

## McCabe, Maureen

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**From:** Peter L. Mello <pmello@mhtl.com>  
**Sent:** Tuesday, May 28, 2019 2:51 PM  
**To:** McCabe, Maureen  
**Subject:** RE: Board of Appeals Meeting Packet for May 28, 2019 - UPDATE  
**Attachments:** 2014.06.23 P. Spiro Initial Determination.pdf; 2014.06.18 Nutter Letter Admitting Tree Platform is a Structure.pdf

Thank you, Maureen. I hope you had a nice Memorial Day weekend.

Please distribute this e-mail and the attached items to the Board in advance of tonight's meeting. As you will note, above attachments include:

1. A one-page written determination prepared by Paul Spiro on June 23, 2014, conveying Mr. Spiro's original determination that the Aerial Adventure Park's tree platforms are "buildings" and "structures" subject to the setback requirements of the Zoning Bylaw; and
2. A three-page letter from Eliza Cox to Mr. Spiro dated June 18, 2014, contradicting Attorney Cox's below-attached recent letter in acknowledging that "[t]he tree platforms . . . meet[] the definition of structures in the Bylaw . . ." See Attached June 18, 2014 Letter, p. 1.

Thank you,

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**Peter L. Mello Esq.**

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**From:** McCabe, Maureen [<mailto:mmccabe@townofsandwich.net>]

**Sent:** Friday, May 24, 2019 4:06 PM

**To:** Eliza Cox ([ecox@nutter.com](mailto:ecox@nutter.com)); Anne Scott-Putney ([ascottputney@heritagemuseums.org](mailto:ascottputney@heritagemuseums.org)); Jonathan Silverstein ([jsilverstein@k-plaw.com](mailto:jsilverstein@k-plaw.com)); Katherine Laughman ([klaughman@k-plaw.com](mailto:klaughman@k-plaw.com)); Peter L. Mello; Brides, Brendan; Chase Terrio ([chaseterrio@gmail.com](mailto:chaseterrio@gmail.com)); BOA - Chris Neeven; Drake, Leanne; Dunham, George; VanBuskirk, Erik; Gael Kelleher; BOA - Gerald Nye; BOA - James Killion; Jensen, Samuel; Lapp, Doug; McCabe, Maureen; Paula Johnson ([holderhill@gmail.com](mailto:holderhill@gmail.com));

Paula Schnepf; BOA - Robert Jensen; Tim O'Neill ([oneill.t@gmail.com](mailto:oneill.t@gmail.com)); Vitacco, Ralph; Tao Woolfe  
**Subject:** Board of Appeals Meeting Packet for May 28, 2019 - UPDATE

Hi everyone,

In addition to the meeting packet which was emailed on May 23, 2019, attached please find a letter from Eliza Cox, Esq. Kindly note this letter was received in our office today, May 24, 2019.

Thank you,  
Maureen

Maureen McCabe  
Sr. Administrative Assistant  
Office of Planning & Development  
16 Jan Sebastian Drive  
Sandwich, MA 02563  
Phone: 508-833-8001

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There is a question as to whether the tree elements of the "Aerial Adventure" located at Heritage Gardens and Museum are within the 30 foot front setback. Their argument is attached.

Under the provisions of our Protective Zoning Bylaws, a Yard is "*a required open space, unobstructed with structures more than thirty (30) inches high, other than fences or other customary yard accessories.*"

Further, the bylaw defines a structure as "*anything constructed or erected, the use of which requires fixed location on the ground, or attachment to something on the ground, including all buildings, mobile homes, billboards, towers, swimming pools or tanks that have a capacity of 4,000 gallons or more, or the like or part thereof; but not including paving, usual lawn accessories, fences or retaining walls six (6) feet in height or less.*"

One of the contentions of their argument is that "buildings" are required to comply with the Intensity of Use, Section 2600. They do agree that the tree platforms are structures as defined by the bylaw definition but they "*cannot be considered as buildings*"; thus the tree platforms are not buildings in their view. Since our bylaw does not define what a "building" is; I would refer to the definition of a building as defined in 780 CMR (Massachusetts Building Code) which is "*any structure used or intended for supporting or sheltering any use or occupancy*".

With the aforementioned in mind, it would be my interpretation that the tree platforms, although only twelve inches in height, are structures; in fact they agree to that interpretation. The building code refers to a "building" as any structure and the tree platforms are built with the intent of being used and occupied. It would be my building code interpretation that these platforms are buildings with that defined intent.

Our bylaw doesn't allow an in-ground pool to be placed in the front yard unless it complies with the proper setback; certainly an in-ground pool is less than 30 inches in height, arguably less than twelve (12) inches in height. An in-ground pool is a structure per our bylaw and is built with the intention of being used and occupied as a structure. Since an in-ground pool cannot be placed in a required front yard unless it complies with the setbacks for that district, their contention that the tree platforms, only twelve (12) inches in height, do not obstruct any open space and are not subject to the front yard setback is invalid. Since an in-ground pool cannot be placed in the front yard without proper setbacks, their argument that Section 2510 only applies to "buildings" would also be invalid since a pool is a structure and a building is any structure.

I do not believe that it is the spirit and intent of the Sandwich Zoning Bylaw to allow for tree platforms to be placed within the front setback of a yard since they are not on the ground and are not obstructing open space even if they are twelve (12) inches high. By virtue of the fact that they are placed in trees would nullify any height arguments of them being less than thirty (30) inches in height as measured above the ground.

