COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

NANTUCKET, ss. 24 MISC 000543 (MDV)

CATHERINE S. WARD,

Plaintiff,

v.

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

Defendants.

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

This is the Court's second case examining how Nantucket's zoning bylaw (the "Zoning Bylaw" or "Bylaw") applies to defendants Dr. Peter A. Grape and Linda Oliver Grape's short-term rentals (that is, rentals fewer than 31 days long) of their property at 9 West Dover Street in Nantucket (the "Grape Property"). In March 2024, this Court ruled that the Bylaw – which voters at Nantucket's Town Meeting adopted and repeatedly have amended – is a type that allows people to use their properties only as the Bylaw expressly permits, meaning that the Grapes may rent their property only if the Bylaw affirmatively allows that. See *Ward* v. *Town of Nantucket*, 32 LCR 129, 129 (2024) (Vhay, J.) ("*Ward I*"). *Ward I* also held that Nantucket's zoning officials incorrectly concluded that the Grapes' rentals ("STRs") between 2017 and 2021 were within their Property's allowed principal use under the Bylaw as a "primary dwelling." See *id.* at 136-137.

Ward I didn't reach several, now-disputed issues involving the Grape Property. It didn't examine the Property's use prior to when the Grapes bought it in 2017, other than noting that they took ownership subject to "several bookings" for STRs of one of the Property's two residences, the "Main House." *Id.* at 130. *Ward I* also found that plaintiff Catharine S. Ward, the owner of 4A Silver Street (the "Ward Property," a home immediately behind the Grapes'), started living there in 1993; before then, she "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." *Id.* at 131. (The Court learned in *Ward I* and in this case that between 1982 and 2017, the Grapes too had stayed in other people's Nantucket homes, guest houses, bed-and-breakfast establishments, and hotels.) But of chief importance to this second *Ward* case is this: none of the *Ward I* parties requested a ruling on whether (or how) the Bylaw in effect at various times prior to 2017 governed STRs.

Ward I briefly addressed an issue raised in that case by defendants Town of Nantucket and the members of the Nantucket Zoning Board of Appeals (the "ZBA"): that the Grapes' STRs are permissible under the current Bylaw as an "accessory use" of their Property. As Ms. Ward herself had been "both a short-term lessor and a short-term renter of Nantucket residences," *id.* at 137-138, the Town and the ZBA's argument sounded plausible, but since the ZBA hadn't officially decided the question, the Court remanded the case to the ZBA for the first formal review of the issue. See *id.*

The Grapes, the ZBA, and the Town eventually chose not to appeal *Ward I*. Instead, in April 2024, the ZBA opened a public hearing on the STRs-as-accessory-uses issue. The Commonwealth's Zoning Act, G. L. c. 40A, doesn't require municipalities to regulate accessory uses in any particular way, and as will be seen later, Nantucket has taken several approaches to such uses. Since 1991 (with an important amendment adopted in 2023), Nantucket's chief test

for allowed accessory uses has been found in § 139-15 of the Bylaw. At the time the ZBA opened its 2024 public hearing, § 139-15 said this: "In addition to the principal buildings, structures or uses permitted in a district, there shall be allowed in that district, as accessory uses, such activities as are subordinate and customarily incident to such permitted uses including, but not limited to, the rental of rooms within an owner-occupied dwelling unit."

Section 139-15's accessory-use test isn't unusual. Twenty years before Nantucket adopted it, the Supreme Judicial Court decided *Town of Harvard* v. *Maxant*, 360 Mass. 432 (1971). *Maxant* analyzed the phrases "clearly subordinate to, and customarily incidental to," found in the accessory-use provisions of a Harvard zoning bylaw. See *id.* at 435. Like Nantucket's Bylaw, the Harvard bylaw allowed in the town's residential zones only expressly authorized uses. See *id.* at 436. *Maxant* characterized the following excerpts from *Lawrence* v. *Zoning Bd. of Appeals of North Branford*, 158 Conn. 509 (1969), as a "helpful discussion of the meaning of the words 'subordinate and customarily incidental' in a zoning by-law provision for accessory uses . . . ." *Maxant*, 360 Mass. at 438.[1]

> The word "incidental" . . . incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. Indeed, we find the word "subordinate" included in the definition in the ordinance under consideration. But "incidental," when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of "incidental" would be to permit any use which is not primary, no matter how unrelated it is to the primary use.

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[1] At page 10, n. 3 of their corrected pretrial brief, the Town and the ZBA point out that the zoning bylaw at issue in *Maxant* allowed as accessory uses only those activities that were "clearly" subordinate and incidental to a permitted principal use, while § 139-15 of the Bylaw omits the adverb "clearly." The statements and analysis in *Maxant* upon which this Court relies have nothing to do with the Harvard bylaw's use of the word "clearly."

