



Town of Barnstable

Zoning Board of Appeals



www.town.barnstable.ma.us/ZoningBoard

Board Members:

Craig Larson – Chair Brian Florence – Vice Chair Alex Rodolakis – Clerk George Zevitas – Member
David A. Hirsch – Associate Member Herbert Bodensiek – Associate Member
James Tinsley – Town Council Liaison

Staff Support

Elizabeth Jenkins – Principal Planner - elizabeth.jenkins@town.barnstable.ma.us
Carol Puckett – Administrative Assistant – carol.puckett@town.barnstable.ma.us

Minutes

Wednesday
June 25, 2014

2nd Floor Hearing Room – 367 Main Street, Hyannis, MA

Craig Larson - Chair	Present
Brian Florence – Vice Chair	Present
Alex Rodolakis – Clerk	Absent
George Zevitas	Present
David Hirsch	Present
Herbert Bodensiek	Present

Also present were Elizabeth Jenkins – Principal Planner and Carol Puckett – Administrative Assistant.

Call to Order

Introduction of Board Members

As a quorum has been met, Craig opens the hearing and members introduce themselves. He then reads the following:

Notice of Recording

Please note that this meeting is recorded and broadcast on Channel 18 in accordance with MGL Chapter 30A §20. I must inquire whether anyone is taping this meeting and to please make their presence known.

Approval of Minutes

April 23, 2014, May 14, 2014

Motion is made by Craig Larson and seconded by Brian Florence to approve minutes as submitted.

Vote:

All in favor

7:00 PM

Appeal No. 2014-026

Metlow

Deborah and Peter Metlow, as prospective lessees, have petitioned for a Conditional Use Special Permit in accordance with Section 240-25(C)(1) HB Business District. The petitioners are seeking to operate a personal service or parapsychology business which will include palm readings and tarot card readings. The property is located at 120 West Main Street, Hyannis, MA as shown on Assessor’s Map 290 as Parcel 161. It is in the Highway Business (HB) zoning district

Continued from June 9, 2014. Members assigned: Craig Larson, Alex Rodolakis, George Zevitas, Brian Florence, Herbert Bodensiek

Craig Larson states that a letter from Attorney Mark Boudreau has been received by the ZBA asking for a continuance to July 9, 2014

Motion is made by Craig Larson and seconded by Brian Florence to continue this appeal to July 9, 2014 at 7:00 PM.

Vote:

All in favor

CONTINUED TO JULY 9, 2014 at 7:00 PM

Comprehensive Permit Modifications

7:00 PM

Comprehensive Permit 2010-036

Living Independently Forever, Inc.

Living Independently Forever (LIFE), Inc. has requested a minor modification to Comprehensive Permit No. 2010-036 to change the designation of the affordable units within the multi-family development. The Applicant seeks to confirm the current location of affordable units within then development and subsequently add units B-2 and D-4 as affordable units and release Units A-2 and A-4 from affordability restrictions.

The property is subject to Comprehensive Permits 1992-068, 1995-020 and 2010-036. The property is located at 550 Lincoln Road Extension and 184 Castlewood Circle, Hyannis, MA as shown on Assessor's Map 272 as Parcel 025.

Members assigned: Brian Florence, George Zevitas, David Hirsch, Herbert Bodensiek, Craig Larson

Representative: Attorney Peter Freeman.

Attorney Freeman states that also with him tonight is the Director/Treasurer, James Godsill. He states that they are not changing anything except the designation of the affordable units. He states that they need the board's permission to deem this an insubstantial change and to allow the Town Manager to sign the modification to the regulatory agreement under the Local Initiative Program.

Craig Larson asks if there is anyone from the public who would like to speak either in favor or in opposition. No one speaks.

Craig Larson makes findings:

- 1.** This modification request does not constitute a substantial change and therefore does not require a public hearing and is approved.
- 2.** The dedicated affordable units shall be changed from Unit Nos. A-1, A-2, A-4, C-4 and D-3 to unit Nos. A-1, B-2, C-4, D-3, and D-4.

