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DUXBURY, MASS.

TOWN OF DUXBURY



BOARD OF APPEALS

DUXBURY BOARD OF APPEALS

MEETING MINUTES

May 13, 2021 @ 7:30 p.m.

ATTENDANCE: Wayne Dennison, Judith Barrett, Kathleen Muncey, Freeman Boynton Jr., Emmett Sheehan, Philip Thorn & Borys Gojnycz

Other persons present at the hearing: James Wasielewski, Building Commissioner and Lauren Haché, Administrative Assistant

CALL TO ORDER: Wayne Dennison called the meeting to order and reads the Governor's Preamble: Pursuant to Governor Baker's March 12, 2020, Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §18, and the Governor's March 15, 2020, Order imposing strict limitation on the number of people that may gather in one place, the Town of Duxbury's Board and/or Committee meetings will be conducted via remote participation to the greatest extent possible with members. For this meeting, members of the public who wish to watch the meeting may do so by viewing the Duxbury Government Access Channels – Verizon 39 or Comcast 15. Viewers can visit www.pactv.org/duxbury for information about Duxbury programming. To watch a meeting live on PACTV's streaming channel, PACTV Prime, visit www.pactv.org/live. To watch replays of a meeting, visit www.pactv.org/duxbury or to watch online visit PACTV's Video on Demand at www.pactv.org/ondemand. NO IN-PERSON ATTENDANCE OF MEMBERS OF THE PUBLIC WILL BE PERMITTED. Every effort will be made to ensure that the public can adequately access the proceedings to the best of our technical abilities; and despite our best efforts due to lack of technical infrastructure, this meeting will be available on PACTV to view a video recording and a transcript or other comprehensive record of proceedings as soon as possible after the meeting.

ZBA Case #2021-06, Harlow Brook LLC, Village at Harlow Brook, 766, 782 and 0 Temple Street (CONT'D): *The Board voted unanimously to continue the public hearing to June 10, 2021 at 7:30p.m.*

ZBA Case #2021-10, Keir, 117 Chestnut Street: *The Board voted unanimously to continue the public hearing to June 24, 2021 at 7:30 p.m.*

ZBA Case #2021-11, EJP Ice House, Lot 7 Ice House Lane: *The Board voted unanimously to continue the public hearing to June 24, 2021 at 7:30 p.m.*

ZBA Case #2021-12, Nouria/Gulf Station, 10 Washington Street: *The Board voted unanimously to continue the public hearing to June 24, 2021.*

Administrative

Wayne Dennison makes a motion to approve the meeting minutes of April 8, 2021. Judith Barrett seconds. (5-0)

Wayne Dennison makes a motion to approve the meeting minutes of April 22, 2021. Judith Barrett seconds. (5-0)

Wayne Dennison makes a motion to close the public hearing. Kathleen Muncey seconds (5-0)

BOARD OF APPEALS — MINUTES

Case No: 2021-10

Petitioner: Ellen Keir

Address: 117 Chestnut Street

Date: May 13, 2021 Time: 7:30 p.m.

Members present: Judith Barrett (CPT), Kathleen Muncey, Emmett Sheehan, Freeman Boynton Jr., Philip Thorn & Borys Gojnycz

Members Voting: Judith Barrett, Kathleen Muncey, Emmett Sheehan, Freeman Boynton Jr. & Borys Gojnycz

Other persons present at the hearing: James Wasielewski, Director of Municipal Services & Lauren Haché, Administrative Assistant

- Judith Barrett opens the public hearing and reads the Governor's preamble and states we have five members and continues to read the public hearing notice and states we have the application, the project brief, a certified plot plan and detailed architecture plans and case responses. Judith Barrett continues to read the case response memos from the Conservation Commission, the Board of Health, the Planning Board and the Design Review Board. Ms. Barrett states I would like to turn this over to Mr. Hoyt Cousin to present the project
- Architect for the project, Hoyt Cousin asks Lauren Haché to share her screen and continues to explain the slide and the project. Mr. Cousins states there was one statement incorrect in the Design Review Boards memo that the two structures will be connected, but that is not the case. These will remain two separate structures or dwellings. The main house is proposed to have an addition of a master bedroom and bathroom and screened in porch. The second dwelling is proposed to add a bedroom and bathroom and utility space for the water heater and laundry, which is currently in an out building that is being proposed to be demolished.
- Judith Barrett states thank you, does the Board have any questions
- Emmett Sheehan states I do, so the back building, cottage number 2, it is going from what size square foot to what
- Hoyt Cousin states the rear bungalow is a one bedroom dwelling, 625 square feet to a proposed 1,323 square feet
- Emmett Sheehan states so it's doubling it, it could be an in law or rental
- Hoyt Cousin states it is currently a rental unit and has been for several years
- Emmett Sheehan states how many years
- Hoyt Cousin states this was built according to the Assessors in 1947 and used as a workshop for Lloyd Ferral and in the 60's converted it into the current states. There is not a definitive paper trail as to when this happened, we have looked with Jim Wasielewski and there isn't anything definitive
- Emmett Sheehan states which is my next question, is there a paper trail or just converted to a rental apartment and that is what I am troubled with at this point

