

**TOWN OF PROVINCETOWN  
ZONING BOARD OF APPEALS  
MEETING MINUTES OF  
October 5, 2017**

**Members Present:** Jeffrey Gould, Rob Anderson, Marianne Clements, Daniel Wagner and Steven Latasa-Nicks.

**Members Absent:** Jeremy Callahan (excused).

**Others Present:** Gloria McPherson (Town Planner) and Ellen C. Battaglini (Permit Coordinator).

Vice Chair Jeffrey Gould called the meeting to order at 6:33 P.M.

**EXECUTIVE SESSION**

TMC New England LLC v. Zoning Board of Appeals, Land Court Docket No. 17 MISC 000430. A declaration and vote, under G.L. c.30A, §21(a) (3), are expected, to allow the ZBA to go into executive session to discuss litigation strategy as a discussion in open session may have a detrimental effect on the litigation position of the ZBA. The litigation concerns the appeal of a ZBA decision that denied the Plaintiff's Special Permit application request for a Formula Business use at 132 Bradford Street.

*Vice Chair Jeffrey Gould declared that pursuant to G.L. c.30A, §21(a) (3), the ZBA would go into Executive Session to discuss litigation strategy, as a discussion in Open Session may have a detrimental effect on the litigation position of the ZBA. The litigation concerns the appeal of a ZBA decision that denied the Plaintiff's Special Permit application request for a Formula Business use at 132 Bradford Street. The ZBA will then return to Open Session. The vote by roll call was unanimous. Rob Anderson: Yes; Marianne Clements: Yes; Daniel Wagner: Yes; Steven Latasa-Nicks: Yes and Jeffrey Gould: Yes.*

The Board returned to Open Session at 7:12 P.M.

**PUBLIC HEARING**

Vice Chair Jeffrey Gould called the Public Hearing to order at 7:15 P.M. There were 5 members of the Board present and 1 absent.

- 1) **ZBA 17-64** (*postponed from the meeting of September 21<sup>st</sup>*)  
**3 Cudworth Street (Residential 3 Zone), KA Bazarian Construction, on behalf of Maria Cirino**–  
The applicant seeks a Special Permit pursuant to Article 3, Sections 3110, Change, Extensions and Alterations, and 3115, Demolition and Reconstruction, of the Zoning By-

Laws to demolish a garage and rebuild in the same footprint, adding dormers on the east and west elevations. Jeffrey Gould, Rob Anderson, Marianne Clements, Daniel Wagner and Steven Latasa-Nicks sat on the case.

**Presentation:** Lyn Plummer appeared to present the application. She said that the project has been revised and would not include the dormers as previously proposed. The revised proposal would demolish and rebuild the garage in kind. The proposed height will be 17' 1¾", as the existing height of 16' if duplicated would not have met current building codes. The garage is on a pre-existing, non-conforming lot and is non-conforming as to the east and south dimensions.

**Public Comment:** None.

**Board Discussion:** The Board questioned Ms. Plummer.

***Rob Anderson moved to grant a Special Permit pursuant to Article 3, Sections 3110, Change, Extensions and Alterations, and 3115, Demolition and Reconstruction, of the Zoning By-Laws to demolish a garage and rebuild in the same footprint at the property located at 3 Cudworth Street (Res 3), Marianne Clements seconded and it was so voted, 5-0. Steven Latasa-Nicks will write the decision.***

2) **ZBA 18-05** (*postponed from the meeting of September 21<sup>st</sup>*)

**350 Bradford Street (Residential 3 Zone), BPJC, LLC –**

The applicant is aggrieved by a July 12, 2017 decision by the Building Commissioner regarding the height of a structure at the property and is appealing that decision. Jeffrey Gould, Rob Anderson, Marianne Clements, Daniel Wagner and Steven Latasa-Nicks sat on the case.

