

Town of Barnstable
Zoning Board of Appeals
Minutes
December 2, 2009

A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday December 2, 2009 at 7:00 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was met. Also present were Art Traczyk – Principal Planner, Carol Puckett – Administrative Assistant, Ed Marchant – Comprehensive Permit Consultant to the Zoning Board and JoAnne Miller Buntich - Director, Growth Management .

Laura Shufelt	Absent
James McGillen	Present
Michael Hersey	Absent
Craig Larson	Present
William Newton	Present
Alex Rodolakis	Absent
Nikolas Atsalis	Absent
Brian Florence	Absent
George Zevitas	Present

Vice Chair James McGillen opens the hearing at 7:10 PM. He indicates that Joyce appeals are being continued and a letter from Attorney Kenney is submitted to the file.

Appeal Nos. 2009-036 & 037 - Continued

Joyce Realty Acquisition I, LLC.

Opened July 22, 2009, continued October 21, 2009, November 18, 2009, and to December 2, 2009
Continued to permit additional time for review and rework of possible conditions

Members Assigned: James F. McGillen, William H. Newton, Michael P. Hersey, Craig G. Larson, Laura F. Shufelt - Associates Present: Brian Florence,

Appeal No. 2009-036

Modification of Variance No. 1998-16

Joyce Realty Acquisition I, LLC, d/b/a/ Joyce Landscaping Inc., has applied for a modification of Variance No. 1998-16. The applicant is requesting the modification to permit development and use of the property in accordance with a new site plan submitted and to allow; the storage of additional materials, employment of more than twenty (20) persons, include landscape masonry work from the site, provide for heavy duty equipment at the site and allow for more tractor trailer deliveries to the site. The subject property is addressed 68 and 50 Flint Street, Marstons Mills, MA, and is shown on Assessor's Map 123 as parcels 004-006 and 004-007. It is zoned Residential F and in a Groundwater Protection Overlay District.

Appeal No. 2009-037

Appeal of Administrative Official

Joyce Realty Acquisition I, LLC, d/b/a/ Joyce Landscaping Inc., has appealed a May 13, 2009 Notice of Zoning Ordinance Violation and an Order to Cease, Desist and Abate issued by the Building Division. The appeal cites that the applicant has filed for a modification of Variance No. 1998-16 as requested in the order and that the other activities cited in the order are exempt as agricultural use. The subject property is addressed 68 & 50 Flint Street and 743 Osterville-West Barnstable Road, Marstons Mills, MA. The parcels are shown on Assessor's Map 123 as parcels 004-006, 004-007 and 008. The property is zoned Residential F and in a Groundwater Protection Overlay District.

CONTINUED TO DECEMBER 30, 2009 AT 7:00 PM

James McGillen then calls appeal 2009-069 and reads it into the record. He indicates that there will be a consultant who will be here at approximately 7:30 PM.

While waiting, JoAnne Miller Buntich addresses the ZBA members regarding separation of lots/lot lines, HB district along Route 132, Craigville DCPC and corporate branding in the villages.

James McGillen calls a brief recess until the consultant gets here.

Back in session at 7:43 PM.

James McGillen calls Appeal 2009-069 and reads it into the record:

Appeal No. 2009-069 – New

**Barnstable Housing Authority
Comprehensive Permit -"Stage Coach Residences"**

The Barnstable Housing Authority has submitted a Comprehensive Permit Application pursuant to MGL Chapter 40B "affordable housing" for development of "Stage Coach Residences". The application seeks to develop 12 affordable rental apartment units. The units are to be located in three, two-story buildings and consist of 6 one-bedroom and 6 two-bedroom units. The locus is a 6.9 acre site created by the combination of two lots addressed 70 Stage Coach Road and 151 Oak Street, Centerville, MA. The subject property is shown on Assessors Map173 as parcels 026 and 014-001. It is in a Residence C Zoning District.

