

Zoning Board of Appeals Decisions Decisions for: 04-14-2016

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

APPEAL NO: 108-15

APPELLANT(S): JAMES E. GARDNER & KERRY GARDNER of Manlius, NY

SUBJECT PROPERTY: 3 Little Harbor Road, Woods Hole, Massachusetts
Assessor's Map: Map 51A, Section 01, Parcel 021, Lot 000

PROPERTY OWNER: The Climate Foundation

DEED/CERTIFICATE: Book 27457 / Page 142

SUMMARY: Appeal Granted – Assistant Zoning Enforcement Determination Overturned

PROCEDURAL HISTORY

1. Under a date of November 10, 2015, the appellant filed an Appeal with the Town Clerk regarding a determination by the Assistant Zoning Enforcement Officer that no violations exist on subject property known as 3 Little Harbor Road, Woods Hole, Massachusetts.
2. Notice was duly given as required by Section 11 of Chapter 40A, M.G.L., as well as notices sent to all persons deemed to be affected thereby as they appear on the tax list, and at which hearing, at the Board's discretion, relevant and appropriate testimony was heard.
3. A duly advertised public hearing was opened on December 10, 2015.
4. The public hearing was terminated on April 14, 2016, wherein the Board consisting of Chairman Kimberly Bielan, Vice Chairman Kenneth Foreman, Clerk Terrence Hurrie, Member Ed Van Keuren and Member Paul Murphy made a decision to Grant the Appeal, overturning the Assistant Zoning Enforcement Agent's determination that no violation exists on subject property. Minutes from the hearing(s) are on file in the Board of Appeals.
5. Waivers to extend the 100 day hearing process were signed by the Appellant's attorney and filed with the Town Clerk. See file for said waivers.
6. The appellant was represented at the hearing by Attorney Christopher Lebherz who reviewed and discussed the Appeal with the Board.
7. The Board received documents and information prior to and during the public hearing that are on file in the office of the Board of Appeals at Town Hall, as set forth below:

Letters/E-mails from Abutters/Interested Parties

2/22/2016 Letter of support for Climate House submitted to the file by William Roslansky of Woods Hole.

3/2/2016 Letter from Attorney Brian Wall of Troy Wall Associates on behalf of Climate Foundation dated March 2, 2016 with attachments:

- Exhibit 1 – State of Oregon Secretary of state – copy of Articles for Climate Foundation as a 501 (c) (3) non-profit Organization;

- Exhibit 2 – Copy of IRS letter authorizing 501 (c) (3) organization dated January 22, 2009;
- Exhibit 3 – copy of article from Cape Cod Times 10/29/2015;
- Exhibit 4 – copy of Quitclaim Deed from Woods Hole Oceanographic Institution to Climate Foundation for subject property;
- Exhibit 5 – 11 pages of inquiries and/or remarks and acceptance or declines regarding stays at Climate House;
- Exhibit 6 – Copy of Quit Claim Deed regarding Gardner property (abutter);
- Exhibit 7 – Copy of Letter from Asst Zoning Enforcement Agent to Mr. Gardner dated October 14, 2015 regarding complaint of Climate House;
- Exhibit 8 – Copy of United States map with markers on certain states; and
- Exhibit 9 – Copy of map with markers on European countries and others

3/3/2016 Attorney Wall submitted several letters/e-mails to the file (some not signed or dated, no origination of e-mail address) as follows:

Letter of Support submitted to file by Andreas Schoenborn dated July 11, 2015

Letter from Brian von Herzen of Climate Foundation to Princeton University regarding program at Climate House dated February 12, 2016

Letter from Michael Beckerle dated December 1, 2015 regarding Climate House

E-mail from Greg Wagner dated July 22, 2015 (no destination of e-mail) regarding Climate House

Letter from Jennifer Lippincott-Schwartz dated July 21, 2015 regarding Climate House

Copy of letter from Jeri Schaefer of Princeton Internships to Brian von Herzen regarding acceptance to Climate Foundation dated Feb. 10, 2016