- Hoyt Cousin states that's what we know, that it was converted and rented maybe close to 50 years or maybe 35 years, we don't have a paper trail
- Emmett Sheehan states my problem is this will set a precedence. We have these unpermitted sheds or cottages and now people are coming to add on to these and basically create second homes on the property and that troubles me
- Hoyt Cousin states you wouldn't characterize this as a legitimate second home at the moment
- Emmett Sheehan states maybe not, there's no paper trail at the moment, no permits, anyone can do this as we have a lot of these. Anybody can take a chicken shed and convert it to an apartment and now here we are and you want to double this in size
- Kathleen Muncey states so there is no evidence that it pre-existed zoning
- James Wasielewski states as far as we can tell, there is no paper trail. I did do a site visit and took a look at the foundation to determine age and it was definitely built in the 40's, but we have no way to tell when it was converted into a living space
- Kathleen Muncey states what does the kitchen look like, the age of the kitchen
- James Wasielewski states I did not go inside
- Hoyt Cousin states it is certainly not a brand new kitchen
- Freeman Boynton Jr. states it was a 1 bedroom dwelling in 2002 when I upgraded the septic
- Emmett Sheehan states I think my problem is that out buildings are being turned into accessory apartments with no permits and then expanding, 1200 sq. ft. is the average size home in 1970. I think it's a slippery slope. We have case precedence with Whitelaw on Powder Point; they could prove with paperwork its existence. I knew Lloyd Ferrell, I remember the place, but every big shed in town could turn into a place like this with no proof. It's a lot to think about on this one
- Judith Barrett states so, what documentation would we be looking for, so that we set a precedence
- Emmett Sheehan states I have a little place in my backyard that is this size, we want to deed restrict it that you cannot, but there are a lot of these little places around. Two homes on one lot...
- Judith Barrett states we need to make sure Applicants know what they need to bring on cases like these
- Kathleen Muncey states what date are we looking at Jim
- James Wasielewski states this is a challenging thing to determine, as far as I can tell, going back and forth with Amy Kwesell. The challenge is that the paper trail didn't exist. Any records like leases or utility records to prove this, it's a gray area and the burden of proof is on the Applicant to bring to us. As far as I can tell, in 1947 a single family dwelling existed then, before that zoning was 1943
- Kathleen Muncey states is there any period in time where a violation turns into an allowed use
- Judith Barrett states let's ask Amy (Kwesell)

- Town Counsel, Amy Kwesell states there is a difference between a non-conforming structure and a non-conforming use. A non-conforming structure will become legally non-conforming after 10 years in existence. That was the new change to 40A. Here it's a non-conforming use, because it's multi-family in a single family zone and a non-conforming use never becomes legally non-conforming. There is in section 7 or chapter 40A section 7, there is a provision that the Building Commissioner cannot seek enforcement of a non-conforming use that is subject to original building permit after 6 years. So unfortunately here we have no original building permit and we have a non-conforming use and it is of my opinion in this circumstance that the non-conforming use cannot be altered. So therefore, I am not really sure they are properly before the Board of Appeals, they want to expand a non-conforming use, not a pre-existing, non-conforming structure.
- Kathleen Muncey states well, we don't know that it is
- Amy Kwesell states right, we don't have an original building permit, we do know that. Even if we did have an original building permit, that just means that Jim can't issue a violation; that use can exist, but cannot change and expand. But are we expanding a pre-existing, non-conforming structure. They will have to come back and prove that that structure was in existence
- Emmett Sheehan states so, is it your opinion that the structure in the rear is pre-existing, non-conforming use, so in reality, it shouldn't be allowed
- Amy Kwessel states so the Applicant should provide if possible, an original building permit. If there is an original permit for a single family house then Jim's hands are tied. He cannot issue...
- Emmett Sheehan states for the rear building
- Amy Kwesell confirms, yes that's what I am saying, but if that structure has been there for more than 10 years, then that structure is a pre-existing, non-conforming structure. It can come to this Board as any other non-conforming structure, however there is a complication here because there is a pre-existing, non-conforming use. They are in front of you to expand their pre-existing, non-conforming structure, they can do that because I think it's clear the structure has been there for 10 years
- Emmett Sheehan states with our permission
- Kathleen Muncey states can't they do it without our permission because they comply in every other way
- Amy Kwesell states do they
- Kathleen Muncey states the reason they are here is because there are two houses on a lot, they have to come before us
- Amy Kwesell states exactly, so under your Bylaw section 401.2 #5 it states any alteration to a dwelling on a lot containing more than one dwelling, must obtain a special permit and a finding by the ZBA, but we still have an issue of the use. A multifamily use in a single family zone.
- Judith Barrett states so I have a question for Jim, what does it take for two separate structures to be one

