

A Regular Meeting of the Zoning Board of Appeals was held on Thursday, August 11, 2022 at the Mendon Community Center, 167 North Main Street, Honeoye Falls, NY, 14472 at 7:00 pm.

PRESENT: Daniel Bassette
Stephen Maxon
Dustin Cichon
Christian Mahood
Stephen Tudhope

ATTORNEY: David Hou

OTHERS: Approximately 15 residents; Andy Conroy, via Zoom.

Minutes were taken by Katrina Allen.

Mr. Bassette opened the meeting at 7:01 pm.

MINUTES

MOTION

Mr. Mahood moved, seconded Mr. Maxon to approve the minutes, as amended, from the July 28, 2022 meeting.

APPROVED

Mr. Bassette – aye; Mr. Maxon – aye; Mr. Mahood – aye; Mr. Cichon – aye; and Mr. Tudhope – aye.

Mr. Bassette said they closed the public hearing at the last meeting before they should have.

MOTION

Mr. Bassette moved, seconded Mr. Cichon to open the Public Hearing at 7:03 pm.

APPROVED

Mr. Bassette – aye; Mr. Maxon – aye; Mr. Mahood – aye; Mr. Cichon – aye; and Mr. Tudhope – aye.

FIORE APPEAL OF THE CODE ENFORCEMENT OFFICER’S INTERPRETATION OF THE TOWN CODE REGARDING BED AND BREAKFAST/TOURIST HOMES

Margaret Fiore, for property located at 383 Pond Road, Honeoye Falls, consisting of 27.87 acres, bearing Tax Account No. 204.04-1-40.21 Zoned RA-5, requesting a review of the Code Enforcement Officer’s interpretation of Section 260-52 B of the Zoning Ordinance regarding operating a Bed and Breakfast/Tourist Home, the subject premises shall be owner occupied, such that the premises is the owner's primary residence.

Mr. Bassette said there were a number of comments via email, and the Board has received updated information from the applicant. He asked if the applicant wanted to add anything.

Mr. Paul Sylvestri, attorney for Margaret Fiore, stated they did want to add information. Mr. Sylvestri wanted to reiterate again they submitted information on Friday, and they appreciate the opportunity to submit.

Mr. Sylvestri said Ms. Fiore stayed at 383 Pond Road 31% of the time, and that is most out of any other of the locations. She spends 20% in Florida, 20% in Hicksville, and 20% in Canada. Mr. Sylvestri said he believes the Board should follow what the IRS uses. She has voter registration and driver's license in addition to the other information submitted.

Mr. Sylvestri said looking back at Code, it states the premises shall be owner occupied such as it is the owner's primary residence. He said primary residence is not defined in the Code. The definition of primary is not 100% or even 51%. He said when looking at common definitions, primary means first rank of importance or value. Given this information, this is her primary property. The Code Enforcement Officer had no jurisdiction, and Ms. Fiore needs to go to the Planning Board for a Special Use Permit.

Mr. Bassette said 383 Pond Road was rented in April and May and asked Ms. Fiore if she was there when it was rented. Ms. Fiore said no, she was not.

Mr. Bassette asked Ms. Fiore if it is her intent to be there when the guests are there. Ms. Fiore said Air B&B or VRBO states owners are not to be there when guests are. She has a cabin in the back, but there is no water, leech lines, or running water. Her goal is to have that transformed as a place for her to stay.

Mr. Maxon asked if the house is listed stating the owner cannot stay there. Ms. Fiore said with VRBO and Air B&B, there can be no owner staying there when it is rented. She said bed and breakfasts fall under Air B&B, but with a bed and breakfast, you must serve food. She said she cannot do that with the County. When she had the wedding there, Ms. Fiore told the County said she had no intent to serve food. The County said she would not be able to.

Mr. Maxon asked what Mr. Sylvestri believes the Code amending to stating Owner Occupied means? What does he think it means if it was not to have the owner there when it is rented? Mr. Sylvestri said it is the Boards obligation to interpret the code. Mr. Maxon said what else could that mean? He cannot think of one.

Mr. Bassette asked if there were any other questions.

