

## WEST TISBURY ZONING BOARD OF APPEALS

Thursday, February 16, 2023

Meeting Minutes

*Approved March 16, 2023*

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

**Absent:** Casey Decker

**Also Present:** Kim Leaird (*Board Administrator*), Nevette Previd, Robert McCarron, Minah Oh Worley, Heather Capece, Triva Emery, Nicole Cabot, Byron Lynn, Patty Favreau, Richard and Suzanne Hammond, Julie Hatt, Rachel Alvarado, Anne Evasick, Sandy Burt, Lane O'Brien, Andrea Rogers, Brian Ditchfield, Faith Runner, Donna Bubash, Stuart Macfarlane, Ollie Becker, John Becker, Lisa Strachan, Tamy Degregorio, Susan Wasserman, Jeffrey Dubard, Kelsey Biggars, Thomas Humphrey, Mark Alan Lovewell, Eunki Seonwoo

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**5:00 pm** – The meeting minutes of January 19<sup>th</sup> and February 2<sup>nd</sup> were approved. Kim will insert the transcript of Jeffrey's questioning regarding standing.

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**5:15 pm** – A public hearing on an Application for a Special Permit from the **Vineyard Preservation Trust** to allow the increase in the degree and intensity of the non-conforming use of the Grange Hall under sections 11.1-3A, 8.5-2, 8.5-3, and 3.1-1 of the Zoning Bylaws at **1067 State Rd., Map 32, Lot 66** in the VR District.

Larry read the hearing notice. Representing the Vineyard Preservation Trust ("The Trust") were Nevette Previd and Attorney Rob McCarron.

Atty. McCarron said before they began, he wanted to make two points: 1) They see this is a settlement discussion and that testimony tonight will not be admissible to the court in the current lawsuit. 2) He noted that the hearing was advertised erroneously as being in the Major Roads district. He does not feel this will be an issue or grounds for any appeal.

Jeffrey asked if they are submitting themselves to the jurisdiction of the board. Atty. McCarron said that's what they've done by filing a special permit application. He said that by applying for a special permit, they are not admitting they need a special permit because that is what the lawsuit is about. Jeffrey also said the parameters are not clear in the application about what they are asking for. Larry said that is what we are going to get into with this hearing.

Larry said if we issue a special permit, the hope is no one appeals it, and the lawsuit goes away.

Atty. McCarron said they are here with the best of intentions, hoping that The Trust and representatives of the town can meet to find a solution that works for the whole community.

The Trust acquired the Grange back in 1997 with deeded rights to the types of allowed use. In early 2022, the Trust leased a portion of the Grange on a temporary basis to Circuit Arts. During that time, they also submitted to the Building Inspector ideas and plans for upgrades to the Grange Hall. Those plans are not part of the application for a special permit; they are shared as part of the context. In spring 2022, the Building Inspector made various rulings regarding food trucks. They believe it is not a coincidence that on

May 20, 2022, the Building Inspector issued his letter to The Trust stating there was an increase in the intensity of use. The type of proposed use was introduced to the Building Inspector five months earlier. The ZBA in 2022 affirmed the Building Inspector’s determination that a special permit is required. The Trust appealed that decision and litigation is pending in the early stages. They filed this application for a special permit in an attempt to resolve everything as it relates to the Grange.

Atty. McCarron presented a framework for discussion, arguing that there are four different zoning categories of historical use applicable to the Grange. Exempt Education & Religious, Allowed Charitable, Preexisting Nonconforming (PENC), and Business Uses.

