



**Town of Barnstable**  
Zoning Board of Appeals  
**Minutes**  
**January 14, 2009**

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

***Laura Shufelt opens the hearing at 7:01 PM. She reads a summary of the appeals to be heard tonight.***

***She takes the Mill Pond Estates out of order. She indicates that there was a request from Attorney Schulz to withdraw and indicates that the letter cites that the seller has not received final approval for cost approval from DHCD and need that in order to move forward and have standing before the Board.***

**Comprehensive Permit No. 2005-013**

**Mill Pond Estates - Starboard, LLC  
Request for Minor Modifications**

In part, this is a re-submittal of that request previously made to the Board that includes the transfer of the permit to a new owner. However, it was expanded to now include a request to modify the style of homes to be built.

By letter submitted January 7, 2009, from Attorney Michael F. Schulz, Paul T. Caggiano and Brady P. Otey, as Mangers of Mill Pond Osterville Associates LLC, are seeking to modify Comprehensive Permit No. 2005-013 "Mill Pond Estates" issued to Starboard, LLC for the division of 2.81 acres into a 13 lot subdivision for the development of 11 single-family dwellings at 459 and 449 Old Mill Road, Osterville, MA. Three of the 11 dwellings are to be committed to affordable housing pursuant to MGL Chapter 40B, Section 20-23. The applicants seek;

- the transfer of the permit to “Mill Pond Osterville Associates LLC”,
- to be allowed to build one ‘model home’ for the purposes of marketing the development,
- to have waived the requirement for posting of securities for the completion of the subdivision until a second building permit is sought, and
- a request to change two of the three approved home designs, the “Fairview” and “Westgate” to “Walden” and “Fair Acres” style homes.

***Laura Shufelt indicates that she administratively accepts the withdrawal letter.***

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***Laura Shufelt then calls the Tokarz/Walsh appeal and reads it into the record.***

**Appeal 2009-002 - New**

**Tokarz/Walsh  
Modification Variance No. 2003-155**

Deborah Tokarz as owner of 1271 Old Stage Road, Marstons Mills, MA and Richard Walsh as future owner of 1283 Old Stage Road, Marstons Mills, MA, have applied for a Modification of Variance No. 2003-155 issued to Anne St. Cyr. The applicants are requesting the removal of Condition No. 3 of that Variance requiring that the two lots to only have and share one curb cut on Old Stage Road. The subject properties are addressed as 1271 & 1283 Old Stage Road, Marstons Mills, MA and are shown on Assessor’s Map 150 as Parcels 078 & 079. The subject properties are in a Residence F Zoning District.

***Members assigned: Alex Rodolakis, Michael Hersey, Craig Larson, William Newton, Laura Shufelt.***

***Deborah Tokarz is here representing herself and indicates that she owns the land at 1283 Old Stage Road and explains why she is here. She indicates that there is a conflict with the curb cut although the driveway will be shared. She indicates that she is aware of the possible traffic conflicts. She realizes that it will not happen all the time. She indicates that Dan Ojala from Down Cape Engineering had done the engineering on the lot originally and done the easement so you can see the curb cut where one goes into one lot and the other lot. He had done that and is familiar with it. She indicates that they had him there when the Walsh’s bought the lot a couple of weeks ago and has a memo in support of this same thing. She indicates she has copies and hands them to the Board members. She indicates that because of the economy she doesn’t know when she will develop her lot. She would like a curb cut to be on her lot and situated away from the area of concern. She is not sure why she should be penalized for being the last one to build on Old Stage Road and cannot get a curb cut whereas everyone else has one. Maybe the engineering department would be better suited to place that curb cut appropriately. She talks about others on Race Lane that have curb cuts and some that have two curb cuts.***

***Laura Shufelt asks if board members have any questions.***

***Brian Florence asks what the issue is with the utility pole***

***Deborah Tokarz indicates that the utility pole is right before the driveway and the driveway was cited on that lot for that one house and not for two lots as it is now. Unless they can move the pole out of the way and doesn't think it would be easy o move.***

***Michael Hersey clarifies with Deborah Tokarz that only one lot has a house on it. Ms. Tokarz indicates that she has the empty lot and plans to build on it in the future.***

