



Town of Barnstable Zoning Board of Appeals

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Jo Anne Miller Buntich - Director
Carol Puckett – Administrative Assistant

Minutes November 3, 2010

A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday November 3, 2010 at 7:00 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was met. Also present were Art Traczyk – Principal Planner, Elizabeth Jenkins – Principal Planner, and Carol Puckett – Administrative Assistant.

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

Approval of Minutes from September 15, 2010

Laura Shufelt opens the hearing at 7:03 PM. She indicates that 2002-044 for Jempee will be withdrawn and Comprehensive Permit 2005-014 regarding Mill Pond will be withdrawn. She then calls the McCowan Cotuit Trust & Pelletier appeals and reads them into the record.

7:00 PM Appeal No. 2010-034 – Continued

McCowan Cotuit Trust – 1992 Variance – Bulk Regulations

Opened September 29, 2010, continued to November 3, 2010

No Members assigned. No testimony taken.

Decision Due December 8, 2010 - Extension signed for additional 90 days = March 8, 2011

The McCowan Cotuit Trust – 1992 has applied for a Variance to Section 240-14.E, Bulk Regulations, Minimum Lot Area and Minimum Lot Frontage and Section 240-36 Resource Protection Overlay District. The variance is sought to render the property a buildable lot for a single family dwelling. The subject lot was established in 1961, however, the establishment of the lot did not conform to the zoning requirements for a legally created lot and therefore the applicant seeks to now legalize the lot under zoning. The property is addressed 1372 Main Street, Cotuit, MA and is shown on Assessor’s Map 033 as parcel 046. It is in a Residence F Zoning District.

7:05 PM Appeal No. 2010-045 – New

Pelletier Realty Trust Variance – Bulk Regulations

Pelletier Realty Trust has applied for a Variance to Section 240-14.E, Bulk Regulations, Minimum Lot Area, Minimum Lot Frontage, and Minimum Yard Setbacks, and Section 240-36 Resource Protection Overlay District. The variance is sought to render the existing developed lot a legal lot under zoning. The subject lot was established in 1961, however, the lot did not conform to the zoning requirements for the district and therefore the applicant seeks to now legalize the lot under zoning. The property is addressed 1376 Main Street, Cotuit, MA and is shown on Assessor's Map 033 as parcel 024. It is in a Residence F Zoning District.

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

Attorney Sarah Turano-Flores with Nutter McClennen & Fish is representing both applicants. She indicates that she has condensed some notes and has a color coded plan which she passes out to the Board members. She indicates that in appeal 034 owned by the McCowan Cotuit Trust (Barn Lot) and the house on the house lot, which is parcel B on this 1961 plan, that these structures have been here since at least 1880 and were once part of a larger lot owned by the Morse family. She indicates that Mr. Rick McCowan is present with her tonight.

She indicates that the larger parcel by 1935, a 3.9 acre parcel was carved out it. In a 1961 plan, Mrs. Dunning-Morse had it carved into 3 parcels and never had it approved by any board within the Town nor recorded at the Registry of Deeds. The plan surfaced in 1975 as part of the probate of her estate. In 1968 she wrote a will and how she wanted these lots disposed of upon her death. She wanted the A lot to go to her stepchildren, the B parcel was to go to her niece and the C parcel was to go to three other nieces and nephews. In 1968 and in 1961 when this plan was created, zoning would've rendered these lots conforming as they were in the RD zone and 20,000 square feet of area was required. Mrs. Dunning, however, did not die until 1975 and in 1973 zoning in Barnstable changed to RF and required one acre and frontage increased to 150 feet. She indicates that in 1992 there was a building application filed, an addition was constructed, a permit was pulled on the red house lot (B parcel on the plan) and simultaneous with that was a 3 bedroom septic system which was installed and connected to the barn. Renovations to the barn would've included seasonal bedrooms, a bathroom but no kitchen which were never undertaken and to this day remains unfinished. In 2008, the Pelletier Realty Trust is now owner of the red house lot and the McCowan Cotuit Trust is owner of the barn lot. In 2008, the trustees of the barn lot felt that they should formalize the then current use of the barn lot as a parcel that wasn't going to be developed and decided to approach the Barnstable Conservation Land Trust for a conservation restriction and forgo formal development rights on that property. They had always been taxed as a buildable lot and applied for the restriction with the Town Council. However, one of the Town Councilors questioned the buildability of the lot and determined that there was a serious question about buildability and did not approve the conservation restriction.

