



# GUARD LAW LLC

May 3, 2023

Via Email: [pturner@wareham.ma.us](mailto:pturner@wareham.ma.us)

Paul Turner, Building Commissioner  
Town of Wareham  
Memorial Town Hall  
54 Marion Road  
Wareham, MA 02571

Nazih Elkallassi, Chair  
Zoning Board of Appeals  
Town of Wareham  
54 Marion Road  
Wareham, MA 02571

RE: Safe Harbor Marinas Onset Bay, Boat Rack height and location determination

Dear Mr. Turner:

As you know I represent SHM Onset Bay LLC in their application to raze and reconstruct the west side boat racks located at 18 Green Street between the marine shop building and the bulkhead at the water's edge. At the public hearing of the Zoning Board of Appeals held on Wednesday, April 26<sup>th</sup> the Board suggested that the proposed forty (40') foot height of the new rack may require a variance. The Board further suggested that an increase in height, or by way of example the extension of a nonconforming structure along an existing nonconforming setback, would increase the nonconforming nature of the structure. The Board would be correct, if the structure was a single or two-family residential structure under section 1352 of the Bylaw. *See attached Bylaw excerpt.* The mechanism for relief in that case would be a special permit finding by the Board that the proposed alteration or extension was not "substantially more detrimental to the neighborhood" under section 1352 of the Bylaw.

Our project does not fall under section 1350 et seq. of the Bylaw as that section applies to single or two-family residential structures. The controlling section applicable to our project is section 1360 "Alteration or Extension of Other Structures. Specifically, section 1361 which states in part:

**"1361 A lawfully pre-existing non-conforming structure, *other than a single or two-family residential structure*, may be altered or extended provided that:**

- 1. The alteration, extension, or structural change itself conforms to the current requirements of the Zoning Bylaw.**
- 2. A finding by the Zoning Board of Appeals is made that the change will not be substantially more detrimental to the neighborhood than the existing non-conforming structure.**
- 3. The non-conformance concerns the size of the lot in question and /or the frontage of said lot. If the only non-conformity is lot size and /or frontage, a building permit may be allowed by right provided that all other aspects of the Zoning Bylaw are met.**





4. **Any proposed change that adds a new non-conformity or aggravates and/or intensifies an *existing nonconformity* will require a Variance form the Zoning Board of Appeals.”**  
(emphasis added)

This project proposes to reconstruct the racks 16.6 feet from the residential district, the existing racks being only 6.64 feet therefrom. The proposal does not extend the new racks along the pre-existing non-conforming 6.64 foot setback (and by way of analogy under section 1350 for a single or two-family residential structure which is not applicable here), which could be argued as an intensification as suggested by the Board at the April 26<sup>th</sup> meeting, but rather, moves the racks 10 feet further from the residential district thereby lessening the non-conforming setback. It cannot be argued that a “lessening” of the nature of the non-conforming setback could also be an “intensification or aggravation” at the same time. The proposal brings the structure closer to compliance than the existing structure.

The application also proposes to increase the height of the new rack to forty (40’) feet. As previously vetted with you, the overall height restriction for “structures” (as defined by Article 16 of the Bylaw within which the proposed rack falls) within the MR district is forty-five (45’) feet. It is the applicant’s position that the proposal falls under subsection 1 of section 1361 in that the proposed height “change” to 40’ “*itself conforms to the current requirements of the Zoning Bylaw.*” However, for the sake of argument, if subsection 2 were applicable, the Board could make a finding that the increase in height from 33’ existing to 40’ is not substantially more detrimental to the neighborhood than the existing structure. This finding could be made in that the impact, if any, of the 7 additional feet of structure height would be offset by the relocation of the structure further away from the residential district and the 40% reduction in the area within the setback occupied by the proposed structure (2,300 s.f. existing vs. 1,432 s.f. proposed). Again, not extending the height of the structure in the same plane of the pre-existing non-conforming setback of 6.64 feet, but rather at 16.6’, 10 feet further away from the residential district.

Subsection 4 of the 1360 is not applicable here in that as described above the proposed change does not add “a new non-conformity or aggravates and/or intensifies an existing nonconformity.” In this case the “*nonconformity*” being the 6.67 foot setback from the residential district, which setback is being increased to 16.6 feet thereby lessening the *nonconformity*. It should be noted that, unlike section 1352 applicable only to one and two-family residential structures which specifically uses the terms “structure” or “non-conforming structure” rather than “nonconformity,” section 4 does not refer to the “structure” itself, nor does it refer to the “nonconforming nature of the structure” but rather the “existing nonconformity” to which the application of subsection 4 of section 1360 is limited. The only “*existing nonconformity*” in this proposal is the setback from the residential district which is not being intensified but rather lessened and as such, a variance is not required.

