



TOWN OF WESTPORT
Westport Town Hall
816 Main Road, Westport, MA 02790
Zoning Board of Appeals
Tel: 508-636-1041 or Fax 508-636-1147

December 18, 2023

Kristin Stinson, Town Clerk
Town of Westport
Westport, MA 02790

NOTICE OF DISMISSAL OF ADMINISTRATIVE APPEAL

Dear Ms. Stinson:

The Zoning Board of Appeals hereby submits for filing in your office the following record of the Zoning Board of Appeals proceeding and its decision on the administrative appeal of Kevin Brayton McGoff and Amended Administrative Appeal of Kevin Brayton McGoff and Ryan Kim from a determination by the Building Commissioner that the use of the property at 435 Old Harbor Road for educational service would be allowed, provided that the Planning Board approves the site plan as mandated by Zoning Bylaw Article 8, Section 8.7. The subject property is located at 435 Old Harbor Road, Westport, MA and is shown on Assessor's Map 87, Lot 2.

RECORD OF PROCEEDINGS

Pursuant to a Notice of Public Hearing that was duly published in the Westport Shorelines on October 7, 2023 and October 14, 2023, and posted in the Town Hall Bulletin Board and mailed to the owner, Petitioners, abutters, owners of land directly opposite on any public or private street or way, abutters to the abutters within three hundred (300) feet of the property line of the Petitioner, the Westport Planning Board, the Dartmouth Planning Board and the Fall River Planning Department, public hearings were held on Wednesday, November 1, 2023 and December 6, 2023 at 6:30 p.m. at the Westport Town Hall, 816 Main Road, Westport, MA on the above-mentioned petition.

November 1, 2023

At the outset, Town Counsel Blake stated that:

1. The Building Commissioner's letter is merely a preliminary interpretation of the Zoning Bylaw pertaining to "educational use."

2. There were no plans filed with the Building Department and no permit has been granted.

3. The response filed by Attorney Richard Burke, who represents Ken Weber, the potential owner of the project, is correct that the Petitioner is not an abutter and, therefore, lacks standing to bring this appeal before the Board.

4. Another reason that this appeal should be dismissed is that it lacks ripeness to be before the Board.

5. The Building Commissioner's letter clearly stated that the educational use would be allowed, depending on approval by the Planning Board.

6. The Dover Amendment and the McLean Hospital case provide a broad definition of "educational use."

7. At the time that a building permit, occupancy permit or any other determination by the Building Department is issued, that would be the time to file an appeal with the Zoning Board.

Chair Menard stated that the Zoning Board lacks authority to proceed with this appeal until such time as the Planning Board makes a determination on the site plan approval and only when the Building Commissioner issues a permit.

Accordingly, Chair Menard made a motion to dismiss the administrative appeal. Vice-Chair Coutinho seconded the motion, stating that the Petitioner lacks standing.

Kevin Brayton McGoff, the Petitioner, of 233 Old Harbor Road, Westport, asked to be heard and that in the prior matter, the Board allowed the Petitioner to speak on his appeal.

Vice-Chair Coutinho said that the applicant in this hearing lacks legal standing and that is one reason for dismissal.

Town Counsel Blake said that the prospective buyer takes a risk in purchasing the property for a purpose that the Building Commissioner has not yet permitted. The letter in question is not a building permit and states for "educational use" only, and it seems, as members of the audience are proclaiming, the project is not only for educational use under the law.

Ms. Gee agreed with Mr. McGoff's comment that he was unable to make a statement as the applicants in the first matter.

Mr. Elias said he watched the initial hearing before the Planning Board and understands that the Building Commissioner's letter is not considered a building permit.

Vice-Chair Coutinho said that the prospective buyer requested that the Building Commissioner issue an opinion prior to his petitioning the Planning Board on a site plan

approval. He also noted that the letter does not state definitely that the project is permitted.

Ms. Gee, therefore, made a motion to reconsider the motion to dismiss. Mr. Elias seconded the motion. Vice-Chair Coutinho said that he did not believe that the Board could reconsider a prior dismissal, however, he would be interested in having a more expansive discussion by the public on the issues. Town Counsel Blake advised that the Board has the right to reconsider its prior motion. The motion to reconsider passed unanimously.

Mr. McGoff asked that the hearing be continued because he had not received Attorney Burke's response and would like an opportunity to review the standing issue. He also said that he believes that he can resolve the standing issue by getting abutters to sign onto the appeal petition. Mr. McGoff also stated that he believes that Mr. Weber will require a variance because of a non-conforming use and that Mr. Weber's prior e-mails indicated that he intended to establish a nursing home on the property.

