

## WEST TISBURY ZONING BOARD OF APPEALS

Thursday, February 2, 2023

Meeting Minutes

Approved February 16, 2023

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

**Absent:**

**Also Present:** Kim Leaird (*Board Administrator*), Paul Haverty (*Blatman, Bobrowski, Haverty & Silverstein*), Ross Seavey, Shelyn Garcia, Luiz Oliveira, Eric Peters, Reid Silva, Russ Hartenstine, Matt Coffey, Chris Alley

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**5:00 pm** – The approval of the January 19 meeting minutes was pushed to the next meeting, so that Kim can re-listen to the recording and clarify the answer given to the standing question Jeffrey posed to petitioner during Garfinkle appeal.

Larry gave an update on the Zoning Amendment Committee work. At the last meeting they took public comments. There are four new insertions to the use table for consideration: 1) Chain businesses; 2) Limited Retail Sales and 3) Mobile Food Establishments both requiring a plan review by the Planning Board; and 4) Weddings. There was discussion about removing it but we lobbied to keep it on for to see if this is something the public wants and would be a special permit from the Planning Board. This will all be presented at a public hearing before town meeting. There is also the additional thought that 9.1 will need to be expanded in order to develop specific criteria for reviewing these different uses.

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**5:15 pm** – A public hearing on an Application for a Special Permit from **Jeffrey and Carolyn Carney**, to construct a new 18’x42’ inground swimming pool to replace an existing 18’x37’ swimming pool with a new 8’x15’ pool equipment shed to replace the existing shed under Section 8.5-4C and 6.1-5B of the Zoning Bylaws, at **80 Plum Bush Point Rd., Map 35, Lot 6.7** in the Inland and Shore Zones of the Coastal District within the RU district.

Larry read the hearing notice. Reid Silva and Russ Hartenstine represented the applicants. The property is on Tisbury Great Pond and has an existing house, pool house, and an 18x37 pool. There is also an existing pool equipment shed currently sitting on the property line shared with neighbors, John and Judith Boynton.

The proposal is to extend the pool 5 ft. towards the water and relocate the pool equipment shed 18 ft. back from the property line. The proposed “spa” is on the side of the pool and set back 51 ft. from property line. At its Jan. 30 meeting, the Planning Board had discussed the placement of the equipment shed on the property line, so the applicant moved it 18 ft. back. Reid said this is possible in the bylaws (WT bylaw 4.2-2D) that allows one accessory structure, 120 sq. ft. or less, to sit within setbacks as long as it is a minimum of half the height. The proposed shed is approximately 9 ½ ft. high.

Russ said there is a large berm on the property line. The back of the proposed shed will actually be in the berm, and stick out from ground 5 feet above ground. They picked this spot due to a large hedge of rhododendron. [The neighbors] shouldn’t see it because of the hedge. They plan to pull and move the

hedge and bury the pool equipment shed in the berm, flush back, so they can maintain open field where they play badminton. He said it will be completely sound proof.

Pat asked how the old shed was approved and whether the new shed is taller than the existing. Russ said he didn't know but the old one does not have a proper foundation. He said the berm is at 0 and the top of the berm is about 4 ft. above grade. Russ added the neighbors are not happy but he feels they've done the best they can. He said the equipment can't be placed beyond 50 or 70 ft. because of the pool equipment itself. The owners wanted them to put the shed behind the pool house facing the driveway.

Deborah asked about the clearing planned around the shed for airflow and asked that if in the pursuit of something that 'looks good' were they compromising the quality of the shed. Russ said there would be plenty of circulation around it. She also asked if the existing pool had failed. Russ said yes,  $\frac{3}{4}$  of it has failed. There are leaks underground and a re-build is necessary.

### Correspondence

Larry read a letter from the Planning Board – they felt it important the board enforce the requirements under bylaw 8.5-4A(4): *In order to minimize the noise impacts on neighbors, associated noise-producing pool equipment shall be located as far as possible from abutting properties, and at least the minimum required setback and shall be installed in a sound insulated enclosure.* Normal setback for a structure is 50 ft. but under bylaw 4.2-2D a shed under 120 sq. ft. could be allowed within the setbacks. The ZBA has the purview to allow it.

