



Town of Barnstable
Zoning Board of Appeals
Minutes
May 25, 2011

A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday April 27, 2011 at 7:00 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was met. Also present were Jo Anne Miller Buntich – Director, Growth Management, Elizabeth Jenkins – Principal Planner and Carol Puckett – Administrative Assistant

Laura Shufelt - Chair	Present
William Newton – Clerk	Present
Michael Hersey	Present
Craig Larson	Present
Alex Rodolakis	Absent
Brian Florence	Absent
George Zevitas	Present

Quorum being met, Laura Shufelt opens the hearing at 7:07 PM.

Introduction of Board Members – Board members introduce themselves.

[Approval of minutes from April 13, 2011](#)

Motion is made by Michael Heresy and seconded by William Newton to approve the minutes as submitted.

Vote:

All in favor

Chair – Laura Shufelt indicates that two appeals are being continued. First, she calls 2011-023 Jane McC. Thompson appeal and reads it into the record.

7:00 PM Appeal No. 2011-023 - New Jane McC. Thompson – Trustee of Scudder Lane 203 Realty Trust

Jane McC. Thompson, Trustee of Scudder Lane 203 Realty Trust has applied for a modification of Variance No. 1995-052, which provided relief from minimum lot frontage requirements and allowed for the creation of a new lot. The applicant is proposing to amend the existing variance to reflect a change to an interior lot line as set forth in the Planning Board’s endorsed Approval Not Required Plan recorded in Book 586 Page 81 at the Barnstable Registry of Deeds. The property is located at 203 Scudder’s Lane, Barnstable, MA as shown on Assessor’s map 259 as parcel 007-002. It is in the Residence 2-C zoning district.

Laura Shufelt indicates that the attorney for the applicant, Gerald Garnick, has requested a continuance.

Motion is made by Laura Shufelt and seconded by William Newton to continue this to June 8, 2011 at 7:00 PM.

Vote:

All in favor

CONTINUED TO JUNE 8, 2011 at 7:00 PM

Laura calls Appeal No. 2011-024 for Higgins and reads it into the record.

7:05 PM **Appeal No. 2011-024 - New** **Higgins**

Mary F. Higgins has petitioned for a Special Permit to Section 240-92.B – Expansion of a Nonconforming Buildings or Structure. The petitioner is proposing to alter and expand an existing residential structure located 2.3 feet from the nearest property line by removing and replacing the existing sun porch and demolishing the rear ell to the first floor deck and rebuilding a new second floor with two shed dormers and a roof. The property is addressed as 38 Little River Road, Cotuit, MA as shown on Assessor's Map 053 as parcel 007. It is in a Residence F zoning district.

Chair Shufelt indicates that the petitioner's attorney, Michael Schulz, has requested a continuance to July 13, 2011 at 7:00. Motion is made by Laura Shufelt and seconded by William Newton to continue to July 13, 2011 at 7:00 PM. Vote:

All in favor

CONTINUED TO JULY 13, 2011 AT 7:00 PM

At 7:10 PM, Laura Shufelt opens Appeal 2011-007, the special permit, and reads it into the record

7:00PM **Appeal No. 2011-007 – Continued** **Stuborn Limited Partnership,
Stuart Bornstein – General Partner**

Members previously assigned: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt. Also present were Brian Florence. Alex Rodolakis recuses himself.

Stuborn Limited Partnership, Stuart Bornstein – General Partner, has petitioned for a Special Permit in accordance with §240-94B Expansion of a Pre-existing Nonconforming Use. The petitioner is proposing to demolish and remove the majority of the existing structure and construct a new, six bedroom single-family residence with an attached garage and attached guest house on the property. The petitioner is proposing to retain approximately 1000 square feet of the structure per order of the Old King's Highway Regional Historic District Commission. The property is addressed as 153 Freezer Road, Barnstable, MA as shown on Assessor's Map 301 as parcel 006. It is in a Marine Business B (MB-B) zoning district.

Members assigned tonight: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt.

