

**TOWN OF PROVINCETOWN
ZONING BOARD OF APPEALS
MEETING MINUTES OF
September 13, 2012**

MEETING HELD IN THE JUDGE WELSH ROOM

Members Present: Anne Howard, Robert Littlefield (arrived at 6:45 P.M.), Amy Germain, David Nicolau (left at 7:08 P.M.), Harriet Gordon, Joe Vasta (departed at 8:13 P.M.) and Leif Hamnquist.

Members Absent: Tom Roberts (excused).

Others Present: Russ Braun (Building Commissioner), Maxine Notaro (Permit Coordinator) and Ellen C. Battaglini (Recording Secretary).

WORK SESSION

Chair Anne Howard called the Work Session to order at 6:30 P.M.

DISCUSSION WITH ZONING ENFORCEMENT OFFICER:

The Board discussed the issue of the Special Permit conditions for the gazebo at Ciro & Sal's restaurant with ZEO, Russ Braun. Chair Anne Howard had written a letter to Building Commissioner Russ Braun, per the Board's direction, asking him to contact the owner and to request that he comply with those conditions by a date certain and to report back to the Board whether he had complied or not. Mr. Braun did not receive the letter. AH inquired as to why the SP was issued before the conditions were fulfilled. RB replied that, in his opinion, there were several physical conditions that were not enforceable and other of the conditions that were not reasonable and would do nothing to muffle sound. He pointed out that, upon inspection, he observed that several of the conditions were met, such as the planting of pine trees, the bamboo fence and the baffles hung around the sides of the gazebo. He added that the owner was guilty of violating the conditions in regard to the hours and types of service that were taking place in the gazebo. He suggested that in future deliberations, it is incumbent upon the ZBA to take more time to come up with reasonable and enforceable conditions that will serve the Board's requirements in issuing a SP. DN also visited the property and didn't observe any of the physical conditions in place. He was concerned that table service was occurring during the week, in violation of the conditions. He believes that a warning should have gone out to the owner and if the violation continues, the SP should be revoked. The Board discussed whether it was appropriate for RB or the Maxine Notaro, the Permit Coordinator, to weigh in on issues during Board deliberations. AG asked about the possibility of nighttime enforcement. RB will speak with the Chief about possible police enforcement of Zoning By-Laws. He added that the Department of Community Development did not have the staffing to ensure that all SP holders conform to the conditions of their permits. AG suggested splitting up the duty between departments in the DCD. She noted that aggrieved citizens who see violations of Zoning By-Laws should call the PPD. The Board requested a Work Session with Mr. Braun at 6:00 P.M. on

October 18, 2012.

Chair Anne Howard reported that she had a call from an abutter to the Harbor Hotel who made a noise complaint to the Police Department on Friday, August 24th, 2012. The complaint alleged that music was emanating from the exterior of the premises in violation of a condition of their SP. The complaint was logged by Bay Colony Condominium. MN suggested that the PPD be notified to contact the ZBA when it receives these complaints, as now they only contact the Licensing Department.

Chair Anne Howard mentioned that another topic of discussion for the next hearing will include information given to a business owner not to bother to get a SP for outdoor display because the by-law will be changed. She stated that no one can predict whether Town Meeting will vote to revise the by-law or not and in the meantime, the by-law should be enforced.

Rick Murray appeared to voice a complaint regarding the property located at 71 Commercial Street involving a ZBA decision dated July 6, 2011, Case #FY11-88. He is an abutter to the property. He alleged that the outdoor stairs on the front of the house are in violation of the Zoning By-Laws, including encroachment into the front yard setback and in regard to lot coverage. He stated that the owner should have obtained a Variance in order to allow the construction of the front stairs because of the front yard setback encroachment. Chair Anne Howard requested that MN send the decision to Board members and that the issue be put on the agenda for the next hearing on October 4, 2012.

Chair Anne Howard adjourned the Work Session at 7:08 P.M.

PUBLIC HEARING

Chair Anne Howard called the Public Hearing to order at 7:08 P.M.

NEW CASES:

FY13-05 5 Harbour Drive (*Residential 1 Zone*), Sandler-Davidson Living Trust, T. Sandler and J. Davidson, Trustees –

The applicant seeks a Special Permit under Article 2, Section 2450, G12, of the Zoning By-Laws for the installation of an in-ground saline lap pool. Anne Howard disclosed that she did work for the Trustees in the past and in a different location but stated that she does not now work for them. Anne Howard, Robert Littlefield, Amy Germain, Harriet Gordon and Joe Vasta sat on the case.