***William Newton asks Kimberly Walsh about the status of her property as far as development on it.***

***Mrs. Walsh indicates that her curb cut is to the right and is narrow and if they had to share they would have to come out and over to take a right hand turn and around the utility pole. She has to watch for traffic as it is a busy intersection. Her husband Rich Walsh hands a plan of the lots to the Board members.***

***William Newton asks how and if they knew it was built not in conformance with that requirement***

***Mrs. Walsh indicates that all she knew is that it was an old stipulation that was brought back years ago to have that shared cut.***

***Mr. Walsh indicates that he believes the problem is with the utility pole and that they couldn't put it in the middle of the two lots.***

***William Newton indicates that there are emails between Mr. Ojala and the Town Engineer that would indicate that there was some discussion about putting that driveway in between the two pieces of property and that the Town Engineer's opinion was that it fine but that it needed to be registered and asks if it ever got registered. William Newton reads the email from Dan Ojala regarding the recording of the easement and reads a portion of that email***

***Mrs. Walsh indicates that in order for them to close their loan they had to record that easement.***

***Laura Shufelt clarifies that in 2003, one of the conditions of the variance that was issued to the lots was that there only be one curb cut and at that time that condition was not appealed.***

***Mrs. Walsh indicates that when they purchased the property they were told about it after the fact.***

***The Board asks about a copy of the easement that was recorded***

***Craig Larson asks staff if this is an untimely appeal of the variance. Art Traczyk explains. .***

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

***Margaret Fitzgibbons of 1100 Old Stage Road, who is a direct abutter, speaks and indicates that the reason she is here is to question allowing another curb cut on this short stretch of roadway which is extremely dangerous. The reason for this is that it is a non-traffic light intersection where Old Stage, Old Falmouth Road and Race Lane meet. She indicates that it makes for an unusual traffic jam. She has a copy of her curb cut permit if the Board wishes to see it. She has counted that there are 12 curb cuts. She thinks that the traffic does not allow for any further curb cuts. She indicates that the developer of these lots, Mr. Morin, could've addressed this problem with the curb cut and doesn't think they need anymore dangerous curb cuts.***

***Mr. Walsh indicates that he thinks that it makes sense to have the curb cut down from the intersection.***

***Laura Shufelt notes that in the previous decision it is noted that the applicant had no problem with the proposed conditions.***

***William Newton comments he would like more information and indicates that 1283 Old Stage Road was almost immediately built on and to have that shared driveway was not followed and is not sure how it came about.***

***Mrs. Walsh indicates that when they originally looked at the property they did not know there was a driveway issue and was notified after the fact.***

***Alex Rodolakis has reservations on granting relief requested.***

***Brian Florence indicates that he agrees with Alex Rodolakis.***

***Laura Shufelt agrees with both Alex and Brian.***

***Mrs. Walsh asks what the benefit is of one curb cut versus two.***

***Art Traczyk indicates that every time you put a curb cut you increase the occurrence of conflicts and explains.***

***Michael Hersey makes negative findings:***

***He would incorporate by reference the findings of the December 3, 2003 hearing of the Barnstable Zoning Board of Appeals and that there has been no substantial change in the circumstances surrounding when the two lots from December 3, 2002 when the lots were unmerged and the variance was issued. There is no financial hardship in denying the***

*modification and would move that the conditions as laid down on December 3, 2002 for variance 2003-155 stand and not be altered.*

*William Newton makes another finding that in fact when the one curb cut was put in there was agreement by both parties to the location and design*

**Vote:**

**AYE: Alex Rodolakis, Craig Larson, Michael Hersey, William Newton, Laura Shufelt**

**NAY: None**

*Motion is made for modification as presented in 2009-002 for a modification of 2003-155 be denied.*

*Seconded.*

**Vote:**

**AYE: Alex Rodolakis, Craig Larson, Michael Hersey, William Newton, Laura Shufelt**

**NAY: None**

*Michael Hersey states that this be denied as there has been no substantial change in circumstances regarding the lots and no showing of undue hardship on the two lots.*

**Vote:**

**AYE: Alex Rodolakis, Craig Larson, Michael Hersey, William Newton, Laura Shufelt**

**NAY: None**

## **MODIFICATION DENIED**

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*Laura Shufelt then calls the Hirsch appeal and indicates that they received a letter January 6<sup>th</sup> requesting an extension of a continuance to February 11<sup>th</sup> at 7PM*

**Appeal No. 2009-003 - New**

**Hirsch  
Expand/Alter a Nonconforming  
Dwelling**

The continuance is requested to allow for review of the plans for an as-of-right building permit. Copy of Attorney Kirrane's January 6<sup>th</sup> letter and copy of staff's letter of November 14, 2008 enclosed. No report has been completed at this time and no application materials transmitted herein.