Chair Shufelt indicates that at the last hearing they requested an opinion from the Town Attorney which the board has received. Laura asks if anyone has questions of Attorney Weil. The board discusses and agrees to have Attorney Weil give a summary. Attorney Weil indicates that there was discussion the last time about Chapter 40A Section 6 of MGL and 240-97 of the ordinance as to whether abandonment or non-use are separate terms and thinks her memo makes it clear. The other issue that was raised was whether the applicant's misfortune regarding advice from Town officials or the dilapidated condition created an impediment. She indicates that it is the applicant's duty to maintain the use. She believes the cases that Attorney Kenney relied on do not have applicability to this case.

William Newton asks what constitutes tolling. Attorney Weil indicates that, in her opinion, there is no tolling of the applicant's obligation to continue the nonconforming use and is the applicant's duty solely.

Attorney Kenney reviewed Attorney Weil's opinion and thinks it is a narrow view. He talks about impediment and when time is tolled. He indicates that his client had inquired three times about applying to

the Zoning Board and was told that he had to follow a process and had he filed, he could've frozen the process and got continuances. It is their position that the permitting process was a real practical impediment which prohibited him from exercising his zoning right which was a continuation of the pre-existing nonconforming residential use of the property.

The board discusses. George asks about the abandonment issue. Laura believes that Attorney Weil addressed that in her opinion.

Laura asks if there is anyone here from the public who would like to speak either in favor or in opposition.

Attorney Joseph Berlandi is here representing a group of people and indicates that he has submitted another memo regarding this appeal. His position is that the nonconforming use lapsed much earlier than 2006 according to the photos from Mr. Santos and that the burden is on the petitioner to continue the residential use which, in his opinion, he has not done. He indicates that the leases referred to by Attorney Kenney do not have any documents to back them up such as tax records or insurance records to prove that the people purportedly signed those leases, who are not available, and who actually lived there. He indicates that the photos taken in 2004 by Mr. Santos shows that it is clear that the property was abandoned in December of 2004 and thinks it has been abandoned for years. He would hope that the board finds that it has lapsed and should have no standing for a special permit.

John Julius disagrees with Mr. Berlandi and that tolling is important. He has looked at the tax records which have increased from 2009 to 2010. He does not think it is abandonment.

Mark Santos indicates that he grew up approximately ¼ mile from property. He indicates that he has lived there since 2000 and has been on this property numerous times and did not see anyone living there in 2000. He shows photos from 2004, 2005, 2007 and indicates that no one has lived there and that it has been abandoned.

William Newton asks Mr. Santos when he thinks it was abandoned. Mr. Santos believes that shortly after Mr. Bornstein purchased it in 1999 that no one has lived in that house and also that the sliding door was shattered in 2000.

Joe Rodrigues of 11 Freezer Road indicates that he built in the area in 1985. He indicates that people on Freezer Road do not support Mr. Bornstein but feel it would be the best use of that property.

Ann Canedy, Town Councilor from Precinct One indicates that the parcel is fragile, environmentally sensitive. She indicates that Mr. Bornstein was aware of the issue of abandonment in 2008 and that the use has been abandoned.

Craig Larson asks about the lease with the Town and asks approximately when it was. Ann Canedy explains and believes that it was around 2008 and at the time that the structure was dilapidated. Craig asks if there are appraisals on the property. Ann Canedy indicates that the appraisals are not public record as of yet as they are part of executive session minutes.

Kathy Charboneau, who lives in Barnstable Village, is troubled as zoning laws are for protection and this is not being presented honestly. She believes the applicant would build condos.

John Julius indicates that Mr. Bornstein's assessed values on the house went down but taxes went up.

Lenny Clark from West Barnstable believes that the zoning is to be enforced and that it would be looking the other way of the zoning if this was granted.

Attorney Kenney asks for better decorum as other speakers had indicated that they were not being truthful. He talks about statements from others like Mr. Sheckman and refers to Attorney Berlandi's memo, Mr.

Santo's statement and Mr. Eastman's statement about vagrants, and believes there is conflicting evidence. He indicates that his position is that they stopped using the property in 2006 but the statute of limitations is tolled.

The board discusses.

A motion is made by George Zevitas and seconded by Craig Larson to take a 10 minute recess.

