



December 11, 2023

**CERTIFIED MAIL NO. 7021 2720 0003 5019 6531
AND FIRST CLASS MAIL**

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

**RE: Appeal Application for Karen DeMichele, Property Located at 43 South
Boulevard, Wareham, MA 02532; Assessor's Map 1, Lot 10**

Dear Members of the Boards of Appeals:

This office represents Albert Lawrence, Jr. and Laurie Lawrence (collectively, the “Lawrences”), who own the property located at 56 West Central Ave in Onset, Massachusetts. We write on behalf of the Lawrences to oppose and request the dismissal of the Appeal Application for the Notice of Violation issued by the Town of Wareham Building Department dated October 10, 2023 (the “Appeal”), filed by Karen DeMichele. Ms. DeMichele seeks to appeal a determination by the Building Department that a structure assembled at the rear of 43 South Boulevard, Onset Massachusetts (the “Property”) is in violation of the Town of Wareham Zoning By-Laws. The Lawrences are abutters to the Property.

The Zoning Board of Appeals (“ZBA”) should dismiss the Appeal because it is untimely and because Ms. DeMichele does not state a basis for overturning the decision of the Building Department.

FACTUAL BACKGROUND

In August of 2022, Ms. DeMichele caused to be installed a structure at the Property that consists of three (3) posts approximately fourteen to sixteen feet apart with the top post elevation approximately twelve to fourteen feet above grade with a rope pulley system to raise and lower tarps. The structure is located within ten (10) feet of the side/rear yard property line that abuts the Lawrences’ property. On or about September 29, 2023, counsel for the Lawrences sent a letter to the Town of Wareham Building Commissioner which requested enforcement of the

Office Locations

Main Office – Use for all correspondence
2 Batterymarch Park, Suite 202
Quincy, MA 02169
Tel. (508) 510-5727 ■ Fax (508) 857-0751
Office Hours: Monday – Friday ■ 9:00 AM – 5:00 PM

183 Mammoth Road
Londonderry, NH 03053
Tel. (603) 404-6200
Office Hours: Appointment Only

Town of Wareham Zoning By-Law which requires that all side and rear yard setbacks be a minimum of ten (10) feet.

On October 10, 2023, the Town of Wareham Building Commissioner sent a Notice of Violation letter to Ms. DeMichele informing her that the structure was in violation of the Town of Wareham Zoning By-Law with regard to side and rear yard minimum setbacks. The Notice of Violation informed Ms. DeMichele that the structure was to be decommissioned within sixty (60) days of receipt of the Notice of Violation. The Notice of Violation also informed Ms. DeMichele, “Any person, firm, or corporation violating any of the provisions of the By-Law shall be liable for a fine not more than three hundred dollars (\$300.00) for each violation. Each day the violation exists shall constitute a separate offense. In accordance with the provisions of MGL chapter 40A §§ 15, you may apply to the Zoning Board of Appeals for the above noted relief within thirty (30) days of receipt of this letter.”

On November 29, 2023, Ms. Demichele field notice of the Appeal with the Town of Wareham Planning/Zoning Department¹. On November 30, 2023, Ms. DeMichele filed the Appeal with the Wareham Town Clerk. Both notice of the Appeal are more than thirty (30) days from the date of the Notice of Violation.

LEGAL ARGUMENT

I. The Zoning Board of Appeals Lacks Jurisdiction To Hear The Appeal As The Appeal Was Not Timely Filed.

“[A] party with adequate notice of an order or decision that violates a zoning provision must appeal that order or decision to the appropriate permit granting authority within the thirty-day period allotted for such an appeal. G.L. c. 40A, §§ 8, 15.” Gallivan v. Zoning Bd. of Appeals of Wellesley, 71 Mass. App. Ct. 850, 857 (2008). Adequate notice may be actual or constructive. Id. at 859. Here, Ms. DeMichele received actual notice of the zoning violation in the Notice of Violation. G.L. c. 40A, § 15 provides that “[a]ny appeal under [§ 8] to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed.”

The Notice of Violation is dated October 10, 2023, which gave Ms. DeMichele until November 9, 2023 to timely file an appeal with the Zoning Board of Appeals. It is evident that Ms. DeMichele was aware of this deadline as both Atty. Morton’s letter to the Zoning Board of Appeals and Ms. DeMichele’s signature on the Appeal are allegedly dated November 9, 2023. Despite being well aware of the deadline to file an appeal, Ms. DeMichele did not file her appeal with the Wareham Town Clerk until November 30, 2023, three weeks past the deadline.

¹ The letter from Atty. Morton to the Zoning Board of Appeals and Ms. DeMichele’s signature on the Appeal are dated November 9, 2023 despite the Appeal not being filed until three weeks later.

The thirty-days deadline to appeal a decision “is both strictly enforce and is jurisdictional prerequisite to the [ZBA’s] jurisdiction to hear an appeal.” McIntyre v. Zoning Bd. Of Appeals of Braintree, 94 Mass. App. Ct. 204, 207 (2018).

There is no dispute that Ms. DeMichele failed to file the Appeal within thirty days of the Notice of Violation. Ms. DeMichele does not seek to excuse her untimely filing and appears to hope the Zoning Board of Appeals will ignore this fatal defect in the Appeal. Therefore, the Appeal is untimely and should be dismissed.

II. The Zoning Board of Appeals Should Deny The Appeal As Ms. DeMichele Provides No Basis To Overturn The Building Commissioner’s Decision.

In the Appeal, Ms. DeMichele references ongoing litigation with the Lawrences as the sole basis for the Zoning Board of Appeals to overturn the Building Commissioner’s decision in the Notice of Violation. The existence of ongoing litigation that does not involve violations of the Town of Wareham Zoning By-Law has no relevance as to whether Ms. DeMichele has installed a structure that is in violation of the Town of Wareham Zoning By-Law. Ms. DeMichele provides no legal basis to overturn the Notice of Violation. The late and deficient Appeal is a stall tactic by Ms. DeMichele to keep the illegal structure in place for as long as possible. Ms. DeMichele’s tactics should not be rewarded and any fines that may be imposed for the illegal structure should be imposed from the expiration of the sixty (60) day period the Building Commissioner provided Ms. DeMichele to remove the structure. Therefore the Appeal should be denied and all fines should be retroactively imposed.

Thank you for your consideration.

Sincerely,

MIRRIONE, SHAUGHNESSY
& UITTI, LLC

/s/ Gregory Fleming
Gregory Fleming, Esq.

Cc: Town of Wareham Building Commissioner