



ZONING BOARD OF APPEALS

2 Fairgrounds Road
Nantucket, Massachusetts 02554
www.nantucket-ma.gov

Commissioners: Susan McCarthy (Chair), Lisa Botticelli (Vice chair), Ed Toole (Clerk), Michael J. O'Mara, Elisa Allen
Alternates: Mark Poor, Geoff Thayer, Jim Mondani

~~ MINUTES ~~

Thursday, December 9, 2021

This meeting was held via remote participation using ZOOM and YouTube.

Called to order at 1:00 pm and Announcements made by Ms. McCarthy

Staff in attendance: Leslie Snell, Deputy Director of Planning; Nicky Sheriff, PLUS Admin spec; Marcus Silverstein, Zoning Enforcement Officer; Paul Murphy, Building Commissioner; Terry Norton, Town Minutes Taker
Attending Members: McCarthy, Botticelli, Toole, O'Mara, Allen, Poor, Thayer, Mondani
Early Departures: Poor, departed early in the meeting.
Town Counsel: Alex Weisheit, KP Law

I. APPROVAL OF MINUTES

1. November 22, 2021

Motion **Motion to Approve as modified.** (made by: Toole) (seconded)
Roll-call vote Carried 5-0//McCarthy, Botticelli, Toole, O'Mara, and Allen-aye

II. OLD BUSINESS

1. 30-21 Anne Dewez, et. al (Applicants) 103 Main Street Dennison
Applicant is appealing the determination of the Zoning Enforcement Officer that a structure at 103 Main Street conforms to the definition of hot tub/spa in Zoning Bylaw Section 139-2A. Locus is situated at 103 Main Street, shown on Assessor's Map 42.3.3 as Parcel 153, and as Lot 2 upon Plan File 04-48. Evidence of owner's title is recorded in Book 1494, Page 211 at the Nantucket County Registry of Deeds. The site is zoned Residential Old Historic (ROH).
Voting McCarthy, Toole, O'Mara, Allen, Thayer
Alternates Poor, Mondani
Recused None
Documentation File with associated plans, photos, required documentation, and Timing Deadlines PowerPoint
Appellant rep. Wayne Dennison, Brown Rudnick LLP
Anne Dewez, 5 Mill Street
Appellee rep. Arthur Reade, Reade, Gullicksen, Hanley, & Gifford LLP
Dan Bailey, Pierce Attwood
Linda Williams
Discussion (1:07) **Weisheit** – Procedural matters have been related to him. One matter is standing of abutters and whether or not they are aggrieved persons; the Board should solicit how they are aggrieved. Another matter is the timeliness of the appeal; normally an abutter must challenge a ruling within 30 days of issuance of the permit; the papers submitted here raise the question of when the notice of the issuance of the building permit occurred; the Board should elicit facts about when the abutters had actual or constructive notice of issuance of the building permit. Those two matters should be addressed first then dive into the question of hot tub versus pool.
Mondani – Asked for clarification about the 30 days or 8 years and what triggers which. Also asked if matters what was installed versus what was permitted.
Weisheit – The normal rule is 30 days; case law become murky when an abutter claims they had no notice within 30 days. There are some cases in which the land court takes equitable factors into account and if the abutters waited until after the work was completed before appealing. He'd be interested to hear why enforcement wasn't requested during construction. If what was constructed was something different from what the building permit contemplated, the court might be more lenient on the 30-day deadline. He understands that what was constructed here is what the permit allowed.
Dennison – In his opinion, the Zoning Enforcement Officer (ZEO) got this wrong; there have been procedural issues raised. The law is nuanced around notice; he's organized cases around the appeal versus issuance of the building permit. The staff comment looks like the staff is recommending looking at procedural and timing. Referred to a Timing Deadlines PowerPoint explaining the Massachusetts General Law regarding notification of issuance of a building permit and aggrievement. If you have a permit for a spa and you install a pool, you have exceeded the building permit. Another issue is standing as an aggrieved person. Ms. Anne Dewez at 5 Mill Street and Mr. Robert Kargman at 8 Mill Street testified to diminution in their property and other nearby property values due to the construction of an unlawful pool. Mr. Peter Taylor's property at 98 Main Street is within 55 feet of 103 Main Street. All these properties are within the ROH, which

prohibits swimming pools. Addressed the definition of pools versus spas versus plunge pools. The definition of spa doesn't address gallonage. Cited case precedent allowing multiple or successive request for zoning bylaw enforcement. He doesn't agree with Town Counsel that this case is murky; the law applies to this case where there was no actual notice of issuance of the building permit.