**Presentation:** Attorney Lester J. Murphy, Ginny Binder, Dave Michniewicz, of Coastal Engineering, and Attorney E. James Veara appeared to present the application. Attorney Murphy said that the application was a request to overturn the Building Commissioner's decision regarding a zoning violation at the property located at 350 Bradford Street. He reviewed the history of the project, which when designed, was in conformity with the Zoning By-Laws and did obtain the approval of the Planning Board for site plan review. The zoning violation notice was issued in regard to the height of one of the structures, the building containing units 9 and 10, because it exceeded the 23' height requirement for flat roofs. Attorney Murphy reviewed the definitions of height and natural grade pursuant to the Zoning By-Laws. He said that determination of grade was the crucial factor in the determination of height. He explained the design process of the project and the permitting that had been granted to date. He reviewed the events that occurred once an abutter had made a complaint to the Building Commissioner about the building's height. When that complaint was lodged and reported to his client, BPJC, LLC, work was stopped on the building in order to resolve the issue. He said that at that point, Ms. Binder was hired to research and document the natural grade of the property and she did so based upon a Dept. of Public Works survey from 1920. She contended that this plan most accurately indicated where natural grade was located and before any human-made alteration as defined in the Zoning By-Laws. Her report was given to the Building Commissioner and the Board. He reviewed a portion of Ms. Binder's research regarding the natural grade.

He said that the Town had hired the firm Ryder & Wilcox to render an independent evaluation of the height of the building in question. He argued that their height determination was based on incorrect elevations taken from a 1990 septic plan drawn by William N. Rogers. And that this misinformation, and the methodology used by Ryder & Wilcox, was the basis of the Building Commissioner's decision regarding the zoning violation. Attorney Murphy further argued that the applicant's engineer, Dave Michniewicz, of Coastal Engineering, performed an analysis that supported the applicant's appeal and showed a building height that was 2' below the 23' height above natural grade.

Attorney Murphy said that the applicant had provided to the Building Commissioner and the Board a stamped and signed plan by Coastal Engineering triangulating and superimposing Binder's 1920 survey with elevations showing compliance with the Zoning By-Laws. He alleged that the 1920 plan is the earliest available, reliable topographical data for this site and documents the grade before any human-made alteration. This is the information that is required under the By-Law definition of natural grade and, he asserted, has not been contested or invalidated by any surveyor. He concluded that the height of the structure containing units 9 and 10 was in conformity with the Zoning By-Laws and that the discredited and unreliable Ryder & Wilcox plan and analysis could not be relied upon as a basis for the Building Commissioner's violation. In conclusion, he stated that if the Board were to uphold her decision, the applicant would have the option of redesigning the structures with pitched roofs, which would raise their heights by 10', and would still be consistent with the Zoning By-Laws.

Ms. Binder reviewed her research, which concluded that the 1920 plan shows the last time non-human altered topography existed on the site. She said she would review her methodology in more detail at the Board's request.

Mr. Michniewicz reviewed his analysis and the methodology to come to the conclusion that the height complied with the Zoning By-Laws using the 1920 DPW plan.

Attorney Veara reviewed his letter to the Building Commissioner regarding the issue, outlining the two separate interpretations of natural grade. He said that he had talked to two people from Ryder & Wilcox, including Phillip Scholomiti who made the Ryder & Wilcox determination of grade, and they both indicated to him that the plan they used for their analysis did not constitute natural grade for the purpose of determining building height. Therefore, the Ryder & Wilcox analysis, and the 1990 plan of William N. Rogers upon which it was based, was flawed and the Coastal Engineering's methodology and analysis were correct. This supported the Attorney Murphy's argument that the Building Commissioner's decision should be overturned.

**Board Discussion:** The Board questioned Attorneys Murphy and Veara, Ms. Binder and Mr. Michniewicz. Attorney Veara acknowledged during this discussion that an error of miscalculation had been made by the architect of the project based upon a plan that the applicant's engineer had created of existing conditions.

Anne Howard, Building Commissioner, reviewed her decision and how it she came to her conclusion about the height, and as the 1990 William N. Rogers' septic plan was the earliest record that the Town had of the site, it was given to Ryder & Wilcox for its independent analysis of building height. The Board questioned Ms. Howard.

Phillip Scholomiti, a land surveyor with Ryder & Wilcox, explained his analysis and methodology. He said that there was a letter from the applicant's architect, EGA Architects, that they too, had used the 1990 plan by William N. Rogers to establish a basis for natural grade. He had a copy of the architect's site plan that showed the highest point of the roof on Units 9 and 10, as 37.22'. His determination after taking measurements in the field was that those units were too high by 6.2'. He said that using the same benchmark as Coastal Engineering that is located on the ground at the site, he found a difference in elevation from the proposed elevation shown on the architect's plan of 4'. The Board questioned Mr. Scholomiti. He said that the as-built ridge height was 41.1', whereas the architect's plan showed a proposed height for Units 9 and 10 as 37.22'.

