



Town of Barnstable Zoning Board of Appeals



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Anna Brigham – Principal Planner – anna.brigham@town.barnstable.ma.us
Carol Puckett – Administrative Assistant – carol.puckett@town.barnstable.ma.us

Minutes

Wednesday, May 10, 2017

Hearing Room – 2nd Floor – 367 Main Street, Hyannis, MA

Brian Florence - Chair	Absent
Alex Rodolakis - Vice Chair	Present
David Hirsch	Present
Herbert Bodensiek	Present
Robin Young	Present
Matthew Levesque	Present
Spencer Aaltonen	Present
Jacob Dewey	Present

Also present were Anna Brigham – Principal Planner and Carol Puckett – Administrative Assistant

As a quorum has been met Alex Rodolakis opens the hearing

Call to Order

Introduction of Board Members - *All members present introduce themselves*

Alex Rodolakis reads the following with no response:

Notice of Recording

Please note that this meeting is recorded and broadcast on Channel 18 an in accordance with MGL Chapter 30A §20. I must inquire whether anyone is taping this meeting and to please make their presence known.

Election of Officers

Tabled until May 24th

Alex reads the following into the record:

7:00 PM Appeal No. 2017-034

Topalski

Gencho M. Topalski, as lessee, has applied for a Special Permit pursuant to Section 240-25(C)(1) – Conditional Uses in the Highway Business (HB) Zoning District. The applicant is proposing to use the premises (Store #6) for purposes of a retail business. The subject property is located at 1652 Falmouth Road, Centerville, MA as shown on Assessor’s Map 209 as Parcel 113. It is located in the Highway Business (HB) Zoning District.

Members assigned tonight: Alex Rodolakis, David Hirsch, Herbert Bodensiek, Robin Young, Matt Levesque

Representative: Phil Boudreau, Esq. Alex Rodolakis discloses that he has been involved in matters with Attorney Boudreau and asks if anyone would have a problem with him sitting on this. No one has a problem.

Phil Boudreau is here with Mr. Topalski to ask for relief to allow the use of the vacant unit for pet food and specialty supplies. The use is allowed by obtaining a conditional use special permit. He states that this would not be a substantial detriment as there are other retail stores in the plaza. It will be a small use and low intensity. He states that the staff report cites the history but that in 1984-84, there is question as to whether it was approved or appealed. He states that it was approved and not appealed. With permission he asks to hand in a copy of the

decision (**Exhibit A**). He states that there was confusion about a curb cut or cuts being closed. The way the decision reads, curb cuts 2 and 3 heading east shall be closed. He states that there were 2 curb cuts closed. He shows an aerial photo (**Exhibit B**). He states that there was a typo under conditions in the staff report and states that it should read pet food and supplies.

Questions from the board

Matt asks Anna Brigham if she is satisfied with the paperwork Attorney Boudreau has handed in. Anna Brigham is comfortable with the information and states that she had a conversation prior to the hearing with Attorney Boudreau. Alex asks about signage. Attorney Boudreau states that it will be in accordance with the ordinance.

Alex Rodolakis asks for public comment. No one speaks.

Matt makes findings:

Special Permit Findings

1. In Application No. 2017-034, Gencho M. Topalski, as lessee, has sought a Special Permit pursuant to Section 240-25.C(1) – Conditional Uses in the Highway Business (HB) Zoning District. The petitioner seeks to establish a retail business in the existing Unit #6 at the Centerville Shopping Plaza.
2. The property is located at 1652 Falmouth Road, Centerville, MA, as shown on Assessor’s Map 209 as Parcel 013.
3. Section 240-25(C)(1) of the Zoning Ordinance allows any use permitted in the B District with a Conditional Use Special Permit. Retail and wholesale stores and salesrooms, retail trade services and shops, and any other business uses of a similar nature are permitted in the HB District with a special permit from this Board.
4. After an evaluation of all the evidence presented, the proposal fulfills the spirit and intent of the Zoning Ordinance and would not represent a substantial detriment to the public good or the neighborhood affected.
5. The proposed use of the property will not substantially adversely affect the public health, safety, welfare, comfort or convenience of the community.

Vote:

All in favor

Anna wants to add another condition that a Site Plan Review (SPR) letter was submitted which approved this project.

