



**Town of Barnstable**  
**Zoning Board of Appeals**  
**Minutes**  
**July 9, 2008**

***A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday, July 9, 2008 at 7:00 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was met. Also present were Art Traczyk – Principal Planner and Carol Puckett – Administrative Assistant.***

<b><i>Gail Nightingale</i></b>	<b><i>Present</i></b>
<b><i>Ron Jansson</i></b>	<b><i>Present</i></b>
<b><i>Daniel Creedon III</i></b>	<b><i>Present</i></b>
<b><i>James Hatfield</i></b>	<b><i>Present</i></b>
<b><i>Sheila Geiler</i></b>	<b><i>Present</i></b>
<b><i>John Norman</i></b>	<b><i>Present</i></b>
<b><i>Nikolas Atsalis</i></b>	<b><i>Present</i></b>
<b><i>Laura Shufelt</i></b>	<b><i>Present</i></b>

***Gail Nightingale opens the hearing at 7:00 PM. She reads a summary of the appeals into the record. She indicates that the comprehensive permit for Cotuit Equitable Housing scheduled for tonight is going to be withdrawn. She welcomes Laura Shufelt and Nikolas Atsalis. She recognizes that Jerry Gilmore is here.***

***She calls the Mueller and Paramount Enterprises, Inc. at 7:04 PM and reads it into the record. She indicates that they have requested a continuance and will not assign any Board members.***

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<b>7:00 PM</b>	<b>Appeal 2008–039 - New</b>	<b>Mueller &amp; Paramount Enterprises, Inc. Appeal of Administrative Official</b>
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Letter from Attorney Colleen Kramer submitted 07/08/08 requesting a continuance in order to obtain an engineered measured survey.

Amy L. and Carl E. Mueller & Paramount Enterprises Inc., have appealed the Building Division's issuance of an April 14, 2008 notice of zoning violation and order to cease and desist the operating of a landscape business in a residential zone. The notice cites that the use of the property is contrary to the permitted single-family use allowed under Section 240-11 of the Zoning Ordinance. The property is addressed as 22 Suomi Road Hyannis, MA and is shown on Assessor's Map 269 as parcel 102. The property is in a Residence B Zoning District.

***Gail Nightingale indicates that there will be no board members assigned as it is going to be continued.***

***To be continued Sept 10<sup>th</sup> at 7:00 PM.***

***Continued to September 10, 2008 at 7:00 PM***

***She then indicates that she cannot call the next hearing until 7:15 PM. She then gives a summary of the amnesty apartment appeals heard tonight. She granted 4 permits and rescinded 2 permits.***

***She then asks for a motion to approve the minutes from January 30<sup>th</sup>, April 16<sup>th</sup> and June 11<sup>th</sup>.***

***Motion is made to approve the minutes.***

***Seconded.***

***Unanimous vote to approve the minutes.***

***Minutes approved.***

***She then takes a break until 7:15 PM to call the next appeal. Before calling the next appeal she makes an announcement that Cotuit Equitable is withdrawing their request for a minor modification and will re-apply for a major modification. She also informs the public that the Ellis appeal will be continued.***

***Gail Nightingale calls Appeal 2008-040 at 7:15 PM. She reads the appeal into the record.***

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<b>7:15 PM</b>	<b>Appeal 2008-040 - New</b>	<b>The 1995 Ferraro Family Investment Trust Appeal of Seeking Enforcement Action</b>
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Joseph P. & Brenda Ferraro, Trustees of the 1995 Ferraro Family Investment Trust have appealed to the Zoning Board of Appeals seeking enforcement action regarding the use of the property at 3206 Main Street, Route 6A, Barnstable, MA for "Nirvana Coffee". The subject property is shown on Assessor's Map 300 as parcel 008. The property is in the Village Business A Zoning District.

***Members assigned: Ron Jansson, Dan Creedon, James Hatfield, Laura Shufelt, Gail Nightingale***

***Attorney Paul Tardif is representing the Ferraro's, the owners of the property at 3220 and 3214 Route 6A in Barnstable. His client's property houses the Barnstable Village store as well as other stores and offices and abuts Nirvana Coffee. He indicates that this appeal seeking enforcement action is brought by the appropriate party in that his clients, as an abutting property owner, is a person aggrieved as defined by Section 17 of Chapter 40A thus having standing. He gives a history of the property in question. He indicates that on March 11, 2008, Nirvana Coffee went before the***

**Board of Health for a variance for the location of a grease trap which was approved and for a bathroom that was denied. On March 21, 2008, a lease was signed including a provision that the parties acknowledged that the premise offers no on-site parking and attached was a letter a letter from the landlord to David Lancaster, President of Nirvana Coffee, stating that the residential tenants "are not permitted to park on-site" On March 28<sup>th</sup>, an application was submitted for a building permit for interior renovations including food preparation areas shown on a plan. The current and proposed uses were left blank. The application was granted on April 15, 2008. By letter April 17, 2008, in pursuant to Section 7 requesting enforcement of the zoning ordinance and that the building permit be rescinded immediately. Pursuant to section 7, the Building Commissioner was required to respond within 14 days of receipt of the request. Based on a receipt date of April 18<sup>th</sup> as stated in the staff report, a response would've been due May 2, 2008. When no response was received and trying to preserve his client's rights under Section 7 and also to expedite a response to the issues raised in his letter, he filed an appeal pursuant to Section 8 on May 28, 2008. On that same date a letter was drafted from the Building Commissioner although it didn't take any position as to whether his request would be fulfilled or denied, he will assume that Mr. Perry was trying to explain his rationale for granting a building permit. It is his client's position that the present use of the property is not in compliance with Barnstable's Zoning Ordinance and requires, at the very least, a special permits from this Board and, at the most, Site Plan Review and is asking this Board to overturn the decision of Mr. Perry and direct him to require full compliance with the ordinance. He wants to clarify the reason for this appeal, parking in his client's lot is very limited and necessary for the operation of the businesses he rents to. Every business that has been at that Nirvana spot has resulted in uncontrolled parking of customer's in his client's parking lot. Despite what the Building Commissioner has indicated, in which he will discuss, both Nirvana Coffee Shop and the Barnstable General Store are destinations where people drive. If spaces are not available at lunch time people will turn around and leave. If no spaces are provided for his client's customers it is unworkable and an unfair result. He indicates he has aerial pictures and hands them to the Board members and explains them. He indicates that in his letter to Mr. Perry he raised two issues and reads his letter and the uses in the VB-A zoning district. . He questions why Mr. Perry doesn't deem this a food service establishment. He indicates that the general store was required to have a special permit but not Nirvana Coffee.**

**He indicates that his second point in the letter has to do with parking and that Nirvana Coffee does not have sufficient parking and reads the ordinance regarding parking. He talks about the parking in the county complex and difficulties finding a parking space there. He indicates that Mr. Perry doesn't address where the parking is which turns out to be at the general store parking lot. There is a problem with unauthorized parking in his client's lot. He thinks the ordinance in this case has been ignored.**

**Ron Jansson asks Attorney Tardif if it is his contention that this is a Conditional Use.**

**Attorney Tardif indicates yes.**

**Ron Jansson asks how he would equate the use as a coffee shop.**

***Attorney Tardif indicates that he serves coffee, pastries, prepackaged item, already made sandwiches, drinks and indicates that the menu is two pages.***

***Ron Jansson asks what percentage is prepared on the premises.***

***Attorney Tardiff indicates that he is unsure. He indicates that you cannot carry these items as they are meals for lunches and goes beyond that and what is going on at Nirvana Coffee requires them to come to the Zoning Board to make certain that the ordinance is complied with.***

***Ron Jansson indicates that under our bylaw we don't define a food service establishment.***

***Attorney Tardif indicates that it is something other than a restaurant and that what matters here is that the food is being sold to patrons.***

***John Norman asks about Stop and Shop comparably and would he consider items such as food wraps that are prepackaged food service items and should be held to the same standard as a restaurant? .***

***Attorney Tardif indicates yes regarding the Conditional Use and the special permit..***

***Ron Jansson indicates that he knows that a restaurant requires a food service victualer license and asks if a food service establishment requires a common victualer license.***

***Attorney Tardif is not certain because a common victualer's hearing was commenced and continued indefinitely and whether or not the Licensing Board requires it, he is uncertain.***

***Gail Nightingale comments that she doesn't think a common victualer's license is required but thinks they require a Board of Health food service license.***

***Ron Jansson asks if this property required a food service license from the Board of Health.***

***Attorney Tardif indicates that he believes it did but doesn't know if they acquired one.***

***Ron Jansson asks if in fact they require a food service license and asks whether they know if Stop & Shop and Shaw's, when they are selling pre-packaged food, are required to carry a license?***

***Attorney Tardif indicates that he doesn't know.***

***John Norman indicates that he is concerned on the conditional use as defined and notes it is not clearly defined but wants to understand how other businesses with similar aspects that do not and are not required to have the kind of parking that zone mentions. He indicates that he doesn't want to blend the retail uses with Board of Health issues.***

