

Zoning Board of Appeals Town of Oak Bluffs

Kris Chvatal, Chairman

Members:

Gail Barmakian

Jane Lofgren

Michael Underwood

George Warren

Associate Members:

Joseph Re

Peter Palches

NOTICE OF DECISION

February 5th, 2009

RE: Appeal of Neil and Carla Rolde of 363 Barnes Road (the “Rolde’s”) from the Building Inspector’s denial of their request for zoning enforcement regarding an accessory structure owned by Kerry and Mary Caldon (the “Caldons”) located at 369 Barnes Road, identified on Oak Bluffs Assessors Map 27 as Lot 13 (the “Caldon Property”).

A. Background

1. The Board has considered the issues raised by the Rolde’s requests for zoning enforcement, dated July 11, 2003 and May 26, 2006, at public hearings in three prior appeals on the following dates: a.) September 18, 2003; b.) May 19 and August 16, 2005; and c.) September 25 and October 18, 2006 (which latter day was held, in part, as a joint session with the Planning Board under G. L. c. 40A, § 16). In a decision dated October 18, 2006 (filed with the Town Clerk on October 23, 2006), the Board decided as follows:

“[T]he Building Inspector is authorized to act on the [Rolde’s] May 26, 2006, request for zoning enforcement. The matter is returned to the Building Inspector to act on that request within thirty (30) days of the filing of this decision with the Town Clerk.”

2. The Caldons appealed that decision to the Dukes County Superior Court on November 8, 2006 under G. L. c. 40A, § 17.

3. On December 19, 2008, the Dukes County Superior Court (in Caldon v. Oak Bluffs Zoning Board of Appeals, DUCV2006-00045) issued a judgment requiring the Board to hold a hearing on the merits of the Rolde’s request for zoning enforcement to determine whether the Caldons converted storage space into a guest house in violation of the Zoning By-laws.

4. All parties agreed to a hearing date of February 5, 2009. The Board sent a Notice of Hearing to all statutory abutters; that was hand-delivered to counsel for the parties; and the Board caused a notice to appear in the the Martha’s Vineyard Times on January 15th and 22nd. The Board filed the notice of hearing with the Town Clerk and posted it at Town Hall

on January 9, 2009. As required by the December 19, 2008, order, the office of Town Counsel submitted the Notice of Hearing to the Dukes Superior Court, by letter dated January 7, 2009.

5. The Board members, in the presence of counsel for the Caldons, visited the site at 2:45 p.m. (Board member Palches) and at 4:00 p.m. (the remaining members). The Board members were permitted to examine the 2nd floor of the Garage/Bedroom. The Rolde's representative, Attorney Dan Larkosh, participated in the 4:00 p.m. site visit.

6. The Board received no correspondence.

B. Summary of Hearing

1. A summary of the proceedings is appended to this Decision as an appendix entitled "Record of Proceedings."

2. On February 5th, 2009, the Chairman, Kris Chvatal, opened a duly posted public hearing. A quorum consisting of Kris Chvatal; George Warren; Gail Barmakian; Joe Re; and Peter Palches were present.

3. The Rolde's representative, Attorney Dan Larkosh, gave a history of how the garage structure with a second floor area came into existence. He talked about the site visit Board Members conducted during the afternoon prior to the hearing. He said that the structure appears to have a second floor that is a dwelling unit and, if that were the case, the use violated zoning. He argued that the space cannot be used as a dwelling unit without a special permit. He asked that the Board recognize that the 2nd floor area of the structure in question has been changed into an accessory space that is habitable and should have its use abated because it contradicts town regulations or if it can qualify to remain as is with a special permit.

4. Attorney Larkosh presented a written summary of the Rolde's position. That submission asserts, in part, that "it was unlawful for the Caldons to convert the storage space into an Apartment without a Special Permit as required under Section 3.4.3."

5. The Caldon's representative, Attorney Martin Tomassian, approached the Board as representative for the Caldons. He stated that the Roldes are pursuing enforcement because of a personal dispute with the Caldons. He showed copies of all permits, inspections and correspondence between the Caldons and town officials stating that they were open and notorious in their intent to build an accessory structure with living space above. They were told by the former Building Inspector Richard Mavro that, as long as the 2nd floor space did not have a kitchen, they could make it into anything they wanted. Attorney Tomassian stated that the condition of the space above the detached garage has not changed since the certificate of occupancy was issued 4 years ago and since this Board approved its condition in August of 2005. Attorney Tomassian said the Caldons were told they had to wait five

years, and were instructed that, without a refrigerator and stove, the second floor space is not an independent living facility.

