

Zoning Board of Appeals MINUTES Wednesday, July 24, 2024 7:00 PM

To all persons interested in or affected by the actions of the Zoning Board of Appeals, you are hereby notified, pursuant to Section 11 of Chapter 40A of the General Laws of the Commonwealth of Massachusetts, and all amendments thereto, that a public hearing on the following appeals will be held on Wednesday, July 24, 2024, at the time indicated:

The Zoning Board of Appeals Public Hearing will be held by remote participation methods. Public access to this meeting shall be provided in the following manner:

1. The meeting will be televised live via Xfinity Channel 8 or high definition Channel 1072. It may also be accessed via the Government Access Channel live stream on the Town of Barnstable’s website:
<http://streaming85.townofbarnstable.us/CablecastPublicSite/watch/1?channel=1>
2. Real-time access to the Zoning Board of Appeals meeting is available utilizing the Zoom link or telephone number and Meeting ID provided below. Public comment can be addressed to the Zoning Board of Appeals by utilizing the Zoom link or telephone number and Meeting ID provided below:

Join Zoom Meeting Option	Telephone Number Option
https://townofbarnstable-us.zoom.us/j/81692916753	US Toll-free 888 475 4499
Meeting ID: 816 9291 6753	Meeting ID: 816 9291 6753

Applicants, their representatives and individuals required or entitled to appear before the Zoning Board of Appeals may appear remotely, and may participate through accessing the link or telephone number provided above. Documentary exhibits and/or visual presentations should be submitted in advance of the meeting to anna.brigham@town.barnstable.ma.us so that they may be displayed for remote public access viewing.

Copies of the applications are available for review by calling (508) 862-4682 or emailing anna.brigham@town.barnstable.ma.us.

Call to Order

Chair Dewey calls the meeting to order at 7:08 PM with an introduction of Board members:

Member	Present	Absent
Dewey, Jacob – Chair	X	
Bodensiek, Herbert – Vice Chair	X	
Pinard, Paul – Clerk	X	
Alves, Manny		X
Hansen, Mark	X	
Hurwitz, Larry	X	
Webb, Aaron	X	

Also present is Anna Brigham, Principal Planner and Genna Ziino, Administrative Assistant.

Notice of Recording

This meeting of the Zoning Board of Appeals is being recorded and broadcast on the Town of Barnstable’s Government Access Channel. In accordance with MGL Chapter 30A §20, I must inquire whether anyone is recording this meeting and if so, to please make their presence known.

Minutes

June 12, 2024 – Herb Bodensiek moves to approve the minutes. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Mark Hansen, Larry Hurwitz, Aaron Webb

Nay: None

Patricia Baker and David D. Moir, as Appellants, are appealing the issuance of Building Permit BLDR-23-780 issued on November 1, 2023 to EJ Jaxtimer for the construction of a 3,100 sq. ft., 3-bedroom home for Janet Holian, Trustee of Holian Family Realty Tr. The subject property is located at 240 Windswept Way, Osterville, MA and 250 Windswept Way, Osterville, MA as shown on Assessor's Map 051 as Parcel 012-001 and 012-000, respectively. It is located in the Residence F-1 (RF-1) and the Resource Protection Overlay District (RPOD). Continued from January 24, 2024, February 28, 2024, March 27, 2024, May 22, 2024. Members assigned: Jake Dewey, Herb Bodensiek, Aaron Webb, Larry Hurwitz, Manny Alves.

Manny Alves is an assigned member but is absent, so Mark Hansen, who was present at the prior meetings, fills in.

Attorney Ben Tymann is representing the appellants, who are direct abutters. His position is that this is not a buildable lot under MA law and Barnstable zoning regulations and subdivision regulations.

David Moir, one of the appellants, walks through a history of ownership of his property and the neighborhood. He has concerns about wetlands, flooding, boundaries, and increased traffic. He shares a document entitled "LCC 15354a 1933 Complete" and begins to detail further history of the neighborhood and the deed. The Board stops Mr. Moir and notes that this information is extraneous.