> The word "customarily" is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of "incidental," it should be applied as a separate and distinct test. Courts have often held that use of the word "customarily" places a duty on the board or court to determine whether it is usual to maintain the use in question in connection with the primary use of the land. . . . In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use . . . .
>
> In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even though it is not necessarily found on a majority of similarly situated properties.

Id. at 438-439, quoting *Lawrence*, 158 Conn. at 512-513.

In a decision filed with Nantucket's Town Clerk on September 13, 2024 (the "ZBA Decision"), the ZBA concluded that the Grapes' STRs of their "Main House" are "a permissible accessory use under the Nantucket Zoning Bylaw." *Id.* at 8. The ZBA held that those rentals were "subordinate to the as-of-right residential use of their primary dwelling," having considered

> the Grapes' strong ties to Nantucket and the property in question; their regular personal use of the property as a vacation home for as-of-right residential use, including occupancy of both the Main House and Garage House [the other residence on the Grape Property], and use and occupancy of the property year-round; that they sometimes occupy the Garage House at the same time the Main House is being rented; that they did not acquire the property as an investment property to maximize the amount of money they earn from renting it; that they use the revenue from rentals for upkeep, maintenance, and improvements to the property; and that they do treat periods of vacancy as periods when the property is available for their own personal use as they see fit.

Id. at 7-8. The Board also concluded that STRs "are customarily incidental to as-of-right residential use of a primary dwelling in the ROH district," the location of the Grape and Ward Properties. *Id.* at 7.

Ms. Ward timely appealed the ZBA Decision under G. L. c. 40A, § 17. That appeal forms Count I of her complaint in this second *Ward* case. She also sued the Town under G. L. c. 240, § 14A, for a declaration that the Grapes' use of their Property for STRs is "neither subordinate nor customarily incidental to the permitted principal use [of] a residence" under the Bylaw (Count II of the complaint). Finally, Ward sought a writ of mandamus against the Town under G. L. c. 249, § 5 (Count III of the complaint). In that claim, Ward asked for an order directing "the Town to enforce the Zoning Bylaw such that any dwelling unit short-term rented for more time than used for residential use cannot be deemed a permitted Accessory Use, but instead is a principal use prohibited in residential zones."

The parties appeared for trial on February 19-21, 2025. At the close of Ms. Ward's evidence the Court dismissed Count III, Ward's mandamus claim. Following closing arguments, the Court ordered the Town to file complete versions of both its original 1972 Zoning Bylaw (Trial Exhibit 10), a 1991 "update" or "recodification" of that Bylaw (Trial Exhibit 11), and a compilation of various Bylaw amendments and selected Town Meeting warrants after 1991 (the "April 4 Appendix"). The Court ADMITS the April 4 Appendix into evidence as Trial Exhibit 12. When they filed the Appendix, the Town and ZBA moved to reopen the trial to allow testimony from the Town's planning director; the Court denied that motion.

The Court has heard the parties' witnesses, reviewed the parties' stipulations of fact and the documents admitted into evidence, and read and heard the arguments of the parties (including those in their post-trial supplemental briefs). Pursuant to Rule 52, Mass. R. Civ. P., the Court FINDS the facts set forth above as well as those that follow. The Court HOLDS that § 139-15 of the current Bylaw does not authorize the Grapes to rent the Main House for less than 31 days at a time, as such rentals are not "incidental" (as *Maxant* and other cases define that term) to the allowed use of "primary dwellings" in the ROH district when the primary owner is not in

residence. The Court will thus REVERSE the ZBA Decision and REMAND the case for further action by the ZBA on Ms. Ward's request for zoning enforcement. The Court also will make a declaration, binding on the Town, concerning the meaning of the current Bylaw.

The Court makes these additional findings:

The 1972 Bylaw and Vacation Rentals Prior to November 1990

1. Section IV of the 1972 Bylaw introduced the following principle into Nantucket's zoning laws: "No . . . building, structure or land, or part thereof 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." Trial Exhibit 10 at 5.

2. The 1972 Bylaw divided the town into four districts: a "Limited Use, General" district, a "Residential" district, a "Residential, Old Historic" district (the "ROH District"), and a "Residential Commercial" district. *Id.* In the three latter districts, the 1972 Bylaw permitted as of right "[a]ny municipal use" and "[a]ll uses permitted in Limited Use[] General district." *Id.* at 9.