- James Wasielewski states we have to look at it a few different ways. One, we have to determine if it is a second dwelling and that is defined by a kitchen with a stove. So when they become one, is when they are commonly accessed within a finished space. In this case here, there are separate kitchens in separate dwellings and it is tough to determine when it was legitimized. That paper trail unfortunately doesn't exist for a lot of these in town.
- Judith Barrett states ok, I am just trying to understand, so if these two dwellings were joined together by a breezeway or something, does that make them
- Kathleen Muncey states well, they are separate still
- James Wasielewski states well, the way that it has been done, it has to be enclosed, a continuation of the living space. If it's separate in a way without common access, then we don't view it as one dwelling.
- Amy Kwesell states the key words in the definition of dwelling unit in the Bylaw states "not shared with any other unit", so that's where we determined this
- Judith Barrett asks is anyone has any questions
- Philip Thorn states I have a question, so if you have two separate dwellings on a parcel zone for single family, if you have pre-existing, non-conforming structure, there isn't anything preventing us in the Bylaw to prevent this as long as the coverage is not exceeded but that is entirely separate from the use that is non-conforming. If everything else works with the plans as presented, can you allow the pre-existing, non-conforming structure to continue but the use cannot, so condition it that it can be a guest house but cannot be rented
- Judith Barrett states I was wondering that as well
- Emmett Sheehan states sure, we have been down that, but the proponent has said a rental
- Kathleen Muncey states because it's currently a rental
- Emmett Sheehan states that has been brought up right off the bat
- Judith Barrett states understood
- Emmett Sheehan said whereas other cases have said they will never rent it and want it as a guest house and now this is put on our Building Commissioner to go and check this stuff out and they don't have time
- Freeman Boynton Jr. states well then they will never be able to claim grandfather status if they illegally put the stove in
- Judith Barrett states correct
- Kathleen Muncey states so when we get these cases before us, the first thing we should do is determine whether or not they are two pre-existing, non-conforming dwellings
- Amy Kwesell states so, it's extremely confusing, but we have to remember is that is there a pre-existing, non-conforming use. So if the use is pre-existing, non-conforming, they have to have the original building permit if it does not have an original building permit, it is there but you can't enforce or issue a violation. That pre-existing non-conforming structure becomes legal after 10 years and you can expand it, but by expanding that structure, what is happening to the use. Are you then expanding that use? This is where the major issue is

with these cases. The use isn't changing but expanding. Are you allowing this use to change for multi-family on a single family lot

- Emmett Sheehan states so, Commissioner Wasielewski can't issue the violation, however we don't have to allow a larger expansion on to a pre-existing, non-conforming use, is that what you are saying
- Amy Kwezell states the use isn't changing, is it expanding
- Emmett Sheehan states it is expanding, it's proposed 1200 square feet versus 600
- Amy Kwezell states this is where it is so difficult, Jim and I have been going back and forth over this. When you expand a pre-existing, non-conforming use, is this expansion within the realm. Under your zoning Bylaw section 401.2.5 you have to issue a special permit any time there is an alteration to a dwelling with more than one dwelling on a lot. You have to make findings in the special permit.
- Emmett Sheehan states thank you
- Hoyt Cousins states could I ask a couple of questions, a number of scenarios have been identified, if there were no expansion of the rear bungalow, is that ok
- Emmett Sheehan states that would be ok with me
- Hoyt Cousins states could we make a slightly bigger bathroom and enclose the washer dryer and perhaps add a smaller addition of 120 square feet
- Freeman Boynton states I would be ok with it, as long as it stays one bedroom. I wish we had a floor plan for the existing portion of it
- Hoyt Cousins states it is real simple, bedroom, bathroom, living room and kitchen. Pretty small within 625 sq. feet. I am wondering where the degree is, I understand a whole second bedroom is what is holding this up as opposed to adding a slightly bigger bathroom. Or a third scenario and connecting the two structures, does that make any difference or if the owner were to say they would no longer rent it. It has been rented for quite a long time, but just as a fourth scenario
- Judith Barrett states the town does allow for a guest house with a special permit. The issue to attaching the two, it becomes a single family dwelling
- Emmett Sheehan states you're doubling the size of it, the intensity of it
- Judith Barrett states I am just trying to understand the options
- Emmett Sheehan states that maybe he come back and go down in size and perhaps deed that it won't be a rental, I believe that is what the Applicant is suggesting
- Kathleen Muncy states so at this point he could discontinue the use as a second dwelling and take out the kitchen and do everything they want to do because there is no longer two houses on it, right
- Freeman Boynton Jr states and then you can't rent it out either
- Kathleen Muncy states right, then they won't have to come back to us
- Freeman Boynton Jr states that's true, as a guest house
- Kathleen Muncy states they don't have to have a special permit for the guest house because the structure already exists

