

**ZONING BOARD OF APPEALS  
TRURO, MASSACHUSETTS  
MINUTES  
MARCH 27, 2017  
7 PM - TRURO TOWN HALL  
24 TOWN HALL ROAD, TRURO**



QUORUM PRESENT: B. Perkel (Chmn); F. Todd (V. Chair); A. Hultin, Clerk; J. Thornley; J. Dundas; N. Brown, (Alt.). Vacancy Alt.

Also present, Planner Carole Ridley, Town Counsel Silverstein. (S. Kelly, Recording Sec.)

Meeting convened at 7 PM by Chairman Perkel.

**--Continuation: Public Hearing on Remand of 2016-009ZBA**, Fisher Road Realty Trust, by Atty. Christopher Snow, for property located at 9B Benson Road (Atlas Sheet 53, Parcel 50), Regis. of Deeds title ref Book 22682, Page 84), for a variance from the street frontage definition, road width and frontage requirements set forth in Sections 10.4 and 50.1 of the Truro Zoning Bylaws, as continued from 2/27/17.

Chairman Perkel explained there had been a remand from the Court for the ZBA to elaborate reasons/findings in regard to the aforementioned property; he hoped to achieve a super majority for granting a Variance. Atty. Silverstein provided background on the site with note of the hardship aspect -- due to the soil conditions, shape and topography of the lot the grant of a variance would be justified; not being able to build on the site is the hardship; furthermore, grant of a Variance would not derogate from the intent of the bylaw. It was noted the property in question would not be subdivided and it will remain one single-family residence (SFR) lot. It was also explained the Land Court referred this to the local permitting authority.

Mr. Perkel spoke of his reservations originally and with respect to the Findings proposed he was still not sure of his support for Sec. 2 Findings. Atty. Snow then spoke and explained this property has been litigated for many years; he spoke of the soil conditions and their unique status, with the slope aspect and the environmentally-sensitive area; this resulted in the reduction of the road width from 40-feet wide to 12-feet wide. He spoke of Judge Piper's findings in court and referred to the record (in Land Court) and the ref. to C.40A, Sec.10 (Variances) which cited the aforementioned circumstances regarding the lot (criteria for hardship). Members spoke of the remand. Mr. Todd said it was clear the situation was unique and it was also evident the judge had tried to formulate a compromise; however, it is troublesome to issue a variance that addresses those issues, ie: shape, size, topography of lot. Mr. Hultin spoke of Sec. 10 of C. 40A and noted this was not generally affecting the district the lot is in; he also spoke of a 'literal enforcement' of that provision of the bylaw; he felt the ZBA could address the remand. Mr. Todd spoke of the lots in the subdivision in that area and said other lots in that larger subdivision were created in accordance with the Subdivision Regulations; the Caters had looked into access through the subdivision mentioned but the cost was exorbitant. There was an applied right-of-way created by the court.

Atty. Cockfield, representing abutter Clark, spoke and noted they had to specify the unique soil condition, shape or topography which related to frontage thus rendering the lot unbuildable; the only hardship is the Caters do not have frontage. It was noted the only engineering analysis was done under the Planning Board regarding grade and width; furthermore, Town Meeting vote did not change that provision of the bylaw. Also, in regard to the creation of the easement, Judge Piper upheld the easement creation and they have an easement right. Members discussed the right to access property; Atty. Cockfield said they can have an easement but not frontage. Members discussed a Motion with a variance from street frontage definition, road width and frontage requirements. Mr. Brown noted there is a 50-year history dealing with substandard roads in Truro.

Members agreed to a short recess at 8:20.

Upon resuming the meeting, members discussed C40A, and the finding regarding soil conditions, shape or topography as well as remand language and types of variances, Chairman Perkel asked if anyone else wished to speak. Resident Holt spoke and said although she was not an abutter, she knew the neighborhood and provided background on the site.

Atty. Snow, representing the Caters, spoke and said they were not seeking to change the bylaw; this was a unique case; the abutters had been dealt a generous judgment which goes back to the argument for minimum safety (ie:

12-foot-wide road) to preserve the impact on abutters; they were not applying for subdivision; furthermore, the only remedy to implement the judgment of the Land Court is the grant of a variance in terms of width. He continued, if the ZBA doesn't act on this and it goes back to the judge at land Court, the judge might render a decision requiring a 40-foot (wide) way, and he felt the judge was correct. He continued, traffic is to a single-family dwelling and they would not need as big an arc; the challenge is with the slope towards the beach side thus rendering the challenge to the topography aspect; the variance request is in reference to the 40-foot road requirement.

Members resumed their discussion on the proposed Findings of Fact; Chmn. Perkel noted they would close the evidentiary portion and discuss said Findings. Member Brown said he was in favor of Findings and Mr. Dundas spoke of reference to Findings 8 and 9. Mr. Hultin noted the complexity of the case and spoke of C.40A authorizing the ZBA to act. He wanted to be sure their wording of the decision was adequate for a vote. Mr. Perkel suggested a short recess then a "work session" to frame the Motion.

