

Zoning Board of Appeals MINUTES Wednesday, March 8, 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, March 8, 2023, at the time indicated:

The Zoning Board of Appeals Public Hearing will be held by remote participation methods. Public access to this meeting shall be provided in the following manner:

1. The meeting will be televised via Channel 18 and may be viewed via the Channel 18 website at <http://streaming85.townofbarnstable.us/CablecastPublicSite/>
2. Real-time access to the Zoning Board of Appeals meeting is available utilizing the Zoom link or telephone number and Meeting ID provided below. Public comment can be addressed to the Zoning Board of Appeals by utilizing the Zoom link or telephone number and Meeting ID provided below:

Join Zoom Meeting Option	Telephone Number Option
https://townofbarnstable-us.zoom.us/j/83843835239	US Toll-free 888 475 4499
Meeting ID: 838 4383 5239	Meeting ID: 838 4383 5239

3. Applicants, their representatives and individuals required or entitled to appear before the Zoning Board of Appeals may appear remotely, and may participate through accessing the link or telephone number provided above. Documentary exhibits and/or visual presentations should be submitted in advance of the meeting to anna.brigham@town.barnstable.ma.us so that they may be displayed for remote public access viewing.

Copies of the applications are available for review by calling (508) 862-4682 or emailing anna.brigham@town.barnstable.ma.us.

Chair Dewey notes that while the meeting notice said this meeting would be televised live, it is not. David Hevenor, Channel 18 Video Specialist, confirms that because of intermittent service, it will be available on the Channel 18 YouTube channel tomorrow.

Call to Order

Chair Jacob Dewey calls the meeting to order at 7:04 and takes roll call:

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

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

February 8, 2023 –Chair Dewey makes a motion to approve. Mark Hansen seconds.

Vote:

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

Nay: None

Old Business

7:00 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. Members assigned were Dewey, Webb, Pinard, Johnson, Bodensiek.

Attorney Lawler requested via email to continue this item to April 12, 2023, and is not present. Chair Dewey thought that attorneys needed to be present if they gave less than 24 hours' notice to request a continuance. Anna Brigham says she spoke to Attorney Lawler and he believed he was within the appropriate timeframe. Herb Bodensiek makes a motion to continue. Paul Pinard seconds.

Vote:

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

Nay: None

Appeal No. 2022-057 Wentworth is continued to April 12, 2023.

7:01 PM

Appeal No. 2023-001

Centerville Gardens II, LLC

Centerville Gardens II, LLC has petitioned for a Variance pursuant to Section 240-125 B. (1)(c) and (e) Variances; 240-107 Wireless Requirements; Article IX Site Plan Review; and MGL Ch. 40A. The Petitioner seeks to construct a 110 foot above-ground level (AGL) monopole-style tower with the capacity for at least four wireless communication services providers, together with related amplifiers, cables, fiber, and other associated antenna equipment, to replace the existing tower at 1047 Falmouth Road where 30 feet is the maximum height. The subject properties are located at 36 Wequaquet Lane, Centerville, and 1060 Falmouth Road, Hyannis, as shown on Assessor's Map 250 as Parcels 023-T00 and 023-H00, respectively. The parcels are located in the Residence D-1 (RD-1) and Highway Business (HB) Zoning Districts, respectively. Continued from February 8, 2023. Members assigned were Dewey, Bodensiek, Hansen, Webb, Pinard.

Attorney Ed Pare, representing the applicant, requests that Chair Dewey read Appeal No. 2023-002 into the record as well. He reads:

7:02 PM

Appeal No. 2023-002

Centerville Gardens II, LLC

Centerville Gardens II, LLC has applied for a modification of Special Permit 2012-007 Condition No. 5, pursuant to Section 240-125 C. and MGL Ch. 40A. The Applicant seeks to allow commercial activity and associated site improvements within the portion of the site located within the RD-1 Zoning District. The subject properties are located at 36 Wequaquet Lane, Centerville, and 1060 Falmouth Road, Hyannis, as shown on Assessor's Map 250 as Parcels 023-T00 and 023-H00, respectively. The parcels are located in the Residence D-1 (RD-1) and Highway Business (HB) Zoning Districts, respectively. Continued from February 8, 2023. Members assigned were Dewey, Bodensiek, Hansen, Webb, Pinard.