Attorney Tymann explains that a building permit was issued for Janet Holian to build a single-family home. His clients appealed the building permit, so it was suspended. The Planning Board then endorsed a revised ANR plan submitted by Ms. Holian's attorney, and the Building Dept. unsuspended the building permit, which his client is appealing. An endorsed ANR plan does not confer zoning compliance. His 3 zoning issues are:

1. Insufficient lot area for Parcel A: Attorney Tymann shares the deed (document entitled "Holian Deed With Access Way Boundries Way Encumbrances Marked") and explains his belief that the land Ms. Holian included in her lot is not actually part of her lot and is not included in the deed, based on language from page 2. He shares a plan entitled "Merrikin 2024-06-10 Annotated ANR Exhibit" to show the amount of land Parcel A is claiming to achieve (87,139 sq ft.), which is 19 ft. over the minimum. 9,400 sq. ft. of that encompasses the Windswept right of way and land on the other side of the way, which is not countable towards lot area because it's not part of the land according to the deed and is not a lot as defined under the subdivision regulations.
2. Insufficient frontage: He reads the definition of what is a sufficient way for frontage under the subdivision regulations, which includes categories A, B, and C to be met. He believes this does not meet A or B, so the debate is over whether it meets C. He shares the standards of adequacy for existing ways, and shares a document entitled "2024-07-23 Legacy Engg Annotated ANR Plan." The plan shows no actual access on the ground from the parcels to Sunset Point. Sunset Point has 30 ft. of right of way, and 33 ft. are required. Windswept Way is 12 ft. and needs to be 18 ft. to meet the standard of adequacy.
3. The fact that if Lot A were allowed to be a buildable lot, it would render Lot B less conforming, which is not permissible under state law. He says case law is clear on the concept of infectious invalidity: you can't create a new buildable lot if it will render the old lot nonconforming or more nonconforming (shares Norton V Donohue case law).

Attorney Mike Ford is representing Ms. Holian and responds to Attorney Tymann's claims. He explains that his client originally for a prior ANR used wetland lines that were approved when she bought the house. They later discovered a lot shape error because they utilized the old wetlands line. They then had land surveyors redraw the lines so both lots met the shape factor and resubmitted to the Planning Board. He says all of Attorney Tymann's arguments were made to the Planning Board prior to their endorsement, and they still signed the plan endorsing that Sunset Point provided adequate frontage. In fact, one of the plans that Attorney Ford provided to the Planning Board was an ANR plot that created Patricia Baker's (an appellant's) lot, which used Sunset Point as frontage. The Planning Board made a finding that Sunset Point was suitable as frontage and there was precedence for that road being used as frontage.

He further explains that when there is sufficient linear frontage along a road that's found to be adequate, you do not need actual access off that linear frontage under the zoning ordinance. He confirmed this with the Building Commissioner. As long as his client has legal access off of Sunset Point, and could have physical access if they wanted to, that's sufficient.

Regarding the lot area argument, his client's property is not land court property. Oyster Harbors never owned the 20-foot wide right of way. He talked this issue through with the Building Commissioner, who reasoned that the right of way, which is not land court property, was simply an easement in which people have rights of way by stipulation. His client owns it and it can be used toward lot area.

Regarding the language Attorney Tymann referred to in the deed, Attorney Ford does not believe this Board has jurisdiction to interpret a deed and is not a land court. Even still, that language is specific to ways owned by Oyster Harbors, which this isn't—the small connector road is not Windswept Way according to any plan and is owned by his client. The language in the deed does not prevent the fee in the right of way going to his client. He worked with the Building Commissioner on this. For those reasons, he feels the lot has sufficient area, sufficient frontage, and the lot shape factor has been corrected. He believes the Building Inspector's lifting of the suspension of the building permit is correct, and he asks that the Board upholds that decision of the Building Inspector.

Mark Hansen asks if Parcel A was sold, would the owner be able to create a driveway from Sunset Point on Parcel B. Attorney Ford confirms and adds that infectious invalidity is not in play here. His client has sufficient linear frontage. Chair Dewey asks if the building permit was originally suspended only because of the lot shape factor. Attorney Ford confirms. He reiterates that the Building Commissioner classifies the right of way here as an easement, not a street, and that he agrees that actual physical access off of linear frontage here is not required.

Attorney Tymann disagrees with Commissioner Florence that there need not be at least a plan of access to the frontage according to state law. He rebuts that there is no way to reconcile the agreed upon 30 ft. width of Sunset Point with the requirement that it be 33 ft. Attorney Ford says he doesn't have to reconcile those numbers—the standards of adequate access is up to the Planning Board's discretion. Additionally, this is not an appeal of the Planning Board's action—this is about the Building Commissioner's decision.