6. Attorney Tomassian offered a three-ring binder of documents to the Board containing prior permits, notices of intent, correspondence, and other documents relating to the history of the Garage/Bedroom.

7. After giving the parties an opportunity to present, the Board adopted a motion to close the public hearing to all evidence, with the exception of receiving a written decision prepared by the Administrator with the assistance of the office of Town Counsel.

8. The Board voted to reconvene on February 12, 2009, to review and adopt a written decision.

C. General Findings

1. The Caldon Property is located in the R-3 Residential District, and contains approximately 53,600 square feet; a single family, two bedroom residence; and an accessory garage/bedroom structure (the structure at issue in these proceedings)(the “Garage/Bedroom”). The minimum lot area in the R-3 District is 60,000 square feet.

2. The residence is located within the Shore Zone of the Coastal District, and the Garage/Bedroom is located within the Inland Zone of the Coastal District, as defined in Section XVIII(1.)(A.) (under Section 9.0) of the Zoning By-law.

3. Section 9.0 of the Zoning By-law contains the regulations adopted under the authority of the Martha’s Vineyard Commission for Districts of Critical Planning Concern, including the Coastal District, which are overlay regulations. Section XVIII(1.) (which is located within Section 9.0) provides that “[w]here there is a conflict the more limiting regulation shall prevail.”

4. Section XVIII(1.)(A.)(5.) of the Coastal District, Regulations provides:

“Only those uses permitted in the respective Zoning District which are consistent with the fragile nature of the area, such as outdoor recreation, conservation purposes, and agricultural purposes,

Within the Inland Zone, permitted uses also include detached single family dwelling and non-habitable, minor accessory structures normally used for personal, family and household purposes which are subject to the regulations and restrictions of Section XVIII(1.)(a)(7).” (emphasis added).

5. Section XVIII(1.)(a)(7) imposes a height limitation of 24 feet on accessory structures in the Inland Zone of the Coastal District.

6. Section 3.4 of the Zoning By-law governs accessory or guest apartments. Section 3.4.2(7) provides that “[n]o permits under this section may be granted within the coastal district.” Section 3.4.3 provides that “[i]f an applicant is unable to satisfy one or more of the conditions . . . the Board of Appeals may, by special permit authorize such dwelling unit.”

7. The 2006 Annual Town Meeting amended the Zoning By-law to include Section 4.4, which provides for detached bedrooms of no less than 400 square feet. Section 4.4 does not specify whether detached bedrooms are permissible in the Coastal District.

D. Specific Findings

Based on the observations made during the site visit and on the evidence presented at the public hearing, the Board made the following findings:

1. The 2nd floor, or bedroom, part of the structure has an entrance that does not enter directly through the Garage.
2. The door leading to the stairwell for the 2nd floor is locked from the outside and has an outside light.
3. The 2nd floor main room has two closets, one of which has in the back a storage area not shown on the floor plan.
4. The 2nd floor has an area which appears “kitchen ready” with a microwave oven, plumbing for a sink, and wiring for a stove that is visible from the ceiling of the 1st floor garage area.
5. The 2nd floor ceiling height is approximately 8 feet; 3 ceiling fans were present in different rooms.
6. The 2nd floor has a full bath with a shower, sink and toilet.
7. The 2nd floor has a “bedroom” with closet space.
8. The 2nd floor has registers for forced air heat, and smoke and carbon monoxide detectors.
9. In the downstairs garage area there are drain pipes for the upstairs bathroom and kitchen area.
10. There are two outlets for telephone and a jack for cable TV in the area marked on the site plan for “storage”.
11. Clothing is in the closets on the 2nd floor, and toilet paper is in the bathrooms.

12. There are doors leading from the main area on the 2nd floor to an outdoor deck.
13. The downstairs garage area is equipped with a furnace and a hot water heater.
14. The Garage/Bedroom structure does not appear to be higher than 24 feet above mean natural grade.
15. Based on the dimensions set out on the Second Floor Plan submitted by the Caldons to the Board, stamped “August 29, 2005”, the gross floor area of the 2nd floor appears to be in excess of 750 square feet.

E. Decision

1. Each Board member expressed his or her view that, based on the site visit and the evidence produced at the hearing, the upstairs portion of the garage structure is “habitable” within the meaning of the regulations governing the Inland Zone of the Coastal District.
2. Ms. Barmakian made a motion that, based on the findings that the accessory structure is habitable, it is not is not a permissible accessory structure under the Coastal District regulations.
3. The Board voted to approve the motion, and to grant the petition for zoning enforcement. The motion carried 5–0.
4. The matter is returned to the Building Inspector to proceed with zoning enforcement. The Building Inspector is instructed to take whatever steps he deems are necessary to insure that the Garage/Bedroom is returned to, or made to be, a non-habitable, minor accessory structure normally used for personal, family and household purposes.