Chair Dewey notes that public comment was left open for both Centerville Gardens appeals.

Attorney Pare summarizes: at the last meeting, an abutter (Richard Harrigan) requested time to review the files. Mr. Harrigan has since sent an email that he is no longer interested in objecting or "appealing." Attorney Pare also wants to clarify that regarding the crane test, the tower will be where the balloon is, straight down from there. He says as long as the facility complies with the FCC standards then this Board has no jurisdiction because it's federal law.

Chair Dewey brings it back to the Board for questions. Paul Pinard would like Attorney Pare to explain how he believes this passes the 3-prong test. Attorney Pare summarizes: their case is unusual because they are dealing with wireless facilities. The hardship relating to topography is the gap in coverage, recognized by MA law. If the tower couldn't go past 30 feet, they wouldn't be high enough to go past trees and houses and could offer no coverage. Their uniqueness is the existing tower across the street that is coming down in 2024 due to expiration of the lease agreement. Best practice is towers are allowed everywhere in town. They are a benefit to public safety. This is effectively a net swap from one tower to another, so there is really no detriment. He believes he's shown there will be no impact of property values. Route 28 is a commercial area already. They have screened the view from the residential side as much as possible. The facility is unmanned so doesn't require town services.

Mark Hansen asks if the gap in coverage reasoning is federal statute. Attorney Pare says it's the Federal Telecommunications Act of 1996. It gives boards like this the ability to grant variances to comply with federal law. Aaron Webb asks if the town was brought into the discussion about other, more suitable areas for a tower. Attorney Pare says they didn't go that far because the existing pole is

across the street so they were staying within the geographic area of where they're providing coverage. They did look at alternative locations, and this was the best option, but the town was not included in that conversation.

Chair Dewey goes to public comment. Robert Wenger of 810 Strawberry Hill Road addresses the Board. He addresses the applicant's appraiser's testimony that said property values would not be affected, and adds that that appraiser only included two examples, one of which was a property in New Hampshire. He says he canvassed local realtors and they all said that property values will be negatively impacted. It also was addressed by the Cape Cod Commission, in Section F-69: "...more acute impacts to properties in immediate proximity." He also says the decision from the Commission was an annulment of regional impact, not an approval. He adds that the 2012 decision for this had a condition that the residential zone shall remain undeveloped in a natural state. He believes the ZBA's intention there was to protect residential abutters in the future. Attorney Pare rebuts that George Valentine has credentials as an appraiser, not just a realtor. Regarding the special permit, they are arguing this is not an extension of commercial activity but rather is infrastructure. There were also previously developed structures there—it's not undeveloped land. Chair Dewey makes a motion to close public comment for both appeals. Herb Bodensiek seconds.

Vote:

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

Nay: None

The Board deliberates. Chair Dewey doesn't think there is a clear justification yet. Mark Hansen agrees. Paul Pinard thinks having an issue with 911 coverage would be sufficient. Chair Dewey says that doesn't affect the petitioner specifically. The Board discusses Attorney Pare's suggested reasons. They see an obvious financial hardship. Mark Hansen feels it's a like-for-like transfer. Herb Bodensiek doesn't have an opinion. Aaron Webb was intrigued by Mr. Wenger's presentation that it would be a detriment to the public good. Clearly there would be an effect if there was no coverage, but he is also concerned about the property values for residents there. He thinks near the high school/adult center would be a better option, and it would be worth talking to the town about. Paul Pinard asks what other sites were considered. Attorney Pare says it's Exhibit 6 of his submission.

Paul Pinard makes findings for 2023-001:

Centerville Gardens II, LLC has petitioned for a Variance pursuant to Section 240-125 B. (1)(c) and (e) Variances; 240-107 Wireless Requirements; Article IX Site Plan Review; and MGL Ch. 40A. The Petitioner seeks to construct a 110 foot above-ground level (AGL) monopole-style tower with the capacity for at least four wireless communication services providers, together with related amplifiers, cables, fiber, and other associated antenna equipment, to replace the existing tower at 1047 Falmouth Road where 30 feet is the maximum height. The subject properties are located at 36 Wequaquet Lane, Centerville, and 1060 Falmouth Road, Hyannis, as shown on Assessor's Map 250 as Parcels 023-T00 and 023-H00, respectively. The parcels are located in the Residence D-1 (RD-1) and Highway Business (HB) Zoning Districts, respectively.

