MINUTES
March 22, 2022

6:00 p.m.
Sand Hill School Community Center, 16 Dewey Avenue

Present: Erik Van Buskirk, Chair; James Killion, Vice-Chair; Robert Jensen via phone; Christopher Neeven; Chase Terrio; and Mary Foley
Absent: Gerry Nye
Also Present: Ralph Vitacco, Director of Planning & Economic Development; Brendan Brides, Building Commissioner; Justin Perrotta, Esq., Town Counsel; and Maureen McCabe, Sr. Administrative Assistant
Absent: Leanne Drake, Town Planner

Mr. Van Buskirk opens the meeting with the Pledge of Allegiance and the reading of the Opening Statement. He announces that Agenda items will be taken out of order.

New Business

- #22-06: 28 Boardley Road – Special Permit – Sullivan

  Mr. Van Buskirk reads the Public Hearing Notice into the record.

Approval of Minutes

- Mr. Killion motions to approve the minutes of the meetings held February 22, 2022, and March 8, 2022, as written. Mr. Neeven seconds. Unanimously approved by roll call vote.

New Business

- #22-06: 28 Boardley Road – Special Permit – Sullivan

  Mr. Van Buskirk reads the following comment memos into the record:

  - Memo to Erik Van Buskirk, Chair, Board of Appeals from Sam Jensen, Assistant Town Engineer re: Petition 22-06, Application for Special Permit, 28 Boardley Road, Assessor’s Parcels 14-334-, dated March 17, 2022
  - Memo to Erik Van Buskirk, Chairman Board of Appeals from David J. DeConto, Director, Department of Natural Resources re: Conservation Commission comments on #22-06, 28 Boardley Road Sandwich, MA, dated March 8, 2022
Mr. Killion motions to open application #22-06. Mr. Terrio seconds. Unanimously approved by roll call vote. Ms. Jennifer Sullivan explains that she would like to teach a couple of lessons at her property; nothing big. She says she has six horses so it can’t be a huge facility and she would like to take all the necessary steps to be sure she is doing everything the Town requires. There will be a couple of lessons a week; she would like to have a small business of her own. Mr. Neeven asks about the six horses and there are six stalls in the barn she is building. The Board of Health says only four horses are allowed. Ms. Sullivan agrees and says one stall will be a tack up stall and the other stall will be for storage. Mr. Vitacco explains that he spoke with David Mason. Mr. Mason said if there are six stalls and they want to expand it to six he has no objection to that. However, the applicant will have to go through the Board of Health. Mr. Killion asks Ms. Sullivan if she has adequate parking. Ms. Sullivan says she has around ten total spaces down by the proposed barn. Ms. Neeven asks about any plans to install a sound amplification system and also the use of the 50’ wide section that the Association owns. Ms. Sullivan says that she won’t be using the section that the Association owns. Mr. Van Buskirk opens the matter up to the public for comment. There is none. Mr. Killion asks if the existing barn will remain or be removed. Ms. Sullivan says that it will be removed. There are no further questions from the Board. Mr. Killion motions to close the Public Hearing and take the matter under advisement. Mr. Terrio seconds. Unanimously approved by roll call vote.

Old Business

- #22-03: 10, 20, 30 and 40 Colonial Way, Map #25 Parcel #’s 123, 124, 125 and 126 – Appeal of Decision of the Building Commissioner – Swift – Continued

Mr. Van Buskirk says there is no need to open the Public Hearing because this matter has been continued. The applicant, Mr. Michael Swift, says that he was asked to submit a timeline which he has done. Attorney Perrotta says the last time we were kicking around the wrong date. We were talking about 2011. That is when the first appeal was over. Mr. Swift filed a couple of other appeals that aren’t in the record anywhere but we were able to get the Docket for those. Those ended formally with a motion to Dismiss the Appeals on March 10, 2015. Technically there is a 30-day appeal for that so those were over April 9, 2015. That is the starting date looking forward from there. Attorney Perrotta says statutory extensions during the housing crisis didn’t apply to Comprehensive Permits. Attorney Perrotta confirms to Mr. Killion that this puts the date out to April 9, 2018.

