TOWN OF PROVINCETOWN

ZONING BOARD OF APPEALS

MEETING MINUTES OF
September 9, 2010

MEETING HELD IN THE GRACE GOUVEIA BUILDING

Members Present: Anne Howard, Elisabeth Verde, Robert Littlefield, Amy Germain, David Nicolau and Tom Roberts.
Members Absent: None.
Others Present: Attorney Ilana Quirk (Town Counsel), David Gardner (Assistant Town Manager), Maxine Notaro (Permit Coordinator) and Ellen C. Battaglini (Recording Secretary).

PUBLIC HEARING

Chair Anne Howard called the Public Hearing to order at 7:00 P.M. in the hallway outside of Room 6 in the Grace Gouveia Building. ***Amy Germain moved to reconvene the Public Hearing downstairs in Room 2, David Nicolau seconded and it was so voted, 6-0.***

The Board will consider a request, received from The Community Builders, Inc. on August 26, 2010 (and dated August 25, 2010), which would modify an affordability condition in the June 18, 2009 Comprehensive Permit issued under Case #2009-20 to The Community Builders, Inc. for property located at 90 Shank Painter Road in the GC Zoning District in Provincetown, Massachusetts; and, specifically, to consider whether the modification request is a substantial or an insubstantial change to the Comprehensive Permit under 760 CMR 56.05(11). Anne Howard, Elisabeth Verde, Robert Littlefield, Amy Germain and David Nicolau heard the request.
Presentation: Jan Brodie, of The Community Builders, Inc., appeared to present the request. Ms. Brodie explained that the project has not yet been funded because of the large number of projects vying for too little available money. They are ready to enter a new round of funding and have made revisions to the project for which they are seeking the Board's approval. The modification that is requested is to one of the Conditions of Approval, namely Affordability, Section III, Paragraph 9 (Page 7) of the ZBA Decision. The section requires eight of the units be designated for individuals or couples with an annual household income at or below 30% of the Barnstable County area medium income, thirty-three of the units be designated for individuals or couples with an annual household incomes at or below 60% of the AMI and nine of the units be designated for individuals or couples with an annual household income at or below 80% of the AMI. The Community Builders seeks to change this Affordability condition by adding the eight units for individuals or couples with an annual household income of 30% of the AMI to be added to the thirty-three units, for a total of 41 units, designated for individuals or couples with an annual household income at or below 60% of the AMI. TCB maintains that this is not a substantial change and requests that the Board modify its decision as requested and as attached

as 'Exhibit A' in a letter dated August 25, 2010, written by TCB Attorney Kate Mitchell, and that the Comprehensive Permit be deemed modified by the Board.
Public Comment: Michelle Jarusiewicz, Community Housing Specialist and speaking on behalf of the Community Housing Council, that the CHC strongly supports, as does she, the request by TCB to modify the decision. David Gardner, Assistant Town Manager, wanted to remind the Board of the relevance and importance of the CHC's recommendation, pursuant to Article 6, s. 6300 of the Zoning By-Laws.

Attorney Quirk reviewed with the Board the standards it would apply when deciding whether the request made by TCB is substantial or insubstantial. She also informed the Board of the Supreme Judicial Court's recent decision in the *Amesbury* case regarding the issue of "local concern" as a factor pursuant to 760 CMR 56.07(4).

Board Discussion: The Board questioned Ms. Brodie and discussed the issue.
Amy Germain moved that the Board find that the proposed application to modify the June 18, 2009 Comprehensive Permit issued to The Community Builders, Inc. for 90 Shank Painter Road to alter the affordability requirements so as to remove the requirement that eight units shall be available to individuals or couples with annual median income of below 30% of the Barnstable County median and annual income and to amend the requirement in the existing Permit that requires thirty-three units to be available at or below 60% of AMI and change it to forty-one units, with the understanding that the applicant will make its absolute best efforts to provide the eight units at 30% of AMI, David Nicolau seconded and it was so voted, 5-0.

Chair Anne Howard adjourned the Public Hearing at 7:50 P.M.

WORK SESSION

Chair Anne Howard convened the Work Session at 7:50 P.M.

The Board discussed Zoning issues with Attorney Quirk. David Nicolau had submitted a list of questions:

Ilana began the discussion by again reviewing the SJC's recent *Amesbury* decision. Cities and Towns no longer have a 'local concern' regarding affordability issues in 40B cases. That now rests with the State and the subsidizing agency. Town's can counteract this decision by passing a zoning provision that will set affordability considerations as a 'local concern'.