1. Owing to circumstances related to soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located. He finds that the 1996 Federal Telecommunications Act satisfies this.
2. A literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner. He finds that the gap in coverage that would result from not replacing the tower would be a hardship, and emergency services would suffer.
3. Desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning ordinance. He finds that this is a replacement tower of equal height and there was a balloon test for visibility, sound attenuation, and screening by the petitioner.

Mark Hansen seconds.

Vote:

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

Nay: None

Paul Pinard says that the appeal is subject to conditions 1-5 from staff report dated January 4, 2023. Principal Planner Anna Brigham clarifies that condition no. 5 was added to wrap in the Cape Cod Commission's DRI decision and conditions. Senior Planner Jim Kupfer says condition no. 18 could be highlighted: it's a requirement to decommission the other tower and is very important to the quality and character of the neighborhood. Paul Pinard says the appeal is subject to conditions 1-5 as suggested by Mr. Kupfer.

Vote:

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

Nay: None

Variance No. 2023-001 Centerville Gardens II, LLC is granted with conditions.

Paul Pinard makes findings for Appeal No. 2023-002:

Centerville Gardens II, LLC has applied for a modification of Special Permit 2012-007 Condition No. 5, pursuant to Section 240-125 C. and MGL Ch. 40A. The Applicant seeks to allow commercial activity and associated site improvements within the portion of the site located within the RD-1 Zoning District. The subject properties are located at 36 Wequaquet Lane, Centerville, and 1060 Falmouth Road, Hyannis, as shown on Assessor's Map 250 as Parcels 023-T00 and 023-H00, respectively. The parcels are located in the Residence D-1 (RD-1) and Highway Business (HB) Zoning Districts, respectively.

1. The application falls within a category specifically excepted in the ordinance for a grant of a special permit.
2. Site Plan Review is not required for single family residential dwellings. It did go to Site Plan Review on January 27, 2022.
3. 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.

Vote:

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

Nay: None

Paul Pinard reads that the appeal is subject to conditions 1-6 from the staff report dated January 24, 2023. Attorney Pare approves.

Vote:

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

Nay: None

Special Permit No. 2023-002 Centerville Gardens II, LLC is granted with conditions.

New Business

7:03 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.

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

Attorney Ford has called into the meeting. He is having internet problems but would like to proceed. He and the Board received a letter from Town Attorney Charlie McLaughlin requesting that the Board not take a vote this evening. Attorney Ford would still like to present tonight. Chair Dewey polls the board: he, Mark Hansen, and Paul Pinard are fine proceeding. Herb Bodensiek and Aaron Webb would prefer to save the presentation for the day of the vote. Chair Dewey thinks having this meeting as well as the additional in-person meeting on April 12 is the best option to provide the public with a fair opportunity to be present. Attorney Ford thought they would be continued to March 22, not April 12. He has already submitted an application to Planning Board as well, which is dependent on this ZBA decision. They decide to discuss dates later.

Attorney Ford is representing the applicant. The property owner is Wakeby Road Realty, Inc. His client is before the Board as lessee. They have applied for a modification permit under Chapter 240-8 of the ordinance, and are proposing an exempt use. He believes this qualifies under Chapter 40A Section 3, which protects the installation of solar energy systems or the building of structures that facilitate the collection of solar energy. It provides that no zoning ordinance shall prohibit or unreasonably regulate the installation of those facilities. A modification permit standard is different than a special permit and variance: the applicant has to show that without the modification they seek, the regulations would substantially diminish or detract from the usefulness of the proposed development, provided the modification will not create a public safety hazard along adjacent roadways or a nuisance among nearby properties such that it would impair the use of those properties. It uses the language: "the Board shall modify," if they make these findings. Rather than 4 out of 5 votes, a modification permit is a simple majority of those present.