Chair Dewey opens for public comment. Brooke Baker of 43 Sunset Point, the daughter of one of the appellants, asks Attorney Ford to clarify his comments about the easement and the wetlands being adjusted. He reiterates his former statements.

David Moir shows a document entitled "105-13 Way Easement 1952" and says that the ways are in active use and Windswept Way is a Land Court way and a through road. Attorney Ford responds that the plan being shown is not a Land Court plan—it's a plan signed by the Board of Survey of Barnstable recognizing Sunset Point coming off Windswept Way. That said, his client recognizes that the Moir family has the right to access the 20-foot right of way for all purposes to get to their lot.

Mark Hansen moves to close public comment. Aaron Webb seconds.

Vote:

Aye: Jake Dewey, Mark Hansen, Herb Bodensiek, Aaron Webb

Nay: None

The Chairman mistakenly forgets to include Larry Hurwitz in the vote.

The Board discusses that the Building Commissioner determined the way is no different than an easement and the frontage is not a requirement in Barnstable. They discuss whether they prefer to continue the appeal and have the Commissioner present. Mark Hansen asks Attorney Tymann if his client simply doesn't want a house to be built there, or if the concern is really about not having access to the right of way. Attorney Tymann answers that they want the language of the standards of adequacy to be enforced.

Aaron Webb moves to close the public hearing. Jake Dewey seconds.

Vote:

Aye: Jake Dewey, Mark Hansen, Herb Bodensiek, Aaron Webb

Nay: None

The Chairman mistakenly forgets to include Larry Hurwitz in the vote.

Mark Hansen makes findings: The Board affirms the Building Commissioner's issuance of BLDR-23-780 for the construction of a single-family dwelling at 240 Windswept Way, Osterville does not violate the Zoning Ordinance. Herb Bodensiek seconds.

Vote:

Aye: Jake Dewey, Mark Hansen, Herb Bodensiek, Aaron Webb

Nay: None

The Chairman mistakenly forgets to include Larry Hurwitz in the vote.

The Building Commissioner's issuance of Building Permit BLDR-23-780 is upheld.

7:02 PM

Appeal No. 2024-020

New Cingular Wireless PCS, LLC

New Cingular Wireless PCS, LLC has applied for a Special Permit pursuant to Section 240-108 Antennas Permitted by Special Permit in All Zoning Districts and 240-125 Zoning Board of Appeals. The Applicant is proposing to extend the existing cell tower by 15 feet and collocate its wireless facility at the site pursuant to the Federal Spectrum Act and the Town of Barnstable Zoning Ordinance. The subject property is located at 830 Wakeby Road, Marstons Mills, MA as shown on Assessor's Map 013 003. It is located in the Residence F (RF) Zoning District. Continued from June 26, 2024. Members assigned: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, and Manny Alves.

Manny Alves is an assigned member but is absent, so Mark Hansen, who was present at the prior meeting, fills in.

Attorney Dolan is representing the applicant. He explains that at the last hearing, it was not apparent that his client had gone through Formal Site Plan Review. The letter confirming completion has since been provided to the Board.

Chair Dewey opens for public comment. Anna Brigham says there was a letter from Keyes in support that is missing from Laserfiche (document entitled "Public Comment from C Keyes in Support"). Chair Dewey moves to close public comment. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen

Nay: None

Mark Hansen moves to close the public hearing. Aaron Webb seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen

Nay: None

Chair Dewey makes findings:

1. The application falls within a category specifically excepted in the ordinance for a grant of a special permit: Section 240-125 allows for a Special Permit.
2. After an evaluation of all the evidence presented, the proposal fulfills the spirit and intent of the Zoning Ordinance and would not represent a substantial detriment to the public good or the neighborhood affected.
3. The single-family nature of the property and of the accessory nature of the detached structure are preserved.

Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen

Nay: None

Chair Dewey moves to grant Special Permit No. 2024-020 subject to conditions 1-4 from Staff Report dated June 11, 2024.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Aaron Webb, Mark Hansen

Nay: None

Abstain: Paul Pinard (tech issues)

Special Permit No. 2024-020 New Cingular Wireless PCS, LLC is granted with conditions.