Attorney Freeman wants it noted that it is also acceptable that the Town Manager sign the modification to the regulatory agreement of the Local Initiative Program. Craig Larson will accept as presented.

Motion is made by Craig Larson and seconded by Brian Florence that this is determined to be an insubstantial modification.

Vote:

All in favor

INSUBSTANTIAL MODIFICATION GRANTED

Craig Larson then calls the Bay Point appeal and reads it into the record:

7:00 PM

Comprehensive Permit 2005-100

Bay Point, LLC & PLM Buzzy, LLC

Bay Point, LLC and PLM Buzzy, LLC have submitted a request to extend a date as stipulated in a Second Memorandum of Understanding executed in connection with the Endorsed Disposition and Settlement Agreement between Bay Point, LLC and the Town of Barnstable and Cotuit Fire District. The Second Memorandum of Understanding stipulates a date of June 30, 2014 by which the applicant agreed to undertake and complete all construction on the existing residence shown as "Existing D.U." on a plan partially entitled "Bay Point Townhouses Layout and Landscape Site Plan" dated and revised 05-08-09. The Applicants are requesting the June 30, 2014 date be extended to October 31, 2014. The request states the extension is being requested in

accordance with 760 CMR 56.05(11) – Changes After Issuance of a Permit. On May 28, 2014 the Zoning Board unanimously voted to forward this request to a public hearing.

The property is subject to Comprehensive Permit No. 2005-100 – Cotuit Center Residences (Book 27606 Page 3), an Endorsed Disposition and Settlement Agreement (Book 27606 Page 32) and two Memorandums of Understanding (Book 27606 Page 58, Book 27606, Page 61). The property is located at 671 Main Street, Cotuit, MA as shown on Assessor’s Map 036 as Parcel 015. It is in the Residence F Zoning District.

Members assigned: Brian Florence, George Zevitas, David Hirsch, Herbert Bodensiek, Craig Larson
Representative: No representative is here.

Craig Larson asks if there is anyone here to represent the application before the board. No one speaks.

1. Bay Point, LLC was issued Comprehensive Permit No. 2005-100, modified by an Endorsed Disposition and Settlement Agreement dated March 22, 2011 and accompanied by two Memoranda of Understanding dated March 28, 2012 and April 23, 2013.
2. PLM Buzzy, LLC is the owner of record of the property at 671 Main Street, Cotuit, as evidenced by a deed recorded in Book 27900 Page 187.
3. Bay Point, LLC and PLM Buzzy, LLC submitted a request to the Zoning Board of Appeals office on May 14, 2014 to modify a date in the second memorandum of understanding issued in conjunction with Comprehensive Permit 2005-100 and the March 22, 2011 Endorsed Disposition and Settlement Agreement. On May 28, 2014, within 20 days of receiving the request, the Board unanimously voted to refer the request to a public hearing. A public hearing was advertised for June 25, 2014, within 30 days of the Board’s initial determination.
4. Neither Bay Point, LLC nor PLM Buzzy, LLC currently has standing to seek a change in the terms of Comprehensive Permit No. 2005-100. Neither entity currently has control over the Comprehensive Permit: Bay Point, LLC does not own the subject property at 671 Main Street and PLM Buzzy, LLC has not been approved as an entity appropriate to hold the Permit pursuant to the relevant provisions of 760 CMR 56.00.

Vote:
All in favor

Motion is made by Craig Larson and seconded by Brian Florence to deny this request.

Vote:
All in favor

DENIED

Craig Larson allows the public to speak on this matter:

Rich Bowden, resident of Cotuit and president of the Cotuit Civic Association is pleased that the board turned down the request and states that over the last 9 years the property has deteriorated.

