

Zoning Board of Appeals MINUTES Wednesday, April 12, 2023 at 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, April 12, 2023, at the time indicated:

Call to Order

Chair Jacob Dewey calls the meeting to order with an introduction of Board Members.

Member	Present	Absent
Dewey, Jacob	X	
Bodensiek, Herbert	X	
Pinard, Paul	X	
Hansen, Mark	X	
Johnson, Denise	X	
Webb, Aaron	X	

Also in attendance is Anna Brigham, Principal Planner; Charlie McLaughlin, Assistant Town Attorney; Jim Kupfer, Senior Planner; and Genna Ziino, Administrative Assistant.

Notice of Recording

Please note that this meeting is recorded and broadcast on Channel 18 and in accordance with MGL Chapter 30A §20. I must inquire whether anyone is taping this meeting and to please make their presence known.

Minutes

March 8, 2023 – Mark Hansen makes a motion to approve. Paul Pinard seconds.

Vote:

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

Nay:

Old Business

7:00 PM

Appeal No. 2022-021

Vuilleumier

Louis Vuilleumier has filed an appeal of an Administrative Official’s Decision in accordance with Section 240-88 Appeals. The Building Commissioner issued a Notice of Zoning Violation and Order to Cease & Desist on March 3, 2022 which stated that the total number of dwelling units are four: three units in the main dwelling and one in the detached barn/workshop are a zoning violation under Chapter 240-11 A. (1) in the RF-2 Residence F-2 Zoning District. The subject property is located at 4380 Main Street, Barnstable, MA as shown on Assessors Map 351 as Parcel 042. It is located in the Residence F-2 (RF-2) Zoning District. Continued from December 7, 2022 and February 8, 2023. Members assigned were Dewey, Bodensiek, Hansen, Pinard, Webb.

Attorney Sabbat requested to withdraw without prejudice. Paul Pinard moves to withdraw Appeal No. 2022-021 without prejudice. Mark Hansen seconds.

Vote:

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

Nay:

Appeal No. 2022-021 Vuilleumier is withdrawn without prejudice.

7:01 PM

Appeal No. 2022-057

Wentworth

Peri S. Wentworth has applied for a Special Permit in accordance with Section 240-47.2 C. (4) Accessory Dwelling Unit. The Applicant seeks to construct a detached two bedroom Accessory Dwelling Unit which exceeds the allowable “as of right” square footage. The proposed Accessory Dwelling Unit is 1,876 square feet and the “as of right” size is 900 square feet, thereby exceeding the allowable size by 976 square feet. The subject property is located at 16 Walley Court, Hyannis, MA as shown on Assessors Map 324 as Parcel 020. The property is located in the Residence B (RB) Zoning District. Continued from January 25, 2023 and March 8, 2023. Members assigned were Dewey, Webb, Pinard, Johnson, Bodensiek.

Attorney Lawler requested to withdraw without prejudice. Mark Hansen moves to withdraw Appeal No. 2022-057 without prejudice. Denise Johnson seconds.

Vote:

Aye: Jake Dewey, Denise Johnson, Aaron Webb, Herb Bodensiek, Paul Pinard

Nay:

Special Permit No. 2022-057 Wentworth is withdrawn without prejudice.

7:02 PM

Appeal No. 2023-005

TJA Clean Energy

TJA Clean Energy, as lessee, has applied for a Modification Permit pursuant to Section 240-8 A. 3 (b) Modification from Section 240-44.2 E. 3. Dimensional Requirements and Section 240-44.2 F. 2. Special Permit Provisions. The Applicant proposes to construct a large-scale ground-mounted Solar Photovoltaic Installation pursuant to Section 240-44.2 E (3) of the Zoning Ordinance. The proposed setback for the solar array is 16 feet from undeveloped land on the westerly side of the property, where 100 feet is required. The subject property is located at 810 Wakeby Road, Marstons Mills, MA as shown on Assessor's Map 013 as Parcels 004, 005, and 052. It is located in the Residence F (RF) Zoning District. Continued from March 8, 2023. Members assigned were Dewey, Bodensiek, Hansen, Pinard, Webb.