3. The 1972 Bylaw allowed in the Limited Use General District a "[s]ingle family detached dwelling containing one housekeeping unit only, together with accessory buildings not containing a housekeeping unit." *Id.* at 5-6. The Bylaw didn't define "single family" or any similar phrase. It didn't define "housekeeping unit" either, but it did define "Dwelling unit." That's "a room or group of rooms forming a habitable unit for one family with facilities used or intended to be used for living, sleeping, cooking, and eating." *Id.* at 2. The Bylaw defined "Dwelling, detached" as "a dwelling which is designed to be and is substantially separate from any other structure or structures except accessory buildings." *Id.* The Bylaw defined "Dwelling" as "a building or structure used in whole or in part for human habitation." *Id.* The Bylaw defined "Accessory Building" as "a structure devoted exclusively to a use accessory to a principal use of the lot." *Id.*

4. The 1972 Bylaw had twin definitions for "Accessory use" and "Use accessory"; both defined the concept as "a use customarily incident to, and on the same lot as, a principal use." *Id.* at 2, 4. The Bylaw defined "Use, principal" as "the main use of land or buildings as distinguished from an accessory use." *Id.* at 4.

5. The 1972 Bylaw allowed in the town's Residential Commercial District as of right (but not in the ROH District) "[a]ll uses permitted in Limited Use General Districts and Residential districts" plus thirteen other uses. *Id.* at 9. The latter uses included "[t]ransient residential facilities (hotels, motels, guest houses)." *Id.* The Bylaw defined "hotels" and "motels," but not "guest houses." *Id.* at 3-4.

6. The 1972 Bylaw defined "Use." The definition reads in full: "'Use', *as a verb*, shall be construed as if followed by the words 'or is intended, arranged, designed, built, altered, converted, *rented or leased* to be used.'" *Id.* at 4 (emphases added).

7. Prior to the adoption of the 1972 Bylaw, and continuing through at least November 1990, some Nantucket homeowners rented their properties seasonally, primarily in July and August. No one established at trial the extent of such activity prior to November 1990, what percentage of Nantucket homeowners engaged in it, or how much time annually such homeowners rented their properties. The Court credits William Liddle's testimony that before the mid-1990s, substantially fewer owners rented their homes to vacationers as compared to the last several years. The pre-November 1990 rentals also were primarily one month or longer in duration. One or two-week rentals weren't rare, but they also weren't common.[2]

Vacation Rentals 1990-2015 and the 1991 Bylaw

8. The original 1991 Zoning Bylaw, effective November 13, 1990, replaced in "its entirety" the 1972 Bylaw. Trial Exhibit 11 at 4. The new Bylaw provided that "[a]ll uses . . . existing at the effective date . . . and lawfully conforming under the [prior] Bylaw shall thereafter be deemed lawfully conforming under the 1991 Zoning [Bylaw], but only to the extent such uses and structures continue without substantial change with respect to zoning requirements." *Id.*; see also § 139-33.A (detailed pre-existing non-conforming use provision).

9. The original 1991 Zoning Bylaw divided Nantucket into fifteen districts, including two "overlay" districts. *Id.* at 14. The Bylaw still had, however, a ROH District. *Id.* The Grape and Ward Properties are in that district.

10. The original 1991 Zoning Bylaw revised the 1972 Bylaw's definition of "Use, Principal" (see Finding # 4). The 1991 Bylaw defines the term as "[a] use which is expressly permitted by this zoning bylaw (other than as an accessory use), either with a special permit or without need of one." Trial Exhibit 11 at 13.

11. Under § 139-7.A of the original 1991 Zoning Bylaw, the permitted housing-related uses in the ROH District were "[o]ne single-family dwelling"; "[o]ne detached building constituting a secondary dwelling," provided it met eight conditions; and a "secondary dwelling attached to a principal dwelling," provided it met six conditions. Section 139-7.C of the Bylaw also allowed as of right "Accessory apartments." (More on that in Finding #16 below.) The Bylaw didn't allow in the ROH District "transient residential facilities," which the Bylaw defined as "[h]otels, motels, inns; rooming, lodging or guest houses; and time-sharing or time-interval-ownership dwelling unit or dwelling, dwelling units or dwellings."[3]

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[2] The parties submitted scant island-wide demographic information regarding seasonal rentals. Instead, the facts concerning rentals prior to 2002 came from the testimony of rental agents or persons who themselves had rented seasonally; none of them presented data concerning Nantucket's population as a whole.

[3] In 2009, Nantucket's Town Meeting collapsed this definition's concept of "hotels, motels, and inns" into a definition of "hotel" (defined 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") and replaced the last phrase of the definition with "time-sharing or time-interval-ownership dwelling unit(s)." Trial Exhibit 12 at 24, 34.

12. Section 139-2.A of the original 1991 Zoning Bylaw defined "dwelling" as "[a] building used, or to be used, for habitation, containing sanitation facilities." It defined "dwelling unit" as "[a] room or enclosed floor space used, or to be used, as a habitable unit for one (1) family or household, with facilities for sleeping, cooking and sanitation." Following the receipt of objections from the Attorney General, the Bylaw defined "family" as "[o]ne (1) or more persons occupying a dwelling unit and living as a single, nonprofit housekeeping unit," and defined "household" as "[o]ne or more persons occupying the premises and living together as a single housekeeping unit."

