

## WEST TISBURY ZONING BOARD OF APPEALS

Thursday, August 4, 2022

Meeting Minutes

Approved August 11, 2022

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

**Absent:** Jeffrey Kaye

**Also Present:** Kim Leaird (*Board Administrator*), Andrea Rogers, Nevette Previd, Brian Ditchfield, Rob McCarron, Marilyn Vukota, Joe Tierney, John Klein, Prudence Burt, Jessica Miller, John Robilhau, Ann Restak, Nancy Caraboolad, Kate Warner, Anna Alley, Nancy Dole, Joshua Gothard, Tara Whiting-Wells, Jennifer Pillsworth, Chris Morse, Michael Goldsmith

\*\*

**5:00 pm** – (*Continued from July 28, 2022*) A public hearing on an Application for a Special Permit from **Anna Alley** to construct a One-Bedroom Affordable Accessory Apartment above a three-car garage which will replace a pre-existing, non-conforming structure on a lot located in the Major Roads Zone under section 4.4-3A, 6.2-3D2 and 11.1-3A of the West Tisbury Zoning Bylaws at 1058 State Rd., Assessors' **Map 32, Lot 92**, VR District.

Larry read the hearing notice and turned over the discussion to Julius. After a July 28 hearing they requested that applicant return with a plan that properly shows the second egress.

Builder Robert Russillo submitted drawings that show the egress stairs and the elevation marked. The board reviewed the drawings and said that while the stairs are shown as a sketch, it would be better to include those on the second-floor ("top down") plan.

*A vote to approve the Special Permit on the condition that new second floor plan be submitted to the ZBA office. Motion passed 4-0-1. (Larry was ineligible to vote)*

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

\*\*

**5:00 pm** – A public hearing on an application from the **Vineyard Preservation Trust** to Appeal a Decision by the Building Inspector requiring the applicant to obtain a Special Permit from the ZBA for an Extension or Alteration of Use under sections 11.1-3A and 8.5-2 of the Zoning Bylaws. The Appeal is made under M.G.L. Ch.40A sections 8 and 15 for property at 1067 State Rd. Assessor's **Map 32, Lot 66** VR District.

Larry opened the hearing at 5:09 pm and read the hearing notice.

In attendance for the Vineyard Preservation Trust (VPT) were: Attorneys Rob McCarron and Marilyn Vukota, VPT Executive Director Nevette Previd, and Martha's Vineyard Film Festival (MVFF) Executive Director Brian Ditchfield.

Nevette addressed the board and said that MVFF needed a new home and it seemed a good fit with the VPT. They went door to door to see what the neighbors would bear [especially] after a dormancy of 2 years due to Covid. The Preservation Trust has owned the Grange Hall since 1997 and it has always been a community space. When they received letter from the building inspector [requiring a special permit], they were confused because they believe they are using it the way it's supposed to be used, as per the deed from the town.

Atty. Rob McCarron said they are here to ask the board of appeals to overturn the decision of the building inspector whose argument is that the use is pre-existing, non-conforming (PENC) but the degree is such that it needs a permit by the Trust and Film Festival.

Atty. McCarron maintained the PENC does not apply, and that there are two other categories in the West Tisbury bylaws permitted as of right:

- 1) Charitable use, and
- 2) Educational use.

He said that charitable use encompasses the overwhelming amount of programming that takes place at the Grange Hall. The film programming and Cinema Circus (MVFF) have increased the intensity per [the building inspector], however both of these organizations are nonprofits and have tax-exempt status. He maintained that “pre-existing non-conforming” only comes into play after charitable and educational use.

Other uses, such as the Antique World Market “would be incidental” to the main use. He likened it to a homeowner lending his house to a friend for a wedding.

The MVFF programming is mainly art house films meant to educate; many are documentaries. He said, just like you can’t regulate a residential property, it should not matter how many [showings] there are.

Andy asked about the interior alterations: Nevette said there are upgrades but only because the building needs it: there is a new elevator, [planned] heat, insulation and window upgrades. On the second floor there is seating on risers – but the space has always been one with seating facing the stage. The film projector was installed in 1997.

