

**ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES
WEDNESDAY
AUGUST 23, 2023**

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WESTPORT ZONING
BOARD OF APPEALS

Members Present: Roger Menard, Chair
Gerald Coutinho
Constance Gee
Barbara Pontolilo
Raymond Elias
Cynthia Kozakiewicz

Absent was: George Stelljes

Chair Menard called the meeting of the Zoning Board of Appeals meeting to order at 6:30 p.m. with the reciting of the Pledge of Allegiance. He stated that the meeting is being conducted with a quorum present.

Also present were Town Counsel Jeff Blake and Ralph Souza, Building Commissioner/Zoning Enforcement Officer.

Chair's Announcement - Under MGL Chapter 30A, Section 20(f) - Meeting being recorded.

1. Chair Menard took the petition of 50 Spinnaker Way LLC out of order. The Petitioner has filed an administrative appeal from a cease and desist order of the Building Commissioner/Zoning Enforcement Officer and the Building Commissioner/Zoning Enforcement Officer's determination that short-term rentals are not specifically authorized as a permitted use under the Zoning Bylaws, Article 5, Section 5.1. The subject property is located at 50 Spinnaker Way and is shown on Assessor's Map 22, Lots 2Y and 20K.

Chair Menard said that the administrative appeal was prompted by a letter issued by the Building Commissioner/Zoning Enforcement Officer dated June 26, 2023, which states, in pertinent part:

Please be advised that after reviewing the Town of Westport's Zoning Bylaws and the complaints by neighbors to the property located at 50 Spinnaker Way (the property), I have reached the conclusion that the use of the Property for a short-term rental is not allowed in a Residential/Agricultural zoning district.

I reach this conclusion based on the Town of Westport Zoning Bylaw, Section 5, Use Regulations which prohibit any property use that is not specifically authorized in Section 5.1 Table of Use Regulations. Short term rentals are not specifically authorized as a permitted use.

Section 5 Use Regulations [states that] except as provided in Section 5.1 hereof, no building or structure shall be constructed, and no building, structure or land, or part thereof shall be used for any purposes or in any manner other than for one or more of the uses hereinafter set forth as permitted in the district in which such building, structure or land is located, or set forth as permissible by special permit in said district and so authorized.

Note number (4) of the table of Use Regulations, Section 5.1 prohibits uses not specifically listed in the Table of Use Regulations.

(4) Any use not specifically or generally listed herein or otherwise permitted in a district shall be deemed to be prohibited.

Chair Menard explained the procedure that would be followed at this hearing, namely: the Petitioner would present its evidence; the Board would ask questions and discuss the information submitted; open up the hearing to the public for comment or questions; close the hearing; and the Board would then deliberate and render a determination.

Chair Menard stated that the members voting on this matter would be Gerald Coutinho, Barbara Pontolilo, Constance Gee, Ray Elias, and, himself, Roger Menard. He said that four (4) out of five (5) members would need to vote in favor of the granting of the administrative appeal.

Also present were Attorney Jeff Blake, Town Counsel, and Ralph Souza, Building Commissioner and Zoning Enforcement Officer.

Addressing the Board for the Petitioner was Attorney Robert Pellegrini, 63 Main Street, Bridgewater, MA, who asked Town Counsel Jeff Blake if his request for a continuance was still pending before the Board.

Town Counsel Blake said that the Board was expecting the motion to continue, if he wanted to still pursue a continuance.

Attorney Pellegrini stated that, on behalf of his client, he was requesting a continuance of the hearing to September 20, 2023 on the ground that his client is actively trying to sell the property and he believed that this matter would be resolved by then. Additionally, Attorney Pellegrini was trying to spare the Town any further cost or time in handling this matter.

Chair Menard asked whether Attorney Pellegrini was making the representation that, if the hearing were to be continued, his client would withdraw her appeal.

Attorney Pellegrini said that the real estate agent is also present to represent to the Board that the house is being actively marketed. He also said that the property is being rented until it is sold and all weekends in September are booked.

Chair Menard said that it was his understanding that, once the cease and desist letter was issued, the Petitioner was required to stop all rentals.

Attorney Pellegrini said he understood that it was proper to continue renting the property during the appeal period.

Town Counsel Blake said that, although there is not much case law on this issue, in his opinion, the cease and desist letter commands that the rentals stop, and this is the position taken by municipalities when the Building Commissioner/Zoning Enforcement Officer issues such a notice, until the Zoning Board affirms or overturns the cease and desist order. However, there is case law -- Brayton Point -- upholding that any fines imposed as of the date of the cease and desist order, through the appeal period to the Zoning Board, as well as through the appeal process with the Superior Court are valid.

The Board discussed the ramifications of denying the motion to continue, namely: any fines currently in place, and whether to go forward with the hearing as scheduled.

Vice-Chair Coutinho asked whether Attorney Pellegrini could gather from his client the rental records and that he should have presented those at the hearing.

Attorney Pellegrini said he did not believe that those records are applicable to a request for a continuance.

Chair Menard said there are several variables that the Board may consider, namely: the cease and desist order of the Zoning Enforcement Officer to stop renting immediately; the administrative appeal; the neighbors' concerns; and any impact to those already reserved the property in the future.

Ms. Gee said that the future rentals should not be considered in the Board's decisionmaking process.