Amendment accepted

Vote:

All in favor

Matt Levesque makes a motion to grant the relief being sought with the following conditions with an amendment that in Condition #1 it will be to establish a retail pet food and supply business:

Conditions

1. Special Permit No. 2017-034 is granted to Gencho M. Topalski, as lessee, pursuant to Section 240-25.C(1) – Conditional Uses in the Highway Business (HB) Zoning District. The petitioner seeks to establish a retail pet food business in Unit #6 at the Centerville Shopping Plaza. The property is located at 1652 Falmouth Road, Centerville, MA as shown on Assessor’s Map 209 as Parcel 113.
2. The improvements shall be in substantial conformance with the site plan entitled “Site Plan for the Centerville Shopping Center 1620-72 Falmouth Road, Barnstable (Centerville) Mass. By Sullivan Engineering dated February 25, 2009, and the plan entitled, “Alterations & Additions Centerville Shopping Center by Aiger and Quinn, architects, dated May 31, 1984.
3. The Applicant shall comply with all conditions of the March 29, 2017 Site Plan Approval; these conditions shall be incorporated as conditions of this Special Permit.
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 issuance building permit. The rights authorized by this special permit must be exercised within two years, unless extended.

Seconded by David Hirsch

Vote:

All in favor

GRANTED WITH CONDITIONS

Alex reads the following into the record:

7:01 PM Appeal No. 2017-020

Parrella

Cynthia Parrella has applied for a Special Permit pursuant to Section 240-91.H(3) Nonconforming Lot - Developed Lot Protection. The applicant is proposing to demolish an existing 1,313 square foot dwelling and construct a new 2,248 square foot, three-bedroom single-family dwelling with a one-car garage on a developed lot that contains less than 10,000 square feet. The proposed structure will not be in compliance with current zoning setback requirements but will be more conforming than the existing structure. The property is located at 109 First Avenue, Osterville, MA as shown on Assessor's Map 116 as Parcel 043. It is located in the Residence C and Resource Protection Overlay Zoning Districts.

Decision Due: 07-11-17

Continued from April 12, 2017. Members assigned 04-12-17: Brian Florence, Herbert Bodensiek, Jake Dewey, Alex Rodolakis, Matthew Levesque

Members assigned tonight: Alex Rodolakis, Herbert Bodensiek, Matt Levesque, Jake Dewey

Attorney Boudreau states that they would like to Withdraw without Prejudice

Motion to Withdraw without Prejudice is made by Alex Rodolakis and seconded by Matt Levesque.

Vote:

All in favor

WITHDRAWN WITHOUT PREJUDICE

7:03 PM Appeal No. 2017-014

Centerville Village Apartments Realty Trust

Adam J. Hostetter and Kristen Williams Haseotes, Trustees of the Centerville Village Apartments Realty Trust have applied for Special Permits pursuant to §240-93(B) Nonconforming Buildings or Structures not used as single or two-family dwellings and §240-94(B) Expansion of a Preexisting Nonconforming Use. The Applicant seeks to expand the preexisting nonconforming multi-family residential use on the property. The proposal is to relocate and preserve the existing filling station building on the property; demolish the remainder of the structures; and construct nine single-family dwellings (four two-bedroom units and five one-bedroom units). The property is located at 981 Main Street, Osterville, MA as shown on Assessor's Map 117 as Parcels 026 and 178. It is located in the Residence C and Wellhead Protection Overlay Zoning Districts

Original Decision Due: 06-06-17. Time Extension: New Date for Decision Due: 07-06-17

Continued from March 8th, March 22, 2017 and April 12, 2017. No members assigned. No testimony taken.

Correspondence received 04-25-17 asking to continue to May 24, 2017 with the new application Appeal No. 2017-038

Alex Rodolakis states that a letter has been received from Attorney Michael Schulz asking to continue this matter to May 24, 2017.

Motion is made by David Hirsch and seconded by Matt Levesque to continue this matter to May 24, 2017 at 7:00 pm.

Vote:

All in favor

CONTINUED TO MAY 24, 2017 AT 7:00 PM

Alex reads the following into the record:

Old Business

7:00 PM Appeal No. 2017-008

Glick

Marvin and Diane Glick are appealing the Building Commissioner's constructive denial of a request for zoning enforcement. The Appellants seek enforcement of a zoning violation on 305 Baxters Neck Road, specifically the construction of a retaining wall inside of the zoning setback area adjacent to the Glick property located at 285 Baxters Neck Road. The appeal is filed pursuant to Massachusetts General Law 40A Section 7, citing Sections 240-123 (enforcement), 240-14 (RF Zoning District) and 240-128 (Definitions) of the Zoning Ordinance. The property that is the subject of this appeal is located at 305 Baxters Neck Road, Marstons Mills, MA as shown on Assessor's Map 075 as Parcel 009. It is located in the Residence F (RF) Zoning District.