Thank you for the opportunity to share the within observations.



**GUARD LAW LLC**

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Steven M. Guard'. The signature is fluid and cursive, with a large initial 'S' and a long, sweeping underline.

Steven M. Guard

SMG/gd

Encls.

cc: client, via email  
Merrill Engineering, via email  
Jonathan Dickinson, Asst. Planner, via email



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# ARTICLE 13:

## Zoning Protection

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### 1310 APPLICABILITY

These by-laws shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing required by MGL c. 40A, § 5, at which these bylaws, or any relevant part hereof, were adopted. Such prior, lawfully existing non-conforming uses and structures may continue, provided that no modification of the use or structure is accomplished, unless authorized hereunder

### 1320 RESTORATION OF DAMAGED OR DESTROYED STRUCTURES

Any lawfully non-conforming building or structure which has been damaged or destroyed by fire or other accident or natural disaster may be repaired or rebuilt to its original dimensions, either in its original location or in a more conforming location, provided that the owner shall apply for a building permit to start operations for restoring and rebuilding of said premises within 18 Months after such catastrophe. An extension of time for 180 days may be requested through the Zoning Board of Appeals for matters beyond the applicant's control. Further, said reconstruction shall comply with all other state laws, codes, and regulations in place at the time of permit application.

### 1330 RESTORATION OF UNSAFE STRUCTURES

Nothing shall prevent the strengthening or restoring to a safe condition of any structure, or part thereof, declared unsafe by the inspector of buildings. Once made safe, all required permits must be applied for and secured prior to any reconstruction activities. If unsafe, a deck, porch, or stairway may be torn down and reconstructed to the same height and footprint providing that the applicant can prove existing dimensions at the time of permitting.

### 1350 NON-CONFORMING STRUCTURES

1351 A lawfully pre-existing, non-conforming, single or two family residential structure may be altered or extended by right if the Building Official determines that it meets the following criteria:

1. The proposed addition/extension will conform to current setbacks and coverage for the zoning district in which the existing structure and addition/extension are located; and
2. The non-conformance concerns the size of the lot in question and/or the frontage of said lot and/or an encroachment of the existing structure.

1352 If the Building Official determines that a proposed addition, alteration, or extension to a lawfully non-conforming single or two family residential structure increases the non-conforming nature of the structure, a denial letter will be issued and the applicant must make application to the Board of Appeals for a new determination in order to proceed. If the Board of Appeals affirms the Building Official's decision, no such alteration or extension may occur unless the Board of Appeals issues a Special Permit for alteration or extension after finding that the alteration or extension will not be substantially more detrimental to the neighborhood than the existing non-conformity. An addition, alteration, or extension that increases the non-conforming nature would include but not be limited to:

1. A non-conforming structure built in the same footprint to an increased building height.
2. A structure that continues along the same line as an existing encroachment without increasing the encroachment.
3. A non-conforming structure rebuilt that decreases the pre-existing non-conforming setback.

1353 An addition, alteration, extension, or structural change that is found to increase the non-conforming nature of the structure and is found by the Zoning Board of Appeals to be substantially more detrimental to the neighborhood will require a Variance.

1354 A lawfully pre-existing non-conforming single or two family residential structure may, by right, be demolished and replaced with a new structure on the same site provided that:

1. The proposed new construction will conform to current building height, setbacks, and coverages for the zoning district in which it is located; and
2. The non-conformance concerns the size of the lot in question and/or frontage of said lot.

1355 A lawfully pre-existing non-conforming single or two family residential structure may, by Special Permit, be demolished and replaced with a new structure on the same site provided that the Zoning Board of Appeals determines:

1. The replacement structure will not be substantially more detrimental to the neighborhood than the existing structure.
2. The replacement of the structure will not cause or contribute to any undue nuisance, hazard, or congestion in the neighborhood, zoning district, or town.
3. The replacement structure will not intensify any of the following existing non-conformities: building coverage, impervious coverage, or setback encroachment.
4. The replacement structure will not create any new non-conformities.

1356 A proposal to demolish and replace a single or two family residential structure, that is found to be substantially more detrimental to the neighborhood will require a Variance from the Zoning Board of Appeals pursuant to M.G.L. c 40A §10.

