



Town of Barnstable
Zoning Board of Appeals
Minutes
September 14, 2011

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

Also present were JoAnne Miller Buntich – Director of Growth Management, Elizabeth Jenkins – Principal Planner and Carol Puckett – Administrative Assistant. In the audience were the Maloney’s, Ann Canedy, Joe Berlandi, Peter Kohler and others.

Laura opens the hearing at 7:08 PM. Members introduce themselves.

Introduction of Board Members

Board members introduce themselves

Craig Larson has recused himself and left the room.

Laura Shufelt calls the EAC appeal.

7:00 PM Appeal No. 2009-025 - Continued

**EAC Disposal, Inc. d/b/a
Cape Resources Company
Modification of Variance No. 1996-14**

EAC Disposal, Inc., d/b/a Cape Resources Company has applied for a modification of Variance No. 1996-14. The modification is sought to allow for revisions to the site that include a new wood processor and staging area, alteration to interior site circulation, and additions and alterations to screening berms and landscape. Appeal No. 2009-025 has been amended to include a request that Condition Number 28 in Variance No. 1996-14, requiring that the variance expire on December 31, 2015, be deleted. The Applicant requests the modification of such other conditions and terms contained within Variance No. 1996-14 as may be required to effectuate the intent of the new proposed plan submitted with the application and the terms of any decision to be rendered by the Zoning Board of Appeals. The subject property is addressed 280 Old Falmouth Road, Marstons Mills, MA as shown on Assessor’s Map 100 as Parcel 008. The lot is in a Residence F Zoning District.

Opened April 1, 2009, continued, May 20, 2009, August 5, 2009, September 23, 2009, November 4, 2009 December 9, 2009, February 10, 2010, moved to February 24, 2010, April 14, 2010, May 26, 2010, July 14, 2010, August 11, 2010, September 15, 2010, October 27, 2010, December 1, 2010, February 2, 2011., March 9, 2011, April 13, 2011, May 11, 2011, June 8, 2011, June 22, 2011, July 27, 2011 and September 14, 2011.

Board Members Assigned: William H. Newton, George T. Zevitas, Brian Florence, Alex M. Rodolakis, Laura F. Shufelt

Decision Due: September 15, 2011 With Extension: November 14, 2011

Laura indicates that tonight Attorney Sabatt is just giving an update. Attorney Sabatt indicates that on two occasions, his client and he, along with the consultant who participated via speakerphone, met with members of the Growth Management staff to discuss the monitoring criteria and have been discussing a performance base modification instead of an operational base. He indicates that in the next few weeks, a new engineer for his client will establish some ambient noise levels and then make some suggestions regarding the noise and dust which will be reviewed by the ZBA's consultant. Also, they are trying to refine the keeping of the record book, etc., and feels they are moving in a positive direction and would like more time to do that and working diligently on this.

William Newton asks if the ZBA's consultant, Mr. McCarron, is on board with the performance base and evaluating it. Attorney Sabatt indicates that they are trying to work on performance standards and has not heard an objection from the consultant but isn't sure if he is on board. William Newton asks JoAnne Buntich about staff comments on the staff report. JoAnne indicates that they have met with Attorney Sabatt as indicated and are trying to get at what the issues are and together they arrived at a consensus as to what needs to be controlled which are the impacts. The issues of noise, dust, vibration and odor can be measured and the ZBA's consultant is involved in the instruments involved, training, etc. William Newton suggests a recommendation from the consultant as to what he agrees to and what he doesn't agree to.

Laura reads a letter from the Maloney's and one from Edgar Cook who is against changing condition #28.

The board discusses a date for a continuance.

Motion is made by William Newton and seconded by Brian Florence to continue this to November 9, 2011 at 7:00 PM.

CONTINUED TO NOVEMBER 9, 2011 AT 7:00 PM.

Craig Larson returns to the dais.

At 7:22, Laura calls the Stuborn Limited Partnership appeal and reads it into the record.

7:00 PM	Appeal No. 2011-008 - Continued	Stuborn Limited Partnership, Stuart Bornstein- General Partner Use Variance
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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 guesthouse 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.

Opened May 25, 2011, continued to July 13, 2011, August 10, 2011 and September 14, 2011.

Members assigned on May 25, 2011: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt. Present: Brian Florence. Recused: Alex Rodolakis.

Decision Due: October 31, 2011

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

Attorney Kenney is representing the applicants.

Laura indicates that a new map was submitted.

