

**TOWN OF PROVINCETOWN
ZONING BOARD OF APPEALS
MEETING MINUTES OF
October 18, 2012**

MEETING HELD IN TOWN HALL AUDITORIUM

Members Present: Anne Howard, Robert Littlefield, Amy Germain (left at 8:26 P.M.), Tom Roberts, Harriet Gordon, Joe Vasta and Leif Hamnquist.

Members Absent: David Nicolau (excused).

Others Present: David Gardner (Assistant Town Manager), 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 6:00 P.M.

Discussion with Russ Braun, Zoning Enforcement Officer on several zoning concerns:

AH: If you are attending the meeting, have read the pending decision or have read the minutes of the meeting, the Board would request that you speak up if you think that conditions of a Special Permit, such as Ciro & Sal's, are not enforceable.

RB: He is not always made aware of the decisions and has not read them and is not on the e-mail list for minutes.

AH: Ellen will put you on the e-mail distribution list.

RB: He does not want to interject himself into Board's deliberation. Most ZBA decisions are well-written and enforceable. The intent in the case of Ciro & Sal's was to reduce noise. It is incumbent up to the applicant to come up with verifiable ways to solve that issue. He is not an expert in the field, but does have some knowledge, just enough to ask the right questions. The ZBA might want to take more time in writing decisions. He would encourage the Board to ask him questions regarding issues about which he may be more knowledgeable.

HG: If RB has information, she would welcome it.

RB: If any Board member has a question related to a case, he or she can contact him for help, or strategize if he doesn't know the answer. The enforcement aspect is difficult given the time that he and Justin have during the busy season and their involvement in licensing issues and rental certifications. They write letters, do follow-ups and issue citations, if need be. They cannot be out on Commercial Street at night looking at restaurants and bars for zoning enforcement compliance during the summer. They have had internal discussions about the issue and realize that it is an issue. It's a man power problem and they cannot rely on a police officer to do that job, even if they could.

JV: How can a Board member stop a zoning violation if it occurs?

RB: If a Board member gets a phone call, he will contact the owner of the establishment and report that there was a complaint about a violation of the Special Permit. They do issue citations

and fine people, but in the middle of the summer when zoning violation issues occur, it is difficult. He is not sure what the answer is and they are sensitive to selective enforcement.

HG: Is there a committee that can look at that the enforcement issue? If people know that enforcement is weak, they will continue to not comply with the by-law.

DG: The Town needs to continue to work on zoning by-laws so as to make them specific enough to give direction, but not too specific that it doesn't permit people to do things with their property. Zoning decisions should be specific in terms of what is permitted and what is not permitted. He encourages the Board to be more specific in writing decisions and state the obvious in order to make it easier for the applicant to understand what his or her responsibilities are in terms of the SP.

AG: We are getting off the topic. Enforcement is an issue in a lot of different areas of Town. Staff needs to come up with a plan to deal with it. It's not the decisions or the by-laws that are the issue, but the lack of a mechanism for zoning enforcement to take place. The Board is saying that this is of importance and that it is needed. There should be a paper trail when there is a violation, not just a phone call.

RB: A notice of violation goes out and there is then a follow-up. He is concerned about uniform enforcement, such as signage and outdoor display.

DG: One of the things that has been done in regard to Licensing is that a community relations officer through the Police Department was created. He is out interacting with property owners and business owners and looking for licensing violations.

HG: It could be something as simple as sending out letters to SP holders before the season starts telling them that they are expected to abide by the conditions of their SP.

DG: The community should be educated.

TR: Is it viable to have a community relations officer enforce Zoning By-Laws?

DG: We already have a Zoning Enforcement Officer. Most of SPs deal with non-conforming or scale issues, so community relations officer is not the appropriate person for that. Building or use violations or illegal construction couldn't be handled by a police officer.

RB: Building or use violations generally are not the issue. We have building plans on file and those things are checked against plans submitted.

AH: Do seating plan changes that come before the ZBA get recorded or tagged with a business license so when licensee is renewed the new seating plan shows up in their file to be verified?

MN: A copy of ZBA decisions are given to the Licensing Agent. The license will be amended to reflect the change.

DG: The Licensing Board can choose to add more conditions to a SP.

AH: My question is how do you make sure the seating plan is adhered to after an inspection?

RB: Say if you are licensed for so many seats with a specific floor plan and come August, a restaurant owner decides that the floor plan works better a different way and re-arranges the tables, how is that supposed to be dealt with? If someone is out there doing a regular premises inspection, they would need a large binder full of floor plans.

DG: Some day we will have those available electronically.