Bailey – After reading the many cases, he agrees with Town Counsel that it's not black and white. Regarding timeliness, the question is whether or not Ms. Dewez had constructive notice of issuance of the building permit; The Historic District Commission (HDC) approved the spa in December 2020; the building permit was issued on March 3, 2021 with construction beginning on April 23, 2021. Reviewed the reasons he feels Ms. Dewez was aware that construction had started at 103 Main Street. No one said anything between April and August until the gunite for the spa sides arrived when Ms. Dewez approached the workers. These cases on timeliness are much talked about; there is a question if a permit holder can be subject to enforcement after construction, which is based upon a building permit, is complete. Zoning boards don't normally look at the subject of standing; it requires fact-finding and inquiry. He submits there is no standing; explained reasons for his opinion that none of the appellants have standing. To be aggrieved, a person must state a particularized harm, which no one has in this case. For these reasons, we request the Board dismiss the appeal.

Reade – There is a distinction in the bylaw between hot tub/spa and a swimming pool. The hot tub/spa falls within the category of accessory use permitted under Zoning Bylaw section 15. In 2017 at Special Town Meeting (STM) a definition of hot tub/spa was included for clarification. The definition of pool includes language for exceeding 1,000 gallons; he submits that language has resulted in many absurd results. Explained the math behind the error of having the 1,000 gallons as part of the pool definition. Commissioner Murphy was correct in issuing the building permit.

Toole – Asked Mr. Weisheit's response to the presentations.

Weisheit – He agrees the Board should address all issue including procedural and merits in one decision. He received the most recent submission from the appellant's counsel a couple of hours before this hearing and would like time to review that information. Both counsel have pointed out factual disputes; the law is nuanced in this area. It would behoove everyone to take more time to absorb the information.

Allen – Since Mr. Reade has all the math down, asked how many gallons would be in a body of water that is 15'X8' and 4' deep.

Reade – Approximately 4,000 gallons.

Toole – In one presentation, we heard this particular structure is 3,000 gallons.

McCarthy – That was in some of the letters of concerns; she doesn't recall it from the presentation.

Mondani – If you have a 3x3 spa, 1,000 gallons would allow for it to be 17' deep. His question is would that still be a spa; to him that would be more like a pool.

Reade – Any application of gallonage to pools and spas results in absurd results.

O'Mara – The math as he's heard it deals with a pool in terms of depth, length, and width. All spas have a gunite bench, which wouldn't be included in the cubic footage of a pool. From the photo, it's hard to tell if this structure as a spa bench. Asked Town Counsel that if the 1,000 gallons was a scrivener's error, what provisions are in there in the law for that.

Weisheit – He's not aware of any zoning related law with a scrivener's error. The zoning bylaws needs to be read as a whole; a court review this would take the language in its totality and would consider whether or not it leads to inconsistent results.

Dennison – The issue about gallonage is being approached backwards. Before 2011, a pool in Nantucket was a body of water over 1,000 gallons. You don't need a definition of a pool in terms of depth; what you need to know is putting in a spa that isn't a spa. As far as HDC review of a pool or spa, their jurisdiction is what is visible, and the depth isn't visible. If you don't impost the 1,000-gallon limitation, what you are saying is that you can put in a plunge pool in a district where swimming pools are prohibited. With respect to dispute over whether or not Ms. Dewez interacted with the workmen, there is an affidavit that never happened. Mr. Kargman has opined Ms. Dewez's property values are impacted by this use.

McCarthy – Mr. Dennison is saying Mr. Kargman is an expert witness whose affidavit give Ms. Dewez's status.

Dennison – Mr. Kargman has 50 years of experience in evaluation of real property. He has opined under oath that Ms. Dewez's property is impacted by this plunge pool.

McCarthy – If he's an expert witness, he is then not an aggrieved person and doesn't have the right to bring this appeal because he's providing support for an aggrieved person. For her, she hasn't heard anything about what the exact harm is to Ms. Dewez. She doesn't understand how a spa that blocks away impacts her property value.

Dennison – You can be both an expert witness and be an aggrieved person; that is sufficient to prove standing. You don't have to be an abutter to have standing. Ms. Dewez was acting on behalf of a group.

Bailey – He agrees Mr. Kargman has a lot of real estate experience, but he's not an appraiser. Cited a case where diminution in value alone wasn't enough to demonstrate aggravement. Courts are very strict on who is an aggrieved person. Someone who is 600' feet away will be hard pressed to prove aggravement.

