

Zoning Board of Appeals
MINUTES
Wednesday, May 14, 2025
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, May 14, 2025, at the time indicated:

Call to Order

Chair Jake Dewey calls the meeting to order at 7:04 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
Pittenger, Natalie	X	
Tavano, Rodney	X	
Webb, Aaron		X

Also present is Jim Kupfer, Director of Planning & Development; Brian Florence, Building Commissioner; Kate Connolly, Assistant Town Attorney; 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

January 8, 2025 – Manny Alves moves to approve the minutes. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Paul Pinard, Manny Alves, Mark Hansen, Natalie Pittenger, Rod Tavano

Nay: None

Executive Session

Appeal No. 2023-010 Arista/Wendy's LLC - Executive Session for the purpose of discussing litigation strategy with respect to the case in the Land Court (24 Misc. 00088) by Arista/Wendy's LLC, for property at 715 West Main Street, Hyannis, originally appealing the denial of a special permit to construct a drive-through window at a Wendy's fast-food restaurant, then appealing the grant of the special permit with conditions upon remand order by the Land Court, and the filing of a complaint for contempt against the ZBA for the remand special permit conditions, if the Chair determines that an open session could be detrimental to the Board's and Town's litigation position.

The Chair declares that an open meeting discussion will have a detrimental effect on the litigation position of the ZBA.

Chair Dewey moves that the Zoning Board of Appeals convene in Executive Session under G.L. c. 30A section 21(a)(3) to discuss litigation strategy with respect to Arista/Wendy's LLC v. Town of Barnstable Zoning Board of Appeals at 715 West Main Street, Hyannis based on the Chair's declaration that an open meeting discussion may have a detrimental effect on the litigating position of the Zoning Board of Appeals in the appeals and that the Board will return to open session at the conclusion of the Executive Session. Paul Pinard seconds.

Vote:

Aye: Jake Dewey, Paul Pinard, Manny Alves, Mark Hansen, Natalie Pittenger, Rod Tavano

Nay: None

Executive session begins at 7:06 PM

The Board returns to open session at 7:20 PM.

Old Business

7:00 PM

Appeal No. 2024-039

25 Falmouth Rd, LLC

25 Falmouth Road LLC has filed an Appeal of an Administrative Official's Decision in accordance with M.G.L. Chapter 40A Sections 7, 8, and 15 and Section 240-88 of the Barnstable Zoning Ordinance. The Appellant is appealing the Decision of the Building Commissioner in issuing Building Permit BLDC 22-227, dated September 17, 2024. The permit was initially denied pending the receipt of a narrative to explain the expansion of the mechanical bays on the property. The Appellant's position is that the permit fails to take into account evidence and documentation from the town records and files, which conflict with the determination to issue the Building Permit. The subject property is located at 95 Falmouth Road, Hyannis, MA as shown on Assessor's Map 311 as Parcel 073. It is located in the Highway Business (HB) and Residence B (RB) Zoning Districts. Continued from November 13, 2024, January 8, 2025, February 12, 2025 and April 9, 2025. No members assigned.

Attorney Mike Ford is representing the applicant. He explains that there has been no resolution between the parties so the appeals are still active. There is a threshold question about whether his client has standing to bring the appeal to the ZBA. Counsel has requested that the Board seek the advice of the town attorney's office about standing. This applies to Appeal No. 2024-040 as well.

Chair Dewey says they reached out to the town attorney's office and didn't hear back. The Chairman asks Building Commissioner Florence for his opinion. The Commissioner agrees with the suggestion to have legal review the applications for standing. Chair Dewey moves to continue Appeal No. 2024-039 and Appeal No. 2024-040 to June 25, 2025. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Paul Pinard, Manny Alves, Mark Hansen, Natalie Pittenger, Rod Tavano

Nay: None

Appeal No. 2024-039 25 Falmouth Rd, LLC is continued to June 25, 2025.

