

Town of Orleans
Zoning Board of Appeals
Meeting Minutes – May 4, 2022

This was a virtual meeting on Wednesday, May 4, 2022 of the Orleans Zoning Board of Appeals that convened via remote participation using “Zoom” video technology, with real-time public access provided by Orleans Channel 18 on the Town website and cable television.

Review Remote/Virtual Meeting Protocols:

Mr. Marnik reviewed protocols for the “virtual” meeting. Any Committee votes must be taken by roll-call vote.

In attendance were the Chairman Michael Marnik, Vice Chairperson Lynne Eickholt, Matthew Cole, Emily Van Giezen, Gerald Mulligan and Bruce Taub, as well as Building Commissioner Tom Evers and Mia Baumgarten from MIS. Also in attendance was Board Secretary Stacy Faber. The meeting was duly noticed. The meeting was called to order at 7:00pm.

Case# 2172 – David Currier has applied on behalf of owner AJ Luke for a special permit in accordance with MGLA Chapter 40A, Section 6, 164-44. The present use of this building is office space and apartments. The applicant is proposing a retail cannabis shop and apartments. This has been presented and accepted by the Planning Board and Site Plan review. The property is located at 14 Lots Hollow Road, Map #40, Parcel #122.

This application falls under the MGLA section 164-40.4(e)2. Town Planner, George Meservey, let the Board know via email on May 4, 2022 that the town had not received all of the proper documentation in relation to this application. Tim McNamara, speaking on behalf of the applicant, states he received the same information from the town planner by email on May 4, 2022, as well. He also states that the state will issue a provisional license until everything is passed. The applicant is proposing to postpone the hearing until all proper documentation is retained. The board chair states that the by-law in which this application falls under requires all licenses be in place prior to gaining the approval of the Zoning Board of Appeals. The applicant proposes to postpone the hearing until June 15, 2022.

Mr. Cole makes a motion to continue the hearing for application 2172 until June 15, 2022, second by Mr. Mulligan. Mmes. Eickholt and Van Giezen and Messrs. Cole, Marnik, Mulligan and Taub voting aye. Motion carries 6-0.

Case# 2171 – (Continued from April 20, 2022) Phil Ruggieri has applied for a special permit in accordance with MGLA Chapter 40A, Section 9, 164-13, use tables adding outdoor entertainment, as amplified entertainment is an intensification of a pre-existing, non-conforming use. Presently, the site is being used as a full service restaurant (The Barley Neck Inn) and is proposing adding outdoor live, amplified music during 3 months out of the year. The property is located at 5 Beach Road, Map# 36, Parcel# 137.

The board chair asks if the board feels that if this is an intensification of an pre-existing, non-conforming use of entertainment. Mr. Taub states that the council for the abutters will be defending that this is an intensification of the pre-existing non-conformity and has a negative impact on the neighborhood.

John Kanaga brings evidence to draft proposed findings of the intensification of the pre-existing, non-conforming use. Mr. Kanaga states that this goes back to a vote at town meeting in 1971, which was considered the limited business district, when this business was the Pequot Inn.

In exhibits 2A through 2D that was sent to the Zoning Board (zoning maps & schedules of use tables) it states the provisions. In 1971, the change from the use of the district current use restaurants with use of current use today restaurants with entertainment & sale of alcohol beverages an subject to special permit review if in they were in the limited business district, which it was at the time. In 1976, the zoning district changed to the rural district. Prior to town meeting in both 1971 & 1976, live amplified music up to 7 days per week until 1am, with no restrictions on sound amplification, was occurring. Mr. Kanaga states that the question is brought up is that new restrictions from the Select Board, restricting the live, amplified music only four days per week from 5pm – 8pm, is this an intensification of a pre-existing use? The abutters site Cape Resorts Hotels several times, which morphed from a restaurant/hotel to a night time destination, with three night clubs on the property, which was an intensification of pre-existing use. The present case is more like the case of Rugel vs. McGee, where a car repair shop started repairing larger, heavier pieces of equipment. A judge ruled that there wasn't a change of use in this case. The Board asked the applicant to apply the Powers test – the nature and purpose has not changed, there has always been live, amplified music played on the premises. The restrictions from the Select Board would be upheld under the outdoor music license, which is less of an intensification of the current use. Mr. Kanaga sites the statement from abutter Laura Shiell of 2 Beach Road, that the proposed use is less intense than the pre-existing, non-conforming use.

