

# Town Of Sandwich

THE OLDEST TOWN ON CAPE COD



TOWN CLERK  
TOWN OF SANDWICH

## PLANNING BOARD

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JUL 21 2011

MINUTES  
May 17, 2011

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7:17pm

Meeting Room  
Town Office Building,  
16 Jan Sebastian Drive

**Present:** Dan Marsters, Chair, Henry Rakov, Amy Lipkind, Vice Chair, and Sarah Regan  
**Absent:** Nanette Perkins, Rich Claytor, and Joe Vaudo

### Minutes

Ms. Lipkind moved the Board approve the minutes of April 19, 2011. Mr. Rakov seconded. The vote was unanimous.

### ANR

#### 24 Teaberry Lane

#### William Cotter

Mr. William Cotter, applicant, presented a new ANR plan to the Board. He explained the changes from the previous ANR.

Mr. Marsters asked if there was any public comment. Attorney Jonathan Fitch, representing PA Landers Company, an abutter, objected to this ANR plan. In his opinion the plan does not qualify; there is no such street or way as stated on the plan after the David Evans property. Mr. Cotter has a 20' wide right of way only. He would like to have some type of hearing where the applicant brings in a surveyor to show why he believes that this qualifies as a road or way under Subdivision Control laws and is not a right of way out to Route 130.

### Board Discussion

#### Canvasback

Mr. Marsters explained that this was a continued discussion to determine the next course of action. Mr. Avratin, attorney for the HOA, said he thought this was a public hearing. Mr. Avratin was under the impression at the last meeting that he was to submit in writing a request to appear on the agenda. Mr. Marsters also said that at the last meeting, which he did not attend, there was discussion about whether a special permit is required.

Ms. Lipkind asked Mr. Avratin if permission was being requested for the paths. Mr. Avratin said they were required by Conservation and that is what is before the Board. Mr. Avratin said that they have made multiple requests in writing to have the opportunity to present this matter. He also said this matter is going on since March 16, 2010, even before Conservation. The Board had tabled the issues until Conservation made a determination as to what was acceptable to them with regard to the buffer zone and resource area. Mr. Avratin said his purpose tonight is to address the request of the Canvasback Homeowners Assoc. pursuant to Condition #3 of the Terms of the cluster subdivision provide that "within open space areas, cutting and clearing of vegetation, alteration of ground surface, or erection of structures shall not be performed without the permission of the Planning Board."

Mr. Avratin said he is concerned that this is not moving forward. Mr. Marsters said the Board needs clarification of what the HOA is asking for. Mr. Avratin said on March 16<sup>th</sup> the Board tabled the paths required to facilitate the eight docks

requested by the HOA. As a result Conservation took over for the purpose of getting the appropriate authority to have eight docks at this particular site. There have been multiple visits and walks also with David DeConto of Conservation. After the second hearing the Conservation Commission indicated they would like certain things on the plan changed. Mr. Marsters asked if they were seeking permission for the entirety of this plan. Mr. Avratin said, no, they are asking for permission solely for the new path which Conservation has required along with the erection of two stairs also required by Conservation. Mr. Marsters said one of the problems with the plan is showing all of the existing paths which were not part of the original Special Permit. Mr. Avratin said they are not asking for anything other than what Conservation has demanded be put in place - one new path within the jurisdiction of the Planning Board and one stairway that were required, not requested by the HOA. Mr. Doyle came up with this plan discontinuing paths and came up with a new path within the buffer zone. Mr. Avratin said that they are looking to erect a set of stairs and clear a path.

At the last meeting Mr. Avratin indicated that he made contact with the D.E.P. We are happy to tell you that the President of HOA received a letter from the D.E.P. indicating that they were proceeding with Chapter 91 licensing; the last obstacle to the homeowners to enjoy their docks.

Mr. Avratin said the Conservation Commission is required to make sure natural resources are maintained along with erosion control. The Special Permit clearly indicates it does not come in the open space; do not cut until you come before the Planning Board. Mr. Avratin further stated that he understands that the Planning Board is not responsible for enforcing violations he believes it is the Building Inspector. If there have been violations, let that proceed in a separate matter. On April 6, 1988 the homeowners were told you are not to cut paths. They are now seeking to cut because of the Conservation Commission. Mr. Avratin said that one Board says that is what they want so why wouldn't the other Board follow.

