



Town of Barnstable
Zoning Board of Appeals
Minutes
July 13, 2011

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

Also present were Elizabeth Jenkins – Principal Planner, Carol Puckett – Administrative Assistant and JoAnne Buntich – Director, Growth Management

Laura Shufelt opens the hearing at 7:09 PM

Introduction of Board Members – Board Members introduce themselves

Approval of Notes from May 11, 2011 and minutes of May 25, 2011, June 8, 2011 & June 22, 2011

A motion is made by William Newton and seconded to Craig Larson to approve the minutes as submitted:

Vote:

All in favor

Laura Shufelt approves the notes from May 11, 2011 as submitted.

7:00 PM Appeal No. 2011-008 - Continued

**Stuborn Limited Partnership,
Stuart Bornstein- General Partner**

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) District.

Members assigned: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt. Present: Brian Florence. Recused: Alex Rodolakis.

Decision Due: August 16, 2011

AT 7:12m Laura Shufelt calls the Stuborn appeal.

Members assigned tonight: William Newton, Craig Larson, George Zevitas, Brian Florence, Laura Shufelt.

Laura Shufelt indicates that Brian Florence was not present the last time this appeal was heard and asks Attorney Kenney if he is agreeable to having only four members sitting on this. Attorney Kenney indicates that Brian Florence is eligible for the Mullin Rule. Director of Growth Management – JoAnne Buntich explains that prior to the close of the public hearing portion of this appeal, that Brian Florence or Michael Hersey or both could utilize the Mullin rule. JoAnne also indicates that there is no staff report because the board was still fact funding and therefore her recommendation is that the board not consider closing the public hearing.

Laura Shufelt asks Town Attorney - Ruth Weil about the Mullin Rule as it pertains to the variance being opened but no testimony being taken. Attorney Kenney indicates that they addressed the special permit and did not open the use variance until the last meeting. Ruth Weil indicates that it doesn't matter which meeting, however, that under the Mullin Rule you cannot rule on a matter until you have heard/reviewed all the information submitted and that the Board could not vote on it tonight because Mr. Florence would have to look at the record. Laura Shufelt indicates that Michael Hersey could also sit on this the next time and do the Mullin Rule regarding tonight's hearing.

Laura Shufelt asks Attorney Kenney if he is comfortable with that. Attorney Kenney would be comfortable with Brian Florence using the Mullin rule and is okay with going forward tonight.

Attorney Kenney indicates that the last time there were issues concerning the height of the building and wants to make a presentation tonight about the height. The last time they talked about the conditions and the Kirkwood case. Tonight, they intend to talk about the house design. He indicates that he had heard rumors that this was going to be condos and all the other rumors. He indicates that he called the Town Attorney - Ruth Weil today about some of these concerns and suggested conditions relating to those concerns. Ruth Weil, he states, suggested a conservation restriction and public access. He indicates that he presented this to his clients who want a building envelope and an area that would be Mr. Bornstein's with the rest of the area being restricted and no further building. However, Mr. Bornstein is not agreeable to the public access. Attorney Kenney indicates that they will be willing to enter into a conservation restriction that would prohibit a 40B from being built.

Attorney Kenney indicates that also with him tonight are: Kieran Healey from BSC Group, David Sigl of DSH Building Designs and Norm Hayes, a wetland scientist from BSC Group. Kieran Healey speaks first about the design of the house and that the foundation is in the flood zone at elevation 17 and the garage floor is at elevation 18. They are constructing the house so that the footings are at elevation 17 and garage floor at elevation 18. FEMA's recommendation is that all enclosed space should be above the base flood elevation. They also do not allow life support systems such as heating, duct work, etc., below elevation 17 He shows a picture with the house superimposed with trees. There is no view from the first floor or garage floor and thus will be a reversed house design with the bedrooms on the lower level and living area above. The house will be constructed in an area that is already disturbed. All of the cedars on site will stay on-site supplemented with new ones. He shows a view from Barnstable Harbor and points out the vegetation. The height of the house is to take in the views of the harbor. He shows a picture of a house under construction from the harbor to show a wall. He shows a picture of boat racks and another of a house with harbor views. Attorney Kenney clarifies with Kieran Healey that the foundation wall will be one foot and that the garage floor will be level. Attorney Kenney indicates that they could lower the house by a total of four feet that they will further discuss.

