



# Town of Barnstable Zoning Board of Appeals



### Board Members:

Alex Rodolakis – Chair David Hirsch – Vice Chair Herbert Bodensiek - Clerk  
Jacob Dewey – Regular Member Paul Pinard – Regular Member  
Todd Walntis – Associate Member Mark Hansen – Associate Member Robert Twiss – Associate Member  
David Bogan – Town Council Liaison

### Staff Support

Elizabeth Jenkins – Director - [elizabeth.jenkins@town.barnstable.ma.us](mailto:elizabeth.jenkins@town.barnstable.ma.us)  
Anna Brigham – Principal Planner – [anna.brigham@town.barnstable.ma.us](mailto:anna.brigham@town.barnstable.ma.us)  
Carol Puckett – Administrative Assistant – [carol.puckett@town.barnstable.ma.us](mailto:carol.puckett@town.barnstable.ma.us)

## Minutes

### Wednesday, July 22, 2020

*As a quorum has been met, David Hirsch – Vice Chair, opens the hearing at 7:02 PM and reads the following:*

The Zoning Board of Appeals public hearing will be held by remote participation methods as a result of the COVID-19 state of emergency in the Commonwealth of Massachusetts.

Alternative public access to this meeting shall be provided in the following manner:

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

Join Zoom Meeting

<https://zoom.us/j/92828698008>

Meeting ID: 928 2869 8008

888 475 4499 US Toll-free

Meeting ID: 928 2869 8008

3. Applicants, their representatives and individuals required or entitled to appear before the Zoning Board of Appeals may appear remotely and are not permitted to be physically present at the meeting, 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: [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)

*David Hirsch calls the hearing to order and takes Roll call attendance:*

### Call to Order

Introduction of Board Members

Member	Via Zoom	Via Conference Call	Absent
Alex Rodolakis			x
David Hirsch	x		
Herb Bodensiek		x	
Jake Dewey		x	
Paul Pinard		x	

29 OCT '20 AM 10:36  
BARNSTABLE TOWN CLERK

Todd Walantis			X
Mark Hansen			X
Bob Twiss	X		
Staff			
Anna Brigham	X		
Carol Puckett		X	
Participants			
Paul Revere, Esq.	X		
Michael Schulz, Esq.	X		
Brian Florence	X		
Charlie McLaughlin	X		

*David reads the following with no response:*

#### Notice of Recording

Please note that this meeting is recorded and broadcast on Channel 18 and in accordance with MGL Chapter 30A §20. I must inquire whether anyone is taping this meeting and to please make their presence known.

#### Minutes

None

#### Old Business

*David Hirsch reads the following into the record:*

**7:00 PM**

**Appeal No. 2020-022**

**Nickson**

Charlene and Charles Nickson are appealing the decision of the Building Commissioner in denying a request for enforcement action filed with the Town of Barnstable's Building Commissioner in January, 2020. The Appellants requested that the Building Commissioner require Beacon Marine Construction LLC., to stop the storage of a commercial barge and crane on a mooring off Cordwood Landing in a residentially zoned district. The application indicates the approximate location of the barge and crane are located adjacent to Cordwood Road on a mooring located in the Residence F (RF) Zoning District.

*Continued from July 8, 2020 – No members assigned, no testimony taken*

*Time extension signed and time stamped until 09-26-20*

*Members assigned: David Hirsch, Jake Dewey, Paul Pinard, Herb Bodensiek, Bob Twiss*

*Representative: Paul Revere, Esq.*

*Jake Dewey notes that he has a boating enterprise and rents small outboard boats out of Lewis Bay and has no connection to Beacon Marine and wants to make sure that the appellant/representative is comfortable with that. Attorney Revere doesn't see it as an issue. He does indicate that his clients are also participating on ZOOM and asks them to comment if they have an issue. Neither speaks. Attorney Charlie McLaughlin from the Town Attorney's office of Barnstable asks Jake Dewey if he has any current or past contracts with Beacon Marine. Jake Dewey states that he has not had, or currently does not have any dealings with Beacon Marine. Charlie McLaughlin asks Attorney Revere to verbally ascend to Mr. Dewey's participation, which he does.*

*Attorney Revere shares his screen online. He goes over if the zoning applies to the waters of Cotuit Bay, does the Paul Revere, Esq., shares his screen showing:*

*Nickson Appeal – Enforcement Request*

- 1. Does Zoning extend to the waters of Cotuit Bay:*
- 2. Does the long-term storage of a commercial barge with crane violate the RF zoning district requirements?*
- 3. Are the Nickson's aggrieved by the decision of the Building Commissioner*

