

# Zoning Board of Appeals MINUTES Wednesday, October 26, 2022 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, October 26, 2022, 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:

- The meeting will be televised via Channel 18 and may be viewed via the Channel 18 website at <http://streaming85.townofbarnstable.us/CablecastPublicSite/>
- 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
<a href="https://townofbarnstable-us.zoom.us/j/87035338923">https://townofbarnstable-us.zoom.us/j/87035338923</a>	888 475 4499 US Toll-free
Meeting ID: 870 3533 8923	Meeting ID: 870 3533 8923

- 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](mailto: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](mailto:anna.brigham@town.barnstable.ma.us).

## Call to Order

Chair Jacob Dewey calls the meeting to order at 7:00 PM and takes roll call:

Member	Present	Absent
Dewey, Jacob – Chair	X	
Bodensiek, Herbert – Clerk	X	
Hansen, Mark	X	
Pinard, Paul	X	
Walantis, Todd		X
Johnson, Denise	X	
Webb, Aaron	X	

## Notice of Recording

The Chairman reads: 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

None for approval. Jake Dewey notes that Councilor Clark brought to the Board's attention that there are minutes missing from the town website. Staff is working on them.

## Discussion and vote

### 7:00 PM - Request for Minor Modification Cotuit Residences – Comprehensive Permit No. 2005-100

In 2007, Comprehensive Permit No. 2005-100 was granted for five (5) units of multi-family housing on 2.38 acres. In a letter dated August 26, 2022, Attorney Patrick Nickerson, representing the Condo Association, requested a minor modification of Comprehensive Permit #2005-100 so that the responsibility for maintenance of the existing landscaping is transferred from the Town to the Trust, and so that the Trust may make changes and improvements

to the landscaping and its aesthetics. By permitting this minor modification to the Comprehensive Permit, the Trust will be empowered to make changes, improvements, and maintenance to the landscaping and aesthetics. The Town will also be relieved of its obligation to maintain the existing landscaping. Continued from September 28, 2022.

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

Attorney Patrick Nickerson is representing the applicant. He is joined by Denise Moynihan, President of the Trust, and Molly Kelly, Treasurer of the Trust. Their request is to revert town control over maintenance of the landscape and allow the trustees to make changes. Attorney Nickerson provides some history: after the comprehensive permit was approved in 2007, it became subject to an endorsed disposition settlement agreement, then in 2013 it became subject to a memorandum of understanding. Those placed additional controls on the parcel and limited the Trust's ability to maintain and change its landscaping. In 2018, the Trust submitted a master deed, which allows the Trust to maintain, repair, replace, and alter the landscaping. They are requesting that the Board find that this request is a minor modification and approve the relief requested.

Paul Pinard asks if the work the Trust requested relief for last time has been done. The applicant and Building Commissioner Brian Florence confirm that the work was done. The Commissioner adds that when the applicant applied for the permit, it was the Commissioner's understanding that they planned to make this request that is now before the Board. The memorandum of understanding was never meant to be permanent but unfortunately, that's not the way the language read—it was just an oversight. When the current President came for the building permit, the Building Department suggested correcting the language on the record. Paul Pinard supports approval.

**Jake Dewey opens for public comment.** None. Principal Planner Anna Brigham says that public comment is not required as this is just a discussion and vote.

Jake Dewey makes a motion that they find this request as a minor modification to Comprehensive Permit 2005-100. Herb Bodensiek seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Aaron Webb**

**Nay: None**

Jake Dewey makes a motion to approve the request for minor modification to transfer the power of maintenance from the town to the Trust. Paul Pinard seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Aaron Webb**

**Nay: None**

**Request for Minor Modification – Comprehensive Permit No. 2005-100 is approved.**

## **New Business**

**7:01 PM**

**Appeal 2022-049**

**Sundelin et al**

Richard Sundelin, Samantha Gray, and Damion Murray have filed an appeal of an Administrative Official's Decision in accordance with Section 240-125B(1)(a). The Building Commissioner issued a Notice of Zoning Violation and Order to Cease & Desist on August 25, 2022 which stated that a pre-existing, nonconforming auto body shop has expanded in scope, size and volume in violation of Section 240-94 B.; there has been an expansion of a pre-existing business and parking area without Site Plan approval; and the results of the expansion necessitated the re-design and reconfiguration of the pre-existing parking lot and was accomplished without Site Plan Review approval in violation of 240-100 C. & D. The subject property is located at 970/972 Main Street, West Barnstable, MA as shown on Assessors Map 156 as Parcel 026. It is located in the WBVBD Zoning District.

