

Zoning Board of Appeals

MINUTES

Wednesday, July 27, 2022 at 7:00 PM

Call to Order

Chair Jacob Dewey calls the meeting to order and takes roll call:

Member	Present	Absent
Dewey, Jacob	X	
Bodensiek, Herbert	X	
Pinard, Paul	X	
Hirsch, David		X
Hansen, Mark	X	
Walantis, Todd	X	
Johnson, Denise	X	
Webb, Aaron		X

Notice of Recording

Please note that this meeting is recorded and broadcast on Channel 18 and in accordance with MGL Chapter 30A §20. I must inquire whether anyone is taping this meeting and to please make their presence known.

Minutes

None.

Executive Session

The Zoning Board of Appeals may vote to enter into an Executive Session under M.G.L. c. 30A §21(a)(3), to discuss litigation strategy with respect to threatened litigation by the property owners/applicants O'Neill and Dunbar at 689 and 697 Scudder Avenue, if the Chair declares that an open meeting may have a detrimental effect on the litigating position of the Town.

The Chair moves that the Zoning Board of Appeals convene in Executive Session under M.G.L. c. 30A §21(a)(3), to discuss litigation strategy with respect to threatened litigation by the property owners/applicants O'Neill and Dunbar at 689 & 697 Scudder Ave based on this declaration that an open meeting discussion may have a detrimental effect on litigating. Paul Pinard seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, Denise Johnson, Todd Walantis

Nay: None

The Board enters Executive Session and then returns to open session.

Old Business

7:00 PM

Appeal No. 2021-057

O'Neill and Dunbar Point LLC

J. Brian O'Neill, Miriam O'Neill, and Dunbar Point LLC have applied for a Special Permit pursuant to Section 240-91 F Merged Lots. The Applicant seeks to relocate the property line between 689 and 697 Scudder Ave which would result in the cottage to be part of 689 Scudder Ave. The subject properties are 689 Scudder Ave and 697 Scudder Ave, Hyannis on Assessors Map 287, Parcels 061 and 062. It is located in the Residence F-1 Zoning District. Continued from Dec 8, 2021, Jan 12, 2022, Feb 23, 2022, July 13, 2022.

Town Attorney Charlie McLaughlin provides a brief background. There is a doctrine called constructive approval that assigns certain time periods within which a Board must act, with there being consequences if there is no action. In this case, the formality of a vote to disapprove this item did not occur, and the due date of the statute was missed, so the petition was constructively approved. The town had discussions to find a compromise with Attorney Revere on behalf of his client. Attorney Revere filed an action in the superior court to create the atmosphere for a settlement. The settlement they are recommending is the agreement for judgement as presented. Besides dismissing the action with prejudice, the settlement's primary content is that it shall result in the issuance by the Town Clerk of a certificate of constructive grant of the appeal in 2021-063 and as a matter of compromise, the plaintiffs have agreed to put a deed restriction affecting both properties on record at the registry. In summary, the deed restriction would allow the property to be divided with a new lot line, that the cottage will be appended to the property which the Oneills will continue to own and under all purposes will be considered an accessory unit only. None of the property may be improved without coming before the

Board to seek relief. The cottage will remain as an accessory use to the primary building only and may not be separately rented, although the entire property may be rented as a unit to one tenant at a time.

Herb Bodensiek, as acting Chair during the closed session, moves to authorize the Legal Department of the Town of Barnstable to enter into an agreement to settle the pending litigation to accept the deed restriction. Paul Pinard seconds.

Vote:

Aye: Herb Bodensiek, Mark Hansen, Paul Pinard, Denise Johnson, Todd Walantis

Nay: None

Attorney Revere requests to withdraw the appeal. Herb Bodensiek, as acting Chair for this item, assigns himself, Mark Hansen, Paul Pinard, Denise Johnson, and Todd Walantis to this item. He moves to withdraw Appeal No. 2021-057. Paul Pinard seconds.

Vote:

Aye: Herb Bodensiek, Mark Hansen, Paul Pinard, Denise Johnson, Todd Walantis

Nay: None

Appeal No. 2021-057 O'Neill and Dunbar Point LLC is withdrawn.