Issue: The advertisement of an application where the Article and Section were erroneous, but the notice had the sum and substance of the issue correct.

IQ: There is case law regarding this issue. You shouldn't be concerned when a clerical error occurs. We all make mistakes. We all make them. And it is understood, of course. It is perfectly

understandable. And when that happens, as long as the substance of the relief is advertised properly, you can adjust essentially, what it is that you are dealing with so that you can give the relief that you need to. And there are three cases that speak to this issue. Make it clear that you have the discretion when you feel comfortable that you can certainly do this: The *Dutow (*sp.?) case, the *Shopper's World* case and the *Pelletier* case. You actually put on a clinic, as I said to David when we discussed it earlier. You did it absolutely the right way. I understand that you said to the applicant, "Look, this is at your risk," because of course, if an abutter hears later, "Oh, well, gee, I thought you were under a 3110 and you were doing a finding, instead it ended up being a Variance and so it is a different standard", well, the abutter could appeal and then that costs money and it's time and it's effort, and so what I always recommend is that you do exactly what you did. You say to the applicant, "Look, this is at your risk, what do you want to do, it's up to you"? Offer to the applicant, "Do you want to re-advertise so that you can eliminate any risk that there will be an appeal on this basis." As long as you offer that, I think you have done everything that you possibly could and provided that you are comfortable that the description of the relief is sufficient. And, in fact, there is actually a case that says that when someone comes in and characterizes their application as an appeal from a cease and desist order, that that can, if you are comfortable with it, encompass the grant of the Special Permit relief that they need in the event that you find that, "Yeah, we are going to give you a cease and desist order, and then you need zoning relief in order to overcome the cease and desist order." You know, rant a Special Permit with conditions. The courts have said, "Yeah, everybody understands this is what they are trying to do, this is what they are doing, they have a cease and desist order against them, there's the appeal, but that, we'll then encompass them asking for the relief that they would need in order to be in compliance with your zoning in order to do what they are doing. And it got advertised.

ECB: But the number of seats advertised was also incorrect.

IQ: If you described it as looking to increase by 25 seats and then in the end it is only 15, I think that's not a problem. And again, I do want to emphasize though that it is at your discretion. You should feel comfortable when you take the position. You don't have to. And if you really feel that you need to re-advertise, if you feel there is some kind of deception or that, you know, that people were confused. One of the concerns that I always have, um, although there could be a move from Special Permit relief to Variance relief because you find that well you can't do the use that you are asking for without a use Variance. You know, when it comes to that, really look at the applicant and say, "Gee, do you want to do this?" and do all of you feel comfortable. I think under the case law, you probably could do it, but it invites litigation and it makes people feel uncomfortable potentially with the process, because the standard, obviously, for a Variance, you know, it's much harder to get versus a Special Permit. But it's what you are comfortable with, it's at your discretion.

AG: Isn't it more right to just re-advertise and hold another public hearing? In this case, there was not a compelling reason not to re-advertise?

IQ: I think that, uh, from a practical standpoint, that comes into it, if you have someone who has a very non-controversial request for, let's say, adding a deck and the neighbors all sent in letters of support, there's no controversy about it. And it would delay them and perhaps, you know,

eliminate their financing and they would have to pay more to re-apply and re-advertise and all that, as opposed to a major shopping center that asked for a certain kind of relief and then arrived in front of you and everyone realizes, "Well, gee, you need this other Special, this whole different Special Permit". I think you just have to exercise your discretion as to when it is appropriate and when it is not. But I always recommend that you put it right back on the applicant to say, "Well, if we do go forward, the risk is yours", because if we grant this relief and an abutter appeals on that basis, it will be up to you to defend. As you know, in those circumstances, we just do a passive defense unless there is some kind of a bias claim or a bad faith claim against the Board and we just keep track of the litigation, perhaps appear at the first Pre-Trial Conference to make sure that the documents are in order, but then it moves on with the developer, that successful applicant, bearing the costs of the legal defense.

AG: The Board tells applicants that there is a twenty-day appeal period and there is a risk.

IQ: There is a risk. There is a risk and it is up to them to analyze and assess whether they wish to assume it or not.

IQ: And then I understand that you had a number of questions about, um, basically the interaction between 3110 and 2500 and 4120. I can move through those, if you'd like, if that is appropriate.

The Board assented.

IQ: I am not sure that the first item was a question. "Previous decision by Town Counsel regarding dimensional requirements, Special Permits versus Variances…" I think that the questions that actually follow, uh, in number two, someone was under the understanding that in order to have an additional principal structure on a lot that an additional 5000 square feet is required. And you have a provision in your By-Law that says that every principal building needs to meet the area requirement for a building lot. So, for example, if you're in the R3, which requires 5000 sq. ft. of area and you have two principal buildings, it would need to be 10,000 sq. ft. minimum.

