COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

NANTUCKET, ss. 22 MISC 000064 (MDV)

CATHERINE S. WARD,

Plaintiff,

v.

THE TOWN OF NANTUCKET; NANTUCKET ZONING BOARD OF APPEALS; SUSAN MCCARTHY, et al., as they are members of the Nantucket Zoning Board of Appeals; PETER A. GRAPE; and LINDA OLIVER GRAPE,

Defendants,

and

RALPH KEITH and BONNIE KEITH, as trustees of the Delaney Keith Trust,

Intervenors/Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Rule 52, Mass. R. Civ. P.)

In 1991, Nantucket's town meeting adopted a comprehensive zoning bylaw[1] that replaced the island's prior zoning bylaw. Section 139-6.A of the 1991 Bylaw states: "[N]o building, structure or land . . . shall be used for any purpose or in any manner other than for one or more of the uses hereinafter set forth as permitted in the district in which such building, structure or land is located, or set forth as permissible by special permit in said district and so authorized."

[1] As amended, the "Zoning Bylaw." References to the Bylaw are to the version filed at Tab 17 of the Appendix to Plaintiff's Motion for Summary Judgment ("Ward Appendix").

Massachusetts cities and towns are free to adopt zoning bylaws of this type. See *Town of Harvard* v. *Maxant*, 360 Mass. 432, 436 (1971). Sometimes they're called "permissive" zoning bylaws, see *id.*, but that label's misleading. Those who aren't zoning lawyers are likely to think that "permissive" means "allowing," "lenient," or "tolerant." The American Heritage Dictionary of the English Language, 977 (1976). A permissive zoning bylaw isn't necessarily any of those things. Instead, a permissive bylaw typically is one that prohibits every use of a property in a zoning district unless the bylaw specifically authorizes the use. Under such bylaws, when controversies arise about the lawful use of a property, it's not enough for a property's owner to show that the bylaw doesn't *expressly prohibit* the disputed use; instead, the owner must show that the bylaw *expressly permits* it. See *Maxant*, 360 Mass. at 436; *Leominster Materials Corp.* v. *Board of Appeals of Leominster*, 42 Mass. App. Ct. 458, 462 (1997); *Town of Belchertown* v. *Paixao*, 19 LCR 542, 545 (2011) (Piper, J.).

In September 2021, plaintiff Catherine Ward sent Nantucket's building commissioner a letter asking him to order Ward's backyard neighbors, defendants Peter and Linda Grape, to stop renting on a short-term basis the primary dwelling on their property (the "Main House") at 9 West Dover Street (the "Grape Property"). In her letter, Ward called such rentals an illegal "commercial use" of the Grape Property, a property that, like Ward's (the "Ward Property"), lies in the Residential Old Historic ("ROH") district under the Zoning Bylaw.

The commissioner promptly declined Ms. Ward's request. He wrote: "[I]n my opinion, the use of the [Grape Property] for short term rentals does not violate the Town's Zoning Bylaw." Ward appealed the commissioner's action to the defendant Nantucket Zoning Board of Appeals (the "ZBA"). In a November 2021 decision (the "ZBA Decision"), the ZBA sided with

the commissioner, saying he'd "appropriately applied the plain language of the By-law" in refusing Ward's request.

Ms. Ward timely appealed the ZBA Decision to this Court under G.L. c. 40A, § 17. She asks this Court in Count I of her complaint to annul the ZBA Decision. In Count II of her complaint, Ward seeks under G.L. c. 240, § 14A, a declaration against defendant Town of Nantucket (the "Town") that the Zoning Bylaw prohibits short-term rentals in the ROH district.

In March 2023, Ralph and Bonnie Keith, as trustees of the Delaney Keith Trust (the "Keiths"; together with the Grapes, the ZBA, and the Town, the "Defendants"), moved to intervene in this case. The Keiths own 15 Delaney Road on Nantucket (the "Keith Property"). That property's in another residential district under the Zoning Bylaw, the R-1 district. Like the Grapes, the Keiths rent their property short-term. A neighbor who lives in the same R-1 district, Christopher Quick, has done as Ms. Ward did with the Grapes: he challenged the Keiths' use of their property for short-term rentals. As with Ward, the building commissioner and the ZBA disagreed with Quick; he then filed his own c. 40A, § 17 appeal in this Court against the ZBA and the Keiths. See *Quick* v. *Town of Nantucket Zoning Board of Appeals*, Case No. 23 MISC 000056. As this Court was well on its way to reaching the short-term rental question in this case, the Keiths (with no objections from the parties to this case) opted to intervene in this case and be heard on that issue now.

After the parties completed discovery, Ms. Ward moved for summary judgment on her Count II. The Grapes cross-moved for summary judgment on Ward's Count I, asserting that a recently adopted Nantucket general bylaw regulating short-term rentals ("Article 39") moots Ward's challenge to the ZBA Decision. The Town (supported by the Keiths) cross-moved for summary judgment on Ward's Count II, contending she lacks standing under c. 240, § 14A, to

bring that claim. The Town and the Keiths also argued the reverse of Ward's principal contention: they submit that the Zoning Bylaw permits short-term rentals in all of Nantucket's residential districts.

In September 2023, the Court denied the parties' summary-judgment motions, as the facts concerning Ms. Ward's standing to bring both Counts of her complaint were disputed. The Court thus ordered the parties to trial on all standing issues. That trial started December 12, 2023, on Nantucket. The Court viewed the Grape and Ward Properties prior to hearing testimony. Trial continued in Boston on January 3, 2024.

Having taken a view, having heard the parties' witnesses, having reviewed the exhibits admitted into evidence, and having read and heard the arguments of the parties' counsel, the Court HOLDS:

- Ms. Ward has standing to bring Count I of her complaint.
- Since the Town (the central defendant on Count II) concedes that the test for standing on Count I is more rigorous than that for Count II (see the Town and the ZBA's Pre-Trial Memorandum of Law, 12, 14 ("Town's Pre-Trial Memorandum," docketed Nov. 30, 2023)), Ward also has standing to pursue Count II.
- The town's adoption of Article 39 hasn't mooted Ward's claims.
- The Zoning Bylaw doesn't expressly authorize short-term rentals as a principal use of "primary dwellings" in the town's ROH district.
- The Zoning Bylaw may allow, however, rentals of primary dwellings as an "accessory use" of such dwellings.
- Since the ZBA didn't consider in connection with Ward's appeal whether the Grapes lawfully were renting their Main House as an accessory use, the Court will vacate the ZBA Decision and return the case to the ZBA for further proceedings.

