

**ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES
WEDNESDAY
NOVEMBER 1, 2023**

RECEIVED

FEB 7 —

**WESTPORT ZONING
BOARD OF APPEALS**

Members Present: Roger Menard, Chair
Gerald Coutinho, Vice-Chair
Constance Gee
Barbara Pontolilo
Raymond Elias
George Stelljes

Absent: Cynthia Kozakiewicz

Also present was Attorney Jeff Blake, Town Counsel.

Ralph Souza, Building Commissioner, was not present.

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.

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

1. Chair Menard stated that the first matter before the Board was the administrative appeal of Tracy Boothman and Alexander Caracuzzo from a determination by the Building Commissioner that the subject lot meets the requirements of Zoning Bylaw 7.6 and is a buildable lot. The subject property is located at 1835 Main Road, Westport, MA and is shown on Assessor's Map 83, Lot 77.

Chair Menard said that the members voting on this matter would be Gerald Coutinho, Barbara Pontolilo, Constance Gee, Ray Elias and himself, Roger Menard. He also stated that the Petitioners would provide information they believe is pertinent, the Board will ask questions and, then, the public will have an opportunity to make a comment.

Chair Menard said that the administrative appeal was prompted by a letter issued by Ralph Souza, the Building Commissioner dated September 15, 2023, which states, in pertinent part:

After review of the submitted documents for Map 83 of Assessor's Map [sic] 77, it has been determined that the lot in question contains 33,280 square feet of area with

128 feet of frontage on Main Road. The above-mentioned lot meets the requirements of the Westport Zoning by-Laws, Article 7.6, Pre-Existing Non-Conforming Lots and is therefore a buildable lot.

Petitioners, Alexander Caracuzzo and Tracy Boothman, 1847 Main Road, Westport, MA addressed the Board. They stated that:

1. The surveyor had asked the Building Department to make a determination as to whether Lot 77 at 1835 Main Road was a buildable lot. The Building Commissioner determined that it was a pre-existing non-conforming use with proper square footage and frontage.

2. That the determination is incorrect because the same person owns both the lot at issue and the adjoining lot (Lot 78) that currently has a single-family residence.

3. Both lots have been used as a single lot, in that Lot 77 contains the septic system, leaching field, the well, and parking for the single-family residence.

4. There are easements with abutters that span both lots, the square footage and location of which were not considered by the Building Commissioner.

Chair Menard explained what an administrative appeal is, that it contradicts the determination made by the Building Commissioner pursuant to the Zoning Bylaw. The Zoning Board must determine whether or not the Building Commissioner correctly administered the Zoning Bylaw.

Also present was Attorney Jeff Blake, Town Counsel, stated that there is a procedural issue, in that, the Petitioners should have waited until a building permit was issued and filed the administrative appeal at that time. He said that this appeal is not properly before the Zoning Board at this time. He also said that it is possible that a building permit may not be issued in this matter. Therefore, the administrative appeal should be dismissed for lack of ripeness.

Town Counsel Blake also noted that the Petitioners raised the issue of merger and there is currently a case known as the Dalbec case, which pertained to merger of lots in common ownership in Westport, protecting lots in existence at the time, even if they were held in common ownership. For the Petitioners to prevail, they would have to show that there was no protection with these lots.

Therefore, the administrative appeal suffers from a procedural defect, in that, it is not ripe before the Board.

Vice-Chair Coutinho asked whether a continuance was proper here, to allow time for the Building Commissioner to issue or not issue a building permit.

Town Counsel Blake said it was not proper, due to statutory deadlines for issuing a decision.

Mr. Caracuzzo said that he asked Mr. Souza about the issue of common ownership, but Mr. Souza said that he was asked to review square footage and frontage.

Vice-Chair Coutinho said that even if the Zoning Bylaw were changed, the case of Dalbec may prevail.

Mr. Caracuzzo asked whether it was proper for the determination letter to be sent to the surveyor and not the owner.

Vice-Chair Coutinho said that the surveyor was acting on behalf of the owner.

Town Counsel Blake said that abutters are not notified of the issuance of a building permit. It is up to an interested party to keep contacting the Building Department to find out if a permit has been issued.

Vice-Chair Coutinho suggested that the Petitioners also contact the Board of Health regarding the current septic system issue.

Town Counsel Blake said that, at some point, the lot conformed to zoning for the permit to be issued for the house and septic system.