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

Attorney David Lawler is representing the applicant. He, the Chairman, Building Commissioner Brian Florence, and Assistant Town Attorney Kate Connolly discuss whether the burden is on the applicant or the Building Commissioner to prove their case first. It is decided that the responsibility lies on the applicant, so Attorney Lawler presents. He introduces those with him: Richard Sundelin, the owner of the property; Sam Geoffrion, the manager of the abutting business; Neil Atwood, the previous owner of the auto body shop; and Damion Murray, the current owner of the auto body shop. Attorney Lawler provides background: the property has been an auto body shop since before 1940. It is preexisting nonconforming use with respect to a repair shop. He says the real issue is the claim that the expansion of the business is in itself a zoning violation. There are two parts to his argument: he believes there has not been an expansion of business, and he believes even if there was, it would not be a zoning violation.

Attorney Lawler references a document entitled *Westlaw: Cape Resorts Hotels, Inc. v. Alcoholic Licensing Board of Falmouth*, specifically the last paragraph of page 6, where it says, "...while it is true that a use is not different in kind simply because it's bigger..." That case references *Building Commissioner of Medford v. McGrath*, where the opinion is that, "the use of the premises for a riding school was an existing nonconforming use at the time of the adoption of the zoning ordinance and hence was unaffected by the ordinance. There was no change in use. There was so far as appearance no alteration of the building. It has been decided that a nonconforming use of the same premises may not only continue but also increase in volume." He believes that this is good law and that the alleged violation itself does not constitute a violation of zoning.

Attorney Lawler reiterates that the business has not increased. He shows the Board comparison photos of the premises from the 1990's and 2014. There are many cars on the lot in both images. The images Attorney Lawler sent from present day do not open due to an incompatible file format, but he explains that the buildings look identical and the premises are in a relatively neat and orderly condition.

Attorney Lawler is joined by Neil Atwood, who ran the auto body shop from 1975-2019, including when the older photos were taken. Mr. Atwood says that while everything in the affidavit he submitted is true, there is additional information that is not included because he was not asked about it. When Mr. Atwood retired in 2019, he had slowed down the business and cleared out the property, but his business used to be very similar to how it is today. They worked whenever they had to work, including nights and weekends outside of their standard work hours. They worked outside and left doors and windows open while working. He loaned the shop out at night/off hours to people who would use it while he wasn't there. He was also part of a classic car enthusiast group, the Shark City Lugnuts, who had a designated meeting on Thursday nights for 20 years. The group hung out and played music, and the neighbors never complained and were welcoming. The business had busy times and lulls.

Mr. Sundelin is the owner of the property and also worked at the shop in the 90's and has lived within a few miles for 64 years. Mr. Sundelin has been friendly with all owners of the auto shop. He says Mr. Murray painted the building and cleaned the building and premises, but hasn't changed the building or parking area from what he can tell. Mr. Sundelin adds that around the time of Mr. Atwood's retirement, Mr. Atwood stopped bringing in work, so the level of Mr. Murray's business seems higher in comparison although the level is similar to Mr. Atwood's busy times.

Sam Geoffrion owns 990 Route 6A, the property directly abutting. She put up the fence between the properties 3 years ago when she was upgrading the exterior of her property. She worked in Unit 4 of that building from 1987-1989 and the cars were near the property line at that time too. She says the property line has been fluid between neighbors since the 1980s. She has 4 tenants in the building and visits frequently. She agrees that the building was painted and cleaned since Mr. Murray took ownership. The amount of vehicles is about the same, and has never been a bother. The tenants have never complained. There is no noise, and she has never seen them selling cars.

