

Date Filed: 18 March 2020
File No.: 21-20

RECORD OF PROCEEDINGS

I, Lisa C. Morrison, assistant to the Zoning Board of Appeals of the town of Edgartown, hereby certify that the following is a detailed record of proceedings pertaining to the appeal by WJH LLC, Green Hollow LLC, the Reily Family Limited Partnership, William B. Reily IV and Caroline Reily of the Building Inspector's decision not to require a flood plain permit under sections 7.3 and 7.4 D of the Edgartown Zoning Bylaw for work on property belonging to Thomas M. Sheehan, Tr. for Donald L. Sullivan. The property is located at 32 Ocean View Avenue, Assessor's Parcel 29-137 in the R-60 Residential District.

1. On 18 March 2020 the application, a true copy of which is marked "A," was presented to the Town Clerk and to the Zoning Board of Appeals office.
2. Because of the pandemic, and with Mr. Moriarty's (the appellants' attorney) approval, the initial hearing was not scheduled until 30 September 2020.
3. An advertisement, a true copy of which is marked "B," was published in the *Vineyard Gazette* on 11 September 2020 and 18 September 2020.
4. Notice of the hearing, a copy of which is marked "C," was mailed, postage prepaid, to the petitioners; the abutters - owners of land adjacent to the subject property within 300 feet of the property lines - all as they appear on the most recent, applicable, certified tax list; and to all the proper town boards and departments.

On Wednesday, 30 September 2020, the hearing was held remotely via Zoom. The following board members were present for the hearing: Nancy Whipple – Acting Chairman, John Magnuson, Carol Grant, and alternates Robin Bray and Julia Livingston. Also present were Timothy Moriarty, Caroline and Bo Reily, Doug Hoehn, Michael Bonner – attorney for Mr. Sullivan, Eric Las, and Jason Brickman.

Ms. Whipple opened the hearing and asked for the appellants' presentation. Mr. Moriarty began by outlining the ways in which his clients are aggrieved by Mr. Sullivan's project. He said that Mr. Sullivan has overdeveloped a nonconforming .92-acre lot by clearing the northeast corner of the property of trees, regrading the area, and installing a nonconforming retaining wall and driveway. Mr. Moriarty commented that the driveway does not provide adequate access for large vehicles to turn around, subjecting the Reilys' to the near-constant beeping of trucks backing up the entire ½-mile of Ocean View Avenue.

Mr. Moriarty stated that on 7 February 2020, he filed a request for enforcement with the Building Inspector [See letter in file dated 7 February 2020], alleging that Mr. Sullivan did work in a floodplain without receiving a special permit from the Zoning Board of Appeals or from the Conservation Commission. [Mr. Sullivan, in fact, received a Negative Determination of Applicability from the Conservation Commission for the work in the flood plain. Mr. Moriarty appealed this determination to DEP. As a result, there is currently a NOI pending before the Conservation Commission.]

Mr. Moriarty said that on 21 February 2020 he received a response from the Building Inspector [See letter in file dated 21 February 2020] stating that according to section 7.7 of the bylaw, no special permit is required for the construction, grading, or backfilling of the wall and driveway as they are “incidental to the construction of a residence or other structure for which a building permit has been issued.” Mr. Moriarty stated that the driveway is not ‘incidental’ to the construction of the house, but is new construction in the Flood Zone and, as such, requires a special permit.

Mr. Moriarty said that on 18 March 2020, he appealed the Building Inspector’s determination to the Zoning Board of Appeals. Mr. Moriarty stated that his appeal is not untimely because his clients received no notice that Mr. Sullivan was planning to construct a 10 ½-foot wall within 7-feet of their property. It was only when they returned to the island and saw that all the trees had been removed from the site and extensive excavation was taking place. The Reilys’ complained vociferously to the Planning Board during a special permit hearing for the garage and to the Conservation Commission when they issued a negative determination for those portions of the wall and stairway landing that were in the flood plain.

Mr. Moriarty insisted that construction of a wall in the Flood Plain requires a special permit under sections 7.3 and 7.4 D of the bylaw. Ms. Livingston asked Mr. Moriarty if he could provide examples of any special permits issued by the Zoning Board for driveways or walls within in the Flood Plain. Mr. Moriarty could not.

Caroline Reily commented that she believed the purpose of the Conservation Commission, the Planning Board, and the Zoning Board of Appeals is to protect and preserve the natural and historic nature of the town. She said that the Sullivans have disregarded everything that makes this part of Edgartown Harbor special. She said that the excavation in question was not minor, but extensive and amounted to a total clear-cut of the property. She said that the redesign of the driveway is inadequate and does not provide space to allow trucks to turn around. She said that the trees that Mr. Sullivan planted are already dying and will not last through a storm. She said that her family now has to suffer the consequences of Mr. Sullivan’s bad planning and over development. She said that had the boards really been aware of what was to be constructed, they never would have allowed it to happen.

Michael Bonner, attorney for Mr. Sullivan, said that much of what has been stated is not really relevant to the appeal. He said that the ZBA lacks jurisdiction to even hold the hearing, because the appeal is ‘time-barred.’ In addition, he said the Reilys have no standing. Mr. Bonner also stated that the Building Inspector was correct in her determination that the work in the flood plain was incidental to

validly issued permits and did not require special permits under flood plain zoning. He said on those merits alone, the board could deny the appeal and uphold the decision of the building inspector.

