

Town of Sandwich
THE OLDEST TOWN ON CAPE COD



Board of Appeals

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Minutes
May 28, 2019

TOWN CLERK
TOWN OF SANDWICH

JUN 27 2019

10H 00M AM
RECEIVED & RECORDED

6 p.m.
Upper Meeting Room
270 Quaker Meetinghouse Road

Present: Christopher Neeven, Chair; James Killion, Vice-Chair; Robert Jensen; Timothy O'Neill; and Gerald Nye

Absent: Erik Van Buskirk and Chase Terrio

Also Present: Brendan Brides, Building Commissioner; Ralph Vitacco, Director of Planning & Economic Development; Leanne Drake, Assistant Town Planner; Sam Jensen, Assistant Town Engineer; Katherine Laughman, Town Counsel; and Maureen McCabe, Sr. Administrative Assistant

Mr. Neeven opens the meeting with the Pledge of Allegiance and the reading of the Opening Statement.

Approval of Minutes

There are no minutes to approve

Old Business

- 0 Pocasset Road and 0 Shawme Road, Map 37 Parcels 1&2 – The Adventure Park at Heritage Museums and Gardens, LLC – Special Permit – Continued

Mr. Neeven states that the Board will be hearing again from the applicant. Anyone who would like to speak is welcome to do so, however, please keep comments to new information and limit your remarks to under five minutes each. Mr. Van Buskirk is unable to attend tonight's meeting. Mr. Nye is sitting in for Mr. Van Buskirk and Mr. Nye has listened to the tape from the last session and has signed the required affidavit to this effect. Mr. Neeven goes on to explain that since the last meeting the Board has received public comments, as well as correspondence from Attorney Cox and Attorney Mello. These materials have been reviewed by the Board. Attorney Mello interjects to ask Mr. Neeven if Board members have received the email to which the letters were attached. Mr. Neeven confirms that they have.

Eliza Cox, Esq.

Attorney Cox reintroduces herself and her team to the Board. Also present at the table with her is Anne Scott-Putney and Bahman Azarm. At the Board's request, Heather

Ross from Cape Cod & Islands Appraisal Group is here to respond to Mr. Killion's questions. Attorney Cox references her letter dated May 24, 2019 which clarifies three components:

1. This use is not an amusement park within the meaning of the Zoning By-Law or within the meaning of the Comm. of MA regulation. Attorney Cox tells the Board she will not go into detail on this point, however, if the Board has any questions or concerns she would like an opportunity to respond.
2. Tree platforms are not structures within the meaning of the Zoning By-Law. Attorney Cox references the site visit the Board made to the Aerial Adventure Park and states that at that time they had an opportunity to view the platforms that are in the trees. Attorney Cox explains that each platform sits on wedges which are surrounding the tree. The platforms are there by compression; there is nothing attached to the trees. There are no nails, bolts or screws going into the trees. The method of suspending the platform is in contrast, she suggests, to the definition of structures within the Town's Zoning By-Law, which expressly requires something be attached to the ground or a fixed location on the ground. Attorney Cox goes on to say that here the platforms are not attached to the ground or on anything to the ground and therefore they cannot be structures within the meaning of the Town's Zoning By-Law. Previously the Town did not consider them to be structures when this project received the Building Permit in 2015. Attorney Cox tells the Board upon reflection she believes the language within in the Zoning By-Law is intended to regulate such things as second floor decks which are attached to buildings that are located on the ground. Here the platforms are sitting in the trees by compression; they are sitting on wedges that lean against the trees. Attorney Cox references Peter Mello's email with attachments which includes a letter she had prepared in 2014. It did indicate that their view at the time which was platforms could be structures. Ultimately the Building Commissioner disagreed and issued a Building Permit indicating that they are not structures. She tells the Board that Memo was intended to address whether or not they were building within the meaning of the By-Law requiring compliance with the general setback requirements. Attorney Cox states that their position is that the tree platforms are not structures.
3. Included with the letter is a color graphic requested by the Board which shows the location of the ropes courses on the property. Attorney Cox tells the Board she is also submitting historic daily attendance data for a period of two years for both Heritage and the Adventure Park and provides a summary of the information. Attorney Cox offers some observations: these numbers do not reflect the number of vehicles or cars that are coming to either facility; these attendance numbers are spread out over the course of a day and they are not numbers that happen all at once at either location. At the Adventure Park climbers are regulated and Attorney Cox goes on to provide the Board with these details to include the number of harnesses as well as a reservation system. Overall, Heritage is a significantly higher generator of attendees than the Adventure Park.