Pursuant to Rule 52, Mass. R. Civ. P., and Land Court Rule 4,[2] the Court FINDS the facts set forth above as well as these:

The Grape Property

1. The Grapes have owned the Grape Property since 2017. Their primary residence is in Wellesley, MA. They own another property in Florida.

2. The Grape Property is a 0.13-acre parcel. There are two structures on it, the Main House and the "Garage House." The Main House is a four-bedroom, two-story home. The Garage House is a detached two-story building, with a garage on the first floor and a single-bedroom apartment (with living room, bathroom, and kitchen) on the second floor.

3. The outdoor hardened surfaces leading to, surrounding, and within the Grape Property are uneven. There's a brick patio between the Main and Garage Houses (the "Patio"), adjacent to the rear of each. The Grapes expanded the Patio shortly after they purchased the Property. The Patio stretches between an entrance to the Garage House and a side entrance to the Main House. The Patio's equipped for outdoor dining, and it's frequently used that way in the warmer months. At the rear of the Patio stands a privet hedge. It runs along the entire rear boundary of the Grape Property and separates that Property from the rear of the Ward Property.

4. Near the side entrance to the Main House described in Finding #3 is an outdoor lamp (the "Globe Lamp"). A part of the Main House shields the Lamp and the Patio from passersby on Dover Street. But on the first floor of that part of the Main House, there are rear-facing windows (the "Patio Windows") that are perpendicular to the wall to which the Globe Lamp's attached. Those Windows reflect the Lamp's light in the direction of the Ward Property. At the time of trial, the Globe Lamp had a 35-watt bulb. It's a switched light; it has no regulating timer, photocell, or motion sensor.

5. At the base of the rear of the part of the Main House that's closest to the Ward Property, there's an exterior stairway that descends to the Main House's basement. One can reach that stairway from the Patio. There's an exterior light (the "Stair Light") that's attached to the rear of the Main House, over the exterior stairway. At the time of trial, there was a bulb in the Stair Light that had an interior reflecting surface; no one described its wattage or lumens. The Light was pointing downwards into the stairwell of the exterior stairway. That Light too is switched (the switch is in the basement of the Main House, just inside a door at the base of the stairwell); the Light lacks a regulating timer, photocell, or motion sensor.

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[2] Land Court Rule 4 requires parties who move for summary judgment to file a statement "of the material facts upon which the moving party relies . . . ." Rule 4 requires those opposing a motion for summary judgment to respond to the moving party's factual statement. If an opposing party fails to respond properly to the moving party's statement, "the facts described by the moving party as undisputed shall be deemed to have been admitted." Most of the facts concerning the Grape and Ward Properties, the Grapes' rentals, and the Zoning Bylaw were undisputed at summary judgment.

6. At the time the Grapes purchased the Grape Property, its prior owners had several bookings for short-term rentals of the Main House. While the Grapes don't rent their Wellesley or Florida properties, they bought the Grape Property in part because of its rental potential. When they purchased the Property, they'd decided they'd accommodate the already-booked rentals, as well as those they hoped to get, by staying primarily in the Garage House (and not in the Main House) when they visited Nantucket. Since buying the Property, the Grapes have stayed in the Main House only when it's not rented. There was no evidence at trial of the Grapes ever occupying the Main House while renting the Garage House.

7. Since buying the Grape Property, the Grapes have advertised the Main House for rent, on a nightly or weekly basis, using local real-estate brokers. The Grapes also rent the Main House to their extended family and friends. For the most part, those who rent through brokers communicate with those brokers and not the Grapes. The brokers e-mail lease agreements to renters, then e-mail the Grapes the signed agreements for the Grapes to execute.

8. 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. They generally reserved such times for themselves and made them unavailable for booking. But during that same 2017-2021 period, the Grapes rented the Main House between 90 and 111 days yearly. The number of renters fluctuated between seven and thirteen yearly. None had relationships with the Grapes prior to renting. Some of the renters were repeat customers; most were not. With one exception, all of the Grapes' renters have been families.

9. The length of the rentals of the Grape Property has ranged between five and fourteen consecutive days. The only stay at the Grape Property by someone other than the Grapes that lasted longer than fourteen days was in 2020, during the coronavirus pandemic, when the Grapes' daughter stayed for approximately six weeks.

10. 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.

11. Rent for the Grape Property ranges from $2000 per week during the offseason to $8000 per week during the summer months. Since 2017, the Grapes have reported between $51,219 and $68,918 yearly in rental income from the Grape Property.

12. The Grapes use a local caretaker and cleaning company to work with renters and maintain the Grape Property when the Grapes aren't there.

Evidence of the Effect of the Grapes' Short-Term Rentals on Ms. Ward

13. Ms. Ward owns and resides year-round at the Ward Property, 4A Silver Street in Nantucket. She bought the property in 1993; the present Main House and Garage House on the Grape Property weren't built at that time.

14. Prior to buying the Ward Property, Ward and her family rented other Nantucket residences on a short-term, seasonal basis. For a decade's worth of summers between 2000 and

2010, she also rented out the Ward Property, two times each summer. Ward hasn't done that since 2010.

15. The entire rear of the Ward Property abuts the rear of the Grape Property. Ward has a four-bedroom home on her property. That home has a deck that extends from the rear of the home's main floor. There are bedrooms at the rear of Ward's residence, facing the Grape Property. Ward's is the closest residence to the rear of the Grapes' Main House, their Patio, the Globe Light, and the Stair Light.

16. Ms. Ward's home is substantially upslope of the Grape Property. Thus, notwithstanding the hedge that separates the properties, from her home and deck Ward has an unobstructed view of the rear of both stories of the Grapes' Main and Garage Houses, the Globe Light, the Stair Light, and parts of the Patio.

17. Ms. Ward claims the Grapes' short-term rentals have increased the noise she hears at her property and have subjected her home to increased nighttime light.