Norm Hayes talks about the trees, disturbed areas and conservation easement. They will be saving an apple tree. Three cedar trees will be transplanted and have found three, 23 foot cedars which will be moved in parallel with reventment wall and will screen people in boats going down the channel. On the north end, the invasive species will be removed in accordance with the management plan and all native hollies, cedars and groves will be protected. He talks about areas #1, 2, and the clean-up of the site.

Attorney Kenney asks Mr. Hayes about the storms below elevation 13.3. Norm Hayes talks about a report on storms and the length of fetch which is the length of water. Mr. Hayes indicates that if you look due north there is a fetch of about 1.3 statute miles. However, if they went out about 60 ° east, it came out to be 14.3 statute mile. They have wave height calculations on 80% of the storms which would be mean high water plus an elevation of 2.5 feet multiplied by a rough stone factor of the reventment which came out to a height of 13.3 feet for a storm tide on that site which would impact the coastal resource areas. If you took a look at the 100 year storm event measured in Boston in 1978, it was 3.4 feet and above, which, when added to the elevation of 13.3, it comes out to approximately 16.7 to which a foot would be added for sea level. This comes up to approximately 17 feet which almost perfectly matches the current FEMA documents.

David Sigl of DSH Building Designs indicates that they have revised the house plans and talks about the current plans which are revision #11. On the revision there has been a reduction of square footage, compression of the building's footprint and the reduction of the building height. The plans were approved by the other boards and after the last meeting, Mr. Bornstein came to him and asked if he could lower the building. He altered the roof pitch of the main massing which resulted in the lowering of the main ridge down to 36.6 feet of height. It is his opinion that this is not a significantly high house.

Attorney Kenney indicates that the OKH permit has expired but was renewed. They are required to have a historical architect on-site to decide what part of the Captain Gerald Fish House structure can be saved. The renewed permit is good for a year and can be a condition that the fish house be dismantled and repaired according with the OKH decision. Also, for the record, he wants to clarify when talking about the conservation restriction and no further building, Mr. Bornstein will be going for his personal marina, he will want a small shed near the marina for storage fishing rods, life jackets, etc. The proposal to be presented to the Conservation Commission has not been compiled as of yet but wanted the board to know that they would like this shed.

Craig Larson asks Mr. Healey to explain the floor zone datum. Kieran Healey explains that the state wanted them to use a mean low water datum. At the time in 1929, it was mean sea level at Barnstable Harbor which was between low and high mean water. Mr. Healey indicates that if you convert the elevation of 18 onto NGVD it would be elevation 13 but because this is mean low water datum the base floor elevation is 17 and the garage floor is 18. Alternatively, they could've listed this as an NGVD datum where the flood zone would be elevation 12 and the garage floor would be elevation 13.

Brian Florence asks where the first floor will be set at. Mr. Healey indicates that it will be at 18 and the first floor will be at 28. Craig Larson clarifies that the garage floor will be uninhabitable space but that there will mechanics and duct work there.

William Newton asks him to give the board an idea about the conservation restriction. Attorney Kenney indicates that the conversation about the restriction took place today and that the concept was that the house and area immediately around it would not be within the restriction but outside. In the agreed upon area there would be a conservation restriction that would prohibit development and Mr. Bornstein would be required, as part of this and the order of conditions, to do and maintain mitigating planning, etc with the Conservation Commission. Also, Attorney Kenney indicates that they would like the right to continue to maintain the sea wall and that this idea of a conservation restriction is to limit the developable area so that there is no threat of a condominium project. William Newton asks if he can elaborate on this at the next meeting with a plan.

Ruth Weil indicates that Attorney Kenney had called her in regards to limiting the lot to one house and what they came up with was a conservation restriction which is permanent.

Craig Larson asks Norman Hayes to explain the Chapter 91 license.

There is a discussion about the proposed guest house and Attorney Kenney indicates that they would agree to a stipulation that it not be rented and for guests only. Laura Shufelt confirms that it would also not be used for an apartment.

Laura Shufelt asks about the historic portion of the building. Attorney Kenney indicates that it would be a gardening shed and that they don't have the footprint as they need a historical architect on-site in order to give them that figure. Attorney Kenney indicates that the first floor is 840 feet and that it also has a second floor. He indicates that they would remove the second floor if they found it was not historic. Laura suggests taking out the kitchen. Attorney Kenney will agree to no kitchen, no bathrooms, no water, no utilities and for it not to be habitable. Laura clarifies that the intention for this property is that this will be a single family home with an uninhabitable shed. Attorney Kenney says the only other thing is that the shed will be for the fishing poles. Laura asks if they can use the gardening shed for that. Attorney Kenney indicates that the 10 X 10 shed will be just a storage shed for convenience.