Attorney Kenney received a request through staff for additional information. The updated plan reflects 4 points:

- **Footprint and square footage of the fish house which is to be retained. He indicates that he cannot give that information, as an historical architect needs to review it first but estimates it is 960 to 980 sf. The bump out does not have a second floor and is not sure if they will be required to retain a second floor.**
- **The prior plan showed three parking spaces which has been reduced to one for the gardener. Also, they agreed there would be no utilities nor occupancy of that structure and to be used strictly as a gardening shed.**
- **He has submitted an updated plan of a 10X10 boat shed. He indicates that it is not a boat shed it is a shed which would store accessories for boating activities. They increased the footprint to 12X15 and asks if they will approve up to 12X15 shed as they are allowed up to a 10X12 shed without having to go back to Old King's Highway. If they don't have to go back to OKH they will probably reduce it down to a 10X12 shed. If they have to go back then they will go back for a 12X15 shed. It is also an approximate location and have not gone to the Conservation Commission for approval as of yet. He would ask the board to approve the shed subject to OKH approval requirements and subject to meeting zoning setbacks. There was also an agreement that the shed have no bathrooms, bedrooms, no kitchen and no occupancy.**
- **Next, they were asked to show the finished grade of the house. Unfortunately, Mr. Healey could not be here tonight but he discussed the matter with him. His notations on the plan stated that there are two constant elevations: the main portion of the house $\frac{3}{4}$ of the way around the house is at 24.6, the garage or the basement slab is at elevation 18. He has calculated the average adjacent grade to be 23.4. The first floor elevation is at 28, the plate elevation which is the attic floor is at 47, The building height which is the plate elevation minus the average grade is 23.6. They use the average grade to the height requirement and they meet that.**

Laura asks what district is the 30-foot building height limitation from. Attorney Kenney indicates that he believes it is from the RF-1 zoning district which should be the nearest residential zoning district requirement. Attorney Kenney then shows a slide of the house from the north and indicates that it should be noted that the only views will be from the second floor over the trees. He then shows a slide from the south, east, and west and indicates that they have dropped the ridge height by 3.6 inches. He indicates that the slab is at elevation 18 and would like to remain there because of the floor plain but will drop to 17.5 feet if this board wishes.

- **Attorney Kenney then indicates that another concern of staff's was about licensing permitting water dependent development on the property and that Mr. Hayes, who is also not here tonight, indicated that they have to go back to Conservation about the private dock and have agreed that there will be no commercial uses or a lift, etc.. Also, they have to go back to Conservation for a new Order of Conditions in order to amend their Chapter 91 license, apply to the state under the MEPA act for an amended or new Chapter 91 license and then apply to the Army Corp of Engineers for a new license and possibly file for jurisdictional determination in order to see if they have to file an environmental notification form. He indicates that Mr. Hayes had informed him that as long as the dock is at five feet or above the mean high water mark, no stairs are required. If below five feet, stairs would be required giving the public access to go up, cross the dock and back down the stairs.**
- **As for Attorney Connors, who at the last meeting discussed his clients rights to an easement over Mr. Bornstein's property, he had title work done, tried to meet with Mr. Connors on several occasions and believes that the parcel was sold in two sections. The first portion, which abuts Freezer Road, was sold and at that time he owned land to the north and south and retained land on the westerly edge of the upland. Subsequent to the easement, the heirs sold the land to the north and there were no easement rights retained. He indicates that the easement would be for about 100 feet over the Bornstein's**

property but believes the easement is extinguished due to lack of purpose and does not tie into Freezer Road and in his opinion, there is no easement.

Laura asks Kenney about public access. she indicates that the existing Chapter 91 license has conditions that require the free passage between high and low water marks and that signs be posted to that effect. Attorney Kenney indicates that there will be signs posted.

Mike Hersey clarifies that the pier/dock will be for personal use only. Attorney Kenney reiterates that it will be for personal use and for guests only. Michael Hersey is concerned that people would be prevented from walking under the pier. Attorney Kenney indicates that under Conservation and MEPA there will be enforcement mechanisms.

They discuss the pier/dock on the plan and what would happen if a personal residence was not approved. Craig Larson comments that this board approves applications according to the plan submitted. Laura indicates that if the dock changes they would have to come back to ZBA. JoAnne Buntich indicates that the proposed latest site plan is dated 09/05/11. Attorney Kenney indicates that they have a license that allows for what is shown on the plan now. JoAnne asks for documentation from their engineer to be clear about it going forward.

