



Town of Barnstable
Zoning Board of Appeals
Minutes
April 13, 2011

A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday April 13, 2011 at 7:00 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was met. Also present were Jo Anne Miller Buntich – Director, Growth Management, Elizabeth Jenkins – Principal Planner and Carol Puckett – Administrative Assistant

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

Laura Shufelt opens the hearing at 7:04 PM.

Introduction of Board Members

The board introduces themselves.

Laura Shufelt calls the EAC Disposal appeal.

**7:00 PM Appeal No. 2009-025 – Continued EAC Disposal, Inc.
Modification of Variance No. 1996-14**

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 and February 2, 2011..

Continued for an update on Consulting Services.

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

Decision Due: June 18, 2011

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. The 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

Laura Shufelt indicates that a letter from Attorney Charles Sabatt was received today requesting a continuance to May 11, 2011.

Laura Shufelt makes a motion to continue this to May 11, 2011 at 7:00 PM. Michael Hersey seconds

Vote:
All in favor

CONTINUED TO MAY 11, 2011 at 7:00 PM

At 7:05, Laura Shufelt calls the Botsini-Prime appeal and reads it into the record:

7:05 PM Appeal No. 2011-004 - Continued Botsini-Prime, LLC

Board Members assigned: William Newton, Michael Hersey, Craig Larson, George Zevitas, Laura Shufelt
Present: Alex Rodolakis (recused), Scott Harvey, Brian Florence

Botsini-Prime, LLC., has appealed the December 30, 2010 decision of the Building Commissioner. Botsini-Prime, LLC., in a letter to the Building Commissioner received December 17, 2010, had requested that the Building Commissioner revoke building permits issued to the Barnstable Municipal Airport Commission authorizing construction to begin on the Airport Expansion Project and refusing to enforce the Cape Cod Commission's Enabling Regulations and issuing permits in violation thereof. The property is located at 480 Barnstable Road, Hyannis, MA as shown on Assessor's Map 329 as parcel 003. It is in the Industrial (IND), Business (B), Highway Business (HB), and Hyannis Gateway (HG), zoning districts.

Alex Rodolakis recuses himself.

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

Attorney Cox is here representing the applicant. She indicates that she has had a chance to review the Town Attorney's opinion. Laura Shufelt indicates that she would like to hear from the Town Attorney first

Town Attorney - Ruth Weil explains that under Section 40A, Section 8 when a party aggrieved files an appeal of an administrative official to the ZBA under 40A, Section 15 has to be within 30 days of the decision. In this case the building permit was issued on July 9th. The applicant had actual notice of it as evidenced by their complaint. She has further documents which she hands to the board. She talks about the Gallivan case which she has attached to her opinion and gives a summary of that case. She talks about the email chain from Mr. Ed Lambert, consultant on this project, to the two principals of Botsini-Prime dated July 15th. Also, a follow-up letter copied to counsel indicating that a letter would be sent forthwith to the Cape Cod Commission and the packet from Ruth from Nutter and Rackeman/Sawyer& Brewster shows a series of correspondence exchanges between Nutter and Commission counsel. A July 14th letter where Nutter indicates that they are aware that the building permit application was made and is putting the Commission on notice and expects the commission to take action against the airport in the event construction begins. Also, a subsequent letter dated July 22nd, where counsel for the applicant indicates that they have become aware that the foundation permit was issued. Also, a follow-up up letter to the board dated July 23, 2010 from Commission counsel saying that the issuance of the building permits, in his opinion and in the opinion of the Commission, were proper. Under the Gallivan case, she believes that the applicant had sufficient notice and as a result this board does not have jurisdiction. She talks about the December 15th letter that Nutter filed with the Building Commissioner.