18. Since the Grapes' purchase of the Grape Property, repetitive noises from the Grape Property, audible to Ms. Ward from the interior of her home, have increased during those times when the Grapes rent their property. Many of those noises bother Ward. Those noises primarily are (a) the rolling of suitcases, coolers, and other items on the Property's uneven surfaces as people arrive at, or depart from, the Grape Property; (b) the excited voices of the Property's occupants as they explore the Main House and the Patio; (c) clanging and banging accompanying use of the Patio's grilling equipment (including slamming of a grill's lid); and (d) loud conversations, and sometimes parties, on the Patio. Some of the parties include games (a handful have involved drinking) and recorded music. Ward truthfully identified three instances since 2017 when outdoor "party" noise occurred after 10:00 PM. She doesn't hear as much noise from her other neighbors, few of whom rent their properties.

19. In August 2019, Ms. Ward wrote a letter to the Grapes complaining of noise from their renters. The Grapes responded by letter. That letter said the Grapes "want to be respectful neighbors and will address your concerns," but Ward detected no change in the pattern or the volume of noises from the Grape Property after getting the letter. The Grapes did add a note to a sheet of paper titled, "Welcome to 9 West Dover." The Grapes keep the sheet at the Main House; renters don't receive it in advance of their stay. And the note said only this (capitalization in original):

> PLEASE NOTE THAT NANTUCKET TOWN BYLAWS SPECIFY QUIET HOURS BETWEEN 10:00PM TO 7:30AM. WE ASK YOU TO KEEP OUTDOOR NOISE TO A MINIMUM DURING THESE HOURS FOR THE BENEFIT OF OUR NEIGHBORS. THANK YOU!

20. Several times, Ms. Ward has asked the Grapes' renters to be quiet. Most ignored Ward. She also had to repeat the requests each time renters changed.

21. When they are at the Grape Property, the Grapes themselves, their family, and their non-renting guests make the same noises described in Finding #18 above. Ms. Ward hears the bothersome noises more frequently, however, when the Grapes are renting their Property.

22. As a result of the noises described in Finding #18, Ms. Ward has changed (or skipped altogether) the times she gardens, enjoys her deck, or has the rear windows of her house open. She's also considered moving away.

23. As noted earlier, the Patio Windows reflect light from the Globe Light towards the Ward Property. Thus, owing to the elevation of the rear bedrooms of the Ward residence, when the Globe Light's on, both its direct and reflected light shine into Ward's bedrooms unless she's closed their blinds or curtains.

24. When the Stair Light is on, even in the position it was at trial, Ms. Ward can see its light from multiple places within the rear of her house unless she closes the blinds or curtains.

25. After the Grapes purchased the Grape Property, Ms. Ward noticed an increase in instances when the Globe and/or Stair Lights were left on all night. The increase in light disrupted her sleep. She subsequently installed blinds in her home's rear bedrooms; to close the blinds, however, the windows must be closed too, an inconvenience on summer nights.

26. The form that the Grapes provide to renters lacks instructions regarding the use of the Property's outdoor lights.

27. Ms. Ward's home has an outdoor floodlight, but a motion detector regulates it.

Nantucket's General Bylaws[3]

28. Chapter 101 of Nantucket's General Bylaws is titled "Noise." Its § 101-1, "General prohibitions; exemptions; relief," provides in pertinent part:

> A. Prohibited noises. It shall be unlawful for any person or persons to create, assist in creating, cause or suffer or allow any excessive, unnecessary, loud or unusual noise which either annoys, disturbs, injures or endangers the reasonable quiet, comfort, repose or the health or safety of others by taking any of the following actions:
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> (1) Making of loud outcries, exclamations, other loud or boisterous noises or loud and boisterous singing by any person or group of persons . . . between the hours of 10:00 p.m. and 7:00 a.m. (7:30 a.m. between June 15 and September 15 in each year) where the noise is plainly audible at a distance of 100 feet from the source of the noise or the property line of the building, structure, . . . or premises in which or from it is produced. The fact that the

[3] The Court includes Findings ##28-34 primarily because the parties requested findings concerning Nantucket's light and noise general bylaws. The Court does not base its conclusions concerning Ms. Ward's standing on any finding or holding that the Grapes have violated Nantucket's general bylaws. That Nantucket has general bylaws concerning light and noise is, however, evidence that its residents' interests in reducing noise and light that affect their homes are legitimate. Defendants didn't claim at trial that the Zoning Bylaw doesn't protect those interests.

noise is plainly audible at a distance of 100 feet from its source or the property line . . . shall constitute prima facie evidence of a violation of this section.

. . .

(3) To load, unload, open, close or otherwise handle boxes, crates, containers, building materials, trash cans, dumpsters or similar objects between the hours of 10:00 p.m. and 6:00 a.m. so as to unreasonably project sound across a real property line . . . .

29. Section 101-3.A of the General Bylaws provides that the "Noise" general bylaw "may be enforced by Board of Health officials, Nantucket Police Department Employees, plus Inspectors, Natural Resources Enforcement Officers, and any other agents appointed by the Select Board."

30. Chapter 102 of the General Bylaws (Trial Exhibit 17) is labelled "Outdoor Lighting." Chapter 102 is "applicable to all lighting and no lighting shall be installed or continued that violates the standards of this chapter." *Id.* at § 102-1.E.

31. Section 102-3 of the General Bylaws, "Regulations; prohibitions," provides:

A. All residential fixtures with lamps of 600 lumens (about 40 watts incandescent) or less per fixture are exempt from regulation.[4]

B. All residential and commercial exterior lighting (except floodlights) shall be contained in fixtures with an opaque top and translucent sides (partially shielded) such that the bulb is not directly visible from adjacent and neighboring properties or public rights-of-way.[5]

C. To minimize light trespass, in residential areas the light level at the property line shall be no greater than 0.5 of a footcandle, measured at a height of five feet above grade.[6]

D. Commercial property or properties containing mixed uses with a commercial component may not have lighting which exceeds the

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4 Section 102-2 of the General Bylaws defines "Fixture" as "[t]he assembly that houses the lamp or lamps . . ." Section 102-2 defines "Lamp" as "[t]he component of a light source that produces the actual light."

5 Section 102-2 of the General Bylaws defines "Flood or Spotlight" as "[a]ny light fixture or lamp that incorporates a reflector or refractor to concentrate the light output into a directed beam in a particular direction."

6 Section 102-2 of the General Bylaws defines "Light Trespass" as "[l]ight falling where it is not wanted or needed, generally caused by a light on a property that shines onto the property of others." Section 102-2 defines "Footcandle" as a "measurable industry standard of illumination equivalent to one lumen per square foot. Measured by a light meter."

