

**Town of Bourne
Zoning Board of Appeals
Meeting Minutes
November 9th, 2022**

PRESENT: Chairman James Beyer, Harold Kalick, Wade Keene, Karl Spilhaus (Associate).

ABSENT: Vice Chairperson Chris Pine, John O'Brien.

STAFF: Ken Murphy

PUBLIC: Kevin Klauer, Christopher Kirrane, Don Bracken, Mark Hutker, Zac Basinski, Emilie Martin, Shannon Heino

Chairman Beyer called the meeting to order via Zoom at 7:00pm.

Approval of Minutes: 10.12.22

Mr. Keene makes a Motion to Approve the Minutes. Mr. Kalick seconds the motion.

Roll Call Vote as Follows: Mr. Keene – YES. Mr. Kalick – YES. Mr. Spilhaus – YES.
Chairman Beyer – YES.

The Motion Passes.

Public Hearing for Supportive Finding No. 2022-SF05: *Patricia Curran. 104 Rocky Point Rd, Bourne. To construct detached garage with habitable space above for an office.*

Chm. Beyer states that because they are missing a member, they will need all four members of the board to vote yes for this to pass.

Atty. Kevin Klauer of Ament Klauer LLP introduces himself as representative of the project. He states that they are looking to alter the existing non-conforming structure by removing the two existing structures nearest the lot line and construct a two-story garage. This property is located on the shore of Phinney's Harbor in a residential neighborhood with generally larger lots. There is approximately 35,000 sqft of upland, and it is in the R-40 zoning district. Currently there is a 4-bedroom single family residence with two detached accessory structures. The overall footprint is just under 3200 sqft, which is a lot coverage of 9.2%.

The main dwelling currently is non-conforming. The front yard setback is 25.4 ft when 30 is required, although they are not proposing any changes to the main dwelling. The accessory structures are non-conforming to the front yard setback. The first accessory structure is setback 19ft when 30ft is required, and the side yard setback is 8.9ft when

15ft is required. The second accessory dwelling is just behind the first and is only 5ft from the lot line where 15ft is required. Otherwise, the rest of the property conforms to all setbacks. The proposed project would remove those two non-conforming structures and replace them with a two-car garage. The proposed structure would meet the 30ft front yard setback but would still be non-conforming to the side yard setback with 6ft from the lot line. Included in this proposal would be a new six-bedroom septic system, which has been reviewed and approved by the Board of Health and Conservation Department.

Due to the non-conformities, this project required a supportive finding under Section 2320. This section allows for non-conforming structures to be altered, constructed, or extended if approved by the board if deemed to be not more detrimental than what currently exists. Atty. Klauer states that to determine detrimentality, one would consider if the new structure creates any new dimensional non-conformities. In this case Atty. Klauer argues that there are no new dimensional non-conformities because the front yard setback now conforms and the side yard setback is improved. This new proposed structure also does conform to the neighborhood which has larger homes and larger lots. There is no detriment to vehicular flow or safety, and will create interior parking on the property. This plan will declutter the property and will not impact the natural environment. In addition to this, a support letter was provided by the abutter at 112 Rocky Point Rd, which is the only abutter on that side of the property which will be most impacted.

Chm. Beyer asks for clarification on some points. Atty. Klauer confirms that the main house is non-conforming to the front yard setback but no changes are being proposed to the main dwelling. Chm. Beyer states that this makes it a non-conforming lot, which determines whether a supportive finding can be used. Chm. Beyer states that he has not seen the approval of the septic system from the Board of Health yet, so if the proposal is approved, that must be a condition of the approval. Chm. Beyer also states that he has not seen the letter of support from the abutters at 114 Rocky Point Rd. Atty. Klauer states that he forwarded this letter to Mrs. Gutterson and she confirmed that she sent it to the members of the board. Atty. Klauer states that he will email the letter to Chm. Beyer, and Mr. Keene states that he has it.