Presentation: Attorney David Reid, Gary Locke and Paul Shea appeared to present the application. A revised landscaping plan was submitted to the Board. The applicant seeks to install a residential swimming pool, accessory to a single-family home. A prior owner of the property did receive a SP from the Board in February of 2011, to install a swimming pool in the open area north of the structure and the garage. That decision was appealed by an abutter to the north of the property. The appeal is still pending. When the present owners purchased the

property and became involved in the litigation, they reviewed the abutter's concerns in regard to the swimming pool. In looking for an alternative solution, they proposed to build a much smaller pool with a smaller patio area to the east of the house and to the south of the garage, not visible or audible to the abutter. The lap pool measures 19' by 33' and has an adjoining hot tub and a small patio surrounding the pool on two sides. This is one-third smaller than the pool proposed by the previous owners and its location is twice the distance from the abutting property. A large garage is located between the abutting property and the pool. The proposed patio is a fraction of the size of the previously proposed patio, making it impossible for large groups to congregate and make noise. The water for the pool will be trucked in and a 4' high fence will surround it. No elevated or flood lighting will be installed in the pool area. Ground lighting of a low voltage is proposed around the patio perimeter as marked on the site plan and will be located beneath shrubbery. The pool itself will be lit from within. Attorney Reid reiterated that because of the new location and the reduced size of the pool and the patio, less noise will emanate from the area. Two speakers exist in the patio area where dining takes place frequently. The new proposal does not include additional speakers. He argued that there will be no any adverse effects to the neighborhood or Town as a result of this pool. There is ample space on the lot so as not to create any congestion. No environmental degradation will result from this project as the water will be trucked in and the project has received an Order of Conditions from, and the approval of, the Conservation Commission. There is some marginal benefit to the Town in that the tax base will be increased and the property will be improved and its value maintained. Part of the goal of the community is that its citizens provide for their own recreational needs and not to expect the Town to provide for them and that residents have healthy, productive lives. This pool will contribute to the quality of life and the health of the owners. There are no adverse effects to the neighborhood or Town that outweigh these benefits. Photographs of the area were submitted to the Board. Attorney Reid had also submitted a draft decision, which included a statement that if the SP were granted in this case, it would supercede the previous SP, #FY11-52, that was the subject of the appeal.

Public Comment: Attorney Bruce Gilmore, representing an abutter to the property, Nancy Valonis, who, while applauding the attempt to re-locate and downsize the pool, still has concerns about the potential for disrupting noise to emanate from the property as a result of the installation of the pool. She has no opposition to the plan as presented, however she requests that the Board impose the same conditions on this project as it did on the previous owner's project. She is concerned about the proposed landscaping plan, as the vegetation would negatively and significantly impact her view of the Harbor. She would request that no vegetation be allowed to grow higher than 6'. She is also concerned about the status of the prior SP if the Board were to grant a SP in this case. There were 1 letter in the file in support of the application.

Board Discussion: The Board questioned Attorney Reid. AH had concerns about the ability of the proposed plantings to survive and if the applicant would consider capping their height. HG asked if there was a request not to put speakers outdoors

in the previous conditions. The existing speakers are in a pergola on the other side of the house. AH reminded the Board that there is a noise by-law. RL asked about what the Board thought the conditions should be. AG suggested that the pool not be illuminated and that the pool area be lit with only ground-facing low voltage lighting. She questioned whether the ZBA should be concerned with the height of vegetation. She would like to know what the requirements were for pool illumination. RB will research the topic. AG wanted clarification on the previous SP. AH stated that this SP, if granted, would supercede any previous one and that would be written in the decision. AG is concerned with approving the SP while the appeal is still pending. Attorney Reid stated that if this SP is granted and recorded, the previous SP is superceded according to the conditions stated in the Board's decision. He has consulted Town Counsel in regard to this issue. AG suggested postponing the decision until the next hearing when she had a draft decision. AG proposed imposing a condition regarding the prohibition of music or speakers near or surrounding the pool. AH wondered if that was an enforceable. JV has no problem with the project. The Board discussed the conditions. HG and RL think that no further conditions should be required of the project. AG read out the proposed conditions and solicited the opinions of each Board member.

Documents submitted: Photograph depicting existing speakers, ZBA Application for a Hearing, Pool specifications and a site plan for Lot 12 lap pool, dated 7/28/12, job no. G6944 by Aquascape Pool, Designs and Landscape plan dated 8/21/12 by Centerline Studios, Inc.