Steven Hirsch and Steven Hirsch as Trustee of the 131 Ocean View Realty Trust has petitioned for a Special Permit pursuant to Section 240-92 Nonconforming buildings or structures used as single- and two-family residences. The petitioner is seeking to modify a single family structure with a portion of its reconstruction encroaching into a 10 foot side yard setback though no closer than existing encroachment. The subject property is addressed as 131 Ocean View Avenue, Cotuit, MA and is shown on Assessor's Map 034 as Parcel 060. The subject property is located in a Residence F Zoning District.

***Motion is made to continue this appeal to February 11, 2009 at 7:00 PM.***

***Seconded***

***Vote:***

***AYE: Alex Rodolakis, Craig Larson, Michael Hersey, William Newton, Laura Shufelt***

***NAY: None***

**CONTINUED TO FEBRUARY 11, 2009 at 7:00 PM (at which time the Board will be fully constituted.)**

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***Laura Shufelt then calls the Burke appeal at 7:50 PM. She reads it into the record.***

**Remand Appeal No. 2007-048**

**Burke**

**Remanded for Additional Conditions**

By Agreement for Judgment, the decision issued in Appeal No. 2007-048 by the Zoning Board to Joseph H. Burke, Jr. and F. William Burke for construction and use of a timber stairs for beach access on an accessory lot has been remanded back to the Board for insertion of two additional conditions. The essence of the two added conditions are to restrict the use of the accessory lot to that of beach access only and limit the use to only that land area the Burkes are entitled to use. The principal residential lot is addressed 242 Sea View Avenue, Osterville, MA and is shown on Assessor's Map 138 as parcel 011. The accessory lot is addressed 249 Sea View Avenue, Osterville, MA and is shown on Assessor's Map 138 parcel 034. Both lots are in a Residential F-1 Zoning District.

***Members assigned: Brian Florence, Craig Larson, Michael Hersey, William Newton, Laura Shufelt***

***Joseph H. Burke, Jr. is here representing himself and his brother. He gives a history of how this appeal has gone from application to the ZBA and onto it being appealed. He indicates that they did agree to the conditions and that they would only use the beach for their own use. He indicates that in the original submission to the Board there were pictures if the Board so wishes to view them. He indicates that and it seems that they have all agreed to.***

**Board members have no questions.**

**Darah L. Schofield of Nutter, McClennan & Fish, LLP., who is representing abutters Ms. Morrison and Mr. Jones, indicates that they have come to terms with the Burkes and that she is here in support of the additional conditions.**

**Laura Shufelt asks if there is anyone here from the public who would like to speak either in favor or in opposition. No one else speaks.**

**William Newton makes a motion to make a positive motion to approve the addition of these two extra conditions and would reference appeal 2007-048. The previous conditions that were noted in the original piece and to include within that two additional conditions # 8 and 9 on pages 2 and 3 of the staff's material. William Newton reads #8 AND #9. He would incorporate those to the original findings of fact**

**Mr. Burke suggests for the fact of clarity that the property which has been referenced as Zero Sea View Avenue in the judgment but 249 Sea View Avenue in the zoning appeal is the same and should be added.**

**Seconded.**

**Vote:**

**AYE: Brian Florence, Craig Larson, Michael Hersey, William Newton, Laura Shufelt**

**NAY: None**

**TWO ADDITIONAL CONDITIONS HAVE BEEN ADDED AND SPECIAL PERMIT 2007-048 HAS BEEN GRANTED**

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**Laura Shufelt then calls the Berry appeal and reads it into the record.**

**Special Permit No. 2007-107**

**Berry  
Request for a One-Year Extension**

By letter dated December 19, 2008 from Attorney Eliza Cox, John P. Berry and Margaret D. Berry have requested a one-year extension of Special Permit No. 2007-107 issued January 23, 2008 for the demolition of an existing nonconforming dwelling and rebuilding of a new dwelling maintaining the nonconforming front yard setback. The request is being made pursuant to MGL Chapter 40A, Section 9. The subject lot is addressed 111 Ocean Drive, West Hyannisport, MA and is shown on Assessor's Map 266 as parcel 005. It is in a Residence B Zoning District.