***Attorney Tardif indicates that if you determine that those are retail uses he thinks you are opening yourself up to a big problem in the future where restaurants and food service establishment will***

***find a way around that requirement and be able to open in a lot of zones where they are not required.***

***John Norman indicates that we are talking about a retail use that is continued on that property prior to zoning.***

***Attorney Tardif then indicates that the Department of Taxation statues, MGL, Chapter 64H defines restaurant and reads the definition.***

***Gail Nightingale then asks if there is anyone here from the public who would like to speak either in favor or in opposition.***

***Attorney Bruce Gilmore is here representing Robert and Lynn Medeiros who are the proprietors of the Barnstable General Store and are tenants. He indicates that only products that are sold from Nirvana Coffee are food products and if you look at the records from the Board of Health and plans submitted, a significant portion of the left rear of the leased premises is food preparation area. Also, there is a birasta area, an area where coffee is prepared, as well as refrigeration space. There is nothing sold in this building that is not food either prepared on the premises and delivered to the public. If it was a pre-existing nonconformity you are then under 40A for an alteration and expansion. If you look at the menu and look at the rent on the lease, this has to be by definition a high volume operation of people going in and out buying their beverages and various foods that are prepared on site. If he looks at a common sense definition of food service establishment or looked to the Department of Revenue or in Hyannis of the Hyannis restaurant or look to the Board of Health regulations for food service permits, all of them are instructive but not depositive.. This is a common sense situation and he would have to say without qualification that if this is not a food service establishment serving the public food, there are none. More importantly is the provision regarding site plan review. This clearly is a change of use in a commercial area and there was no Site Plan Review. He reads section 240-98 and points out the part affecting neighboring properties and surrounding areas. He indicates that in Section 240.100 B & C there is no question that this should've required Site Plan Review.***

***He indicates that Mrs. Medeiros has had altercations with people using Nirvana and her parking lot during critical times for her operation and they have no right to be there. He indicates that she has taken pictures and threats indicating that if she has their cars towed that she would be sorry and the impact has been significant and the Town has never considered the impact on his client. He thinks that Nirvana Coffee aggravates an already bad situation regarding the issue of parking in the village. He indicates that his clients shouldn't have to be parking police.***

***Ron Jansson takes a moment to disclose that he is appointed by the court of the Commonwealth as a receiver in a matter and Mr. Gilmore represents the court but feels that if there is at least an appearance of a conflict he will remove himself from this appeal.***

***The Board, Attorney Gilmore and Attorney Tardif agree that this is not a problem.***

***Gail Nightingale indicates that there is a petition signed by 57 residents, patrons of the village of Barnstable, who are very opposed to the Town permitting Nirvana Coffee to be in business in Barnstable Village. She reads the letter attached to the petition.***

***Jerry Desalvatore, who rents from Mr. Ferraro at 3220 Main Street and shares a parking lot with Bob Medeiros, Mr. Shiffmann, Mr. Manning and the public defenders office, indicates that many times they have had to chase people from the parking lot who are not patrons of the businesses mentioned. He indicates that Nirvana Coffee should have their own parking.***

***Ron Jansson asks how long has he been at this location. Mr. Desalvatore indicates that he has been there approximately 5 or 6 years. Ron asks, prior to Nirvana Coffee, if there were parking problems before. Mr. Desalvatore indicates that there was and that this will aggravate the already existing problem.***

***Building Commissioner, Tom Perry, speaks and indicates that when they first came to see him, which was back in mid-February, Attorney Kenney came in to talk to him about this location and about putting in the coffee shop which would rely on foot traffic which seemed reasonable to him given the village. He indicates that the village has a lot of foot traffic but also a serious parking problem. However, you look at a coffee shop, and ask, would you drive across town to go to a coffee shop? He doubts it and thinks that you would rely on people being there for something else. He indicates that more than likely they are there for the court, the registry of deeds or the buildings across the street. He was convinced that this would be based on foot traffic and had no problem with the deficiency of parking. He indicates that when you get to the use, his office for years has looked at an operation such as this even though there might be 5, 6 or 7 seats inside, it was considered retail. He indicates that if they grabbed everything that had a seat and called it a restaurant then they would be looking at the Christy's, Tedeschi's, the 7-Eleven's, White Hen Pantry and start to call them restaurants. He doesn't want to do that and that is why they look at these operations as strictly retail as has been said many times, retail is allowed in the district, in the village business. They have situations that are very similar to this such as Nibbles 'n Bits in Marstons Mills, which is a small coffee shop which sells sandwiches, coffee, ice cream, various pastries and has half a dozen seats on the inside and a picnic table outside and look at that as retail. Also, the Sea Street Market in Hyannis which is a similar situation with a small deli, newspapers and such but has been there for a long time as well as the West Barnstable Village Store which is a very similar situation with a lunch counter and approximately half a dozen seats when the previous operators were operating it and was considered a retail operation. He indicates that he had him take out the seats and they agreed to that.***

***James Hatfield asks Mr. Perry why he doesn't think this would be an intensification from this use as opposed to the uses prior and seems that the key point is parking.***

***Mr. Perry indicates that it is one thing if you are going to a specific place and don't find a parking space but that there was many other retail operations going on previous to this business. He indicates that part of the bank operation was an ATM machine and was sure that there would be traffic counts for that also.***

**Ron Jansson asks how is it that he would define the term food service establishment?**

**Tom Perry indicates that they have never looked at or discussed it.**

**Ron Jansson asks if there is anything under the building or health code that defines it.**

**Mr. Perry indicates that he knows that there is nothing under the building code and is not sure about the health code.**

**Ron Jansson asks Mr. Perry if he researched the zoning history for the definition of food service establishment. Mr. Perry indicates no.**

**Ron Jansson asks if he has ever issued a building permit for a food service establishment while he has been Building Commissioner.**

**Mr. Perry indicates that he did, for the Nibbles 'n Bits establishment in Marstons Mills which is the same type operation and it is in the same district: VB-A and then clarifies that it was for retail .**

**Ron Jansson clarifies that Mr. Perry has never issued a building permit for a food service establishment.**

**Mr. Perry indicates that he has never issued a food service establishment permit as there is no definition for it.**

**Dan Creedon asks about Site Plan Review. Mr. Perry indicates that if it was a new establishment it would require it but because there has been retail operation in this establishment for a number of years, it was his determination that been Site Plan Review was not needed and sold him on foot traffic.**

**Gail Nightingale clarifies with Mr. Perry that he believes this was retail to retail use.**

**Dan Creedon asks how many parking spaces this use requires under the zoning ordinance. Mr. Perry indicates that with no seats he believes it would be 3. They look at Section 240-56.- Schedule of Off Street Parking. Ron Jansson reads the ordinance of what a bank requires and comments that retail use requires more and asks why that wouldn't be an intensification.**

**Mr. Perry indicates that the use had always been retail in the past and because of the history.**

**Attorney Tardif comments that if throw away the retail and look at the definition under 240-56 for "Restaurants, licensed common victualer or purveyor of food ready to be consumed on or off premises" that the required parking is "1/every 3 seats + 1/every 2 employees + 5/take-out area". He believes there are 4 employees and thinks that there is 7 alone.**

**Mr. Perry comments that Attorney Gilmore brought up that there are only 3 conditional uses in the zoning ordinance and disagrees and came up with 8 districts with conditional uses and basically treated with special permits.**

**Attorney Kenney is here representing Nirvana Coffee and David Lancaster. He indicates that he did make application for Site Plan Review on January 25, 2008. The application included 8 seats, the products, assembled sandwiches, prepackaged salads and that nothing is made to order other than the coffee. On February 5<sup>th</sup> his office contacted the building department for any comments in order to review previous to formal Site Plan Review. The building department responded and indicated that they did not have any issues or problems and that the Building Commissioner determined it was as of right and no intensification of the use was noted. He indicates that the business will be open 6:00 to 4:30 PM and that his target base is people that are there for the courthouse, etc. He indicates that they made application to the Board of Health and requested two variances, one for grease recovery devices and another for one unisex bathroom. The Board of Health denied the variance for the bathroom if they were going to have seats. After the Board of Health they applied for building permit and was issued one on April 15<sup>th</sup> and construction began. In June, as construction was going along, he was requested by the Building Commissioner to remove the seats. This was after they had installed and invested almost \$10,000 for the installation of the restroom and was now asked to remove the seats. He indicates that they do plan in the future to seek 8 seats. He indicates that this is not about parking but is about competition. He indicates that the staff report has a definition of restaurant which focused on certain criteria and reads it.**

**Ron Jansson asks about the food prep area.**

**Attorney Kenney indicates that food is being assembled on-site and not cooked and that you have to look at food service and they do not fall in the category of restaurant. He talks about the parking of a bank versus retail use and indicates that there is no intensification of use but a reduction by one for parking. He indicates that the county complex, as with many of the other businesses, are allowed to use the parking in the county complex. He indicates the Building Commissioner's decision is consistent regarding numerous locations throughout the town that are similar and that are deemed retail and asking to uphold the Building Commissioner's decision. He also notes that his client has arranged for deliveries to be made before 7 AM and by doing that it does not create a problem. His client does not want his customers to park in the abutter's lot there either. He indicates that he has 17 letters and a petition signed by 146 people all in support to be submitted to the file. In summary, they are not a restaurant or a food service establishment, they are retail.**

