



Town of Barnstable Zoning Board of Appeals



www.town.barnstable.ma.us/ZoningBoard

Board Members:

Brian Florence – Vice Chair Alex Rodolakis – Clerk George Zevitas – Member David A. Hirsch – Associate Member
Herbert Bodensiek – Associate Member Robin Young – Associate Member Matthew Levesque – 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, May 13, 2015

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

Brian Florence – Vice Chair	Absent
Alex Rodolakis – Clerk	Present
George Zevitas	Present
David Hirsch	Present
Herbert Bodensiek	Present
Robin Young	Present
Matthew Levesque	Present

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

Call to Order

Introduction of Board Members – *All members present introduce themselves.*

As a quorum has been met, Alex Rodolakis - Vice-Chair s calls the hearing to order at 7:07 pm.

Alex Rodolakis reads the following with no response:

Notice of Recording

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

Minutes

Minutes from March 25, 2015, April 8, 2015 and April 22, 2015

Alex Rodolakis states that he was not present during the April 8th or April 22nd hearings.

Motion is made by David Hirsch and seconded by George Zevitas to accept all minutes as presented.

Vote:

AYE: George Zevitas, David Hirsch, Herb Bodensiek, Matt Levesque

NAY: None

ABSTAINED: Alex Rodolakis, Robin Young

Alex calls the first appeal and reads it into the record at 7:12:

New Business

7:00 PM Appeal No. 2015-021

Bassil

Elie Bassil, Trustee has petitioned for a Special Permit pursuant to §240-25(C)1 (Conditional Uses in the Highway Business District) to convert 1,270 square feet of automotive repair space to retail space; the automotive repair use will be abandoned. The property is located at 199 Falmouth Road, Hyannis, MA as shown on Assessor's Map 311 as Parcel 079. It is in the Highway Business (HB) and Groundwater Protection (GP) Overlay Districts.

Members assigned: David Hirsch, Matt Levesque, Herb Bodensiek, George Zevitas, Alex Rodolakis

Representative: Halim Choubah – Consulting Engineer

Mr. Choubah gives a summary of the relief being sought which is to renovate and convert square footage to that of retail space. He states that the property is currently known as the Getty gas station and points it out on the map on the easel. Access to the site is via two driveways off Falmouth Road. He states that there are two gas pumps on site, an overhead canopy and that each underground storage tank accommodates 10,000 gallons each. He talks about the turnoff and states that there will be no change to footprint to the building and that the lot coverage will not change. They are in compliance with parking and have Site Plan approval. There will be landscape improvements, has a landscape plan and states that there will be renovation improvement to the exterior as well as the interior of the existing building and will meet state codes that are applicable.

Alex asks if there is a tenant already in place. Mr. Choubah states that this will be owner-occupied.

Alex Rodolakis asks for public comment. No one speaks.

Questions from the Board.

Robin Young noticed that the handicapped access is on the right side and asks about handicapped parking next to the ramp.

Mr. Choubah points out the handicapped parking.

Alex asks Mr. Choubah if he has seen the staff report which he states he has not. Elizabeth Jenkins hands Mr. Choubah a copy.

Mr. Choubah reads the conditions and accepts the findings/conditions in the staff report. George Zevitas clarifies that this will remain a gas station with a convenience store.

Alex Rodolakis makes findings.

Special Permit Findings

- The application falls within a category specifically excepted in the ordinance for a grant of a special permit: Section 240-25(C)1 allows retail uses in the Highway Business District with the grant of a Special Permit.
- Site Plan Review approval was granted for the project on March 25, 2015.
- 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.
- Such uses do not substantially adversely affect the public health, safety, welfare, comfort or convenience of the community in particular that they are removing the auto repair and replacing with retail use.

Seconded by George Zevitas

Vote:

All in favor.

Based on those findings, Alex Rodolakis makes a motion to grant relief being requested as stated in staff reported dated May 7, 2015 being conditions 1 through 5. (Exhibit A)

Seconded by George Zevitas.