Mr. Bornstein speaks and indicates that he doesn't have a problem with putting any conditions on this dock as this will be for his private use. They are increasing the dock 35 feet and are bringing it up to the bulkhead and putting in finger docks and that the existing wharf is coming out. He has to have permission to pull out the wharf and might take 8 or 9 months before he can do that. Attorney Kenney is concerned that the only problem with conditions is that they will have to come back here. Craig Larson asks JoAnne if a condition could be put on this to state that if it were substantially different they would have to come back. JoAnne indicates that once the board has an opportunity tonight to go through the findings they would be happy to discuss any potential conditions they wish to propose. Laura comments that she still believes that the plan should reflect what is proposed. Attorney Kenney indicates that they haven't made a proposal to the Conservation Commission as of yet because it hasn't been designed. He will confirm with the engineers that the dock, which is shown on this plan, is drawn as an existing condition and asks that they leave it at that. Attorney Kenney indicates that they are agreeable to it not being commercial but they have to get permits elsewhere.

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

Attorney Joe Berlandi is representing a group of citizens concerned with Freezer Point. He believes that Mr. Bornstein plans to build what he is proposing which is why he objects. He believes that the real issue is whether he has met the legal requirements of the zoning variance. He hasn't proven the soil condition test of this site and he has to prove that the conditions of his site vary from the conditions of the zoning area that he sits in which he hasn't done. Also, it derogates from the zoning code. The code was passed and the zone was setup as a Marine Business District and not a residential district. Attorney Berlandi indicates that this petitioner is proposing to take 40% of the current marine zoning district and remove it from that zoning and make it into a residential zone which is equivalent to spot zoning and not a use variance which he believes is not the venue of this board.

John Julius says this has been a residence and wharf previously.

Attorney Kenney rebuts to Attorney Berlandi's comments and indicates that the shape factor is because this property juts out into the harbor and is surrounded on 3 sides by water with coastal dunes as well as tidal lands jutting into the property as well as the topographical features such as the freezer and cannery building are unique to this site. As far as the zoning code and spot zoning, he has submitted a case: Kirkwood vs Rockport for spot zoning. He also went through uses allowed under the Marine Business district and regional policy plan of the Cape Cod Commission. He quotes part of the Kirkwood case. As far as 40% that Attorney Berlandi mentioned, the actual upland is about 2 acres.

Craig Larson would like to keep the public comment open. The board then discusses variance conditions. Craig indicates that he doesn't think they are not changing the zoning in this district and thinks that Attorney Kenney did prove the conditions relating to soil and topography according to the plan. He does believe that other boards have rendered this property mute and that the Cape Cod Commission rendered this unbuildable as a marina and also doesn't know how they would get a marina there.

George concurs with Craig. William Newton indicates that he mostly concurs and thinks that this is a unique site. He doesn't see any evidence that would suggest that there is any interest in a marine use and if they could do he doesn't see it and not a viable use in the current zoning. Also, Freezer Road cannot be changed as it is a scenic road, can't see commercial use traffic, and would be in favor of a use variance. Michael Hersey concurs with the others and supports the fact that Mr. Bornstein is willing to reduce substantially something he has a federal right to do already. He thinks it will improve the water sheet and thinks that to deny the variance would potentially only give him one legitimate use for the property which conflicts with everything they have heard between traffic, the historic way being overused and doesn't want to see head boats out of there. He thinks this is probably the best use for this property and supports the use variance. Laura indicates that she is okay with the reasoning about Freezer Road being made a scenic way. She would like to see public access be continued. She believes this is a continuance of a residence that had been there previously.

Laura Shufelt asks Attorney Kenney if he has a copy of the draft conditions. Attorney Kenney has a copy with his suggested changes.

Laura reads the draft findings:

- 1. 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 in the MB-B District. The applicant has proposed construction of a new, six bedroom, single-family residence with an attached garage and attached guest house on the property.**
- 2. The property is addressed 153 Freezer Road, Barnstable, MA and is shown on Assessor's Map 301 as Parcel 006.**
- 3. The subject property is zoned Marine Business B (MB-B) zoning district. Single-family residential dwellings are not a principal permitted use in the district.**

William Newton suggests listing all the current viable uses in the MB-B district. They discuss. They agree that it is okay as written.

- 4. The subject property is a triangular-shaped peninsula of land bounded by Maraspin Creek on the east and Rendezvous Creek on the west and Barnstable Harbor on the north. According to a boundary plan submitted by the Applicant (rev. date 5-27-11), of the 7 acres of assessed property, 2.82 acres are upland as defined by the Zoning Code.**

Attorney Kenney wants to add the language in yellow.