RL: Agrees with Amy. The ZBA should strive to write the most defensible decisions with the most specificity possible and it is not the job of the Board to do the enforcement.

AG: In regard to Russ' input during a hearing, it is helpful and important to provide clarification or help during the hearing of a case. Consulting on a one-to-one basis is better done in the public hearing forum with the whole Board present. She is not hearing that a system of enforcement is being worked on and she would like that to happen.

DG: The Town is intending upon hiring a Town Planner to review ZBA applications, write staff reports and give the Board staff input as to how the applications conform to the applicable by-law and recommendations about SP conditions and help in drafting those conditions. The Town would like to see more support for the ZBA.

AH: A planner would not do enforcement.

DG: The issues would be addressed prior to decisions. The Planner would be able to do the follow-up on the decision and the enforcement.

RB: Our ability to do good Building Code enforcement is dependent upon taking in a lot of the appropriate information on applications and documentation. It then makes things easy and understandable. The more that is done up front to make the Board's job easier and more effective, the simpler the enforcement then becomes.

TR: The more complete information we receive from the applicant, even if it requires them to come back to the Board, the easier it is to write a good decision.

Gordon Siegel was invited to speak with the Board. He informed the Board that he would like to withdraw his application as he is going to rejoin the Finance Committee

MINUTES: October 4, 2012 – *Amy Germain moved to approve the language as written, Robert Littlefield seconded and it was so voted, 5-0.*

PENDING DECISIONS:

FY13-07 14A Standish Street (*Residential 3 Zone*), Patrick Peterson –
Anne Howard, Robert Littlefield, Amy Germain, David Nicolau and Joe Vasta sat on the case. Robert Littlefield read the decision. ***Amy Germain moved to approve the language as written, Harriet Gordon seconded and it was so voted, 4-0.***

Rick Murray had some questions regarding the discussion with Mr. Braun. He alleged that it is against the Open Meeting Law to discuss any case in private before it is heard at a Public Hearing. He suggested that a notice be put into the licensing renewal application asking business owners to make sure their SPs are current.

Chair Anne Howard adjourned the Work Session at 6:57 P.M.

PUBLIC HEARING

Chair Anne Howard called the Public Hearing to order at 7:00 P.M. There were seven members of the Board present and one absent.

NEW CASES:

FY13-09 71 Commercial Street (*Residential 3 Zone*), Mark Kinnane of Cape Associates, Inc. on behalf of Eleanor Pannesi –
The applicant seeks a Special Permit under Article 3, Section 3110 of the Zoning By-Laws to construct a covered entry up and along a pre-existing, non-

conforming front and side setback. Tom Roberts and Harriet Gordon recused themselves because of conflicts of interest. On October 9, 2012, Joe Vasta has received permission from the Board of Selectmen, by a vote of 3-1, to hear the case. Anne Howard, Robert Littlefield, Amy Germain, Joe Vasta and Leif Hamnquist sat on the case.

Presentation: Mark Kinnane and Gary Reinhardt appeared to present the application. The applicant seeks approval for an existing portico over front stairs at the premises. The Historic District Commission approved the stairs. Mr. Reinhardt requested that the case be heard under the *Goldhirsh v. McNear* ruling. ***Amy Germain moved to deny the request to hear Case #FY13-09 under the Goldhirsh v. McNear ruling, Anne Howard seconded.***

The Board discussed the motion. AG thinks the case should require a full decision because it was constructed without ZBA approval and the applicant is here to seek that approval. GR replied that it was not the fault of the applicant that this situation exists. AG briefly reviewed the recent SP history of the property.

The motion was so voted, 3-2 (Robert Littlefield and Joe Vasta opposed).

Documents Presented: Application for a Hearing, a plot plan drawn by Richard Freeman, dated 05/10/11, proposed and existing floor plans and elevation drawings by Architecture Studio, Inc.

Public Comment: Rick Murray, an abutter, had some points of clarification for RB about the property. Is there a writing that requested that the applicant come before the ZBA for approval of the portico? RB replied that the portico started being built after the applicant got HDC approval. He saw the work being done and checked the Zoning file and not seeing a SP, told the contractor to stop the work and directed the applicant to apply for a SP. A letter was not issued, but if the applicant had not gone to the ZBA, it would have been. Mr. Murray contended that a letter should have been written to clarify the situation so as to inform the Board, the public or an abutter of what has been approved or what work has been stopped or what is going to proceed. This would give an abutter or other member of the public the ability to voice concerns at a Public Hearing. The portico was not shown on the original plans, was not requested and was not granted a SP and built without permission. Is the house a two- or single-family? AH replied that it was a two family. Mr. Murray claimed that the SP granted in July of 2011 for the construction of the front stairs should have been a Variance because they encroach into the front yard setback. AG stated that it was at the discretion of the Building Commissioner to approve the construction of those stairs. RB stated that he is allowed to approve means of egress and can supercede the Zoning By-Laws. Given that the building was raised, there was a need to have an egress out to a public way and he allowed the stairs to be built. Mr. Murray claimed that the character of the neighborhood has been changed as a result of the stairs. There was 1 letter in favor of the application.