Silverstein – He's read a lot of appeals where property value is a frequent argument; usually there is lack of proof for actual diminution in property value. Nantucket Bylaw is burnt from State Code Chapter 40.A, as are all municipal codes, with its own in-and-out. He spoke with the owners to work out the gallonage of this spa; he had hoped he would have it today. Appellants don't know that gallonage. The spa has a bench around all four sides, that cuts the gallonage down. 1,000 gallons stopped being a standard at 2017 STM; prior to that, the pool was defined as either greater than 150 square feet (sf) of surface

area with more than 24" depth or exceed 1,000 gallons. The definition, approved at STM, for a spa is defined as less than 150 sf surface area and depth greater than 2'. Mr. Reade addressed the ridiculous results of applying 1,000 gallons to a spa.

Allen – Asked Mr. Silverstein if the wording of the pool definition is 150sf OR 1,000 gallons.

Silverstein – The working is a surface area of more than 150 sf surface area AND a depth greater than 24" OR 1,000 gallons. We had this situation in early 2017; at that time, he requested the gallonage, which exceed 1,000 gallons; that was denied.

Allen – She googled 5 New Mill Street; 5 New Mill is more like 1,000 feet from the appellee's property. There is no way this structure will affect that property's value. Also, our current real estate market is off the chart, so in her opinion, that argument means nothing.

Dewez – It's important to understand the context of the definition for hot tub/spa; there were no public hearings and was part of a complicated technical amendment broken down into 5 pieces, one of which was definitions. Those definitions were for structures excluded from ground cover; it makes sense in that case to exclude gallonage. Stated she lives on Mill Street, which is closer to Main Street. She finds it incredible that it was insinuated she knew about this just because she lives in the old historic district. She knew nothing about this until she got a photo taken from the Thomas Macy House on August 9th. She did not complain to the construction crew; that statement is false. From 2011 to 2017, people abided by the less than 1,000-gallon rule. It's not hard to construct a basin of water that's less than 1,000 gallons and very comfortable. She has been following the HDC hearings this summer regarding construction in her neighborhood, each of which have spas designed to be under 1,000 gallons. Thinks it's sad to look at just procedural issues rather than the merits.

McCarthy – We are a regulatory board; it's our job to make decisions based upon zoning bylaw as written.

Silverstein – Agrees that dealing with the merit is paramount but the merits aren't there; this matches the definition for a hot tube. As far as regarding groundcover, there is nothing in any record saying the hot tub definition was added to the bylaw because of groundcover. As far as the structure under appeal, we haven't heard what the gallonage is and from all appearances, this is a spa and can't be used for anything but sitting in.

McCarthy – The question of abutters to abutters to abutters, she wants to be clear on who the appellants are. She would like to know the gallonage. Mr. Silverstein confirmed the benches all around the interior. Town Counsel has said they want time to review the memos. She wants to give Town Counsel time to respond in a meaningful way and give the Board better guidance regarding standing and timeliness. Action deadline expires before the next ZBA meeting on January 13th.

Murphy – Stated that this was a legally issued permit.

Toole – He'd like to look at this in person; he doesn't see a bench all the way around in the photo; the pool is done except for the finish and coping. The plans as submitted, don't show a bench in the spa.

Dennison – We will agree to an extension of the action date. You can't look at the spa definition and ignore the pool definition; you must look at both.

Williams – She's disturbed comments were attributed to her by someone without a clue. We split the definitions in the article and so the bylaw because we wanted to allow them; there were no problems until recently. Spas are innocuous and don't generate the noise of a pool. This meets the definition for a spa as stated in the bylaw. If this is continued to March, that's past the 1st publication of the articles.

McCarthy – This work has already been done. One of the issues is if there is standing for an appeal.

Mondani – The "elephant in the room" is the plunge pool; when this tech amend was made, he doesn't know of plunge pools were an issue. Asked if this is shot down by standing, asked if Mr. Dennison's client would file an appeal.

Dennison – All he's asked for is an interpretation of the bylaw that's consistent with the bylaw. Going forward, the case law is clear that repetitive requests relative to this pool/spa can be made under the appeals court decision. This already has a building permit, so it won't be impacted by the proposed article.

McCarthy – Suggested extending the action date to Feb 1. If you don't like the bylaw, Mr. D's client can change it; it's clear that the Town officials were working within the current bylaw.

Allen – The location of 5 Mill Street looks like more the 5'. It looks like there are 5 or 6 properties between 103 Main Street and 5 Mill Street. Asked if she is an abutter or a citizen appeal.

McCarthy – That's something she wants TC to rule on if any of these the appellants have standing. She also wants to know the existing gallonage of the spa and to see how it looks on the ground now.