- 5. Approximately the northern one-third of the site consists of salt marsh and is subject to regular tidal flooding. The northern portion of the site is also within a FEMA 'V' Velocity Zone. Vegetated wetlands extend further into the site on all three sides of the property.**
- 6. A soil survey for the property conducted by ENSR, dated October 1, 1999, classifies the majority of soils on the subject property as artificial fill, underlain by salt marsh peat. There is also a coastal bank on the property, with land seaward subject to coastal storm flowage. There are filled tidelands on the property, subject to public trust rights under M.G.L. Chapter 91.**
- 7. Areas of the property along Maraspin Creek north of the licensed existing wharf have been shown to have high suitability for shellfish. Northern portions of the property are within an Area of Critical Environmental Concern (Sandy Neck Barrier Beach System) and within the National Heritage and Endangered Species Program BioMap Core Habitat.**

8. *The depth to groundwater at the proposed site is reportedly shallow. Testimony was provided at the hearing that the basement of the existing structure repeatedly flooded by high groundwater. **Verify from public testimony from minutes***

9. *The site is impacted by the remnants of former commercial structures on the property, including a 9,100 square foot and a 7,250 square foot concrete slab.*

JoAnne Buntich indicates that one of the issues around the plan is that one of the findings that is not here yet as they need a final plan so they will site the plan and title black and last revision date and each of these findings will relay back to that plan.

10. *The square footage calculations submitted by the applicant during the hearing state the proposed single-family home will have 14,859 square feet of gross floor area.*

11. *During the course of the hearing, the applicant submitted revised elevations for the dwelling, entitled "New Residence, Scheme 11, Freezer Road Barnstable Massachusetts, dated July 13, 2011, drawn by David H. Sigl, that propose to reduce the overall height of the structure by three feet, six inches. At the hearing, David Sigl, architect, stated the reduction in height was achieved by reducing the roof pitch.*

12. *On October 13, 2010, the Regional Committee of the Old King's Highway Regional Historic District Commission (OKH) issued Certificate of Appropriateness approving the design for a new residence on the property, labeled Scheme 10. This decision annulled the Town's Committee's vote to deny the application, which cited concerns over the exposed foundation and the building height in relation to surrounding commercial structures. The elevations labeled Scheme 11 have not been reviewed by the Old King's Highway Regional Historic District Commission.*

13. *A letter from Tom Perry, Building Commissioner, dated April 22, 2011 confirms that the proposed dwelling is a two-story dwelling and is in compliance with the height restrictions in the Zoning Ordinance.*

14. *According to the application, the applicant is proposing to retain **approximately 1,000 square feet** of an existing structure on the property per order of the Old King's Highway Regional Historic District Commission. On June 22, 2011, the Barnstable Old Kings Highway Regional Historic District Commission approved a Certificate of Demolition for partial demolition of the existing structure, subject to conditions.*

JoAnne Buntich will make, through testimony from tonight, the highlighted area more specific

15. On the property, there is an existing wharf and concrete bulkhead that provides access to Maraspin Creek. During the course of the hearing, the Applicant submitted a plan proposing six boat slips at the site of the wharf. One of the proposed boat slips is located within 25 feet of the Maraspin Creek navigable channel. It is the applicants intention to remove that boat resulting in five slips.

Attorney Kenney and the board discuss and decide to add last sentence.

16. *During the course of the hearing, the Applicant proposed an additional up to **12X15** square foot water-dependent accessory structure on the property for the storage of items used in conjunction with the property owner's boats.*

JoAnne Buntich indicates that the revised plan showed a 12X15 square foot accessory structure and the applicant's testimony said it will be up to 12X15 and they will further describe this to the plan.

17. See Attorney Kenney's findings.....Attorney Kenney indicates that Norman Hayes testified to that at the hearing. JoAnne Buntich indicates that this could say that Norman Hayes stated at the meeting of X, Y, Z and whatever he stated... Attorney Kenney will see if he can get a copy of the document as the record is still open.

18. *The Applicant has a Chapter 91 License (No. 11070), recorded in Book 20834, Page 200, to maintain the existing stone revetment and wharf, and to use the structures for commercial and non-commercial docking and boating access.*

19. *The Applicant submitted documents into the record from the Cape Cod Commission, the Division of Marine Fisheries, the Office of Coastal Zone Management, and the Department of Conservation and Recreation, dated between February 3, 2009 and February 10, 2009, reacting to an Environmental Notification Form submitted by the Applicant for proposed dredging of 10,000 cubic yards of material from Maraspin Creek and development of a 50-slip commercial marina. The documents provide an overview of the regulatory requirements for the proposed dredging and marina construction.*

20. *The property is subject to a variety of environmental constraints and local, regional, state and federal regulatory requirements which a combined prevent the Applicant from being able to reasonably make us of its property for the purposes or in the matter allowed by the Zoning Ordinance are likely to significantly increase costs and are likely to significantly increase costs and lengthen timeframes for commercial development.*

JoAnne Buntich indicates they could list Old King's Highway, Conservation, MEPA, etc. Attorney Kenney would like his language (in yellow) as written. They discuss.