Mr. Swift says the case was over in 2013. He goes on to say that in 2013 he was going to try to do the appeal to the SJC but he did not; he thought he had 60 days. Mr. Swift says he thought the timeline would move more toward 2013. Attorney Perrotta responds by saying the regs say the Permit doesn’t go into effect until all appeals are over. He tells Mr. Swift his appeal was technically ongoing until the judge dismissed it in 2015.
He explains to Mr. Swift that he could have even appealed that to the Appeals Court and it would have kept going. Because that didn't happen that was the end of the appeals.

Mr. Swift apologizes and tells the Board he wanted his questions answered and this was the only vehicle he could go through to get them. Mr. Swift says he was able to answer many of his own access road questions. His reason for the access road question versus the driveway is because he thought the driveway could only have three houses and they built four. He reads a quote from Attorney Cutler and paraphrases by saying what she is saying is that it is an easement. Mr. Swift says where he got it all confused is they are getting driveway permits and it's not an access road it's a driveway. As to the question regarding non-buildable lots, Attorney Cutler and Attorney Lane in 2007 kept saying you can't be doing this. Mr. Swift says that HAC has previously acknowledged it can't order the ZBA to extend its power outside of the project boundaries. Mr. Swift says he is referring to Hollis vs. ZBA. He reiterates that he is looking for a fair shake; he just wants to get answers.

Mr. Killion asks Mr. Swift what is his assertion on the state of the Comprehensive Permit. Do you concede that it is still in force or you don't? Mr. Swift says that he does not. He says there is a bigger picture. The whole idea was to do the cell tower. We didn't want the cell tower; we gave in. They told us we had all this protection and there would be no more building. Then they came in and carved out nonconforming lots.

Mr. Killion says at the last meeting that the Board discussed having invoices that demonstrated work done prior to the April 9, 2018. There was an invoice submitted for electrical work in 2017. Mr. Killion asks if that is all that there is. Mr. Paul Cusson introduces himself. He says that he submitted a timeline to the Board. He goes on to say that there were several letters and invoices submitted to the Board previously. Mr. Cusson references a letter sent by Atlantic Engineering which he says is before 2011. He says the details of this letter indicate the start of the construction process. He says it is really not up to Sandwich Housing Partners, II to prove; the Building Permit has already been issued. It is up to the appellant to prove that something is in error. Mr. Cusson says that he thinks they have proven their case in the fact that the Building Inspector has issued the Permit and Town Counsel has opined that the case was not dismissed until 2015. Mr. Killion explains the Board was asking that the work be substantiated; they would like to see what the volume of work was. A spirited discussion ensues as it relates to this matter. Mr. Killion says the Board is trying to quantify Condition #21 of the Comprehensive Permit Decision. The conversation continues and includes Mr. Killion, Mr. Cusson and Mr. Matt Dacey discussing the value of the project, the amount of money already invested, not including lawyers’ and specialists’ fees, and what is considered “substantial”. Mr. Killion says the only thing submitted that shows actual work done and paid for was an invoice for $7,500.00 back in 2017. Mr. Dacey says he can testify that $200,000 to $300,000 has been spent at a minimum. Mr. Killion says if that is all you can provide that is all we will be able to accept. Attorney Perrotta says certainly the amount of money they spend is relevant. That is not the be all and end all. He provides an explanation and the conversation regarding what is considered “substantial” continues. Mr. Dacey says he can guarantee that a minimum of $300,000.00 has been invested in this project but can’t guarantee that much was spent prior to the expiration date of April 9, 2018. He states that the electricity was turned on when he became involved with the project and even before that. Mr. Cusson says the applicant has come before this Board on several occasions and the Board determined that the Permit is active. Mr. Killion says this is prior to the expiration date. The Board
wouldn’t have had reason to challenge the Permit because it would have been valid at that time. Mr. Jensen’s phone connection disconnects at 6:30 p.m.; Mr. Jensen’s phone connection is restored at 6:30 p.m. Mr. Jensen says he understands the conversation regarding the work that has been done but that the only document the Board has to show that work was done was Farrell Electric’s invoice for $7,500.00. Mr. Killion confirms Mr. Jensen’s understanding. Mr. Neeven says all of the engineering work and everything else had to be done and paid for. Mr. Brides asks how many linear feet of conduit was installed. Mr. Dacey says it is close to 800 feet and that doesn’t go in until after the road is rough-graded to rough grade. He says the electrical conduit was brought in from Chase Road and the vault was set. Prior to that Comm. Electric issued a plan for that. Excavation work had to get done prior to the electric being set.

