

April 26, 2021

Via E-mail

Martha's Vineyard Commission
c/o Adam Turner, Executive Director
P.O. Box 1447
Oak Bluffs, MA 02557

Re: *DRI # 614*
Harbor View Hotel
Request to compel an application for the pool bar modification for Commission DRI
review and request to return the pool bar to its original location and size

Dear Members of the Martha's Vineyard Commission:

The Martha's Vineyard Commission ("Commission") is charged with "preserving and enhancing" the Island's unique historical and cultural values for all its residents. G.L. c. 831 § 1. Those unique values, which make the Island such a special place, are threatened and possibly "irreversibly damaged" by "uncoordinated or inappropriate" uses of the land. *Id.* Through indifference or disregard, the Harbor View Hotel ("Hotel") has transformed a nine-seat pool bar into an outdoor restaurant and cocktail lounge without seeking the necessary approval from the Commission. This inappropriate change threatens to irreversibly damage the surrounding neighborhood's historical character. In light of this unapproved change, I am writing to request that the Commission (1) require the Hotel to apply for a modification of DRI 614 for the change in location and size of the pool bar and inclusion of an outdoor restaurant, and (2) return the Hotel to restore the bar and restaurant to its original location, size, and scale while the Commission undertakes the required review of the application.

As you know, I represent a group of neighbors to the Hotel ("Neighbors"), who have voiced their opposition to the Hotel's recent proposal to construct a public day spa, the application of which is currently before the Commission ("DRI 614 M7"). Written and oral testimony from the Neighbors, Edgartown, and Island residents raise great concern that the Hotel's numerous recent activities, which stem from a change in ownership in 2018, are dramatically changing the character of the Hotel, a preexisting nonconforming use, and the surrounding residential neighborhood – including, perhaps most prominently, the substantial change in the pool bar. At the public hearing of February 11, 2021, Hearing Officer Doug Sederholm noted that the pool bar was not part of the Hotel's current application before the Commission and whether the Commission could do anything about the nonreferral was "very much unknown." I write now to explain that the Commission indeed has the authority (1) to require the Hotel

to submit an application for the pool bar for Commission review so that the Commission may properly weight the detriments and benefits of this project, and (2) to request the Commission require the Hotel to return the pool bar to its original location and size while the Commission undertakes the application's review.

I. Background

The Martha's Vineyard Act establishes a statutory process for the Commission to review developments of a certain scale or type – dubbed “developments of regional impacts” or “DRIs” – before a town issues any local development permit. G.L. c. 831, §§ 12-16. When a project proponent applies for a permit, the reviewing municipal board completes the Commission-developed “DRI Checklist,” and, if a proposed project meets one of the criteria identified on the DRI Checklist, the proposed project is referred to the Commission for review as a DRI. DRI Regulations § 4.1. If the Commission accepts the project for review as a DRI, the Commission approves, denies, or approves the proposed project with conditions. Once a project is approved as a DRI, any development or substantial change to the originally approved plan must also be referred to the Commission. DRI Checklist 1.2.

In 2008, the Hotel, under then-owner Scout Real Estate, applied to the Commission for a comprehensive renovation of the Hotel. The Commission approved this plan as DRI 614, with conditions intended to increase the benefits and minimize the detriments of the renovation. (Exhibit 4.¹) Since the approval of DRI 614, the Hotel has applied to the Commission for several modifications of the originally approved plan. (*See, e.g.*, Exhibits 6, 7, 9, 10.)

On March 20, 2019, the Hotel applied for a Special Permit to the Edgartown Zoning Board of Appeals (“ZBA”) “to allow construction of a 176 s/f pool bar to replace the existing 225 s/f +/- pool bar in a new location” (“2019 Bar and Restaurant”). (Supplemental Appendix, Exhibit 38.) The original pool bar (“Old Pool Bar”) was located on the east side of the pool, attached to the Main Building. (Exhibit 11.) Two special permits issued in 1990 and 1992 govern where and when food and drink could be served outside. (Exhibit 13; Exhibit 14.) The ZBA application requested to move the Old Pool Bar to the other side of the pool, over a lawn in between the pool area and the “Great Lawn.” Although construction plans attached to the ZBA application show a bar with 19 seats, the meeting minutes of May 1, 2019 reveal the ZBA's understanding was that the “new bar will be smaller than the old bar with a negligible gain of two seats.”² (Supplemental Appendix, Exhibit 39.) The application for the 2019 Bar and Restaurant was not referred to the Commission, and the meeting minutes reflect that the ZBA did not discuss whether the application should be referred to the Commission as a modification to a DRI.

¹ The exhibits referred to in this letter can be found in the Appendix attached to the Neighbors January 20, 2021 Memorandum of Law. Any additional exhibits can be found in the Supplemental Appendix, attached to this letter.