> average minimum levels listed in the IESNA Recommended Publication . . . .[7]

32. Section 102-4.D of the General Bylaws provides in part: "Floodlighting is only permitted when it is down-directed and fully-shielded such that the lamp is not visible from adjacent and/or neighboring properties."

33. Section 102-4.E of the General Bylaws provides in part: "Safety and security lighting shall use motion sensors, photocells, or photocell/timers to control duration of nighttime illumination. In all cases the maximum light intensity on the property measured at a height of three feet above grade shall be limited to no more than five footcandles:"

34. Section 102-8 of the General Bylaws gives oversight of enforcement of Chapter 102 to the Town's "Lighting Enforcement Officer."

35. Article 39, passed at Nantucket's 2022 town meeting, enacted a new general bylaw, Nantucket General Bylaws Chapter 123. Article 39's purpose is to "provide for an orderly process for identifying, registering, and regulating short-term rentals within the Town so as to ensure that such short-term rentals do not create or cause any nuisance conditions within the Town." Article 39 regulates short-term rentals chiefly by requiring their operators to register with Nantucket's Board of Health and prove they have liability insurance.

Nantucket's Zoning Bylaw

36. Section 139-6.A of the Zoning Bylaw states: "[N]o building, structure or land . . . shall be used for any purpose or in any manner other than for one or more of the uses hereinafter set forth as permitted in the district in which such building, structure or land is located, or set forth as permissible by special permit in said district and so authorized."

37. The Zoning Bylaw's "Use Chart," § 139-7.A, identifies these "residential" uses as "as of right" in the ROH district: "primary dwelling," "secondary dwelling," "accessory dwelling," "garage apartment," "home occupations," and "keeping of pets for personal use." The Chart lists the same as-of-right uses for properties in the R-1 district but adds "duplex." The Chart doesn't list any commercial uses as being as of right in the ROH or R-1 districts.

38. Section 139-2 of the Zoning Bylaw defines various terms. The Bylaw states that those terms have their defined meanings "unless a contrary meaning is required by the context or is specifically prescribed . . . ."

39. Section 139-2 of the Zoning Bylaw defines the residential uses listed in Finding #37 (except "keeping of pets" and "duplex," which aren't defined) as follows:

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[7] Section 102-2 of the General Bylaws defines "IESNA" as "Illuminating Engineering Society of North America (IES or IESNA), the professional society of lighting engineers, including those from manufacturing companies, and others professionally involved in lighting."

a. A "primary dwelling" is, in pertinent part, a "detached single-family dwelling unit or the portion of a structure that contains a single dwelling unit." The Bylaw defines "dwelling unit" as a "room or enclosed floor 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."

b. A "secondary dwelling" is, in pertinent part, a "detached single-family dwelling unit located on the same lot as a primary dwelling unit." The Bylaw's definition of "secondary dwelling" imposes various design, access, and ownership requirements on them. The secondary-dwelling definition then states:

> The principal purpose of secondary dwellings is to create housing opportunities through the provision of affordable rental housing for year round residents . . . while affording the owner of the primary residence with the opportunity to generate supplemental income. The intent of this provision is also that one of the two dwellings be designated and constructed at such scale and bulk so as to be clearly subordinate in both use and appearance.

c. An "accessory dwelling" is a "dwelling unit located within an owner-occupied single-family building." The Bylaw defines "owner occupied" as

> [t]he primary residence, or temporary (seasonal) residence, of a person(s) or the individual beneficiaries of a legal entity that holds title to the property, where such persons are physically present and living within dwelling units on said property for at least three months each calendar year. Properties owned by corporations and the like, time sharing interval dwelling units, or where all units are made available for rent do not qualify as owner occupied.

The Bylaw defines "building" as a "structure forming a shelter for persons, animals or property and having a roof. Where the context allows, the word 'building' shall be construed as though followed by the words 'or part thereof.'"

d. A "garage apartment" is a "dwelling unit located within a residential or commercial garage." (The Bylaw defines "garage" as a "building for covered shelter of one or more vehicles.") The Bylaw's definition of "garage apartment continues:

> The dwelling unit shall not exceed 150% of the gross floor area of the garage. If located on the same lot as a primary dwelling unit, the following requirements shall be applicable:
>
> (1) Both dwelling units shall be in the same ownership unless one of the two dwelling units is subject to the [Nantucket Housing Needs Covenant]. The ownership of a lot by a condominium cooperative housing corporation, land trust,

> or other common interest ownership entity in which there is a separate beneficial ownership of the primary dwelling and garage apartment on the lot shall not be deemed to constitute "the same legal and beneficial ownership." . . .

e. A "home occupation" is an "occupation, trade, profession, or business activity conducted as an accessory use wholly or partly within a dwelling unit or in one or more accessory structures." Section 139-2(1)(a) states that such occupations "shall be conducted by occupants of a dwelling upon the lot, and not more than one additional worker who is not an occupant of a dwelling upon the lot." The Bylaw doesn't define the term "occupant."

40. Section 139-15 of the Zoning Bylaw provides: "In addition to the principal . . . 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." Section 139-2 of the Bylaw defines "use, principal" as a "use which is expressly permitted by this chapter (other than as an accessory use), either with a special permit or without need of one." Section 139-2 defines "accessory uses" as "[s]eparate structures, buildings or uses which are subordinate and customarily incidental to a principal structure, building or use located on the same lot."

41. The Use Chart identifies "transient residential facilities" as a "business commercial" use. Section 139-2 of the Bylaw defines "transient residential facilities" as "[h]otels; rooming, lodging or guest houses; and time-sharing or time-interval-ownership dwelling unit(s)." The Bylaw defines "hotel" as a "building or buildings on a lot containing a commercial kitchen and rental sleeping units without respective kitchens, primarily the temporary abode of persons who have a permanent residence elsewhere." The Bylaw defines "lodging, rooming or guest house" as a "building or buildings on a lot containing rental sleeping units without respective kitchens, and not having a commercial kitchen, primarily the temporary abode of persons who have a permanent residence elsewhere." The Bylaw defines "time-sharing or time-interval-ownership dwelling unit or dwelling" as a

> dwelling unit or dwelling in which the exclusive right of use, possession or ownership circulates among various owners or lessees thereof in accordance with a fixed or floating time schedule on a periodically recurring basis, whether such use, possession or occupancy is subject to either: a time-share estate, in which the ownership or leasehold estate in property is devoted to a time-share fee (tenants in common, time-share ownership, interval ownership) and a time-share lease; or time-share use, including any contractual right of exclusive occupancy which does not fall within the definition of "time-share estate," including, but not limited to, a vacation license, prepaid hotel reservation, club membership, limited partnership or vacation bond, the use being inherently transient.