Joanne Buntich asks why they introduced the NGVD datum. Mr. Healey indicates that the building department will not issue permits without that data. Also, she asks Mr. Sigl if the height is measured from finished grade? Mr. Sigl indicates that it is from the garage slab. JoAnne asks how it would relate to the finished grade. Mr. Sigl indicates that he believes that figure varies around the building. JoAnne Buntich requests those figures at the next meeting.

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

Joseph Berlandi is representing citizens who are concerned. His question is if the developer has met the legal requirements for the board to issue a variance. He indicates that it is up to the applicant to meet the requirements and to prove the three prong test. He indicates that the petitioner has not proven that his site is different from others in this district. Secondly, regarding the literal enforcement of the zoning code and whether it would involve substantial hardship financial or otherwise to the petitioner, he doesn't feel he had met this condition as it is self inflicted and hasn't proven anything to the contrary. Thirdly, that desirable relief may be granted without substantial derogation or detriment to the public good and without nullifying or substantially derogating from the intent of the zoning code, he believes that granting the variance will clearly nullify the intent of the zoning code. The marine business district has about 18 acres and there is no other Barnstable Harbor which is why this was enacted which was to preserve marine use in this very small district.

Frank Hinckley was Chairman of the Planning Board in 1965 when it was changed and would like to point out that the members were Bob O'Neill, Bob Hayden, Fred Conant and Betty Mellen who represented different parts of Barnstable and voted for this change in 1965 so that people would have access to the water.

Robert Ambrose lives in Cummaquid and has been on the Cape for fifteen years and has been concerned about Barnstable harbor for a long time. He indicates that this is a hardship made by the applicant. Marine use zoning protects the harbors. If the marine use is breached, it will affect the boaters today. He indicates that some other people with property in this area who would like to do the same would be able to do it if this application is granted. This harbor is in demand and we can't lose it.

Mark Santos urges the board not to be biased by the presentation and it is zoned marine use and has the largest dock on the north of Barnstable. He suggests that this could be a docking point for luxury ships and that there is potential for marine businesses.

Attorney James Connors represents abutters, Brian and Kathy Hickey. He wants to know if they reviewed all the deeds as there are people who have rights across this property. In 1914 there was a deed filed granting his clients a 40 foot easement across Freezer Point and over Mr. Bornstein's property and has not seen anything pertaining to this easement and feels it would substantially change this proposal. He indicates that the Book/Page number is 12037/258. He submits a copy of that easement to the board and indicates that it has since been recorded. There were issues that were raised and his clients have a deeded right of access.

Attorney Kenney believes it is over the southeast corner of the property and is nowhere near the building envelope, they have title insurance policy through Chicago Title Insurance and there is no reference for such an easement and thinks that the attorney can submit a claim to that company. Attorney Connors indicates that it is not their burden to talk to the title insurance company. Attorney Kenney doesn't know the location or purpose or how Attorney Connors received rights and would be happy to talk with Attorney Connors.

John Julius refers to the Bassett house and that the Bornstein's are just asking to build a retirement house.

Attorney Kenney replies to public comments.

Brian Florence asks what the use was back 81 years ago. Attorney Kenney indicates that the Bassetts lived there in the 1930's, the fish house was moved over here in the late twenties and since then additions were added. He indicates that it was used primarily as a residence. Brian asks when the last time the cannery was used. Attorney Kenney is not sure. Brian would like more information on it.

Laura asks Attorney Kenney for clarification regarding the Marine Business use not being a viable use currently versus the 1999 decision that came down from the Housing Appeals Committee that upheld the Town's position that Marine Business was a finite district that needed to be protected. There was testimony from a consultant and in the decision, which was not appealed, it was claimed there was a viable use for Marine Businesses.

Attorney Kenney indicates that what has changed since 1999 is that Freezer Road has been named a scenic road and the RPP does not allow the expansion of scenic roads in historic districts. In order to do the marina use, they would have to go to Cape Cod Commission that would apply the RPP which would have to show that a 14 foot wide road could handle 500 trips on the weekday and 700 trips on the weekend with people towing boats through a residential area. After 1999, the zoning was amended to prohibited chain stores.

