



TOWN OF YARMOUTH
BOARD OF APPEALS
DECISION

YARMOUTH TOWN CLERK

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FILED WITH TOWN CLERK: January 21, 2014

PETITION NO: #4494

HEARING DATE: December 12, 2013

PETITIONER: Kevin J. McBride

**PROPERTY: 400 Higgins Crowell Road, (Mattacheese Middle School)
West Yarmouth, MA
Map & Parcel: 0064.36; Zoning District: R-40
Book & Page: 1105/361**

MEMBERS PRESENT AND VOTING: Steven DeYoung, Chairman, Sean Igoe, Bryant Palmer, Chuck Hart and Richard Neitz.

Notice of the hearing has been given by sending notice thereof to the Petitioner and all those owners of property as required by law, and to the public by posting notice of the hearing and publishing in *The Register*, the hearing opened and held on the date stated above.

The Petitioner is Kevin J. McBride of 11 Cocheset Path, West Yarmouth, MA. The Petition seeks to Reverse the Decision of the Building Commissioner to issue Building Permit #B-14-472 which allowed the construction and installation of ground based solar panels at Mattacheese Middle School, which location is in an R-40 Zoning District and within the Aquifer Protection District.

Noteworthy is the prior, related Decision by the Board in the matter of Petition #4464 which, in substance, denied the Petition for relief for a Special Permit to erect the solar panels. Following that action, the Building Inspector was asked to issue a Building Permit on the claim that the project was permitted under M.G.L. c. 40A, §3 due to its educational component and, so, was exempt from the need for zoning relief. Having first obtained the opinion of Town Counsel, the Build Commissioner, Mark Grylls, determined that the Building Permit should issue. Mr. McBride, the Petitioner herein, is an interested party who properly and timely, filed this appeal.

There were many persons who spoke in favor or against the Petition. OnE Exhibit was received and marked and consisted of a "talking point" handout dated 12/11/13 provided by the opponents to the Petition.

Attorney Anthony Alva appeared with the Petitioner. Attorney Alva presented a well-considered overview of the basis of the petitioned relief sought. He presented a thoughtful argument, essentially relying on the Supreme Judicial Court's Decision in the matter of Regis College vs

Town of Weston, et als, 462 Mass. 280 (2012). Noting what he argued to be fact in the Regis case similar to that in the recent Petition, Mr. Alva felt this Board should rely on that Decision as determinative of the proposition that the Building Commissioner erred in his reliance on M.G.L. c. 40A, §3 in deciding to issue the Building Permit in question. Mr. Alva was succinct and to the point throughout his presentation.

Attorney David Reid spoke in favor of the Petition. His eloquent support for the Petition was largely in agreement with the arguments raised by Mr. Alva on behalf of the Petitioner. As was true of most in favor of the Petition, the argument was made that the project, in order to obtain a Building Permit, must have as its primary purpose an educational element, i.e., that which is to be built must primarily relate to an educational purpose. Attorney Reid argued that the cost savings to be realized from the production of electricity, while perhaps an economic benefit, did not cause this project to have education as its primary purpose. His analysis of the need to Overturn the Building Commissioner's Decision was presented concisely and well.

Also speaking in support of the Petition was Ms. Vida Morris. As well, the Board had received prior to the hearing various correspondence both in favor and opposed to the relief sought, or said differently, to the Building Commissioner's action in granting the Building Permit.

Attorney Michael Ford as Attorney for the D-Y School District (the party directly benefiting from the solar panels, if constructed) presented his opposition to the Petition. He spoke concerning his view of the Regis decision. His primary argument was, however, that there was a significant educational component relative to solar and renewable energy, in general, and specific to this project as evidenced by a grant received in conjunction with the Cape Cod Community College that would develop a college credit granting program in conjunction with Barnstable High school and the D-Y School District. Attorney Ford then ceded the floor to Carol Woodbury, the School district Superintendent. Ms. Woodbury, together with Mr. John Sinopoli, Ms. Regina Wood and Ms. Sandra Locke all spoke with passion as to their claim that there was a significant educational opportunity created through the construction of the solar panels. From these opponents of the Petition, the Board received a power point presentation which, essentially, followed and summarized the contents of the One Exhibit received by the Board.

Before proceeding to its deliberations, the Board heard from Town Counsel, Attorney Bruce Gilmore, who spoke on behalf of the Building Commissioner and his Decision to grant the Building Permits. He provided his interpretation of the Regis decision and noting factual differences therein when compared to the matter now under review. In addition, he provided background as to dialogue between the Building Commissioner and himself prior to the issuance of the Building Permits now being challenged by Mr. Mc Bride.

The Board proceeded to its deliberations. Board Vice-Chairman, Sean Igoe, provided his analytical and thoughtful review of the applicability of the Regis College v Town of Weston, et als decision. His forceful argument was that the Regis court clearly controlled in that, in order to benefit under M.G.L. c. 40A §3, a project must have, as its primary purpose, an educational purpose. He presented a strongly held conviction that this project lacked education as its primary purpose; that its true primary purpose was the generation of profit/income to the school district; and that he was wholly in support of Mr. McBride's Petition for relief.

Member Richard Neitz echoed Mr. Igoe's position. He also expressed legitimate concerns over the effect on property values of properties close to the Mattacheese Middle School if the solar panel array is constructed.

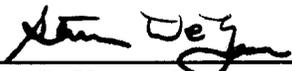
Member of the Board, Chuck Hart, noted that he was of the opinion that while a question arises as to the appropriateness of application of the Regis decision to the Building Commissioner's issuance of a Building Permit, this was why he could not support the Petition of Mr. McBride. He expressed his opinion that, in light of there being this question the Board should support the Building Commissioner.

Board member Bryant Palmer essentially agreed with Mr. Hart, though noting that he reserved his judgement until the final vote.

Board Chairman, Steven DeYoung, spoke to his interpretation of the Regis decision and his view that the solar panels must be considered as merely a component of the entire site which has, as its primary purpose, education.

After discussion by the Board as to how the Motion should be framed, Mr. Hart then made a Motion to approve the Petition, thereby Overturning the Building Commissioner's issuance of the Building Permits. Mr. Palmer seconded the Motion. After discussion of the Motion by the Board the vote was then taken resulting in Board members Mr. Igoe and Mr. Neitz in favor of the Motion and Mr. Hart, Mr. DeYoung and Mr. Palmer opposed to the Motion. Accordingly, the Petition to Overturn the Decision of the Building Commissioner's issuance of Building Permit # B-14-472 was denied.

Appeals from this decision shall be made pursuant to MGL c40A section 17 and must be filed within 20 days after filing of this notice/decision with the Town Clerk.



Steven DeYoung-Chairman



TOWN OF YARMOUTH

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Town
Clerk

CERTIFICATION OF TOWN CLERK

I, Jane E. Hibbert, Town Clerk, Town of Yarmouth, do hereby certify that **20 days** have elapsed since the filing with me of the above Board of Appeals Decision #4494 that no notice of appeal of said decision has been filed with me, or, if such appeal has been filed it has been dismissed or denied. All appeals have been exhausted.

Jane E. Hibbert, CMC/CMMC
Town Clerk