

Date Appeal Filed: 18 April 2024

File No.: 17-24

DECISION AND FINDINGS OF THE ZONING BOARD OF APPEALS

Re: Appeal under M.G.L. Chapter 40A, Sections 8 & 15 by Victor Colantonio, Trustee of the Dawn Roberta Colantonio Revocable Trust of a determination by the Building Inspector relative to the activities of the Trustees of Reservations (TTOR) on Cape Poge. The Colantonio Trust is the owner of 55 Lighthouse Road & 0 Road to the Gut (Assr. Pcls. 3-11 & 2.2)

Book: 1361 Pages: 902 & 906, respectively.

PROCEDURAL HISTORY:

1. On 28 February 2024, Victor Colantonio, owner of the above captioned parcels, wrote to Reade Milne, Building and Zoning Inspector for the town of Edgartown, requesting a formal determination as to whether or not the activities of the Trustees of Reservations are in compliance with R-120 zoning requirements and the Cape Poge DCPC (Section 5.4) and if there has been an increase in the intensity of use over the last thirty years.
2. On 19 March 2024, Ms. Milne responded that she is unable to make the requested determination or issue a cease and desist as she does not have sufficient information to determine a baseline of TTOR's use and activities on its Chappaquiddick property at the time the Planning Board issued a special permit in 1990 and, therefore, was not in a position to determine whether TTOR has increased the intensity of its use to a degree requiring an amended or new permit.
3. On 18 April 2024, the Colantonio Trust appealed Ms. Milne's decision not to take action on the enforcement request to the Edgartown Zoning Board of Appeals.
4. A hearing by the Edgartown Zoning Board of Appeals was scheduled for 5 June 2024. Notices were placed on the town's website and with the Town Clerk, and advertised in the *Vineyard Gazette* on May 17th and May 24th 2024. Abutters were notified of the time and date of the hearing and the necessary Zoom information to attend the hearing.
5. On 5 June 2024 the hearing was held remotely via Zoom. Appellant Victor Colantonio was present, as was the attorney for the Trustees, Dylan Sanders, members of the Martha's Vineyard Beach Access Group (MVBAG), residents of Cape Poge and Chappaquiddick and other members of the public at large.

6. 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].

7. The Board voted to continue the hearing to 12 June 2024 in order to hear additional testimony and deliberate [See Record of Proceedings].

FACTS:

1. TTOR filed an application for a special permit from the Planning Board in May of 1990 under section 14.4 of the Edgartown Zoning Bylaws - Cape Poge District of Critical Planning Concern (the "DCPC"). Activities covered by the filing included: wooden walkways, vehicle ramps, trail and road extensions, fencing and other structures. It was accompanied by a document entitled 'Cape Poge Wildlife Refuge/Wasque Reservation Management Plan.'

2. Minutes of the Planning Board indicate that meetings were held on 29 May, 5 June, and 26 June 1990. At the meeting on 26 June 1990, the Planning Board voted unanimously to issue the special permit with the condition that the permit would be reviewed annually for compliance with the goals of the DCPC.

3. There is no record of the permit in the Dukes County Registry of Deeds, in the Edgartown Town Clerk's Office, or in the Planning Board archives. Likewise, the Trustees have not been able to produce the permit. Similarly, there is no record of any subsequent reviews taking place.

4. Mr. Colantonio and other residents of Cape Poge gave evidence that – in their opinion – the Trustees have far exceeded the scope of the 1990 special permit, and that the intensity of TTOR's use of its land within the DCPC has increased. [See Record of Proceedings]. One example referenced by the witnesses is that the Dike Bridge was not operational for a period of time after the Planning Board's vote on the 1990 special permit. Once the Dike Bridge became passable after 1994, it is likely that circumstances led to an increase in the use of the trails leading to the DCPC. [See Record of Proceedings]. Mr. Colantonio and others alleged that TTOR, by collecting millions of dollars in sticker and walk-on fees and other activities, is operating a commercial enterprise without a valid special permit [See Record of Proceedings].

5. Mr. Colantonio and other residents of Cape Poge further allege that the Trustees are not adequately managing their properties and are rerouting OSV (Over Sand Vehicles) onto private property in an attempt to access the Gut. [See Record of Proceedings].

6. Members of MVBAG allege that a group of private landowners have 'weaponized' regulatory bodies such as the ZBA to 'further their agenda of establishing a private sanctuary.' [Sliwowski email of 12 June 2024. See also Record of Proceedings].

7. Mr. Colantonio and other residents of Cape Poge have stated that they are not attempting to prohibit OSV access to Chappaquiddick beaches, but are asking that the Edgartown Zoning Bylaws and the DCPC regulations be enforced.

8. Dylan Sanders, attorney for the Trustees, stated in his letter dated 12 June 2024 that there is no basis for finding that the Trustees are 'in violation of any specific provisions of the bylaw.' Attorney Sanders denies that the Trustees have no special permit to 'allow the public to continue using over sand vehicles

(OSVs) north of the Dike Bridge, as the public has been doing for over 60 years' or that the Trustees are engaged in commercial activity by charging fees for OSV permits in the R-120 Residential District.

FINDINGS:

1. TTOR relies (cited in a letter to the Planning Board dated 7 March 2024) on the decision *McDermott v. Bd. of Appeals of Melrose*, as a basis for stating that: 'it is well established that such [unrecorded] special permits are effective so long as the permits were used and acted upon.'
2. In the McDermott case, the holder of the special permit had an actual copy of the special permit (but it was not recorded.) Here, no special permit has been produced.
3. Without the actual special permit voted on in 1990 – and without additional factual information – the Building Inspector lacked the necessary information to determine whether or not the increase in intensity of use of the lands in the DCPC – or the creation of new facilities such as trails – constituted an increase in the intensity of use authorized by the Planning Board's 1990 vote, requiring an 'amended' special permit.
4. Testimony by witnesses at the public hearing, including Victor Colantonio, Bo Reily, Rachel Self, and William Gazaille, and the documents submitted and referenced by Ms. Self, establish a strong likelihood that the intensity of TTOR's use of its lands within the DCPC has increased since the Planning Board's 1990 vote.
5. The available beach and shoreline within the DCPC have eroded significantly since the Planning Board's 1990 vote.
6. In view of these findings and the lack of clarity in the scope of the Planning Board's 1990 special permit, the Board determined that it would be in the best interest of all concerned for TTOR to file for a new special permit in order to (1) establish a baseline for their use of the land within the DCPC; and (2) correct the deficiency in the overall record caused by the missing 1990 special permit.

DECISION:

In a roll-call vote of 5-0, the ZBA voted unanimously to uphold the decision of the Building Inspector not to issue a cease and desist and to modify her decision by requiring TTOR require the Trustees of Reservations to file for a new special permit with the Planning Board by 12 July 2024 or cease operations within the DCPC.

Martin V. Tomassian, Chairman
Edgartown Zoning Board of Appeals

Note: This decision was filed in the office of the Town Clerk on 26 June 2024. 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.

_____ 2024

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

Attest: _____

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