

# Town of Scituate

ZONING BOARD OF APPEALS

600 CHIEF JUSTICE CUSHING WAY  
SCITUATE, MASSACHUSETTS 02066  
(781) 545-8716



Decision of the Scituate Zoning Board of Appeals (the "Board") on the application of Elinor Nichols of 2 Baileys Island,, Massachusetts 02066 (the "Applicant") requesting a variance under Massachusetts General Laws ("MGL") Chapter 40A, Section 10 from Section 610.2 Lot Frontage Requirement of the Town of Scituate Zoning Bylaw ("SZB") for the property known as 2 Bailey's Island, Scituate, Massachusetts. ("subject property").

The applicant is the owner of the subject property.

The application was received and advertised and an initial public hearing was opened on April 19, 2012 and continued to and held on May 17, 2012 with the following members of the Zoning Board of Appeals hearing the application:

Peter Morin, Chairman  
Brian Sullivan  
Sara Trezise

The property that is the subject matter of this application is located in an A-2 Residential District. The subject property lies in AE (EL 11) and Zone X as shown on FIRM Map Community Parcel #2502820001E, dated October 16, 2003.

The locus does not lie within the Town of Scituate Water Resources Protection Zoning District but does lie in the Town of Scituate Flood Plan and Watershed Protection District (EL. 10). At the time of the application title for the subject property stood in the name of Elinor Nichols by way of deed dated August 31, 1970 and recorded with the Plymouth County Registry of Deeds in Book 3616, page 296. The applicant was represented by Richard A. Henderson of Henderson and Henderson, PC, 76 South Main Street, Cohasset, Massachusetts and a letter of authorization to act on behalf of Mrs. Nichols was filed with the application.

The subject property contains 4.76 acres (4.3 acres of upland) and consists of a bedrock island surrounded in its entirety by salt marsh. The A-2 Residential District requires 20,000 square feet of area and 100 feet of frontage. Bailey's Island may not have legal frontage although it does have access roads which currently serve two residential dwellings, one on the subject property owned by the applicant and one on an adjacent property owned by an abutter, and does not abut a street or way other than the access road providing access through Wood Island Road to Indian Trail and Border Street ("access way"). The residents of Bailey's Island do have the benefit of the right the access way.

At the May 17, 2012 hearing the Board reviewed with the applicant the plan submitted on behalf of the applicant entitled "Plan of Land Bailey's Island Scituate, Mass" prepared for

Elinor Nichols by Cavanaro Consulting, Inc. dated September 22, 2011 which plan is not currently recorded.

It was stated on the applicant's behalf that the request for variance is the first step in a permitting process to divide the applicant's portion of Bailey's Island into two lots, one consisting of 3.01 acres of land (2.9 acres of upland) improved by a single family residence and garage and a second lot consisting of 1.75 acres (1.4 acres of upland) unimproved other than by an existing tennis court. The applicant's objective through estate planning and contractual obligations is to convey the lot improved with the residential dwelling to a daughter and devise or otherwise gift the unimproved lot to a granddaughter. The applicant was unable to obtain a Form A approval on the basis of representations made through the Planning Board Office in which the Board questioned the date of the creation of the access way which services Bailey's Island. The applicant is under a constraint from both the estate and gift tax deadlines and from contractual obligations to divide the property on or before December 31, 2012 or lose both certain tax benefits as well as certain testamentary rights to devise or otherwise gift the unimproved parcel to her granddaughter. Since the property is Land Court, municipal approvals will have to be re-examined by the Land Court engineering department which could take several months.

Bailey's Island is a rock formation surrounded by salt marsh, fed by two high tides each day, containing steep grade changes and is irregularly shaped with several course changes around its perimeter. Since the glacial age, soil has deposited upon the rock ledge and brush and woodlands have grown upon the subject property.