Vote:

All in favor

GRANTED WITH CONDITIONS

At 7:22, Alex reads the following into the record:

7:01 PM Appeal No. 2015-022

Sullivan

John D. Sullivan, et al has appealed the decision of an Administrative Official issued March 13, 2015 pursuant to Massachusetts General Law Chapter 40A Sections 3, 7, 8 and 15, specifically respecting Section 3 which states in part "notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, bylaws and decisions from a city or town shall not discriminate against a disabled person...No dimensional lot requirement of a zoning ordinance or bylaw, including but not limited to set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person." This is an appeal from the denial of the Building Commissioner's March 15, 2015 to the Appellant's request for a building permit to construct a handicapped access ramp at the private residence of the Appellant. The property is located at 564 Old Craigville Beach Road, Centerville, MA as shown on Assessor's Map 226 as Parcel 177. It is in the Residence B Zoning District.

Mr. James Milano, the applicant's builder from Yarmouth, asks the board to postpone temporarily until the applicant's attorney arrives.

Alex Rodolakis allows it and calls the Pacheco/Lucien appeal and reads it into the record:

7:02 PM Appeal No. 2015-023

Pacheco/Lucien

Wayne J. Pacheco and Nancy Lucien have petitioned to modify Special Permit No. 2014-018 pursuant to Massachusetts General Law Chapter 40A Section 14. The petitioners seek to delete Condition No. 3 of the decision, which requires "any kitchen or other improvements that represent a second unit on the property be removed by the owner with the required permits from the Building Division." The Petitioners stated reason for the request is the decision conflicts with Barnstable Ordinance Chapter 501, Article IV Sections 501-28 and 501-29. The property is located at 791 Pitchers Way, Hyannis MA as shown on Assessor's Map 271 as Parcel 159. It is in the Residence C-1 Zoning District.

*Members Assigned: George Zevitas, Alex Rodolakis, David Hirsch, Robin Young, Herbert Bodensiek
Representative: Paul Tardif, Esq.*

Attorney Tardif gives summary of relief and quick history of ownership. He states that it was built as lodging home and has 6 lodgers and a manager's unit. He then gives history of most recent relief which the board granted for an additional two lodgers to make a total of 8 lodgers and states that they wanted to use the basement unit for a lodger. He reads Conditions #3 and 4 from the previously granted permit from ZBA (Exhibit A). He states that, as it was, the applicant attempted to get a lodging license from the Licensing Division for 8 lodgers and was denied and told that they could only have 6 because of the basement unit which was not in compliance with Condition #3 and would be considered a separate maintained unit because of cabinets and countertop. Attorney Tardif states that they then attempted to resolve the problem by inviting Robin Anderson and Tom Perry from the Building Division to view the premises. He states that Robin Anderson viewed and took pictures. Attorney Tardif notes that he has pictures of the unit of concern and that the request tonight is because they continue to have a problem with the interpretation of this special permit with the Building Department. The conflict, it seems, is to what is considered to be a kitchen and what the ordinance allows in terms of cooking facilities. He reads 501-29 about cooking facilities. He states that the Building Commissioner thinks the basement unit goes beyond cooking facilities and believes it to be a kitchen. They would like to modify the condition that would explain as they are trying to comply with Condition #3 and 4. He suggests adding language to Condition #3 that allows for the installation of cooking facilities as defined and thinks it meets the spirit and intent of the bylaw and would not be a detriment to the neighborhood.

Alex asks for public comment. No one speaks.

Alex wants to make sure that the board has had time to read the information that was just received from Attorney Tardif today. George would like to have an opportunity to read both positions but would like to also ask some questions tonight.

George asks how large the basement unit is and how many people would be living in the unit. Attorney Tardif states that the unit would meet the 150 square foot requirement, submits a floor plan and pictures (Exhibit B) and states that one person lives in that unit. George asks if there is a separate entrance for the unit. Attorney Tardif states that the entrance is through the house via internal stairs. Attorney Tardif states that there is also a laundry room in the basement that everyone can utilize.