Attorney Mike Ford is representing the applicant. He is joined by Brendan Reali of Atlantic Design Engineers, who is the environmental planner that assisted with the plan. Mr. Reali walks the Board through his presentation¹. He explains that the fire department requested they widen the access road to 20 ft. He also explains how a negative decision would affect the project: the layout has already been reduced significantly (by 26%) and a denial would reduce it by another 3,000 panels (33%). Regarding the environmental concerns from the last meeting, he says a Comprehensive Site Assessment was approved by MassDEP in 2019 that included substantial cleanup activities. Detailed onsite soil testing and down gradient groundwater testing was done and indicated that concentrations of contaminants of concern were below MassDEP standards. He reiterates the site will not have battery storage and the modules will not contain PFAS. The transformer fluid will be biodegradable and is primarily food grade vegetable oil. MassDEP findings also indicated little or no risk to the environment during normal use. Researchers have concluded that potential for emissions derived from PV components during typical fires is limited to the relatively short duration of most fires and a high melting point of over 1,000 degrees Celsius. The information on fires was derived from reports on data collected on residential, commercial, and sub-station level installations, which are the three primary sizes of solar arrays. MassDEP has not identified water samples containing PFAS coming off or present on solar panels. Attorney Ford adds that the deeds for the abutting town property show that the town holds the land for open space and watershed protection purposes and it will never be developed. It is also subject to a conservation restriction held by the Barnstable Land Trust and the COMM water and fire district. He points out that the Site Plan Review decision has been updated in two respects: they've resolved any issues with the fire department about the access road, and DPW's concern regarding hazardous materials and the berm were resolved after reviewing the stormwater plan.

Chair Dewey brings it back to the Board for questions. Paul Pinard asks for clarification: there is no contamination existing now per MassDEP, and studies show no measurable contamination from solar panels to pollute the site? Mr. Reali confirms. Chair Dewey asks what would be used to put fires out. Mr. Reali does not know. Attorney Ford adds that fire was mainly an issue with their early plan that contained battery storage and inverters. He addresses that some public comments have suggested the current plan is not accurate, and explains that this project has gone through rounds of revision and redesign, and the comments are referencing outdated plans. What he submitted to the Board is accurate. Chair Dewey asks about whether COMM has reviewed this. Attorney Ford says they participated in Site Plan Review and had no comments.

Attorney McLaughlin reads into the record an opinion letter². He adds that the Board needs solid findings whichever way they vote. Mark Hansen says "welfare" is ambiguous and asks for the definition in this context. Attorney McLaughlin says it's a part of "public health, safety, and welfare"—perceived to be a catch-all intended to protect the best interests of the town and its populous. Chair Dewey asks what percentage of land in town is zoned for solar. Attorney McLaughlin says it's an open item for litigation and there's suggestion in the pleadings filed by TJA in Land Court that it's around 2%. GIS's evaluation was closer to 6-8%. In terms of supporting large ground-mounted solar arrays, a significant portion of available land that meets the criteria is utilized. Chair Dewey asks if the Tracer Lane project couldn't have been built without the road or could it have been made smaller. Attorney McLaughlin believes it

¹ Brendan Reali's presentation:

<https://itlaserfiche.town.barnstable.ma.us/WebLink/DocView.aspx?id=918466&dbid=0&repo=TownOfBarnstable>

² Attorney McLaughlin's opinion letter:

<https://itlaserfiche.town.barnstable.ma.us/WebLink/DocView.aspx?id=918510&dbid=0&repo=TownOfBarnstable>

was the only viable access way so reducing the size wasn't an option. They discuss the Dover Amendment. Chair Dewey asks how the bulk regulations for solar were created and if they are standard. Jim Kupfer, Senior Planner, says the amendment to the ordinance took 7 months of research and development. They used the Cape Cod Commission's guidelines and best practices throughout the country and internationally. There were further amendments on the Town Council floor from 100 ft. to 150 ft. Herb Bodensiek asks if the lawsuit that resulted in this zoning district was foreseeing that this permit would come before the Board. Attorney McLaughlin says that the planning process was done without reference to TJA but was site specific to include this site in the overlay district. They discuss hazardous materials and protections in place for water sources.

