



**Flood Plain & Watershed Protection District Special Permits
Section 470.9 Determination of Suitability
114 Edward Foster Rd.
118 Edward Foster Rd.**

01/07/08 10:10 AM
100-022 P. 3/16
100-022 P. 3/16

Decision: DENIED
Date: July 21, 2008
Owner/Applicant: Maryann Doherty
Location: Assessor's Parcels 49-2-1
Plans: Determination of Suitability Plan for 114 and 118 Edward Foster Rd. in Scituate, Mass. by Ross Engineering Co., Inc. dated March 24, 2008;
Proposed House and Septic System Construction Plan for #114 Edward Foster Rd. by Ross Engineering Co., Inc., dated 3/1/07;
Proposed House and Septic System Construction Plan for #118 Edward Foster Rd. by Ross Engineering Co., Inc., dated 3/1/07.

Members Hearing Special Permits: Donald Walter, Chairman; William Limbacher, Donna Chisholm, Robert Vogel and Mark Fenton.

Background: The property consists of two vacant lots shown on Assessor's Maps as #114 and 118 Edward Foster Rd., containing 21,600 sq. ft. +/- and 20,950 sq. ft. +/- total area, respectively. Both lots are in the Residence A-3 Zoning District.

According to the Zoning Map, the lots are in the Flood Plain and Watershed Protection District. The boundary of the FEMA flood plain districts was shown on the plans. About one third of the lots was in the FEMA A0 Zone, and two thirds was in the FEMA V Zone with a flood elevation of 20'. The applicant requested two Flood Plain Special Permits for property at 114 Edward Foster Rd. and 118 Edward Foster Rd. under Section 470.9 of the Scituate Zoning Bylaw based on a finding that the land is not subject to flooding.

Section 470.9 of the Zoning Bylaw, Determination of Suitability, states that if land in the Flood Plain and Watershed Protection District is proven to the Planning Board as being not subject to flooding and not unsuitable because of drainage conditions for a permitted use, the Planning Board may issue a Special Permit for the proposed use.

Procedural Summary: Applications for Special Permits for 114 and 118 Edward Foster Rd. were filed with the Town Clerk and the Planning Board on April 10, 2008. Public Hearings for both applications were held concurrently. These Public Hearings before the Planning Board were duly advertised and notices sent to all abutters in accordance with MGL Chapter 40A. The Hearings were opened May 8, 2008, and continued to June 12,

2008, and July 10, 2008, at which time the Hearings were closed and the Special Permits were denied.

Summary of Hearings: Atty. Michael Bliss, Paul Mirabito, PLS, and Lester Smith, a coastal geologist, represented the applicant before the Planning Board.

At the Public Hearing on May 8, 2008, Mr. Bliss stated that it was his belief the Flood Plain and Watershed Protection District did not apply to the lots under consideration. On a detailed map, the boundary of the Flood Plain and Watershed Protection District is shown as the 10' contour. The lots in question have an elevation above the 10' contour, so he believed they should not be included in the district.

Mr. Mirabito summarized the history of the property. The applicant had perc tests done, a septic system was approved by the Board of Health, and the Conservation Commission disapproved the project because they thought a septic system would harm the barrier beach. After a period of years DEP issued a superceding order of conditions, and finally the Conservation Commission issued an Order of Conditions under the local Wetlands Bylaw. Mr. Mirabito stated that the property was not subject to flooding, but only subject to coastal storm flowage. The waves break at the sea wall which takes the energy and the water flows over the property. The land is building up as opposed to eroding.

The Planning Board discussed the locations of the Flood Plain and Watershed Protection District on the Zoning Map and a small scale map also available. They asked for clarification that the Zoning Bylaw states that the district is as shown on the Zoning Map. There was discussion that sometimes land which builds up is eroded again by major storms. There was discussion that in this location, the sea wall is quite low. It was clarified that this situation differs from that of Peggotty Beach, Minot and other locations because permission is sought to build new homes, rather than add on to or expand those already existing. The Planning Board agreed that the area shown on the Zoning Map as the Flood Plain and Watershed Protection District encompassed the lots at 114 and 118 Edward Foster Rd.

At the Public Hearing on June 12, 2008, Attorney Bliss pointed out that the new house would be built on pilings and would be above the flood elevation. He asked the Planning Board to consider the Flood Plain and Watershed Protection District requirements separately from the FEMA flood zones. He compared this application to earlier applications approved by the Planning Board. He presented pictures of additions to existing homes nearby. At this meeting, Lester Smith, a coastal geologist with Epsilon Associates, discussed the history of the project and compared it with construction on several sites where the new construction of various types had been approved.

