

# WEST TISBURY ZONING BOARD OF APPEALS

Thursday, November 3, 2022

Meeting Minutes

Approved November 17, 2022

**Present:** Larry Schubert, Julius Lowe, Deborah Wells, Jeffrey Kaye, Andy Zaikis, Casey Decker

**Absent:**

**Also Present:** Kim Leaird (*Board Administrator*), Phil Murray, Robert JC Murphy, Tom Burke, Kathleen Gulino, Manny Gulino, Michelle Spain, Larry Nesser, Tom Engley, Joseph Tierney, Kevin Mabie, Jesse Fuller, Jason Blandini, Michael Daniels, Lisa Daniels, Stephen Hart

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**5:00 pm** – The meeting minutes of October 20 were approved.

## New Business

**Red Arrow Road Community Housing**, 40B modifications. (*Julius Lowe recused himself from the discussion*). The project has been reviewed by the Martha's Vineyard Commission and approved and the ZBA has received an application. The board voted that the modifications being sought are substantial and that a hearing would be held within thirty days as is required for a 40B Comprehensive Permit. The board also voted to enlist the technical assistance available to municipalities from MassHousing.

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**5:15 pm** – (*Continued from March 24, May 26, July 28 and September 22, 2022*): A public hearing on an Application for a Special Permit from **David J. Reed** to allow the operation of a Service Business (wedding venue) under section 8.5-2 of the West Tisbury Zoning Bylaws at **371 Edgartown Rd., Map 30, Lot 4**, RU District.

Larry read the hearing notice. Mr. Reed participated via conference call. Larry summarized the timeline thus far and said that after speaking with town counsel it was determined that there is no appeal in front of the board, only a special permit application that the board needs to act on.

The question is whether or not a wedding venue can be found in the **Use Table under 3.1-1** (*...The Use Table that follows indicates allowable uses in the districts shown. See Article XIV for definitions of the use categories. Uses that are not listed below are prohibited, unless the Zoning Board of Appeals determines that a proposed use is so similar in character and impact to listed uses as to justify inclusion within a given use category. or if it can be found to be so similar to something else that is allowed in the Use Table.*)

From Article XIV: the definition of a **Service Business**: *A business or non-profit organization that provides services to the public, either on or off the premises, including but not limited to building, electrical, plumbing, and landscape contracting, arts instruction or studio, auto repair, business and educational services, catering, health club, house cleaning services, locksmith, photocopying, repair and restoration services, tailoring, typing, and word processing. Service business does not include retail business, restaurants, warehouses, or other uses separately listed in the Use Table.*

Discussion followed about whether or not a Wedding Venue would be considered similar to anything explicitly allowed in the Use Table for a Service Business or if it were more similar to uses explicitly prohibited. It was noted that while “Catering” is allowed, this suggests preparing food on site and delivering it off the premises.

Jeffrey said the review criteria laid out in 9.2-2 is very explicit on what we consider when looking at granting a special permit. Is this harmonious with the rest of the neighborhood? How is [15-20 weddings] incidental to a home occupation use?

Mr. Reed said if that is the case, what about the weddings held at the Grange, Agricultural Hall and at Flatpoint Farm.

Larry said that the Building Inspector considers “more than one” outside of the definition of incidental use. The Grange and Ag Hall are different situations with different agreements with the Town.

Discussion returned to whether or not they could fit a wedding venue in the Use Table. Deborah said in looking a use table, the board is guided by the bylaws. There is not a direct opening to this particular proposal. Clearly there are other wedding venues in West Tisbury but those have not come to the ZBA for a special permit.

Andy said he would agree that a wedding venue does not seem to fit the Use Table under 3.1.

Mr. Reed said he should not have even asked permission by applying for a special permit, that this is a case of selective enforcement of the bylaws and is unfair. He said he’d encourage the Building Inspector to shut down weddings at Flatpoint Farm, the Grange and at the Agricultural Hall.

The board took a vote on whether or not a Wedding Venue can be considered under the 3.1 Use Table. The vote was unanimous that it cannot.