New Business

7:00 PM

Appeal No. 2014-031

U.S. Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement, as lessee, has petitioned for a Special Permit under §240-108 and a modification of Special Permits Nos. 1997-008 and Variance No. 1997-009, issued by an August 18, 1999 Memorandum of Understanding. The petitioner is proposing to install one antenna and appurtenant equipment at the 170 feet mounting height on the existing telecommunications tower. The property is located at 749 Oak Street, West Barnstable, MA as shown on Assessor’s Map 215 as parcel 015-002. It is zoned Residence F.

Members assigned: Brian Florence, George Zevitas, David Hirsch, Herbert Bodensiek, Craig Larson

Craig Larson states that no representative is here but that they can still act on this.

Craig Larson makes findings:

- The proposal by US Immigrations and Customs Enforcement to add one antenna and appurtenant equipment within the 170 foot lease area on the existing lattice communications tower at 749 Oak Street, West Barnstable meets all of the requirements of Section 240-107 of the Zoning Ordinance. The installation is supported by a passing structural analysis prepared, signed and stamped by a Professional Engineer registered in Massachusetts.
- The proposed antennas will not increase the height of the tower.
- A Site Plan approval letter dated June 18, 2014 was issued for the proposed installation.
- Based on an evaluation of the material submitted and the evidence presented, the proposal will not be a substantial detriment to the public good and will not nullify or substantially derogate from the intent or purpose of the zoning ordinance.
- The proposal fulfills the spirit and intent of the Zoning Ordinance and does not represent a substantial detriment to the public good or the neighborhood affected. The proposal will not be substantially more detrimental to the neighborhood than the existing structure.

Vote:

All in favor

Motion is made by Craig Larson and seconded by Brian Florence:

1. The request for a Special Permit and modification of Special Permit 1997-08 and Variance 1997-09, as modified by Appeal No. 2002-129 and 2013-004, is granted to U.S. Immigration and Customs Enforcement to allow the installation and operation of one antenna and appurtenant equipment within the 170 foot lease area on the existing lattice communications tower at 749 Oak Street, West Barnstable.
2. The improvements shall be installed as shown on the plans in "Exhibit C – Technical Drawings of Proposed Work" and the structural analysis by FDH Engineering, Inc dated August 16, 2012.
3. All conditions of Special Permit 1997-08, Variance 1997-09, and Appeal 2002-129 and 2013-004 shall remain in full force and effect.
4. All work shall be completed in accordance with the requirements of the Site Plan Review approval dated June 18, 2014.
5. This decision shall be recorded at the Barnstable County Registry of Deeds and copies of the recorded decision shall be submitted to the Zoning Board of Appeals Office and the Building Division prior to issuance of a building permit for the installation.

Vote:

All in favor

GRANTED WITH CONDITIONS

Craig then reads the following into the record:

7:01 PM

Appeal No. 2004-033

Cape Cod Chamber of Commerce

The Cape Cod Chamber of Commerce has applied for modification of Use Variance No. 2003-045 (a modification of Use Variance No. 1957-33), which granted relief from §240-13(A) Principal Permitted Uses in the RF-1 Zoning District. The applicant seeks to allow for a 370 square foot expansion of the existing structure, additional parking and improvements to the internal site circular driveway. The applicant also seeks to modify the prior variances to allow for additional construction and tenants in the future without having to return to the Zoning Board for further permit modifications provided that: 1) the use is Chamber-related or an office use; and 2) the future construction complies with all applicable dimensional requirements of the Zoning Ordinance. The property is located at 5 Patti Page Way, Centerville, MA as shown on Assessor's Map 235 as Parcels 003-B00 and 003-W00. It is zoned Residence F-1.

Members assigned: Brian Florence, George Zevitas, David Hirsch, Herbert Bodensiek, Craig Larson

Representative: Attorney Eliza Cox: of Nutter McClennen and Fish. Also with here tonight is Wendy Northcross – President and CEO of the Chamber of Commerce.