Attorney Ford rebuts. He reads the dimensional requirements for the new overlay district: they are "to contain noise." Noise is not an issue with solar. There is no reason for a setback on the westerly side because it's not developable land, so they instead increased the setback on the residential side. He suggests there is nothing in this record that this will create a public safety hazard or be detrimental to public welfare in terms of noise (240-44.2E3 – Dimensional Requirements). He walks the Board through his reasoning for how this passes the three-prong test:

1. If they don't get the modification permit, there would be substantial diminishment of the solar array by 3,000 panels.
2. If they grant the relief, there is nothing in the record to show that there would be a detriment to public health, safety, or welfare. The increased setback requirement in the ordinance was for noise—the parcel they're getting closer to will never be developed.
3. Granting a reduced setback would not affect adjacent roadways. There is no traffic or wastewater. It will not create a nuisance to other surrounding properties because they're asking for a modification for the side that's away from abutters.

Chair Dewey opens for public comment. Steve Hukalowicz of 26 Dove Lane speaks in opposition with concern of fires and hazardous materials. The Board discusses whether the topic of fire is public safety and within their purview.

Mary Burkenshaw of 133 Mockingbird Lane speaks in opposition with concern of fire, especially as it relates to the property owner's history of ignoring rules and court orders.

Christine McDonough of 111 Mockingbird Lane speaks in opposition with concern of the property's history of illegal uses.

Catherine McDonough of 111 Mockingbird Lane speaks in opposition with concern of jeopardizing the neighborhood and the water.

Ryan Malicia of 23 Dove Lane speaks in opposition with concern of water contamination, fires, and general welfare.

Cody Jones of 111 Mockingbird Lane speaks in opposition with concern of the environmentally sensitive area.

Chair Dewey reads the public comment letters received into the record: Stephanie York, Anne Salas, Lily Rapoza, Suzanne Powers, Richard Mell, Debbie Lavoie, Fred Hegg, Teresa Leonard-Gilham, Rebecca Coverdale, Jeanne Cannon, Debra Caney, and Kathleen Akulonis wrote letters in opposition³.

Anne Salas of 145 Mockingbird Lane speaks in opposition with concern of an inaccurate decommissioning list, noise levels exceeding the EPA level of danger, setbacks being disturbed, fire, water quality, and hazardous materials. She submits two additional documents to the Board⁴.

Attorney Ford responds about the decommissioning list. It was an early conceptual plan that is outdated and was incorrect. The stamped version says 2 converters. There are 2 transformers and 6 inverters, located on 2 concrete equipment pads, which is reflected in the one line from the licensed electrical engineer. All inverters and transformers are not within the setback. Chair Dewey asks if they will produce the noise as Ms. Salas said. Mr. Reali says yes, but 100 feet is what's required to disperse the sound. They will be under the MassDEP requirements for decibel and can't be moved because they need to be by the access road. Attorney Ford says they're not seeking relief here for either of those factors. Ann Salas says the Supreme Judicial Court ruled that access roads should not be included in setbacks, which are meant to be undisturbed in perpetuity. Chair Dewey makes a motion to close public comment. Herb Bodensiek seconds.

