

COMMONWEALTH OF MASSACHUSETTS

Nantucket, ss.

Land Court Department
Case No. _____

)
CATHERINE S. WARD)
Plaintiff,)
v.)
)
TOWN OF NANTUCKET, TOWN OF)
NANTUCKET ZONING BOARD OF)
APPEALS, SUSAN MCCARTHY, MICHAEL)
J. O'MARA, ELISA H. ALLEN, JOSEPH)
MARCKLINGER, and JOHN B. BRESCHER.)
as they are members of THE TOWN OF)
NANTUCKET ZONING BOARD OF)
APPEALS, PETER A. GRAPE AND LINDA)
OLIVER GRAPE.)
Defendants.)
)

)

COMPLAINT

Pursuant to G.L. c. 40A, § 17 and G. L. c. 240, § 14A, the plaintiff Catherine S. Ward files this complaint to appeal a decision by the Nantucket Zoning Board of Appeals (the “Board”) on remand of Land Court Case No. 22 MISC 000064 (“Original Appeal”) finding that the use of 9 West Dover Street (the “Property”) as a short-term rental (“STR”) is a valid Accessory Use under the Nantucket Zoning Bylaw. As feared and anticipated by Ward in the Original Appeal, this remand only gave the Board an opportunity to double-down on its past mistakes.

More specifically, the Board found the Grapes’ rentals to be an “Accessory Use” despite the fact that - as found by this Court after trial - the Main House on the Property is used as an STR between 90 and 111 days per year, and for residential use only 40 to 55 days per year – not even *half* as much. Given these facts, there was no rational basis for the Board to decide that the

Grapes' STR use was "subordinate" or "customarily incidental" to a primary use in order to qualify under Nantucket Zoning Bylaw (the "Bylaw") as an "Accessory Use." Where the rental use outnumbers any residential use, that rental use is more properly characterized as a "principal use" of the Property. And given that this Court already determined that STRs are not a permitted principal use in the ROH Zone, the Grapes' use of the Property to this extent as a short-term rental violates the Bylaw and must be permanently enjoined.

Furthermore, in light of the fact that the Town has continuously refused to enforce the plain language of its Zoning Bylaw to protect its residents (as opposed to just the seasonal home owners), Ward also brings an action for mandamus under G.L. c. 249, § 5 to seek action to be imposed by the Court directly.

The Parties

1. Plaintiff Catherine S. Ward owns the real property at 4A Silver Street in Nantucket, Massachusetts and is a direct abutter to the Property.
2. Defendants Peter A. Grape and Linda Oliver Grape, of 61 Lowell Road, Wellesley, MA 02481, are the record owners of the Property (the "Owners").
3. Defendant Town of Nantucket is a body politic located in Nantucket County with a principal address of 16 Broad Street Nantucket, MA 02554.
4. Defendant Nantucket Zoning Board of Appeals (the "Board") is the Town of Nantucket's duly constituted board of appeals pursuant to G.L. c. 40A with offices at 2 Fairgrounds Road, Nantucket, Massachusetts, 02554.
5. The following defendants are the Chair and members of the Board:
 - a. Susan McCarthy, Chair; 26 Goldfinch Drive, Nantucket, MA 02554;
 - b.. Michael J. O'Mara, 240 Polpis Road, Nantucket, MA 02554
 - c. Elisa H. Allen, 9 Pond Road Nantucket, MA 02554

- d. Joseph Marcklinger, 3 Grove Ln., Nantucket, MA 02554.
- e. John B. Brescher, 31 Somerset Lane, Nantucket, MA 02554.

Prior Case

6. This Complaint incorporates all facts from the Corrected Findings of Fact and Conclusions of Law in 22 MISC 000064 (“FOF”).

The Property

7. The Property is a .13 acre parcel located in the downtown Historic District of Nantucket and consists of a four-bedroom house as well as a separate, detached garage with a bedroom, bathroom, and living room. FOF ¶ 2.

8. The Grapes use the Property for their own personal use between 40 and 55 days a year. FOF ¶ 8.

9. The Grapes rent the main house on the Property as an STR between 90 and 111 times per year. FOF ¶ 8.

10. The main house on the Property thus sits vacant, not being used, between 214 and 228 days per year (at least during the years of 2017 to 2021). FOF ¶ 10.

11. The Grapes advertise the Property as available for rent on a weekly basis year-round on multiple luxury vacation websites, including Sotheby’s International Realty, Lee Real Estate, and Atlantic East Nantucket Real Estate.¹

12. Based on the advertisements, it is available for rent on a weekly basis 365 days per year.

¹ <https://www.themaurypeople.com/nantucket-rentals/property/49505-9-west-dover-street-nantucket/> (last visited Sept. 12, 2024), <https://www.leerealestate.com/nantucket-rental/town-9-west-dover-street/> (last visited Sept. 12, 2024), <https://nantucketrealestate.com/nantucket-vacation-rentals/11517/?page-no=15> (last visited Sept. 12, 2024).

13. Prices to rent the Property range from \$4,700 per week during the winter months to \$8,900 per week during peak weeks in the summer and fall.

