

FALMOUTH ZONING BOARD OF APPEALS

**FINDINGS AND
DECISION AFTER REMAND**

APPEAL NO: 108-15 – AFTER REMAND 086-17

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. This matter involves an appeal of a determination by the Assistant Zoning Enforcement Officer that no violations exist on subject property known as 3 Little Harbor Road, Woods Hole, Massachusetts (the “Property”).
2. The Board rendered a Decision to Grant the Appeal, overturning the Assistant Zoning Enforcement Agent’s determination that no violation exists on subject property (the “Initial Decision”).
3. The Initial Decision was filed with the Town Clerk on April 27, 2016.
4. The Landowner, The Climate Foundation, appealed the Initial Decision to the Land Court.
5. The Board and Landowner participated in mediation with Retired Land Court Justice Leon Lombardi acting as mediator.
6. As a result of the mediation session, the Board and Landowner filed a joint motion to remand which was approved by the Land Court.
7. The Board held the Hearing After Remand over three (3) separate evenings on December 7, 2017, May 3, 2018 and July 17, 2018.
8. Attorney Brian Wall represented the Landowner.
9. Assistant Town Counsel Patricia Harris represented the Board.
10. Minutes from the Hearing After Remand are on file in the Board of Appeals.

11. The Board received documents and information prior to and during the public hearing preceding the Initial Decision that are on file in the office of the Board of Appeals at Town Hall, as set forth in the Initial Decision.
12. The Board received documents and information prior to and during the Hearing After Remand 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

None

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

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| 9/27/2017 | Letter from Attorney Brian Wall of Troy Wall Associates dated September 25, 2017, filed with Town Clerk on September 27, 2017, pursuant to a Court Remand Order on behalf of Climate House |
| 9/27/2017 | Attorney Brian Wall of Troy Wall Associates submitted 5 booklets with 12 exhibits, 5 sets of Site Plans, 5 sets of Floor Plans of 3 Little Harbor Road (subject property) on behalf of Climate House |
| 1/12/2018 | Staff received signed waiver by Attorney Brian Wall of Troy Wall Associates to extend the hearing process on behalf of Climate House (filed with Town Clerk same date) |
| 3/8/2018 | Response to the Board's questions submitted by Attorney Brian Wall of Troy Wall Associates on behalf of Climate House |
| 5/1/2018 | Received proposed conditions from Attorney Brian Wall of Troy Wall Associates on behalf of Climate House |

Letters/Referrals/E-mails from Town Departments

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| 9/27/2017 | Staff requested abutter's mailing list from Assessors for mailing process (MGL c40A, sec 11) |
| 9/27/2017 | Staff submitted to the file copies of Special Permits 2065, 1990, 48-15, 108-15 granted for subject property by Board of Appeals |
| 10/4/2017 | Email from staff requesting fee for Remand process and with waiver for continuation as requested by Attorney Brian Wall of Troy Wall Associates |
| 11/3/2017 | Staff submitted to the file a copy of the certified abutters list from Assessors |
| 11/3/2017 | Staff submitted to the file a copy of the Court Order of Remand |
| 11/30/2017 | Staff received a copy of 'undeliverable' Notice of Public Hearing of abutter from postal service |
| 12/11/2017 | Copy of an Email from Pat Harris, Associate Town Counsel to Falmouth Fire Rescue Department regarding requested inspection of subject property (3 Little Harbor Road, Woods Hole) submitted to the file |
| 12/15/2017 | Letter submitted to the file from Andrew Mattox to Pat Harris, Associate Town Counsel |
| 4/2/2018 | Letter submitted to the file from Building Commissioner Rod Palmer to Board of Appeals dated 3/30/2018, received April 2, 2018 regarding inspection of structure on subject property (3 Little Harbor Road) with floor plans of said structure attached |
| 7/10/2018 | Received revised conditions from Pat Harris, Associate Town Counsel submitted to the file |