**Members assigned: Alex Rodolakis, Craig Larson, Michael Hersey, William Newton, Laura Shufelt**

**Attorney Eliza Cox is representing the applicants and hands out a copy of "LEXSTAT MASS. ANN. LAWS-CH 40A §9".to the Board members. She gives a summary of the relief being sought. She indicates that she disagrees with the Board not being able to extend the special permit. She indicates that she handed in a copy of Chapter 40A Section 9. She reads a paragraph from that handout. She indicates that the home rule amendment of the Massachusetts constitution states that towns can adopt local bylaws which are not inconsistent or in conflict with the state statute or any law enacted by the general court like chapter 40A, the zoning act. She indicates that on page 2, fourth paragraph it says that "zoning ordinances or bylaws may provide that certain classes of special permits, etc. Now when you contrast that with the language she has highlighted it provides that (in that paragraph) zoning ordinance or bylaws "shall" provide and so that this is not discretionary language and this requires that zoning bylaws adopt this type of language contained in this highlighted paragraph and when the statute mandates that a town adopt certain language, the town cannot deviate from that language otherwise it would be inconsistent with the state statute. In this case, the word "shall" mandates that the zoning bylaws allow for extension of special permits upon showing of good cause. In this case any interpretation of our local zoning bylaw including section 240-125(C)which is the period of validity of special permits, which prevents or prohibits the zoning board from recognizing and granting extensions of special permits upon showing of good cause, is inconsistent with the zoning act and therefore she believes cannot stand or, to put it another way, it is not a matter of what is printed in our zoning bylaw, it would be unlawful to interpret and that section would be void if it were interpreted to prevent this Board from granting extensions upon a showing of good cause. The state statute requires that the language be in zoning bylaws. She disagrees with "allows" in the staff report and refers back to the language of the statute which says "shall". It doesn't allow, it requires that this language be in our local zoning bylaw. She believes there is good cause in this case. She indicates that the Berry's are selling their townhouse in Southborough to utilize the proceeds in order to allow for the reconstruction of the house authorized by the decision. The townhouse has been on the market for over 2 years and, given the current economic climate, they have not been able to sell the house. The Berry's live in Barnstable and have worked here and they are asking for a one year extension and ask the Board's consideration in granting this one year extension.**

**Brian Florence believes that intent of the language is that the special permit granted not be beyond the two year period. He does not disagree that this Board does not have the authority to grant the extension notwithstanding the comments made by Attorney Cox's argument.**

**William Newton comments that he believes that if it says something that you can actually do, you can do it but if it is silent you cannot do that. He is not sure if he is comfortable with changing the ordinance.**

***Attorney Cox indicates that the local zoning act has to be consistent with the State zoning act and this requires that zoning bylaws provide for a set period of time for a special permit but it also provides that it can be extended for a showing of good cause and if you interpret your local bylaw to be inconsistent with that, that section is of your local bylaw is void because it cannot be inconsistent with the State zoning law.***

***Alex Rodolakis comments that the Town had been asked to amend this but did not act on it and indicates that they must've known what the issue is and are bound by what the Town has or hasn't done.***

***Attorney Cox indicates that she is agreeable to continuing this in order for them to get the opinion of the Town Attorney's office.***

***William Newton makes a motion to take a couple of weeks in order for Town Council to weigh in on this and suggests that maybe her clients can pursue a building permit for additional time.***

***Laura Shufelt asks if there is anyone here from the public who would like to speak either in favor or in opposition. No one speaks.***

***Motion to continue this to February 11, 2009 in order for the Town Council to weigh in on this issue as to whether in fact this Board has the ability or not to make a change. Also, allowing Attorney Cox to pursue another way to approach this. .***

***Seconded.***

***Vote:***

***AYE: Alex Rodolakis, Craig Larson, Michael Hersey, William Newton, Laura Shufelt***

***NAY: None***

**CONTINUED TO FEBRUARY 11, 2009 at 7:05 PM.**

***Laura Shufelt indicates that she will take up the minutes from November and December at the next meeting.***

***Motion to adjourn***

***Seconded***

***All in favor***

***Meeting adjourned at 8:18 PM.***

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