



ZONING BOARD OF APPEALS

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

Commissioners: Susan McCarthy (Chair), Elisa Allen (Clerk), Michael J. O'Mara, John Brescher, Joe Marcklinger
Alternates: Mark Poor, Lisa Botticelli, Jim Mondani

~~ MINUTES ~~

Thursday, July 13, 2023

Public Safety Facility, 4 Fairgrounds Road, Community Room –1:00 p.m.

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, Director of Planning, William Saad, Land Use Specialist, Nicky Sheriff, Administrative Specialist;
Paul Murphy, Building Commissioner
Attending Members: McCarthy, O'Mara, Allen, Brescher, Poor, Marcklinger, Mondani
Remote participant:
Absent: Mondani

Agenda adopted by unanimous consent

Motion **Motion to Approve as drafted.** (made by: Brescher) (seconded)

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

I. APPROVAL OF MINUTES

1. May 18, 2022

O'Mara – Pages 1,4 &5 “his name is spelled wrong”

June 08, 2023

McCarthy- Pages 2 &8 “remove the word “foreign” after what Michael said and also some minor changes.

Motion **Motion to Approve as amended.** (made by: O'Mara) (seconded)

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

II. OLD BUSINESS

1. 37-21 Kristina & Nicholas Amendolare

8 Bank Street

Williams

Requests to Withdraw without Prejudice

Discussion 7:38 **Alger-** I don't think it's appropriate to allow a withdrawal without prejudice when you've gone through over a year of public hearings, and you've closed the public hearing and you're at the brink of taking a vote. To withdraw it without prejudice after all this time is unfair, particularly to the abutters.

McCarthy- Can you explain the thought process behind this?

Williams- We just like to withdraw without prejudice and if we come up with something we'll come back again for the September meeting and I don't believe the Board has ever denied a request to withdraw without prejudice and as I say we'll come back, and they can start over again if they'd like to, but we'll come back and we'll ask to incorporate the entire record including all of their objections into the uh new record.

McCarthy- I would rather give an extension on this one because I do have some questions about the timing, not really your motivation so much as just procedurally to make sure that that we're doing the right thing. I hadn't really thought about the fact that we had closed the public hearing and I just want to make sure that the timeliness of the request is appropriate.

Voting **McCarthy, O'Mara, Allen, Botticelli, Mondani**

Alternates

Recused

Documentation **None**

Representing **Linda Williams & Michael Wilson**

Public **Sarah Alger**

Motion **Motion to continue to August 10, 2023.** (made by: Allen) (seconded)

Roll-call vote Carried 4-0//McCarthy, Allen, O'Mara, and Botticelli-aye

2. 09-22 Harris on Weweeder, LLC

50 Weweeder Avenue

Brescher

Continued to August 10, 2023

Voting	McCarthy, O'Mara, Allen, Poor, Mondani
Alternates	
Recused	Brescher
Documentation	None
Representing	None
Public	None
Discussion	None
Motion	Motion to continue to September 14, 2023. (made by: Allen) (seconded)
Roll-call vote	Carried 5-0//McCarthy, Allen, O'Mara, Poor, and Mondani-aye

3.06-23 NOB ACK, LLC

2 Nobadeer Way

Cohen

Requests to Withdraw without Prejudice

Voting	McCarthy, O'Mara, Allen, Brescher, Botticelli
Alternates	
Recused	
Documentation	None
Representing	None
Public	None
Discussion	None
Motion	Motion to Withdraw without Prejudice. (made by: Brescher) (seconded)
Roll-call vote	McCarthy, O'Mara, Allen, Brescher, Botticelli- Aye

4.07-23 Charles B. Johnson

4 Harbor Square

Alger

Applicant is appealing the Building Commissioner's March 31, 2023, determination pursuant to Zoning Bylaw Section 139-25 and 139-31. The locus is situated at 4 Harbor Square, shown as Assessor's Map 42.2.4, Parcel 1, which is shown as lot 11 on Land Court Plan 10222-E. Evidence of owner's title is registered on Certificate of Title No. 17791 at the Nantucket Registry District of the Land Court. The site is zoned Commercial Downtown (CDT).

