



## Town of Provincetown

Meeting of the

BOARD OF HEALTH

Thursday, August 1, 2013

Judge Welsh Hearing Room, Provincetown Town Hall,  
260 Commercial Street, Provincetown, MA

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**Board Members Present:** Mark Phillips, Chair; Laurie Delmolino, Vice Chair; Ken Janson, Dr. Janet Whelan and Elizabeth Williams

**Board Members Absent:** Paige Mansfield, Alternate

**Other attendees:** Brian Carlson, Health and Environmental Affairs Manager and Morgan Clark, Public Health and Safety Officer

**Recorder:** Susan Leonard

**Call to Order:** Mark Phillips called the meeting to order at 4:00 p.m.

### **Public Comments:**

There were no public comments.

### **Old Business:**

There was no old business discussed.

### **New Business:**

#### **a. 19 Off Conwell Street, Title 5 Variance Request**

**Discussion:** Brian Carlson introduced the Title 5 variance request as follows: The property owner requests a variance from 310 CMR 15.211 (1) to allow the proposed soil absorption system to be located less than 20 feet from the existing cellar wall for building 1 located at 19 Off Conwell Street. An updated revised plan was handed out to the Board. The revision indicates a new test hole, which Mr. Carlson required for the project.

William N. Rogers, Engineer appeared along with the property owner Robert Russell to present the Title 5 plans. He explained that the existing pipe and stone leaching

system was failing. The owner had previously installed a new D-Box that had collapsed. The proposed plan presented is for a new 60' x 8' leaching facility with leaching chambers which is a lot better than the current pipe and stone leaching system. The present system was installed under the 1978 Code. Mr. Carlson requested a new test hole; which was done. The only variance requested was the variance from the homeowner's own building. No other properties are affected by it.

Ken Janson asked why Mr. Rogers chose to install the new leaching field in the proposed area. Mr. Rogers explained that the other area near the existing drive and parking area is too low to accommodate it.

**Motion:** *To approve the septic plan for 19 Off Conwell Street as presented.*

**Motion:** Ken Janson

**Seconded:** Laurie Delmolino

**Vote:** 5 – 0 – 0

**Materials Submitted:** Letter William N. Rogers II, July 15, 2013, Request for Title 5 Variance; Plan Depicting Sanitary Subsurface Sewage Disposal System, No. 19 Off Conwell Street, Revised 7/24/13

## **b. Discussion of Site Visit of 90 Shankpainter Road**

**Discussion:** An inspection of 90 Shankpainter Road was conducted by Ken Janson, Mark Phillips and Brian Carlson.

(At this point in the presentation Elizabeth Williams recused herself from the meeting.)

The visit was conducted on May 29, 2013. A couple of management team members from the property were also present. Four different units were inspected including first and second floor units some of which were near the stairwells of concern. The Board members on the inspection team were able to hear some noise. The team met with tenants who had their apartments remediated, as well. Some tenants seemed satisfied with the results.

Ken mentioned that it seems the builders did the best that they could to alleviate sound in the construction phase. There is some noise, but in his opinion it was not intolerable. He is hoping, perhaps, there are still remedial measures that can be taken such as installing carpet and acoustic tile ceilings.

Brian Carlson added that he ran up and down stairs to demonstrate the noise produced. This was done near both un-remediated and remediated units. Two lower level and two upper level units over three different buildings were checked. All, except the one that was remediated, abutted outside stairwells.

Mark Phillips addressed the question of under what authority the Board would be acting in regards to the original complaint, which was heard by the Board on May 16, 2013. Brian Carlson had suggested, at that time, that it may be under Article 8, Public Nuisances. After that initial discussion, Mr. Phillips consulted with Town Counsel for an opinion on how the Board could go about determining the difference between a private nuisance and a public nuisance. He read the following email from Town Counsel, Gregg J. Corbo into the record:

*Dear Brian:*

*On behalf of the Board of Health, you have requested guidance concerning the Board of Health's authority to respond to complaints about nuisances stemming from noise. I offer the following general guidelines in this regard:*

*Pursuant to G.L. c. 111, ss. 122-125, the Board of Health may order the abatement of activities with constitute nuisances, sources of filth and causes of sickness within its town. G.L. c. 111, s. 122. Noise may constitute a nuisance when it is such that it adversely affects the health or comfort of ordinary people in the vicinity to an unreasonable extent. Tortorella v. H. Traiser & Co., 284 Mass. 497 (1933). Injury to a person with particular sensitivities, however, is not actionable. Id.*

*In my opinion, the Board of Health is authorized to take action to abate or control a "public" nuisance, as opposed to a "private" nuisance. A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury. Connerty v. Metropolitan District Commission, 398 Mass. 140, 148 (1986). To be public, the nuisance must result in an unreasonable interference with a right common to the general public. Restatement (Second) of Torts, s. 821B(1).*

*A public nuisance differs from a private nuisance in that it is a much broader term. Id. A nuisance is public when the conduct involves a significant interference with the public health, safety, peace, comfort or enjoyment. Restatement (Second) of Torts, s. 821B(2). In contrast to a public nuisance, a private nuisance is created where a property owner creates, permits or maintains a condition that causes a substantial and unreasonable interference with the use and enjoyment of the property of another. Belanger v. Commonwealth, 41 Mass.App.Ct. 668, 670, n. 3 (1996). A private nuisance may be enjoined through a private cause of action by the affected property owner. See, e.g. Taygeta Corp. v. Varian Associates, Inc., 436 Mass. 217 (2002) (property owner permitted to bring civil suit against neighbor for groundwater contamination caused by illegal dumping on neighbor's land).*

