

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 and completed deliberations and voted approval of this Decision on September 5, 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 _____, seconded by _____, 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 _____ in favor of the motion, and _____ against. The motion therefore carries, and this Decision is issued accordingly

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SIGNATURE PAGE FOLLOWS

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