Toole – Asked if he can go onto the property to look at what's there.

Bailey – He will check with the client.

Weisheit – Asked for something acknowledging they agree to extending the deadline.

Motion **Motion to Continue to January 13th meeting.** (made by: O'Mara) (seconded)

Roll-call vote Carried 5-0//McCarthy, Toole, O'Mara, Allen, and Thayer-aye

2. 18-21 Ack Smart as Applicant for 21 Woodbine LLC 21 Woodbine Street Beaudette
Applicant requests variance relief to validate the location of a solar ground array within the side and rear yard setbacks. The Locus is situated at 21 Woodbine Street, is shown on Nantucket Tax Assessor's Map 80 as Parcel 321 and shown as Lot 4 on Plan No. 54W on file with the Nantucket County Registry of Deeds. Evidence of owner's title is recorded in Book 1342, Page 75 on file at the Nantucket County Registry of Deeds. The site is zoned Limited Use General 1 (LUG-1).

Voting McCarthy, Botticelli, Toole, O'Mara, Mondani

Alternates None

Recused None

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|-------------------|---|
| Documentation | File with associated plans, photos and required documentation |
| Representing | Richard Beaudette, Vaughan, Dale, Hunter & Beaudette, P.C. |
| Public | None |
| Discussion (2:46) | Discussion about whether or not Mr. Toole can sit on this and his feeling he needs to review the information. |
| Motion | Motion to Continue to December 16 at 8:10 am. (made by: Botticelli) (seconded) |
| Roll-call vote | Carried 5-0//McCarthy, Botticelli, O'Mara, Mondani, and Toole-aye |
3. 19-21 Ack Smart as Applicant for Timothy & Lauren Miner 12 South Valley Road Beaudette
- Applicant requests variance relief to validate the location of a solar ground array within the front and side yard setbacks. The Locus is situated at 12 South Valley Road, is shown on Nantucket Tax Assessor's Map 43 as Parcel 139 and shown as Lot 76 on Land Court Plan 11461-J and as Lot 21 on Land Court Plan 11641- H on file with the Nantucket County Registry District of the Land Court. Evidence of owner's title is recorded as Certificate of Title No. 24316 on file at the Nantucket County Registry District of the Land Court. The site is zoned Limited Use General 1 (LUG-1).
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| Voting | McCarthy, Botticelli, O'Mara, Thayer, Mondani |
| Alternates | None |
| Recused | None |
| Documentation | File with associated plans, photos and required documentation |
| Representing | Richard Beaudette, Vaughan, Dale, Hunter & Beaudette, P.C. |
| Public | None |
| Discussion (2:47) | Discussion on whether or not to go forward with a 4-person board without Mr. Poor.
Snell – Suggested a special meeting for the two Ack Smart applications. No public notice necessary. |
| Motion | Motion to Continue to December 16 at 8:10 am. (made by: Botticelli) (seconded) |
| Roll-call vote | Carried 5-0//McCarthy, Botticelli, O'Mara, Mondani, and Toole-aye |
4. 21-21 Michael S. Jemison & Kristina Jemison 195C Hummock Pond Brescher
- Applicants are seeking a modification of a previously issued Special Permit (File No. 040-04) and to the extent necessary, a Special Permit for the expansion of the pre-existing nonconforming use, to allow for an increase in ground cover ratio to construct a pool cabana. Locus is situated at 195C Hummock Pond Road, shown on Assessor's Map 65 as Parcel 23, and as Unit 2 on Plan No. 03-34. Evidence of owner's title is recorded in Book 865, Page 40 with the Nantucket County Registry of Deeds. The site is zoned Village Residential (VR).
- | | |
|-------------------|---|
| Voting | McCarthy, Allen, Thayer, Mondani |
| Alternates | None |
| Recused | None |
| Documentation | File with associated plans, photos and required documentation |
| Representing | John Brescher, Brescher & Glidden P.C.
Lisa Botticelli, Botticelli & Pohl |
| Public | None |
| Discussion (3:09) | Brescher – All the Board was waiting for was the HDC Certificate of Appropriateness (COA) number; we have that. He thought the Board was ready to vote and is willing to go forward with the 4-member Board.
McCarthy – Staff brought up getting clarification on the no-cooking condition.
Toole – He could read back in; his conflict is more perceived.
Snell – This is not a dwelling so shouldn't have a kitchen. It could be conditioned with no stove or microwave.
McCarthy – Now that the cooking apparatus is gone, it is more of an enforcement issue.
Allen – If they decide not to install the washer-dryer and sink in the laundry room, can they get a Certificate of Occupancy (CO) because it looks like a bedroom again.
Murphy – Once they make that decision, they should come in to explain the change; he can still give them a CO as long as it complies.
McCarthy – If this is ruled as not for human habitation, any change towards a dwelling becomes an enforcement issue. Conditions would be: no egress basement windows, basement to remain unfinished, and not for human habitation; any changes to the plan are to come back for relief.
Brescher – Asked for a vote.
Discussion about a new motion:
McCarthy – Suggested adding a condition removing the door from the laundry room.
Allen – Wants the laundry room door removed and no provisions made to delete the laundry room and to get the CO, the laundry room must be in place with no door.
Discussion about how to condition this so that it can get 4 votes.
Allen – No laundry door and any further changes to come before the ZBA.
Botticelli – ZBA has no jurisdiction over the interior. At issue is the groundcover. |
| Motion | Motion to Approve as written with conditions as discussed; we are approving this as a cabana, not a dwelling. (made by: Thayer) (seconded) |
| Roll-call vote | Not Carried //McCarthy, Mondani, Thayer-aye; Allen-nay |
| Motion | Motion to reopen the application. (made by: Allen) (seconded) |
| Roll-call vote | Carried 4-0//McCarthy, Allen, Mondani, and Thayer-aye |

