

Final

Wellfleet Zoning Board of Appeals

October 12, 2023, 7:00 pm

In person and Zoom meeting held at the Adult Community Center

An Executive Session took place at 6:15.

Board Attendees: Chair Sharon Inger, Vice Chair Trevor Pontbriand, Janet Morrissey, Theodore Heyliger, C. Wilson Sullivan, Mick Lynch, Al Mueller

Also in attendance: Carolyn M. Murray, Mark Tocchio, Jennifer Elsensohn, Committee Secretary

Regrets: Andrew Freeman

Manny Heyliger made a motion to call the Executive Session pursuant to G.L.c 30A, Section 21(a)(3) “to discuss strategy with respect to...litigation if an open meeting may have a detrimental effect on the...litigating position of the public body and the chair so declares” with respect to Great White Realty Group v. Wellfleet ZBA Land Court Case No. 21 MISC 000255, Case No. 22 MISC 000087 and Case No. 22 MISC 000284 regarding the property located at 1065 State Highway Route 6. The Board will discuss and deliberate as to litigation strategy and the order of remand. The motion was seconded by Mick Lynch. A roll call vote was taken: Sharon Inger, aye; Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye; Mick Lynch, aye; Al Mueller, aye. The motion was approved 7-0. Sharon Inger called the Executive Session to order at 6:15 pm.

Mick Lynch made a motion to adjourn the Executive Session. The motion was seconded by Al Mueller. A roll call vote was taken: Sharon Inger, aye; Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye; Mick Lynch, aye; Al Mueller, aye. 7-0. The Session was adjourned at 6:54.

Public Hearings

Board Attendees: Chair Sharon Inger, Vice Chair Trevor Pontbriand, Janet Morrissey, Theodore Heyliger, C. Wilson Sullivan, Mick Lynch, Al Mueller

Also in attendance: Carolyn M. Murray, Esq., Benjamin Zehnder, Esq., David S Reid, Esq., Mark Tocchi, Esq., Ann Freyss, Christopher Seni, Esq., Patty Lemme, Laura Kozak, Kevin Coakley, Steve DiGiovanni, Jennifer Elsensohn, Committee Secretary

Regrets: Andrew Freeman

7:00 pm

Sharon Inger set the board for the hearing: Jan Morrissey, Wil Sullivan, Al Mueller, Trevor Pontbriand, and Manny Heyliger.

23-15, Freyss, 26 Hamblen Farm Road, Map 12, Parcel 12-24-0: Applicant requests Special Permit pursuant to Wellfleet Zoning Bylaw 6.1E.1 to alter a pre-existing, non-conforming dwelling on their property by rebuilding with alterations to use as a year-round rental. (continued from September 14, 2023)

The Board had viewed the updated plans provided by Ann Freyss and had no questions or comments on them. Freyss had nothing additional to present and there were no comments from abutters.

Manny Heyliger made a motion to move to findings of fact. The motion was seconded by Trevor Pontbriand and a roll call vote was taken: Jan Morrissey, aye; Wil Sullivan, aye; Al Mueller, aye; Trevor Pontbriand, aye; Manny Heyliger, aye. 5-0.

Findings of Fact:

1. The applicant owns a parcel of land in a Residential Zone upon which are two residential structures, one of which is the homestead of the applicant and the other is a residential structure which in the past has been occasionally rented out as a seasonal cottage. The rental structure is not suitable for year round use.

Both existing structures are pre-existing and nonconforming as they were built years before zoning bylaws were created by the Town of Wellfleet.

The applicant proposes to raze the existing rental structure containing 882 square feet and replace it with a 1544 square foot structure, hereinafter referred to "the improvements".

Although the footprint will be expanded there will be no increase in the setback non-conformities. The existing nonconformities are the east side setback (20.9 feet where 25 feet is required.) and the rear setback (9 feet where 30 feet is required.)

The lot coverage will increase from 10.6 % to 11.6% where 15% lot coverage is allowed.

2. There were no appearances or correspondence in support for / in opposition to the application.

4. There was one objection from an abutter.

5. The Board has made a site visit of the property.

6. The applicable provisions for this application under the Town of Wellfleet Zoning Bylaws are Section 5.4.2, Section 6.1.E (1)(b) and Section 8.4.2.

