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By Email: zba@westtisbury-ma.gov

Kim Leaird
Administrator
West Tisbury Zoning Board of Appeals
1059 State Road
P.O. Box 278
West Tisbury, MA 02575

Re: Stillpoint Martha's Vineyard, Inc. – Special Permit Application

Dear Ms. Leaird:

I have been asked to provide the Zoning Board of Appeals (the “ZBA”) with guidance on the following two questions concerning an application submitted to you for uses at 20 Stillpoint Meadows Road. I have consulted with Town Counsel Ronald Rappaport and Attorney Lisa Goodheart of Fitch Law Partners LLP, and they have reviewed and agree with my opinion.

- 1. Can the board continue to review Stillpoint under the special permit criteria under 9.2-2 and 11.1-3A or are they limited?**
- 2. What is the board’s purview in reviewing the 20% “off mission” events Stillpoint plans to have?**

As explained below, (a) the Dover Amendment, G. L. c. 40A, § 3, limits the ZBA’s review of Stillpoint’s proposed educational use¹ of the Site to the reasonable regulation of traffic and related public safety concerns through a site plan review process, and (b) the proposed “off mission” use of the facility, as a rented venue for third-party events of unspecified purposes, is subject to ZBA regulation pursuant to the otherwise-applicable standards and special permit

¹ We had not been tasked with analyzing whether Stillpoint’s proposed use is in fact a Dover-protected educational use.

requirements, unless the ZBA determines that such uses are an essential part of, or an incidental accessory use to, Stillpoint's Dover-protected educational land use.

I. Background.

1. Stillpoint Martha's Vineyard, Inc. ("Stillpoint"), the applicant, owns a 13.1 acre parcel of land located off of State Road (the "Site") in the Town. The Site is located in the AR zoning district under the Town of West Tisbury Zoning By-law ("ZBL").

2. The Site is improved by an approximately 3000 square foot,² studio/barn (the "Barn") constructed in 2012.

3. We are informed that the Site and the Barn comply with all current dimensional requirements of the ZBL, and that neither the Site nor the Barn triggers review under any specially protected or overlay district which would affect our zoning analysis (e.g., an aquifer protection district).

4. Prior to construction of the Barn in 2012, Stillpoint's predecessor sought approval from the Planning Board under the apparently then existing provisions of the ZBL, which required site plan review from that board for residential accessory structures over 2000 square feet. The Planning Board authorized the construction based on the execution of a "covenant," providing that, in exchange for "receiving all permits . . . for the construction of [a] barn . . . larger in square footage than current zoning permits . . . [,] the [Site] shall be restricted [to] . . . no more than two (2) structures . . . at any one time." That covenant is recorded in the Dukes County Registry of Deeds (the "Registry") in Book 1274, Page 909,

5. Stillpoint acquired the Site in 2022.

6. In May of 2022, Stillpoint contacted the Building Official with a proposal to provide educational programs at the Site (the "Project"). The Project would involve converting the Barn to "Assembly Space" (according to its site plan dated July 21, 2022), but would not involve physical expansion of the Barn. Parking facilities would be added to the Site, as well as internal improvements to the Barn. On-site septic facilities and ADA compliant ramps would be added as well.

7. After reviewing Stillpoint's submission, the Building Official concluded that its proposed use appeared to be a protected educational use, that Stillpoint's proposal should be referred to Martha's Vineyard Commission (MVC) for review as a development of regional impact (DRI), and that Stillpoint would need a special permit under Section 11.1-3(A) to expand or extend the use of Barn. Stillpoint did not appeal the Building Official's determination.

² The Assessors' Card states that the Barn has a net area of 2700 square feet, whereas the MVC decision identifies it as being 3200 square feet in area.

8. Stillpoint applied for a special permit under ZBL Sections 5(3), 8.5.2, 8.3.3, 11.1-3(A), and mentioned the use table in its materials -- which it filed with the Town Clerk on July 27, 2022.

9. The MVC accepted the Building Official's DRI referral, and Stillpoint proceeded to a public hearing, on August 18, 2022. The MVC characterized the Project as seeking "to repurpose the [Barn] as a community educational space, and other year-round community uses. . . ." (DRI Decision at 3.2). The MVC completed its review and issued a decision, recorded in the Registry in Book 1656, Page 112, on May 26, 2023 (the "MVC Decision"). The MVC Decision imposes sixteen (16) conditions on the Project, including condition 1(c) providing that "[n]o more than 20% of all events may be off-mission."