In summary, Attorney Cox tells the Board they believe they have demonstrated that the Adventure Park is a recreational use. It is similar to a climbing wall which is included as an example in the Town's Zoning By-Law as a recreation facility. The Superior Court found this to be dominantly a recreational use. Attorney Cox believes they have

demonstrated that this is a small-scale use and states they meet the requirements of Section 4151. This project does not result in substantial hardship or derogation. She references the various studies which were included with the Special Permit application. This outdoor recreation use is wholly consistent with the surrounding land uses. The closest residence is substantially buffered by mature vegetation from the Adventure Park. Attorney Cox tells the Board she believes they meet the criteria for the granting of the Special Permit.

Mr. Killion, Attorney Cox and Ms. Scott-Putney discuss Heritage's wintertime hours of operation. Mr. Jensen asks if the Adventure Park has ever attained 120 maximum which the course can hold. Mr. Azarm states that there are 120 harnesses but there are never 110 people in the trees at the same time. Attorney Cox states that changes to the reservation system have been made to reduce the number so that there wouldn't be so many people starting at one given time. The Board and Mr. Azarm discuss daily averages for the entire season.

Heather Ross, Real Estate Appraiser, Cape Cod & Island Appraisal Group, LLP

Ms. Ross introduces herself to the Board. In response to Mr. Killion's inquiry, Ms. Ross provides the Board with a detailed explanation as to how she assembled her entire assessment. She tells the Board the focus of the assignment was to identify if there had been any diminution of market values due to the ropes course at the Heritage Museum. Ms. Ross goes into detail regarding the sales and resales in the two condominium buildings. For clarification purposes, Mr. Killion asks if "resale" refers to a unit that is trans-acted as one of a multiple within that time period, the same unit. Ms. Ross confirms that the data refers to the same unit. The result of the analysis is that there were measurable increases in value which demonstrated there was no decline. Mr. Killion asks how this compared with other properties in the area. Ms. Ross references and provides the Board with a copy of the Warren Group data compilation and tells them this provides a general idea of what was happening in the market as a whole for residential condos in Sandwich. It shows there was an overall increase over this four year period of 35% and also an 8.4% increase annually. Ms. Ross states that even though this number might not be specific to the condominium projects that about the Museum it's still demonstrating that the increase in values in those condominium projects are consistent with the increases in the market as a whole. Ms. Ross confirms for Mr. Jensen that both the condominium projects showed an increase in value. Mr. Jensen asks about the single family dwellings. Ms. Ross states that she looked at what had sold and not sold on Pine Street. She states the average price per square foot in over the five year period. Ms. Ross says her conclusion is that the increase in traffic did not have a measurable diminution on value. Mr. Killion asks Ms. Ross if she looked at the days on the market. Ms. Ross says this is relevant because in 2013-2015 there was an oversupply of inventory in the market. It did result in longer marketing times and it did result, in some cases, of people having to discount their properties to shorten up that sale period. In analyzing the data, the longer marketing time is implicit in the sale price. Mr. Killion asks about days in inventory. Ms. Ross says this is usually measured in days on market. Mr. Killion asks how this changes from 2015 to 2018. Ms. Ross replies by saying what they have seen are the inventory was gradually absorbed and we started to see asking prices increase and sales prices increase. Mr. Killion asks about the analysis that was done based on location to recreational uses. Ms. Ross explains the purpose of this part of the study was whether there was any negative influence in the market to

outdoor recreational facilities. She explains that the basis of this study was to take a sale of a property that was next door to a school that had an outdoor field or outdoor use. Similar properties were compared in similar neighborhoods with the outdoor recreational use and the sale without the recreational use. Mr. Killion asks if she found that properties located near these types of uses suffered any type of value diminution. Ms. Ross responds that general comments can be misleading. Buyer motivation may be different. Ms. Ross confirms that her study was based on available data but also the primary purpose of the Impact Study was to identify the difference between what was happening in the market before the installation of the ropes course and what was happening after. Based on this purview she went into the market and found the relevant sales as they were available. The Board has no further questions for Ms. Ross.

