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**FINDINGS AND DECISION OF THE
WARWICK ZONING BOARD OF APPEALS**

RE: Appeal from an order of the Warwick Building Inspector and Zoning Enforcement Agent pursuant the Warwick Zoning Bylaw, Section Two, B., 3, dated May 16, 2014 and received by the Town Clerk on May 19, 2014.

DATE: August 18, 2014

PROCEDURAL HISTORY:

1: On April 18, 2014 Phil Delorey, Warwick Building Inspector and Zoning Enforcement Agent, issued an order to Kim Smith and Scott Williams of Wagon Wheel Campground notifying them that "your continued use of your property as a year round mobile home park is contrary to the Warwick Zoning Bylaw. Section Two, B, 3, prohibits the use of Mobile home parks." The order goes on to say, "Therefore, you are required to immediately cease continued use of your property as a Mobile home park."

2: On May 5, 2014, Attorney Donna MacNicol submitted an appeal from the building inspector's order on behalf of Kim Smith and Scott Williams, citing the zoning bylaw's provision excluding nonconforming pre-existing uses of the property as justification for appealing from the order to cease. The notice of appeal was not accompanied by the required \$75 application fee.

3: On May 16, 2014 Miryam Ehrlich Williamson, chair of the Warwick Zoning Board of Appeals, notified Attorney MacNicol of failure to submit the application fee. On May 19, 2014 the Warwick town clerk received the required check and noted its receipt by stamping the date on a letter from Attorney MacNicol accompanying the \$75 check.

4: Notice of a public hearing appeared in the Athol Daily News on June 4 and June 11, 2014. Notices were mailed to abutters and interested parties on June 2, 2014. A public hearing was opened on June 25, 2014 at 7:22 p.m. Eastern Time; the hearing was continued to July 16 at 7:00 p.m., and closed at 7:26 p.m. Fourteen people attended the first hearing and eight were at the continuation.

5: During the period during which the hearing remained open, four members of the Zoning Board of Appeals, with permission of the owners, visited the Wagon Wheel Campground. Appellants Smith and Williams escorted the members around the area in question. They answered general questions about the campground (e.g. What is a "safari field?") Board members did not discuss what they learned among themselves.

6: The Board reviewed the application, testimony received at the public hearing, and all additional materials and information submitted prior to the close of the public hearing. The Board gave due consideration to the testimony given at the public hearing, as well as the materials and information submitted.

7: The following Board members attended the public hearing: Robert Croke, Francis Renna, and Miryam Williamson, regular members; James Erviti and Arthur Long, alternate members.

FINDINGS:

1: Wagon Wheel Campground was laid out in a plan filed by John N. Durkee et al dated April 2, 1971, titled Trailer Park and Camp Site. A legend is included indicating that subdivision approval of Warwick's Planning Board was not required, dated April 8, 1971. It was filed with the Franklin County Registry of Deeds on April 11, 1971 and entered in Plan Book 32, page 75. According to evidence submitted by the appellants, this is the first official record of the campground's existence and layout.

2: In the mid-1970s the campground was purchased by Alexander R. Lattanzio. No deed or other record of the sale was submitted by the appellants.

3: On January 5, 2007, Alexander R. Lattanzio granted a quitclaim deed to Smith and Williams, LLC (Kim Smith and Scott Williams, appellants) for the property at 909 Wendell Road, Warwick, the property described in the plan cited above.

4 – According to testimony submitted by the appellants through their attorney, Donna MacNicol, Smith and Williams, LLC have occupied the property, rented out dwellings on the property, and operated the campground year round since then. Licenses by the Board of Health for operation of the campground were submitted by appellants. Issuance dates for consecutive years range from October 18, 2006 through May 14, 2014, with expiration dates mainly December 31, with one dated July 1, 2014. David Young, the town's administrative coordinator, provided at the continuation of the hearing a license from the Board of Health expiring November 30, 2014, with a note saying that future licenses will run from April 1 to November 30 of each calendar year. No licenses for years prior to 2006 were provided.

5: Appellants' counsel cites "contracts for winter rentals of the camp site" as Exhibit F in their submission. Exhibit F consists of handwritten statements by three individuals stating that they have rented camp sites in the winter in the years 2010 – 2014, 2012 – 2014 and 2013 – 2014 respectively.

6: Administrative Coordinator David Young entered into the record a portion of

the town's street list as of January 1, 2014, which shows six individuals age 16 and older residing at 909 Wendell Road, the street address of the campground. At the first session of the hearing one woman volunteered that while she has a residence in Orange, she prefers to winter at the campground with her two daughters. The daughters, she testified, attend elementary school in Orange. Asked what address she gave the school as the children's residence she said 909 Wendell Road, Warwick. These facts are contrary to the appellants' assertion that the campground is used in the winter solely for recreational camping.