7. Section 6.1.E (1)(b): The Board finds that the construction of the improvements is not substantially more detrimental to the neighborhood than the existing non-conforming structure.

8. Section 8.4.2: The Board finds that the benefits derived from the construction of the improvements outweigh any adverse effects from said construction.

9. Section 8.4.2.1:

A. The Board finds that the improvements are suitable in that they are compatible with nearby land uses which would not be damaged by the construction of the improvements.

B. The Board finds that the roads, drainage, and other public utilities would not be affected by the construction of the improvements.

C. The Board finds that the construction of the improvements will not contribute to environmental damage.

10. Section 8.4.2.2:

Not applicable

11. Section 8.4.2.3:

The Board finds that the improvements will not adversely affect scenic views from public ways or neighboring properties.

Trevor Pontbriand made a motion to accept the Findings of Fact. Manny Heyliger seconded the motion, a roll call vote was taken: Al Mueller, aye; Jan Morrissey, aye; WilSullivan, aye; Trevor Pontbriand, aye; Manny Heyliger, aye. 5-0.

Trevor made a motion to grant the Special Permit. The motion was seconded by Mick Lynch. A roll call vote was taken: Al Mueller, aye; Jan Morrissey, aye; Wi Sullivan, aye; Trevor Pontbriand, aye; Manny Heyliger, aye. 5-0.

7:08 pm

Sharon Inger set the Board for the hearing: Manny Heyliger, Trevor Pontbriand, Wil Sullivan, Janet Morrissey, Mick Lynch.

23-16, Carter, 94 Hiller Ave, Map 20, Parcel 71, applicant seeks a special permit pursuant to MGL. C 40A, s. 6, and Wellfleet Zoning Bylaw s. 235-6.1(E)(1)(b) and s. 235-8.4(b) to alter a pre-existing, non-conforming garage on a pre-existing, non-conforming lot to add one story of studio space with loft space above.

Attorney Zehnder spoke on behalf of the homeowner and asked for a continuance because he had received a phone call from the abutter's counsel, and they will meet to discuss the plans and the abutter's concerns. Christopher Seni, the counsel for the abutter was present and asked for permission to present his client's concerns. The main concerns are the proximity of the existing garage to their property and a valued tree, as well as the proposed garage and addition. Currently, the existing garage ranges from 1.2 feet to 6 inches to the property line. The new plans bring the footprint to within 1.4 inches from the property line. The new area with proposed loft will add 9.2 feet to the height of the building. The plan violates Section 6 of the bylaw, could be

substantially more detrimental and invades all of the setback requirements. Seni's client would like to explore different options to make this project less detrimental; perhaps moving the garage over, and/or making the building narrower. Zehnder and Seni will discuss possibilities.

Board members indicated that they would not have been in favor of the plan as it had been presented. While it would replace an eyesore, the height and location are concerning. It was noted that two parking spaces must be available on the property. Zehnder acknowledged this.

Trevor Pontbriand made a motion to continue the hearing to November 9. The motion was seconded by Mick Lynch. A roll call vote was taken: Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye, Mick Lynch, aye. 5-0.

7:17 pm

Sharon Inger set the Board for the hearing: Sharon Inger, Manny Heyliger, Trevor Pontbriand, Wil Sullivan, Janet Morrissey.

21-13, 21-14, 21-15, 22-02, and 22-09, Great White Realty LLC, 1065 State Highway 6, Map 36, Parcel 184 REMAND

Upon the Order of Remand issued by the Land Court in the matters of Great White, et al v. Wellfleet ZBA, et al., C.A. Nos.21 MISC 000255, 22 MISC 000087 and 22 MISC 000284 regarding the property located at 1065 State Highway in Wellfleet, MA, as shown on Assessors Map 36, Parcel 184, the Wellfleet Zoning Board of Appeals will hold a hybrid public hearing for the purpose of reconsidering their prior decisions in Case Nos. ZBA 21-13, 21-14, 21-15, 22-02, and 22-09 relative to zoning enforcement actions and prior denials of Special Permit Applications for Bulk Storage, Open and More than One Principal Use on a Lot. The ZBA will reconsider whether and under what conditions Great White and/or its tenant may operate a contractor's yard as of right at the Property, including the imposing of conditions thereto, and whether to grant a special permit for Bulk Storage, Open pursuant to Wellfleet Zoning Bylaw Section 235-8.4.B and More than One Principal Use on the Same Lot pursuant to Section 235-5.4(N). The property is located in the Commercial zoning district.