Mr. Killion asks Mr. Brides if it is in his opinion that the platforms meet the definition of structures. Mr. Brides states that the definition that is provided in the Protective Zoning By-Law defines these structures as platforms in the trees. Mr. Killion asks if a tree with a piece of cable in it is considered a structure. Mr. Brides says a cable is not a structure but in this case there are tunnels which he considers a structure. Mr. Killion asks if there were a tree that just had a cable to support something else would that be considered a structure. Mr. Brides cites a clothes line as an example. It's not considered a structure but in this case there is a combination of bridges, platforms and cables that contribute to these platforms and bridges so he believes they would be a structure. Mr. Killion asks Mr. Brides if, in his opinion, a cable between two trees with devices suspended from it is or is not a structure. Mr. Brides' response is that in the case of supporting the bridges that cross from one tree to another it is a structure. Mr. Killion asks about elements that aren't a bridge. Some ropes hang from cables in between a tree would that be considered a structure. Mr. Brides says probably not in accordance with the By-Law. Mr. Killion summarizes by saying it is specifically anything that is part or fixed near or to the tree. Mr. Brides quotes the By-Law requirements. Mr. Killion asks Mr. Brides if he has any comment regarding previous conclusions made by the Building Department that these were not structures. Mr. Brides quotes Mr. Paul Spiro, the former Building Inspector's position. Mr. Killion asks how this works with the street and the side setbacks. Mr. Brides says he believes the front setbacks were 30 feet at the time. He believes some of the structures are less than that at this point. Mr. Brides states that he can't comment on his predecessor's interpretation. They discuss the side yard property line and what was previously determined. Mr. Brides references an amendment in the Zoning By-Law that took place in May 2014 that changed how they interrupt front yard setbacks. Mr. Killion asks Mr. Brides if he would treat the lot line as a line that would meet setback. Mr. Brides questions which lot line he is referencing. Mr. Killion states it is the lot line intersecting the property. Mr. Brides states that he would not consider this lot line to meet setback as it is adjoining property commonly owned.

Attorney Cox tells the Board she has the trial testimony from the Superior Court case and reads a portion of Mr. Spiro's testimony aloud regarding structures and setbacks. She states that ultimately her understanding is that Mr. Spiro concluded them not to be structures as he testified to at trial.

There are no further questions from the Board to Town Counsel, the applicant or Mr. Brides. Mr. Neeven opens the matter up to the public and asks that comments be brief. The following people spoke:

Jennifer Bouchard, 24 Pine Street

Ms. Bouchard directs her comments toward the Impact Analysis and references the letter she submitted to the Board. She says she is surprised to hear that data was not available prior to 2014 or 2015 with respect to Pine Street. She tells the Board it's unusual to do an evaluation of a trend in data to not establish a significant baseline, trend and then evaluate the difference. Ms. Bouchard tells the Board she is concerned about the conclusion was there would have been an immediate change in market value after the increase in traffic. She says that she believes the market duration analysis was not adequately addressed. Ms. Bouchard disagrees with the comparative analysis for other outdoor recreation facilities. The issue everyone has is the access to the park. Ms. Bouchard asks the Board to consider the impact on the residents.

Peter Mello, Esq.