7:01 PM

Appeal No. 2022-033

Couto's Realty Investment/Dunkin Donuts

Couto's Realty Investment Co., II LLC has petitioned for a Variance from 240-25 D. Bulk Regulations in the HB District. The Petitioner is seeking a variance from the side yard setback for a proposed drive-thru canopy. The proposed setback is 7.2 feet where 10 feet is required. The subject property is located at 751 West Main Street, Hyannis, MA as shown on Assessor's Map 249 as Parcel 163. It is located in the Highway Business (HB) Zoning District. Continued from July 13, 2022.

Attorney John Kenney is representing the applicant. He is joined by Sal Couto, the owner of the company; Matt Eddy from Baxter Nye Engineering; and Randy Hart, a traffic engineer from VHB. Attorney Kenney would like to present for Variance No. 2022-033 and Special Permit No. 2022-034 at the same time, so the Chairman reads Appeal No. 2022-034 into the record as well.

Chair Dewey assigns himself, Herb Bodensiek, Paul Pinard, Mark Hansen, and Denise Johnson.

Mr. Eddy walks the Board through the Site Plan. The existing lot area is approximately 13,000 sq. ft., with 136 ft. of frontage along West Main St. The site is 99.8% developed with impervious area, with no environmental features, and is on public sewer and water. The existing footprint will not be modified at all. The existing building is approximately 2,100 sq. ft. of gross floor area. The site has 2 entrances and 18 existing parking spaces. For the proposal, the main addition will be a drive-thru window and a canopy over the window, which will be 7.2 ft. off the property line, which is what the variance is for. Mr. Eddy notes that the ordinance does not directly address/forbid projections off of structures, like canopies. Impervious coverage will be slightly reduced to 98.6%. They would be removing the existing parking spaces, enhancing landscaping, adding a drive-thru lane (a 12-car queue), a bypass lane, and 13 new parking spaces (12 required) with one being handicap accessible. Paul Pinard asks if the entrance on West Main Street will be changed. Mr. Eddy answers no. Mark Hansen asks if it will still allow traffic going both ways. Mr. Eddy answers yes.

Attorney Kenney explains that there are three forms of requested relief. Section 240-25 C says a food establishment can have a drive-thru if they can show that it does not have substantial adverse effects. They need a special permit under 240-93 B to allow for the expansion to add the drive-thru window and the canopy. They want to add a drive-thru as a result of public demand. Since the pandemic, this store lost a significant amount of sales because people don't want to go inside. In this way, the drive-thru service has a positive effect on the health, safety, and wellness of the public. The traffic study shows there would be minimal impact. He asserts that the shape of the lot, which was divided from a large lot, and the building on the lot, which is trapezoidal in shape, are unique in nature. Store sales have suffered as a result of people no longer wanting to go inside stores, so that is a financial hardship for the petitioner without a drive-thru option. The applicant has entered into an agreement with an abutting neighbor to acquire a 15-foot easement, which mitigates the encroachment into the setback. The most affected neighbor has stated their support for this project.

Mr. Hart walks the Board through the traffic studies. The first was done during peak summer traffic conditions and the second was a follow-up after Barnstable High School had reopened. The property is already generating traffic, with weekday mornings being the critical period. The highest they recorded was about 131 trips during one hour, and about 90 in the evening commuter timeframe. Their study showed an expected increase of 19 trips in the morning during that one critical hour, and a 10-trip increase during the evening peak hour. They also reviewed the driveways and found that both driveways far exceed the site distance requirements. They also did a gap study, which showed that there are more than adequate gaps to ensure left and right movement. Regarding the

queue, they have data from the Dunkin Donuts on Route 28 in Cotuit and on Route 130 in Sandwich, where the average maximum queue between the two facilities during peak times was 9 cars.

Chair Dewey brings it back to the Board for questions: Mark Hansen says he frequents this location, and it's a bit of a nightmare turning there. He believes this plan may alleviate how people move within the lot. Todd Walantis and Paul Pinard are familiar with the Cotuit Dunkin and note that the queue backs up all the way down the street (upwards of 20 cars). Todd Walantis asks what the plan is if the proposed drive-thru backs up into the street, because it's already a gridlock in that area in the morning. Additionally, many of the drivers in that location are novice drivers going to the high school. Mr. Hart rebuts that of course anomalies exist, but they rely on the data in a situation like this, and the data shows that the proposed location could handle peak drive-thru hours without spill-out. The applicant would be willing to pay a crossing guard to help with cars spilling out if it becomes an issue.