7:01 PM

Appeal No. 2024-040

25 Falmouth Rd, LLC

25 Falmouth Road LLC has filed an Appeal of an Administrative Official's Decision in accordance with M.G.L. Chapter 40A Sections 7, 8, and 15 and Section 240-88 of the Barnstable Zoning Ordinance. The Appellant is appealing the Decision of the Building Commissioner in a letter dated September 4, 2024. The Appellant believes that the determination fails to take into account evidence and documentation from the town records and files, which conflict with the determination and do not address the concerns raised as set forth in the Appellant's enforcement letters and correspondence. The subject property is located at 95 Falmouth Road and 123 Falmouth Road, Hyannis, MA as shown on Assessor's Map 311, Parcels 073 and 078. Lots are located in the Highway Business (HB) and Residence B (RB) Zoning Districts. Continued from November 13, 2024, January 8, 2025, February 12, 2025 and April 9, 2025. No members assigned.

Appeal No. 2024-040 25 Falmouth Rd, LLC is continued to June 25, 2025.

7:02 PM

Appeal No. 2025-007

Miklosky et al Appeal

Victoria Miklosky, Cynthia Foster, and Mary Curley have filed an Appeal of an Administrative Official's Decision in accordance with Chapter 240-91 Nonconforming Lot of the Barnstable Zoning Ordinance. The Appellants are appealing the Decision of the Building Commissioner in issuing Building Permit BLDC BLDR-25-14, dated February 7, 2025, issued to Michael Martin and property owned by TL Acquisitions LLC. The Appellants state the Building Permit should not have been issued as the premise is not a valid nonconforming lot under Section 240-91, the premises lack required legal frontage and access in the Private Way, and the project fails to comply with the Zoning Ordinance requirements applicable, including Special Permit. The subject property is located at 933 Main Street, Osterville, MA as shown on Assessor's Map 117 as Parcel 187. It is located in the Residence C (RC) Zoning District. Continued from April 9, 2025.

Chair Dewey says Herb Bodensiek was the Acting Chair at the April 9 meeting and assigned members but no testimony was heard so the Chairman would like to assign members present today instead. The attorneys are fine with that. Paul Pinard recuses himself. Chair Dewey assigns himself, Mark Hansen, Manny Alves, Natalie Pittenger, and Rod Tavano.

Attorney Jack McElhenney is representing the applicants. He provides background: the property contains 21,592 square feet where 40,000 square feet is required. The owner razed the 880 square foot cottage to replace it with a 4,200 square foot home, which is under construction notwithstanding the appeal. The central issue is that the lot doesn't have the required 40,000 square feet to be a buildable lot and therefore its eligibility for a permit depends on its qualification as a legal preexisting nonconforming lot.

He explains that this issue involves 2 lots: one of which was legally preexisting nonconforming and the second of which was appended to the first lot in 1999 and tripled the size of the property. It's Gallery Place Neighborhood, which consists of 10 small cottages built prior to 1970 that share a common driveway, common utilities, and a set of common restrictions. None of the lots have frontage on any public way other than the common driveway, a private way. 8 of the 10 lots are under 5,000 square feet. The parcel in question is at the end of the common way, and was created by combining Parcel B1 (8,600 square feet) with a larger 12,000 square foot lot that was not part of Gallery Place and has no legal right to use the common driveway or utilities. There is no dispute that the appended parcel was never part of the trust property. The property doesn't meet the 40,000 square foot requirement and is therefore unbuildable unless it can meet the requirements of Section 240-90 H. In order to qualify, lot D must be a preexisting nonconforming lot and must meet certain requirements regarding setbacks, FAR, and lot coverage. They believe the property fails to meet that standard for the following reasons:

1. The lot is not set back 20 feet from the front lot line as is required. He believes it is set back 16 feet according to the plans.
2. The lot is not a legal nonconforming lot. He cites the Mendes vs Barnstable case, which says that a lot which gains its buildable status by virtue of a grant of zoning relief is not considered a legal nonconforming lot.

He believes the 1999 special permit needed to be amended to authorize further construction on this property.

He asks the Board to consider whether the language of 240-90 H applies to Lot B1, which was laid out as part of the original subdivision and was 8,000 square feet with the original cottage, or does it apply to the much larger square foot lot. He feels the intent of the bylaw was to protect the then-existing lot as it was then, 8,000 square feet. He doesn't think the protection should extend to the much larger lot. He says there is a lawsuit pending in Barnstable Superior Court about this. He asks the Board to require a change to the 1999 special permit, which would allow them to analyze whether the new home is substantially more detrimental than the prior home.