Attorney Mello thanks the board for the opportunity to speak. He states that they are veering a little off field with the decision to consider the appraisal analysis. Mr. Jensen asks why this is the case when they are to determine if nuisance, hazard or congestion is created. Attorney Mello explains that they are not eligible for a special permit under Section 4151 which makes the appraisal obsolete. Attorney Mello states that that the conclusion of the Building Commissioner here with respect to the definition of the word structure is irrefutable. Attorney Mello urges the Board to take a look at his letter and chart he had previously submitted. He addresses some of the points made by the applicant in their submission on Friday. Attorney Mello points out that it totally contradicts what they expressly acknowledge in their previous submission to Mr. Spiro. Ms. Cox expressly acknowledges that the tree platforms constitute structures under the by-laws. Attorney Mello has provided email correspondence that show this. Attorney Mello discusses previous interpretations by Mr. Spiro that concluded that the structures could even be classified as buildings under the town's zoning by-laws. Attorney Mello discusses why this is important. Mr. Killion asks for a point of clarification and questions whether Attorney Mello is saying that these platforms are buildings. Attorney Mello states that this was Mr. Spiro's conclusion. He continues to discuss Attorney Cox's reasoning that these are not structures but elements. Attorney Mello argues that structures and elements are not mutually exclusive. He tells the Board that Attorney Cox is quoting the definition of an element under 520 CMR 5 and if you read the definition fully it states than an element may be part of a self-supporting structure. On its face, this expressly contradicts Heritage's position. Attorney Mello discusses the word "attached" and how the word does not mean it has to be nailed or bolted to something as Attorney Cox describes. Attorney Mello lists the reasons this would be troublesome. The dictionary defines the word attached as tied up, strapped, bonded, a fixed and so on. Affixed is a word the applicant herself used when last reviewing this project in 2014. Attorney Mello reads aloud an email from Attorney Cox stating this. Attorney Mello cautions the board on this newly expanded concept and further encourages the Board to review the chart he has provided. Attorney Mello begins to address the appraisal submitted by Ms. Ross. He believes the courts findings are binding on the Board. Mr. Jensen disagrees. Attorney Mello argues that even if you make a hyper-technical legal argument that it is not a suitable place for Estoppel, a court, as a practical matter, would see this issue as being thoroughly vetted. The Board would have a hard time defending this issue in an appeal. Attorney Mello states that the appraisal suffers from two fundamental defects. The appraiser only looked at the decline of property values. This is

irrelevant. It should address property values with and without the park. This is something that been done and thoroughly vetted by the court. The court found that the property owners suffered a diminution of 10% on what their values should be because of the park. This is what is important. The appraiser did not look at properties that are comparable to the properties in the condominium; this is an oversight. Mr. Neeven asks Attorney Mello to start wrapping up. Mr. Killion asks when the study he had previously mentioned was conducted. Mr. Jensen states that they have not yet seen that study. Attorney Mello states that the study was done years ago in reference to the court date. Mr. Killion presses him for a date. Attorney Mello believes it was sometime is 2016. Mr. Killion asks if it was conducted prior to the opening of the park. Attorney Mello responds that the park opened in 2015, the appraiser looked at data prior to the opening of the park and during the operation of the park. The study was completed around the Fall of '17. Attorney Mello continues to discuss the defects of the applicant appraisal and references the compared sales analysis which is completely flawed in his opinion. The appraiser looked at properties outside of Sandwich and in close proximity to ball fields and schools. Attorney Mello continues to say that people are attracted to school related ball fields and it makes the community attractive. It's not comparable. Mr. Killion states that he did ask the appraiser that question and she responded that some people like being beside schools and others don't. It's a matter of personal preference. Mr. Killion tells Attorney Mello he thinks this analysis is important to look at as it gives example on how certain things are affected by other factors. Attorney Mello states that it is not relevant to the question, what is the impact of the park on surrounding properties. Mr. Neeven asks Attorney Mello to finish up. Attorney Mello states he has one more point. The visitor counts in the trial exhibits differ to what was presented by the applicant. On a typical busy summer day the applicant sites 250 visitors however our counts show almost double that. Attorney Mello references the daily attendance submitted by the applicant and tells the Board that these are historically low and artificially made. He references one of his prior submissions that states during the litigation process they were applying means to artificially produce visitor totals. Mr. Killion asks how they did that. Attorney Mello states that there were all kinds of strategies they used post litigation to drive up visitor counts. Attorney Mello says it wouldn't surprise him if this was permitted, that they would be back before the board to expand the course. Mr. Neeven states that the daily counts are factual enough for the Board's purpose. Attorney Mello states that during the court case Heritage had contemplated adding more harnesses and intake stations to increase the number of visitors to the park. Mr. Neeven counters that the applicant has already stated that they are not expanding the park. Attorney Mello states that they are not physically expanding the park at this time but could add these features to drive up attendance. Mr. Neeven thanks Attorney Mello and tells him he is excused but can come back at the end.