Mr. Vitacco reminds the Board that it was under the purview of the Building Commissioner to determine that substantial commencement has taken place. The research was done and we felt extremely confident that the Comprehensive Permit was in place given the court cases and also the work that has been done such as the road grading, hammerhead and additionally with the Farrell Electric invoice. Mr. Brides had visited the location for different reasons and he did substantiate that. We were not looking for a dollar figure, however, Mr. Brides did determine that substantial commencement had taken place within the appropriate time frame. Mr. Killion asks how the work was quantified to be substantial. Mr. Vitacco said it was determined by looking at the work that had been done, for example road clearing.

A discussion ensues as it relates to how to make Comprehensive Permit language more clear and easier to understand going forward. Mr. Vitacco quotes from the Wing School’s Comprehensive Permit Decision. He also references similar language used in the Comprehensive Permit Decision for the Habitat of Humanity projects. Mr. Cusson says to make a Comprehensive Permit subject to construction by needing a building permit to be issued to determine that substantial completion has commenced, he believes, is unfair. Mr. Cusson references a project in Bridgewater and says that before getting a building permit millions of dollars are being spent, for example putting a road in. He suggests finding another mechanism to determine the start of substantial completion, e.g. tying it to the roads.

Mr. Dacey references a letter from Atlantic Engineering dated October 6, 2011 stating that they had done the staking of the roadway and the field drainage. He says they notified the Board that they had started construction.

Mr. Killion asks Mr. Swift if he has any additional questions. Mr. Swift asks if a new Proforma has to be submitted. The Board could have drawn their number off of that. He says he doesn’t believe Sandwich Housing Partners exists anymore. Mr. Neeven says this is not a decision this Board would make. Mr. Swift says he has nothing further to add to this discussion. There are no further questions from the Board, the applicant or the public. Mr. Killion motions to close the matter and take it under advisement. Mr. Terrio seconds. Unanimously approved by roll call vote.

Mr. Van Buskirk states that this matter has been continued from February 22, 2022; the Public Hearing remains open. Board members confirm that they are in receipt of documents from Mr. Brides, Mr. Swift and Attorney Pare.

The applicant, Mr. Swift, tells the Board he has provided them with pictures. He talks about the location of the gate and the conditions stated in the DRI Decision; Sandwich also put conditions regarding all of this. Mr. Swift says his complaint is that none of this has been watched over the past 16 years. He quotes from the agreement which states, "the gate has to be located at the entry." They say they have a right to move it. They moved it back so they could put in the 40B houses. Mr. Swift references the access road. At the Board's request, Mr. Swift says he measured the road. The blue dotted line on the map he provides shows where the road should have been. When the cell tower went in the neighbors were told they were protected. Mr. Swift says he's not blaming Mr. Brides because he wasn't around at that time. Mr. Swift says when the road was constructed it should have been 60 feet. People don't pay attention after the fact. It's not just one thing there are six to eight things on the list that haven't been complied with. Mr. Swift says all he asked is that they be told they have to change these things; it's a contract. Mr. Swift says every year "radio frequencies" are supposed to be taken. He acknowledges that they have been taken recently but that this has been going on for the last 20 to 22 years. No one does it and the Town should be checking it because it was part of the contract. We asked for this; we said we don't want any more building. They need to adhere to all of this. Mr. Van Buskirk asks Mr. Swift if he is referring to the first DRI Decision. Mr. Swift says that he is. Mr. Van Buskirk states that this went to the Housing Appeals Committee. If they had seen a problem with it they would have said no, you can't do this. Attorney Perrotta explains that the Comprehensive Permit controls to the extent that is a part of it. Everyone agreed there might have been some other requirements that were written in a separate agreement. Certainly those have to be abided by.

