

**TOWN OF PROVINCETOWN
ZONING BOARD OF APPEALS
MEETING MINUTES OF
November 29, 2012**

MEETING HELD IN THE JUDGE WELSH ROOM

Members Present: Anne Howard, Amy Germain, Robert Littlefield, David Nicolau, Tom Roberts, Joe Vasta and Leif Hamnquist.

Members Absent: Harriet Gordon (excused).

Others Present: Ilana J. Quirk, Esq. (Town Counsel), 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.

MINUTES: November 15, 2012 – *Tom Roberts moved to approve the language as amended, Joe Vasta seconded and it was so voted, 6-0.*

PENDING DECISIONS:

- FY13-14** **5 School Street (*Residential 3 Zone*), Deborah Paine, Inc. on behalf of Licia Zurn-Galinsky –**
Amy Germain, Tom Roberts, Harriet Gordon, Joe Vasta and Leif Hamnquist sat on the case. Tom Roberts read the decision for the Special Permit for Article 3, Section 3110. *Joe Vasta moved to approve the language as written, Leif Hamnquist seconded and it was so voted, 4-0.* Tom Roberts read the decision for Article 2, Section 2640. *David Nicolau moved to approve the language as written, Leif Hamnquist seconded and it was so voted, 4-0.*
- FY13-13** **32 Bradford Street (*Residential 3 Zone*), William N. Rogers, II P.E. & P.L.S. on behalf of Enco Realty, Inc. –**
Anne Howard, Amy Germain, Tom Roberts, Harriet Gordon and Joe Vasta sat on the case. Amy Germain read the decision. *Tom Roberts moved to approve the language as amended, Anne Howard seconded and it was so voted, 4-0.*
- FY13-15** **698 Commercial Street (*Residential 1 Zone*), Christopher J. Snow, Esq. on behalf of 698 Commercial Street Realty, LLC –**
Anne Howard, Amy Germain, David Nicolau, Tom Roberts and Leif Hamnquist sat on the case. Leif Hamnquist read the decision. Attorney Ilana Quirk asked if the Special Permit was existing or under current discussion. Anne Howard replied that the applicant had requested a one-year renewal of a Special Permit set to lapse on December 31, 2012. Attorney Quirk reminded the Board that the

Legislature had passed the Permit Extension Act that, with limited exceptions, automatically extends, for two years beyond its otherwise applicable expiration date, any permit or approval that was “in effect or existence” during a tolling period beginning on August 15, 2008 and extending through August 15, 2012. The Act concerns regulatory approvals issued by local, regional or state entities that concern the use or development of real property. Anne Howard replied that the applicant had applied for a change in the Special Permit initially, but then requested the renewal of the original Special Permit. She explained that the Special Permit was a one-year trial based upon concerns by the neighbors. Attorney Snow said that his client was fine with a one-year extension of the Special Permit.

David Nicolau moved to approve the language as amended, Tom Roberts seconded and it was so voted, 5-0.

CONTINUED CASES:

- FY13-09** **71 Commercial Street (*Residential 3 Zone*), Mark Kinnane of Cape Associates, Inc. on behalf of Eleanor Pannesi** (*continued to the December 6, 2012 Public Hearing*) –
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.
- FY13-12** **148 Commercial Street, Unit #1 (*Town Commercial Center Zone*), Debbie Nadolney of AMP/Art Market Provincetown** (*continued to the December 6, 2012 Public Hearing*) –
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.

Chair Anne Howard postponed the Work Session at 7:06 P.M.

PUBLIC HEARING

Chair Anne Howard called the Remand Public Hearing pursuant to an Order of Remand issued by the Barnstable Superior Court on September 13, 2012, in litigation known as 158 Bradford, LLC v. Anne Howard, et al, Barnstable Superior Court, C.A. No. BACV2012-00163, to order at 7:06 P.M. There were seven members of the Zoning Board of Appeals present and one absent.

- FY12-37** **158 Bradford Street (*Residential 3 Zone*), Lester J. Murphy, Attorney, on behalf of 158 Bradford, LLC** –
The applicant seeks a Special Permit under Article 3, Section 3110, ¶3 of the Zoning By-Laws for the extension of a pre-existing, non-conforming guest house/lodging house use by the addition of one guest unit.

