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TOWN OF DUXBURY



BOARD OF APPEALS

DUXBURY BOARD OF APPEALS

MEETING MINUTES

September 13, 2018 @ 7:30 p.m.

ATTENDANCE: Wayne Dennison, Judith Barrett, Kathleen Muncey, Borys Gojncyz & Freeman Boynton, Jr.

CALL TO ORDER: Wayne Dennison called the meeting to order.

- **ZBA Case # 2018-12 Savery, 66 Cove St., Special Permit:** *The Board voted to accept the withdrawal of the application without prejudice. All in favor (5-0).*
- **ZBA Case #2018-10 McLaughlin, 685 Washington St., Cont'd:** *The Board voted to close the public hearing. All in favor (5-0).*

ADMINISTRATIVE

- **Duxbury Farms:** *The Board determined that the proposal was insubstantial and voted (4-1) to approve the modification request for Comprehensive Permit #03-12R.*

BOARD OF APPEALS — MINUTES

Applicant: Donald Savery

(John Cully, Agent)

Property Address: 66 Cove Street

Case No: 2018-12

Date: September 13, 2018 Time: 7:30 p.m.

The Board of Appeals will hold a public hearing in the **Ellison Room at the Duxbury Senior Center, 10 Mayflower Street**, on Thursday, September 13, 2018 at 7:30 p.m. to consider the application of Donald J. Savery for a Special Permit under Article(s) 400 and 900, Section(s) 401.2 #4, 410.4 and 906.2 of the Duxbury Protective Bylaw. The property is located at 66 Cove Street, Parcel No. 116-045-000 of the Duxbury Assessors Map, consisting of 14,810 S.F. in the Residential Compatibility District and owned by Donald J. & Cathleen O. Savery. The Applicant's proposal to construct an addition over and connect an existing garage to an existing dwelling, both of which are pre-existing, non-conforming structures, encroaches in the side setbacks. A Special Permit is required.

-APPLICANT REQUESTED TO WITHDRAW APPLICATION -

Members present: Wayne Dennison, Judith Barrett, Kathleen Muncey, Freeman Boynton, Jr., & Borys Gojncyz

Members Voting: Wayne Dennison, Judith Barrett, Kathleen Muncey, Freeman Boynton, Jr., & Borys Gojncyz

Other persons present at the hearing: Scott Lambiase, Director of Municipal Services, Amy Kwesell of KP Law & Angela Ball, Administrative Assistant

- Wayne Dennison, Chairman, calls the meeting to order.
- Wayne Dennison states that the Applicant in this case has requested their application be withdrawn.
- Wayne Dennison makes a motion accept the withdrawal without prejudice.
- Judith Barrett seconds. All in favor (5-0).

Motion: Motion: It was moved, seconded and unanimously voted to accept the withdrawal.

Moved by: WD

Seconded by: JB

Number in favor: 5

Number opposed: 0

BOARD OF APPEALS — MINUTES

Applicant: John McLaughlin

(Paul Brogna, Agent)

Property Address: 685 Washington Street

Case No: 2018-10

Date: September 13, 2018 Time: 7:30 p.m.

(Cont'd from June 28 & July 12, 2018)

The Board of Appeals will hold a public hearing in the Mural Room at Town Hall, 878 Tremont Street, on ~~Thursday, June 28, 2018~~ at 7:30 p.m. to consider the application of John McLaughlin for a Special Permit under Article(s) 400 and 900, Section(s) 404.6, 404.7, 404.8, 404.9, 404.20 and 906.2 of the Duxbury Protective Bylaw. The property is located at 685 Washington Street, Parcel No. 117-147-000 of the Duxbury Assessors Map, consisting of 3.79 acres in the Residential Compatibility & Wetlands Protection Overlay Districts and owned by John G. and Doreen K. McLaughlin. The Applicant proposes to construct a new pier. A Special Permit is required.

