



ZONING BOARD OF APPEALS

2 Fairgrounds Road
Nantucket, Massachusetts 02554
www.nantucket-ma.gov

Commissioners: Susan McCarthy (Chair), Elisa Allen (Clerk), Michael J. O'Mara, John Brescher, Joe Marcklinger
Alternates: Lisa Botticelli, Mark Poor, Jim Mondani

~~ MINUTES ~~

Monday, June 3, 2024

Public Safety Facility, 4 Fairgrounds Road, Community Room
This meeting was held via remote participation using ZOOM and YouTube.

I. CALL TO ORDER

Called to order at 1:06 pm and Announcements made by Ms. McCarthy

Staff in attendance: William Saad, Land Use Specialist
Attending Members: McCarthy, Allen, Brescher, Marcklinger, O'Mara
Remote attendance: Botticelli, Mondani
Absent: -
Late Arrivals: Poor
Early Departures: -
Town Counsel: George Pucci, KP Law, P.C.

II. APPROVAL OF AGENDA

Motion: Motion to Approve the agenda, as drafted. (made by: Brescher) (seconded by: Allen)
Vote: Carried 5-0 // McCarthy, Allen, Brescher, Marcklinger O'Mara (aye)

III. PUBLIC COMMENT

Chair McCarthy called for public comment. There were no public comments.

IV. OLD BUSINESS

11-24 Cathy Ward (as Applicant) 9 West Dover St. Pickering-Cook
(ZBA FILE NO. 36-21 Under remand from Commonwealth of Massachusetts Land Court No. 22 MISC 000064 MDV)
Applicant is appealing a determination by the Building Commissioner that the use of 9 West Dover Street as a short-term rental ("STR") business is not a commercial use prohibited in the residential zone in which it is located. Applicant requests that the Zoning Board of Appeals overturn the Commissioner's determination with respect to the property and further that zoning enforcement action be taken by issuing an order to the owner to cease and desist using the property as an STR. The Locus is situated at 9 West Dover Street, is shown on Assessor's Map 55.1.4 as Parcel 189 and in Plan Book 7, Page 29. Evidence of title is recorded in Book 1581, Page 238 on file at the Nantucket County Registry of Deeds. The site is zoned Residential Old Historic (ROH).

Voting:	McCarthy, Allen, Brescher, Marcklinger, O'Mara
Alternates:	Botticelli, Mondani
Documentation:	File with associated plans, photos, correspondence and required documentation
Representing:	Nina Pickering-Cook , Anderson Krieger – Representing Catherine "Cathy" Ward Robert E. McLaughlin, Sr. , Gilman, McLaughlin & Hanrahan, LLP – Representing Peter and Linda Grape
Discussion:	George Pucci, KP Law, P.C. - Stated that as counsel to the board, he was available to review any questions or comments during the hearing process or afterward, offering advice as needed. - Reminded the board that it is crucial to interpret the provisions of the zoning bylaw as part of their process, considering relevant information, interpreting the bylaw on the

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issue of accessory use, and ultimately rendering a decision in accordance with the court's order, which will be sent back to the court.

McCarthy

- Thoroughly explained the procedure and expectations for conducting the meeting.

Pickering-Cook

- Oriented the board to their task, focusing on the narrow issue of whether the Grapes use is a legitimate accessory use under the Nantucket bylaw, as remanded by the court.
- Emphasized that, despite the broader interest, their decision should be based solely on the facts of 9 West Dover Street.
- Stressed that for a use to be a legitimate accessory use, it must satisfy both characteristics: being subordinate to a principal use and being customary and incidental to it.
- Clarified that the court found the Grapes' short-term rental use fails on both counts.
- The court found the Grapes used their house for rentals more often than for personal stays from 2017 to 2021. Tax returns show 40 to 55 days of personal use, supporting this finding.
- Argued that actual use, not potential use, must be considered.
- Counting vacant days as residential could allow properties to be primarily rentals, contrary to customary use.
- Asked if living in the house for 270 days a year and renting it out for 90 days would be considered an accessory use. Confirmed that this would be valid as long as the 270 days were actual residential use, and it was reflected on their tax return.

McLaughlin

- Emphasized that the court remanded the case because the Board never considered accessory use initially.
- Clarified that the Board is not limited by the judge's findings regarding vacant use and can consider vacancy when determining primary use.
- Restated that the Nantucket zoning bylaw defines accessory use with three key words: subordinate, customarily, and incidental to the principal use on the same lot.
- Stated that the law considers the 275 vacant days as part of the primary use of the Grapes' vacation home, which is the central issue in this case.
- Argued that the Board is not a policymaking body and should not set policies on usage or rental limits.
- Stressed that the Board's role is to decide if the Grapes' use of 90 to 111 rental days meets the criteria of being subordinate, customarily, and incidental to the principal use.
- Noted that defining a vacation home is subjective and up to the owner.
- Asserted that the primary use is as a vacation home, with rental periods being subordinate, customarily, and incidental to this primary use.