- Jim Wasielewski states so, going back to if the two dwellings are connects, the single use would still have separate utilities, so it's looked like two family.
- Freeman Boynton Jr states my bottom line is that I don't not have a problem with the use and being able to rent out the unit, but I don't want to see the use expanded to become a two bedroom or whole family as opposed to a single or couple renting in the unit
- Hoyt Cousins states to add to that, could we add storage for the water heater and perhaps some space to the existing bathroom, given the barn structure is being razed.
- Hoyt Cousins continues the highest priority for my Client are the aspects with the water heater, laundry and storage
- James Wasielewski states Amy, my question is if they allow for the expansion to add these new spaces for the storage and washer and dryer and bathroom, does this in any way legitimize the use as a second dwelling
- Amy Kwesell states it does not, in my opinion it does not, because you have to have an original building permit. There is a case, Cohasset Heights case, where they had a special permit but not an original building permit and Land Court held that a special permit does not equal an original building permit.
- James Wasielewski and yet no enforcement to the non-conforming use can't be enforced.
- Amy Kwesell states there is no enforcement IF there is an original building permit
- Judith Barrett states Mr. Cousins what would you like to do
- Hoyt Cousins states I was going to ask if we could this be conditioned
- Judith Barrett states well, we need a plan to document what we approve
- Hoyt Cousins states ok, so we would need to come back
- Philip Thorns states would the Applicant agree to condition the permit as not renting the unit out and turn it into a guest house
- Hoyt Cousins states well, I can't speak for my Client, but she did buy it as a rental income place
- Emmett Sheehan states right but you can't prove that
- Freeman Boynton Jr states and you want to make it bigger
- Hoyt Cousins states that's a separate issue, I want to keep that separate
- Emmett Sheehan states well, no that's not a separate issue
- Judith Barrett states perhaps, maybe consult with your client and figure out what they want to do and continue with this hearing
- Hoyt Cousins states can we continue the hearing and submit plans showing the smaller accessory dwelling
- Judith Barrett states yes
- Hoyt Cousins states ok
- Judith Barrett states were are perfectly happy to extend the hearing so you can come back after consulting with your Client.
- Emmett Sheehan states I'll make a motion
- Judith Barrett asks when we could continue this to

- Lauren Haché states June 24, 2021
- Hoyt Cousins states that works
- Freeman Boynton Jr makes a motion to continue the hearing to June 24th
- Emmett Sheehan seconds
- All in favor JB, ES, BG, FB, KM (PT)

Motion: It was moved, seconded and unanimously voted continue the public hearing to June 24, 2021.

Moved by: FB

Seconded by: ES

Number in favor: 5

Number Opposed: 0

BOARD OF APPEALS — MINUTES

Case No: 2021-12

Petitioner: Nouria/Gulf Station

Address: 10 Washington Street

Date: May 13, 2021 Time: 7:30 p.m.

Members present: Wayne Dennison, Kathleen Muncey, Emmett Sheehan, Freeman Boynton Jr., Philip Thorn & Borys Gojnycz

Members Voting: Wayne Dennison, Kathleen Muncey, Emmett Sheehan, Freeman Boynton Jr. & Borys Gojnycz

Other persons present at the hearing: James Wasielewski, Director of Municipal Services & Lauren Haché, Administrative Assistant

- Wayne Dennison opens the public hearing and requests Lauren Haché read the public hearing notice.
- Lauren Haché reads the public hearing notice
- Wayne Dennison states Lauren, what have we received in terms of case response
- Lauren Haché reads the memos from the Planning Board, Conservation Commission, the Board of Health and an email from the Design Review Board.
- Wayne Dennison states let's hear from the Applicant
- Steve Pedro with Ayoub Engineering introduces himself as the Agent for Nouria and states these are the new Lessee's and they are looking to rebrand the store to reflect that. Mr. Pedro continues to explain where they are looking to install signage. One 54" sign on the building with illumination internally. The siding shows a green band, part of their color scheme as a business
- Wayne Dennison asks the Applicant to share their screen
- Lauren Haché shares her screen and the Applicant continues
- Steve Pedro continues to explain the proposed signage on the building and then the freestanding sign that is currently a gulf sign. The Applicant is looking to re-face the sign.
- Wayne Dennison states ok, so you're taking away the Verc signage and there won't be signage there.
- Steve Pedro states no, there will not be, we're looking for the siding and sign with internal illumination on the front of the building
- Wayne Dennison states so, the existing signage, where we spent a lot of time with Dunkin' Donuts and their color of awnings and then one day I wake up and see that the approved sign of blue is now bright orange. Did you have anything to do with that? The existing sign panel
- Emmett Sheehan states Wayne, that was done about a month ago