Attorney Cox gives a summary of relief being requested and shows an outline of the parcel on the easel. There was a note in the staff report questioning whether notice was properly given since the application had the address listed as Centerville. She would suggest that it was proper and explains. She refers to Google and Mapquest all noting that the Chamber of Commerce also lists it as Centerville. The board has no questions. She gives a history of when the property was acquired. It is developed with two structures which she points out on the map on the easel. The property is uniquely shaped and what it abuts which she points out. Two existing use variances, one in 1957 for the construction of one of the buildings, in 2003 the original decision was modified to build the other structure. They plan on constructing a 370 square foot addition to an existing building for a meeting space and are looking to increase parking on-site and 46 are proposed. She met with Building Commissioner and there is a condition of the decision because of the plans submitted at that time. The second variance request, is to expand on-site in the future so t hat they wouldn't have to come back before the board. She gives the conditions in reference to the three prong test for a variance. They have also received Site Plan Review approval. They have worked very closely with the Growth Management Department staff over the last couple of days regarding proposed conditions to insure there would not be any detrimental impact.

Brian Florence asks when the future alterations would take place. Wendy Northcross states more than 5 years. Attorney Cox states that they did include language that if zoning were to change it would be subject to those changes.

Craig asks if there is anyone from the public who would like to speak either in favor of in opposition No one speaks.

Brian Florence makes findings:

Variance Findings

- owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located;
- a literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner.
- may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning ordinance.
- The Site Plan Review Committee approved the proposed plan, as evidenced by an approval letter dated June 9, 2014.
- Use variances are no longer permitted within 300 feet of Route 132; however, allowing future office use of the property does not represent an intensification of the uses permitted under the existing use variances.
- Current state and local Health regulations for on-site wastewater disposal would allow 2,000 square feet of additional office space on the property, or, in the event a de-nitrification system is installed, an additional 5,000 square feet of office space.

Vote:

All in favor

Motion is made by Brian Florence and seconded by Herbert Bodensiek to grant relief being sought with the following conditions revised June 25, 2014

Conditions

1. A modification of Use Variance No. 2003-045 (a modification of Variance No. 1957-33) is granted to allow a 370 square foot expansion to the existing building, additional parking, and improvements to the internal circular driveway as shown on the plan entitled "Site Plan for Proposed Addition to Chamber of Commerce Building" dated May 5, 2014, drawn and stamped by Atlantic Design Engineers and the elevations entitled "Renovation & Addition for Cape Cod Chamber of Commerce" dated 8-5-13, drawn by ConServ Group, Inc.
2. Permitted uses of the property shall be:
 - (a) Chamber of commerce offices, including a visitors/information center.
 - (b) Office use, except that medical, dental, chiropractic, psychologist, and similar offices are prohibited.
 - (c) Uses permitted in the zoning district applicable to the subject property.

3. Retail sales or any regular food preparation or food service is prohibited. This condition shall not include the sale of food products within vending machines, or the provision of refreshments to visitors.
4. An additional 5,000 gross square feet of development consisting of new buildings and/or additions to existing buildings not depicted on the plan referenced in Condition No. 1 shall be permitted on the property without requiring a modification of this decision. The additional 5,000 gross square feet permitted shall not include the 370 square foot addition permitted by and shown on the plan referenced in Condition No. 1. Any future development proposed in excess of 5,000 gross square feet shall require a modification of this decision.
5. Future development of the site permitted by Condition No. 4 shall be subject to the following:
 - (a) Approval from the Site Plan Review Committee.
 - (b) All bulk and dimensional requirements or other performance standards for development required by the Zoning Ordinance, including any requirements contained in applicable overlay districts in effect at the time of construction, or with the more restrictive requirements provided in this decision.
 - (c) Minimum parking requirements of the Zoning Ordinance, as determined by the Building Commissioner. New parking areas shall comply with the design and landscape requirements of Article VI Off-Street Parking Requirements, including but not limited to §240-53(A), or with requirements for off-street parking areas in effect at the time of construction.
 - (d) A 45 foot building setback from the Route 6/Mid-Cape Highway off-ramp along the property's northerly boundary shall be required for any future development.
 - (e) Exterior site lighting shall not exceed 18 feet in height and shall only be directed onto the site. Fixtures shall be full-cutoff and no light shall be directed onto adjoining roadways and areas.
 - (f) Dumpsters and/or trash receptacles shall be screened in compliance with Board of Health regulations.
6. There shall be no future division of the lot without a modification of this decision by the Board.
7. If the variance has not been recorded at the Barnstable County Registry of Deeds within one year from the date of issue of this variance, this variance shall expire, unless extended by the Board. This variance shall be deemed exercised, and all of the rights authorized hereunder vested, upon the earlier of the following: a) issuance of a building permit for the 370 square foot expansion; or b) commencement of the site improvements shown on the plan referenced in Condition 1.

