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## ZONING BOARD OF APPEALS

### TOWN OF PROVINCETOWN

**January 21, 1999**

**Members Present:** Rick Murray, Ken Janson, Peter Bez, Steve Melamed, Greg Lambrou, Barbara Gard (arrived at 6:05 PM)

**Members Absent:** Ray Boylan, Gary Reinhardt (both excused)

### WORK SESSION

Chair Rick Murray called the Work Session to order @ 6:00 PM

### PENDING DECISIONS

**98-114 275 Commercial Street, Christopher Snow on behalf of George Kraniotakis d/b/a George=s Pizza** - Rick Murray, Ken Janson, Gary Reinhardt, Barbara Gard, Peter Bez sat on case. Peter Bez read the decision. *Ken Janson moved to accept the decision as read, Rick Murray seconded and it was so voted, 3-0, 2 absent (Barbara Gard, Gary Reinhardt).*

**99-003 9 Ryder Street Extension to 248 Commercial Street, Vincent Duarte on behalf of Dorothy Cook** - Rick Murray, Ken Janson, Barbara Gard, Gary Reinhardt, Peter Bez sat on case. Rick Murray read the decision. *Ken Janson moved to accept the decision as read, Peter Bez seconded and it was so voted, 3-0, 2 absent (Barbara Gard, Gary Reinhardt).*

**99-004 269 Commercial Street, Richard Williams d/b/a Pilgrim Bay Cafe, on behalf of John Cicero** -Rick Murray, Ken Janson, Barbara Gard, Gary Reinhardt, Peter Bez sat on case. Ken Janson read the decision. *Barbara Gard moved to accept the decision as read, Peter Bez seconded and it was so voted, 4-0, 1 absent (Gary Reinhardt).*

**99-005 131-133 Bradford Street, Cerutti Restaurant Corp. d/b/a Cerutti and Co.** -Rick Murray, Ken Janson, Barbara Gard, Gary Reinhardt, Peter Bez sat on case. Peter Bez read the decision. *Ken Janson moved to accept the decision as read, Barbara Gard seconded and it was so voted, 4-0, 1 absent (Gary Reinhardt).*

### PENDING CASES

**99-006 40 Pearl Street, Provincetown Housing Authority** - Rick Murray, Ken Janson, Barbara Gard, Gary Reinhardt, Peter Bez sat on case. The applicant has formally requested to withdraw the application because they do not need a special permit due to a recalculation of the scale units. *Peter Bez moved to allow the applicant to withdraw without prejudice, Barbara Gard seconded and it was so voted, 4-0, 1 absent (Gary Reinhardt).*

**98-116 150 Bradford Street, Timothy McNulty, d/b/a McNulty=s 150 Marketplace** - Rick Murray, Ken Janson, Barbara Gard, Gary Reinhardt, Steve Melamed sat on case. Timothy McNulty appeared to discuss the application. Rick Murray distributed corrected scale calculations. Board discussion: applicant is requesting 60 scale units over average; property has Aalways@ been a market; neighborhood markets are beneficial to the town; will not increase traffic; possibility of restricting use of abutting lots owned by the applicant to use for parking only; addition will add a residential unit, but the market will not increase by much.

Applicant statement: trying to return market to its original size; market has to be large in scale; simply wants to extend existing roofline; addressed special permit criteria; scale average is low due to small buildings at edge of circle - several buildings nearby are larger than the market.

Board: no change in the footprint; addition would enhance aesthetic appeal; trash to be contained; is one of few markets open year-round; are not changing the use.

The Board decided to wait until Gary Reinhardt could be present to help make the decision.

**99-002 428 Commercial Street, B. Charley Stites** - Rick Murray, Ken Janson, Barbara Gard, Gary Reinhardt, Peter Bez sat on case. B. Charley Stites appeared to discuss the application. Board: will not add to existing parking. *Peter Bez moved to grant with specific conditions per bylaw, Ken Janson seconded, and it was so voted, 4-0, 1 absent (Gary Reinhardt).* Peter Bez will write the decision.