Richard Harries, 10 Morgan Trail

Mr. Harries states that he doesn't feel the Board members have a very high regard for Judge Moriarty's ruling. Mr. Jensen explains that we are not talking about the Judge's ruling; this is a new application before the Board with all new information. Mr. Harries has a difference of opinion. He believes the new information pits neighbor against neighbor. He tells the Board that no one will disagree that this is a neat device. Unfortunately it is not compatible with the character of the neighborhood. Mr. Harries quotes from the Judge's ruling and references the three areas outlined in the ruling. Mr. Harries says the Board upheld the ruling of the Building Inspector under the Dover

Amendment. The Judge ruled the Dover Amendment did not apply. Mr. Neeven interjects to explain that the Board has read the ruling and understands what it says. The Board thought the Dover Amendment applied and the Judge disagreed so we move on. This is not the matter before the Board now. Mr. Neeven categorically states that the Board never said they could overrule the Superior Court decision. The Judge's decision overturned the Board's decision. Mr. Harries asks that the Board not look for answers in post-trial allegations and testimony. He tells the Board it has some left reminders of how much the neighbor's trust in Heritage has eroded over the past few years. In summary, Mr. Harries tells the Board that approval of this application will be a wrongful attempt to overrule the findings of the court which is unlawful use.

Carlo DiPersio, 11 Morgan Trail

Mr. DiPersio says that Heritage has applied for a Special Permit classifying it as a "small outdoor recreational facility." He says that Heritage is attempting to extract the word "community." Mr. DiPersio quotes the definition of "community" from the Town's By-Law. He asks Board members what is their definition of "small scale community." He goes on to say if the Board can't define the term how can they vote on what they cannot define? Mr. DiPersio says 30,000 people per year is not small scale, it is big business. He would define small scale as, for example, a baseball field or basketball court. Mr. Jensen tells Mr. DiPersio that, as part of their deliberations, the Board will define "small scale."

Eric Small, Jonathan Lane

Mr. Small tells the Board his comments are in part contributed to Cas Malec. We both live on Jonathan Lane. Mr. Small quotes from Cas and explains that he is unable to attend tonight's meeting. The quote says that the ropes course at Heritage is in the wrong place. The statement goes on to ask the Board if Heritage did not exist would the majority owner of this commercial enterprise be permitted to install and operate at this location. If the answer is "no" then the Board is in agreement with the Superior Court ruling and it must be permanently closed.

Dean Coe (street address not provided)

Mr. Coe tells the Board he has been a neighbor of Heritage since 1983. He says his comments are looking back, not forward. Mr. Coe has been a consultant to Heritage in the past. He tells the Board this project started with deception and continued deceptively. Mr. Coe says it took the court to exercise the discipline that the Board should have exercised. Mr. Coe goes into detail explaining what he thought the Board's course of action should have been. He tells Board members he understands sustainability and that a nonprofit organization has to revitalize itself to keep itself going. Mr. Coe talks about the Peabody Essex Museum and what they did to increase attendance was consistent with their values as well as increasing the value of the surrounding community. Mr. Neeven asks Mr. Coe to address the matter before the Board instead of other projects. Mr. Coe says that he is and then goes on to discuss Cape Cod Museum of Natural History's installation of a butterfly house. He tells the Board that he has a concern that doesn't have to do with Heritage: if this gets passed what are we saying to future organizations both within our community and outside of our community that want to move selfishly toward their own interests. Mr. Coe tells the

Board this is a community of value and that to vote in favor of this application will compound the problem. It is time to move on and heal.

Anne Scott-Putney

Ms. Scott-Putney tells the Board she would like to respond to Mr. Coe's comments. She is the leader of Heritage; Heritage has leadership. She addresses Mr. Coe and says that values were addressed at the last meeting and she doesn't believe his comments are pertinent to this case. Ms. Scott-Putney says that the Adventure Park is an extension of Heritage's values: the values of families working together, the values of education and the value of discovery in nature. There are a lot of community benefits from the Adventure Park that are positive, for example school groups who use it as well as the neighbors. This project is an extension of Heritage's mission; it is an extension of our values.