- Motion **Motion to Approve with no egress basement windows, unfinished basement, not for habitation, no exterior laundry door, constructed in substantial conformity with the attached plan, any changes to be reviewed by ZBA.**
(made by: Allen) (seconded)
- Roll-call vote Carried 4-0//McCarthy, Allen, Mondani, and Thayer-aye
5. 25-21 John J. Barry and Nancy J. Barry 1 Goose Cove Way Brescher
Continued to January 13, 2022
- Voting McCarthy, Botticelli, Toole, O'Mara, Mondani
Alternates Thayer
Recused None
Documentation File with associated plans, photos and required documentation
Representing None
Public None
Discussion (time) None
- Motion **Motion to Continue to January 13, 2022.** (made by: Mondani) (seconded)
Roll-call vote Carried 5-0//McCarthy, Mondani, Botticelli, Toole, and O'Mara-aye
6. 23-21 Timothy Green 6 Macy Road Williams
- Applicant is seeking a special permit pursuant to Zoning Bylaw Section 139-2A and 139-7A to construct a residential swimming pool on the locus. Locus is situated at 6 Macy Road, shown on Assessor's Map 60 as Parcel 144, and as Lot 265 upon Land Court Plan 3093-18. Evidence of owner's title is registered on Certificate of Title No. 28130 with the Nantucket County District of the Land Court. The site is zoned Village Residential (VR).
- Voting McCarthy, Botticelli, Toole, O'Mara, Allen
Alternates Thayer, Mondani
Recused None
Documentation File with associated plans, photos and required documentation
Representing Linda Williams
Public None
- Discussion (3:43) **Williams** – We marked the sideline and staked the end of the pool; there is no longer a retaining wall. The prior owner had owed part of the neighbor's lawn; we will replant that as shown in the new landscaping plans. We put it at grade so there is no issue with setback.
McCarthy – When we ask for a lighting plan, it can state on the plan where and type of internal lighting and no external lighting; that would suffice; Staff has the language.
Toole – Looking at the newest plan, it seems the 2nd-floor deck and part of the 1st-floor deck are within the setback.
Botticelli – The zoning setback is 10' and the pool setback is 20'.
Toole – The decision will mirror other decisions we've made: engage a professional to fill, discharge, and dispose of pool water; no chemical treatment between November 1 and May 1; chemical treatment stopped 3 prior to discharge; and landscaping and hardscaping is to be installed in substantial compliance with the submitted HDC approved site plan.
Allen – Confirmed which plan is the newest landscape plan.
Williams – It's the one that shows replanting of the abutters lawn and no retaining wall. She sent the revised plan out this morning.
Ms. Botticelli and Mr. Toole did not get that plan; Ms. McCarthy forwarded them a copy.
- Motion **Motion to Approve based upon Paul Santos landscape plan dated 12/2/2021 to be submitted as Exhibit A; Exhibit B to be the plan emailed out yesterday; and other conditions applicable to this type of application.** (made by: Botticelli) (seconded)
- Roll-call vote Carried 5-0//McCarthy, Botticelli, Allen, Toole, and O'Mara-aye