F. Reasons

1. The Garage/Bedroom is in the Inland Zone of the Coastal District.
2. The Coastal District regulations governing the Inland Zone permit only non-habitable, minor accessory structures normally used for personal, family and household purposes.
3. The 2nd floor is, or has been converted to, habitable space because it has heat, plumbing, a bedroom, a bathroom, an area for a kitchen, and can be readily used for human habitation.

Any appeal of this decision shall be made pursuant to Section Seventeen (17) of Chapter 40A of the General Laws, and shall be filed within twenty (20) days after the filing of this decision in the Office of the Oak Bluffs Town Clerk.

Said Board of Appeals is a legally constructed Appeals Board, exercising the powers granted to it under Section Fourteen (14) of Chapter 40A of the General Laws, and under Chapter 831 of the Acts and Resolves of 1977, as amended, an act further regulating the protection of lands and the waters of the island of Martha's Vineyard.

As required by law, The Board of Appeals certifies that copies of this decision have been filed with the Oak Bluffs Building Inspector, the Planning Board, and Town Clerk, and mailed to the parties appearing at the end. This decision does not relieve the applicant from obtaining all other necessary permits.

After expiration of the twenty (20) day appeal period, the applicant will receive the original copy of this decision. It will include the original signature page, signed by the members of the Board of Appeals presiding at the hearing. This copy will verify, by the Town Clerk, that no appeals have been filed, and if there were appeals filed those said appeals were dismissed or denied against this decision. At that time, the decision, along with the original signature page must be filed at the Dukes County Registry of Deeds before it is legally recognized.

G. Recorded Vote

The following members of the Zoning Board of Appeals voted to grant to the request of Neil and Carla Rolde for zoning enforcement regarding an accessory structure owned by Kerry and Mary Caldon located at 369 Barnes Road, identified on Oak Bluffs Assessors Map 27 as Lot 13.

(Kris Chvatal)

(Gail Barmakian)

(George Warren)

(Joseph Re)

(Peter Palches)

Received and filed in the Office of the Town Clerk:

Date:_____

Copy of Findings and Decision mailed to:

Neil and Carla Rolde c/o Daniel J. Larkosh, Esq.,
20 Meshacket Road P.O. Box 9000, PMB#193 Edgartown, MA 02539.

Kerry and Mary Caldon c/o Martin v. Tomassian, Jr., Esq.,
46 Main Street, Edgartown, MA 02539.

APPENDIX – RECORD OF PROCEEDINGS

Zoning Board of Appeals Minutes of Meeting 02/05/2009 Oak Bluffs Council on Aging Building

Members present: Kris Chvatal, Chairman, Gail Barmakian, George Warren

Also present: Associate Members Joseph Re & Peter Palches. Adam Wilson, Zoning Administrator & ZBA Clerk. Michael Goldsmith, Town Counsel. Daniel Nee, Stenographer
Attorney Martin (Skip) Tomassian. Attorney Dan Larkosh.

The meeting began at 6:05 pm. Kris introduced members and stated the associates sitting for the meeting. He asked if 40A notification had been executed. Adam stated he had the meeting advertised in the MV Times January 15th & 22nd and sent 300' abutters notice in the mail January 15th.

-Kris then outlined how the meeting would proceed. The legal notice would be read followed by a presentation from the petitioner. After that there would be a presentation or questions by those either in support or opposition and any correspondence on the matter. What will then follow will be questions from the board. After that the hearing will be closed but Board Members still have the right to ask any clarifying questions or seek opinion from town counsel. There will be discussion by the Board only and then either a decision will be rendered or the meeting would be continued. He asked everyone present if there were questions on the procedure. No one spoke.

-Kris read the legal notice for the petition of Carla & Neil Rolde seeking zoning enforcement for the accessory structure at Kerry & Mary Caldon's residence, 369 Barnes Road, as to whether the structure's 2nd floor had been converted from storage space into a guest house in violation of zoning by-laws.

-Dan Larkosh represented the Roldes and 1st and gave a history of how the structure came about. He talked about the site visit Board Members conducted during the afternoon. He said that the structure appears to be guest house because it is so large and the space available is more than 750 square feet. He asked that the Board recognize that the 2nd floor area of the structure in question has been changed into an accessory space that is habitable and should have its use abated because it is in violation of zoning laws or if it can qualify to remain as it is with a special permit.