Mr. Murray says he sells car at a different location, but he is not doing anything at this location other than auto repair. The business hours are 8 AM-5 PM but similarly to Mr. Atwood, sometimes he will stay later to get the job done. He recounts his experiences with the police being called because of noise complaints: the police officers said they were called so frequently that they started walking up the street rather than driving to see if they could hear or see anything,

but found no violation. The police have been by on numerous occasions due to complaints but have never found a violation.

Attorney Lawler concludes that it is his position that the business has not expanded and even if it had, based upon the cases he's submitted (Building Commissioner of Medford v. Earl McGrath; Cochran v. Roemer; and Cape Resorts Hotels, Inc. v. Alcoholic Licensing Board of Falmouth), it's allowable under the law.

Herb Bodensiek wants to clarify that Samantha Gray, an apparent appellant, is actually in support of the Commissioner. Attorney Lawler clarifies that the only appellant is Damion Murray. It is an error that Samantha Gray and Richard Sundelin were included as appellants on the application.

Attorney Kate Connolly adds that the three cases Attorney Lawler cited are cases that talk about the three-prong test used to determine whether a current use of a property is protected as a nonconforming use:

1. Does the use reflect the nature and purpose of the use prevailing when the zoning bylaw took effect?
2. Is there a difference in the quality of character as well as the degree of use?
3. Is the current use different in kind in its effect on the neighborhood?

There's a 1988 case that says, "An existing use will lose the protection afforded to a nonconforming use for failure to satisfy even one of these tests." Attorney Lawler respectfully disagrees.

Commissioner Florence addresses the Board. The appellant was first introduced to the Commissioner when Mr. Murray asked if he could sell cars at this location. The Building Dept. explained to him that the use can be expanded by special permit, and it would be required to go before the ZBA for expansion of preexisting nonconforming use. In 2018 and 2019, the Building Dept. started to receive complaints about this property. They investigated and disagreed that it was an expansion and refused to enforce. Complaints continued in 2021, when his office confirmed the expansion of use and saw vehicles for sale and a buildup of traffic. The Commissioner sent the notice of violation and explained they needed to cease the activities that were an expansion of business and stop selling vehicles, but that they could go to ZBA and request relief. They did not do that, so the town started a court action. In December 2021, an agreement was made with Attorney Lawler that the Commissioner would withhold violation while Attorney Lawler applied for the special permit to increase the scope of the work. Attorney Lawler interrupts to vehemently assert that he never agreed to apply for a special permit. The Commissioner raises a point of order and continues that as he recalls, the intent was to dismiss the court case against the petitioner so they could seek a special permit. Instead they filed a petition to overturn his decision. In parallel, Cape Quality Collision has filed with the licensing board for their business Cape Quality Cars to expand the business. The Commissioner says the cars are coming into Cape Quality Collision, being fluffed and buffed, and being sent over to Cape Quality Cars. That is an expansion of use at this location. Additionally, they are not being good neighbors, are not being forthright in their dealings with the Building Department, and are violating ordinances. The Commissioner also recommends when reading Westlaw to read it in its entirety, because it says the increase must be attributable to growth. But the growth in this case is attributable to Mr. Murray's work to supply his other business with more vehicles. Commissioner Florence presents the Board with a series of photographs of the property through the years to show the expansion and addition of what he calls a junkyard. He says it is clearly an expansion of use and if the petitioner wants the relief to expand, they need to ask the ZBA for permission.

Attorney Lawler clarifies that the agreement with Town Council was that the criminal complaint would be withdrawn and the violation would reissue in a civil manner and Attorney Lawler would appeal it to the ZBA. He believes Commissioner Florence made an honest mistake in his claim, but feels it is important to clarify for the record. With regards to expansion of use, Attorney Lawler asks Mr. Atwood if he ever fixed cars intended for resale. Mr. Atwood answers yes, all the time. Attorney Lawler also disputes that the petitioners were selling vehicles there. If there was an occasion the Commissioner saw a car for sale, the petitioner stopped when he was notified that it was a violation. Attorney Lawler shows a photograph from 2014, where there's a camper in the yard and vehicles in the woods. He says his client defoliated the area so you can see into the woods more, but there have always been cars stored in the woods. His clients would be happy to put up a stockade fence on the left. If there was a car carrier there on one or two occasions, that's not enough to claim expansion of use. He feels there has been no change in use and so they don't need a special permit. He also believes that his client owning an additional auto sales business and being a client of himself