10. Stillpoint returned to the ZBA to proceed with seeking local development permits in May of 2023.

11. Stillpoint has identified itself as a "tax exempt educational organization" founded "to create a gathering place for educational offerings including but not limited to classes, discussions, meditation, and the arts." (Stillpoint Narrative, Page 1, pars. 1 & 7).³

12. Stillpoint intends to "repurpose the barn to create a gathering place for educational offerings including but not limited to classes, discussions, mediation, and the arts," and to "provid[e] a community space for classes, conversation, and contemplation," pursuant to its educational mission. (Stillpoint Narrative, Page 2, par. 5.)

13. Stillpoint anticipates substantial non-educational usage of the facility by third parties. In particular, Stillpoint intends to rent the facility to other parties for events with recreational, entertainment, and various other undefined purposes. As stated by Stillpoint: "To raise funding for our educational mission, up to 20% of our events may be off mission. These may include birthday gatherings, fundraisers, and other activities. As per MVC conditions, these will not include weddings." (Stillpoint Narrative, Page 2, second-to-last par.).⁴

14. By letter to the ZBA dated June 5, 2023, Stillpoint's counsel confirmed the organization's view that ZBA review of its proposal is limited by the Dover Amendment, as follows:

³ As noted, we have not independently analyzed Stillpoint's Articles of Incorporation, By-laws, charter, or other documents that would provide a basis for deeming that its mission constitutes an educational use within the meaning of G. L. c. 40A, § 3, par. 2, or the ZBL, but assume that the Building Official correctly made that determination.

⁴ To our knowledge, Stillpoint has not specified the method or metric proposed to be used for purposes of calculating the actual ratio of its "on mission" use to the anticipated third-party "off mission" use of its facility.

“[W]e see the scope of this Special Permit application as being limited by the Dover Amendment . . . to Site Plan Review pursuant to Section 8.5-3 of the Bylaw. . . . [B]ecause the proposed use is one that would conform with current zoning, it does not appear that a Special Permit under Section 11.1-3 . . . or any relief pursuant to G. L. c.40A, §6, is required.”

15. On June 28, 2023, Stillpoint further addressed its plans for renting the facility to non-educational organizations and/or for non-educational uses, in a submission to the ZBA which states, in part, as follows:

“A further area that seems to be of concern is the proposed rental of the barn to outside groups to provide income for Stillpoint’s educational mission. All Stillpoint events will further our educational mission. The vast majority – at least 80 percent – will be education events themselves. To help raise funds for [its] educational mission, the MVC has allowed that up to 20% of events at Stillpoint may consist of rentals to groups outside of [its] educational mission.”

16. Most recently, on August 18, 2023, Stillpoint’s counsel sent a letter to Town Counsel Ronald Rappaport to address the following two issues: (1) “any concern the Board might have that the reservation of 20 percent of events as ‘off mission’ could result in Stillpoint operating a ‘venue event’ under the guise of an educational use,” and (2) “the legal support for [Stillpoint’s] position that an exempt educational use, such as Stillpoint, is entitled to conduct some number of ‘off mission’ events without losing the protections the Dover Amendment provides.”

II. Analysis.

A. Question 1: Scope of the ZBA’s Review of Stillpoint’s Proposal for Educational Land Use and Activities Under the Special Permit Criteria.

1. The Use Table under 3.1-1 of the ZBL provides that Educational/Charitable/Religious uses are designated as “PR” in the RU district, which means “by right, subject only to Site Plan Review by the Planning Board . . . provided that the *proposed use contains no more than 1,500 square feet of floor area in the RU district If the use involves structures with more floor area, a Special Permit must be obtained from the [ZBA]*” (Emphasis added.)

2. This section of the Use Table references Section 8.5-3, which provides, in part:

“Educational uses . . . are permitted by right subject to all applicable provisions of this bylaw and limited Site Plan Review consistent with the restrictions on municipal regulatory authority contained in G. L. c. 40A, Section 3.”