Laura Shufelt indicates that they cannot close the public hearing because of the Mullin rule.

The board discusses a continuance.

Motion is made by William Newton to continue to August 10, 2011 at 7:00 PM.

Craig Larson has questions. William Newton withdraws his motion.

Craig wants to know about any other use variances on Freezer Road. Elizabeth Jenkins indicates that there has been one from 1981 and gives a copy to the board members. Elizabeth to provide more information to the members regarding this. Craig asks about minutes from the Local Comprehensive Plan meetings. JoAnne Buntich to provide that information.

Attorney Kenney is agreeable to signing an extension and will come into the office to sign it.

Craig wants an artist rendering from the architect regarding the trees.

William Newton asks staff to do research on the easement as presented by Attorney James Connors and how it would impact this proposal. Elizabeth can provide the deed but not necessarily of what rights they do have.

A motion is made by William Newton and seconded by Brian Florence to continue this proposal to August 10, 2011 at 7:00 PM.

Vote:

AYE: William Newton, Craig Larson, George Zevitas, Brian Florence, Laura Shufelt

NAY: None

CONTINUED TO AUGUST 10, 2011 at 7:00 PM

Laura calls a 5 minute recess.

At 9:42, Laura calls the Higgins appeal

7:00 PM

Appeal No. 2011-024 - Continued

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.

Opened May 25, 2011: No board members assigned, no testimony taken.

Decision Due: October 10, 2011

Members assigned tonight: William Newton, Brian Florence, Craig Larson, George Zevitas, Laura Shufelt.

A motion is made by Laura Shufelt and seconded by Brian Florence to grant a withdrawal without prejudice.

Vote:

All in favor.

WITHDRAWN WITHOUT PREJUDICE

Laura calls the Shapiro appeal and reads it into the record:

7:05 PM

Appeal No. 2011-040 - New

Shapiro

Gary L. and Barryanne Shapiro have applied for a variance pursuant to Section 240-91.H(b)[1] Developed Lot Protection; demolition and rebuilding on non-conforming lots. After demolishing a dwelling on the property, the applicants are proposing to construct a new single-family dwelling with an attached two-car garage which will exceed the 20% lot coverage permitted as-of-right. The proposed coverage of the dwelling, including the garage and a covered porch, is 23.3 percent of the lot. The property is addressed 141 Old Stage Road, Centerville, MA and is shown on Assessor's Map 189 as parcel 086-002. It is in a Residence D-1 zoning district.

Decision Due: September 27, 2011

Members assigned tonight: William Newton, Brian Florence, Craig Larson, George Zevitas, Laura Shufelt

Attorney Kenney is representing the applicants. They are selling their existing home as they are downsizing and therefore purchased this property to construct a new, single family home. The applicants purchased the lot on March 9, 2011. Previously, the existing house was built in approximately the 1920's. Mr. Bob Dunphy, a builder, had initiated a Purchase & Sales Agreement in order to acquire the property and pulled a demolition and rebuild permit. He tore down the house and around that time had conversations with the Shapiro's about acquiring the property. When the Shapiro's bought the lot it was vacant. Mr. Dunphy was not familiar with the Barnstable ordinance and was led to believe there were no lot coverage requirements. The Shapiro's wanted a larger structure with a two car garage than what Mr. Dunphy was proposing to build originally. It was the Building Commissioner's opinion that the applicants needed to come and request a variance.

Brian Florence asks if there is anyway they could reduce the square footage by 340 square feet. Attorney Kenney indicates that if smaller, it wouldn't be something the applicants would want.

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

Shirley Fisher, an abutter, indicates that it seems to be a substantial house on a small lot. She clarifies with the board that the structure will be two stories. She has no complaint about the 3% however, as a courtesy to the neighbors; she would like to see a condition that would require some kind of screening or vegetation on the perimeter of the lot.

Todd Walker, an abutter who lives at 143 Old Stage Road is concerned about the elevation change. He indicates that it is approximately 3 feet higher from where his house is but has no complaint about the 3% . He is concerned about the water runoff. Also, because of construction on that site, there has been damage to his property in terms of pavers and crushed stone at the end of his driveway. He has spoken with the contractor who assured him that it would be taken care of but would like it put on record. He indicates that the driveway is shared by three properties. He requests that anything that gets damaged in the process be repaired. Also, his septic is in his turnaround but should there be heavy equipment truck damage, he wants the board to know about it. Brian Florence indicates that it might be a civil issue.