Mr. Marsters said his concern with the plan is that it shows all the paths that exist and that are there without obtaining permission. Mr. Avratin said they only seek the one path and the stairs. Ms. Lipkind said permission was needed to be granted by this Board prior to the paths.

Mr. Marsters inquired if Mr. Avratin is representing all of the homeowners. Mr. Avratin said "Yes, it is set up according to Special Permit". Mr. Marsters asked if it allows a majority vote. Mr. Avratin said that with all HOA present there was vote in September and October 2009 that the docks were required. Certain people opted not to participate.

Ms. Elizabeth Lane, Town Counsel, asked if there was an original Cluster Special Permit that allows for what can be done and cannot be done on the one ownership. The Board has not yet decided if a Special Permit is required or just permission. If the Board decides to use a Special Permit they must be guided by regulations. All owners would have to consent in the application. If there are no By-Laws we fall back on two things, Declaration of Trust and the due process concept. Applications have to be signed off by all the owners. The question was asked of Mr. Avratin about whose decision was made at a meeting. Mr. Avratin said it was made by corporate officers. Ms. Lane asked Mr. Avratin where is the authority for the HOA to act on behalf of all residents. Mr. Avratin quoted from the Covenant. There was much discussion about the HOA being made up of all subdivision residents. Mr. Lane indicated once again that the Board must determine whether there is a Special Permit required or just permission. She also pointed out that selling one's home within the subdivision without the proper Special Permits or Variances can be difficult.

Mr. Christopher Senie, attorney for Wendy and Guy Kiedeisch, addressed the Board. Mr. Senie was at the last meeting and he said that all of the nineteen lot owners would have to agree on the docks and paths. He quoted from the declaration itself #32 and #37 of the recorded document. Mr. Senie also gave a history of when the HOA was created apparently seventeen years after the first conveyance. Mr. Senie questions the formation of the HOA. There are nineteen owners on the covenant. There was no HOA. Buyers might count on this to not pay dues. When people took title they knew that there was no HOA. It may have been a mistake but it can be cured. The application needs nineteen homeowners to say, yes, they want an Association and all must agree on the by-laws. Unless this happens the people before you have no authority to submit this application or ask relief. They may own the fee ownership of land in the open space because in addition to forming the association seventeen years later, they went to Mr. Bornstein and got him to set up an association with two gentlemen, whose houses back up to the would be docks, becoming directors and officers with a deed. They may own it now and pay taxes but the Town has handled taxes based on the value of open space as \$40,000 and assessed 1/19 to each homeowner's taxes. The Town has really treated it as if the association had never been formed. According to the property law if it isn't formed according to the covenant, it cannot be formed now. Mr. Marsters spoke and said his question is if the Board is able to decide whether this HOA is a legal entity or not.

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Ms. Lane spoke and said the Board cannot make such a determination but if you have a by-law and regulation that state all owners have to sign off, then owners need to seek another form outside this Board. It appears that they may appeal and come back when they are in accord. Any appeal will be for contesting parties not by the Town.

Mr. Marsters asked for clarity.

Ms. Lane said it might be messy but you could send out a special permit and send to all owners and see who turns up. When someone comes before you, and there are owners with a different point of view, it is very difficult to go forward until all the owners' assent. Mr. Senie said that his clients do not assent.

Mr. MacKoul, attorney for Bruce and Marisa Fraser, said, in a Declaration of Covenant, every person on the deed becomes part of the HOA. If you sign off on the deed, by default you are a member. He disagrees with Town Counsel. The Board ratified the HOA by accepting Mr. Avratin as representing the HOA, which indicates it exists. Now there is a procedural glitch. As Town Counsel pointed out, the HOA members have the ability to walk in the open space. Town Counsel said that anyone has access to the water for recreational use. It is a red herring to say you don't know about the paths and how long they have been there. Mr. Avratin has spent a lot of time and money to get a plot plan of the subdivision. Now, Ms. Kiedeish's counsel comes here to throw a monkey wrench in with procedures that are irrelevant. He said the bottom line was that there is one homeowner unhappy about one path. There have been multiple paths used for years. You lose in court because it is an equitable arrangement because it is their property and they can walk on; it you cannot stop them. Now to have them jump through procedural hurdles they do not need to do is simply a way of emasculating that right. He told the Board that it is doing it indirectly by creating procedural hurdles that do not exist. The Board is going to force this matter to go to court. That is not what the HOA wants to do. He said that the Board ratified this association; in good faith you never said our incorporation was not right. The records will be shown to a judge.