Brian Ditchfield, executive director of MVFF/Circus Arts said their film offerings are not only educational, but community oriented with films such as the health of the Great Ponds, a documentary on Lyme disease, etc. He said that while “Cinema Circus” may conjure up elephants [a big event], the name is solely to draw in the kids. They provide a free educational and media literacy program that engages kids on a different level [than just going to a movie]. They have curated educational movies for kids age 2-7 about *how* to watch movies. The MVFF education director engages and talks with them about [things like] *What does the music do that makes it scary?* etc.

Attorney Marilyn Vukota said even before you get to *Are these pre-existing, non-conforming uses?* and *Is this an expansion of those PENC uses?* you do conclude that the uses of MVFF are not **primarily** educational because if they were, they would be exempt under the Dover Amendment... which leads to the question: “Are they **predominantly** educational?” Libraries and music instruction classes are considered educational. Film is similar. She read from the 2004 MVFF articles of organization.

*“... to do all things related to organizing, supporting, producing, and/or presenting film and video that support the art of storytelling by sharing the stories that both educate and enlighten while they entertain.”*

Atty. Vukota said that Cinema Circus is just an offshoot of this. They are educating children on how to watch a movie. If you are just straight up watching a movie, you are not stopping or pausing it to have conversations about [what you’re seeing]. You’re not taking snack breaks and meeting the filmmaker. She referenced a legal case that supports the argument that [as long as] educational activities are within the corporate purposes of the nonprofit corporation, it does not need to be the *primary* purpose, but the *predominant* one.

She said that on so many levels the activities of the MVFF are educational as well as charitable.

*Larry read into the record the first letter from Joe Tierney, Building Inspector, dated May 20, 2022.*

Larry asked Joe if when he reviewed Phase 1 and Phase 2 of VPT's proposal, did he have the "Exhibit A" list of proposed activities submitted with the June 17 appeal (*Antique Association Show, Artisans' Fair, Consenses Festival of the Senses...*)

Joe said no, that was not provided at the time and furthermore, no one had mentioned the Dover Amendment to him.

Larry asked what Joe looks at when he reviews something for expanded use, what criteria is involved?

Joe said two things stood out here — first the winterization of the Phase 2 part of the project [meant] it would increase to a year-round use. What [the uses] are do not matter, it's [simply] the increase in the *intensity* of use. When VPT provided the narrative, no one spoke with him about the Dover amendment exception. His understanding is that if they are going to claim Dover, they need to request a review with the building inspector to evaluate the use and decide whether it's referred to the Planning Board and site plan review. As it was, Dover was not mentioned and he did not have the chance to consider it.

Andy asked Rob McCarron to explain the Dover amendment and asked if that's what applicant was doing now? Atty. McCarron did not directly address that question but said there are two things being discussed here: 1) Use vs. 2) Application for the permits to do the utility system work.

Andy asked Joe if [the special permit] was the use for showing films or the retrofitted permit. Joe said the first one was the expansion to year-round use and then Cinema Circus that was considered a new use and triggered the three powers. They are separate things: we are talking about Zoning now (Use). The retrofitting involves building permits.

Nevette said they met with Joe in March about retrofitting the building. Joe wanted to know what they would be doing [in the winter]. They put together a list of potential programming based on historic and planned activities and to make sure building was safe. Joe said that right now they had A3 classification as a "Gathering Place" and that if they are going to be doing movies, etc., they will tip into an A1 classification which requires fire suppression among other things. They were going to meet again in the fall but it was a surprise to get the letter from Joe requiring they get a special permit [as well].

*Larry read into the record the second letter from Joe Tierney, Building Inspector, dated July 19, 2022.*

Larry said [the Zoning Board of Appeals] sit up here as members of the community and their role is deciding when something is a detriment or whether it is a positive or historical, but it is always what they believe is right for the community. He said he thinks that Joe as the building inspector makes valid points and that he's not saying he's against any of the uses. He reminded them that we are not here to decide whether or not the Preservation Trust is granted a special permit, we are here to decide whether we think they *need* a special permit or not.