has nothing to do with use. If the vehicles are cleaned and repaired at this location and then duly transported to Hyannis to be sold, that is not a change. Mr. Atwood, who ran the business for 50 years, is saying it was the same business—that is the best evidence of what Mr. Atwood’s business was. Attorney Lawler suggests that the music changed from Bruce Springsteen to Jamaican music, and that’s when the complaints started. The previous owner of the business for 50 years, the direct abutting neighbor, and the property owner are all saying the business has not expanded. The short amount of time the Building Commissioner observed is not enough.

Attorney Connolly adds that she was not at the hearing but the agreement was to dismiss the case and the applicant would appeal a new order of the Building Commissioner, so he issued a new order and that’s what the appeal is.

**Jake Dewey brings it back to the Board for questions.**

Paul Pinard seeks clarification on whether the violation involves change of use. Commissioner Florence says the violation is expansion of use, not change of use. Attorney Lawler explains that he was using the phrase “change of use” as “expansion of use.” Herb Bodensiek asks the Commissioner if he personally saw car carriers and traffic being blocked traffic. The Commissioner confirms that he did. Aaron Webb asks if the adjacent red-roofed building is part of the business. Attorney Lawler explains that Mr. Sundelin owns and lives in that home; it is not part of the business. Mark Hansen asks how often business is undertaken outside the hours of 8 AM-5 PM. Mr. Atwood says he used to do it quite often. Mr. Murray says he sometimes goes in early for paperwork, and they do some late hours, mostly weekends. Mark Hansen asks whether there’s work being done outside the building. Mr. Murray says sometimes they will work on personal projects outside. Mr. Atwood says he did work outside if he didn’t have space inside.

Paul Pinard asks if there is any ordinance that this business is constrained by, where they would not be allowed to work outside their listed business hours. The Commissioner says no, there are no ordinances that would affect that except the peace and good order ordinance. Attorney Lawler adds that that is why he brought up that the police had been called and never issued a violation—because the police deemed that his client is not violating that ordinance.

**Jake Dewey opens for public comment.**

Attorney John Kenney addresses the Board representing four neighbors: Nancy Trafton, Samantha Gray, Roberta Gough, and Patrick Watson. He believes the business has expanded. He agrees with Attorney Connolly about the three-prong test, and does not think the current use matches the original use. He says Cape Quality Collision has converted the use to body work, engine degreasing, automotive work like brake jobs, oil changes, tune ups, and car detailing. He claims the applicant does these outside with no proper containment for water. His clients have seen cars for sale. He believes the business is different in nature and use, and is different in quality and character. He shows images submitted by an abutter of debris and car parts in the yard, a lack of ventilation systems, liquids leaking from cars outside. Abutters are concerned about hazardous fluids entering their well systems. The hours do not match the hours on Mr. Atwood’s affidavit, and Attorney Kenney believes the nonconforming use is regulated by its effect on the neighborhood—working late at night and partying affects the neighborhood. They have between 8-10 employees, they work outside and out of business hours, spray paint vehicles outside, there’s increased noise, increased noxious odors, and there are concerns about groundwater quality and possible pollution.

Samantha Gray lives at 960 Main Street and is a direct abutter. She moved to this house in the spring of 2015 and knew there was a small auto body shop next door, and its yard was rustic and overgrown. She would on occasion hear vehicles late at night and smell fumes, but never saw anyone working in the yard or daily movement of vehicles. In 2019 she started to see violations: expansion of hours and type of work being done 7 days a week; cars for sale; cars being moved and employees yelling after hours routinely; derelict vehicles and large piles of auto parts; clearing an abutter’s lot behind the shop and putting junk there; routinely working outside creating fluid runoff; and noxious fumes outside. She is concerned about her well water, the Great Marsh ecosystem, the health of her family, the historic character of the community, and the safety at the intersection because of large vehicles obstructing the view.