The Planning Board also addressed several arguments of the applicant's representatives. The property appeared to be in the Flood Plain and Watershed Protection District according to the Zoning Map. The applicant questioned the Planning Board's approval of other applications such as 250 Central Ave. (Marinelli) and 119 Edward Foster Rd. (Scituate Marine Park.) These other applications were addressed by the Board. The Marine Park is a public site for public purposes, non-residential and not a viable

comparison. Other applications identified by the applicant had been accompanied by many affidavits stating that the lot did not flood.

At the Public Hearing on July 10, 2008, Attorney Bliss reviewed the definition of flooding, the history of the Flood Plain and Watershed Protection District map, how a flood plain bylaw works and the Determination of Suitability provision. Mrs. Doherty said that during the Blizzard of '78, there was no outgoing telephone service. Her husband was hit with a small piece of broken glass. He was a registered architect and was pleased to see how well their home stood up in the storm.

During the Public Hearings, the Planning Board discussed whether information from FEMA should be used in the decision making process. There was extensive discussion of whether the Overwash (AO) zone should be considered a flood zone. Information on the definitions of FEMA zones was provided by the state's Floodplain Manager. The majority of the Planning Board agreed a substantial amount of water would be present on the site during flood events.

Public Comment:

There was extensive public comment from residents of the neighborhood at the May 8 and July 10, 2008 Public Hearings. Public comment from the May 8, 2008 Public Hearing was as follows:

Mr. Konde, 124 Edward Foster Road, asked, "I am puzzled. We have this important zoning map and you use it to make decisions. If our map is ambiguous, confusing, or out of date shouldn't we update it?" Mr. Walter replied, "The map as presented is not ambiguous." Mr. Konde asked, "So why is there a question?"

Mr. Dayton of North River Road, remembered that back in 1978 the seawall along Edward Foster Road was totally destroyed. Mrs. Doherty said, "I lived there in 1978 and the seawall held then. Nothing was destroyed in 1978. No house was destroyed in '78."

Jane Thompson of Circuit Avenue asked if there would be one house or two houses. Mr. Walter said the proposal calls for two homes, one home on each lot. Mrs. Thompson said, "The seawall on the ocean side - it is true that it has filled in. However, down on the other end of the beach it has totally washed away quite often. I don't know what that says except that it is not at all consistent. My husband was here in 1978. I was not. The whole wall around First Cliff had to be rebuilt after that storm of 1978."

Public comment from the July 10, 2008 Public Hearing was as follows:

Ms. Jane Thompson of 13 Circuit Avenue said she wasn't here in 1978 but she was here in 1991. She said at that time the water was across the road. One of her neighbors didn't think it was very deep and tried to drive through it but he lost his car.

Mr. Hank Stahr of 13 Circuit Ave said certain facts are very clear and that is that there will be another storm. Another fact is Global Warming and the ocean is rising. The next storm will be more severe. The neighbor to the south of the Doherty property had water

flowing all the way through that house. Knowing what these facts show, he doesn't see how anyone with a conscience could permit anything to be built in that area.

Ms. Mary Jenkins of 22 Sunset Road said she thinks some of what she and Maryanne Doherty are discussing is just semantics; differences of how they saw things. She was 17 at the time. She said she feels not being able to call out as not having phone service. You couldn't get emergency contacts. The fire department came through and asked people to evacuate because the causeway was a problem. They couldn't and didn't believe that they could get across there and they weren't able to at high tide for three days. They had to have the causeway cleared every time.

She said her family stayed at 98 Crescent Ave. which is two houses away from where Maryann Doherty's house is on Edward Foster. Maryanne evacuated and the neighbors evacuated. She said there was basically no one else out there except for Gerald Doherty and them. It was her father who found Gerald Doherty on the street. He had tried to board up his window but could not. The water was coming through the house and he had to open the back door to let the water go through the house. He was in a dangerous situation because there was three feet of sand in Edward Foster Rd. and a constant overflow across the road. As he was trying to get out of his house to get to their house, whatever vehicle came out (and they did try to get out on the CB Radio to get the fire department to come out.) They had to wait until the tide receded. She doesn't know who came out but it was from her family's house. Her uncle lived further down directly across from the boatyard and was the only other person she knew who had stayed. The water would come up the beach, shoot into the air, fly across through his house and he had a foot of sand in his upstairs bedroom. The whole strip is a velocity zone.

There was severe flooding during that storm. She said she drove down there on July 4th. There was no storm but the entire Edward Foster Road section was flooded. On both sides of that lot, there are access problems. When there's a storm, they have to schedule getting their child home because the busses don't drive out Edward Foster Road when it's high tide. She said the current fire chief is new and probably doesn't remember that storm. By the end of that storm, there was five feet of sand in Edward Foster Road.

Mr. Peter Konde of 124 Edward Foster Road said in regard to the comment made about observing 124 Edward Foster Road, that was the 1991 storm and they did in fact have damage done to the tune of \$20,000 (1991 dollars). They did file a claim with FEMA.