Mr. Reed respectfully requested to withdraw his application without prejudice.

*A motion was made and seconded to approve the request to withdraw the application without prejudice.*

*A roll call vote was taken with the following resulting votes. Motion passed 6-0.*

*L. Schubert-yes, J. Lowe-yes, D. Wells-yes, J. Kaye-yes, A. Zaikis-yes, C. Decker-yes.*

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**5:35 pm** – A public hearing on an Application from **Emanuel Gulino**, to construct a 768 sf Accessory Apartment under sections 4.4-3A and 4.2-2D3 of the Zoning Bylaws, at **193 Vineyard Meadow Farms Rd., Map 37, Lot 7** in the RU district.

Larry read the hearing notice at 5:53pm. Present for the applicant was Tracey Smith from Schofield Barbieni and Hoehn. The owners were also present. Andy Zaikis disclosed he’s president of the Vineyard Meadow Farms Road Association and feels he can be impartial and sit on this hearing.

The accessory apartment they are proposing is a modular structure and does not require setback relief. However, the floor plans provided include a basement with interior access which is not allowed for an Accessory Apartment. If the board agrees to approve this special permit, it will be on the condition that the applicant provides a revised floor plan that accurately reflects there will be outside access ONLY to the

basement level. A new plan will also be necessary to accurately reflect the correct wall dimension with stair removed.

Larry read correspondence. The Planning Board referred it back to ZBA without comment. Neighbors to the southwest, Valerie and John DeWitt, expressed concern about the number of bedrooms and septic system and whether or not an increase in bedrooms would negatively impact them. They were also concerned about the proximity to their home, screening and the impact of noise, etc.

Tracey said a maximum of six bedrooms is allowed on the lot. They redid the house with four bedrooms in order to allow for two bedrooms in the accessory apartment. Discussion followed about it being an open area between the proposed structure and the DeWitts. Larry asked if applicant would be willing to add some screening. The builder was present and said yes, he could add trees and landscape the property line in order to add a buffer.

Larry went over the requirements of Affordable Apartments and what is required under the bylaws. They are deed-restricted.

*A motion was made and seconded to close the hearing and open the board meeting.*

The board discussed the conditions they should impose. It was suggested that a minimum of five evergreens such as cypress, high enough to block headlights be planted between the proposed apartment and the DeWitt's property line. It was reiterated that a new plan must be provided that shows the exterior-only access to the basement along with the walls appropriately drawn.

*It was moved and seconded to Approve the Special Permit with Conditions.*

*A roll call vote was taken with the following resulting votes. Motion passed 6-0.*

*L. Schubert-yes, J. Lowe-yes, D. Wells-yes, J. Kaye-yes, A. Zaikis-yes, C. Decker-yes*

*Larry went over the 20-day appeal period and reminded applicant that once that expires, the decision must be recorded by applicant and a receipt brought back to the Building Inspector.*

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**5:55 pm** – A public hearing on an Application for a Special Permit from **Lawrence Nesser**, to construct a 16'x31' inground swimming pool requiring 11' of setback relief on the south side and 1' on the north side; as well as a pool shed requiring 16' of setback relief on the north side, under sections 8.5-4C, 4.2-2D and 11.2-1 of the Zoning Bylaws, at **237 Vineyard Meadow Farms Rd., Map 37, Lot 14** in the RU district.

Larry read the hearing notice and opened the hearing at 6:13pm. Present was Tracey Smith of Schofield, Barbini & Hoehn as well as Lawrence Nesser. Andy Zaikis disclosed he's president of the Vineyard Meadow Farms Road Association and feels he can be impartial and sit on this hearing.

The board looked at the plan to place it horizontally behind the house and Larry asked for the reasons it was not turned so as to not require setback relief. Lawrence Nesser said they were trying to center it behind the house in an aesthetic way and if they had sited it differently, more trees would need to be cut down and it would be further away from the house. They would require setback relief for the equipment shed regardless. The southern neighbor is impacted more than the other side. They are only asking for one foot of setback relief on the northern side.