Attorney Kenney adds that there is an additional recent structure that he doesn’t think was approved by Old Kings Highway or Site Plan Review.

Paul Pinard asks again for clarification whether business hours are restricted to the hours of the previous ownership. Attorney Kenney says his opinion is that they are limited to those hours because going beyond those hours affects the neighborhood and makes the business fail the three-prong test. Paul Pinard wants to correct the record that despite Attorney Kenney's opinion, the applicants are not technically restricted to the prior business' hours.

Patrick Watson owns 976 Main Street, a 3.5 acre parcel behind the liquor store and auto body shop. He says what used to be the grass separation between the auto body shop and the liquor store parking lot was his access and had an easement, and has now been paved. He bought the land in 1999 and believes there was not this much junk there ever until recently. The auto body shop has encroached onto his property about 10 feet, and his land has lost plants and vegetation. He is concerned about hazardous materials. He believes the new owners need to survey their property and put up a fence. He had tried to sell his land but the buyers walked away because of this.

Heather Malconey lives at 150 Lombard Ave. She addresses Attorney Lawler's comment about the change in music as a veiled suggestion of racism, which offended her. She does not think this issue has anything to do with race. She thinks the business has changed: it's a lot busier and it looks junky. She says she's seen cars for sale, up until 5 or 6 weeks ago. She is also concerned about the environment.

Councilor Kris Clark is a Town Councilor for Precinct 11. She supports the Building Commissioner and has received complaints over the expansion here. It affects community character, property bounds, the marsh, and the integrity of the water quality of the estuary.

Bill Plettner lives on Willow Street in West Barnstable. He has known this property for 27 years. He thinks the Commissioner and Attorney Kenney are showing pictures of the property during the last owner's retirement stage, when he had slowed business down and was trying to sell. Mr. Atwood had a flourishing business at one point, so it's unfair to only compare the current business against those slow years. He believes that comparison has been manipulated. What's in the yard is not junk, it's car parts—they have to be somewhere. He says they shouldn't be on a neighbor's property, but it's not unusual for that business or that property to have parts around. He did business with Mr. Atwood and is very familiar with the property. He doesn't see any expansion. He believes over the years, sometimes there's more cars and sometimes there's less. It's the same use as it's been for years.

The Chairman reads that the Board received letters from Nancy Trafton and Samantha Gray, an affidavit from Peter Sundelin, and a petition with 50 signatures of residents, all supporting the Commissioner's decision.

Attorney Lawler rebuts: the parking area that was paved belongs to 990 Rt. 6A and the easement is on 990 Rt. 6A, not on Mr. Watson's land. Regarding the petition, this is not a popularity contest. It's an issue of the facts. In regards to the environmental issues, the DEP has tested the land twice and there's been a 21A on the property, and they came back clean. Respectfully, that's not in the jurisdiction of this Board. Regarding fumes, it's an auto body shop. The parts have to be stored on site and recycled as indicated. Regarding the car carrier, that's how cars are transported. Mr. Atwood's cars were delivered by car carrier as well.

Jake Dewey makes a motion to close public comment. Herb Bodensiek seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Aaron Webb**

**Nay: None**

**The Board deliberates.** Aaron Webb thinks both parties have presented their case clearly. He thinks all that's happened here is a natural increase in business, and that's unfortunately causing quality of life issues amongst neighbors. He's not sure how to judge yet. Paul Pinard asks what the penalty would be if they upheld the Commissioner's decision. Commissioner Florence responds that if it's upheld, the appellants can appeal to court, or they can go before the ZBA for a special permit. The business will stay open during that time.

Mark Hansen thinks it's more a case of not being good stewards of the neighborhood rather than expansion. He believes these complaints don't just come out of nowhere and there has clearly been an effect on the neighborhood. He is questioning whether it has truly been shown how the business has been expanded.

