



Town of Barnstable
Zoning Board of Appeals
Minutes
April 28, 2010

A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday April 28, 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, JoAnne Miller Buntich - Director, Growth Management, and Carol Puckett – Administrative Assistant.

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

Laura Shufelt opens the hearing at 7:03 PM. She reads a summary of the appeals being heard tonight.

She then calls the Reed appeal and reads it into the record.

Appeal No. 2010-009 - New

**Reed
Appeal of the Building Commissioner**

Carol Anne Reed has appealed the Building Commissioner's February 12, 2010 denial of a building permit to construct a single family dwelling on a lot addressed as 1175 Shootflying Hill Road, Centerville, MA. The appeal is being made pursuant to Section 8 of MGL Chapter 40A and is requesting that the Board overrule the Commissioner and find that the lot is a legally-created, pre-existing undersized nonconforming lot that is independently buildable. The subject property is shown on Map 190 as parcel 218, and addressed 1175 Shootflying Hill Road, Centerville, MA. The lot is in a Residence D-1 and Residence C Zoning District and in the Resource Protection Overlay District.

Members assigned: James McGillen, Michael Hersey, Craig Larson, William Newton, Laura Shufelt

Attorney Duane Landreth is representing the applicant. He is expecting Ms. Reed to arrive soon. He hands in two exhibits; one is the Assessor's Map showing the subject property highlighted and the other a copy of the ANR plan. He gives a brief description of the lot and that it was created and endorsed by the Planning Board in October 2, 1975 for the then owner Barbara Newton. He gives the Book and Page numbers. When the Planning Board endorsed the plan, the requirements in that district for that lot area were 21,700 plus feet and RC required 15,000 square feet. It had the necessary width and no frontage was required but later on it was a 20 foot requirement which was imposed which this lot has. At the time it was endorsed on the ANR it was a conforming lot. He indicates that it was worth noting that the staff comments seem to draw a distinction between lots that were created by a subdivision plan and those created by an ANR plan as outlined on Page 3 of the Staff Report. There is one distinction, an approved subdivision lot because they have to comply with the zoning bylaw at the time of endorsement of approval, and roads and utilities require substantial amount of investment. Under 40A §6, those lots are protected from any zoning change for a period of 8 years. With regard to an ANR plan they only plan freeze that you get is the 3 year use protection and they are not relying upon anything which relates to how this lot was created. He indicates that the dimensional requirement to 1 acre was passed on February 23, 1985 with frontage requirements which Lot #11 still meets. It became nonconforming at that time because it was undersized. At that time Lot #1 on the ANR plan was approved with a single family house which the Assessor's card said was built in 1900. The lot directly to the east, which is 460 Old Stage Road, was built with a single family house which the Assessor's card indicates both were built in 1900. He wants to address staff report on page 3 about a 1977 ordinance change about lots with less than 50 feet of frontage which comply with shape factor shall not be created from the principal way to a depth greater than two lots. He indicates that the staff report argues that since Lot #11 is three lots deep that the 1977 bylaw made it undevelopable and thinks that this is wrong on the plain language of the bylaw which is perspective and applies to lots created after 1977 and this was created in 1976. He gives a definition of "created" from Webster's dictionary and this lot was in existence before 1977 and doesn't think this has any application. He hands in copies of the bylaw and reads it. He indicates that the ANR plan was endorsed two months before January 1, 1976 it conforms. He reads 240-91. and indicates that what this means is that when the bylaw was changed on February 23, 1985, Lot #11 had to be severed from common ownership before February 23, 1990 which was the five year period. In the present case, Ms. Newton conveyed Lot #11 to another person in June 1989 within the five year period. At that point Lot #11 became a protected lot. As to the later RPOD bylaw requirement, Lot #11 would have the benefit of the piggy back clause, essentially 240-91.G, Section 1.6 which says it is protected by 91.B and C. which that provision doesn't apply. The staff memo makes reference to a case on Page 5 which was a summary judgment reconsideration from Judge O'Neill from Barnstable Superior Court but it dealt with that part of subsection C of 91 that said "or the building of a residence" which he believes concerns a different set of facts, He quotes Jude O'Neill. He indicates that there is no way this case can apply.

James McGillen asks " Is 460 Old Stage Road not an adjoining lot:"

Attorney Landreth answers yes and thinks that 91C applies to unbuilt lots.

James McGillen thinks they have 4 lots here. His opinion is that there are 4 adjoining lots and that 91 would not apply.

William Newton asks about subdivision with staff to get an understanding whether he is correct in his assumption.

Attorney Landreth explains that the Building Commissioner denied the permit. Also, he indicates that he went to the Town Attorney and shared the draft letter, was sent in the direction of another case which he thought had no applicability.