Continued from February 22, 2017. No members assigned. No testimony taken. Time Extension: New Date for Decision Due: 05-30-17. Pending Time Extension:

New Date for Decision Due: 06-29-17

Continued from March 22, 2017. Members assigned: Alex Rodolakis, Herbert Bodensiek, Matthew Levesque, Spencer Aaltonen, Jacob Dewey. Continued from April 26, 2017.

Members assigned tonight: Alex Rodolakis, Herbert Bodensiek, Matt Levesque, Spencer Aaltonen, Jake Dewey.

Attorney Gene Guimond is here tonight with Marvin Glick. He reports that the owners (of 305 Baxters Neck Road) have not applied for the building permit that was discussed at the last hearing with the ZBA as directed by the Building Department. Also, the property owner did not appeal the letter of that building inspector. As for the matrix that other counsel provided regarding other properties in the town with retaining walls, he notes that some of these permits were in other zoning districts where the setbacks differ however, all of them were required to obtain a separate building permit. There has been additional evidence that there has been an added block wall which has extended beyond this retaining wall and a six (6) foot high fence on top of this fourteen foot high retaining wall. From their view, not only do they have a fourteen foot high spite wall but now a six foot high spite fence on top of that and a structure that is creating a nuisance on a daily basis. They are requesting that the temporary CO's issued by the Building Department be rescinded because the Building Inspector said they would only be issued if the property owner applied for a permit. They would also like enforcement of the zoning ordinance to require

that a building permit be applied for and also that a variance be applied for any portion of the wall that falls within the fifteen (15) foot side yard setback.

Alex is not sure that the issue of the temporary CO's is before this board. Attorney Guimond states that the issue of the temporary CO's was taken from the decision letter from the Building Inspector that was related to them at their request for enforcement action.

Attorney Guimond states that it appears to be a continuing project and does not have what the final wall will look like. Attorney Guimond doesn't believe that the permit issued relates to the retaining wall and that they would need a separate permit for the wall.

Alex asks for comment from the owners. Attorney Sarah Turano-Flores is representing the owners of 305 Baxter Neck Road. She states that there are two issues: first, whether this is a timely appeal and secondly if the wall must meet the setback requirements. She states that the Glicks were aware of the retaining wall as of mid-November. She also states that at the last hearing, this board had questioned whether the building permit application materials contained sufficient notice that, had the Glick's decided to open up the building permit application and look at it, would have given the adequate notice required by case law to know what the wall was going to look like and take that appeal within the thirty (30) days. They have submitted the site plans as well as the cross sections showing this wall (**Exhibit A**). The wall shows up on no less than four (4) plans. She states that at the time of the building permit application, these plans were acknowledged by; and in the appellants counsel materials, and there was sufficient information showing a wall of this height as early as October 2015. No appeal was taken within that thirty (30) day period. In December of 2015, the Schwinn's contractor sent the Glick's a full set of plans via email and still no appeal. The wall was constructed in February of 2015 and there were numerous emails from them. In May of 2015, when the Glick's returned from the winter, they drew attention to the contractor and began making comments to the various town departments and yet made no appeal. In December of 2016 a letter was written appealing the issuance of the building permit. Case law is clear that concerned property owners have a strict statute of limitations of thirty (30) days. Requiring the wall to be taken out would be catastrophic to her clients. She urges the board to dismiss this as it is untimely.

Second issue is compliance. She states that they have additional information that this wall is compliant with the zoning bylaw as interpreted by the town. She states that the building code requires that anytime you have a retaining wall over four (4) feet tall that holds back unconsolidated soil; it requires a building permit application. She states that they have (one) building permit for the house and the wall and that a retaining wall doesn't need a separate building permit, just a building permit which they have. She refers to a report of retaining walls with permits within the Town which she conducted. She states that she also has spoken with former Building Commissioner, Tom Perry, would give permission to quote him tonight, in saying that in the past, they had never required a separate permit for a retaining wall and if this board interprets anything different from the current practice, it would require a change in the ordinance. She has photos from when the Conservation Commission visited the site and took pictures (**Exhibit B**).