Mr. Kalick states that Section 2320 allows for the addition and alteration of a pre-existing and non-conforming structure, but what they are asking to do is take down two sheds and put up a new building. Because the lot is so big, Mr. Kalick suggests constructing the building in a place where all setbacks are met and only a building permit is needed instead of a supportive finding.

Atty. Klauer states that moving the structure to the 15ft side yard setback would require the owner to remove a stone-wall that they would like to maintain if possible. Mr. Keene states that this would be more like a variance, because this is two sheds that will be taken down and a completely new structure would go in their place. Atty. Klauer responds that

he interprets the by-law as when you have an existing non-conforming structure such as the sheds, you can effectively take advantage of that existing non-conformity, which is why they are seeking a supportive finding. Because they are lessening or improving the non-conformity, they are seeking a supportive finding over a variance.

Mr. Spilhaus states that he is familiar with the property, and that if the new structure was constructed in the middle of the property, the view of the ocean from the road would be obstructed, so by keeping the structure close to the lot line, there is no disruption to the neighborhood.

Mr. Kalick inquires again about the stonewall, and states that he believes that this should be a permit to build a garage instead of a supportive finding. Chm. Beyer states that since the lot is non-conforming, it must be a permit with supportive finding.

Chm. Beyer shares his screen with the audience. He displays a map of the property, which shows the location of the house and the stone wall. He then displays a picture of the property which highlights Mr. Spilhaus's point regarding the view from the road. Mr. Keene points out that this garage will be much bigger than the sheds so no matter what, the view will be obstructed.

Mr. Kalick asks Mr. Murphy if they applicants are applying for the right permit. Mr. Murphy confirms that a supportive finding is the correct permit.

Mr. Keene states that they will be setting a lot of precedents in which people will be able to build right up to the lot line as long as there is a shed there.

Chm. Beyer corrects his statement at the beginning of the meeting. He states that a supportive finding requires a majority decision of the board. In this case, they would need 3 out of 5 votes for this to pass. Chm. Beyer continues that he believes that there are some extenuating circumstances in this case to consider. The first is that the abutter in which this most effects is in support of the construction. The second is there is arguably a detrimental effect on the neighborhood in the location of the garage to the view of the ocean from the street.

Mr. Keene states that there will be more cases like this that come up, and when they argue for why this was approved, they will say they were trying to save a view. Chm. Beyer adds that also the applicant has the abutters support.

Atty. Klauer adds that in his experience, each case does not have to be precedential and that each case comes with its own set of facts and circumstances that must be weighed. Mr. Keene says that although they hope for this to be true, it does set a precedent in people's minds.

Chm. Beyer states that he will write the decision on this item, and if it passes he will write it in such a way that indicates that the extenuating circumstances weighed heavily on the decision.

Mr. Kalick makes a Motion to Close the Public Hearing for Supportive Finding No. 2022-SF05. Mr. Spilhaus seconds the Motion.

Roll Call Vote as Follows:

Mr. Kalick – YES, Mr. Keene – YES, Mr. Spilhaus – YES, Chm. Beyer – YES.
The Motion Passes.

Mr. Spilhaus makes a Motion to Approve Supportive Finding No. 2022-SF05 conditional upon the following:

- Receipt of a building permit based on the approval of the septic system
- This structure is not used as an accessory dwelling unit.

Mr. Keene seconds the Motion.

Roll Call Vote as Follows:

Mr. Kalick – YES, Mr. Keene – YES, Mr. Spilhaus – YES, Chm. Beyer – YES.
The Motion Passes.

Public Hearing for Supportive Finding No. 2022-SF06: *Mark Hutker. 25 Mystery Lane, Cataumet. To raze and rebuild single family home.*

Atty. Christopher Kirrane introduces himself as representative of the project. He also introduces Don Bracken of Bracken Engineering and Mark Hutker, the applicant and architect. Atty Kirrane states that they are seeking to raze and rebuild a single-family residence in the R-40 zoning district.

