A regularly scheduled and duly posted Public Hearing for the Town of Barnstable Zoning Board of Appeals was held on Wednesday, July 11, 2007 at 7:02 PM at the Town of Barnstable, Town Hall, 367 Main Street, Hyannis, MA. A quorum was met. Also present were Arthur Traczyk, Principal Planner and Carol Puckett - Administrative Assistant.

Gail Nightingale Present
Ron Jansson Present
Daniel Creedon III Present
Randolph Childs Present
James Hatfield Absent
Sheila Geiler Present
John Norman Present
Jeremy Gilmore Absent
Kelly Kevin Lydon Present

Chairman Gail Nightingale opens the hearing at 7:00 PM. She reads appeals with their times into the record. She calls the Clough appeal at 7:03 PM.

7:00 PM Appeal 2007-059 - New Clough Variance Bulk Regulations - Minimum Lot Area

Donna Swift Clough has applied for a Variance to Section 240-36 and 240-13 E, Bulk Regulations, Minimum Lot Area and Resource Protection Overlay District. The applicant seeks to create a buildable undersized lot from a lot that has merged due to common ownership with adjoining lots. The properties are addressed as 99 and 109 Old Salem Way and 83 Swift Avenue, Osterville, MA, as shown on Assessor’s Map 165 as parcels 041, 036 and 122 in a Residence C Zoning District and Resource Protection Overlay District.

Attorney Sarah Alger is representing the applicant. Chairman Nightingale indicates that she won't be assigning members as she believes they would like to continue. Attorney Alger indicates that she is asking for a continuance

Continued to August 8th at 7:50 PM.

7:00 PM Appeal 2007-022 - Continued Fornasaro
John M. Fornasaro has appealed the January 2, 2007 determination of the Building Commissioner that a proposed metal workshop building is not accessory to the single-family use of the property and therefore no building permit will be issued for the construction. The property is addressed as 1470 Race Lane, Marstons Mills, MA and is shown on Assessor’s Map 064 as parcels 107. It is located in a Residence F Zoning District.

Gail asks if Mr. Fornasaro has anything more to add since the last hearing. Mr. Fornasaro indicates that Sheila Geiler had wanted a picture which he presents to her and that Randy Childs indicated something about arborvitaes. He indicates that there are evergreen and bamboo on the premises. Randy Childs asks for clarification as to another access onto Race Lane. Mr. Fornasaro indicates that he is trying to eliminate it and indicates that there will be no access once the building is there. Kelly Lydon asks if he just going to store hay. Mr. Fornasaro indicates that is part of it but indicates that any work will be just for things for his family. Gail Nightingale clarifies why the Board is hearing this.

Gail Nightingale then asks if there is anyone here who would like to speak either in favor or in opposition. Tom Perry speaks and indicates that when it was presented to him, Mr. Fornasaro indicated that it was to restore antique cars and was not customary for this, thus Mr. Fornasaro would have to go to the Board of Appeals and that is why he denied the permit. Dan Creedon indicates he is not sitting on this but asks Tom Perry if there is a difference for the construction of a building versus the use. Tom Perry indicates that this is not a typical structure in this neighborhood and had indicated that he wanted it for antique autos and a full machine shop. Sheila Geiler asks whose autos he would be restoring. Mr. Fornasaro indicates that his father had wanted to fix some cars with him, has since past away but indicates that he would not be storing hay and restoring autos in the same building. Clarification from several Board members is asked about what is the function. Gail asks Tom Perry if he could go back to Mr. Perry with an agreeable use and would be a typical accessory use. Gail clarifies to Mr. Fornasaro that the Board is here to vote on to uphold the Building Commissioner’s decision and not on the building of the structure. Gail clarifies this to Mr. Fornasaro.

Mr. Fornasaro indicates that he would like to withdraw without prejudice.