IQ: Um, then number three, "If you have a house in Res 3 with 4000 sq. ft.", which would mean that it's non-conforming, "…and the person wants a second unit, wouldn't they need a Variance?" Yes, although I would also take the position that they need a finding under 3110 as well because you've got a non-conforming situation that they are looking to change, extend, or alter. So this would be one of those circumstances where you need both. Now, when I look at 3110, I often see those kinds of findings that mimic what we see in 40A, s. 6, in the first paragraph, done by Special Permits. But I see you do it in all cases as simply a finding. And there is special treatment in 40A, s. 6, paragraph 1, for single-family and two-family homes that mirrors exactly what you do, no Special Permit required in the first phase, you simply make a finding if there is going to be an extension or an alteration of a non-conforming, lawfully non-conforming, single-family or two-family situation. You make that finding only; would it be substantially more detrimental than what already exists. If you make a finding that it would not be substantially more detrimental, you're done. If it would be, then you go on to the Special Permit aspect. And you have the other layer…

AH: So you are saying, for a 3110, that if we were to find that the going up or along the pre-existing, non-conforming line is not more detrimental, that we would be fine with, that we would not have to go ahead and issue a Special Permit. They are coming in to us for a Special Permit.

IQ: Is that how you're doing it? Do you always do it by Special Permit rather than by a finding? Because under 40A, s. 6, paragraph 1, if you have a single-family or two-family situation, they have, they, exactly, they have the ability, once you make the finding that it is not substantially more detrimental, you're just done. You're done. You make the finding and you're done if it is not substantially more detrimental.

The Board discussed writing decisions v. filling out a form for a *Goldhirsh.*

IQ: Because what your By-Law says, under Article 3, is that a pre-existing, non-conforming use may be extended or altered if you FIND that the extension or alteration will not be substantially more detrimental. Then it goes on to say, if you make a change, you need a Special Permit.

RL: We do the finding as a finding in the Special Permit decision.

IQ: Ok, **s**o you always do it as a Special Permit, the whole thing?

DN: All my questions are related to hearing something under a Special Permit when it should be a Variance because of dimensional requirements. All my questions…

IQ: Ok, let's zero right in on that. Let me just say, because I have already tried to allude to that. There are those times when you are going to have to do both.

DN: I understand that. I would think that you would want the person to cite the non-conformities, you know such as sideline setbacks, so that's under 3110, because you are citing the non-conformities, but then you still need the dimensional requirement to add another unit and you need the dimensional requirement to add another principal structure. And if you do, then it's a Variance. We have been hearing things that need another principal structure and the Board has been hearing them under a Special Permit.

IQ: In my opinion, you would need both.

DN: Well, yes, but without the Variance. No Variance, just the Special Permit. In other words, someone comes in and they are already non-conforming, they don't have the dimensional requirements for what already exists and they want to take a garage, and make it a principal structure, which needs another 5000 sq. ft., which is going to make it even more non-conforming. Aren't we required to hear that, whether or not you do the Special Permit part, required to hear it under a Variance?

IQ: No, they, they need, and this is a little confusing, so…I would opine that they need the Variance, but they have to ask for it. You can't… you know, they need to, they need to come to you for it. You can say to them, "Gee, have you considered that you may need a Variance?" Because ultimately it is going to be up the Building Commissioner and the Zoning Enforcement

Officer as to how he interprets what comes in front of him, as to whether he is going to give the Building Permit. So, if someone comes to you for a 3110 determination, they may have a good reason why they are not seeking a Variance yet. They may want to know that they can get the 3110 and then go back and determine what level of Variance relief they want to ask for.

DN: Anybody can ask for what they want and we can always say, "Oh yeah, well maybe we'll give you that." However when we look at what's detrimental, you know, when you already have… I am really struggling with, if you have dimensional requirements, that's about density. It's very, very strong that we want the dimensional requirements to be adhered to. So if you hear it under a Special Permit and not a Variance, it's like saying it doesn't matter. Why have dimensional requirements then?

IQ: But, if someone came to you for a 3110, let's use the example, you have a house in Res 3 with 4000 sq. ft. of land and they've got a single-family house, presumably, so they are non-conforming and they want a second unit and they come to you just for a 3110.Certainly you can say to them, "Well, you know, we find it would be substantially more detrimental to have a second unit on a 4000 sq. ft. lot because you don't have enough land for it." You could do that. Or, if you wanted to allow it, you could say, "Well, it wouldn't be substantially more detrimental, that kind of density exists in that particular area already, however, and here's our finding under 3110, however, you need a Variance from the dimensional requirements under the By-Law in order to move forward."