² Comparing photos of the Old Pool Bar, it is difficult to discern how this statement – repeated throughout the meeting minutes and the decision – came about. (Exhibit 11.) From photographs, the Old Pool Bar had nine seats, perhaps with the ability to squeeze in a couple more seats, for a total of up to 11 or 12 seats. In no way could the Old Pool Bar have 17 seats, which would make the statement that “the new bar is a net gain of two seats” accurate, because the new bar has 19 seats.

The ZBA issued a decision approving the 2019 Bar and Restaurant on May 3, 2019. (Exhibit 16.) Again, the decision stated that “the increase of two seats at the bar will not result in a significant intensification in the use of the structure.” The decision also stated that the proposed bar “will not be more detrimental to the neighborhood than the existing pool bar.”

As built, the entirety of the 2019 Bar and Restaurant is significantly larger in scale than the Old Pool Bar and significantly larger than the plans presented to the ZBA. The Old Pool Bar was attached to the Main Building, had nine seats at the bar, with three or four casual tables, at most, in the vicinity. It was clear to any visitor that the Old Pool Bar was intended to serve the pool and its patrons. The 2019 Bar and Restaurant, on the other hand, not only includes a 19-seat stand-alone bar, but a sizeable bluestone patio area with dining tables, couches, firepits, and over sixty outdoor lights – all of which was built over a lawn area. (Exhibit 12.) The 2019 Bar and Restaurant serves lunch and dinner, as well as alcoholic beverages. (Exhibit 17.) This outdoor restaurant and cocktail lounge area was noticeably absent from the application before the ZBA.

II. Argument

A. The 2019 Bar and Restaurant should have been referred to the Commission as a substantial change to a previously approved DRI.

In the first instance, the 2019 Bar and Restaurant should have been referred to the Commission as a “Modification to a Previously Approved DRI.” DRI Checklist 1.2. Modifications to a previously approved DRI trigger a public hearing referral if the modifications are a “development” or “substantial change” that is “on a lot which has been, in part or in whole, the subject of a previously approved DRI application.” DRI Checklist 1.2.

The DRI Checklist states that a “substantial change” is:

A change to an approved plan that would alter the characteristics of a project (such as scale, massing, footprint, appearance, materials, impact on abutters and streetscape, occupancy, use, etc.).

The DRI Checklist, Appendix A, page 14. The 2019 Bar and Restaurant represented a “substantial change” under these criteria.

The Old Pool Bar of nine seats was located on the east side of the pool, and was not a stand-alone structure, but rather attached to the Main Building. (Exhibit 11.) It was approximately 225 square feet and had nine seats. (Exhibit 11; Supplemental Appendix, Exhibit 38.)

Although the 2008 DRI 614 Decision does not mention the pool bar (Exhibit 4), the plans submitted for review do mention a renovation of the pool bar for guests. (Exhibit 5.) These renovation plans, however,

were much more like something one might find at a country club.³ (Exhibit 5, pages 2-3, 4.) Significantly, the 2008 plans note “[a]ll of these improvements are designed for the use of the existing guests of the hotel and are not intended to be used by the public.” *Id.* The renovation of the pool bar as described in 2008 was never built and no subsequent applied-for modification by the Hotel mentions the pool bar.

The 2008 DRI 614 Decision allowed very minor modifications to the buildings, like the layouts of units and porches, to forego Commission review.⁴ (Exhibit 4.) The specific allowance of these minor modifications highlights that any additional modification to the plans approved in the 2008 DRI 614 Decision would require Commission review. Indeed, this is the Hotel's understanding as well, as it has applied for several modifications, some of which have been deemed minor by the Commission.⁵

The ZBA application for the 2019 Bar and Restaurant stated that the plans for the new bar included a change in location and a decrease in square footage from 225 square feet to 176 square feet, although the construction plans attached to the application show a bar structure with 19 seats. (Supplemental Appendix, Exhibit 38.) As built, the physical footprint of the bar structure may be 176 square feet, but the roof extends to 300 square feet and the surrounding patio area with additional tables, couches, and firepits is a whopping 2,300 square feet. There is seating for at least 50 people, with additional standing room for at least 50 more. The bar is no longer tucked behind the pool but located in a central location and is much more welcoming to the public. The Hotel removed a large lawn and tree to build the new bar and patio area, increasing impermeable surfaces and decreasing green space. The outdoor lighting installed and noise from a dramatic increase in the number of patrons is incredibly disruptive to the neighbors. (See, e.g., videos played during Lynn Allegaert's testimony, February 11, 2021.) “The Roxy Pool Bar” serves alcoholic beverages and a full menu. (Exhibit 17.)