Vice-Chair Coutinho stated he was concerned at the manner in which the Petitioner has utilized the property for several months and, basically, thumbing her nose at the Town and the neighbors. He also reiterated that the Petitioner is conducting a business in a residential area, which is not allowed by the Zoning Bylaws.

Ms. Kozakiewicz stated that the neighbors have legal recourse as well, in that they could seek legal advice regarding the deed restriction that mandates that no business will be allowed in the neighborhood.

Chair Menard stated that it is more favorable to the Town that the Petitioner withdraws the petition, which would avoid future litigation. Allowing a continuance to September 20, 2023 in anticipation of the Petitioner then withdrawing the administrative appeal may bode well for all parties.

Attorney Blake agreed that it is always better to have the petitioner withdraw. Attorney Blake also noted that there is case law supporting a Zoning Board of Appeals order.

The Board discussed the option of the Petitioner requesting a stay pending appeal, allowing the Petitioner the opportunity to continue the rentals.

Chair Menard asked Attorney Pellegrini, if a continuance is granted, the property is not to be rented past September 20, 2023, and only one (1) continuance will be allowed. If a continuance is approved, the Board will make a decision during the September 20 hearing. This would at least provide a light at the end of the tunnel for the neighbors, while also preserving the Town Bylaws.

Town Counsel Blake said he believed it was appropriate to put conditions on the granting of the motion to continue.

Attorney Pellegrini stated that, although he believes the property will be sold before September 20, 2023, his client would not agree to stop renting the property.

The request for continuance from Attorney Pellegrini was read into the record, requesting that this hearing be continued to September 20, 2023 and consenting to the extension of the decision deadline.

Vice-Chair Coutinho said he does not agree that the house will be sold by September 20, 2023 and the Petitioner's representations are not trustworthy.

Ms. Pontolilo said that the Board should not take into consideration the people who have rented the property through September.

Ms. Gee agreed and believes that the Petitioner's request for a continuance is disingenuous and an obvious delay tactic.

Chair Menard noted that since the Zoning Bylaws identify the number of votes required to grant a motion, it is always advisable to start with a motion to grant. This is simply a motion which will be followed by discussion before voting. Chair Menard therefore made a motion to grant the request for continuance until September 20, 2023. Since this is a motion to continue the hearing, a simple majority is required to grant the continuance. Vice-Chair Coutinho seconded the motion for purposes of going forward with discussion.

Vice-Chair Coutinho stated that he will not be able to attend the hearing on September 20, 2023. Therefore, Ms. Kozakiewicz, who has attended all prior hearings in this matter, stated that she would be present.

Ms. Pontolilo asked whether the audience should express concerns or comments on the motion to continue.

Chair Menard opened the discussion to the audience, reiterating that comments should be limited to the request for continuance only, not the administrative appeal.

Ana Silvia stated that she, her husband and small child reside at 52A Spinnaker Way. 50 Spinnaker Way is booked through September, as well as into July and August of 2024. She believes the Petitioner has no intention of selling the property, she is never at the property, and the trash is overflowing and into the neighborhood. Ms. Silvia said she opposes the continuance. She said that, a couple of weeks ago, she noticed someone in her driveway, looking into her home while she was alone with her 23-month-old child.

Anthony Grossi, 52 Spinnaker Way, stated that he opposes a continuance. He said he does not believe that the property will be sold in 30 days. Mr. Grossi said he is a real estate broker and, reviewing the MLS listing for the property, with an asking price of \$879,000, that the price is much higher than when it was initially listed in June. The Petitioner purchased the property in 2022 for \$805,000, the amount of which was expensive. He said that, unless the price drops drastically each week, he does not believe the Petitioner is honestly trying to sell.

Ms. Kozakiewicz said that, two doors down from 50 Spinnaker Way, is a house that is on the market at this time for \$749,000.

Alyssa Menard, 49 Spinnaker Way, stated that the neighbors have had to endure the rentals since February. If the Petitioner is diligently trying to sell the property, why is the price not dropping? Why are there no potential buyers looking at the property? She said that there is an ad on Vrbo to rent out the property, and this is simply a delay tactic. She also noted that there are families living in the neighborhood, with small children, who are subjected to people going in and out of that house each weekend. She also said that she has her daughter playing in the back yard so as not to be seen by the people who are renting, not knowing who those people are.

Cheryl Rebello, 4 Briar Drive, stated that she has lived there with her husband since 1971. Right now, unknown people with unknown backgrounds coming from various states are renting the property. She believes this is a safety issue and opposes the continuance.

Vice-Chair Coutinho asked Ms. Silvia if she could let the Board know where the ad that states the property as being rented into next year came from.

Ms. Silvia said the ad was on Vrbo yesterday and on AirBnB. She also noted that Attorney Pellegrini did not submit a purchase and sale agreement to the Board, which, once again, implies that the property is not sold.

Chair Menard asked for a show of hands from the Board members if they would grant the motion to continue to September 20, 2023. No one voted in the affirmative. All members voted to oppose the motion to continue in a unanimous vote.

Chair Menard said that the hearing would go forward as scheduled.

Attorney Pellegrini stated that:

1. The Petitioner is appealing the cease and desist order.

2. Prior to purchasing the property, the Petitioner asked him to contact the Building Department to inquire as to whether or not rentals were allowed. He said that Ralph Souza said that rentals were allowed.