Vote:

³ Public comment: <https://itlaserfiche.town.barnstable.ma.us/WebLink/Browse.aspx?id=880148&dbid=0&repo=TownOfBarnstable>

⁴ Anne Salas' documents: <https://itlaserfiche.town.barnstable.ma.us/WebLink/DocView.aspx?id=919915&dbid=0&repo=TownOfBarnstable>

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

Nay:

The Board deliberates. They discuss groundwater flow. Brendan Reali is not sure what the flow is, but all surface water will be captured onsite within 3 filtration basins. The Board members discuss that they are trying to take public health, safety, and welfare into account but a decision has to be made based only on the setback relief requested. They discuss the absence of COMM fire and water departments. Herb Bodensiek has visited the site and thinks the history of the site and its owner should be taken into account. That being said, he thinks 150 feet of buffer will be an improvement and is as benign a use as the property can be. The Board discusses whether a request to clean up the site as a condition is in their purview.

Aaron Webb finds that using the property for an industrial project is not benign. He thinks the Dover Amendment protects the Board in making a decision based on public health, safety, and welfare. He thinks the proposed modifications will be disruptive of public health, safety, and welfare and there is enough grounds to stand on to deny this. Herb Bodensiek agrees. Paul Pinard says he has a similar feeling but the Board needs to identify specifics and he is struggling to. Aaron Webb says in no presentation has the attorney guaranteed public safety, health, and welfare will be protected regarding fire or the oil in the coolant. Attorney Ford was wrong about the number of inverters and transformers and Mr. Webb does not have faith that what they're being told is 100% accurate.

The Board discusses whether they need to hear specifics from the COMM fire and water departments before voting and ultimately decide they do not. They discuss the setback and whether the only issue they're allowed to consider is noise. Chair Dewey says nothing that makes noise is within this modification request. Aaron Webb asks Senior Planner Jim Kupfer to clarify if noise is the only factor called out in the ordinance. Jim Kupfer says noise is specifically called out in the section regarding setbacks but the ordinance is not meant to be spliced into sections. As a whole, the ordinance calls out a number of site standards: noise, no disturbances in perpetuity, screening, requirements from FAA or CCC, hazardous materials and products onsite, an operation and maintenance plan, a commissioning plan, a fire safety compliance plan, an erosion and sediment control and stormwater management plan, and a decommissioning plan. Paul Pinard asks if those requirements have to be satisfied before Planning Board. Jim Kupfer answers yes. Attorney McLaughlin cautions the Board to deal with the narrow issue before them of the setback as it relates to noise, otherwise it will be hard to defend a decision. Chair Dewey asks if they still need to find that it wouldn't affect public health, safety, and welfare. Attorney McLaughlin says it's a question of thresholds.

Paul Pinard makes findings:

TJA Clean Energy, as lessee, has applied for a Modification Permit pursuant to Section 240-8 A. 3 (b) Modification from Section 240-44.2 E. 3. Dimensional Requirements and Section 240-44.2 F. 2. Special Permit Provisions. The Applicant proposes to construct a large-scale ground-mounted Solar Photovoltaic Installation pursuant to Section 240-44.2 E (3) of the Zoning Ordinance. The proposed setback for the solar array is 16 feet from undeveloped land on the westerly side of the property, where 100 feet is required. The subject property is located at 810 Wakeby Road, Marstons Mills, MA as shown on Assessor's Map 013 as Parcels 004, 005, and 052. It is located in the Residence F (RF) Zoning District.

1. The application falls within a category specifically excepted in the ordinance for a grant of a modification permit. Section 240-8 A. (3) allows for alterations for Exempt Uses.
2. Site Plan Review Committee found the project approvable subject to zoning relief in a letter dated March 6, 2023.
3. That the proposed use shall cover over 10 acres of land for large ground mounted solar as well as associated improvements, and together with the required bulk regulations, this project utilizes nearly 100 percent of the Site.
4. 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.