Representing- Sarah Alger & Daniel De Benedictis- Appellant
Rick Beaudette- Appellee

Discussion (15:15) **O'Mara-** For the record, I said that I was involved in the sale of the properties of Mr. Johnson's daughter about two years ago I didn't represent him, I represented the owner of the house that was purchased by the Johnsons'.

Alger- I don't believe that represents a conflict because you didn't represent anyone in the Johnson family, and it wasn't with respect to this property and it's more than two years ago.

O'Mara- I'd like to hear Mr. Beaudette's feelings on that.

Beaudette- I don't have an issue with that either.

Alger- I represent the Old North Wharf Corporation and Danielle de Benedictus represents Charles Johnson he's one of the shareholders in the cooperative and the holder of a long-term lease on a dwelling that's about 12 inches away from the proposed project at Harbor Square. We're appealing the decision of the Building Commissioner not to revoke the permit that was issued and to require an MCD Special Permit for this property. This is about ensuring that the property owner NIR is placed by the same set of ground rules that everyone else plays with on Commercial Enterprises. This is also not a Clam Shack it's a full-blown 62-seat restaurant with interior and exterior seating a full liquor license and an entertainment license so it's a significant change from what was there before which was a fish market and a takeout ice cream stand. There were three permits issued, the first two were for minor work although I have to say the bulk of the work was done under one of these 75 dollar permits that indicated no change in use, it was mostly demolition, we did not appeal those. The third permit that was issued at the end of January unfortunately despite inquiry was not revealed to us or made available until the middle of March and so as soon as we were aware of it, we appealed within the 30-day period. First of all, when you look at an MCD under 139 11 you have to look at all of the properties that are in common ownership and common control and when you look at the NIR properties that means not just the building that the Straight Wharf fish restaurant is being proposed but it's all of the buildings on that same parcel which is everything on Straight Wharf. The criteria for an MCD under 13911b includes a whole lot of different commercial uses but the easiest one to look at in this case is B5 a restaurant club and or bar use with a combined rated legal occupancy of a hundred or more and then and then you have to look also at C 139 11c which says pre-existing non-conforming uses shall be subject to the sub section when any extended or altered portion of the commercial uses added together starting from the effective date April 4 1979 as amended meets or exceeds the criteria of section B above which defines an MCD. The MCD process allows for abutters to have input into commercial uses that rise to the level of the of a major commercial development and that's important because it gives them the ability to talk about how the trash is going to be handled, what are the hours of operation going to be-all the things that we see all the other major commercial developments in town subjecting themselves to. I'm not saying that a special permit wouldn't issue it very well may issue but we don't know because they haven't applied for it and because they haven't applied for it none of the protections and conditions that would go into place on an MCD have been imposed or

even looked at or even discussed in this situation and that's important, particularly to Mr. Johnson living 12 inches away. I mean he really ought to be able to have some meaningful input into a change from a retail fish market and take-out ice cream stands to a full-blown license licensed 62-seat restaurant with a full liquor and entertainment license.

Botticelli- The detailed scope of work on the permit says "renovate existing dwelling". What is the dwelling?

Alger- There is no dwelling.

Botticelli- So this permit is completely erroneous in a way because it's not describing the work at all.

Alger- I just didn't harp on that because I thought it was a clerical error but you're right. The only place that you learn about what's happening is in section "E" where it says proposed use.

Marcklinger- Mr. Beaudette said this should be time-barred which to me meant the application was beyond the 30 days so if it wasn't in on time why are we here?

Alger- You have to appeal a permit either within 30 days or within 30 days of you being aware of it.

Marcklinger - To me, it seems like well it's just bad luck I didn't know about it and so every time something like this happens well, you know I wasn't informed I didn't find out till later. These are sophisticated people that are in the building department all the time, they know how to find things, and they're going down checking on the building permits all the time.

De Benedictis- I checked multiple times, I was emailing practically every day and we were told repeatedly that there was no permit on file so under these circumstances and the totality and the fact that the abutter was never notified. Maybe it got lost, I'm not implying anything nefarious happened I'm just saying we didn't have it.

Allen- Is there anything showing that the abutters were notified?

DeBenedictis- We received notice from the Con Com it was in order of conditions it said they were going to do a \$7900 repair on a retail store we never had any notification that they were going to do a complete million-dollar renovation and turn into use into a restaurant with an entertainment license 12 inches away from my client's home.