3. The Petitioner informed him that she was buying the property to run a business of an AirBnb.

4. Mr. Souza advised him that the use is limited to the capacity of the septic system. If the house is a four-bedroom, then the house is allowed to have a certain number of occupants.

Vice-Chair Coutinho asked Attorney Pellegrini to state the exact wording of his question to Mr. Souza.

Attorney Pellegrini stated: Is AirBnb, short-term rentals, an allowed use in town.

Vice-Chair Coutinho asked for his definition of AirBnB.

Attorney Pellegrini said: short-term rental.

There was brief discussion of the definition of the term "AirBnb," that it does not necessarily mean breakfast; and it is the actual name of a company, where you can find properties for rent.

Vice-Chair Coutinho asked Mr. Souza if he understood that the Petitioner was asking about whether short-term rentals were allowed in Westport.

Mr. Souza said he does not recall the conversation.

Attorney Pellegrini stated that:

1. He had advised his client, Spinnaker Way LLC, Brenda Hernandez, to not attend tonight's hearing because he believed there would not be a full hearing on this matter and there would not be the "circus" that was happening.

2. On June 18, 2023, the Petitioner received the cease and desist letter.

3. He said the Petitioner thought she could continue with bed and breakfast activity. He advised his client to "take it down," because she had made a mistake.

4. His client has complied with any request that has been "reasonably asked of them."

4. On February 13, 2023, there was an inspection to determine the number of bedrooms.

5. On March 6, 2023, the Petitioner received a letter from the Health Inspector to reduce the number of bedrooms. That issue was resolved.

6. On March 28, 2023, the Petitioner received a letter from Mr. Armendo citing Title 5 violations due to numerous complaints about the number of cars parked at the property and number of people in the house. Attorney Pellegrini said that this issue was resolved by a conversation between Mr. Armendo and himself, wherein Mr. Armendo agreed that the number of cars parked at the property does not affect Title 5 compliance.

7. A couple of days later, a cease and desist order was issued because the property was being used as a bed and breakfast.

8. On April 3, 2023, the Board of Health conducted a meeting to discuss concerns by the neighbors. There was discussion as to filing a petition to expand the number of bedrooms. The Petitioner has no plan to move forward with the petition. When they purchased the property, it had been listed as a five-bedroom home.

9. On June 21, 2023, the Zoning Board of Appeals held a hearing on the administrative appeal.

10. During the Board of Health meeting on April 3, 2023, the Chair indicated that short-term rentals are not regulated by the Town. A Board of Health member noted that there are many short-term rentals in town and they are not considered a commercial activity.

11. It is his client's understanding that short-term rentals are an allowed use.

12. His client is actively trying to sell the house and has conducted 10 open houses. As for the asking price, he has been advised by his client that funds have been expended to upgrade the inside of the house.

Ms. Gee asked why reservations are being accepted for next summer.

Attorney Pellegrini said he was not aware of that and believes that is the process that the AirBnB web site operates when renting no more than a year out. He further asserted that, clearly, his client was being "targeted."

Ms. Pontolilo asked Attorney Pellegrini to explain his statement that his client is being targeted.

Attorney Pellegrini said that there have been several hearings regarding this property and he was not trying to be "argumentative." He realizes that there are other short-term rentals in the area. He said he understands that the Town is working on drafting a zoning bylaw regarding short-term rentals.

Chair Menard stated that he reviewed all of the petitioner's considerations and they all revolve around one thing, and that is "why me" and not "why anybody else." This is the first of this type of case that the Board has heard. The Board has never had another case similar to this. So it is not that you are being picked on, it is just that you happen to be the first case. Chair Menard noted that, presumably, there will be more petitions before the Board in the future because it is known that there are rentals in Westport. He further stated that it is not the job of the Zoning Enforcement Officer to go searching for violations, and that the only thing he can work on is when he receives a complaint, at which time, he would have to take action. That is how it got to the Zoning Board of Appeals. It is not that the Board is "picking on" the Petitioner; it is that the Petitioner's violations just happen to be the first one before the Board.

Ms. Pontolilo said that the Petitioner made a bad business decision and is not operating a positive business, which is the reason that the neighbors come to the meetings.

Ms. Kozakiewicz read a couple of reviews that are on AirBnB regarding the property and those implied that the neighbors may have been acting poorly with the people who were renting the house. However, she did say that the Petitioner rented to some people who were not good renters.

Attorney Pellegrini said that the real estate agent is present, should the Board wish to ask him questions. He also said that, perhaps, the neighbors should not be unpleasant with prospective buyers. He said that he has received three (3) calls from the

agent that prospective buyers backed out because of signs on the lawns or rude neighbors.

Chair Menard asked how the neighbors would know if the people in the house are renters or prospective buyers? He said it would seem to him that, if there were prospective buyers, the neighbors would be more appreciative.

Attorney Pellegrini said that he obtained a copy of a police report that indicates the Police Department had received calls from the neighbors about the renters and vehicles blocking access to the property. He stated that Mr. Souza had advised the neighbors to call the police if there were issues with the renters. Attorney Pellegrini said that he did not believe the issues at the house are as bad as the neighbors contend and, further, he did not think that the Board cared, as the Board is to determine whether the Zoning Enforcement Officer's order was proper under the Bylaw.

