

Case No. 36-22

Application filed: 30 September 2022

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 John P. & Jennifer K. Bretl under M.G.L. ch. 40A. sections 8 & 15. The appeal concerns the determination by the Building/Zoning Inspector that the mapping of the shore zone as shown on the survey by Schofield, Barbini & Hoehn dated 10 September 2021 (revised) is correct. The property is located at 6 Armstrong Lane (Assr. Pcl. 30-20) in the R-120 Zoning District.

1. On 30 September 2022 the application, a true copy of which is marked "A," was presented to the Town Clerk.
2. An advertisement, a true copy of which is marked "B," was published in the Vineyard Gazette on 28 October and 4 November 2022.
3. Notice of the hearing, a copy of which is marked "C," was mailed, postage prepaid, to the petitioners; the abutters and abutters to 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, 16 November 2022, the hearing was opened and held via Zoom. The following board members were in attendance: Martin Tomassian – Chair, Nancy Whipple, Thomas Pierce, Carol Grant, and Pam Dolby. Chairman Tomassian opened the meeting and read the necessary requirements for conducting remote meetings in compliance with both the Governor’s order and the Open Meeting Law.

Attorney Tad Heuer of Foley Hoag LLP was present for the applicants, who were also in attendance. Phil Regan and Matt Cramer of Hutker & Associates were also present.

Mr. Heuer began the presentation saying that the issue is whether a bluff exists on the property or not. He noted that the term ‘bluff’ is defined in Section 5.1.B 1. of the bylaw and is used to determine the location of the shore zone and, ultimately, the location of the house. Mr. Heuer said that he disagrees with the Building Inspector’s determination.

Mr. Heuer commented that although the Shore Zone is mapped on the Martha’s Vineyard Commission map dated 21 April 2011, the map has a disclaimer that states it is not to be used for “boundary determination or regulatory interpretation.” Furthermore, it has not

been adopted by the town at town meeting as required by Chapter 40 A and, consequently, has no legal relevance.

Mr. Heuer said that in order to determine the location of the Shore Zone, one must look to section 5.1.B.1 of the bylaw, which defines both the shore zone and the term 'bluff.' In order for a land form to meet the definition of a bluff, as defined in the bylaw, it must meet three criteria: It must be adjacent to a beach or coastal wetland; it must show the effect of wave or down slope erosion; and the erosion must cause the land to be steeper than the natural slope of the land. Mr. Heuer said that none of these three conditions are present on the Bretl property. [See site report from ECR – dated 5 July 2022].

The applicants hired a hydrogeologist, Stanley Humphries of ECR, with 40 years experience to evaluate the site and determine the location of the shore zone on the property. He determined that the land was not adjacent to a beach or coastal wetland as it was separated by 20 to 30 feet of coastal dune. He also found that the bank was heavily vegetated and showed no evidence of erosion. He further determined that the bank was no steeper than the natural slope of the land but was in fact a side of Manaca Hill. Therefore, he determined that the shore zone should be measured not from the top of the bank, but from the inland edge of the beach.

Mr. Heuer noted that in order to legally uphold the determination of the building inspector on appeal, the board must have expert testimony supporting the inspector's determination. Mr. Heuer said there was no such testimony in the record. He said that the board cannot declare something to be true simply because of past practice, as such a determination is not legally sufficient.

Mr. Heuer said that he would like to reassure the board that should the appeal be granted, very little will change on the site. The proposed house will be less visible from the public view than many of the neighboring houses. It will have the same number of bedrooms as the existing house and will be no closer to the water than the existing structures. Mr. Heuer said that even though the construction of the house will be reviewed by the Planning Board and the Conservation Commission, he wanted to give the board some context. He noted that should the board grant the appeal, it will not change the rules for any of the other properties in the neighborhood or set a new precedent. He said that what the bylaw is written to protect, will remain protected.

Mr. Heuer also commented that he is not sure how the Building Inspector was able to visually inspect the property, as no notification was ever given to the Bretls.