42. The Use Chart shows that "rooming, lodging, or guest house" uses in the ROH district are allowed only by special permit. Such uses are prohibited in the R-1 district. "Hotel or inn" and "timesharing/interval dwelling units" are prohibited in the both the ROH and R-1 districts.

43. Section 139-2 of the Zoning Bylaw defines "commercial" as "in a trade, occupation, or business, including a transient residential facility, but excluding governmental, religious or private residential uses." The Use Chart lists nineteen uses, including those described in Finding #37 above, as "residential," but the Bylaw doesn't otherwise define "residence" or "residential." The Chart doesn't contain a "governmental" use category, although it classifies "Municipal uses (any)" as an "other" use. The Chart doesn't contain a "religious" use category either.

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Ward's Standing Under Chapter 40A, § 17

To challenge a local zoning board's decision under § 17, private citizens must show the decision has "aggrieved" them. Section 17 presumes, however, that persons who are abutters to a property that's the subject of the contested decision are "aggrieved." *Denneny* v. *Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 212 (2003). Abutter § 17 plaintiffs benefit from that presumption unless and until someone suitably challenges their standing. See *Standerwick* v. *Andover Zoning Bd. of Appeals*, 447 Mass. 20, 34-35 (2006).

As the Ward Property abuts the Grape Property, *Standerwick* places on the Grapes and the ZBA the initial burden of rebutting Ms. Ward's claimed standing under § 17. See *Kenner* v. *Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 117-118 (2011). There are many ways a defendant may challenge a § 17 plaintiff's standing. The Grapes and the ZBA lodge two such attacks. They contend, first, that the Grapes' rentals aren't causing the two harms Ward claims, excessive noise and light. See *81 Spooner Road, LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 702 (2012) (party may attack plaintiff's standing by offering evidence that there is or will be no harm). Second, they assert that Ward's concerns about noise and light aren't sufficiently particular to her. See *Murchison* v. *Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209, 214 (2020) (standing under § 17 as a "person aggrieved" requires "evidence of an injury particular to the plaintiff[], as opposed to the neighborhood in general").

To succeed on these arguments, the Grapes and the ZBA "must offer evidence

'warranting a finding contrary to the presumed fact.'" *Standerwick*, 447 Mass. at 34, quoting *Marinelli* v. *Board of Appeals of Stoughton*, 440 Mass. 255, 258 (2003). If that happens, the burden shifts to Ms. Ward to provide "credible evidence" of her claimed standing. *Butler* v. *City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005). Such evidence

> has both a quantitative and a qualitative component. . . . Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the [challenged] action.

Id.[8] But once the court "determines that the evidence is both quantitatively and qualitatively sufficient, . . . the plaintiff has established standing and the inquiry stops." *Id.* at 441-442. In that respect, the court performs only a "gatekeeping" function, one requiring "consideration solely of the quantity and quality of evidence the plaintiffs have presented, [and] not the comparative weight of the plaintiffs' testimony and the defendants'." *Michaels* v. *Zoning Bd. of Appeals of Wakefield*, 71 Mass. App. Ct. 449, 453 (2008).

At trial, the Grapes and the ZBA rebutted Ms. Ward's claims that the Grapes' renters are disturbingly noisy and leave on bothersome lights. But Ward presented sufficient "quantitative" and "qualitative" trial evidence of the opposite: that the Grapes' renters have caused her to hear more noise and experience greater nighttime light. Ward provided first-hand, direct accounts of what she's heard and seen coming from the Grape Property during rentals. Her testimony about noise and light isn't "'speculative personal opinion,'" *Standerwick*, 447 Mass. at 33, quoting

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[8] The Town and the ZBA seem to suggest (see Town's Pre-Trial Memorandum at 17) that *Butler*'s "quantitative" test requires harms to be measurable and that a § 17 plaintiff must "quantify" such harms to preserve her standing. The Town and the ZBA offer no case-law support for those arguments. This Court thus will adhere to *Butler*'s formulation of the quantitative test. For what it's worth, the Grapes and the ZBA didn't offer at trial any light or noise quantifications, apart from providing the wattage of the bulb in the Globe Light.

Barvenik v. *Aldermen of Newton*, 33 Mass. App. Ct. 129, 132 (1992),[9] and hence it passes *Butler*'s "quantitative" test.

Ms. Ward's testimony, the parties' agreed facts, and the documents admitted into evidence collectively present a "qualitative" case for Ward's standing. While she doesn't dispute that the Grapes themselves and their non-renting guests could make (and have made) the same noises she finds objectionable, or could leave the Globe and Stair Lights on all night (the Grapes testified they don't), under *Michaels* this Court may not disregard the evidence that (1) objectively bothersome noises and light come from the Grape Property more frequently when the Property is being rented; (2) Ward's appeals to the renters (either directly or through the Grapes) often are ignored, and have to be repeated as renters change; and (3) Ward's non-renting neighbors don't bother her with their noises or their lights. The Court's mindful of the adage that correlation doesn't equal causation, but it's plausible on the record of this case that owing to factors such as being on a "vacation" schedule, living in an unfamiliar house, not understanding the neighborhood, having no personal connection with Ward or any other abutter, and having parted with a substantial sum for a care-free Nantucket stay, the Grapes' renters create more

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[9] The Town and the ZBA quote *Kenner* and *Kende* v. *Whipple*, 30 LCR 461 (2022) (Speicher, J.), to suggest that Ms. Ward's concerns about noise and light are "speculative." The Town and the ZBA ignore the context of each case. In *Kenner* – a case involving views and traffic impacts, not noise or light – the Supreme Judicial Court characterized as "speculative" the Kenners' claims that a proposed structure would block their views, where they failed to rebut an architect's testimony that the structure wouldn't do so. *Kenner*, 459 Mass. at 119-120. In *Kende*, the § 17 plaintiffs failed to offer any evidence concerning their light and noise claims, despite construction of the facilities they disputed. See *Kende*, 30 LCR at 467-468. They also didn't rebut evidence that the defendant would be installing "window treatments" that would "alleviate" plaintiffs' concerns about light. *Id.* at 467.