Mr. Sylvestri asked why it does not state the owner needs to be present it in the Code? It does not. One of the conditions must be that it must be owner occupied such as it is the owner's primary residence. It never says the owner needs to be present with the guests. If that is what the requirement should be, they should have done a better job of writing the Code if that is what they intended. That could have easily been written into the Code if that was the requirement of the Town Board.

Mr. Bassette said, yes, they could have, but they did not. So, we will make our best judgment.

Mr. Bassette asked if there were any other important questions, and there were not. He opened it up for public comment.

PUBLIC COMMENT

Ron Bielinis, 9 Parkview Manor, said he objects to the Special Use Permit. He was advised the Zoning Board is not granting a Special Use Permit. Mr. Beilinis said he understood, but he wishes it not to proceed, as it will change the character, it is not safe, there is an increase in traffic, and it will lower the property values. It will change the character of the Town.

Dave and Cynthia Remley, 437 Pond Road. Mr. Remley said it will change the character of the neighborhood. It is a county road and is a private road with horses. He has seen an increase in traffic in the past year and speeders have also increased. Mr. Remley said it is 55 mph until over the hill when it changes to 40 mph, he believes. He is concerned with the noise levels, celebrating until the wee hours of the morning, and as he said last time, there are other properties close to it.

Web Pilcher, 461 Pond Road, said whether Ms. Fiore has five homes or twenty homes, a couple of weeks at each home is not a primary residence. He said he looked online, and the majority of primary residences are defined as the majority of the time. It is your home. It is the majority of the year and can prove it is your primary residence. New York and California state it is where you establish your home. Yes, Ms. Fiore could live in the cabin and bring in water and septic, but there is no intent of it being her primary residence. Dr. Pilcher said if his wife had what Mr. Fiore had, transverse myelitis, his wife would be with him at home. He said, instead, the Fiore went to Florida. Dr. Pilcher quoted the Chateau du Marchand Instagram posts and tags. He said this is listed as a commercial establishment. There is no true intention Ms. Fiore plans to live on Pond Road.

Mr. Cichon said he was in contact with Monroe County Sheriffs, and the quiet hours start at 10 pm. Any noise after that, residents are to call 911, and the first time sheriffs are called to the house, they will try and talk to them. If they show up again, they will shut it down. If there is traffic, they need to call right there and then. They cannot wait until tomorrow. The only way the Fiore can be accountable for their actions is if the sheriffs notice it as well. The sheriff also said that Corey Gates, our Code Enforcement Officer, can approach the property daily if he feels violations are occurring.

Mr. Cichon said Mr. Gates, as Building Inspector, too, has occupancy concerns. Ms. Fiore has 10 bunkbeds in the attic without any means of egress, and that is a major safety issue. According to the Monroe County Fire Department, something like that will have you shut down. He told Ms. Fiore it depends on how far she wants to keep pushing this, because we will push back more.

Mr. Sylvestri said pushing what? Mr. Cichon said she has been irresponsible as property owner, otherwise we would not be having this appearance.

Mr. Sylvestri told Mr. Cichon he has shown he is very biased in making this decision. Mr. Cichon said on the contrary, he has been advocating for her the entire time. He does not want her

to sell the house, we do not want you to sell the house, but we are trying to find a way to give the townspeople back their peace.

Mr. Sylvestri said they disagree with a lot the statements that have been made regarding their home. They disagree that they are the source of the disruption. As he stated in his letter to the Board, there is no ATV running up and down the road. They do not have an ATV on the property, and they do not know of anyone staying there who had ATV.

Ms. Fiore said she cannot control the speed of Monroe County. The speed on Pond Road is not set by her, and it was set way before she got here. She has no control of a County owned road.

Ms. Fiore said she has listened everyone complain, and she knows they have concerns, but she does not have 10 beds. She has six small children's beds. She has egress and fire extinguishers throughout the house as well as ladders, so they can get out. She also said she pulled the cameras, and there has been no one walking by with their dog. She has cameras facing both her driveways, and in the past year and half, she has had people come down her driveway and loop around. There have been people all the way back to her pole barn, and she could see the tracks.

Ms. Fiore said people claimed she was dumping gravel, and she was not. She has a gravel driveway and she had water issues and had to put in a culvert. She has raw land and acreage on the side and her house is setback from the road. She does not know who made the noise. During the wedding, they had sound checks.