Members present: Wayne Dennison, Judith Barrett, Kathleen Muncey, Freeman Boynton, Jr., & Borys Gojncyz

Members Voting: Wayne Dennison, Judith Barrett, Kathleen Muncey, Freeman Boynton, Jr., & Borys Gojncyz

Other persons present at the hearing: Scott Lambiase, Director of Municipal Services, Amy Kwesell of KP Law, David LaPointe of & Angela Ball, Administrative Assistant

- Wayne Dennison, Chairman, opens the hearing for 685 Washington Street and quickly recaps that where things were left last it was back and forth about some legal issues. Mr. Dennison states that the Board received an opinion from Town Counsel, which will be public record and invites Town Counsel to read it.
- James Lampert asks if they can have a chance to respond.
- Mr. Dennison states that we will continue on as we had before and all will be given a chance to speak, but first we will review correspondence.
- Amy Kwessel of KP Law (Town Counsel) states that she looked at the applicability of the Bylaw and relevant sections 404.8 similar to others, describing procedure. Ms. Kwessel states that in this case the Board sent an application out to many boards and the Conservation Commission ("CC") recommended it be denied.
- Wayne Dennison asks why, if having failed to timely address in application do we have to address
- Amy Kwessel states that because they are responding to 404 and under 404.9 there have been a lot of people saying that requires CC approve the plan; however she states that she does not think its applicable under 404.9 the Board can grant a special permit for use in this district despite prohibition in 404.5 and the pier is not prohibited, it's specifically allowed. Ms. Kwessel states that 404.9 only applies if 404.5 lists use as prohibited and that she did avoid CC part as she thinks it's inapplicable and under 404.20 a pier shall not extend into a salt marsh and this one will be on the scientists as if you determine that it's not part of salt marsh are all other criteria met and if you determine it is in salt marsh it doesn't comply as it ends in waters edge.
- Wayne Dennison states that the water's edge is not defined by the bylaw and wonders aloud if ZBA can determine.
- Amy Kwessel states 'tidal creek' is hard to define.

- Wayne Dennison states that there is some correspondence – a letter from Driscoll which he will present a letter from Martha Himes, a letter from K. Palmer & Friends of the Bluefish River (“FOBR”) and I’ll let them present. Mr. Dennison explains that all can have a chance to speak but it will be within reason and if it gets redundant I will have to call it off.
- Wayne Dennison lists off the people that submitted correspondence to see if they intend to speak:
 - Mr. Hoyt? Response – No
 - Mr. TenHoor? Response – None
 - Mr. Holden? Response from Kathy Palmer is that it’ll be part of presentation.
 - Loring? Response – Yes
 - John Palmer? Response – Yes
 - Judi & Howard Hall? Response – Yes
 - Preservation MA? Response – Yes
 - Jane & Fernando Guitart? Response – Yes
 - James Lampert? Response – Yes
 - Sarah & Harvey McCormick? Response – Yes
 - Sheila Lynch-Bentinnen? Response – from audience, she may come later
 - Selden Wells-Tearse? Response – None.
- Wayne responds it’ll be on record and that the Beals & Thomas report will be read into record as well, but first let’s hear from applicant and then we’ll do peer review.
- Chris Sherman of 92 Hounds Ditch Lane states he represents the Duxbury Rural and Historical Society and would like to make a comment.
- Wayne Dennison agrees, but after the applicant.
- Paul Driscoll, representing the Applicants, states he’d like a chance for rebuttal after the FOBR speak and asks the same about the opinion that came from KP Law.
- David LaPointe of Beals and Thomas states he was engaged to look at the bylaw, 404.20 – 404.50 and we provided an outline and asks if he should summarize.
- Wayne agrees to summary and points out it seems to comply with all except one part.
- David LaPointe states that the pier is in conformance with all elements like the hand rails, dimensions, mean low water.
- Wayne Dennison states the Planning Board indicated it had two hand rails and Mr. LaPointe states in our review it had one and it complies
- James Lampert states that this is about the bylaw and feels it does not conform and asks if he may respond to Town Counsel’s opinion. Wayne Dennison has no objections.
- James Lampert states he is not happy with the question posed to Beals as he feels the review was too limited and they did not review a lot of relevant things, esp the Wetland Bylaw and had plans been submitted indicating the tidal creek line it may have changed.
- Wayne asks if his point is that the pier does not go to the water’s edge.
- James Lampert states it is his central point and goes on to state that the 2014 plans are the same as what is here now and there are issues with plan – 1. Orientation of the float, 2. Why was the definition of tidal creek changed as it appears that as of 2014 tidal creeks should be considered part of the salt marsh and if they are nearby Con Comm would not approve a pier within a salt marsh.
- Wayne Dennison asks how many in the salt marsh.
- James Lampert states there are none, piers approved are those beyond seaward.
- Lenore White offers that she can get into that with her presentation.
- James Lampert discusses the details of where a tidal creek ends and the MA DEP regulations and that the line on the plan is wrong, could be from GIS maps.
- Mr. Dennison asks questions regarding his points and James Lampert points out on a slide he is showing.
- Freeman Boynton, Jr. asks what the blue line represents.