## MISCELLANEOUS

Rick Murray reported that he had been asked to move application 99-012 to first on the public hearing agenda. Rick Murray informed the applicant in 99-011 that the Board will not have a quorum for that case, but that the hearing will be opened so that there is not a need to readvertise. Rick Murray asked the applicant to bring all necessary materials to the next meeting.

Chair Rick Murray postponed the Work Session until after the Public Hearing.

## **PUBLIC HEARING**

Chair Rick Murray called the hearing to order at 7: 07 PM and informed the audience of the public hearing procedures. Six members of the Board were present and two were absent with excuses (Ray Boylan, Gary Reinhardt ).

**99-007 284B Commercial Street, Unit 6, David Eliseo and Martin Johnson** - Rick Murray, Ken

Janson, Barbara Gard, Peter Bez, Steve Melamed sat on case. David Eliseo and Martin Johnson appeared to present the application, which is for a special permit to construct a front porch and arbor. No one spoke either in favor or opposition. There were no letters in file. Board: will expand deck further into setback; is a multi-family building - requires variance to go into setback; question of lot coverage; need figures on lot size and building size; also need approval from condominium association; can average rear line setback; possible need for site visit; need revised site plan. Taken under advisement.

**99-008 131A Commercial Street, Francis J. Santos** - Rick Murray, Ken Janson, Barbara Gard, Peter Bez, Greg Lambrou sat on case. Francis Santos appeared to present the application, which is for a special permit to construct a stairway. No one spoke either in favor or opposition. There were no letters in file. Rick Murray reviewed the report from the Building Commissioner. Board: third apartment does not yet exist; Board=s issue is only the proposed stairway. ***Ken Janson moved to approve, Peter Bez seconded with conditions, and it was so voted, 5-0.*** Ken Janson will write the decision.

**99-009 27 Commercial Street, Thomas DeFrancesco on behalf of Mary Joanne** - Rick Murray, Ken Janson, Barbara Gard, Peter Bez, Steve Melamed sat on case. Thom Thompson and Tom DeFrancesco appeared to present the application, which is for a special permit to allow the construction of decks within the Harborfront setback. Rick Murray informed the Board that they could rule under Goldhirsch. No one spoke either in favor or opposition. There were three letters in favor, none in opposition. Board: Rick Murray asked about a Cease and Desist order issued by the Conservation Commission and the applicants said that the problem had been corrected and the order lifted; question of application being under appropriate bylaw; non-conformancies; lot coverage; applicant is finalizing approval with the Historic Commission; is a legal two family being used as a single family. ***Steve Melamed moved to approve under Goldhirsch, Peter Bez seconded and it was so voted, 5-0.***

**99-010 401 2 Commercial Street, Arthur J. Santos on behalf of Zolton Gluck** - Rick Murray, Ken Janson, Barbara Gard, Peter Bez, Greg Lambrou sat on case. Arthur Santos appeared to present the application, which is for a special permit to reconstruct a single-family dwelling. Presentation: question of whether a special permit needed; discrepancy in lot size; have approval from DEP and Conservation Commission; will add 160 square feet to house; 32.7% lot coverage. Rick Murray explained that the non-conformancy is in the lot size and the fact that there are two uses on the lot, which would otherwise require 10,000 square feet. Board: is increasing non-conformancy. No one spoke in favor. Attorney Stinson, representing Elena Hall spoke in opposition, claiming a variance was needed. Elena Hall spoke in opposition. Dick Silva expressed concerns about the Town Landing. There were no letters in favor and five letters in opposition. Rick Murray reminded Mr Stinson that the deck in front of the restaurant is not considered a structure. Rick Murray asked the Board whether they should seek opinion of Town Counsel on the variance issue. Rick Murray asked the applicant if the deck on the beach would remain (yes). Board: should also ask Town Counsel if ruling could be under Goldhirsch and if for a special permit, under which bylaw. Mr Santos said the beach deck was not attached to the dwelling and should not be considered for lot coverage calculations. Rick Murray asked if the Building Commissioner had been consulted and Mr Santos said, yes, that the Building Commissioner had also consulted with a zoning specialist. Mr Santos provided a letter from the Board of Health. ***Barbara Gard moved to leave the public hearing open while Counsel=s opinion is sought, Ken Janson seconded and it was so voted, 5-0.***

Rick Murray recessed the Public Hearing at 8:50 PM for 10 minutes.