Mail:

The following individuals sent letters of disapproval of the plan put forth by Attorney, Benjamin Zehnder:

Christine Woods, Patricia Lemme, Lewis Wise, Dr. Allen Flaxman and Professor Rhoda Flaxman, Laura Kozak, Paul Kandel, Marian Knapp, Lisa Monahan, Deborah O'Neill, The Geffins, Jim Burrows, Catherine A. Corman, Markus L. Penzel, Kevin Coakley, Victory and Frances Riedy, Herb and Elizabeth Elliot, Denise Kandel, Elaine Landes, William Iacuess, and David Felson.

Chair Inger set the tone, explaining that this is not a new case, that the concerns of abutters have been received and heard with the reception of approximately 60 letters, and implored anyone who intended to speak to keep remarks relevant, polite, and courteous. Attorney Benjamin Zehnder and his client, Steve DiGiovanni approached the microphone. Zehnder began by offering a recapitulation of the case and its history. Zehnder explained that the application

submitted for this hearing proposes a set of conditions that mirror the set that was previously negotiated with the Selectboard, which makes significant concessions for the protection of the neighbors. Zehnder reiterated that a contractor's yard and its supplies are necessary for the business. The application includes a request for a Special Permit for bulk storage open in case the Board determines the supplies as a second use.

Attorney David Reid approached the microphone to represent his approximately 70 households, and specifically the families that have been involved from the beginning of this case and who intervened with the Court. Reid acknowledged that all of his clients would like the opportunity to speak, but asked them to listen to his presentation first, and then if they feel more testimony is necessary, to keep their remarks short and not repetitive. Reid distributed materials to the Board which included bylaw references, photographs, and letters. His clients have never contested that a contractor's yard is allowed in a commercial zone, but not all activities are allowed. Reid cited several bylaws, focusing on the detrimental, offensive, or detracting from value of the neighborhood, and that no activity in any part of the town allows for dust, smells, vibrations, etc. The Town has received hundreds of complaints. The applicant's proposed limitations are insignificant to reducing the detriment produced by the current and future activities and uses. Reid went through the limitations explaining why they would not remediate the harm done, including a clarification of machinery types that are operating there. The business has been operating for two and a half years not at full capacity and the abutters' quality of life is already suffering. Reid urged the Board to stand by their previous decisions, citing that the new proposal does not comply with Town bylaws. The bylaws provide limitations on businesses in neighborhoods. These limitations are not being followed. Patty Lemme testified that as early as 5:23 am equipment has been going and is very loud. Laura Kozak shared that she had been ill over the winter and now has to sell her house and is concerned about the value plummeting because of the contractor's yard. No one on Zoom asked to speak at this time. Chair Inger acknowledged the letters that the Board had received, and summarized their concerns: dust, noise, heavy machinery, and safety concerns. Attorney Zehnder offered that no business is able to prevent all noise, smells, or detection of some operational activity; the concern is whether it's objectionable. A contractor's yard was a permitted use in Commercial and Commercial 2 districts. All proposed activities are permitted in the bylaws. Bulk storage open is permitted. The problem is the location in regard to the homes. These homes were built on the border of a commercial zone. Zehnder suggested that many of the complaints came in when the remediation work was being done, and that the work never began at 5:30; 7:00 at the earliest. When the neighbors were asked for input on what parameters would be acceptable, they declined. Zehnder said that it is clear that they just want the business gone. Great White has done aggressive planting, limited the size of the trucks on the property, the side of the property near the restaurant is not being used, and they have installed irrigation to keep dust down. Zehnder defended against the assertion that this business would bring down the value of homes nearby. When the bylaw prohibiting vehicles with tracks was addressed, Zehnder said that the size of trucks is more to the point. Attorney Reid said that when the preliminary junction was occurring, the neighbors were contacted and heard by Town counsel, but were excluded when it came to the Agreement for Judgement. Reid asserted that the activity of this business, under the bylaw, would be prevented in any part of Town. Lemme reasserted that equipment has been on as early as 5:30. Kevin Coakley remarked that he is a year-round resident and was unable to sit in his yard all summer because work is being done there seven days a week. He said the business has no integrity or