**Ron Jansson wants to go over the parking requirements regarding prior use and current use and asks Attorney Kenney to go over the figures**

**Dan Creedon asks why neither use had to meet minimum on-site parking requirements.**

**Attorney Kenney indicates that retail use is an allowed use in the district. The structure itself is pre-existing nonconforming as is the premises. The Building Commissioner took the position as he**

***understands it that there was no intensification in use and did not trigger the new parking bylaw requirements.***

***Bob Medeiros, who owns the Barnstable General Store, wants to address the original question that Ron Jansson had regarding restaurant versus retail and according to MASS DOR which is a summary of the MGL's, and reads the definition. He indicates that MASS DOR considers anything that is made on a premise a meal. If the sales of his sandwiches and coffee became larger than the grocery sales, then the whole store would be a restaurant and would be subject to all the laws of a restaurant. He indicates that he had discussions with the Cape Cod Commission and Margo Fenn regarding the parking issues. He believes that Nirvana Coffee is an intensification of use.***

***James Hatfield asks Mr. Medeiros if there has been an increase in cars using his parking spaces. Mr. Medeiros indicates approximately 15 to 20 a day.***

***James Hatfield asks what the parking was when it was compared to the use when it was banking. Mr. Medeiros indicates that it was approximately 5 or 6 a day.***

***Robert Kelly, who runs the Dolphin Restaurant, indicates that parking is a problem everywhere. Restaurants or food establishments need parking for seats. He indicates that the Dolphin Restaurant maintains over 40 spaces and maintains them for the community and that each establishment should have parking.***

***Lynn Medeiros who, with her husband own the general store, indicates that they have tried to stop the parking problems and that this has nothing to do with competition She indicates that she has taken pictures from the past couple of days. She indicates that during construction there was parking in her lot also. She shows and explains pictures she has taken which are submitted to the file. She shows a picture of a delivery truck.***

***Ron Jansson asks what time they were taken.***

***She indicates during the day and not before 7:00 AM.***

***Joan Ellis speaks and indicates that her husband lived in the house where Nirvana Coffee was. She reads a letter that her husband wrote. She indicates that the Dolphin takes care of their building and their lawns. She indicates that she has worked at the Registry of Deeds for over 20 years and if they are going to eliminate the restaurants, etc. are they going to eliminate lawyers, etc.?***

***David Lancaster, who owns Nirvana Coffee, speaks and indicates that he is sympathetic with the parking issues regarding the general store and has put up signs telling people not to park there. He put 4 signs up and if he sees people he stops them and asks them to move their car. He indicates that his 4 deliveries have been told no parking in other spaces. His deliveries are only 4 companies and have been told that they cannot use the adjacent parking.***

***Gail Nightingale asks Attorney Tardif if he would like to recommend.***

**Attorney Tardif indicates that he would just like to reiterate his letter and that parking is a major issue.**

**Peter Leveroni, who is an attorney in the village, speaks and indicates that he is thrilled with having a coffee shop they can walk to. He indicates that they also sell tee shirts, art work, etc., but that parking has always been a problem. He indicates that this can be solved by being good neighbors.**

**Joanne Michaelson from Whistleberry's speaks and indicates that she is classified as a restaurant and is completely take-out and that she had to conform to parking and the patrons.**

**Attorney Kenney indicates that Whistelberry's has seats and that you can order a sandwich and have it made to order.**

**Ron Jansson indicates that the issue is if the Building Commissioner made an error and the basis is whether or not this is allowed as-of-right or if it should've come before the zoning board. He comments that there is food preparation, if it is not a food service establishment.**

**Dan Creedon asks if you are required to get Site Plan Review if you can get a building permit. Ron doesn't believe so. Board discusses.**

**Gail Nightingale makes positive findings.**

**On Appeal 2008-040, the applicants are Joseph P. & Brenda Ferraro, Trustees of the 1995 Ferraro Family Investment Trust have appealed to the Zoning Board of Appeals seeking enforcement action against Nirvana Coffee, David Lancaster, owner regarding the use of the property at 3206 Main Street, Route 6A, Barnstable, MA. The subject property is shown on Assessor's Map 300 as parcel 008. The property is in the Village Business A Zoning District.**

**She indicates that there are letters submitted to the file in favor and in opposition.**

**On March 27, 2008, an application for a building permit for "internal renovations to include rest room, refrigeration, counters and food prep area" was made under the name of David Lancaster (as business owner) for property addressed as 3206 Main Street, Barnstable. The application cited the area to be renovated as being 990 sq.ft. The submission included a copy of the proposed renovation plan identifying the use to be that of "Nirvana Coffee Company". The plan also shows the exterior of the building identifying the existing on-site parking area for two vehicles.**

**On March 31, 2008, Attorney Paul R. Tardif representing R.W. Medeiros Co., Inc., operator of the "Barnstable General Store" located at 3220 Main Street, Barnstable, communicated to the Building Commissioner, Thomas Perry, a request that he be notified of the issuance of a building permit for the coffee shop. The letter states that at this time it is the intent of R.W. Medeiros Co., Inc., to appeal that "decision" to the Zoning Board.**

**On April 15, 2008, building permit No. 2008-01608 was issued as-of-right for the renovations based upon those plans submitted. As staff understands it, the Building Commissioner issued the**

**permit as the principal use would be retail sales of coffee and other incidental pre-packaged food products.**

**On April 18, 2008, a letter was received by the Building Division dated April 17, 2008, from Attorney Paul R. Tardif representing Joseph P. & Brenda Ferraro, Trustees of the 1995 Ferraro Family Investment Trust. That letter cited the April 15, 2008 issuance of the building permit to Mr. Lancaster and requested of the Building Commissioner that he enforce the zoning ordinance identifying:**

- the need for a Special Permit pursuant to Section 240-24.C(1) as the VB-A District specifies restaurant and other food service establishments as conditional use.**
- the existing needs for parking relief as the site is now used (commercial and apartments) which require a total of 8 on-site parking spaces according to the ordinance, Section 240-56.**

**On May 28, 2008, this Appeal of an Administrative Official's Decision was submitted to the Town Clerk's Office and the Zoning Board of Appeals Office with a copy also being submitted to the Building Division. The appeal cites "refusal of the Building Inspector to take a requested enforcement action" and apparently is requesting that the Zoning Board finds that the proposal needs zoning relief and to order the Building Commissioner to enforce that finding of the Board and require the proposal seek zoning relief.**

**On that same day, May 28, 2008, the Building Commissioner, Thomas Perry, issued his written response to he felt Attorney Tardif's April 18<sup>th</sup> letter. The letter notes the history of the building and uses and notes that the proposed coffee shop will rely upon foot traffic more that auto traffic. It also states that the few interior seats being permitted are for the convenience of patrons. It also cites that the building and uses pre-dates zoning including the requirements for on-site parking.**

**On June 16, 2008, the Building Commissioner corresponded with Mr. Lancaster, citing a June 5<sup>th</sup> meeting and an agreement made that no seating would be provided in the Nirvana Café at 3206 Main Street, Barnstable.**

**She feels that the petitioner has complied and the Building Commissioner has determined that he feels that this is a retail use and did not require them to go to Site Plan Review.**

**Laura Shufelt seconds.**

**No discussion**

**Vote:**

**AYE: Laura Shufelt, Gail Nightingale**

**NAY: Ron Jansson, Dan Creedon James Hatfield**

**Gail Nightingale makes a motion to uphold the decision of the Building Commissioner to not have to come to the Zoning Board of Appeals and Site Plan Review.**

**Laura Shufelt seconds.**

**No discussion.**

**Vote:**

**AYE: Laura Shufelt, Gail Nightingale**

**NAY: Ron Jansson, Dan Creedon, James Hatfield.**

**Ron Jansson indicates that he is voting in the negative as he believes that there is a change of use on the site and that this would require Site Plan Review prior to the issuance of the building permit under the provisions of the Site Plan Review ordinance and that this use is more akin to a conditional use i.e., a food service establishment than a retail use and the bylaw distinguishes between retail uses although there is no definition for food service overall. Also, he would find that this is an intensification of the use and the parking and that Site Plan should have occurred and the Building Commissioner have erred in not having Site Plan Review and this matter should've come to this Board for a review.**

**Dan Creedon indicates that he has voted in the negative for reasons previously stated.**

**James Hatfield indicates that he is voting in the negative specifically for the intensification amount of business they are going to be doing and the additional off site parking required**

**Decision of the Building Commissioner is Upheld.**

**Gail Nightingale then calls the Ellis appeal at 9:13 PM.**

**She reads the appeal into the record:**

**7:30 PM      Appeal 2008-041 - New      Ellis  
Use Variance**

A letter dated June 25, 2008 from Patrick M. Butler, Esq., has been received by this office requesting that this appeal be continued due to a conflict on another matter in Mashpee.