After a 10-minute recess ZBA members resumed discussion on the Motion and Findings; it was noted it breaks down to soil conditions, shape or topography being incorporated into the wording; they needed facts that would support said soil conditions or shape or topography. Members discussed whether the proposed Findings taken collectively are adequate; if they are in agreement, they can move that the proposed Findings be incorporated into the Motion; shape and topography with reference to the legal history of the site result in a unique situation where the relevant requirements of zoning could be waived.

Atty. Snow noted he was before the ZBA to seek a 12-foot wide road. Discussion continued on the Motion wording and Findings, and the Decision follows:

### **Procedural Summary:**

On May 17, 2016 Fisher Road Realty Trust filed an application for a variance with the Truro Zoning Board of Appeals (ZBA) seeking a variance from the terms of section 10.4 of the Truro Zoning Bylaw concerning construction of a road with a 12 foot width, 2 foot shoulder width and intersection radius of 0 feet. The road construction was intended to provide access to a 3.46-acre parcel on which the applicant proposed to build a single-family dwelling.

The ZBA held a duly- noticed public hearing on this application on July 18, 2016 and continued to August 22, 2016, and on August 22, 2016 the ZBA voted 3-2-0 on a motion to grant a variance to the applicant. The motion failed owing to the requirement for a 4-vote super majority to grant a variance. On Sept. 8, 2016 the applicant filed an appeal of this decision with the Massachusetts Land Court. A Joint Motion for Remand was filed on behalf of the applicant and the ZBA on January 26, 2017, and on February 1, 2017 the Land Court issued a docket entry allowing the motion to remand the case to the ZBA for "a full and fair lawfully noticed public hearing on the plaintiffs' application for zoning variances. ..." A duly advertised public hearing was conducted on March 27, 2017 at 7 pm. The ZBA heard testimony from the applicants' attorney, Christopher Snow, and other abutters and abutters' representatives.

Following testimony, the ZBA closed the public hearing, deliberated and voted on the matter.

### **Findings of Fact:**

Mr. Hultin made the following motion:

To grant a Variance to Fisher Road Realty Trust, 9B Benson Road from the Street definition set forth in Section 10.4 of the Truro Zoning By-Law and from the frontage requirements set forth in Section 50.1 of the Truro Zoning By-Law based upon the following Findings:

1. Pursuant to the provisions of G.L. c.40A §10 a permit granting authority can grant a variance from the terms of the applicable zoning ordinance or by-law where such permit granting authority specifically finds that owing to circumstances relating to the 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 ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted

without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

2. The unique legal proceedings concerning and governing this property, the topography of the land and the restrictions imposed by the Land Court on any road/driveway distinguish this lot from every other lot in the Zoning District.
3. In the absence of the requested variance, the Caters would suffer a substantial financial hardship as they have fought successfully in the Courts since 1998 for the right to access their landlocked property at great personal expense including enriching the Town's treasury by payment of real estate taxes annually on a lot assessed as buildable for residential purposes. Additionally almost twenty years of litigation to obtain a court judgment confirming that they had the right to access their property would be for naught and definitely result in continued litigation.
4. The variance can be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent of the By-law as a single family use of the oversized property eliminates the possibility of a more intensive use or subdivision of the property. Furthermore, location, route and roadway specifications as directed by the Land Court ensure that any roadway on the right of way would be the shortest possible and produce the lowest impact on the natural environment and aesthetic characteristics of the area. Permitting construction of a roadway in consonance with the Land Court directive preserves, to the fullest extent possible, the natural environment, scenic vistas, property values and privacy for the benefit of all members of the surrounding community which benefit the public good in both a legal and equitable manner.
5. The granting of the requested variance from sections 10.4 and 50.1 of the Zoning Bylaw is in keeping with the purpose and intent of the Zoning Bylaw, and does not result in a condition more substantially detrimental to the surrounding neighborhood. The test of financial hardship has been demonstrated by finding #3 above. The variance is granted on conditions that (a) the 3.46 lot shall be used for one single-family dwelling and (b) shall not be subdivided at any point in the future.

Mr. Brown seconded the motion made by Mr. Hultin.

### Decision

The ZBA voted 4-1-0 to approve the motion made by Mr. Hultin and seconded by Mr. Brown, with Mssrs. Dundas, Brown, Hultin, and Todd in favor of the motion and Mr. Perkel voting against the motion.

### Ordered

2016-009ZBA Fisher Road Realty Trust has been granted a variance from the Street definition set forth in Section 10.4 of the Truro Zoning By-Law and from the frontage requirements set forth in Section 50.1 of the Truro Zoning By-Law for property located at 9B Benson Road, Map 53 Parcel 50, on condition that the lot shall only be used or one single family dwelling and shall not be subdivided. This decision must be filed at the Barnstable County Registry District of the Land Court for it to be in effect. The relief authorized by this decision must be exercised within three years. Appeals of this decision, if any, shall be made pursuant to M.G.L. Chapter 40A, Section 17 within twenty days after the date of the filing of this decision in the office of the Town Clerk. The Applicant has the right to appeal this decision as outlined in M.G.L. Chapter 40B, Section 22.

