



Town of Provincetown  
Zoning Board of Appeals  
Town Hall, Provincetown, MA 02657

September 17, 2020

## Findings and Decision of the Zoning Board of Appeals

Case Number: ZBA 20-65  
Applicant/Owner: 53 Commercial Provincetown, LLC  
Property Address: 53 Commercial Street  
Assessor's ID: 5-4-1-0  
Deed Reference: Certificate 211107, Document 1306892  
Zoning District: Residential District 2 (Res2)  
Board Members: Erik Borg  
Jeremy Callahan  
Peter H. Okun  
Steven Latasa-Nicks  
Daniel Wagner

### I. Introduction

The Applicant is petitioning the Zoning Board of Appeals seeking a Special Permit pursuant to Article 2, Section 2640 Building Scale, Article 3, Section 3110 Change, Extensions or Alterations, and Article 3, Section 3115 Demolition and Reconstruction of the Town of Provincetown Zoning By-Laws (the Zoning By-Laws) to demolish a structure and replace it with two new structures, one of which will exceed the neighborhood average building scale and extend up and along a pre-existing, non-conforming east side yard setback on the property located at 53 Commercial Street (Res2 Zone).

### II. Decision

**The Zoning Board of Appeals hereby grants Special Permit relief pursuant to the Zoning By-Law, Article 2, Section 2640 Building Scale, and Article 3, Section 3110 Change, Extensions or Alterations and Article 3, Section 3115 Demolition and Reconstruction, by a vote of 5 in favor, 0 opposed, and 0 abstaining.**

### III. General Findings

1. The Property is located at 53 Commercial Street, Provincetown, Massachusetts, is known by the Assessor's Office as Parcel ID: 5-4-1-0, and is recorded with the Barnstable County Land Court as Certificate 211107, Document 1306892.
2. The Property is located in the Residential District 2 (Res2) zoning district.
3. The Property is 10,699± sq. ft. in size and developed with a three-story, two-family residential structure.
4. The Subject Property is a lawful pre-existing, non-conforming lot with respect to minimum frontage (40± ft. where 50 ft. is required).
5. The lawfully located pre-existing structures, including sheds and decks, are nonconforming with respect to minimum side yard setback (0± ft. where 6 ft. is required), minimum rear yard setback (0± ft. where 15 ft. is required), maximum building height (35± ft. where only 33 ft. is allowed), and maximum number of stories (3 where only 2.5 are allowed).
6. The proposed Project includes demolishing the existing two-family structure and replacing it with two new single-family structures located on the same parcel. The southernmost building is proposed to be 32.375± ft. in height above natural grade, 2.5 stories, and further landward than the historic Mean High Water, and constructed outside of the velocity zone.
7. The northernmost building closest to Commercial Street is designed to conform to zoning and relief is sought only for the southernmost building closest to the ocean.
8. The southernmost proposed building will extend the pre-existing, non-conforming east side yard setback (2± ft. for existing decks and 5± ft. for building where 6 ft. is required).
9. The neighborhood average scale is 19,375 cf. with a maximum allowable increase from the neighborhood average of 15% within the Historic District of 22,281 cf.
10. The existing principal structure's scale is 43,960± cf., which is 97.3±% above the maximum allowable increase from neighborhood average scale, and is proposed to be demolished. The new southernmost building's scale will be 47,808± cf. which is an 8.75±% increase in scale above the existing structure and is 114.5% above the maximum allowable increase from neighborhood average scale.
11. Work to demolish the existing structure received approval on February 5, 2020 from the Provincetown Historic District Commission (HDC 20-134).
12. The Project received a Certificate of Appropriateness dated March 4, 2020 issued by the Provincetown Historic District Commission (HDC 20-134).
13. The Board held a public hearing on September 3, 2020. Note that the hearing was held virtually in accordance with Governor Baker's March 12, 2020 Order Suspending Certain Provisions of the Open Meeting Law, March 23, 2020 Order imposing strict limitation on the number of people that may gather in one place, and Chapter 53 of the Acts of 2020. Attorney Lester J. Murphy represented the Applicant and was joined by Engineer Stacy Kanaga of Coastal Engineering and Architect Peter McDonald in presenting the Project and the Board provided an opportunity for all those attending the public hearing to be heard.
14. There were four letters from the public expressing concerns with the project that included: impact to views of the ocean from the street (there are no view easements or other restrictions on the privately owned property that would protect views from the public way and the property is adjacent to the west end parking area which offers public access and views to the ocean); increasing the building footprint within the flood zone will increase flooding for the neighborhood (the entire property is located within flood zone; a portion of the existing building proposed to be demolished is located within the velocity zone and