The pool fence will be compliant. The proposed shed is 10'x12' (120 sq. ft.) but no plans were provided.

Larry read correspondence received. The Planning Board had no comment. There was a letter of support from the neighbors to the south (Peters). There was another letter from the neighbors to the north (Daniels) requesting that the Applicant plant three Skip Laurel evergreens next to the trees they were required to plant as part of their special permit granted earlier this year (#2022-27), as doing so will help extend the screening along the property line. Mr. Nesser agreed with this request.

Larry went over the pool conditions that are part of every pool permit.

*A motion was made and seconded to close the hearing and open the board meeting.*  
There were no additional comments.

*It was moved and seconded to Approve the Special Permit with Conditions as stated.*

*A roll call vote was taken with the following resulting votes. Motion passed 6-0.*  
*L. Schubert-yes, J. Lowe-yes, D. Wells-yes, J. Kaye – yes, A. Zaikis, C. Decker-yes*

*Larry went over the 20-day appeal period and reminded applicant that once that expires, the decision must be recorded by applicant and a receipt brought back to the Building Inspector.*

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**6:15 pm** – A public hearing on an Application for a Special Permit from **J.C. Murphy** through his attorney Philip Murray, to APPEAL an email ruling by the Building Inspector requiring the applicant to submit a building permit application before determining the buildability of **14 Pine Lane (“Lot 14”), Map 10, Lot 268** in the RU district.

Larry read the hearing notice and opened the hearing at 6:30 pm. Present were Attorney Phil Murray and owner J.C. Murphy. Larry pulled out the maps to show the area in question, a 1.41-acre parcel.

Larry said he spoke with the Building Inspector who said it is Select Board/Town and Building Department policy to review a building permit application before determining the buildability of the lot. Unlike the ZBA, he did not have a legal budget at his disposal to determine whether or not a lot was buildable. Larry consulted with town counsel who said Joe’s email was not an appealable enforcement order or a denial of an application, it is simply an email that states the policy. There is no legal standing to appeal unless Joe formally sends [Mr. Murphy] a letter on town letterhead outlining his rights to appeal.

Mr. Murray said that on August 7, 2017, Joe had written a letter to Mr. Murphy determining the lot was not buildable and he did so without any application. He said that Mr. Murphy would have to go to the Planning Board first before applying for a building permit. He asked if there is a town policy, what was that denial based on. The only thing that was pending in the town was a sewer permit application filed on July 17, 2017 with the Board of Health, and that was being held pending a Planning Board decision. It has been pending in the Board of Health since July 17, 2017.

Prior legal action was brought in 2011 and 2012. Mr. Murphy filed an Approval Not Required (ANR) plan with the Planning Board that it denied. It was appealed to Superior Court then to Appeals Court which directed the Planning Board to sign and accept the plan [that changed “Recreation Area” to “Lot 14”]. However, it was noted that this ruling did not also decide that the lot was buildable.

Over the summer, Mr. Murray wrote three letters arguing that there was enough information for the Building Inspector to determine it was [now] buildable based on more current case law. They had several back and forth conversations and Joe Tierney told him [the Select Board] will not let him determine its buildability without an application. He asked what made it possible for him to deny it back in 2017 and not in 2022 and noted there is no written town or Select Board policy.

Larry said the Board of Appeals is not in a position to determine the buildability of the lot. He reminded Mr. Murray that they were here to decide whether or not the Building Inspector acted outside of his purview in an email requiring a building permit application. Larry said you are already in possession of a letter from 2017 that answers the question if it's buildable. You are asking us to determine that *Yes, Joe needs to review [it again] without a building permit* or *No, Joe does not need to review it without a building permit*.

Joe Tierney asked if he could respond and said two things: 1) His 2017 letter was never appealed; and 2) This appeal was submitted more than 30 days after his email dated August 26, 2022 and so was not a valid appeal.