Mr. Heuer further commented that the mapping done by Mr. Hoehn simply replicates information from other sources and, as a surveyor, Mr. Hoehn is not qualified to "either interpret zoning bylaws or establish zoning boundaries." Mr. Heuer also noted that Mr. Hoehn's survey does not indicate the presence of a coastal *bluff*, but demarcates a coastal *bank*.

In conclusion, Mr. Heuer asked the board to overturn the Building Inspector's determination, noting that no coastal bluff exists on the property and, therefore, the shore zone should be measured from the inland edge of the beach, not from the top of the bank.

Mr. Tomassian asked if there were any letters from town boards or departments. There was no one present who wished to speak either for or against the request.

Reade Milne, Edgartown Building/Zoning Inspector, said she would like to clarify that she did not enter the Bretls' property without their permission, but was able to observe and photograph the conditions she needed see from below the low tide line.

Ms. Milne then gave a brief outline of events leading up to the appeal. She said she was contacted by Matt Cramer of Hutker & Associates for a pre-application meeting in the spring of 2022. She reviewed the original Schofield, Barbini & Hoehn site plan and agreed with the delineation of the shore zone as determined by Mr. Hoehn and Mr. Cooper. She said that the methodology used to delineate the shore zone is 100% the same across the board - both in Edgartown and the island as a whole - and always has been. She said it came as a surprise to Mr. Cramer when he was told that - in Edgartown - only a 10% increase is permitted in the Shore Zone. (Other towns on the island have different shore zone regulations, but all towns delineate the shore zone by the same methods.) Ms. Milne said that she believed that Mr. Cramer was under the impression that his clients could just go to the Planning Board and get a special permit to increase the size of their proposed dwelling by more than 10%. Ms. Milne said that it was only after Mr. Cramer was told that his clients could not build what they wanted, that they pivoted and petitioned to try and get the shore zone redefined.

Ms. Milne noted that on her visit to the site, the bluff did - in fact - show the effects of down slope erosion.

Mr. Tomassian said that he did not think a rebuttal was required, as the Building Inspector was merely stating her position. He reminded the board that the only decision is whether or not to uphold the determination of the Building Inspector.

Mr. Tomassian said that it appeared to him that the Bretls hired Mr. Hoehn and Mr. Cooper, a wetlands scientist, to determine the limit of the Shore Zone and when the Bretls did not like the answer, they went and hired someone else.

Mr. Pierce expressed some confusion. He said it seemed that the crux of the problem lies in where and how the shore zone is defined.

Ms. Dolby commented that in her decades of experience working for the town, there has been little differentiation between the terms coastal bank and coastal bluff. In her experience, both terms have been used interchangeably. She noted, as a former member of the Conservation Commission, that the Edgartown's Wetland Protection Bylaw does not distinguish between a coastal bank and a coastal bluff. She said that just because a bank, or bluff, is vegetated does not mean erosion is absent, and that one good storm could easily strip away all the vegetation and the underlying sand or soil.

Ms. Dolby asked if town counsel had reviewed the case. Mr. Tomassian said that he believed that he had. Ms. Milne confirmed that she had consulted Mr. Rappaport several times on these issues.

Mr. Heuer interjected that common knowledge or past interpretations do not constitute a valid opinion and that it is the obligation of the board to uphold the bylaw. Ms. Dolby

disagreed and said that she believed the obligation of the board was to interpret, as well as uphold, the bylaw. She said she believed the definitions in the bylaw were open to interpretation. Mr. Tomassian agreed.

Ms. Dolby made a motion to uphold the decision of the Building Inspector and her determination that the shore zone should be measured from the top of the bank and not from the inland edge of the beach. She noted that this is how the bylaw has been interpreted for decades and is the accepted practice both in Edgartown and across the island. She said that she believes the shore zone delineations of Mr. Hoehn and Mr. Cooper are accurate and that this opinion has been confirmed by town counsel.

Ms. Whipple seconded the motion and voted to uphold the decision of the building inspector.

Ms. Grant voted to uphold the decision of the building inspector.

Mr. Pierce voted to uphold the decision of the building inspector.

Mr. Tomassian voted to uphold the decision of the building inspector.

Decision to uphold the determination of the building inspector was unanimously approved, 5-0.

Respectfully submitted,

Lisa Morrison
Assistant