The full text of this provision mentions various uses protected or exempted by G. L. c. 40A, § 3.⁵

3. In the Use Table, these requirements contain a note (denoted by a “●”) that review is “[s]ubject to limitations on municipal regulations in G. L. c. 40A, Section 3. Site Plan Review applies where legally permissible.”

4. Section 8.5-2 provides the “standards” governing “non-residential use” in the AR (and VR) districts. This section provides seven (7) areas in which zoning officials may regulate non-residential uses in the AR District, including the two following areas:

“E. Traffic generation shall not be more disruptive to the neighborhood than traffic normally resulting from . . . residential development . . . unless the [ZBA]⁶ agrees that reasonable modifications are justified by the size and location of the lot. . . .

G. The use shall not create . . . unacceptable disturbances . . . to the neighborhood”

5. Section 3 (par. 2) of G. L. c. 40A (the Dover Amendment) provides in part as follows:

“No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures . . . for educational purposes on land owned or leased by . . . a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.”⁷

6. The Dover Amendment precludes a town from prohibiting the educational uses of land or structures owned or leased by a nonprofit educational corporation. Hume Christian Lake Christian Camps, Inc. v. Planning Bd. of Monterey, 492 Mass. 188, 194 (2023) (“Hume”) (the Supreme Judicial Court’s (“SJC”) most recent analysis of Dover-protected religious uses).

7. The test for determining whether a particular use of land or structures is subject to the protections of the Dover Amendment entails “two related – and at times overlapping – inquiries.” Id. at 195. The first question is “whether the proposed use has as its ‘bona fide goal

⁵ Section 3 of c. 40A has 12 paragraphs with slightly different language exempting, protecting, or limiting local regulation of various uses, structures, or facilities in addition to the Dover-protected educational and religious uses; for example, agricultural uses, child care facilities, and solar energy systems, among others.

⁶ The provision contemplates the ZBA’s role in regulating non-residential use, whether under site plan review, special permit, or by appeal from an order of the Building Official. As noted, Stillpoint applied to the ZBA for relief or approval under Section 8.5-2 of the ZBL.

⁷ The Dover Amendment does not provide exemption or protection to “charitable organizations” which are not using land for religious or educational purposes.

something that can be reasonably described' as [educationally] significant.” Id. (citations omitted). The second question is “whether the [educationally] significant goal is the ‘primary or dominant purpose for which the land or structures will be used.’” Id. (citations omitted).

8. While the Dover Amendment provides substantial protections for qualified land uses, it also “honors legitimate municipal concerns . . . by authoriz[ing] a municipality to adopt and apply reasonable regulations concerning bulk, dimensions, open space and parking, to land and structures for which a[n] [educational] use is proposed.” Id. (citations and quotations omitted).

9. In Trustees of Boston College v. Board of Alderman of Newton, 58 Mass. App. Ct. 794, 809-810, review denied, 440 Mass. 1108 (2003), the Appeals Court summarized the scope of a local board’s power to review parking plans associated with a Dover-protected use under a site plan review provision, as follows:

“To the degree reasonably possible, the Dover Amendment seeks to accommodate protected uses with critical municipal concerns, which include provision of adequate parking. Further, there is no requirement that, to be enforceable, zoning regulations (including the parking regulations here) must be tailored specifically for educational uses. . . . We should attempt to give a local zoning requirement validity if that can be done without straining the common meaning of the terms employed.”

(Citations and internal quotations omitted.)

10. Insofar as Stillpoint seeks approval to implement a program of educational activities at the Site, the ZBA’s review should focus upon and be limited to the reasonable regulation of parking and related public safety concerns (e.g., safe access to and egress from the proposed parking sites) associated with those activities. See, e.g., Timothy Hill Children's Ranch, Inc. v. Webb, 20 LCR 63 (2012). The ZBA may reasonably regulate parking and its related public safety concerns under its existing generally applicable criteria, but not in a manner that would amount to a denial of the Project or Stillpoint’s right to pursue its educational mission on the Site.

11. The ZBA’s reasonable parking-related regulation should take the form of site plan review, in lieu of a special permitting process. See Trustees of Tufts College v. City of Medford, 415 Mass. 753 765 (confirming that the special permit process is an invalid means of restricting a protected Dover use).⁸

⁸ Our opinion on this point is consistent with that expressed by Stillpoint’s counsel in her June 5, 2023 letter.