Ms. Carole Fitzgibbon of 3 Roberts Drive submitted a letter to the Board. She said the overwash has been defined by FEMA as to be a form of coastal flooding. There is no question that overwash is flooding. There is no guarantee even if this property is built higher than the 10' baseline that isn't going at some point to be subject to its overwash. Sediment and other things are going to change that location. In the event of a severe storm, sediment can reduce that 10'. She asked why the house has to be built on pilings?

Mr. Herb Bomengen of 17 Roberts Drive said he's not sure if flooding is having a house with dirt and water going through it but he does know from discussions he's had with a fellow at the other end that his house was built for a hurricane and withstood the 1978 storm with waves breaking over the house. In terms of flooding, the street in front of the

boatyard and all around floods to different degrees. He showed the Board photos that showed waves breaking. He said he has other photos showing water all the way up to the town. Mr. Bomengen said the streets get filled with dirt and stones and increases the hazard of access to and from properties.

Mr. John Martin of 104 Edward Foster Road said his driveway is at the low point. Occasionally there is water in the road at high tides. It isn't a problem unless there's a storm. He's lived there for 15 years but wasn't there in the 1991 or 1978 storms. The house was built in 1951 and as far as he knows, none of the windows ever got broken.

Mr. Pete Konde of 124 Edward Foster Road said he is only here in the summer but even in the summer he has had problems. He's had wooden walkways ripped up by the water. He said the place does flood.

Mary Jenkins of 22 Sunset Road said she feels the Board has to think of the people moving into the homes and what would happen to them. The current property has all kinds of landscaping but as soon as that gets washed through it's going to end up in Edward Foster Road and will have to get plowed out.

Ms. Carole Fitzgibbon of 3 Roberts Drive said the burden is on the applicant. The benefit should be to anyone who objects. They have to prove that the property is not subject to flooding. She has not heard anything proving that. The Board can grant it but Edward Foster Road is a narrow little piece of road with the harbor on one side and that ocean on the other. No one can predict that these two lots are not going to flood.

Ms. Carol Marsh of 145 Edward Foster Road said because of it being a barrier beach subject to flooding, any septic systems could be torn out so none of those houses were allowed.

Mr. Hank Stahr of 13 Circuit Street said the operative word in the bylaw is "may" and not "shall". That means that the Board has the authority to make the decision they want to make. They are not required to make a positive decision.

Decision: Based upon the information presented to the Board, a motion was duly made and seconded to deny the Special Permits based on a determination that both sites do not meet the criteria for Section 470.9.

The Vote was as Follows: Mrs. Donna Chisholm, Mr. Mark Fenton and Mr. Robert Vogel voted in favor of denying the requests to grant the Special Permits. Mr. Donald Walter and Mr. William Limbacher were opposed to the motion to deny the requests.

Project:

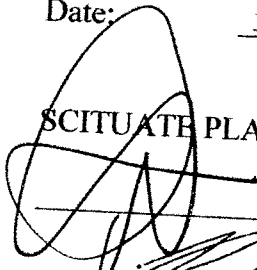
Flood Plain & Watershed Protection District
Special Permits - Section 470.9
Determination of Suitability

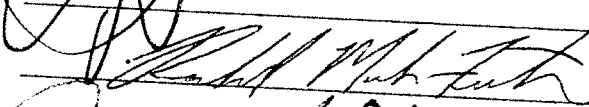
114 & 118 Edward Foster Rd.

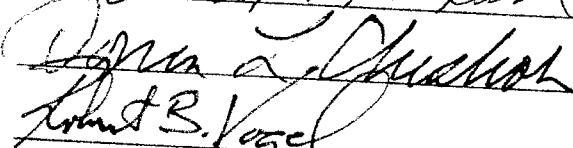
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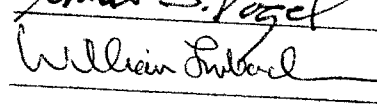
July 21, 2008

SCITUATE PLANNING BOARD









Note: This document will not become effective until such time as an attested copy of the Decision has been filed with the Plymouth County Registry of Deeds, following the expiration of the appeal period of 20 days.

DATE FILED WITH TOWN CLERK: July 23, 2008

The Planning Board certifies that it has complied with all statutory requirements of MGL Chapter 40A, Sections 9 and 11, and will file copies of this decision with the Town Clerk. The Planning Board further certifies that it has taken into consideration all testimony rendered at the Public Hearing, the comments and suggestions of other boards which have reviewed and made comments on the plans, and all plans and documents submitted by the applicant.

- cc: Maryann Doherty
- Michael Bliss, Connors & Bliss P.C.
- Paul Mirabito, Ross Engineering Co., Inc.
- Neil Duggan, Building Commissioner
- Al Bangert, Director, DPW
- Vincent Kalishes III, Conservation Agent