Vote:

AYE: William Newton, Michael Hersey, Craig Larson, George Zevitas

NAY: Laura Shufelt

Back in session at 7:24 PM.

Craig Larson makes findings: in Appeal 2011-007, Stuborn LP:

- 1. The application submitted by Stuborn, LP to the Board requests a Special Permit under §240-94B Expansion of a Pre-existing Nonconforming Use to "allow it to demolish and remove the majority of the existing house and construct a new six bedroom single-family residence with an attached garage and attached guest house on the premises. Applicant will keep the original portion of the existing house deemed historic (approximately 1,000 sq.ft.) per the order of the Old King's Highway Regional Historic District Commission." The total gross floor area of the proposed new house with attached garage and attached guest house is 14,859 square feet. The total number of bedrooms proposed for the new structure is six bedrooms.*
- 2. In 1950, zoning for Barnstable Village that included dimensional requirements was adopted. Barnstable Village was zoned to Residence A, except for the village center on Main Street and the area surrounding Barnstable Harbor. It was not until 1956 that those two areas were zoned B Business. In 1965, Barnstable Harbor, including the subject parcel, was rezoned to BMB Barnstable Village Marine Business District and in 1969 rezoned again to MB-B Marina Business B District, as it remains today. It appears the residential use of the property would have become nonconforming with the adoption of the 1965 rezoning to Barnstable Village Marine Business District.*
- 3. Section 240-97 of the Code addresses abandonment of non-conforming uses. This sections states "any lawful pre-existing nonconforming use...or use of land which has been abandoned or not used for three years shall not thereafter be re-established."*

The Applicant acquired the property in 1999. Although there was conflicting testimony about ongoing residential use from the time of the Applicant's acquisition until October 2006, the uncontroverted testimony indicated that the premises ceased to be used for residential purposes after October 2006. The evidence proved that the premises were not used for residential purposes for three years.

- 4. Based on the forgoing, the Board finds that the pre-existing nonconforming residential use has been lost.*

Vote:

AYE: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt.

NAY: None

Attorney Kenney clarifies that he submitted a correction of gross floor area of 14, 859 square feet.

Motion is made by Craig Larson and seconded by Michael Hersey that based on the findings of fact, a motion was duly made and seconded to deny Special Permit application No. 2011-007 under Section 240-94(B) to expand a pre-existing nonconforming use.

Vote:

AYE: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt.

NAY: None

DENIED

At 8:28, Laura Shufelt reads the Stuborn variance into the record.

**7:05 PM Appeal No. 2011-008 - Continued Stuborn Limited Partnership,
Stuart Bornstein- General Partner**

Members assigned: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt. Also present were Brian Florence. Alex Rodolakis recuses himself.

Stuborn Limited Partnership, Stuart Bornstein – General Partner, has applied for a Variance to §240-23 Marine Business B District – Permitted Uses. The applicant is requesting a variance to allow a single-family residential dwelling (detached) in the MB-B District. The applicant proposes to demolish and remove the majority of the existing structure and construct a new, six bedroom single-family residence with an attached garage and attached guest house on the property. The applicant is proposing to retain approximately 1000 square feet of the structure per order of the Old King’s Highway Regional Historic District Commission. The property is addressed as 153 Freezer Road, Barnstable, MA as shown on Assessor’s Map 301 as parcel 006. It is in a Marine Business B (MB-B)

Members assigned tonight: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt

Attorney Kenney submits height correction to the file. Attorney Kenney gives a summary of relief being requested. Also with him tonight are Keeran Healy from BSC and Norman Hayes from BSC who is a wetlands scientist.