Let the record reflect that the Board is in receipt of some of the materials provided by Mr. Kanaga included an uninterrupted set of affidavits from 1971 through the present owner of the Barley Neck Inn, establishing the use of entertainment and music.

Public Comment

Larry Squire of East Orleans, has lived in town for 35 years, very much in support of issuing the special permit.

Josh Stewart of Skaket Beach Road and a life long resident of Orleans, speaks in favor of the issuing of the special permit, stating that brings culture to Orleans.

Carol Hackett of Pochet Road in East Orleans, speaks in favor of issuing the special permit. She states that taking several walks over the previous summer, she never heard the “loud” music others have complained of. She enjoys that she sees families out on the lawn enjoying the music.

Victoria Dalmas, of Seine & Associates, is the attorney for the opposing abutters. She also invites Richard James, Acoustical Engineer, to present. She will also send the Board Chair the engineer's CV for reference. She asks about the outdoor activities back in the 1970's. The engineer states he's never visited Orleans or Cape Cod and hasn't heard the music that has been complained about.

Mr. Taub states that Mr. James is more of a fact witness rather than an expert.

Mr. Kanaga states he also contacted a acoustical engineer.

The following comments are from four of the abutters represented by Ms. Dalmás.

Katie Day of 224 Main Street, has lived there since 2009. She states that there's been an intensification of use since she's been there, with 4 nights per week of loud music. She states that there's other venues that host live music in Orleans.

Beverly Chappell also representing her mother Mary Ware, who is not on the call, there is also an affidavit from this abutter. She states that she lives very close to the Barley Neck, states that they hear the music all the time. Back in 2021, she notified the Select Board in opposition of the music. She states that the temporary permit was in effect, it was due to Covid restrictions. She states that her mother's house is over 300 feet away, and stated she didn't complain at that time. She states that her mother is elderly, and she doesn't have the option of leaving her home if she hears the music. She states that a lot of people in support of the hearing do not live close to the Barley Neck Inn. She states that the application was not in good taste.

Ward Ghoury, of Brickhill Road Extension, approximately 2000 feet from the Barley Neck Inn, speaks in opposition of the Barley Neck Inn. He states he heard music at the Barley Neck in 2020 and said it was very loud. He states his grandson noticed that it was very loud when they were outside. Mr. Ghoury states he felt "helpless" to control the noise. Mr. Ghoury states he does not like the look of the tent that is in front of the Barley Neck. He states he would have no objection if there was no tent nor an amplification of sound.

Laura Shiell of 2 Beach Road, she has lived there since 2004 and is a year round resident, speaks in opposition of the special permit. She states that previous when music was played outside, there was no liquor or food being served. She then states that she has been threatened by people on Facebook. The Board Chair asks Ms. Shiell to refrain from stating her complaint as such.

The hearing is now closed for the taking of evidence.

Mr. Taub asks if Ms. Day could be recognized. She states that all though music was previously played, it doesn't mean that it was allowed.

Mr. Cole asks the applicant what they propose for noise remediation. He also states he could not find anything in writing by the Orleans Police Department regarding a noise violation.

Mr. Kanaga responds that Mr. Ruggeri, to his knowledge, has never been cited with a noise violation. He stated that Chief MacDonald looked up the records and none existed. Regarding sound mitigation, he states that several ideas have been presented, including sound barriers. He states that according to the acoustical engineer, the bass guitar, bass drum and bass keyboard are what is causing the issue with the noise and the applicant did volunteer to remove that. The applicant also agrees to remove the tent to meet this condition. Mr. Cole states that he read several

letters that suggested certain conditions, such as the management of the Barley Neck Inn controlling the volume instead of the band, Mr. Kanaga agreed to the conditions.

