

**ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES
WEDNESDAY
DECEMBER 6, 2023**

RECEIVED

FEB 7

WESTPORT ZONING
BOARD OF APPEALS

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

Absent was Chair Roger Menard.

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

Vice-Chair Coutinho called the meeting of the Zoning Board of Appeals meeting to order at 6:35 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. The first matter on the agenda was the continued hearing on the application of Tammy Therrien, Applicant, and Tammy Therrien and Keith Therrien, Owners, for a special permit to convert the second floor of the existing garage into a detached accessory apartment, containing 800 square feet, pursuant to Zoning Bylaw Article 9, Section 9.5.4. The property is located at 18 McKinley Street, Westport, MA and is shown on Assessor's Map 11, Lots 557-594.

Vice-Chair Coutinho said that voting on this petition would be Constance Gee, Barbara Pontolilo, Raymond Elias, George Stelljes and himself, Gerald Coutinho.

Tammy Therrien and Keith Therrien addressed the Board. Ms. Therrien said that Joseph Reis had revisited the premises and viewed that one of the bedrooms had been removed in the main residence and that he would notify the Board of Health to approve the septic system as adequate to accommodate the bedroom in the accessory apartment.

The Zoning Board had received an e-mail from the Board of Health, confirming the approval of the septic system.

Ms. Therrien said that she had a received the Deed Restriction from the Zoning Board Administrator, which she and Mr. Therrien would sign.

Accordingly, Mr. Elias made a motion to grant the special permit to convert the second floor of an existing garage into a detached one-bedroom accessory apartment as allowed by Zoning Bylaw Article 9, Section 9.5.4. The subject property is located at 18 McKinley Street, Westport, MA and is shown on Assessor's Map 11, Lots 557-594. Ms. Gee seconded the motion and the Board unanimously voted to grant the special permit.

Vice-Chair Coutinho advised that there is a 20-day appeal period from the date the decision is filed with the Town Clerk.

2. The second matter on the agenda was the continued hearing of 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.

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 the 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.

Administrative Items:

1. Vice-Chair requested that the approval of the minutes of the November 1, 2023 meeting be tabled until the next meeting as he would like to review the minutes again for completeness. The Board agreed.

2. The Planning Board had submitted a request to the Zoning Board for comment regarding the subdivision known as "Rosewood Lane," however, the documents were not submitted in sufficient time to place the matter on the agenda for tonight. Therefore, the response to the Planning Board will be that the Zoning Board has no comment as the materials were not provided in time for review at this meeting.

The next meeting is scheduled for Wednesday, February 7, 2024.

Vice-Chair Coutinho 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. Vice-Chair Coutinho made a motion to go into Executive Session at 8:09 p.m. and not return to regular session. Mr. Elias seconded the motion. The roll call vote was as follows: George Stelljes, yes; Barbara Pontolilo, yes; Vice-Chair Gerald Coutinho, yes; Constance Gee, aye; Ray Elias, aye; and Cynthia Kozakiewicz, aye. The Board voted unanimously to go into Executive Session at 8:09 p.m.

Adjournment.

Respectfully submitted,



Maria I. Branco
Zoning Board Administrator

APPROVED: 

Gerald Coutinho, Vice-Chair