

WEST TISBURY ZONING BOARD OF APPEALS

Thursday, August 11, 2022
Meeting Minutes

Approved August 25, 2022

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

Absent: Jeffrey Kaye

Also Present: Kim Leaird (*Board Administrator*), Louisa Hufstader, Harold Mitchell, Derek Avakian, Valerie and John DeWitt, Erich Mettler, Kristen Reimann, Rob McCarron, Chris Egan

**

5:15 pm – A public hearing on an Application for a Special Permit from **FFD Enterprises MA, Inc.** to amend Special Permit #2021-13 conditions affecting retail sales of marijuana at 510 State Rd., **Map 16, Lot 101**, MB district under section 9.3-3 of the Zoning Bylaws.

Larry read the hearing notice. Atty. Ellen Kaplan and Fine Fettle Chief Operating Officer Cory Ravelson said the Commission had allowed their request for the change in hours (DRI 696-M) and now they are looking to the Zoning Board of Appeals do the same.

They are asking that *Condition 2* from *Special Permit #2021-13* affecting hours of operation, be amended:

2) Hours and days of operation are allowed as follows: Labor Day through Memorial Day, Monday through Saturday 9:00 am to 6:00 pm. From the day after Memorial Day through before Labor Day, Monday through Saturday 9:00 am to 7:00 pm and Sunday, 12:00 Noon to 6:00 pm.

~~2) Hours and days of operation are allowed as follows; September 1st through April 30th Monday through Saturday 9:00 am to 6:00 pm. and May 1st through August 31st 9:00 am to 7:00 pm. No Sunday hours allowed.~~

The applicant requests that *Conditions 3-6* from *Special Permit #2021-13* be deleted in their entirety.

~~3) Sales are to be “by appointment only”; no walk-in sales allowed.~~

~~4) No vehicles are permitted on the premises without a previously scheduled appointment.~~

~~5) A sign at the entrance to the parking lot and all promotional material will clearly state the “by appointment only” restriction.~~

~~6) No more than five (5) appointments allowed per fifteen (15) minute period, with an additional sixth appointment reserved for express orders.~~

Cory Ravelson said they would like to amend the hours they are allowed to be open and remove appointment-only from the conditions stipulated. Larry asked if they operated last July and August.

Cory said yes, they sold medical in July and adult use in August. Larry asked if they kept data on how many people per hour used the facility. Cory said they provided that data to the Commission, but it was not day-to-day [numbers], but instead their “peak days.”

Larry said per the conditions, there were no more than five appointments allowed per 15 minutes (plus one express appointment). If they were allowing for 6 appointments per hour, did they have to turn away anyone? No. He asked how many people per hour ignored the signs and tried to walk in this past July.

Cory estimated that 2-3 people per hour would show up without an appointment. Larry said the reason they placed these restrictions was to navigate traffic in the parking lot and outside on the road. If the board votes to lift these restrictions, do they anticipate they will have [problems]?

Cory said they have the ability to do 150 transactions per hour, with six point-of-sale stations, and 22 parking spaces. Each point-of-sale, at 5-minutes per transaction, can do approximately 12 transactions per hour. Overall for the entire year, they have done 33 per day; with 60-70 per day this summer. They have the capacity to do much more [than they are] without any burden to the community in terms of overflow and having enough parking spaces. They have a good customer service model and the data shows they will not burden the community traffic-wise.

Julius said the other aspect of the burden to the community is the direct abutters to the back, with cars coming in, going out, turning on, turning off -- that's what they were considering [as well]. This is not to say that would preclude removing the appointments as a condition, but that is what they factored in back when they conditioned it.

Atty. Kaplan said the Commission had done a traffic analysis and based on the numbers in the first ten months they were way under their projections and they don't think it was related to appointments, it was [more] the demand.

Cory said their peak day was opening day for recreational with 113 transactions. The next highest day was 47 transactions. Average through the whole year, including opening day, was an average of 33 transactions per day (29 recreational and 4 medical).

Deborah asked if the conditions are removed, do they have a plan to encourage demand, are they advertising, are they are on social media?

Cory said they are sponsoring Beach Road Weekend and have partnered with Island Time in Vineyard Haven. They have an Instagram specific to the Martha's Vineyard operation where they highlight employees, products, initiatives and provide education materials as well.