Edward Pare, Esq. introduces himself to the Board. Attorney Pare says there is no contract. The Cape Cod Commission issued a DRI Decision. Attorney Pare reads a quote from the DRI Decision. He says they have the gate and moved it to the proposed access site. It is there now with barriers around it. The whole purpose is to secure it so people don't go up to the access tower – it's trespassing. The gate is there to prevent people from going onto the property. The Cape Cod Commission wants it secured. Attorney Pare says his position is that they comply. Attorney Pare says with respect to the 60 feet: when the Cape Cod Commission made its decision the land wasn't like it is today with respect to ownership. Mr. MacGregor, through Seacoast, owned from Chase Road all the way up to the tower site, but it was a big lot. After the tower was approved and the road and tower were put in, the Town approached him to try to keep some open space. It is now owned by the Sandwich Conservation Commission. It didn't exist that way when it was approved; Mr. MacGregor owner that entire parcel. The road was constructed 60 feet away from the boundary but it has changed. The land was donated so that it would be kept as open space. We have since changed that abutting property owner to the Town of Sandwich. There is no need for the 60 feet; it was constructed in compliance. Attorney Pare says he has submitted the modification to the DRI which gives the date of full compliance. It is not that the access road wasn't built in the proper location in accordance with the condition it's that 11.5 acres was given to the Town.
Now the Town land actually abuts the access drive to the tower. Attorney Pare tells Mr. Killion the land was donated to the Town so the property line has changed. The Town acquired the land subsequent to the road and the tower. Mr. Killion says no one actually made the determination that it could change it just did by virtue of the property changing hands. Attorney Pare concurs. A discussion takes place as it relates to this matter. Attorney Pare states that the Cape Cod Commission came out, inspected and issued their final certificate that they were in compliance twenty years ago. Mr. Vitacco confirms to Mr. Killion that there has been no discussion internally that the Town owns the land. Attorney Pare talks about the emissions report. He explains that these reports just don’t get filed. They are so low in power they never come close. The idea that this will be violating the emissions standards, it just won’t happen but Attorney Pare says he does agree that the condition says file it every year. The report has been prepared and submitted to Mr. Brides. At its highest level it was about 18% of the maximum up close to the tower; everything else is lower. The condition requires the report be filed with the Building official which Attorney Pare says he did. We are in full compliance. They should be submitted yearly; we will endeavor to do it again or we will visit the Cape Cod Commission and Planning Board to modify the condition.

Regarding the memo which Mr. Brides submitted to the Board, he states that the tests have been completed, the road has been inspected. A year ago the road was not up to minimum road standards but it is a private road. It is certainly adequate to get fire vehicles or commercial four-wheel drive service vehicles through. Attorney Pare says in order to do the emissions test their engineering company drove up to the tower. There are some areas of the road with dips in them. Mr. MacGregor has spoken with the developer of the 40B; the excavator will repair the road. Attorney Pare says the only people using the road are Mr. MacGregor and Mr. MacGregor’s agents and tenants. No one else should be driving on it or it’s trespassing. Attorney Pare says he thinks they have complied with what Mr. Brides required, we are now in compliance and have addressed the issues that Mr. Swift has raised. He asks the Board to uphold the decision of the Building Commissioner.

There are no further questions from the Board, the applicant or from the public. Mr. Killion motions to close the Public Hearing and take the matter under advisement. Mr. Terrio seconds. Unanimously approved by roll call vote.

**Board Discussion**

There are no items to discuss.

**Deliberations**

- **#22-06: 28 Boardley Road – Special Permit – Sullivan**

The Board reviews and discusses the application and materials submitted for Special Permit #22-06. Board members unanimously approve, by roll call vote, the Special Permit with conditions. The Decision, Findings and Conditions are on file in the Planning & Development office.
• #22-03: 10, 20, 30 and 40 Colonial Way – Appeal of Decision of the Building Commissioner – Swift

The Board reviews and discusses the application and materials submitted for 10, 20, 30 and 40 Colonial Way, ADBC. The Board votes to uphold, by roll call vote, the Decision of the Building Commissioner and, therefore, deny the Appeal. The Decision and Findings are on file in the Planning & Development office.

• #22-04: 150 Colonial Way – Appeal of Decision of the Building Commissioner – Swift

The Board reviews and discusses the application and materials submitted for 150 Colonial Way, ADBC. The Board votes to uphold, by roll call vote, the Decision of the Building Commissioner and, therefore, deny the Appeal. The Decision and Findings are on file in the Planning & Development office.