Vice-Chair Coutinho stated that he re-read the first cease and desist letter issued by the Zoning Enforcement Officer and believed Mr. Souza was not wrong in issuing the initial cease and desist order. He also noted that AirBnB does connote air bed and breakfast. In his initial cease and desist letter, Mr. Souza stated correctly that conducting a bed and breakfast is allowed under the Zoning Bylaw with a special permit from the Zoning Board.

Attorney Pellegrini noted that his conversation with Mr. Souza concerned short-term rentals. He also said that he believes the initial letter was in response to an advertisement that the house was to be used as a wedding venue.

Vice-Chair Coutinho reiterated that this case is the first short-term rental case to come before the Zoning Board and a committee has been formed to draft a bylaw for approval at Town Meeting next year. He also noted that, under the Supreme Judicial Court (SJC) case in Styller from June 2021, the facts are very similar to those of this matter before the Board. The SJC determined that the business zoned use would only be allowed in a business zoned area.

Chair Menard opened up the discussion to the audience.

Anthony Grossi, 52 Spinnaker Way, Westport, MA discussed:

1. The manner in which AirBnBs operate and how reviews on AirBnb work, that is, the renter leaves comments before the owner does.

2. Not the fault of the neighbors the way the real estate agent listed the property for sale incorrectly, that the house had five (5) bedrooms when, in fact, there were only four (4).

3. He and two (2) other property owners must maintain the portion of the shared driveway that includes 50 Spinnaker Way.

4. Deed restrictions that a business cannot be conducted in the neighborhood.

Attorney Pellegrini said that leaving a review does not necessarily work the way Mr. Grossi stated.

Chair Menard said that the manner in which reviews work is not relevant.

Ana Silvia, 52A Spinnaker Way, Westport, MA addressed the Board and discussed:

1. The renters' parking in the shared driveway, not allowing her access to her property. When she asks renters to remove their vehicles, she is met with obscene gestures and rude comments.

2. A review by one renter, saying that there were not enough supplies, cabinets were empty, a hole in the deck, and their stay was cut short due to a septic backup in the house. The renters were on vacation, specifically for the beach, pool and vineyard, missing out on reservations that had been made months in advance and relocated to another place that was over an hour away. The review also mentioned that the neighbors' houses have lawn signs that protest the AirBnB. The septic system was last cleaned out in April 2023.

3. The neighbors purchased their homes to provide stability for their families and to live in a quiet area.

4. The Petitioner was well aware of the property that she was purchasing and that the house had only four (4) bedrooms; the Petitioner does not positively contribute to the neighborhood.

5. The "Residents Only, No Trespassing" signs did not deter an older man from approaching her property, which is not in the immediate area of 50 Spinnaker Way, saying he was looking to buy property in the area.

6. AirBnB and Vrbo show that the house is rented for a week in August 2024 and a few days in July 2024.

Ms. Kozakiewicz suggested time limits be put on audience comments.

Alyssa Menard, 49 Spinnaker Way said that the property has been rented since February 2023 and the renters have caused various issues in the neighborhood as her neighbors have already stated. All the neighbors support each other and get along with each other.

Mr. Elias made a motion to close the hearing at 7:45 p.m. Ms. Pontolilo seconded the motion and the Board voted unanimously in favor.

Chair Menard started the discussion by reminding the voting members what is before the Board is very straight forward, namely: whether the Zoning Enforcement Officer correctly administered the Zoning Bylaw by issuing a cease and desist order. If the Board were to grant the petition, the Board would be determining that the Zoning Enforcement Officer erroneously interpreted the Zoning Bylaw. By rejecting the petition, the Board will have determined that the Zoning Enforcement Officer correctly interpreted the Bylaw.

Chair Menard said that the members voting on this matter are Gerald Coutinho, Constance Gee, Barbara Pontolilo, Ray Elias and himself, Roger Menard. There need to be four (4) positive votes to grant the petition.

Town Counsel Blake reiterated that the issue is whether short-term rentals are allowed in the Town of Westport. Everything that you heard from the neighbors is irrelevant. It is not whether the Petitioner is a good neighbor or is running a business properly, it is about whether short-term rentals are allowed under the Zoning Bylaws. Comments made before the Board are not relevant to the issue before the Board and are not material in the Board's analysis. He stated that the Building Inspector had properly laid out the Bylaw in his cease and desist order. It is undisputed that the property is being utilized as a business for short-term rentals and advertised as such on AirBnB, Vrbo and/or other rental web sites. That information, alone, is sufficient for the Board to determine whether the cease and desist order was properly issued. No special permit has been issued by this Board.

Town Counsel Blake said that this is the first case to come before the Board. The Board's decision tonight will most likely have an impact on future cases regarding other short-term rental properties; the complaints of which would typically be brought to the attention of the Building Inspector.

Vice-Chair Coutinho asked that Town Counsel Blake explain the similarities between the case of Styller v. Lynnfield and the case before the Board tonight.

Town Counsel Blake noted that Styller is relevant here, in that, short-term rentals are not lodging houses; the owner does not reside in the house at issue here; the property is being used as a business in a residential area. He said that the court would defer to the Zoning Board when interpreting the Bylaw and that, in his opinion, the matter before the Board was a stronger case than Styller.