Mr. Marsters said we have never changed the rules. Every time new information comes in, we need to address it. Mr. MacKoul stated that this information becomes destructive. The people have the right to walk on the paths. Mr. Marsters said it is not about walking on the paths, it's about clearing vegetation.

Mr. MacKoul said Mr. Smith has written a memo and that he wrote a response to Mr. Smith's characterization of the facts. He would like to make this memo part of the record that was prepared to point out facts in the Declaration of Covenant that were missing and left out. It addresses all of the issues regarding the rights of the HOA and their having a say in the Open Space. He wants the Board to look at the whole spectrum.

Mr. MacKoul further stated that there was a Superior Court Case with testimony taken by a court recorder under oath that Ms. Kiedeisch admitted that the paths existed since 1987 and people had the right to walk on them. Mr. Marsters said this is outside the realm of this Board.

Ms. Lane spoke and said the Board has to decide. The Board is in charge of administering the zoning law. There was a Special Permit granted; Special Permits are a privilege not a right. A Modification of a Special Permit is a privilege not a right. No one is owed anything here. The Board is just trying to be fair, but it is bound by the Cluster Special Permit Bylaw that puts certain restrictions on the land use. If there were no cluster we would look at it a different way. She cautioned the Board to not concern itself with adverse possession; it's not about ownership. Control over the open space is not the same as ownership. Lots are still owned by individual lot owners. They have not turned the lots over to the HOA. The Bylaw says there must be a signoff by owners. You have to look at the whole subdivision.

Mr. MacKoul cited from Section 4444 (e) of the Zoning Bylaws: "For all Cluster Developments, which include a Village Cluster, the Planning Board shall make a finding that such Cluster Development includes recreational amenities, which are intended primarily for the use of residents of the Cluster Development. Such amenities shall include at least one of the following." They list three but the third one reads, "A pond used for swimming and recreational purposes." He proposes that the Zoning Bylaw binds you to foster the use of the pond by the homeowners.

Mr. Avratin spoke and said he needed clarification about the Board not having a complete subdivision plan. Ms. Lipkind said we do not have a recorded plan. Mr. Avratin said he has been retained by the HOA to present to the Conservation Commission and Planning Board plans that were before the EPA and that is his sole requirement. The Declaration provides that the HOA is responsible for taking care of these duties presented to the Board. The Board has a decision to make. Does the HOA make an application for modification? At that point he will say to the Board that is not the intention of the HOA. The HOA intends to request permission as provided under the Special Permit. If the Board is going to make a

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denial of that then the next step is to go to court. His hope is that the Board will not take that direction. There is nothing that the HOA needs to modify. The Special Permit is as it appears; the HOA is not looking to modify anything, it is seeking to exercise what is provided in the Special Permit.

Ms. Lipkind asked if they were seeking permission for only two things (Ms Lipkind pointed to two items). She said it would be great to see this plan ready to be your subdivision plan with what has been approved all along and that could be the plan of record. Mr. Avratin said he would be happy to submit this for that purpose if the Planning Board approves those two spots. Ms. Lipkind said the rest needs permission. Mr. Marsters said if the Board makes this the plan of record we are approving all of it. After much discussion between Mr. Marsters and Mr. Avratin relative to the paths which now exist, and have not been approved by Planning Board, Mr. Avratin said they are only trying to accomplish what is required by the Conservation Commission and seeking permission for two things in compliance with the Conservation Commission demands

Ms. Lane made a clarification of the requirements of Conservation Commission and what is under Zoning Bylaw. Further discussion was held relative to the new plan submitted to the Board by the HOA. Ms. Lipkind requested that the Board be provided with a plan that shows what the HOA is requesting.

Mr. Bruce Fraser, 23 Pierre Vernier Drive, addressed to Board with respect to the paths on the plan.

Mr. Avratin said that the HOA is requesting the Board to grant permission to pursue paragraph #3 along with the two stairways as required by Conservation. The HOA is not going to file for a modification.

Mr. Marsters said we can write up a response to this request.