Attorney Andrew Singer from Dennisport is representing the applicant. He indicates that they have a PowerPoint presentation. (See attached) First slide is the Project Team page. He introduces Sandy Perry, Lorrie Finton, Tim Sawyer, Rick Fenuccio and Amy Ball. He indicates that Laura Shufelt is the Housing Consultant who has recused herself for obvious reasons.

He reads from the "Determination of Project Eligibility/M.H.P. slide. He points out the parcel which is outlined in yellow on the easel and indicates that all apartments will be restricted as affordable rentals. He gives the criterion of the comprehensive permit.

He goes over the "Status of Project Review and Approvals" slide and indicates that there are no Conservation Commission or DEP approvals required. He points out the lots on the slide. The abandoned house and shed are to be removed and there will be no more development in that area. The old septic system will be filled and capped. There will be a total of 18 bedrooms on the property. .

He indicates that site is clustered in such a way that there will be no site disturbance within jurisdictional boundaries of any wetlands and that they will be outside of the 100 foot wetlands boundary. All drainage will be contained on-site and there will be no impacts off the property. He indicates that 10% of the land around the development will be left in its natural state.

He indicates that Centerville currently is at 1.8% of the housing stock for affordable housing and one of the goals of the Comprehensive Plans is to provide housing for all. He indicates that there is an urgent need for rental units for younger residents.

He indicates that they do not need to go to Board of Health as they meet all the requirements and that no waivers are required or sought. He discusses 760 CMR 56 and that they have met with several agencies in support of it. The Town Manager sent a letter to MHP in support also. He talks about the income levels for residents.

ZBA Consultant Ed Marchant arrives at 7:58 PM.

Attorney Singer gives the percentage of lot area being preserved and indicates that according to the Board of Health 440 rule they could have up to 30 bedrooms which is less than 2 units per acre. He indicates that the engineers and architects have designed it to be substantially away from the wetlands. He then talks about Natural Heritage who has mapped it under the Endangered Species Program. He indicates that the locus is surrounding the wetlands and talks about the Eastern Box Turtle. They have designed the project with protocols to protect the mapping of the Eastern Box Turtle on this property. Only 20% of the land will be disturbed and

within that area there will be a turtle protection plan and, if found, the turtles will be moved to preserve the habitat.

No variances are required for setbacks, size or height. Most of this project does conform to zoning. Twenty-four (24) parking spaces will be provided, 18 are required. This project will not be a high traffic generator. The traffic, according to the ITE Trip Generator, will be less than with 12 single family dwellings. One unit will be handicapped accessible and one for the sensory impaired. There will be a local preference for up to 70%.

He gives the request for waivers as outlined in the slide presentation. He indicates that there is an encroachment from a part of a swimming pool, etc., which they are trying to resolve. The abandoned house on Oak Street side is more than 75 years old and they need a waiver from Barnstable Historical Commission and they didn't find any issue.

William Newton asks if it was ever mentioned at Site Plan Review about the need for another access.

Attorney Singer indicates it was not discussed, it was reviewed and okayed by Centerville, Osterville, Marstons Mills fire district and was acceptable to them as they couldn't go north because of wetlands and couldn't go east.

Rick Fenuccio, architect from the firm of Fenuccio, Raber Associates speaks. He talks about the general clustering was done because of the drop-off of topography and is using the highest part of the lot and that there are certain topographical reasons including utilizing natural light into the units and the potential for photovoltaic array. He points out orientation photos. He explains the "Existing Site Conditions" slide, Proposed Site Development", and "Development Data" slides.

William Newton asks about facilities for children of the younger families.

Rick Fenuccio indicates that there is a green space which could be capable of accommodating a swing set or a playground area and as of yet they do not have a detailed landscape plan.

James McGillen introduces ZBA consultant, Ed Marchant.

Amy Ball from Horsley Witten Group talks about the Natural Heritage Endangered Species Program (NHESP) process and that there is a mandatory MESA project review. Natural Heritage will go through the materials. What they have done to date is to work with them to design a project to avoid the "taking" of this species. She indicates that they have stayed their review with them for the moment until they get the design details and through the comprehensive permit process with the ZBA. .