14. From 2017 to 2023, the Grapes reported between \$51,219 and \$68,918 yearly in rental income from the Property.

The Bylaws

15. The Nantucket Zoning Bylaw, at § 139-15, (the “Zoning Bylaw”) allows qualified “accessory uses” as follows: “In addition to the principal buildings, structures or uses permitted in a district, there shall be allowed in that district, as accessory uses, such activities as are subordinate and customarily incident to such permitted uses.”

16. Zoning Bylaw § 139-2 defines Accessory Use as those uses that are “subordinate and customarily incidental to a principal structure, building or use located on the same lot.”

The Trial and Remand

17. This is not the first time Ms. Ward is appealing a decision of the Board concerning the Grapes’ use of 9 West Dover Street as a short-term rental. In 2021, Ms. Ward asked this Board to overturn the Building Commissioner’s decision that states short-term rentals were allowed “residential use” in the ROH zone (“Ward I”).

18. In a decision filed January 20, 2022, the Board denied Ms. Ward’s appeal and agreed with the Building Commissioner that short-term rentals were an allowable residential use in the ROH district.

19. After litigation, dispositive motions, and a trial, the Court disagreed. It ruled that the Zoning Bylaw does not authorize short-term rentals as a principal use of “primary dwellings” in the ROH district, and that therefore such a use is prohibited in that district.

20. Accordingly, the Court vacated the Board’s denial of Ward I.

21. The Court also remanded the case to the Board to determine whether the Grapes' rentals are a permissible 'accessory use' of that structure, and if not, order the appropriate remedies." FOF at p. 24.

The Hearing

22. The Board scheduled the public hearing pursuant to the Court's Remand Order for April 25, 2024, and the hearing was continued without substantive discussion to June 3, 2024. The Board conducted public hearing sessions on June 3 and July 11, 2024 ("Ward II").

23. On July 11, 2024, the Board closed the public hearing and conducted initial deliberations. On August 15, August 29, and September 5, 2024, the Board deliberated and discussed a draft decision, but asked Town Counsel to make changes to that draft decision.

24. The Board did not vote on a final Decision in Ward II until September 12, 2024.

25. The Remand Hearing was on the limited issue of whether the Grapes' past short-term rental of the Main House for the years 2017 - 2021 qualify as a permitted "accessory use" of their property.

26. Nevertheless, at the Hearing, the Board permitted residents to provide long soliloquies about their families' history on Nantucket, how they came to inherit their homes, and, principally, how "unfair" it would be if the Board prevented those people from renting these family inheritances to be able to continue to afford them. *See, e.g.* June 3, 2024 Nantucket Zoning Board of Appeals Meeting Minutes at 3-5, available at <https://www.nantucket-ma.gov/AgendaCenter/ViewFile/Minutes/06032024-13816>.

27. The Board's deliberation at the July 11th hearing focused on how people have long rented their homes on the Island, and paid little, if any, shrift to determining whether that

use is subordinate to a principal use, or examining whether the use has changed over time such that the current use is no longer customary.

28. Both factors are required to make the requisite findings under the Bylaw to be an Accessory Use.

29. The Board's bias (at least by a majority) was evidenced throughout the Remand Hearing on Ward II.

30. For instance, the July 11th hearing began with Board member Elisa Allen, an interior design and house stager for rentals and real estate agents, accusing Lisa Botticelli, a long-standing member of the Board, of having a conflict of interest on this case because she has volunteered with an initiative of ACK*Now, a local non-profit organization.

31. This allegation came despite the fact that the Board Chair had been made aware that Ms. Botticelli had discussed any possible ethical issues with the State Ethics Commission and was cleared to participate. Nonetheless, Ms. Allen and the Board Chair asked her to recuse herself from Ward II. Ms. Botticelli did so, and did not participate in or attend the remainder of the Remand Hearing.

32. Meanwhile, Ms. Allen, and other members of the Board who work in real estate on Nantucket, failed to disclose any potential or appearance of conflict of interest they may have with respect to ruling in this case which would undoubtedly have a broad effect on their industry and clientele.

The Decision

33. The Decision, attached here at Exhibit A, concludes that "the Grapes' rentals of the Main House are a permissible accessory use under the Nantucket Zoning Bylaw." Decision ¶ 42.

34. The Board acknowledged that it was tasked with deciding whether the Grapes' STR use fit within the Zoning Bylaw definition of Accessory Use, which requires a finding that the use was both "subordinate" and "customarily incidental" to an allowed primary use.

35. In doing so, the Board noted that it was bound by the 43 Findings of Fact made by the Court. Decision ¶ 11. But that note appeared to be only lip service, as the Decision went on to ignore those facts, and turn instead on the testimonies of only certain members of the public that spoke at the hearings.

Subordinate

36. With respect to the "subordinate prong," the Board tries to avoid the problem created by the inescapable fact that the Grapes use the Main House (the primary use of the Property) for STRs more than for personal residential use (by them or anyone else), by writing that it "declines to follow a simple mathematical equation on this issue." Decision ¶ 39.

37. Instead, the Board purports to decide the "subordinate" prong based on the "totality of circumstances" Decision ¶ 40.