Board Discussion: RL stated that the issue was to decide whether the portico was substantially more detrimental to the neighborhood than not having a portico. AG thinks the portico does alter the streetscape, is an inappropriate piece of building, is in danger of potentially being hit by vehicles and doesn't think it would be a hardship to remove it. AH stated that the stairs had been vetted and approved

already by the Board and the approval was based on a concern for safety. She believes that the portico does change the streetscape considerably. She reiterated that the Board had to decide if the social, economic and other benefits to the neighborhood and Town must outweigh any adverse effects such as hazard, congestion and environmental degradation and added that she believes that because of the location of the stairs, the portico does create some street congestion. AG saw no benefits to the neighborhood or Town. RL agreed that the benefit was to the applicant only and that the portico was more detrimental to the streetscape, perhaps not necessarily more substantially so, however the negative outweighed the positive. AH offered to poll the Board, however Mr. Reinhardt requested a vote. Upon consultation with Mr. Kinnane, Mr. Reinhardt agreed to a polling of the Board. RL, AG, AH and LH would vote to deny and JV would vote to approve. Mr. Kinnane requested a continuance to the November 1, 2012 Public Hearing.

FY13-10 524 Commercial Street (*Residential 3 Zone*), Ted Smith, Architect, LLC on behalf of Teresa Townsend –

The applicant seeks a Special Permit under Article 3, Section 3110 and Article 2, Section 2640 of the Zoning By-Laws to construct a dormer up and along a pre-existing, non-conforming side setback and for a deviation in building scale. Anne Howard recused herself because of a conflict of interest. Robert Littlefield, Amy Germain, Tom Roberts, Harriet Gordon and Joe Vasta sat on the case. Robert Littlefield chaired the case.

Presentation: Ted Smith and Teresa Townsend appeared to present the application. Mr. Smith explained that the applicant seeks to renovate the premises, including constructing a dormer on the east side of the structure. No upkeep or updating has been done on the structure for a considerable amount of time. The intent is to maintain the overall look of the house because of its historical significance and minimize the renovations as much as possible. The increase in scale is necessitated by the narrowness of the building and the need to access all three floors and to be able to use the third floor space which lacks headroom. He argued that the change is not substantially more detrimental to the neighborhood than what exists and is in keeping with the character of the neighborhood. The appearance of the dormer will be minimal. The density is being decreased as one bedroom will be removed. The economic benefit will increase the tax revenue by increasing the value of the structure. The building is already over scale and the proposed scale increase is 2.5%. The existing scale is 27,640 cu. ft., the allowable scale is 22,557 cu. ft., the neighborhood average is 19,615 cu. ft., the proposed increase is 715 cu. ft. for a total of 28,353 cu. ft.

Documents presented: A photo of the property, Application for a Hearing, Existing elevations and floor plans, dated 06/05/12, drawn by Ted Smith, proposed elevations and floor plans, dated 8/20/12, drawn by Ted Smith, a proposed site plan drawn by Ted Smith and a ZBA non-conforming checklist.

Public Comment: None. There were no letters in the file.

Board Discussion: RL reviewed the non-conforming checklist. AG asked if the staircase could be re-configured. RB explained that the headroom is all down the

middle of the building where the stairway is located. That leaves little usable space on either side of the stairway as that space is taken up by the stairwell. AG wondered if there was another solution to the stairway issue without increasing the scale of the building. RB thought the plans were the best solution given the limitations of the building. Mr. Smith replied that he and the applicant had spent a lot of time on the plans. HG, TR and JV all had no issue with the application. ***Robert Littlefield moved to grant a Special Permit under Article 3, Section 3110 and Article 2, Section 2640 of the Zoning By-Laws to construct a dormer up and along a pre-existing, non-conforming side setback and for a deviation in building scale at the property located at 524 Commercial Street (Res 3), Harriet Gordon seconded and it was so voted, 5-0.*** Robert Littlefield will write the decision.

FY13-11 237 Commercial Street (Town Commercial Center Zone), Robin B. Reid, Esq., on behalf of KRoss, Inc., d/b/a Ross' Grill –

The applicant seeks a Special Permit under Article 2, Section 2460 of the Zoning By-Laws to modify the liquor license from Seasonal to Annual. Anne Howard, Robert Littlefield, Amy Germain, Joe Vasta and Leif Hamnquist sat on the case.