Norman Hayes speaks first and indicates that he will be talking about the uniqueness of the property which includes seven various regulatory wetland resource areas and two coastal banks. He indicates that there are two licenses, one which is a 99 year license for the wharf and the other license is for an area called filled tidelands. He indicates that 7400 feet of concrete will be removed and 3700 square feet of that replanted. He talks about areas 2, 3 & 5. The wharf will be demolished and rebuilt. They will remove approximately 283 pilings and 12000 square feet of rotten materials. They will take out an additional 500 cubic feet of broken off vertical bulkheads that are below the surface of Barnstable Harbor and then take out the entire wharf super structure and put in a five to seven foot personal docking facility for Mr. Bornstein. When they filed the ENF for this project, the Commonwealth of Massachusetts recognized that it was unique. He indicates that Mr. Bornstein will give back license watershed to the town that he has the right to use. He talks about the restriction of chapter 91. He indicates that in total they are cleaning 58,000 to 60,000 square feet of degraded property and 75% will be returned, in some form, to its native habitat. He indicates that the ENF is on file as well as the twenty comment letters.

Michael Hersey asks how many square feet will be given back to the town. Mr. Hayes indicates that when the pier is removed it would be approximately 12000 square feet.

Keeran Healey from BSC gives a summary of the soils, shape and topography of the property. They will have to elevate the buildings above the flood zone level of 17. There was peat found which would be removed and foundation would be on pilings and be putting a concrete floor on top of the pilings. He talks about lowlands and that the total of upland is 3.2 acres and that the property is unique in its shape.

Craig Larson asks for clarification of the flood plain and the height of the garage/first floor of the house.

Mr. Healey indicates that when you are building near a flood zone you want to have the lowest elevation of the structure to be above the flood zone and right now the flood zone there is elevation seventeen on the mean water data and the basement/garage floor is at elevation eighteen and the house goes up from there.

Laura Shufelt asks if they have a map of the whole site. Attorney Kenney explains that the map doesn't show the area below the flood tide. Mr. Healey indicates that that a portion of the property is below water and began their survey of all the area above high mean water.

JoAnne Buntich – Growth Management Director, asks about the upland area and indicates that the zoning ordinance definition of wetland is different from the Conservation Commission's definition of wetlands, have never been given the methodology and doesn't know if the upland area figures submitted were calculated by Conservation Commission's definition or by the zoning ordinance definition.

Mr. Hayes indicates that in regards to the permits they have in hand the delineations were done in accordance with the wetland regulation for the state and under the local Conservation Commission bylaws.

JoAnne Buntich indicates that, in her opinion, that this board needs that information to insure that it was accurately depicted and determined what the upland area is to keep the record correct.

Mr. Healey points it out on the displayed map what the conservation and zoning areas are and indicates that he does not have a calculation but will obtain one.

Attorney Kenney explains the residential use into a marine business district. He believes that the shape of the property, the soil conditions given earlier by Mr. Hayes, and the topography which can include buildings, the remainder of the buildings, concrete pad with cork, are unique and all meet the three prong test for a variance. He indicates that it being at the end of Freezer Road and at the end of the zoning district would suggest it would be a hardship as the waterfront property has a high land value. To develop the property for any business use in the MB-B district one would anticipate you would have to go over 10,000 square feet to make it economically feasible. Given the uses allowed here, it would be difficult to support the cost of the land with a commercial development under 10,000 square feet. Once you exceed the 10,000 square feet you are within Cape Cod Commission jurisdiction. He reads the uses under the MB-B zoning district. He talks about a proposed marine use for with 50 boat slips. He refers to a letter from the Cape Cod Commission regarding a 50 slip marine and the trip generation. He reads the letter from his memo which he submitted. He reads a section from a letter submitted from the Association for the Preservation of Cape Cod. He reads a section from Page 9 of the Village Plan and reasons how the residential use would be better. He indicates that parking at the county complex would be difficult as it is well over 300 feet from the harbor and that this proposed residential project would have the least impact. He refers to Kirkwood vs the Zoning Board of Appeals of Hartford and that the uses in the MB-B district are seasonal uses and not economically feasible for the applicant. He believes, in his opinion, that this could be a 40B or residential use.

JoAnne Buntich would like the deed as is not shown on the plan. Mr. Healey indicates that the survey area was based on the plan that was referred to in the deed and also the abutting plans and the layout of Freezer Road itself and found monuments around the roadway to tie into it. JoAnne Buntich indicates that the 1999 deed in Exhibit A shows a description which is not shown on the plan. Mr. Healey indicates he can provide that.

Laura Shufelt asks if there is anyone here that would like to speak either in favor or in opposition.