John O'Reilly, Project Engineer, from Brewster speaks. He talks about the septic plan on the "Proposed Utilities & Septic Design" slide. He gives definition of intermittent stream. He indicates that the groundwater in this area is at approximately elevation 40. The leaching facility is designed 20% larger than minimum design standards. He then talks about Proposed Stormwater Drainage Design" slide indicating that all run-off will be contained on-site. There will be a bioretention pond and a subsurface drainage facility.

Rick Fenuccio then shows the design conceptual elevation slides. He shows the floor plans. He gives the dimensions of the units. The buildings will be Energy Star rated. All will have sprinkler coverage.

Ed Marchant indicates that he is here as a general advisor to the ZBA and has advised ZBA's previously and that 40B is a complicated program. He distributes a brief outline (see attached) to the Board. He indicates that there are websites such as CHAPA, DHCD, and the Housing Appeals Committee sites for reference. He recommends that people go to CHAPA and DHCD website. He talks about the requirement of 10%. He talks about Barnstable's percentage which is at 6.6%. He indicates that this project is very small and recommends that the Board members visit existing 40B's. He discusses topics on Page 3 of his handout.

The Board discusses.

Ed Marchant then talks about the 4 Performance Deadlines on page 5. He indicates that the 180 days begins tonight and the new guidelines states that it cannot last beyond 180 days. Once you close the hearing you have 40 days to write the decision and file with the Town Clerk and then there is a 20 day appeal period. He talks about the appeal period, voting requirements of the ZBA, and about rules and responsibilities of other Boards.

He indicates that the ZBA can approve as submitted, you can deny it, you can approve it with conditions. If the applicants thinks it makes is uneconomic then the applicant could appeal to Housing Appeals Committee.

Attorney Michael Schulz - Chairman of Barnstable Housing Committee speaks and indicates that they submitted a letter in support and that the housing is needed and would like to lend his full support to the project.

Attorney Paul Revere is here representing a number of people who live in the neighborhood. He understands that they have limited jurisdiction in this matter but thinks there are important issues that need to be addressed. One of the criteria of standing is control of the site. He talks about Autumnwood LLC., vs Sandwich ZBA, HAC Appeal 05-06 regarding access. He indicates that Stage Coach Road is a private way which is not owned by the Town of Barnstable. He asks to be shown where the applicant has shown that they have any easement rights to anything in order to go down Stage Coach Road and that there is no right of access. He indicates that it is the applicant's job to explain how they have it. There are two types of land in Massachusetts. There is land court land, registered title. Back in the 70's there was a rectangular piece of land went through land court process and became a registered titled property. He hands a diagram which he circled in black showing the 1970's Land Court parcel. He points it out on the plan where the rectangular piece of land is and that the land was subdivided by William Dacey who mad e the subdivision and then deeded out the parcels to land owners. Since then that parcel has remained in private hands and the Town has never taken the road. He indicates that the Autumnwood case indicates that the applicant must have a colorable claim which he doesn't see here. He indicates that you cannot adversely possess a piece of land court land and doesn't think this application is complete. Secondly, it was a subdivision and said that as he sees it putting additional burden on the owners in the subdivision puts the ZBA in the position to modify the subdivision. He refers to Matthews vs Planning Board of Brewster, 72 Mass App Ct 456 (See attached). He indicates that in MGL 41 Section 81W you cannot modify the subdivision unless you have the consent of everyone in the subdivision. He doesn't see that BHA has any authority. He hands out pictures to the Board of drainage problems on Stage Coach Road. Attorney Revere asks Jayne Pierce where the picture is taken from. Ms. Pierce indicates that it was taken west looking down Stage Coach Road and that she took the pictures in the summer of 2009. He then indicates that the intermittent stream is a perennial stream under the Rivers Protection Act and that it has to be dry for 4 days and that it has to be dry if the area is not subject to draw down or impoundment. In summary, he doesn't think there is access, he thinks that you might have to modify the subdivision to approve it and address the drainage on that road, and there is a serious question about it being on a river.