Susan W. Ellis has applied for a Use Variance. The applicant is seeking a variance from Section 240-11.A, Principal Permitted Uses, to allow for a second detached dwelling unit on the lot where zoning only allows one single-family dwelling unit per lot. The second dwelling is a former family apartment created within a detached accessory garage/barn structure located on the lot. The subject property is shown on Assessor's Map 208 as parcel 121, addressed as 393 Main Street, Centerville, MA. The property is in a Residence D-1 Zoning District and a Resource Protection Overlay District.

**She indicates that no members will be assigned as this has been continued**

**Continued to August 6<sup>th</sup> at 7:45 PM.**

***Gail calls the Costello appeal at 9:14 PM and reads it into the record.***

**7:45 PM**

**Appeal 2008-046 - New**

**Costello**

**Bulk Variance Minimum Lot Area**

Staff Report and Application Materials enclosed

- Letter in favor from Judith and James McCormack of 18 Woodland Avenue, Osterville, MA submitted to the file 07/02/08
- Letter in favor from Donna Driscoll Tarnoff and Peter Tarnoff of 45 Woodland Avenue, Osterville, MA submitted to file 07/07/08/.
- Letter in favor from Attorney Butler representing Mr. & Mrs. Peter Myer of 219 wianno Avenue, Osterville, MA submitted with one suggested restriction regarding buffer and screening 07/07/08
- Email received in favor provided buffers and screening are provided from Ronald Hollander of 70 Hollingsworth Road, Osterville, MA submitted to file 07/09/08.

Steven M. & Nancy M. Costello have applied for a Bulk Variance to Section 240-13.E, Minimum Lot Area. The applicants are seeking the variance for a 21,000 sq.ft., undersized lot that has lost its buildability under zoning. The lot does not conform to the minimum 1-acre requirement for the zoning district or the minimum 2-acre requirement for the Resource Protection Overlay District. The property is shown on Assessor's Map 140 as parcel 136. It is addressed as 40 Woodland Avenue, Osterville, MA in a Residence C Zoning District and a Resource Protection Overlay District.

***Members assigned: Ron Jansson, Dan Creedon, James Hatfield, Laura Shufelt, Gail Nightingale***

***Attorney Lawler is representing the applicants, Steven & Nancy Costello. Attorney Lawler gives a history of the Costello's as to where they have lived.***

***Ron Jansson clarifies that this lot has been a lot since 1946, is approximately ½ acre but that in 1999 zoning changed and the minimum required lot area was changed to 2 acre zoning, if it remained 1/2 acre, has it merged. It was a legal, pre-existing nonconforming lot.***

***Attorney Lawler indicates that because there was a fire which destroyed the dwelling, refused a building permit without a permit for a variance.***

***Art Traczyk indicates that the property was developed with a house, abandoned, destroyed by fire and was demolished, a permit was taken out several years ago based upon the fire damage but the permit was never exercised. Art refers to the Dial Away case regarding building on the lot with the grandfathering clause.***

***The Board discusses the Dial Away case.***

***Ruth Weil speaks and indicates the Dial Away case is a text book case and that once you exercise your rights on a nonconforming lot by erecting a single family structure, you lose those rights according to Section 40A, Section 6, Paragraph 4. Then you are kicked into Section 40A, Section 6, Paragraph 1 and Dial Away was very similar to the facts here tonight. There was a single family home which was destroyed by fire, there was a 24 year gap before the application of a new***

**building permit, but upon application, the Board ruled that they had exhausted their one time only rights to build on a vacant lot. She discusses demo and rebuilds and the Dugas case.**

**Ron Jansson asks if this is assessed as a buildable lot and if the lot is similar in size to the other lots in the neighborhood.**

**Attorney Lawler answers yes to both questions. Attorney Lawler then indicates that all the neighbors are in support of this. He indicates that there are two letters from neighbors asking for vegetated buffer and landscaping which he indicates that they will comply with and that one of the letters is from Attorney Butler who is representing an abutter. He indicates that there are no other adjoining lots to make it conform and that it meets zoning requirements for shape, topography, and soil conditions as a condition for a variance and that it is a financial hardship as the applicants have invested all their savings into the purchase and the proposed construction. He indicates that he had informed Attorney Butler that he would include the terms his clients are requesting.**

**Laura Shufelt asks Attorney Lawler to go over his reasoning for the variance.**

**Attorney Lawler indicates that there isn't any other adjoining lots to make it conform and that it was an abandoned road and the lot itself is a different shape and size of the others in the neighborhood. He indicates that it is unique as it is the only lot without a house. He indicates that it is a financial hardship as they have sold their house, are renting and that they have invested their life savings into this project.**

**Gail Nightingale asks if they are going to improve Neck Pond Road.**

**Attorney Lawler indicates that they have no intention of improving the road and they can pull into the driveway over the cement part of Neck Pond Road and that if Tom Perry found that was not appropriate that they would change the location of the garage or the direction from where the cars pull in.**

**Ron Jansson asks Attorney Lawler how they paid a lot of money if they thought this was unbuildable and why it wasn't scrutinized before purchasing the land and that a self-imposed hardship is not a condition for a variance.**

**Attorney Lawler indicates that the applicants had gone through the Building Department file and saw the fact that there had been a building permit issued a few years ago and relied upon that and was the basis for what happened.**

**Ron Jansson asks what the access is to the lot and if Woodland Avenue is a paved way. Attorney Lawler answers yes.**

**Ron Jansson asks why they are building a 4500 square foot large house on a small lot.**

**Attorney Lawler indicates that they are building it for their 3 children and themselves.**

**James Hatfield asks what the sizes are of the other houses in the area.**

**Attorney Lawler indicates that he is not sure but the houses on Wianno Avenue are about the same size. He then indicates that his clients would like to keep the plans as they have submitted but would change if need be.**

**Gail Nightingale asks if there is anyone here either in favor or in opposition.**

**Peter Tarnoff, who has also submitted a letter, indicates that he is directly across the street and has been there since 1996. He indicates that the neighbors are unanimous regarding having a home in there and would be happy to see something built.**

**Gail Nightingale asks if he has seen the plans on the house and if he is agreeable with it. Mr. Tarnoff answers yes.**

**James Hatfield does findings.**

**This is appeal 2008-046. The applicants are Steven M. & Nancy M. Costello, property address is 40 Woodland Avenue, Osterville, MA - Assessor's Map 140, Parcel 136 and is in a Residence C Zoning District. The applicants have applied for a Bulk Variance to Section 240-13.E, Minimum Lot Area. The applicants are seeking the variance for a 21,000 sq.ft., undersized lot that has lost its buildability under zoning. The lot does not conform to the minimum 1-acre requirement for the zoning district or the minimum 2-acre requirement for the Resource Protection Overlay District.**

**The subject lot is a vacant lot just shy of a half-acre in area (0.47-acre). It is located on Woodland Avenue and Neck Pond Road. Woodland Avenue is located off Wianno Avenue and accessed via Sylvan Lane. Woodland Avenue is a 40-foot way however Sylvan is only 10 to 18-feet wide.**

**The subject lot was created by deed in 1946 recorded at the Barnstable Registry of Deeds on June 10, 1946. The creation of the date predates the adoption of Subdivision Regulations and zoning and was legal created at that time.**

**According to the Building Division files, the lot had been developed in the late 1940's apparently with a single-family dwelling and a cottage. In 1975, the dwelling was badly damaged by fire and the building fell into disrepair. In June of 1976, the Building Commissioner notified Ethel Sharpe, the property owner at that time that the structures that remained on the property are "unsafe, uninhabited and abandoned". He ordered them to be removed. It appears the Building Division took some action shortly thereafter to secure the buildings to make them safe.**

**The file also showed that the issue of the abandoned fire damage buildings persisted as letters and orders were again issued by the Building Commissioner from 1996 to 2001 citing the unsafe abandoned conditions and orders to remove uninhabitable structure. A March 2004 survey plan identified that the remains of the fire damage buildings still existed on the lot. Staff assumes the buildings were removed sometime in 2004 or 2005.**

**In 2004, McShane Construction submitted plans for rebuilding of a single family dwelling on the lot and on December 28, 2004, Building Permit No. 81469 was issued to John McShane. That building permit was for a 1.5-story, three-bedroom, single-family dwelling of 2,117 sq.ft. and was issued based upon the Section 240-95 of the zoning ordinance - Reestablishment of damaged or destroyed nonconforming use, building or structure. That section provides two-years for rebuilding of fire damaged/destroyed structures**

**On January 3, 2005, the vacant property was sold to John and Gaile McShane.**

**The Building Permit issued for the property was thereafter extended upon request by McShane three times to December 28, 2006. During that period of time no work was initiated under the permits and the Building Commissioner was thereafter required to not issue any more extension.**