Randy Childs makes a motion to withdraw without prejudice

Vote:
AYE: Kelly Lydon, Randy Childs, Sheila Geiler, Gail Nightingale
NAY: None

Withdrawn without Prejudice.
7:15 PM Appeal 2006-024 - Continued Corey
Conditional Use in a Highway Business

Members: Ron S. Jansson, James Hatfield, Daniel M. Creedon, Kelly Kevin Lydon, John T. Norman
No Alternates


Donald J. Corey, Jr., has petitioned for a Special Permit pursuant to Section 240-25 (C)(1) Conditional Use in a Highway Business District and a Modification of Special Permit 1969-66 issued to Father McSwiney Associates Inc. The applicant seeks to demolish the existing Knights of Columbus Hall and redevelop the site with a 9,801 sq.ft. retail building and related site improvements. Use of the site is to be that of retail sales of liquor. The property is addressed as 1030 Falmouth Road (Route 28), Centerville/Hyannis, MA, as shown on Assessor’s record as Map 250 as parcel 065, in a Highway Business and Residence D-1 Zoning District.

7:15 PM Appeals 2007-9 & 10 - Continued Corey

Appeal 2007-009 Conditional Use Special Permit

Donald J. Corey, Jr., has petitioned for a Special Permit pursuant to Section 240-25(C) Conditional Use in a Highway Business Zoning District. The applicant seeks to designate a 30-foot wide easement from Wequaquet Lane to property addressed as 1030 Falmouth Road (Route 28), Centerville/Hyannis, MA. The easement is to be developed as a driveway for access to and egress from a proposed commercial development of 1030 Falmouth Road. The easement and drive is to be created over land addressed as 28 and 0 Wequaquet Lane, Centerville, MA, and 0 and 1030 Falmouth Road, Centerville/Hyannis, MA. The property is shown on Assessor’s Map 250 as parcels 024, 023X02, 023X01 and 065. The land is zoned Residence D-1 and Highway Business.

Appeal 2007-010 Use Variance for Driveway

Donald J. Corey, Jr., has applied for Variances to Section 240-11(A) Principal Permitted Uses and Section 240-11(E) Bulk Regulations of the Residence D-1 Zoning District. The applicant seeks to designate a 30-foot wide easement from Wequaquet Lane to property addressed as 1030 Falmouth Road (Route 28), Centerville/Hyannis, MA. The easement is to be developed as a driveway for access to and egress from a proposed commercial development of 1030 Falmouth Road. The easement and drive is to be created over land addressed; 28 and 0 Wequaquet Lane, Centerville, MA, and 0 and 1030 Falmouth Road, Centerville/Hyannis, MA. The property is shown on Assessor’s Map 250 as parcels 024, 023X02, 023X01 and 065. The land is zoned Residence D-1 and Highway Business.

Ron Jansson takes over the chair for Gail Nightingale as she recuses herself from this appeal. Sheila Geiler also recuses herself.

Ron indicates that there is a letter from Attorney Pat Butler and Eliza Cox asking for a continuance as a peer group traffic study was requested. Art Traczyk indicates that John Diaz of GPI would be representing the peer group and would be relating traffic based on square footage, traffic flow, and volume at peak hours. Ron Jansson asks if it would include the CVS study which Art indicates yes. Ron asks if the Board, which now consists of Ron, John Norman and Kelly Lydon, has an objection to them continuing. They agree to a continuance.
Ron Jansson indicates that he would like to go later than earlier since they need the results from the peer group. Art Traczyk indicates that the consultant would need to be here to do a presentation.

Continued to September 26, 2007 at 7:30 PM.

Ron Jansson then turns the chair back over to Gail Nightingale. Gail asks for a recess until the Doherty hearing is called. She indicates to the Board that there is material on hiring a consultant for the Board to read over. Recess until 7:30 PM.

Back in session.

Gail Nightingale announces that hiring of outside consultants and will be on a hearing on August 22nd. She then announces the results from the Accessory Affordable Apartment Program hearing tonight indicating that she had granted an appeal to Mary Louise Coffey at 2187 Main St, Barnstable, Ronald G. Schloerb at 46 Route 149 Marstons Mills, Joanne E. Bergeron at 829 Osterville/West Barnstable Road. She revoked a permit to Sandy A. Lenney and John M. Gorecki, 25 Newton Street. She transferred permits from William H. Clark and Gina Clark to Adam J. Hostetter and Daniel C. Hostetter Jr., Trustees of AD Realty Trust at 75 Charles Street and 164 Winter Street.