III. NEW BUSINESS

1. 37-21 Kristina & Nicholas Amendolare 8 Bank Street Williams
- Applicants are seeking a Special Permit pursuant to Zoning Bylaw Sections 139-30 and 139-33A to make renovations, including an addition, to a single-family dwelling that is pre-existing non-conforming to the setbacks. Locus is situated at 8 Bank Street, shown on Assessor's Map 73 and Parcel 69. Evidence of owner's title is recorded in Book 1770, Page 216 on file at the Nantucket County Registry of Deeds. The site is zoned Sconset Old Historic (SOH).
- Voting McCarthy, Botticelli, Toole, O'Mara, Allen
Alternates Thayer, Mondani
Recused None
Documentation File with associated plans, photos and required documentation
Representing Linda Williams
Michael Wilson, attorney
Public Margaret Van Deusen,
Kathy Arvay, 11 Front Street

Discussion (4:02)

Williams – Explained the application for raising the ridge 1' in the southwest setback. There was a lot of concern expressed at the HDC and after-the-fact objections, all of which have nothing to do with the ZBA.

Snell – Getting revisions to a project the morning of the meeting makes coordination very difficult.

Toole – He wants to see something that limits the height of the structure.

Thayer – The engineer plan calls out the ridge at elevation 37.7 (above sea level); that should be the number our decision would refer to.

Toole – The neighbor's opposition was probably toward the height, which has been reduced from the original submission.

Botticelli – It should be constructed in substantial conformance with the HDC approval. Looking at the east elevation, the south side of the taller roof should be extended no farther south.

Allen – Confirmed that the only thing within ZBA jurisdiction is the southwest corner of the little shed roof.

Wilson – We are asking for a finding that the *diminimis* increase in the roof height in the location calling for a 5' set back won't be detrimental.

Van Deusen – Regarding the HDC process, the vote was to hold for revisions and that cannot be appealed; their minutes don't reflect an approval. Many people from the neighborhood were on the September 7th meeting. This is going to have to be resolved by the HDC and whether or not there was a violation of Open Meeting Law (OML) by the HDC. Then this board compounding the issue by putting a height limit on this prior to HDC approval would be premature. The statement this wasn't appealed in time is inaccurate.

Botticelli – Asked if this was heard by HDC since September 7th at which this was approved.

McCarthy – Mr. Wilson and Ms. Snell reached out to Town Counsel; read their opinion that the motion to approve was carried by the majority of attendees; 2 voted in favor and 2 abstained leaving a 2-0 vote. Therefore, the motion to hold for revisions wasn't valid because the motion to approve was carried. This is what the HDC enabling act allows.

Toole – He's not comfortable the HDC was doing the right thing; he'd like a more complete vote of the HDC before moving forward with this.

O'Mara – It goes back to preventing obstructionism. He agrees with Town Counsel.

McCarthy – She sees no reason to hold this up.

Van Deusen – The HDC vote to hold was 4-0; that is something they have to work out. Given the timing on this, there is an opportunity to go back to the HDC on this. This has been a very contentious project for the neighborhood because of the height will have a deleterious effect on Front Street. Asked that this go back to HDC. Doesn't know how the plans got stamped when it was not approved at the meeting.

Williams – Town Counsel told HDC staff to stamp the plans.

McCarthy – This is a procedural issue for the HDC; Town Counsel has given an opinion upon which HDC moved forward. The HDC isn't contesting what occurred. Feels the ZBA has to take this at face value. If the HDC approval is reversed through litigation, our decision will follow that. At this point, this is a valid, approved, HDC request.

Van Deusen – Feels this will certainly be appealed because no one knew it was approved until this filing. Feels ZBA has some authority due to the irregularities with the HDC. If you allow this setback, you've approved a project the neighbors feel shouldn't be approved.

McCarthy – Any questions we would have on the HDC vote has been answered by Town Counsel, and it is not our purview to question their vote. We can still condition this.

Toole – Asked if the opponents have lost the ability to appeal the HDC decision or if anyone notified the aggrieved about the approval.

Williams – Yes, you only have 10 days to appeal based upon merits. They are filing an OML complaint.

Snell – The ZBA should rely on Town Counsel's opinion that the approval was valid. If you approve the request and then the HDC approval is found to be not valid, the applicant won't be able to implement the ZBA's plans.

McCarthy – If that happens and the structure gets revised, we would review it again.

Snell – If the ZBA includes the condition requiring substantial compliance with the HDC plans and those plans change, they have to come back to the ZBA.

Toole – Who asked for Town Counsel's opinion and why.

Snell – I did. It was an interesting vote; between our staff and the applicant and representatives, everyone thought the vote meant something different. Town Counsel explained that Roberts Rules of Order, which HDC follows, has a different process regarding voting than the ZBA and Planning Board.