Hearing After Remand – December 7, 2017:

Attorney Brian Wall stated that the issue is whether or not the use of the property is exempt under the Bylaw, section 240-21 and Chapter 40A section 3. This is pursuant to a remand order. The Climate Foundation is a non-profit tax exempt corporation that is involved in researching and studying the issues of climate change and carbon balance. In 2013 the foundation bought the property from WHOI that was used for living accommodations before that it was the Pekenese School and a lodging house. The purpose of buying this house was to create a summer fellowship program for undergrad and postgrad students and doctoral candidates who would study climate change science and to attract other professors. The reason that Woods Hole was chosen was because of the renowned institutions including MBL. The summer program began in 2013 and first started out as a startup program. The program at first used the Air B&B website which ended up having an effect on them because it attracted non-scientists. They figured that they would use the extra capacity of the house to make extra income, which turned out to be a mistake as it brought attention to Andrew Mattox, who was the owner of the Sleepy Hollow Inn. He perceived what was happening at the Climate House to be in competition with his Inn. In April 2015 he filed a complaint with the Zoning Enforcement Officer who denied the complaint finding that the foundation was educational and was exempt under Chapter 40A Section 3 and section 240-21. In June 2015 Mr. Mattox filed an appeal with the ZBA and on the night of the hearing his attorney agreed that he did not have standing pursue and that appeal was dropped. In August 2015 another appeal was filed with the ZBA under James Gardner who lived across the street from the Foundation, this ended up being a front for Mr. Mattox. Mr. Leberz [appellant's attorney] persuaded the Board that this is what this house was being used for, a rental on Air B&B. We argued that the use which is primarily and dominantly educational, under Chapter 40A Section 3 you. In 2012 the SJC said in order to be exempt the use of the property has to be primarily and dominantly. The Board made a finding that the Foundation was a non-profit educational corporation and is educational based on the evidence that was submitted. The Board found that the use had not met the test of "primary and dominant". The Climate House then filed an appeal to Land Court. After the appeal was filed I had several conversations with Town Counsel where we talked about mediation, which was finally decided upon. In June 2016 we had a mediation session we talked about what exactly the Climate Foundation was doing and what they were doing at that exact time. We talked about what happened in 2015 and what would happen in 2016. We prepared conditions during mediation because we saw how concerned the Board was with how the use can change and how the Board can find assurance that the use won't change the use. We talked at length about these conditions and finally at the end of mediation the members felt enough information had been presented. We filed a motion by agreement and the Court remanded us back here. In our packet we have included an existing conditions plan and floor plan and supporting documentation. We think that the Board should reverse its decision and we think that there is enough information for the property to the primarily and dominant test. The Climate House no longer uses the Air B&B Website it hasn't used it for 2 years. The Climate House had 1 fellow in 2016, this past summer there were 7 fellows. The fellows are paid a stipend to come to the house and to study and work with the Climate Foundation fellows. The classes given are usually on permaculture and there's a research program on Climate change issues. The Climate House also gives a 10 week workshop on permaculture and engineering during the summer. Any persons staying at the house of employed through the Foundation consist of students, professors, scientists and documentary film makers all related to climate change. There are no transient people that stay here, it is not available for lodging or people catching the ferry. That may have happened the 1st year but it no longer happens. All residents, students and professors participate and are involved with the fellowship program. The use that is there today [during summer months] proves from the evidence submitted that it does meet the test. We took the input from the 2 members during mediation and discussed some conditions, they had suggested additional changes which I had submitted with the

booklet. The Climate Foundation was selected as a winner which was given by the Australian Government and they were awarded \$250,000.00. The Climate Foundation used that money to develop equipment for permaculture. If the Board agrees the Foundation is educational we would submit to these conditions which includes a yearly submission of reports to give the Board assurance that the use will not change.