Chair Menard said that there are only two (2) options on an administrative appeal: dismissal based on lack of ripeness or dismissal based on lack of standing.

The Board decided to go forward with the hearing for informational purposes.

Chair Menard said that the members voting on this matter would be Gerald Coutinho, Barbara Pontolillo, Constance Gee, Ray Elias and himself, Roger Menard. He then asked for public comment.

Kevin Vendituoli, 682-686 River Road, suggested that a continuance may be proper to allow other abutters to sign onto the petition. He also said that Attorney Burke's letter asked for a determination by the Building Commissioner.

Attorney Richard E. Burke, Jr., 32 William Street, New Bedford, MA, addressed the Board. He stated that:

1. He represents Ken Weber.
2. He and Mr. Weber met with the Building Commissioner and requested a determination about the use of the project, which Ralph Souza provided.
3. He and Mr. Weber attended a preliminary meeting with the Planning Board. Mr. Weber will require site plan approval by the Planning Board prior to requesting a permit from the Building Department.
4. The educational use of the project is an allowed use.
5. Town Counsel has advised that the appeal lacks ripeness.

6. The project will be situated on 10.7 acres, utilize existing buildings, house 12 students/adolescents between the ages of 13 and 17 years old. There will be 6 bedrooms with 2 students in each room. There will be a teacher, social worker and counseling for substance abuse and alcohol. The students will stay no longer than 60 days. The facility will comply with the Massachusetts Department of Education with teaching no fewer than 6 hours a day and 2 hours a day on the weekend.

7. There will be 12 parking spaces to accommodate employees, one of which will remain on the premises at all times. There will be security 24 hours a day.

8. Parents of the students must give authorization to attend the program.

9. All students will participate on a voluntary basis.

10. No zoning variance is required.

11. This will be an educational use, not a nursing home.

Several people addressed the Board, providing their comments, including Matthew Forbes, 468 Old Harbor Road, Rose White, 415 Old Harbor Road, Timothy Reny, 303 Old Harbor Road and others. Their concerns included the project being a drug rehab center, Mr. Weber's lack of communicating with neighbors, and security issues.

Renee Welchman, 226K West Main Road, Little Compton, RI said she is a realtor, whose daughter was in need of a rehab facility and attended one out of state. She said insurance pays for a portion of the expenses and the parent pays the remainder. She agrees that the residents and Mr. Weber should discuss the project.

Ken Weber, 52 Cape Woods Drive, East Falmouth, MA addressed the Board. He stated that:

1. The admission criteria include that the student is not a threat of harm to him/herself and others.

2. There will be no detoxification.

3. There will be a strict schedule of classes.

4. The facility will be monitored 24 hours a day, 7 days a week, with cameras and each student will be checked every 15 minutes.

5. Other courses to be taught include music and physical education as mandated by Massachusetts law.

6. Staff will be licensed clinicians, licensed teachers, dietician, and farming/agricultural activity.

7. Has reached out to the Westport Superintendent of Schools, Fire Department and Police Department.

8. There will be an open bed for a Westport child.

9. He has other similar projects pending; one project has been completed for over a year.

Charles Merrow, current owner of 435 Old Harbor Road, stated that he owns 30 acres and will sell 10 acres to Mr. Weber for the project. He said he intends to build a home on the other acreage. Mr. Merrow stated that Massachusetts law governs the project and that it is not a rehab facility.

Peter Cerilli, 12 Tee Lane said that he believes this is a good, worthy project.

Chair Menard noted that the Board's sole consideration this evening is whether the Building Commissioner correctly advised that the "educational use" would be permissible under the Zoning Bylaw.

Vice-Chair Coutinho asked whether the Board or the Petitioner can request a continuance.

Chair Menard said that the Petitioner is the only one who can request a continuance as Town Counsel has already advised that this appeal lacks ripeness.

Ms. Gee also noted that the two (2) issues are whether Mr. McGoff has standing to bring this appeal and whether the appeal is ripe. She also said that she does not believe that the Building Commissioner properly interpreted the Zoning Bylaw, not taking into account all of the comments in Attorney Burke's letter.

Chair Menard said that, perhaps, the standing issue could be resolved by other abutters signing on to the administrative appeal. However, the issue of ripeness would not be resolved.

Mr. McGoff submitted a motion to continue this matter to Wednesday, December 6, 2023 at 6:30 p.m. with agreement that the decision deadline is extended.

Vice-Chair Coutinho said he would agree to a continuance to allow the Building Commissioner to attend the hearing and participate in the discussion.