Larry read a February 2<sup>nd</sup> letter of opposition into the record from the abutting neighbors, John and Judith Boynton. They object to the pool equipment shed not being as far as possible away from them, or at least 50 feet, objecting to both the proximity and noise and being in their line of sight from their front door.

Larry asked if they planned to put it in the hedge and whether it is propane-fired or an electric pump. It will not be in the hedge, but in front of the hedge. Reid said that the current shed is pre-existing non-conforming. The excessive equipment noise is here today; they could walk away and keep it exactly as is, but they are here because they are expanding the pool, thus the special permit. He said no matter how you cut it, it will improve what is there now.

Russ admitted the current shed is very loud, like a drum -- it is old and has been eaten away by mice. He called it a "falling apart rat shed," and said he could understand how the neighbors were concerned about the noise, but the new one would not be like that.

Discussion followed about building a concrete vault in the ground with just a chimney sticking out -- 50 ft. away or even putting a vault into the berm. Reid said 50' away would be difficult because then it would be right up against the side of the pool.

Deborah asked why they are not considering an electric heat pump vs. propane. Russ said because their current infrastructure is built for propane. Casey said they could always change that now. Deborah agreed and said that this might be a good time to consider making the switch. Larry also agreed and said the noise level would also be less with an electric pump.

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

Larry said if they allowed the shed within the setbacks as represented in the plan but conditioned they replace propane-powered heat pump with an electric heat pump in a sound-insulated structure, would this

be acceptable. Reid said you can put the circulators in a shed, but you can't put a heat pump compressor inside.

Andy said he is troubled by the conflict in our bylaws that allows an accessory structure within setbacks but does not address the noise that comes with a pool shed [accessory structure]. A shed is a matter of right, but this does not necessarily apply to sheds that make noise. He also said if they approve the location with this change the abutters do not have enough time to respond to it. Applicant indicated they might be willing to move it up the line, but they propose to put it in the berm, in the hedge row.

A motion was made and seconded to postpone voting the decision and continue to March 16 at 5:15pm. The applicant was encouraged to return with modifications requested by the neighbors, site the shed 50ft away, and plan for an electric heat pump instead of propane in an opportune time for the neighbors to review it.

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

*L. Schubert-yes, D. Wells-yes, A. Zaikis-yes, J. Kaye-yes, Casey Decker-yes, Pat Barrett-yes*

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*Julius Lowe arrived for the second hearing*

**5:35 pm** – A public hearing on an Application from Ross P. Seavey, Esq. on behalf of **Shelyn M. Garcia**, to amend the conditions of Special Permit #2017-07 and #2022-56 for a Service Business in order to clarify which insulation products may be kept on site, under Sections 3.1-1 and 9.3-3 of the Zoning Bylaws, at **560 State Rd., Map 16, Lot 61** in the Major Roads Zone of the RU district.

Larry read the hearing notice and opened the hearing at 5:47 p.m. Representing Shelyn Garcia was Attorney Ross Seavey, who said he would be recording the meeting.

Atty. Seavey said they were here last for the deer shed and brought up this question about which insulation products could be kept in the garage. The Building Inspector's read of Special Permit #2017-07 is that it prohibits all storage of product. The applicant did not believe that was the intention of the board and thought it referred only to 'product' (singular), meaning spray foam insulation.

They are here to see if the board would allow fiberglass and mineral wool insulation storage and the delivery of that to the site twice a month.

Larry said Finding #8 in the 2017 decision states: *The barn is for storage of equipment only. No storage of product is allowed with the exception of the small amount of product remaining in the hoses and trailer.* Condition #1 gives the Zoning Inspector ability to make unscheduled inspections to confirm storage of spray insulation product is not being stored. There is no language that refers to storage of other products.