He adds that specifically with the setback, there would be a substantial diminishment if this is not approved and it would harm the economics of the project. He believes decreasing the setback does not negatively impact the public health, safety, and welfare and may actually improve the fire aspect if the land is cleared. There is no undue nuisance to adjacent roadways. Chair Dewey adds that it would substantially diminish and detract from the project's usefulness to reduce the project by 33% to respect the required setbacks. They are determining that by allowing construction in the setback they are not creating a public safety hazard or nuisance, specific to the setback area. Mark Hansen seconds. The Board votes to accept the findings as presented.

Vote:

Aye: Jake Dewey, Mark Hansen, Paul Pinard

Nay: Aaron Webb, Herb Bodensiek

Aaron Webb asks how they can justify Finding No. 4. There is no guarantee that the public good or the neighborhood would not be negatively affected by minimizing the setback. He believes you can't splice the ordinance to limit it to noise. Paul Pinard and Chair Dewey disagree with that thought. The Board votes on approving the findings.

Vote:

Aye: Jake Dewey, Mark Hansen, Paul Pinard

Nay: Aaron Webb, Herb Bodensiek

Paul Pinard moves to approve the requested relief with conditions. Jim Kupfer says they will need to amend Condition No 1. to the updated setback. The Chairman calls a 5-minute recess so the Board, Attorney Ford, and Attorney McLaughlin can discuss offline whether the legal notice was sufficient. When the meeting resumes, Attorney McLaughlin says they've examined the legal notice missing the slightly modified access road and all feel comfortable moving forward.

1. Modification Permit No. 2023-005, a request for a Modification Permit pursuant to Section 240-8 A. 3 (b) Modification from Section 240-44.2 E. 3. Dimensional Requirements and Section 240-44.2 F. 2. Special Permit Provisions. The Applicant proposes to construct a large-scale ground-mounted Solar Photovoltaic Installation pursuant to Section 240-44.2 E (3) of the Zoning Ordinance. The proposed setback for the solar array is 16 feet from undeveloped land on the westerly side of the property, where 100 feet is required at 810 Wakeby Road, Marstons Mills, and the setback on the easterly side will include an expansion of the 12 ft access road to a 20 ft, which resides within the setback.
2. The site development shall be constructed in substantial conformance with the plan entitled "Site Development Plans for 810 Wakeby Solar Project" by Atlantic Design Engineers, Inc. sheets 1-6 dated February 1, 2023 and will include the 20 ft access road on the easterly setback and the plans that the Planning Board is approving.
3. The above-described development shall represent full build-out of the lots. No further additions or accessory structures shall be permitted without approval from the Board.
4. Given the size and coverage of the proposed use on the site, all other uses currently enjoyed on the site shall be abandoned and the site restored to natural conditions.
5. The decision shall be recorded at the Barnstable County Registry of Deeds and copies of the recorded decision shall be submitted to the Zoning Board of Appeals Office and the Building Division prior to issuing a building permit. The rights authorized by this Modification Permit must be exercised within two years, unless extended.

Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Mark Hansen, Paul Pinard

Nay: Aaron Webb, Herb Bodensiek

Modification Permit 2023-005 TJA Clean Energy is granted with conditions.

7:03 PM

Appeal No. 2023-006

Andersen

Denise M. Andersen, Trustee of the Andersen 77 Parker Road Nominee Trust, has petitioned for two Variances from Section 240-13 E. Residence C (RC) District, Bulk Regulations, and 240-36 Resource Protection Overlay District (RPOD). The Petitioner seeks two variances to unmerge Lot 1 (40,075 sq. ft.) from Lot 2, a developed lot containing 43,915 sq. ft., pursuant to the plan prepared by Sullivan Engineering and Consulting, Inc. The subject property is located at 77 Parker Rd, Osterville, MA as shown on Assessor's Map 117 as Parcel 135. It is located in the Residence C (RC) Zoning District. Continued from March 22, 2023.

Attorney Schulz has requested to continue this appeal. Chair Dewey makes a motion to continue this to April 26, 2023 at 7:01 PM. Mark Hansen seconds.

Vote:

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

Nay:

Appeal No. 2023-006 Andersen is continued to April 26, 2023 at 7:01 PM.

