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Via E-mail

Ronald Rappaport, Esq.
Town Counsel for Chilmark Board of Health
106 Cooke Street
PO Box 2540
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Dear Mr. Rappaport:

On behalf of the Chilmark Board of Health (“Board”), you have asked us whether the Board may grant a variance request to reduce the separation between septic systems in the Inland Zone of the Coastal District. Specifically, the request for variance in question is to reduce the separation distance from the required 300 feet (or, at minimum, 200 feet) to 66 feet. In our opinion, the variance cannot be granted because (1) the regulations do not allow for such a variance, and (2) the Board does not have the authority to grant such a variance in the Coastal District of Critical Planning Concern (“DCPC”). Even if the Board was able to grant the requested variance, it does not appear that the applicant has met the high burden of demonstrating the proposal will not result in increased pollution or a manifest injustice.

1) The Board does not have the authority to grant a variance beyond a minimum distance of 200 feet in the Inland Zone of the Coastal District.

- a. *When there are conflicting regulations, the more specific of the Board of Health regulations applies.*

The Chilmark Board of Health Regulations (“Regulations”) generally provides that the Board “may vary the application of any of its Rules and Regulations...when, in its opinion, a) the enforcement would do manifest injustice and b) the applicant has proven that the same degree of protection can be achieved without strict application of that particular provision.” Chilmark Board of Health Regulations, Section 1.04, *Variances*.

Further, in Section 3 of the Regulations, which governs on-site sewage treatment and disposal systems, the Board “may vary any section of its regulations to the standards set forth in Title 5.” Chilmark Board of Health Regulations, Section 3.04(2), *Variances and Waivers from Chilmark Board of Health Regulations*. Accordingly, both Sections 1.04 and 3.04(2) provide the Board with the relatively broad discretion to grant a variance in certain circumstances.

Conversely, the Regulations at 3.07(4)(a) state that septic systems in the Inland Zone of the Coastal District must be sited at least 300 feet apart, and that the Board may grant a variance of a minimum distance of 200 feet after certain criteria have been met. Chilmark Board of Health Regulations, Section 3.0(7)(4)(a), *Separation between septic systems in the Inland Zone of the Coastal District*. The entirety of Section 3.07(4)(a) is as follows:

Separation between septic systems in the Inland Zone of the Coastal District: In order to control the quantity of sewage disposal system leachate release into the ground in the Coastal District, there shall be not less than a three-hundred (300) foot separation between onsite sewage disposal system measured from any portion of the leaching area. The Board may permit in particular cases, lesser separation by variance under Section 3.05 of these Regulations, after public hearing; provided however, that there shall be a minimum separation of two-hundred (200) feet and the applicant must prove to the Board's satisfaction that there will be no pollution of ground- or surface waters, domestic water supply or fisheries.

Accordingly, Sections 1.04 and 3.04(2) conflict with Section 3.07(4)(a) where – as is the situation here – a proposed project meets the requirements of Title 5, but not the requirements of Section 3.07(4)(a).

When regulations conflict, “a general grant of authority must yield to the more specific provisions.” *TBI, Inc. v. Bd. of Health of N. Andover*, 431 Mass. 9, 18 (2000) (citing *Risk Mgt. Found. of Harvard Med. Insts., Inc. v. Commissioner of Ins.*, 407 Mass. 498, 505 (1990)).

Of the regulations at issue, Section 3.07(4)(a) is the “more specific provision.” First, it applies only to septic systems located in the Inland Zone of the Coastal District, a subset of land in Chilmark. Second, it includes specific numerical minimum distances for the Board to apply to proposed septic systems. And, regarding what an applicant must prove to the Board, it provides the most specificity: “the applicant must prove to the Board’s satisfaction that there will be no pollution of ground- or surface waters, domestic water supply or fisheries.” Section 3.07(4)(a). Accordingly, Sections 1.04 and 3.04(2) “must yield” to the more specific Section 3.07(4)(a).

In comparison, to obtain a variance under Section 1.04, the general variance provision, the applicant must show “manifest injustice would be committed if not granted” and that “the same degree of protection can be achieved.” This standard provides the Board with broad discretionary authority to grant a variance. Section 3.04(2) is a slightly more specific standard, mandating that

the Board may only grant a variance if it complies with Title 5. While Section 3.04(2) provides a bit more detail than Section 1.04, it still applies broadly to all its regulations and appears to apply equally to all of Chilmark.

While Sections 1.04 and 3.04(2) may apply to other situations in other parts of Chilmark, it is clear that Section 3.07(4)(a) is the Regulation which the Board should apply here, where an applicant seeks a variance for the distance between septic systems in the Inland Zone of the Coastal District.

b. The MVC's DCPC Guidelines also apply.

The Board is similarly bound to the same 200-foot-minimum standard by the Martha's Vineyard Commission's ("MVC") Coastal District DCPC Guidelines. As noted, the proposed project is located in the Inland Zone of the Coastal District. The language of the Board's Section 3.07(4)(a) tracks closely with the guideline found in Section III(2)(a).(1).(a.) of the DCPC Coastal District Decision:

In order to control the quantity of sanitary disposal system leachate released into the ground in a District there shall be not less than a three-hundred (300) foot separation between on-site sanitary disposal facilities measured from the center of the leaching area or pit. Regulations may permit, in particular cases, lesser separation by variance which may be granted after public hearing: provided that there shall be a minimum separation of two-hundred (200) feet and the applicant must prove that there will be no pollution to ground or surface water, domestic water supply or fisheries.