E. Van Keuren – During the summer I went down to Woods Hole and drove past the house. There were 2 kids and 2 adults sitting on the porch and I noticed one spot had a lot of ductile and the other spot have some PVC pipe, what's all that for?

B. Von Herzen – The piping is for our marine permaculture experiments.

E. Van Keuren – So it has nothing to do with the house?

B. Von Herzen – Nothing to do with the house.

E. Van Keuren – Is it sprinkled?

B. Von Herzen – We have a fire alarm system installed by WHOI that has multiple zones but I don't believe it has sprinklers. Our staff had 2 kids staying with him as part of the summer workshop.

K. Bilean – You're saying there's a minimum of 5 fellows and a maximum of 16 at any one time?

B. Von Herzen – It fluctuates year to year based upon winning these challenges and the types of funding they receive.

K. Bielean – What is the bedroom situation, how many people can sleep there?

B. Wall – Some of them are for single people or a married couple and others are more dormitory style.

K. Bielean – You made reference to a qualified director, would they live on the property?

B. Wall – Yes, Dr. Von Herzen lives on the top floor and he is the director. I wrote “qualified director” because it would be a qualified person that would give the fellowship.

K. Bielean – What would make someone “qualified”?

B. Wall – They would have to have a PhD to administer the fellowship program or that type of education. If you are going to do post-doctoral research you have to have a PhD.

K. Bielean – you said in your presentation that they do a 10 week workshop. The conditions say a 6-10 week workshop, why would it vary and not be consistent and what does the workshop consist of.

B. Von Herzen – The subject and the duration could vary from year to year. We can commit to a 6-10 week workshop.

K. Bielean – If you're only doing it in the summer, what would the rest of the year consist of?

B.Von Herzen – We start in the spring preparing for the workshop and then in the fall we do testing from the research we've done.

K.Bielan – You also referenced in the conditions that the Climate House was not enrolled in the Fellowship program. During the appeal Attorney Lebherz said it was insufficient for purposes of section 3. There are people who are staying there outside of the program. What is their participation in the educational use?

B.Von Herzen – There are several professors who spent several weeks and visited our fellows and taught other professors while they were there.

B.Wall – In conditions #5, #6, #7 and #8 those conditions address the concerns you would have with what the other guests that stay there do they ensure that these people have technical backgrounds. Attorney Lebherz asked how they would filter inquiries from Air B&B. We are providing conditions that ensure the Board regarding how long the minimum stay is, an agreement to participate in a program and work with the fellows.

K.Bielan – Specifically condition #8 provides assurance that only people participating in the program will stay at the house. Then you say that other educational programs should be permitted to stay at the Climate House. I'm concerned with the other educational programs which goes back to the original concern.

B. Wall – We are open to any suggestions from the Board. The point of that was to address Attorney Lebherz's comment on how people get filtered.

K.Bielan – Any plans get sprinkle or speak to fire?

B.Wall – Even if we are exempt from zoning we will have to comply with fire and building codes. There is a commercial grade fire alarm system.

K.Foreman – Is it ADA compliant?

B.Von Herzen – There are ramps that we have not altered. There is a bathroom on the first floor and the kitchen are handicap accessible.

K.Foreman – I would second the concern about fire safety. If we do approve this we might be able to have some kind of fire safety review put in there.

S. Budrow – I would request that Attorney Wall submit that to the conditions where this is an appeal Associate Town Counsel P.Harris – The Board can require a use and occupancy review by the Fire and Building Departments. They will come out to inspect the property.

S. Budrow - If the Board overturns the last decision they can direct the applicant to receive an occupancy permit. Is that correct?

P.Harris Yes, an occupancy for an extended use.

K.Foreman – These conditions will be part of our findings then.

B.Wall – We will be bound by them.

K. Foreman – Maybe we could include some language in condition #9 about what is planned for the following season.

B.Wall – That would be fine.

K.Foreman – We want to ensure that the use is what's described here.