Other Matters Not Reasonably Anticipated

• There is a general discussion amongst Board members, Attorney Perrotta and Mr. Vitacco regarding the phraseology of Comprehensive Permit Decisions going forward.

Adjournment

Mr. Neeven motions to adjourn. Mr. Terrio seconds. The vote is unanimous. The meeting adjourns at 7:28 p.m.

Respectfully Submitted,

Maureen McCabe

Supporting Documents:

1. Draft Minutes dated February 22, 2022 (15 pages)
2. Draft Minutes dated March 8, 2022 (3 pages)
3. 28 Boardley Road Public Hearing Notice (1 page)
4. 28 Boardley Road Special Permit application (16 pages)
5. Memo to Erik Van Buskirk, Chair, Board of Appeals from Sam Jensen, Assistant Town Engineer re: Petition 22-06, Application for Special Permit, 28 Boardley Road, Assessor’s Parcels 14-334-., dated March 17, 2022 (1 page)
6. Memo to Erik Van Buskirk, Chairman Board of Appeals from David J. DeConto, Director, Department of Natural Resources re: Conservation Commission comments on #22-06, 28 Boardley Road Sandwich, MA, dated March 8, 2022
7. Email to Maureen McCabe from Brendan Brides, Building Commissioner re: Request for Comment: #22-06 28 Boardley Road Map 14 Parcel 334, dated March 3, 2022 (1 page)
8. Email to Maureen McCabe from David Mason, Director of Public Health re: Request for Comment: #22-06 28 Boardley Road Map 14 Parcel 334, dated March 2, 2022 (1 page)
9. Pictures submitted by Michael Swift (10 pictures)
10. Email to Maureen McCabe from Brendan Brides, Building Commissioner re: Colonial Way Update, dated March 17, 2022 (1 page)
11. ZBA History Timeline submitted Paul Cusson (2 pages)
12. 40B Timeline submitted by Michael Swift (7 pages)
13. Cell Tower Fact Sheet submitted by Michael Swift (2 pages)
14. Town of Sandwich Planning Department Timeline, dated March 17, 2022 (14 pages)
15. Photographs of the Cell Tower Access Road submitted by Ed Pare, Esq. (11 pictures)
17. Cape Cod Commission Minor Modification #1 re: Modification of a Development of Regional Impact, Project No. TR98035, Seacoast Inc. Sandwich Tower, Sandwich, MA, dated June 25, 2012 (3 pages)
18. Definitive Subdivision Plan for Colonial Way prepared by Atlantic Design Engineers for Sandwich Housing Partners II, endorsed June 14, 2007 (sheet 1 of 5: 1 drawing)
20. Preliminary Site and Utility Plan for Lot 1A – Chase Road prepared by Atlantic Design Engineers for Bruce MacGregor, dated December 8, 2005 (1 drawing)
21. Memo to Barbara Walling, Town Clerk from Frederick Watt, Chair, Board of Appeals re: Plan Endorsement for 43 Chase Road, Comprehensive Permit under Chapter 40B, dated June 13, 2007 (1 page)
22. Cell Tower Gate picture submitted by Ed Pare, Esq. on February 23, 2022 (1 picture)
23. Mr. Swift reads a quote from Ms. Cutler (language not provided to the Board)
24. Hollis vs. ZBA (copy not provided to the Board)
25. 2011 Letter from Atlantic Engineering (copy not provided to the Board)
26. Invoices referenced by Mr. Cusson (copies not provided to the Board)
27. Board of Appeals Comprehensive Permit Decision dated December 28, 2006 (6 pages)
28. Farrell Electric, Inc. Invoice, Invoice # 5867, dated May 25, 2017 (1 invoice)
29. Comm. Electric’s plan (copy not provided to the Board)
30. Wing School Comprehensive Permit Decision (16 pages)
31. 167 Cotuit Road Comprehensive Permit Decision, Habitat for Humanity of Cape Cod, Inc. (16 pages)
32. 1 Nauset Street Comprehensive Permit Decision, Habitat for Humanity of Cape Cod, Inc. (14 pages)
33. Letter from Atlantic Engineering dated October 6, 2011, as referenced by Mr. Dacey (copy not provided to the Board)
34. Diagram Mr. Swift references when discussing the cell tower (1 map)