DN: Variances are very difficult, so of course people want to come in under a 3110 because it is easier. So, if you letting people come in under 3110 when they don't have the dimensional requirements for the amount of units they need or the commercial accommodations. There is a reason why we have dimensional requirements because of density.

IQ: How would you find that it's not substantially more detrimental in those circumstances?

DN: I would find that because there is a reason why we have dimensional requirements. Because most of the dimensional requirements, the 5000 sq. ft. and the 40% lot coverage and all of those things.

IQ: But that's what I am saying, how would you make the finding that it is not substantially more detrimental, how could you make a positive finding?

DN: I wouldn't, I mean personally I feel we should not hear it. The Zoning Enforcement Officer should tell them they need a Variance and that they won't prevail if they come in under a 3110.

IQ: Well, you need to deal with the relief and there would have to be a vote as to whether they're entitled to relief under 3110 or not. And if you wish to signal, you know, within that relief, if it happens to be granted for one reason or another, that it is the Board's belief that Variance relief is required. Or, then you can do that. Ultimately, it is up to the ZEO to determine all of the relief that is required. Are you saying that the ZEO is granting Building Permits in this circumstance without requiring Variance relief? Is that…

DN: He is determining that they can be heard under a Special Permits, not Variances. So again, I always thought that when we hear cases that we want to make a strong case, that when we make a decision and a finding that it will stand up in Court. And I think that anyone comes in under that circumstance and the Board hears it under a Special Permit… I want the Board to be educated and be the best Board it can be. So if something should be a Variance, cause I've always known this my whole life and if I am wrong, I am wrong. But to me, it's very simple what a Special Permit is and it's very simple what a Variance is. If you can't meet muster for the dimensional requirement, it's a Variance. And if the Board chooses to hear them under a Special Permits, then hear them all under a Special Permits. I have never heard of that in any other town.

IQ: No, but I am saying that it could be both.

DN: Yes, I understand the both part. I would want to know all the non-conformities, you know, and then to cite them, but then to say, "And you need a Variance for the dimensional requirements."

IQ: Exactly, and I think you should have a checklist for yourselves so that the first question you ask is, you know, what district is it in, what are the requirements, what are the non-conformities, are the non-conformities lawful. Because remember that the burden of proof to show you that the property owner is bringing forward a lawfully, pre-existing, non-conforming situation is on the property owner. So there should not, necessarily, be a presumption. Some evidence should be provided to you, to satisfy you, that this is indeed a lawfully, pre-existing, non-conforming situation. Then you have to determine is it is an alteration, an extension, can you just make the finding. Is there a change in the use or is there an increase in the dimensional non-conformities? In both of those cases, you need a Variance.

AH: There was your answer.

Again, it's hard sometimes when we as a Zoning Board can only look at whatever is in our purview because we don't look at Health, we don't look at whether the lot would be big enough for a septic system for whatever is already there. So we can't even go there. Yet we are charged with looking at our By-Laws for how much land is needed and how much, you know, and parking and such and all of the other stuff. What are everyone else's thoughts?

The Board discussed the issue.

IQ: And two things, if I can get, uh, something else that you didn't ask about in edgewise. Two things; number one, in your decisions, please put in the expiration date. For Variances, one year, for Special Permits, two years. And in each case, require, as a condition, that they record, uh, you want, or else it lapses. So that you have that additional hook.

DN: Recorded with the Registry?

IQ: Yes. And then the other thing that I like to see, not in absolutely in every case, you use your judgment, but if you are giving Variance relief, I recommend that you put in your decision, or even a Special Permit really, put in your decision very specific conditions that say exactly what

the relief is that you are giving, or if it is shown on a plan, then have the plan attached to your decision and incorporated by reference. Try to get them on 8 1/2 by 11 pieces of paper and then they get recorded. Because the worst thing is, you know, someone comes in and shows you a plan; they have an existing house and they show you, oh, you know, here's the addition that we are going to put on and it's just going to continue the non-conformity with the sideline and it's only 15', you know, further out the back. And so you grant a 3' sideyard Variance. If you don't have a plan, then they could go back to the Building Inspector, you know, a year or two years later, after they put that initial addition in and then say, "Well, I've got this Variance all the way out the back, until I hit the rear setback." So, you want to be really careful to hem people in. It doesn't mean that you wouldn't give them further relief if they came back and asked for it, but you want to make sure that you are not inadvertently saying, you know, we're giving you carte blanche throughout that whole, whole, line. Ok?