P.Harris – One of the provisions that relates to a determination of an exemption says if the property doesn't comply with parking or dimensional requirements after the exemption was given a special permit would be required,[section 240-2.1(a)] from the Planning Board. I understand that there is some concern about how many people would stay each year. The number of beds might be something that you would want to consider as a condition and because this is a combined use there are other code requirements for lodging/educational uses so I think the bedroom count is important. You many want about a submittal in May for summer scheduling.

K.Foreman – Rather than January?

P.Harris – Yes, because you can review what was done the year before and see what is being proposed.

K.Foreman – The only concern I may have is if a future Board decides not to grant this they will be far in the planning process.

P.Harris- I think that you should get clarification on if the program is during the summer and the remainder of the year is preparation or recovery there is still a few month not counted in there. It would be ok if there was 1 person staying there but if there are more it would have to fall within the definition of educational use, the dominant and primary purpose.

B. Von Herzen – We may be doing research and education for the 10 weeks but we are researching in the spring and fall in Woods Hole or other sites where we have worked in during the winter. We're doing research year round.

K.Foreman – We need to come up with a set of conditions that we either accept the building commissioner's determination or we accept the appeal and overturn this. Correct.

S. Budrow – Yes.

K.Foreman – Because there is some uncertainty we should direct Sari to draft a decision.

S. Budrow – Do you want Attorney Wall to revise those conditions based on your discussion.

G.Potamis – Should we have discussion as to whether we would be inclined to grant or deny?

K.Foreman – So what's your vote?

G.Potamis – I'm not a voting member but I think it would be to write a positive decision.

T.Hyrrie – I was the sole one last time and tend to have a liberal interpretation of the Dover Amendment. I'd be in favor, the appellant did work a lot with these conditions. I would be in favor of tweaking the conditions a bit and voting in favor.

K.Bielan – I would take somewhat of the opposite position. I'm concerned with the 6-10 week program there are some people staying there who are in a mentorship role. What I wanted to see out of this remand are more specific conditions, I think they are fuzzy. They should be more specific for them to be exempted from zoning for an educational purpose. I want to look at the case law and look at what use these conditions would provide, I could get there if the conditions are strong enough. I need to see stronger conditions.

E.Van Keuren – I haven't seen the new conditions. I think we need to take the time to go through this and public safety. I think we need to continue it and get the fire department involved.

K.Bielan – I think it would be helpful were to confer with the Fire Department so we would have that information prior to making a decision.

R.Dugan – I think we need to get a breakdown of what they are doing the rest of the year. If they get the exemption how enforceable is it?

K.Foreman – One clear statement is that no one who is not associated with this can stay there.

R.Dugan – Once they get the exemption how enforceable is it if they don't submit to the town.

P.Murphy – Not easily.

K.Foreman – There is a lot of documentation about people who applied and got the fellowships and competed for the stipends. Not just any person can meet these standards.

B.Wall - We are trying to convince you with an educational use. The 6-10 week program is a core of the program. The graduate and post-doctoral research that is going on is very different that a normal high school or college. It is very independent. One thing that we talked about at mediation was to have a product at the end of the program that we could say the fellows did that, whether it was a paper or video. One of the conditions was to publish that work, it's much more than a 6 week program. We are happy to work on the conditions again.

K.Foreman – It sounds like we want to continue.

S.Budrow – And allow Attorney wall to revise those conditions and run them by Pat before they are turned into the Board.

B.Wall - Before there is a vote taken, Dr. Von Herzen travels and he will not be at the next meeting so I would suggest if anyone has any questions for him they should ask him now.

P.Harris – I think you should ask Mr. Von Herzen that he provide access to the home for the fire department so they can inspect it along with the building department.

S. Budrow – They have someone that is on the premises now correct?

B. Von Herzen – We would be happy to accommodate any inspections. The house is not very well insulated so the house is shut down as of December.

K.Foreman – Do you turn of the heat and drain the pipes?