21. *The property is accessed by Freezer Road, which is a designated scenic road. Repair or reconstruction of scenic roads may require approval from the Tree Warden and/or Planning Board. And taking of the roads would result in taking of private properties. JoAnne Buntich wants to add the language in blue.*

22. *The lot coverage of the proposed dwelling, accessory guest quarters, and 1,000 square feet of the existing structure is 5.32 percent of the total upland area calculated pursuant to the Zoning Code.*

23. *The property is subject to compliance with Section 240-7(F)(1) Number of buildings allowed per lot, which states that only one principal permitted building shall be located on the lot.*

24. *The proposed dwelling is subject to the requirements of Section 240-7(G) Setbacks from wetlands/great ponds. According to the plans submitted by the Applicant, the proposed dwelling will be constructed in compliance with the required 35-foot setback from wetlands.*

25. *Findings re: proposed Conservation Restriction: _____*

26. *There exist circumstances related to soil conditions, shape, or topography of the subject land and structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located.*

27. *A literal enforcement of the provisions of the Zoning Ordinance would involve substantial hardship, financial or otherwise to the applicant.*

28. *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.*

JoAnne Buntich asks if the board if they want to add additional language regarding public access. Laura Shufelt wants to look at Chapter 91 license and has not prepared anything yet.

Ruth Weil – Town Attorney indicates that there was discussion about the current use of the pier/wharf and the applicant's willingness to abandon commercial use and limit it to private use and thinks a finding would be in order for that. Also, they need a clear finding on the conservation restriction as there will be a public conservation restriction and a private covenant and thinks it will limit the use of the parcel to a single family home plus its accessory structures as delineated in the plans. Also, with the private covenant there will be an envelope including the house and accessory structure and that there will be flexibility in the future to change that if both the applicant and Town are willing.

Laura Shufelt thinks that any violation of order of conditions of ConComm would be a violation of the variance and which would mean it would be enforceable here if they don't adhere. Joanne Buntich indicates that they can work with that language. Attorney Kenney thinks that the board would be overstepping their jurisdictional boundaries.

The board members discuss the pier. Craig Larson wants a condition referencing the details of the pier. JoAnne Buntich suggests that the board's interest here is in the use and not necessarily the configuration on the water sheet so that one of the things the board could contemplate is that the applicant has provided ample testimony that they want to limit this to a recreational amenity for a single family home that they have pledged in public testimony that there will be no head boats, no fishing boats and will only be for private and personal use for the applicants and guests of the family. Therefore, the board could very clearly and strongly condition the accessory use of the dock without conditioning the configuration of the dock which is in the jurisdiction of another board. The board members discuss. Attorney Kenney is agreeable with limiting it to five boats.

Joanne Buntich suggests that there are two items that they don't know yet because they are dependent on subsequent permitting which are:

- the size and location of the boat shed - which they don't know what size it will be based on Old King's Highway and don't know where it will be based on Conservation Committee*
- the Captain Gerauld Fish House - which they don't know what size it will be.*

JoAnne Buntich suggests that the board set a maximum and be specific about the use of the structures, which are not clearly defined on the plan.

Staff to draft findings and conditions as amended and have available for the next meeting. They discuss a continuance date.

Motion is made by William Newton and seconded by Michael Hersey to continue to October 26th at 7:00 PM

CONTINUED TO OCTOBER 26, 2011 at 7:00 PM

Chair's Discussion:

Suggested Video of ZBA Chair from Board & Commissions meeting.

Laura Shufelt indicates that at the meeting of chairs it was suggested that every chair do a video to inform the public of the board's mission and what they do. JoAnne Buntich explains. The board is in agreement that Laura should do the segment.

Process for review and release of Executive Session minutes for resolved matters.

Laura Shufelt indicates that there are minutes going back to 1995 and have to be released or held. Laura Shufelt proposes that she review with Legal and Growth Management staff whether they should be released or held and then bring the board members summaries of those. JoAnne Buntich explains that it would only be for closed matters. Ruth Weil – Town Attorney indicates that they can also alternatively delegate Laura Shufelt – Chair to review and release and announce it at a meeting which would mean that the board members will not have to vote on them by solely giving Laura Shufelt the authority to do that on their behalf.

Motion is made by Craig Larson and seconded by William Newton to authorize Laura Shufelt – Chair to review and release the executive session minutes.

Vote:

All in favor.

Motion is made by Michael Hersey and seconded by Craig Larson to adjourn.

Meeting adjourned at 9:14 PM