In 2009, the Building Commissioner issued two letters stating it was unbuildable. As a result, the McCowan's took the letters to Assessor's who refused to classify it as unbuildable as they felt they needed a denial by the Zoning Board of Appeals. She indicates that it is on appeal to the appellate tax board. She indicates that under infectious invalidity doctrine she may be jeopardizing one of the lots which ¹she

¹ In [zoning law](#), infectious invalidity is a term used to describe a principle where a parcel of land that itself complies with zoning requirements is considered to be in violation of zoning laws because of the circumstances of its creation. The situation arises when a parcel of land is improperly divided into two lots, resulting in one of the new lot conforming to the applicable zoning standards and one lot not conforming. The legal principle is applied resulting in the conforming lot being deemed to be infected because of the illegal condition created on the other lot and the creation of the two lots is deemed invalid. Infectious invalidity affects both zoning and property ownership rights. (From Wikipedia)

explains. They approached the owner of the red house seeking a variance to legalize it under zoning and for it to be lawful as it has been for the last 150 years.

William Newton looks over a memo from her office dated April 10, 2009 and reads part of it. He asks if the lots had merged. Attorney Turano-Flores indicates that a merge for zoning purposes is different from a merge for title purposes. She indicates that those lot lines exist on the ground and on the plan before them and define the lots held by different people but for zoning purposes the zoning doctrine would cause them to see it as merged unless they get a variance and is why there are here to request a variance that the two lots that exist for title purposes can also exist for zoning purposes. William Newton asks what the status is of the lots today. Attorney Turano-Flores indicates that she believes that they are still two separate lots owned by two separate entities but what the Building Inspector is saying is that for zoning purposes they are merged. William Newton asks what the Assessor's office's position is on this. Attorney Turano-Flores indicates that the Assessor's office is correct as seeing it as two separate lots but that they are taxed as two buildable lots. Where she disagrees with the Assessor's office is that determination was made by the Building Commissioner that one of those lots is unbuildable and that the Assessor's office refuses to change one of them to unbuildable until they get a variance denied by the Zoning Board of Appeals.

Craig Larson clarifies that they are merged for zoning purposes and that the request tonight is that parcel C is unbuildable.

Brian Florence asks what will happen with parcel C. Attorney Turano-Flores indicates that the current trustees propose to use it as it has always been used which is for storage, a playhouse for the children and where family members will sleep. She indicates that it is unfinished and that the goal is to keep it in the family. Brian Florence comments that what she is asking to do is have an accessory structure on a separate lot that will continue to be used as an accessory structure but which will no longer be an accessory structure to a principal dwelling.

They discuss nonconforming use versus nonconforming structure.

Attorney Turano-Flores indicates that Art Traczyk had recommended having an ANR plan with a notation on it indicating that the C lot would be unbuildable. Craig Larson comments that the use would not be legal.

Laura Shufelt asks since it was not recorded under zoning how do they propose to meet conditions for a variance and comments that she believes it is a self-imposed hardship. Attorney Turano-Flores comments that she is not sure that is true and that it was recorded upstairs at the Registry of Deeds instead of downstairs and the hardship is a result of it being recorded at the wrong place. Art Traczyk indicates that in 1962 the subdivision control law came into effect in Barnstable and that the will was done in 1968.

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

John Riordan of 307 Ocean View Avenue in Cotuit speaks and indicates he had written a letter in opposition but thinks they he would now support it and that property has been used almost forever as is. He indicates that he would have an objection if it were to be a buildable lot given the number of drives on a short distance of land. William Newton asks if he has any objections if it were to be merged. Mr. Riordan indicates no and has owned the property since 1992 the property has been used as described.

The Board discusses.

Attorney Turano-Flores thinks they could continue this and will bring the question of merger to the four individuals and decide where to go from there. One of the options might be to seek two variances.

George Zevitas asks if when they went to ConComm if they went with the idea that it was buildable. Attorney Turano-Flores indicates that they did.

Art Traczyk comments that in regards to the 1993 building permit, it was for the house lot and issued as an accessory.

Motion is made by Brian Florence to continue both appeals to December 1, 2010 at 7:35

William Newton seconds

Vote:

AYE: ALL IN FAVOR

NAY: None

CONTINUED TO DECEMBER 1, 2010 at 7:35 PM

Laura Shufelt then reads the Jempee Enterprises appeal and states that they have a letter for Jempee Enterprises from Attorney David Lawler requesting to withdraw without prejudice.