³ The original renovation plans for the pool bar included keeping the bar in the same location, building direct access to the kitchen and creating a dual retail-grille space with grab-and-go breakfast and light, pool-side meals. (Exhibit 5, page 4.) The 2008 Summary of Proposed Developments and Impacts states:

Currently, the pool-side grill consists of an outdoor grill and beverage bar located under an awning. The planned improvements consist of creating direct access to the kitchen and a 1,089 square feet dual purpose retail space (e.g., for sales of Harbor View logo products and other goods) and a serving bar where hotel guests may purchase grab-and-go breakfast items (coffees, teas and pastries), fast food lunches (sandwiches, hamburgers, and salads), and light dinner pool-side meals in the evening.

(Exhibit 5, page 4.)

⁴ Section 14.1 of the 2008 DRI 614 Decision states “In order to allow the applicant flexibility in dealing with the Edgartown Historic District Commission and abutting neighbors as to porch enclosures, the applicant may make minor modifications to the layout of the units and porches so long as said modifications do not increase the number of units, rooms or bedrooms or the footprint of the buildings.” (Exhibit 4, page 11.)

⁵ See, e.g., Request for Modification, Exhibit 7, “Commissioners decided that this use does not require a public hearing and approved the modification based on the proposal being in keeping with the original scope of the project, the decreased impact on abutters, and the fact that they have come back to the MVC for modification review for any further changes.” (Emphasis added.)

Based on the application to the ZBA, the 2019 Bar and Restaurant should have been referred to the Commission as a substantial change to a previously approved DRI. Although the application may have downplayed the change in scale, the construction plans attached to the application do show a bar structure with 19 seats – more than twice the number of seats at the Old Pool Bar, which is a significant change in scale. In addition, moving the location of the bar to a more prominent and exposed spot has an increased impact on abutters, due to increased noise, lighting, and change and increase of foot traffic by Hotel guests and the public. More than doubling the size of the bar and moving its location is a substantial change under the DRI regulations, as it is a change in scale, appearance, massing, intensity of use, and impact to abutters. Any substantial changes to a previously approved DRI must be referred to the Commission. DRI Checklist 1.2.

Certainly, as currently built the 2019 Bar and Restaurant is, without a doubt, a substantial change to the Old Pool Bar and the plan approved in 2008 in scale, massing, footprint, appearance, impact on abutters, and intensity of use; one need only to compare photographs of the original Old Pool Bar to the new, 2019 Bar and Restaurant to grasp the significance and scale of the change. (Compare Exhibit 11 with Exhibit 12.) The bar has gone from a sleepy, convenient place for pool patrons to grab a beer while they watch their kids play in the pool to a boisterous restaurant and nightclub that caters to the general public. The pool bar is yet another piece of the puzzle that is part of the Hotel's grand scheme to become a major, all-inclusive events destination. When joined with the actual pool area, 200 people could easily fit for an outdoor event.

It is clear that the 2019 Bar and Restaurant as built is a substantial change to a lot which has been the subject of a previously approved DRI application under the DRI regulations. DRI Checklist 1.2. Simply put, an application for the 2019 Bar and Restaurant should have been reviewed by the Commission.

B. The Martha's Vineyard Commission has the authority to now require the Hotel to submit an application for the 2019 Bar and Restaurant because it is a substantial change to a previously approved DRI.

The lack of referral by the ZBA does not bar the Commission from now reviewing the 2019 Bar and Restaurant.

1. The Commission's enabling statute confers broad enforcement authority upon the Commission.

The Martha's Vineyard Commission Act, G. L. c. 831, § 17, (the "Act") states:

The commission may enforce any decisions, conditions or restrictions it may impose upon a development by recording certificates of noncompliance with appropriate plan or title references in the registry of deeds. *The commission may commence such other actions or proceedings*

as it may deem necessary to enforce its decisions, conditions or restrictions.

(Emphasis added.) The highlighted provision grants broad authority to the Commission to use whatever tools it considers needed to ensure that the purpose of the Act is maintained. Likewise, the Commission's DRI Compliance Procedure, under "Proposed Procedures for...Cases of Non-Compliance" states "Section 17 of the Martha's Vineyard Commission Act (Chapter 831) authorizes the Commission to begin proceedings as it may deem be necessary to enforce its decisions." DRI Compliance Procedure, § 2.4, Injunctive Relief.

Examples of nonreferrals of a major project to the Commission are fortunately rare, and this leads to sparse case law. One case, *Caliri v. Knight*, however, does provide insight into the Commission's authority to review a project that has evaded Commission review. 2012 WL 716297 (Nos. 11 MISC 448373 & 449416)(Mass. Land Court March 2, 2012)(Piper, J.)(*"Caliri"*) (Supplemental Appendix, Exhibit 40.)

In *Caliri*, the Land Court, for several reasons, declined to modify or annul a decision of the Edgartown ZBA because the ZBA did not refer a project to the Commission.⁶ Speaking to the Commission's broader purpose, the Land Court stated that "[i]t is the **Commission alone** which under the Act has **responsibility** for seeing to it that projects which do or may constitute DRIs are brought before the Commission for review under the Act and the Commission's implementing rules." The Land Court continued that "[t]he **Commission has ample power to compel a project proponent to submit to review by the Commission.**" (Emphasis added).