<b>Exempt Education and Religious</b>	<b>Allowed Charitable</b>	<b>Preexisting Nonconforming</b>	<b>Business</b>
Film Showings	Fraternal Meetings	Weddings & Receptions	
Concerts (Educational)	Concerts (non-profit)	Historically conducted activities	
Lectures	Expositions & Displays	<i>(not includable elsewhere)</i>	
Panel Discussions	<i>by Non-Profits</i>	Expositions & Displays	
Theatrical Performances	Dinners (non-profits)	<i>by for profits and other groups</i>	
Organized Youth Activities	Public Gatherings	Dinners	
Public Gatherings			

With each category there are different review criteria. Atty. McCarron said the **Exempt Education and Allowed Charitable** uses are subject to plan review under 8.5-2 or a special permit under 8.5-2 if the square footage is above 1500 sq. ft. [in the VR district]. Section 11.1-4B suggests that if the use is to be enlarged to a size that would require a special permit, then such expansion shall req a special permit. If the use is **Preexisting Nonconforming** (PENC) and has never gone through a plan review and was expanding more than 1500 sq. ft. -- that use would require a special permit. If the board were to allow a new **Business Use**, then it would need to comply with the criteria under 8.5-2. *(excessive sound, noise vibration, screening of parking and buildings subject to ZBA reasonable modifications; traffic can be equal to residential or agricultural volume subject to reasonable modifications by the ZBA, etc.)* For PENC uses, the criteria under 11.1-3A is that the extension of the nonconforming use must not be substantially more detrimental to the character of the neighborhood. Atty. McCarron said they believe most of their uses are exempt uses.

He said with their application they provided a list of prior events and the corresponding use categories from the deed they believe they fall under.

He again emphasized that they are here to take a significant step towards resolving differences and to work with the town and the entire community, and use the Grange for a purpose that benefits everyone. The Trust preserves landmarks emblematic to the character of the island. The Town is organized to serve the best interests of the community. We have a common interest.

Nevette said the intention of this meeting is to really establish common ground. We [both] serve the community. As stewards of the Grange, [the Trust] wants to use it as it was intended. They have spent considerable time looking back at the history of the Grange, trying to understand what exactly triggered the requirement for a special permit: is it the retrofitting [of the building] or is it Circuit Arts coming in. Is it the number of *events* or the number of *people*? Is it the off-season programming? She said the farmer’s market is no longer at the Grange and that had arguably more people and traffic.

She said the heating systems are 20 years old and the Trust’s job is to protect the building and upgrade it so it can be sustainable for the next 100 years. If it is the off-season programming that is the concern, let’s

talk about it. What are the concerns? They really want to be good neighbors. They have listened and addressed neighbor concerns about the direction of headlights and noise. They limit hours and do not allow amplified music. They allow parking on their lots by town employees and the community; snow is deposited there after being plowed and they clean it up. They share the well, leaching field, and septic with Town Hall. They are here to move forward and discuss concerns and settle this.

Larry said they did not discuss the deed at the hearing last summer when the board voted to uphold the Building Inspector's determination that they needed a special permit. The increase makes you come but the increase is not a reason for you to either be allowed or denied a special permit. We will all talk about what we think and feel about that tonight.

Larry met with town counsel and understands that he shares common thoughts with Atty. McCarron. A August 22, 2011, legal opinion written by Atty. Rappaport was discovered and he thinks it's relevant to tonight's hearing. Larry read from the opinion:

*[8.] ...In furtherance of the Town Meeting vote, the Selectmen issued a Request For Proposals ("RFP") seeking bids from not-for-profit entities to purchase the Grange Hall Property. The RFP outlined the following as permitted on the property:*

"public gatherings, organized youth activities, showing of films and theatrical performances, lectures, fraternal meetings, panel discussions, concerts, weddings and receptions, dinners, expositions, and displays by non-profit and for-profit organizations, and other groups; and for other activities that have been historically conducted on a consistent basis at the Hall."

Larry said why would we advertise and issue an RFP if we did not want all of these uses that are itemized in the RFP, the purchase agreement, and the deed. He also read sections of the legal opinion where the Town reserved the right "to use the premises from time to time for any event or program sponsored by the Town of West Tisbury" and that the Trust agreed to coordinate the scheduling of events to facilitate that as well as a Preservation Restriction Agreement between the Trust and the Commonwealth of Massachusetts limiting the type of improvements which could be made on the premises.