- Lenore White states it's not clear
- Kathy Muncey asks if a creek has a defined width.
- James Lampert replies that it does not.
- Paul Driscoll states that he is referencing points from a case that was denied.
- Wayne Dennison states that every point cannot be rebutted, please keep it relevant.
- James Lampert states that he'd like time to respond to KP Law opinion, Driscoll's letter and tidal creek definition and I disagree that 404.9 does not apply because a pier is a structure and 404.6 prohibits as of right unless by special permit.
- Wayne asks if he applied under 404.9?
- Kathy Palmer asks if she may speak, she thought her information would've been reviewed and she thinks it's off without 404.50.
- Wayne Dennison states that it's her position that its incomplete since it doesn't consider the Scenic Overlay District. Kathy – yes.
- David LaPointe states that we did consider that it's in there in report and it's noted that some are applicable and some are not.
- James Lampert goes on to state that a pier must reach the water's edge and it appears that any water's edge is ok, even if in the salt marsh, but it means on the seaward side. 404.20 #3 and #4 speak to this.
- Wayne asks if at high tide the float would float. James – Yes.
- Jeff Palmer states he read Town Counsel's report and she suggests that a tidal creek is part of the salt marsh and that key point wasn't considered by peer review.
- Amy Kwessel states that she reviewed a lot and did not see that applicant submitted the SOC from DEP.
- Kathy Palmer states it's still in litigation.
- Amy states that for reasons of fairness, we have a lot about CC hearings but nothing from DEP's opinion.
- Paul Driscoll states that the CC had 11 hearings over a long period of time and the end result was that the Town settled and that is the final decision and this is null and void, the tidal creek definition is not part of the Wetlands Protection Act.
- Wayne Dennison summarizes that he understands that the old case is done is his point.
- Lenore White of Wetlands Strategies describes the salt marsh as showing slides to the Board, indicating the aerial views and that a Dr. Fitzgerald prepared the slides and she agrees with his slide/line.
- Wayne asks if DEP has a definition of a tidal creek.
- Lenore states a stream is defined as a creek, river, or a body of water running into and a tidal is a modifier indicating its fresh vs salt and I'd like to say that the GIS line used in plans cannot delineate wetlands.
- Freeman asks if other line on the other side of the slide is something that can be used and asks what the validity is to Dr. Fitzgerald's line.
- Lenore explains that he is the expert in his field.
- Wayne asks what harm the pier would cause.
- Lenore explains that this is definitely a salt marsh and salt marshes may contain creeks and it would cause habitat disturbance, water quality issues, shading and habitat disturbance and this does not qualify for a small elevated pier it was denied twice, fish run here, turbidity is a problem with spawning fish and salt marshes are protected for a reason, that if they are not they will fail to function and this cannot be permitted under the bylaw.
- Wayne asks if the position would be that it's better to grant a variance than a special permit
- Kathy Muncey states there has to be something unique about the typography.
- Kathy Palmer states she does not think a pier is appropriate for a variance.
- Borys Gojncyz states that he wants to point out that he did not see any piers along the coastline within the tidal creek and we'd be setting a precedent here.