7:30 PM Appeal 2007-015 - Continued Doherty

Appeal of an Administrative Official

Members; Randolph Childs, Ron S. Jansson, Kelly Kevin Lydon, Sheila Geiler, Gail Nightingale


Philip R. Doherty, owner of Air Cape Cod LLC, has appealed the December 13, 2006 determination of the Building Commissioner that no zoning violation exists and therefore no enforcement action would be taken on the part of the Building Division. The applicant sought zoning enforcement against the existing operations and the proposed construction of a 7,480 sq.ft. air hangar building of Cape Flight Instruction, Inc. The applicant has cited that the operations and proposed development is in violation of Section 240-35, Groundwater Protection Overlay District regulations. The property is addressed as 480 Barnstable Road and 200 Mary Dunn Way, Hyannis, MA and is shown on Assessor’s Map 329 as parcels 003 and 013. It is located in an IND Industrial and Groundwater Protection and Well Protection Overlay Zoning Districts.

Gail Nightingale indicates that this will be closed for public comment but is open to official comments. She indicates that Attorney Gilmore has made a submission which the Board and Attorney Fitch have both received.

Attorney Fitch indicates that he has presented was is, and is not, a municipal use. He did receive a copy of Mr. Gilmore’s submission of a 1967 opinion from the Attorney General that dealt with the Beverly Airport Commission taking some land in a neighboring town and whether they were subject to the zoning bylaw in the neighboring town. He would distinguish that from the facts and the legal issue before this Board. In as much as they are not in a neighboring town and whether or not this is a municipal use that is somehow exempt from what is otherwise is a bylaw. You can't do what we are complaining about unless you are exempt. He indicates that he has submitted a memo that argues that a municipal use is a municipal use and does not extend to the lessee on
municipal property as long as that lessee is not doing something that is a municipal use. It is a private enterprise. He would like to comment on the opinion submitted by Mr. Gilmore by the last paragraph “where it is the opinion of the Attorney General that the Beverly Airport Commission, acting within its authority is not subject to Danvers zoning bylaw”. To the extent that they may prevent it from discharging its public function, there is no suggestion here that the use that is being complained about by Mr. Doherty is a use that is furthering a public function. He believes that the airport has survived for many years without this particular use and repairing aircraft is not essential to providing transportation. There are numerous airports which do not have repair facilities. He indicates that repairing is not essential to providing transportation and there are numerous airports that don’t have a repair facility. He indicates that Cape Air services different airports but doesn’t have facilities in all of them. He reiterates that this is private enterprise, it is renting property and providing revenue to the community but not essential to the conduct of an airport as a transportation facility.

Randy Childs inquires if Attorney Fitch’s client does the very same things – repair aircraft? Attorney Fitch indicates that his client does and the reason he does is that his client is not a competitor but is grandfathered in.