This project has a long history. Last year, Town Council amended the zoning ordinance and the zoning map so this site would lie within the Solar Overlay District, where a use like this is permitted. Because an underlying zone is residential, there needs to be a special permit, which they have applied for from the Planning Board. The applicant has been to Site Plan Review where they got conditional approval with the only outstanding issue being further review of access roads by the fire department. They have since

reached an agreement with the COMM Fire Department: the plan will be amended to show a 20-foot access road. The Cape Cod Commission made a determination that no review was necessary as a development of regional impact, because their change of use standard found that the proposed use won't have a substantially different impact on the resources than the existing use.

Attorney Ford is joined by Brendan Reali, an environmental scientist for Atlantic Design Engineers (who prepared the site plans). Mr. Reali walks the Board through a presentation¹ covering existing conditions, obtained approvals/determinations, and a technical summary of the project. Attorney Ford says this is before the Board because they're seeking modification of the setback. He believes it's important to examine the language of the overlay district ordinance as it lays out the 100-foot setback: "...adequate measures to contain and suppress noise and sound." He believes the setback restriction has its genesis in noise, and solar panels don't make noise. Two inverters are part of the project and make some noise, but not much, and neither is near residences. To meet the setback they would need to eliminate almost 2,000 modules, 22.5% of the entire output of the solar array, and over 2 acres of land. He believes that would meet the standard of substantial diminishment. He notes that the land they're seeking a reduced setback from is owned by the town of Barnstable and was purchased for watershed purposes. It will never be developed.

The other item they've applied for modification from is the proposed berms (required under the bylaw to screen the array from the developed abutting properties) falling within the setback. He believes there is ambiguity regarding whether the berms can be within the 150-foot setback. There's an implication that Planning Board has the right to authorize to berm inside the setback. He says the fire access road is also within the setback. The same reasoning applies.

Chair Dewey brings it back to the Board for questions. Mark Hansen asks for the monetary annual value for the lost modules. Attorney Ford doesn't have the number but will look into it—he isn't sure the project is feasible without those modules. Chair Dewey says it's up to the Board to decide what is substantial. Paul Pinard asks for the highest point of the project. Mr. Reali says between 7-9 feet. Paul Pinard asks if the junkyard that is currently there will be removed. Attorney Ford says yes, the proposal includes cleaning the site up and a condition that all other existing uses of the property be discontinued. Herb Bodensiek says putting an access road through the buffer zone shouldn't be considered. He prefers to wait until the next hearing to ask his questions, but feels that the abutters should be the Board's main concern. He is also concerned that the applicant sued the town to get this solar overlay district, and now they are asking for favors. Chair Dewey asks if the abutting town land is watershed. Senior Planner Jim Kupfer says there is a land restriction that it be used for the protection of drinking water. Chair Dewey asks for documentation from whoever holds that land that there is no environmental impact for the public. Mark Hansen requests that that also include the ongoing maintenance of the project. Chair Dewey asks if a recent environmental study has been done to the existing property. Mr. Reali says cleanup was completed from MassDEP in the late 80s or early 90s. There was testing completed on the site but it was limited to fill being brought in. Attorney Ford will provide that for the next meeting. Herb Bodensiek would like to hear from the fire and water departments regarding emergency services.

Chair Dewey opens for public comment. Anne Salas of 145 Mockingbird Lane is an abutter. She says in September of 2019 the DEP letter stated the land was tested and clean. She says TJA is suing the town and for that reason, the town already has made modifications to the bylaw, and now TJA wants to modify the modifications. She believes including the berm and access road in the setback would defeat the purpose. She says the topography of the site as a result of the extreme mining will direct runoff to the neighboring watershed land. That water serves 30,000 people, and the electricity generated from this array will serve only 600 people. She asks the Board to review the maps and information she supplied in her emails. She says the access road will be used daily during construction, and then by Eversource when they acquire the project. She says if Commissioner Florence wouldn't take action to stop 15,000 tons of ocean dredging spoils from being illegally dumped at this site, he would not respond to screening trees being left to die. She says abutters will experience daily torment for the next 30 years. She is concerned about glyphosate being sprayed unannounced yearly, and that runoff going into town water. She asks the Board to vote no to the modifications.