Paul Pinard doesn't think there's any data that can predict the decision a high-school driver will make. The data doesn't account for the high school being across the street and the effect that will have. Mr. Hart responds that the site is currently active and busy, and there have only been 5 accidents total over a 5-year period. Paul Pinard says that is because the high schoolers that go there now are walking from across the street, not driving. Chair Dewey agrees and adds that the parking lot is already bad, and a drive-thru will enhance that, with cars coming and going from both entrances, and cars trying to back out of parking spaces being blocked by cars in the drive-thru. Mr. Eddy says Mr. Couto also owns the Cotuit location, and it does twice the amount of sales of this location. Mr. Eddy says Mr. Couto would be willing to designate one entrance to exit only and if needed, right-turn only.

Jim Kupfer, Senior Planner, Planning & Development recommends that if the Board would like to consider the application, to request a peer review of the traffic. If the applicant agrees, the Planning & Development staff could procure a traffic engineer to review BHV's report and all the potential adjustments Mr. Eddy is proposing and provide the Board with some guidance. Chair Dewey is also concerned about internal flow of the lot in addition to regular traffic flow. Mr. Kupfer will include that in the scope. Paul Pinard just doesn't think any report or review could include the fact of the high school drivers. Mr. Kupfer confirms that the averages do not include unique variables like that and are taken from national averages. Denise Johnson believes it's contradictory to say it will have a minimal effect and also say they're providing a service most of their customers would prefer. Mr. Hart says they took that into account and believe the data shows they could handle the increase. Chair Dewey believes a peer review would be the best next step. Paul Pinard wants to see data that is specific to this unique location, not based on national averages.

Chair Dewey opens for public comment. He asks Mr. Kupfer how they can get data that is specific to this location. Mr. Kupfer says he can speak to a traffic engineer to get recommendations for that type of analysis. The Board and the applicant's representatives discuss possible parking lot options to alleviate concerns. Chair Dewey asks if the applicant has spoken with the neighbor at 765, as that property just sold. Attorney Kenney says no.

Chair Dewey makes a motion: per MGL Chapter 44 Section 53G and the adopted ZBA rules and regulations, the Board can vote to hire an outside consultant to conduct an assessment of the submitted traffic study and of the site with a particular focus on vehicular and pedestrian circulation and potential traffic safety measures. The applicant shall bear the cost of the peer review and the Zoning Board shall defer consultant selection to the Planning & Development Department staff. Herb Bodensiek seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Denise Johnson

Nay: Paul Pinard

Denise Johnson asks for clarification about whether the data is all national averages. Mr. Hart explains that the queue data is from local data (Cotuit and Sandwich locations) but the hourly increase data is from national averages.

Chair Dewey makes a motion to continue Appeals No. 2022-033 and 2022-034 to September 14, 2022. Denise Johnson seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Denise Johnson, Paul Pinard, Todd Walantis

Nay:

Appeal No. 2022-033 and Appeal No. 2022-034 are continued to September 14, 2022

New Business

7:02 PM

Appeal No. 2022-035

Levi

Jacqueline and Yahshua Levi have petitioned for a Variance from Section 240- 11 E. Bulk Regulations in the Residence B (RB) Zoning District and Section 240-125 B. (1) (c) Variances. The Petitioners are seeking a variance from Lot Size requirements to allow the sale

of the subject Lot and “unmerge” the subject lot from the lot addressed as 400 Pitchers Way. The subject property is located at 327 Mitchell’s Way, Hyannis, MA as shown on Assessor’s Map 290 as Parcel 056. It is located in the Residence B (RB) Zoning District.

Sitting on this is Jake Dewey, Herb Bodensiek, Paul Pinard, Mark Hansen, and Todd Walantis.

Attorney Robert Mills is representing the applicant. He is asking the Board to grant a variance for 327 Pitcher’s Way based upon the shape and dimensions of the lot, which make the lot undersized and nonconforming and are a hardship. He provides some background: both of these properties were owned by Eugenia Fortes, and were passed down to her family members. The two lots merged because they were held in common ownership. All of the nearby lots are smaller than this lot and are built upon. The owner has been paying taxes on both lots as buildable lots (as did Ms. Fortes), and also lives out of state and so pays higher taxes.