Back to the Board for questions. Manny Alves asks if the new lot doesn't have access to the trust, how would it be serviced. Attorney McElhenney says it's a question for the town, but there's a lawsuit in superior court about the new construction not paying its fair share in terms of the shared common expenses. Manny Alves asks if it's their point that the combined lot did not exist prior to this ordinance being in place. Attorney McElhenney says it existed but by virtue of a special permit, so its zoning validity is dependent on a special permit, which should be amended as the proper channel forward. Mark Hansen asks if, outside of the special permit, this would be merged. Attorney McElhenney confirms. Only parcel B1 was protected. Natalie Pittenger asks about legal frontage. Attorney McElhenney says the bulk of the property has no right to use that private way legally, and that's how they lack frontage. Additionally, he thinks they don't meet the 20-foot front yard setback.

Building Commissioner Brian Florence explains his reasoning to the Board: the use of the driveway is not a zoning matter. The use of utilities is not a zoning matter. They are civil matters. The 1995 Board found that the lot was preexisting nonconforming. He says Attorney McElhenney was trying to say that the 1995 special permit was a merger, but actually the special permit was to permit the conveyance of part of the lot to 3 of the northern abutters. It wasn't combining the lots. As a result, this falls under 240-90 Nonconforming Lot Provisions, where the intent is to protect the property rights of owners of preexisting legally created nonconforming lots and to provide regulation of changes or expansion of preexisting nonconforming structures, buildings, and uses. So, for protecting a preexisting nonconforming lot, you must look at the provisions for a demolition and rebuilding. That takes you to 240-91 H, wherein you can demo/rebuild on a preexisting legal nonconforming lot with at least 10,000 sq. ft. of contiguous upland if it meets the provided criteria. The structure conforms to all current use and setback requirements of the zoning district it's located in. In terms of the setback from the property line, it's measured from the property line and not the road that goes across the easement. This conforms to that requirement. The lot coverage does not exceed 20%, the FAR does not exceed 30%, and the height is less than 30 feet from the top plate. He submits that the Building Department acted judiciously, responsibly, and reasonably in evaluating the review of that property under 240-90 H.

Manny Alves says factually he's hearing 2 different things about what the special permit did. Commissioner Florence says the special permit's purpose was to convey a piece of the parcel. The lots merged separately by virtue of ownership and the result was a legally nonconforming lot at the time.

Attorney Charles Sabbat is representing TL Acquisitions, the permit holder. He agrees with the Commissioner that the building permit was correctly issued. He echoes that the two lots were merged at least as of 1954, because there is a plan of record that both lots were owned by Mr. and Mrs. Marston as of 1954, so they were merged for decades before 1999. The provision they came in for in 1999 was to increase the degree of nonconformity. That 1999 Board confirmed that the merged lots were nonconforming and the decision included that finding. Regarding frontage, his client owns to the front property line, subject to an easement, which is not a street line. The setback is determined from the street line, which is owned by the town, so the proposal is compliant. He agrees that the concern over utilities is a civil matter and not a zoning matter.

Chair Dewey moves to open public comment. Mark Hansen seconds. Robert Savage of 69 Meadowlark Lane, an abutter, speaks in opposition and asks since the buildability is in dispute, why is it allowed to continue to be built. Chair Dewey moves to close public comment. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Mark Hansen, Manny Alves, Rodney Tavano, Natalie Pittenger

Nay: None

Attorney McElhenney rebuts: if this is a private way and not a street, where is this lot's frontage? Secondly, he made the point that the lot was created by the prior special permit—he feels that's correct. There were 4 lots involved in that special permit and this one was created by virtue of the action of the ZBA. He again cites the Mendes decision, which says that if a lot exists by virtue of the grant of zoning relief, that lot is no longer a preexisting legal nonconforming lot. He thinks once the ZBA touched that lot, it lost its exemption status. It's a fact of the approval and not what occurred for the approval. Manny Alves says he read the Mendes decision and it said that creating the lot is the issue, not just touching the lot.

The Board deliberates. Mark Hansen thinks the lot was merged in 1954 and is struggling to understand the legality of why it's not subject to the rights of the first lot. Manny Alves is not convinced that the property lost its status as a preexisting nonconforming lot as a result of the 1999 decision.