**On February 16, 2007 the property was sold for \$400,000 to Paul R. Botello as recorded at the Registry of Deeds in Book 21787, page 7. On January 3, 2008, Mr. Botello sold the property to the applicants, Steven M. & Nancy M. Costello for \$485,000 as recorded at the Registry of Deeds in Book 21787, page 7.**

**Section 240-95 of the zoning ordinance provides two-years for rebuilding of fire damaged/destroyed structures. After 2 years the subject lot would lose that ability to rebuild the fire damaged single-family dwelling. Given that the permit issued had expired and that the two years laps, the rights granted under the local zoning ordinance were exhausted. Thereafter, the state law (MGL Chapter 40A) would govern the land. As supported in case law, "DIAL AWAY CO., INC. v. ZONING BOARD OF APPEALS OF AUBURN" (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446) this lot was rendered nonbuildable as an independent single-family lot on the date the building permit expired, December 28, 2006.**

**Plans for the proposed single-family dwelling have been submitted. That plan shows the development of four-bedroom 1.5-story single family dwelling with an attached two-car garage. The living area of the home, including a "bonus room" over the garage, is 4,346 sq.ft. The garage is calculated at an additional 672 sq.ft. The structure is shown on a full basement.**

**The lot is not in a Groundwater or Wellhead Protection Overlay District and is not subject to the local 330 rule or the states 440 nitrogen loading limitations.**

**There are no known wetlands in the area the would trigger the need for an order of condition form the Conservation Commission for development of the lot.**

- owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located;**
- a literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner; and**

**desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning ordinance specially the neighborhood has come out favorably for this development.**

**Dan Creedon seconds.**

**Ron Jansson has a concern that there is a letter addressed to McShane Construction, John J. McShane – President, dated June 14, 2006 from the Building Commissioner, Tom Perry and he reads the letter. "Since this is a third request we cannot allow any more extensions on this**

*project". He believes that the extension expired on December 28, 2006 and Mr. McShane goes forward on February 16, 2007, 2 months later knowing it expired and sells it to Paul Botello for \$400,000 knowing that his extension had expired. He indicates that at sometime someone needs to step in stop this from happening again.*

**Vote:**

**AYE:** *Ron Jansson, Dan Creedon, James Hatfield, Laura Shufelt, Gail Nightingale*

**NAY:** *None*

**Based on the positive unanimous findings, relief is granted with the following conditions:**

- 1. This variance is granted only to the requirement of minimum lot area. Development of the lot shall conform to all other applicable bulk regulations and the conditions contained here in.**
- 2. The use of the lot is limited to that permitted in the district and its accessory uses. The dwelling to be built shall be substantially in conformance with the plans submitted with the application entitled; " The Costello Residence 40 Woodland Avenue, Osterville, MA." as drawn by W.B. Daniels dated 03/06/08.**
- 3. The total number of bedrooms shall not exceed four-bedrooms. The on-site septic shall conform to all local and state requirements without variances.**
- 4. The living area of the structure including the "bonus room", shall not exceed 4,346 sq.ft., and the gross area of the garage shall not exceed 672 sq.ft.**
- 5. All parking shall be contained on the lot.**
- 6. The development authorized in this decision shall be considered full build out of the lot and the structure authorized thereafter shall not be expanded in footprint or in area.**
- 7. This decision must be recorded at the Barnstable County Registry of Deeds and a copy of that recorded document must be submitted to the Zoning Board of Appeals office and to the Building Division prior to the issuance of any building permit for the dwelling.**
- 8. This variance expires one year for the date of issuance. The relief authorized must be executed within that year by the issuance of a building permit for the structure authorized herein.**
- 9. Prior to the commencement of construction, the applicant shall erect a 7 foot stockade privacy fence running from the northeast corner of the subject property to the west, a distance of no less than 80 feet. The applicant shall also plant on the northerly side of the fence, Leyland spruce at five feet, at five foot intervals of a caliber of no less than 3 inches with an anticipated height of at least 7 feet at maturity. The applicant shall also maintain for a distance of 10 feet to the south of the fence a vegetated strip**
- 10. A buffer of mature evergreen shrubs or trees shall be planted along Neck Pond Road sufficient in height and density to block the view of the new residence from the path and to restore this section of the road to its former natural woods-like setting.**

**Seconded.**

***Ron Jansson indicates that he is concerned about the size of the structure, is inclined to vote in favor of this application for a variance but only with the understanding that all of the conditions that have been enumerated hereto will be observed in the event the applicant will take an appeal of any of those conditions he would want to go onto the record as saying he would not support the grant of a variance***

***Gail Nightingale comments that the last condition will prevent the entrance and exit.***

***Attorney Lawler indicates that whatever the Board decides, they will abide.***

***The Board discusses.***

***Attorney Lawler indicates that they will relocate the driveway onto Woodland Avenue.***

***Ron Jansson wants to clarify that one of the conditions is that the structure be built according to the plans submitted and wants it noted that the latter condition imposed regarding the relocation of the driveway needs to be added.***

***Vote:***

***AYE: Ron Jansson, Dan Creedon, James Hatfield, Laura Shufelt, Gail Nightingale***

***NAY: None***

## **GRANTED WITH CONDITIONS**

***Gail Nightingale now indicates that there is a joint statement from the members of the Barnstable Zoning Board of Appeals. Dan Creedon, Sheila Geiler, James Hatfield, Ron Jansson, Gail Nightingale & John Norman. Gail reads the statement indicating that the above mentioned members are resigning. (See letter which is filed with the Town Clerk's Office).***

***Gail Nightingale then indicates that there is one more hearing tonight and reads the new Cardarelli appeal into the record. She does not assign board members because as their statement that the Board members are resigning.***

***Attorney Boudreau indicates that he had previously asked for a continuance and since had met with Growth Management and if they were going forward tonight they would be withdrawing the newer variance read into the record tonight and even though there are 6 different reliefs, 3 of them are caused because they are reconfiguring the lots and the other 3 deal with the property next door and they are up against a deadline on a Purchase and Sales agreement.***

***The Board discusses.***

***Ron Jansson recuses himself as he has had business dealings with Mr. Cardarelli.***

***The Board discusses and indicates to Attorney Boudreau that if they don't finish tonight he might have to start all over again.***

***Gail Nightingale reads the appeals into the record.***

**8:00 PM Appeals 2008-029 to 034 - Continued Cardarelli**

Noticed for May 21, 2008, Opened June 11, 2008 and continued to July 9, 2008

No Members Assigned, No testimony Taken

Staff anticipates materials to be forthcoming and will send once received.

**Appeal 2008-034**

**Cardarelli  
Bulk Variance to Reconfiguration Lots**

John F. Cardarelli has applied for a Variance to Section 240-25.E, Bulk Regulations, minimum front yard setback. The variance is sought in conjunction with a reconfiguration of the subject lots in order to allow the existing nonconforming building addressed as 644 West Main Street, Hyannis MA to remain situated 53.7 feet off West Main Street when zoning requires a 60-foot front yard setback. The subject property is shown as "Lot A" on plans submitted. That lot being a part of the reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business and Residence B Zoning.

**Appeal 2008-030**

**Cardarelli  
Conditional Use Special Permit – Restaurant**

John F. Cardarelli has petitioned for a Conditional Use Special Permit pursuant to Section 240-25.C of the Zoning Ordinance. The petitioner seeks the permit to allow for the operation of the existing restaurant and existing apartments located above. It is to include accessory retail sales as related to the restaurant business. The permit is for the existing building addressed as 644 West Main Street, Hyannis MA situated on the reconfigured "Lot A" shown on plans submitted. That lot being a part of the reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business and Residence B Zoning.

**Appeal 2008-031**

**Cardarelli  
Conditional Use Special Permit – Retail Sales  
Seafood**

John F. Cardarelli has petitioned for a Conditional Use Special Permit pursuant to Section 240-25.C of the Zoning Ordinance. The petitioner seeks the permit to allow for the redevelopment of "Lot B" shown on the plan submitted with a 7,103 sq.ft., building to be used as wholesale and retail sales of seafood, including accessory office space for the business. Lot B is a part of the reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business and Residence B Zoning.

**Appeal 2008-029**

**Cardarelli  
Permit Preexisting Structural Nonconformity Lot  
A**

John F. Cardarelli has petitioned for a Special Permit pursuant to Section 240-93.B of the Zoning Ordinance for the alterations or expansions in a pre-existing nonconforming building or structure. The petitioner seeks the permit to allow for the existing restaurant on a proposed "Lot A" and the redevelopment on proposed "Lot B" as shown on a plan submitted. The permit is sought for the accessory site improvements of parking and landscaping. The proposed improvements do not conform to the specific requirements of zoning but are no more nonconforming than the existing site conditions. They include front yard landscaping and parking requirements, and lot coverage for Lot A. The lots are a reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business, Residence B Zoning and is located in a Groundwater Protection Overlay District.