New Business

7:00 PM

Appeal No. 2024-027

Poyant Signs/Cape Cod 5

Poyant Signs/Cape Cod 5 have applied for a Variance pursuant to 240-65 Signs in B, UB, HB, HO, and SD-1 Districts. The Petitioner seeks to install an additional wall sign for a total of 3 wall signs where 2 are allowed, and to install an oversized directional sign. The subject property is located at 1620 Falmouth Road, Centerville, MA as shown on Assessor's Map 209 as Parcel 013. It is located in the Residence C (RC) and the Highway Business (HB) Zoning Districts.

Chair Dewey assigns himself, Herb Bodensiek, Paul Pinard, Aaron Webb, and Mark Hansen.

Bethany Leonard of Poyant Signs is representing the applicant. She explains that the bank is rebranding so they are proposing to replace existing signs. There are currently 3 signs on the business and the proposed square footage is less than the existing. They are also requesting an oversized directional sign to clarify lanes, but the square footage of the text area is the same.

Back to the Board for questions. Chair Dewey says the existing signs have been sufficient for the use of this property. The Board discusses the sign requests and their orientation. Ms. Leonard explains that it's an oddly shaped building with unusual orientation in relation to the parking lot and the roadway. The Board discusses whether this meets the 3-prong test or could be made to conform.

Chair Dewey opens for public comment. There is none. The Chairman moves to close public comment. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen

Nay: None

The Board deliberates. They discuss whether this lot is unique and whether each sign is necessary. Chair Dewey believes it may be up to Town Council to update the bylaw. The Chairman asks for the square footage of the oversized sign. Ms. Leonard answers that it's 7 square feet, and the current sign panel there is 2 feet by 3.6 feet. The group discusses different options to make this conform.

Bert Talerman, President of Cape Cod 5 is present and asks for a continuance to August 14. Chair Dewey moves to continue this to August 14, 2024 at 7:02 PM. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen

Nay: None

Appeal No. 2024-027 Poyant Signs/Cape Cod 5 is continued to August 14, 2024 at 7:02 PM.

7:01 PM

Appeal No. 2024-028

McGill

Scott and Melinda McGill have applied for a Special Permit pursuant to Section 240-91 H. (3) Nonconforming Lot. The Applicants propose to demolish the existing dwelling and construct a new single-family dwelling. The proposed dwelling will comply with all setbacks, but exceeds the allowed by-right lot coverage and floor area ratio. The existing Lot Coverage is 17.6% and the proposed Lot Coverage is 30.4% where 20% is allowed, and the existing Floor Area Ratio is 21.4% and the proposed Floor Area Ratio is 45.0% where 30% is allowed. The subject property is located at 394 Strawberry Hill Road, Centerville, MA as shown on Assessor's Map 248 as Parcel 228. It is located in the Residence B (RB) Zoning District.

This item is taken out of order and is heard first under New Business. The Board received a request from Attorney Boudreau to continue this to August 14 because he filed a subsequent variance and would like to present both at that time. Chair Dewey moves to continue this to August 14, 2024 at 7:01 PM. Aaron Webb seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Larry Hurwitz

Nay: None

Appeal No. 2024-028 McGill is continued to August 14, 2024.

7:02 PM

Appeal No. 2024-029

Woodwell

Richard and Linda Woodwell have applied for a Special Permit pursuant to Section 240-91 H. Developed Lot Protection. The Applicants propose to partially demolish, reconstruct, and expand the main house, and to relocate the tower dwelling and place it on a new foundation. The existing Gross Floor Area is 2,428 square feet (22.5%) and the proposed Gross Floor Area is 3,205 square feet (29.7%) where 30% is allowed. The subject property is located at 9 Lafayette Ave, Hyannis, MA as shown on Assessor's Map 287 as Parcel 043. It is located in the Residence F-1 (RF-1) Zoning District.

Chair Dewey assigns Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, and Larry Hurwitz. The Chairman recuses himself and leaves the meeting. Herb Bodensiek becomes Acting Chair.