Botticelli – Finds it interesting that the neighbors weren't informed of the approval denying them the ability to appeal the approval. HDC was mistaken that the motion to approve didn't carry; this is a very unusual circumstance.

McCarthy – We only have control over the application as it is before us.

Mondani – Asked for clarification on the request.

Wilson – Reviewed the structure and the reason for this request; less than 25sf will go up 1' within the setback.

Arvay – This is a pretty situation the way it was approved. A main concern is the fact that a basement will be excavated right against a bank backing onto a road that is emergency access; no one is addressing this. Feels an engineer study should be requested.

Wilson – That concern is addressed through the code and the Building Commissioner's review of the permit. The triangular section in question would have no impact on that.

Botticelli – We have required engineering plans when digging so close to the property lines. The footing will have to extend onto the other property.

Toole – We will need some protocol digging that close to the property line. We should ask for a plan. He's still very uncomfortable with how this played out and the applicant should have gone through the process and found a loophole and taking advantage of that.

Williams – It wasn't a loophole. The vote was questioned by staff.

Snell – Numerous people asked about the vote and what it meant; that's why she asked for Town Counsel's opinion. Further discussion about how the HDC vote was handled not allowing abutters the chance to appeal.

Botticelli – We need engineer's information on this.

O'Mara – His question is about construction and driving steel into the bank. He had assumed all Codfish Park was in a wetland.

Williams – This lot is not.

O'Mara – Agrees that in the past we always required an engineer's plan and stamp before we approved it.

Van Deusen – Codfish Park is on a flood plain and the bank is a coastal bank; both are protected by the Wetlands Protection Act. At some point the Conservation Commission decided they weren't going to regulate between South and North Gully due to the excessive construction in the area; she doesn't understand their reasoning.

O'Mara – Given the scope of the work, we need a lot more information. If he were a neighbor on the hill, he'd want to know how damage to the bank and neighbors would be mitigated.

Allen – Asked what type of foundation is proposed. It looks like the west elevation window wells are in the bank. As she sees the plan, there is no full basement or crawl space. The window well on the north side encloses the door swing area. If this is on a slab, from having to shore up the one side you don't have to dig any further into the ground than the 1st-floor.

Botticelli – We need clarification on the foundation and how deep it is. We need to understand on the digging perspective.

Allen – Asked if the ZBA can vote on the corner in question as the plans are now.

McCarthy – We usually require more information on a property that's this tight.

Thayer – They will need to retain both streets and the Town will have to sign off on both of those as well as Public Works will want to weigh in.

Wilson – The Board is appropriately situated on voting the relief as requested; that is that the integrity of the neighborhood is improved and there is no detriment. The course of construction must conform to the Building Code. Asked the Board to look at the finished elevation as it relates to the triangular piece and if the 1' increase will have a detrimental impact on the integrity of the neighborhood. It remains a single-family dwelling with the same level of non-conformity.

McCarthy – Other projects that are this close, we've asked for more information on the construction protocol.

Mondani – Mr. Thayer noted the construction will be governed by other Town agencies because the abutting properties are public roads.

Toole – We have always have been involved by making it part of our decision. He'd like to go see the site; it talks about an existing retaining wall that he doesn't see in the pictures. Also, the architect should make clear whether or not they are digging down and what needs to be retained.

Mondani – Agrees it would be helpful to look at this.

Thayer – The wall referenced is holding up Middle Gully Road.

Van Deusen – The plans presented to the HDC indicated 8' to 9' deep basement with living space.

Toole – The 1st-floor plan shows stairs going up and down; that indicated a basement. Also, he'd like them to go back to the HDC for an approval.

Arvay – Her property abuts to the north; there is a retaining wall on the north side. Also, there is a retaining wall to the west. The HDC plans called for 2 bedrooms and a bath in the basement.

Wilson – Asked what is being sought and if it is to be supplemented to this application.

McCarthy – She's like to see a basement plan. Asked if Ms. Williams or Mr. Wilson can confirm whether or not there is a full basement. We need clarification on the basement; how far they are digging down and an engineering plan addressing shoring up the abutting properties for the excavation.