Ms. Fiore said she knows a lot of people are upset, and she respects that, and she has kept her mouth quiet. A lot of what they are saying is very inaccurate. She said this is about her residency and nothing else. She wants to stay focused and the community opinions should not impact the Board's decision.

Mr. Sylvestri stated previous comments on the number of days Ms. Fiore spends here is not to be considered, but rather her intent. She has extended family in the area and she intends to return to her home at Pond Road. She grew up here, and she has many, many relatives. She has voter registration, and she voted in the Town Supervisor election.

Mr. Tudhope asked if it is her intent to rent the home, and if it is actively listed. Ms. Fiore said she did not rent the home from January 2021 to late June 2021. Mr. Tudhope asked if she rented it the last fiscal year, and Ms. Fiore said she did.

Mr. Tudhope asked Ms. Fiore if it is her intent to post availability after the proceedings. Ms. Fiore said yes, with a Special Use Permit, her intent is to rent again. She wants to rebuild the farm. When she is not there, renting helps pay for the maintenance of the property.

The number of permitted bed and breakfasts in Town was discussed and the non-permitted have been sent Notice of Violations.

Mr. Maxon said according to the Chateau du Marchand website, it appears she is intending to rent the home. He asked if it is Ms. Fiore's intent to rent the residence on a regular basis if she

has a Special Use Permit. She said it is only rented when she is not there. When Ms. Fiore is there, it is blocked out to guests.

Ms. Fiore said in the summer months, she is in Canada, and it is advantageous for her to not let the house just sit there.

Mr. Mahood said the property is listed as a winery. Ms. Fiore said that was listed before the Town removed special events in residential areas. Mr. Mahood stated she can see that it is listed as a winery though. Ms. Fiore said it has been awhile since she looked at the website, but she believes it was listed as something to come and not happening today.

Mr. Mahood read the description of the property's website and said it also lists it as a special events venue. The applicant said that was produced before the Town changed the laws on special events, and she has not had any events there. The only one was the wedding she had a Special Use Permit issued last fall. They have no intent to have special events until the law changes to allow it.

Mr. Bassette asked the Board if they had any other questions or if they should go back to public comment.

Andy Conroy, 603 West Bloomfield Road, spoke via Zoom. Mr. Conroy said he wanted to address the letter and exhibits that were recently submitted from Ms. Fiore's attorney that assert Ms. Fiore's primary residence is 383 Pond Road. Mr. Conroy stated the Code Enforcement Officer's determination Ms. Fiore's application did not meet the criteria set forth in the Zoning Code, was not just reasonable, it was justified.

Mr. Conroy stated Ms. Fiore has been operating a short-term rental in direct violation of the Code Enforcement Officer's issuing not one, but two, Notice of Violations. Mr. Conroy said the information submitted by Mr. Sylvestri was a brazen and calculated attempt to establish residency after the fact. He said Ms. Fiore's driver's license listing 383 Pond Road as her address was issued 14 months after she purchased the property and only after she was issued the first Notice of Violation.

Mr. Conroy said the documentation of vehicle registration and insurance listing 383 Pond Road that was submitted was issued one day before her previous Zoning Board of Appeal's hearing. Mr. Conroy said Ms. Fiore was unable to issue documentation listing 383 Pond Road as her primary residence at the meeting two weeks ago, but has submitted documentation listing her time there since January 2022. He asked why she did not list the time she was there in September when she was issued the violation.

Mr. Conroy asked how the Zoning Board of Appeals can determine her primary residence when they have not been given anything that governs the rules of evidence or discovery? He respectfully asks that the Zoning Board Appeals consider and ask the following questions before issuing its determination: Why is Ms. Fiore not providing redacted copies of her Federal and, more importantly, her New York State tax returns, which would show her primary, principal residence. He said where she keeps her valuable personal possessions and being in close

proximity to her children and grandchildren shows where she is making roots here. He said the information Ms. Fiore submitted is a low bar and was calculated and disingenuous.

Denny Pooler, 373 Pond Road, asked if a Cease-and-Desist order is in effect. He drove by and in the past two weeks there have been cars with plates from three different states: Pennsylvania, Maryland, and Georgia. He has pictures.