Attorney Tardif states that the previous hearing when the conditions were being imposed, the attorney at that time, asked Craig Larson if she could add language to Condition #3. Attorney Tardif reads from the minutes of the previous hearing "She states that they will be dealing with the Building Division as far as whether there is a second unit and what constitutes a second unit. Craig Larson does not accept the amendment and states that they can come back for that." Attorney Tardif states that is what they are here for now. George Zevitas suggests asking the Building Commissioner to attend the next hearing. Board member, Robin Young, suggests moving the cooking facilities to the bedroom and use that as an open area instead of what they are asking. Attorney Tardif doesn't believe that would satisfy the Building Division. George Zevitas asks if there is a main kitchen in the house. Attorney Tardif answers yes and describes. Herbert Bodensiek states that the sketch on the May 7th Staff Report is not the same as what was turned in today and that the May 7th report shows a sink but doesn't see it in the photograph. Attorney Tardif states that it is not in the photograph because it was proposed and wanted to include it because, if you have a cook top, he believes the Board of Health requires it which would be another requirement under Condition #4. He believes that the Building Department's fear is that this will be changed into a kitchen.

They discuss asking the Building Commissioner to appear before the board to clarify.

Motion is made by Herbert Bodensiek and seconded by George Zevitas to continue this to May 27, 2015 at 7:00 PM.

Vote:

All in favor

CONTINUED TO MAY 27, 2015 at 7:00 PM.

At 7:45, Alex calls the Laham appeal and reads it into the record:

7:03 PM

Appeal No. 2015-025

Laham Management & Leasing, Inc

Laham Management and Leasing, Inc has applied for a use variance from the provisions of Section 240-24.1.6 (OM Zoning District) to establish parking to be used in conjunction with the existing abutting automobile dealership. The Applicant also seeks, to the extent required, a dimensional variance from Section 240-24.1.6(C) as to minimum lot area, minimum lot frontage and landscape setbacks. The property is located at 157 Stevens Street, Hyannis, MA as shown on Assessor's Map 309 as Parcel 240. It is zoned OM Office/ Multi-Family Residential Zoning District.

Members assigned: Matt Levesque, David Hirsch, Herbert Bodensiek, George Zevitas, Alex Rodolakis

Representative: Michael Ford, Esq.

Attorney Ford clarifies that the petitioner is not the owner of the property. However, he is the agreed vendee under the P&S agreement which provides for use and occupation of the premises and the purchase of the premises. He has provided a copy of that to staff today. With him tonight is Griffin Bowden– Site Engineer from Atlantic Design, Inc., and Chris and Nick Laham.

Attorney Ford gives a history of the property: The site was originally approved by a single family home sometime around 1940. At that time the property was unzoned as comprehensive zoning only started in the 1950s and in the 70s was deemed urban business including this lot. It was permitted as of right. There was no minimum lot size, and was conforming. In 2005, it was rezoned Hyannis Village district, office multi family but does not allow single family home and at that moment, the lot and the use became nonconforming. Also the adjacent use also became nonconforming. Also, because of nonconforming use, became nonconforming in size. The lot currently is nonconforming in size and the single family has been removed and would like to have it for parking to the adjacent dealership. Because you can't change from one nonconforming use to another, they have had to come here. In 2000, the owner at the time, Mr. Daniels, began to lease it to the owner of the dealership, Mr. Ed Lesley