A significant distinction to the matter here, the Commission in *Caliri* was made "fully aware" of the project at issue, the details of which were "amply communicated to a number of members of the Commission," and yet, still, the Commissioners did nothing. From that full awareness, the "only reasonable inference" the Land Court felt it could draw was "that the Commission [knew] plenty about the project, and (so far at least), has taken no action to insist that the project submit to DRI review." From the Commission's inaction, the Land Court concluded that the Commission did not care about the particular project because the Commission did not act, despite having "ample power" to do so. The Land

⁶ The appeal of the Edgartown ZBA decision was brought by an abutter under statewide Zoning Act, G.L. c. 40A § 17 to the Land Court. Consequently, some of the reasons in *Caliri* are less obviously relevant here, such as lack of standing under G.L. c. 40A § 17 and the Land Court's lack of jurisdiction to review decisions of the Commission. The Land Court's reasoning, however, can provide some additional instruction. For example, in discussing an appeal under Chapter 40A, the Land Court explained that although the Martha's Vineyard Commission Act sets out a scheme that "uses local zoning boards as receptors for projects which should be brought to the Commission's attention if they trigger the need for Commission DRI review," the matters which the Commission reviews are not necessarily that of zoning and cannot be reviewed under the Zoning Act. Therefore, Commission review need not depend solely on referral by a zoning board. And, the Land Court noted that even if it had jurisdiction in this case, it would find that the project in *Carili* did not trigger the DRI Checklist. Here, the 2019 Bar and Restaurant does trigger the DRI Checklist as a substantial change to a DRI.

Court even left the door open for the Commission in *Caliri* to initiate proceedings for review when it noted that the Commission had not “so far at least” taken action.

Caliri does not place the Commission’s ability to require an application from a project proponent on whether it received a referral from the local permitting board. Rather, *Caliri* suggests that the Commission, upon notice that a project should have been referred, may require a project proponent to submit an application to the Commission even when the local permitting board did not refer the project to the Commission.⁷

Caliri makes it clear that the Commission has the authority – indeed, the “ample power” – to compel a project proponent apply for review by the Commission when the Commission has been made aware of a project that triggers the DRI Checklist. Note that the Commission often reviews applications for already built projects. In fact, the Hotel has currently applied for after-the-fact approval under DRI-M7, for seven already-built rooms.⁸ In this case, the Commission would use that same authority to review an application for the 2019 Bar and Restaurant.

⁷ In fact, the Commission’s own DRI Compliance Procedure guidance contemplates this very scenario in § 3 “Non-Referral of Projects on the DRI Checklist.” The full text of § 3 states:

MVC Response to Non-Referral of Projects that Trigger DRI Checklist

If the MVC discovers that a project has been or is in the process of being reviewed and/or approved by a Town that appears to trigger the DRI Checklist but has not been referred to the MVC, we will use the following procedure.

- 1) MVC staff will contact the town building inspector or regulatory board to clarify the situation.
- 2) If the situation is not clear-cut, the Compliance Committee will invite the building inspector and/or permitting board to discuss it with the Committee.
- 3) If it appears clear-cut that the project should be referred, MVC staff in cooperation with the Compliance Committee Chairman will send a letter to the building inspector and the relevant town permitting board (cc Board of Selectmen and Commission Counsel) informing them that the project appears to trigger the DRI Checklist and should be sent to the MVC for review as a DRI.
- 4) If the situation is not resolved, the Compliance Committee will consider the situation and advise the full Commission as to whether it recommends taking further action, including the possibility of legal action.
- 5) If a building inspector or referring board asks the Commission to clarify an item in the DRI Checklist that appears to be open to interpretation, MVC staff should make the clarification, seeking LUPC input if necessary, and so inform the town official. This will ensure that the DRI Checklist is applied in a similar and equitable way in all towns. These clarifications should be incorporated in future revisions of the Checklist.

⁸ In the Main Building, 36 rooms were approved; 40 were built (+4). In the Mayhew Cottage 48 rooms were approved; 51 were built (+3). In the Pease Cottage 10 rooms were approved; the Hotel is seeking approval for 11 (+1). Note that the Hotel argues that there will be “no net changes in rooms,” because the yet-to-be-approved spa will remove eight rooms. If the spa is not approved, however, the Hotel’s rooms will have increased by seven. This point will be further addressed in a separate letter.

2. Local permitting authorities have similar powers to compel compliance.

Local permitting authorities, such as zoning and planning boards, have the authority to compel compliance of structures that were built without a permit or structures that were built beyond the bounds of the permit. The Commission's authority in this case is no different.