He explains that the lot is unique, situated between two used roads, and one road that is used for nothing else but an abutting driveway. There are three front yard setbacks, none of which the current dwelling conforms. The current property was built sometime in the early 1900s, there is a cesspool on the property, and the house is not habitable. They plan improve upon setbacks from Mystery Lane and Ocean Ave. The lot size is 8,253 sqft, and the reason for that is that they are capturing a portion of Thayer Lane under the Derelict Fee Statute. Atty. Kirrane explains that this is a Massachusetts statute that allows an owner owns up to the middle of the road. This square footage is what the GFA and lot coverage will be based upon. He states that the Planning Board reviewed the GFA and lot coverage and it was approved. He also believes that there may have been some letters of support sent by neighbors. He states that the proposed property should not be detrimental

to the neighborhood, they will be putting in a code compliant Title V property and improving setbacks.

Chm. Beyer asks if the house is going on the exact same footprint. Atty. Kirrane responds that the house will be sliding towards Thayer Lane. The existing structure is approximately 668 sqft, and they will be expanding to 1110 sqft, which is 13.4% lot coverage.

Mr. Keene asks why the septic system wasn't put on the other side of the house and keep the proposed project where the current house is located.

Don Bracken answers that they tried to do that originally, but where the existing house is there is an 18.5ft setback to the streetline, and they would need to be 20ft from the foundation and 10ft from the lot line, so there was no space. He states that they reviewed this plan with the Board of Health, and their first attempt was to keep the house in a similar spot and keep the septic on that side of the house, but they were not allowed to put the septic in the roadway. Because of this, they could only put the septic on the east side of the house. He states that Title V requires a minimum of three-bedroom design for a septic system, but they had to reduce it to two bedrooms just to make it fit where the house currently sits. Some other factors are that they are putting the slab and garage on that side so they can be closer with the soil absorption system. In the corner near where the existing house sits there is also some vegetation that they would like to preserve. Mr. Bracken continues that even though this is R-40 and they show a front yard setback of 30ft and side rear setback of 15ft, this is a grandfathered lot of a 20ft front yard setback which they will maintain. In the rear, there is more like 30ft from the edge of the pavement. Therefore, the proposed spot seemed like the best spot.

Mr. Keene inquires about Thayer Lane and if it is already developed and if it is used to get into someone else's property. On a map of the property shared via zoom, Mr. Bracken highlights where the driveway is on Thayer Lane. The rest of Thayer Lane is undeveloped but has disturbed ground, and the property which will be captured already appears to be part of the lot and you can't distinguish that there is a road there. Mr. Keene asks if there could be any type of development or someone wanting to widen the road to what it was. Mr. Bracken states that he does not believe this will happen. The lot was designed in 1894, and if you look at the road network, there wouldn't be any reason to build that road. However, everyone in that subdivision has the right for pedestrian access, but it is not apparent that this is a road. Mr. Bracken says that the Hutkers could not build any structures in that area.

Mr. Kirrane however clarifies that the applicants own up to the center line, referring to the lot blueprint and Thayer Lane.

Chm. Beyer notes that they have received five distinct letters of support, one of which had twelve signatories to it, some of which also wrote letters. Chm. Beyer adds that in his experience, that kind of support is unprecedented.

Mr. Kalick makes a Motion to Close the Public Hearing for Supportive Finding No. 2022-SF06. Mr. Keene seconds the Motion.

Roll Call Vote As Follows:

Mr. Kalick – YES, Mr. Keene – YES, Mr. Spilhaus – YES, Chm. Beyer – YES.
The Motion Passes.

Mr. Kalick makes a Motion to Approve Supportive Finding No. 2022-SF06. Mr. Spilhaus seconds the Motion.

Roll Call Vote As Follows:

Mr. Kalick – YES, Mr. Keene – YES, Mr. Spilhaus – YES, Chm. Beyer – YES.
The Motion Passes.