who started using 157 Stevens Street for storage and parked cars on the property and has an affidavit from Mr. Leslie to that affect. At the time Mr. Lesley bought the lot, he also bought the adjoining land in the same name and another issue arose about a merger. Whether a merger happened under zoning is anybody's guess. In December they prepared a litany of these issues this and presented it to Tom Perry – Building Commissioner. He provided that affidavit to Mr. Perry who asked him to go to the ZBA. The house came down last year or late 2013 and Mr. Laham had thought, that because the Purchase and Sales agreement stated that the properties could be used for these purposes, paved the lot and was advised, by the Building Department, that he did not have permission to use the lot for that purpose. They went to Site Plan Review with the same plan that is before them tonight which was approved with a condition with the fact that they had to get approval from ZBA. There is a right to apply for a regulatory agreement via Planning Board and try to negotiate a zoning contract, then if the Planning Board recommends favorably, it goes to Town Council, who has their own hearing, and if the vote is positive by a 2/3 vote, it would authorize the manager to have a regulatory agreement. However, as there will be no buildings and only used for parking, they thought that the regulatory process was too complex for this simple use. He gives variance conditions:

He would suggest that this lot is unique given the zoning history and the uses around it because it had a conforming single family home in the middle of the Urban Business zoning district, but once the OM district came in, it made it nonconforming and the size nonconforming and leaves the lot with no uses. If you apply the bylaw literally, it gives rise to the hardship which is that it cannot be used for the purposes of which it can be used since 2000 which is accessory to the automobile dealership which is next door.

Given the fact that it was approved by Site Plan and this board can make a finding that it will not be substantially more detrimental to the public good to allow this, he would suggest that the use fits with the rest of the site. He has a copy of the affidavit given to the Building Commissioner which he hands to the Chair (**Exhibit A**). He also states that they had reached out to the abutters in the immediate area with no objections.

Alex Rodolakis asks if there anyone from the public who would like to speak on this. No one speaks.

Alex asks Attorney Ford about a landscape plan. Griffin Bowden responds and states that there is a small landscape buffer between Steven Street and the property but is basically grass. Attorney Ford states that they wouldn't have a problem with a condition requiring approval from Growth Management as this is in the Growth Incentive Zone. Alex asks about lighting on the lot. Mr. Bowden states that currently no lighting on the lot is proposed. Herbert Bodensiek asks about right of way. Attorney Ford says that the right of way is and will be maintained. Alex asks when they can come back with landscape plan. Attorney Ford asks if it could be a condition that this be administratively approved. Elizabeth Jenkins states that is up to the board, however, no findings or conditions have been drafted.

Attorney Ford will get some landscape plans and come back.

Motion is made by George Zevitas and seconded by Herbert Bodensiek to continue to May 27, 2015 at 7:00 PM.

CONTINUED TO MAY 27, 2015 AT 7:00 PM.

Alex Rodolakis reads the following into the record:

7:01 PM Appeal No. 2015-022

Sullivan

John D. Sullivan, et al has appealed the decision of an Administrative Official issued March 13, 2015 pursuant to Massachusetts General Law Chapter 40A Sections 3, 7, 8 and 15, specifically respecting Section 3 which states in part "notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, bylaws and decisions from a city or town shall not discriminate against a disabled person...No dimensional lot requirement of a zoning ordinance or bylaw, including but not limited to set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person." This is an appeal from the denial of the Building Commissioner's March 15, 2015 to the Appellant's request for a building permit to construct a handicapped

access ramp at the private residence of the Appellant. The property is located at 564 Old Craigville Beach Road, Centerville, MA as shown on Assessor's Map 226 as Parcel 177. It is in the Residence B Zoning District

Members Assigned: George Zevitas, Alex Rodolakis, Robin Young, David Hirsch, Herbert Bodensiek

