaks

Laura Shufelt asks for a finding that these requests are insubstantial

James McGillen makes findings.

- 1. Pursuant to 760 CMR, he finds that comprehensive permit be transferred from Starboard LLC to Mill Pond Osterville Associates LLC***
- 2. The amend condition #21(b) to allow DHCD to be the monitoring agent***
- 3. Remove condition #21(c) which requires an escrow account to be created and funded prior to the accounting certification for the development***
- 4. To amend condition #40 which requires DHCD prior to the issuance of any building permit to provide only for the necessary approval from DHCD***
- 5. in the current condition to strike the word funding***
- 6. Said request to amend insubstantial and minor modification to the comprehensive permit***

Seconded.

Vote:

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

NAY: None

Laura Shufelt makes an amendment that the motion is to include the 5 conditions as listed in the staff report. She asks Attorney Schulz if he has looked over the conditions.

Laura Shufelt reads the conditions to Attorney Schulz from the staff report.

Attorney Schulz agrees to them.

Vote:

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

NAY: None

Laura Shufelt indicates that this is granted to the insubstantial requests and that Attorney Schulz will be coming back for another hearing on the substantial requests.

INSUBSTANTIAL MODIFICATION GRANTED

SUBSTANTIAL REQUEST SCHEDULED FOR MAY 20, 2009

At 8:10 PM, Laura Shufelt calls the Cotuit Oyster appeal and reads it into the record.

Remand & New Applications**Cotuit Oyster Co.****Remand Appeal No. 2003-094****Cotuit Oyster Co.
Bulk and Parking Variances**

By a Stipulation for Remand and Stay, Barnstable Superior Court has remanded to the Zoning Board of Appeals for a new and full public hearing of Appeal No. 2003-094. In that appeal Cotuit Oyster Co., Inc., had applied for variances to Section 3-1.4(5) Bulk Regulations Minimum Setback Requirements (today's Section 240-14.E), and Section 4-2.9 Schedule of Off-Site Parking Requirements (today's Section 240-56). The relief is sought for construction of a pile supported one-story work building and a pier not in conformance to the 15-foot minimum side yard setback for the district, and for a reduction in the required on-site parking. The property is addressed 26 Little River Road, Cotuit, MA, and is shown on Assessor's Map 053 as parcel 009. It is in a Residential F Zoning District.

Remand Appeal No. 2003-110**Cotuit Oyster Co.
Exempt Use Modification Permit**

By a Stipulation for Remand and Stay, Barnstable Superior Court has remanded to the Zoning Board of Appeals for a new and full public hearing of Appeal No. 2003-110. In that appeal Cotuit Oyster Co., Inc., had applied for a Modification Permit in accordance with Section 2-4.3(B) Exempt Uses (today' Section 240-8.A(3)). The modification permit is sought to allow for the construction of a building and a pier not in conformance to the minimum yard setbacks and for a reduction in required on-site parking. The property is addressed 26 Little River Road, Cotuit, MA, and is shown on Assessor's Map 053 as parcel 009. It is in a Residential F Zoning District.

Remand Appeal No. 2003-137**Cotuit Oyster Co.
Variance to Exempt Use Provisions**

By a Stipulation for Remand and Stay, Barnstable Superior Court has remanded to the Zoning Board of Appeals for a new and full public hearing of Appeal No. 2003-137. In that appeal, Cotuit Oyster Co., Inc. had applied for variances to provision (B) and the last paragraph of Section 2-4.4, Exempt Uses (today's Section 240-8.A(4)(b) and 240-8.B). Those variances are to allow for an aquaculture use to employ up to 5 persons and to construct a building and pier within the required 25-foot yard setback imposed by the exempt use section of the Ordinance. The property is addressed 26 Little River Road, Cotuit, MA, and is shown on Assessor's Map 053 as parcel 009. It is in a Residential F Zoning District.