Public Hearing for Supportive Finding No. 2022-SF07: Ann & William Murray. 31 Tahanto Rd. To raze and rebuild a single family dwelling.

Zac Basinski of Bracken Engineering introduces himself as representative of this project. He states that the non-conforming lot is a 5800 sqft lot abutted by the Pocasset River and associated resource areas to the west, Tahanto Rd to the east, a vacant lot to the north, and a developed single-family lot to the south. The house was built in 1920 and the lot was laid out in 1922. Currently the house sits in a FEMA flood zone, elevation 15. When the applicants purchased the property, they were looking to renovate it but because of FEMA substantial improvement requirements they must elevate the structure. The proposed project would raise the house up eight feet to elevation 16. They will be maintaining the side yard setback (6.5ft currently to proposed 6.7ft). Currently the front yard setback is only 2.5ft, but they will improve the setback to 8ft. There will be added onsite parking for visitors which improves current traffic and pedestrian conditions in which visitors must park on the grass on the road. The project has received approval from the Board of Health and Conservation. The project requires installing a new nitrogen reduction septic system which will help improve the water quality of the Pocasset River. This property will maintain a year-round housing for the residents. There will be no detriment to the abutting properties and the setback is met for the lot to the south.

Chm. Beyer asks Mr. Kalick to write the decision for this item.

Emilie Martin of 33 Tahato Rd introduces herself as the owner of the vacant property. She inquires about where the measurement for the proposed building comes from and believes that the proposed building will be higher than what is allowed. She states that

there is a lot of standing water even in a mild rainstorm. Firstly, she inquires whether all the FEMA applications have been submitted and certified, and where to find them if they have been approved. Secondly, she inquires regarding what the current foundation of the house is made from. Thirdly, she expresses concern that the height measurement is from the ground level. She states that they have put a slab four inches on one end and eight inches on the other, and they have presumed that the measurement begins at the eight-inch level of the slab. She states that there should be no impediment of water in structures in this location and that water should flow freely, but the applicants have now covered their property in a very large cement slab and there is no way for the water to be reabsorbed into the earth. Next, she expresses concern that the applicants have a rainwater mitigation system proposed when rainwater should go from the roof down a gutter and back to the property. Lastly, although she believes the applicants should build what they want, she does not know the definition of hardship. She questions whether it would be a hardship to go from a one level home to a two-level home which makes the house higher than what it's supposed to be. She states that it would be a problem for her property if there is any change in the elevation of the property in terms of drainage. She asks for assurance from the board that these things will not happen and wants to know if the board will help her keep the applicants within the rules of the zoning board.

Mr. Murphy asks Mr. Basinski if he has already gone before Conservation. Mr. Basinski replies that he has gone before Conservation, Board of Health, and he has the lot coverage sheets as well from the Town Planner's Office.

Chm. Beyer states that he wishes to address a couple things from Mrs. Martin's statement. He says that the allowable building height from the ground is 35ft, and the height proposed is 29.2ft. Mr. Basinski states that the allowed height for this area is 25ft, but they are using the provisional bylaw which allows the additional 5ft with the roof pitches for a max height of 30ft. With a proposed height of 29.2ft, they meet zoning requirements for height and still meet all FEMA requirements to raise the house out of the flood plane. This has also been reviewed by Conservation.

Mr. Basinski then addresses some of Mrs. Martin's concerns and shares a blueprint of the proposed property. The property has a pile design elevation because of GFA restraints around a closed wall elevation design. The reason for the concrete slabs at the bottom of the house is to protect the piers from scour in the event of a flood. The purpose of the slab is not to increase any site grade, and all site grades on the property remain the same. They are not increasing any impervious coverage and the hard masting gets smaller than before. There is an open-air deck which allows rainwater to fall back to the soil. The reason for the roof drainage system is that the new system gets the water down into the ground quicker and gives it somewhere to be mitigated on site, which will help improve flooding concerns in the area. Mr. Basinski states that this was required by Conservation because they want to see roof water recharge. This system will be a vast improvement from water standing on the lot.