Larry then read what the Board of Selectmen said in the 1996 Town Report:

*[10.] "We were pleased that the Town voted to accept the plan of the Selectmen to sell the building known as the 'Old Agricultural Hall'. We listened carefully to community concerns at public meetings and concluded that sale of the building and land was in the best interest of the Town. A carefully developed "Request for Proposal" was crafted that included concerns relating to community involvement, protection, and preservation of the historic structure, it also required the purchaser to develop a plan for its use, and most importantly have a time table and the financial resources to restore the building. Also included in the proposal was an Advisory Committee of seven members that will assist on policy matters....*

Jeffrey said that was his opinion in 2011. Larry said he sat with Atty. Rappaport this week and he did not ask him if he had the same opinion.

Julius said for the record, if someone is wondering why this opinion letter was not known about before now, he wanted the public to understand that over the years, with different select board members that sometimes things can be forgotten or lost.

Jeffrey said he doesn't understand what they are asking for in their special permit application. There are no detailed requests unless you just want to be on your own to do what you want, pursuant to what you construe the deed to mean that you can do, if that was the purpose of your declaratory judgment suit.

Atty. McCarron said the whole purpose of the lawsuit was to say the Trust does not believe they *need* a special permit. They are here because they are trying to serve the community. They [still] do not understand what criteria is up for review. Mr. Tierney felt we were increasing the intensity of a nonconforming use without identifying the nonconforming use.

Andy said as a retired attorney, there should be a conclusion made by Atty. Rappaport and he pointed out Paragraph 17 in the opinion letter. There is a wide spectrum of uses and according to this opinion the zoning officer would need to determine whether the current uses are a substantial change which existed before 1972. This is the issue: Joe has never stated what activities can't happen there. Andy said the Trust is engaged in permitted activities and somehow there was a trip. The board can't decide how many of each event can occur and believes the Trust would need to bring that to the Select Board.

*[17.] "Under c. 40A, the Zoning Officer is charged, in the first instance, with undertaking the following analysis: he must determine whether the current uses are a change or a substantial extension of the uses which existed prior to 1972. In making that determination, the Zoning Officer must examine whether the current uses reflect the nature and purpose of the uses prevailing when the zoning was first adopted in West Tisbury. He should then examine whether there is a difference in the quality, character or degree of the current uses which is different from the uses which existed prior to zoning. Finally, the Zoning Officer must examine whether the current uses are different in kind and effect on the neighborhood from the former uses.*

*If the current uses are consistent with the prior uses, then the Zoning Officer's inquiry ends - the uses are protected under G. L. c. 40A, § 6. If the Zoning Officer determines that the current uses do not meet these tests, then he should so find and The Preservation Trust can pursue relief from the Zoning Board of Appeals, which Board is authorized, in its discretion, to allow changes or extensions of a pre-existing, nonconforming uses.*

*While the analysis set forth above is the responsibility of the Zoning Officer in the first instance, based on the historic uses of the Grange Hall; given that the Grange Hall is located in the village of West Tisbury (as opposed to the rural outskirts); and given the extensive public involvement in articulating the uses which would be permitted in the Grange Hall Property, I am of the view that it is highly unlikely that the Zoning Officer's research will show that the current uses are not lawfully permitted, pre-existing, nonconforming uses.*

Jeffrey said we are also answerable to the town and his major concern is the commercialization of the Grange such as with weddings and other commercial activities.

Nevette said weddings help pay the bills.

Andy said the Trust is engaged in permitted activities and reached a tripping point where they now require a special permit. As he understands from their presentation, they are asking the board to define where the limits are but that is not our role.

Atty. McCarron said let's fit the framework into what you just said. He said they believe that all films are educational events and are protected and exempt from zoning per the Dover Amendment. The degree of the use may have increased, but it is still an allowed use.