Ms. Gee made a motion to continue this matter to Wednesday, December 6, 2023 at 6:30 p.m. Ms. Pontolilo seconded the motion, which was voted unanimously by the Board.

December 6, 2023

Vice-Chair Coutinho opened the meeting, stating that the voting members would be Constance Gee, Barbara Pontolilo, Ray Elias, George Stelljes and himself, Gerald Coutinho.

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

Vice-Chair Coutinho asked Town Counsel to explain the Board's authority in this matter.

Town Counsel Blake stated that:

1. At the last hearing, the issues of standing and ripeness were addressed.
2. The Zoning Board does not have authority to address this matter because the letter issued by the Building Commissioner was in an advisory capacity only.
3. Mr. Souza's letter specifically states that "the use of the property at 435 Old Harbor Road, Westport, MA for educational service would be allowed provided that the Planning Board approves, as per section 8.7, Site Plan Approval. Building permits will be required for any alterations and/or additions to the existing."
4. No building permit or occupancy permit has been issued by the Building Commissioner and, therefore, there is nothing to appeal.
5. The Petitioners' attorney, in his letter to the Board, admits that the Building Commissioner's letter is advisory only.
6. This administrative appeal lacks ripeness.

Ms. Kozakiewicz asked whether Ken Weber, prospective buyer of the property, could obtain a binding letter from the Town. She stated that she believed that a prospective buyer should not be entitled to a letter from the Building Commissioner.

Town Counsel Blake said that anyone may get an advisory letter when purchasing property, however, the Building Commissioner was not in a position to provide a zoning determination without reviewing plans and other documents as to the facility that is being proposed at the property, which were not available at the time he issued the advisory letter.

Attorney Stephen MacGillivray addressed the Board, stating that:

1. He represents Kevin Brayton McGoff and Ryan Kim.
2. He suggested that the Board has three (3) options: (a) overturn the letter (b) remand the matter back to the Building Commissioner for further explanation; or (c) determine that the letter was advisory only and Mr. Weber would be required to apply to the Zoning Board for other relief (i.e. special permit) for the project.

3. The standing issue has been resolved because Ryan Kim is an abutter and has joined the Petitioner, Kevin Brayton McGoff, an aggrieved party, on the Amended Administrative Appeal.

4. Under the bylaws, you must be an owner to petition the Planning Board to review a site plan or be part of a purchase and sale agreement with the owner. Mr. Weber is not an owner at this time, and no Purchase and Sale Agreement has been supplied to either the Planning Board or the Zoning Board that proves that Mr. Weber intends to purchase the property.

Vice-Chair Coutinho reminded Attorney MacGillivray that this meeting is to discuss the administrative appeal of Mr. Souza's letter. He also noted that the standing issue has been resolved with Mr. Kim's joining in the administrative appeal. However, the site plan approval is not the subject of this appeal, nor is it an issue that is resolved by the Zoning Board. The only issue here is whether or not the appeal lacks ripeness.

Attorney MacGillivray agreed that the issue of standing has been resolved. He noted that Mr. Weber had no standing to ask the Building Commissioner for an opinion.

Vice-Chair Coutinho asked Mr. Souza if the owner was present when Mr. Weber addressed the matter with him. Mr. Souza said he was not. Vice-Chair Coutinho asked Attorney MacGillivray to address the issue of ripeness.

Attorney MacGillivray said that Mr. Weber went to the Planning Board with the understanding that Mr. Souza's letter allowed him to go forward. He stated that Mr. Weber will require a special permit or other determination from the Zoning Board.

Town Counsel Blake said that, if the facility is for educational use, Mr. Weber must get a site plan review by the Planning Board. If approved, Mr. Weber must apply to the Building Department for the proper permits. Mr. Souza would then make a determination in the first instance. Any determination by the Planning Board is appealable to the Superior Court or Land Court. Any determination by the Building Commissioner is appealable to the Zoning Board of Appeals and, then, to Superior Court or Land Court thereafter, if necessary.

Town Counsel Blake also said that he believes that advisory opinions are an issue that can lead to appeals similar to the one that is currently before the Board. However, Mr. Souza's letter essentially restated the wording of the Zoning Bylaw and was not an interpretation of the Bylaw.

Ms. Kozakiewicz said that it seems the cart is before the horse here and that the prospective buyer must obtain site plan approval from the Planning Board first before applying to the Building Department for permitting.

Vice-Chair Coutinho stated that anyone wishing to speak should provide new information only, and not rehashing what was said at the last meeting. He also said that, at the last

meeting, the Board initially voted to dismiss the appeal and reconsidered only to allow people in the audience to comment as a courtesy to those who were present. The only issue before the Board at this time is the issue of ripeness, i.e. there is no building permit or occupancy permit or other definitive decision by the Building Commissioner issued in this matter.