-Skip approached the Board as representative for the Caldons. He stated that the current situation derives from a long standing feud his clients have had with their neighbors involving the building of the structure and landscaping issues between the two properties.

Board Members reviewed with Skip copies of all the permits that had been granted that moved the building towards completion. Included in the review was the septic approval plan, building permit, orders of conditions from the Conservation Commission, inspection sign offs for various contractual work and the final certificate of occupancy. Skip stated that in no way did the Caldons do anything "under the cover of darkness". They were told by the former Building Inspector Richard Mavro that as long as the 2nd floor space did not have a kitchen they could make it into anything they wanted. Skip stated that the condition of the space above the detached garage has not changed since the certificate of occupancy was issued 4 years ago and the same condition when the then 3 member board inspected it as well.

-Memos from various town hall administrative officials were shown to board members indicating that plumbing was allowed for the structure. He showed a letter from Dick Barbini relating to the height of the structure being allowed in the Island Roads District. Skip said there was nothing in the bylaws at the time of construction that said a detached bedroom was prohibited. He also said there were no provisions to have one or to conditionally have one. He made a reference to building statutes and the building code that states that in order for a dwelling to be habitable it needs to have a refrigerator and cooking facilities. Is it an independent living facility?

-Skip brought up the dismissal of the 1st complaint that the building was not a 2nd family dwelling. He showed the Board other letters that kept reinforcing the concept of living quarters vs. habitable space.

He showed a photo of another residence close by that had a detached structure similar to the Caldon's garage.

-Skip showed letters from Mavro to ZBA on his interpretation of "living quarters." He showed order of conditions handed down by ConCom plus the inspections done to bring the structure to a C.O. status as "garage with bedroom above." A site plan from Barbini was shown indicating the garage was not in the Coastal District's "Shore Zone."

Skip included definitions in the by-law language that was in existence at the time of the construction of the garage. Language included "dwelling", "dwelling – two family", "habitable room". He showed definitions from the CMR 6th edition for accessory structures as being habitable – for sleeping, living, cooking or dining purposes. He quoted 7th edition of the CMR about dwellings and dwelling units involving sleeping and living tied in with smoke & carbon monoxide detectors. Skip stated that certain parts of dwelling are not considered habitable – bathrooms, hallways and closets to name a few. He also showed the board a floor plan.

-Skip asked if it was an independent living facility. Peter also asked why there was so much emphasis in Skip's presentation on the word "dwelling". Skip said the Caldons were told they had to wait 5 years. They were told it could only be used by family members. They were instructed that without a refrigerator and stove, it was not an independent living facility. The kitchen cabinets were ok because they were for storage only. He said that down the road there might be a consideration of the space as a detached bedroom but for now it stands for what it is. He thanked the board for their time.

-Dan in rebuttal talked about the fact that the Caldon's applied for a permit for a guest apartment to the ZBA in 2000 and was turned down. He talked about the litigation that's been involved for over 5 years and that the recent judge's ruling is that the substance and the merits of the issue for the Roldes has never been addressed. The Roldes said that the Caldon's don't have the right to have a space for someone to live above the garage according to the by-laws. Every time they had brought that fact up with the town they were told that it's a garage with storage above. Dan then pointed out that there is a refrigerator and ½ bathroom downstairs and a full bathroom upstairs. There is a bedroom with a television in it and a living room with an adjoining deck looking out over the pond. He said there is a microwave and a spot cut out for the insertion of a stove with ventilation above. Dan said it's clearly a dwelling. He said the way the former Building Inspector did things was to allow a garage to be built and in the end you could put anything in it you want to. He said the Caldon's don't have a permit for what they have up there, either regular or special, and what is in existence violates zoning by-laws.

-Peter asked what Judge McDonald was looking for. Kris said the determination is whether or not the Caldons converted storage space into a guest house. The Board discussed what they are looking for in their decision. Kris said there should be some findings and to base the decision on what's currently being presented.

-Michael said the Board is starting back to the hearing from 2003 where there was an appeal of the building inspector's denial for enforcement. The question is whether the structure and use right now is permissible under zoning by-laws. What are the findings as to what was seen at the site visit and do those findings support a decision that requires the inspector to enforce zoning? Dan agreed with Michael's statement. Skip said the judge was not specific as to what the Board should be looking for. He said there's a caveat as to whether there was "conversion" of the space to a guest house. He talked about how a use can be converted after an occupancy permit has been issued. He said the judge should have said go back to the original enforcement action.

-Gail said that the building permit was for a garage with storage space. Now the Board has to ask if today there is a guest house or an accessory use living area. She said if the board finds, based upon the site visit, that it doesn't conform to the building permit or if there's a guest house or accessory use that's in violation of zoning bylaws, then it should go back to the building inspector to enforce zoning bylaws.