FY12-36 158 Bradford Street (Residential 3 Zone), Lester J. Murphy, Attorney, on behalf of 158 Bradford, LLC –

The applicant seeks a Special Permit under Article 3, Section 3115 of the Zoning By-Law for the demolition and reconstruction of a lawful, pre-existing, non-conforming structure and for changes to the footprint and an increase in scale and regarding side yard and building setbacks under Article 3, Section 3110, ¶2 and Article 2, Section 2550 of Zoning By-Laws. This application was originally filed with the Zoning Board of Appeals on December 16, 2011, but was withdrawn on February 2, 2012, and now has been renewed by the applicant so as to be heard together with the above-remanded application for relief. The Board heard the two cases together. Anne Howard, Robert Littlefield, Amy Germain, David Nicolau and Tom Roberts sat on both cases.

Attorney Quirk presented a brief background of the remand and explained that the Board is tasked with determining if allowing an additional guest unit at the premises is substantially more detrimental to the Town and the neighborhood or not under Article 3, Section 3110 of the Zoning By-Laws. After looking at the non-conformancies on the property, if the Board determines that the change is substantially more detrimental than what exists, it will make findings and a decision will be written. She would be willing to write a draft decision for the Board for its consideration.

Presentation: Attorney Lester J. Murphy and Robyn Bazlen-Weglarz appeared to present the application. Attorney Murphy submitted a Non-conforming Situation Checklist to the Board. The applicant seeks to add a guest unit, for a total of 9, on the property and to demolish an existing one-story guest cottage structure in the rear and re-construct it as a one-and-a-half story structure. The lot has 5,779 sq. ft. and contains two structures. The use is allowed in the Res 3 zone, however under Article 4, Section 4120, which sets forth the density requirements for commercial accommodations, the requirement is for 1,000 sq. ft. per guest unit. The current structures contain 8 guest units requiring 8,000 sq. ft., making the premises non-conforming as to density. In addition, if the Board were to require square footage for the residential unit, an additional 2,500 sq. ft. would be needed. The addition of 1 guest unit requires another 1,000 sq. ft., which means that the non-conformancy is being extended. No new bedrooms are being added. According to Attorney Murphy, there are three tests that the Courts use to determine if an extension can be allowed by Special Permit: if the use reflects the nature and purpose of the existing use, if there is a difference in the quality and character as well as the degree of use, or if the use is different in kind in its effect on the neighborhood than the present use. He argued that the conversion of the owner's bedroom to an additional guest unit meets these requirements. The proposal constitutes an extension of a non-conforming use and can be authorized by Special Permit. The Courts have also held that a non-conforming use can be enlarged as long as the increased use is attributable to the growth of the original non-conforming use. The demand for guest accommodations in Town has increased, which is why the applicant is requesting relief to add another guest unit. According to Attorney Murphy, there will be no detrimental effects on the

neighborhood as a result of this change, such as increases in activity, noise or pollution on the property.

The criteria set forth in Article 3, Section 3115, allowing a pre-existing, non-conforming structure to be razed and replaced, includes the requirement that the construction must commence within two years after its demolition, the structure must be re-built in the same footprint as the original non-conforming structure and must be the same building scale or area as the original structure, unless approved under Article 3, Section 3110, and the use must be re-established within one year of the issuance of a Certificate of Occupancy. The applicant is requesting to raze and re-build the structure with a greater scale than the original structure. The Board must decide if the larger structure will be more detrimental to the neighborhood than the existing building. Attorney Murphy alleged that it will not be more detrimental because the existing structure is situated between 2.5' and 3.5' away from the main structure on the premises, and as close as .1' away from the north sideline, and the one-and-a-half story structure proposed would only be 3.5' away from the main house and between 1.5' and 4' 8" off the north boundary. The increase in separation from the northerly boundary line is a benefit to the abutting property. The footprint will vary slightly, increasing by 93 sq. ft. The scale would increase from 5,260 cu. ft. to 10,315 cu. ft., however that is well below the allowable and the maximum allowable scale for the neighborhood. The height will increase from 10' 3" to 24', but will still be lower by 5' 6" than the main building. This is not out of scale with the rest of the neighborhood and would be more in keeping with the character of the neighborhood. The new structure will be more historic in nature and architecturally and aesthetically pleasing than the existing structure and therefore of benefit to the neighborhood.