Atty. Seavey said the products they want to store are safe, non-combustible, and fire blocking under building code. It is important to his clients because if they can't have storage in the garage, they are looking at renting yet another storage facility to store more material and at that point they are not really operating their business out of their home. He said there is no point of a "service business" being in the town's bylaws if you have to do [much] of your business off-site and can only do office work at your house. He said nothing about the business is changing; his client was already storing product because client was unaware that he could not store any [non-spray foam product].

Pat asked what the size of a delivery would be? Atty. Seavey said about the size of a Cape Cod box truck. Jeffrey asked why does any product need to be stored there.

Discussion followed about the recollection of past hearings. Deborah said while she wasn't on the board in 2017, it is hard to know from the decision if 'no storage of product' means all product of just spray foam product.

Julius said he was present and there was a long back and forth conversation during the 2017 hearing about the chemicals associated with spray foam insulation. He said if you go through the decision it is specifically spray foam that is mentioned. [At the time] they did not contemplate a product other than spray foam insulation. There were concerns about traffic and delivery to the site, but it was very much wrapped up in the chemical components of spray foam specifically.

Atty Seavey said that in that hearing there was a discussion about 'materials and equipment' in garage and that maybe [materials] didn't make it in to the decision from the minutes.

Larry said he'd hope they are moving forward and his recollection was the reason Mr. Oliveira wanted the garage was so he could keep his large truck inside with the pumps warm. By building the structure he could back the equipment in. He recalled a long discussion about the barrels of foam. The neighbor had concerns about deliveries that entailed big trucks backing in from State Rd. Testimony given by Luiz was he wanted to clean up the property, get rid of his hoop shed, and put truck inside a garage. Once the garage was built the door was too small and he returned to the ZBA to amend the decision for the door.

Larry told the applicant that when you apply for a service business, it's for work you do elsewhere. If he is going back and forth with his own equipment that was one thing, but delivery trucks were eliminated with the 2017 special permit because product was not going to be delivered.

Atty. Seavey said this is off of State Rd., they are just asking for two deliveries a month which is not much more than residential deliveries and likened it to UPS trucks for Amazon deliveries.

Larry read the letter from the Planning Board who strongly encouraged that all insulation be stored in the garage and not on the ground and that no spray foam insulation storage should be allowed.

There was also a six-page letter from Eric Peters as attorney for abutter Patti Linn. Eric addressed board and elected to read his Feb. 2 letter into the record. The letter gave a broad overview of the history of the special permits granted for this property starting in 2016, including with the lengthy discussions captured in the minutes about the nature of the service business and the conditions imposed in Special Permit #2017-07, which he quoted to make the case that they have been violated.

He alleged the proposed amendment to "clarify the original intent of the board" is disingenuous and reminded the board that past discussions stipulated no deliveries of any products. He said the property is non-conforming and not in harmony with the general purpose and intent of the WT Zoning bylaws. The only benefits of the proposed uses are private to the applicants and there are no benefits to the town that would outweigh their adverse effects to abutters and the neighborhood. He noted the days of operation (Mon-Sat, 7:30-5pm) have not adhered to, trucks and cars go in and out all hours and after dark. There is excessive vehicular traffic, including big semi-trucks. No product deliveries were to be made to the property and that is happening. He offered the board several photos that showed different sized trucks on the property.

Pat asked from where the photos were taken. Atty. Peters said they were taken from Patti Linn's back porch and yard in the past week. Over the years several emails and photos have been sent to the town. In April 2021 there were photos of what appeared to be Mr. Oliveira's employees moving product around wearing hazmat suits. Given the repeated violations over the years, Atty. Peters said all deliveries should be off-site. The barn / garage is supposed to be for vehicles and equipment, not product.

Jeffrey asked if they still have the storage facility at the airport? Atty. Seavey said they do not, instead, they currently have an agreement with their off-island vendor, Carroll's. They hold the product until it's needed and then it comes to the island. He said by comparison, spray foam insulation is an expanding product, two cans will do a whole house. Fiberglass is not an expanding product and the amount you would need for a house is significant. Carroll's is not really a warehousing facility. They are asking for only two deliveries a month so they can store and leave each day with what is needed.