13. Section 139-2.A of the original 1991 Zoning Bylaw defined "lodging, rooming or guest house" as "[a] building or buildings on a lot in which lodgings are let to five (5) or more persons not within the second degree of kindred to a resident owner or manager, or containing four (4) or more rental sleeping units without respective kitchens, and not having a commercial kitchen." In 2009, Nantucket's Town Meeting revised the definition to read "[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." Trial Exhibit 12 at 25.

14. Like the 1972 Bylaw, § 139-2.A of the original 1991 Zoning Bylaw provided that "Used . . . [*a*]*s a verb*, shall be construed as if followed by the words 'or is intended, arranged, designed, built, altered, converted, *rented or leased to be used.*'" (Emphases added.)

15. Like the 1972 Bylaw, § 139-2.A of the original 1991 Zoning Bylaw defined "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." But the 1991 Bylaw introduced a limitation on the prior definition: "**Accessory uses** *shall not be construed to include a building or structure used in whole or in part for human habitation.*" (Bold in original, italics added.) Nevertheless, the original 1991 Zoning Bylaw contained a separate provision not found in the 1972 Bylaw, § 139-15, "Accessory Uses." It stated:

> In addition to the principal buildings, structures or uses permitted in a district, there shall be allowed in that district, as accessory uses, such activities as are subordinate and customarily incident to such permitted uses.

16. Section 139-7.C of the original 1991 Zoning Bylaw introduced a new allowable use in the ROH District, that of an "Accessory apartment." Section 139-7.C's aim was

> to provide an owner of an existing or proposed single-family dwelling the opportunity to install one (1) year-round accessory apartment unit within the exterior walls of his or her home, in lieu of any secondary dwelling or other dwelling unit on the property, provided that the owner is willing to limit the unit to year-round occupancy.

Id. at § 139-7.C(1). Section 139-7.C restricted the size, interior and exterior design, ownership, and occupancy of the apartment and required the owner to provide one additional parking space for it.

17. In 2009, Nantucket's Town Meeting amended the Bylaw to define "accessory apartment," described as "[a] dwelling unit located within an owner-occupied detached single-family dwelling unit" and meeting similar requirements as those mentioned in Finding #16. See Trial Exhibit 12 at 14. The 2009 amendment expressly required the owner, however, to

> [e]xecute and record against the deed to said property a restriction, running with the land and in favor of the Town of Nantucket, to the effect that occupancy of the accessory apartment shall be limited to natural persons domiciled in the Town of Nantucket year round *and that the dwelling may not be offered for nor used for seasonal occupancy*; and the owner shall file with the Town, prior to issuance of an occupancy permit and within 30 days of any change in ownership of the premises, an affidavit . . . attesting to the fact that occupancy of the accessory apartment is and will be limited to natural persons domiciled in the Town of Nantucket year round *and that the dwellings will not be offered for nor used for seasonal occupancy*. The affidavit shall be renewed by the owner of the premises every three years as a condition for retaining an occupancy permit for the accessory apartment.

Id. at 15 (emphases added).

18. Town Meeting also amended in 2009 the Bylaw's provisions regarding allowed uses in the ROH District. Those uses were now called "primary dwelling," "secondary dwelling," "accessory dwelling," and "garage apartment."

19. Starting in 2009, the Bylaw defined the term "primary dwelling" (which replaced the previous Bylaw's term, "dwelling") as "[a] detached single-family dwelling unit or the portion of a structure that contains a single dwelling unit. A primary dwelling may contain an attached garage." *Id. a*t 28.

20. The stated principal purpose of the 2009 Bylaw's "secondary dwelling" provision (the Bylaw now defined that term, and embedded within it several requirements and qualifications) was

> 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 a scale and bulk so as to be clearly subordinate in both use and appearance.

Id. at 29-30.

21. While the 2009 Town Meeting adopted a definition of "accessory apartment" (see Finding #17 above), it didn't define the term "accessory dwelling."

22. As of 2009, a "garage apartment" was a "dwelling unit located within a residential or commercial garage" meeting certain size, access, and ownership requirements. See *id.* at 22-23.

23. The original 1991 Zoning Bylaw introduced limits on the "rate of development," via its § 139-24.A. Of chief interest to this case is § 139-24.A(3)(a), which states: (emphasis added):

> The provisions of this Section 139-24A shall not apply to a building permit for a single- or two-family dwelling if issued to a natural person who is or about to become domiciled in Nantucket if:
>
> [1] that person executes a covenant running with the land and in favor of the Town for a period of five (5) years starting on the date of issuance of an occupancy permit for the dwelling.
>
> [2] The covenant shall provide that the dwelling shall be used only as the year-round residence of a Nantucket resident *and not offered for seasonal rental so long as the covenant is in effect. . . .*

Section 139-24.A expired in 2008. See Trial Ex. 12 at 106 n.31.