Amy Germain moved to grant a Special Permit under Article 2, Section 2450, G12, of the Zoning By-Laws for the installation of an in-ground saline lap pool at the property located at 5 Harbour Drive (Res 1) with the conditions that water to fill the pool will be trucked into and out of the site, the pool area shall be illuminated with low voltage lighting as described on the site plan dated 8/21/12, no additional speakers for the amplification of music shall be installed around the pool (the applicants may maintain their existing outdoor music system at the pre-existing dining area and pergola on the patio adjoining the pool), this Special Permit is intended to supercede the Special Permit issued on February 17, 2011, in Case # FY11-52, and upon this Special Permit becoming final and being recorded by the applicant, the Special Permit #FY11-52 will be considered to have been surrendered by the applicant and automatically rescinded and of no further effect and no construction activity shall take place between June 1st and September 15th.

AG asked a question in regard to how the decision gets filed with the Town Clerk. **Robert Littlefield seconded and it was so voted, 5-0.** Amy Germain will write the decision.

FY13-06 50 Commercial Street, Unit U3 (Residential 2 Zone), Henry Richard Maniace, Jr. –

The applicant seeks a Special Permit under Article 3, Section 3110 of the Zoning By-Laws to re-construct a pre-existing, non-conforming porch up and along a pre-existing, non-conforming setback and convert it to an enclosed living area. (The applicant requests to be heard under the *Goldhirsh v. McNear* ruling). Anne

Howard, Robert Littlefield, Amy Germain, Harriet Gordon and Leif Hamnquist sat on the case.

Presentation: John DeSousa and Henry Richard Maniace, Jr. appeared to present the application. Mr. DeSousa requested that the case qualified for a hearing under the *Goldhirsh v. McNear* ruling because it involves a pre-existing, non-conforming single-family house. The 7728 sq. ft. lot contains a 20' by 24', one and one-half story, single-family dwelling unit with an attached covered deck measuring 12' by 24' on the west elevation, and another single-family unit. The neighborhood is comprised of both two and two and one-half story dwelling structures, which are larger than the structure in question. The applicant seeks to increase the livable space for year round occupation by enclosing the current covered deck space. The pre-existing, non-conforming dimensions include an encroachment into the rear yard setback and an encroachment into the west side yard setback. The proposed plan includes a reduction in one non-conformancy due to the reduction by 2' of the footprint on the west side yard. And because of the condominium eliminating a passageway, the west side non-conformancy will be removed altogether. A revised site plan was submitted showing the removal of the passageway. The current structure's footprint is 184 sq. ft and the proposed footprint will be 120 sq. ft. The project is in keeping with the following Local Comprehensive Plan criteria: Chapter 1, Goal 1, Policy B; Goal 2, Policy A; and Chapter 4, Goal 2, Policy A. The plans also meet the requirements of Article 3, Section 3110 of the Zoning By-Laws because the change is not more detrimental than the existing non-conformancy. There are no adverse effects such as hazard, congestion or environmental degradation and there are a number of benefits, including an increase in the year round population, an increase in the tax base and the contributions that the applicant will bring to the Town.

Robert Littlefield moved to hear Case #FY13-06 under the *Goldhirsh v. McNear* ruling, Harriet Gordon seconded and it was so voted, 5-0.

Public Comment: None. There were 4 letters supporting the application in the file.

Board Discussion: The Board questioned Mr. DeSousa and Mr. Maniace, Jr. AG and RL thought that the benefits of the project outweighed any negative effects, of which there were none. HG had no concerns. AH asked to clarify the rear yard setback

Documents submitted: Plot plan by William N. Rogers, II existing and proposed revised plan of land, #P-02 0449C.

Robert Littlefield moved to grant a Special Permit under Article 3, Section 3110 of the Zoning By-Laws to re-construct a pre-existing, non-conforming porch up and along a pre-existing, non-conforming setback and convert it to an enclosed living area under the *Goldhirsh v. McNear* ruling at the property located at 50 Commercial Street, Unit U3 (Res 2), Harriet Gordon seconded and it was so voted, 5-0.

MINUTES: August 2, 2012 – Robert Littlefield moved to approve the language as written, Harriet Gordon seconded and it was so voted, 3-0.

Chair Anne Howard stated that the decision in Case #FY13-01 needed to be amended by revising the expiration date for the SP to read 1/2/14. *Amy Germain moved to amend the decision in Case # FY13-01 by revising the expiration date of the Special Permit to 1/2/14, Harriet Gordon seconded and it was so voted, 5-0.*

NEXT MEETING: The next meeting will take place on October 4, 2012. It will consist of a Work Session at 6:45 P.M. followed by a Public Hearing at 7:00 P.M.

ADJOURNMENT: *Amy Germain moved to adjourn 8:45 P.M. and it was so voted unanimously.*

These minutes were approved by a vote of the Zoning Board of Appeals at its meeting on October 4, 2012.

Respectfully submitted,
Ellen C. Battaglini

Approved by _____ on _____, 2012
Anne Howard, Chair