Attorney Veara denied that the buildings were built higher than what had been approved.

**Public Comment:** William N. Rogers, who denied that his 1990 plan showed natural grade, challenged the accuracy of Mr. Scholomiti's analysis and Bob Hazard spoke in support of the appeal. Len Bowen had a point of information about the 1920 plan and a comment about the applicant's option of utilizing pitched roofs. Louise Venden read an email from the Somerset Heights Homeowners' Association stating why it was not presenting its opposition to the appeal, and she also spoke in opposition to the appeal. Clint Kershaw, representing 4 abutters at 11 Bradford Acres Road, spoke in opposition to the appeal. There were 5 letters in opposition to the appeal.

**Board Discussion:** The Board questioned Ms. Howard again. Vice Chair Jeffrey Gould polled the Board. Attorney Jonathan Silverstein suggested that Board members articulate their findings and reasoning for their individual conclusions.

***Steven Latasa-Nicks moved to deny the appeal by BPJC, LLC of a July 12, 2017 decision by the Building Commissioner regarding the height of a structure at the property located at 350 Bradford Street (Res 3), Marianne Clements seconded and it was so voted, 5-0. Jeffrey Gould will write the decision.***

3) **ZBA 18-07** (*postponed from the meeting of September 21<sup>st</sup>*)

**963 Commercial Street, #28 (Residential 1 Zone), Linda E. Salmon -**

The applicant seeks a Special Permit pursuant to Article 3, Section 3110, Change, Extensions or Alterations, of the Zoning By-Laws to vertically extend a cottage up pre-existing, non-conforming dimensions. Jeffrey Gould, Rob Anderson, Marianne Clements, Daniel Wagner and Steven Latasa-Nicks sat on the case.

**Presentation:** Linda E. Salmon appeared to present the application. She requested that the Board hear the matter under the *Goldhirsh v. McNear* ruling. She reviewed the project that involved the structure on the site going up vertically in a pre-existing, non-conforming rear, or east, dimension. There will be no increase in the footprint of the structure and she argued

that the change would not be more detrimental to the neighborhood than the existing situation. She reviewed the history of the project and why zoning relief had not been requested at an earlier stage of the project.

**Public Comment:** Attorney Ed Patton, representing Maria Kuliopulos, an abutter, and Jason Kuliopulos spoke in opposition to the application. Michael Powers and Donna Pilliere spoke in support of the application. There were 4 letters in support and 1 letter opposed to the application.

**Board Discussion:** The Board questioned Ms. Salmon.

*Jeffrey Gould moved that the addition to the non-conformity meets the non-substantially more detrimental to the neighborhood standard for G.L. c. 40A, s. 6 finding, Marianne Clements seconded and it was so voted, 5-0.*

- 4) **ZBA 18-11** (postponed from the meeting of September 21<sup>st</sup>)  
**22 Bangs Street & 6 Upper Miller Hill Road (Residential 3 Zone), Paul Fiore & David Foley -**

The applicants seek a Special Permit pursuant to Article 3, Section 3110, Change, Extensions or Alterations, of the Zoning By-Laws to replace a retaining wall. Jeffrey Gould, Rob Anderson, Marianne Clements, Daniel Wagner and Steven Latasa-Nicks sat on the case.

**Presentation:** Paul Fiore appeared to present the application. He briefly described the project. There is a crumbling retaining wall that needs to be replaced in the back of the property.