Remand Appeal No. 2004-075**Cotuit Oyster Co.
Special Permits for Nonconformities**

By a Stipulation for Remand and Stay, Barnstable Superior Court has remanded to the Zoning Board of Appeals for a new and full public hearing of Appeal No. 2004-075. In that appeal, Cotuit Oyster Company, Inc., had applied for Special Permits in accordance with Section 4-4.4(2) Expansion of a Pre-existing Nonconforming Building or Structure Not Used as Single or Two-Family Dwelling (today's Section 240-93.B), Section 4-4.5(2) Expansion of a Pre-Existing Nonconforming Use (today's Section 240-94.B), and Section 4-4.6(1) Re-Establishment of Damaged or Destroyed Nonconforming Use or Building or Structure (today's Section 240-95). The applicant seeks to locate, expand and alter the shellfish harvesting business including the construction of a pile-supported work building and a pier not in conformity to the districts required setbacks. The property is addressed 26 Little River Road, Cotuit, MA, and is shown on Assessor's Map 053 as parcel 009. It is in a Residential F Zoning District.

Appeal No. 2009-031 - New**Cotuit Oyster Co., Inc.
Special Permit Reduction in Parking**

Cotuit Oyster Company, Inc., had applied for a Special Permit pursuant to Section 240-57 Circumstances Warranting Reduction of [Parking] Requirements. The applicant seeks a reduction in the required on-site parking due to factors that reduce the need for that parking. The property is addressed 26 Little River Road, Cotuit, MA, and is shown on Assessor's Map 053 as parcel 009. It is in a Residential F Zoning District.

Appeal No. 2009-032 - New**Cotuit Oyster Co., Inc.
Use Variance**

Cotuit Oyster Company, Inc., had applied for a Variance to Section 240-14.A, Principal Permitted Uses in the Residence F Zoning District. In this appeal, the applicant seeks authorization to use the property for a commercial shellfish business, the Cotuit Oyster Company. This use variance application is made in the alternative to that part of the Remand of Appeal No. 2004-075 that seeks an Expansion of a Pre-Existing Nonconforming Use. The property is addressed 26 Little River Road, Cotuit, MA, and is shown on Assessor's Map 053 as parcel 009. It is in a Residential F Zoning District.

Members assigned: Craig Larson, James McGillen, William Newton, Brian Florence, Laura Shufelt

Attorney Marielise Kelly from Gargiulo and Rudnick, LLP is representing the applicant. She indicates that Mr. Christopher Gargiulo, president of Cotuit Oyster and Arlene Wilson from A.M. Wilson Associates, Inc. are also here with her. She indicates that they are proposing to build a small work building structure and a pier on property at 26 Little River Road. She indicates that Cotuit Oyster Company has 33 grants that are leased from the Town of Barnstable to Cotuit Oyster. She indicates that they are here after litigation with the Superior Court of the Town of Barnstable and lengthy mediation sessions between objecting abutters which the Town participated in and that mediation was before Judge Rudolph Cass. There was a settlement agreement which is part of the application materials they have submitted to the Board. The settlement resulted in substantial modifications to the proposal that was previously before the Board. In brief summary, it included shortening the proposed pier, reducing the height of the pier, reducing the height of the building, restrictions on the hours of operation, the noise of the operation and aesthetic things such as lighting and planting.

She indicates that for the purposes of simplicity they will focus on the issue of special permit relief because of pre-existing nonconforming use. Also, they will speak to the issue of variance and so limiting their presentation they are not waiving the other types of relief but are trying to be time efficient. Also, procedurally they have received approval from Conservation, a septic variance from the Board of Health and have received site plan review. As a result, this is their last step for seeking a building permit for the project. She will also tell the Board briefly about the business operations of Cotuit Oyster at Little River Road.

Laura Shufelt informs Attorney Kelly that this is a new Board and that they are hear to listen but nobody here has been able to observe this and that they only recently received this but will take testimony and public comment but that all this material is a lot to digest.