Representative: Attorney Simeone. Attorney Simeone hands in a memo (**Exhibit A**). He summarizes the initial proposal which was to knock down the cottage and that it was noted the design was due to Mr. Sullivan's handicap. He states that Mr. Sullivan's principal abutter, Mr. Munsell, has written a letter to the board in response to this request here tonight. He states that Mr. Munsell took it upon himself to leverage his position at that time as an abutter and approach his client's previous attorney and said he wouldn't appeal as long as he made some kind of deal by putting money aside for improvements for shrubbery. With that said, the initial variance was not appealed and the construction began. During the course of construction, the local building inspector, Mr. Lauzon, would do his inspection. He did his last inspection to issue an occupancy permit and Mr. Munsell had asked him to meet him on the site. At that time, Mr. Munsell complained that the Sullivan's had relocated, what the board had approved as a sundeck in the middle of the property, to the southeast corner of the property. Attorney Simeone states that tonight, he is appealing the building inspector's decision because his client, as a disabled person, sought a handicapped ramp. He states that the courts in Massachusetts allow individual property owners who have violations to cure those violations. When Mr. Munsell made his complaint to the building inspector, Mr. Lauzon made an error. He assumed that his client's were going to build both decks (both the sundeck and the deck they had constructed). He said that, wherein, both decks were going to be constructed there was an increase in FAR (floor area ratio). Mr. Lauzon had suggested to his client to hire an attorney to seek a variance for increase in FAR. He states that his client's, the Sullivan's, never intended to build the sundeck that was approved by this board but simply relocate the sundeck to a different location. They then came before this board for an increase in FAR when a plan he has attached clearly establishes that there was no increase in FAR. He states there is a plan by Weller and Associates signed by Mr. Rumba that, with the current deck in dispute, there is still 25.6% FAR. He refers to the DiGiovanni case as he has noted in his memo that he handed in tonight (**Exhibit B**) and that "the Massachusetts courts have said that when a variance is granted for a project as shown by the plans, the variance requires strict compliance with the plans at least as far as site locations and the bulk of buildings are concerned". He is not here to argue that case but to resolve this case. He thinks that the building inspector's opinion (which he reads from see **Exhibit C**) is wrong and that the Massachusetts courts give property owners a right to cure illegal conditions.

He states that a disabled person has a right to build a ramp and does not have to comply with dimensional limitations in the district. No one can discriminate against a disabled person, even municipalities and is here at this point because his clients want to build the deck and move on. He states that the architect is also with him tonight to answer any questions.

The board asks questions as to whether this is an illegal deck. Attorney Simeone states that this deck is in dispute and that it would need to be reviewed in court as to whether relocating the deck was okay. Alex clarifies that what the applicants are trying to do is to cure this which is to have this board approve the deck. Mr. Simeone states that what they are looking for is for this board to overturn the building inspector's decision to deny the building permit and to issue the permit for the ramp and that the applicant has the right to cure the disputed deck and has a right to build a handicapped ramp without setback regulations. Robin Young for clarification of which case law he refers to. Attorney Simeone states that it is in his memo he submitted to the board tonight (**Exhibit B**) which is (Harrison vs. Building Inspector of Braintree) which he reads part of. He also refers to his memo and the cases of Stowe vs. Puglsey and Sterling vs. Poulin.

David MacLean, architect with an office in Cataumet speaks. He states that he was not involved with the project originally but was hired as a consultant to resolve and explore other alternatives. He was asked to make a comparison to where the deck is located currently versus to where it was originally approved to be located. He refers to Sheets A.1.1 and A.1.2 (**Exhibit D**). He states that moving the deck to the alcove that is close to Centerville Avenue pulls it further away from the rear property line. The dimension of the deck is the minimum required to get wheelchair access to the ramp. He did a couple of studies, which he passes out to the board members and explains. He explains how much ramp is needed to get to grade to keep at an appropriate slope. Board members ask questions pertaining to relocating the ramp.

Alex asks for public comment.

Steven Richardson, who lives up the street and is a Senior Project Manager for Bayside Builders, has built homes by following regulations, laws and codes. In his opinion, by approving the ramp is to make the deck legal and suggests that the deck be removed and the ramp be constructed in the front of the house

Tom Munsell of 15 Circuit Avenue, Centerville, an abutter who is also here with his wife, states that the agreement as cited previously had five criteria that needed to be met to insure their privacy and comfort which has been violated. He states that screening was needed which he had paid \$8000.00 for when his neighbor was supposed to pay for it. He states that the core part of the agreement was in regards to the setback of the house to the property line, elevation of the house and that there be no deck across from their own deck and that the Sullivan's deck be located down the wall to insure privacy. He states that they formally object to this request, thinks the deck is illegal and putting a ramp on it makes no sense. He believes that the home is grossly over the 2800 square feet allowed by the variance for the home, then they added over 100 square foot deck to the rear. Also, the deck was built not where it was originally approved to be built and is causing them distress. He is concerned about the noise. He states that the current deck introduces one foot into the 10 foot setback and they had a 13 foot setback agreement with the Sullivan's. He states that some of the roots of the trees on his lot were destroyed which he had to replace. Robin Young, asks Mr. Munsell to go over the criteria in the agreement.