honor. At this time, Janet Morrissey asked for clarification about the claim that the neighbors had been excluded from the Agreement discussions. Attorney Murray affirmed that the abutters gave affidavits that were helpful for the preliminary injunction, but the judge refused to grant a preliminary judgement and told the parties to try to craft one themselves. The only parties to the litigation are Great White, GFM, the Zoning Board of Appeals and the Building Inspector, and these are the only parties that can be involved in settlement discussions. In Executive Sessions, attorney Murphy sought the direction of the Selectboard about a preliminary, and then a more permanent, agreement. The content of those meetings is confidential and cannot be shared, but the abutters' concerns were brought to the table. Zehnder said that when neighbors were contacted through Reid to offer feedback on what the company could do to protect the neighborhood and town, they were silent. Kozak spoke on Great White's history with the Town of Truro.

Jan Morrissey made a motion to close the public hearing. Wil Sullivan seconded, and a roll call vote was taken: Janet Morrissey, aye; Wil Sullivan, aye; Trevor Pontbriand, aye; Sharon Inger, aye; Manny Heyliger, aye; 5-0.

The Board shared their concerns. Within the course of the conversation the following issues were raised: the scope of the vehicles and proposed storage exceeds what is allowable by the bylaw, the activity and equipment are detrimental to the wellbeing and value of the neighborhood, there is no limitation that would make the use acceptable to the neighbors, current activity is above and beyond the intention of the bylaw as a whole for a contractor's yard. A note was made that while light industry is allowed by the bylaw, heavy industry is not. Some of the machines and equipment present and proposed are heavy industry. Attorney Murray was asked how the Board should proceed since there is no way this will be resolved through the Zoning Board. The Board feels it must go back to court. Murray stated that the Board was asked to consider previous and new information to deliberate if proposed use is allowed and what limitations must be designated. The consensus of the Board is that the scope and scale exceed a contractor's yard under the zoning bylaw. If it is not allowed as of right, the Board can deliberate about a Special Permit. The Board can take a vote to approve or deny bulk storage open. Murray would, in that case, prepare a decision consistent with the Board's vote and submit it to the court.

Janet Morrissey made a motion to deny the Special Permit to allow for Bulk Storage, Open. The motion was seconded by Trevor Pontbriand. A roll call vote was taken: Sharon Inger, aye; Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye. 5-0.

Wil Sullivan made a motion to deny the Special Permit to allow multiple uses. The motion was seconded by Trevor Pontbriand. A roll call vote was taken: Sharon Inger, aye; Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye. 5-0.

Chair Inger acknowledged that the courts asked that all parties be heard. All parties were heard.

Manny Heyliger made a motion to affirm the Board's previous decision in light of the fact that, although a contractor's yard was allowed by use of right when the application was originally filed, use was subject to other provisions in the zoning bylaw, specifically section 5.2, that the use was not consistent with the district objectives, that this use exceeds the contractor's yard

definition. The motion was seconded by Trevor Pontbriand and a roll call vote was taken: Sharon Inger, aye; Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye. 5-0.

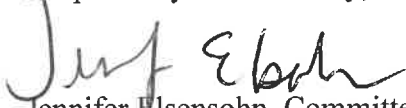
Business:

Approval of Minutes from September 14, 2023.

Wil made a motion to approve the minutes with correction made by Janet Morrissey. The motion was seconded by Mick Lynch. A roll call vote was taken: Sharon Inger, aye; Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye, Mick Lynch, aye; Al Mueller, aye. 7-0.

Mick Lynch made a motion to adjourn the meeting. The motion was seconded by Janet Morrissey. A roll call vote was taken: Sharon Inger, aye; Trevor Pontbriand, aye; Janet Morrissey, aye; Manny Heyliger, aye; Wil Sullivan, aye, Mick Lynch, aye; Al Mueller, aye. 7-0. The meeting was adjourned at 8:37 pm.

Respectfully submitted by,

A handwritten signature in dark ink, appearing to read "Jennifer Elsensohn", written over a horizontal line.

Jennifer Elsensohn, Committee Secretary

Documents:

Freyss updated site plan

Great White Realty Remand application and supporting documents, and letters from abutters

Carter Special Permit Application and supporting documents

Minutes September 14, 2023

