

Date Appeal Filed: 30 September 2022

File No.: 36-22

### **DECISION AND FINDINGS OF THE ZONING BOARD OF APPEALS**

**Re: Appeal under M.G.L. Chapter 40A, Sections 8 & 15 by John P. & Jennifer K. Bretl of a determination by the Building Inspector relative to the location of the Shore Zone on property located at 6 Armstrong Lane, Assessor's Parcel 30-20, in the R-120 Residential District.**

**Title Reference: Book: 82 Page: 127**

#### **PROCEDURAL HISTORY:**

1. In the spring of 2022, the Building Inspector, Reade Milne, met with Matt Cramer of Hutker Architects for a pre-application meeting.
2. Subsequent to that meeting, emails between Phil Regan of Hutker Associates, the Building Inspector, and J. P. Bretl, appellant, were exchanged. [See application package submitted by Tad Heuer of Foley Hoag LLP]. The emails concerned the location of the Shore Zone on 6 Armstrong Lane.
3. In an email dated 20 May 2022, the Building Inspector stated that she believed the location of the Shore Zone - as shown on the original site plan dated 2 July 2021 by Schofield, Barbini & Hoehn as well as the location of the top of bank as plotted by Doug Cooper of Cooper Environmental - were both correct and accurate "using the same criteria that they use for any property that falls within the Coastal District."
4. On 6 July 2022, Mr. Bretl forwarded to the Building Inspector, a copy of the report made by Stanley Humphries of Environmental Consulting & Restoration, LLC (ECR) dated 5 July 2022. The report concluded that no bluff exists on the Bretl property.
5. In a follow-up email dated 15 July 2022 from Mr. Bretl to Ms. Milne, Mr. Bretl asked for a determination in order to move the application forward for further review by the Conservation Commission and the Planning Board.
6. On 16 September 2022, the Building Inspector issued a formal zoning determination, finding that the Shore Zone is properly located from the Top of the Bank, as depicted on the Schofield, Barbini, and Hoehn plan dated 2 July 2021.

7. On 30 September 2022, Tad Heuer of Foley Hoag LLP submitted an appeal of the Building Inspector's decision to the Zoning Board of Appeals.

8. A hearing by the Board was scheduled for 16 November 2022. Notices were placed on the town's website and with the Town Clerk, and advertised in the *Vineyard Gazette* on October 28<sup>th</sup> and November 4<sup>th</sup> 2022. Abutters were notified of the time and date of the hearing and the necessary Zoom information to attend the hearing.

9. On 16 November 2022 the hearing was held remotely via Zoom. Attorney Heuer was present to represent the appellants, Mr. & Mrs. Bretl, who were also in attendance. Matt Cramer and Phil Regan from Hutker's office were also present on behalf of the Bretls.

10. The Board reviewed the appeal, the plans and photographs, and all other materials and information submitted prior to the close of the public hearing. The Board received and gave due consideration to the testimony given at the public hearing [See Record of Proceedings].

**FACTS:**

1. In the course of his presentation, Attorney Heuer stated that the issue before the board is the location of the Shore Zone, which – he said – is determined by whether or not a bluff exists on the property.

2. Mr. Heuer said that the report by ECR concluded that no bluff - as defined by Section 5.1.B.1 - 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.

3. Mr. Heuer noted that according to 5.1.B.1 of the bylaw, three criteria must be met in order for a land form to be called a bluff: In addition to being higher than 15-feet, a "bluff shall mean land adjacent to a beach or coastal wetlands which shows the effects to [sic] wave erosion of [sic] other down slope erosion causing it to be steeper than the otherwise natural slope of land."

4. Mr. Heuer said that neither of these three criteria exist at 6 Armstrong Lane: the water side of the property is heavily vegetated and shows no sign of erosion; it is not adjacent to the beach but separated by 20 to 30 feet of coastal dune; and it is not any steeper than the natural slope of the land, i.e., Manaca Hill.

5. Building Inspector Milne disagreed, and noted that her inspection of the property indicated that there was evidence of down slope erosion. She said that she is confident in the methodology used by Mr. Hoehn and Mr. Cooper in determining the Shore Zone.

6. Ms. Milne stated that it was not until after her pre-application conference with Mr. Cramer, that any questions arose regarding the accuracy of the Shore Zone designation on the Schofield plan. During that conference, Mr. Cramer was made aware that in Edgartown additions of more than 10% of floor area are not permitted in the Shore Zone. Ms. Milne stated that Mr. Cramer believed that his clients could apply to the Planning Board to increase the addition beyond 10%, which Ms. Milne informed him was not the case.

7. Ms. Milne said that after the appellants learned that they could not build what they initially planned, they apparently retained ECR in order to challenge the location of the Shore Zone.

8. In the course of their deliberations, the Board noted that the terms 'Coastal Bank' and 'Coastal Bluff' were used interchangeably in many instances over the past decades, and there is no differentiation between the two in the Edgartown Wetlands Protection Bylaw.

9. It was further noted that simply because a bank is vegetated that does not make it immune to erosion. As stated by Ms. Dolby, one good storm could wipe away that vegetation. Rising sea levels and increasingly violent storms increase that likelihood.

10. It was also noted that the bank in question is clearly a coastal land form and adjacent to a beach, even if separated by 20 to 30 feet of coastal dune.

#### **FINDINGS:**

1. Based on the above, the ZBA finds that the Building Inspector was justified in relying on the determination made by Mr. Hoehn and Mr. Cooper on the location of the Shore Zone, using the same methodology they have used for decades across the island.

2. The board finds that the Building Inspector properly exercised her discretion in informing the clients and their agents that the proposed new structure was located in the Shore Zone and therefore, could not be expanded by more than 10%.

3. The board finds that the terms 'Coastal Bank' and 'Coastal Bluff' have been used interchangeably and agree with the Building Inspector's determination that the line designated as 'Top of Bank' on the revised Schofield, Barbini & Hoehn survey (12 August 2021) is the correct line from which the Shore Zone should be measured.

4. In a roll-call vote of 5-0, the ZBA voted unanimously to uphold the decision of the Building Inspector and deny the appeal.

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Martin Tomassian, Chairman

Note: This decision was filed in the office of the Town Clerk on 30 November 2022. 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.

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