Jeffrey asked Atty. Seavey what they had to say about the photos. Atty. Seavey said that the trucks belong to Mr. Oliveira. They have his business name on them. One is a dump truck and another is a box truck. The horse trailer belonged to a friend who was visiting. Jeffrey asked if anything in the trailer went to the barn and was told no.

Atty. Seavey showed the board aerial photos that show the separation between the applicants and Patti Linn. The tall bay is available for a truck but that it was never envisioned for all of the vehicles to be in the garage.

Atty. Peters said it's irrelevant where Patti Linn's house is and the distance between them. The fact is that these activities are taking place and employees arrive at all sorts of hours with equipment. To say it wasn't the intent to not use the garage for all the equipment...the garage was supposed to hide the equipment and help ameliorate the impact of this business and it does not. It is not being used to do that.

Jeffrey said Finding #7 in the 2017 decision is very clear about deliveries not being allowed.

Atty. Seavey said he asked Kim to send recent decisions for service businesses and none mention limiting deliveries or storage. Julius said that inherent in the service business bylaw limitations are outlined.

Larry said we make every effort to treat everyone the same and to pick apart past decisions is a rough road to go down. They are here for a very narrow reason, and that is to define whether or not a different product can be stored. In 2017 the focus was on prohibiting the storage of spray foam product. We've heard from Eric Peters that it meant to prohibit ALL product related to the insulation business. And Shelyn believes it meant only the storage of spray foam insulation and that other product could be allowed as this board saw fit as an amendment.

Deborah commented that the use of word product (singular) may infer that only spray foam insulation was the issue. If the board was looking at different types of product then the plural would have been used.

Jeffrey said Condition #2 stipulated that spray insulation products would be stored at the airport. Atty. Seavey said they did so until they began a new arrangement with Carroll's Trucking. There have been other deliveries to the property and this issue only came up was because Joe saw that [other product] was being stored.

Atty. Peters said that if board agrees that Special Permit #2017-07 prohibited deliveries of all kinds, they should deny this modification. How would they even enforce two deliveries per month.

Julius said that's why they generally do not limit deliveries for service businesses because it's impossible to enforce and because showing up in middle of night could be construed as a delivery.

Atty. Seavey said he understands they are difficult to enforce and so asked for a condition that allows only two deliveries per month. He does believe the deliveries come via a box truck. Shelyn added that when there is a delivery, it is not on the street. They signal and go down the driveway to the back. It is very easy to walk out and snap a photo and say they're blocking the road when they are just turning in.

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

Jeffrey said he thought the building inspector read the decision correctly and they should keep conditions of 2017 special permit. He said he's in favor of saying *No product should be delivered*. Pat said he agreed based on the findings of the 2017 permit. Julius said as someone who has a service business, it is impossible to operate and have zero deliveries. A physical address is -- what if it's a delivery of a tool but looks like a delivery of a product?

Larry said they are here to clarify the type of product that can be stored. Deliveries are part of that but if the board does not allow fiberglass insulation to be stored in the garage, there will be no deliveries of fiberglass.

*A motion was made to modify the special permit: No spray foam insulation will be delivered. Fiberglass and mineral wool insulation can be kept onsite and indoors with two (2) deliveries per month.*

*The motion was not seconded; however, a roll call vote was taken with the following resulting votes. Motion failed. 2-3.*

*L. Schubert-no (abstain), J. Lowe-yes, D. Wells-yes, A. Zaikis-no, J. Kaye-no, Casey Decker and Pat Barrett abstained as Associate Members.*

*The modification was denied to the applicant.*

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*Andy Zaikis left the meeting; Julius Lowe recused.*

*Present for the following hearing: Larry Schubert, Deborah Wells, Jeffrey Kaye, Casey Decker, Pat Barrett*

**6:15 pm** – A public hearing on an Application for Modifications to a Comprehensive Permit granted to **John Abrams and South Mountain Company** in 1998, for plans to subdivide **Assessor's Map 10, Lot 200** in order to create a 3.17-acre parcel that will have six (6) structures including four (4) housing units with a total of 11 bedrooms: one 2BR unit and two 2BR units (80-140%AMI) and one 3BR house to be sold to a West Tisbury family under M.G.L. Chapter 40B, Modifications to a Comprehensive Permit, at **0 Red Arrow Rd. (20 Rock Pond Rd.)** in the RU district.