The Grapes argue that a plaintiff may not claim standing under § 17 with respect to noise or light unless he or she has expert evidence. While one case the Grapes cite, *Maloof* v. *Carroll*, 12 LCR 359 (2004) (Long, J.), contains language to that effect (see *id.* at 364), *Maloof* was a decision on summary judgment, and at summary judgment, the defendant developer provided unrebutted expert opinion that the developer's project wouldn't cause noise exceeding what was allowed in the project's district, a commercial zone. See *id.* at 361. By contrast, the Grapes and the ZBA offered at trial no expert evidence disproving Ms. Ward's claims of bothersome noises and light. The Grapes also cite *Ubertini* v. *Cataloni*, 13 LCR 215 (2005) (Trombley, J.), and *Cohen* v. *Rector*, 26 LCR 16 (2018) (Piper, C.J.), but while the plaintiffs in both of those cases submitted expert acoustic evidence, neither case holds that § 17 plaintiffs who claim harms from noise (especially those who are challenging noisy activities that have already started) *must* present expert testimony.

disruption than the Grapes and their non-renting guests do. See *Styller* v. *Aylward*, 26 LCR 464, 466 (2018) (Long, J.), aff'd on other grounds sub nom. *Styller* v. *Zoning Bd. of Appeals of Lynnfield*, 487 Mass. 588 (2021).[10]

The Court thus holds that Ms. Ward has provided credible evidence under *Butler* that renting the Grape Property results in harmful noise and light. The Court also holds that she has credible evidence under *Butler* that those harms are particular to her property and not the larger neighborhood. Apart from the Main House and the Garage House, Ward's is the closest residence to the Patio, the Globe Lamp (plus the Patio Windows), and the Stairway Lamp, the primary sources of objectionable noise and light. Ward asserts that the noise and light are disrupting her life; she makes no claim (nor do the Grapes assert) that the Property's noise and light are just as disruptive to the community at large. Ward thus has proven her standing under c. 40A, § 17, to challenge the ZBA Decision.

Article 39

The Grapes contend that passage of Article 39 moots Ms. Ward's challenge to the ZBA Decision.

> Courts decline to hear moot cases because (a) only factually concrete disputes are capable of resolution through the adversary process, (b) it is

[10] Because Ms. Ward had by the time of trial seven years of first-hand experience with the Grapes' rentals, and because number of rental days is undisputed, her causation evidence is superior to that criticized in *Marashlian* v. *Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719 (1996); *Maloof*, 12 LCR 359; *Shemuga* v. *Brown*, 27 LCR 46 (2019) (Speicher, J.); and *Doyle* v. *Zoning Bd. of Appeals of the City of Attleboro*, 29 LCR 533 (2021) (Rubin, J.). In *Marashlian*, the plaintiffs successfully asserted standing based on a "tangible" loss of parking, in contrast to "speculative" testimony in another case (rejected by the Supreme Judicial Court) where a plaintiff feared the "possibility" that increased traffic would allow "more lights from automobiles to shine into the plaintiff's home." *Marashlian*, 421 Mass. at 722 n.5. The losing plaintiffs in *Maloof* and *Shemuga* similarly testified only to "speculative" noise and light impacts (*Maloof*, 12 LCR at 362), or to "possible interference," "unknown," and "could be" effects (*Shemuga*, 27 LCR at 48). In *Doyle*, Mr. Doyle attempted to extrapolate from four instances of delivery trucks turning in his driveway, which was 100 feet from the site of a proposed two-family dwelling, that the dwelling's addition of one residential unit would increase the use of Doyle's driveway. The court described Doyle's evidence as "not the kind on which a 'reasonable person could rely to conclude that the claimed injury likely will flow from'" the granting of the two-family dwelling's permit. *Doyle*, 29 LCR at 536, quoting *Butler*, 63 Mass. App. Ct. at 441.

> feared that the parties will not adequately represent positions in which they no longer have a personal stake, (c) the adjudication of hypothetical disputes would encroach on the legislative domain, and (d) judicial economy requires that insubstantial controversies not be litigated.

Wolf v. *Comm'r of Pub. Welfare*, 367 Mass. 293, 298, (1975).

The parties agreed at summary judgment that after the adoption of Article 39, the Town regulates short-term rentals under the authority of G.L. c. 64G, § 14.[11] The Grapes reason that if the Town regulates short-term rentals, then perforce the Zoning Bylaw allows those rentals as of right. The latter proposition doesn't follow from the former. Nothing in c. 64G suggests that it or a municipal bylaw adopted pursuant to c. 64G, § 14, preempts, supersedes, or otherwise governs what a municipality regulates through its zoning laws. See *Rayco Investment Corp.* v. *Board of Selectmen of Raynham*, 368 Mass. 385, 390-391 & n. 4 (1975) (that a municipality may regulate activity under a general bylaw does not preempt or control its ability to regulate conduct separately as a zoning matter). In fact, the law points in the other direction: if a municipality regulates activities through its zoning bylaws, it may adopt general bylaws that *supplement* zoning regulations, but not contradictory laws. See *Valley Green Grow, Inc.* v. *Town of Charlton*, 27 LCR 99. 103-105 (2019) (Foster, J.), aff'd, 99 Mass. App. Ct. 670 (2021).

Even under Ms. Ward's interpretation of the Zoning Bylaw, short-term rentals would be allowed in commercial districts as of right and in the ROH district by special permit. She also

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[11] Section 14 allows municipalities to regulate "operators," which c. 64G, § 1, defines as including "a person operating a . . . short-term rental . . . in the commonwealth . . . ." Section 1 defines "short-term rental" as

> an owner-occupied, tenant-occupied or non-owner occupied property including, but not limited to, an apartment, house, cottage, condominium or a furnished accommodation that is not a hotel, motel, lodging house or bed and breakfast establishment, where (i) at least 1 room or unit is rented to an occupant or sub-occupant; and (ii) all accommodations are reserved in advance; provided, however, that a private owner-occupied property shall be considered a single unit if leased or rented as such.