Gail Nightingale asks Attorney Gilmore to comment on his submission. Attorney Gilmore indicates that his memo was to address standing. He indicates that three different statutes enacted by the state legislature form the basis for Attorney General Elliot Richardson’s decision 30 years ago. The Town of Barnstable appears to have been aware through town meeting or through acts via the Town Council of the concept of municipal exemption when it created it not only at the airport but at other municipal facilities. The reason the exemption exists as it relates at the airport and was incorporated into the more municipal exemption was because the state legislature understood that the viability of these regional airports, these transportation hubs across Massachusetts, needed to certain assistance by way of leases to remain commercially viable and not become a burden on the taxpayer. When they enacted chapter 90 section 51 and its various subparts it gave airport commissions the power to lease property for 20 years which is important since Chapter 40 Section 3 gives town the ability to lease but only for 10 years. When the legislature gave the towns the power to lease for 10 years but gave airports 20 years, it was creating an exception. Secondly, in a more recent statute chapter 30B section 1, the state procurement act, in section 1 clause 29 the state legislature exempted airport commissions from the constraints of 30B for any aviation purposes. It shows a legislative intent at the state level to give airports certain flexibility, certain passes, if you will, that are not enjoyed by government generally. One of the arguments that was advanced to you sometime ago was that the RTA was not exempt and that they are a governmental use. Richardson dealt with that in his opinion when he talked about the fact that certain state agencies or governmental agencies are specifically required to follow local zoning. Chapter 161B says that the RTA, statewide, are not exempt from zoning but are bound by it. No restriction is imposed in chapter 90 section 51. However, the more important point is the fact that the land in Danvers was of no great importance. The use which the Town of Danvers wished to prohibit was the lease of the hangar and flight school which he indicates is precisely what you have here. The Town of Danvers said that is a commercial use. The Attorney General said it’s an ancillary use to fulfill the public purpose of the airport and is exempt and the bylaw in Danvers does not apply. We do not have to worry as the Barnstable Town Council or meeting has said that for municipal uses. Clearly Richardson knew that running an airport needed a fuel farm, hangars and avionic shops and fix base operators to make and place work. Local airports would not be viable without the fuel or FBO’s that are all under a lease. He indicates that Mr. Perry and Mr. Smith’s opinion are on the money. Under section 17 he doesn’t think he would make standing as an aggrieved party.
Kelly Lydon asks Attorney Gilmore if he believes that airports in general are exempt from DEP regulations. Attorney Gilmore answers probably no and that this issue goes to the issue of zoning. The exemptions from 30B are specific statutory creations and he is not aware if that would be an exemption from DEP regulations. Kelly asks if they build a hangar building on top of a groundwater protection if they would have to conform to DEP regulations. Attorney Gilmore answers certainly and that there would be a requirement but the groundwater protection is a creation of zoning and therefore he is not going to that issue but indicates that all uses at the airport that are ancillary. He indicates that in other towns there might be an exception as in the Town of Plymouth where they have a combination airport/industrial park. He indicates that the industrial uses are not exempt but the airport uses are.

Ron Jansson asks Attorney Gilmore the applicability of the exemption to the prior approval under Chapter 90 by the Massachusetts Aeronautical Commission and if it is true that in order for exemptions that the town has to obtain or the municipality has to receive approval from Massachusetts Aeronautical Commission for the zoning exemption. Attorney Gilmore indicates that he is not aware of that and is relying strictly on what Elliot Richardson said. He indicates that he has to submit their rules and regulations for the airport and they have to be approved by the MAC. Ron asks if that has occurred. Attorney Gilmore indicates that it absolutely has.

Randy Childs asks if there was a zoning change between the time Cape Air started working and what they are talking about currently and asks what it was and when. Attorney Gilmore indicates that he has been the airport attorney since 1979 and the Groundwater Overlay District did not exist when Mr. Doherty’s business was started and for as long as he has been involved with the town, since 1979, there has always been an aviation base fixed operator at this location. He indicates that it was Hyannis Aviation many years ago but until this case came up he was unaware of any commercial use coming into the town to seek zoning relief for anything because the assumption was, until Mr. Doherty’s appeal, that these various commercial activities were exempt. He indicates that he doesn’t remember anyone asking for zoning relief and that the reason was that they assumed they were operating on municipal land performing airport related purposes and zoning was never an issue until this appeal.

Gail Nightingale asks the Board and public if anyone has any questions.