There being no further discussion, Chair Menard made a motion to grant the administrative appeal of 50 Spinnaker Way LLC from the cease and desist order of the Building Commissioner/Zoning Enforcement Officer dated June 26, 2023, and the Building Commissioner/Zoning Enforcement Officer's determination that short-term rentals are not specifically authorized as a permitted use under the Zoning Bylaws, Article 5, Section 5.1. The subject property is located at 50 Spinnaker Way and is shown on Assessor's Map 22, Lots 2Y and 20K.

Chair Menard also noted that after the motion, and a second, we would discuss the motion to make sure we all knew what we were voting on before we actually take a vote.

Vice-Chair Coutinho seconded the motion.

Chair Menard said that Town Counsel Blake clearly spelled it out, that the cease and desist order is straightforward, and that the Zoning Bylaws do not allow short-term rentals. The Zoning Bylaws state that anything not specifically allowed is not allowed. Short-term rentals are not specifically allowed, so they are not allowed. Voting in the affirmative denotes that the Petitioner is correct that the Zoning Enforcement Officer erroneously administered the Zoning Bylaw. Voting in the negative denotes that the Zoning Enforcement Officer was correct in issuing the cease and desist order.

Zero (0) members voted to grant the administrative appeal.

All five (5) Board members voted unanimously to reject the administrative appeal.

Chair Menard said there is a 20-day appeal period from the date of filing of this determination with the Town Clerk and the cease and desist order remains in effect.

The cease and desist order of June 26, 2023 remains in effect.

2. The second matter before the Board is the petition of Dwight Silvia for a variance from the setback requirement in removing the existing shed (6' x 8'), and construct a 10' x 16' shed with 6' x 10' attached deck, with a setback of five (5') feet from the eastern property line, as mandated by Zoning Bylaw Article 7, Section 7.7.2. The property is located at 181 East Beach Road, Westport, MA and shown on Assessor's Map 76A, Lot 86.

The Petitioner, Dwight Silvia, was not present.

Present was Ralph Souza, Building Commissioner/Zoning Enforcement Officer and Alison Cesar of Civil & Environmental Consultants, Inc., 31 Bellows Road, Raynham, MA, the architect firm that represents the Petitioner.

Chair Menard opened the hearing by reading a letter issued by the Building Commissioner/Zoning Enforcement Officer to the Petitioner dated August 16, 2023, stating in pertinent part:

"After review of the engineered site plan of your property at 181 East Beach Road, Westport, MA, it was noticed that you have a 160 square foot shed with an attached 60 foot deck in violation of the Westport Zoning By-Laws Article 7.7.2, Side Yards. The required setback is ten (10) feet in clear width between side of the building or structure and the side lot lines. In order for a building permit to be issued for the combination shed/deck, the structure in question will need to either be granted a variance from the Board of Appeals or the structure moved to the correct side yard setback."

Alison Cesar addressed the Board. She stated that:

1. The property is located across from Horseneck Beach.
2. The Petitioner understands that the setback requirement is not met.
3. The Petitioner discussed this issue with his neighbor and they agreed that the new structure should be placed in the location of the previous structure.
4. The shed contains portable water storage.

5. She could provide copies of the plans to the Board after the hearing, should the Board require them.

6. The Petitioner is requesting a Notice of Intent from the Conservation Commission and that approval is contingent on approval of the variance by the Zoning Board.

Chair Menard asked Mr. Souza to explain the reason that the Petitioner was requesting a variance and not a finding, as the property is an existing non-conforming lot.

Mr. Souza said that the prior structure was no longer on the property and it could not be determined where, on the property, the structure was actually located. He also noted that if the structure had been under 200 square feet, no building permit would have been required. This new structure is 220 square feet and, therefore, must require a building permit and conform to the setback requirement of ten (10') feet to comply with current zoning. Had the prior structure remained on the property, the Petitioner would have required a finding and not a variance.

Vice-Chair Coutinho said that, on the plan submitted by the Petitioner dated December 2022, there was a notation on the plan that said "existing shed to be removed." He asked whether the shed was in existence in December of 2022.

Ms. Cesar could not confirm that fact, and said that Petitioner could not attend the hearing and, as a result, she was unable to answer a few questions posed by the Board.

Mr. Souza said that this structure is considered a complete structure, in that, the deck is attached to the shed and, therefore, the square footage is a combined total of 220 square feet, which requires a building permit. If the structure had been 200 square feet or under, the Board would still need to consider whether to issue a variance because the structure is encroaching on the setback requirement.

Chair Menard commented that the "existing shed" went away in the recent past. He also asked why the shed could not be moved five (5) feet to be in compliance. Ms. Cesar could not answer.

Chair Menard also noted that, in order to grant a variance, a hardship is required. The hardship is not monetary, but must be based on something related to the property such as a stream or a rock or ledge that forces the use of a particular spot.

Ms Cesar responded that that was the spot that the owner wanted to place the shed.

The Board discussed the issue of whether the structure could have been placed on the lot to comply with the setback requirement, as well as the hardship being identified for the variance (i.e., topography of the land, existence of a stream or rock that would compel the placing of the shed at its current location).

Ms. Cesar said that the lot is a pre-existing, non-conforming lot and space on the side was limited. She also noted that the structure might have been placed on that spot so as to preserve the aesthetic nature of the beach area, away from the road as it would be used for a portable water source.