38. The Board states that its determination that the Grapes' STR use is "subordinate to" the as-of-right residential use is based on "[t]he way the Grapes rent the main house, as described by Mrs. Grape in her affidavit and oral testimony to the Board." Decision ¶ 41.

39. In addition, The Board deemed a list of "factors" "relevant" to its determination, including:

- a. the Grapes' "strong ties" to Nantucket and the property in question;
- b. the Grapes' regular personal use of the property as a vacation home for as-of-right residential use, including occupancy of both the Main House and the Garage House and use and occupancy of the Property "year-round;"
- c. that the Grapes sometimes occupy the Garage House at the same time the Main House is being short-term rented;

- d. that the Grapes did not acquire the Property as an investment property to maximize the amount of money they earn from renting it;
- e. that they use the revenue from short-term rentals for upkeep, maintenance, and improvements to the Property; and
- f. that they treat periods of vacancy as periods when the Property is available for their own personal use as the Grapes see fit (i.e., as residential use by the Grapes).

40. But these factors do not support a finding that the Grapes STR use was “subordinate” to their residential use where the numbers, as self-reported by the Grapes to the IRS and found by this Court, state otherwise.

41. Some factors listed, namely, the Grapes’ historic ties to Nantucket and the fact that they use the revenue from STRs for upkeep to the Property, are simply irrelevant to whether the Grapes’ use of the property as an STR is subordinate.

42. The Grapes’ “regular personal use” of the property as a vacation home does not support a finding that the STR use is subordinate where it is devoid of any findings as to the number of days or any quantum of the time spent in the Main House and whether it is more or less intense than the STR use.

43. And, at least one of the factors the Board listed is simply false: the Grapes do not occupy the any part of the Property “year-round.” This is an insult to those who do in fact live on Nantucket year-round, like Cathy Ward.

44. The Grapes own three homes, and admit that Wellesley is their main residence. The Main House of the Property here on Nantucket is used as an STR for much of the summer, and the Grapes’ use of the Garage is not the primary use of the Property and only intermittent.

Customarily Incidental

45. With respect to the “customarily incidental” prong, the Board states that its determination is based “upon the written and oral submissions summarized above, concerning the nature and history of residential short-term rentals on Nantucket.” Decision ¶ 37.

46. The Decision contains six paragraphs (19-25) extensively detailing defendant Mrs. Grapes’ description of her family’s use of the Property.

47. In contrast, there is not a single paragraph describing the effects of the STR use on plaintiff/neighbor Catherine Ward, despite the Court making no less than 6 specific findings about such impact.

48. Indeed, reading the Decision leaves one with the impression that the Board hearing was dominated by individuals in support of the Grapes’ use of the Property for Short-Term Rentals being permitted as a customary use on the Island.

49. The Decision cherry-picks testimony from Real Estate Broker Penny Dey (Decision ¶ 28), Real Estate Broker Edward J. Sanford (Decision ¶ 29), Real Estate Broker Lisa Winn (Decision ¶ 30), Nantucket resident (and president of the Political Action Committee Nantucket Together) Kathy Baird (Decision ¶ 31), Nantucket resident Caroline Baltzer (Decision ¶ 32), and Nantucket land-use attorney Stephen Cohen (Decision ¶ 33-34) to justify its findings on this prong.

50. Yet it contains only one short paragraph detailing that Nantucket resident Melissa Philbrick and “other Nantucket residents such as Charity Benz and Leslie Forbes” spoke in opposition to STRs and that Nantucket Neighborhoods First submitted comments to the written record (Decision ¶ 35).

51. This is wholly inconsistent with the testimony actually received by the Board during the hearing. In addition to the numerous written comments, which the Board apparently

ignored, many individuals with relevant experience provided testimony and asked the Board to find that the Grapes' STR use is not an Accessory Use.

52. Indeed, Ward submitted detailed evidence to the Board illustrating how STR use on Nantucket (and indeed in many vacation spots around the country) had changed in the last 5-10 years, rendering the STR use experienced on Island now to be different in substance and scope from what was historically experienced. The Board makes no mention of this submission in its Decision.

53. Likewise, resident Eric Sultan raised issues with the injustice of STR owners paying residential tax rates; resident Patsy Wright explained how the use of STRs in a residential neighborhood is inconsistent with zoning purpose—developing community for long term inhabitants—of single family zoning district; resident Melissa Philbrick explained that the use of STRs on the Island has dramatically changed over time and is no longer customary; resident Lisa Forbes noted the expenses the town incurs related to STRs and their associated increased intensity of use; residents Charity Benz and Ann Duez explained the ease with which homeowners can, and often must, calculate days for other purposes, making an accessory use determination simple; resident Darlene DeMichele discussed the impacts of supposed “accessory use” of STRs on her neighborhood; Attorney Dennis Murphy spoke on behalf of Nantucket Land and Water Council about increased intensity of water use associated with STRs.

54. Yet these comments were either excluded from the Decision entirely or given short shrift in comparison to the detailed paragraphs explaining the comments made by various STR supporters, many of those in the same industry as many Board Members (i.e., real estate on Nantucket).