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

Leslie Walters (Schreiter) owns an abutting property. She indicates that if a home is built her concern is regarding sewerage as her home is on the bottom on a steep hill. She indicates that she has a copy of the site and sewerage plan.

Laura Shufelt comments that right now they are discussing the denial of the building permit.

JoAnne Buntich comments that they are just here for the matter of law and they understand her concerns and explains that she could go to the Board of Health and the Building Department.

John Newton of 1171 Shootflying Hill Road is an abutter to this property and one of the former owners of this lot and wants to speak in favor of this appeal. He indicates that there are no other lots in this area that are as large as this and wants to point out that the Town has put a burden as it is assessed at full market value for several years. He received an abatement one year but denied the following year.

Craig Larson wants to clarify with Attorney Landreth that on October 15, 2008 his client took title to Lot #11, Lot #1 and 464 Old Stage Road. Attorney Landreth answers yes. Craig Larson asks if he's saying those weren't in common ownership at that time. Attorney Landreth indicates that the rights vested at the time and under the time the application vested in 1989 when the lots went into separate ownership and a later transfer of the property did not cause a merger. Craig Larson asks if there is a structure on 480 Old Stage Road. Attorney Landreth answers yes and that the Assessor's map shows the structure. Craig Larson asks if it is habitable and if anyone is living there currently. Attorney Landreth indicates he doesn't believe anyone is living there and is asked if it is abandoned. Attorney Landreth indicates that it is owned in common ownership with the owner of Lot #1 and the property is not abandoned but currently not inhabited. Craig Larson asks if what Attorney Landreth is saying is that the vesting rights aren't distinguished when the lots are remerged. Attorney Landreth answers yes and that his position is that after the recombination of the lots it did not affect the merger.

William Newton comments that he is not moved to make a decision on this at this time.

Attorney Lndreth indicates that his client would be willing to have a continuance and asks for a continuance for guidance on this to allow either an amended application or one that could be consolidated with this one.

Art Traczyk indicates that they would need one month and that the Town Attorney's office is very busy.

Art Traczyk suggests July 14th.

Laura Shufelt makes a motion is made to continue to July 14, 2010 at 7:00 PM.

Seconded

Vote:

All in favor

CONTINUED TO JULY 14, 2010 AT 7:00 PM

Laura Shufelt then calls the Sousa appeal and reads it into the record:

Joseph J. Sousa and Lorraine A. Sousa have applied for a Modification of Special Permit No. 1990-031 issued to Marathon Enterprise, Inc., for a conditional use of a convenience store and to alter a nonconforming use of a gas station. The modification is sought to alter the area upon which the special permit applies from a 7.88-acre lot to a new lot of 1.86 acres. The new lot is shown as Parcel 1 on a plan submitted. The subject property is shown on Assessor's Map 290 as parcel 101-001, addressed 125 West Main Street, Hyannis, MA. It is in the Highway Business and Residence B Zoning Districts.

Members assigned: James McGillen, Craig Larson, Michael Hersey, William Newton, Laura Shufelt

Attorney Michael Ford is representing the applicants. Attorney Ford indicates that this is a technical request and that in 1990, a special permit was issued for the entire acreage for the gas station and retail store. There were findings with respect to the nonconforming nature of the gas station. They are seeking the special permit to be attached to a new lot (lot #1) instead of to the whole parcel. There was some question if a modification was needed but given the language regarding the entire parcel, it was needed. He lists the zoning districts (3) which the parcel is located in. He indicates that the whole parcel is located in the Wellhead Overlay Protection area that makes it nonconforming. Parcel one meets dimensional requirements and coverage and use requirements. They seek no modification of the conditions and they have no problems with recording the ANR plan.

Laura Shufelt comments that there are monitoring wells from the gas station and asks if any of them will be on parcel #2

Attorney Ford doesn't know the answer to that question as to whether all the monitoring wells are on parcel #1. Attorney Ford would suggest that currently the property is under one ownership and if the Board requires that the monitoring wells, if they exist off-site and are necessary for monitoring the gas station on parcel #1, that they be permitted to continue on parcel #2 and doesn't think it is a condition that would not be problematic.

Laura Shufelt asks that if there was any monitoring that would have to happen that the cost would be borne by whoever was the owner of parcel #1. Attorney Ford answers yes, to the extent that monitoring is required.

James McGillen comments that as a condition, if sold, they would have to monitor

Attorney Ford indicates that if there is a monitoring condition it would have to be complied with.

George Zevitas asks if there is still an auto repair facility operating on the premises.

Attorney Ford indicates that there is no repair facility on site and that the gas station side has been closed for 15 months.