Documents submitted: Non-conforming Situation Checklist, public letters in support of the above-referenced applications, a Kopelman and Paige fax dated September 14, 2012, a copy of ZBA minutes from 1/5/12 and 2/2/12, an Application for a Hearing of the ZBA, a certified site plan made for 158 Bradford, LLC by Slade Associates, Inc. #2011-141, proposed and existing floor plans and elevations by Brown Lindquist Fenuccio & Rabber Architects, Inc. and ZBA decisions for Cases #FY12-037, dated 2/2/12 and #FY12-070, dated 5/17/12.

Public Comment: Mark Juairé and Kathleen Fitzgerald spoke in favor of the application. There was 1 letter signed by 5 abutters, 3 letters and 4 form letters from abutters in support and none in opposition to the applications.

Attorney Quirk inquired as to whether the Chair intended to close the Public Hearing, in which case no new evidence could be submitted. The Public Hearing was not closed.

Commission Discussion: David Nicolau stated that moving the bedroom from the main structure into the cottage will increase the density pursuant to the dimensional schedule in the Zoning By-Laws. The proposal is to change a bedroom that was never open to the public to one that can be rented to the public, thus potentially increasing the use of the property and exacerbating traffic

entering and exiting the parking area onto a main thoroughfare. The cottage is already a pre-existing, non-conforming one-story structure and is non-conforming as to its distance from the main building. The proposal would increase the non-conformancy by adding a half story, making it closer to the main building on two levels. He is concerned about the safety issue if a fire were to erupt on the property. It is his opinion that adding another story on the cottage would make the property denser and therefore substantially more detrimental to the Town and the neighborhood. Tom Roberts had a concern about the added height of the cottage given its proximity to the main structure. Joe Vasta is also concerned about the fire safety issue. Amy Germain lauds the benefits of the project to the Town, such as the increase in the tax base and the increase in the number of guest units, however there is a cost to the Town due to the increase and extension of the non-conformancies and her opinion is that the cost outweighs the benefits. The fire safety issue also places a burden on the Town and is of concern to her. Robert Littlefield thinks the benefits to the Town and the neighborhood outweigh any detriment caused by the increase in height of the cottage or the proximity of the buildings to each other. David Nicolau asked if the applicant would consider a re-design or a re-orientation of the cottage. Anne Howard said she would like to see another rendering of the cottage. The Board requested that the applicant return with an alternative design for the cottage.

Attorney Quirk suggested that the Board offer Attorney Murphy the opportunity to continue to a date certain so his client can think about the issues of concern raised by the Board. This is so as not to foreclose the applicant in the event the applicant wanted to withdraw without prejudice, consider a re-design or investigate fire suppression methods. Attorney Murphy requested a vote on the Article 3, Section 3110 application. Attorney Quirk did not recommend that the Board vote as Article 3, Section 3115 encompasses Section 3110. If there was a re-design, it would have to be considered under Section 3110 again. If the Board voted on Section 3110 now, it would be voting on the design before it. She suggested a non-binding straw poll of the Board on whether the proposed increase in the density of one additional guest unit in the cottage would be substantially more detrimental to the neighborhood or not. A straw poll was conducted and a majority of the Board thought the changes to the cottage would be more detrimental to the neighborhood. Attorney Murphy requested a continuance to come up with an alternative design that is not substantially more detrimental to the neighborhood. Attorney Quirk will write a draft decision and submit it to the Board and if the Board gives her permission, to Attorney Murphy.

Robert Littlefield moved to continue the matter to a Public Hearing on January 10, 2013 at 7:00 P.M., Amy Germain seconded and it was so voted, 5-0.

Chair Anne Howard adjourned the Public Hearing at 8:40 P.M.

WORK SESSION

Chair Anne Howard reconvened the Work Session at 8:40 P.M.

The Board finished signing documents.

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

ADJOURNMENT: *Amy Germain moved to adjourn 8:50 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 December 6, 2012.

Respectfully submitted,
Ellen C. Battaglini

Approved by _____ on _____, 2012
Anne Howard, Chair