WEST TISBURY ZONING BOARD OF APPEALS

Thursday, January 19, 2023
Meeting Minutes

Approved February 16, 2023

Present: Larry Schubert, Julius Lowe, Deborah Wells, Jeffrey Kaye, Casey Decker, Pat Barrett
Absent: Andy Zaikis
Also Present: Kim Leaird *(Board Administrator),* Gary BenDavid, Jay F. Theise, Myron Garfinkle, Troy and Kimberly Stanfield, Sarah Turano-Flores, Bryan Collins, Charles Gilstead, Phil Regan (Hutker Architects), Joseph Tierney

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5:00 pm – The meeting minutes of January 5th were approved 5-0-1 (Deborah abstained). In addition, the board reviewed and approved the December 31st invoice from town counsel, comprised mostly of charges regarding the Murphy Appeal. Also, the Board reviewed and approved the $4,000 Request for Transfer from the Reserve Fund for the Finance Committee. Expenditure is necessary to account for unprecedented rate of public hearings so far in FY23.

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5:15 pm – A public hearing on an Application for a Special Permit from **Vineyard Hangar G, LLC,** to construct a 15,000 sq. ft. hangar located at Martha's Vineyard Airport to garage eight (8) small aircraft with space for two (2) automobiles [EACH] under Section 3.1-1 of the Zoning Bylaws, at **Hangar Rd. South, Map 28, Lot 1.15** in the LI district.

Larry read the hearing notice. The project went to the Martha's Vineyard Commission (MVC) and the ZBA has received the written decision (DRI 737 – Hangar Lot G).

Gary BenDavid presented the project. The hangar will be in a gated area regulated by the FAA for aviation use only – no one has access unless they have an FAA badge. It is the last undeveloped area and is just past the safety building. Access is right off of Airport Rd. just past entrance to Plane View restaurant.

The space will be managed by Gary along with M. Peter Rogers. They have secured approvals from the Martha's Vineyard Airport and the MVC. The airport manager, Geoff Freeman, regulates all access to the hangars. They are in front of the ZBA solely due to the size of the building (15,000 sq. ft.). This hangar is larger than other existing hangars in order to accommodate the larger wing span planes that need them. There is electric and water. They will have one hangar with tie in to sewer. He noted, however, that nothing can happen without other permits from the town.

A motion was made and seconded to close the hearing and open the board meeting.
There was no further discussion.

It was moved and seconded to Approve the Special Permit.

A roll call vote was taken with the following resulting votes. Motion passed 6-0.
L. Schubert-yes, J. Lowe-yes, D. Wells-yes, J. Kaye-yes, Casey Decker-yes, Pat Barrett-yes

Larry went over the 20-day appeal period and reminded applicant that once it expires, the decision must be recorded by applicant and a receipt brought back to the Building Inspector. He also noted that conditions placed by the MVC would be incorporated into the Special Permit.

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5:35 pm – A public hearing on an Application from **Myron Garfinkle,** trustee of MBG Realty Trust, through his attorney Jay Theise, to **APPEAL** a December 5, 2022, determination made by the Inspector of Buildings concerning the application for four (4) foundation-only permits for **140 Sarita Walker Rd., Map 38 Lots 7.1 and 7.12** in the Inland and Shore Zones of the Coastal District in the RU district. The Appeal is made under M.G.L. c.40A §8 and §15, as well as M.G.L. c.40A §7, M.G.L. c.183 §158 and 4.2-1 and 4.2-2A3 of the West Tisbury zoning bylaws.

Larry read the hearing notice and opened the hearing at 5:35 p.m. Representing Myron Garfinkle was Attorney Jay Theise. They are here looking for a reversal of the Building Inspector's decision to grant four foundation permits.

Reasons:
1) The Building Inspector relied on a plan that shows a unique 6.3 acre lot. Attorney Theise said they dispute that it is one 6.3-acre lot as it includes land that was not owned by the sellers at time they made conveyance and therefore is not owned by the buyers [the Stanfields]. The "derelict fee" statute and the "fee in the way" statute are unequivocal – when you convey land and use a private way as one of the bounds, the fee in the road goes to the buyer unless explicit language that excepts (or eliminates) from conveyance title to that part of the road is in the deed. He said that all the deeds that came out of the Coffin Realty Nominee Trust did not have language reserving the fee in the road, therefore ownership automatically passed to the abutters.