Vote:

All in favor

GRANTED WITH CONITIONS

At 7:35, Craig calls the Berube appeal and reads it into the record:

7:02 PM

Appeal No. 2014-034

Berube

Michael and Julie Berube have petitioned for a modification of Special Permit 1996-068 and alternatively a Special Permit pursuant to §240-92 - Nonconforming buildings or structures used as single-family residences. The petitioners seek to expand an existing dwelling by increasing the second-floor living area through the addition of a dormer. Special Permit 1996-068, which permitted expansion of the dwelling not in conformance with setback requirements, includes a condition that states "there shall be no further expansion of this dwelling on this undersized lot." The property is located at 55 Longwood Avenue, Hyannis (Hyannisport), MA as shown on Assessor's Map 287 as Parcel 055. It is zoned Residence F-1.

Members assigned: Brian Florence, George Zevitas, David Hirsch, Herbert Bodensiek, Craig Larson

Representative: Thomas Demelio, the contractor/builder is representing the applicants. He gives a summary of the relief being requested and explains that the applicants would like to expand the dormered bedroom and remodel the bathroom also on that level, they are not increasing bedrooms or the footprint.

Craig Larson asks if there is anyone here from the public who would like to speak either in favor or in opposition. No one speaks.

Craig asks Mr. DeMelio if the applicants would be okay with a condition regarding future expansion of the footprint of the building. Mr. DeMelio is agreeable.

Craig Larson makes findings:

Special Permit Findings

- The application falls within a category specifically excepted in the ordinance for a grant of a special permit:
The Petitioners seeks to modify Condition No. 3 of Special Permit No. 1996-68, which prohibits future expansion of the dwelling. Special Permit No. 1996-68 allowed for the alteration and expansion of a preexisting nonconforming single-family residence in accordance with Section 240-92(B). The proposed expansion will not increase the gross floor area of the dwelling within a 20 foot front yard setback or 10 foot side yard setback.
- Site Plan Review is not required for single-family residential dwellings.
- After an evaluation of all the evidence presented, the proposal fulfills the spirit and intent of the Zoning Ordinance and would not represent a substantial detriment to the public good or the neighborhood affected.

Further, Section 240-92(B) requires the Board to find:

- The proposed alteration and expansion will not be substantially more detrimental to the neighborhood than the existing building or structure.

Seconded by Brian Florence

Vote:

All in favor

Motion is made by Craig Larson and seconded by Brian Florence to grant the relief being sought with the following conditions:

Conditions

1. Special Permit No. 2014-034 is granted and shall modify Condition No. 3 of Special Permit No. 1996-68 to permit a second-story dormered addition to the dwelling at 55 Longwood Avenue, Hyannis as shown on the plans entitled "Proposed Dormer – 55 Longwood Ave, Hyannisport, MA" dated 10-30-2013, drawn by JB Designs.
2. There shall be no future expansion of the of the footprint of the dwelling without prior approval from this Board.
3. The conditions of Special Permit 1996-68 shall remain in full force and effect.
4. The decision shall be recorded at the Barnstable County Registry of Deeds and copies of the recorded decision shall be submitted to the Zoning Board of Appeals Office and the Building Division prior to issuance building permit. The rights authorized by this special permit must be exercised within two years, unless extended.