Attorney MacGillivray stated that he believed the Zoning Board could determine use.

Mr. Elias noted that there is no actual issue before the Board at this time other than the administrative appeal.

Ms. Kozakiewicz asked Attorney MacGillivray to explain why he believes that Zoning Bylaw 5.1 does not allow an educational use for a non-profit organization.

Ms. Gee agreed that she would like to hear the argument and that it might be instructive for the Planning Board as well.

Attorney MacGillivray said that there is case law that governs educational use for non-profit facilities. He noted that educational use is not defined by the Zoning Bylaw and is to be interpreted by the Zoning Board. He further explained that he believed the intent of footnote 3 to Section 5.1 was to comply with the Dover Amendment regarding non-profit educational facilities; and that Mr. Weber's proposed facility would be for profit.

Vice-Chair Coutinho said that the words "primarily educational" used by Attorney MacGillivray are to be considered as well.

Attorney MacGillivray believes that the educational use issue should be resolved by the Zoning Board prior to the site plan is approved by the Planning Board.

Town Counsel Blake reiterated that:

1. If a building permit is issued, then the Petitioners or anyone else may appeal at that time to the Zoning Board.
2. It is not the function of the Zoning Board to do all the work for the prospective buyer and, determining the educational use would be doing just that.
3. Footnote 3 to Section 5.1 is a typical footnote used in many bylaws and the Attorney General may strike it because the Dover Amendment prohibits the Town from determining educational use for non-profit facilities.
4. There is no case law that governs "for profit" educational facilities. Case law pertains to Dover Amendment cases pertaining to non-profit facilities; however, the corporate structure of an entity has no bearing on the use as to whether it is educational or not.

5. In reviewing the Zoning Bylaw, certain uses are rather simple in nature to distinguish between profit and non-profit. Educational use is not one of those uses.

Ms. Kozakiewicz said she believes that the education use was inserted into the table of uses subsequent to the Dover Amendment's mandate becoming effective.

Mr. Souza noted that no building permit has been applied for at this time and he has no knowledge as to when there will be an application for a building permit. He stated that the project is currently before the Planning Board for site plan approval. Mr. Souza stated that, when he was originally approached by Mr. Weber to issue an opinion, he visited the property and waited for the owner to appear to allow him into the building. The owner did not appear and he was unable to view the inside of the building to view the renovations and construction that may be required.

Ms. Kozakiewicz asked for clarification as to the bylaw that permits only four (4) unrelated people in a housing unit as it pertains to an educational use.

Town Counsel Blake said the facility would need to be a lodging house to be limited to the four (4) people pursuant to the Zoning Bylaw.

Mr. Souza also said that the building code would take it to the next step as he would be requesting building code synopsis as to how many people would be in the building, including students, staff, visitors, service people, etc.

Ms. Gee stated that she believed the matter is ripe at this time, in that, had the appeal not been filed, the project may have gone forward.

Mr. Elias said that the proposed buyer must go through various processes in order to obtain approval from the Planning Board.

Vice-Chair Coutinho said that the Planning Board cannot determine "use" as defined in the Zoning Bylaw.

Mr. Souza said he has not made a decision as to the project because he has not seen any plans, documents or information on the project.

Vice-Chair Coutinho said that, in response to a question at the prior hearing as to the number of students residing at the premises, Mr. Weber indicated that there would be a maximum of 12 students residing there.

Ms. Kozakiewicz said she did not believe the appeal was ripe at this time; the Zoning Board should not make decisions or solicit information for the prospective owner. Mr. Weber should contact an attorney who can advise as to whether or not the project will be allowed.

Ryan Kim, Co-Petitioner and abutter, 445 Old Harbor Road, Westport, MA addressed the Board. He said he was not at the prior hearing. He noted that there are times during the

year when he is able to see the property from his home. Mr. Kim said he understands that Mr. Souza was unable to tour the property. He also said that he believed it was unfair for Mr. McGoff and himself to spend more money on legal fees if this matter is not resolved tonight. He also wondered whether Mr. Souza would be able to revise his letter.

Ms. Kozakiewicz noted that everyone is clear that the letter is non-binding.

Vice-Chair Coutinho said that Mr. McGoff was advised by the Zoning Board Administrator in writing by e-mail that filing an administrative appeal in this matter was premature to go before the Board. This was confirmed by the Zoning Board Administrator. He also said that the Board does not act as legal counsel for either the Petitioners or Mr. Weber, and that Mr. Weber will be required to apply to other Boards for proper permitting.