B. Von Herzen – We do winterize it.

E.Van Keuren made a motion to continue application #086-17 to January 11, 2018 @ 6:30pm

K.Bielan – I don't know if I am available.

T. Hurrie seconded the motion.

Motion carried 5-0.

Hearing After Remand - May 3, 2018

Attorney Brian Wall stated The Climate Foundation is a nonprofit tax exempt corporation who have a research team that study climate change. The property was bought by the Climate Foundation in 2013. A neighbor filed a complaint but the Zoning Enforcement Officer said that no violations existed because the property was being used for educational purposes and was exempt from zoning. The neighbor was aggrieved and filed an appeal. In 2016 the Board found that the foundation was non-profit, tax exempt, but the property didn't meet the 'primary and dominant' test. My client appealed the Board's decision to Land Court. I had spoken with Associate Town Counsel Pat Harris after the appeal was filed because the use had begun to change and talked about mediating and the Board agreed. One of the focuses of the mediation were proposed conditions. The case I was trying to make was that if this was conditioned like a special permit, the Board may feel more comfortable with the educational use. At our first hearing in December I had made the argument that the use had become more robust and the fellowship program had grown more with formal classes being given. Mr. Van Keuren had brought up a comment about public safety regarding the fire suppression system and building code issues. Since the last hearing the fire and building department have both been out to inspect the property. There are 3 issues in their report; second means of egress, a fire ladder and one of the other matters didn't meet building code. The Fire Department said that if it has been used consistently as a dormitory use, the fire suppression system may be grandfathered in and will be allowed to remain, if not it would require a sprinkler system. Attorney Harris has also sent you some suggested changes to the conditions. One of the conditions that the Town suggested was the issues with the building code need to be corrected and my client will have to have a certificate of occupancy from the Town in order to continue. The conditions that I sent on April 26th are what I had submitted in December but have been modified after Town Counsels suggestions.

P. Harris (Associate Town Counsel) – The Board has to first decide whether or not this is an exempt educational use, just because I have submitted these proposed conditions doesn't mean that the Board has agreed this is an exempt use. My recommendation is, if that finding is made that it is an educational use the special conditions should be included with that determination. Because you initially found this to be a lodging house you need to be able to define certain terms to keep it as a legitimate educational use.

The Town Engineer also pointed out that the driveway being used by the landowner is on Town property. The special conditions didn't talk about parking, but I would like you to think about that. The memo from the Building Department said that before this educational use can proceed they must have their certificate of compliance from the Building Commissioner.

K.Foreman – How would they be able to cure the off street parking issue?

P.Harris – That would be up to the land owner and his counsel. They could find another lot for parking or a license from the Town to use Town property. I think a condition about parking should be added and there should be some fine-tuning on the definitions.

S.Budrow – You're saying that the Board shouldn't look at these until they have made a determination.

P.Harris – The special conditions and the determination dovetail. There are also certain things that need to be defined.

S.Budrow – I want to make clear to the Board that they have to find that this is an educational use.

P.Harris – Another way to look at it is if the use follows this criteria it would be considered exempt.

K.Foreman – I think we might be able to do that.

P.Harris – A long time has passed and you still haven't determined if it was an educational use or not. You need to come up with a set of conditions that you all agree on and then the vote that this is an educational use subject to these conditions.

S. Budrow – My issue is when I sent these conditions to the Board it wasn't clear.

P. Harris – I can do a synopsis under each condition as to what the change was and what the impact is.

K.Foreman – I think we would want to have one document to look at and consider. One document that is agreed upon.

B.Wall – I agree that there does need to be a finding of educational use. Case law is very clear that to be an educational use doesn't need to have a blackboard in the background. The reason why you have two sets is because when my client got the Town's changes we went through in detail but there are some things that won't work and we weren't able to reach an agreement. I do agree with Attorney Harris that they are dovetailed.