Chair Dewey moves to close the public hearing. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Mark Hansen, Manny Alves, Rodney Tavano, Natalie Pittenger

Nay: None

Manny Alves makes findings:

He finds that the properties merged by virtue of common ownership in the 1950's and this Board found at that time that the property was nonconforming. He finds that the property was not created in 1999 and that the 1999 decision only conveyed a piece of the lot outward. He is inclined to uphold the Building Commissioner's decision. The Board discusses whether the lot has adequate frontage. Anna Brigham says the Board is here only to uphold or overturn the Building Commissioner's decision.

Mark Hansen seconds the findings.

Vote:

Aye: Mark Hansen, Manny Alves, Rodney Tavano, Natalie Pittenger

Nay: None

Abstain: Jake Dewey

In Appeal No. 2025-007 Miklosky et al Appeal, the Building Commissioner's decision is upheld.

7:03 PM

Appeal No. 2025-006

Clark

James D. Clark and Christine D. Clark have appealed an Administrative Officials Decision. The Petitioners are appealing the Notice of Zoning Ordinance request for enforcement denial dated January 24, 2025 under M.G.L. Chapter 40A Section 7. The Petitioners submit that the decision of the administrative official dated January 24, 2025 was in error as the structure was erected at 968 Main Street is not a "pole supported by wires/ropes and burlap" but was constructed by 4 x 4 lumber cemented into the earth extending approximately 20 feet into the air directly on the common property line draped with burlap which encroaches at 978 Main Street. The subject property is located at 978 Main Street, Cotuit, MA as shown on Assessor's Map 034 as Parcel 032. It is located in the

Residence F (RF) Zoning District. Continued from March 26, 2025 and April 9, 2025. Members assigned: Dewey, Bodensiek, Pinard, Hansen, Tavano.

This item is heard out of order and is heard after Appeal No. 2024-040. Attorney Michael Schulz is representing the applicant and requests to continue the appeal to May 28, 2025. He's spoken to Attorney Michael Gill who is representing the abutter and is fine with the continuance. Building Commissioner Brian Florence confirms that he can attend on the 28th. Mark Hansen moves to continue this to May 28, 2025 at 7 PM. Paul Pinard seconds.

Vote:

Aye: Jake Dewey, Paul Pinard, Manny Alves, Mark Hansen, Natalie Pittenger, Rod Tavano

Nay: None

Appeal No. 2025-006 Clark is continued to May 28, 2025.

New Business

7:04 PM

Appeal No. 2025-012

Zig Harbor, LLC

Zig Harbor, LLC has applied for a Special Permit pursuant to Section 240-92 (B) Nonconforming buildings or structures used as single- and two-family residences. The Applicant proposes to renovate and restore a preexisting nonconforming single-family dwelling. The scope of work includes lifting the house and pouring a new concrete foundation to replace the existing foundation, with alterations and updates to certain windows, dormers, entrances, roof decks, and porches. A Special Permit is required due to a portion of the proposed alterations occurring within the 10-foot rear setback. The subject property is located at 100 Washington Ave, Hyannis, MA as shown on Assessor's Map 287 as Parcel 116. It is located in the Residence F-1 (RF-1) Zoning District.

Chair Dewey recuses himself and leaves the meeting. Paul Pinard becomes Acting Chair and assigns himself, Mark Hansen, Natalie Pittenger, Manny Alves, and Rod Tavano.

Attorneys John Kenney and Patrick Nickerson are representing the applicant and are joined by Kevin Dauphinais, the project architect, and Caroline Tenney, one of the principals of the LLC. They are before the Board because of the rear setback. The house was constructed in 1900, so predates zoning. The rear setback is one foot. The owner is looking to restore the property by lifting the house, pouring a new foundation, and setting the house back down. There will be alterations and updates throughout, mostly like for like. They've gotten approval from Barnstable Historic. Attorney Nickerson walks through the details of the proposed changes. The proposal will improve the setback to 3.1 feet but because they're still within the 10 foot rear setback, they need relief. They are proposing a modest height increase of 14 inches as a result of the new foundation, but it's within the allowable height under the ordinance.

Back to the Board for questions. Mark Hansen asks who owns the property near the rear setback. Attorney Nickerson says it is also owned by the LLC and is improved with a detached garage with living quarters. He doesn't believe that they have merged because the believe both lots predate zoning and are therefore entitled to developed lot protection. He discloses that his client is proposing to submit another application to the Board regarding alterations to the rear dwelling, but those haven't been finalized and are not before the Board tonight. Attorney John Kenney confirms both lots were developed prior to zoning, and developed lots don't merge.