Vote:

All in favor

GRANTED WITH CONDITIONS

At 7:38, Craig Larson reads the Gevorgyan appeal into the record:

7:01 PM Appeal No. 2014-021

Gevorgyan

Garik Gevorgyan has petitioned for a Special Permit pursuant to §240-94 for change of a nonconforming use to another nonconforming use and §240-93 for alteration of a nonconforming structure not used as a single- or two-family dwelling. The petitioner seeks to demolish an existing 120-seat restaurant and single-family dwelling and reconstruct two multi-family, three-unit dwellings with parking areas and other associated site improvements. The new construction will be more conforming than the existing structures, but will not meet all current setback requirements. The property is located at 36 Old Colony Road, Hyannis, MA as shown on Assessor's Map 306 as Parcel 117. It is in the Residence B Zoning District.

Continued from May 14, 2014. No members assigned

Members Assigned: Brian Florence, George Zevitas, David Hirsch, Herbert Bodensiek, Craig Larson
Representative: Attorney David Lawler. Also with Attorney Lawler tonight are Mr. Gevorgyan and John Level from Baxter and Nye.

Attorney Lawler states that this proposal has been before the Conservation Commission and the historic board and approved. He summarizes the relief for the special permit. They are proposing 6 units and believes that in every respect and is less detrimental than the restaurant. He discusses principles of estoppel. The applicant purchased the property last fall. The applicant went to town hall and was handed a document which he hands in to the board members ((EXHIBIT A). He hands in another document citing that the date (the date when the restaurant was closed) on the document was altered (EXHIBIT B) His client purchased a property for a substantial amount of money based on this document. In preparation of this meeting, Attorney Lawler states that he reached out to the neighborhood, went through the file, and wrote a letter to the people in opposition. He contacted neighbors, and hands in letters to staff (EXHIBIT C).

John Lebel from Baxter Nye speaks and gives specification of and on the lot. He states that they will be doing some mitigation planting in the rear, parking for 12 cars as well as 2 handicapped spots. They are proposing sidewalks and one curb cut on Old Colony Way, thus closing two curb cuts. There will be landscaping all around and trees, concrete pad is proposed under the dumpster with a fence around it. There will be new water and sewer connections as well as a stormwater system. The building setbacks will be more conforming than current as well as the parking, reduction in traffic and wastewater. He then shows elevation drawings

Attorney Lawler knows this area has had problems but that this is an improvement and will be condo units. They have designed the property so that it can be maintained at a low cost. He believes that this application is in keeping with the bylaw and less detrimental and thinks that the document, as previously stated, has been altered. It is clear from his investigation that the restaurant closed on November 6, 2010 and not 2011. Craig Larson asks if he could obtain proof as to when the restaurant equipment was removed. Attorney Lawler consults with his client briefly and states that there is partial restaurant equipment there currently such as oven hood, walk in coolers, bar and other things consistent with a restaurant use.

Brian Florence states that a common victualer license is not a zoning determination. Attorney Lawler states that it is evidence of use and in fact the applicant, not being a lawyer, went to the entity that issues that license for use. Mr. Florence suggests a certificate of inspection and possibly obtaining information from the previous owner, etc. Attorney Lawler states that it was marketed as a restaurant up until the last year or so. He confers with his client's son-in-law and then states that he can supply verbal marketing evidence and that it was being sold as a former Up the Creek restaurant. Attorney Lawler states that the previous owner of the restaurant has moved to Florida.

Craig Larson states that there are numerous letters in the file in opposition which he will take home and read as he believes this case will be continued. He then asks if there is anyone here from the public who would like to speak either in favor or in opposition.