Alex asks Attorney Guimond to go over the history as to when his clients were noticed. He thinks that if you look at the distance of the wall that is provided in the original application that it is shorter than the wall that was actually built and was shown on follow-up plans for the pool. Attorney Guimond thinks that the valuation of the wall is not on the building permit and thinks that it needed the second permit. They want the walls that are not in compliance with the 15 foot setback be removed or relocated.

Alex opens for public comment. No one speaks.

Attorney Guimond states that the appellant would like to speak. Marvin Glick lives at 285 Baxter Neck Road and has been there for approximately 20 years. His understanding was that the Schwinn's purchased the property, had two other houses on the bay, and wanted to knock this house down after owning it for 10 years. The land at the lot line was level, the same height just a small incline. In December of 2015, Mr. Schwinn contacted him to let him know that he would be building a house and asked about putting up a fence. A few months later Mr. Schwinn contacted him saying that his builder would be getting in touch with him about permission to trespass on his property in order to construct a wall. He asked Mr. Schwinn to explain. Mr. Schwinn told him that he wanted to put in some construction walls because they needed more room on the side of the property facing Mr. Glick. Mr. Glick asked him why he needed the room since he had approximately ten acres of land and suggested he shift the placing of the house instead. A couple of months later, Mr. Schwinn's contractor called him asking permission to trespass on his property in order to excavate and put footings on Mr. Schwinn's property. Mr. Glick was then emailed the plans when he was in Florida and sent back an email denying permission to use his property for any purpose.

At that point they weren't sure if he was building his house or not but had just sent the email not consenting to the use of the wall. When they came home from Florida they saw the large retaining wall and were told by Mr. Schwinn who put him in touch with his builder and was told it was approved by the Town and the Conservation Commission (ConComm). Mr. Glick was told by the builder that he would've been notified by ConComm by mail about their intention to build the wall. Mr. Glick then went to the Conservation Commission who pulled the file and was told that the wall was not under their purview since it was outside of the 100 foot line and that the Schwinn's did not apply to them for this wall. He then went back to Mr. Schwinn and the builder and told them that the plan to build the wall was not submitted to ConComm and then was told that it was approved by the Town. He states that the wall is 14' high, no drainage, only pvc pipe. He also contacted OSHA stating that it was unsafe and that fencing was needed for safety purposes. OSHA then came down and instructed the Schwinn's that they needed the fencing. He states that the Schwinn's didn't need to elevate the lot and that there was no need to put the house close to the property line. He feels it was done voluntarily putting the house there, the wall was not necessary.

Attorney Turano-Flores states that the Schwinn's had a different account and thinks that there is a vast difference.

The board deliberates. They discuss the two prong test about timely appeals and then about making a decision.

Glick states that they didn't know that they applied for a permit because it is not a requirement to notify abutters. They knew in December after the permit was pulled in November.

The board discusses.

Alex asks for vote on jurisdictional issue:

Motion is made by Alex Rodolakis whether or not the objection to the retaining wall should have been raised with the issuance of the building permit for the single family was timely.

Vote that this was not filed timely: Herb Bodensiek, Matthew Levesque, Jake Dewey

Vote that it was filed timely: Alex Rodolakis, Spencer Aaltonen

Alex clarifies that the board has voted not to overturn the Building Commissioner's decision therefore this appeal is denied.

Alex calls the Bornstein appeal and reads it into the record:

7:01 PM Appeal No. 2017-036

Bornstein

Stuart Bornstein has petitioned for a variance from Section 240-24(B)(1)(b) to allow apartments on the first floor of two existing buildings. The petitioner is proposing to convert the buildings from commercial use to apartments on the first and second floors. Apartments are a permitted accessory use in the VB-A District when located above the first floor only. The subject property is located at 3821 Falmouth Road, Buildings 1 and 9, Marstons Mills, MA as shown on Assessor's Map 057 as Parcel 004. It is located in the Village Business A Zoning District.

Members assigned: Alex Rodolakis, David Hirsch, Herbert Bodensiek, Robin Young, Spencer Aaltonen

Stuart Bornstein is here representing himself and gives summary of what he is intending to do. They will not be changing the design, they have more parking than they need, and is proposing to make 2, 1 bedroom apartments. The other building (#9) has 2, 2 bedrooms, no structural changes except for the emergency egress on the outside. The only issue he found out today is that #1 needs a septic inspection and will be done some time next week and asks if they approve both pending the septic inspection report on building #9. This will be energy efficient units.