Larry read the hearing notice and opened the hearing at 6:45 p.m. Present were Matt Coffey and engineer Chris Alley. John Abrams was present via phone to listen only. Larry confirmed that they had already been to the Martha's Vineyard Commission (MVC) as well as to the Planning Board under Sections 4.4-3 (*Exceptions to lot frontage*) and 4.4-3B (*Multi-family housing by special permit*) for the increase in dwelling units and been approved. They are here in front of the ZBA for the modification to a Comprehensive Permit granted in 1998, namely to allow a 3.17-acre parcel to be removed from the larger 40B development area to be developed separately under local bylaws.

The board determined the changes were substantial and that is why we are here in a public hearing.

The Planning Board has already approved the multi-family development and issued its decision. However, the ZBA still needs to modify the 40B comprehensive permit in order to allow the removal of the 3.17-acre parcel.

Paul Haverty, from the MassHousing Partnership, asked the Applicant if they were looking to simply reduce the area by taking the 3.17-acres out or were they looking for the board to actually approve the housing. He said if they planned to make the housing a part of the 40B they would be subject to a lot of regulatory requirements under 40B, including profit limitations, final approval from a subsidizing agency and the need to execute a regulatory agreement and a monitoring agreement. Whereas if they are simply removing acreage from the existing development and getting it approved under local zoning, they would not need to do any of that.

Mr. Haverty said every Chapter 40B development is subject to future modification. There is case law that talks about the standards required. The Board of Appeals does not look at the economic impacts of the application at local level. He told the board that if there is an appeal of their decision by the Applicant to the Housing Appeal Committee (HAC), they will review whether it was an un-economic modification and if granting the modification would render it significantly un-economic. If there is no economic impact, then the HAC does not get involved. He told the board that they are 100% in their right to approve the modification of a comprehensive permit that reduces the amount of land area. The only thing they want to look at is, does reducing [the larger parcel] create a local concern? Once the parcel is removed from the 40B development, it is subject to local zoning.

Jeffrey asked if the MVC reviewed it as a comprehensive permit. Mr. Haverty said he did not know. He said the Planning Board has no jurisdiction under Chapter 40B, whatever decision the ZBA makes would supersede the Planning Board decision.

For the Applicant, if they seek to keep the 3.17-acre parcel part of the 40B development, there are several subsidy requirements under 40B that are not part of local zoning. For example, on a 40B, the developer is limited to a 20% return on the total cost. They would have to go through a final approval process, put up escrow for a cost certification to ensure they don't go over the profit limitation. It is very cumbersome and something to avoid. The Applicant's proposal in terms of the sale of the market rate unit and up to 140% to employees of the company could create a problem under 40B because someone could come in and say you are artificially limiting the profit on the project to get around the 20% profit limitation. This may be something Applicant would like to avoid as well.

Mr. Haverty added that under 40B the board would not have authority to issue conditions that intrude on the exclusive jurisdiction of the financing agency. That does not mean that they could not include a condition along the lines of, *The applicant shall execute a regulatory agreement as required by the subsidizing agency.* You would want to make sure that is stated in the decision otherwise the applicant might just avoid that step. However, this would only come in to play if the Applicant seeks to keep the housing part of the 40B development.

The Applicant confirmed they are looking to remove the 3.17 acre from the 40B development area.

Mr. Haverty said the only thing the board is looking at is: are there issues of local concern by removing the 3.14 acre from the 40B.

Larry read some of the findings from the DRI decision that found. Jeffrey said the MVC did not find the change to be substantive. Mr. Haverty said the MVC is doing its review under its own statute and regulations as a development of regional impact. That is separate from the 760 CMR regulations that govern comprehensive permit developments, whether or not it is substantive for the MVC, it could still be substantial for the Board of Appeals.