Herb Bodensiek says his concerns are trespassing, air quality, and water quality. Spray painting outside is unacceptable. He finds the hazardous water runoff appalling. The use of a car carrier makes him think it's an expansion of use. He supports the Commissioner on that alone. He asks for clarification about the three-prong test and whether an applicant loses their preexisting nonconforming use protection if they fail to prove. Attorney Connolly clarifies that she was referencing the case of Bridgewater v. Chuckran and Powers v. Barnstable. They set forth a three-prong test that says that if the expansion does not meet all three of the prongs, then the preexisting protection is lost. Chapter 40A Section 6 is the statute: the zoning ordinance or bylaw shall apply to any change or substantial extension of such use...there exists a three-part test for determining if the current use of property is protected as a nonconforming use, from Bridgewater v. Chuckran. She rereads the three prongs of the test. Another case, Green v. Board of Appeals of Provincetown, says an existing use will lose the protection afforded a nonconforming use for failure to satisfy even one of these tests. There are additional cases that set forth the same three-prong test from the Bridgewater case. Herb Bodensiek feels it is a clear-cut expansion of use, among a number of other violations. He is appalled.

Jake Dewey says repairing more cars is expected and encouraged. Where he struggles is looking at GIS maps comparing 1985-2014, and seeing in recent years a clear expansion into the back area for car storage or junkyard, versus what it was before: cars that were actively being repaired close to the building. There also seems to be storage of other things (a boat, a Bobcat, some machinery). He doesn't think it has stayed within the same degree of use. He feels there is a strong case made by neighbors for how it's affecting the neighborhood. It was an acceptable scale of business before, but it has expanded to an unacceptable scale. Mark Hansen agrees.

Aaron Webb thinks a car carrier or tow truck is normal for an auto repair business. Jake Dewey thinks cars are being dropped off in great number, potentially to be repaired and sold at Cape Quality Cars, and are being stored at the property in question, which is not what the prior business did. Herb Bodensiek says a business receiving car carriers full of cars is not the same as a mom and pop auto body shop. He thinks the Board needs to consider their responsibility to other regulatory agencies and the fragile ecosystem.

Attorney Lawler requests to continue this item and potentially negotiate offline. He believes concluding the case tonight could put his client out of business. Commissioner Florence would like to conclude the case tonight. He says Attorney Lawler and his client still have all the same options: apply for a special permit to expand, appeal the matter to court, or clean up the yard and reduce the scope of work. He says the town does not want Mr. Murray out of business. The Board expresses confusion over Attorney Lawler's request for continuance and how that would change the situation, and why he thinks a decision would shut down his client's business permanently. Attorney Lawler is concerned about Attorney Connolly's comment that failure to pass the three-prong test would result in losing the protection afforded a nonconforming use. Attorney Connolly says she simply cited that case but it is still this Board's determination whether this is an acceptable expansion. His clients would still be in a position to file a special permit.

Aaron Webb expresses frustration that there are no clear parameters for the size of the business. How many cars are they allowed to have? There's no guideline for what will satisfy the Building Commissioner or neighbors. Jake Dewey says one of the prongs is the business's effect on the neighborhood, and there seems to be clear evidence that there is a negative effect. Aaron Webb says there is also evidence from a neighbor who lived there for 27 years who disagrees that it's changed or is a detriment to the neighborhood. He is torn because there are no specific parameters that they can tell the owners to meet. But he is in agreement to move forward with a decision.

Herb Bodensiek makes a motion to deny the request for a continuance. Paul Pinard seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Aaron Webb**

**Nay: None**

Paul Pinard makes a motion to uphold the Building Commissioner's decision. Mark Hansen seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Aaron Webb**

**Nay: None**

Paul Pinard wants to clarify that he saw no signs nor heard any word of racism. He feels the Board made a decision based on the facts presented. The Chairman agrees.