Ms. Shiell states that she called the restaurant to complain about the noise over the previous year. She states she feels that the Barley Neck Inn would not comply with the conditions.

Mr. Marnik references a phone call by Orleans Police Department, dated 09/11/21, in which the police spoke with the Barley Neck Inn, asking the band to turn the volume down, the police officer stated while standing in the parking lot, he said he didn't hear the music. Mr. Taub asks for this to not be relevant in the hearing.

It is proposed to vote that the board should vote that this is an intensification of the pre-existing non-conformity.

Mr. Mulligan makes a motion that for Case 2171, that this is not an intensification of the pre-existing, non-conformity, second by Mr. Cole. Ms. Eickholt and Messrs. Cole, Marnik, Mulligan voting yay. Mr. Taub voting nay. The motion carries 4-1.

Mr. Cole states there's been sufficient testimony from both sides that noise has emanated from this site for years, and this is not an intensification of the use.

Mr. Mulligan makes a motion to adjourn, second by Mr. Marnik. The vote was 6-0 with Mmes. Eickholt & Van Giezen and Messrs Cole, Marnik, Mulligan and Taub voting aye.

Meeting adjourned at 9:36pm

Respectfully submitted,

Stacy Faber, Recording Secretary

Attachments included:

CASE 2172: Email from George Meservey, Town Planner, dated May 4, 2022, addressed to the Zoning Board of Appeals and the applicant, regarding the incomplete application.

CORRESPONDENCE RECEIVED REGARDING CASE 2171:

1. Email from James Mitola of 178 Pochet Road, dated April 11, 2022, in support of Case 2171
2. Email from Susan Aquino of 15 Seavers, dated April 11, 2022, in support of Case 2171
3. Email from Betsy Bently of 64 Tides End Lane, dated April 8, 2022, in support of Case 2171
4. Email from Stephanie LeBlanc, dated April 9, 2022, in support of Case 2171
5. Email from Ariolaj@comcast.net, dated April 9, 2022, in support of Case 2171
6. Email from Nancy & James Callery, dated April 10, 2022 in support of Case 2171
7. Email from Tom and Yasmine McNellis of Eastham, dated April 12, 2022 in support of Case 2171
8. Email from James Fiala of 12 Grist Road, dated April 8, 2022, in support of Case 2171
9. Email from Nauset Marine, dated April 12, 2022 in support of Case 2171
10. Email from Kim Reilly of 50 Bridge St, dated April 13, 2022 in support of Case 2171
11. Email from Jonathan Stein of 4 Mill Ln, Unit H, dated April 13, 2022 in opposition of Case 2171
12. Email from Ward Ghory of East Orleans dated April 13, 2022 in opposition of Case 2171
13. Email from Christine Cameron of 150 Hopkins Ln dated April 8, 2022, in support of Case 2171