Botticelli- I mean irrespective of where your client lives it seems to me that this is a change of use and you should have some ability to check the list of how they're going to deal with the trash, it just seems fair.

Beaudette- We are asking that you uphold Paul's decision not to revoke the Building Permit that we have and I'm going to get to the legality of some of these things. I take issue with the insinuation that NIR doesn't play by the rules and that we didn't get permits. I've been representing NIR for over 16 years and one of the beauties of them as a client is they always get their permits as it is important to them to not have bad press like this for not getting permits so it's incorrect that they don't play by the rules, and they don't want to go get permits. I file MCD'S for them a couple of times a year, and, in this case, this is just an internal memo with all the permits on just this little that we compiled and those have been in place for some of them over two years so the insinuation that we didn't get the permits that we don't want to play by the rules is flat out incorrect. There are a couple of reasons why you should uphold Paul's decision, the first as Joe pointed out is that this matter is time-barred, Sarah said it's important that we get an MCD so that her clients have notice and can talk about trash and everything else well they've had notice for nearly two years. The very first application we filed was August 16, 2021, at the HDC and an abutter's notice was sent out to all these people that are appealing now and they didn't oppose anything, and that was approved unanimously. The set of plans with that application clearly shows a restaurant.

Botticelli- I have the October 15th permit here, it says to remove existing equipment, interior only remove existing dry wall. The description of the work is not reflective of what was done.

Beaudette- The third Building Permit everybody's talking about saying dwelling I agree that's a mistake. I think the question is did Paul think this was a dwelling? Did we think it was a dwelling? Did Scott Anderson think it was a dwelling as he was the one renovating it, I doubt it. I think it's a mistake and it should have said commercial structure, but it says dwelling, and I don't think it's relevant because everybody knows it's not a dwelling and none of the plans show it as a dwelling. In any event, they didn't appeal that permit either. Sarah says they didn't know that the permit existed, so I have a couple of thoughts on that. If it's true, it's either 30 days or 30 days when you have actual notice or constructive notice. Constructive notice by the way is I don't know there's a building permit but there's a heck of a lot of building going on there, so they clearly had constructive notice because this is probably the most visible property on the island being in front of the boats. Through your suggestion Susan there is a second reason why you should uphold Paul's decision and not revoke this permit and that's because this doesn't require an MCD period, the MCD provision of the bylaw 13911 B is the definition of what an MCD is, and it states that a an MCD is required for a group of structures or uses to be constructed it's a two-part test number two is meeting any of those criteria okay you need both of those in order to qualify for an MCD all right and then Sarah is relying on expanding that by including the provision in 13911C which is the pre-existing non-conforming use section of the MCD provision in the bylaw and that provision is only applicable for pre-existing non-conforming uses that you're going to extend or expand or alter okay this building this use has gone from a conforming use to a conforming use it is not a pre-existing non-conforming use that's the only time you use that provision of the bylaw and MCD is not use it's not an enumerated use in the bylaw and since there's no pre-existing non-conforming use here any expansion or alteration can't take place and be used to bring us into MCD land because you're not altering a pre-existing non-conforming use.

Alger- I want to clarify why we didn't appeal from the ConCom and the HDC and all of those. None of those permits allowed a change of use. I also want to point out that not only did we appeal the building commissioner's decision not to revoke the permit, we also appealed the issuance of the permit itself. To say that an MCD doesn't apply when you're adding over a hundred rated occupancy on straight wharf just doesn't make any sense at all.

McCarthy- Rick can you address Sarah's points about the change of use and adding hundreds of seats of restaurants seating without permits and then also just what you see would be a trigger to create an MCD?

Beaudette- I've been doing this a long time for this client, and I know in fact we would come into you guys if there was some kind of

non-conformity like parking when we were changing a use and that was going to change or increase parking, or we've been here a number of times for uses for individual buildings so that is exactly how it's always been interpreted. In terms of the numbers, I don't think if there are numbers like that out there, I don't think those can change because I think those restaurants have probably relied on those numbers for a long time and I don't think that can change now but even aside from that even if Sarah's right about increasing restaurants occupancy over the years I question the numbers. Just because someone says your occupancy went up when you did nothing the MCD provision of the bylaw is very clear to be constructed and those provisions must be read together so if it's a pre-existing non-conforming use that is to be constructed, expanded, altered, extended it says then that could trigger an MCD.