Larry asked when the subdivision was created and Atty. Theise said it is not a subdivision but a land division that has occurred over the last five years.

2) Fee in the way statute. Atty. Theise said the 6.3-acre plan was previously two separate lots. In 2019, he and his client successfully prevented what is called the Barn Lot from being built upon because they argued it was substandard under 3 acres. The Building Inspector revoked the permit. Then in November 2021, an Approval Not Required (ANR) plan combining the two lots was filed without notice, bypassing the Planning Board. The Gund and Walsdorf properties abut the way and he claimed they each own 50% of the fee in the way. He said this is not about the right of way, this is about the ownership. While the plan has been accepted at the Registry of Deeds, the deeds that conveyed the abutting lots did not include language specifically reserving ownership of the fee in the road. Therefore, as they did not do so, it cuts off any possibility of rejoinder of the two lots.

Larry asked Building Inspector Joe Tierney whether or not the 6.3-acre plan was submitted by a licensed engineer or surveyor and if that gave him confidence in the ruling he made. Joe said yes, it was stamped by a licensed surveyor. In addition, he reviewed documentation about the issues in question provided by attorneys on both sides and also reached out to special counsel. This led to the determination he made in his December 5, 2022, letter regarding the four foundation permits.

Atty. Theise said they had hoped a legal opinion was forthcoming from the special counsel, but one was not proffered.

Petitioner Myron Garfinkle said he spoke with a surveyor who told him if it's on the plan, it's on the plan – there is nothing to argue about. But when he spoke to an attorney he was told the plan does not matter, it is the deed that defines the plan. In his opinion, the deeds speak for themselves and describe what should be on the plan.

Atty. Theise said that even one of the Coffin lawyers agrees because title passed to Ben Coffin and that deed did except that portion of the road.

Representing 140 Sarita Walker Rd. owners, Troy and Kim Stanfield, was Attorney Sarah Turano-Flores. Also present were Surveyor Charles Gilstead and Bryan Collins from Sourati Engineering and Architect Phil Regan from Hutker Architects.

Atty. Flores said the Stanfields applied to build the guest house and barn. Charles was the licensed surveyor who stamped the plan in question as well as successive ANR plans for the Coffin properties over the years and were all presented to the Planning Board. In addition, Charles has submitted an affidavit specific to this property.

When the Stanfields bought the property, they tasked their team with creating a design that met the town's zoning bylaws. The new residential house bylaw put caps on the square footage and they knew they wanted a house and a guest house but nothing too large because they wanted to be respectful to the area. The team they put together designed structures allowed for by right – and they invited all of the neighbors to see them before they filed the foundation permits with Joe. They filed first with foundation permits because they heard Mr. Theise assert it was not a 6.3-acre lot.

Atty. Flores said to show that it is indeed a 6.3-acre lot, they have submitted an affidavit from land attorney Dick Dubin who certified title for the Stanfields. Both the Gilstead and Dubin affidavits are dated in fall of 2022. She said that the letter that Mr. Theise referred to from his land court expert is in regards to a different parcel on the northwesterly portion: this is not relevant to this property.

She said the zoning board has probably never heard of the Derelict Fee statute, and that is because it has nothing to do with the ZBA's jurisdiction. Matters of title are determined by courts of competent jurisdiction, not the zoning board. The certified plan meets the zoning requirements of the zoning. The Stanfields are looking at a house and a guest house; for both you need just 4.5 acres. Even if you take the fee out of the equation, it is only minus .9 acre and that is calculating the full 30-foot width.

Their zoning application includes square footage of the traveled way that is Sarita Walker Rd. It has been there as far back as the 1938 GIS map. The acreage of the traveled way is 10,000 sq. ft.: if you take out the acreage, you are left with a lot of 6.04 acres; if you take out the full acreage of 30ft. you have 5.38 acres. If you take both out you have more than enough for a house and guest house by right under the town's zoning bylaws.

Atty. Flores said the board's proper purview is to look at the foundation permits for any other triggers that may require a special permit and zoning relief. They know they will need one for the barn, and will be back in front of the ZBA for it.