Pickering-Cook

- Highlighted that the issue of the calendar and vacant days was addressed by the judge, who made specific findings.
- Encouraged reviewing these findings, which show that the Grapes used three rental agencies with online calendars.
- Noted that the Grapes blacked out dates for personal use, leaving the rest of the year, including January, February, and March, available for rent.

McLaughlin

- Emphasized that the judge found this board has never considered accessory use.
- Clarified that while this finding relates to primary use, it does not address what constitutes accessory use.

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	Linda Oliver-Grape, Owner of 9 West Dover Street - Stated that their plan was to use both the house and guest house for several weeks each year and spend more time on the island after retirement. - Noted that when they purchased their home, they had to honor several existing leases for 2017, resulting in the highest rental utilization of 111 days, limiting their family's access to the main house until Labor Day. - Explained that their family decides on dates they plan to use the house, such as for holidays, and they then block those dates. - Noted that they have no initial control over the calendars and only block dates once they plan to use the house, ensuring it is not rented during those times.
Public Comment: (01:06:19)	Penny Dey - Highlighted that renting homes to defray ownership costs is customary on Nantucket, with most rentals averaging less than 52 days per year. - Asserted that short-term rental of private homes has been a long-standing property right on the island. Kathy Baird (Online) - Added three points: First, the vast majority of Nantucket homes are vacation homes, and their vacancy most of the year is a traditional and customary use, with only about 15% rented as short-term rentals (STRs). Second, federal census data categorizes homes as owner-occupied or vacant, validating vacancy as a primary use. Third, use is fluid and unpredictable over time for every family. Dan Bailey (Online) - Represents the Delaney Keith Trust at 15 Delaney Road, noting their pending case before Judge Vhay, which has been remanded back to the Nantucket Zoning Board for a hearing. - Expressed support for attorney McLaughlin and his client's arguments. - Noted that Nantucket, like much of the Cape and islands, is a resort community where renting houses has long been a common practice. Bob Vidoni (Online) - Asked, through Chair McCarthy, Attorney Nina Pickering-Cook if days when a house is taken off rental calendars (e.g., January, February, and March) because the owner might use it, should be considered as part of the owner's actual usage. Pickering-Cook - Explained that it is within the board's discretion to count days when a property is not available to rent as residential use. - Highlighted that the judge focused on the actual use of the property and representations made to the government. - Warned that counting vacant days as residential use could legalize full-time short-term rentals, which the town meeting has consistently opposed, as it could allow investors to rent properties for a few months and leave them vacant the rest of the year, impacting neighborhood fabric. Vidoni - Clarified that as an individual owner, it feels unfair to be penalized for making their house unavailable for rent and to be classified similarly to corporate rentals. Caroline Baltzer - Contradicted attorney Pickering-Cook's characterization of the history of short-term rentals, noting that rentals have long been a business, not just to defray expenses. - Highlighted evidence from the 1920s to the 1950s showing rentals as a traditional and profitable use.

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- Disagreed with the notion that Airbnb is the problem.
- Pointed out that the increase in short-term rentals correlates with the overall population growth from 2010 to 2020.

Abby Camp

- Shared a personal history of renting their family home for additional income for 40 years to offset rising costs.
- Noted significant changes in Nantucket's character pre-COVID, with increased sales, scarce housing, and a surge in development applications, making it an investor's paradise.
- Urged the Zoning Board to uphold existing zoning to preserve the island's character and protect long-term residents who rent traditionally to maintain their homes.

Lisa Winn

- Summarized a letter to the board, highlighting 40 years of experience as a broker on Nantucket.
- Argued that short-term rentals are crucial for the island economy, especially during the off-season, and do not significantly impact year-round rental housing stock.
- Clarified that rental calendars are often left open because they don't have the time to block off all unavailable dates, and availability is confirmed with homeowners case-by-case.

Eric Sultan

- Questioned if homeowners who rent out their properties for short-term periods pay residential tax rates year-round or if commercial rates are applied during rental periods.
- Expressed concern that if only residential rates are applied, it results in a loss of revenue for the town and higher taxes for permanent residents.
- Argued that it is unfair for non-renting residents to be financially penalized to support those who choose to short-term rent.

Pickering-Cook

- Observed that in high-end resort and vacation communities, investors increasingly target single-family homes for conversion into short-term rentals, marking a significant investment opportunity over the past 10 years.
- Noted that this represents a new use for these homes in such areas and offered to provide supporting data later.

Kit Murphy

- Asked for clarification on whether the Zoning Board of Appeals (ZBA) is considered a policymaking board.