IQ: The next one was: If a two-family dwelling with 5000 sq. ft. of land, it looks like a law school exam question, see, I enjoy these things, if the two-family dwelling with 5000 sq. ft. of land wants an additional free-standing principal structure with another dwelling unit, don't they need another 5000 sq. ft. of land or a Variance? The answer is yes, absolutely. Under 2420, you see what the dimensional requirements are for a two-family, which is 5000, then you go to, um, 2550, which says if you have more than one principal building on a lot, then the lot area requirements must be met for each principal building without counting any lot area twice. So yes, you would need 10,000.

MN: Is that for a new building or a building that already exists? Like a garage that they wanted to convert.

DN: Is it attached or free-standing?

AH: Let's say it is free-standing.

IQ: Oh, now, that's interesting, um….I think they would need a Variance. I think they would need a Variance because 2550 says two buildings per lot. "More than one building, uh, may be erected or moved, provided not closer" etc., etc. Then it goes on to say, "lot area requirements must be met for each principal building without counting any lot area twice." And in the circumstance that you raise there, Maxine, that would be a change in use from the accessory building to a principal building, so I think it needs that 5000 sq. ft. for itself and so it would need a Variance.

IQ: Number five: "If a single-family wants to convert to a guesthouse", and I didn't follow the guesthouse. Did you mean a tourist home? A boarding house? If they wanted to convert it in a Res 3 and there is only "4000 sq. ft. of land and 5 bedrooms, don't they need 5000 sq. ft. of land and parking for 5 cars or a Variance for the parking requirements and fifth bedroom?"
So I wasn't really sure what use categories we were talking about. If it is a single family and it goes to a multi-family, then it's going to have to meet the requirements for multi-family, which you got at in a later one where because a multi-family is a minimum of three units and each one of them has to have at least 2500 sq. ft. of area.

DN: This is the one with the commercial accommodations where the schedule is 1000 sq. ft. of land per unit, per guestroom. So they've got five and they have less than 4000 sq. ft. of land so already they are exceeding their square footage for the fifth bedroom. They also need one parking space per bedroom. So that is why I thought it would be two Variances, one for parking and one for the, um…

IQ: That may well be, I'll hesitate to weigh in on it just because I wasn't able to follow which provisions in the Zoning By-Laws we were talking about, so without actually having reviewed the, I mean that sounds correct, but I would want to look at it myself before... it does sound like they would need two Variances.

IQ: Number six: "If any pre-existing lot in Res 3 does not have enough land for the current amount of units and wants an additional unit, don't they need the required square footage or a Variance." Yes, and the determination under 3110. Ok?

IQ: Number seven: "Are we following Article 4, Section 4120, Schedule for Lot Area, regarding dimensional requirement in our Zoning By-Law?" Well, remember that Article 4 has to do with multi-family housing, so that's where the 2500 sq.ft. for each unit comes in, but to be multi-family, you have to have at least three, so for multi-family, um, in the Res 3, the minimum lot area is 5000, but if you have a multi-family use, you need 5000 plus the 2500, so you would need 7500 in order to have the three units. Ok? Alright.

IQ: Number eight: It comes from 40A, s. 9**,** which expressly states in the statute that you can impose conditions, safeguards and limitations on time and use whenever you grant a Special Permit. They need to be reasonable on time and use, you know, certainly for a commercial operation, you know, hours of operation, you can follow whatever your local By-Law is, you know, to show what's reasonable. Uh, days of operation, you know if it is an industrial use, you might say, “Gee, no Sundays, no holidays.”

DN: If someone wants to apply for a Variance and they want to separate two buildings and I just gotta ask this...

IQ: Let me just stop you there before you go any further. Let me just say that, you know, that we have been talking about these hypothetical questions. If you have a particular matter that is pending before you...

DN: It’s done.

IQ: Ok, alright.

DN: And let's say we grant it, the separation, but the applicant says,“ I want to keep it a single-family house.” Can we condition it that it always stay a single-family home?

IQ: Yes. It's my recommendation...there are two ways that you can do it: One is to put it as a condition of the relief that you give. Just say it is a condition. So as long as they are using your decision, then they have to honor that condition. But then they can always come back and ask

that the condition be taken out. As we said earlier, if you said no, I would take the position that they don't have the right, lawfully, to appeal. That it's an untimely appeal of the initial condition. But you are at risk that some future Board would take the condition out. So one of the things that you can think about doing is, as part of your conditions, to make the condition permanent in way of a covenant that gets recorded against the property, you know, in favor of the Town.