24. In the years immediately following adoption of the 1991 Zoning Bylaw, vacation-rental practices on Nantucket didn't change much from the situation described in Finding #7. Eighty percent of vacation rentals exceeded two weeks. Weekend rentals were unusual. Most rentals occurred during the late-June through August "high season."

25. Vacation-rental practices shifted in the early 2000s. Witnesses identified three things that propelled the change. First, "fast ferry" service was introduced to Nantucket in 1995 and grew thereafter. It dramatically cut travel time to the island for those who didn't own an airplane or were unwilling to pay for air travel. Faster affordable transportation increased visitor interest in the island as a short-term destination. Second, opportunities for Nantucket property owners to reach vacationers improved in the late 1990s and 2000s. Established brokers and new broker entrants started catering more to the shorter-term rental market. Internet booking platforms further increased the visibility of properties offered for rent and the ease of arranging rentals. Third, responding to increased demand, more Nantucket property owners – even those in neighborhoods traditionally attractive only to year-round residents – began offering their residences for vacation rentals, and not just during the high season.

26. Between the Town's 2002 and 2015 fiscal years, the number of residential parcels on Nantucket subject to real-estate tax assessments grew from 9,486 to 10,600, a 12% increase. Of those parcels, between 19.18% (in 2002) and 21.91% (in 2011) were owned by persons who had applied and qualified for a tax exemption for year-round residents. The parties stipulate that the remaining residences were vacant for much of the year.

The 2015 Zoning Bylaw Amendments and Subsequent Vacation Rentals

27. In 2015, Nantucket's Town Meeting made several changes to the Bylaw. In the order in which they appear earlier in this decision:

- Town Meeting allowed "rooming, lodging, and guest houses" in the ROH District by special permit. (Contrast with Finding #11 above.)

- Town Meeting eliminated the definition of "Used," and with it its "rented or leased to be used" language (see Finding #14).

- Town Meeting dropped from the definition of "accessory use" its final sentence, "Accessory uses shall not be construed to include a building or structure used in whole or in part for human habitation." See Finding #15; Trial Exhibit 12 at 265. Section 139-15, "Accessory Uses," remained unamended.

- Town Meeting changed the term "accessory apartment" to "accessory dwelling." See Findings ##16-18, 21; Trial Exhibit 12 at 264-265.

Town Meeting also added a definition of "owner occupied" to the Bylaw:

> The 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.

Id. at 277. The amended 2015 Bylaw's definition of "accessory dwelling" employs the term "owner occupied." *Id.* at 264-265.

28. The Grapes bought their Property two years later. It has two structures, the Main House and the Garage House. Between 2017 and 2021, the Grapes occupied the Main House 40 to 55 days per year; all other times that they occupied the Property, they stayed in the Garage House. (They've never occupied the Main House when it's been rented.) They rented the Main House 90 to 111 days annually between 2017 and 2021. Those rentals ranged between five and fourteen consecutive days. In 2024, the Grapes rented the Main House for 74 nights. They stayed at the Property 82 nights, mostly in the Garage House. With one exception, the Grapes' renters have been families. Renters use the Main House for sleeping, cooking, and sanitation, and not for the renters' own commercial purposes.

29. Between 2017 and 2021, the Grape Property was vacant between 214 and 228 days per year. The Grapes have on-island caretakers to look after the Property during those times. While the Grapes continuously advertise the Property for rent, they determine when they will (or won't) rent the Property.

30. Ms. Ward offered no new evidence at trial in this case concerning the effects of the Grapes' rentals. She relied instead on *Ward I*'s findings that, during times when the Grapes rented their property, Ward heard more noise at her residence and that it was "subjected . . . to increased nighttime light." Trial Exhibit 1 at 7.

31. In 2023, Town Meeting amended § 139-15 of the Bylaw, "Accessory Uses." As amended, § 139-15 reads (amended language in italics): "In addition to the principal buildings, structures or uses permitted in a district, there shall be allowed in that district, as accessory uses,

such activities as are subordinate and customarily incident to such permitted uses *including, but not limited to, the rental of rooms within an owner-occupied dwelling unit*." Trial Exhibit 12 at 469. This decision will refer to the italicized language as the "2023 Amendment."

32. Between the Town's 2015 and 2025 fiscal years, the number of residential parcels on Nantucket subject to real-estate tax assessments grew by 354 parcels to 10,954, representing a 16% increase over 2002. The percentage of year-round versus vacation residences remained steady; in 2025, owners of 21.46% of the Town's residential parcels received the year-round-resident tax exemption.