Attorney Ron Jansson speaks first. He is representing three of the abutters to the property involved. He represents several members of the Meece family as well as the DiPalma family. He gives a summary of the zoning enabling act back in 1920. It sought to protect uses which no longer conformed potential zoning changes that municipalities were about to make. Zoning changes didn't come about for many municipalities until the 60's or 70's. In Barnstable, we adopted our first zoning ordinance in 1927 which was not a comprehensive zoning ordinance at that time and subsequently modified it to make it more comprehensive in the 1950's. However, it wasn't until the 1970's that we actually addressed nonconformities. Prior to that nonconformities had been addressed pre 808 under the provision of Chapter 40A Section 6. The purpose behind protecting nonconformities was constitutional in nature. A lot of uses would expire over time. As a result, the statute was changed and through the Home Rule towns were allowed to adopt similar types of ordinances and bylaws, as the Town of Barnstable ultimately did. It was never intended to allow nonconforming uses to be utilized predominately for spot zoning. Through Home Rule, several towns opted out to be able, and this is a municipal change only, from one nonconforming use to another. Based on his research, the Town of Barnstable did it in the 70's when they adopted the abandonment bylaw and other bylaws which he helped draft. When the Town of Barnstable initially adopted the abandonment bylaw, they talked about a nonconforming use, if abandoned, will be discontinued as there was a planning policy that they wanted to make overall zoning and uses consistent with our zoning code. The courts went on to construe this to mean that there had to be intent to abandon and that the lack of intent could be proved by several things such as being forced out of the property due to financial reasons and leaving your equipment in the building evidencing no return. Sometime in the late 80s, the Town of Barnstable opted to modify the bylaw

and what it did under Section 240-97 was to expand the concept of abandonment which, prior to this change would occur in two years and not three, however, when they modified the bylaw they had it to say that any lawful, pre-existing, nonconforming use of land which has been abandoned, or not used for three years shall not thereafter be established. The courts recognized through Home Rule and municipality the ability of a town to extinguish nonconforming uses. The court in ruling on this language said that if you establish abandonment through non-use, you do not have to establish that there was an intent to leave the property or not use the property. Lack of use, in and of itself was sufficient. As for Attorney Lawler's statement of estoppel, he states that the SJC does not apply to municipal actions and believes that is not a legitimate argument. He talks about town records and that there was no evidence in the licensing files in 2011 in regards to an application for a common victualer or alcoholic license. He indicates that all restaurants in Massachusetts are required to be examined and inspected annually by the local Board of Health. The last time, in the records of the Board of Health, that this restaurant was examined was November 10, 2009. He notes that the owner could've had a contingency when purchasing the property asking that the purchase be dependent on going before the ZBA. In changing the use, the bylaw only has two options to do so, use variances or to have it established as a nonconforming use. If it cannot be established that it is a nonconforming use, there is no springboard for him to change from one use to another. He believes that the property has not been used for more than 3 years and the bylaw is specific about abandonment. He submits a map outlining lots in the immediate area (EXHIBIT D) and notes that the proposed structures will bring it within 10 feet of abutting properties, will be setback only 15 feet from the required setback which will require a variance which is not before the board tonight and that the size and massing of the project is an over intensification of a lot and would be detrimental to the neighborhood impacted. Other criterion that has not been addressed tonight and if the board finds that this is a nonconforming use and it can be changed to another nonconforming or not detrimental to the neighborhood then it is required that the board makes additional findings, if you cannot make those additional findings then the board cannot grant the special permit. His conclusion is that additionally it doesn't meet the requirements of Section 240-94.A. He quotes from Lockwood vs. Snow case (EXHIBIT E) "any extension or structural change of a nonconforming structure must comply with the applicable zoning ordinance or by-law". He talks about the parking lot. He asks the board to deny the request which is not right for this site.

Craig Larson asks Attorney Jansson to highlight on the intent to abandon.

Attorney Jansson reiterates that Massachusetts Supreme Judicial Court has indicated that abandonment could only be established if there was intent to abandon. Our bylaw says you can lose a nonconforming use in two ways: through abandonment or through non-use.

Craig Larson asks if there is anyone from the public who would like to speak either in favor or in opposition.

Kathy Ireland Meece who owns 186 Gosnold Street agrees that it would contribute to congestion, cannot stay in its current condition and asks to make this property to that of single-family.