In instances where a structure was built in a manner that exceeded the scope of a permit, or the use exceeded the scope of the permit, a zoning authority has six years to bring an enforcement action in the form of a cease-and-desist order, injunction, or civil or criminal penalty to redress the zoning violations. *Lord v. Zoning Bd. of Appeals of Somerset*, 30 Mass. App. Ct. 226, 227 (1991). Likewise, in instances where a structure was built without a building permit at all, a zoning authority has ten years to bring an enforcement action to redress. *Id.* See also *Moreis v. Oak Bluffs Bd. of Appeals*, 62 Mass. App. Ct. 53, 60 (2004); *Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth*, 385 Mass. 205, 217 (1982).

Importantly, the Commission's authority is stronger than that afforded to local zoning authorities because it protects regional interests. *Island Properties, Inc. v. Martha's Vineyard Comm'n*, 372 Mass. 216, 229 (1977) (discussing the Commission's enabling act, stating "the reason of [the Commission's] being is to import regional – island-wide and Statewide – considerations into the protection of the land and water of Martha's Vineyard, considerations which, the [state] Legislature could believe, the towns themselves had not and would not severally bring to bear."). See also *Bullen v. Velarde*, No. 356078 (GHP), 2009 WL 1843616, at *4 (Mass. Land Ct. June 29, 2009), judgment entered, No. 356078 (GHP), 2009 WL 1843992 (Mass. Land Ct. June 29, 2009).

Therefore, it follows that if a local zoning board has the authority to compel compliance upon discovery of a violation – like an unpermitted structure or use – then the Commission certainly holds the same, if not stronger, authority.

3. If not now, when?

By not requiring the Hotel to apply for review by the Commission when the 2019 Bar and Restaurant so plainly triggers the DRI Checklist as a substantial change to a DRI, the Commission undermines its own authority and hollows out its own purpose as laid out in the Act.

If the Commission determines that it does not have the authority to require the Hotel to submit an application for DRI review of the 2019 Bar and Restaurant, the Commission's oversight authority is rendered meaningless. Developers, other project proponents, and towns will feel emboldened to circumvent Commission review by not referring a project to the Commission, subsequently issuing development permits, and going forward with construction projects, knowing the Commission has limited its own review power.

Likewise, if the Commission determines that it does have the authority to compel a project proponent to retroactively submit an application for an already-built project, but it will not in this case, the meaning of

“substantial change” would be narrowed. “Substantial change” would become something more than changing a sleepy pool bar of nine seats into a stand-alone restaurant and cocktail lounge with seating for over 50 people and standing room for over 50 more. This could allow for unchecked expansion of hotels, inns, bars, and restaurants around the Island.

Frankly, the Hotel knows that Commission review is required for a change such as the 2019 Bar and Restaurant, and has sought Commission review for changes much smaller than the one at issue here. The Hotel's application to the ZBA, which omitted how big the 2019 Bar and Restaurant really would be, disrespected the local and regional permitting authorities and disrespected all the other Island businesses which disclosed their full plans to these authorities when seeking permits. The Commission should exercise its duly granted authority to set this right.

C. The Commission should require the 2019 Bar and Restaurant return to its original location and original scale, until the Commission has reviewed and approved an application for the 2019 Bar and Restaurant to the Commission as a substantial change to a DRI.

Because the 2019 Bar and Restaurant should have been referred to the Commission as a substantial change to a DRI but was not, the Commission should require the Hotel to move the bar to its original location and scale until the Hotel submits an application for a modification to a DRI, an application which is representative of what was built.

As explained above, the Commission enjoys broad authority to enforce its decisions. Section 17 of the Commission's enabling act, G.L. c. 831, authorizes the Commission to initiate proceedings, including for injunctive relief, as the Commission deems necessary to enforce its decisions. G.L. c. 831, § 17. The DRI Compliance Procedure § 2.4 specifically provide for injunctive relief. And, the 2008 DRI 614 decision provides for attorney's fees if the Commission determines it necessary to seek judicial relief, including injunctive relief, setting up an expectation of enforcement if the decision is violated. (Exhibit 4, page 8.)

Although it is the Neighbors' position that the Island will ultimately suffer from the transformation of this neighborhood into a nightlife district, the Neighbors currently suffer an outsized impact from the 2019 Bar and Restaurant's externalities – externalities which are supposed to undergo Commission review. The noise level has considerably increased, into hours much later than any late night at the Old Pool Bar, which closed around 6:00 pm when the pool closed. Members of the public traverse North Water and Fuller Streets in greater numbers and stay on the Hotel's grounds longer. The night lighting shines directly into backyards. Most large projects come before the Commission before they are built. With this summer anticipated to be one of the busiest in recent history, the Neighbors should not bear the

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brunt of the 2019 Bar and Restaurant's evasion of the Commission. Nor, frankly, should the Hotel benefit from duplicitous procedural maneuvers.⁹ Right now, the detriments far outweigh the benefits.