Jim Milano, the builder for the Sullivan's, speaks and says that what Mr. Munsell says is not true in regards to the agreement. He states that the screening was put in according to the plan that was drawn by a relative of Mr. Munsell, the roots of the trees which Mr. Munsell claims were destroyed were trees that Mr. Munsell stated he was going to take down anyway which he did. He planted new trees to replace those without telling the Sullivan's and sent them the bill for it. As for the elevation of the building, it was no higher than the original cottage. Mr. Milano states that the Sullivan's paid for drainage. Also, he believes that Mr. Munsell had to pay to have his own gas line off Mr. Sullivan's property.

The board discusses. David Hirsch thinks that land court should decide this issue. With explanation, Alex and George do not believe that putting the ramp will cure this and would be inclined to uphold the Building Inspector's decision.

Mr. Simeone states that he knows that what they are asking for is unique and that he could instruct the builder to dismantle the rear deck and stairs, but that they could file another permit and get that permit.

Motion is made by Alex Rodolakis with the following findings:

The handicap ramp plan submitted with Building Permit Application No. 201500514 relies on an existing deck constructed contrary to plans approved by the Zoning Board and which is currently involved in ongoing litigation.

The minimum area necessary for a landing to serve a private handicap ramp is three (3) by three (3) feet according to the Building Code. The existing 160 square foot deck is well in excess of the minimum requirements of the Building Code.

A handicap ramp would be permitted under Massachusetts General Law Chapter 40A §3 regardless of setback from the property line, but the plan submitted with Building Permit Application No. 201500514 includes the deck which is not part of the plans previously submitted and approved by this Board and which is being put forth to the Building Inspector.

Motion is made by Alex Rodolakis and seconded to uphold the decision of the Building Inspector.

Vote:

All in favor

Based on that vote the decision of the Building Inspector has been Upheld.

DECISION OF BUILDING INSPECTOR - UPHELD

Other Business

Next regularly scheduled hearings are May 27, June 10, June 24

Motion is made by David Hirsch and seconded by George Zevitas to adjourn.

Vote:

All in favor

EXHIBITS

7:00 PM Appeal No. 2015-021 Bassil

- EXHIBIT A = Bassil Staff Report dated May 7, 2015

7:01 PM Appeal No. 2015-022 Sullivan

- Exhibit A = Attorney Simeone's Memo dated May 13, 2015, 8 pages
- Exhibit B = Masscases.com: Joseph P. DiGiovanni & another vs. Board of Appeals of Rockport & another (19 Mass. App. Ct. 339 – September 13, 1984 – February 13, 1985 – 10 pages
- Exhibit C = Letter dated March 13, 2015 to James A. Milano from Jeffery L. Lauzon – 1 page
- Exhibit D = Proposed Ramp Plan, Issued 26 March 16 (Progress), by David R. Maclean, Sheets A 1.1 and A 1.2

7:02 PM Appeal No. 2015-023 Pacheco/Lucien

- Exhibit A = ZBA Decision 2014-018, 3 pages, time stamped by Town Clerk on June 24, 2014
- Sketched floor plan entitled "791 Pitchers Way – Basement Unit" along with 4 pages of pictures showing basement unit – total of 5 pages

7:03 PM Appeal No. 2015-025 Laham Management & Leasing, Inc

- Exhibit A = Affidavit of Edward Leslie, signed by Mr. Leslie and dated November 12, 2014

Approved