IQ: So I think those were all the questions that you had, anything else you can think of?

AG: Would writing in the time line and expiration of the Special Permit or Variance come under a specific finding or a general finding?

IQ: Yeah, you could have your general conditions that, you know, I mean, do you, do you...

AG: Or would it be under a condition?

IQ: Oh, it's a condition. It's a condition. It's a condition.

AG: Then we'll always be having conditions on our Special Permits.

AH: If you are doing something that is going up and along a pre-existing, non-conforming line and if we do that under a Special Permit…I am confused.

IQ: Oh, the expiration is on the exercise of the Permit. So, in other words...(Unintelligible)..So use it or lose it.

MN: What about the Governor's permit extension legislation?

IQ: Section 173, yes. Yes, but all the more reason that you should be very clear in all of your decisions. That was in response to the *Cornell v. Dracut* case where there was a Variance that the developer tried desperately to exercise everything except building, which is what they needed to do and they didn't. And I actually wrote an amicus brief to support the Town's position on behalf of the American Planner's Association to say you had to record, you need these bright lines, the one year was up, the fact that he, the developer, went out and did an ANR and went and tried to get a septic permit and went and applied for Conservation approval, did all these different things, and that's not the exercise of the relief, though. Exercise of the relief is actually building the structure that was allowed under the Variance. And the Court agreed. And the development community was very upset and so now we see this emergency relief which says that any permit or approval that was in effect between August 15, 2008 and August 15, 2010 is automatically extended for a two-year period. That includes Building Permits, Orders of Condition, your Special Permits, your Variances, your Comprehensive Permits...

The Board discussed this ruling with Town Counsel.

AG: This is a procedural question. When people come in under *Goldhirsh*, is it really our place to tell someone would they like this to be heard under *Goldhirsh* or is it up to them to come in and say this is the criteria and I meet all the requirements of *Goldhirsh* and I would like to be

heard under *Goldhirsh*?

IQ: You mean 3110?

AG: Yes. What the practice has been is that the Board has offered that to people. And it is the practice of the Board, oftentimes, to offer other things. I am generally uncomfortable with that...

IQ: It is a very slippery slope. Um, my constant advice is that you should not give legal advice, you should not give development advice and one of the difficulties whether it's the Building Inspector, ZEO or the Planning Board, the ZBA, the Board of Health have the same kinds of people in all of those positions, people who care about public service, who want to be helpful. But you have to make sure that you maintain an arm's length distance so that you don't become the applicant. Your job is to be the Board and to be objective with respect to the requests for relief pending before you and to act upon it. Certainly, you are only human and you do have urges to be helpful and so there are times when you are going to say, "Gee we have a concern that you maybe haven't thought about this", and that's the way to phrase it, "Have you thought about this?" Not, "I think you should do this" or "I recommend that you do this", but "Have you thought about this?" "Have you considered whether you need this?" And then they can consider it and they can decide whether they think that they need it without you saying that, "I recommend that you do this" or "I think that you should do this" or "You need to do this".

AG: With *Goldhirsh*, I have always objected to our asking if they want to be heard under *Goldhirsh* and then we explain *Goldhirsh* is or we don't. What I am hearing you say is that the applicant needs to come to us and they need to come to Community Development with the question in hand and not be given the...or maybe DCD says, "You might want to look into this ..." and then they go look into it and then they come to the Board... We are put into the position of explaining what *Goldhirsh* is. That's where the problem for me lies. It is not up to us to explain case law to an applicant who is sitting before us when we are then asked to make a decision upon it. It's not that much of an issue if we asked if they considered it and sent them away to research it and continue their case.

MN: Would it have to be advertised…

IQ: For 3110.

MN: For 3110, but it wouldn't have to say that the applicant has requested to be heard under *Goldhirsh*?

IQ: I am not quite understanding what you mean by being heard under *Goldhirsh*? Do you mean under c. 40A, section 6, paragraph1?

IQ: 3110 encompasses that finding. It's right in there. If they are advertised under 3110, you have to make the finding.

DN: Is it within our realm to tell people who come in for relief from the building scale that we think the building is too big, and to come back with something smaller?

IQ: Well, I resisted the urge when you said the word 'scale' to do like this. The whole idea of scale and the way that the calculations are made, you know, I would need assistance with the calculations is all I am saying. So I am not a hundred percent sure that I understand what you are asking.