Ron Jansson indicates that he is concerned because if Mr. Doherty was to currently apply to the Zoning Board that his use would be prohibited. He indicates that he would concur with Mr. Fitch’s comment on standing. However, he came upon a case of Sherrill House, Inc. vs Board of Appeals of Boston and indicates it is cited as 473 Northeast Section 716 Mass Appeals case handed down in 1985. What this case basically says is they were taking about the ability of a nursing home, which was a pre-existing nonconforming use, to appeal the granting of a special permit to convert a nonconforming use which was, at that time a hospital, into a prison facility. The nursing home appealed the decision of the ZBA even though both were in a residential zone. What the court went onto say is that the one who has a pre-existing nonconforming use and is basically appealing the right of someone else to obtain a use that doesn’t conform, simply doesn’t have standing and the reason behind it is simple. It says the primary purpose of zoning with reference to land use is the perseveration in the public interest in certain neighbors against uses which are believed to be deleterious to certain neighborhoods. In this instance, the overlay zone was established to protect that zone from potential water contamination. In this case, it was established to protect the applicant’s business which is located in the same zone. Another words, the court went on to say that the appellant in the Sherrill House matter had no legitimate interest in preserving the integrity of the district and thinks it is the case here. Mr. Doherty has not indicated that he has any legitimate interest from the purposes of protecting the water supply because he is basically doing the same thing and because he is basically doing the same thing, he believes he
simply doesn't have standing to appeal. He talks about public use and public purpose and thinks that if a municipality owns a piece of land doesn't exempt it and believes that the decision of the Building Commissioner is correct.

Gail Nightingale asks for findings that represent the standing and whether or not we uphold the decision of the Building Commissioner.

Ron Jansson does findings on the determination of the Building Commissioner.

1. Appeal No 2007-015 is that of Philip R. Doherty, owner of Air Cape Cod, LLC, appealing the December 13, 2006 determination of the Building Commissioner that no zoning violation exists and, therefore, no enforcement action would be taken on the part of the Building Division. The property is addressed as 480 Bamstable Road and 200 Mary Dunn Way, Hyannis, MA and is shown on Assessor's Map 329 as parcels 003 and 013. It is located in an IND Industrial and a GP and WP Overlay Zoning District. The applicant sought zoning enforcement against the proposed construction and use of a 7,480 sq.ft. air hangar building of Cape Flight Instruction, Inc. The applicant has cited that the operations and the proposed development is in violation of Section 240-35, Groundwater Protection Overlay District regulations.

2. The subject locus of the appeal is a lease area consisting of approximately 19,000 sq.ft., located within the Bamstable Municipal Airport. Access to that location is from Route 28 via Mary Dunn Way. A copy of the signed and executed lease dated February 21, 2006 between the airport and Cape Flight Instructions, Inc., has been entered into the file and copies provided to the Board. The leased area site is situated on the east ramp area - Taxiway B, just northeast of the existing Air Cape Cod hangar building.

3. On October 10, 2006, Philip R. Doherty, as Owner of Air Cape Cod, communicated to the Building Commissioner his concerns that the proposal of Cape Flight Instruction “would be in violation of zoning … [as it] will be used for maintaining and repairing aircraft…”. On November 20, 2006 a building permit application for construction is made on behalf of Cape Flight Instruction and thereafter a foundation permit was issued on January 24, 2007 and the foundation installed.

4. On December 13, 2006, a letter was sent from the Building Division to Attorney Jonathan D. Fitch apparently responding to the October 10th letter. That letter concludes “that there is no zoning violation”. On January 11, 2007, an appeal was filed at the Town Clerk’s office by Attorney Jonathan D. Fitch on behalf of Philip R. Doherty (as owner of Air Cape Cod LLC.). The appeal, which was based upon the December 13, 2006 letter, was brought pursuant to MGL Chapter 40A, Section 8, and was filed in a timely fashion as prescribed in that section.

5. The Section 8 appeal before the Board is being made presumably on the basis of a structure, a hangar building, now under construction and which is going to be in violation of Groundwater Protection Overlay District provisions of the Bamstable Zoning Ordinance. In fact, Mr. Doherty himself is running a similar facility that has been submitted to the Board as a legal pre-existing nonconforming use in that it predated the enactment of the Groundwater Protection Overlay District.