Attorney Kelly apologizes but wants to walk them through the most important elements. She indicates that Arlene Wilson will also give a presentation. Attorney Kelly then speaks of the current operation of the business. She indicates that as part of the operations, it takes seed oysters, develops them, puts them into the grants, then harvests and brings them back to 26 Little River Road to be prepared for market. She indicates that the operation has some equipment. There is also a flupsy float which is a nursery for seeds. She indicates that there is no building on-site at #26 Little River Road since the hurricane of 1938 and what they are operating out of is a metal truck. She indicates that this is a 12 month operation but that they do not have bathroom facilities nor storage. Part of her goal is to provide that the proposed operation would house the current use with storage and be aesthetically pleasing. She then talks about the history of the pre-existing, nonconforming use of the property. She gives a presentation of the history of the property and surrounding area according to a bound booklet that was submitted to the Board

and goes through the history. She then indicates that Arlene Wilson is here to answer any questions the Board may have.

George Zevitas asks if the pier at #28 Little River Road is being used

Attorney Kelly indicates that the pier doesn't exist, and that after the Nelson's lost the lease it was in disrepair and as it exists today, there is no pier. George asks if it goes across the street. Attorney Kelly indicates that #35 and #28 are in common ownership

Arlene Wilson speaks and discusses the specifications of the plans that were given to the Board. Almost all of the site has been altered over time. The lot has a number of wetland zones. She talks about floor velocity zone and flood zones. There are oddly shaped coastal banks on this lot. She indicates that the proposed plan shows the structure elevated on piles open underneath and will be enclosed with lattice work for storage. On the platform will be the one story building reminiscent of the old oyster shanties. The platform is setback 65 feet back from the road. The lot is only 35 feet wide. It cannot meet side yard setback and has designed the building to small as practical and is smaller than the building at #28 Little River Road. She talks about the access to the building on both ends. The scissor lift does not use regular hydraulic liquid but does use a fluid with vegetable oil as its base. She talks about the interior. She indicates that there will be a small office space and bathrooms which will have incinerating toilets. There is a floating pier to be replaced by a permanent pier with a ramp and two floats. There is an order of conditions on this and that permit is in place and has not been appealed. She indicates that there will be 4 parking spaces at the front end of the building which 1 will be at the loading area. She indicates that all of the surfaces are shell and gravel and that there is no paving on this proposed site. Whatever drainage is produced is handled in a catch basin under the building in the East end of the building and is out of sight. She talks about the landscaping and the height of the building.

William Newton asks if the business continues as of today. Arlene Wilson answers yes.

William Newton asks for clarification on what they are trying to do under the special permit.

Attorney Kelly explains that the use may be expanded to include the structure of a building and has cited a case regarding Cumberland Farms, an agricultural operation, which sought to expand a use to include a new barn and the argument against it was that expanding a use doesn't allow you to build a new structure. The Supreme Judicial Court disagreed with that and said that expanding a use, although in that case an exempt use, allowed for the construction of a new building. Having said that, there is no case specific on point but thinks it is well within the purview of their ability to find that the construction of the new building is a permissible expansion of an existing nonconforming use on lot #26.

Craig Larson wants to confirm the conditions from the Conservation Commission as the Board does not have those conditions.

Arlene Wilson indicates that she will get a copy for the Board and indicates that both the Board of Health and the Conservation Commission have required that if this property is no longer used for commercial aquaculture, the building comes down, everything goes away, the lot gets

restored and it is open space. She also indicates that they do not have the disposal works permit but that they have the variance from Board of Health.

William Newton asks about the parking reduction.

Arlene Wilson clarifies that there are 4 parking spaces on the lot and that they do sell a small amount of product retail but the people have to call ahead and place an order and pick it up. She indicates that the maximum number of employees at one time was 5 and even when that was happening, people would come to the site in one car because it was a family operation. Also there is a town landing with 8 or 10 spaces as an alternative.

Attorney Kelly talks about the expansion of the use and the benefits to the health and safety of the neighborhood and the conditions as pertains to the legal elements of the variance. She then talks about the issue of a variance for parking and setbacks.

William Newton asks Attorney Kelly to briefly tell him about the 2004 issue in terms of denying those requests.

Attorney Kelly explains

Laura Shufelt calls a 10 minute break at 9:25 PM.