The Applicant originally sought a division of the land under MGL Chapter 41, Section 81P ("Form A Approval") based upon the third definition contained in MGL Chapter 41, Section 81L. It was argued on behalf of the applicant that each of her proposed lots fronted on a way which was in existence when Subdivision Control became effective in the Town of Scituate. It was also argued that the access way had sufficient width, suitable grade and adequate construction to provide for the means of vehicular traffic to service the two proposed lots. Prior to the hearing, however, members of the Planning Board's staff challenged the part of the argument relating to the existence of ways when subdivision adopted, advancing the proposition that subdivision became effective in the and it was difficult to establish that the way existed prior to 1954. The access way was created circa 1954. At that point, rather than resist denial of the plan, the applicant withdrew without prejudice and sought this variance. While the applicant does not waive her rights to argue as to the effective date of subdivision in the Town of Scituate, nor the date of the existence of the ways, it is apparent without the variance and/or cooperation of the Planning Board, the applicant will be deprived of a substantial use of her land not to mention the modification of her testamentary rights by virtue of certain contractual obligations. The applicant seeks only to create one additional lot for gift or testamentary purposes and it is noted that prior to the adoption of zoning the applicant could have constructed up to nine single family homes on the subject property using the existing access way to provide legal access to public ways. Due solely to the enactment of the frontage clause of the Bylaw there is no viable economical use of the additional part of

the premises within allowable uses in the zoning district without a variance. The Board also noted that no act of the applicant or her predecessor in title had occurred to create the need for the variance, the land in question being of geological phenomena and the regulation creating the requirement for frontage upon a street or way that created the need for a variance was through no act of the applicant.

The Board also finds that if variance is granted, other safeguards will be in place to insure compliance with the stated purposes of zoning. Specifically, in addition to the variance, the applicant will still need to have the approval of the Planning Board to divide the subject property into two lots, and should a single family residence be built on the unimproved lot, it would be scrutinized by the Board of Health, Conservation Commission, Police Department and Fire Department to ensure proper health and access requirements. In essence, one additional dwelling over the existing access way constructed on the subject property will conserve health, secure safety from fire, flood, panic and other dangers and provide adequate light and air, prevent overcrowded of land and avoid undue concentration of population . The Board finds that the subject property is located within a residential zone and the addition of one dwelling for Bailey's Island is most appropriate use for land owned by the applicant. With the assistance of the Board of Health and Conservation Commission and the applicant's own attitude towards her property, natural resources will be conserved and pollution of the environment will be prevented. The unique beauty of the subject property and it value for one additional dwelling site on the remaining land will prevent blight. As indicated, however, the objective of the applicant at this point is testamentary or lifetime giving not development of the site.

Based upon the evidence presented the Board finds the following:

1. Bailey's Island is an irregularly shaped parcel of land, separated from the mainland comprised of bedrock surrounded by salt marsh with steep grades and elevations up to twenty five feet. Its nature as an island and the Planning Board position dictate that it has no frontage on a way or street and its nature as such greatly pre-dates zoning. Therefore, Bailey's Island shape and topography especially affect the parcel but does not affect generally the zoning district in which it is located.
2. Bailey's Island's shape and topography prohibit its development consistent with the permitted uses within the zoning district. The applicant cannot reasonable make use of the property for the purposes or the manner allowed with the zoning district. That no act of the applicant or any predecessor has occurred to create the need for the variance, there has been no division of land that has created the need for a variance. Its nature as an island, its topography and its condition and layout have existed since well before the institution of zoning show, that the substantial hardship is not self imposed and therefore literal enforcement of the frontage provisions of the Bylaw would involve substantial hardship, financial or otherwise to the applicant.
3. During the course of the permitting process the Town will be insured that the principals of zoning will be adhered to in any use of the additional parcel intended to be

created by virtue of this variance. The construction of one additional dwelling upon the island is the most appropriate use of the land, so adequate light, air and the prevention of overcrowding of land is assured; therefore, desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the Bylaw.

For the foregoing reasons the Board unanimously grants the applicant's request for a variance from the frontage requirements of Section 610.2 of the Scituate Zoning Board with the condition, to allow the creation of one additional lot as depicted on the "Plan " filed with the Board.

Conditions:

1. Adequate, practical access to the subject property shall be provided to the satisfaction of the Building Inspector, Police Department and Fire Department.
2. Only one single family dwelling with allowable consistent with the Plan.
3. The subject property shall not be further divided.

ZONING BOARD OF APPEALS

  
Peter Morin, Chairman

  
Brian Sullivan

  
Sara Trezise

Filed with the Town Clerk on: June 19, 2012.

This Variance will not become effective until such time as an attested copy of this decision has been filed with the Plymouth County Registry of Deeds after the appeal period of twenty (20) days.

Appeal of any decision of the Zoning Board of Appeals may be made pursuant to MGL Chapter 40A, Section 17, and shall be filed in a court of competent jurisdiction. Proof of that filing shall be provided to the Town Clerk within twenty (20) days of the date of the filing of the Town Clerk