Anna Brigham states that they have not received Site Plan Approval as of yet. Bornstein states that it was because of septic approval on #9 and found that they needed it on #1. He also states that it a state of the art system. Alex asks if he has seen the staff report. Bornstein is not sure. He is given a copy of the staff report. Alex asks him to explain the 3 prong test. He states that it is an irregular shaped complex. As for #2 of the 3 prong test, building #9 has been empty for 4 years and building #1 has had financial problems. He also states that there are almost no apartments in the Cotuit and Marstons Mills area.

Alex asks for public comment.

Robert Marx, 1065 Old Putnam, has concerns and states that during the Dunkin Donuts renovation, there was a lot of noise and that traffic is worse especially during the weekends. During the renovations his concerns would be dumpsters, parking for the trucks and trash removal and noise.

Mr. Bornstein states that his concerns are valid about the dumpsters, and as far as trash, they will not be doing anything to the outside, only to the inside and probably will only be there two weeks during renovations and doesn't envision a lot of trucks for construction as it will be interior. They will be painting the buildings and can keep the dumpsters close to the Route 28 side and will address his concerns. All trucks during construction will be on site.

Patrick McNamara of 30 Frazier Way asks for clarification of where the renovations will take place. Mr. Bornstein explains. He thinks this should stay as a business complex and is more in favor of not converting it because of the noise aspects with tenants.

Herbert Bodensiek asks if there are any other residential units. Mr. Bornstein states that there isn't any but there is a big demand for the apartments on the back and that the traffic would be less than a commercial use.

Jake asks Mr. Bornstein to readdress the first of the 3 prong test.

David Hirsch makes findings:

Proposal & Relief Requested

The Petitioner is seeking a Variance to allow for apartments to be located on the first floor of building No. 1 and No. 9. Specifically the Petitioner is seeking one 1-bedroom and two 2-bedrooms in Building #1, and two 2-bedrooms in Building No. 9. Section 240-24 (B) (1) (b) only allows for apartments above the first floor.

Variance Findings

The statutory requirement of MGL Chapter 40A, Section 10 for granting a variance is a three-prong test. The Board is required to find that each of the following three requirements has been met in order to consider granting the variance:

1. 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;
2. a literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner; and
3. 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.

An application for a variance that has met all three requirements “does not confer ... any legal right to a variance.” The Board still has the discretionary power to grant or not to grant the variance.

Alex Rodolakis asks David Hirsh to accept an amendment as it pertains to the three-prong test. As, Mr. Bornstein stated that the unique shape of the complex applies to #1 of the test, David Hirsch states that as for #2, the financial hardship has been that one store has been empty for three to four years and had had three tenants in that period of time. As for #3, David Hirsch does not feel that is going to affect the public good considering there is plenty of parking and doesn't find that the apartments will create noise to disturb the neighborhood.

Vote:
All in favor

Variance Conditions

1. Variance No. 2017-036 is granted from Section 240-24 (B) (1) (b) to Stuart Bornstein owner of 3821 Falmouth Road, Marstons Mills, MA for relief from the restriction that apartments must be located above the first floor only.
2. The improvements shall be in substantial conformance with the site plan entitled “As Built Plan prepared for Holly Management located at Windmill Square 3821 Falmouth Road, Marstons Mills, Mass” prepared by JC Engineering, Inc, dated July, year illegible.
3. This construction shall represent full build-out of the lot. Any additional increase in building coverage or gross square footage or use shall be prohibited without prior approval of this Board.
4. This 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 issuance of a building permit. The rights authorized by this variance must be exercised within one year, unless extended.

David would like to add:

5. *Pending septic inspection for granting a Site Plan Approval (nothing could proceed until the septic inspection was complete and until they receive a Site Plan Approval)*

Alex would like to add:

6. *No work or other trucks parked on Old Putnam Road during the construction project*
7. *The dumpster shall not remain on the Old Putnam Road side*

Seconded by Herbert Bodensiek

Vote:
All in favor

GRANTED WITH CONDITIONS

Correspondence

Matters Not Reasonably Anticipated by the Chair

Upcoming Meetings

May 24th, June 14th, June 28, 2017

Adjournment

Motion is made by Spencer Aaltonen and seconded by Herbert Bodensiek to adjourn.

Vote:

All in favor

Approved