

Case # 45-19

Date Filed: 10 December 2019

DECISION AND FINDINGS OF THE ZONING BOARD OF APPEALS

**Re: Appeal under M.G.L. Chapter 40A Sections 8 & 15 by Shute Building Realty Trust, Benjamin L. Hall, Trustee from a determination of the Edgartown Zoning Inspector
Owner: Town of Edgartown, lessee Summer& Main LLC, Christopher Celeste, Manager
Assessor's Parcel: Map 20D Lot 125
Book: 1442 Page: 310**

PROCEDURAL HISTORY:

1. The Shute Building Realty Trust filed a complaint seeking zoning enforcement with the Zoning Officer dated 11 October 2019 concerning permits issued for property owned by the Town of Edgartown at 66 Main Street. Shute owns a property across the street at 11 South Summer Street.
2. On 21 October 2019, the Zoning Officer issued a decision denying Shute's request for enforcement.
3. By letter dated 20 November 2019 - but not stamped into the Town Clerk's Office or the Zoning Board of Appeals Office until 21 November 2019 - Shute purported to appeal the 21 October 2019 decision of the Zoning Inspector.
4. By letter dated 25 November 2019 and by hand, the ZBA Administrator informed Shute that its appeal was incomplete, because it was not on the proper form nor did it include the \$100 filing fee mandated by the ZBA rules and regulations. The ZBA Administrator informed Shute that - as per the ZBA rules and regulations - until the application form and fee were received the letter dated 20 November 2019 would be deemed to be a notice of intent to file an appeal.
5. On 10 December 2019 Shute, through its attorney, Benjamin L. Hall, Jr., filed its complete appeal application with the ZBA.
6. The grounds for Shute's appeal, as set forth in its 6 December 2019, letter, which incorporated by reference Shute's letter dated 20 November 2019, may be summarized as follows:

a. The Town, which acquired the property by eminent domain, and utilized Community Preservation Act (CPA) funds for a portion of the acquisition cost, was required to place restrictions on the property under the CPA. The appeal stated that the Town failed to place “all restrictions ...as required,” and a building permit should not have been issued until all restrictions had been filed.

b. Local permitting authorities were required to refer the project to restore and rehabilitate an existing historic structure on the property - commonly referred to as the ‘Yellow House’ - and a smaller commercial building (which project the Town awarded to a private entity under the applicable procurement laws) to the Martha’s Vineyard Commission (MVC) because: (1) the permits issued authorized development of five ‘new units’ on the property, thus triggering MVC referral under checklist items 3.2 and 2.1; and (2) the Town Administrator submitted an ANR plan to the Planning Board, adjusting the boundary line between site and an adjacent parcel owned by the Town, without an authorizing vote of the Board of Selectmen; and (3) the lot line effectuated by the ANR approval constituted a division of commercial property, which also requires a referral to the MVC. Shute further contends on appeal that, without the lot line adjustment, the smaller building on the property, closest to the abutting Town parcel, does not meet the requisite setback requirement.

7. Shute requested that a hearing on its appeal not be held prior to 7 January 2020 due to Attorney Hall’s vacation schedule. Accordingly, the ZBA noticed a public hearing for 15 January 2020. Attorney Hall then requested a continuance of that hearing date due to personal family matters and, by agreement, the ZBA continued the hearing to 29 January 2020. In connection with that continuance, Mr. Hall executed an agreement to extend time limits under G. L. c. 40A, ¶ 15, which has been filed with the Town Clerk.

8. At the 29 January 2020 public hearing, Shute, through Attorney Hall and Brian Hall, presented the arguments similar to what Shute advanced in its written submission.

9. Former Zoning Inspector, Leonard Jason, Jr. also testified. Mr. Jason retired between the time of his 21 October 2019 denial and the 29 January 2020 hearing. Mr. Jason’s decision denying zoning enforcement dated 21 October 2019 was submitted and reviewed by the ZBA, and Mr. Jason supplemented his letter with oral statements

FACTS

1. Prior to the issuance of a building permit for the small building, the Planning Board endorsed an ANR plan, which approval had the effect of adjusting the lot line between the site and the Town’s abutting property. The lot line adjustment added an area approximately two-feet wide to the site, adjacent to the small building, and cured any purported setback violation. The Planning Board provided notice to Shute of the date and time when it would be acting on the ANR plan, although not required to do so by statute. Shute did not appeal or otherwise seek judicial review of the Board’s endorsement and, accordingly, has lost its rights to do so through a later zoning enforcement request.