Attorney Cox indicates that she has read the opinion and disagrees on several points. She introduces one of the principals of Botsini-Prime, Harry Botsivales. She indicates that first, she does not believe that the Gallivan case referenced in Attorney Weil's opinion applies to this case as Gallivan, and its progeny following Gallivan, apply to appeals involving the Zoning Act, Chapter 40A. This case is different as this is a case of first impressions where the Building Commissioner issued a building permit wrongfully based upon wrongfully issued preliminary certificates of compliance from the Cape Cod Commission. There is no administrative appeal process to appeal a certification of compliance or a building permit that was issued wrongfully while a Cape Cod Commission decision is on appeal as they are not supposed to be issued while the Cape Commission decision is on appeal. This matter of first impression is not covered by the Gallivan case. This enforcement action was brought to cover all of their bases in the litigation process. She suggests that Gallivan, because it is an appeal of the Zoning Act and before the ZBA, is an appeal under the Cape Cod Commission Act and the building permit issued in reliance on the certificates of compliance does not cover this situation. She indicates that the Gallivan case and its progeny all involve residential properties where the plaintiffs had adequate notice of issuance of a building permit and a fair opportunity to appeal that permit. She indicates that the

Gaillivan case was from Wellesley which has a unique zoning bylaw which required that notice be mailed to the abutters and notice published in the newspaper which Barnstable does not. She talks about other cases similar to the Gallivan case. Unlike in Gallivan, Barnstable does not provide notice to abutters of building permits. No notice was published or sent to her clients when the building permit was issued. As Ms. Weil indicated, on or about June 20th, a representative for Botisini inquired whether or not a building permit had been issued for the terminal. They were informed, at that time; by the Building Department that they did not keep copies of the building permit which she believes is an inaccurate statement but was told to them. They could not produce a copy of a building permit but did provide them with a computer printout but did not indicate that a building permit had issued but that it was being reviewed at the time. She would suggest that they did not have sufficient notice of the issuance of the building permit as required under Gallivan, In September of 2008; her firm sent a freedom of information act request to the Town Clerk's office asking for copies of many documents including any building permit application. They received a reply from the Town Clerk's office under that request indicating that they did not have the information requested. They then sent a letter to the Town Attorney's office indicating that it was an inadequate response in requesting the information requested. She would suggest that her client did not have a fair opportunity to appeal the issuance of the building permit as they received no notice from the Town that the building permits had been applied for or issued. Also, when her clients sent a representative on July 20th inquiring about the building permits for the terminal, they were told they didn't have copies, were provided with a printout and that the application was still under review. Therefore, there was no adequate opportunity to appeal that building permit that she gathers was issued on July 9th within the 30 day appeal period. She cites another case: Fitch vs. Board of Appeals of Concord, the court makes clear that the request for the enforcement procedure is independent of the right to take an appeal under 40A Section 15 within 30 days of the issuance of a permit. Attorney Cox summarizes her position.

Brian Florence asks Attorney Cox about documentation. She hands in materials to Laura Shufelt.

Brian Florence comments that he believes that it would put a huge burden on the community every time a building permit was issued. Brian would like to see a clearer timeline.

Tom Perry, Building Commissioner, is present and asked by Craig Larson about the issuance of the permit. Mr. Perry indicates that if he didn't have permission from the commission he wouldn't have issued the building permit. Michael Heresy asks when the permit was issued. Mr. Perry indicates that the permit was issued in July of last year.

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

Dan Santos – Chairman of the Barnstable Municipal Airport Commission indicates that in response to the representative trying to acquire information from the building department about the issuance of the permit, as a member of the media, that person would've received their press release indicating that they received the building permit. This decision cannot be made in a vacuum as there are consequences and implications in their decision which are far greater than whether a building permit was appropriately issued. This is over a 30 million project and over 50% completed with the terminal which has nothing to do with the appeal of the transportation work which they have not started. Botsini-Prime have chosen to appeal that decision to the Cape Cod Commission which was heard in Land Court last month for which they are awaiting a decision. He would suggest that the Cape Cod Commission, the Building Department and the Airport have acted in good faith. He indicates that they are too far down the road to determine whether the permit should be rescinded. He asks to the board to uphold the decision of the Building Commissioner.

John Julius wonders if either the Building Commissioner or Attorney Weil will clarify if the Cape Cod Commission gave 100% clearance for the issuance of the building permit.

Town Attorney - Ruth Weil indicates refers to a letter dated July 23, 2010 written by Eric Wildlinger who is counsel for the Commission counsel and reads part of that letter. She then references the letter from Cape Cod Commission Executive Director, Paul Niedzweiki which further outlines that the Commission recognized that the airport could go ahead with the construction. She gives a response to Attorney Cox's statement.