Mr. Moriarty said there were two significant defects that were not addressed in Mr. Bonner's argument: the WPA requires that all necessary permits be issued or applied for before a notice of intent can be submitted. He noted that the plans submitted with the original Notice of Intent did not show the flood plain at all.

Ms. Whipple then closed the public portion of the hearing for discussion among the board members.

Ms. Grant commented that she has been on the board for nearly 30-years and - to the best of her knowledge -the board has never issued a special permit under Floodplain Zoning. John Magnuson, another long-time board member, agreed and said that he had never seen a request for a special permit under the Floodplain Zoning, and there have been many structures built - at least partially -in the flood plain.

Ms. Livingston commented that the word 'incidental' usually means something that is subordinate to something else - in this case the house. She said that 'incidental' is not the same as 'necessary.' She said that she believed the Building Inspector made a reasonable decision.

Mr. Bray asked if Reade Milne, the Building Inspector, would like to weigh in on whether or not the wall is a structure. Ms. Milne replied that she and Doug Hoehn spoke extensively about how to determine the height of the wall. The bylaw does not address any method of determining the height from mean natural grade except for houses, where one measures the height of the four corners from mean natural grade and averages them. The 'as-built' plan of the wall was submitted to the Building Inspector on 28 August 2020. She said she is satisfied with Mr. Hoehn's methodology. Mr. Hoehn reiterated that there is no formula for measuring a 198-foot 1.5-foot wide wall specified in the bylaw.

Mr. Sullivan said that he has reviewed the report submitted by Mr. Las, the engineer hired by Mr. Moriarty. Mr. Sullivan said that the engineer was using erroneous plans. Mr. Hoehn agreed, and noted that although Mr. Las was using a similar protocol for measuring the wall, he was working from a sketch of the proposed wall, rather than the actual wall.

Mr. Moriarty accused Mr. Hoehn of 'cooking the data.' He said that not enough measurements were taken and that Mr. Hoehn's measurements were based on 'approximate' data. Moriarty maintained that the wall is over 6-feet and therefore should be considered a structure under the Zoning Bylaw and therefore requires a special permit or a variance from the ZBA as it does not conform to setbacks.

Mr. Hoehn responded that Mr. Moriarty has completely misinterpreted his report. He noted that the previous owner had commission a full topographic study of the property. He said that when he was referring to 'approximate NGVD29 datum' and 'project datum' it was in no way meant to signify that the original topographic was approximate. He said Mr. Moriarty was not reading his calculations correctly and that his own engineer would understand that methodology used was not based on approximate data.

Mr. Reily commented that Mr. Hoehn is responsible for most of the work that has been a problem. He said he did not think that Mr. Hoehn should be 'checking his own work.'

Ms. Milne replied that she has a long-standing relationship with Mr. Hoehn and has always found him to be completely honorable and unbiased.

Mr. Hoehn said that he wished to clarify the fact that he did not design the wall, nor did he build it. He was asked by the Building Inspector to make a determination on the height of the wall. He said he used the same professionalism that he used when he surveyed the Reily property many times in the past.

Ms. Reily asked why Mr. Hoehn left the floodplain off the plan originally submitted to the Conservation Commission if he wasn't 'cooking the books.'

Ms. Whipple then closed the public hearing and the board voted unanimously by roll-call vote to continue the hearing to Thursday, 15 October 2020 at 3:00 p.m. in order to review the information provided in the hearing, draft a decision, and consult with town counsel – if necessary. She told all those present that they would be welcome to attend the continuation, but reminded them that the record was closed.

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On Thursday, 15 October 2020 at 3:00 p.m. the Board reconvened via Zoom. The hearing was posted and duly noticed. Present for the hearing were: Nancy Whipple – acting chairman, John Magnuson, Carol Grant, Robin Bray – alternate, and Julia Livingston, alternate. Also attending were: Bo & Caroline Reily, Tim Moriarty, Eric Las, Don Sullivan, Doug Hoehn, and Michael Bonner.

Ms. Whipple opened the hearing and reminded those present that the record was closed to public input and no additional information will be received or presented. Ms. Whipple said that the question before the board is: Was the Building Inspector correct in exercising her discretion not to enforce Section 7 – Floodplain Zoning? She asked if there was any discussion or questions from the board members.

Mr. Magnuson said that he reviewed the information presented at the prior meeting and the minutes. He said he did not think any discussion was necessary and that he is ready to make a motion.

Ms. Grant said that she too reviewed the minutes and other materials. She noted that in her entire experience as a member, the board has never been asked to issue a special permit for work in the flood zone.

Mr. Magnuson made a motion to deny the Reily's request for enforcement and uphold the Building Inspector's decision not to require the Sullivan's to apply for a special permit under Flood Plain Zoning.

Ms. Grant seconded the motion and voted to uphold the Building Inspector's decision for the same reasons.

Ms. Whipple, Ms. Livingston, and Ms. Bray also voted to uphold the decision of the Building Inspector for the same reasons.

Motion carries, 5 to 0.

The board also voted unanimously by roll-call vote to allow the assistant to sign the decision on their behalf and file it with the town clerk within 14 days.

Respectfully submitted,

Lisa C. Morrison
Assistant