Attorney Joseph Berlandi is representing a group of concerned citizens. He disagrees with Attorney Kenney's reasoning regarding prerequisites of a variance. He talks to the first prong test and wonders why the applicant would want to build a residential use and notes that this is not different from the other marine properties in the district and has not proven otherwise. Secondly, this property was purchased knowing what it was zoned for. As the to the third prong test, he thinks this is key as this zoning was done to preserve the

use of the harbor and if you start allowing new residential uses, how can they stop the next person and believes that this would destroy the intent of the zoning code.

Ann Canedy, Town Councilor, indicates that this property has been used for limited marine use over the years and had dock storage up until last year. She indicates that in 1965, 700 people got together to oppose a proposed development by Mr. Van Doozer and developed this marine commercial use.

Michael Hersey calls point of order and asks Councilor Canedy if she is suggesting that she knew what the people were thinking in 1965. Ann Canedy indicates that she has minutes from that meeting and will provide Mr. Hinckley who will tell the board exactly what he said, if so requested. She indicates that Mr. Bornstein purchased this property in 1999 and had control of the property from 1997 to 1999 until he passed papers and during that time floated, with the Town, an idea of a multi-residential unit and knew two things: he knew what the zoning was and knew that the Town was going to oppose residential use on that point. There was also a contingency on that Purchase and Sales agreement that if that if he sold condos there would be a percentage back to the sellers. If he wanted to challenge the use he could've done it at the time. She indicates that the people have not opposed a marine use and that this could be used profitably for commercial use.

Mark Santos indicates that this is the only harbor on the north side and that the proposed use would be giving up 70% for residential use. He indicates that nothing has changed since the applicant purchased the property and is asking the board to consider the zoning and how this would affect the neighborhood and future generations.

Ann Canedy talks about an agreement that the Town and Mr. Bornstein had attempted previously regarding the property and that she would be willing to try it again but would need time to accomplish this.

Lenny Clark indicates that it is the policy to enforce zoning requirements around the harbor to keep the integrity. He is speaking out against this because it is inconsistent with the strategic planning map in the Local Comprehensive Plan.

Laura indicates that there are letters received from Louis Cataldo in favor, email from Dr. Peter Smith who is opposed, email from Paulette Lapadula who is opposed, email from Peter Eleftherakis opposed, letter from David Henderson and Pam Pryor of 75 Freezer Road who are opposed as well as an email from Roy Hammer who is also opposed

Attorney Kenney rebuts and that what the zoning allows is not feasible. He asks Mr. Hayes to readdress the soil conditions and the 99 year license. Attorney Kenney indicates that everyone they have contacted on Freezer Road has supported this. He also explains that the purpose of the lease was to let the Town take a look to see if they wanted to purchase it. He also indicates that this is not a self-created hardship.

Laura Shufelt would like to continue this matter. JoAnne Buntich indicates that the Town Attorney has agreed to provide the board with some info.

Attorney Kenney requests that the public hearing be closed.

JoAnne Buntich clarifies with Attorney Kenney that the historic building will be for the storage of gardening equipment. JoAnne would like, in addition to the calculation of upland area per the zoning definition of wetland and a plan showing a plan showing the parcel as described by deed and plan, she would also request any easements or encumbrances that would have to be described on that plan and a description (square footage, etc.) of the historic structure and use of the that building that will not be demolished as they don't have a plan for it.

Craig Larson would like to hear the public speak again and the board discusses whether to close the public hearing.

Town Attorney – Ruth Weil believes that leaving it open for public comment would be a good idea.

Attorney Kenney indicates that if the board is suggesting they change the plans that it would have to go back to Old King's Highway which they do not want to do.

The board discusses a continuance and a 60 day extension.

Attorney Kenney agrees to a 60 day extension.

*Motion is made William Newton and seconded by Michael Hersey to continue this to **July 13, 2011 at 7:00 PM** for the variance.*

Vote:

All in favor

CONTINUED TO JULY 13, 2011 at 7:00 PM

A motion is made by William Newton and Michael Hersey to adjourn.

Vote:

All in favor

Meeting adjourned at 10:37 PM.