Attorney Cox indicates that the July 23rd letter from Attorney Wildlinger, second paragraph, that decision is on appeal and is not a final appeal. She has a rough timeline:

July 1st = Cape Cod Commission issued the major modification decision

July 9th = the building permit issued

July 15th = there is an email from Mr. Lambert, a consultant for her client, who was at Town Hall

July 20th = paralegal from Nutter McClennen & Fish was at the Building Department inquiring about the permit for which she received the printout

July 28th = Nutter McClennen & Fish filed an appeal of the major modification decision

July 14th = Nutter McClennen & Fish sent the a letter to the Cape Cod Commission which Attorney Weil handed in tonight indicating that they discovered that a building permit was filed for and did not indicate that a building permit had issued.

George Zevitas asks when they knew the permits had issued. Attorney Cox is not sure but as of July 20th they knew it had been applied for and that it was under review as indicated on that printout and are not sure of the date when they found out that the building permit was issued.

Michael Hersey asks when they filed the appeal with the Zoning Board of Appeals. Attorney Cox indicates that on December 15th an enforcement action letter was sent to the Building Commissioner which was denied on December 29th and within the application to the ZBA was filed.

Elizabeth Jenkins indicates that the application to the ZBA was filed on January 26th.

Ruth Weil and Tom Perry are asked questions.

The Board discusses.

Brian Florence makes a motion that in the Appeal of 2011-004, he would find that the Building Commissioner acted reasonably, fairly and judicially in issuing the building permits under this appeal. Also, there is sufficient evidence has been submitted which shows that the petitioner had sufficient notice of the issuance of the building permits. The petitioner was required to file and appeal of that decision to issue those permits within 30 days and had failed to do so.

Michael Hersey seconds.

Vote:

AYE: George Zevitas, Craig Larson, Michael Hersey, Laura Shufelt

NAY: None

Motion is made by Brian Florence and seconded by George Zevitas to uphold the Building Commissioner's decision in the issuance of the permits listed under Appeal No. 2011-004

Vote:

AYE: George Zevitas, Craig Larson, Michael Hersey, Laura Shufelt

NAY: None

DECISION OF THE BUILDING COMMISIONER IS UPHELD

At 7:52, Laura Shufelt calls the Stuborn Limited Partnership appeal.

7:15 PM Appeal No. 2011-007 - **New**

**Stuborn Limited Partnership,
Stuart Bornstein - General Partner**

Special Permit – Expansion of Pre-existing,
Nonconforming Use

Stuborn Limited Partnership, Stuart Bornstein – General Partner, has petitioned for a Special Permit in accordance with §240-94B Expansion of a Pre-existing Nonconforming Use. The petitioner is proposing 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 guest house on the property. The petitioner 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) zoning district.

7:20 PM

Appeal No. 2011-008 - **New**

**Stuborn Limited Partnership,
Stuart Bornstein- General Partner**

Variance - §240-23 Marine Business B District = Permitted Uses.

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 use 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 guest house 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) zoning district.

Laura indicates that a letter was received today from Attorney Kenney who is representing the applicant, requesting a continuance to April 27th, at 7:05 PM.

Laura Shufelt makes a motion to continue this to April 27, 2011 at 7:05 PM. Michael Hersey seconds.

Vote:

All in favor

CONTINUED TO APRIL 27, 2011 AT 7:05 PM

At 7:53, Laura calls the Kamrowski appeal and reads it into the record.

7:25 PM

Appeal No. 2011-009- **New**

Kamrowski Centerville Realty Trust

Deborah S. Kamrowski, as Trustee of the Kamrowski Centerville Realty Trust, has applied for a Variance to §240-13. E Residence C District Bulk Regulations – Minimum Front Yard Setback. The Applicant is proposing to construct an 8 X 32 square foot covered porch addition to the front of the structure. The Applicant requests relief from the required 20 foot front yard setback to allow the porch addition to encroach 4 feet into the required front yard area. The property is located at 227 Horseshoe Lane, Centerville, MA as shown on Assessor's Map 207 as parcel 080. It is in a Residence C zoning district.

Alex Rodolakis comes back to the hearing.

Deborah Kamrowski is here representing herself. Also with her is the contractor, Doug Williams.

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

Deborah Kamrowski reads a letter indicating her reason for asking for a variance as she is trying to build a farmer's porch in the front of the house. She indicates that her contractor was issued a foundation permit on January 28, 2011 for the porch. She indicates that he put in the footings which were inspected. The inspector felt that there may be an issue with the setbacks and told her contractor that she needed to have the land surveyed again which showed that there property was not in compliance. After being issued the permit she spent over \$5000 to install the footings, have the front concrete landing and steps removed and disposed of, a tree relocated, bushes removed and the front yard dug up for the footings. She has spoken to several of her neighbors who are in support and does not feel that this would be a detriment to the neighborhood.