Ms. Gee believed that Mr. Kim made good arguments and that he had brought this matter to the public's attention, as well as the attention of the Planning Board.

Mr. Souza said that anyone can contact the Building Department to find out whether a building permit has been issued. However, he said that he will not be in a position to issue a permit until and unless the Planning Board approves the site plan; and the prospective owner submits various documents and plans to him.

Town Counsel Blake said that an advisory letter is not appealable. The Board has options: it can deny the appeal for lack of ripeness; grant the appeal; or dismiss the appeal with certain language.

Mr. Kim expressed his concern for the future of the facility if it is allowed to proceed. He said that Mr. Weber's prior facility in Falmouth was in operation for four (4) years and, then, he sold it and it is now an adult rehabilitation facility. The property in Falmouth was originally a motel. He is concerned as to the future of the Old Harbor Road property.

Vice-Chair Coutinho asked for a consensus of the Board as to whether it would like to hear any new information from the audience or go directly to voting on a motion that the matter is not ripe at this time.

Ms. Gee said she would like to know if there is any new information that the public could inform the Board.

Mr. Stelljes asked for further clarification from Mr. Kim as to the sale of the Falmouth facility.

Mr. Kim said he was unable to tour the Falmouth facility and does not have information as to whether Mr. Weber profited from the sale.

Tim Reny, 303 Old Harbor Road, Westport, MA asked the Zoning Board to affirm that the letter was advisory.

Ms. Kozakiewicz said, if the Board determines that the matter is not ripe, then it is in the record that the letter was written in an advisory capacity.

Vice-Chair Coutinho said that the minutes of the prior hearing and of this hearing will become an official record; that, at the prior hearing on November 1, 2023, the Board said that the letter was in an advisory capacity; and that, if the Board makes a motion tonight, there would be certain language in the motion.

Arthur Sweetser, 34 Whistler Point Road, Westport, MA said that he believes the prospective owner will call the project a school in order to get it through the process.

Kevin Vendituoli, 686 River Road, Westport, MA asked that the Board inquire of Mr. Souza, Mr. Weber's attorney or the real estate agent as to the hours of meetings that took place to discuss this matter.

Vice-Chair Coutinho said that, even if there was a full conversation between all the parties, there is nothing in writing by the Building Commissioner and, if there was a decision made orally, it is not binding. He again noted that there is no determination by the Building Commissioner before the Zoning Board at this time.

Town Counsel Blake reiterated that any determination made by the Planning Board would be appealed to Superior Court or Land Court; any building permit or occupancy permit determination would be appealed to the Zoning Board of Appeals.

Attorney MacGillivray admitted that the letter is non-binding and asked that, if the Board dismisses the appeal, that the Board's motion include the language that it is dismissed without prejudice to further appeals, that the letter by the Building Commissioner has no legal effect as to the use, and that the underlying issues have not been adjudicated by the Zoning Board.

Philip Weinstein, 93 River Road, Westport, MA asked whether someone who is not the owner can come before the Board for an advisory opinion.

Town Counsel Blake said non-owners ask for opinions all the time. Towns are advised not to give opinions; but can issue advisory letters that restate the Zoning Bylaw, which was done in this case. The Zoning Board does not issue opinions.

Mr. Elias stated that this is an unusual situation, in that, appeals of non-binding letters do not ordinarily come before the Zoning Board. No building permit nor letter of determination has been issued.

Mr. Elias made a motion to dismiss the administrative appeal of Kevin Brayton McGoff and Ryan Kim with respect to the property located at 435 Old Harbor Road as not being ripe for appeal as no decision has been made by the Zoning Enforcement Officer; and that the letter dated June 12, 2023 issued by the Building Commissioner was merely an opinion and non-binding to the Zoning Board of Appeals. Ms. Pontolilo seconded the motion, which was voted unanimously by the Board.

Vice-Chair Coutinho advised that there is a 20-day appeal period from the date of the filing of the decision.

FILED WITH THE TOWN CLERK ON:

ZONING BOARD OF APPEALS



By: *Maria I. Branco*
Maria I. Branco
Zoning Board Administrator

Any person aggrieved by a decision of the Board of Appeals may appeal to the Superior Court Department in which the land concerned is situated or to the Land Court Department, or to the division of the District Court Department within whose jurisdiction the land is situated by bringing an action within twenty (20) days after the decision has been filed in the office of the Town Clerk. Notice of the action with copy of the complaint shall be given to such Town Clerk so as to be received within such twenty (20) days in accordance with M.G.L. Chapter 40A, Section 17.