Ms. Gee stated that she visited the site and noticed that there was ample room for the structure to have been placed on the lot so as to comply with the setback requirement.

Ms. Cesar said that the end of the deck is ten (10') from the property line.

Chair Menard said that the structure could have been straight in line with the property line and would not require a variance.

Ms. Cesar also stated that the deck was installed to provide an outdoor shower.

Chair Menard noted that the voting members on this petition would be Gerald Coutinho, Constance Gee, Barbara Pontolilo, Ray Elias and himself, Roger Menard. Chair Menard said that approval of the variance requires affirmative votes by four (4) members.

Ms. Gee stated that this situation seemed like the Petitioner thought it easier to go ahead with what he wanted to do than to ask permission and, now, he's asking for forgiveness.

Ms. Cesar said that she believes the Petitioner did not understand or have knowledge of the Zoning Bylaws or what was required of him, thinking that he would replace the existing shed with another shed. She also stated that, at some point in the past, on former SITEC plans, the original shed was 6' x 8', which is a total of 48 square feet. The new structure is 220 square feet.

When Chair Menard opened the discussion to anyone in the audience, no one asked questions or made comments.

Mr. Elias noted that the property is in the flood zone, however, the plans do not show that the house is elevated.

Ms. Cesar said the house is on pilings.

Hearing no further comments, Ms. Gee made a motion to close the hearing. Mr. Elias seconded the motion and the Board voted unanimously to close the hearing at 8:10 p.m.

Chair Menard commented that he did not see a path to approving this variance: the Petitioner has not provided any grounds for requesting the variance; the structure could have been located outside of the 10-foot setback requirement; and no hardship has been identified. He also noted that, had the original shed stayed in place, the Petitioner could have requested a finding and not a variance, which would be a different process. The Petitioner had the option of placing the new structure that would comply with the Zoning Bylaws.

Ms. Gee noted that the structure was placed there prior to applying for a building permit or requesting a variance.

Mr. Coutinho said it is still undetermined where the original shed was located.

Chair Menard made a motion to grant the variance from the setback requirement in removing the existing shed (6' x 8'), and construct a 10' x 16' shed with 6' x 10' attached deck, with a setback of five (5') feet from the eastern property line, as mandated by Zoning Bylaw Article 7, Section 7.7.2. The property is located at 181 East Beach Road, Westport, MA and shown on Assessor's Map 76A, Lot 86.

Ms. Gee seconded the motion.

Chair Menard asked for a show of hands for those members voting to grant the variance, no member voted to grant the variance. Chair Menard asked for a show of hands for those members in opposition to the motion to grant the variance, Gerald Coutinho, Constance Gee, Barbara Pontolilo, Ray Elias and he, Roger Menard, voted to oppose. Accordingly, the Petitioner's request for a variance is denied on the ground that no hardship was identified.

Chair Menard advised of the 20-day appeal period.

3. The third matter before the Board is the petition of Casey P. Amaral for a variance to continue use of the residential building known as 581-C Drift Road, Westport, MA, which will not be detrimental to the public good, will not impact the integrity or character of the neighborhood, nor negatively impact abutting properties and require no structural changes, and would otherwise cause substantial hardship to the Applicant as mandated by Zoning Bylaw Article 5, Section 5.1. The subject property is located at 581-C Drift Road, Westport, MA and is shown on Assessor's Map 53, Lot 12A.

Chair Menard stated that the members voting on this matter would be Gerald Coutinho, Constance Gee, Barbara Pontolilo, Ray Elias and himself, Roger Menard. He said that four (4) affirmative votes are required to grant the variance.

Attorney Vincent Cragin of Halloran, Lukoff, Smith & Tierney, 432 County Street, New Bedford, MA addressed the Board. He stated that he represents the Petitioner, Casey Amaral, who is requesting a variance, the only viable solution to the issue of the existence of an accessory building on the same lot as a single-family residence, both structures of which are being rented out. Attorney Cragin said that, at the prior hearing, the Zoning Board had asked that Mr. Amaral return with a variance request, in light of the history of the structure, which dates back prior to issuance of zoning in 1973.

Chair Menard stated that, in 2018, the Board had made a ruling that divided the property into two (2) separate parcels, both of which would be subject to current zoning provisions.

Attorney Cragin agreed, stating that the lots are non-conforming and the Board had requested at its last meeting that it needed evidence that the structure was a residence prior to the institution of zoning provisions. He further noted that the shape and topography of the land are proof of a hardship for purposes of a variance.

Vice-Chair Coutinho said he remembers that the Board made a compromise with Mr. Amaral, in that the Board had previously requested that the structure be disabled as a residence, and, at that time, Mr. Amaral said that he had a veteran living in the structure.

Attorney Cragin said that he watched the video, wherein Mr. Amaral withdrew his application, and would return to the Board with proof that the structure has been lived in for many years prior to

zoning. He also stated that there was no request by the Board at the prior hearing that Mr. Amaral remove the kitchen pursuant to the 2018 decision before re-filing for a variance.

Chair Menard noted that, in the decision of April 2018, the Board helped the petitioner (Joan Amaral) and decided that the structure at 581C Drift Road "shall not be used as a residential dwelling and any and all kitchen facilities must be completely removed, never exist in the future unless legally allowed." Mrs. Amaral agreed to that condition at that time.