Larry said we should be careful about talking about anything limited. There was nothing in the 2011 opinion that mention limited. We've determined that it's the intensity of use not the actual uses. He would hope that as a community we would move forward from the concerns of the neighborhood and what this board has purview over, such as: The issues around the intensity of the use are: Parking, lights, noise, traffic, hours and possibly to speak to this rather than sit and try to design this at the table. The board does not want to sit and design these policies and would prefer the Trust take time to formulate policy statements that address all of these issues. For example, you are having an event and expect 50 cars – what policies are in place for parking? The farmer's market, for example, moved to the Agricultural Hall and part of their special permit contains a condition they will operate according to their charter and policy of operations.

Nevette said they do have policies that are given to everyone who rents the Grange, and said they could expand on these.

Deborah said one of the things they should look at when drafting a policy is the 9.2-2 special permit criteria the board must utilize in its review. Also, that specificity is important as well.

Nevette asked how the special permit would work. Larry said it would be recorded and attached to their deed. He would hope through the issuance of a special permit that the board would not narrow it down to a point so that the Trust feels constrained. He noted that the board of the Agricultural Society does feel constrained with what they can do on their property.

Atty. McCarron spoke to the preexisting nonconforming uses mentioned in that last paragraph of Atty. Rappaport's opinion letter. He was talking about PENC uses and he agrees to everything he wrote; The Building Inspector's letter also specifically references the expansion of PENC uses. He said he thinks they would run into a problem if conditions are discussed that regulating permitted uses.

Jeffrey began referencing Chapter 40A section 17 and what the zoning enforcement is charged with.

Larry said arguing as if we are in a court of law is not going to be productive. He said we should hear from the community.

### **Public testimony**

Susan Wasserman lives on Music St. and said she has the most extensive property border with the Grange. She remembered when the Agricultural Society said they needed to sell and they had to convince the community that it would need to be preserved. The town didn't just turn it over, they have an easement for septic and water that allowed the renovation of the Town Hall. She said they have never had an issue with noise. The major activity was the farmer's market and it's now moved and so she is interested to hear that it is busier [with it gone]. It used to be really difficult to exit Music Street when the market was here, and it's surprising that there is a perception that it is busier now. She pointed out that other neighbors were concerned about the mowing hours, and it was immediately addressed and resolved.

Nicole Cabot has lived here 27 years and said the Grange is the heart of the town. She wants it to feel welcoming, and wants the people who are creating so much [community] programming to have the support of the town. She said she is embarrassed – the Trust should not feel like they are walking on eggshells.

Richard Hammond, said he was present at town meeting when the town decided to first buy the Grange, and again when they decided to sell the Grange. He is a near neighbor, just down past the gas station, and said he has never been adversely affected by anything the Trust has done.

Brian Ditchfield, director of Circuit Arts, said he's pleased to hear all of the positive comments and reiterated the need for community use. He said they will do all they can to mitigate traffic. They are more than amenable to having a parking attendant.

Patty Favreau, West Tisbury resident and Circuit Arts board member, said she is proud of the community and what she is hearing. They moved Circuit Arts from Chilmark to make it more inclusive. She said she wants to be honest with the neighbors: people are going to drive to the Grange to participate in events. There may be more lights and noise, but she hopes when we consider there will be more color, more age, more inclusivity, there will also be more laughing.

Heather Capece, teacher at the Charter School, said the Trust has made the Grange available to them for events. She asked where do we want to go as a town? Giving kids culture, programming, and laughter [is important]. Having year round [activities] is key. Will there be more traffic? Yes, but it's important for the community's youth.

Jefrey Dubard, member of the Affordable Housing and Community Preservation committees said he is a big supporter of the Grange. He questioned how many events are reasonable and expressed concern about the number of commercial events. He said he does not want revenue generated to be subsidizing other Preservation properties in other towns.

