



Decision of the Scituate Zoning Board of Appeals on the appeal of Richard W. Twigg Jr. of 11 Stetson Road Norwell, Massachusetts (hereinafter, the "Appellant"), of the decision of the Scituate Building Commissioner and Zoning Enforcement Officer, Neil F. Duggan (hereinafter, the "Building Commissioner"), to issue a building permit (Building Permit No. 08295) on July 7, 2008 to Mark Stewart ("Stewart") to erect a single-family dwelling at 27 Collier Road (the "Premises").

The Appellant's appeal was timely filed with the Town Clerk on August 6, 2008. The appeal was received by the Board of Appeals, advertised, and a public hearing was scheduled for September 18, 2008. With the assent of all parties in interest, the hearing was opened on that date and continued to October 16, 2008. The Appellant represented himself at the October 16, 2008 hearing. The Building Commissioner was in attendance as was Stewart and his attorney, William H. Ohrenberger of Scituate. The following members of the Zoning Board of Appeals heard the application:

Peter Morin, Chairman  
Brian Sullivan  
Edward Tibbetts  
John Hallin

The Building Commissioner submitted the following documents to the Board's file: (i) Letter from Stewart's civil engineering consultants, SITEC, dated August 1, 2006; (ii) Letter from Stewart's former attorney, Michael C. Hayes, dated August 9, 2006; (iii) Correspondence from Town Counsel, Illana M. Quirk, dated November 1, 2006; (iv) Deed of the Premises to Stewart's predecessor in title, Nell G. Perry, dated January 1, 1947 and recorded with the Plymouth County Registry of Deeds at Book 1963, Page 250; (v) Letter from the Building Commissioner to Stewart dated December 16, 2006; (vi) Letter from Stewart's attorney, William H. Ohrenberger, III, dated March 6, 2008; (vii) Copy of Sheet 7 of 7 of a plan entitled "Easement Plan of Land for Brown Avenue and Collier Road in Scituate, Mass." dated November 2003, prepared for the Town of Scituate by Ross Engineering Company, Inc., 683 Main Street, Norwell, Mass., recorded with the said Registry as Plan No. 348 of 2005 at Plan Book 49, Page 906; (viii) Letter from Town Counsel, James A. Toomey, dated July 1, 2008, and (ix) Building Permit Application for the Premises and related plans.

The basis for the appeal is the allegation by the Appellant that the Premises is not a "grandfathered lot" for zoning purposes. According to plans submitted by Stewart with the application for the building permit, the Premises is an approximately 14,685 square foot parcel located in the A-3 Residential Zoning District. Stewart owns the Premises as Trustee of Mark Stewart Realty Trust. The Appellant owns a vacant parcel of land adjacent to the Premises and another parcel diagonally across the street. The Appellant submitted an affidavit filed in a Superior Court action (Plymouth Superior Court Docket

2007-CV325) wherein the Appellant swears his property value would be diminished. The Board did not challenge whether the Appellant had standing.

The Appellant does not dispute that the lot is a buildable lot, but rather the ruling by the Building Commissioner that the lot enjoyed grandfathered status. G.L. Ch. 40A, Section 6, provides as follows:

“Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.”

According to documents provided to the Board, the Applicant's predecessor in title acquired the Premises in 1947. The Town of Scituate did not enact dimensional zoning requirements until 1953, and, therefore, at the time prior to the adoption of dimensional zoning in 1953, the Premises was legally buildable.

The Appellant did not dispute that the minimum requirements of G.L. Ch. 40A, Section 6 were met. Instead, the Appellant argued that the Premises had in excess of 100-feet of frontage on Collier Road. The Appellant's argument presumes that, if the Premises had 100-feet of frontage on a public way, then it cannot enjoy grandfathered status. The Board was not persuaded by that argument.

The Premises is bounded by the public way known as Collier Road and by an unimproved way leading to the ocean. The Appellant argued to the Board that the unimproved way meets the requirements of M.G.L Ch. 81L, for frontage purposes. The Bylaw defines frontage as “that portion of a lot fronting upon and having rights of access to a way providing legally sufficient frontage for a division of land under the requirements of M.G.L. ch. 41, sec. 41I, to be measured continually along a single street line.” The Board agreed the frontage of the lot was on the public portion of Collier Road, and not on the unimproved portion of the unnamed way adjacent to Mr. Stewart's lot.

Recently, due to the sewer improvement, the Town took by eminent domain a portion of the unimproved way and erected a sewer pump station thereon. A plan of that taking was prepared by a registered Land Surveyor hired by the Town and recorded at the Registry of Deeds as Plan No. 348 of 2005. If, as the Appellant argued, this unimproved way was part of the public way known as Collier Road, there would have been no need for the Town to have taken the unimproved way by eminent domain. The Appellant had no response to Stewart's estoppel argument that the Town cannot assert that the unimproved

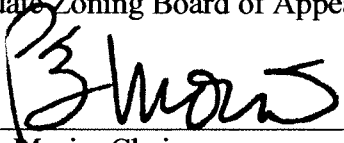
way is a private way for purposes of the eminent domain taking, while later holding out that it is a public way for zoning purposes.

In addition, Stewart owns the fee to the midpoint of the way per the derelict fee statute, G.L. Ch. 183, Section 58. This ownership interest to the midpoint of the unimproved way was also noted on the above referenced record plan of the taking previously filed by Ross Engineering on behalf of the Town and recorded at the Plymouth County Registry of Deeds.

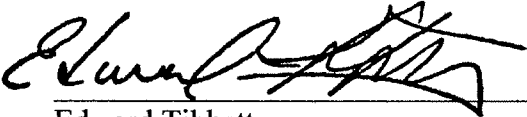
The second argument advanced by the Appellant was that the Building Commissioner should not have issued the permit due to pending litigation involving Stewart's approvals from the Conservation Commission. In accordance with local permitting procedures, the Conservation Commission endorsed the Building Permit application prior to issuance. The Building Inspector issued the permit in due course as required by the State Building Code 780 CMR 111.1 and 111.2, and by the Town of Scituate Zoning Bylaws.

For the above stated reasons, the Board unanimously voted to UPHOLD the decision of the Building Commissioner to issue the building permit to Stewart to construct a single family dwelling at the Premises.

Scituate Zoning Board of Appeals

  
Peter Morin, Chairman

  
Brian Sullivan

  
Edward Tibbetts

Filed with the Town Clerk on October 29, 2008

Appeal of any decision of the Zoning Board of Appeals may be made pursuant to M.G.L. 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 decision with the Town Clerk.