B. Question 2: Scope of the ZBA’s Review of Stillpoint’s Proposal to Allow Substantial Non-Educational Land Use and Activities By Unspecified Third Parties.

1. Stillpoint’s request for approval of “off mission” uses of its facility by third parties requires a different analysis.⁹ As a threshold matter, the ZBA must determine whether it has been given enough information to enable the ZBA to undertake the appropriate analysis and reach an informed decision regarding the permissibility of any proposed use. Particularly with respect to the proposed “off mission” uses referenced by Stillpoint, the ZBA may reasonably expect and require a fair amount of detail about the nature, scope, and impacts of the third-party events that are anticipated to constitute 20% of the overall Site usage, based on Stillpoint’s intended venue rentals.¹⁰ The ZBA may appropriately defer or decline to make a Dover Act determination with respect to any proposed use that has not been sufficiently defined and delineated for its consideration. Certainly, the ZBA should decline to offer any advisory opinions regarding hypothetical “off mission” uses that rest upon unsupported assumptions and unknown or unspecified facts.

2. If and when the ZBA is satisfied that it has received sufficient information to support a proper Dover Amendment determination, the ZBA should then decide whether Stillpoint’s proposed “off mission” venue rentals for third-party events are an essential part of a Dover-protected use or, alternatively, an incidental accessory to a Dover-protected use. See Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 844-45 (1994) (an incidental accessory use is one that is attendant or concomitant, as well as minor in significance and subordinate). This is an inherently fact-based and case-specific inquiry.

3. Stillpoint contends that the proposed venue rentals for third-party events will further Stillpoint’s educational mission in two ways: (a) by generating essential revenue that will support Stillpoint’s own educational programming, and (b) by exposing a potentially broader audience to the Stillpoint facility “in the hopes of increasing attendance at further educational offerings.” August 18, 2023 letter at pp. 4-5.

⁹ Although Stillpoint previously used the term “off mission” in its own narrative, Stillpoint’s counsel has recently stated that “the term ‘off mission’ arose unintentionally” and “does not accurately reflect the reality.” August 18, 2023 letter, at p. 1. We continue to use the term “off mission” here as a shorthand reference, as we consider it to be a fair and accurate characterization of the proposed rental of Stillpoint’s facility to third parties, as a venue for events that do not have Stillpoint’s educational mission as their primary or dominant purpose, but are instead designed to serve third parties’ recreational, entertainment, and/or other purposes.

¹⁰ As a general matter, “[t]he board's decision must be confined to the matter pending before the board and cannot validly determine matters not pending before the board.” Pelletier v. Board of Appeals of Leominster, 4 Mass. App. Ct. 58 (1976).

4. The ZBA should consider Stillpoint’s revenue-generation argument based on the applicable analytic framework, which the Land Court has concisely summarized as follows:

“An activity at [a property] that, in and of itself, would not be considered educational or religious in nature may still be protected if it is an accessory use. Henry v. Bd. of Appeals of Dunstable, 418 Mass. 841, 844 (1994). An accessory use is a use “incidental” to a permissible activity that is “necessary, expected or convenient in conjunction with the principle use of land.” Id. (citing 6 P.J. Rohan, Zoning and Land Use Controls, § 40A.01 at 40 A–3 (1994)). Renting [a project proponent’s property] to secular entities for recreation is in no way incidental to the primary religious and educational purposes of the property which are protected, because such secular use is not related to the educational or religious uses of [the project proponent]. . . . [If project proponents] permit secular, non-educational or non-religious use of [their property], for example, for a corporate retreat or a family reunion, they must follow all applicable Bylaw regulations and such use is not protected by the Dover Amendment.”

Timothy Hill Children’s Ranch, *supra*, 20 LCR at 70 (emphasis added).

5. The decision in Collins v. Melrose-Wakefield Hospital Association, 4 LCR 178 (1996) is similarly instructive. In that case, the Land Court found that the leasing of church parking lots to a hospital was not protected under the Dover Amendment, and expressly rejected the argument that the economic benefit of the arrangement to the church provided a religious purpose sufficient to trigger Dover Amendment protection, as follows:

“Although the religious purposes exemption has been held to include a number of accessory uses. . . . I cannot find that the challenged parking arrangements fall within the category of a religious use. The fact that the churches receive income from the parking arrangements does not in and of itself imbue the activity with religious purpose. . . . Clearly churches and other religious institutions must raise funds to survive, but to endorse every fund raising activity of such institutions with the zoning cloak of ‘religious purpose’ would enable religious groups to freely engage in business enterprises whenever and wherever they chose in derogation of the zoning ordinance.