Andy asked about the booth plans for Beach Road. Cory said he ordered t-shirts and sunglasses.

Larry said his concern, and the concern of the community, is that if the restrictions are lifted there will be a public safety issue if cars are stacking up in the road, involving police and fire.

Cory said a cannabis company can't afford not to take the community into consideration [because] everyone's eyes are on them. He said he's been doing this for 13 years and the community is of utmost importance. He is 100% able to work with law enforcement. He was approached by police for assistance with a case because their cameras are the best on the island, covering the entire parking lot.

Deborah asked if they could drill down to what the average number of sales *per day* is, at *what time of day* is there a rush. Cory said rainy days are busier but the lunch hour 12:00 pm-1:30 pm and then 4:00 pm-close are the busiest times of the day.

Deborah asked if they would consider having appointment hours at certain times if it appears that the peak hours are [a problem]. Cory said they are open to that but he feels confident given the demand. In the summer he'd estimate there are 10 transactions per hour during those busy times.

Casey said he's driven by several times daily and never seen the parking lot at capacity.

Discussion about the hours and the days

Larry said that currently they're allowed 9:00 am to 6:00 pm Sept. 1 thru Apr. 30; 9:00 am to 7:00 pm May 1 thru August 31; we used dates instead of days because we thought it was a clearer way to state it with holidays that move around on the calendar.

The applicant would like to instead make it 9am to 6pm Labor Day through Memorial Day and 9am to 7pm [between Memorial and Labor Days] plus add noon to 6pm on Sundays.

The board asked to hear if there was any correspondence. Two letters were read into the record.

1. The Planning Board wrote a letter referring it back to the board with no comment on the hours.
2. Letter from Abby Rabinowitz on behalf of Tea Lane Associates with concern about people using their parking lot and walking over to Fine Fettle after three instances in July.

Chris Egan, an abutter on Dr. Fisher Rd., said while he still doesn't approve [of the dispensary] it has been very quiet, he is not sure how they stay profitable. Logic, though, says they're going to want to maximize their operations to survive. He said hearing how streamlined their operations are and how many transactions that can actually occur concerns him and he thinks it will be slow-moving increase until there are other [similar] businesses on the island. Advertising and [sponsoring] events will increase demand. He said he has not seen parking attendants in a while. He said he does not support the Sunday hours and hopes [the town] can keep tabs on it.

When they first appeared at the Commission in 2020 (DRI 696) the applicant offered two parking attendants for at least the first three months. It was not required in the conditions of the ZBA special permit #2021-13. The Commission did not require they keep a parking attendant.

Deborah asked without a parking attendant who is tasked to monitor the cameras and act on what is being monitored? Cory said his security monitors are at the front desk so they are not able to be missed. Deborah wanted to know what their policies and procedures are with respect to avoiding people parking in the neighbor's lot.

Cory said there is a big deck outside where they could have an employee situated to monitor the parking lot. They do not allow more than one person to be in the vestibule. If things get busy, it's an easy adjustment to having an employee greet people [outside] tell them only one person at a time, asking if they have a pre-order, [where did they park], etc. While he does not have formal policies and procedures written, he is willing to do so.

Julius asked if there would be a mechanism to respond if you have 3-4 people waiting.

Cory said in any situation, there's always going to be a scenario. Even if there is a parking attendant, he might be dealing with one end of the lot and something could happen at the other end, he wouldn't be able to get there either. He said their security coverage over the entire premises, having a front desk person and outdoor greeter (only when needed), are great checks and balances to have in place. They do not want to allot labor costs if there's nothing to monitor, but he suggested that maybe during peak hours they could have someone outside, as a best practice, rather than it being mandated, entrusting us to do [what's necessary]. He said this is a core function of running a good business.

Larry asked about their security system. The Cannabis Control Commission (CCC) has certain requirements, do they have a system if someone is unruly you can lock the door, notify other employees, etc.? Cory explained that they do have panic buttons -- if you hold it for 2 seconds a notification is sent to the police department.

Larry said this would address Tea Lane's concern. It would be great if they could have an extremely convenient way they could communicate with Fine Fettle to let them know when someone is in their parking lot.

Cory said there is a line of trees between their two properties and so they can't see when people are parking in their lot, but all Tea Lane has to do is call them and they will address it. He noted that [Tea Lane] did not call at all with the three July incidents they reported in their letter.