She added that they included calculations from Hutker on how they meet residential floor area and supplemental floor area requirements. The guest house is 992 sq. ft. The barn is 643 sq. ft.

Owner Troy Stanfield thanked the board for its service. He said they want to be good neighbors and have gone out of their way to *not* be secretive with their plans but there has been a lot of drama from the start. They assembled a great team that understands the bylaws. Kim Stanfield said this has been another uncomfortable step in a process with many uncomfortable steps due to Mr. Theiss and Mr. Garfinkle. She said they have done their due diligence and been accommodating. For example, when they were asked not to put a split rail fence in, they agreed. Everything they've done to be neighborly and avoid conflict has still landed them here. She told the board that even when they closed on the property and came to see it, [the neighbors] had flanked the road with large legal signs [about ownership]. She said this was very impactful and not neighborly.

Larry asked Joe if when he made his decision if he was in possession of the certified letters from Chuck Gilstead and Dick Dubin. Joe said yes, he had them.

Larry addressed the board and reminded them that a few years ago these two (separated) lots were here in front of them. The building permit was being appealed for the northwestern lot because it did not have enough square footage. Joe revoked the building permit on the northwestern lot because it did not have 3 acres. Since that time, the two lots were combined and now there is more than enough acreage for a house and guest house by right.

Larry said it appears what is in front of them is a legal dispute. Julius said he didn't think this is the board's jurisdiction to decide and before we go too far forward, he said he sees no reason why they wouldn't uphold the Building Inspector's decision.

Jeffrey asked Myron and Atty. Theise what his standing is and whether or not he was an aggrieved party. What is the issue – is it about development? **[SEE relevant transcript, last page]**

Atty. Theise said it is the legal issue it is not about the architecture. He said that in order for this to be a 6.3-acre lot, or a 5-acre lot, or in excess of 4.5 acres which would permit a house and a guest house, it has to be 4.5 *buildable* acres. As a matter of law, he said it is not and cannot be, because of the intervening disconnection of title that prevents [the two lots] from being joined. He said he is taking a position on behalf of his client [because] it is offensive to the zoning laws of the town.

Myron added that this is his year-round and one-and-only home and he's upset about a guest house being built in his view on what he perceives is an unbuildable lot and is aggrieved that it is in offense of the town bylaws. He said it was not the first time he has been in front of the board about what he calls the "barn lot" and for these same reasons. He said his neighborhood is being developed, he objects, and at the very least he'd like town to support its own bylaws.

Julius said what he is hearing is that Myron is aggrieved because in his opinion they are still separate lots, not one, and in his mind, it remains unbuildable. Myron said yes, it had been on the market for a year and a half. The Coffins filed the ANR plan on November 2, 2021 with the two combined lots and sold it as 6.3 acres of waterfront property.

Attorney Flores said it is their story to tell. The Stanfields bought it in Spring 2022, it was not on the market for year and a half. She said in 2019, Mr. Garfinkle succeeded in scrubbing the Coffins attempt to get a building permit. After, they decided they had to combine the two lots at a great loss. She addressed the standing question that Jeffrey had posed. She said the pieces of the road Mr. Garfinkle claims they don't own – he does not own them either. The actual abutters to the road are not here protesting. She said

he has no legal standing. She added that in terms of his motivation, his property is for sale with language that includes "sweeping meadow views" and guarantees an easement.

Mr. Theise said he wanted to correct a statement for the record. [In 2019] the building permit for the barn lot was granted. It was revoked when Mr. Tierney received the opinion from special counsel that the road had not been deducted. That legal opinion led them to withdraw their appeal.
Casey said he agrees with Julius that this is out of their purview. He is an engineer and when he produces a plan and submits them to the Building Inspector, he has to take the plan that a surveyor or engineer creates. Joe did right thing, he did his research and a stamped plan is an accurate plan.

Pat said we're here because of the Building Inspector's decision and from what he sees in front of them, he made the correct call.

Myron again said that surveyors say *this is what plan says*. The law says *it is what the deed says*. He said the thought the board should be looking at that.

Julius asked and it was confirmed that the Coffins had always owned the land surrounding the right of way going back decades. Julius said that it seems to him if they owned the way and they're showing it with bounds, it is a pretty reasonable thing to attach and combine them.

Myron said he believed they sold [the way] when they sold the property.