Douglas Small, 321 Pond Road, said there have been five fully loaded dump trucks going to Pond Road and it seems a little extreme for a one-time event. He said a couple of weeks ago, a surveyor was there for temporary parking, but he looked at Google maps, and it was a very large parking area. Mr. Small said the size is a little smaller than the parking lot at Community Center. He says it seems there is a lot more than a bed and breakfast for a honeymoon. The parking is for 40-50 cars, and it is clearly for events. Mr. Small said he thought that with a bed and breakfast, the owner was there. He said it is boundless and complete contempt and Ms. Fiore thought we were a bunch of farmers. Mr. Small said Ms. Fiore says she is feeling victimized, but she is the one basically giving us the middle finger. He said if he wins the lottery, does he not need to follow the code?

Dr. Pilcher readdressed the Board and said the parking seems to be posed for future events.

Ms. Fiore asked to respond.

Mr. Cichon asked Ms. Fiore if she participated in early voting. Ms. Fiore said yes. Mr. Cichon asked if she intends to vote in person, and she said yes.

Ms. Fiore said she had her driver's license issued in December, because when her husband got sick, they were going to sell. She could not find her driver's license when she was in Hicksville and looked everywhere. She had to get a new one, and that is why it is dated 12/9/21.

Ms. Fiore explained her lease on her car ended June 30th, and that is why her car is new because she had to wait for it to come in. She showed the information on her phone to her attorney proving this, and he attested to the information.

Ms. Fiore said she does not have concrete, trucks, or a parking lot. She has a gravel driveway that goes all the way back to her pole barn.

Mr. Cichon asked if there is a turn around. Ms. Fiore said she has construction vehicles coming in for her farming, and she has lawn sprinklers, so she does not want trucks driving on the grass. She stated she does not have a 40-50 car parking lot.

Mr. Sylvestri stated as it was discussed earlier, Mr. and Mrs. Fiore are married, filing jointly.

MOTION

Mr. Maxon moved, seconded by Mr. Mahood to close the Public Hearing at 7:48 pm.

APPROVED

Mr. Bassette – aye; Mr. Maxon – aye; Mr. Mahood – aye; Mr. Cichon – aye; and Mr. Tudhope – aye.

Mr. Bassette said in his mind, there are two primary questions to answer. Was the Code Enforcement Officer justified in blocking the Special Use Permit application? It is not a matter of right and wrong.

Mr. Bassette read the Code and said it is the duty of the Planning Board to review a Special Use Permit, and only the Planning Board can deny a Special Use Permit. No one else can.

Mr. Cichon said the Code Enforcement had an obligation to review it for the occupancy, and he was asked to review it. Mr. Maxon said that is for the Planning Board to decide.

Mr. Bassette said in reviewing State Code, he could not find a definition of Tourist Home, so it is inferred it is the same meaning as Bed and Breakfast.

The Board said it does not need to define Tourist Home.

The Board discussed what the criteria is for primary residence.

Mr. Cichon said as Mr. Conroy stated, primary residence is where one keeps his or her valuables and passport.

Mr. Tudhope stated according to the Chateau du Marchand website, this is not Ms. Fiore's primary residence.

Mr. Maxon said the Board has a draft determination. A primary residence is a fixed and permanent home. It is the primary place you intend to live.

Mr. Tudhope asked if the Board decides if it is Ms. Fiore's primary residence.

Mr. Tudhope said with the website, the intent is that it is not her primary residence. It is listed as a destination for visitors.

Mr. Bassette said the Board's role is to give a definition, not to make a decision.

Mr. Tudhope said Ms. Fiore can have her driver's license listing 383 Pond Road, but the intent is key to him.

Mr. Maxon said in the draft determination he cites a Court of Appeals case where it defines residence and treats it as a synonym of domicile. Domicile is defined as a fixed and permanent home. It is an intent to remain.

Mr. Bassette said the Board is to make a measuring stick on what the definition of primary residence should be defined as, but not do the actual measuring. Mr. Hou stated the task before

the Board is to decide how owner occupied should be interpreted. It is setting the standard for the Planning Board to decide if an applicant meets those criteria.

Mr. Bassette asked Mr. Hou if the Board gives a measurement of how occupied as an owner residence is interpreted, but not say yes or no. Mr. Hou said that seems fair.