- Jim Wasielewski states Wayne that was something we permitted in the building department due to the existing sign there that was drastic. It was previously reviewed by Scott Lambiase, so with the no change in size I permitted it, maybe that was a mistake
- Wayne Dennison states ok, does it comply with our Bylaw
- Jim Wasielewski states the only reason I thought it was before you tonight was because of the illumination
- Wayne Dennison states well, there is already illumination
- Emmett Sheehan states I think he's talking about the building sign
- Jim Wasielewski states it complies as far as I can tell, it was specially permitted some time ago. As long as the size, location and elevations don't change, we allow them to be permitted as long as it remains white
- Kathleen Muncey states so is the free standing sign ok
- Wayne Dennison states so there's a special permit for the existing free standing sign is what I am asking
- Jim Wasielewski states yes, they are just changing the skins of the sign
- Emmett Sheehan states was the special permit for illumination
- Jim Wasielewski states I am not sure
- Emmett Sheehan states was it ever permitted for illumination
- Wayne Dennison states I would be interested to know the status
- Emmett Sheehan states my office is right there and this is a lot brighter and not that long ago, we were very ejective to that. It's Halls Corner you know
- Wayne Dennison states so let's look at the Bylaw
- Kathleen Muncey states is the green part of the sign going to be illuminated or the white above it
- Steve Pedro states it's a little semicircle will be illuminated with white lights but will be green
- Kathleen Muncey states but not neon. And the green bank on the bottom of the siding is aluminum not lit up
- Emmett Sheehan states our Bylaw states we can't illuminate if not open correct.
- Jim Wasielewski states correct, only business hours
- Emmett Sheehan states what is your understanding of that
- Steve Pedro states I am not sure if the freestanding sign is illuminated if the business is not open
- Emmett Sheehan states what is your suggestion for the new sign
- Steve Pedro states that the illumination would be according to the Bylaw, just like the free standing sign
- Emmett Sheehan states it is lit right now
- Jim Wasielewski states is that sign lit while the gas station is closed
- Emmett Sheehan states it is

- Jim Wasielewski states it shouldn't be, I will look into that
- Emmett Sheehan states Halls Corner is a quiet little village and we keep lighting it up
- Wayne Dennison continues and reads an excerpt from the Bylaw. My questions generally, in most instances people come to us, I would like a freestanding sign because the sign on the building is not sufficient for my purposes, but you already have a free standing sign. Are we going to have to figure out if they are the old free standing sign and the new sign exceeds the square footage requirement
- Jim Wasielewski states that is a great questions. We look at the length ... as far as the free standing sign goes, does any additional signage do we combine with respect to a free standing sign.
- Emmett Sheehan states I don't mind the sign above the door, but I don't think they need to light that up. I am opposed to that
- Kathleen Muncey states do they need a permit from us if they don't light it, Angela's letter states it's the illumination for both
- Wayne Dennison states I think it does meet everything else without illumination-which you can't illuminate green either
- Jim Wasielewski states the sign out front has orange panels with white lights and the new proposal is with green skins. I have seen that Nouria sign in Carver and it is not that bright, it actually looks nice
- Steve Pedro states it's actually not that bright, it's a glow
- Emmett Sheehan states then don't do it because I am never going to approve it. There is enough signage and it's all lit up already
- Steve Pedro states the modification to the free standing sign is under special permit
- Wayne Dennison states I would love to see the special permit for the free standing sign
- Steve Pedro states I think the proposed change is less obtrusive than what is there now
- Wayne Dennison states I might agree with you, but I would like to know how it was permitted originally specific to colors and illumination. In this case, you most likely will need to come for a new special permit for the free standing sign
- Jim Wasielewski states I did just received the special permit from Lauren that was originally filed.
- Wayne Dennison states ok, so this is an old one.
- Kathleen Muncey states oh, there's a prohibition against signs on it
- Wayne Dennison states acrylic material and lighted in white section of the sign only
- Emmett Sheehan states so they broke their special permit
- Steve Pedro states well, Nouria recently acquired the site, so they did not put that orange sign
- Wayne Dennison states no, I am not stating that your Client did this, I understand that, but I do think you should examine the existing special permit and tailor your application as a modification to your proposal