**Appeal 2008-032**

**Cardarelli  
Permit Preexisting Structural Nonconformity Lot B**

John F. Cardarelli has petitioned for a Special Permit pursuant to Section 240-93.B of the Zoning Ordinance for the alterations or expansions in a preexisting nonconforming building or structure. The petitioner seeks the permit to allow for the proposed redevelopment on a proposed "Lot B" shown on a plan submitted. The permit is sought for allow the development of the 7,103 sq.ft., building to be located 31.2 off Dunn's Pond Road. The location being an expansion of the nonconformity of the existing building located on the property. The lot is a reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business, Residence B Zoning.

**Appeal 2008-033**

**Cardarelli  
Bulk Variance Minimum Front Yard**

John F. Cardarelli has applied for a Variance to Section 240-25.E, Bulk Regulations, Minimum Front Yard setback. The variance is sought in the alternative to the above petition for a special permit to allow for the 7,103 sq.ft. building to be located on the proposed 'Lot B' 31.2 feet off Dunn's Pond Road when the zoning requires a minimum front yard setback of 60 feet. The lot is a reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business, Residence B Zoning.

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**8:00 PM      Appeal 2008-052 - New**

**Cardarelli  
Bulk Variance Minimum Front Yard**

John F. Cardarelli has applied for a Variance to Section 240-25.E, Bulk Regulations, Minimum Front Yard setback. The variance is sought to allow for the development of a 7,103 sq.ft. building to be located within the 60-foot front yard setback required off West Main Street and off Dunn's Pond Road. The lot is a reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business, Residence B Zoning.

***Gail Nightingale indicates that the Board members assigned are: James Hatfield, Dan Creedon, Gail Nightingale, Laura Shufelt, John Norman and Sheila Geiler and Nik Atsalis as alternates.***

***Gail Nightingale calls a 5 minute recess.***

***Back in session at 10:15 PM.***

***Attorney Boudreau gives a summary of relief being sought.***

***He indicates that the only construction or demolishing is demolishing the existing cottage and the rear structures there. He indicates that Growth Management suggested to remove 3 parking spaces closest to West Main Street which they have done, and remove 4 from where the cottage is being razed. He indicates that Site Plan has approved this and has a landscaped plan which has been tweaked somewhat but is approved.***

***He indicates that at 626 West Main there was a gas station and this lot is substantially larger and goes back into the RB district. They are proposing 1.5 story building over 9000 square feet but they are also looking for a conditional use variance for a wholesale and retail seafood market with related offices which is allowed as a conditional use in HB. They are requesting a variance from Dunn's Pond Road. They have closed one curb cut close to West Main Street and they have replaced it with one to the rear where the delivery trucks will be. They are putting extensive landscaping to the rear with a fence and throughout the lots.***

***John Norman asks if the two proposed curb cuts have a radius of 24 and if Site Plan Review requested it.***

***Attorney Boudreau indicates that they are 24 and that initially they removed the rear curb cut and kept the other one but Growth Management wanted it reversed.***

***Sheila Geiler comments that she thought that those issues should've been addressed at Site Plan Review and asks how long after site plan he had to wait to get Growth Management's approval.***

***Attorney Boudreau indicates that there was a question about traffic and that he waited four months .***

***Dan Creedon asks about issue of standing.***

***Attorney Boudreau indicates that he has submitted a Purchase and Sales Agreement.***

***Gail Nightingale asks if there is anyone here from the public who would like to speak either in favor or in opposition.***

***No-one speaks.***

***Gail clarifies that they are withdrawing the bulk variance.***

***Attorney Boudreau indicates that they are withdrawing the bulk variance regarding the front yard setback but are still seeking the variance from Dunn's Pond Road.***

***Dan Creedon does findings.***

***On appeals 2008-034, 2008-030, 2008-031, 2008-029 and 2008-032 and 2008-033.***

**The applicant is John F. Cardarelli. The property address is 644 and 626 West Main Street and 29 Dunn's Pond Road, Hyannis, MA, Assessor's map 249, parcels 133, 095 and 132. They are in a Highway Business, Residence B and Groundwater Protection Overlay Zoning District.**

**The subject property before the Board is that of three parcels as identified by the Assessor's records previously stated. The lots are located fronting on West Main Street and on Dunn's Pond Road in Hyannis**

**The property is located across from West Main Street Shaw's Supermarket Store and is occupied by The Daily Paper Restaurant (a 95 seat restaurant and food take-out) and the currently closed "Icebox" ice and water store. A one-story cottage type dwelling also exists on the restaurant site and an apartment is known to exist above the restaurant. The Assessor's record indicates that all of the property is owned by Charles Rando**

**The applicant has submitted to the file as evidence of his standing before the Board to present these petitions a Purchase and Sales agreement wherein he is identified as the buyer.**

**The applicant's proposal can be viewed and summarized into three segments.**

- **The first is the reconfiguration of the land upon which nonconforming uses exist into two new lots.**
- **The second is to retain the nonconforming restaurant use and make site improvements to that area shown as proposed as Lot A.**
- **The third is to redevelop Lot B as retail and wholesale selling of fish.**

**To accomplish the plans as submitted, certain zoning relief has been requested and is needed**

**The prior plans for the lot reconfiguration, site improvements and redevelopment were submitted to the Site Plan Review Committee and found to be approvable (see attached Site Plan Review notes and approval letter). The revisions made do not appear to be that drastic to indicate that a full site plan review need be conducted.**

**The existing site is, and the proposed development will be, connected to the public sewers; therefore, no Board of Health Title 5 permit is required. However, the property is in the Groundwater Protection Overlay District and subject to the zoning provision of Section 240-35. The revised plans reduced the amount of paving, increased the landscaping and incorporated "rain gardens" (run-off over vegetated area) improving the quality of the on-site drainage**

**The land is shown on a 1934 plan filed with the Barnstable Registry of Deeds as Land Court Plan 10614-B. The Daily Paper lot is shown on that plan as unregistered land owned by Warren S. Elliot. That lot was created by deed around 1913 and adjusted for a taking for the State Highway. Lot A shown on the plan is registered land. The Icebox is situated on a leased area of that lot defined in a 1966 ANR Plan recorded at the Registry of Deeds in Plan Book 202, page 77. That plan also created a 1,494 sq.ft., triangular private right-of-way over the unregistered lot occupied by the Daily Paper**

**The applicant seeks to adjust the lots so as to create two new lots from the land. That reconfiguration is being proposed to better accommodate the existing restaurant and to provide a site for redevelopment and relocation of Cape Fish and Lobster. The existing cottage dwelling that is nonconforming in setbacks is to be removed from the restaurant site.**

***The resulting new lots will conform to the minimum lot area (40,000 sq.ft.), minimum lot frontage (20 feet) and minimum lot width (160 feet)<sup>1</sup> for the Highway Business Zoning District.***

***The reconfiguration of the lots can be accomplished by submission of an Approval Not Required (ANR) plan for endorsement by the Planning Board and no relief is needed for the lot reconfiguration. The intent for Lot A is to demolish the nonconforming cottage building situated on the north corner of the lot and to retain the existing principal building.***

***The principal building is setback 53.7 feet off West Main Street and does not conform to the current 60-foot minimum front yard setback requirement in the HB Zoning District. The location of the building is a pre-existing, legally created, nonconformity in setbacks established by the fact that the building predates the November 1983 rezoning of this area to Highway Business. However, there is no specific section in the Ordinance that clearly provides for relief by a special permit. Therefore, the applicant has submitted a petition for a variance - Appeal 2008-034 - to permit the principal building to remain in its existing location on that proposed new Lot A.***

***John F. Cardarelli has applied for a Variance to Section 240-25.E, Bulk Regulations, minimum front yard setback. The variance is sought in conjunction with a reconfiguration of the subject lots in order to allow the existing nonconforming building addressed as 644 West Main Street, Hyannis MA to remain situated 53.7 feet off West Main Street when zoning requires a 60-foot front yard setback. The subject property is shown as "Lot A" on plans submitted. That lot being a part of the reconfiguration of property addressed as 644 West Main Street, 626 West Main Street and 29 Dunn's Pond Road, Hyannis MA and is shown on Assessor's Map 249 as parcels 133, 095 and 132. The property is zoned Highway Business and Residence B Zoning.***

***The building already exists in this location and the grant of the variance does not intensify the nonconformity nor change that which exists.***

***To cause the building to be relocated on the property could constitute a financial hardship to the applicant.***

***The structure as it currently exists on the land is a unique condition which affects the parcel but not the neighborhood within which it is granted which substantiates the granting of the variance under the ordinance and under MGL 40A Section 10.***

***Desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning ordinance.***

***The next segment of the proposal is to:***

- retain the existing uses of Lot A as a 95 seat restaurant with take-out service and an apartment unit above, and***
- to make site improvements and alterations to Lot A to accommodate those uses.***

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<sup>1</sup> Note: For Lot A, minimum lot width is met when measured parallel to West Main Street, and Lot B minimum lot width is met when measured parallel to Dunn's Pond Road.