Back in session at 9:40 PM

Laura Shufelt asks Assistant Town Attorney, Charlie McLaughlin, to talk about pre-existing nonconforming use on the property and the litigation that has occurred.

Attorney McLaughlin indicates that this case was contentious and they were happy to work through a process of mediation with Judge Rudolph Cass. They were cognizant of efforts of all negotiations. There was a settlement agreement but Mrs. Haseck had passed away during the mediation. On the issue Mr. Newton had raised on the prior litigation, he would concur with Attorney Kelly's synopsis of it but the matter dealt with aquaculture versus agricultural and whether there was any exemption. As to the pre-existing nonconforming, there were findings that the prior Board made and would agree they were concerned about whether the subsequent process applied by the Board and whether or not it could be successfully defended as to the findings. He indicates that he is pleased to see that this has come back for a full and clear new presentation for this Board to hear the evidence to make that determination as to whether it is pre-existing nonconforming. He talks about the Gifford Brothers Sand & Gravel case and the legal affect of it indicating that in 1929, if you had a commercial use, then it would be protected and everything else would be residential.

Laura Shufelt asks if there is anyone here from the public who would like to speak either in favor or in opposition.

Chris Gargiulo, who is the current owner of the Cotuit Oyster Company, indicates that having a building and pier at this lot is important for keeping the historical use of this property. They

want to continue, keep and preserve the historic use of this site and asks that the Board look at this information in the book they submitted.

Alex Rodolakis asks Mr. Gargiulo when they harvest.

Chris Gargiulo indicates that they typically harvest year round but that the oysters go dormant in the winter months.

Alex Rodolakis asks when the peak season for staffing.

Chris Gargiulo indicates primarily summer and fall.

Richard Nelson, former owner/operator of Cotuit Oyster Company from 1973 to 2003, indicates that he would like to back up the importance of the historical nature of this operation. He indicates, as operators for 30 years, had worked with the community and tried to be good neighbors and thanks the Board for their consideration.

William Newton asks Mr. Nelson what was going on with lot #28 as it does not have a home on it.

Mr. Nelson indicates in 1973, they leased #24, 26 and 28. Along the way they dropped the lease on #24 in the early 80's and was able to purchase #26. They operated largely out of the building on #28 (Gifford shanty) but used #26 extensively during that time. During the clambake years they had to vacate the premises at #28 for the summer and worked off the beach on #26 for about 3 months during the summer and then went back in after Labor Day.

Albert Surprenant of Osterville speaks and indicates that he has known the Cotuit Oyster Company for 50 years and that they have been a good neighbor, an excellent operation and that growing oysters helps the environment, taking out the nitrogen and is 100% in favor of this project.

Richard Kraus of West Barnstable indicates that he has been in the shell fishing business and supports their application and the future viability of the Cotuit Oyster Company.

Councilor Richard Barry from Precinct 7 speaks and asks for the Board's support. He indicates that he had submitted a letter to the Board. He indicates that the shape of the lot is a variance condition and that in reference to the special permit that this would not be a detriment. He reads a paragraph from a book entitled "Cotuit/and Santuit" by James Gould and Jessica Rapp. He comments that Cotuit Oyster is actually helping the environment. He has also spoken with Stu Goodwin and that it is his understanding that they have written a letter in support for this project.

Steve Wright, President for Massachusetts Aquaculture Association and who is with Chatham Shell fishing Company, indicates that he has a letter in support of the building and pier.

David Ryan of Cotuit, who has also worked in the shell fishing field, asks for them to support the structure and pier on lot #26.