Members of the Board said it is not Ms. Fiore's primary residence, and Mr. Maxon said that is not the Zoning Board of Appeals to decide.

Mr. Tudhope asked if the Board is to decide the definition of primary residence, and Mr. Maxon said yes.

The Board discussed its definition of primary residence and the draft determination.

RESOLUTION – DECISION ON INTERPRETATION

MARGARET FIORE, 383 POND ROAD

WHEREAS, an appeal and interpretation request by Margaret Fiore was received by the Clerk of the Town Zoning Board of Appeals ("ZBA") on June 23, 2022, appealing i) Town Code Enforcement Officer ("CEO") Corey Gates' rejection of her special use application for a tourist home at 383 Pond Road (the "Property"); and ii) his determination under Town Code § 260-52 (B) that the Property was not "owner-occupied as the owner's primary residence", as stated in his June 10, 2022 letter determination; and

WHEREAS, the ZBA is authorized to hear appeals from such determinations pursuant to Town Law § 267-b (1) and conducted duly noticed public hearings in accordance with the law on July 28, 2022 and August 11, 2022 at which Ms. Fiore and her representatives and members of the public were present; and

WHEREAS, at said public hearings all who desired to be heard were heard and their testimony and any submissions they wished to make were received into the record of the proceedings; and

WHEREAS, this appeal is classified as a Type II action under Section 617.5(c)(37) of the New York State Environmental Quality Review Act and therefore does not require further action; and,

WHEREAS, after due deliberation, the ZBA has carefully considered the appeal and all of the testimony and submissions by Ms. Fiore, the CEO, the Town, and all others who wished to be heard;

NOW, THEREFORE, BE IT RESOLVED that the ZBA makes the following findings:

As background, the CEO issued a Notice of Violation to John Fiore on September 1, 2021, asserting that the Property had been illegally operated as a bed-and-breakfast (the "Chateau du Marchand") without a special use permit. The Fiores responded by applying for a special use permit. They began the application on September 14, 2021 and completed it – following the issuance of a second Notice of Violation for the same offense – on May 25, 2022.

Noting that Town Code § 260-52 (B) requires that a tourist home or bed-and-breakfast establishment “be owner occupied, such that the premises is the owner’s primary residence,” the Fiores asserted, in a May 2022 addendum, that “Margaret Fiore (Marchand), deed holder, is the only permanent occupant and NYS resident with drivers license residency at 383 Pond Rd.”

To that addendum, the Fiores attached a photocopy of Ms. Fiore’s New York State driver license – a standard ID version, as opposed to a REAL ID or Enhanced ID version – which listed the Property address. The distinction between the types of license is relevant because the New York State Department of Motor Vehicles permits the use of a mailing address on a standard ID driver license, while a REAL ID or Enhanced ID license must show a residential address.¹

In response to the Fiores’ May 2022 special use permit application, the CEO issued a letter on June 10, 2022 with the subject line “RE: Determination Regarding Special Use Permit Application.” The CEO acknowledged receipt of the Fiores’ application but concluded that it did not meet the Town Code’s “specific guidance relative to the operation of tourist homes and bed-and-breakfast establishments.” The CEO added that the “Planning Board would be permitted to approve only the use of the property as a bed and breakfast conforming to these conditions and criteria,” and informed the Fiores that “the Town will not accept the application in accordance with the applicable portions of the Town Code,” namely, § 260-52 (B) – the requirement that the premises be owner-occupied and an owner’s primary residence.

For the reasons that follow, we reverse the CEO’s determination in part, only insofar as it prevented the special use permit application from being considered by the Planning Board. We further accept Ms. Fiore’s request for an interpretation of Town Code § 260-52 (B) and conclude that it requires that the applicant for a proposed tourist home or bed-and-breakfast must establish, at the special use permit hearing before the Planning Board, that the premises are the “primary residence” of one or more of its owners, as further defined below.

I. The Special Use Permit Application Should Be Considered By The Planning Board.

The Town has authorized the Planning Board to grant special use permits.² The Planning Board is required to consider the specific rules and conditions applicable to a particular special use and, for approval to be granted, must make written findings certifying compliance with those requirements.³ The specific conditions applicable to a tourist home and bed-and-breakfast establishment are found in Town Code § 260-52.