If the applicant is aggrieved by this interpretation, they have the right to apply for a variance and appear before the Zoning Board of Appeals as outlined in Section 1300 of the Sandwich Protective Zoning Bylaw.

Paul D. 6/23/14

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Eliza Cox  
Direct Line: (508) 790-5431  
Fax: (508) 771-8079  
E-mail: [ecox@nutter.com](mailto:ecox@nutter.com)

June 18, 2014  
112654-4

Paul D. Spiro  
Inspector of Buildings  
Town of Sandwich Building Department  
16 Jan Sebastian Drive  
Sandwich, MA 02563

Re: Heritage Museums and Gardens  
Memorandum in Support of Building Permit Application

Dear Paul:

On behalf of Heritage Museums and Gardens ("Heritage"), I am submitting this memorandum in support of Heritage's building permit application for its new exhibit, Aerial Adventure Experience (the "Project"). I understand that you raised a concern that the setback requirements of the Sandwich Zoning Bylaw (the "Bylaw") may apply to some components of the Project. We have reviewed the applicable provisions of the Bylaw and based upon our review, do not believe that the setbacks apply to the tree platforms proposed for the Project<sup>1</sup>, and therefore, no further zoning relief is required prior to issuance of a building permit.

As shown on the plans accompanying the building permit application, six to nine of the platforms to be used for the Project may be located within thirty feet of the front property line. A review of the applicable sections of the Bylaw indicates that the front yard setback only applies to buildings and non-building structures over thirty inches in height.

Section 2510 of the Bylaw requires that buildings erected in any district comply with the intensity of use schedule in Section 2600 of the Bylaw. The tree platforms, while meeting the definition of structures in the Bylaw, cannot be considered as buildings. As the tree platforms are not buildings, they are not subject to the dimensional requirements of Sections 2510 and 2600.

In addition, the definition of yard contained in the Bylaw is "a required open space, unobstructed with structures more than thirty (30) inches high, other than fences or other customary yard accessories." As the tree platforms are only twelve inches in height and do not obstruct any open space at the property, they are not subject to the front yard setback.

<sup>1</sup> We do believe that the proposed yurt structures are proposed to be located more than 30 feet off the property line.

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It should also be noted that the goals of the Bylaw and the Zoning Enabling Act are not detrimentally impacted by the presence of the tree platforms within the front yard setback. The Zoning Enabling Act, 1975 Mass. Acts 808 § 2A, provides for a number of goals including the lessening congestion in the streets, securing safety from fire, flood, panic and other dangers, provision of adequate light and air and avoiding undue population concentration in promoting zoning controls. *See* 1975 Mass. Acts 808 § 2A; *see also MacNeil v. Town of Avon*, 386 Mass. 339, 341 (1982). The definition of "yard" in Sandwich's Bylaw follows these goals as it requires open space unobstructed by structures over thirty inches in height.

The tree platforms will not cause congestion, will not impact light or air and will not impact population. Because of their limited footprint, height and locations, the tree platforms have no impact on the front yard area at the property, meeting the goals of the Bylaw and Zoning Enabling Act.

I would also point out that a number of improvements have been considered by Massachusetts's courts in determining whether they are structures or buildings subject to a setback requirement. For example, tennis courts and basketball courts have been allowed in the setback. *See e.g. Selectmen of Lancaster v. DeFelice*, 352 Mass. 205, 207 (1967); *Bell v. Zoning Bd. of Appeals of Cohasset*, 14 Mass.App.Ct 97, 101-103 (1982). Like those improvements, the tree platforms have no impact on the open space protected by the Bylaw's yard requirements.

Finally, application of the setbacks to the proposed tree platforms could be found to be invalid by a court. In *MacNeil*, the Supreme Judicial Court ("SJC") applied a test that would allow a party to contest the reasonableness of a zoning bylaw as "arbitrary and unreasonable", and thus invalid. 386 Mass. 339, 340 (1982). This test requires a plaintiff to show that a bylaw as applied to a particular project is "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. *Id.*

In *MacNeil*, the SJC found that a frontage requirement was valid where there was no showing that the requirement bore any relation to a legitimate zoning purpose. *Id.*; *see also Noto v. Zoning Board of Appeals of Weston*, 73 Mass.App.Ct. 1121 (2009) (quadrangle requirement was found to be valid as it reinforced lot area and shape requirements of zoning). The SJC noted in *MacNeil* that the plaintiff failed to show that a 200-foot frontage requirement for several parcels of land with multiple dwellings lacked a relation to the public interest or that application of the requirement is unnecessary to accomplish the purpose of zoning. *MacNeil*, at 343.

Here, the requirement of a setback for a structure, less than 30 inches in height, that in no way obstructs the front yard area and has no detrimental effect on public health, safety, morals or general welfare is unnecessary and unreasonable. The construction of the tree platforms will leave the entire front yard open at ground level as required.

Paul D. Spiro, Inspector of Buildings  
June 17, 2014  
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Based on the above, we do not believe the proposed tree platforms are subject to the front yard requirements. I would be happy to discuss this with you.

Thank you very much for your time, input and assistance.

Very truly yours,

Eliza Cox

EZC:

cc: Ellen Spear, President & CEO, Heritage Museum & Gardens

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