Matt Coffey gave a short presentation on their project. The intention is to build four homes, one market rate unit is for Julius and Mila Lowe; two 2-bedroom homes meant for South Mountain employees with a maximum AMI of 140%; and one unit to become available for the town lottery. For this unit they will be partnering with Island Housing Trust (IHT) to do a ground lease on the property. Going through this process with the MVC and Planning Board, they have made a number of substantive changes to make everyone happy. They met with a neighbor and modified site plan to increase the buffer to their property. They increased the one-bedroom unit to two-bedrooms for the 80% AMI lottery home in the interest of adding one more bedroom to the town.

The overall planning for this project is building high performance, low maintenance, zero net energy houses with a communal feel. There's a solar parking canopy that will provide power for all homes. Electric vehicle charging stations will be built in, there will be shared storage for bikes, etc. They will provide two de-nitrification septic systems on the property as well as one off-site. They are trying to keep a light footprint, minimizing clearing and bring back native vegetation.

Larry asked what original parcel of the 40B development for Island Co-Housing was. The total was 27.92 acres Island Co-housing Will end up with 24.75 left if 3.17 acres removed.

Larry asked when the 40B development was first proposed were the offices and business separate from the acreage. Chris said there was a evolution of how it all came together.

Chris Alley said that Co-housing homeowner's association will benefit monetarily from the sales.

Larry read from the Planning Board special permit decision. They approved the plan to create a 3.17-acre parcel of land to construct a market-rate dwelling unit, three affordable dwelling units, a solar shed, and a community garden. The housing has already been approved and the board's vote will be to allow taking out the 3.17-acre parcel from the 40B development.

Mr. Haverty asked the applicant if they needed any relief once the acreage is removed from the 40B. As long as no other 40B type of relief is needed, the best path is to vote on severing it from the larger 40B development.

Larry said the multi-housing bylaw covers a lot of potential issues. Chris said the access question is a good one because originally, they were thinking of doing something different.

Pat asked if there was any correspondence. Larry read a letter from Michael Colaneri who encouraged review by MassHousing. The board has availed itself of attorney Paul Haverty from MassHousing Partnership. Mr. Haverty said he has also spoken with Mr. Colaneri and explained the process and how it works.

Larry read a letter from the Building Inspector dated today regarding a cement business operating at 20 Rock Pond Rd. that does not possess a Use Permit to operate in the RU District and that the property appears to be in violation of Section 10.1-1A of the bylaws. He ordered them to immediately cease

operation of the business at this location. Larry said that Zoning Bylaw 9.4 (*Premises containing bylaw violation*) states that no approval may be issued if there is a violation of the bylaws.

Matt Coffey said he went by there today. Ninety percent has been removed but there is still a form truck there with everything to be removed within ten days. He hoped the board could continue with the hearing and suggested a condition that this happen.

Larry said it would be cleaner to continue the hearing until we have another letter from the building inspector that says the violation has been corrected.

Mr. Haverty said that when the board closes its hearing it has 40 days to write its decision. He will need the time to write the decision and if continued, he could bring the draft decision to the next meeting where the board could review it.

A motion was made and seconded to continue the hearing to March 2 at 5:00 pm.

*A roll call vote was taken with the following resulting votes. Motion passed 5-0.*

*L. Schubert-yes, D. Wells-yes, J. Kaye-yes, Casey Decker-yes, Pat Barrett-yes*

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## **Other**

- **Affordable Housing Committee.** Larry said he's been a member of the Affordable Housing committee (AHC) for about 8 years and is ready to step down. The board needs to appoint someone new. He said there are two alternate members currently on the AHC, and Larry said he could ask one or both if they'd be interested in being appointed by the board. Deborah asked how would the communication work back to the board. Larry said they could come to a meeting and report if necessary. No vote was taken.

The Meeting adjourned at 7:40 p.m.

Respectfully submitted,  
Kim Leaird, Board Administrator