2. Shute had actual and constructive knowledge that Mr. Jason had issued a building permit for the small building – the project is in the center of Town and is highly visible. Shute did not appeal the issuance of the building permit to the ZBA within the 30-day period mandated by G. L. c. 40A, ¶ 15 and, again, has lost its right to do so through this later filed enforcement request.
3. A lot line adjustment does not require referral to the MVC. Mr. Jason stated that he had conferred with Adam Turner, the Executive Director of the MVC, who agreed with that position.
4. Mr. Jason stated, and the ZBA concurs, that the project is creating only three new units, thus bringing the number of ‘new units’ below the threshold required for MVC referral. Mr. Jason further represented that Adam Turner, the Executive Director of the MVC, agreed with this determination.
5. The ZBA accepted into the record a vote of the Selectmen ratifying and confirming the actions of the Town Administrator in connection with the submission of the above-described ANR plan to the Planning Board.
6. The ZBA asked Attorney Hall to explain how Shute was ‘aggrieved’ by the issuance of the building permits for the small building and the Yellow House. Attorney Hall and his brother, Brian Hall, stated - in essence - that they have a right to expect that zoning will be even-handedly enforced. Shute did not present any argument as to how its property will be adversely affected by the construction activity authorized by the building permits.
7. Upon motion, duly made and seconded, the ZBA closed the public portion of the hearing. The matter was continued until 5 February 2020.
8. Chairman Tomassian reported that he had consulted with counsel and his search of the public records showed that the Town had recorded a Conservation Restriction and a Historical Preservation Restriction with the Dukes County Registry of Deeds on 13 December 2018 (Book 1485, Pages 430 and 456).
9. The ZBA then proceeded to discuss the evidence and, upon motion made and seconded, it unanimously voted to deny the appeal on the following grounds:
 - a. The Planning Board endorsed the ANR plan adjusting the lot line between Town-owned parcels; the Town Administrator’s actions in submitting the plan to the Planning Board were ratified and confirmed by the Selectmen, both by vote and by approval of the payment to the surveyor who prepared the plan;
 - b. The lot line adjustment does not require submittal/referral to the MVC;
 - c. Shute failed to appeal or otherwise challenge the approval of the ANR plan in court;
 - d. The small building presently conforms to all setback requirements;

- e. Shute did not appeal within the time limit the issuance of the building permit for the small building, which allegedly created a setback issue;
- f. Shute did not set forth any particularized harm that it suffered as a result of the alleged setback violation. In this regard, the ZBA noted that the direct abutter is in fact the Town. Shute produced no evidence that it is a person 'aggrieved' within the meaning of the zoning act;
- g. The Zoning Inspector correctly determined that the number of new units in the project does not require referral to the MVC.
- h. Shute also did not identify or specify any particularized injury or harm resulting from any purported failure of local permitting authorities to refer the matter to the MVC;
- i. Shute conceded that any referral to MVC based on the number of units necessarily required the MVC to concur that the project needed review, and Brian Hall stated - in essence - on behalf of Shute, that he had no doubt that the MVC would refuse to review the project;
- j. Shute's appeal was not filed in a timely manner as its submission dated 20 November 2019 was incomplete. The final submission of 10 December 2019 was beyond the period within which an appeal can be taken pursuant to G. L. c. 40A, ¶ 15. The ZBA does not, however, rely on the late filing as a basis for rendering its decision; and finally,
- k. The ZBA found that, whether or not the Town recorded appropriate restrictions under the CPA with the Registry of Deeds, is not germane to any of the zoning issues that Shute raised, and that, in any event, the Town had recorded such restrictions.

FINDINGS & DECISION:

1. Based on the above, the ZBA finds that the Zoning Inspector properly exercised his discretion in not granting zoning enforcement or relief to Shute. The ZBA agrees and concurs with the Zoning Inspector's 21 October 2019 decision in all respects.
2. The ZBA finds that there is no basis to conclude that the project does not comply with the Edgartown Zoning Bylaw or G. L. c. 40A.
3. The ZBA unanimously determines that zoning enforcement is denied, and affirms the decision of the Zoning Inspector by a vote of 5-0.
4. The decision of the Zoning Board of Appeals and a record of its proceeding shall be filed with the office of the Town Clerk.

As recorded in the minutes, the Board voted unanimously to approve the Chairman to sign the Decision and Findings as drafted.

Martin V. Tomassian, Jr.

Note: This decision was filed in the office of the Town Clerk on February 2020. Appeals, if any, should be made pursuant to Section 17 of Chapter 40A of the Massachusetts General Laws and should be filed within 20 days of the filing of this decision in the office of the Town Clerk.

2020

I hereby certify that no appeal has been filed in the twenty-day period following the date of filing this decision.

Copies of the Decision and Findings will be mailed to: petitioner, all parties of interest, and any person who requested a copy of the Decision at the public hearing.

Lisa Morrison, Administrator