McCarthy- Just to clarify, Rick, the change of use the restaurant uses is allowed by right and the use that existed before these permits are pulled.

Beaudette- They both were as of right uses. It was a fish store, retail, and an ice cream shop and it went to a retail fish store and a restaurant. Any restaurant under 70 seats is allowed as a matter of right.

McCarthy- So they don't need a Special Permit or anything.

Beaudette- They don't need a special person if it was a restaurant with 71 seats, we would have to get a special permit not an MCD but for that use. If it's occupancy over a hundred for new construction or expansion of a pre-existing non-conforming use, then it's MCD.

Marcklinger - The time-barring thing, who decides? I agree that it wasn't in a timely fashion but here we are.

Beaudette- I mean at some point it is like a higher Court. I think ultimately if you agree with Paul that he should not have revoked a permit then your decision gets appealed to Superior Court and the Superior Court will clearly address the time of our issue and any other issues as well potentially, but I think they'll start there.

Allen- What was the occupancy number of the ice cream and fish store?

Beaudette- To be perfectly honest I don't know, but I can find out.

Allen- Does occupancy mean sitting and dining or does occupancy mean just standing in the space?

Beaudette- Both. I think it is included in the 63 that's our legal occupancy.

McCarthy- Yes, they're going to be more than just the people sitting in the restaurant inside but what I was trying to say was the calculation for the legal occupancy rate to my understanding from what I've read from both sides is the seats in the restaurant.

O'Mara In the past, in these situations, I think the Board was asked to determine whether the expansion of a pre-existing non-conforming space was reasonable, and I think that that's the question here. I think everyone knows that it wasn't intended to be a dwelling, never has been a dwelling. So how is the expansion going to affect the neighborhood?

Alger- One of the things that changed was the elimination of the parking requirement downtown, it states that a commercial use requiring 20 or more off-street parking spaces pursuant to 139/18. So, when the parking requirements for the CDT were eliminated a lot of the requirements for an MCD in the CDT were eliminated. I feel like this applicant should have had to do an analysis and provide it to you to show how they're not triggering an MCD.

Beaudette- To reiterate you don't even get to use the additive measures from 1979 which by the way the MCD provision was so different from that unless you have a proposed construction of a pre-existing non-conforming use.

Murphy- I issued this permit because I felt that I had the authority to issue it. This is a renovation of an existing building, it's not a new structure and it's not a non-conforming use. It's under 70 seats which is allowed in Commercial-Downtown, and I didn't go any further than that because I didn't feel that I needed to. Typically, when we look at occupancy, we don't really worry about staff in terms of how they hire, or how they fire, we just look at seats.

DeBenedictis- I think that this hundred number has been misconstrued. We're talking about more than 100 restaurant seats, which there are many more on the whole Wharf. There's only one order of conditions on file at Con Com but that is an order of conditions that relates to a permit that was issued under \$7900 renovation that turned into a million three construction of a different use. I just sat through a whole Con Com hearing where people were forced to go back for amended order of conditions on things that were so much more minor than that.

Beaudette- The idea that Paul issued a permit without a Con Com order of conditions is false. We sent a letter after the fact to the staff and said we're still not changing the footprint, but we have to replace the foundation. They've tried to get the Con Com to do the same thing they're asking you to do with this permit and the Con Com has said no three times.

Allen- I'm unclear and I want to know the repercussions of my vote and I'm tipping my hand right now, but I don't want to put a valid restaurant out of business. I want to give them the chance to do it the way we might think that they're not doing it correctly now to correct whatever we might think that they're doing wrong.

McCarthy- If we voted today and did not uphold your decision and said we are revoking this permit and we think it's an MCD what happens to the NIR permit?

Murphy- I would revoke the Building Permit. In an appeal, the Board has all the powers of the Building Commissioner so whatever you direct me to do I'd have to do it.

Brescher- I'll make a motion that we are upholding the issuance of the Building Permit and that we are upholding the determination of the Building Commissioner that a Major Commercial Development is not necessary.