McCarthy

- Reiterated that in past decisions regarding short-term rentals and commercial use, the ZBA has focused on following existing regulations rather than making new policy, which is seen as the role of the planning board, select board, and town meeting.

Pickering-Cook

- Agreed that the ZBA is an adjudicatory board, not a policymaking board.
- Clarified that in its role, the ZBA interprets and applies the existing zoning bylaw.

Curtis Barnes

- Mentioned that if registered with the state as a rental, owners must report their rental income monthly to the state.
- Noted that the state monitors registered rental properties through Mass Tax Connect, which could be helpful for tracking rental periods.

Patsy Ray

- Noted that in June 2021, the highest court in Massachusetts ruled that short-term rental

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use of a single-family home is inconsistent with the zoning purpose of a single-residence zoning district.

- Mentioned that towns across Massachusetts have recognized the precedent set by the Skyler vs. Lynnfield case and indicated the intention to read three excerpts from this case.

Melissa Philbrick

- Reflected on the disruptive changes since online platforms like Airbnb went global in 2011, which significantly altered the Nantucket rental market.
- Expressed concern over the lack of local oversight and the impact on neighborhood character.

Caroline Baltzer

- Discussed the impact of the seasonal population increase on Nantucket, which rises from 20,000 year-round residents to about 80,000 in the summer, necessitating zoning adjustments to accommodate this change.
- Highlighted that a statistician hired by the town reported that corporate ownership of short-term rentals on Nantucket is only 2.2%, a figure expected to decrease.

Leslie Forbes

- Provided a counterpoint to the economic impact of short-term rentals highlighted by realtors.
- Acknowledged the income the town receives from the short-term rental tax but emphasized the associated expenses.
- Highlighted the significant costs voted for affordable and attainable housing, partly due to the demand for services created by short-term rentals.

Mike Herlihy

- Responded to concerns about equity in taxation related to short-term rentals.
- Shared that in their case, the combined property tax and short-term rental tax, which partially goes to the state, more than doubles the property tax amount.

Charity Benz

- Suggested that homeowners renting their properties and properly filing taxes should easily count and report the days used personally and rented out.

Penny Dey

- Clarified that Nantucket has 12,600 dwelling units, and in the last year for which statistics are available, 1,758 collected and filed the short-term rental tax.
- Noted that houses on Nantucket will be occupied in the summer, whether by owners, their friends and family, or tenants, both long-term and short-term.
- Emphasized that the need for increased services is driven by the overall popularity of Nantucket, not just short-term rentals.

Stephen Cohen

- Highlighted that Nantucket has never enforced against short-term rentals and has brought no cases against them, indicating acceptance as a legal use.
- Clarified that Judge Vhay found short-term rentals are not an allowed use under the current zoning code but did not rule on whether they met the primary use criteria.
- Emphasized that there is no requirement in the zoning code for a homeowner to occupy a property to rent it out.
- Stated that holding out a property for rental or sale is considered a use of the property.
- Argued that vacancy should be considered a legal use and that any policy decisions regarding short-term rentals should be made by town meeting.
- Urged the board to determine that short-term rentals for less than half the year are an accessory use, consistent with Nantucket's tradition and history.

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	Patsy Ray - Questioned why homeowners cannot rent for longer periods, such as 30 days, instead of by the week or weekend, suggesting they rent for a month and use the property at other times. Linda Dolphin - Shared experience as a short-term rental owner on Nantucket for 25 years, noting varied accounting opinions on reporting days stayed in the house. - Explained that according to their research, days spent working on the property do not count as personal use days on the federal tax return.
Board Comments: (02:17:11)	McCarthy - Suggested that unless the board has specific questions for counsel or each other, it would be prudent to continue the meeting to a later date. The next meeting would continue to allow public comment. Botticelli - Asked for a synopsis of Judge Vhay's decision, as there has been much discussion and differing interpretations regarding his findings. Pucci - Offered to provide a synopsis of Judge Vhay's decision, highlighting that the factual findings made by the judge are binding. Botticelli - Acknowledged that short-term rentals have long been a part of Nantucket but noted significant changes with the advent of online platforms. - Emphasized the need to understand the terms "accessory use" and "primary use." - Requested a legal synopsis and interpretation of Judge Vhay's decision to help laypeople better understand it.
Motion:	Moved to continue the public hearing to June 24, 2024. (made by: Brescher) (seconded by: Marcklinger)
Vote:	Carried 5-0 / / McCarthy, Allen, Brescher, Marcklinger, O'Mara (aye)

V. OTHER

- ZBA regular meeting, Thursday, June 13, 2024, at 1 PM in person and via Zoom

VI. ADJOURNMENT

Motion:	Motion to adjourn. (made by: Allen) (seconded by: Brescher)
Vote:	Carried 5-0 / / McCarthy, Allen, Brescher, Marcklinger, O'Mara (aye)

Submitted by: Elaina Cano