There is no provision either in the state law or the Town Code that contemplates the involvement of the CEO as a gatekeeper to assess the sufficiency or legality of a special use permit application. The Town Code provides that all applications for special use permits shall be made to the Planning Board Clerk, who “after determining that an application is in proper form, shall transmit” copies to the Planning Board.⁴ We believe that this language in this instance mandates the transmission of a complete application to the Planning Board.⁵

¹ See How to change your address, New York State Department of Motor Vehicles, available at <https://dmv.ny.gov/address-change/how-change-your-address> [accessed July 18, 2022]).

² See Town Law § 274-b (2); Town Code §§ 260-24 [A]; 260-97 [F].

³ See Town Code §§ 260-24 [A]; [B] [3]; 260-25 [A].

⁴ See Town Code § 260-102 [C] [1], [2].

⁵ See *Glacial Aggregates, LLC v Zielonka*, 7 Misc 3d 1019[A] at *1 [Sup Ct, Cattaraugus County 2005], *affd for the*

As a result, the ZBA concludes that the portion of the CEO's determination that stated that the Town "will not accept" the Fiores' special use permit application must be reversed. Provided that the special use permit application is complete and "is in proper form"⁶ the special use application shall be transmitted to the Planning Board for further review pursuant to Town Code § 260-52 (B).

II. Interpretation Of "Owner Occupied As A Primary Residence" As Used In Town Code § 260-52 (B).

The Town Board amended Town Code § 260-52 (B) on December 13, 2021. Prior to that date, the section required that the "operator(s) of the tourist home/bed-and-breakfast shall reside on the premises".⁷ The amendment changed the language to require that the premises "be owner occupied, such that the premises is the owner's primary residence".⁸ The amendment thus effected two changes – it required an owner (not simply a third-party "operator") to reside on the premises, and it required that the premises be that owner's "primary residence."

A ZBA's interpretation of a provision of Town Code should be based, whenever possible, on the original intent of the governing board.⁹ A video recording of the Town Board's meeting where the above amendment was adopted is available for public access.¹⁰ The relevant portion of the meeting takes place between 30:25 and 40:18 of that video, but no members of the Town Board explained their reasoning for adopting the amendment.

In a July 13, 2022 letter to the ZBA as part of these proceedings, the CEO stated: "The intent of our local law is to require an on-site owner, residing on the premises, as to regulate unwanted guests, behaviors and activities and to protect the safety and character of the Town and its residents."

In the absence of a statutory definition for a term, words should be construed "with their usual and commonly understood meaning".¹¹ The term "primary residence" – which further

reasons stated 34 AD3d 1299 [4th Dept 2006].

⁶ See Town Code § 260-102 [C] [2].

⁷ See Town Code former § 260-52 [B].

⁸ See Town Code § 260-52 [B].

⁹ See Zoning Board of Appeals, New York Division of Local Government Services, available at <https://dos.ny.gov/system/files/documents/2021/09/zoning-board-appeals-.pdf> [accessed July 18, 2022].

¹⁰ See Town Board 2021-12-13, Town of Mendon, NY, available at <https://www.youtube.com/watch?v=Bqq43KpYIU0> [accessed July 18, 2022].

¹¹ See *Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016]. In *Yaniveth R.*, the Court of Appeals interpreted the meaning of the term "reside" in a New York City local law, crediting dictionary definitions that included a status as a person's "fixed, settled, or legal abode" (*id.* at 192-193). The Court also found this definition to be consistent with its own case law, which had concluded that "a person's 'residence' entails 'something more than temporary or

modifies “residence” with a term intended to connote a distinction of predominance over any competing home – has been treated as a synonym of the term “domicile”.¹² A “domicile” is defined as a person’s “fixed and permanent home”.¹³

As Ms. Fiore’s attorney notes, the language of the amendment is also similar to the well-known standard of the Internal Revenue Service for the determination of a taxpayer’s “principal residence”.¹⁴ Although the Fiores’ counsel is correct that “a balancing test of various factors is used” in that analysis, he omits the fact that “the most important factor is where you spend the most time”.¹⁵ We also point out the longstanding New York rule that a party to litigation may not take a position in opposition to a position taken on his or her tax return.¹⁶