- Kathy Palmer states that there will be many adverse impacts.
- Mr. Chris Sherman of Duxbury Rural & Historical Society states that he's not there to enter into a debate but when they sold this property it was agreed with the homeowner that should they request a pier then they will go through the proper motions, one of which is garnering opinions from other Boards and we ask that you consider our concerns.
- Wayne Dennison asks what concerns are.
- Chris Sherman states that they rely on other boards for expert opinions and are concerned about our agreement with the property owner.
- Sarah McCormick states she's concerned and reads from the Duxbury Rural & Historical Society book, explaining that it's always been the goal of theirs to clean up and maintain and preserve the salt marsh and the WSA was created in 2004 to help preserve them.
- Wayne Dennison states that 404.5 expressly says put a new pier
- Robert Vose states his family has been there years and there is no other place in town with this view and this is the shipbuilder's district and a pier would destroy the landscape.
- Bill TenHoor states that the WSA was created to protect scenic views and a provision was added to the bylaw intentionally.
- Wayne Dennison points out that the efforts resulted in 404.50. Bill TenHoor agrees
- Wayne asks if this pier does not comply with 404.50? Bill responds, no. Wayne asks why.
- Bill TenHoor explains that we tried not to allow anything bigger in WSA but it does not prohibit piers.
- Wayne Dennison states that we can agree that it's ok to put a pier in under 404.50.
- Bill TenHoor states they developed a database of WSA properties in Duxbury and noted that some places it was not possible and here we thought that and with it being owned by the DR&HS.
- Jack Leahy of Captain's Hill Road states that he feels this has gone on long enough and it seems very unfair to him if the applicants have met all other requirements.
- Jeff Palmer disagrees, stating that under 906.2 it applies, we need CC's approval and others have concern like the general laws in MA that held for CR to be held by Towns or historical societies.
- Wayne Dennison asks if there are other comments.
- Jeff Palmer states that allocations have been made that the Board cannot consider CC and why ask them again if you can't consider their opinion and piers must access the salt marsh over the shortest distance possible in CC Bylaw but not in Zoning.
- Kathy Palmer points to CC regs 23.6 that a pier cannot end in a tidal creek.
- Tony Citaldo states he is overwhelmed by that a pier would cause such environmental issues and thinks the McLaughlin's have done everything they can to comply and he sees many other piers in the same area.
- Keith Pratt states he is a member of the FOBR and moved here primarily for the view.
- Cap Cannon states that he views the bylaw and ZBA as crafted to protect the Town and I hope that's still the case.
- Howard Hall states the marsh isn't doing so well lately and I've taken pictures of the marsh – it's affected by climate change.
- Sherman Hoyt states that he is a very concerned abutter and he's studied marsh and is not an expert but has a very real interest, that the distance set is not arbitrary, it's to protect the WPA. He goes on to state the site is pristine and memorializes the shipbuilders era and if we allow a pier the view will be blocked and Mr. McLaughlin is not aware of the preservation agreement.
- Wayne Dennison states that the ZBA enforces the Zoning Bylaw not preservation agreements.
- Sherman Hoyt thanks the Board for all his hard work.
- Jeff Corcoran states he appreciates abutter's not wanting change, but his has gone on forever and it's time to make a decision.

- Fernando Guitart states that the purpose of our bylaw is to protect the Town's features.
- Bob Moskowitz of Surrey Lane states he is hearing both sides but thinks other considerations might be relevant.
- Sherman Hoyt asks to make a comment regarding something said in the paper.
- Paul Driscoll states he'll focus on the zoning issue, but first will reiterate that this was denied by ConComm twice but why keep that going as a judge has already decided that decision was reversed. Driscoll goes on to state that there are 23-25 other piers in the area and it comes down to an opinion of whether or not this will destroy the marsh. Mr. Driscoll points out that the property is in a shipbuilder's district, the DRHS agreement allows piers, there is a pier bylaw that was adopted by vote of the Town, and that the open water argument and tidal creek definition are nonexistent.
- Wayne Dennison wonders that if the pier should extend the full distance over the salt marsh and if it's in the tidal creek, then if it hasn't gone the full distance.
- Paul Driscoll argues that it states it is to be used to access the water's edge and wonders if this has come about as people have walked over the marsh in the past.
- Paul Driscoll and the Board discuss if a boat mooring would be allowed.
- Wayne Dennison asks Mr. Driscoll if he needs more time to consider the water's edge issue. No.
- Kathleen Muncey asks for the status of the Superseding Order of Conditions.
- Mr. Driscoll replies that a SOC was issued and the FOBR filed to intervene but it has not been acted on as of yet.
- Kathleen Muncey asks if it's been recorded.
- Judi Barrett and Driscoll discuss the particulars of the past Con Comm denial, the untimeliness of that filing and the appealed result being that the Con Comm cannot apply their Conservation bylaw any longer.
- Kathy Palmer states that the first case was remanded and thinks that they don't have a SOC by the DEP.
- Jeff Palmer states he disagrees with the tidal creek argument.
- Wayne Dennison states that the point was that there was no definition of tidal creek and if it's in the tidal creek it's in the salt marsh.
- Jeff Palmer states that many piers are ancient and the argument is disingenuous.
- Wayne Dennison states that he recalls that Mr. Brogna spoke of other piers and that all are pre-existing non-conforming and asks if he agrees.
- Mr. Brogna states that every pier is unique, that they customize each and that the bylaw has been the same for years.
- Wayne Dennison asks if what Borys stated about no other piers ending in a tidal creek was correct.
- Paul Brogna states that is not correct, there is one near Elderberry. He also states that the McLaughlins have agreed to not put the mooring in the marsh.
- Wayne Dennison wonders aloud if that is enforceable and if it could be a condition.
- Paul Brogna states that they would likely accept all conditions and then quotes part of the Beals & Thomas report that it ends in a tidal flat not a creek and that they went with the expert's opinion as to where the line was drawn.
- Wayne Dennison asks if the distinction between flat and creek is important.
- Paul Driscoll states that it doesn't matter as neither is mentioned in the bylaw.
- Lenore White states that it is very important as a tidal creek is vital for drainage and salt marsh is the breeding ground of life and tidal flat filters
- Wayne asks in terms of the bylaw...
- Lenore states the tidal creek may be part of the salt marsh and that tidal flats are beyond that.
- James Lampert states that it shall be considered salt marsh if in or surrounded by vegetation.