*In my opinion, whether a nuisance is public or private is a matter of degree. Whether or not a particular situation crosses the line from private to public nuisance is a determination within the discretion of the Board of Health, depending upon all of the facts and circumstances surrounding a particular situation. Furthermore, although the Board of Health is authorized to act to abate a public nuisance, it is not required to do so. Ribeiro v. Town of Granby, 395 Mass. 608, 613 (1985). This measure of discretion is necessary because municipalities “lack the resources necessary to police the entire housing sector.” Id.*

*Please do not hesitate to contact me if you have any questions in this regard.*

*Very truly yours,*

*Gregg J. Corbo, Esq.*

*Kopelman and Paige, P.C.*

*101 Arch Street*

*12th Floor*

*Boston, MA 02110*

Mr. Phillips, Chair, stated that after consideration, in his opinion, this issue is a private nuisance and recommends that the Board not take further action.

Laurie Delmolino asked if it is a private nuisance because it occurs on private property? Mr. Phillips replied that it does not reach the level where it affects the general public; it affects the residents of the property and they have various remedies available to them that are outside of the Board of Health. Both Ken Janson and Dr. Janet Whelan agreed with the chair that it was not a public nuisance.

There being no further discussion by the Board, Mr. Phillips asked Betty Williams to return to the meeting and rejoin the Board. Before she assumed her seat, Ken Janson asked her if the acoustic ceiling had helped with the noise in her apartment. She responded that it has helped about 50%. It is only in her bedroom; she still hears the noise in the rooms where it has not been installed. It is not perfect, but she is going to live with it.

### **Any Other Business That Shall Properly Come Before the Board**

Mark Phillips mentioned that he had attended a meeting with Public Television and they mentioned they will be going live with all the public meetings over the next month. Probably, at the next meeting in September it will be a live meeting. They will be improving the sound and clarity. They will be able to index the meeting by agenda items.

### **Approval of Minutes**

#### **June 6, 2013 Minutes**

**Motion:** *Move to approve the minutes of Thursday, June 6, 2012*

**Motion:** Dr. Janet Whelan

**Seconded:** Ken Janson

**Vote:** 4 – 0 - 1

### **Health Department Report**

#### **Dog Dining Report**

The Summer Sanitarian, Carol Eastman did a compliance check of all the establishments that currently have dog dining variances. Out of the 5 restaurants, it was pretty much the same response. They do have the required hand sanitizer on hand, but don't leave it on the tables because people leave with it. Although she did not make mention of signage, she did mention that the Crown & Anchor does have everything required of them.

#### **Cape Cod Cesspool Questionnaire**

Morgan Clark shared with the Board the results of an informal survey she conducted of other Cape & Islands towns regarding their regulation of existing cesspools. Each town seems to handle it differently. Some towns consider cesspools to be in automatic failure, others do not. Tisbury requires an inspection of all septic systems every 7 years.

Mr. Phillips asked if the specific regulations from each Cape town could be obtained? He mentioned that a few towns seem to have tighter regulations than Provincetown has now. What would be the impact on harbor water quality if stricter regulations were implemented?

Laurie Delmolino said that the water quality in the harbor - nitrogen loading - would be her biggest concern. Brian mentioned that nitrogen is also coming from Title 5 septic systems not just cesspools.

Ken Janson referred to the recently completed cesspool map. It is apparent there are only a few cesspools still in use along the harbor. He feels that they are doing a fairly good job of getting rid of them. He suggested starting a routine of cesspool inspections every so often. This might find some that have failed. Brian Carlson stated that the town sewer system is not mandatory at this time, as long as the cesspool system has not failed. It would require a change in the regulations to require sewer hook up. Perhaps, new triggers like building permits might be found.

Mr. Phillips said the Board needs to be responsive if there is an issue. Other towns seem to do more than what Provincetown currently does. Mr. Carlson pointed out that the hope is to connect failed systems directly to the sewer and not have owners invest in a Title 5; most other towns don't have the option of the sewer. Not all the properties in town will be served by the sewer so those that still have cesspools are nearing the end of their life and will need to be upgraded.

Betty Williams asked if once a property is sold it is required to upgrade to a Title 5? Brian responded that they could seek an ACO which allows them to upgrade to the sewer when it becomes available. If it is determined that the property will not be served by the sewer, then they are required to upgrade.

Morgan added that there is work being done by DEP regarding alternative disposal systems, be it composting, grey water or other options.

## **Water Quality**

Brian Carlson reported that, this summer, water quality has been very good. There have not been very many beach closures. Mr. Phillips thought it might be due to the new pavement; it is designed to filter.

## **Board Members' Statements**

There were no statements made by the board members.

## **Adjournment:**

There being no further business, Mark Phillips adjourned the meeting at 4:42 pm.

Respectfully submitted,

Susan Leonard

**Approved by \_\_\_\_\_ on \_\_\_\_\_, 2013**