Letter of support to the Falmouth Zoning Board from Jeffrey Weiss dated July 21, 2015 regarding Climate House

Letter of July 21, 2015 from Alan Barr with California Institute of Technology to Brian von Herzen regarding stay and conversations at Climate House

E-mail letter (not dated, no e-mail origination) to the Board from E Kent Swift, III of Woods Hole regarding support of the Climate House

E-mail letter (not dated, no e-mail origination) to the Zoning Board from Schanbacher regarding support of Climate House

E-mail letter to Town of Falmouth (not dated, no e-mail origination) in support of Climate House from Wendy Scholes

E-mail letter (not dated, no e-mail origination) from Sofia Bacon in support of Climate House

3/4/2016 E-mail from Pam Stark of 9 Little Harbor Rd. stating she has had no impact on parking from Climate House

3/28/2016 Letter from Woods Hole Business Association, signed by Beth Colt, VP and Donald Estes, Treasurer - dated March 19, 2016 in support of Climate House (no verification of Association vote)

4/6/2016 E-mail letter from Melissa Allison dated April 6, 2016 in support of Climate House

4/11/2016 Letter dated April 7, 2016 from Attorney Brian Wall on behalf of Climate House/Brian von Herzen in response to comments by Appellant's representative

4/11/2016 Letter from Rebecca Truman dated April 8, 2016, forwarded to ZBA by Brian von Herzen, with explanation of Climate House use

4/13/2016 E-mail letter from Jessica Edgar dated April 10, 2016 regarding fellowship with Climate

Foundation – asking ZBA to uphold ‘educational ruling’

4/14/2016 E-mail letter from Brian von Herzen regarding research and education use of Climate House and comments made by appellant’s representative

Letters/E-mails/Information from Applicant/Representative(s)

11/10/2015 Appellant’s representative Attorney Lebherz filed an appeal with the Town Clerk and submitted filing to the Board of Appeals with the following attachments:

- Copy of Form 990 filed by the Climate Foundation;
- Copy of IRS Manual for Starting a Non-Profit Organization;
- Copy of Whitinsville Retirement Society, Inc. vs Town of Northbridge;
- Copy of Regis College vs Town of Weston & Others;
- Copy of e-mail from Andrew Mattox to Assistant Zoning Enforcement Agent Fitzpatrick;
- Copy of advertisements (9 pages) for Climate House offering several accommodations – from March and May of 2015;
- Copy of letter to Brian Von Herzen of Climate House from Asst. Zoning Enforcement Agent date April 9, 2015;
- Copy of response from Brian von Herzen (not dated) to Falmouth Inspection Department in response to April 9, 2015 letter;
- 8 pages of copies of e-mails during April, May and June;
- Copy of ‘Confidential Complaint Form’ by Andrew Mattox dated April of 2014;
- Response from Brian von Herzen regarding Complaint by Mr. Mattox;
- Copy of Property Record Card from Assessment Department;
- Copies of Special Permit #1990 and 2065 for subject property;
- Copy of ‘Confidential Compliant Form’ from Mr. Gardner; and
- Letter of October 14, 2015 from Assistant Zoning Enforcement Officer Fitzpatrick to Mr. James Gardner regarding complaint.

4/8/2016 Letter to Zoning Administrator dated April 8, 2015 from Attorney Christopher Lebherz on behalf of appellant regarding use of subject property with attachment “Why Massachusetts General Law Chapter 40A, Section 3 the “Dover Amendment” Needs Amending”.

Letters/Referrals/E-mails from Town Departments

12/9/2015 Referral submitted to the file Board of Health Agent Carignan that states: This property is served by Town sewer.