Here, the ZBA concludes that the amount of time the owner spends living in his or her home should be the primary factor in determining whether that home qualifies as the owner’s “primary residence.” The presence of an owner on the premises of a rented home provides benefits to all involved parties – the owner (who will be able to directly supervise the rental of his or her property), the renters (who will have easy access to a responsible party in the event of a problem), the neighbors (who can direct any comments or complaints to a known party who will be able to address them immediately), and the Town (which can more effectively hold the owner-occupant responsible for any nuisance that occurs on the property). This analysis is strengthened, in our view, by the Town Board’s specific choice to eliminate the possibility of residency by an “operator” or property manager, and to require proof that the premises are an owner’s “primary residence” instead of his or her mere “home” or “residence.” Both factors make the owner’s presence at any given time more likely.

Other factors might, under certain circumstances, be relevant to the Planning Board’s determination of whether a property is “owner occupied” and qualifies as an owner’s “primary residence” under Town Code § 260.52 (B). Such factors could include – as they do for federal

physical presence,’ with ‘some degree of permanence and an intention to remain’” (*id.* at 193, quoting *Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]). “[A] person may reside in more than one place, but that does not mean that every place in which a person spends time constitutes a residence” (*Yaniveth R.*, 27 NY3d at 194).

¹² See 11 Ops Counsel SBRPS No. 18 [2001] [in context of STAR exemption]; see also *Yaniveth R.*, 27 NY3d at 192-194.

¹³ See *Yaniveth R.*, 27 NY3d at 193, quoting *Matter of Newcomb*, 192 NY 238, 250 [1908].

¹⁴ See 26 CFR § 1.121-1 [b].

¹⁵ See Internal Revenue Service, Publication 523, Selling Your Home, available at <https://www.irs.gov/pub/irs-pdf/p523.pdf> [accessed July 18, 2022]; see also 26 CFR § 1.121-1 [b] [2] [“If a taxpayer alternates between 2 properties, using each as a residence for successive periods of time, the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer’s principal residence”].

¹⁶ See *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009].

and state tax purposes – voter registration, vehicle registration, tax address, primary mailing address, proximity to the owner’s workplace, proximity to the owner’s primary bank, and proximity to clubs and organizations in which the owner holds membership. But because the ZBA concludes that the intent and purpose of the amendment to Town Code § 260.52 (B) was to ensure that an owner is present at the rented premises as often as is practicable, we identify the amount of time the owner spends – and intends to spend, in the future – living at the residence as the primary relevant factor. Only if an applicant can prove to the Planning Board’s satisfaction that they have “an intention to remain” in their residence as a “fixed and permanent home” is the requirement of Town Code § 260.52 (B) met.

In light of our limited jurisdiction based on the questions presented on the appeal, we offer no opinion concerning whether Ms. Fiore has demonstrated that the Property is her primary residence; that question has been delegated to the Planning Board to determine, as noted above, and the testimony and submissions by the Fiores (including their August 5, 2022 submission quantifying her time spent at her various properties) and others regarding that issue may be considered by the Planning Board as part of its review process.

On motion made by Mr. Tudhope, and seconded by Mr. Cichon:

Daniel Bassette	Aye
Stephen Maxon	Aye
Dustin Chichon	Aye
Christian Mahood	Aye
Stephen Tudhope	Aye

Approved: 5 Ayes, 0 Nays

DANIEL BASSETTE, Chairperson of the Zoning Board of Appeals, hereby certifies that the foregoing Resolution was duly adopted at a meeting of the ZBA duly convened and held on August 11, 2022, a quorum being present.

Daniel Bassette, Chairperson
Zoning Board of Appeals

MICHELLE BOOTH, Town Clerk of the Town of Mendon, hereby certifies that the foregoing Resolution was duly filed in her office on August __, 2022.

Michelle Booth, Town Clerk
Town of Mendon

MOTION

Mr. Tudhope moved, seconded by Mr. Maxon to adjourn the meeting at 8:21pm.

APPROVED

Mr. Bassette – aye; Mr. Maxon – aye; Mr. Mahood – aye; Mr. Cichon – aye; and Mr. Tudhope – aye.