14. Email from Mary Donleavy of 31 Lovell Ln dated April 8, 2022, in support of Case 2171
15. Email from Mary Barry of Orleans, dated April 9, 2022, in support of Case 2171
16. Email from Christina Larson, dated April 9, 2022, in support of Case 2171
17. Email from James Prendergast of 134 Barley Neck Rd, dated April 9, 2022, in support of Case 2171
18. Email from Karen Stack of 16 Pleasant View Dr., dated April 9, 2022, in support of Case 2171
19. Email from Patricia Fitzgerald of 83 Briar Spring Rd., dated April 9, 2022 in support of Case 2171
20. Email from max4e6226@charter.net dated April 9, 2022 in support of Case 2171
21. Email from Martin Freed of 41 Jack Knife Pt Rd & 5 Defiance Ln, dated April 10, 2022, in support of Case 2171
22. Email from Paige Sullivan dated April 10, 2022, in support of Case 2171
23. Email from Scott Goodwin of 4 Walker Rd., dated April 10, 2022 in support of Case 2171
24. Email from Geoffrey Biron dated April 10, 2022 in support of Case 2171
25. Email from David Patterson of 10 Fox Ridge Dr., dated April 10, 2022, in support of Case 2171
26. Email from Jenifer Sant of 30 Barley Neck Rd., dated April 10, 2022, in support of Case 2171
27. Email from Christine Rein of 85 Beach Road, dated April 10, 2022, in support of Case 2171
28. Email from Joan Francolini of 7 Barney Way, dated April 10, 2022, in support of Case 2171
29. Email from Phillis Dima of 60 Daley Terrace, dated April 11, 2022, in support of Case 2171
30. Email from Michelle & John Walsh of 49 Winslow Dr., dated April 11, 2022, in support of Case 2171
31. Email from Christiane Boezio of 8 Sherman Rd., dated April 11, 2022, in support of Case 2171
32. Email from Susan Aquino of 15 Seavers, dated April 11, 2022, in support of Case 2171
33. Email from Jen & Chris Webb of 40 Viking Rd., dated April 11, 2022, in support of Case 2171
34. Email from Kelly & Blair Maddy of Eastham, dated April 11, 2022, in support of Case 2171
35. Email from Kevin Hershberger dated April 11, 2022, in support of Case 2171
36. Email from Courtney Zwirn, dated April 12, 2022, in support of Case 2171
37. Email from Sue & Marty Reynolds of X Country Crossing, dated April 12, 2022, in support of Case 2171
38. Email from Andrew Gere of Eastham, dated April 12, 2022, in support of Case 2171
39. Email from Mark Szymanski of 50 Bridge Rd., dated April 13, 2022, in support of Case 2171
40. Email from Tait & Heather Stamp of Orleans dated April 13, 2022, in support of Case 2171
41. Email from Candice Hammond of Orleans, dated April 13, 2022, in support of Case 2171
42. Email from Janet Lindahl dated April 13, 2022, in support of Case 2171
43. Email from Elizabeth Crowley dated April 14, 2022, in support of Case 2171
44. Email from Ilene Horowitz of 79 Great Oak Road dated April 14, 2022, in support of Case 2171
45. Email from Tony Conte of Wellfleet, dated April 14, 2022, in support of Case 2171
46. Email from Michael Tack of 8 Norseman's Dr., dated April 14, 2022, in support of Case 2171
47. Email from Warren Waugh of 35 High Tide Ln, dated April 14, 2022, in support of Case 2171
48. Email from Julie Doherty of 15 Fisher Way, dated April 14, 2022, in support of Case 2171
49. Email from L. Scott of 8 Tonset Rd, dated April 15, 2022, in opposition of Case 2171
50. Email from Sherri Holden of 14 Deer Run, dated April 15, 2022, in support of Case 2171
51. Email from Bruce Maclean dated April 15, 2022 in support of Case 2171
52. Email from Ashley Ruggieri, dated April 15, 2022, in support of Case 2171
53. Email from Rebecca Leatherman, dated April 15, 2022, in support of Case 2171
54. Email from Judy Bloom, dated April 15, 2022, in support of Case 2171
55. Email from Marietta Nilson of Harwich, dated April 15, 2022, in opposition of Case 2171
56. Email from Anthony Conte of Wellfleet, dated April 15, 2022, in support of Case 2171
57. Email/hand delivery from abutters Sheel, Schenfeld & Stein of 2 & 8 Beach Rd. & 4 Mill Rd. from Atty Victoria Dalmas, in opposition of Case 2171
58. Email from Hope Plavin of 15 Joshuas Way Eastham, dated April 16, 2022 in support of Case 2171
59. Email from Bruce Nosler of 83 Spring Ln, Brewster, dated April 15, 2022 in support of Case 2171
60. Email from Nancy Renn of Beach Road, Orleans, dated April 16, 2022 in support of Case 2171