- Paul Brogna summaries that Ms. White talked about piers, Beals & Thomas commented on it and we're complying with regulations and designed this as close to perfect as possible and the McLaughlins have agreed to put boat out and use a dingy.
- Amy Kwessel asks if there were any restrictions on boat by DMF.
- Paul Brogna states no.
- Wayne Dennison asks if there are further questions.
- Borys asks how you identify the body of water where piers are in open water
- Paul Brogna points out two locations – 27 Elderberry & 74 Captains and shares photos.
- Kathy Palmer states that Con Comm determined this is not like other piers.
- Lenore White reiterates the importance of salt marsh, tidal creek as part of salt marsh.
- Bill TenHoor states that there is a pier bylaw for a reason and the idea that you've never denied piers before is not true.
- Paul Brogna presents slides showing piers on blue fish river and summarizes the details which include those within the tidal creek
- Sherman Hoyt asks why the railing presented is 3' higher etc.
- Wayne Dennison asks if a motion is appropriate and asks Ms. Barrett is there are further questions in her opinion.
- Amy Kwessel states she thinks it's important to have the SOC info if it is final and although it's not essential, it'd be clarifying and you could give it more weight if you knew it was final.
- Judith Barrett asks if it has any weight if not final.
- Amy Kwessel states that yes, they made a determination.
- Judith Barrett asks Dave LaPointe of Beals & Thomas if he as anything to add.
- Dave LaPointe states he's not a wetlands expert, but an OOC approves a project and confirms resource areas and the resource areas are depicted as the limit of the salt marsh and the plans have it as beyond that and according to the Bylaw it appears to comply.
- Paul Driscoll asks if they have a copy of the SOOC.
- The Board and Town Counsel discuss and find the SOOC confirms the lines that were on the plan the applicant submitted.
- Wayne Dennison asks for a motion to close the public hearing.
- Kathleen Muncey makes a motion to close the public hearing. Judith Barrett seconds. All in favor.
- Wayne Dennison asks if there is any discussion.
- Judith Barrett states it's late and she'd like to deliberate on another night at a public meeting and points out that the next meeting there will be no evidence taken at the next meeting although the public is welcome to come.

Motion: It was moved, seconded and unanimously voted to close the public hearing for 685 Washington Street. All in favor.

Moved by: KM
Number in favor: 5

Seconded by: JB
Number opposed: 0

BOARD OF APPEALS — MINUTES

Applicant: Duxbury Farms

Property Address: 685 Washington Street

Case No: 2003-13R

Date: September 13, 2018 Time: 7:30 p.m.

Members present: Wayne Dennison, Judith Barrett, Kathleen Muncey, Freeman Boynton, Jr., & Borys Gojncyz

Members Voting: Wayne Dennison, Judith Barrett, Kathleen Muncey, Freeman Boynton, Jr., & Borys Gojncyz

ADMINISTRATIVE:

Duxbury Farms: Applicant requests to modify the Amended Comprehensive Permit #03-12R by removing condition #40 which required a one-time traffic mitigation contribution. The Board of Appeals must determine if the proposal constitutes a substantial or insubstantial modification to the existing permit.

- Wayne Dennison states there is an administrative matter for Duxbury Farms to discuss and asks if anyone is there for this.
- Angela Ball states that they'd like to remove condition #40 from the permit in order to release the funds.
- Scott Lambiase and Town Counsel discuss it.
- Judith Barrett makes a motion that this would be an insubstantial change and motions to approve it. Kathleen Muncey seconds. Wayne Dennison opposed. 4-1.

Motion: It was moved, seconded and voted to approve the change and deem it insubstantial, 4-1.

Moved by: JB

Seconded by: KM

Number in favor: 4

Number opposed: WD