33. A June 2023 study prepared by the UMass Donahue Institute analyzed vacation leases brokered by the Nantucket Association of Real Estate Brokers ("NAREB"). The study reported 3,738 brokered leases in 2019, 3,647 in 2020, 4,766 in 2021, and 4,345 in 2022. NAREB's numbers don't include rentals arranged through online vacation-booking platforms such as Airbnb or VRBO. The majority (11,791) of the 16,496 NAREB leases were for terms in July and August; 2,462 were in June, 1,389 were in September, and the rest were scattered over other times of the year. Sixty percent of the NAREB leases were for terms of seven days or less. Twenty-six percent were for two weeks. During the 2019-2022 study period, between 92% and 96% of the NAREB leases were "short-term rentals" as defined under Nantucket's general bylaws, meaning less than 32 days long.

34. In the fall of 2019, the Massachusetts Department of Revenue began publishing data collected by its Public Registry of Lodging Operators, sometimes called the "STR Registry." A working group commissioned by Nantucket's Town Meeting analyzed that data and concluded that in the fall of 2019, there were just short of 750 Nantucket "whole-home" sites (as opposed to sites offering only private rooms) that had registered with the STR Registry. By March 2023, that number had grown to 2,460 sites.

* * *

The parties frame the issue in this case as whether the current Bylaw allows STRs as an "accessory use" of the Grape Property. Section 139-15 of the Bylaw currently provides (2023 Amendment italicized): "In addition to the principal buildings, structures or uses permitted in a district, there shall be allowed in that district, as accessory uses, such activities as are subordinate and customarily incident to such permitted uses *including, but not limited to, the rental of rooms within an owner-occupied dwelling unit*." The ZBA didn't rest its Decision approving the Grapes' STRs on the 2023 Amendment, nor have the Grapes claimed that they qualify for its protections. The Bylaw thus allows the Grapes' STRs as an accessory use only if, as the remainder of § 139-15 puts it, such activities are "subordinate and customarily incident" to

the permitted uses of the Grape Property. As noted earlier, by the time Nantucket's Town Meeting adopted that test for accessory uses, *Maxant* was twenty years old. The terms "subordinate," "incidental," and "customary" thus had then (and still have now) judicially settled meanings; this Court must use those interpretations in determining whether the ZBA Decision's correct.

The Court begins with "subordinate." The parties cite approvingly *Hauer* v. *Casper*, 20 LCR 125, 134 (2012). There Judge Grossman relied on the definition of "subordinate" found in Black's Law Dictionary 1439 (7th ed. 1999): "Placed in or belonging to a lower rank, class, or position." Courts often determine the "subordinate" issue mathematically. See, for example, *Cunha* v. *City of New Bedford*, 47 Mass. App. Ct. 407, 411-412 (1999) (property's use as a home office "four to five hours per week" was subordinate to its use as residence "two nights per week for about thirty weeks"). The "mathematical" facts found by this Court support a conclusion that the Grapes' STRs were subordinate to the Grapes' principal use of their Property: the Grapes either occupied the Property themselves or chose to leave the Property vacant more nights than they rented it. On Nantucket, leaving one's home vacant is a "residential" use under the Bylaw. See Bylaw at § 139-2.A ("dwelling" defined as a "room or enclosed floor space used, *or to be used*, as a habitable unit for one (1) family or household, with facilities for sleeping, cooking and sanitation") (emphasis added).

Ms. Ward correctly points out that numbers can be deceiving. For that reason, *Maxant* itself holds that "subordinate" includes within it the notion that the claimed accessory use must be "'minor in significance.'" *Maxant*, 360 Mass. at 483, quoting *Lawrence*, 150 Conn. at 512. A claimed accessory use may lose its "subordinate" status if its impacts are significant. See, for example, *Henry* v. *Board of Appeals of Dunstable*, 418 Mass. 841, 845 (1994) (three-year project to excavate and remove 300,000 cubic yards of gravel, in advance of long-term primary use of

property for agriculture, not "minor"). The Court received insufficient evidence at trial of this case, however, to conclude that the Grapes' STRs have such effects. At pages 6-7 of her pretrial brief, Ward argues that *Ward I* held that the Grapes' STRs harmed her. That contention's incorrect. *Ward I* concluded only that Ward's evidence of harms from noise and light was sufficiently "quantitative" and "qualitative" to preserve her standing under c. 40A, § 17, to appeal the ZBA's first decision in favor of the Grapes. See *Ward I*, 32 LCR at 135 ("The Court thus holds that Ms. Ward has provided credible evidence under *Butler* [v. *City of Waltham*, 63 Mass. App. Ct. 435 (2005)] that renting the Grape Property results in harmful noise and light."). *Ward I* quotes *Butler*'s admonition that once a court determines that a plaintiff's standing evidence "'is both quantitatively and qualitatively sufficient, . . . the plaintiff has established standing and the inquiry stops.'" *Ward I*, 32 LCR at 134, quoting *Butler*, 63 Mass. App. Ct. at 441-442. *Ward I* thus did not decide that Grapes' STRs have "more than minor" effects on Ward or others.