has incurred past flood damage; the proposed buildings are located outside the velocity zone and will be raised to comply with the Massachusetts Building Code to mitigate potential flood hazards); the building scale is too large (the proposed building includes an 8.75±% increase in scale above the existing structure); the building height is significantly taller than neighboring buildings (the southernmost building is proposed to have a gable roof, be 2.5 stories, and 32.375± ft. tall which complies with the maximum height of 33 feet required by Section 2560); and there is insufficient parking (proposed parking complies with Section 2470 which requires 1.5 parking spaces per dwelling unit with two or more bedrooms).

15. The applicant submitted an exhibit and renderings of the Project and the Board members had sufficient time to review these prior to the hearing. These included:
  - a. Plan entitled “Plan Showing Existing Site Conditions” prepared for Jay Anderson, prepared by Coastal Engineering Co. at a scale of 1” = 10’ dated July 24, 2018, certified by John McElwee, PLS No. 33602 in 1 sheet (24x36) labeled C1.2.1.
  - b. Plan entitled “Plan Showing Proposed Site Modifications” prepared for Jay Anderson, prepared by Coastal Engineering Co. at a scale of 1” = 10’ dated March 16, 2020, certified by Stacy Kanaga, PE No. 52475 in 1 sheet (24x36) labeled C2.1.1
  - c. Architectural Plan Set entitled “Jay Anderson Residence 53 Commercial Street Provincetown, MA” prepared by Peter McDonald Architects, dated March 16, 2020, uncertified, in 8 sheets (24x36) labeled D1, D2, and A1 through A6.

#### IV. Applicable Law and Decision Criteria:

1. Massachusetts General Laws Chapter 40A, Section 6 (Existing structures, uses, or permits):  
*...Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood...*
2. Section 2640 E of the Zoning By-Law:  
*Discretionary approval for a deviation in building scale may be granted if the Board of Appeals finds that the deviation meets the standards for a Special Permit, under Article 5, Section 5300 and that the applicant demonstrates that the deviation is appropriate and meets one or more of the following criteria:*
  1. *The proposed building or addition is in keeping with the goals and objectives of the Local Comprehensive Plan.*
  2. *The building is an important structure to the community as a whole. Public buildings are logical candidates for this type of conditional approval. For example, the Pilgrim Monument is out of scale with everything in town, yet its value as a monument to the town's history and in giving identity to the town, makes it acceptable.*
  3. *The proposed building or addition by necessity must be large and that the location is suited for that larger scale use. For example, churches may be permitted uses in*

*a residential district and their larger scale is often dictated by traditional architectural forms.*

4. *The building scale deviation is warranted due to the size of the parcel of land involved so as to discourage subdivision into smaller parcels and the proposed building or addition will not result in a structure that will disrupt the character of the neighborhood in which it is located.*
  5. *The proposed building or addition successfully integrates into its surroundings and is sited in a manner that minimizes the appearance of mass from the streetscape and will not have a significant negative impact on the natural light to, or views from, neighboring structures.*
  6. *The property is located in the Provincetown Historic District and the addition is consistent with the Historic District Guidelines and approval of the deviation would further the purpose and intent of the bylaw.*
3. Section 3110 of the Zoning By-Law:  
*As provided in Sec. 6, Ch. 40A, G.L., lawfully preexisting, non-conforming structures and use may be altered, reconstructed, extended or changed as set forth below...*
1. *Single and two family structures may be altered as provided for under G.L. c.40A, §6, 1, with any required finding by the Board of Appeals that needs to be made, to be made by Special Permit and any new nonconformity to obtain any necessary dimensional relief.*
4. Section 3115 of the Zoning By-Law:  
*A nonconforming structure and/or use may be demolished and reconstructed, and/or reestablished by Special Permit and in accordance with the following provisions:*
1. *Reconstruction of said premises shall commence within two years after such demolition.*
  2. *Structures(s) as reconstructed shall be located within the same footprint as the original nonconforming structure and shall be only as great in building scale or area as the original nonconforming structure, unless as approved under Section 3110.*
  3. *The use of said premises shall be reestablished within one year of the issuance of the certificate of occupancy.*
5. Section 5330 of the Zoning By-Law:  
*Special Permits (other than those specified in Section 3420) shall be granted by the Special Permit Granting Authority only upon its written determination that the social, economic or other benefits of the proposal for the neighborhood or town outweigh any adverse effects such as hazard, congestion or environmental degradation.*