*As to #1, Attorney Revere notes that the zoning map shows the RF zoning district going into the waters of Cotuit Bay. The Building Commissioner (BC) never disagreed with that issue but rather used a legal opinion of the Town Attorney's office. He submits that it is inappropriate for either the Board or the BC to make a decision that some other law or legal interpretation somehow allows the Board to not enforce the zoning ordinance for an area that Town Council said it wanted to zone and thinks that it a decision made by a court or a third party and not by the BC or the Board of Appeals.*

*In January 2017, on behalf of the Nickson's, Attorney Revere requested enforcement action. He refers to exhibit #1 and sent a clarifying letter on March 5<sup>th</sup> and again on April 10<sup>th</sup>. On the same day he sent his clarifying letter/email were sent, the BC sent his response. The BC's letter said that the area in question is land of the Commonwealth and is beyond the jurisdiction of the BC. The BC never addressed directly whether the zoning district went into the water. Instead, the BC response is that he couldn't regulate it and that the Nickson's are not aggrieved. Revere thinks that the ZBA has to conclude that the area is within the zoning of the Town and would have to find some authority for the BC to not follow the zoning ordinance. Attorney Revere shows pictures of the crane and barge and explains. He shows the Cotuit area zoning map.*

Brian Florence calls point of order regarding materials being shown tonight as he did not see before writing his letter. He notes that however, not that it would change the decision that he has made or the determination that they have made. Attorney Revere asks Brian Florence to clarify what materials he is referring to since his letter had the pictures and the only thing shown so far that was not in the letter is the map showing Cordwood Landing. Brian states that it is the map and possibly some of the pictures. Attorney Revere continues, talks about the Cotuit zoning map and explains. Notes that the barge and crane are used for repairs of docks in the Barnstable area and moves around in the spring/fall reinstalling them or just to do repairs. There was a period of time in middle 2000's it was stored down near Little River and then was brought back to this area. The Town of Barnstable (TOB) has, from the map, caused the zoning to go into the bay. He refers to exhibit #3 regarding the 1975 Acts Chapter 808. He then refers to the principal permitted uses in the RF zoning district. He states that if it wasn't regulated by the RF ordinance then it could be used for a casino, restaurant, etc. As for the BC saying he couldn't regulate the lands of the Commonwealth, he refers to the Crawford case in the TOB regarding a 280-foot pier into Cotuit Bay and explains. The last issue that was addressed by the BC was that the Nickson's were not aggrieved. Attorney Revere states that is not a proper reason for denial of enforcement action request. It is conflating the requirements for Section 8 and 17 Appeals with Section 7, which he reads. Attorney Revere talks about persons aggrieved and in the materials he submitted was a letter from Kinlin Grover to the Nickson's regarding property values and how the location of the barge would have an effect on the value of the Nickson's property. His client's property is in close proximity to this business which is storing commercial equipment and supplies from the barge. He talks about zoning exemptions and abandonment. He goes over the three main reasons that the Nickson's are aggrieved.

David Hirsch asks if the board has any questions. No one speaks.

David Hirsch asks if there is anyone present who would like to question Mr. Revere. No one speaks

David Hirsch opens to public comment.

Brian Florence – Building Commissioner speaks and states that his enforcement is discretionary and if he decides that the purpose for his refusal to act, that is up to him. He could be wrong and notes again that it is discretionary and defers to Charlie McLaughlin. McLaughlin notes that the two cases that he cited, one is SJC dating to 2000, which is the case in the Long Beach area regarding a vessel on a dock in to the navigable waters, which the Conservation Commission (CONCOMM) was concerned about. He refers to page 2 of his opinion letter and reads it. In summary, he states that there is no authority to zone below that mean water line.

Brian Florence notes that the Town does not have authority over the sovereign land of the Commonwealth; the state does not give up their sovereign authority over highways or here. He states that there were some things that were presented tonight that he didn't received but which has not changed his opinion or determination.

Michael Schulz, Esq. is representing Beacon Marine and agrees with Charlie McLaughlin. He gives a background on Beacon Marine noting that it is a local business by residents of the Town who offer emergency services. He refers to the Crawford case law, doesn't think it's helpful to his case, and only refers to a pier which they do not have here.

David Hirsch asks if there is any more public response. No one speaks.

Paul Revere, Esq., asks if he can respond to Charlie McLaughlin's comments. Hirsch allows it. McLaughlin rebuts and urges the board to follow the advice the Town has provided.

The board deliberates:

Jake Dewey asks if maybe the Harbormaster could relay how long and what the history is of this barge.