55. The Board failed to provide any explanation as to why none of these submissions or public testimony was credited.

56. Instead, the factors used by the Board demonstrate that it made a policy decision—one rejected by Nantucket voters at Town Meeting five times now – that STRs owned by individuals like the Grapes should be allowed, rather than undertaking a rigorous application of the Bylaw language to the facts at hand.

57. The Decision is the result of the Board clearly deciding that it wanted STRS to continue unabated on the Island and driving the process to find facts which conveniently fit that end, regardless of the Bylaw language or the legal arguments made by Ward (most of which were never addressed by the Board in the hearing or in the Decision).

58. In short, the Board's Decision is not only biased but also contains no analysis of the actual issue on remand; it fails to explain how any of the factors listed demonstrate that the Property's use as an STR either is subordinate or customarily incidental to a permitted primary use—let alone how it is *both* subordinate *and* customarily incidental.

The Plaintiffs' Harm

59. This Complaint incorporates the findings on the Plaintiff's Harm from the Judgment.

60. Ward suffers the same harm as a result of the use of the Property for short-term rentals, whether that is categorized as a principal use or accessory use under the Bylaw.

COUNT I **G.L. c. 40A, § 17**

61. Ward incorporates into this paragraph all the allegations set forth in the paragraphs above.

62. The Board found that the Grapes' STR use of the Property was a valid Accessory Use under the Zoning Bylaw, despite the fact that it was used as a rental for more days than used for residential use, and evidence that vacation rentals (now called short-term rentals) on Nantucket have drastically changed in the last decade.

63. Thus, the Board improperly interpreted § 139-15 and § 139-2 of the Bylaw.

64. Ward has been aggrieved by the Board's Ward II Decision.

65. The Board's Ward II Decision is arbitrary and capricious, an abuse of discretion, exceeds the Board's authority, and is based on legally untenable grounds.

COUNT II
G.L. c. 240, § 14A

66. Ward incorporates into this paragraph all the allegations set forth in the paragraphs above.

67. The Board determined that the use of the Property as an STR is not a violation of the Nantucket Zoning Bylaw's Accessory Use provisions.

68. In doing so, the Board improperly interpreted § 139-15 and § 139-2 of the Bylaw.

69. As a direct abutter impacted by the use of the Property as an STR, that zoning decision has a direct effect on Ward's enjoyment of her land.

70. Thus, pursuant to G. L. c. 240, § 14A, Ward is entitled to a declaration that the Grapes' use of the Property for STRs is neither subordinate nor customarily incidental to the permitted principal use as a residence and thus in violation of the Nantucket Zoning Bylaw.

COUNT III
MANDAMUS - G.L. c. 249, § 5

71. Ward incorporates into this paragraph all the allegations set forth in the paragraphs above.

72. In ignoring the Court Order to render a decision consistent with the facts as the Court found them, and permitting STRs to continue as a principal use unabated, the Board has failed to take action required by the Judgment.

73. This documented failure and continued refusal to interpret the Zoning Bylaw consistent with its plain language and meaning has harmed and continues to harm Ms. Ward, as a direct abutter and resident of Nantucket who is unable to get relief and protection from the Board that the Zoning Bylaw (as voted by Nantucket Town Meeting) provides.

WHEREFORE, the plaintiff requests that this court:

1. Annul the Board's decision in Ward II;
2. Enter a judgment declaring that use of 9 West Dover Street as a short-term rental is not a valid Accessory Use as defined by the Nantucket Zoning Bylaw;
3. Direct the Town to enforce the Zoning Bylaw such that any dwelling unit short-term rented for more time than used for residential use cannot be deemed a permitted Accessory Use, but instead is a principal use prohibited in residential zones; and
4. Grant the plaintiff such other relief as it deems just and proper.

CATHERINE C. WARD

By her attorney,



Nina Pickering-Cook (BBO # 668030)
npickeringcook@andersonkreiger.com
ANDERSON & KREIGER LLP
50 Milk, 21st Floor
Boston, MA 02109
617.621.6536

Dated: September 19, 2024

EXHIBIT A



NANTUCKET
TOWN CLERK

2024 SEP 13 AM 10:42

**TOWN OF NANTUCKET
BOARD OF APPEALS
NANTUCKET, MASSACHUSETTS 02554**

Date: September 12, 2024

To: Parties in Interest and Others concerned with the Decision of The BOARD OF APPEALS in the Application of the following:


Application No: 11-24

Owner/Applicant: Catherine S. Ward

Enclosed is the Decision of the BOARD OF APPEALS which has this day been filed with the office of the Nantucket Town Clerk.

An Appeal from this Decision may be taken pursuant to Section 17 of Chapter 40A, Massachusetts General Laws.

Any action appealing the Decision must be brought by filing a complaint in Nantucket Superior Court or Land Court within TWENTY (20) days after this day's date. Notice of the action with a copy of the complaint and certified copy of the Decision must be given to the Town Clerk so as to be received within such TWENTY (20) days.