Attorney Mike Ford is representing the applicant. He explains that this house is in the historic register, and they have applied to the Historic Commission, with a hearing scheduled for August. Scheduling wouldn't allow for them to get to Historic before this Board, unfortunately. The house is a non-contributing historic structure—only the tower is historic in the register, and they plan to save it. He explains that they want to do a partial demolition, but they are demolishing enough that it's not simply an alteration and needs to go under the raze and replace bylaw. The setbacks don't meet current setback requirements, so they cannot do the demolition as of right, which is why they are before the Board. They are either maintaining or improving all setbacks, the proposed lot coverage complies, and they're far under building height limits. He explains that this was designed to please the Historic Commission, and they are saving the tower to avoid any detriment to the neighborhood. He adds a correction: he should have applied under solely Linda Woodwell's name, as Richard Woodwell is deceased.

Herb Bodensiek opens public comment. There is none. Herb Bodensiek moves to close public comment. Aaron Webb seconds.

Vote:

Aye: Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Larry Hurwitz

Nay: None

Aaron Webb moves to close the public hearing. Paul Pinard seconds.

Vote:

Aye: Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Larry Hurwitz

Nay: None

Mark Hansen makes findings:

1. The application falls within a category specifically excepted in the ordinance for a grant of a special permit. Section 240-91(H)(3) allows for the demolition and rebuilding of a residence on a nonconforming lot.
2. Site Plan Review is not required for single-family residential dwellings.
3. After an evaluation of all the evidence presented, the proposal fulfills the spirit and intent of the Zoning Ordinance and would not represent a substantial detriment to the public good or the neighborhood affected.
4. The proposed yard setbacks must be equal to or greater than the yard setbacks of the existing building. The proposed front yard setback and side yard setbacks will remain, rear yard setback will conform to the required 15 feet. (An improvement) . Also the tower will be moved to bring it further into the lot.
5. The proposed lot coverage shall not exceed 20% or the existing lot coverage, whichever is greater. The existing lot coverage is 16.1% and proposed lot coverage is 18.9%, which does not exceed the threshold.
6. The floor area ratio shall not exceed 0.30 or 30% the existing floor area ratio of the structure being demolished, whichever is greater. The existing FAR is 22.5% and the proposed FAR is 29.7%, which does not exceed the threshold.
7. The building height, in feet, shall not exceed 30 feet to the highest plate and shall contain no more than 2 ½ stories. The proposed height for the principal dwelling is 17.5 feet and the proposed height for the tower is 20.5 feet.
8. The proposed new dwelling would not be substantially more detrimental to the neighborhood than the existing dwelling.

Aaron Webb seconds.

Vote:

Aye: Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Larry Hurwitz

Nay: None

Mark Hansen says the appeal is subject to conditions 1-6 from the Staff Report dated July 12, 2024. Paul Pinard seconds.

Vote:

Aye: Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Larry Hurwitz

Nay: None

Special Permit No. 2024-029 Woodwell is granted with conditions.

Correspondence

Matters Not Reasonably Anticipated by the Chair

Upcoming Hearings

August 14, 2024, August 28, 2024, September 11, 2024

Adjournment

Aaron Webb moves to adjourn. Paul Pinard seconds.

Vote:

Aye: Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Larry Hurwitz

Nay: None

Documents Used at this Meeting

- June 12, 2024 minutes
- Appeal No. 2023-042 Baker & Moir application packet
- Document entitled "LCC 15354a 1933 Complete"
- Document entitled "Holian Deed With Access Way Boundries Way Encumbrances Marked"
- Plan entitled "Merrickin 2024-06-10 Annotated ANR Exhibit"
- Document entitled "2024-07-23 Legacy Engg Annotated ANR Plan"
- Norton V Donohue case law
- Document entitled "105-13 Way Easement 1952"
- Appeal No. 2024-020 New Cingular Wireless application packet
- Document entitled "Public Comment from C Keyes in Support"
- Staff Report dated June 11, 2024 for Appeal No. 2024-020
- Appeal No. 2024-027 Poyant Signs/Cape Cod 5 application packet
- Request from Attorney Boudreau to continue Appeal No. 2024-028
- Appeal No. 2024-029 Woodwell application packet
- Staff Report dated July 12, 2024 for Appeal No. 2024-029

Respectfully submitted,
Genna Ziino, Administrative Assistant

Further detail may be obtained by viewing the video via Channel 18 on demand at <http://www.town.barnstable.ma.us>