The Court thus holds that the evidence at trial of this case supports the ZBA's conclusion that the Grapes' STRs are "subordinate" (as *Maxant* uses that term) to the principal use of their property.[4] The evidence also supports the ZBA's conclusion that seasonal rentals of Nantucket residences have become "customary."[5] It appears that the original 1972 Bylaw treated that era's

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[4] While the Court agrees that the Grapes' STRs are an appropriately "subordinate" use of their Property, the ZBA Decision's discussion of the "subordinate" test mentions three factors – the "Grapes' strong ties to Nantucket," that "they did not acquire the property as an investment property to maximize the amount of money they earn from renting it," and that "they use the revenue from rentals for upkeep, maintenance, and improvements to the property," Trial Exhibit 2 at 7 – that have no bearing on that test or the current Bylaw's other accessory-use tests. If the ZBA Decision weren't flawed on other grounds, the Court would have vacated and remanded the matter to the ZBA with directions that it may not consider under current § 139-15 of the Bylaw any of the three factors. See *Britton* v. *Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003) (local board may not rest its decision "on a standard, criterion or consideration not permitted by the applicable statutes or by-laws").

[5] In their post-trial briefs concerning the history of the Bylaw and its amendments, the parties urged the Court not to decide whether previous versions of the Bylaw authorized STRs in the ROH District. The analysis that follows does not decide that question, as the ZBA Decision never reached it. Nonetheless, in litigating the issue the

seasonal rentals as a lawful primary use of a single-family dwelling in Nantucket's residential districts. The 1991 recodification of the Bylaw retained that framework for the seasonal rentals of its era: the 1991 Bylaw kept intact the as-of-right, "one single-family dwelling" use in the town's residential districts and the prior Bylaw's definition of "Used," including its "leased or rented" language.[6] Its new definitions pertaining to accessory uses (see Finding #15) suggest that rentals weren't to be viewed as accessory uses. The Bylaw's new "accessory apartment" and "rate of development" provisions (see Findings ##16 and 23) also expressly distinguished between "year-round occupancy" by persons other than a property's owner and "seasonal rentals." There'd be no need to make those distinctions if the 1972 and 1991 Bylaws outlawed seasonal rentals. And hovering over the historical evidence are two undisputed facts: first, the vast majority of Nantucket residences have been (and still are) second or "vacation" homes; and second, a sizeable part of Nantucket's economy is connected to the goods and services demanded by the seasonal occupants of such homes, whether they be the families of owners or the families of renters.

The trial evidence thus supports the ZBA's conclusion that seasonal rentals of residential properties on Nantucket have been "customary" within the meaning of *Maxant* since at least the 1970s. That leaves *Maxant*'s last hurdle, its "incidental" test.

ZBA did reach – whether the Grapes' STRs are a lawful accessory use of their property – both sides presented to this Court evidence of historical seasonal rental patterns on Nantucket. One can't properly apply *Maxant*'s accessory-use tests to that history without also understanding what the Bylaw allowed or prohibited historically.

[6] At page 6 of their Post-Trial Memorandum of Law (docketed Apr. 25, 2025), the Town and the ZBA argue that the "rented or leased" language "expressly authorized" rentals "of a primary residential dwelling . . . ." See also *id.* at 12-13 ("rented or leased" language authorized rentals as a "primary use" of residential properties). That argument is consistent with the Town and the ZBA's post-trial offer of proof that, prior to 2015, no one brought to the ZBA a challenge under the Bylaw to seasonal rentals of residential properties. See Town and ZBA's Offer of Proof as to Planning Director's Testimony, 2 (docketed Apr. 11, 2025). The Court does not accept the Town and the ZBA's arguments, or their offer of proof, as evidence in this case, but the Court notes that their arguments are consistent with the evidence that's in the trial record.

Henry has this to say about "incidental" uses:

> Uses which are "incidental" to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law. An accessory or "incidental" use is permitted as "necessary, expected or convenient in conjunction with the principal use of the land." Determining whether an activity is an "incidental" use is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses. In analyzing the [asserted incidental use], the focus is on the "activity itself and not . . . such external considerations as the property owner's intent or other business activities."

Id. at 844-845 (citations omitted), quoting P.J. Rohan, 6 Zoning and Land Use Controls, § 40A.01, at 40 A-3 (1994), and *County of Kendall* v. *Aurora Nat'l Bank Trust No. 1107*, 170 Ill. App. 3d 212, 218 (1988). See also cases collected in *Dery* v. *Town of Boxford Zoning Bd. of Appeals*, 30 LCR 400, 403 (2022) (Foster, J.).

The Grapes' STRs fail as "incidental" to their primary residential use because there's no connection between their primary use and their STRs other than a financial one. That the primary user of a property profits from a claimed accessory use is insufficient, standing alone, to make that use "incidental" to the primary use.

> [T]he words "customarily incidental" . . . imply that the use flows from, naturally derives or follows as a logical consequence of, or is a normal and expected offshoot from the main use. . . . A valid accessory use to a single-family dwelling is one which actually furthers or enhances the use of the property as a residence and not one which merely helps finance the property.