**The Building Commissioner's finding for Appeal 2022-049 Sundelin et al is upheld.**

**7:02 PM**

**Appeal 2022-051**

**Schulz, Trustee of Race Mill Realty Trust**

Michael F. Schulz, Trustee of Race Mill Realty Trust, has petitioned for a Variance pursuant to Section 240-14E – Bulk Regulations footnote 2. The Petitioner proposes a subdivision of land where a parcel has a proposed lot area of 72,600 square feet where 87,120 square feet is required. The subject properties are addressed as 7 Millrace Rd, 1479 Race Ln, 1465 Race Ln, 1451 Race Ln, 1437 Race Ln, 12 Old Mill Rd, 6 Elmwood Dr, 20 Elmwood Dr, 34 Elmwood Dr, 27 Camelback Rd, 11 Camelback Rd, as shown on Assessor's Map 064 as Parcels 071, 072, 073, 074, 075, 076, 077, 094, 095, 096, and 097. The lots are located in the Residential F (RF) Zoning District.

Sitting on this will be Jake Dewey, Herb Bodensiek, Mark Hansen, Paul Pinard, and Denise Johnson.

Attorney Michael Schulz, Trustee of Race Mill Realty Trust addresses the Board. The property is lacking 5,932 square feet to achieve 3 compliant 2-acre lots. Attorney Schulz had submitted a memorandum to the Board dated October 21, 2022. The properties are shown as lots 5, 6, and 7 on Land Court Plan 37712-B sheet 2, and are a portion of a 60-lot subdivision that was created in 1980. In 1980 the Roman Catholic Church of Fall River purchased 12 lots: lots 1-7, 22-25, and lot 61 from the original developer. At the time of the purchase, the Roman Catholic Church had 11 conforming lots, all of .5 acre or more. Since the creation in 1980, all of the lots in the subdivision have been developed with the exception of the 11 lots. Although conforming in 1980, the zoning amendments of 1985 and 2000 merged a portion of the lots. The town Assessing Division taxes each of the 11 lots separately. As shown in the proposed plan by Hayes Engineering, the petitioner is proposing an effective division of the land, which would not create any new lot lines but would clarify the merged lot lines. The proposed Lot A would reflect a combination of 4 lots and would contain over 2 acres of land. The proposed Lot B would reflect a combination of 4 lots and would contain over 2.1 acres of land. The proposed Lot C would be just shy of 2 acres at 1.667 acres and would be comprised of 4 lots. The properties are surrounded on all sides by roads, which prevent the ability to acquire more area to make proposed Lot C conforming. Attorney Schulz suggests that a shape issue does exist due to successive mergers creating unclear lot lines and configuration of the 11 conforming lots. The hardship is the time that would be lost by needing to go through Land Court. Clarifying lot lines is in the public interest and would not be a detriment to the neighborhood.

Paul Pinard asks for clarification that all the other lots in the subdivision are developed. Attorney Schulz confirms. Paul Pinard asks if all the other lots are less than 2 acres. Attorney Schulz confirms: they are all almost exactly .5 acre. Paul Pinard asks if the 2 conforming lots have been merged already or if that is dependent on all three being approved. Attorney Schulz answers that they have not been merged and it is dependent on all three being approved. Paul Pinard suggests that if the Board decides to approve, they a condition that it's contingent upon the consolidation of the other two lots as proposed.

Jake Dewey asks what the affordable component required for this would be. Attorney Schulz clarifies that they are not creating any housing or lots, they are just unmerging lots 5, 6, and 7, because the other lots are already conforming. The problem is there was no real rhyme or reason as to how the lots were merged. The lot lines were merged to be made compliant to 2-acre zoning, but the complying lot lines aren't evenly divided. The Chairman summarizes that by right, they can create 2 lots, and if the Board grants this variance, they can create 3 lots. Mark Hansen asks if the lots are for development or for sale. Attorney Schulz responds either or.



**Jake Dewey opens for public comment.**

Christopher Cooley of 9 Old Mill Road addresses the Board. His concern about this development is the location of the driveways, because there is a dangerous intersection there. Jake Dewey asks Attorney Schulz if they considered frontage road access when they were dividing the proposed lots. Attorney Schulz answers that it was merely an effective compilation of the lots without altering any lot lines. They would be willing to add a condition to prevent curb cuts off Race Lane or Old Mill Road. Mr. Cooley says that would satisfy his concern.