III. Conclusion

For all the foregoing reasons, the Neighbors respectfully request that the Commission require the Hotel to apply for a modification of DRI 614 for the change in location and size of the pool bar into an outdoor restaurant and cocktail lounge, and require the Hotel to return the bar to its original location and size while the Commission undertakes the application's review. The Commission is tasked by the Act to protect the cultural and historical resources of the Island. It has done so successfully by implementing a procedure for review of regionally significant projects. Whether intentional or not, the 2019 Pool Bar has escaped Commission review. The Commission must now use its "ample power" to ensure that the procedures it has established are followed and not honored in the breach.

Sincerely,



C. Dylan Sanders

4818-5797-9111, v. 1

⁹ The Neighbors also note that expending finances is not a "get out of jail free" card and the Hotel should not be allowed to continue to operate the 2019 Bar and Restaurant simply because it is already built. *Island Properties, Inc. v. Martha's Vineyard Commission*, 372 Mass. 216, 226 (1977); *Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth*, 385 Mass. 205, 224 (1982).

Supplemental Appendix

EXHIBIT 38

APPLICATION FOR EDGARTOWN
ZONING BOARD OF APPEALS HEARING

Date: **March 20, 2019**

Name & Mailing address of Applicant or Appellant: **Harbor View Hotel
Owner LLC c/o McCarron, Murphy & Vukota, LLP, 282 Upper Main
Street, PO Box 1270, Edgartown, MA 02539**

Name & Mailing address of owner (if not applicant): _____

Name & Mailing address of person representing applicant: (a letter of
authorization signed by applicant/owner must be submitted as part of this
application) **Sean E. Murphy, Esq., McCarron, Murphy & Vukota, LLP,
282 Upper Main Street, PO Box 1270, Edgartown, MA 02539**

Location of Property-Street Name: **131 North Water Street**

Dukes County Registry of Deeds – Book # **1458** Page # **46**

Town of Edgartown Assessors – Map# **20B** Lot # **107**

Edgartown Zoning District: **R5**

Nature of Application or Appeal (including applicable section of bylaw):

**Request for a Special Permit under Article 11.9(f) of the Edgartown
Zoning By-Laws to allow construction of a 176 s/f pool bar to replace
the existing 225 s/f +/- pool bar in a new location.**

Attach completed set of plans as required under Article II, Section 3 of the
Zoning Board of Appeals Rules and Regulations (attached to application).

I HEREBY REQUEST A HEARING BEFORE THE BOARD OF
APPEALS WITH REFERENCE TO THE ABOVE NOTED
APPLICATION OR APPEAL.

SIGNED: _____

TITLE: _____

BUILDING/ZONING INSPECTOR SECTION BELOW:

Applicable section of bylaw: _____

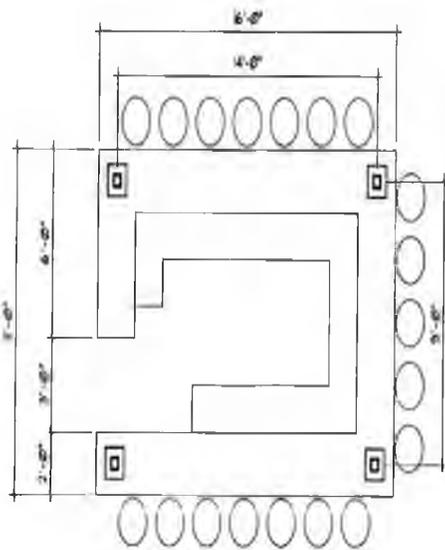
Signature:  _____

Date: 3/20/19 _____

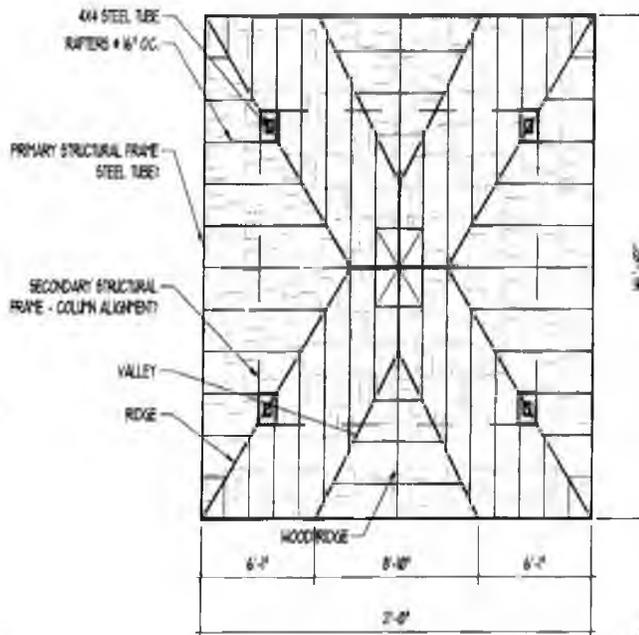
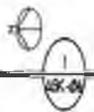
YOU MUST HAVE THE BUILDING/ZONING INSPECTOR SIGN-OFF
PRIOR TO SUBMITTING YOUR APPLICATION.