Catherine McDonough of 111 Mockingbird Lane is an abutter and is speaking on behalf of the McDonough family. She says illegal activities have persisted on this property for decades despite court rulings. The land is not clear now because of previous misuse and has not been used for sand and gravel for almost 20 years. All of the vegetation had grown back until a couple years ago when the owner illegally clear cut it so he could falsely claim it was appropriate for solar. Her family has been assured that the amended Solar Overlay Ordinance would not only set a precedent for all other overreaches of this nature, but would protect residents from this type of large-scale commercial operation. She says it's because the land was so severely and dangerously over dug that it now needs an emergency access road. She says when her father told the ZBA about the deposit of dredge soils in 2021, Herb Bodensiek called it sacrilege. She references the train fire that has ruined East Palestine, Ohio, and is afraid for the potential of this large-scale array ever malfunctioning. She and her family invested in their home because of its distance from commercial enterprises, tranquility, and

¹ 810 Wakeby presentation:

<https://itlaserfiche.town.barnstable.ma.us/WebLink/DocView.aspx?id=875013&dbid=0&repo=TownOfBarnstable>

abundance of nature. She says if the solar project is not feasible within the current ordinance, it shouldn't be allowed. TJA is suing the town in an attempt to have the Board disregard what's best for residents and the environment.

Ryan Militia of 23 Dove's Lane is an abutter. He asks if COMM Fire Dept. has been trained for the worst case scenario of a solar field fire. He asks what the purpose is of a watershed property if it will be abutted by toxic chemicals like glyphosate. The vegetative buffer is really only seasonal, and he doesn't think it stands a chance anyway. Regarding the research that was done for short duration fires, where are those fires coming from and are they forest or electrical fires?

Debbie Lavoie of Bay Head Road has lived in Long Pond since 1976. She is not an abutter but she can see and hear the property from her home, and is appalled at what's going on there. She affirms that a few years ago there were many trees and all of sudden they were clear cut. She asks the Board to do the right thing, not the profitable thing.

Councilor Betty Ludtke thanks the members of the public for their research and comments. Councilor Kris Clark says the same.

Steve Hukalowicz of 26 Dove Lane is very concerned but would like to save his comments for the April 12 meeting.

Chair Dewey says there were letters received by the Board from Mike Werbick, Tom Swaida, Eric Schwaab, Nicole Salas, Anne Salas, Nancy Minnigerode, Keith McKeone, Roberta Mauch, Alfred Kobacker, Julie Jones, Steve Hukalowicz, Debbie and George Gwizd, Paula Grimes, Tom Doherty, Dorothy De Young, Fred Clausen, Christine and James McDonough, Catherine & Cody McDonough, and Mary Burkinshaw, all in opposition. Chair Dewey will be keeping public comment open.

Attorney Ford rebuts: there is no plan for Eversource to buy this solar array or spray anything on this property. Whatever conditions come with the permits will be binding, so herbicide limits could be added to conditions. Also, the property currently has a permitted use as a salvage yard, which will go away once it's permitted for solar array. Regarding the litigation, the Board will need to get information from the town attorney—Attorney Ford is not counsel for that. Anne Salas, an abutter, asks who will be taking over if not Eversource. Attorney Ford says an entity, not a utility. He cannot provide any more information than that.

Chair Dewey makes a motion to continue the appeal to April 12, 2023. Herb Bodensiek seconds. Attorney Ford requests that the Board consult with the town attorney regarding a timing issue with the litigation.

Vote:

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

Nay: None

Appeal No. 2023-005 TJA Clean Energy is continued to April 12, 2023.

Correspondence

None.

Matters Not Reasonably Anticipated by the Chair

The Board discusses whether to strictly enforce the rule that if an attorney requests to continue an appeal with less than 24 hours' notice before a meeting, they will need to attend the meeting. They discuss pros, cons, and logistics, and decide to leave it as is.

Upcoming Hearings

March 22, 2023, April 12, 2023, April 26, 2023

Adjournment

Chair Dewey makes a motion to adjourn. Aaron Webb seconds.

Vote:

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

Nay: None

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>