New Business

7:04 PM

Appeal No. 2023-008

Carangelo

Robert Carangelo has applied for a Variance in accordance with Section 240-14E RC-1 Residential District Bulk Regulations Minimum Lot Area, Minimum Front and Side Yard Setbacks. The Petitioner sold 4 Skipjack Lane to the current owners on November 20, 2022 and is responsible for obtaining post-closing zoning relief under the terms of a duly authorized escrow agreement. The parcel is within the Cobblestone Landing Subdivision and was granted a Special Permit with certain waivers in 1986 of the town's subdivision rules and regulations as shown on Book 5380 Page 252 of the Barnstable County Registry of Deeds. In 2012, the owners of 4 Skipjack Lane and 10 Skipjack Lane created new 617 sq. ft. parcels and exchanged them in order to resolve a driveway encroachment. Although the new lots remain in compliance with the 1986 Special Permit and waivers, they may not be in compliance with current

zoning. Petitioner requests a Variance or in the alternative a determination that no zoning relief is needed. The subject property is located at 4 Skipjack Lane, Hyannis, MA as shown on Assessor's Map 273 as Parcel 085 004. It is located in the Residence C-1 (RC-1) Zoning District.

Sitting on this will be Chair Dewey, Aaron Webb, Mark Hansen, Herb Bodensiek, and Paul Pinard.

Attorney John Kenney is representing the applicant. He explains that his client and a neighbor conveyed 617 sq. ft. pieces of property to each other to resolve driveway/shed encroachment. Attorney Kenney identified that this was an open space subdivision, which would mean it did not require a variance. He explains open space subdivisions and says zoning for this site was set forth in the special permit approved in the open space subdivision. Section 240-17R of the zoning ordinance says, "an application for endorsement of Approval Not Required plans to adjust lot lines between abutting owners not involving open space lot lines or right of way lot lines shall not be considered a modification of the subdivision or require notice to abutters provided that such plan and building locations comply with the requirements herein," which they do. He explains that he spoke to Commissioner Florence who was comfortable with whatever the Board decided. Attorney Kenney asks the Board to consider that there is no relief required.

Chair Dewey agrees that no relief is required. Jim Kupfer agrees and suggests the Board vote to find that they concur for the record. Chair Dewey makes a motion that the Board confirm that 240-17R complies here and no relief is required. Herb Bodensiek seconds.

Vote:

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

Nay:

Variance No. 2023-008 Carangelo is found as no relief required.

Correspondence

- Cape Cod Commission Public Hearing for Bourne Solar Project on Thursday, April 13, 2023 at 1:00 p.m. at the Cape Cod Commission office, 3225 Main Street in Barnstable.
- Cape Cod Commission Public Hearing for N.E. Wind 1 Connection (Vineyard Wind) on Monday April 24, 2023 at 4:00 p.m. will be held virtually.
- Cape Cod Commission Public Hearing Notice for MV Reliability Project (NSTAR) in the Town of Falmouth on Thursday, April 27, 1:00 p.m. will be held virtually.

Matters Not Reasonably Anticipated by the Chair

The Board continues their discussion about the continuations and withdrawals policy to the next meeting.

Upcoming Hearings

April 26, 2023, May 10, 2023, May 24, 2023

Adjourn

Chair Dewey makes a motion to adjourn. Paul Pinard seconds.

Vote:

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

Nay:

Documents Used at This Meeting

- March 8, 2023 minutes
- Attorney Sabbat's request to withdraw without prejudice appeal no. 2022-021
- Attorney Lawler's request to withdraw without prejudice appeal no. 2022-057
- 2023-005 TJA Clean Energy application package
- Brendan Reali's (Environmental Planner, Atlantic Design Engineers) presentation
- Assistant Town Attorney Charles McLaughlin's opinion letter
- Public comment letters
- Anne Salas' documents for public comment in opposition

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>