K.Foreman – We are looking for one document to come back. I think another issue is the compliance issue because I don't think it's very challenging for them to comply with safety.

S. Budrow – Especially since it's evolved so much, this started out being for 6 to 10 kids and now it appears with a curriculum for ten weeks and people will be staying there in the off months. Regardless, it needs to be brought up to public standards for an educational use.

P.Harris – That’s one of the reasons that a certificate of compliance would have to be issued from the Building Commissioner because all of the safety precautions would be required. Sari’s comment about people staying overnight wouldn’t be allowed under these special conditions.

S. Budrow – I was talking about the initial hearing when that was brought up. It’s totally evolved, but the safety standards still need to be met. What about the egress that goes through town property?

P.Harris – The secondary egress from the second floor is in the layout of the Town way. One of the conditions included is a requirement under the provision in the by law that allows for a determination by this Board that it’s an exempt educational use but if there are dimensional or parking requirements a special permit from the Planning Board is required.

R. Dugan – Has there been a determination of the actual allowed occupancy?

P.Harris – I’ll double check that with Rod.

S.Budrow – It’s based on the size of the bedrooms and you have to check with the Board of Health because each bedroom can only sleep so many.

P. Harris – I can work with Attorney Wall to try and finalize an agreement and where we can’t I’ll have a bullet and an explanation of why and the Board can decide what they want to do.

E. Van Keuren made a motion to continue #086-17 to July 12, 2018 at 6:30 PM. T. Hurrie seconded the motion.

Motion carried 5-0.

Hearing After Remand - July 12, 2018

Brian Wall stated we are now focused on the proposed conditions. This was brought to you in 2016 to overturn the Zoning Enforcement Officers decision that no violations existed. The Board found that the Climate House was engaged in educational activity and was a qualified nonprofit organization. For this to be exempt the property has to be primarily and dominantly used for educational purposes, the Board believed the primary use to be a lodging house and the Climate house then filed an appeal with Land Court. By agreement of parties this was remanded back to the Board. The information that you had in 2015 and 2016 was outdated and the education use has grown with the Fellowship and permaculture programs. The Air bnb advertisements were no longer being used and in order to stay they had to be a part of the program. During mediation we had proposed 9 conditions that would give the Board assurance if this was to be granted as an educational use. The Board wanted more detail, so we brought back 11 revised conditions which were submitted in September. Pat Harris and I then tried to come up with some more conditions. At the May 3rd hearing there was a disagreement with some conditions even though my client agreed with most. The Board asked for a comparison of the conditions to be submitted. My client has cooperated with the Board and we are in agreement with 10 of the 16 proposed conditions. In Chapter 40A §3 there are certain things that zoning should not regulate. We have come to a point that we have shown primary and dominant use. One of the conditions at mediation that was agreed to was that there will be continual reports submitted to the Board of the activities that take place. The Board discussed conditions that were agreed upon during mediation with the applicant and Attorney Wall.

T. Hurrie – You said 10 out of the 16 conditions were agreed upon. Can you tell us which ones are out?

P.Harris – The burden is on the land owner to establish to the Board that they have a bona fide educational use, there has to be a substantial educational purpose. If there is a bona fide educational use then that educational use has to be the primary and dominant use. The goal was to establish a bona fide educational use and the Board could come to a determination that this was the primary and dominant use of the property. I disagree that the members in mediation were just waiting for the Landowner's proposed conditions. The Board and the Landowner agreed to try to work out conditions that if approved would satisfy the Board that the use of the Property was a bona fide educational use and it was the primary and dominant use of the property. The Board can impose any conditions and the land owner can appeal or not appeal the conditions.

G.Potamis – Can you briefly outline where the disagreement is?