William Saad,
Zoning Administrator

cc: Town Clerk
Planning Board
Building Commissioner/Zoning Enforcement Officer

PLEASE NOTE: MOST SPECIAL PERMITS AND VARIANCES HAVE A TIME LIMIT AND WILL EXPIRE IF NOT ACTED UPON ACCORDING TO NANTUCKET ZONING BY-LAW SECTION 139-30 (SPECIAL PERMITS); SECTION 139-32 (VARIANCES). ANY QUESTIONS, PLEASE CALL THE NANTUCKET ZONING BOARD OF APPEALS OFFICE AT 508-325-7587.

NANTUCKET ZONING BOARD OF APPEALS
2 Fairgrounds Road
Nantucket, Massachusetts 02554

Assessor's Map 55.1.4, Parcel 189
9 West Dover Street
Residential Old Historic (ROH)

Book 1581, Page 238
Plan Book 7, Page 29

DECISION:

I. Background

1. This is a decision of the Nantucket Zoning Board of Appeals ("Board") on remand, in accordance with an order from the Massachusetts Land Court in the case of Ward v. Town of Nantucket, et al., Case No. 22 MISC 000064 (MDV).

2. The plaintiff in the Land Court case, Catherine S. Ward, who resides at 4A Silver Street, appealed a determination of the Building Commissioner that the use of 9 West Dover Street, owned by Peter and Linda Grape, for short-term rentals is not a prohibited commercial use in the residential district in which it is located.

3. By decision dated November 22, 2021, the Board denied the appeal on the grounds that the Building Commissioner's decision was based on an appropriate determination that the Grapes' use of the property for short-term rentals complies with allowable residential use in the ROH district.

4. After litigation and dispositive motions in the Land Court, and a trial on the issue of the plaintiff's standing, the Court held that the Zoning Bylaw does not "expressly authorize short-term rentals as a principal use of 'primary dwellings' in the ROH district," but that the "Bylaw may allow, however, rentals of primary dwellings as an 'accessory use' of such dwellings." See Findings of Fact and Conclusions of Law ("Findings and Conclusions"), dated March 14, 2024, at p. 4.

5. Accordingly, the Court vacated the Board's denial decision and remanded the case to the Board to "determine whether the Grapes' rentals of their Main House are a permissible 'accessory use' of that structure, and if not, order the appropriate remedies." Findings and Conclusions, at p. 24.

6. The Board scheduled the public hearing pursuant to the Court's remand order for April 25, 2024 but the hearing was continued without substantive discussion to June 3, 2024 due to scheduling conflicts amongst the parties and their respective counsel. The Board conducted substantive public hearing sessions on June 3, 2024 and July 11, 2024.

7. On July 11, 2024, the Board completed and closed the public hearing and conducted initial deliberations. On August 15, 2024, the Board conducted deliberations on a draft remand

decision, discussed certain substantive revisions to the draft, and continued deliberations to August 29, 2024 to consider a final draft incorporating the revisions. On August 29, 2024, the Board continued deliberations and discussed further revisions to the draft decision. The Board continued deliberations on September 5, 2024 and September 12, 2024, and completed deliberations and voted approval of this Decision on September 12, 2024.

II. Nantucket Zoning Bylaw

8. In its Findings and Conclusions, the Court cited several provisions from the Nantucket Zoning Bylaw which are controlling on the issues the Board is considering on remand, as follows:

- The Use Chart, § 139-7.A identifies the following as of right residential uses in the ROH district (the R1 district at issue in the companion Quick remand proceedings is the same, but adds “duplex”): “primary dwelling,” “secondary dwelling,” “accessory dwelling,” “garage apartment,” “home occupations,” and “keeping of pets for personal use.”
- Aside from listing as of right uses in residential districts, the Bylaw does not otherwise define the word “residential.”
- Section 139-2 defines “primary dwelling” as a “detached single-family dwelling unit or portion of a structure that contains a single dwelling unit.”
- The Bylaw defines “dwelling unit” as a “room or enclosed space used, or to be used, as a habitable unit for one family or household, with facilities for sleeping, cooking and sanitation.”
- The Bylaw defines “family” as “[o]ne or more persons occupying a dwelling unit and living as a single household.”

9. As noted by the Court in its Findings and Conclusions, the Nantucket Zoning Bylaw, at § 139-15, also allows “accessory uses” as follows: “In addition to the principal buildings, structures or uses permitted in a district, there shall be allowed in that district, as accessory uses, such activities as are subordinate and customarily incident to such permitted uses.”

10. The Zoning Bylaw, at § 139-2, defines “accessory uses” as follows: “ACCESSORY USES – Separate structures, buildings or uses which are subordinate and customarily incidental to a principal structure, building or use located on the same lot.”

III. Remand Hearing/Findings

11. In hearing and deciding this appeal on remand, the Board notes that it is bound by, and incorporates herein by reference, the 43 findings of fact noted by the Court on pp. 5-13 of the Findings and Conclusions. Certain defined terms used herein, such as “Main House” and “Garage House” at the Grapes’ property, are as defined in the Court’s Findings and Conclusions.

12. At issue on remand is whether the Grapes' rentals of the Main House are an allowed "accessory use" of that structure as their "primary dwelling."