- Emmett Sheehan states you did inherit this, I think you should repair what was done wrong
- Steve Pedro states well, this was to modify this special permit
- Kathleen Muncey states really
- Steve Pedro states I'm sorry, it was modification to the signage
- Wayne Dennison states I thought you were seeking a new special permit, but I think in respect to the freestanding sign, you need to modify this special permit. Can we get the Applicant a copy of the special permit, Lauren, so the Applicant can consider what the special permit requires and prohibits and thereafter can make his presentation either consistent with the language of the special permit or come back to the Board and convince the Board that it's doing something that is not deleterious to the neighborhood and therefore the modification is appropriate
- Freeman Boynton Jr states just to make it clear, we want neutral colors, with that example of Dunkin Donuts and the awnings of pink and orange
- Emmett Sheehan states and our Bylaw states none of these signs should be lit beyond operating hours, ever and again I am never going to vote for the one against the building.
- Wayne Dennison states I would like to continue this so the Applicant can consider what the current special permit is relative to the existing free standing sign. We could take a vote on the sign proposal on the building, but you might consider withdrawing that request, rather than having be voted down
- Steve Pedro states regarding the free standing sign, you are directing me to modify the special permit relative to that special permit
- Wayne Dennison states that free standing sign exists as a result of a special permit issued in 1992. That free standing sign is subject to a series of restrictions on what can be on it and when and how it can be lit. So, if you want to operate a sign that is different than what is spelled out in that 1992 permit, you'll have to move modify that permit.
- Steve Pedro states alright, Lauren could you email that special permit to my office thank you
- Wayne Dennison states do you want to continue generally or just with the free standing permit, I am happy to move to vote with illumination with the sign on the building.
- Steve Pedro states I would rather revisit this at a continuation
- Jim Wasielewski states if the Applicant applies for the mounted sign to not be backlit, but perhaps come back with goose neck lighting or canopy lighting
- Emmett Sheehan states no, I would say no, it's already lit up like a Christmas tree
- Wayne Dennison states Lauren when can we take this up again
- Lauren Haché states we have room on June 24th
- Wayne Dennison states I move to continue this matter on June 24th
- Emmett Sheehan seconds
- All in favor WD, ES, KM, FB, PT

Motion: It was moved, seconded and unanimously voted continue the public hearing to June 24, 2021.

- Moved by: WD Seconded by: ES
- Number in favor: 5 Number Opposed: 0

BOARD OF APPEALS — MINUTES

Case No: 2021-11

Petitioner: EJP Ice House, LLC

Address: Lot 7 Ice House Road

Date: May 13, 2021 Time: 7:30 p.m.

Members present: Wayne Dennison, Judith Barrett, Kathleen Muncey, Emmett Sheehan, Philip Thorn & Borys Gojnycz

Members Voting: Wayne Dennison, Judith Barrett, Kathleen Muncey, Emmett Sheehan & Philip Thorn

Other persons present at the hearing: James Wasielewski, Director of Municipal Services & Lauren Haché, Administrative Assistant

- Wayne Dennison opens the public hearing
- Lauren Haché reads the public hearing notice and continues with reading the case response from the Board of Health, the Conservation Commission and the Planning Board
- Wayne Dennison states what is the date of Jim's determination
- Lauren Haché states March 1, 2021
- Wayne Dennison states why don't we hear from the Applicant first and then Jim
- Attorney Robert Galvin states good evening, I represent the Appellant and this is the lot at the corner of Elm Street and Ice House Road. This lot was one of about 14 lots in the original Freeman Farms subdivision approved by the Planning Board on February 10, 1998 and in effect at the time was the 1997 version of the Duxbury Zoning Bylaw and at the time these lots were created and the requirement was 40,000 square feet in the Aquifer Protection Overlay District where now the Aquifer Protection Overlay District now has a lot size requirement of 60,000 square feet. My Client purchased 4 or 5 lots in this subdivision and has already built one or two homes here and you have heard that there are no wetlands issues there and an approved septic design. We filed the Appeal in March 25, 2021. The specific provision of the Bylaw is section 103 of the zoning Bylaw and the establishment of prior rights. Mr. Wasielewski did consult with Town Counsel and my understanding is that you only get 8 years of zoning protection for lots that are developed in a Residential subdivision that is created by a definitive subdivision approval based State Law Chapter 40A section 6 paragraph 5. I agree with that, but we have a zoning Bylaw that is a little different. If you look at section 3.2 of the subdivision rules and it requires that all of the lots to comply with zoning and they did and that is why the subdivision was approved. So, that brings us to the specific language in section 103 of the Zoning Bylaw and prior rights. "All plans and permits legally approved under the provision Bylaws shall not be voided and shall remain in effect". We are talking about a plan that was previously approved.
- Wayne Dennison states I think we understand Mr. Galvin
- Jim Wasielewski states I would like to defer to Amy Kwesell on this