PLEASE NOTE ATTACHED ARE THE INSTRUCTIONS FOR
PETITIONERS FILING TO APPEAR BEFORE THE TOWN OF
EDGARTOWN ZONING BOARD OF APPEALS. PLEASE READ
THEM CAREFULLY. IF THIS APPLICATION IS SUBMITTED AND IT
IS NOT COMPLETE IT WILL BE RETURNED BY CERTIFIED MAIL.

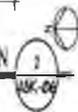
ALSO ATTACHED IS THE PROCESS YOU MUST FOLLOW IF YOUR
APPLICATION IS APPROVED.



POOLSIDE BAR CONCEPTUAL FLOOR PLAN
SCALE 1/4" = 1'-0"



POOLSIDE BAR CONCEPTUAL ROOF FRAMING PLAN
SCALE 1/4" = 1'-0"



BEACON
ARCHITECTURAL ASSOCIATES

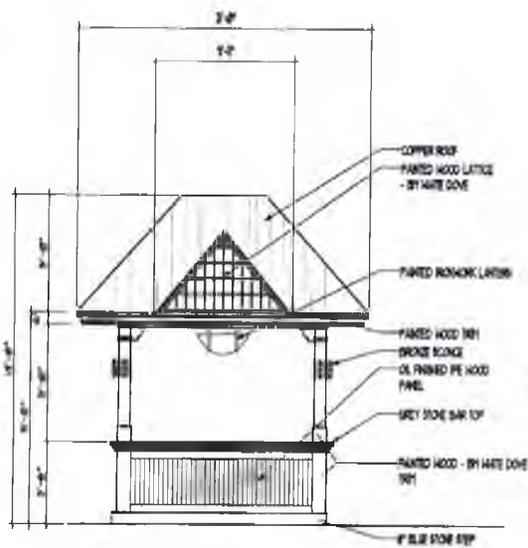
145 South Street
Boston, MA 02111
T 617.357.7171
www.beaconarch.com

DATE: 03/05/2019
SCALE: 1/4"=1'-0"
DRAWN: T. DUFFY

Harbor View Hotel
Mayhew Cottage Poolside

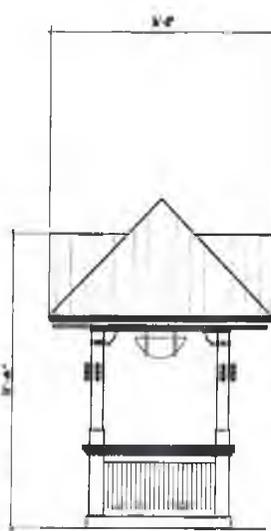
Poolside Bar Floor Plan
& Roof Framing Plan

INFO:
SKETCH #
ASK-06A



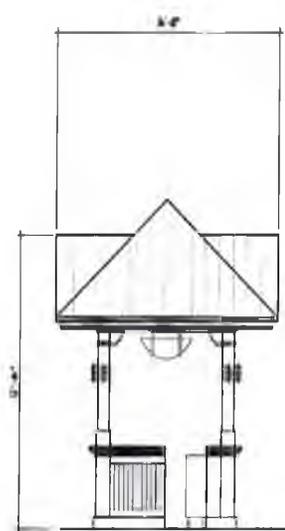
POOLSIDE BAR ELEVATION
SCALE: 3/8" = 1'-0"

1
A-304



POOLSIDE BAR ELEVATION
SCALE: 3/8" = 1'-0"

2
A-304



POOLSIDE BAR ELEVATION
SCALE: 3/8" = 1'-0"