Alta v. *Ben Hame Corp.*, 836 P.2d 797, 801 (Utah Ct. App. 1992) (citations omitted).

Massachusetts cases upholding various uses as "incidental" to an allowed primary use contain the "furtherance" or "enhancement" characteristic described in *Alta*.[7] *Gallagher*

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[7] See *Valley Green Grow, Inc.* v. *Town of Charlton*, 99 Mass. App. Ct. 670, 685 (2021) (cogeneration facility and product-processing plant were permissible accessory uses to primary indoor commercial/horticultural use); *Miles-Matthiass* v. *Zoning Bd. of Appeals of Seekonk*, 84 Mass. App. Ct. 778

v. *Board of Appeals of Acton*, 44 Mass. App. Ct. 906 (1997), demonstrates how this factor plays out in cases involving rentals of residential properties. In *Gallagher*, the owner of a 960 square-foot house sought permission to build a 2,688 square-foot addition containing four "boarding suites." *Id.* at 906-907. The proposed suites would have had no access to the existing home except through the basement. Acton's bylaw allowed the renting of rooms for not more than four persons as an "accessory use," but the *Gallagher* court held that the town rightly denied a building permit for the addition and its use as "neither subordinate to the primary purpose" of the applicant's existing home

> nor attendant upon it. . . . While renting to a boarder may be concomitant to use of a large single-family residence with a few spare rooms, a much larger boarding house use, with its own kitchen and its own laundry room, is not concomitant to single-family occupancy of a 960 square foot house. The absence of connection . . . is dramatized by the absence of any access from one part of the building to the other, except at [the] basement level.

Id. at 907-908. There's a similar lack of connection (other than financial) in this case: the Grapes make no use of the Main House while renting it; when they've been at the Grape Property during rental periods, they've used the separate Garage House.

Allowing absent owners in Nantucket's residential districts to engage in STRs under the aegis of § 139-15 (as opposed to one of the Bylaw's express "accessory" exceptions, such as the one found in the 2023 Amendment) also undercuts the intent of the Bylaw in its current form. For whatever reason, Nantucket's Town Meeting dropped from the Bylaw in 2015 its distinctive definition of "used," the key to the Town and the ZBA claiming in this case (see note 6 above)

(2014) (common driveway to access residential lots a permissible accessory use to the primary residential use); *Simmons* v. *Zoning Bd. of Appeals of Newburyport*, 60 Mass. App. Ct. 5 (2003) (stabling of three horses for owner's personal use accessory to owner's residential use); *Cunha*, 47 Mass. App. Ct. at 410-411 (home office accessory to owner's residential use); *Maselbas* v. *Zoning Bd. of N. Attleborough*, 45 Mass. App. Ct. 54 (1988) (garage and swimming pool for owners' own use); *Dery*, 30 LCR at 404-405 (owner's model-train hobby accessory to owner's primary residential use).

that STRs once were among the expressly allowed primary uses of residential properties on Nantucket. That action left the Bylaw exposed to the Supreme Judicial Court's 2021 decision in *Styller* v. *Zoning Bd. of Appeals of Lynnfield*, 487 Mass. 588 (2021), which held that STRs aren't an "implied" principal residential use under zoning bylaws like those on Nantucket. This Court ruled in *Ward I* that, reading the post-2015 Bylaw through *Styller*'s lens, STRs aren't an allowed principal use of the Grape Property as a "primary dwelling." *Ward I*, 32 LCR at 136-137. The Court's found no authority that suggests that once a municipality has (knowingly or not) withdrawn express authorization for a primary use, that use can return as an "incidental" accessory absent other express authorization.

In both *Ward I* and in this case, the Town and ZBA have leaned heavily on a single footnote in *Styller*, 487 Mass. at 600 n. 19. The call for that footnote appears at the end of this sentence in *Styller*: "For the above reasons, we conclude that the plaintiff's use of the property for short-term rentals was not a permissible use under the town's zoning bylaw, as it existed prior to its amendment in 2016." The footnote announces: "We hasten to add, however, that a different result 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."

The facts found by this Court show that STRs are, as the Town and ZBA have contended, a "customary" activity on Nantucket, albeit one with a puzzling zoning history. But footnote 19 (and *Styller* as a whole) remind us that the "specifics of the zoning bylaw" matter. With exceptions not pertinent to the ZBA Decision in this case, § 139-15 of Nantucket's restrictive Zoning Bylaw currently requires an accessory use to be not only "customary," but also "subordinate" and "incidental" to an allowed primary use. The Grapes' STRs fail the last test: STRs aren't "incidental" under *Maxant* and *Henry* to the allowed use of their Property as a

"primary dwelling."

Judgment to enter accordingly.

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

Dated: June 6, 2025