Presentation: Attorney Robin B. Reid and Ken Ross appeared to present the application. Attorney Reid argued that the social, economic and other benefits to the Town outweigh any adverse effects, as there are no adverse effects, such as hazard, congestion or environmental degradation as a result of the change. The benefits are that operating year-round is now a viable option for Ross' Grill and will, in the off-season, draw more people into Whaler's Wharf and provide employment for his staff. It will strengthen his relationship with his customers, many of whom drive from up Cape, and contribute to the Town's reputation as a dining destination in the off-season, drawing even more visitors. Providing year-round employment for permanent residents and supporting a sustainable, year-round economy are both goals consistent with the Town Vision and with Section 5 of the Local Comprehensive Plan.

Documents submitted: Application for a Hearing.

Public Comment: None. There was 1 letter in support of the application.

Board Discussion: Attorney Reid explained that Mr. Ross is heartened by the increase in open businesses during the off-season and he would like to contribute to that economy. AG asked about the hours of operation. Attorney Reid stated that the hours of operation would remain the same. The remainder of the Board had no issues with the request.

Amy Germain moved to grant a Special Permit under Article 2, Section 2460 of the Zoning By-Laws to modify the liquor license from Seasonal to Annual for the property located at 237 Commercial Street (TCC), Robert Littlefield seconded and it was so voted, 5-0. Tom Roberts will write the decision.

FY13-12 148 Commercial Street, Unit #1 (Town Commercial Center Zone), Debbie Nadolney of AMP/Art Market Provincetown –

The applicant seeks a Special Permit under Article 2, Section 2460 of the Zoning By-Laws to have occasional poetry readings, conceptual performances pieces,

some video/film and some live acoustic music at gallery openings. Amy Germain recused herself because of a conflict of interest. Anne Howard, Robert Littlefield, Tom Roberts, Harriet Gordon and Joe Vasta sat on the case.

Presentation: Debbie Nadolney appeared to present the application. She submitted several letters of support to the Board. The applicant's gallery holds traditional art shows, small performance events, films and video and some events featuring acoustic music. No admission is charged, no alcohol is served and no gambling is allowed at the events. She has been holding events all summer. She allows artists who have works in progress to exhibit or perform their work, to show a film or to read new work.

Documents submitted: Application for a hearing.

Public Comment: Sam Smiley, an abutter, spoke in favor of the application. Mary Beth Caschetta, an abutter, had concerns and read a list of limitations that she is requesting the Board to impose on the applicant if a Special Permit is granted. The applicant has agreed to the list, which includes:

- all events ending by 9:00 P.M., with the crowd disbursing by 9:30 P.M. and the gate closing by 10:00 P.M.;
- only acoustic music be allowed (no microphones, amplifiers or amplification system);
- no drumming;
- no entrance fees or cover charge and no donations solicited that could be construed as a fee for the event;
- no tickets sold;
- wine can be served, but not sold;
- no alcohol can be served or sold;
- no gambling (even for fund-raising events);
- no outdoor music or outdoor events of any kind;
- all windows and doors will be closed for evening indoor events,;
- no smoking on the premises or grounds;
- the space will be publicized as a gallery, not a performance venue;
- these restrictions will be attached to the business, not the space; and
- the Special Permit will be granted for only one year.

Phillip and Evelyn Gaudio spoke in opposition to the application. Meryl Cohn spoke about her concerns and agreed with the restrictions voiced by Mary Beth Caschetta. Dorothy Palanza spoke in favor of the application. There were 2 letters of support from abutters and 16 in support from non-abutters. There were 9 letters from abutters in opposition.

Board Discussion: HG and JV suggested that the applicant meet with her neighbors to address their concerns. The applicant said she met with her neighbors in the building and the owner of the bar located across the street. RL asked the applicant to describe the type of seating provided in the gallery. He thought the definition of 'art gallery' in the by-laws was too restrictive. RB reviewed the definition of a gallery and Article 2, Section 2460. The applicant requested a continuance. The case will be continued on November 1, 2012 when the public portion will be re-opened.

NEXT MEETING: The next meeting will take place on November 1, 2012. It will consist of a Work Session at 6:45 P.M. followed by a Public Hearing at 7:00 P.M.

ADJOURNMENT: *Robert Littlefield moved to adjourn 9:30 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 November 15, 2012.

Respectfully submitted,
Ellen C. Battaglini

Approved by _____ on _____, 2012
Anne Howard, Chair