Mrs. Martin asks for reassurance that the elevation of the ground is not going to change. She references the eight-inch slab that will be constructed with the new property and how this may force water away towards the abutting properties.

Mr. Kalick states that he doesn't think that Conservation would have permitted this unless they felt comfortable that it can handle the water that is coming off the building.

Shannon Heino, of 33 Tahanto Rd, states what her and her mother's main concern is, which is that the elevation of the property will not change. She states that it will make their vacant property become a river. But if the elevation remains the same and the house on stilts, there should be no problem with it.

Chm. Beyer states that in terms of assurances, with a vote to approve this project, they are only certifying that this project conforms to the zoning requirements. The engineers are responsible for assurances on design. Chm. Beyer states that in his own professional opinion as an architect, the new design is much better than what currently exists, and that slab is not going to block any water. Ms. Heino states that as long as they don't do extensive landscaping that changes the elevation that should be fine. Chm. Beyer states that on the plans, the topography does not show any changes and that Mr. Murphy is the enforcement of this.

Mr. Murphy states that if there is an issue, they will do a site visit with Conservation to address anything that may have come up. Mr. Basinski adds that as a part of the approval through Conservation they are required to submit an "As Built" plan back, which would show all the topographical grades at the end of the project. Also, the plans do not change any site grades around the structure.

Mr. Keene makes a Motion to Close to Public Hearing for Supportive Finding No. 2022-SF07. Mr. Spilhaus seconds the Motion.

Roll Call Vote As Follows:

Mr. Kalick – YES, Mr. Spilhaus – YES, Mr. Keene – YES, Chm. Beyer – YES.

The Motion Passes.

Mr. Keene makes a Motion to Approve Supportive Finding No. 2022-SF07. Mr. Spilhaus seconds the Motion.

Roll Call Vote as Follows:

Mr. Kalick – YES, Mr. Spilhaus – YES, Mr. Keene – YES, Chm. Beyer – YES.

The Motion Passes.

New Business:

Chm. Beyer states that Mr. Kalick made a comment that currently their forms marry a special permit to a supportive finding. Chm. Beyer and Mr. Kalick believe that this is incorrect and that you can have a supportive finding without having a special permit and there should be a form that reflects that. After looking through some of the zoning laws, Chm. Beyer states that it is clear that supportive findings are aimed at projects that have non-conforming lots. Special permits have seven or eight criteria that have to be met in order for them to be issued. Chm. Beyer volunteers to create another form that reflects this.

Mr. Kalick asks Mr. Murphy how other towns handle this. Mr. Murphy answers that supportive finding is either tied into the special permit or separate. Mr. Kalick describes how it can be sometimes confusing for people who want a supportive finding but their form says special permit/supportive finding.

Mr. Murphy adds that in some situations supportive findings do not even have to go before the board according to case law.

Mr. Keene and Mr. Murphy have a discussion regarding the Planning Department and ZBA's relationship. They say that the Planning Department may alter bylaws and the ZBA enforces those laws.

Chm. Beyer states that from 2320 it is clear that one can have a supportive finding without a special permit. He states that you are allowed to extend or alter an existing non-conforming structure without a special permit. He suggests that they need a separate supportive finding template. The three templates would be special permit, special permit plus supportive finding, and supportive finding.

Mr. Kalick states he believes that they only need two forms, one for a special permit and one for supportive finding. If an applicant needs both, they would use both forms.

Old Business:

None.

Adjournment

Mr. Kalick makes a Motion to Adjourn, seconded by Mr. Spilhaus.

Roll call vote as follows:

Mr. Keene – YES, Mr. Kalick – YES, Mr. Spilhaus – YES, Chm. Beyer – YES.

With no further business before the Board, the meeting was adjourned at 8:20PM.

Respectfully Submitted,
Ina Sullivan