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

Alternates

Recused Mondani

Documentation **Motion to Uphold the determination of the Building Commissioner and deny the appeal** (made by: Brescher)
(seconded)
Roll-call vote 5-0

3. 17-22 Nantucket Cottage Hospital 16 Vesper Lane Beaudette
Applicant is seeking Variance relief pursuant to Nantucket Zoning Bylaw Section 139-16 in order to divide an existing lot, which is nonconforming as to frontage, into three lots, none of which will meet the required frontage of 50 feet in the CN district. The lots will be accessed via an easement from Vesper Lane. Locus is situated at 16 Vesper Lane, shown on Assessor's Map 34, Parcel 72, and shown as Lot 1 on a plan dated May 5, 1978, with the Nantucket County Registry of Deeds. Evidence of owner's title is recorded in Book 184 and Page 112 with the Nantucket County Registry of Deeds. The site is zoned Commercial Neighborhood (CN).
Representing- Rick Beaudette

Discussion-2:00:22 **Beaudette**- 16 Vesper Lane is behind the Coast Guard housing on Vesper, and we have an oversized lot of approximately two acres in the CN District which requires 7500 square feet of lot area. The property currently is non-conforming as to frontage it has zero in a district that requires 50. It is currently accessed through an easement on the property of the Coast Guard and the property owned by the trust. We're here seeking a variance to allow us to take this property and create four lots one that will have the existing structure on it that we're keeping and three that are proposed to be conveyed to the Affordable Housing Trust in exchange for the affordable housing trust will convey 18 Vesper next to it. At the last hearing, I think in general the Board was in favor of the request but there were a couple of questions that people wanted some clarification on. I've drafted a decision that is in your packet and that isn't meant to be presumptuous, I did it just so it's in a form that we're used to looking at and it has a number of conditions that I think addresses some of those things and that those conditions have been vetted by Leslie as well but the first condition we put in there is that there will be no further subdivision of this without further relief from the Board. I did hopefully that's what Elisa was looking for and that addresses her concern um that the access easement is in good repair and accessible that the cost of that driveway access easement is born by the owners that the zoning board or zoning enforcement officer has enforcement capabilities of these conditions that the driveway is constructed of impervious materials and that and that the property conveyed to the trust as a condition.

Botticelli- What's going to be allowed to be built on these four (4) lots? Is it a single family?

Beaudette- I doubt it, I don't think the affordable housing trust has a plan yet. I think what's more than likely and what's allowed in CN district is apartments or apartment buildings.

Botticelli- I mean just give us a background on what's allowed all.

Snell- So I've talked with Tucker Holland the housing director about apartment buildings for those properties and you can have up to six units with up to a total of eight bedrooms, but it depends on your lot size so there's a density of eight bedrooms per lot depending on the size of the lot. You can have one dwelling unit for each three thousand square feet of lot area because they're in the Commercial Neighborhood District.

Brescher- Are we validating three lots as separately marketable and buildable?

Beaudette- You are that's what we're asking for.

Brescher- You might want to include that in the decision.

O'Mara- Any opposition from the neighbors on this?

Saad- There's been no opposition, there was one email back when they first submitted in December 2022 from the Coast Guard, and I believe that's been worked out between the applicant and the Coast Guard.

McCarthy- I appreciate the decision that you put together and submitted it cleared up the questions I had, which were more about the easement and access and understanding that the lot as it exists has no frontage and has always been accessed through the Coast Guard property.

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

Alternates

Recused Mondani

Documentation **Motion to approve Variance relief as requested** (made by: Brescher) (seconded by Allen)
Roll-call vote 5-0

III. NEW BUSINESS

1. 10-22 Paul P. Moran & Jean M. Moran 4 Washington Avenue Santos

Continued to August 10, 2023

Voting McCarthy, O'Mara, Allen, Brescher, Marcklinger

Alternates

Recused None

Documentation None

Representing None

Public	None
Discussion	None
Motion	Motion to continue 10-22 to August 10, 2023. (made by: Brescher) (seconded)
Roll-call vote	Carried 5-0// McCarthy, O'Mara, Allen, Brescher, Marcklinger -aye

IV. OTHER BUSINESS

V. ADJOURNMENT

Motion	Motion to Adjourn at 3:15 pm. (made by: Poor) (seconded)
Roll-call vote	Carried 5-0// aye

Submitted by:
Nicky Sheriff