- Amy Kwessel states thank you Mr. Chairman, I don't agree with Attorney Galvin on this at all. The last question he asked would be referring to site plan or a building plan. MGL 40A section 6 specifically states if a definitive plan or a preliminary plan follows within 7 months followed by approval under the subdivision control law. So clearly 40A makes it clear that it has to be a plan approved under the subdivision control law and your Bylaw does not. So there is a difference between a plan approved under zoning and a plan approved under the subdivision control law. I did submit an email that I had sent to Jim a while ago, but under the Oreigo case, the court defines the difference. Once you file a subdivision plan it does not mean that every single lot is buildable. The other issue is that in my opinion, Attorney Galvin's view is nonsensical, meaning that the Town of Duxbury can resurrect any lots that would create an infinite timeframe
- Eric Pontiff states as the Applicant may I speak, he states that when I purchased the lot, it said all plans and it didn't distinguish it. The Bylaw is totally independent. It was approved as a buildable lot
- Wayne Dennison states how do we know that
- Kathleen Muncey states it met dimensional requirements
- Robert Galvin states it met all requirements
- Wayne Dennison states yes, at that time someone could have built at that time
- Judith Barrett states well, we have to wrestle with a not well written Bylaw. Jim was this provision in the prior Bylaw-this section 103
- Jim Wasielewski states that there is an issue as well about the line of the APOD changing and now almost all of that lot is in the APOD and the reason is to protect the Town's water supply from over development and Nitrogen loading
- Robert Galvin states this provision has been in the Bylaw for 20+ years
- Judith Barrett states does it pre-date the 2003 rewrite
- Emmett Sheehan states this troubles me due to the APOD line changing and making these lots non-buildable
- Eric Pontiff states and that is the point of section 103
- Wayne Dennison states 103 says all plans and actions taken under the provision on the zoning Bylaw
- Robert Galvin states legally approved under the provisions of the prior zoning Bylaws
- Wayne Dennison states how was that approved under the prior provision
- Robert Galvin states because you couldn't gain subdivision approval in 1998 without it complying with the zoning Bylaw. It's an expressed condition of the subdivision rules and regulations
- Amy Kwesell states do we know if there were any waivers
- Robert Galvin states the Planning Board can't waive a subdivision
- Amy Kwesell states no, I don't agree, any provision in the subdivision rules can be waived by the Board, so they could waive 3.2
- Robert Galvin states it's a clear issue of law

- Borys Gojnycz asks was there a perc test done at the time
- Robert Galvin states I don't know the answer to that
- Amy Kwesell states there would have to be according to your theory
- Robert Galvin states I will pull the original Plans that were filed
- Amy Kwesell states what if Title V changes, does that mean that these lots will still be buildable
- Eric Pontiff states but section 103 doesn't really to Title V
- Amy Kwesell states that's what I am saying
- Robert Galvin confirms from Mark Casey that perc tests were done on all of the lots at the time
- Amy Kwesell states we have to determine what is a plan
- Judith Barrett states we did not have a site plan provision in 1992
- Emmett Sheehan states how did this come up to be denied
- Amy Kwesell states because in 2003 APOD requires 60,000 square feet for a lot
- Wayne Dennison states I have a hard time rejecting the counsel from Town Counsel, I would like to see the subdivision plans on this
- Judith Barrett states we have the plans
- Mark Keating, I live on the street, the plans are in the packet. It shows how it was laid out before the changes made in 2003
- Emmett Sheehan states Mark are you for or against it
- Mark Keating states we as neighbors are surprised that this is an issue, we feel the lot is perfect for a house
- James Wasielewski states the issue is the APOD to protect the water supply
- Judith Barrett states this Board is challenged to interpret a horribly written Bylaw. I am having trouble trying to figure out why we are not allowed to issue the building permit for this lot
- Amy Kwesell states so, one of the things that you think about under 40A with an ANR plan there is a 3 year freeze on the use of that lot. So any time there is a zoning change, it's not just single family lots here.
- Wayne Dennison states my problem is that we go from "all plans approved" and then going to the provisions of the prior zoning bylaw. Subdivisions aren't approved under the zoning Bylaw
- Judith Barrett states we don't disagree with that
- Mike Shultz, I live at 26 Ice House Rd which is Lot 9, I purchased the lot from Brad Cushing about 10 years ago and none of this was every addresses and it has been for sale for the last 15 years. I am confused that when a developer buys the lot and goes to build on this and they are told no they can't build on it.
- Judith Barrett states welcome to Duxbury
- Mike Shultz states this is very confusing. It's been an approved subdivision and I am happy to see this land getting developed and I support that fully