Plans submitted by Applicant/Applicant’s Representative

None

Hearing:

Attorney Lebherz reviewed the subject property noting that there is an existing special permit granting the structure on subject property the use as four (4) apartments. He stated that the property is being used by Climate Foundation as a ‘lodging house’ known as “Climate House”, which is not a by-right use in the Town of Falmouth. The Assistant Zoning Enforcement Agent determined that the property is exempt under the Dover Amendment. Attorney Lebherz asked the Board to review the information he submitted that shows the on-line advertisements for the renting of rooms on a transient basis within the structure on subject property. He noted that the Climate Foundation feels the property is being utilized as an education use and is exempt under Section 240-2.1 of the Code of Falmouth as they (The Climate Foundation) claim that they screen individuals to ensure some kind of scientific purpose for those who want to rent at Climate House. Attorney Lebherz suggested that there is no proof of an institution of higher learning as stated by the property manager who said the Climate House serves people visiting or working at the nearby scientific institutions. Attorney Lebherz cited the Regis College v. the Town of Weston case as well as the Whitinsville case. He noted that the Regis case is very clear in that it states a ‘primary and dominant’ use under the Dover Amendment has to be shown. He feels that there is no significant use of the property to be that of ‘educational’ or ‘scientific’ – he stated that its use is a ‘lodging house’.

Attorney Wall spoke on behalf of The Climate Foundation and Brian von Herzen. He suggested that the appellant has no standing. He reviewed information that he (Attorney Wall) submitted the previous day. He reviewed the definition of a 'school' and how in 2008 Dr. von Herzen founded the Climate Foundation which is a 'thank-tank' for climate concerns. In 2013 The Climate Foundation purchased the subject property from WHOI (Woods Hole Oceanographic Institute). He explained that the Air BnB advertising was used for its bookkeeping capabilities and that all people were screened before they were approved for staying at the Climate House. Individuals staying at the Climate House have internships, do post-doctoral work, thesis papers, etc. during the summer months at different institutions in the general area. Attorney Wall suggested that Mr. Mattox, who filed first complaint, owns a hotel in the area and has complained many times about the use of this property – he does not have standing. Attorney Wall suggested that Mr. Mattox contacted the Gardner's who may have standing to appeal the Assistant Zoning Enforcement Agents determination and therefore he suggests that the Gardner's do not have standing. Attorney Wall stated that he believes the Climate House is protected under the Dover Amendment.

Board members asked questions of both Attorney Leberz and Attorney Wall relative to their testimony and subject property.

Chairman Bielan asked for any public comment in support or opposition of the proposed project.

Andrew Mattox of Woods Hole Road in Woods Hole spoke in support of the Appeal and feels the property is being used as a lodging house and that he submitted documentation showing said use; he then stated that the Climate House does not always screen for scientific use as was stated by Attorney Wall. He further stated that the Gardner's are not present and that he can speak on their behalf.

Zoning Administrator Budrow asked if he had written approval by the Gardner's that he could speak on their behalf. Mr. Mattox said he had nothing official.

Rebecca Truman of 3 Little Harbor Road (on behalf of The Climate Foundation) stated that the previous manager for Climate House is no longer employed by Climate House due to management concerns with rentals.

Paula Beckerle of 44 Two Ponds Road stated that she parks in the driveway for Climate House and it fits seven cars. She said she has been acquainted with several people who have stayed at the Climate House.

Mike Beckerle of 44 Two Ponds Road stated that the Air BnB advertising is no longer used.

Bob Mullenhauer, Director for The Climate Foundation, stated that the educational use of the property is sincere and he further noted that many individuals who stay at Climate House do not have vehicles on site.

Attorney Leberz suggested that there is no curriculum at the Climate House; they do not offer classes; and that the use does not meet the meaning of 'educational purpose' – it is a lodging house. Attorney Leberz stated that the Gardner's do have standing by virtue of being an immediate abutter.

The Board discussed and would like more time to review information recently submitted to the file by both parties.

Member Murphy made a motion to continue the hearing to April 14, 2016 at 6:30 PM. Member Van Keuren seconded. Motion carried 5 – 0.

Hearing – April 14, 2016 – 6:30 PM.

Members sitting: Chairman Kimberly Bielan, Vice Chairman Kenneth Foreman, Clerk Terrence J. Hurrie, Members Ed Van Keuren and Paul Murphy.

Board discussed merits of the appeal. Member Murphy felt that the entitlement by The Climate Foundation under M.G.L. c. 40A, § 3 is very thin.