DN: People come in with different degrees of largeness. There was a case where I knew that I, personally, would not have approved the building because it was too large. I said that and added, "If you come back with something smaller, I might consider it."

IQ: There's nothing wrong with that. There's nothing wrong with that. And that's always implied, you know, you act on what is before you and you can have a conversation with the applicant, certainly encouraged by the Courts, have the conversation. Of course they will penalize us sometimes, too, for having the conversation after telling us that we should. But putting that aside, you can certainly say to the applicant, "Look, I have a concern that this is too large, do you want to try to bring something else before us or do you want us to act on this?" And then it is up to them whether they want to undergo the expense of re-drawing their plans and bringing it to you, because there is an expense involved, both in terms of the delay and the professional to re-draw it. And if they don't have a sense of the Board, of, you know, of what might satisfy the Board in the way of Variance relief, something that's maybe based upon the points, which I have never really understood, but let's say they were one hundred percent over, or they were 100 points over, and you might be able to say to them, "Well, gee, this is way too big." And they might say to you, "Well, if I went half as big at 50 points, do you think that that might work?"And then everybody in good faith could say, "Well, maybe it would because at this stage it is just too much for me" and they get that sense of the Board, but they also get the sense that maybe at the 50 point level, that it might be entertained, but then they have to understand, and you should be very clear with them, it's at their risk because you can't tell them yes, at the 50 points without seeing it and it's subject to the Public Hearing continuing and getting everybody's input, so there is that risk involved. And just so long as they understand that risk, then they decide, "Ok I am going to assume it, I am going to spend that money, I've already did it once, I am going to do it again. I might not get a return, but I think the 50 points will work for me and I think I can something persuasive and I am willing to spend the money."

EV: Relevant to that situation, sometimes when that conversation happens, we sometimes feel like we are re-doing their application for them and it starts to get into specifics and, for me, I feel like there is a line that I shouldn't cross because if we tell them to make a specific design change and they come back in with that design change and the Board denies their application, they are angry. It also puts us into the position where we are contributing to the creation of the application and we are the ones that are supposed to be reviewing it.

IQ: What I recommend in that circumstance it is that you say to them, "Look, this, as you can see, is not being well received the way that it is designed. You could come back with another design proposal, but there is no guarantee. You would have to re-design it and you would have to show it to us. We can't tell you that we will approve that design, but that might be, uh, that might work. We might be amendable to that."

MN: So in that situation if they make a change, how does the abutter weigh in on that? Because you have an abutter who comes in to me and says they want to see the plans and I show it to them and they say that they don't have a problem with them and doesn't go to the meeting. And then the change is made.

IQ: The abutter has to keep track, um, no notice goes out as to the continuations of the Public Hearing or the fact that the plan is an evolving thing, which is often the case, but you raise a very good point and that's what I was trying to say just a moment ago, that you want to be very careful to say, "Well, you can change your design, but that's going to cost you money and we respect that. And you have to make the decision as to whether you want to bring that to us, because there is not a guarantee that if you do that, you'll get the votes." You can say, "Gee, you know, I personally looking at that, I think that that really could resolve my issue, but I can't know until I see it on the plan." It's only theoretical until I see it on the plan.

AG: I think it is easier to say it's too big, bring it down as much as you possibly can and then we will look at those plans.

IQ: That's an approach. That's a good approach.

AG: I want to go back to the *Goldhirsh* thing. I want to make sure that Maxine didn't get cut-off from clarifying and asking. So you are really comfortable. You're the much more important part of it for the applicants. I would also like to re-state what I heard and that the Board members are in agreement with that, so that we walk away being clear and not the next time this happens have the whole conversation all over again that we've had a million times. If we feel that they would like to suggest that the applicant may want to look into this thing called *Goldhirsh*…

IQ: 3110.

AG: Right. That, at that point, we would then ask the applicant to continue the case, waive time constraints, if possible, to then come to another Hearing. If they are going to come to us under *Goldhirsh*, it's not up to us to explain it at a Public Hearing. If they ask to be heard under *Goldhirsh*, and say here's the criterion, then I am fine with that.

IQ: 3110, you mean.

AG: Whatever. Yes, 3110.

EV: Well, sometimes they ask what *Goldhirsh* is.

IQ: Well, then you give them a copy of 3110 and tell them then….

AG: Then go home, read it and we'll take it up at our next meeting.

MN: You might as well hear it under the 3110.

DN: You, as the Permit Coordinator, can give them information about *Goldhirsh*, if they come in

with a one or two-family house, and send them away with that information and say that they can consult their attorney or someone else about it and then come in that way. It's already happened before they come before us.