Eliza Cox, Esq.

Attorney Cox says there is no contempt for the Superior Court Decision. When the Decision was rendered the Adventure Park was immediately closed. She states that the whole application is consistent with the Superior Court Decision. The court found that it was not dominantly educational but it was dominantly recreational and a recreational Special Permit is being sought. Regarding comments made that the Superior Court determined there was a loss of property values that was for four plaintiffs' properties. What has been presented to the Board through Ms. Ross' analysis is how the project impacts the neighborhood. Her report indicates there is no negative market impact to the neighborhood as a whole as a result of this project. Attorney Cox references Mr. DiPersio's comments regarding criteria: this is within the Board's discretion. She references Section 4151 and says that it directly relates to the scale and ensures that anything that comes under that application has to meet each criteria that ensures it is small scale. Attorney Cox references the tremendous positive comments from the community in support of this application. In summary, Attorney Cox reiterates that Mr. Spiro's October 2017 testimony determined they were not structures but elements. It is the applicant's position that the platforms are not attached to something on the ground; the platforms are not structures because they are not fixed to the ground, they are not located on the ground, they are not in a fixed location on the ground, they are not attached to anything constructed on the ground – they are not structures under the Zoning By-Law consistent with what the previous Building Commissioner said.

Peter Mello, Esq.

Mr. Neeven asks Attorney Mello to keep it as succinct as possible. Attorney Mello addresses the last comment Attorney Cox made. Mr. Spiro explained the reversal of his opinion in internal communications with Town officials. These were entered in as trial exhibits. Attorney Mello reads from the communications. Attorney Mello continues to discuss previous submissions by Attorney Cox referencing the park as a challenge course. After the Superior Court's decision this can no longer be identified as a challenge course because there is no supervised curriculum associated with this activity, it is a self-guided exercise. In the State regulations the definition of challenge course expressly recognizes the need for a supervised curriculum. Mr. Jensen asks for clarification. He believes the applicant stated that there was a half hour class for

climbers before they used the course. Attorney Mello states that it is 15 minutes and the class is exclusively used to show people to how to strap into their harness. That cannot be counted as a supervised curriculum. Mr. Jensen acknowledges the point made. Mr. Neeven recognizes Attorney Cox. Attorney Cox states that the Court never recognized whether there was a curriculum associated with this project. All the court found was that this was not a dominantly educational use. Of course there is a recreational curriculum associate with this use. Attorney Coz describes the curriculum. Attorney Mello responds that the Court found this was a self-guided exercise not a supervised curriculum. Attorney Cox interjects and speaks over Attorney Mello. Both parties continue to speak over one another. Mr. Neeven asks them to stop and allows Attorney Mello to continue. Attorney Mello starts to address the appraisal analysis. He does not feel that he should have to bring forward prior appraisal analysis as this was already decided upon in court but if the Board is inclined to accept the applicant's appraisal he would like to submit some trial exhibits. Mr. Jensen and Attorney Mello discuss the trial exhibits and previous appraisals. Attorney Mello is told he can submit trial exhibits. Attorney Mello states that they are missing a big portion of this. It is not about whether or not property values decreased but what would be the property value if the park had never been introduced into the area. A discussion ensues relating to this. Mr. Neeven asks Attorney Mello to move on and wrap up. Attorney Mello addresses Mr. DiPersio's comments regarding small-scale and community. The Board cannot answer these questions without going back and seeing what Town Meeting ascertained. Mr. Neeven explains the process of getting zoning by-laws passed. Attorney Mello agrees and explains that during this process there are usually back-up materials that determine the intent of a zoning by-law. Attorney Mello states he has one more point to make. He thanks the Board for allowing him to present again. He states that the Board has really only known him over the years through litigation, the sound of his name probably raises the blood pressure of some. Mr. Neeven states that he did not know who Attorney Mello was prior to the meetings. Attorney Mello states that he hopes there's not an inherent ill-will. Mr. Neeven tells Attorney Mello that is not how the Board operates. They are always fair, always listen and always do their due diligence. It has nothing to do with who's before the Board. Attorney Mello states that he respects that and just wanted to make sure. Attorney Mello thanks the Board for their time.