Dave Morin of 20 Millrace Road addresses the Board to ask if the property will be single family housing, meaning there will be three single-family houses added. Attorney Schulz confirms. Mr. Morin asks if the look and the price range will be in keeping with the rest of the neighborhood. Attorney Schulz confirms. Jake Dewey adds that they could add a condition for that, but the main restriction is that the structures are single-family houses.

Jake Dewey makes a motion to close public comment. Mark Hansen seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Denise Johnson**

**Nay: None**

The Board deliberates. Mark Hansen expresses a general concern that cases like this are coming before the Board more frequently, and the Board is creating value by giving variances. He wonders if petitioners would be open to making some sort of donation toward the Affordable Housing Trust or something in that vein. Jake Dewey supports that idea and adds that the petitioners bought the property knowing they could only build two houses, so the Board would be giving a bonus density. The Board and Attorney Schulz discuss how to make an effort toward supporting affordable housing in this scenario. Paul Pinard thinks it's a good idea but that it's the purview of Town Council. Rick Fenuccio, the owner, addresses the Board to say he's a local architect who has been involved in housing for 35+ years on Cape Cod. He does not think his partners would be opposed to making a donation. He doesn't know how to put a formula to it, but he wants to put forward that if the Board grants the variance, he and his partners will give serious consideration to making some level of donation to the Affordable Housing Trust.

The Board discusses whether this passes the three-prong test. Paul Pinard believes it does. Mark Hansen agrees because it's surrounded on all sides by roads, making it impossible to expand the lot to make it conforming.

**Paul Pinard makes findings for Appeal No. 2022-051:**

Michael F. Schulz, Trustee of Race Mill Realty Trust, has petitioned for a Variance pursuant to Section 240-14E – Bulk Regulations footnote 2. The Petitioner proposes a subdivision of land where a parcel has a proposed lot area of 72,600 square feet where 87,120 square feet is required. The subject properties are addressed as 7 Millrace Rd, 1479 Race Ln, 1465 Race Ln, 1451 Race Ln, 1437 Race Ln, 12 Old Mill Rd, 6 Elmwood Dr, 20 Elmwood Dr, 34 Elmwood Dr, 27 Camelback Rd, 11 Camelback Rd, as shown on Assessor's Map 064 as Parcels 071, 072, 073, 074, 075, 076, 077, 094, 095, 096, and 097. The lots are located in the Residential F (RF) Zoning District.

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;
2. A literal enforcement of the provisions of the zoning ordinance would involve substantial hardship, financial or otherwise to the petitioner; and
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.

Mark Hansen seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Denise Johnson**

**Nay: None**

Paul Pinard reads that the appeal is subject to conditions 1-5 on the Staff Report dated October 6, 2022. He adds conditions 6 and 7:

6. There will be no egress or ingress to the three proposed lots from Race Lane or Old Mill Road.
7. This approval is contingent on all three parcels being formed as proposed: two conforming lots and one nonconforming lot.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Denise Johnson**

**Nay: None**

**Variance No. 2022-051 Schulz, Trustee of Race Mill Realty Trust is granted with conditions.**

#### **Correspondence**

Anna Brigham had previously forwarded to the Board a zoning training opportunity.

#### **Matters Not Reasonably Anticipated by the Chair**

The Chairman introduces Councilor Kris Clark, who has been appointed Town Council Liaison for the ZBA.

2023 Schedule: The Board members will review and send any conflicts to Anna Brigham. The Board discusses whether they should hold their 2023 meetings in person or remote, but does not decide.

#### **Board Election**

Paul Pinard nominates Herb Bodensiek for Vice Chair. There are no other nominations.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Denise Johnson, Aaron Webb**

**Nay: None**

Herb Bodensiek nominates Paul Pinard for Clerk. There are no other nominations.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Denise Johnson, Aaron Webb**

**Nay: None**

#### **Upcoming Hearings**

November 9, 2022, December 7, 2022 – both are virtual.

#### **Adjournment**

Denise Johnson makes a motion to adjourn. Herb Bodensiek seconds.

**Vote:**

**Aye: Herbert Bodensiek, Paul Pinard, Mark Hansen, Jacob Dewey, Aaron Webb, Denise Johnson**

**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>.