V. Specific Findings:

The Zoning Board of Appeals hereby finds the following:

1. Where the Project proposes two new buildings, the northernmost building complies with zoning, and work on the southernmost building is generally located within the same area of lot as the existing structure that is proposed to be demolished and the

- proposed change, extension or alteration is not substantially more detrimental than the existing nonconforming structures to the neighborhood or Town.
2. Where the existing Property includes two residential dwelling units and the Project proposes two single-family residential units, it does not propose to change the existing residential use and the use of said premises will not be altered or extinguished by the Project.
  3. Where the proposed southernmost building's scale will be 47,808± cf. which is an 8.75±% increase in scale above the existing structure and is 114.5% above the maximum allowable increase from neighborhood average scale, the volume will be located within the same general area of the existing 3-story structure proposed to be demolished, and is due in part with raising the proposed building's foundation to comply with the Massachusetts Building Code for structures located within the flood zone, such that the proposed building successfully integrates into its surroundings and is sited in a manner that minimizes the appearance of mass from the streetscape by maintaining the appearance of a 2.5 story structure and being located behind a smaller proposed single-family dwelling located on the same lot, and will therefore will not have a significant negative impact on the natural light or neighboring structures.
  4. Where the Property is located in the Provincetown Historic District and the Project received a Certificate of Appropriateness dated March 4, 2020 issued by the Provincetown Historic District Commission (HDC 20-134), the proposed building is consistent with the Historic District Guidelines and approval of the change, extension or alteration of the nonconformity would further the purpose and intent of the bylaw.
  5. Where proposed work is within the same general area of the existing building within the Property, the Project is designed to maintain reasonable means of access and egress and the proposed alterations are unlikely to create construction hazards or increased congestion on Commercial Street.
  6. Where proposed extensions of the lawful, pre-existing nonconformities are generally within the existing structures footprints, the Project may be granted the necessary dimensional relief such that the change, extension or alteration is not substantially more detrimental than the existing nonconformity to the neighborhood or Town.
  7. That the Applicant submitted plans containing appropriate supporting detail showing that the size and scale of the proposed extensions and alterations are designed to be architecturally compatible with neighboring buildings so as to reduce the appearance of increased scale and not substantially detract from buildings located within the neighborhood.
  8. As a result of the above (Sections III - V), the Board finds that the social, economic or other benefits of the Project for the neighborhood or Town outweigh any adverse effects such as hazard, congestion or environmental degradation.

A. Waivers. No waivers were requested as part of the Application.

VI. VoteZBA 20-65:

Motion by Steven Latasa-Nicks to grant a Special Permit pursuant to the Zoning By-Laws Article 2, Section 2640 Building Scale, Article 3, Section 3110 Change, Extensions or Alterations, and Article 3, Section 3115 Demolition and Reconstruction, to demolish a structure and replace it with two new structures, one of which will exceed the neighborhood average building scale and extend up and along a pre-existing, non-conforming east side yard setback on the property located at 53 Commercial Street. The Motion was seconded by Peter Okun.

**VOTE: By 5 in favor, 0 opposed, and 0 abstaining the Zoning Board of Appeals Approved this application.**

SIGNED BY:

DATE OF FILING:

A copy of the application in this matter, bearing the stamp of this Board, the signatures of the sitting members or the designee, and the date of this decision, will be on file in the Provincetown Department of Community Development. The applicant is hereby put on notice that any deviation from the above referenced application shall invalidate this Decision and shall require further review by this Board. Furthermore, the Decision issued hereunder shall not be valid until recorded at the Registry of Deeds in Barnstable as provided in the Provincetown Zoning By-Law and G.L. ch. 40A.

Important: Any appeal from the decision of the Zoning Board of Appeals can be made only to the Court and must be made pursuant to MGL ch. 40A, § 17, as amended, and must be filed within twenty (20) days after the date of filing of the decision with the Town Clerk.

Note: or as such timeframes are suspended and extended pursuant to Section 17 of Chapter 53 of the Acts of 2020.