Rick Murray reconvened the Public Hearing at 9:00 PM.

**99-012 40A Nelson Avenue, Provincetown Heights, Inc. on behalf of Charlotte Nelson Rogel and Robin Garran** - Rick Murray disclosed that Attorney Snow, who was representing the applicants, was no longer his attorney. Rick Murray informed the public that this is the first comprehensive permit application and explained the procedures. Permit Coordinator had sent a letter to the applicant requesting more specifics on which waivers were to be sought. Before Rick Murray could announce the Board members who were to sit on this case (Rick Murray, Ken Janson, Barbara Gard, Steve Melamed, Greg Lambrou had been selected), Attorney James Veara, who was representing a group of eight neighbors, rose to two points of order. First, he stated that he had reached an agreement with the applicant that technical information could be presented at the next meeting of the Board. Second, Mr Veara requested that Rick Murray and Ken Janson recuse themselves from the case due to pending litigation. Mr Veara also disclosed that Steve Melamed is a client of Mr Veara's in an active case and therefore has a possible conflict-of-interest.

Rick Murray pointed out that the Board was missing two members and that Peter Bez is an abutter. Steve Melamed has a disclosure on file with the Town Clerk concerning his relationship with Mr Veara. Ken Janson also has documentation on file and has been cleared by the Ethics Commission. Rick Murray noted for the record Mr Veara's opposition to his being seated and said that he would not allow any pending litigation to affect his judgement. Rick Murray further stated that he has disclosures on file and has permission from the applicant to sit on the case. Ken Janson suggested that rather than attempt to seat members with conflicts, it might be better to seek the advice of Town Counsel. Rick Murray affirmed that the applicant has the right to a public hearing and suggested that they also seek the advice of the Selectmen. Greg Lambrou said that the Rule of Necessity meant that members with potential conflicts could sit on a case.

Attorney Snow said that the applicant had no problem with keeping the public record open until February 4<sup>th</sup> and on the issue of recusal, he said that the Board members had taken an oath of office to rule without prejudice, even if seated with a conflict. He said he had no objection to any of the members sitting on this case, that a small community makes conflict unavoidable. Mr Snow said that it would be sensible to seek outside guidance, that he does not want the process prejudiced.

Rick Murray said that they were going to continue the public hearing until February 4<sup>th</sup> anyway.

Jim Davis rose with a point of order, stating that Mr Veara needs to identify the people he represents. Mrs. Henrique said that she felt Mr Davis was out of line, that Mr Veara had previously identified his clients before the Planning Board. Rick Murray asked Mr Veara to disclose the names of his clients and Mr Veara complied.

Rick Murray stated that the Board will find a way to seat a panel to hear the application. Rick Murray asked two of Mr Veara's clients if they had any problem with him (Rick Murray) sitting on the case. Both clients responded neutrally, saying they needed to consult with their attorney.

Steve Melamed said he was concerned about the start date for the application time clock, that it should be reset to February 4<sup>th</sup>.

Rick Murray reminded those in attendance that the Zoning Board is a voluntary, unpaid board, that they are trying to do their best. The Board has tried to expedite all applications and be user-friendly. Rick Murray said that there is a potential for the appearance of conflict for everyone in town. He said the Board tries very hard to make impartial decisions. Rick Murray reiterated that he will seek the advice of Town Counsel and the Selectmen.

***Steve Melamed moved to reset the public hearing start date to February 4<sup>th</sup>, 1999 and Ken Janson seconded.*** Attorney Snow pointed out that the clock cannot be reset and Rick Murray agreed. ***The Board voted 0-5 to defeat the motion.***

Attorney Freeman, who also represented the applicants, commented that the public hearing needs to

be held within 30 days of the date of application and that January 21, 1999 was thirty days from the date of application. He asked if the Board does not have enough members that can sit on the case that night, has the public hearing been officially opened. Attorney Veara said that the applicant can waive the 30 day limit and can extend the time limits.

Rick Murray called a recess at 9:40 PM.