Motion **Motion to Continue to January 13th, 2022; the board is expecting engineering plans addressing excavation and basement plan.** (made by: O'Mara) (seconded)

Roll-call vote Carried 5-0//McCarthy, Toole, Botticelli, MO, and Allen-aye

2. 29-21 CRH 46 Surfside, LLC
Continued to January 13, 2022

46 Surfside Road Halik

3. 31-21 James A. and Susan G. Genthner, Trustees of the James A. Genthner Trust and Susan G. Genthner Trust
128 Surfside Road Self

Applicant is seeking a variance pursuant to Zoning Bylaw Section 139-A and 139-32 to exceed the maximum allowable ground cover ratio of 7%. Locus is situated at 128 Surfside Road, shown on Assessor's Map 80 as Parcel 299.1 and as Lot 3 upon Land Court Plan 40394-B. Evidence of owner's title is registered on Certificate of Title No. 28319 on file at the Nantucket County District of the Land Court. The site is zoned Limited Use General 1 (LUG-1).

Voting McCarthy, Botticelli, Toole, O'Mara, Allen

Alternates Thayer, Mondani

Recused

Documentation File with associated plans, photos and required documentation

Representing Susan Genthner, co-owner

Public

Discussion (5:21) **Genthner** – Explained the reasons for her request; 2 paper roads flank her property, which she was awarded through the Yard Sale Program in 2013 and provides enough land for a second dwelling. The Land Court process is taking frustratingly long; reviewed the timeline since 2013. She's now asking for relief to allow her to start construction on a second dwelling.

Snell – The Land Court can be and unpredictably long process; there is no reason it won't be approved. The variance would be temporary until she takes possession of the roads.

McCarthy – We have gone forward on similar requests in the past; asked if this is in the same stage of process as those.

Snell – Yes. Ms. Genthner is not asking for relief on a potential setback matter.

Toole – He recalls the Linda Yates matter.

McCarthy – We had asked Ms. Yates to get to a certain point to ensure she would get the property. Our concern was that we would approve the variance and the structure built then when the yard sale came through, the owner decided not to purchase that property because they already have the property.

Snell – They were waiting for a new certificate to be issued.

Toole – He would prefer to wait until the new certificate is issued to the Town.

Botticelli – She doesn't have a strong feel. There will be a large number of these coming up and it's hard to keep granting variances.

O'Mara – He's willing to accommodate the applicant as long as we can tighten up the guarantee they will purchase the properties when they become available.

Genthner – She's stalled in the process; she had a design done, which is no longer available; she was half-way through the HDC process. She will have to do a redesign but doesn't want to start the process again until she's sure she can build the structure.

Allen – Asked if construction would start before she purchases the paper roads.

Genthner – She needs the variance in order to build the structure; once she purchases the land, the variance goes away. Because she thought the transfer of property was imminent, she placed the structure exactly where she wanted it. Now she wants the variance for groundcover; once she has that, she can come back about the placement.

Mondani – It's an important distinction if you are building on the existing property or building into the setback or road. We've gone through a couple of these and it's a matter of Land Court jammed up because of COVID; he feels more comfortable about granting something as long as the building is on her current property.

Thayer – He somewhat agrees with Mr. Mondani in that the relief sounds reasonable.

Genthner – The setback is 10' from the back line, asked if they could consider a lesser setback at this time.

Snell – We didn't advertise the setback relief; it's not an option to vote on today.

McCarthy – She agrees with Mr. Mondani about it not being built in the paper road. Asked about reducing the rear and side-yard setback.

Snell – In LUG-1, you can't reduce the setback; that has to be done through a variance. We could notice with setback for next month.

Discussion about how much to allow for intrusion into the setback and other requests involving delays at the Land Court.

Botticelli – Wants some assurance that the property can't be subdivided after the property is transferred.

McCarthy – No one seems ready to vote on this; asked how members want to proceed and what additional information they want to see: site plan with dimensions placing the structure showing a 10' setback.

Botticelli – She has to leave; she supports the continuance.

Motion **Motion to Continue to January 13, 2022.** (made by: Toole) (seconded)

Roll-call vote Carried 5-0//McCarthy, Toole, O'Mara, Allen, and Mondani-aye

IV. OTHER BUSINESS

- Toole – Asked if the next meeting was for December 16th and the time.
McCarthy – December 16th at 8:00 am and needs to be over by 9:15 am for the two ACK Smart projects. McCarthy, Botticelli, O'Mara, Thayer, and Toole on one and the other is McCarthy, Botticelli, O'Mara, Mondani, and Toole.
- McCarthy – Hopes the meetings will be back in person on February 10th and that will make the meetings shorter.
- Toole – Asked about the issue of a member showing up for 1 minute and leaving.
McCarthy – There is a process for that.

V. ADJOURNMENT

Motion **Motion to Adjourn at 6:00 pm.** (made by: Toole) (seconded)
Roll-call vote Carried unanimously

Sources used during the meeting not found in the files or on the Town website

1. None

Submitted by:
Terry L. Norton