P.Harris – Condition 1: they eliminated the requirement that fellows in the program be a minimum of 5. Condition 5: The revised condition regarding overnight guests. The definition of mentors and PHD were watered down. Condition #6: They eliminated a 'business week' for the minimum amount of time staff must stay. Condition #7: They eliminated limitation on overnight guests to 16 people, which was related to the number of bedrooms, these are safety issues. The Landowner also struck the condition prohibiting advertising of overnight guests at Climate House, this was a grave concern to the Board when it originally overturned the determination of the assistant zoning enforcement officer. Condition #9: The intent was that from mid -June to the end of August there would be a 6-10 week educational program that would take place. The Landowner said that from May through the middle of June and from September to December the Director and Assistant would be staying at the house. January through April the house would be vacant as it's not winterized. This condition limits the use. The revised condition added that the house could be used as a single family dwelling at all times with the exception of the term of the 6-10 week course. There was a use variance from 1967 that allowed 4 apartments.

K.Foreman – There is a 6-10 week period of a formal education program and then 19 weeks where it's a single family dwelling. If we don't limit this to just the staff, what would be going on. Would it be a residence?

B.Wall – The educational use has always been during the summer months. The property is shut down during the year and only occupied by the Director and his assistant. Dr. Von Herzen comes 1 or 2 months before the program begins to prepare the curriculum and then the educational use occurs and after it ends Dr. Von Herzen and his assistant stay there. We said single family use to give some flexibility. If he has a guest stay over it would be in violation.

K.Foreman – If the educational use has to be primary and dominant that use is only for 6-10 weeks.

B.Wall – Education is confined to summer months. The property is shut down part of the year. Dr Von Herzen travels and comes back in May to write the curriculum. After the summer session Dr. Von Herzen and his assistant stay at the property.

K.Foreman – Education has to be the predominate use. There are 10 weeks – maximum – of an educational use and the other 19 weeks that not. If they are doing things there that pertain to the educational use after the 10 weeks are up than I would agree, but it has to be defined.

B. Wall – The only reason we object to the language by the Town was because it was restricted to 2 people and if there was an extra person we would be in violation. We are only in disagreement 6 conditions, it's a slight disagreement.

K.Foreman – Everything that they are not in agreement with pertains to some restriction and that causes me concern as it might turn into a lodging house.

B.Wall – We could put a condition that it will not be used as a lodging house.

K.Foreman – I would extend the period of educational use to include all planning that occurs.

B.Von Herzen – It takes time to prepare for the educational and outreach programs. We have been provided with grants from the government confirming our educational use. We have established a strong research and educational use. When we aren't traveling the Climate House is used as a base for our global operations.

K.Foreman – With the modifications that you requested, it doesn't mention any of that.

B.Wall – We could include a condition that says any use beyond the educational purpose has to be related to the program in the summer and another condition that there wouldn't be any lodging for a fee.

R. Dugan – It says 6-10 week course, could it only be 6 weeks?

B.Wall – It's to provide flexibility, the minimum would be 6 weeks.

E.Van Keuren – What's going on this week, I drove by and saw some cars and a man coming out with a backpack.

B. Von Herzen –We have oceanographers there doing research for our permaculture course.

E.Van Keuren – What bothers me is the time. It looks like 41% of the time it's used for lodging, 38% of the time its shut down and 19% of the time is the educational use. Did the issues with the inspectional services get resolved?

B.Von Herzen – The issues will be taken care of.

T. Hurrie – In regards to condition #7, maximum people 16, why was that striked out?

B. Wall – The capacity is 20-24 and my client felt that was restrictive.

T.Hurrie – Have you made any attempts with the Town or private parties in regards to parking?

B.Wall – We are waiting to see if this goes through before any arrangements are made. Many people either ride bikes or use public transportation.

T.Hurrie – Condition # 1 – you don't want a minimum amount of fellows?