1357 Any proposed change that adds a new non-conformity will require a Variance from the Zoning Board of Appeals.

1358 For the purposes of this section, determination of "substantially more detrimental" shall include consideration of impacts to the general and immediate neighborhood from the resulting height, building coverage, impervious coverage, and width of the altered, reconstructed, extended, or structurally changed structure. Additionally, in determining whether an altered, reconstructed, extended, or structurally changed structure will be substantially more detrimental to the neighborhood, additional considerations may include impacts to abutting properties, increases in traffic, noise, surface water runoff, and related site planning issues.

## 1360 ALTERATION OR EXTENSION OF OTHER STRUCTURES

1361 A lawfully pre-existing non-conforming structure, other than a single or two family residential structure, may be altered or extended provided that:

1. The alteration, extension, or structural change itself conforms to the current requirements of the Zoning By-law.
2. A finding by the Zoning board of Appeals is made that the change will not be substantially more detrimental to the neighborhood than the existing non-conforming structure.



3. The non-conformance concerns the size of the lot in question and/or the frontage of said lot. If the only non-conformity is lot size and/or frontage, a building permit may be allowed by right provided that all other aspects of the Zoning By-law are met.
4. Any proposed change that adds a new non-conformity or aggravates and/or intensifies an existing nonconformity will require a Variance from the Zoning Board of Appeals.

### **1370 NON-CONFORMING USES**

- 1371 A non-conforming Use of a building or of land which has been abandoned shall not thereafter be returned to such non-conforming Use. A non-conforming Use shall be considered abandoned when said Use has been discontinued for a period of two years, or when the characteristic equipment and furnishings of the non-conforming Use have been removed from the premises and have not been replaced by similar equipment within two years.
- 1372 Once changed to a conforming Use, no structure or land shall be permitted to revert to a non-conforming Use.
- 1373 In no case shall a non-conforming Use be converted to another non-conforming Use.
- 1374 The lawful Use of any structure or land existing at the time of the enactment or subsequent amendment of the By-law may be continued, although such structure or Use did not conform to the provisions of the By-law as adopted or amended.

### **1380 NON-CONFORMING LOTS**

- 1381 Existing lots lawfully laid out by plan or deed which complied at the time of layout with applicable provisions of zoning by-laws, if any, may be built upon for single or two family residential purposes, provided that:
1. Said lots have at least 5000 square feet, 50 feet of frontage, and were not held in common ownership and/or control after November 19, 1951.
  2. For lots that were held in common ownership or under common control, said lots may be buildable for single or two family residential Use provided that such lots have 7500 square feet and 75 feet of frontage and were lawfully laid out by plan or deed prior to November 19, 1951 or conformed to setback zoning requirements in effect as of January 1, 1976. This protection is available to not more than three adjoining lots.
  3. The buildings to be located thereon are to be set back equal to the setback in effect at the time of lot creation or endorsement. For lots laid out prior to November 19, 1951, structures must meet the setback zoning requirements of the first published regulation in effect for the applicable zoning district.
  4. Said lots are buildable under other applicable state and local regulations i.e. Conservation, Health, Fire, etc.
  5. If said lots are shown on a subdivision plan as defined in Subdivision Control Law, and have been approved by the Planning Board, said lots must be in compliance with all applicable sections of M.G.L. Ch. 40A, Ch. 41, and all of the aforementioned provisions noted in this By-law.[Amended Fall 2022 Town Meeting]

### **1390 DE MINIMIS**

- 1391 Regardless whether there are increases in the non-conforming nature of a structure, the following alterations, enlargements, extensions, or structural changes to lawfully existing single or two family residential structures may be allowed in accordance with the procedures set forth below; provided that:
1. Relief is limited solely to that portion of the building or structure which is presently dimensionally non-conforming.

2. The resulting changes on the non-conforming side will be no closer than five feet from the side or rear property line.
3. The resulting distance to the nearest residence at the side where the proposed construction will take place is equal to or greater than the sum of the required setbacks of the adjacent lots.
4. The resulting construction will meet all building, fire, safety, conservation, and health requirements for said zoning district.

1392 In accordance with the aforementioned provisions, the following de Minimis alterations are allowed:

1. Dormers that do not extend above the height of the existing roof peak and do not add more than 400 square feet of floor area.
2. Enclosing an existing porch of any size.
3. Bay windows in the side and rear setbacks which are cantilevered and do not have foundations.
4. Bay windows which protrude no more than two feet into the required front yard setback and are no less than five feet from the front property line.
5. A balcony or bay window limited to half the length of the building: not more than two feet.
6. Open terrace or steps, stoop, or similar structure under four feet in height: up to half the required setback.
7. Window sill, chimney, roof eave, fire escape, fire tower, storm enclosure or similar architectural structures or steps or stoops over four feet in height: not more than two feet.