Attorney Douglas Murphy, who represents the executor of Janet Haseck's estate, speaks. He appears on their behalf in opposition to the relief being requested as the property and the business don't qualify for the relief being requested. He indicates that they need either a special permit or a variance and they have acknowledged to the Board the fact that there has never existed, for practical and zoning purposes, that there has never been a building on the lot in question. So, what they have is a new structure being created onto which the petitioner would have you believe that this somehow constitutes an alteration or an intensification of a use. The zoning ordinance deals with 3 aspects of nonconformities dealing with uses, lots and buildings and there is a reason for that as they treat each differently. He indicates that what the petitioner would like the Board to do is to Ignore the limitations and restrictions that apply to altering, expanding or intensifying a building and let's just call it a use instead and pretend that the use is a building and change that use to create a building. He comments that even if the Board gets beyond that hurdle you will have to conclude that the result will not be any substantially detrimental to the neighborhood that what exists there at present. What exists there at present is a vacant lot. There are a series of 3 small lots starting at the town landing, then the Haseck's property, the lot in question, and the lot to the north. They are being asked to find that the vacant lot is unique, somehow attributable to either the soil conditions or the topography or the lot shape and are different from the lots in the zoning district. He indicates that there is nothing unique about the shape of the lots. He indicates that the soil characteristics are no different from the other lots and that the topographical features are the same.

He doesn't think that the lot meets the threshold criteria to get a variance as there is not one of those characteristics that are unique within the zoning district. This is a residential zoning district and not a business zone. He indicates that the Haseck's house was designed to overlook the harbor but if the abutter constructs a commercial building they will be obstructing the view, building a flupsy, an actively managed process, in view of the residential home. He comments that he doesn't know what the hours of the operation would be except that this will be a year round operation. He indicates that the structure and equipment will be visible and thinks that the pier and flupsy will obstruct the Haseck's property and subsequent owners from obtaining a dock or pier permits. Also, there will be noise, unloading oysters to the processing shack, trucks coming and going and odor from the nature of the operation of the business, and increase in traffic because of some retail business being conducted. He asks the Board if they will continue this in order to review the large amount of materials which were given to the Board.

Also, he suggests that there will be a signification diminution in the value of the Haseck's property if this is allowed to go forward. He also asks that the Board to continue this as he has not been given the opportunity to review the large amount of materials that Attorney Kelly has submitted to the Board and would like to submit a memorandum or brief to the Board in opposition. Also, his client would like the opportunity to have an appraiser review to provide the estate of what would be the diminution of what the value of the property would be if this proposal is to go forward

Nik Atsalis asks Attorney Murphy to point out the Haseck's home.

Sandra Nelson speaks and indicates that she, with her husband, were past owners of the Cotuit Oyster Company. She wants to correct two statements that were just previously made. First, the underwater property in front of the Haseck's house is a Cotuit Oyster Company grant and, secondly, for the purposes of taxation, the Town of Barnstable classifies this property as commercial.

Richard Nelson indicates that Mrs. Haseck never objected to anything they did there.

Attorney Kelly points out provisions in the settlement agreement Paragraph E points out parking. This settlement limits to parking onsite to 4 spaces maximum and to other times of the year 3 at maximum and parking will not be increased. In perpetuity they cannot have anymore than 4 spaces. Also, paragraph J to the settlement agreement addresses the hours of operation, as recorded as a deed restriction.

William Newton asks Attorney Kelly about odor.

Attorney Kelly indicates that it is a common misconception in reference to this operation. They are taking whole shellfish off site. It is fresh and does not smell. There are salt marshes and low tide issues in that impact this area.

Craig Larson asks if this ceases to exist will this revert?

Attorney Kelly indicates that should the Cotuit Oyster Company cease to exist, this cannot become private residential or Spanky's Clam Shack, it can only have limited uses as defined in the settlement agreement and the restrictions from the Conservation Commission.

Laura Shufelt asks Chris Gargiulo about the flupsy and reads from the settlement agreement. She asks if there is any noise produced from the flupsies.

Chris Gargiulo answers no but basically is powered by an electric motor underwater and that you will not hear the noise of the upweller while it is in the water. All it is doing is circulating water underneath the dock which is drawing plankton into the oyster.

Assistant Town Attorney, Charlie McLaughlin, indicates that they should do site visits on their own to avoid open meeting law issues.

Motion to continue to June 10, 2009 at 7:00 PM

Seconded

Everyone in favor.

CONTINUED TO JUNE 10, 2009 AT 7:00 PM

Laura Shufelt then indicates that at next meeting they will approve minutes

Motion to adjourn.

Seconded

Meeting adjourned at 10:30 PM