



TOWN OF YARMOUTH  
BOARD OF APPEALS  
DECISION

**FILED WITH TOWN CLERK:** February 1, 2012

**PETITION NO:** 4370

**HEARING DATE:** January 26, 2012

**PETITIONER:** Optimist Realty Trust

**PROPERTY:** 134 Route 6A, Yarmouth Port, MA  
Map & Parcel: 0122. 32  
Zoning District: R-40  
Book & Page: 20158/ 12

**MEMBERS PRESENT AND VOTING:** Sean Igoe, Chairman, Richard Neitz, Robert Howard and Diane Moudouris.

Notice of the hearing has been given by sending notice thereof to the Petitioner and all those owners of property as required by law, and to the public by posting notice of the hearing and publishing in *The Register*, the hearing opened and held on the date stated above.

The Petitioner seeks a Special Permit pursuant to Zoning Bylaw §104.3, in order to extend a pre-existing non-conforming use (Use Code H10) in a residential neighborhood. Specifically, the Petitioner is seeking to utilize a pre-existing outdoor patio area for food and beverage service for the restaurant's patrons. The area measures approximately 20' x 28', and is proposed to contain seating for up to 16 customers. The property is located in the R-40 Zoning District. The restaurant use is allowed as a pre-existing non-conforming use pursuant to prior Decision #3606, and the Petitioner seeks to alter the use pursuant to Zoning Bylaw §104.3.2 (4).

The patio area is located in the front of the existing restaurant structure, closest to Route 6A, and is located approximately 17 feet from the actual boundary line along 6A and is 24.5 feet from the easterly abutting neighbor's lot line, and approximately 43 feet from his structure. The Petitioner will maintain the current seating capacity of the restaurant at 80, but will move 16 of those seats outside during warm weather months.

The property currently houses the Optimist Café, a restaurant serving breakfast and lunch, and has since 2006. The Optimist Café is open daily between 7:00 am and 4:00 pm. The restaurant does hold a beer and wine liquor license. The building itself was constructed in 1849 and the lot contains approximately 26,000 square feet. There is parking for 28 cars, including 2 handicapped spaces. Being a corner lot, the building complies with the front setbacks and one side setback. It sits approximately 14 feet from the abutter to the east, where 20 feet is currently required. It does comply with the remaining bulk requirements, including lot coverage and height limitations.

The easterly abutter appeared and spoke about the noise and odors associated with kitchen functions and the restaurant, as well as the outdoor lighting. He objected to the expansion of the restaurant use to the patio area. Other nearby residents submitted letters in support of the proposal as a unique amenity for tourists and residents alike to enjoy the historic character of Route 6A while enjoying a dining experience. The Petitioner spoke regarding the type of clientele at his establishment, and the nature of his business plan to serve healthy food, with a positive message. He felt that service on the patio area would be in keeping with this plan, and that there was no other part of the property which would be appropriate to make it practical.

The Board finds that the outdoor seating area is a desirable feature in the area, but expressed concerns regarding the proximity of the easterly abutter, a resident, to this added activity so near his property. The Board did find that this type of use is now becoming prevalent, and that based on this Petitioner's business model, and the type of clientele it attracts, that the Special Permit could be granted, but with conditions to ensure the least amount of disruption to the abutter. In addition, the Board felt that the hours of operation, being from 7:00 am to 4:00 pm, would eliminate much of the noise issue, and eliminate all of the lighting issues associated with the operation.

The Board finds that the Petitioner has demonstrated that the proposal to use the outdoor patio area for 16 seats will not be substantially more non-conforming and will not be substantially more detrimental to the neighborhood, Zoning District or Town than is the existing non-conforming use, with certain conditions.

Accordingly, a Motion was made by Mrs. Moudouris, seconded by Mr. Neitz, to grant the Special Permit, as requested, with the following conditions:

- 1) Petitioner shall install a 6 foot high fence along the common boundary with the easterly abutter, from Route 6A and proceeding north to a point on the boundary where the rear of the Petitioner's structure is located;
- 2) There will be no music or other entertainment allowed in the patio area;
- 3) Petitioner agrees to install a "No Smoking" sign near the patio area in an effort to keep offending odors from wafting to the easterly abutter's property, and in keeping with the Petitioner's business model;
- 4) The patio area will be allowed to be occupied for table service from May 1 until November 1 each year, at which time the tables shall be removed from the patio until the following year;
- 5) This Special Permit shall be reviewed one year from the date of this Decision, to ensure that the expanded use is not a detriment to the neighborhood based on tangible and unaddressed issues between the Petitioner and the abutter; and
- 6) This Special Permit shall become null and void in the event that the Petitioner sells the property to a new purchaser.

The members voted unanimously in favor of the motion.

No permit shall issue until 20 days from the filing of this decision with the Town Clerk. Appeals from this decision shall be made pursuant to MGL c40A section 17 and must be filed within 20 days after filing of this notice/decision with the Town Clerk. Unless otherwise provided herein, the Special Permit shall lapse if a substantial use thereof has not begun within 24 months. (See bylaw §103.2.5, MGL c40A §9)

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Sean Igoe, Chairman