7: Appellants base their appeal on the zoning bylaw provision under Section Three: Pre-existing Uses A. "Continuation and Restoration: The lawful use of any building, structure or land may be continued, provided that such use was properly allowed when it began and has not been discontinued or destroyed by fire or natural cause for a period of two or more consecutive years." Appellants assert that the campground has been in operation year round continuously since the 1960s.

8: The first Warwick Zoning Bylaw was adopted by Town Meeting on July 6, 1970 and approved by the Attorney General on November 9, 1970. Section 2. D. provides for the continued use of any existing and lawful use existing as of the date of the adoption of the bylaw. Section 4 D provides for the establishment of trailer parks including trailers and mobile homes only if authorized by the Board of Appeals. The campground and trailer park were in existence on the date the zoning bylaw was adopted. There is no evidence that the Board of Appeals ever authorized the campground for year round residential use.

9: Subsequent iterations of the Warwick zoning bylaw dealt in various ways with campgrounds, mobile home parks, and trailer parks. These amendments are not relevant to the issues raised in this appeal.

DECISION:

The Board found it necessary to address three issues.

Issue 1: Is the property being used as a mobile home park?

Chapter 140 Section 32Q defines a "manufactured home" as follows:

"As used in sections thirty-two A to thirty-two P, inclusive, the words 'manufactured home' shall mean a structure, built in conformance to the National Manufactured Home Construction and Safety Standards which is transportable in one or more sections, which in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three

hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling unit with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein.

Smaller dwelling structures defined as a "camping unit" are described at 105 CMR 440.01. This seems to describe the structures ZBA members saw at Wagon Wheel during their site visit on Saturday, July 12, 2014.

Although there is no reference to mobile homes in MGL 140:32Q, the Board accepts Attorney MacNicol's assertion that "manufactured home" and "mobile home" are synonymous. At the hearing the Zoning Enforcement Officer acknowledged that he didn't know the difference between a mobile home and the kind of structure found at Wagon Wheel. The Board finds that Wagon Wheel Campground is not operating a mobile home park. However it sees the distinction between mobile home and camping unit as one of semantics and does not find the enforcement officer's error sufficient reason to vacate the cease and desist order.

Issue 2: Is year-round operation of the campground a preexisting, nonconforming use?

To qualify under the 1970 zoning bylaw's "grandfather clause," the Board must find that recreational camping took place during the winter of 1969-1970, that such use was properly allowed when it began and has not been discontinued, not used, or destroyed by fire or natural cause for a period of two or more consecutive years. [Warwick Zoning Bylaw, Section Three, Preexisting Uses, Paragraph 1, Continuation and Restoration] This is the section of the zoning bylaw upon which the appellants base their case.

No evidence was presented at the hearing to support the appellants' claim.

Issue 3: Where does the burden of proof rest concerning preexisting use?

In the interest of completeness, the Board asked Warwick's town counsel, Jeremia Pollard, where the burden of proof rested.

He replied that the appellant bears the burden of showing that they are entitled to the protection of G.L. c. 40A, § 6, fourth paragraph, first sentence. It is well accepted that the party seeking to demonstrate a nonconforming use bears the burden of proof.

See *Derby Refining Co. v. Chelsea*, 407 Mass. 703, 712 (1990) (party seeking protection as a preexisting nonconforming use under G.L. c. 40A, § 6 bears the

burden of proof);

Hall v. Zoning Bd. of Appeals of Edgartown, 28 Mass. App. Ct. 249, 257 (1990) (plaintiff seeking protection as prior nonconforming use under G.L. c. 40, § 6, bears burden of proof);

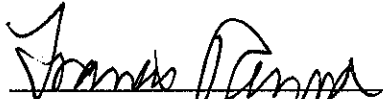
Cape Resort Hotels, Inc. v. Alcohol Licensing Bd. of Falmouth, 385 Mass. 205, 220-221 (1982) ("property owner bears the burden of proving the requisite similarity between the current use and the original nonconforming use").

Therefore, the Zoning Board of Appeals finds that Wagon Wheel Campground is not authorized to operate as a year-round residential campground. The order of the Building Inspector and Zoning Enforcement Officer is upheld.

The following members of the Board voted to uphold the Zoning Enforcement Officer's order:



Robert Croke



Francis Renna



Miryam Ehrlich Williamson

This Decision was filed with the Town Clerk on

August 21, 2014

I, the undersigned Town Clerk of the Town of Warwick, hereby certify that twenty days have elapsed after the date of filing with my office of the above referenced finding and that no notice of appeal has been filed with my office from said finding.