Accordingly, both the Chilmark Board of Health and the Coastal District DCPC Guidelines generally provide for a separation of 300 feet between septic systems, and provide for a variance – but with a minimum of 200 feet.

The nearly identical language in Section 3.07(4)(a) notwithstanding, it is our opinion that the Board does not have the authority to grant a variance which would be in violation of the guidelines set forth in the DCPC Coastal District Decision. We have reviewed the 2008 letter from prior town counsel, which provides a comprehensive analysis of the statutory and regulatory history, and confirms the validity of Section 3.07(4)(a). Thus, the Board's hands are further tied by the MVC's predominant authority in a DCPC.¹

¹ That the Board can only grant a variance of up to 200 feet is further supported by Section 5 of the MVC Enabling Act, G.L. c. 831, § 5, which states:

Notwithstanding the provisions of any ordinance or by-law of a municipality on Martha's Vineyard, every municipal land regulatory agency shall be governed by the procedures, standards, and criteria established pursuant to this act in passing on applications for development permits relating to areas and developments

2) Even if the Board had the authority to grant a variance, the applicant has not met the requisite standards.

a. There has been no showing the applicant has met its burden.

For the Board to grant a variance under Section 3.07(4)(a), “the applicant must prove to the Board’s satisfaction that there will be no pollution of ground- or surface waters, domestic water supply or fisheries.” Similarly, for a variance to be granted under Section 1.04, the applicant must prove “that the same degree of protection can be achieved without strict application of that particular provision.”

These are high standards to meet, particularly because the proposed project is located on Menemsha Pond. Menemsha Pond has “excellent” water quality, and is home to a limited bay scallop fishery and a several commercial oyster aquaculture projects, and a herring run. *Martha’s Vineyard Commission 2020 State of the Pond Report*. It is considered to have better water quality than most of the large ponds on the Island. While it appears that there have been extensive discussions regarding the potential nitrogen load, neither the application nor the meeting minutes of January 18, 2023, April 5, 2023, April 19, 2023, and May 3, 2023, reflect a consideration of the proposed project’s impact to fisheries.

It appears that the proposed project is located on a very narrow, functional peninsula – bordered by Menemsha Pond on the one side and a marsh wetland on the other. This is an incredibly vulnerable and fragile spot, and any development should be reviewed under such a high standard as required.

b. Denial of the requested variance will not result in “manifest injustice.”

As mentioned above, under Section 1.04 of the Board’s regulations, the Board “may vary the application of any of its Rules and Regulations when, in its opinion...the enforcement would do manifest injustice.”

It is our understanding that a septic system was installed on the property in approximately 1984 or 1985, but the property was never further developed, and the septic system was considered abandoned in May 2022. In 1992, the neighboring property at 23 Chockers Lane received a variance that allowed their septic system to be located 66 feet away from the existing septic system.

subject to this act. A copy of each such permit granted by any such agency shall be filed with the commission.

Where there is conflict between a local rule, regulation, ordinance, by-law or master plan, the more limiting or restrictive requirement shall prevail.

(Emphasis supplied.) Section 5 of the MVC Enabling Act makes clear that when there is a conflict between an MVC regulation and a local regulation, the more restrictive regulation applies. In this case, the minimum distance of 200 feet provided for in the Board of Health regulations, Section 3.07(4)(a), and the MVC Coastal District DCPC Guidelines Section III(2)(a.)(1.)(a.), is “the more limiting or restrictive requirement” and should therefore “prevail.”

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Despite what the applicant argues, the variance requested here is not a simple reciprocal waiver. In 1992, when the variance for 23 Chockers Lane was granted, the septic system had been installed for several years, but unused and with no further plans to use develop on the horizon. Unlike what the applicant argues here, it would have been unjust to deny the requested variance at 23 Chockers Lane because a septic system sat idly nearby. This would create a perverse incentive for property owners, who may install a system to forever “freeze” or preserve the property’s rights.

Additionally, the Coastal District DCPC guidelines have been in place since the late 1970s. In fact, according to the 2008 letter, the Coastal District DCPC guidelines at the time provided for a minimum distance of 300 feet between septic systems, with no variance provision at all. The Quitsa Nominee Trust purchased the property in 1985, after the septic system was installed, but the Trust did not seek to further develop the property. The Trust has owned this property since the 1980s and only now seeks to develop it in 2023. The Trust has put no resources or investment towards development for decades, so it cannot be said that it has any investment-backed expectations for the property.

Last, we note that, for the project to receive appropriate permits, three additional variances are requested. A project that requires four variances is a red flag that the municipality or permitting authority, in enacting such regulations, did not intend for a such project to be built in such a location. *See, e.g., Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754 (2005) (zoning regulations on lot in coastal conservancy district which prohibited residential development were reasonably related to legitimate state interests in protecting rescue workers and residents, the effectiveness of the town’s resources to respond to natural disasters, and the preservation of neighboring property).

To conclude, the Board does not have the authority to grant a variance of 66 feet separation between septic systems in the Inland Zone of the Coastal District DCPC.

Sincerely,

/s/ Lisa C. Goodheart

Lisa Goodheart

/s/ Alessandra Wingerter

Alessandra Wingerter

LCG/kt