Rick Murray reconvened at 9:45 PM.

Rick Murray stated that, after conferring with other Board members, the feeling was that the hearing had been opened with five members seated. Rick Murray reminded those in attendance that both he and Ken Janson sat on the recent case involving the Crown & Anchor, which was represented by Mr. Veara. Mr Veara did not then object to Rick Murray and Ken Janson sitting on the case, despite the fact that it was after the appeal of the variance for Rick Murray's business. Rick Murray also mentioned a hearing on another case which could be considered a precedent, namely that of George's Pizza, which was continued to the next meeting at which time new members were seated on the case.

***Barbara Gard made a motion to continue this application until the meeting of February 4<sup>th</sup> , but there was no second.***

Attorney Snow said that he and Attorney Freeman have consulted their clients on the issue and, while they realize they could press forward and wind up in a courtroom, they would prefer to have a full, open hearing before the Zoning Board in Town Hall. The applicants have therefore agreed to waive the time constraints. Attorney Freeman said that the applicants have agreed to waive the requirement to hold a public hearing within 30 days of application, but not on the time allowed to make a decision. Mr Snow said that they have thereby cleared the issue of trying to seat a valid board that night. Mr Veara commented that the time extension has to be by mutual consent of both the Board and the applicant. Mr Freeman said that by agreeing to waive the time requirement, the issues of recusal and conflict become moot.

After discussion, the Board agreed it will have to be by Rule of Necessity that a full five member board is seated on this application.

***Steve Melamed moved to, with the agreement of the applicant, waive the requirement to hold a public hearing within 30 days of the date of application. Ken Janson seconded and it was so voted, 5-0.***

Attorney Snow offered a written, signed agreement to waive the timely hearing requirement.

***Ken Janson moved to adjourn the public hearing at 10:05 PM, Barbara Gard seconded and it was so voted unanimously.***

#### **WORK SESSION (continued)**

Chair Rick Murray reconvened the work session at 10:05 PM

## MISCELLANEOUS

Rick Murray asked the Board if they would prefer to have someone else represent the Board at the DRMCC meetings. Seeing no indication of any desire for such a change, Rick Murray reviewed several items to be brought before the DRMCC:

- What buildings should be included in scale calculations. By consensus the Board said that only habitable spaces should be included.
- The Assessors= Office is currently notifying every property owner within 300 feet of the subject property, while the law says that it should only be the abutters and abutters to abutters within 300 feet. ***Steve Melamed moved to authorize Rick Murray to tell the Assessor to limit abutter notification per MGL Chapter 40A. Ken Janson seconded and it was so voted, 6-0.***
- After discussion, ***Barbara Gard moved to authorize Rick Murray to request that every zoning board application be reviewed by DRM staff at the time of application. Ken Janson seconded.*** Discussion on the motion: question of confidentiality - zoning board application is a public document. ***The Board voted 6-0 to approve the motion.***
- The Board discussed cases, such those involving properties on Arch Street and Bangs Street, which are still Ahanging. @ ***Peter Bez moved to direct Rick Murray to bring such cases to the DRM, Ken Janson seconded and it was so voted, 6-0.***

## MINUTES

January 7, 1999 - ***Ken Janson moved to approve, Steve Melamed seconded and it was so voted, 5-0, 1 abstain (Greg Lambrou).***

## OTHER

Greg Lambrou questioned the situation where an applicant was told by DRM staff that their application was scheduled for a specific hearing date, but then the application was not put on the agenda. Rick Murray suggested that Greg Lambrou take the matter up with DRM.

Rick Murray said that there was not a qualified person on staff who could definitively answer questions about ethics and conflicts-of-interest. Concerning financial conflicts-of-interest, if a Board member has a disclosure on file, he or she still needs to get permission from the appointing authority (the Selectmen) to sit on a case. There is this distinct difference between how a financial relationship and a simple appearance of conflict should be handled. Steve Melamed stated that he has no problem sitting on case 99-012. By consensus, the Board agreed that lawyers should not be able to determine who sits on a case.

***Steve Melamed made a motion to adjourn at 10:22 PM and it was so voted.***