Carl Johansen (no address provided)

Mr. Johansen tells the Board he is asking what is being called a structure and what is not being called a structure. The applicant says a tree is not a structure; the Town's Zoning By-Law says it is. Mr. Johansen asks Town Counsel what her legal opinion is as it relates to this matter.

Katherine Laughman, Esq., Town Counsel

Attorney Laughman states that the Zoning By-Law defines structure and ultimately it is the Building Inspector's job in the first instance to interpret that definition. To the extent anyone disagrees with that they have the option of bringing that question before the Zoning Board of Appeals who are the ultimate arbiter of what that definition means and whether it applies to this particular project and structure. Anyone who disagrees with that interpretation can seek further judicial review of that interpretation. Attorney Laughman states she's not sure her opinion necessarily matters here but certainly you have a definition and the Building Inspector will choose to interpret it and apply it.

Peter Mello, Esq.

Attorney Mello adds that to the extent the Building Commissioner has rendered that interpretation any reversal of that would require its own independent procedure as opposed to the Building Commissioner's interpretation being decided in this permit process.

Eliza Cox, Esq.

Attorney Cox disagrees with Attorney Mello. There is an application before you that requires you to evaluate how the zoning by-laws apply to the project in front of you. This includes whether the elements in this project meet the definitions or not. This is squarely before the Board.

Carlo DiPersio

Mr. DiPersio says he disagrees with Town Counsel and quotes from 780 CMR and says that it takes precedence. Mr. Killion explains that the Board is bound by the definitions in the Zoning By-Law. Mr. Jensen explains that the Building Code is referenced by the Building Inspector. Mr. Killion goes on to say that with regard to Special Permits and Variances this Board makes the determination based on the definition in the Zoning By-Law. The Building Inspector has to abide by the Board's decisions. Mr. DiPersio discusses the safety aspect and asks if the Board has determined whether the platforms are structures or not. Mr. Killion points out that the Board has not entered into deliberations yet.

Regarding the platforms being inspected, Mr. Brides states that there is nothing in the Building Code specifically about these types of platforms so in this situation where they are attached to a tree by way of friction fit we would rely on the opinions of an engineer who would confirm that the platform or structure will be adequate to hold people.

Mr. Neeven recommends keeping the Public Hearing open and continuing the matter to Tuesday, June 11. Mr. Jensen indicates he is unavailable to attend in person. Mr. Van Buskirk will be in attendance on June 11. Attorney Cox comments to the Board that this matter has been opened for over one month. There has been ample time to submit studies and reports. The report submitted with this application is more comprehensive in that it has additional time periods that were not included in the document that was reviewed by the court for the four properties. The report is a more comprehensive look of the neighborhood as a whole for a longer period of time. Mr. Neeven says there is an extreme amount of information and data to consider. He suggests the Board deliberate on a date that is convenient for the applicant. Attorney Cox requests a brief recess to discuss availability with her client. The meeting resumes at 8:03 p.m.

Mr. Azarm addresses the Board regarding platforms. He tells them it is the State who inspects the platforms. The platforms are not something that he looks at as a structural item. He says people can be on the platform and essentially the shims can come out and the platform could drop and the person is still secure with their lifelines. He discusses the locking mechanism which prevents someone from disconnecting while on

the course. A person can only disconnect while they are back on the ground. The platforms are there for someone to rest but he does not consider them structures.