Daniel Meece of 181 Gosnold Street would support single-family use but not more intense use. He is concerned about Snows Creek and buffer to neighbors regarding privacy.

Jerry DiPalma of 194 Gosnold Street has been talking to his neighbors and has a PowerPoint presentation (EXHIBIT F). He received over 50 signed petitions which have been submitted to the board. He states that density will be a problem. He talks about previous patrons climbing over his stockade fence, traffic and parking problems on Old Colony. He believes that this proposal is more detrimental to traffic, safety, privacy.

Jan Cullum, Town Councilor for the area and who also lives on Sea Street speaks. She notes that in the past there have been home invasions in the neighborhood at duplexes. She thanks the board for listening to the concerns of the neighborhood.

Jill Golden – Trustee and owner of Captain Gosnold Village. She is in opposition and believes there will be parking problems.

Alexis Golden – Trustee and owner at Captain Gosnold Village is in opposition and believes that the ZBA should be protecting the neighborhood and asks that they do so.

Chris Deal lives off of Gosnold Street who previously owned a home off Sea Street. He moved from Sea Street which he feels is an area which hasn't been taken care of and moved to Gosnold Street, is in opposition to the proposal to the multi-unit development.

Ken Pina at 51 Old Colony is against it thinks it is too big for the area and will contribute to noise and parking problems.

David Lawler rebuts first to Attorney Jansson's statements. He cites Sullivan vs. Chief Justice Administration (448 Mass 15.) where estoppel did apply to a municipality. In reference to use, this was a seasonal use and wouldn't have ended until the next season and they would've been within the 3 year period. With respect to zoning requirements, other than lot coverage, anywhere where this project does not meet the specific zoning requirements they are less than the present existing structures and disagrees with Attorney Jansson that a variance is required. He does not believe that this is more detrimental to the neighborhood.

Michael Vallas of 81 Gosnold Street believes that a smaller version of the proposal would be a better idea. There has been a recession and talks about all the restaurants that have been shut down and indicates that what is missing is middle class to support these businesses.

Ruth Pina of 51 Old Colony thinks that this project is too much on that piece of property and is concerned about traffic and parking problems.

The board discusses. Craig feels he is not prepared to vote and has not seen evidence of the nonconformity. Brian Florence has not seen evidence of the nonconforming use.

Craig Larson asks Attorney Lawler if he would like to continue this to a future date. Attorney Lawler asks to confer with his client.

Attorney Lawler states that after conferring with his client, he would request a vote tonight.

Craig Larson calls a five minute recess.

Back in session.

Craig makes findings:

Garik Gevorgyan petitioned for a Special Permit pursuant to §240-94 for change of a nonconforming use to another nonconforming use and §240-93 for alteration of a nonconforming structure not used as a single- or two-family dwelling. The petitioner seeks to demolish an existing 120-seat restaurant and single-family dwelling and reconstruct two multi-family, three-unit dwellings with parking areas and other associated site improvements.

Based on that, motion is made to grant negative findings in the following:

1. Estoppel argument is not an argument for ZBA
2. Intent to abandon use based on non-renewal of licenses and no evidence of intent to continue business
3. Nonuse of property for 3 years plus
4. No restaurant has been operated since September 6, 2010
5. Proposed use represents an expansion and intensification of use not allowed under Zoning
6. The application does not fall within the category specifically exempt and in accordance with granting a special permit because no pre-existing nonconforming use has been established

Vote:

All in favor

Craig Larson amends his findings to include:

7. Evidence of marinating the building that is continued to heat or be used for storage or other uses of the building is not necessarily sufficient to establish the continuation of the nonconforming use

Vote:

All in favor

Motion is made by Crag Larson and seconded by Brian Florence, based on the negative findings, to deny this application for a Special Permit.

Vote:

All in favor

NOT GRANTED

Other Business

Next Regularly Scheduled Hearings: July 9, August 13, September 10

Adjourn

Motion is made by Craig Larson and seconded by Brian Florence to adjourn.

Vote:

All in favor