Discussion resumed about the hours. Larry again said that Sunday was eliminated mostly due to the concern of the neighbors in the back. Tea Lane is not there on Sunday, other businesses in the area are also closed.

Casey asked how often deliveries are made from the grow site. Cory said the state does not allow them to say when we do deliveries, they are randomized for security. In off season, he said it's about once a week; in the summer there can be up to two deliveries a week but never more than that. They are discreet deliveries. Cory said that they would not have deliveries on Sundays, that could be a condition or a finding if the board were to ask for that. Casey said he was concerned about traffic on Sundays.

Deborah said they weren't [allowing] Sundays in order to give the neighbors a break one day per week. But Sundays are only proposed for the summer, and so her concern is minimal.

Julius said he was always in favor of reviewing the by-appointment-only policy because he did not think they should add stipulations that would be unduly burdensome and prevent them from being successful as a business. More generally, they are very restrictive of businesses operating [on Sundays] in the MB district as it abuts up on Island Farms. He said he is reluctant to change two variables at the same time: 1) removing the by-appointment-only policy AND allowing Sunday hours. There will be an increase in traffic when they remove the by-appointment-only and allow all walk-ins.

Julius added that he thought they could extend to all of the month of September the days they stay open until 7:00 pm as there are still a lot of people on island during September.

Atty. Kaplan asked what other businesses are creating traffic in this area? The post office, Cronigs and the bank are closed. Conroy's and Vineyard Meadow Gardens are open on Sundays.

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

Larry said they've asked to delete conditions [around appointment-only] and modify the hours. If we do that and don't allow Sundays after we've modified the appointment-only policy, then it would give them a year to come back [with data] to review.

Julius said we could modify the hours, pick a date in mid-July to review the data and re-visit Sundays. Next year they'll have more data with the no appointments. Deborah agreed and said it's an incremental approach.

Cory agreed that it will not affect sales too much this summer as the season is almost over, but he would like to be open on Sundays for the whole season next year and asked if they compile data could they meet instead in May 2023 with a more accurate picture.

Larry suggested they vote to remove Conditions 3, 4, 5, and 6 --- and modify Condition 2. He proposed: JUNE 1 to OCT 1, 9:00 am to 7:00 pm; OCT 2 to MAY 31, 9:00 am to 6:00 pm, Monday-Saturday with no Sunday hours with the condition they review the ask for Sunday hours on JUNE 1, 2023. That means they would apply in May and we'd have a hearing in June to look at the traffic data.

Discussion followed about changing the date to review the data to MAY 1, 2023 instead so the applicant could get through the 20-day appeal period and be able to open for the season should the board vote to approve at that time. The ZBA will pick a May 2023 hearing day and the applicant should look to apply in April 2023.

Larry said if they should decide not to come back for Sunday hours, they will still need to return to review the data on the no-appointment hours.

Deborah asked that they provide comparable data year by year, day by day or week by week so we can see [any] jump. She would also like to see policies and procedures with best practices so there is evidence of anticipating peak days, although would not make this a finding or condition.

It was moved and seconded to Grant the Special Permit with conditions.

The request to remove Conditions 3, 4, 5, and 6 is granted. On the request to change the days and hours of operation, the board voted against opening on Sundays but will allow them to stay open until 7pm, May 1 to October 1. In May 2023 they will return to the ZBA with new data on how the removal of appointments has affected the number of transactions per hour.

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, 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.

**

5:35 pm - (Continuation from June 30, 2022) A public hearing on an Application for a Special Permit from **FFD Enterprises MA, Inc.** to amend Special Permit #2021-12 to allow the 3,000 sf. of canopy to be used for cultivation of both medical and recreational use marijuana, eliminating the original designation of 1,000 sf. for cultivation of medical use marijuana and 2,000 sf. for cultivation of adult/recreational use marijuana at 90 Dr. Fisher Rd., **Map 21, Lot 12**, LI-1 district under section 9.3-3 of the Zoning Bylaws..

Larry opened the hearing at 6:35 pm and read the hearing notice.

Larry said they continued this because the 1,000sf limitation on medical marijuana is still in the dimensional table of the bylaws and we needed to find out if that had been removed or if it was a clerical issue or still valid. The board consulted with town counsel whose opinion is that the ZBA does not have the authority to grant [modify] this special permit unless town bylaws are in conflict with state law.