**Lot A – Restaurant & Apartment Use:**

**Although the restaurant and apartment uses were legally established when the area was zoned Business B and conformed to the principal permitted uses for that district, rezoning of the area to HB allows the uses only as Conditional Uses by special permit.<sup>2</sup> Appeal 2008-030 seeks that conditional use for the restaurant and apartment use on Lot A.**

**The use is to remain a 95 seat restaurant with take-out service and accessory retail sales (newspapers, t-shirts & sundries). An apartment exists above the restaurant which is to remain.**

**The detached cottage dwelling located within required setbacks is to be removed reducing the number of buildings, the intensity of the residential use, and eliminating a structural nonconformity that now sits on the property.**

**Site improvements are to be made to better accommodate the uses and customers.**

**Curb cuts are to be reduced in length to provide safer access to and from the property.**

**The restaurant is connected to the Town sewer.**

**Conditional Uses are permitted under Section 240-25.C if the Board makes findings that support:**

**The uses are permitted in the B District and**

**“The uses do not substantially adversely affect the public health, safety, welfare, comfort or convenience of the community.”**

**Conditional uses are also subject to the provisions of Section 240-125C - Standards for Granting Special Permits. To satisfy those requirements, the Board must make findings that support:**

**An evaluation of all the evidence presented at the public hearing by the petitioner and interested parties as it relates to the fulfillment of the spirit and intent of this chapter without substantial detriment to the public good or the neighborhood affected.**

**A site plan has been reviewed and found approvable subject only to the issuance of a special permit.**

**Lot A – Site Alterations and Improvements**

**The nature of the site improvements proposed for Lot A include expanding the on-site parking from 27 spaces to 54 spaces, associated landscaping, site drainage and reduction in the length of curb cuts on West Main Street. All of the improvements are fully situated within that area of the lot that is within the Highway Business Zone except for a drainage swale and Infiltration trench that is located in the Residence B Zoning District.**

**The proposed site improvements and alterations do not fully comply with current zoning requirements and standards for landscape setbacks to parking lots, interior landscaping**

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**requirements, front yard landscaping and lot coverage in a Groundwater Protection Overlay District. Although improvements are being made, those improvements are based partly on the existing site conditions and do not fully comply with zoning. The applicant therefore has requested a special permit under Section 240-93.B to permit the alterations in the pre-existing nonconformity in structure of the site – parking, pavement, landscaping, and lot coverage. This relief is requested in part in Appeal 2008-029.**

**The proposed alterations to Lot A will satisfy the parking needs for the existing restaurant patrons, food takeout service, employees and the apartment unit. According to the plans submitted there is an excess of parking spaces on Lot A and those spaces will be made available for the adjoining redevelopment on Lot B. The “shared parking” arrangement would be allowed as-of-right under Section 240-51, Location of parking spaces.**

**The granting of a Special Permit requires**

- that the application falls within a category specifically excepted in the ordinance for a grant of a Special Permit,**
- that after evaluation of all the evidence presented, the proposal fulfills the spirit and intent of the Zoning Ordinance and would not represent a substantial detriment to the public good or the neighborhood affected.**
- that a site plan has been reviewed by the Site Plan Review Committee and found approvable.**

### **Lot B - Redevelopment & Reuse: (Fish Market)**

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**The third part of the proposal is the redevelopment and reuse of Lot B for retail sales and wholesale of fish and seafood by “Cape Fish and Lobster”.**

**Presently Cape Fish and Lobster is located at 406 West Main Street, Hyannis (intersection of West Main with La France Avenue) in a 2,350 sq.ft., building on 0.16 acres. The business has apparently outgrown its present location and the lack of sufficient land area for customer parking, delivery vehicle and parking as well as the limited buffer to abutting residents has lead to some complaints and issues. Relocating to the new site is viewed as a solution to those issues providing the business establishment and its customers with a much more efficient operation, sufficient parking and land buffer to abutting residents.**

**The proposal is to develop Lot B with a 1.5–story, 9,103 sq.ft. building and associated on-site parking, loading dock area, landscaping and site drainage. The building is to contain 6,121 sq.ft. for warehousing, food purveyor preparation, retail sales and an office area of 982 sq.ft.**

**The location of the proposed building is 60 feet off West Main Street but only 31.2 feet off Dunn’s Road. That setback off Dunn’s Road does not conform to the minimum front yard setback for the district which is 60-feet.**

**The development is located fully within the Highway Business Zoning District and only a drainage swale and infiltration trench is located in that area of the lot situated in the Residence B Zoning**

**District. That area is estimated to be approximately 1.38 acres of the 1.80 acres. The lot area zoned residential is to act as a buffer to the residents located to the northeast.**

**The applicant requires a Conditional Use Special Permit pursuant to Section 240-25.C of the Zoning Ordinance as requested in their appeal 2008-031 for the proposed use of a retail sale and retail sale of fish and seafood.**

**The present building and site is in deteriorating condition and underutilized for the location. The applicant has submitted elevations of the proposed building that clearly indicates that it would be a visual improvement to the area. Site improvement plans for the redevelopment addresses the functional needs of the business, screens the loading docks from West Main Street, provides convenient and safe customer parking, upgrades site drainage in the Groundwater Protection area, and provides much needed landscaping.**

**Use of the site could be seen as specialty retail sales and wholesale delivery. No specific ITE land use category seems applicable in this situation. There is no finding that the amount of traffic generated by the site would cause any noticeable impact on the roadway.**

**Conditional Uses are permitted under Section 240-125.C if the Board makes findings that support:**

- **The uses are permitted in the B District and**

**"The uses do not substantially adversely affect the public health, safety, welfare, comfort or convenience of the community."**

**Conditional uses are also subject to the provisions of Section 240-125C - Standards for Granting Special Permits. To satisfy those requirements, the Board must make findings that support:**

- **An evaluation of all the evidence presented at the public hearing by the petitioner and interested parties as it relates to the fulfillment of the spirit and intent of this chapter without substantial detriment to the public good or the neighborhood affected.**
- **A site plan has been reviewed and found approvable subject only to the issuance of a special permit and those conditions have been met**

### **Proposed Building Setback Relief**

**As noted, the proposed building is to be situated 31.2 feet off Dunn's Road and will not conform to the 60-foot Minimum Front Yard Setback for the Highway Business Zoning District.**

**The applicant has submitted both a special permit request for an expansion of the nonconforming building (Appeal 2008-032) and a variance application (Appeal 2008-033) to allow for this building to be located as proposed in the plan.**

**The proposal is to demolish the existing building and rebuild a new building. The existing building is 39.8 feet off Dunn's Pond Road and the proposed new building is to be 31.2 feet off Dunn's Pond Road. An intensification of 8.6 feet in the nonconformity in setback.**

**The site is a corner lot and a 60-foot front yard setback is required on both West Main and Dunn's Pond Road. Applying that setback and a 10-foot side yard setback to the area of Parcel B that is zoned Highway Business gives a building envelope of 30-feet by 140-feet situated in the far northern corner of the lot. The building, as designed, could not be accommodated in that building envelope.**

**In addition, if the applicant were forced to locate the proposed structure within the building envelope the resulting building and its loading docks and delivery truck parking area would have to be situated in the front yard area and fully exposed to the intersection of West Main Street and Dunn's Pond Road.**

**In regards to 2008-032 and 2008-033 that:**

- owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located;**
- a literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner; and**
- desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning ordinance.**

**Those would be his proposed findings applicable to all of the enumerated appeals before the Board.**

**John Norman seconds.**

**Vote:**

**AYE: Laura Shufelt, James Hatfield, Dan Creedon, John Norman Gail Nightingale**

**NAY: None**

**Based on those positive and unanimous findings, motion is made to grant all forms of relief requested by the applicant subject to the following conditions:**

**Appeal 2008-034:**

- 1. This variance is granted to a proposed Lot A consisting of 40,034 sq.ft. as shown on a plan entitled: "Cape Fish & Lobster 626 West Main St., Barnstable, MA" titled Proposed Lotting Plan, Sheet 3 of 9, as drawn by Stenbeck and Taylor, Inc., and dated December 3, 2007, last revised July 3, 2008, to allow the existing principal building consisting of 3,778 sq.ft., located on the land and situated 43.7 feet off West Main Street to remain as it is situated, not in conformance to the required 60 foot front yard setback.**
- 2. An Approval Not Required Plan reflective of that plan referenced in Condition #1 and including a notation referencing this variance shall be prepared by the applicant and submitted to the Planning Board for endorsement.**

3. ***Both the Approval Not Required Plan and this variance shall be recorded at the Barnstable Registry of Deeds. A copy of that recorded plan and this variance shall be submitted to the office of the Zoning Board of Appeals for this relief to be in effect.***
4. ***The cottage dwelling building located on the property and identified on the plan as "Existing House (to be razed) on the plan entitled "Demolition Plan, Sheet 4 of 9, as drawn by Stenbeck and Taylor, Inc., and dated December 3, 2007, last revised July 3, 2008, shall be removed from the property within one year of the grant of this variance. That area shall be converted to a landscaped "rain garden" area to improve on site drainage of run-off.***
5. ***If the principal building located on the proposed Lot A is demolished or voluntarily removed, this variance shall expire and any new building shall conform to the required front yard setback for the zoning district.***