6. In order to take an appeal under MGL Chapter 40A, Section 8, the “person” needs to be aggrieved. In the case of Sherrill House, Inc., v. Board of Appeals of Boston, 473 NE Sec.19 Mass. App. 274, the Court has held that one who has a pre-existing nonconforming use lacks standing with reference to anther seeking a nonconforming use in the district when they
themselves operate contrary to the underlying zoning. This is the case in this appeal before the Board. The appeal is being initiated by Mr. Doherty as owner of Cape Cod Air, a nonconforming activity in terms of Groundwater Protection regulations, Section 240-35 of the Ordinance. That use is entirely the same type of use that he now seeks enforcement of zoning against which is Cape Flight Instruction's construction of an air hangar building. Mr. Doherty's appeal seeks enforcement under that same Section 240-35 that he, Mr. Doherty, does not comply with. Therefore, it can be concluded that he has little, if any, interest in preserving the integrity of that Groundwater Protection Overlay District. The Groundwater Protection Overlay Districts are zoning districts identified by boundaries on the Zoning Map and do have permitted and prohibited uses and other district regulations as specified in the ordinance. Based upon case law and the facts as presented here, Mr. Doherty does not have standing to take an appeal of the December 13, 2006 letter of the Building Commissioner to the Zoning Board of Appeals as he is not a “person aggrieved”.

7. With regards to the construction and use of the air hangar building, in Burnham v. Mayor and Alderman of Beverly, 309 Mass. 388, 391, the court upheld that the establishment of municipal airports is a municipal purpose. The Barnstable Municipal Airport is a municipal use that provides a public service to the public at large. Section 240-8 of the Barnstable Zoning Ordinance specifies that municipal uses are exempt and that exemption includes the airport. In this instance, we have a proposed air hangar as an accessory use to the airport in that it is customary to airports, incidental in area, size, and function, subordinate to the overall operation of the airport and a necessary facility and function to discharge the operation of the airport. Much as a restaurant, ticket counters, lounge, gift shop, fuel depot, and other necessary services that the traveling public has come to expect and which the operation of a modern airport require. In Barnstable, accessory uses that are customary, incidental, and subordinate to a permitted use are allowed as-of-right and such is the case here. The airport is a municipal use permitted in any zoning district as would be the allowed accessory uses.

Randy Childs seconds.

The vote on the findings of fact was:


NAY: Kelly Kevin Lydon

Board Member Lydon cited that he voted in the negative as he believes Mr. Doherty does have standing to appeal the issuance of the building permit at the airport as he constitutes an abutter to the development. He also stated that he would agree that municipal airports are exempt from traditional zoning, but, like MassPort, they do not have exemption from environmental aspects.

Based on the findings of fact, a motion was duly made and seconded to uphold and reaffirm the Building Commissioner's determination as expressed in the December 13, 2006 letter to Attorney Jonathan D. Fitch that no zoning violation exists and no enforcement action will be taken on the construction of a 7,480 sq.ft. air hangar building of Cape Flight Instruction, Inc., located at the Barnstable Municipal Airport.

Randy Childs seconds.

The vote was as follows:

NAY: Kelly Kevin Lydon
Kelly Lydon indicates that his reasons are the same as previously stated.

**Decision of the Building Commissioner is Upheld**

Gail Nightingale then calls the Hyannis Country Gardens and indicates there is a request for a continuance.

**7:45 PM Appeal 2007-033 - Continued**

**Hyannis Country Garden**

**Exempt Use Modification Permit for Wind Turbine**

Opened April 25, 2007, continued to July 11, 2007  No Members Assigned, No Testimony Taken

Staff anticipates that this will not be going forward on this date as the applicant is seeking to have the Building Commissioner to review this for an as of right permit.

Hyannis Country Gardens Inc., has applied to the Zoning Board of Appeals for a Modification Permit pursuant to Section 240-8.A(3). The permit is sought for an existing Agricultural Exempt Use to allow the installation of a 120-foot high monopole wind turbine. The property is shown on Assessor’s Map 269 as parcel 052. It is commonly addressed as 380 West Main Street, Hyannis, MA. The property is zoned Highway Business for a depth of 200 feet from West Main Street and the remainder is zoned Residence B.

**Continued to October 10, 2007 at 7:30 PM**

Motion to adjourn.

Kelly Lydon seconds.

Hearing adjoumed.