Laura Shufelt asks if there is anyone here from the public who would like to speak

Richard Murphy is an abutter at 30 Arbor Way. He is interested if this change is allowed and what will be the zoning of the new lot separate from the gas station and asks if a single family house would be allowed.

Art Traczyk indicates that all of the new lot is in the RB which is single family

Richard Murphy asks if someone could put 6 buildings on that parcel.

Art Traczyk indicates that that it could be a subdivision and could be a total of 4 single residential lots.

Richard Murphy wants to know if it could be larger. Art Traczyk indicates that someone could ask for a variance or it could become a 40B complex.

Craig Larson comments that the original permit was the entire parcel but now, if approved, it will only pertain to the front and there will be no special permit on the back lot.

Richard Murphy indicates that when he originally moved to Arbor Way and Hastings Meadows came along, it didn't become housing for the elderly which was proposed and is concerned about what will be on this new parcel.

William Hoagland at 10 Arbor Way has lived there since the 60's and is concerned as he believes that there is more than one reason why they want to separate the properties and wants to express his concerns about future uses of the property. He indicates that there is a large amount of wildlife and a brook. He asks what the original special permit allowed them to do.

Laura Shufelt explains that back in 1990 what the special permit allowed them to do.

Mr. Hoagland asks if they do divide what will become of that back lot.

Laura Shufelt indicates that they are not aware of what will be done with the back lot.

Art Traczyk wants to add that there are exempt uses allowed also.

Mr. Hoagland has a concern about the creek and asks about the curb cut and is told that it would have to go to ConComm.

Attorney Ford is not seeking any rezoning and the commercial portion of the lot and is confining it to parcel #1.

Craig Larson does findings:

- 1. Joseph J. Sousa and Lorraine A. Sousa have applied for a Modification of Special Permit No. 1990-031 issued to Marathon Enterprise, Inc., for a conditional use of a convenience store and to alter a nonconforming use of a gas station. The modification is sought to alter the area upon which the special permit applies from a 7.88-acre lot to a new lot of 1.86 acres. The new lot is shown as Parcel 1 on a plan submitted. The subject property is shown on Assessor's Map 290 as parcel 101-001, addressed 125 West Main Street, Hyannis, MA. It is in the Highway Business and Residence B Zoning Districts.*
- 2. On June 6, 1990, the Zoning Board issued Special Permit 1990-031 to Marathon Enterprise, Inc. The permit was issued to allow for the expansion and alteration of a nonconforming use of a gas station in the Groundwater Protection Overlay District and for a conditional use, a "Mini Mart", for retail sales in the Highway Business Zoning District.*
- 3. Today, the applicant is seeking to modify the special permit to have it apply only to a proposed new lot of 1.86-acres to be created from the existing larger lot. The proposed new lot is shown on a 2005 Approval Not Required (ANR) plan endorsed by the Planning Board on March 23, 2005.*

He moves that this Board modify Special Permit 1990-031 as presented by the applicant with the following conditions:

Special Permit No. 1990-031 is hereby modified to now apply to a new lot of 1.86 acres to be created from the original 7.88-acre lot. That new lot is shown as Parcel 1 on a plan submitted and entitled Plan of Land prepared for Joseph J. Sousa Barnstable, (Hyannis) Mass as drawn by CapeSurv and dated March 12, 2005 and endorsed by the Planning Board of the Town on March 23, 2005.

This modification and that plan referenced above shall be recorded at the Barnstable Registry of Deeds and proof of that recording shall be submitted to the Board's file for the modification to be in effect.

All other conditions of Special Permit No. 1990-031 shall remain in full force and effect except that it shall hereafter apply only to the reduced lot of 1.86 acres.

William Newton seconds.

James McGillen wants to amend the findings. The relief requested is in harmony with the general purposes and intent of the zoning ordinances and would have no adverse effect.

Craig Larson accepts the amendment.

Vote:

AYE: James McGillen, Craig Larson, Michael Hersey, William Newton, Laura Shufelt

NAY: None

MODIFICATION HAS BEEN APPROVED

Laura Shufelt then calls the Old Post Road, LLC., appeal and reads it into the record:

Appeal No. 2010-011

- New

Old Post Road, LLC & Law

Bulk Variance to Exchange Equal Land Area

Old Post Road, LLC and Donald F. Law, Jr., Trustee of the 595 Old Post Road Realty Trust have applied for a variance to Section 240-14.E Bulk Regulations, Minimum Lot Area and Section 240-36, Resource Protection Overlay District. Both sections require all single-family lots recorded after November of 2000 to have a minimum lot area of 2 acres. The subject lots are developed and the petitioners seek the variance to allow for an equal exchange of 2,152 sq.ft., between the two lots. The subject properties are shown on Assessor's Map 054 as parcels 017 and 016 addressed 581 and 595 Old Post Road, Cotuit, MA. The lots are in the Residence F Zoning District and the Resource Protection Overlay District.