Kate Warner said when she was on the Planning Board they rewrote the zoning bylaws and created the VR district. They wanted to encourage businesses, doctors, lawyers, etc. Crane Chocolates used to be there.

Atty. McCarron said again that Joe is looking at the wrong criteria. It is a charitable or educational use lawfully existing at the property and does not trigger a special permit [just] because it might go to year

round. He gave some history of the Grange — it was owned by the Agricultural Society from about 1859. The Town acquired it in the 1990s and sold it the Preservation Trust in 1997. When they conveyed it they restricted it so that the use wouldn't be defined, it was new language (not carried forward from earlier deeds). While it does not define zoning, the language in the deed said:

The premises shall be used only for the following: *public gatherings, organized youth activities, film showings, theatrical performances, lectures, fraternal meetings, panel discussions, concerts, weddings, wedding 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 on or from the premises.*

The VR district was formed at the same time which reflects what the town intended back then. They wanted it to be permitted for charitable uses. Atty. McCarron said Joe's letter only makes sense if you find that the uses are *not* educational or *not* charitable.

Andy said a 50% increase is what made Joe decide this. He asked him if the intensity had only been 25% more, would he have ruled the same. Joe said yes. Andy asked Town Counsel Michael Goldsmith to speak to intensity and degree of use.

Atty. Goldsmith said if you are focusing on the Powers test, there are reams of cases about where the line is drawn on this three-part test. Many are based on when the use changes. But there are also ones that focus on degree of use and the seasonal use. This is a difficult line for the board to draw.

He said that what no one has offered to sort out is the **mixed use**. While Dover exempts a variety of uses, there are a number of things on the "Exhibit A" list that do not qualify under the Dover amendment. While Rob and Marilyn are saying you can't require a special permit under Dover for educational use, what they are not saying is that under the Dover amendment you can still impose reasonable regulations on height, bulk, open space and a big one: Parking. So even if it *does* fall under a Dover [exemption], parking is within the purview of municipal authorities. This may be why Joe said if Dover is claimed the applicant may need to go to the Planning Board.

Atty. McCarron said Dover is not the charitable use. Dover is a separate allowed use in the West Tisbury zoning bylaws (8.5-3), just as a residential use is. Some uses could easily fall under Dover or under charitable use under Community Uses from the Use table and then also under Definitions.

Julius said that in every district in the table shouldn't there be review by the Planning Board?

Rob said yes but there's no change to the building. Further the charitable use has been established.

Julius asked if the Powers test is applied at the discretion of the building inspector and to his own understanding if it's triggered. Atty. Goldsmith said yes.

Julius said that these are [mostly] established uses, not pre-existing non-conforming uses. It seems they would be designated uses by right, but if you go under what plan review entails – if its use of square footage over [a certain number] there is rationale that there *would* be a requirement for a special permit. Some of the uses [in Appendix A] are contemplated under an exemption like Dover, or these charitable uses, but some are different – more of a gathering – established, but considered more commercial.

He asked Is it somehow highly *disadvantageous* for them to ask for a special permit that would encapsulate future uses, providing a framework for what use would look like, considerations that can only be addressed

via a special permit. If we just go on the idea that the uses have always existed it doesn't necessarily preclude that they shouldn't go under review. Whether it's a site plan review or special permit, it seems like that's a natural offshoot of the phase 2.

Kate Warner, as a direct abutter, said she seconded what Julius said that it would serve the abutters, the film festival and the VPT to have a better understanding and have guidelines would serve everybody.

Deborah asked what percentage of new use is in the off-season? Traditionally they have stopped in November due to the plumbing, and cold weather.

Atty. McCarron addressed Julius' comment. They do not want a Special Permit because they do not want to regulate the use. There's no change to the property boundaries, no change to the building (size, bulk, location) that would trigger site plan review for use of the property. It has remained the same and IS a permitted use.

Atty. Vukota said the analysis is: *Is the use exempt? If it is you don't need a special permit.* Both under the bylaws for charitable purposes and under Dover amendment for educational purposes. So if the use falls under any one of those there should be no need for a special permit.