- Kathleen Muncey states was merger ever an issue, was an adjacent lot ever an issue
- Mark Keating states the adjacent lot is now being built on
- Kathleen Muncey states did lot 8 have the same issue
- Robert Galvin states no, the APOD line goes towards Elm Street and moved into lot 7 – after this was approved.
- Emmett Sheehan states how many homes are you building in there
- Eric Pontiff states I am building 7 homes in there
- Wayne Dennison states the question before us is whether the Building Inspectors denial of the building permit is appropriate or not
- Robert Galvin states I would like to conclude by saying it says “all plans” a legally approved plan under this provision of the Bylaw
- Wayne Dennison states I don’t understand why a plan previously approved was one approved under the zoning Bylaw
- Philip Thorn states the APOD line, is that a line based on science a hard and fast line or is there any freedom to allow construction in that zone if the builder gives up some land in another area of the zone.
- Jim Wasielewski states when there is a boundary line on the lot, you are allowed to encroach into that zone by 30 feet. That boundary line has changed and is now covering about 90% of that lot
- Emmett Sheehan states is this a scientific line, who determined that line
- Judith Barrett states the line was determined by a firm to establish a boundary in the 1990’s. The line with the 60,000 square feet was determined at Town Meeting in 2002
- Philip Thorn states ok, so there are two plot plans here, one from 2021 and then one dated 1996 showing only half the lot is in the APOD. My concern is that the subdivision plan was approved and then Mr. Pontiff bought the land and expected this would be a buildable lot and now the Town is saying it was buildable but now it’s not
- Wayne Dennison states I am sympathetic to that but the buildable lot was determined 22 years ago and cannot guarantee that 22 years later it is still buildable. My problem is what do you do about the subdivision plans from the 1960’s with a 5,000 square foot lot and someone walks in and says it was approved in 1960
- Kathleen Muncey states so when the district boundary change
- Judith Barrett states 2003 APOD changed
- Wayne Dennison states haven’t there been multiple attempts for lots to be taken out of the APOD at Town Meeting
- Robert Galvin states I have represented that regarding the Wetland Protection Overlay but not APOD
- Wayne Dennison agrees
- Kathleen Muncey states have there been multiple lots affected by this APOD line change
- Amy Kwesell states I think because the APOD is based on the recharge zones, it wasn’t considered

- Emmett Sheehan states can they find relief at Town Meeting
- Robert Galvin states we could but it would probably met with resistance
- Mike Shultz states so what obligation does the Town have to notify a land owner that a previously approved subdivision is no longer allowed
- Kathleen Muncey states no
- Amy Kwesell states so what about a Variance if that is the only lot in the neighborhood
- Kathleen Muncey agrees, soil conditions, topography, it's got it
- Wayne Dennison agrees
- Robert Galvin states we would be happy to apply for a Variance and have this consolidated
- Wayne Dennison states as hesitant as we are with Variance, this to me complies with the State requirements to get a Variance
- Amy Kwesell and Kathleen Muncey agree
- Judith Barrett states well, you know what will happen when that Variance gets appealed, that will happen
- Emmett Sheehan states who
- Jim Wasielewski states I think I know someone that will
- Judith Barrett states the probability is very high, I just want to be fair to the Applicant
- Amy Kwesell suggests to continue this hearing and start a new hearing for the Variance, so he has options
- Judith Barrett states I am still troubled by the language with this Bylaw
- Mike Shultz can you clarify what a Variance appeal
- Wayne Dennison states if a Variance is appealed you cannot proceed with the building during the appeal period
- Wayne Dennison continues that an appeal goes to the Land Court or Supreme Court
- Mike Shultz states thank you
- Borys Gojnycz is this lot taxed as a buildable lot
- Robert Galvin states yes, this is taxed as buildable
- Borys Gojnycz states I agree with Judi, I have no issue with them going ahead and building on this lot
- Robert Galvin states I think we will apply for a Variance and I will not be closing or withdrawing this application in the process. I have to be able to proceed under this Bylaw
- Wayne Dennison states can we continue this hearing and decide the Variance thing first
- Amy Kwesell states yes, but you should wait the 20 day appeal of an approved Variance when that time comes
- Eric Pontiff states that it seemed to me that there is a consensus to approve the case at hand
- Kathleen Muncey states I am conflicted
- Emmett Sheehan states why don't we continue this appeal

- Judith Barrett stated we have 100 days, so July 3rd
- Lauren Haché states June 24, 2021
- Robert Galvin states ok, I will get the application for the Variance in
- Wayne Dennison moves to continue this to June 24
- Emmett Sheehan states second
- All in favor WD, ES, KM, JB, PT

Motion: It was moved, seconded and unanimously voted continue the public hearing to June 24, 2021.

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|----------------------|-------------------|
| • Moved by: WD | Seconded by: ES |
| • Number in favor: 5 | Number Opposed: 0 |