



September 18, 2023

Chilmark Board of Health  
P.O. Box 119  
Chilmark, MA 02535

RE: Quitsa Nominee Trust, Off Chockers Lane, Assr. Pcl. 33-8  
VLSE Job No. 666-5

Dear Board Members,

I, with attorney Christina Marshall of Anderson & Kreiger, LLP, am writing this letter on behalf of the Quitsa Nominee Trust regarding our recent application for a septic permit on the above referenced property and in particular to express our concerns with the letter, dated June 21, 2023, from Lisa C. Goodheart and Alessandra Wingerter of Fitch Law Partners LLP, regarding variance requests for reduced separation between septic systems in the Inland Zone of the Coastal District in Chilmark, and specifically the request for a variance for a 66' distance between septic systems at Off Chockers Lane (the "Fitch Letter"). The Fitch Letter opined: (1) that the Chilmark Board of Health Regulations ("BOH Regulations") do not authorize a variance that grants less than a 200' distance between septic systems in the Inland Zone of the Coastal District; (2) that the Martha's Vineyard Commission's ("MVC") Guidelines for distance between septic systems also do not authorize less than a 200' distance; and (3) that even if a variance of less than 200' were permissible, the "applicant has not met the requisite standards" for that variance. Each of these opinions is troubling, for different reasons.

First, the opinion that the BOH Regulations do not authorize a distance of less than 200' between septic systems in the Inland Zone of the Coastal District conflicts with what we understand to be the longstanding interpretation of the BOH itself. It is also wrong. Section 3.07(4)(a) of the BOH Regulations state that "The Board may permit in particular cases, lesser separation by variance under Section 3.05 of these Regulations . . ." Here, the variance was sought under both Sections 3.04 and 1.04 of the BOH Regulations (we presume the reference to Section 3.05 in the Regulations is a typo).

The Fitch Letter does not provide any reason why the broad protections of Section 1.04, which empowers the Board to "vary the application of any of its Rules and Regulations" (emphasis added), should not apply equally to Section 3.07(4)(a). "Where two statutes appear to be in conflict, [courts] do not mechanically determine that the more recent or more specific statute ... trumps the other." *George v. National Water Main Cleaning Co.*, 477 Mass. 371, 378 (2017). Instead, provisions should be harmonized "so that the policies underlying both may be honored." *Id.* General provisions control where they were drafted "to provide comprehensive coverage of the subject area," such as variances. *Grady v. Comm'r of Corr.*, 83 Mass. App. Ct. 126, 132 (2013). It does no harm to Section 3.07(4)(a) for the Board to conclude it may waive the septic distance requirement to less than 200' if, as provided in Section 1.04, "the enforcement would do manifest injustice and ... the applicant has proven that the same degree of

protection can be achieved without strict application of that particular provision.” BOH Regulations, § 1.04. This is especially true because Section 1.04 comprehensively provides for variances from “any” provision in the BOH Regulations. There is no ambiguity.

Second, the opinion that MVC Guidelines supplant duly-enacted regulations is incorrect. The BOH Regulations were enacted with MVC approval, as is legally required. St. 1977, c. 831, § 10. In approving the BOH Regulations, the MVC determined that they conformed to the Guidelines. *Id.* There is no reason to revisit specific provisions of the Guidelines to determine how to interpret BOH Regulations which differ from the Guidelines and which were approved by the MVC.

Third, the Fitch Letter’s analysis of the standards for a variance as applied in this particular application is an inappropriate attempt to replace the judgment of the Board with the judgment of its outside counsel. Under Section 1.04, it is the Board’s “opinion” that is controlling as to the ultimate outcome of a variance application. As with all municipal permits, the ultimate decision as to whether an applicant has met its burden rests with the members of the Board, not with its attorneys.

Because of the misguided conclusions presented to the Board by the Fitch Letter, we made the difficult decision to withdraw the application for a septic system at Off Chockers Lane, Chilmark. Were it not for the Fitch Letter, we believe our application met the requirement of the Board of Health to protect human and environmental health. If the application had been denied, this would have effected a regulatory taking of the property—without a septic system, the property is stripped of its useful value.

We respectfully request the Board discuss this matter at an open meeting where we may be given the opportunity to attend. Such a meeting could help resolve this issue, define the Board’s intent, and eliminate confusion in the future. Please call or email Reid Silva at V.L.S.E. with a meeting date that this issue can be discussed. Thank you for your time and consideration throughout this application process and this request.

Sincerely,



Reid G. Silva, PE PLS  
Professional Engineer  
Professional Land Surveyor



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