***Appeal 2008-030***

1. ***This Conditional Use Special Permit is issued under Section 240-25 (C)(1) to allow for the continuation and operation of an existing 95 seat restaurant with take-out service and accessory retail sales (newspapers, t-shirts & sundries), and an apartment unit located above the restaurant. The uses are in an existing building addressed as 644 West Main Street, Hyannis and shown located on proposed Lot A of 40,034 sq.ft. to be configured as per plan submitted entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" titled Proposed Lotting Plan Sheet 3 of 9 as drawn by Stenbeck and Taylor, Inc., and dated December 3, 2007, last revised July 3, 2008.***
2. ***Lot A upon which the uses are located shall be improved as shown on plans submitted to the Board entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" Sheets No. 5 through 9 of 9. Those improvements shall be made prior to the issuance of an occupancy permit for that part of the proposed redevelopment on Lot B shown on the plans.***
3. ***The restaurant shall not be expanded in seats or in gross area, nor shall additional uses be incorporated that intensifies the use of the property including the use of the apartment beyond that which now exists without permission from the Board.***
4. ***There shall be no storage units and/or trailers of any type located on the property except as may be temporarily allowed by the Building Commissioner during site development or construction.***
5. ***Use of Lot A is limited to that area of the lot located within the Highway Zoning District. That district being defined as 200 feet deep from West Main Street. At that zoning line, the applicant shall cause a split rail fence to be erected to keep that area of the lot in the Residence B Zoning District from being parked on. The portion of the lot located in the residential zoning district shall only be used for drainage purposes and landscape buffer.***
6. ***The area of the lot located in the residential district is to remain vegetated to act as a natural buffer between residential homes to the northeast and the business uses in the business district.***
7. ***All signage shall conform to zoning.***

8. ***As the uses now exist on the subject property, implementation of this permit shall include the initiation of site improvements as shown on the plans submitted to the Board. Those improvements must be initiated within one year from the grant of this permit or this permit shall be considered expired.***

**Appeal 2008-029**

1. ***This Special Permit is issued under Section 240-93.B to allow for the alteration of an existing nonconforming site with site improvements of parking, landscaping and lot coverage not in full conformity to the requirements of zoning but no more nonconforming than the existing site conditions. The permit is issued for improvements to Lot A to be configured as per plan submitted entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" titled Proposed Lotting Plan Sheet 3 of 9 as drawn by Stenbeck and Taylor, Inc., and dated December 3, 2007, last revised July 3, 2008.***
2. ***Lot A shall be improved as show on plans submitted to the Board entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" Sheets No. 5 through 9 of 9. Those improvements shall be made prior to the issuance of an occupancy permit for that part of the proposed redevelopment on Lot B shown on the plans.***
3. ***As Lot A shares common site entrance and exists with Lot B shown on the plans and as Lot A is to provide on-site parking spaces for Lot B, access between the two lots shall not be blocked.***
4. ***All drainage shall be contained on property owned by the applicant. Should any improvements cause any runoff to be shed on any public way, the applicant shall be required to make improvements to correct the situation.***
5. ***All improvements within the public right-of-way shall be reviewed and approved by the Town Engineer. All improvements shall be to Town standards including granite curbs, handicapped sidewalks, street trees and parkway landscapes.***
6. ***During all stages of site development, all vehicles, equipment, and materials associated with the improvements shall be required to be located on the property. Any construction within a public right-of-way shall be reviewed and approved by the Public Works Department of the Town. All improvements within the right-of-way shall be to Town standards including granite curbs, handicapped sidewalks, street trees and parkway landscapes. The applicant shall be responsible for maintaining the sidewalk in a passable condition at all times during the improvements and to restore the public way as may be needed after construction.***
7. ***Implementation of this permit shall be the initiation of site improvements as shown on the plans submitted to the Board. Those improvements must be initiated within one year from the grant of this permit or this permit shall be considered expired.***

**Appeal 2008-031 - Suggested Conditions:**

***Should the Board find to grant the conditional use special permit for the retail and wholesale of fish on Lot B they may wish to consider the following conditions:***

1. ***This Conditional Use Special Permit is issued under Section 240-25 (C)(1) to allow for the development and use of Parcel B for the retail and wholesale of fish. Lot B is to be a 78,541 sq.ft. lot addressed as 626 West Main Street, Hyannis, to be configured as per plan submitted entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" titled Proposed Lotting Plan Sheet 3 of 9 as drawn by Stenbeck and Taylor, Inc., and dated December 3, 2007, last revised July 3, 2008.***
2. ***Lot B, upon which the use is to be located, shall be improved as shown on plans submitted to the Board entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" Sheets No. 5 through 9 of 9. Those improvements shall be made prior to the issuance of an occupancy permit for business use.***
3. ***The building to be built shall not exceed a one-story, 9,103 sq.ft. structure. The 6,121 sq.ft. of the building shall be used for warehousing and 982 sq.ft. shall be used as an office for the business. Retail sales, including food purveyor, is permitted as accessory to the wholesale operations and shall be limited to not occupy an area in excess of 20% of the wholesale storage or 1,224 sq.ft.***
4. ***Parking shall include 15 designated on site parking spaces as shown plus rights to use 7 parking spaces located on the abutting property addressed as 644 West Main Street.***
5. ***All business deliver trucks shall be parked to the rear of the lot and shall not be located within the front half of the lot where the 15 designated parking spaces are shown on the plan.***
6. ***There shall be no storage units and/or trailers of any type located on the property except as may be temporarily allowed by the Building Commissioner during site development or construction.***
7. ***Except for a part of the site driveway as shown on the plans submitted, use of Lot B is limited to that area of the lot located within the Highway Zoning District. That district being defined as 200 feet deep from West Main Street. At that zoning line and driveway extended, the applicant shall cause a split rail fence to be erected to keep that area of the lot in the Residence B Zoning District from being parked on. That portion of the lot located in the residential zoning district shall only be used for drainage purposes, landscape buffer and a part of the entrance driveway off Dunns Pond Road.***
8. ***The area of the lot located in the residential district is to remain vegetated to act as a natural buffer between residential homes to the northeast and the business uses in the business district.***
9. ***All signage shall conform to zoning.***
10. ***Within one year of the issuance of this permit, the applicant shall be required to secure both a demolition permit for the existing building and a building permit for the new building for this permit to be considered implemented. The demolition of the existing building and construction of the new building must proceed diligently to completion as determined by the Building Commissioner for this permit to then remain active.***

**Appeal 2008-032 & 033:**

- 1. This relief is granted to permit a proposed one-story building consisting of 9,103 sq.ft. to be located 31.2 feet off Dunn's Pond Road, Hyannis when the permitted front yard setback is 60-feet. The proposed building is to be located on a 78,541 sq.ft. lot shown as Parcel B and configured as per plan submitted entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" titled Proposed Lotting Plan Sheet 3 of 9 as drawn by Stenbeck and Taylor, Inc., and dated December 3, 2007, last revised July 3, 2008.**
- 2. Development of the lot shall be as shown on plans submitted to the Board entitled "Cape Fish & Lobster 626 West Main St., Barnstable, MA" Sheets No. 5 through 9 of 9.**
- 3. The 31.2 feet between the building and Dunn's Pond Road shall only be used as vegetated area. It shall not be paved or used for parking.**
- 4. Within one year of the issuance of this permit, the applicant shall be required to secure both a demolition permit for the existing building and a building permit for the new building for this permit to be considered implemented. The demolition of the existing building and construction of the new building must proceed diligently to completion as determined by the Building Commissioner for this permit to then remain active.**

**John Norman seconds.**

**Laura Shufelt indicates that in Appeal 2008-031, Condition 3, indicates that the building shall not exceed a one story building but the plans show a 1.5 story building and is repeated again in 2008-032 and 2008-033, Condition #1 and that it should be changed to 1.5 stories.**

**Dan Creedon accepts the amendment.**

**Motion is made to accept the amendment.**

**John Norman seconds the amendment.**

**John Norman asks Attorney Boudreau if they would have opposition to a condition that during construction that the Dunns Pond entrance should be utilized as that section of West Man Street, during the school year mornings and afternoons, would be problematic and asks if the applicant could limit large deliveries and large pours during those hours.**

**Attorney Boudreau agrees to that condition.**

**Gail Nightingale indicates that it will be a condition in all of the appeals granted.**

**Vote:**

**AYE: Laura Shufelt, James Hatfield, Dan Creedon, John Norman Gail Nightingale**

**NAY: None**

**Attorney Boudreau indicates that he would now request to withdraw 2008-052 without prejudice.**

**John Norman makes a motion to withdraw 2008-052 without prejudice.**

**James Hatfield seconds.**

**Vote:**

**AYE: Laura Shufelt, James Hatfield, Dan Creedon, John Norman Gail Nightingale**

**NAY: None**

***Gail Nightingale then thanks staff and fellow Board members for their dedication over the years.***

***Motion to adjourn.***

***Seconded.***

***Meeting adjourned.***