Attorney Cragin agreed that, at the prior hearing, this matter was discussed and the Board requested that Mr. Amaral return with a request for a variance and show at which point the structure was used as a residence. Attorney Cragin said the Petitioner is ready to provide that information to the Board tonight.

Ms. Kozakiewicz said that the prior decision of 2018 was made at the time that Joan Amaral owned the property. At this time, Casey Amaral owns the property and, therefore, may be considered a new owner.

Chair Menard said the decision stays with the property, not future owners. Town Counsel Blake confirmed this fact.

Chair Menard said that he believes the discussion at the prior hearing in 2022 was that, although the petition that Mr. Amaral had filed at that time was not a valid request, that, perhaps, there may be other avenues that would be valid to resolve this matter. The Petitioner has opted to ask for a variance, which he believes is a proper avenue to resolve the issue.

Attorney Cragin said that the person currently residing in the structure is paying minimal rent and, if evicted, would need to find other low-income housing, which would be very difficult. Mr. Amaral purchased the property from his mother when she was unable to sell the property. The renting of the structure is not disruptive to the neighborhood, and it has been rented for decades.

Chair Menard read into the record a letter from Jennifer Leite, 561 Drift Road, a neighbor, who supports the petition. Also, there was a letter from former Assessor John McDermott, who explained that the accessory building has been on the premises for decades and taxed as a dwelling.

Chair Menard said that, at this point in time, there is a single-family dwelling and an unpermitted accessory apartment on the

property. The Zoning Bylaws mandate that the owner of the property reside in either the main house or the apartment for the issuance of a Special Permit by the Board. Mr. Amaral does not reside on the property.

Vice-Chair Coutinho read from the decision of November 2022, whereby the application was for a Special Permit and/or variance. The decision also notes that the Board requested that the Petitioner provide proof that the structure was an apartment prior to the zoning requirement that prohibits more than one (1) residence on a lot. Vice-Chair Coutinho also said that he suggested that the relief may be a variance.

In the November 2022 decision, Ms. Kozakiewicz said that it would be difficult for the Board to grant a variance from Zoning Bylaw 9.5.3 due to the fact that the Petitioner does not plan to reside in either the main house or the accessory apartment. The decision also noted that one option would be for Mr. Amaral to withdraw his petition and return to the Board for further relief.

Vice-Chair Coutinho said that many people can testify that the structure has been rented for decades, but that does not make the structure a legal apartment.

Attorney Cragin said that the Board previously asked the Petitioner to return with proof as to the rental activity of the structure and he is offering that proof to the Board tonight.

Ralph Souza, the Building Commissioner and Zoning Enforcement Officer has asked several times that the kitchen be removed pursuant to the Zoning Board's decision of April 2018.

Mr. Elias said he understands that the structure has been used as a residential dwelling for many years, as far back as the 1970s, and has been taxed as a residential dwelling.

Ms. Kozakiewicz asked whether the 2018 decision had been recorded at the Registry of Deeds and the Clerk answered that it had been.

Chair Menard opened up the hearing to the audience for comment.

Tony Vieira, 8 Kelly Avenue, Westport, MA, said that due to the farming and fishing industry over the many decades, there are many similar sheds in Westport that were built to accommodate the workers. This shed has remained in the same family since 1950 and he believes the grandfather clause would remain intact since Joan Amaral, mother, conveyed to her son, Casey Amaral.

Ann Boxler, 1 Fox Lane, Westport, MA stated she attended the meeting in November 2022 and thought that the Zoning Board's intent was to work out the issue with Mr. Amaral.

Carla Amaral, 850 Pleasant Street, New Bedford, MA said that the structure in question has been rented out for 50 years. She said that she lived on the property in the early 1980s.

Vice-Chair Coutinho stated that he would like an opportunity to review the prior decisions and review the legality of the buildings, having been built without permits. He also said that he did not believe that the Board asked the Petitioner to seek a variance, that it may have been a possible way to resolve this issue, but did not want it to seem like the Board had suggested that requesting a variance would, in fact, resolve this matter.

Mr. Elias asked whether the Petitioner had any further proof to present to the Board.

Attorney Cragin said that the letter from the former Assessor, John McDermott, and testimony of the witnesses, prove that someone has resided in the structure over many decades.

Chair Menard said the Board may revert back to the decision of April 2018, which goes with the property after conveyance, and which was not complied with. However, granting the variance would negate that decision that the Board made in good faith.

Tony Vieira reiterated that the grandfather law should be in effect and the Assessor's records also note that the structure was considered a residence.

Vice-Chair Coutinho said that the Zoning Board has heard many cases where the Assessor's records are not always in concert with the Zoning Bylaws.

Town Counsel Jeff Blake stated that the grandfather clause stays with the property, not a family conveyance.

Petitioner, Casey Amaral, stated that the property is being taxed as a multi-house property.

Attorney Cragin stated that aerial photographs show that the structure existed in 1935 and has remained the status quo for years.

Vice-Chair Coutinho said that he believes aerial photographs would show sheds, but not necessarily used as residences.

Attorney Cragin also noted that Mrs. Amaral continues to reside in the main residence and it is a safe environment for her.

Vice-Chair Coutinho asked as to a hardship for the variance.