#### Public Comment

Tom Engley, 26 Pine Lane, said that area (*first called "Recreation Area" and then as "Lot 14"*) was always known as a common area. He recalled that Mr. Murphy said that maybe it would be "a place for horses or a playground." He noted that their well is right at the road as is everyone in the neighborhood.

Elizabeth Carr, 28 Pine Lane, said she was one of the first buyers in the neighborhood. When she purchased she was told it was a common area. The middle was a Recreation Area. All of their wells are around that circle and it's [always] been a green area. She later said it felt like [the neighborhood] was being bullied. Mr. Murphy had a lawyer but they did not.

John Fragosa, 24 Pine Lane, said that Mr. Murphy approached him and asked if he'd support building on that lot and he told him if the town says you can, then sure. But it was designated a recreation area so why would it be allowed to change.

Stephen Hart, 6 Pine Lane, said that when he first signed on to this property the covenants stated it was a "common" or "recreational" area.

At 7:00 pm, Board member Jeffrey Kaye recused himself because he had consulted in his legal capacity with the Petitioner.

Discussion followed about how the appeal was filed past the 30 days required under Chapter 40A. Julius questioned if they even needed to cast a vote as it seems it is an invalid appeal.

Mr. Murray said he assumed the board would rule that the [appeal period] had expired and also said he will look to see what statutory authority he has to get the Building Inspector to give his opinion.

Julius said if the Applicant had submitted a building permit and was denied, *then* he'd have the opportunity to appeal [the buildability of the lot] and so the conversation in front of the ZBA would be different.

Mr. Murray said Mr. Murphy is doing his estate and wants to sell the parcel without worrying what is [allowable] there. He said they should not need a building permit application in order to decide its buildability. It should be in the town's rules and regulations. He asked to read Chapter 240 Section 14A.

Larry said we are not arguing these points at this appeal hearing. Their appeal was based on an email opinion of the Building Inspector, Joe Tierney. We are here to decide whether or not the Building Inspector should have or should not have required a building permit application before determining the buildability of the parcel in question.

A short history of what happened in 2017: Mr. Murphy applied to the Board of Health who in turn asked Joe for the building plans. There were none, and Joe wrote a letter to Mr. Murphy stating that he did not believe it was a buildable lot. There was the opportunity for him to appeal his 2017 letter that [already did] deem the lot unbuildable. Mr. Murray said [however] that Joe did not base it on an application [back then] and this is the one document standing in Mr. Murphy's way in selling this lot.

In regard to the exhibits that Mr. Murray provided with his appeal, Larry said we do not do the public's business anywhere else other than here at the table. This is their opportunity for the board to review his appeal.

Andy said he is struck by Joe's point that jurisdictionally they have no authority here, there is not a valid appeal in front of [the board] as it is outside the appeal window and said he does not think they can go any further in this matter.

Julius said even if we were within the 30 days he would have no problem with Joe having a requirement to administratively do the business of the town -- in this case, requiring a building permit application.

Mr. Murray said the public is entitled to notice of that procedure. He again referred to Chapter 240, Section 14A and Julius noted that they would need to go to court for that [argument].

Julius asked about the covenants and was told they were good for 20 years they were renewed in 2003 for another 20 years (through 2024).

Larry again said that town counsel believed this is not an application the board can act on because it is outside the 30-day appeal period. However, he has paid his fee with his appeal application so we must act now, regardless if it has no standing before us.

Julius said we can't uphold or deny the building inspector's decision because it's outside the appeal period.

*A motion was made and seconded to close the hearing and open the board meeting.*

Discussion followed about denying the appeal because it was filed outside the appeal period.

*It was moved and seconded to DENY the appeal.*

Deborah abstained. Jeffrey abstained by virtue of having recused halfway through the hearing.

*A roll call vote was taken with the following resulting votes. Motion passed 4-0-2.*

*L. Schubert-deny, J. Lowe-deny, D. Wells-abstain, J. Kaye-abstain, A. Zaikis-deny, C. Decker-deny*

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The Meeting adjourned at 7:30 pm.

Respectfully submitted,  
Kim Leaird, Board Administrator