B. Wall – The program varies year to year based on funding, putting a minimum of 5 may not work. We could also add a condition that it will never be less than a certain percentage. No's 5 & 6 are minimal disagreements. On no.5 the Board asked it be revised to state all mentors must have a PhD, but not all mentors do. The Climate Foundation also makes documentaries and they have people come to show the fellows the proper way to film. Not all of them have a PhD. No. 6 we would ask that a 'business week' be defined as 4 nights and 5 days.

R. Dugan – Going over the different conditions it doesn't appear this is an educational use. I feel like they are trying to get an exemption for that short amount of time. It doesn't make sense, there is educational use going on but I don't think it's primary and dominant.

P.Murphy – This is problematic for me, I wouldn't go near it if I was asked to make a decision. I agree with Bob, I'm not in favor at all.

E.Van Keuren – I don't see how we could approve this.

T. Hurrie – I second the Board.

K.Foreman – I think we tried to provide conditions and they came back with a set that was watered down. I can't support this.

G.Potamis – What if adequate language was put into the conditions?

P.Murphy – It shouldn't be this difficult, I don't think it's simple.

R.Dugan – They have come back with conditions that are watered down and it goes right back to being a lodging house.

B.Wall – Would the Board be inclined to approve with what Attorney Harris submitted?

K.Foreman – I would be okay with them personally.

P.Murphy – I wouldn't be.

E.Van Keuren – I don't see how we could approve this as an educational use. It's not primary and dominant.

T.Hurrie – I agree with Ken.

K.Foreman – I would approved if those conditions were adopted.

R.Dugan made a motion to close the hearing. E.Van Keuren seconded the motion. Motion carried 5-0.

FINDINGS

The Board of Appeals incorporates by reference the Initial Decision, including the facts, testimony and findings referenced therein. The Board of Appeals, after carefully considering all of the testimony, facts and evidence submitted prior to and at the Hearing After Remand, makes the following additional findings:

1. The Board filed the Initial Decision with the Town Clerk on April 27, 2016 granting the Gardner appeal and overturning the Assistant Zoning Enforcement Officer's determination that no zoning violations exist at the Property (the "Initial Decision").
2. The Landowner appealed the Initial Decision to the Land Court (Land Court Case No. 16 Misc 000263).
3. The Board and Landowner engaged in mediation which resulted in a joint motion for remand, which motion was approved by the Land Court.
4. The Board held the Hearing After Remand over three (3) evenings.
5. The driveway at the Property is located on Town-owned land.
- 17 The exterior emergency egress landing and stair system from second floor of the residence located at the Property (located on the east side of the building) violates the Building Code. The egress structure is located within the layout of Little Harbor Road.
- 18 An aluminum ladder attached to north side of the house and used for emergency egress violates the Building Code. The egress ladder is located within the path of high voltage electrical wires.
- 19 If the proposed educational and dormitory use were authorized, the Landowner will be required to install a fire suppression system, unless the Landowner is able to demonstrate that dormitory use has continuously existed at the Property since prior to January 1, 1975, then the use will be grandfathered and will not require installation of a fire suppression system.
- 20 The proposed educational use is for 6 to 10 weeks per year during the summer season.
- 21 There is no primary or dominant educational use being conducted or proposed on subject property.
- 22 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 purposes.
- 23 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.

24 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 of zoning.

K.Foreman made a motion to approve an educational use at the Property with conditions as an exempt use.

T.Hurrie seconded the motion. P.Murphy, R. Dugan and E.Van Keuren in opposition.

Motion did not carry 2-3.

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 After Remand to reaffirm the Board's Initial Decision **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 – After Remand 086-17**

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: 2-3 motion to approve the use of the Property with conditions as an exempt educational use. Motion did not carry. The Initial Decision to Grant the Appeal, Overturning the Assistant Zoning Enforcement Officer's determination that subject property is not in violation of zoning, is affirmed after remand.



Edward Van Keuren, Clerk, Board of Appeals

Terrence J. Hume, Chair

RECEIVED

AUG 10 2018

FALMOUTH TOWN CLERK

AD @ 8:15am

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.