-Michael said that the court has nullified prior ZBA decisions. So the decision in 2005 by the 3 member board that agreed with the building inspector's denial of enforcement and the 2006 repetitive appeal by the Roldes has been voided. So it goes back to September of 2003 when the question was asked that the

structure in the Inland Zone of the Coastal District does not allow habitable accessory structures. Michael said is it an accessory structure being used for habitable purposes.

Dan said the agreement is that this is a hearing that has to occur so that the merits of the Roldes request for zoning enforcement can be heard.

-Michael said whatever the Board decides, both parties have the right to appeal.

Peter said he visited the site and saw that there was plywood on the kitchen counter that may or may not have been hiding a sink. Gail said she saw a hole under the board for a possible oven and stove.

-Joe asked Skip that the building was the same as when it was given a C.O. and inspected by the 3 member board. Skip said the floor was the same but had been refinished.

Kris asked if board members had any other questions before closing the public hearing.

-Gail said she had no more questions. George said the same. Joe asked Michael if everything from the past is a clean slate. Michael said it goes back to 2003 when there was an appeal of Mavro's decision not to enforce zoning. Joe said he was all set with questions.

-Peter asked again what the Board is looking for. Michael said the decision is "what's on the ground there comply with zoning today."

-Kris asked if anyone else had anything to say. Skip said he thought he was agreeing with going back to the 2006 hearing that didn't legally happen the way it was supposed to happen when the Roldes asked for the right to request enforcement for zoning under a different petition within two years of the 1st request. He also asked if procedurally the Board had the right to ask questions of those present after the public hearing was closed. Kris said he had already stated that the board would have the right to retain authority to ask questions of those present during their deliberations. Dan said that he thinks the board's decision is not made based on what were the prior decisions but if the structure violates by-laws. If it does then it should be remanded for zoning enforcement.

-Adam stated that there was no correspondence to be read from abutter's or the public

George motioned to close the public hearing, Peter seconded.

The Board voted 5 – 0 to close the public hearing.

Kris said he had notes from his site visit that he wanted to part of the board's general findings. He said the upstairs part of the structure has an entrance that does not enter directly through the garage. It is locked from the outside and has an outside light. The upstairs room has two closets, one of which has in the back a storage area not shown on the floor plan. There is an area that he would describe as "kitchen ready" with a microwave oven and plumbing that's visible from the 1st floor. He said the ceiling height to be at least 8 feet and 3 ceiling fans. There is a full bath with shower, sink and toilet. There is a closet in the bedroom. Kris found multiple registers for forced air heat and smoke & CO detectors. In the garage were pvc drain pipes for the bathroom and kitchen area.

-Gail said she saw the things Kris saw and found it to be habitable space because it has heat and plumbing and a bedroom and an area for a kitchen.

-Kris read the inland zone regulations of the Coastal District which only allows detached single family dwellings and non habitable minor accessory structures normally used for personal family use.

-Peter said he noticed that on the site plans it shows a main living area it says "storage". But he said there were two outlets for telephone and a jack for cable TV. He said there was clothing in the closets and toilet paper in the bathrooms. Kris added that there were two distinct rooms. One labeled "storage" and one that is a bedroom. George said he thought it was a livable space and that if the kitchen were finished a nice place to live. Peter said the garage area had a furnace and hot water heater.

-Kris asked Board Members by virtue of what had been described it constitutes a habitable dwelling.

By consensus the Board agreed.

Kris said he thought local by-laws don't have to apply in this case because there is already an overlay regulation for habitable spaces in accessory structures in the Coastal District that require zoning enforcement because they are not permissible.

Gail made a motion that based on the findings that the accessory structure has a habitable dwelling, it is determined that it is not permissible under the zoning bylaws for the Coastal District.

George seconded.

Michael said it would be best if the Board met again to review the decision before signing. There was discussion if the motion had to be more specific about which bylaw was being violated. Kris said he was satisfied that the Board understood that it was Coastal Zone regulation Section 18 – 1.8.5 that was being applied. He then asked if there was any further discussion. Hearing none he asked for a vote.
The Board voted 5 – 0 to approve the motion.

-Kris asked if there was anything else on the agenda. Adam stated that any deviation to the decision would have to be agreed upon by the full board in a public meeting. Michael said another meeting is necessary to go over the decision. Adam said he would post the meeting in his office for 6 pm on the 12th.

Peter made a motion to close the meeting. Joe seconded.

The Board voted 5 – 0 to close the meeting of February 5th, 2009