-- **Continuation: (Public Hearing on): 2017-001ZBA**, Nathalie Ferrier, Nancy Callander, Trustee, SRT, John A. Van Kirk, Jon Friedman, Joanne Barkan and Vicky Tomayko, by Atty. Robert Shapiro, seek to appeal the Building Commissioner's Denial of Enforcement Action for property at 25-27 Stephen's Way, Truro, as continued from

2/27/17.

Mr. Friedman, one of the parties in the appeal, spoke on behalf of the abutters; he noted Atty. Shapiro could not be present and provided background on the appeal; he explained he and the other abutters in the appeal had requested enforcement by the Building Commissioner and this enforcement request had been denied by Building Commissioner Braun; a letter from Atty. Shapiro regarding a continuation request was read as well.

Chairman Perkel asked for any questions from the ZBA and asked Atty. Silverstein, the Town's Attorney, about the Court action; it was explained the Land Court had entered Judgment regarding the aforementioned property; none of the abutters (in the present appeal) were party to that Judgment. Furthermore the Court gave the ZBA certain authority pursuant to said Judgment of the Court. Abutters noted a request had been received from Atty. Shapiro for a Continuation; members discussed granting a Continuation; Motion was as follows:

**Motion (Hultin, 2<sup>nd</sup> Todd):** Move in the matter of Nathalie Ferrier, Nancy Callander, Trustee, SRT, John A. Van Kirk, Jon Friedman, Joanne Barkan and Vicky Tomayko, by Atty/Agt. Robert Shapiro for property located at 25-27 Stephens Way (Atlas Sheet 53, Parcel 73)(2017-001/ZBA) to grant a continuation to the meeting of April 24, 2017. Vote: 0/in Favor (of continuation); 5 Against (Hultin, Perkel, Todd, Dundas, Thornley). Motion to Continue does not carry.

The Board then made a second Motion:

**Motion (Perkel, 2<sup>nd</sup> Hultin):** Move in the matter of Nathalie Ferrier, Nancy Callander, Trustee, SRT, John A. Van Kirk, Jon Friedman, Joanne Barkan and Vicky Tomayko, by Atty/Agt. Robert Shapiro for property located at 25-27 Stephens Way (Atlas Sheet 53, Parcel 73) (2017-001/ZBA) to reverse the decision of the Building Commissioner. Vote: 0/in Favor; 5 Against (Hultin, Perkel, Todd, Dundas, Thornley). Motion (on reversal) does not carry. (Mr. Brown did not vote on the decision.)

**2017-002/ZBA – Ben Robinson,** by agt/rep David Milliken/Milliken Construction, for property located at 11 Coast Guard Terrace, (Atlas Sheet 34, Parcel 1). Applicant is seeking a Special Permit and/or Variance, whichever the Board deems appropriate, w/ref. to Sec. 30.7 of the Truro Zoning Bylaw for a deck extension, and moving existing deck stairs, as per plans filed. Mr. Cabral was present to explain the petition. He noted the project was 29 ft. from the southeast lot line and 21 ft. from the other lot line. The previous non-conforming status would thus become more of a non-conforming issue. He explained they wished to relocate the access stairs to the deck. Mr. Brown commented on the erosion issue at the site. Since there were no further comments or questions from the Board the following Motion was made:

**Motion (Todd, 2<sup>nd</sup> Perkel):** Move to grant a Special Permit to Ben Robinson (by agt/rep David Milliken) for property located at 11 Coast Guard Terrace (Atlas Sheet 34, Parcel 1) (2017-002/ZBA) w/ref. to Sec. 30.7. of the Truro Zoning Bylaw for a deck extension and moving existing deck stairs, as per plans filed. The ZBA Finds said Grant is not substantially more detrimental to the neighborhood and shall exist in harmony with the intent of the Bylaw.

Voted in Favor: Hultin, Perkel, Todd, Dundas, Thornley. Voted Against: None. (Brown recused). Motion Carries: 5/Yes; 0/No, Unanimous.

**2017-003/ZBA – Neal Walker,** by agt/rep Keith Hutchings, Old Harbor Homes, for property located at 40 Parker Drive (Atlas Sheet 42, Parcel 40)(Reg. of Deeds title ref: Book 27093, Page 331). Applicant is seeking a Special Permit and/or Variance, whichever the Board deems appropriate, w/ref. to Sec. 10.4, of 50.1.A. of the Zoning Bylaw, in order to construct a 44'x24' attached garage, as per plans filed. Mr. Perkel noted there had been a request for a Continuation to the next meeting of April 24, 2017. Motion made by Mr. Todd, 2nd by Mr. Perkel to Continue the petition (2017-003/ZBA – Neal Walker) to April 24, 2017. Unanimous vote to Continue.

Since there was no other business to consider, Motion was made to adjourn.

Meeting adjourned at 9:05 PM.

Respectfully submitted,

  
Susan Kelly