Larry said whether or not we understand the two arguments, it is beyond the board's purview to decide.

Mr. Theise said we are here about a legal issue: the plan has nothing to do with the issue of ownership and regardless of what you think about the issue of title, if the Building Inspector's decision was made without the legal opinion of both sides (as special counsel did not write an opinion), as a matter of law it is an unreasonable standard for a [foundation] permit to be issued. He said the ZBA must overturn Joe's decision because it was unreasonable, arbitrary, and capricious. This is the standard to make a such a decision knowing there is a fact undetermined.

Joe said the Select Board policy for when there is a questionable lot requires getting an attorney's opinion from the applicant. He also took attorney Theise's rebuttal into consideration.

Attorney Flores reminded the board that Joe had the sworn affidavits of Atty. Dick Dubin and licensed surveyor Charles Gilstead and this [meets the] standard. Mr. Dubin also wrote the title insurance for the Stanfields.

Discussion followed about whether or not consulting counsel was warranted. Jeffrey's opinion was that this was beyond the board's authority. Julius asked if legal expenses would be higher if they took one direction or another and he still believes they should not be rendering an opinion on something that is for a court to decide.

A motion was made and seconded to close the hearing and open the board meeting. A roll call vote was taken.
Jeffrey said while the board has disagreed with the Building Inspector before, he does not see that Joe did anything he should not have. Larry said he feels Joe used his best instruments and expertise.

Julius made a motion to deny the appeal and uphold the decision of the Building Inspector. The motion was seconded by Deborah.

A roll call vote was taken with the following resulting votes. Motion passed 4-0.
L. Schubert-deny, J. Lowe-deny, D. Wells-deny, J. Kaye-deny

Larry went over the 20-day appeal period in which an aggrieved party may appeal to Superior Court.

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Other

- **Remote hearings discussion.** The board received another request from an applicant interested in participating remotely. The board reaffirmed their previous vote that attendance must be in person, however anyone could listen in on another attendee's phone but would not be allowed to give testimony.

The Meeting adjourned at 7:15 p.m.

Respectfully submitted,
Kim Leaird, Board Administrator

Jan 19, 2023 / ZBA Meeting RE: Garfinkle Appeal

1:15:40

JEFFREY: I'm just curious, in terms of – I read all of the literature and a lot of good stuff in your blog… what is your standing? Are you an aggrieved party? As you [someone] said, I don't know what's going on here. What is all [with] the legal filings, people are filing briefs of 140 pages, whatever. What is the issue that I'm missing? Because once you [Atty. Theise] said one of your core values is about 'perception doesn't match the fact.' My perception is I don't really know what this is about. It might be about development on Sarita Rd. and people are positioning themselves. But what is this about -- whether he puts in a guest house, a shed, possibly fixes the barn. What is the real issue here that you have that you're aggrieved by?

THEISE: For me the real issue is the legal issue, it is not about the architecture. In other words, for this to be a 6.3-acre lot, or a 5-acre lot, or in excess of 4.5 acres which would permit a house and a guest house, it has to be 4.5 buildable acres. That's clear and unequivocal under the bylaws … As a matter of law, it is not, and cannot be, because of the intervening disconnection of title that prevents [the two lots] from being joined.

JEFFREY: Why are you aggrieved by what the Building Inspector had decided? Why is it such an issue if it's 5.8 acres or 6 acres? What is the developmental issues which I perceive is happening that you are trying to prevent? You are just taking a position?

THEISE: I am taking a position on behalf of my client who asked me to investigate this and because I concluded that this is not, and can't be, a 6.3-acre lot, that it is offensive to the zoning bylaws of the town. And so here we are.

PAT: I think what he's trying to get at, in plain English, is what is the hardship? It would be nice to understand… what is the real objection or real hardship is. I don't see it so far either.

GARFINKLE: This is my year-round and one-and-only home and to see someone build on a lot that is unbuildable fairly close to my house, right in my view I find difficult and, in my feeling, not up to the bylaws of the town I live in, the town I pay to taxes to and the town that is supposed to uphold their own rules and regulations.

JEFFREY: But what is your standing. You're not an abutter, are you?

LARRY: Yes, he is.

LARRY: Jeffrey, I think he actually answered the question.