Chair Pinard opens for public comment. Caroline Tenney, the owner, says they will be keeping it all together and have no plans to separate it.

Town Councilor Betty Ludtke lives close to the property and is in support of the project. She admires the work done for the project and its historic presence.

Chair Pinard moves to close public comment. Mark Hansen seconds.

Vote:

Aye: Paul Pinard, Mark Hansen, Natalie Pittenger, Manny Alves, Rod Tavano

Nay: None

Manny Alves makes findings:

1. The application falls within a category specifically excepted in the ordinance for a grant of a special permit. Section 240-92 B 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. A site plan has been reviewed and found approvable in accordance with Article IX herein subject only to the issuance of a special permit. *Site Plan Review is not required for single family dwellings.*
4. The proposed alteration or expansion will not be substantially more detrimental to the neighborhood than the existing building or structure. It will be an improvement.

Natalie Pittenger seconds.

Vote:

Aye: Paul Pinard, Mark Hansen, Natalie Pittenger, Manny Alves, Rod Tavano

Nay: None

Manny Alves says the appeal is subject to conditions 1-5 from the Staff Report dated April 24, 2025. Chair Pinard seconds.

Vote:

Aye: Paul Pinard, Mark Hansen, Natalie Pittenger, Manny Alves, Rod Tavano

Nay: None

Special Permit No. 2025-012 Zig Harbor, LLC is granted with conditions.

Correspondence

Chair Dewey returns to the meeting.

- Cape Cod Commission Thomas B. Lander Road Gravel Proforma Hearing Notice, April 28, 2025 at 10:30 a.m.
- Cape Cod Commission 75 Holway Proforma Hearing Notice, April 29, 2025 at 10:30 a.m.
- Cape Cod Commission Nominating Committee Meeting Agenda, May 1, 2025 at 11:30 a.m.
- Cape Cod Commission Executive Committee Meeting Agenda for Thursday, May 8, 2025 at 1:00 p.m.
- Cape Cod Commission Committee on Planning and Regulations Meeting Agenda for Thursday, May 8, 2025 at 2:00 p.m.
- Housing Assistance Corp update on affordable units
- Cape Cod Commission Regional Policy Plan Subcommittee meeting agenda for Monday, May 12, 2025 at 10:00 a.m.

Matters Not Reasonably Anticipated by the Chair

Chair Dewey asks how the meeting regarding a path to permitting for pools went. Manny Alves says Jim Kupfer, Director of Planning & Development, is working on a draft with the Building Commissioner.

Upcoming Hearings

May 28, 2025 (remote), June 11, 2025 (in person), June 25, 2025 (remote)

Adjournment

Paul Pinard moves to adjourn. Jake Dewey seconds.

Vote:

Aye: Jake Dewey, Paul Pinard, Mark Hansen, Natalie Pittenger, Manny Alves, Rod Tavano

Nay: None

Documents Used at This Meeting

- January 8, 2025 minutes
- Appeal No. 2025-007 Miklosky et al application materials
- Appeal No. 2025-012 Zig Harbor, LLC application materials
- Staff Report dated April 24, 2025 for Appeal No. 2025-012
- Correspondence: Cape Cod Commission Thomas B. Lander Road Gravel Proforma Hearing Notice, April 28, 2025 at 10:30 a.m.
- Correspondence: Cape Cod Commission 75 Holway Proforma Hearing Notice, April 29, 2025 at 10:30 a.m.
- Correspondence: Cape Cod Commission Nominating Committee Meeting Agenda, May 1, 2025 at 11:30 a.m.
- Correspondence: Cape Cod Commission Executive Committee Meeting Agenda for Thursday, May 8, 2025 at 1:00 p.m.
- Correspondence: Cape Cod Commission Committee on Planning and Regulations Meeting Agenda for Thursday, May 8, 2025 at 2:00 p.m.
- Correspondence: Housing Assistance Corp update on affordable units

- Correspondence: Cape Cod Commission Regional Policy Plan Subcommittee meeting agenda for Monday, May 12, 2025 at 10:00 a.m.

Respectfully submitted,
Genna Ziino, Administrative Assistant

Further detail may be obtained by viewing the video via the Barnstable Government Access Channel on demand at town.barnstable.ma.us

APPROVED