Section 1 defines "occupant" as "a person who uses, possesses or has a right to use or possess a room" on an operator's premises "under a lease, concession, permit, right of access, license or agreement." The Grapes contend they're "operators" and that they've complied with Article 39.

doesn't dispute that Article 39 supplements whatever restrictions the Zoning Bylaw imposes on lawful short-term rentals. She challenges instead whether the Zoning Bylaw allows such rentals in the ROH district as of right. Neither c. 64G nor Article 39 expressly answers that question. Even if Article 39 announced that short-term rentals were allowed in the ROH district, Nantucket's town meeting wasn't free to amend the Zoning Bylaw by means of a general bylaw like Article 39 if, as Ward contends, the Zoning Bylaw prohibits short-term rentals. The Court thus DENIES the Grapes' cross-motion for summary judgment on Ward's Count I.

Short-Term Rentals Under the Zoning Bylaw

As mentioned in the introduction to this decision, the structure of the Zoning Bylaw and its § 139-6.A require the owner of a property whose use of the property is challenged to show that the Bylaw expressly allows the use. Zoning boards and courts are to construe zoning bylaws in this manner:

> We determine the meaning of a bylaw "by the ordinary principles of statutory construction." We first look to the statutory language as the "principal source of insight into legislative intent." When the meaning of the language is plain and unambiguous, we enforce the statute according to its plain wording "unless a literal construction would yield an absurd or unworkable result." We "endeavor to interpret a statute to give effect 'to all its provisions, so that no part will be inoperative or superfluous.'"

Shirley Wayside Ltd. P'ship v. *Board of Appeals of Shirley*, 461 Mass. 469, 477 (2012) (citations omitted), quoting *Framingham Clinic, Inc.* v. *Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981); *Adoption of Daisy*, 460 Mass. 72, 76 (2011); and *Connors* v. *Annino*, 460 Mass. 790, 796 (2011).

At summary judgment, the Town and the ZBA argued that short-term rentals of "primary dwellings" are a permitted "principal use" of such properties under the Zoning Bylaw, owing to the Bylaw's definition of "primary dwelling." Memorandum of Law in Support of the Town, the

ZBA, and the Keiths' Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, 5, 12-14 ("Town's Brief," docketed May 9, 2023). Having considered the meaning of the terms that make up the Bylaw's definition of "primary dwelling," their context, and the Supreme Judicial Court's decision in *Styller*, the Court disagrees with the Town and the ZBA's interpretation.

The Town and the ZBA reason as follows: under the Bylaw, a "primary dwelling" is a "detached single-family dwelling unit . . . ." A "dwelling unit" is a "room or enclosed floor space used, or to be used, as a habitable unit for one family or household, with facilities for sleeping, cooking and sanitation." And a "family" is "[o]ne or more persons occupying a dwelling unit and living as a single household." The Town and the ZBA argue that the Grapes' Main House indisputably is detached from all other structures; it has enclosed facilities for sleeping, cooking, and sanitation; and when renters are in the Main House, they're occupying it solely as a "dwelling unit" (and not for the renters' own commercial or industrial purposes). The Grapes also testified they try to rent the Main House only to persons who are living as a single household and not groups of unrelated vacationers. The Town and the ZBA thus argue that the Main House, like all "primary dwellings" in Nantucket's residential districts, may be rented short-term.

The Town and the ZBA's reading of "primary dwelling" and its component terms is contrary to how the Supreme Judicial Court interpreted a similar bylaw in *Styller*. The bylaws in *Styller*, like Nantucket's Zoning Bylaw, prohibited any use of a property that the bylaws didn't specifically authorize. See *Styller*, 487 Mass. at 589. Homeowner Styller nevertheless argued that the bylaws implicitly allowed "transient" rentals (that is, rentals for 30 days or less) of his single-family residence because the bylaws allowed "one family detached houses" as a primary

use in a "single-residence district," and it was undisputed that he owned such a house. The court disagreed. The court held that the terms on which Styller relied, by themselves, did not "specifically permit[]" short-term rentals of his property. *Id.* at 597. The court reached that conclusion having considered the purposes of Lynnfield's single-residence zoning district, the Lynnfield bylaws' definition of "family," and a common definition of "residence." *Id.* at 599-600. "Reading the two terms in context, and giving them sensible meaning," the court concluded that Lynnfield "'clearly and unambiguously excluded, in pertinent part, purely transient uses of property in [a residential zoning district].'" *Id.* at 600 (citation omitted, brackets in *Styller*, quoting *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Bd.*, 652 Pa. 224, 245 (2019)).

In fairness, the bylaws at issue in *Styller* and Nantucket's Zoning Bylaw aren't identical. Nantucket's defines "family," for example, as "[o]ne or more persons occupying a dwelling unit and living as a single household," while Lynnfield's definition said a "family" included "[a]ny number of persons living and cooking together on the premises as a single housekeeping unit, *as distinguished from a group occupying a boarding house, lodging house, or hotel*." *Styller*, 487 Mass. at 600 (emphasis added). Lynnfield's bylaws thus expressly distinguished its "families" from more transient groups.

But Nantucket's bylaw contains a provision not present in *Styller* that shows that Nantucket's bylaw too doesn't contemplate transient uses by non-owners of the town's "residences" (a term neither town's bylaw defines, see *Styller*, 487 Mass. at 600 and Finding #43). That provision is the Zoning Bylaw's definition of another as-of-right residential use, the "secondary dwelling." The Bylaw defines "secondary dwelling" as a "detached single-family dwelling unit located on the same lot as a primary dwelling unit," provided certain design, access, and ownership requirements are met. The definition goes on to state, however, that

"[t]he principal purpose of secondary dwellings is to create housing opportunities through the provision of affordable rental housing *for year round residents* . . . while affording the owner of the primary residence with the opportunity to generate supplemental income." One can't reconcile that statement (the Zoning Bylaw's only express mention of rentals in connection with any residential "dwelling") with the Town and the ZBA's contention that the Bylaw allows all "dwelling units" to be leased to transient (that is, not year-round) "families."

Multiple cases hold that when reviewing a local board's decision under c. 40A, § 17, a court must "accord deference to a local board's reasonable interpretation of its own zoning bylaw . . . ." *Shirley Wayside*, 461 Mass. at 475 (citations omitted). Cases are equally clear, however, that a local board's interpretation of its own zoning bylaw isn't dispositive. See *Tanner* v. *Boxford Bd. of Appeals*, 61 Mass. App. Ct. 647, 649 (2004). "[A]n 'incorrect interpretation of a statute . . . is not entitled to deference.'" *Shirley Wayside*, 461 Mass. at 475 (citations omitted), quoting *Atlanticare Med. Ctr.* v. *Comm'r of the Div. of Med. Assistance*, 439 Mass. 1, 6 (2003). An unreasonable interpretation of a bylaw likewise does not enjoy deference. See *Perry* v. *Hull Zoning Bd. of Appeals*, 100 Mass. App. Ct. 19, 23 (2021).