13. The Court's factual findings describing the Grapes' rentals of the Main House include (but are not limited to) the following:

- The Grapes have rented the Main House more often than they've used it for personal stays. Between 2017 and 2021, they occupied the Main House between 40 and 55 days yearly... But during that same 2017-2021 period, the Grapes rented the Main House between 40-55 days yearly... With one exception, all of the Grapes renters have been families.
- The length of the rentals of the Grape Property has ranged between five and fourteen consecutive days. [The only exception] was in 2020, during the coronavirus pandemic, when the Grapes' daughter stayed for approximately six weeks.
- When not used by the Grapes or rented, the Grape Property is vacant. In 2017-2021, the Property was vacant between 214 and 228 days.
- Rent... ranges from \$2,000 per week during the offseason to \$8,000 per week during the summer months. Since 2017, the Grapes have reported between \$51,219 and \$68,918 in yearly income from the Grape Property.

14. In addition to the findings of fact noted in the Court's Findings and Rulings, the Board makes further findings in addition to, but not contradictory to, the Court's factual findings, in accordance with footnote 12 of the Court's Findings and Conclusions, noting that further evidence not relevant to the "principal use" issue decided by the Court "might become relevant to the issue of permissible accessory uses of principal dwellings." See Findings and Conclusions, at pp. 22-23, footnote 12.

15. At the public hearing sessions on June 3, 2024 and July 11, 2024, counsel in the Land Court action for both the plaintiff, and the co-defendant Grapes, made presentations, answered questions, and made written submissions, including legal memoranda from the plaintiff's counsel, and a legal memorandum and exhibits from the Grapes' counsel, including an analysis of short-term rentals on Nantucket performed by the UMass Amherst Donahue Institute and an affidavit of co-defendant, Linda Grape.

16. The plaintiff's counsel argued that for a use to be a legitimate accessory use it must satisfy both characteristics of being subordinate to a principal use and being customary and incidental to it. The plaintiff's counsel claimed that the Land Court found that the Grapes' use failed on both counts on the grounds that the Grapes used the Main House for rentals more often than for personal stays based on tax returns from 2017 to 2021.

17. The plaintiff's counsel argued that actual use, not potential use, must be considered and that counting vacant days as residential could allow properties to primarily be rentals, contrary

to customary use. When asked by one of the Board members, by way of hypothetical, whether living in the house for 270 days a year and renting it out for 90 days would be considered an accessory use, plaintiff's counsel stated this would qualify as an accessory use as long as the 270 days were actual residential use and it was reflected on their tax return.

18. The Grapes' counsel argued that the Board can and should consider vacant days on the accessory use issue. He stated that the Bylaw defines accessory use with three key words: subordinate, customarily, and incidental to the principal use on the same lot and that 275 days counts as part of the primary use of the Grapes' vacation home. He further argued that the Board should not set policies on usage and rental limits and that the Board's role is to decide if the Grapes' use of 90 to 111 rentals days meets the criteria of being subordinate, customarily, and incidental to the principal use. Counsel argued that use of a vacation home is subjective and up to the owner and that the Grapes' principal use is as a vacation home with rental periods being subordinate, customarily, and incidental to their primary use.

19. Co-defendant, Linda Grape spoke at the public hearing in addition to submitting the above affidavit, through counsel. She stated that when the Grapes purchased the property in 2017, it had already been reserved for rentals which the Grapes honored, as booked.

20. Mrs. Grape stated that the Grapes purchased the property as a second, vacation home, not as an investment property and not to maximize the income they could earn from renting it. She stated that they purchased the property because they love Nantucket, had been visiting for decades, and had previously rented houses in the Siasconset neighborhood, including the same house for more than 20 years.

21. Mrs. Grape stated that they decided to buy their own residence so that they could visit whenever they wanted and to be able to spend more time on Nantucket when they retired. She stated that they rent the property, mainly during the high-season Summer months, but do not consider that to be the primary use of the property. Mrs. Grape noted that if one compares the days when the property was rented in a year to the days when it was not rented, the non-rental days, approximately 250+ days per year, outnumber rental days of approximately 100 days per year.

22. Mrs. Grape stated that the Grapes' primary residence is in Wellesley but that they use the Nantucket property as their vacation home, visiting approximately 1-2 times per month in the colder months and 3 times or more during the warmer months, and that their adult daughter and son, and their families, also visit and stay at the property, both in the Main House and Garage House.

23. She stated that they have a tradition of visiting over Thanksgiving weekend, staying with family and friends in both the Main House and Garage House, celebrate family birthdays on Nantucket, that their grandchildren are regular visitors with favorite attractions they enjoy, that their daughter was engaged and celebrated her wedding on Nantucket in 2023, and that the Grapes frequently visit Nantucket for events throughout the year, such as Daffodil Weekend, Christmas Stroll, the Wine Festival and Figawi. Mrs. Grape also noted that now that her husband Peter is retired, he will be spending more time on Nantucket and that they both will be visiting and hosting family there more once both are retired.

24. According to Mrs. Grape, they only rent the Main House for regular residential use, and that it is not and cannot be rented for larger events such as weddings, reunions, corporate functions or the like. She stated that they use the money from rentals to help pay for upkeep, maintenance, and improvements to the property. She stated that they usually keep the Main House for themselves and family and friends for approximately 3-4 weeks during the Summer months, deciding when they want to stay and then letting brokers know what weeks are available to rent. She stated that there are also times when the Main House is rented and that she and her husband occupy the Garage House at the same time.