Chair Dewey brings it back to the Board for discussion. Paul Pinard asks if the lots are separate or merged. Attorney Mills says by zoning purposes, they are merged, but otherwise they are two separate lots. Chair Dewey clarifies that the applicant is asking for a variance to make the lot at 327 buildable, not 400. Attorney Mills confirms—400 is already conforming.

Chair Dewey opens for public comment. There is none. He makes a motion to close public comment. Paul Pinard seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, Todd Walantis

Nay:

The Board deliberates. Mark Hansen asks if they were ever separate parcels or were they always in common ownership. Attorney Mills answers that they were originally separate parcels.

Chair Dewey makes findings for Appeal No. 2022-035:

1. 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 in which it is located. He finds the shape and size of the lot are unique in the area.
2. A literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioners. He finds that without the lot area variance, the lot is unusable.
3. 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 ordinance. He finds the lot is large enough for development without detriment to the public good or the neighborhood.

Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, Todd Walantis

Nay:

The Chairman says the appeal is subject to Conditions 2 and 3 on the Staff Report dated July 14, 2022, and changes Condition No. 1 to, “Variance No. 2022-035 from Section 240- 11 E. Lot Area in the Residence B (RB) Zoning District and Section 240-125 B. (1) (c) to allow the sale of the subject Lot and “unmerge” the subject lot from the lot addressed as 400 Pitchers Way by granting a lot area reduction of approximately 18,470 square feet. The subject property is located at 327 Mitchell’s Way, Hyannis, MA.”

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, Todd Walantis

Nay:

Appeal No. 2022-035 Levi is granted with conditions.

7:03 PM

Appeal No. 2022-036

Farrin

Emily A. Farrin has applied for a Special Permit pursuant to Section 240-92 B. Alteration or expansion of a nonconforming structure used as single-family residence. The Applicant proposes to construct a 633 square foot addition and front entry porch to the existing single family dwelling. The subject property is located at 140 Oak Neck Road, Hyannis, MA as shown on Assessor’s Map 307 Parcel 172. It is located in Residence B (RB) Zoning District.

The Board received a request to withdraw. Chair Dewey makes a motion to withdraw Appeal No. 2022-036 without prejudice. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, Todd Walantis, Denise Johnson

Nay:

Appeal No. 2022-036 Farrin is withdrawn without prejudice.

7:04 PM

Appeal No. 2022-034 READVERTISED

Couto's Realty Investment/Dunkin Donuts

Couto's Realty Investment Co., II LLC has applied for a Special Permit pursuant to Section 240-25 C. Conditional Uses in the HB District and Section 240-93 B. Alterations and expansions of a nonconforming structure not used as single or two family residences by Special Permit. The Applicant is seeking to add a drive-thru to the existing Dunkin. The subject property is located at 751 West Main Street, Hyannis, MA as shown on Assessor's Map 249 as Parcel 163. It is located in the Highway Business (HB) Zoning District.

This item was taken out of order and was presented together with Appeal No. 2022-033. It was continued to September 14, 2022.

Correspondence

Matters Not Reasonably Anticipated by the Chair

Discussion

The Governor has signed the Remote Meeting extension to March 2023. Chair Dewey suggests one meeting per month in person and one meeting per month remote. The Board agrees. Chair Dewey makes a motion that August 10 will be in person, August 24 will be online, and the first meeting of the month will be in person and the second will be online going forward.

Upcoming Hearings

August 10, 2022, August 24, 2022, September 14, 2022

Board Elections

Herb Bodensiek nominates Jake Dewey for Chair. Paul Pinard seconds. Paul Pinard nominates David Hirsch for Vice Chair. Mark Hansen seconds. Paul Pinard nominates Herb Bodensiek for Clerk. Jake Dewey seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, Todd Walantis, Denise Johnson

Nay:

Adjournment

Chair Dewey makes a motion to adjourn. Paul Pinard seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, Todd Walantis, Denise Johnson

Nay:

Respectfully submitted,
Genna Ziino, Administrative Assistant

Further detail may be obtained by viewing the video via Channel 18 on demand at <http://www.town.barnstable.ma.us>