AH: They should come to us with that knowledge and make the request. It shouldn't be us to tell them about *Goldhirsh*.

EV: And if they ask us we can just say it is not up to us to explain that to you.

IQ: Please always say you can't give legal advice.

AG: Are we agreed that the request comes to us and we hear it. And we're not then….

Everyone said they were not going to offer to hear a case under *Goldhirsh*.

DN: I would still like the Permit Coordinator offer that information to the applicant when they come in. Have the information available that you can offer them. I don't want get into a situation where I'm never going to say that and say I am never going to say that because…
If Maxine can remember and had that information, then they would decide before they even come to us, which would make it a lot easier. I would be fine with that.

EV: There are places where the By-Laws are very open to interpretation and I'd like to give an example of one that, um, about in the Design Standards, under Roofs, Section 3330, page 32, top of page 32. So, um, it's about flat roofs. It's under 3330 B. And if you go to the second half of section B. This is just an example…(she read the section about avoiding flat roofs).

IQ: Where are you? Ok. I've got it.

EV: When I read they should be avoided, I interpret that as they should not be allowed unless it was completely unavoidable.

RL: Or is there a total prohibition? What does 'shall' mean?

IQ: 'Shall' is mandatory, but the issue is what does 'avoided' mean? "They shall be avoided". It does not say that they shall not be allowed, it says they shall be 'avoided'. So if, if, it's language that is slightly ambivalent, because if the intent was to prohibit them, then one would say, "they shall not be allowed", but it doesn't say, "they shall not be allowed", it says, "they shall be avoided", which carries the implication, of perhaps under some circumstance, it could be allowed and that would be up to the interpretation, you know, to give life to these words, um, by this, by this Board.

EV: What I have observed is that most people who want a flat-roofed home are doing it for their own design preference, so it's highly unusual that you would be unable to build a pitched roof. And so, to me, if you are able to build a pitched roof, then you can avoid a flat roof.
MN: This language, is one of the ones that we are trying to change at Town Meeting.

RL: We treat flat roofs as bad. Most of the time.

IQ: Is that for aesthetic reasons or for other reasons?

EV: There was one that was a water-front home and they wanted a flat roof so they could have two stories instead of one, if I remember correctly. The neighbors all came out in support of the flat roof because a pitched roof would have blocked their view of the water. And, obviously the homeowner wanted it because he could have two floors instead of one. I think I voted against it, at least I intended to anyway, who knows right now. It did pass and my feeling was he is able to build a pitched roof, he just doesn't want to have a one-story house and the only reason he has community support is because of the way it affects their view. It wasn't surrounded by flat-roofed homes.

DN: Was it in the Historic District? They didn't have any jurisdiction.

IQ: Did it alter the traditional character of the Town in that area?

EV: I would say yes. This isn't referring to the historic districts, it is referring to the Town having a traditional quality.

IQ: I would just change the By-Law.

DN: Do you go back and tell them to re-design it? We just had this conversation.

EV: I would have just denied it, personally.

IQ: So did you give a Variance from the roof pitch requirement?

EV: No.

DN: Well, a flat roof can only be 23' high. So how do you get two stories?

AH: It's on pilings, not a foundation. I didn't build it. I didn't build it.

IQ: So they are not in compliance then with C, Roof Pitch? "All new developments shall have roof pitches between 6 and 12 and 14 and 12 except a hip roof which shall be at least 4 and 12." So they got a Special Permit to allow that? Ok, so they did get relief from that. Well you did what you did.

EV: How would you interpret the "they shall be avoided" language? That type of language is throughout the By-Laws.

IQ: I would say that, um, you, however you interpret that, you should do it consistently. That if you interpret it to mean that it doesn't mean prohibited, that under limited circumstances it is allowed, make sure that have a reason in those circumstances where you do allow it that you then are going to apply it equally to people in the same situation the next time. Be consistent is my…

EV: Consistent as a Board member or consistent as a Board?

IQ: Consistent as a Board. And the only way that you each can do that is for each of you to try to be individually consistent. Some of you are going to consistently vote 'No' and some of you are going to consistently vote 'Yes' and then eventually, you know, you, you, you know, the balance goes one way or, you know, the other.

ADJOURNMENT: ***Amy Germain moved to adjourn at 9:12 P.M. and it was so voted unanimously.***

These minutes were approved by a vote of the Zoning Board of Appeals at their meeting on November 4, 2010.

Respectfully submitted,
Ellen C. Battaglini

Approved by _____ on _____, 2010
Anne Howard, Chair