Ms. Lipkind said she is not sure when you request permission to change a plan if it can be done informally, but with a request for a condition of a new recordable plan. She is trying to avoid a Special Permit process. Maybe there are just some portions that need change. She would like to avoid a Special Permit and change only the plan of record.

Mr. Christopher Senie, attorney for Wendy & Guy Kiedeisch, said he would request a more formal process. He also asked if the application would represent the nineteen HOA which was formed after the application. Mr. Seine said he would prefer all nineteen homeowners receiving a notice of a special hearing on this question.

Ms. Lane said there must be a determination of who is the proper applicant.

Someone spoke and said take a walk on the paths. There is no beach at the end - people need docks. You cannot pull your boat onto the rocks. The paths have been there for years. The only recreation out on the pond is to boat.

Ms. Regan said the Special Permit references the vegetation and disturbance of vegetation; it did not reference structures. The first page states permission is required.

Mr. Marsters has a concern with the entirety of plan being shown because he feels the Board is doing more than granting the request of the HOA and would be making this an approved plan.

Ms. Kiedeisch said the whole problem here beginning in 1988 is there were no docks, no paths, just a subdivision of nineteen lots with open space. Everything has been done without permission even eight docks. There should be a modification of a Special Permit.

A gentleman spoke and said that if you go with Ms. Kiedeisch's premise that in 1988 there were no docks and paths yet the whole focus of the covenant is to allow people to recreate on the pond there is only one way you can recreate on the pond and that is to put a boat out there. Ms. Regan said none of the docks were officially applied for so the paths were created to get to an illegal dock.

Mary Chace, 27 Pierre Vernier Drive, asked if she needed a permit to walk on the land. She understands Town Counsel said as a homeowner she owns 1/19 of that land and is entitled to walk on it. Ms. Lane said she is subject to the restrictions of the Special Permit.

Mr. Avratin said he has an email from Bud Dunham dated 2/12/2010 indicating that permission from the Town must be granted for paths and structures. Mr. Marsters said the Board is not going to deny the request; it is just not sure what vehicle they will use.

Mr. Avratin said it is not a request under an application for a modification. As the representative of the HOA he is requesting permission under paragraph 3. If that is the intent of the Board to ask for a modification, then just deny it. Mr. Avratin said that if an application comes before the Board it is a request for permission for something that already exists.

Another resident of Canvasback, who was not identified, stated that over time people walked on the open space which created the paths. She invited members of the Board to come to the subdivision and see this for themselves. That the issue is the removal of dead tree branches and vegetation was stated by the Board.

Mr. Joe Silva stated that nine people who work for the Town had walked the paths and had found no problem with them.

Mr. Marsters said the Board will have to continue the deliberation on another night prior to the next meeting. They needed to deliberate and make a decision.. The Board will determine what it will allow. The meeting will be public, but there will be no further public input. The posting will be at Town Clerk's Office and upstairs at 16 Jan Sebastian Drive.

The meeting was continued until Monday, May 23<sup>rd</sup>.

## **Board Reorganization**

Ms. Lipkind nominated Sarah Regan as Chair. Mr. Rakov seconded. The vote was unanimous. Mr. Lipkind nominated Dan Marsters as Vice Chair. Ms. Regan seconded. The vote was unanimous.

The Board was requested to nominate a member to the Water Quality Control Committee. Sarah Regan accepted the nomination with Henry Rakov and Nanette Perkins as alternates.

## **Zoning By-Laws**

Mr. Smith told the Board he was looking to them for guidance on the three sections that need to be in the warrant for the fall Special Town Meeting. They are:

SSVC Development Plan  
Solar Bylaw  
Amended Use Table.

He further said there is much information to get out to the community before the fall. The Bylaw Committee is no longer meeting. He would like to have the proposed rewrite for the next meeting. He is sending them to the Board by email so the members can look through them ahead of time.

## **Canvasback**

Ms. Lane said litigation has been threatened and suggested members of the Board looking at the property. Ms. Regan said she and Ms. Perkins have been there. All of the paths exist to docks that were not approved to begin with.

Ms. Lipkind moved the Board adjourn. Mr. Rakov seconded. The vote was unanimous. The meeting adjourned at 9:45pm.

Respectfully submitted,  
Marilyn K. Bassett