Charlie McLaughlin states that there were a number of reasons per the Harbormaster that the complaint could not be enforced.

Paul Pinard believes that this will not be resolved by the ZBA but only in Superior Court and thinks that in this case he would support the BC. Twiss agrees with Pinard. Hirsch also thinks that he would support the BC.

Hirsch states that a vote in favor would be to uphold the BC and a nay vote would be to overrule the BC

Roll Call Vote:

Member	AYE	NAY	ABSTAINED
Alex Rodolakis	ABSENT	ABSENT	ABSENT
David Hirsch	x		
Herb Bodensiek	x		
Jake Dewey	x		
Paul Pinard	x		
Todd Walantis	ABSENT	ABSENT	ABSENT
Mark Hansen	ABSENT	ABSENT	ABSENT
Bob Twiss	x		

Twiss asks if they have to do findings before the final vote.

Hirsch makes findings:

**Findings**

The Board affirms the Building Commissioner’s finding that the request is not enforceable as the claim is without merit. The request is not enforceable as the claim is without merit.

- The land below the mean low water mark belongs to the Commonwealth and is beyond the jurisdiction of the building commissioner.
- The waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.
- The Appellants lack standing to request enforcement.

Should the Board wish to overrule the Building Commissioner’s Decision, below are draft findings for the Board’s potential consideration.

1. The Board finds the storage of a commercial barge and crane in a resident district violates the Zoning Ordinance.

**Procedural Information**

Upon making findings, the Board may choose to vote to:

- Uphold or the Building Commissioner’s denial of enforcement action; or
- Overrule the Building Commissioner’s denial of enforcement action,

A vote of 4 members of the Board is required to overrule the Building Commissioner’s decision.

Member	AYE	NAY	ABSTAINED
Alex Rodolakis	ABSENT	ABSENT	ABSENT
David Hirsch	x		
Herb Bodensiek	x		
Jake Dewey	x		
Paul Pinard	x		
Todd Walantis	ABSENT	ABSENT	ABSENT
Mark Hansen	ABSENT	ABSENT	ABSENT
Bob Twiss	x		

**UPHELD THE BUILDING COMMISSIONER**

*David Hirsch reads the following into the record:*

**7:01 PM**

**Appeal No. 2020-024**

**Elefante/Gardiner as Trustees**

Mark B. Elefante, Trustee of 25 East Avenue Realty Trust and Nancy Gardiner, Trustee of 45 East Avenue Realty Trust are appealing the decision of the Building Commissioner in suspending construction of a structure (foundation) as it exceeds the scope of the building permit which permit was premised upon Special Permit 2017-071 granted by the Zoning Board of Appeals. The subject property is located at 8 East Avenue, Osterville, MA as shown on Assessor’s Map 139 as Parcel 075. It is located in the Residence F-1 (RF-1) Zoning District.

*Continued from July 8, 2020. Members assigned: Alex Rodolakis, David Hirsch, Jake Dewey, Herb Bodensiek, Paul Pinard . Request to continue to August 12, 2020 received. Time Extension signed. Time extension signed and time stamped until 11-11-20*

*Hirsch reads a letter from Attorney Schulz asking to allow for the revised publication and re-notice to the August 12<sup>th</sup> hearing.*

*Members assigned: David Hirsch, Jake Dewey, Herb Bodensiek, Paul Pinard, Bob Twiss*

*Motion is made by Jake Dewey and seconded by Paul Pinard to continue/re-notice to the August 12, 2020 hearing at 7:00 pm.*

**Roll call vote:**

Member	AYE	NAY	ABSTAINED
Alex Rodolakis	ABSENT	ABSENT	ABSENT
David Hirsch	x		
Herb Bodensiek	x		
Jake Dewey	x		
Paul Pinard	x		
Todd Walantis	ABSENT	ABSENT	ABSENT
Mark Hansen	ABSENT	ABSENT	ABSENT
Bob Twiss	x		

## CONTINUED TO AUGUST 12, 2020 AT 7:00 PM

New Business

Correspondence

Matters Not Reasonably Anticipated by the Chair

Upcoming Hearings

August 12, 2020, August 26, 2020

Adjournment

*Motion to adjourn is made by David Hirsch and seconded by Paul Pinard*

*Roll Call Vote:*

Member	AYE	NAY	ABSTAINED
Alex Rodolakis	ABSENT	ABSENT	ABSENT
David Hirsch	x		
Herb Bodensiek	x		
Jake Dewey	x		
Paul Pinard	x		
Todd Walantis	ABSENT	ABSENT	ABSENT
Mark Hansen	ABSENT	ABSENT	ABSENT
Bob Twiss	x		