Craig Larson asks if a certified plan was submitted with the building application. Mrs. Kamrowski indicates that there was a different one submitted with the application.

Doug Williams, the contractor, indicates that what was submitted for the application was a stamped mortgage survey on which they sketched in a porch which they accepted. Craig Larson clarifies with Mr. Williams that the new survey was done after they did the work.

The Building Commissioner, Tom Perry, indicates that the reason they issued a foundation permit was because they knew it was going to be close even through admission from the contractor. They agreed to issue a foundation permit but wanted an as-built to see if it met the setbacks. If it didn't meet the setbacks, he was told that they would have to make application to the ZBA. He is not sure if the homeowner was aware or told by the contractor the situation. At the beginning, the contractor was told that it might be an issue and questioned whether they were going to be accurate and is why only the foundation permit was issued.

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

Joanne Miller of 217 Horseshoe Lane indicates that she has the same situation with her wall which was cracked, had a plot plan done to put in a fence and was surprised where the stakes were in her front yard. She would like to know if it applies to the retaining wall. .

Building Commissioner, Tom Perry indicates that retaining walls do not have to meet setbacks. .

Jeanne Aylward is against how it was obtained.

Mrs. Kamrowski indicates that she had talked to Tom Perry about this and was unaware of any issues with the mortgage plan.

Michael Hersey believes it was the responsibility of the homeowner and contractor.

Tom Perry indicates that he had a discussion with the contractor and pointed out to him the issues.

Mr. Williams indicates that the discussion did not take place and that he submitted the plan and was issued a foundation permit.

They board discusses.

Laura reads a list of letters submitted to the file from: John Fasciano, in favor, Elizabeth Crossman, in favor, email from Carol DeFranco, in favor, letter from Joanne Aylward saying she doesn't like the steps (heard from BC that a retaining wall is not subject to setbacks).. Ron & Angela Francescone, in favor, Christopher Kuhn & Penelope Hinckley, in favor. Craig clarifies with Joanne Aylward who is in favor with the porch.

Craig Larson makes findings:

Deborah S. Kamrowski, as Trustee of the Kamrowski Centerville Realty Trust, has applied for a Variance to §240-13(E) Residence C District Bulk Regulations – Minimum Front Yard Setback. The Applicant is proposing to construct an 8 X 32 square foot covered porch addition to the front of the structure. The Applicant requests relief from the required 20 foot front yard setback to allow the porch addition to encroach 4 feet into the required front yard area. The property is located at 227 Horseshoe Lane, Centerville, MA as shown on Assessor's Map 207 as parcel 080. It is in a Residence C zoning district.

The applicant seeks a variance from the required minimum front yard setback to complete the construction of an 8 foot by 32 foot covered front porch.

- **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;**

- *a literal enforcement of the provisions of the Zoning Ordinance would involve substantial hardship, financial or otherwise to the petitioner, and*
- *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.*

George Zevitas indicates that he is against the granting of the variance as he believes it does not meet the three prong test.

Vote:

AYE; Craig Larson, Michael Hersey, Alex Rodolakis, Laura Shufelt

NAY: George Zevitas

A motion is made by Craig Larson to grant the permit with the following conditions:

- 1. This variance is granted to Deborah Kamrowski, Trustee of Kamrowski Centerville Realty Trust for the construction of an 8 foot by 32 foot covered porch at 227 Horseshoe Lane, Centerville.**
- 2. The porch shall not project more than four feet into the required front yard setback, exclusive of stairs. The porch shall be constructed in the location shown on the plot plan dated 2/21/11, drawn and stamped by Eagle Surveying, Inc.**
- 3. 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 of a building permit. The rights authorized by this variance must be exercised within one year, unless extended.**

Michael Hersey seconds.

Vote:

AYE: Alex Rodolakis, Craig Larson, Michael Hersey, Laura Shufelt

NAY: George Zevitas

GRANTED WITH CONDITIONS

Motion to adjourn is made by Laura Shufelt and seconded by Alex Rodolakis

Meeting Adjourned at 8:17 PM