James McGillen asks about the Land Court number.

Attorney Revere indicates that the deed ends at the W.E.D. Realty Trust, William Dacey, document # 150987 and the Land Court Plan # is 32851B.

Ray Goff of parcel 45, which is 57 Stage Coach Road, talks about the traffic and that there will be a disruption. He bought this house 10 years ago and knows that this is a private way. The traffic will impact his property rights with his deeded private way. He indicates that in the past there have been abandoned cars which the Police Department cannot tow because Stage Coach Road is a private way. .

Susan Hatfield from Hitching Post Lane indicates that Hitching Post Lane is also a private way. She indicates that Stage Coach Road floods and the only way should access be approved, the only way they could get to their development is to cut through Hitching Post Lane which runs horizontal.

Mark Corbett from 29 Hitching Post Lane speaks. He has seen box turtles in the area. He asks if there is a provision for 15 to 20 years if they need another leach field if there will be space to accommodate another one. Also, he has a concern about an apartment complex among single family homes. He thinks the complex is too dense for the neighborhood.

Jayne Pierce of Patriot's Way speaks about the flooding and indicates that the previous speaker Susan Hatfield has a handicapped child and that this will impact the traffic in this neighborhood. She indicates that Coach Light has had three accidents in the first seven months of 2009 and a fatal accident within that site within the last 5 months and asks for a traffic study. She wants to submit the police report to the Board. She talks about the dumpster and is worried about coyotes and that it should be contained inside. She talks about the abandoned house on 10 Hitching Post Lane and thinks that it should be looked at so that it is not a fire hazard.

Ed Cyburt from 42 Peep Toad Road talks about the 6.6% for the Town of Barnstable and asks how that compares to other cities/towns and asks what other search was done for alternative sites.

James McGillen explains.

Ed Marchant explains that the ZBA cannot choose as they vote on it as presented.

Attorney Singer rebuts. He addresses the issue of access and indicates that the Dacey subdivision is one he researched and when Mr. Dacey deeded it out he granted every owner an easement over the road but maintained the fee ownership in those roads and maintained expressed language which reserves the right to grant easements to people not who own land in this subdivision; to other people for access over the road. He indicates that

- *The owners in that subdivision all have easements and don't own fee in the road and they don't own the road anymore than BHA does and cannot block other people's access to it*
- *The Town on its website has a map which purports to show private and public roads and when you look at it, Three Pond Drive is a public drive and has found a taking for it. When you look at the others, he doesn't find that those are public but the Town shows them as public.*
- *Also, the title from where Conant connects to Padlock and onto Stage Coach Road is the exact same title that our locus is derived from. Attorney Singer indicates that he thinks that the fee is still in the Dacey's Trust and the Barnstable Housing Authority has power of eminent domain either by easement or a fee in a subdivision. He believes there is more than a colorable claim of right.*
- *He also indicates that drainage will be looked at and can have Amy Ball address the perennial river.*
- *He indicates that the dumpster will also be fenced and covered.*

Craig Larson asks if they have tried to get the fee in the road and how the lot was created.

Attorney Singer is in the process of researching the fee in the road issue and also explains eminent domain as it applies to the Housing Committee. As to the creation of the lot, he indicates that it appears that an owner came in sometime in the 1970's and started piecing ownership excluding this piece which the Town ended up taking.

Craig Larson asks James McGillen if they can approve a project that does not have access who asks Ed Marchant.

Ed Marchant indicates that they could go to the project eligibility letter about site control and that maybe they could condition it with that issue but would defer it to counsel.

The board discusses.

William Newton asks if they can go forward if access is a problem and asks if the Town Attorney could look at this before the meeting on December 30th.

James McGillen indicates that this will be continued to December 30th at 7:00 PM.

CONTINUED TO DECEMBER 30, 2009 AT 7:00 PM.

Motion to adjourn

Seconded

Vote:

All in favor