7:15 PM Appeal No. 2010-044 - New

**Jempee Enterprises, Inc.
Conditional Uses in the Highway Business**

Jempee Enterprises, Inc., lessee, d/b/a Subway Restaurant, has applied for a Special Permit pursuant to Section 240-25.C, Conditional Uses in the Highway Business Zoning District. The conditional use special permit is sought to allow a food service establishment in Units 5 and 6 of the Centerville Plaza. The property is located at 1661 Falmouth Road, Centerville, MA as shown on Assessor's Map 209 as parcel 087-001. It is in a Highway Business Zoning District.

Laura Shufelt indicates that a letter has been submitted from Attorney David Lawler who is representing the applicant, asking to withdraw without prejudice.

Motion is made by Laura Shufelt to withdraw without prejudice

Brian Florence seconds

Vote:

All in favor.

WITHDRAWN WITHOUT PREJUDICE

At 8:00 Laura Shufelt calls the Doherty appeal and reads it into the record:

7:20 PM Appeal No. 2010-046 - New

**Doherty
Bulk Variance for a Shed**

Theodore L. Doherty & Christine S. Doherty as Trustees of the Doherty Family Trust have applied for a Variance to Section 240-14.E, Bulk Regulations, Minimum Yard Setbacks. The applicants are requesting a variance from the required 15-foot side and rear setbacks to allow construction of a 10 X 12 foot shed 6.8 feet off the rear property line and 3.9 feet off the side property line. The property is located at 97 Castlewood Circle, Hyannis, MA as shown on Assessor's Map 273 as parcel 053. It is in a Residence C-1 Zoning District.

Craig Larson recuses himself.

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

Laura Shufelt explains to Mr. & Mrs. Doherty that there is only a four member Board and that a vote must be unanimous. The applicants request a continuance in order to have a full Board.

Motion is made by Brian Florence to continue to December 1, 2010 at 7:40 PM

Seconded by William Newton

Vote:

All in favor

CONTINUED TO DECEMBER 1, 2010 at 7:40 PM

At 8:03, Laura calls the Mill Pond Estates, reads it into the record and indicates that there is a letter from Attorney John Kenney asking to withdrawn this appeal

7:30 PM Comprehensive Permit No. 2005-013

**Mill Pond Estates - Starboard, LLC
Minor Modification Request**

By letter submitted from Attorney John W. Kenney dated October 26, 2010, Brian T. Dacey, Trustee of Osterville Landing Trust is seeking the Boards approval for the transfer of Comprehensive Permit No. 2005-013 "Mill Pond Estates" issued to Starboard, LLC., to Osterville Landing Trust LLC, a limited dividend organization. Comprehensive Permit No. 2005-013 granted 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. This modification is being submitted as a minor modification as provided for pursuant to 760 CMR Section 56.05(11).

Motion is made by William Newton and seconded by Brian Florence to withdraw their request before the Board.

Vote:

All in favor

WITHDRAWN

At 8:05 PM Laura Shufelt calls the Oyster Harbors Club appeal and reads it into the record:

7:35 P.M. Appeal No. 2010-043 - Continued

**Oyster Harbors Club, Inc.
Alteration & Expand Nonconforming Use**

Opened October 27, 2010, continued to November 3, 2010 - Continued to allow time for abutting neighbor to seek representation and summarize concerns.

Members assigned; Michael P. Hersey, Craig G. Larson, Alex M. Rodolakis, George T. Zevitas, Laura F. Shufelt - Associate Present; Brian Florence,

Decision Due: January 25, 2011

Oyster Harbors Club, Inc., has petitioned for a Special Permit pursuant to Section 240-93.B, Alteration and Expansion of a Nonconforming Buildings or Structures Not Used as Single- or Two-Family Dwelling, and Section 240-94.B, Expansion of a Pre-existing Nonconforming Use. The petitioner seeks to demolish an existing 571 square foot children's play center and to reconstruct a larger, two-story structure of 2,506 square feet for the play center. The building and use is accessory to the principal nonconforming use of the property as a club house. The property is addressed 170 Grand Island Drive, Osterville, MA and is shown on Assessor's map 053 as parcel 012-001. It is in a Residence F-1 Zoning District.

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

Attorney Murphy is here and asks for a 10 minute recess to negotiate with an abutter and her representative.

At 8:30 they come back from recess.

Attorney Murphy asks that this be continued as they are still trying to work out negotiations with an abutter.

Motion to continue this to December 1, 2010 at 7:45 is made by Laura Shufelt

Seconded by Brian Florence

Vote:

All in favor

CONTINUED TO DECEMBER 1, 2010 AT 7:45 PM

Brian Florence makes motion to adjourn.

Seconded by Craig Larson

Vote:

All in favor