Attorney Cragin said the shape and topography of the land pose a hardship. The house is on a steep, rocky slope and shows a true topography issue.

Ms. Kozakiewicz said that financial hardship may be a ground for a variance.

Chair Menard said that financial hardship does not mean losing money as in this case, loss of rental income.

Attorney Cragin said that, if the rental income were to cease, the Petitioner would have a financial hardship to maintain the property.

Ms. Pontolilo asked the reasons for a continuance, and the information that Mr. Coutinho would hope to acquire.

Vice-Chair Coutinho said that he would like to review the prior decisions and minutes as to exactly what was discussed at the prior hearings.

Ms. Pontolilo remembers that, at the 2018 hearing, Casey Amaral was not at the hearing and Joan Amaral's representative attended, however, Mrs. Amaral was not present.

Ms. Gee said she remembers the 2018 hearing consisted of the Board considering a complex issue and took painstaking efforts to come to a reasonable conclusion that would help the Petitioner at the time. Ms. Gee also said that she would like to review the prior decisions and meeting minutes. She also noted that the Board has asked the Zoning Enforcement Officer to contact Joan Amaral and Casey Amaral several times over the years to determine whether the decision had been complied with, but no response was given.

Dorothy Paull, 2048 Main Road, Westport, MA asked Town Counsel if the Board had previously granted a variance, does the Board have the authority to change the conditions with a new variance.

Town Counsel Blake said, yes, that the Board has the authority to grant a new variance on a new petition.

Ms. Pontolilo made a motion to continue this hearing to September 20, 2023 at 6:30 p.m. Mr. Elias seconded the motion, which was voted unanimously. Attorney Cragin assented to the continuance and extension of decision deadlines.

Administrative Items:

1. Approval of revised plan for 131 Pettey Lane. Vice-Chair Coutinho recused himself from voting on this matter. There was discussion that the revised plan does not substantially change much the original plan, and it does not change the Board's prior decision to approve the finding. Ms. Kozakiewicz stated that the plan was straightforward. Chair Menard and other members agreed. Chair Menard said that voting on this plan were Constance Gee, Barbara Pontolilo, Ray Elias, Cynthia Kozakiewicz and himself, Roger Menard. [Note: Vice-Chair Coutinho recused himself from considering this matter as he is an abutter to the subject property]. Ms. Kozakiewicz made a motion to approve the revised plan dated May 14, 2023 and submitted to the Board on August 11, 2023, the plan not being substantially different than the original plan. Ms. Gee seconded the motion and the Board voted unanimously in favor of approving the revised plan.

2. Approval of the minutes of the regular meeting of July 19, 2023. Chair Menard made a motion to approve the minutes of the regular meeting of July 19, 2023. Ms. Pontolilo seconded the motion, which was voted unanimously to approve the minutes of the July 19, 2023 regular meeting.

3. The Board discussed possible zoning violations at the property located at Westport Sea Farms, 2065 Main Road. Mr. Souza stated that the tables that are outside must be removed. There is a license as oyster farming, which would allow sale of oysters on the property; however, the owners are selling other products not grown on the property, with several tables outside. Ms. Gee asked about a liquor license. Mr. Souza said that the Select Board issues liquor licenses and the State then approves them. He also said that he will issue a cease and desist order and advise that the owners must apply to the Zoning Board of Appeals for proper permitting. Vice-Chair Coutinho said there are two (2) Zoning Bylaws under which the owners may be able to continue the business, namely: issuance of a finding that non-conforming use and the business is not substantially more detrimental to the neighborhood; or, once you stop the business, your permit as a

non-conforming use ceases. The owner made the property into a residence and, therefore, the non-conforming use ceases. However, the Zoning Bylaw allows an owner to continue the use, so long as the owner resides at the property, but would not allow for a restaurant.

Ms. Kozakiewicz noted that the Select Board issued a liquor license, the Board of Health approved the operation of a restaurant, but no one sought approval or even a comment from the Zoning Board prior to issuing those licenses. She also stated that several food items -- not grown or cultivated on the property -- are being served on the property. Ms. Kozakiewicz also noted that the Board of Health permitted the restaurant and the Select Board issued a liquor license, all without recognizing the required permits under the Zoning Bylaws.

Vice-Chair Coutinho stated that there are other locations that do not comply with Zoning Bylaws as well. He said that, perhaps, special districts should be established, e.g., The Point District, Village District, etcetera, to issue certain bylaws. The Planning Board has this item on its list of bylaws to propose.

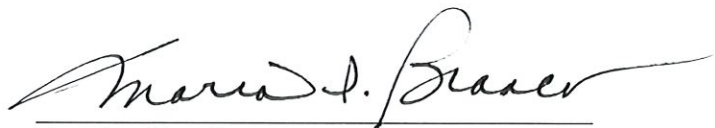
Ms. Gee noted that adequate parking -- or the lack thereof -- is also an issue. She said that she received an e-mail by a concerned citizen and she had received other questions regarding this issue.

The next meeting is scheduled for Wednesday, September 20, 2023.

There being no further matters before the Board, Ms. Pontolilo made a motion to adjourn the meeting at 9:25 p.m. Chair Menard seconded the motion, which was passed unanimously.


Adjournment.

Respectfully submitted,



Maria I. Branco
Zoning Board Administrator

APPROVED:


Roger Menard, Chair