25. Mrs. Grape concluded by noting that as a vacation home, there are significant periods of time when the property is completely vacant, and that as owners, the Grapes "can come and go as we please." She stated that they sometimes decide to visit at the last minute, at the spur of the moment, based on any number of factors, including weather conditions or whether they have other friends visiting.

26. On the issue of short-term rentals on Nantucket generally, the Grapes' counsel submitted a 2023 report of the Nantucket Short Term Rentals Work Group which worked on proposed zoning amendments seeking to balance the "time-honored tradition" of residential rentals on Nantucket and benefits to the local economy versus adverse effects from investor-only acquisitions of residential properties and adverse impacts on residential neighborhoods. The Grapes' counsel also submitted a rental study prepared by the UMass Amherst Donahue Institute which reported that short-term rentals account for 9 out of every 10 lodging rooms on Nantucket and that without such rentals, lodging establishments such as hotel rooms and inns would not be able to support in-season visitation.

27. Various third parties also made written and oral statements to the Board during the public hearing. The Board highlights those it has credited and found to be material to the meaning of "accessory use" as related to residential short-term rentals on Nantucket, but this is not exhaustive of the information presented. The remainder are reflected in the minutes from the public hearing sessions and the Board's administrative record.

28. Real Estate Broker Penny Dey, owner of Atlantic East Nantucket Real Estate and past President of the Nantucket Association of Real Estate Brokers, submitted written comments describing the history of vacation rentals on Nantucket based on 40 years of direct experience as a full-time, year-round real estate broker on Nantucket. She summarized her written comments in oral comments during the public hearing, highlighting that renting homes to defray ownership costs is customary on Nantucket, with most rentals averaging less than 52 days per year, and that vacation rentals of private homes have been seen as a long-standing property right on Nantucket.

29. Real Estate Broker Edward J. Sanford submitted written comments on similar lines as Ms. Dey, noting that seasonal short-term rentals to defray the cost of ownership is a "time-honored tradition, going back at least 100 years, provides the backbone to the island economy and a way for nearly all non-native residents to become acquainted with Nantucket, and was never ill-considered."

30. Real Estate Broker Lisa Winn, a full-time, year-round real estate broker on Nantucket for more than 42 years, doing both sale and rentals of properties on Nantucket for Maury People Sotheby's International Realty, her family's business, also submitted written comments to the Board, dated May 30, 2024. She spoke at the public hearing emphasizing the main points of her written comments, that short-term rentals are crucial to the island economy, especially during the off-season, and do not significantly impact year-round housing stock. She also noted that rental calendars are often left open, and that availability is confirmed with homeowners case-by-case.

31. Nantucket resident and short-term rental proponent Kathy Baird spoke at the public hearing to add three points: First, the vast majority of Nantucket homes are vacations homes, and their vacancy most of the year is a traditional and customary use, with only about 15% rented short-term; second, that federal census data categorizes homes as owner-occupied or vacant, validating vacancy as a primary use; and third, use is fluid and unpredictable over time for every family.

32. Nantucket resident Caroline Baltzer produced historical evidence of advertised rentals on Nantucket going back more than 100 years and provided her own family as an example, stating that her great-great-grandmother rented a cottage on Hulbert Avenue on Brant Point before purchasing a house at Steps Beach. Ms. Baltzer is a fourth generation Nantucket homeowner who described the need of private homeowners similarly situated to rent to help keep their homes. She also submitted statistical evidence that corporate ownership of short-term rentals (versus private party or family ownership) as only approximately 2.2% and expected to decrease.

33. Island land-use attorney Steven Cohen, who is co-counsel for the defendant property owner in the related Quick remand proceedings, submitted written comments and spoke at the public hearing and noted that Nantucket has never enforced against short-term rentals, indicating acceptance as a legal use.

34. Attorney Cohen also emphasized that there is no requirement in the Zoning Bylaw for a homeowner to occupy a property to rent it out. He cited and submitted the Land Court's decision in Maddalone v. Nantucket Zoning Board of Appeals as support for his argument that a property owner does not need to be physically occupying a vacation home for it to be considered available for use. Although the Maddalone case does not involve residential rentals or an interpretation of the "accessory use" definition of the Bylaw, Attorney Cohen argued, and the Board agrees, that it provides analogous support for the proposition that vacant days can be considered a legal use of the owner when considering whether a rental is "subordinate" to the principal as of right use as a "primary dwelling." This is also consistent with the express language of the Bylaw which defines a "primary dwelling" as a "detached single-family dwelling unit or portion of a structure that contains a single dwelling unit" with "dwelling unit" further defined as "a room or enclosed space used, or to be used, as a habitable unit for one family or household, with facilities for sleeping, cooking and sanitation."

35. Nantucket resident, Melissa Philbrick, noted that on-line platforms had altered the Nantucket rental market and expressed concern over the lack of local oversight and the impact on neighborhood character. Other Nantucket residents, such as Charity Benz and Leslie Forbes, also spoke in opposition to short-term rentals, as reflected in the meeting minutes and written

submissions in the administrative record, including a written submission from Nantucket Neighborhoods First quoting excerpts from Styller v. Lynnfield, 487 Mass. 588 (2021), that zoning may be used to protect the residential character of single-residence zoning districts.