Steve Dewey of 190 Old Stage Road indicates that he does not have a problem with the 3%.

Attorney Kenney indicates that his client would be willing to put up screening on the south and east side of the property and will develop a landscape plan to divert the water. Attorney Kenney then addresses the three prong test and reads his memo.

Craig Larson asks if he has seen the conditions. Attorney Kenney indicates that he has.

Laura comments that she believes it is too big of a house for the lot. Craig does not concur.

The board discusses.

Attorney Kenney indicates that it was an honest mistake and that the abutters are okay with the lot coverage and asks the board to grant the variance.

Craig Larson makes findings:

Gary L. and Barryanne Shapiro have applied for a variance pursuant to Section 240-91.H(b)[1] Developed Lot Protection; demolition and rebuilding on non-conforming lots. After demolishing a dwelling on the property, the applicants are proposing to construct a new single-family dwelling with an attached two-car garage which will exceed the 20% lot coverage permitted as-of-right. The proposed coverage of the dwelling, including the garage and a covered porch, is 23.3 percent of the lot. The property is addressed 141 Old Stage Road, Centerville, MA and is shown on Assessor's Map 189 as parcel 086-002. It is in a Residence D-1 zoning district.

The general area was first developed in 1920 with two dwellings and a small cottage. The subject lot was created by ANR plan in 1984, pursuant to the exemption found in Section 81-L of the Massachusetts Subdivision Control Law which allows for the division of lot containing two structures. The cottage was located on the subject property and the two dwellings on the property adjacent. In conjunction with the ANR division in 1984, relief was sought for the undersized lot.¹ Variance No. 1984-100 was granted for relief from the minimum lot area requirement in the RD-1 District, along with dimensional relief for the cottage.²

The plans submitted by the Applicant propose a two-story three-bedroom residence with a footprint of 1,699 square feet, along with a 422 square foot attached garage and an additional paved area of 144 square feet. The elevations and floor plans submitted also show a 56 square foot covered front porch. The total footprint of all proposed structures is 2,321 square feet. The lot is 10,000 square feet in area, so relief is required to exceed the maximum lot coverage permitted by 3.21 percent

- owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located;**

¹ In 1984, the minimum lot size in the RD-1 District was 20,000 square feet.

² The minimum lot area is now one acre in the RD-1 District, and the property is subject to the two-acre minimum lot area requirement of the RPOD.

- *a literal enforcement of the provisions of the Zoning Ordinance would involve substantial hardship, financial or otherwise to the petitioner, and*
- *desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Zoning Ordinance.*

Vote:

AYE: *Craig Larson, Brian Florence, George Zevitas, William Newton, Laura Shufelt*

NAY: *None*

Motion is made by Craig Larson to grant with the following conditions:

1. *This variance is granted to Section 240-91(H)(1)(b) to allow for the reconstruction of a three bedroom single-family residential dwelling with an attached garage with a structural footprint not to exceed 23.3 percent of the 10,000 square foot non-conforming lot.*
2. *The house shall be constructed in substantial conformance with the plan entitled "Existing Plot Plan, Barnstable, MA Parcel B, Plan Book 931 Pg 100, dated 6/13/11, drawn by Sweetser Engineering" and the elevations and floor plans drawn by Greywing Design dated February 14, 2011.*
3. *There shall be no additions or accessory structures constructed on the property without further relief from this Board.*
4. *The decision shall be recorded at the Barnstable County Registry of Deeds and copies of the recorded decision shall be submitted to the Zoning Board of Appeals Office and the Building Division prior to start of construction. The rights authorized by this variance must be exercised within one year, unless extended.*
5. *The property will conform to present date Title V rules and regulation of the Town of Barnstable*
6. *There shall be landscape screening on the east and southerly section of the lot and all drainage to remain on site as discussed.*

Brian Florence seconds.

Vote:

AYE: *Craig Larson, Brian Florence, George Zevitas, William Newton, Laura Shufelt*

NAY: *None*

GRANTED WITH CONDITIONS

A motion is made by Brian Florence and seconded by William Newton to adjourn.

Vote:

All in favor

Meeting adjourned at 10:20 PM