Right now, the town bylaws only allow for 1,000 square feet of medical use. The bylaws should be changed by the planning board and then voted at town meeting.

He said the opinion from town counsel is now a public record. Larry read:

Based on my research, including seeking advice from the municipal law unit of the AG's office, I have not found any authority suggesting that the ZBL's current limitation on the maximum area allotted to cultivating marijuana for medical use conflicts or is preempted by state law. FFD's submission did not point to any specific regulation or statutory provision on which they suggest the ZBA has the authority to - or indeed is required to - grant the requested modification of the special permit.

Given the state of the evolving law, I recommend that the ZBA open and conduct its public hearing, and take the customary public comment, if any, and ask any questions you have. I think it would be reasonable to close the record to all comment, but allow the applicant an opportunity to submit a memorandum or letter, if they wish, demonstrating why or how the current ZBL limitations conflict with state law. I would require them to offer that submission at least two weeks before a continued hearing, which would give us an opportunity to review it and provide further guidance, if you wish. Also note, in the minutes, that you are keeping the record open for further advice from counsel, if necessary. As you know, a decision on a special permit application must be filed with the Town Clerk 90 days after the close of the public hearing, which can be continued by announcing a date certain at the initial meeting and in order to collect more pertinent information concerning the application

Larry noted that we are keeping the record open for further advice from town counsel. He said again that in order for the 1,000 square feet restriction to be changed in the zoning bylaws the planning board would write a bylaw, and it would need to be voted on at town meeting.

Atty. Kaplan said that she understands this but that her legal premise [for allowing their request] is different than that of town counsel. The [CCC] board issued two licenses:

1. One to grow and sell medical marijuana, and
2. One to grow and sell recreational marijuana.

Under each license there are three [additional] licenses: one each for cultivation; one each for processing; and one each for retail sales (for a total of six state-issued licenses).

- 1) Medical marijuana
 - a) Cultivation
 - b) Processing
 - c) Retail sales
- 2) Recreational marijuana
 - d) Cultivation
 - e) Processing
 - f) Retail sales

All of the product that is grown by the applicant is the same plant – there is no distinction on what gets grown for medical vs. recreational. It gets cultivated and processed the same. Only when you get down to THC after processing, is it then separated [out] to go to retail sales. Medical marijuana can have more THC than recreational marijuana.

Cory clarified that all the plants are the same but, in the processing, they have the ability to make more potent products like edibles for medical use because the state allows the dosage to be higher, so there could be differences in production licenses between medical and recreational.

When it is shipped to retail stores the product that is more potent must stay medical at retail; and it can't be sold as recreational because it's over state-allowed dosages. Everything else though, 95% of product they

make, gets shipped to retail with recreational and is split at retail between medical and adult use. The state allows for the delineation of what is sold to a customer as medical in the retail facility. It is all the same product and they split it up at retail level depending on demand.

Cory said they are allowed 3,000 square feet of canopy but are only using 2,300sf.

Julius said [it seems] the problem currently is one of efficiency and consolidation of growing in one room and the expense because you have to split them out. More licenses require more expense for the procurement and maintenance of licenses. There is more expense in the efficiency in keeping the plants separate. He asked if they can you use plants grown under recreational and use them for medical? Yes. Can you use plants grown for medical and use them for recreational?

Cory said, yes, you can, but the way the state tracking system is set up... everything started as medical and when adult use was added, the recommendation was to keep all plants medical and change to recreational at the point of sale rather than convert your whole grow to recreational and use it all as medical. It is not illegal but more cumbersome. He said they are here asking to do it all under the umbrella of medical the way 95% others do it in the state of Massachusetts.

Larry said let's leave the record open and give the applicant time to respond to town counsel's recommendation to return with a memorandum or letter stating why they think he is wrong. In order to change the bylaw, it needs to be voted on at town meeting.

Cory said they need to prove it is conflicting with state law but doesn't think they can it's more that all the plants are treated the same.

Atty. Kaplan put an email dated August 9, 2022, in to the record between Ben Zachs and Joe Tierney regarding the driveway easement that says: "... *If you alter the easement location, on the site plan, to match the area that was prepared as the roadway you would then be in compliance. Once the revised site plan is completed, I would need a copy so I can go to the site and verify.*"

A motion to continue the hearing to October 6, 2022 at 5:15 pm was made and seconded.