Mr. Killion asks Mr. Dunford if he used the data that was actual site visits to compile estimates. Mr. Dunford explains that they used a combination of multiple field visits, counting and a review of transaction data for both Heritage and the Adventure Park. Mr. Killion clarifies that they used counts and asks if there is any correlation in attendance numbers and traffic. Mr. Dunford states that they did do a limited vehicle occupancy study which resulted in 2.6-3 occupants per car. In the first year of the study there really wasn't a direct correlation with the transactions and the traffic counts. But over the course of the 3 years it was apparent that the parking over at the Adventure Park was being used for overflow parking at Heritage. Mr. Killion thanks Mr. Dunford. Attorney Mello refutes this and states that at trial it was found that the new parking was used by those attending the Adventure Park as the parking was cleaner. So it is actually the opposite of what Mr. Dunford states. Mr. Dunford tells the Board that they actually took a lot of videos of the parking areas and what he noted was that there was a predominant flow of people parking at the Adventure Park and walking over to Heritage. Mr. Dunford explains that he finds the opposite to Attorney Mello.

In response to Mr. Bob Jensen's inquiry, Mr. Sam Jensen tells the Board the Engineering Department reviewed the VHB traffic assessment and found that the assumptions appear to be all reasonable and consistent with what they would be looking for. Noted are a few areas on adjacent streets where a little more information could be provided. For example, pavement markings are absent and there is limited pavement width that could be better documented in the report. All in all there was very little impact as predicted.

Attorney Cox tells the Board June 11 is not a good date for her team. Board members and staff discuss their availability. Mr. Neeven announces that the Public Hearing will remain open and deliberations will take place on June 25 at 6 p.m. in this same location. The Public Hearing remains open; therefore, materials can still be accepted.

Mr. Jensen motions to continue the Public Hearing to June 25, at 6 p.m. Mr. Killion seconds. The vote is unanimous.

New Business

There is no new business to discuss.

Board Discussion

There are no items to discuss.

Deliberations

There are no items to deliberate.

Other Matters Not Reasonably Anticipated

Mr. Vitacco advises the Board that Terrapin Ridge will be submitting a minor modification request on June 11, 2019.

Adjournment

Mr. Jensen motions to adjourn. Mr. O'Neill seconds. The vote is unanimous. The meeting adjourns at 8:15 p.m.

Respectfully Submitted,



Maureen McCabe

Supporting Documents:

1. 2017 & 2018 Heritage Museums & Gardens and Aerial Adventure Park Daily Attendance Data (12 pages)
2. Mello Correspondence received May 28, 2019 (6 pages)
3. Letters of Support (4 letters)
4. Letter from Eliza Cox, Esq., to Mr. Christopher Neeven, Chair, Zoning Board of Appeals dated re: The Adventure Park at Heritage Museums and Gardens, LLC, 0 Pocasset Road and 0 Shawme Road, Sandwich, Special Permit Application dated May 24, 2019 (4 pages)
5. Town of Sandwich Protective Zoning By-Law, November 2018 (90 pages, including November 2017 zoning map)
6. April 2019 Impact Analysis prepared by Cape Cod & Islands Appraisal Group, LLP (26 pages)
7. VHB Traffic Evaluation dated April 23, 2019 (217 pages)
8. HMMH Sound Study dated December 10, 2015 (14 pages)
9. The Warren Group, Barnstable County Five-Year Report, Median Sales Price by Town, 2014-2018, received May 28, 2019 (1 page)
10. Supplement to the Town of Sandwich Protective Zoning By-Law May 4, 2015 (9 pages)
11. Trial Court Testimony as referenced by Attorney Cox (copy not provided to the Board)
12. Jennifer and David Bouchard letter dated May 28, 2019
13. Cas Malec statement read by Eric Small (statement not provided to the Board)
14. Memo to Christopher Neeven, Chair from Sam Jensen, Assistant Town Engineer re: Petition 19-04, Application for a Special Permit, 0 Pocasset Road & 0 Shawme Road, Parcels 1 & 2 on Assessors Map 37, dated May 13, 2019 (1 page)
15. Supplement to the Town of Sandwich Protective Zoning By-Law as Voted at Annual Town Meeting May 4, 2015 (9 pages)
16. Checklist for Board of Appeals' Review of the Adventure Park at Heritage Museums and Gardens, LLC's Application for Special Permit submitted by Peter Mello, Esq. (6 pages)
17. 520 CMR 5 (copy not provided to the Board)
18. Barnstable Superior Court Decision (28 pages)

19. Letters of Support (39)

20. Trial Court Testimony as referenced by Attorney Mello (copy not provided to the Board)