Nevette addressed comments and said the Grange does not make money. She noted that Brian Ditchfield had the idea to organize a loose alliance with community members to better plan out the use of the Grange.

Jefrey Dubard asked if there is money to be made, is it going back into West Tisbury?

Kelsey Biggers said West Tisbury [and the Grange] is on the beneficiary end of the Preservation Trust [not a money maker].

Larry and Julius read written testimony into the record. Letters of support were received from Rev. Cathlin Baker, Simon Athearn, Joshua Gothard, Patricia Moore, and Molly Conole. Another letter of support was received from Heather Capece. Letters of concern were received from Prudy Burt, Kate Warner, and Andrea and Charles Winter.

Nevette said she wanted to acknowledge the commercial aspect discussed and that they want to be transparent and create a [shared] calendar and share current policies.

Andy said he thinks a lot of this can be addressed in stated policies, i.e., "We are the Grange... this is what we're entitled to do and we have these exempt preexisting activities," and include a set of policies that address the normal, traditional concerns of the community so that all in the community can refer to it. He does not feel the community should weigh in on what types of events are allowed but thinks the Trust should fill out their calendar how they want to.

Lisa Strachan said the building has a certain capacity, and the numbers can't go over that capacity. That could be part of the policy.

Atty. McCarron said he gets the commercialization concerns and went through the list of events submitted with their application. He wasn't trying to say they want a blank slate.

Larry said he thinks the policy could be very inclusive without being overly restrictive.

Pat, as the newest member of the board. Just looking at it in black and white. Is general policy enough for the board to vote on? And second would that policy apply to all use whether exempt or not.

Larry said when we issue a special permit we can condition it so that it addresses everything.

Deborah said the policies and procedures developed can't be vague, they have to have specificity in order to be followed. Jeffrey agreed.

Atty. McCarron said they wanted to assure the board and the town, the commercialization [and growth] that is feared is regulatable, but it would not get past their office. They are not proposing any commercialization, and if it would arise, it would be subject to permitting if a new use or it would be an expansion of appropriate uses. He said he feels the policies and procedures they will propose will answer those concerns. But he feels this is a solution looking for a problem.

Julius said it's not so much the commercial activities or whether they're happening or not. Alongside the policies, the timing of when the events would occur. Yes, the inside has a capacity, what if the event is mixed indoor/outdoor like a large flea market? What time does it start in the morning and what time does it end? These are types of details that are important to address -- not the number of weddings, the number of events -- it's the impact of the events. He noted they do not want to be restrictive.

A motion was made and seconded to continue the hearing one week from today: February 23<sup>rd</sup> at 5:00pm at Town Hall. All were in favor.

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**6:15 pm** – (Continued from August 25, October 6, November 17, 2022, and January 5, 2023): A public hearing on an Application for a Special Permit from **Stillpoint Martha's Vineyard Inc.** to convert a barn/greenhouse, a pre-existing, non-conforming structure, to a Public Place of Assembly under sections 11.1-3A, 3.1-1, 8.5-2 and 8.5-3 of the Zoning Bylaws at **20 Stillpoint Meadows Rd., Assessor's Map 22, Lot 4.11** in the RU District. **(\*Note that project is still being reviewed at the MVC).**

Larry read the hearing notice.

*A motion was made and seconded to continue the hearing to **March 30, 2023 at 5:15 pm.** Another extension agreement for the board's Time to Act was signed.*

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

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

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## Old Business

- **Affordable Housing Committee.** This was tabled. No vote was taken.

The Meeting adjourned at 7:40 p.m.

Respectfully submitted,  
Kim Leaird, Board Administrator

### Documents on file:

Complete application file

- ZBA application and narrative
- List of historical uses by name and category
- Site plans showing parking
- 2011 Legal opinion from Ron Rappaport
- Events held in 2022
- Events held in 2016-2017
- Correspondence, letters of support and concern