**Public Comment:** None. There were 5 letters in support of the application.

**Board Discussion:** The Board questioned Mr. Fiore.

*Steven Latasa-Nicks moved to grant a Special Permit pursuant to Article 3, Section 3110, Change, Extensions or Alterations, of the Zoning By-Laws to replace a retaining wall at the properties located at 22 Bangs Street & 6 Upper Miller Hill Road (Res 3), Rob Anderson seconded and it was so voted, 5-0. Rob Anderson will write the decision.*

- 5) **ZBA 18-12** (postponed from the meeting of September 21<sup>st</sup>)  
**22 Bangs Street (Residential 3 Zone), Paul Fiore & David Foley -**

The applicants seek a Special Permit pursuant to Article 2, Section 2550, Multiple Buildings per Lot, and Article 3, Section 3110, Change, Extensions or Alterations, of the Zoning By-Laws to renovate a cottage up and along pre-existing, non-conforming south and west elevations. Jeffrey Gould, Rob Anderson, Marianne Clements, Daniel Wagner and Steven Latasa-Nicks sat on the case.

**Presentation:** Paul Fiore appeared to present the application. He reviewed the request concerning the distance between the two buildings on the lot. The proposal is to increase the distance from 5' to 5' 6". He briefly described the cottage renovations, which were approved by the Historic District Commission.

**Public Comment:** None. There were 5 letters in support of the application.

**Board Discussion:** The Board questioned Mr. Fiore.

*Rob Anderson moved to grant a Special Permit pursuant to Article 2, Section 2550, Multiple Buildings per Lot, and Article 3, Section 3110, Change, Extensions or Alterations, of the Zoning By-Laws to renovate a cottage up and along pre-existing, non-*

*conforming south and west elevations at the property located at 22 Bangs Street (Res 3), Marianne Clements seconded and it was so voted, 5-0.*

Rob Anderson will write the decision.

6) **ZBA 18-13**

**15 Commercial Street (Residential 1 Zone), David Silva –**

The applicant seeks a Special Permit pursuant to Article 2, Section 2460, Special Permit Requirements, of the Zoning By-Laws to continue to allow public entertainment at the Red Inn. Steven Latasa-Nicks recused himself because of a conflict of interest. Jeffrey Gould, Rob Anderson, Marianne Clements and Daniel Wagner sat on the case. Vice Chair Jeffrey Gould explained to the applicant's representative that he would need a unanimous decision in order to be granted a Special Permit. He could choose to proceed or postpone until 5 members could be seated. He chose to proceed.

**Presentation:** Sean Burke, on behalf of the Red Inn, appeared to present the application. He briefly reviewed the request.

**Public Comment:** None. There was a letter from the Provincetown Police Dept. regarding reported noise complaints in the last 3 years.

**Board Discussion:** The Board had no questions.

*Marianne Clements moved to grant a Special Permit pursuant to Article 2, Section 2460, Special Permit Requirements, of the Zoning By-Laws to continue to allow public entertainment at the Red Inn at the property located at 15 Commercial Street (Res 1), Rob Anderson seconded and it was so voted, 4-0. Marianne Clements will write the decision.*

**NEXT MEETING:** The next meeting will take place on Thursday, October 19, 2017. It will consist of a Work Session at 6:30 P.M. and a Public Hearing at 7:00 P.M.

**ADJOURNMENT:** *Daniel Wagner moved to adjourn the Public Hearing at 10:51P.M. and it was so voted unanimously.*

## **EXECUTIVE SESSION**

TMC New England LLC v. Zoning Board of Appeals, Land Court Docket No. 17 MISC 000430. A declaration and vote, under G.L. c.30A, §21(a) (3), are expected, to allow the ZBA to go into executive session to discuss litigation strategy as a discussion in open session may have a detrimental effect on the litigation position of the ZBA. The litigation concerns the appeal of a ZBA decision that denied the Plaintiff's Special Permit application request for a Formula Business use at 132 Bradford Street.

*Vice Chair Jeffrey Gould declared that pursuant to G.L. c.30A, §21(a) (3) the ZBA would reconvene in Executive Session to continue the discussion of litigation strategy as a discussion in Open Session may have a detrimental effect on the litigation position of the ZBA. The litigation concerns the appeal of a ZBA decision that denied the Plaintiff's Special Permit application request for a Formula Business use at 132 Bradford Street. The ZBA will not*

*return to Open Session. The vote by roll call was unanimous. Marianne Clements: Yes; Daniel Wagner: Yes; Steven Latasa-Nicks: Yes and Jeffrey Gould: Yes.*

Respectfully submitted,  
Ellen C. Battaglini

Approved by \_\_\_\_\_ on \_\_\_\_\_, 2017  
Jeffrey Gould, Vice Chair