The ZBA Decision doesn't lend itself to deference under *Shirley Wayside*. Paragraph 11 of the Decision says the building commissioner "appropriately applied the plain language of the By-law" in refusing Ms. Ward's request that he halt short-term rentals of the Grape Property. The Decision also says the commissioner made "an appropriate determination that the use of [the Property] complies with allowable residential use," and that the Board "felt it was important to focus on interpreting and applying the specific provision of the Nantucket Zoning By-law to this specific property." But the Decision never identifies (1) the "plain language" upon which the commissioner or the ZBA relied, (2) what "allowable residential use" includes the Grapes'

rentals, or (3) what "specific provision" of the Zoning Bylaw applies to the Grapes' activities. While the ZBA permissibly could have chosen to adopt a written analysis prepared by the commissioner, his only written statement on the topic appears in his letter denying Ms. Ward's enforcement request. That letter says only this about the Bylaw: "[I]n my opinion, the use of the [Grape Property] for short term rentals does not violate the Town's Zoning Bylaw."

The ZBA Decision thus presents no reasoned interpretation of the Zoning Bylaw. (The decision on Mr. Quick's appeal, attached to his complaint in *Quick*, is no more illuminating.) Deference to a board's interpretation of a bylaw typically certainly is warranted when a bylaw term has multiple reasonable meanings, and the board has expressly chosen one. See *Tanner*, 61 Mass. App. Ct. at 649-652. Deference also is warranted where bylaw provisions conflict and the board expressly has reconciled them. See *Perry*, 100 Mass. App. Ct. at 21-23. But the ZBA Decision doesn't disclose what Bylaw terms the ZBA examined in considering Ms. Ward's appeal. There's no suggestion that the ZBA looked at any of the provisions construed in *Styller*, found them to be ambiguous when used in the Zoning Bylaw, then chose an alternative meaning. There's also no hint that in considering Ward's appeal, the ZBA identified a conflict among the Zoning Bylaw's provisions and reconciled them in the Grapes' favor.

The Court appreciates that the ZBA Decision responds to Ms. Ward's oft-repeated contention that short-term rentals constitute prohibited "commercial" activity under the Zoning Bylaw. But under *Styller*, that's the wrong question to ask about the Grapes' activities. The right question is what provision of the Bylaw allows such rentals. The Town and the ZBA's attempt to stretch the Bylaw's definition of "primary dwelling" to cover short-term rentals doesn't work primarily for the same reasons that effort failed in *Styller*.[12]

[12] The Court reaches this conclusion having considered the Zoning Bylaw (the text of which is undisputed), the ZBA Decision (also undisputed), the arguments advanced in the Town's Pre-Trial Memorandum and Brief, and

But that's not the end of the analysis or this case. The Town, the ZBA, and the Keiths argue that even if none of the residential "principal use" categories of the Bylaw allows short-term rentals, such rentals might qualify as a lawful "accessory use" of a residentially zoned property. Under §§ 139-2 and -15 of the Bylaw, an "accessory use" is one that is "subordinate and customarily incidental to" a permitted use on the same lot. *Styller* is clear "that a different result [concerning short-term rentals of residentially zoned properties] may obtain in other circumstances, depending upon, for example, the specifics of the zoning bylaw of the city or town, including what types of additional uses are permitted (if any), *as well as what is considered a customary accessory use in a particular community*." *Styller*, 487 Mass. at 600 n. 16 (emphasis added).

At oral argument on their summary-judgment motions, the parties agreed that, with no disrespect intended toward either community, Lynnfield and Nantucket are different. But the ZBA Decision is clear that the ZBA didn't analyze Ms. Ward's enforcement request through the lens of whether the Grapes' short-term rentals of the Main House are "subordinate and customarily incidental to" the House's permitted use as a "primary dwelling." This Court shouldn't supply rationales for a local decision that the local board hasn't developed itself. See *Wendy's Old Fashioned Hamburgers of N.Y., Inc.* v. *Board of Appeals of Billerica*,

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the cases cited in this decision. The affidavit of Julia Linder (Ward Appendix, Tab 16), the Donahue Institute Report (Tab 12 to Appendix of Peter A. Grape and Linda Oliver Grape in Support of Their Opposition to Ward's Motion for Summary Judgment, and in Support of Their Own Cross-Motion for Summary Judgment), and the deposition testimony of Penelope Dey (Appendix 1 to Supplemental Appendix of Summary Judgment Exhibits of Nantucket Defendants and Intervenors) aren't relevant to the interpretation of the Bylaw's provisions regarding the principal uses of "primary dwellings," although (setting aside other admissibility issues) they might become relevant to the issue of permissible accessory uses of principal dwellings. With that caveat, the Court GRANTS (1) the Grapes' motion to strike the Lindner affidavit, for all purposes in connection with the parties' motions and cross-motions for summary judgment; (2) Ms. Ward's motion to strike the Donahue Institute Report, for all such purposes; and (3) Ward's motion to strike Dey's deposition testimony, for all such purposes.

454 Mass. 374, 387 (2009); *Board of Aldermen of Newton* v. *Maniace*, 429 Mass. 726, 732-733 (1999).

Ms. Ward objects to any remand. She's confident that the frequency of the Grapes' rentals surpasses any permissibly "subordinate" level of use. She also fears the ZBA will overlook the undisputed facts, bless the Grapes' conduct, and force her back to this Court. Ward ignores, however, her September 2021 demand to the building commissioner: that he halt *all* short-term rentals of the Grape Property. If short-term rentals are "customarily incidental" to using "primary dwellings" on Nantucket – after all, Ward admitted at trial to being both a short-term lessor and a short-term renter of Nantucket residences – the Bylaw allows some "subordinate" level of rentals. Thus, while the Court will vacate the ZBA Decision and declare that short-term rentals aren't allowed as a principal use of primary dwellings in Nantucket's ROH district, the Court will remand the case to the ZBA so that it can determine whether the Grapes' rentals of their Main House are a permissible "accessory use" of that structure, and if not, order the appropriate remedies.

Judgment to enter accordingly.

/s/ Michael D. Vhay
Michael D. Vhay
Associate Justice

Dated: March 14, 2024