Id. at 180 (emphasis added).

6. The ZBA should also consider Stillpoint’s audience-development argument – i.e., that general attendance at the events of unspecified third parties for non-educational purposes will increase attendance at Stillpoint’s own future educational offerings – in light of the principle that the scope of a zoning exception cannot be construed so expansively as to swallow the general rule. A speculative and generalized aspirational hope of developing the potential audience for educational programs is not entitled to the protections of the Dover Amendment, for reasons that parallel the rule governing the revenue-generation argument. That is, all educational non-profits must attract sufficient numbers of supporters to survive and thrive, but to endorse every potential audience-development activity with the zoning cloak of “educational purpose”

would effectively enable educational groups to freely engage in business enterprises whenever and wherever they chose in derogation of the zoning ordinance.

7. Finally, as a practical matter, if the ZBA finds that the “off mission” events proposed by Stillpoint are *not* entitled to protection under the Dover Amendment, it does not follow that Stillpoint may never use the Site for an isolated event which is not strictly run for an educational purpose, such as its annual fundraiser. In another matter, not involving the Dover Amendment, the Land Court was called upon to address whether wedding functions held at a private home in a residentially zoned district were permissible.¹¹ DiGiovanni v. Pope, 20 LCR 44 (2012). Now-Chief Justice Piper explained that determining whether a particular use is incidental to the primary use of a property is a fact-dependent inquiry, and whether a property use is a primary or accessory use depends in part on the frequency and intensity of the challenged use. Id. at 52. Judge Piper ultimately ruled that “[t]he rental of locus five times during a single season for outdoor wedding receptions surpasses accessory use and becomes a primary use.” Id. at 52. He also observed, however, that “[z]oning ought not to be so rigid and inflexible as to treat as a violation even a single such event, and neighbors out not to look to the zoning laws to prohibit isolated parties. . . .” Id.

C. Summary

- Through site plan review, and not the special permit process, the ZBA can reasonably regulate Stillpoint’s use of the Site for Dover-protected educational purposes pursuant to the pertinent Dover Amendment factors, including parking and related public safety issues;
- With respect to the proposed “off mission” use of the Site, the ZBA must first consider whether it has sufficient information about the nature, purposes, scope, and impacts of the anticipated third-party events at the Site to support an informed determination concerning the applicability of the Dover Act and the potential reasonable regulation of such events. The ZBA should decline to offer any advisory opinions regarding hypothetical “off mission” uses that rest upon unsupported assumptions and unknown or unspecified facts;
- If the ZBA concludes that the proposed “off mission” use of the Site is intended merely to generate revenue that Stillpoint can apply to its own educational mission, it is not subject to the protections of the Dover Amendment.
- If the ZBA concludes that the proposed “off mission” use of the Site is intended merely to draw new people to the Site in the speculative hope that they may then be

¹¹ We note that in this case, by contrast, the MVC Decision prohibits Stillpoint from leasing the Site out for weddings, and Stillpoint has committed to allowing no weddings and further stated that it “has no desire to be an event venue and will not generate revenue by renting out its space for events that are essentially weddings by some other name.” (August 18, 2023 letter, p. 2.)

inspired to participate in Stillpoint's own educational programs, it is not subject to the protections of the Dover Amendment;

- Unless the proposed "off mission" use of the Site is protected under the Dover Amendment, it is permissible only if and to the extent it may qualify for a special permit under the applicable provisions of the ZBL;
- The ZBA should prepare a decision reducing its findings and conditions to writing, which should be approved by a majority vote, except as to any special permit for charitable uses, which requires a supermajority vote; and
- The Building Inspector will enforce any conditions in the first instance, whether on request by Stillpoint or on a written complaint of a person with standing.

I hope this letter addresses your questions, but please feel free to ask for additional guidance if necessary to complete your review of the Project.

Sincerely,

/s/ Michael A. Goldsmith

Michael A. Goldsmith

cc: Ronald H. Rappaport, Esq.
Lisa C. Goodheart, Esq.