IV. Analysis and Conclusions

36. The Board is mindful and respectful of the need to protect the character of densely developed neighborhoods such as the neighborhood involved in the Ward case but is also mindful of the need to interpret the provisions of the Nantucket Zoning Bylaw consistent with what is considered customary use particular to Nantucket as a seasonal vacation community with limited hotel or lodging options. See Styller, supra, at footnote 19.

37. The Board finds, based upon the oral and written submissions summarized above, concerning the nature and history of residential short-term rentals on Nantucket, that such rentals are customarily incidental to as-of-right residential use of a primary dwelling in the ROH district.

38. The Board finds further that the Grapes' rentals of the Main House at the property qualifies as customarily incidental to their as-of-right residential use of the primary dwelling.

39. On the issue of whether the accessory use is "subordinate to" the as-of-right residential use, which is also required under Sections 139-2 and 139-15 of the Zoning Bylaw, the Board declines to follow a simple mathematical equation on this issue, i.e., on one side the plaintiff argues that rental days exceed occupancy days, and the Board must therefore find the use is not subordinate, while on the other side the Grapes argue that occupancy days, together with vacant days where the property remains available for use or non-use by the Grapes as they see fit, vastly outnumber rental days and the Board must therefore find the opposite. Under the circumstances presented, the Board finds the number of vacant days available for use and occupancy by the owner to be "a" relevant factor on subordinate use, although not the determinative factor.

40. There is no numerical equation or restriction in the Nantucket Zoning Bylaw, nor other definitions to guide the Board on the issue of subordinate use. The Board therefore interprets the Bylaw in light of what is considered a customary use particular to Nantucket and bases this decision on the facts particular to the case and the totality of circumstances.

41. Based on the way the Grapes rent the Main House, as described by Mrs. Grape in her affidavit and oral testimony to the Board, which the Board credits and finds supplemental to and not inconsistent with the above-cited findings of fact in the Court's Findings and Conclusions, the Board finds that the Grapes' rentals are subordinate to the as-of-right residential use of their primary dwelling. Their rental of the Main House is attendant or concomitant to the principal use of the entire property for residential purposes as a vacation home. The factors relevant to this finding include: the Grapes' strong ties to Nantucket and the property in question; their regular personal use of the property as a vacation home for as-of-right residential use, including occupancy of both the Main House and Garage House, and use and occupancy of the property year-round; that they sometimes occupy the Garage House at the same time the Main House is being rented; that they did not acquire the property as an investment property to maximize the amount of money they earn from renting it; that they use the revenue from rentals for upkeep, maintenance, and

improvements to the property; and that they do treat periods of vacancy as periods when the property is available for their own personal use as they see fit.

42. A MOTION was made by ELISA ALLEN, seconded by JENN BRESCHER to determine that the Grapes' rentals of the Main House are a permissible accessory use under the Nantucket Zoning Bylaw. The vote was conducted by roll call of the five voting members (McCarthy, Brescher, Allen, O'Mara, and Marcklinger), with 4 in favor of the motion, and 1 against. The motion therefore carries, and this Decision is issued accordingly

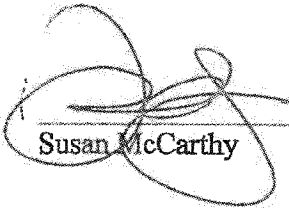
SIGNATURE PAGE FOLLOWS

935271/NANT/0182

Assessor's Map 55.1.4, Parcel 189
9 West Dover Street
Residential Old Historic (ROH)

Deed Book 1581, Page 238
Plan Book 7, Page 29

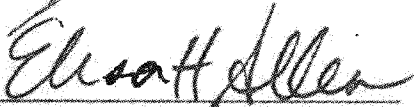
Dated: September 12, 2024



Susan McCarthy



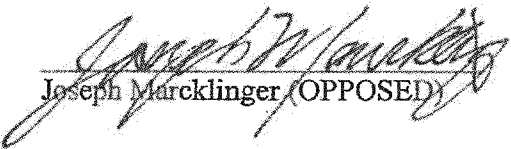
John Brescher



Elisa Allen



Michael O'Mara



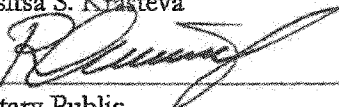
Joseph Marcklinger (OPPOSED)

COMMONWEALTH OF MASSACHUSETTS

Nantucket, SS

On the 12th day of September, 2024, before me, the undersigned notary public, personally appeared Susan McCarthy, one of the above-named members of the Planning Board of Nantucket, Massachusetts, personally known to me to be the person whose name is signed on the preceding document and acknowledged that he/she signed the foregoing instrument voluntarily for the purposes therein expressed.

Rositsa S. Krasteva



Notary Public



ROSITSA S KRASTEVA
Notary Public
Commonwealth of Massachusetts
My Commission Expires
May 10, 2030

May 10, 2030

My Commission Expires