Ms. Gee said that she was not aware that this appeal may not be properly before the Board, but that, once a property owner has gone through the process of obtaining a building permit, more is at stake, which could make any challenge to the permit more difficult for the parties.

Ms. Boothman said that she and others discussed the appeal process with the Zoning Board Administrator and, although she was advised to wait until a permit was issued or for a determination by the Board of Health was made, she thought it would be a good idea to go forward nonetheless to raise the issue at this time for purposes of clarity and transparency.

Mr. Caracuzzo said that the neighbors and other owners in the area are concerned that this may affect the health, character of the neighborhood and population density in the future.

Vice-Chair Coutinho asked whether the Freedom of Information Act or Open Meeting Law help the Petitioners or others to obtain information about permits.

Town Counsel Blake said that anyone can ask about permits that have been issued and the Petitioners could provide their contact information at the Building Department and request that they be contacted should a permit be issued in the future.

Mr. Elias noted that the Board of Health is not under the purview of the Zoning Board and that the septic plan is from the 1990s and, perhaps, the lots were considered as a single lot at the time.

Town Counsel Blake stated that, at some point prior to the Zoning Bylaws being in effect, the lots must have conformed at the time they were created in order to become buildable lots. He said that the Board of Health could determine that the septic system cannot be installed in the lot where the residence is located.

Chair Menard said that if there is no building that straddles the lots, the lots may be considered separate lots.

There being no further discussion, Vice-Chair Coutinho made a motion to dismiss the administrative appeal from a determination by the Building Commissioner that the subject lot meets the requirements of Zoning Bylaw 7.6 and is a buildable lot. The subject property is located at 1835 Main Road, Westport, MA and is shown on Assessor's Map 83, Lot 77 on the basis that the appeal is premature and it is not properly before the Zoning Board. Mr. Elias seconded the motion. All five (5) Board members voted unanimously to dismiss the administrative appeal.

2. The second matter before the Board is the Administrative Appeal of Kevin Brayton McGoff from a determination by the Building Commissioner that the use of the property at 435 Old Harbor Road for educational use or purpose 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 shown on Assessor's Map 87, Lot 2.

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 Pontolilo, 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.

Administrative Items:

1. Election of Officers:

Ms. Gee nominated Roger Menard as Chair. Ms. Pontolilo seconded the nomination with all members voting aye unanimously.

Chair Menard nominated Gerald Coutinho as Vice-Chair. Ms. Gee seconded the nomination with all members voting aye unanimously.

Chair Menard nominated Constance Gee as Secretary. Ms. Pontolilo seconded the motion, stating that she would be backup Secretary until June 30, 2024, and all members voting aye unanimously.

2. Approval of the minutes of the regular meeting of September 20, 2023. Chair Menard made a motion to approve the minutes of the regular meeting of September 20, 2023. Ms. Pontolilo seconded the motion, which was voted unanimously to approve the minutes of the September 20, 2023 regular meeting.

3. The Planning Board's request for comment regarding the Cory Ridge Estates. The Zoning Board had no comment regarding this project.

4. The Planning Board's request for comment regarding the Westport Lakes subdivision. Vice-Chair Coutinho stated that, years ago, this property was before the Zoning Board when it was slated to be a golf course. There is no Zoning Bylaw that allows for this project and he will be objecting personally at the meeting of the Planning Board. The comment that no Zoning Bylaw exists for this particular use will be relayed to the Planning Board.

5. The Planning Board's request for comment regarding the 435 Old Harbor Road project. The comment that this project does not conform to Zoning Bylaws will be relayed to the Planning Board.

The next meeting is scheduled for Wednesday, November 15, 2023.

Chair Menard stated that the Board would resume in Executive Session pursuant to Massachusetts General Laws Chapter 30A, Section 21(a)(3) to discuss Land Court litigation regarding 50 Spinnaker Way LLC where discussion in open session will have a detrimental effect on the Town's litigation position and the Chair so declares. Chair Menard made a motion to go into Executive Session at 9:21 p.m. and not return to regular session. Vice-Chair seconded the motion. The roll call vote was as follows: Gerald Coutinho, yes; Barbara Pontolilo, yes; Roger Menard, yes; Constance Gee, yes; Ray Elias, yes; and George Stelljes, yes. The Board voted unanimously to go into Executive Session at 9:21 p.m.

Adjournment.

Respectfully submitted,



Maria I. Branco
Zoning Board Administrator

APPROVED:



Roger Menard, Chair