Motion passed 5-0.

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

**

5:55 pm – (*Continuation from June 30, 2022*) A public hearing on an Application for a Special Permit from Mark Mazer agent for **Whit Griswold & Laura Wainwright** to add a bow window to a pre-existing, non-conforming structure requiring 24 feet of South side yard setback relief at 295 Lambert's Cove Rd, **Map 7, Lot 6**, RU District. (*Applicant has requested to withdraw*).

Larry read the hearing notice at 6:53 pm. The applicant has requested to withdraw their application without prejudice.

A vote to accept the applicant's request to withdraw its application was made. Motion passed 5-0.

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

**

6:15 pm – A public hearing on an application for a Special Permit from **Michael and Heather Crowley** for setback relief on the proposed construction of a 7-Bedroom dwelling requiring 4’ of NW and SE side yard setback relief to accommodate a rinsing area, a bulkhead and window wells under section 4.3-3D of the Zoning Bylaws at 213 Vineyard Meadows Farm Rd. Assessor’s **Map 37, Lot 10** in the RU District.

Larry read the hearing notice and opened the hearing at 6:52 pm. Andy Zaikis recused and sat in audience. Casey Decker said he is a Squash Meadow engineer but does not feel this will affect him sitting on this hearing.

Larry began by reading the letter from Erich Mettler, abutter and clerk of the Vineyard Meadow Farms Road Association requesting that the board continue the hearing as [the neighborhood] road association was not properly noticed.

There was an email from the principal assessor saying that the road association was not on the certified list of abutters and it has not been the custom to notify road associations. Larry said if the road association owned property that was taxed it would show up on the assessors list.

Erich Mettler read his statement into the record and said they own three roads and that one abuts this parcel in the neighborhood.

Larry said it’s never been the practice of the board to notify road associations, however, the points made are not necessarily invalid. There are different mechanisms for [organizing] a road association, they might be a different legal entity such as a Trust.

Julius said his understanding is that road associations are a special entity and they become one after a certain number of residents become members. Maybe the fact that this entity is a trust means they might have more legal standing.

Andy Zaikis said sometimes property owners might just own to the midpoint of road but the [Vineyard Meadows Farm Road Association] put the specific roads in to a trust and maintenance [is overseen].

The consensus of the board was to seek clarification from town counsel find out how to move forward: if we would need to re-post, close this hearing and re-open a new one; can we re-notify the continued hearing, etc.

A vote to continue the hearing to September 22, 2022 at 6:15 pm was made. Motion passed 4-0.

L. Schubert-yes, J. Lowe-yes, D. Wells-yes, C. Decker-yes

Informal Hearing – Del Prete, 217 Indian Hill Rd. (Map 15, Lot 7)

Kristen Reimann, landscape architect, is proposing to make changes to the landscape on a plan developed by Reid Silva and Chuck Sullivan and approved by the ZBA back in May (Case File 2022-18). As part of this plan there was a proposed addition and a pool component. Kristen was hired later in the process and has been working with the owners on some changes to the landscape plan.

Discussion followed about whether or not these are de minimis changes. While the pool footprint increases, the impervious surface and fence enclosure are both decreased. Essentially this is a more developed landscape plan. The height of the deck is at grade, it is below four feet. It seems like a big switch-around, but the enclosed area is smaller. The merits of re-advertising when the decision already contains pretty strong conditions was debated.

The consensus was that this is de minimis and a vote was taken. Motion passed 4-0. Kim will reflect the board's de minimis vote and send a letter to the building official.

Old Business –

- Review draft decision for **Vineyard Preservation Trust** Aug. 4, 2022 appeal
Discussion about extending the deadline for the filing of the board's decision to uphold the May 20, 2022 decision of the Building Inspector. The Board agreed it was the best way to move forward so that the Trust would not be compelled to file a lawsuit and instead work with the Town to apply for the special permits needed. They signed to extend until Dec. 2, 2022
- The board also voted to waive **Mr. O'Donnell's** application fee after he decided to withdraw his "sport court" application and instead re-apply but for a basketball court.

The Meeting adjourned at 7:50 pm.

Respectfully Submitted,
Kim Leaird, Board Administrator