Chairman Bielan stated she reviewed the Regis case and noted it has a two-step inquiry in that the use of a property has to show 'dominant' and/or 'primary' use; if they (The Climate Foundation) are making

educational use (recent submission to the file on April 6th suggests The Climate Foundation is planning to provide full-time primary education to seven school children using cooperative homeschooling techniques) – the lodging, it appears, is still dominant and/or primary. Evidence is that there is no educational use of subject property.

Members noted that 'education' is listed as a secondary use in their (The Climate Foundation) bylaws; testimony by The Climate Foundation was that talks are being conducted on site by individuals but are not structured; do not see education as primary use – or even evident education use at the site at time of the Appeal.

Members discussed individuals staying at Climate House utilizing other research entities in the Town and surrounding area – primary use is lodging; The Climate Foundation stated that tenants are vetted but no evidence submitted as to how, criteria or by whom.

Board noted that The Climate Foundation is an Oregon registered non-profit organization with testimony given that the West Coast is the primary contact for The Climate Foundation – no evidence that subject property has 'educational' or 'research' use on site.

Member Hurrie disagrees with Board and feels the model of the Climate House is education use, although not within the structure according to evidence by the Dover Amendment as its language is fairly broad for non-profit organizations.

Closing statements by parties:

Attorney Lebherz, on behalf of Appellant, stated that the actual ownership is The Climate Foundation (not House); its use is to rent out rooms with no education on the premise. He said it was once listed on Air BnB and the sharing of rooms; recently the name was changed to Climate House (post appeal) – we go with what was known at time of appeal. Attorney Lebherz suggested that there is no syllabus or books, no classes, no program – just educated people renting rooms. He noted that the case law Attorney Wall submitted was prior to the Regis case – he said this is not a 'close call' in use – the primary and dominant use is the renting out of rooms/beds.

Attorney Wall, on behalf of The Climate Foundation, stated that the Assistant Zoning Enforcement Officer said the use is applicable and the Appellant needs to prove it is not. The Air BnB posts were three years old and Air BnB is not used any longer. He said that 97% of the people stay on site for at least a week. They have a program in place where they have been teaching third graders in Falmouth about carbon balance. He reviewed the Climate House and noted that it brings scientists together to brainstorm and discuss possible solutions on global warming, etc. He said relative to the standing of the Appellant, they have to show harm, which they have not done.

Member Van Keuren asked if there are classrooms for instruction. Attorney Wall said scientists gather in the common area.

Member Van Keuren asked if there are any facilities on site. Attorney Wall stated no.

Chairman Bielan asked how many beds are within the Climate House. Attorney Wall said he did not know.

Member Foreman asked if there are other charges or just lodging. Attorney Wall said that this is not a money maker – they work around the world but to gather the information they use the Climate House in the summer to share ideas.

It was noted by both Mr. Mullenhauer and Paula Beckerle – both involved with the Climate House – that 90% of the budget is research – and that home schooling started in 2014.

Public Comment:

Andrew Mattox – Woods Hole Road, stated that the Assistant Zoning Enforcement Officer's ruling is based on a 2015 complaint. Copies of The Climate Foundation's bylaws were attached to the ZEO's file; the Climate House took in \$60,000 in rental income and had a net profit of \$25,000.

Member Murphy made a motion to close the hearing. Member Van Keuren seconded the motion. Motion

carried 5 – 0.

Chairman Bielan closed the hearing.

FINDINGS

The Board of Appeals, after carefully considering all of the testimony, facts and evidence submitted prior to and at the hearing, makes the following findings:

1. The subject property located at 3 Little Harbor Road in Woods Hole contains 3,920 square feet of Residential B zoned land. The Appellant appealed the determination of the Assistant Zoning Enforcement Agent that there are no violations on subject property and that the subject property is owned by a non-profit corporation and is operating as an educational institution.
2. The subject property had benefit of a Special Permit(s) [#2065] from 1967 allowing the structure on subject property to be used as four (4) apartments. The subject property was previously owned by the Woods Hole Oceanographic Institute, which used the property to house employees.
3. The Appellants have standing based on alleged harm. The Appellants are direct abutters at 4 Little Harbor Road, Woods Hole, Massachusetts and thus have presumptive standing. Additionally, the Appellants' attorney spoke to harms associated with increased traffic and noise as subject property is being utilized by greater number of individuals. The Board finds that the Gardner's allegations of harm are sufficient to reach the merits of this Appeal.
4. Evidence submitted to the file by the appellant's representative shows that the Assistant Zoning Enforcement Officer's (AZEEO) determination was based on a letter [and facts] from Brian von Herzen to the AZEEO (not dated) with a Board date 'received' stamp of November 10, 2015 in response to a complaint dated 8/29/2015 from appellant. It is further noted that an e-mail from the AZEEO to a separate interested party that a meeting took place with the AZEEO and subject property owner and his attorney to discuss the use of the property and during the meeting it was stated that the use of the property is to house students, professors, researchers who have a similar mission as the Climate Foundation; and that the property owner will apply for necessary permits in order for an inspection to take place and will then be subject to annual inspections. There is no evidence submitted to the file that an inspection took place or that any permits were applied for.
5. There was no information submitted to the file by the AZEEO stating that an inspection of the premises and its use included a physical inspection of said premises.
6. The subject property has been historically listed as rentals to third parties on Air BnB and similar sites as late as May of 2015.
7. There was no evidence submitted to the file of any long-term housing, therefore lending it to be deemed as 'transient' rentals.
8. The non-profit organization – The Climate Foundation – is a West Coast Corporation with 'climate change' as its mission.
9. Educational aspects proposed by The Climate Foundation to be undertaken at Climate House are prospective only and non-existent at this time or at the time of the Appeal being filed.
10. Lodging use is not an exempted use under Section 240.2.1 of the Code of Falmouth.
11. In accordance with the Supreme Judicial Court's decision in Regis College vs. Town of Weston 462 Mass. 281 (2012), in order for a property to be exempt from zoning regulations pursuant to M.G.L. c. 40A § 3 (i.e. the Dover Amendment), the use of the land must not only be for educational purposes, but these purposes must also be "primary or dominant".
12. There is no primary or dominant educational use being conducted on subject property.
13. Framework noted in the Regis College v. Town of Weston, the Whitinsville Retirement Society v. Town of Northbridge and analysis of the Dover Amendment clearly indicates that the primary or dominant use

of the property is not for educational or research purposes.

14. Rather, lodging use is the primary or dominant use on subject property and is therefore not exempt under Section 240-2.1 of the Code of Falmouth or M.G.L. c. 40A, §3.

15. The Lodging use on subject property discussed herein required modification of existing special permit #2065 which was not applied for; and therefore the Board finds the subject property in violation.

Member Murphy made a motion to Grant the Appeal, overturning the Assistant Zoning Enforcement Officer’s determination regarding subject property. Member Van Keuren seconded the motion. Motion carried 4 – 1 with Member Hurrie in opposition.

NOW THEREFORE

BE IT RESOLVED, that the Board of Appeals (herein referred to as Board) being of the opinion aforesaid and acting under the provisions of the Code of Falmouth voted 4 – 1 to Grant the Appeal, Overturning the Assistant Zoning Enforcement Officer’s Determination that no violations exist on subject property known as 3 Little Harbor Road, Woods Hole, Massachusetts.

Decision of the Falmouth Zoning Board of Appeals Continued:

Appeal Number: 108-15

Appellant: James E. Gardner & Kerry Gardner of Manlius, NY

Subject Property: 3 Little Harbor Road, Woods Hole, Massachusetts
Map 51A, Section 01, Parcel 021, Lot 000

Property Owner: The Climate Foundation

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: 4 – 1 to Grant the Appeal, Overturning the Assistant Zoning Enforcement Officer’s determination that subject property is not in violation.

Terrence J. Hurrie, Clerk, Board of Appeals

_____ Date Filed With Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after the date of filing of this Decision in the office of the Falmouth Town Clerk.

Notes:
#108-15 Appeal of AZEO / filed w/Town Clerk 4/27/16