Casey asked hypothetically what would prevent them from having events at every hour of the day. Nevette says they have respect for the neighbors, the capacity of the building, noise bylaws, etc. Casey asked theoretically instead of 55 events they could have 100 events and Nevette agreed they could. The tipping point is unknown. They have a 70-seat theater with maybe 35 cars [per event]. Their responsibility as the Preservation Trust is [to offer] a community space and to keep providing services to the community. Their intention is to keep business as is and be good neighbors.

Deborah said there should be a preponderance of agreement on what constitutes a charitable and educational use through the special permit process.

Larry said once you do decide you'll apply for a special permit we won't limit [the decision] to just what is educational or just charitable.

John Klein, chair of VPT board, asked for clarity on parameters of what would be required – would they need to come every year, etc. to secure a special permit?

Larry said his goal is always a one-and-done permit. It would be attached to the deed and eliminate some gray areas.

Julius said this [appeal] seems to be mostly about the Film Festival but... there could very well be other things happening down the road that are not charitable [or educational] and then they would be back here in front of the board anyways. [Not getting a special permit] might open them up to unknown issues in the future.

Nancy Dole, on behalf of Historic Commission and as a neighbor, said she is concerned that VPT is required to get a special permit for something they're already entitled to do. She expressed concern about the business community and that VPT is one of the bigger members of their community.

Larry said that her testimony is more appropriate at a Special Permit hearing, it is not pertinent to the decision that needs to be decided tonight.

Tara Whiting-Wells said she'd ask the board to uphold the decision of the Building inspector and hear from the entire community not just a handful of abutters.

Joshua Gothard, abutter and architect asked if the MVFF wasn't involved, if they just wanted to retrofit the building, would it be allowed?

Andrea Rogers read a quote from Chris Scott who was in charge of the Trust years ago. He wrote this to the Town in answer to the Town asking us [the Artisans Fair?] to leave in 2001.

*“During the past years the Preservation Trust has received requests from a variety of businesses that have sought a long-term exclusive lease of the Grange Hall for the purposes of conducting sales of various goods. The Trust has rejected these requests and will continue to do so on the grounds that a permanent commercial activity is not consistent with the historic uses of the Hall and would preclude the diversity of the community activities that are held at this facility.”*

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

The three tests to determine whether there is an extension or alteration of a use are:

1. Whether the use reflects the “nature and purpose” of the use prevailing when the zoning bylaw took effect;
2. Whether there is a difference in the quality or character, as well as the degree, of use; and
3. Whether the current use is “different in kind in its effect on the neighborhood.”

Larry said looking at Joe's letter and the Powers test that number 3, whether or not the current use is different in kind in its effect on the neighborhood – Is it [different in kind]?

Julius brought up parking as something to contemplate. He said they have not heard anything tonight that negates Joe's reasoning and thinks it would be advantageous to speak of all the uses.

There is the argument that the Film Festival would fall under an exemption under zoning. That's not to say there wouldn't be some future use that is not keeping with the educational and charitable use. Julius said both 2 and 3 of the Powers test are compelling points.

Deborah said she agreed. The effect on the neighborhood and the type of use are the issues. [A special permit] might be an arduous process, but at end of it everyone is all on same page.

Andy said it is easy to pull together a small group of abutters who are in agreement but there are a lot of other factors that play a role here.

Casey said giving them free reign to do whatever they like [at the Grange] is dangerous. He said more input from the community and looking at traffic, lighting, and plan review issues is called for. He said he hopes [the process] goes very quickly.

Julius said that the idea in the community that a Special Permit is inherently about taking something *away* is not right.

*A vote to **uphold** the decision of the building inspector requiring a Special Permit 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 said that the Preservation Trust can still appeal after decision is filed within 14 days.*

\*\*

**Upcoming Meetings**

August 11, August 25, and September 8.

The Meeting adjourned at 7:00 pm.

Respectfully Submitted,  
Kim Leaird, Board Administrator