Members assigned: James McGillen, Michael Hersey, Craig Larson, William Newton, Laura Shufelt

Attorney Sarah Alger is representing the applicant and gives a brief summary of the relief being sought. She indicates that these two parcels are in the RF and RPOD, both lots have a single family dwelling, a shed and garage and were both created in 1927. 595 Old Stage Road is the smaller lot was improved with a single family dwelling in 1930. The larger lot, 581 Old Post Road, was improved in 1938. 581 Old Post Road is nonconforming as to area and contains almost 61000 square feet where 2 acres is required and is currently improved by a residence that violates the 15 required setback and have just over 14 feet of setback and has a resident that violates the setback. If this relief is granted is, it will be relocated and will conform. That dwelling has 3 bedrooms and no additional bedrooms are proposed. At 595 Old Post Road is a 5 bedroom dwelling and is the smaller of the two in lot area and is also nonconforming as to frontage having only 103.5 feet where 150 is required. The setback is not met on the east, shape factor and area. The proposal is to swap equal areas of 2,152 square feet. They want to swap area. She indicates that if not swapped it could be a financial detriment and thinks there is no substantial detriment to the neighborhood nor concern and thinks that the soil/topography is a hard one to argue. She states that if the Board grants this variance they would prepare an ANR plan for endorsement by the Planning Board to be recorded along with the decision.

Craig Larson asks if they can condition the decision to require that the house be moved.

Attorney Alger indicates that it would need to be moved as the area they are proposing to swap is currently where the house is and has talked to Building Commissioner, Tom Perry, about a foundation permit. She states that she does not have a problem with the decision stating that they have to move the house.

Laura Shufelt asks about 595 Old Post Road and asks if there is an addition? Attorney Alger indicates yes, but, there will be no additional bedrooms and is okay with conditioning the decision to that effect.

Michael Hersey asks about the lot line

Attorney Alger indicates that the house is shown on its relocated position on the plan.

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

Art Traczyk thinks it might be limited by the Board of Health under the current regulations as to how many bedrooms are allowed.

James McGillen asks if there is a problem with a total of 5 bedrooms on both lots.

Attorney Alger has no problem with that.

Craig Larson does findings

Old Post Road, LLC and Donald F. Law, Jr., Trustee of the 595 Old Post Road Realty Trust have applied for a variance to Section 240-14.E Bulk Regulations, Minimum Lot Area and Section 240-36, Resource Protection Overlay District. Both sections require all single-family lots recorded after November of 2000 to have a minimum lot area of 2 acres. The subject lots are developed and the petitioners seek the variance to allow for an equal exchange of 2,152 sq.ft., between the two lots. The subject properties are shown on Assessor's Map 054 as parcels 017 and 016 addressed 581 and 595 Old Post Road, Cotuit, MA. The lots are in the Residence F Zoning District and the Resource Protection Overlay District.

- 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.**

James McGillen seconds.

Vote:

AYE: James McGillen, Michael Hersey, Craig Larson, William Newton, Laura Shufelt

NAY: None

Craig Larson makes a motion to grant 2010-011 with the following conditions:

- 1. The variance is granted to permit an exchange of parcels as shown on the plan entitled: "581 & 595 Old Post Road, Cotuit, MA prepared for Donald Law" dated March 25, 2010 as drawn by Field Resources, Inc.**
- 2. An Approval Not Required (ANR) plan shall be prepared based upon said plan and shall incorporate a reference to this variance and notation that the lots are subject to compliance with all conditions of the variance.**
- 3. The Approval Not Required (ANR) plan shall be submitted to the Planning Board for endorsement and thereafter recorded at the Registry of Deeds along with the recording of this variance. Copies of the recorded ANR plan and this decision shall be submitted to the Zoning Board of Appeal's file for this variance to be in effect.**

4. *If the variance and Approval Not Required (ANR) plan have not been recorded at the Barnstable Registry of Deeds within one year from the date of issue of this variance, this variance shall expire.*
5. *Present House or building at 585 Old Post Road shall be removed or moved as per plan.*
6. *581 and 595 Old Post Road shall have a maximum of up to 5 bedrooms each*

James McGillen seconds

Vote:

AYE: James McGillen, Michael Hersey, Craig Larson, William Newton, Laura Shufelt

NAY: None

GRANTED WITH CONDITIONS

William Newton makes motion to approve minutes from February 24, 2010, March 10, 2010 & March 24, 2010.

Michael Hersey seconds.

Minutes are approved.

Motion to adjourn.

Seconded.

Meeting adjourned at 8:13 PM.