3
A-304

BEACON
ARCHITECTURAL ASSOCIATES

145 South Street
Boston, MA 02111
T 617.357.7171
www.beaconarch.com

DATE: 09/29/2019
SCALE: AS NOTED
RAAF: 17-672

Harbor View Hotel
Mayhew Cottage

Edgartown, MA

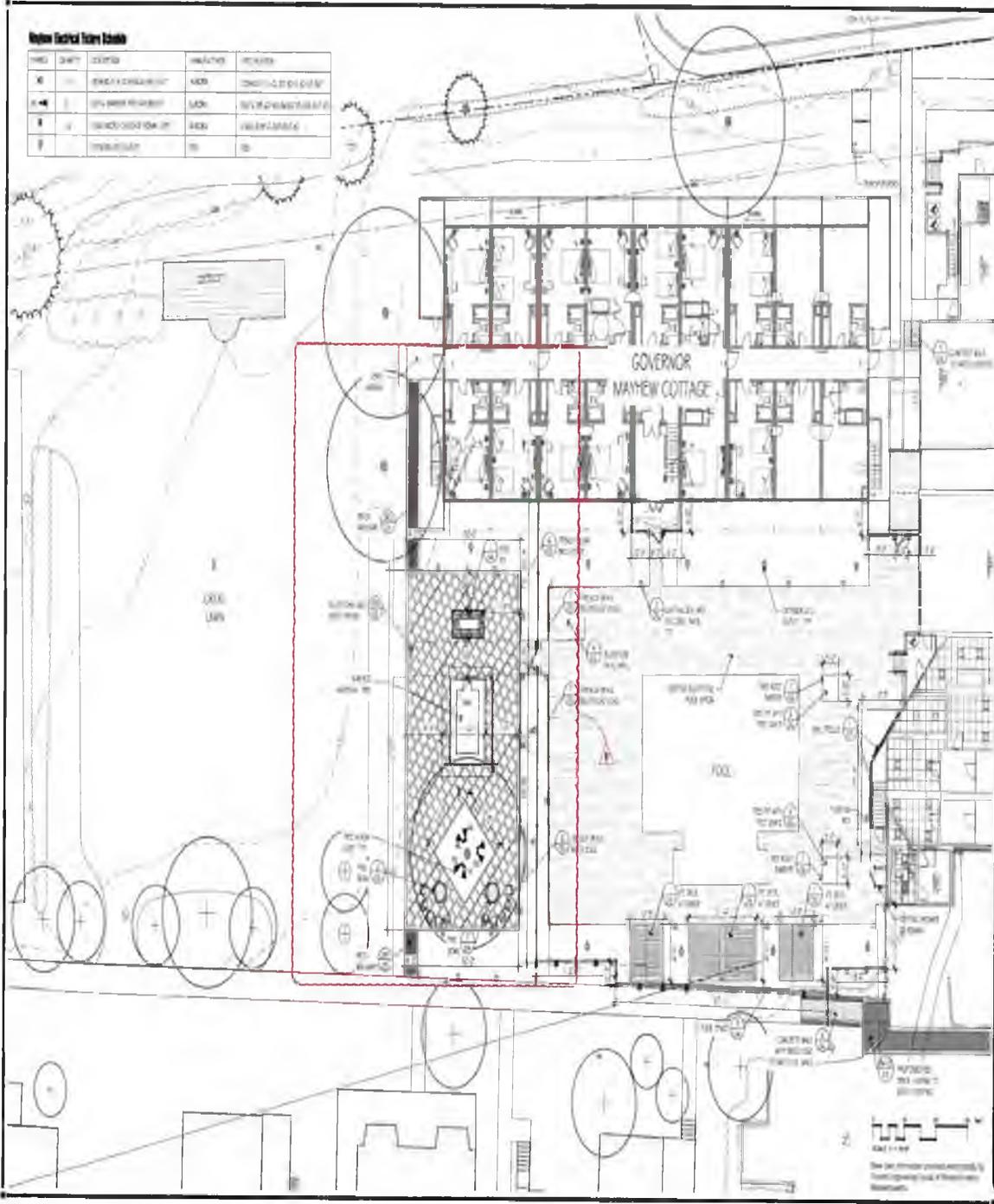
Mayhew Cottage
Poolside Bar
Elevations

INFO:
SKETCH #:

A-304

System Electrical System Schedule

SYMBOL	QUANTITY	DESCRIPTION	UNIT	REMARKS
1	1	CONDUIT	FT	CONDUIT TO BE INSTALLED
2	1	CONDUIT	FT	CONDUIT TO BE INSTALLED
3	1	CONDUIT	FT	CONDUIT TO BE INSTALLED
4	1	CONDUIT	FT	CONDUIT TO BE INSTALLED
5	1	CONDUIT	FT	CONDUIT TO BE INSTALLED



Blind Design, Inc.
 Custom Builders
 1000 Main Street
 Suite 100
 New Bedford, MA 01905
 Phone: 508-538-1111
 Fax: 508-538-1112
 www.blinddesign.com



Scale 1/8" = 1'-0"
 Notes:
 1. See Electrical Schedule
 2. See Mechanical Schedule
 3. See Structural Schedule
 4. See Foundation Schedule
 5. See Foundation Schedule

The Harbor View Hotel
 131 North Water Street
 Cape Cod, Massachusetts

Sheet No. 13.1 of 13.1
**Main
 Mechanical
 Plan**
 Scale 1/8" = 1'-0"
13.1

EXHIBIT 39



Telephone
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508-627-6728

*Town of Edgartown
Zoning Board of Appeals
Post Office Box 1065
Edgartown, Massachusetts 02539*

Case No. 14-19
Date Filed: 10 April 2019

RECORD OF PROCEEDINGS

I, Lisa C. Morrison, assistant to the Zoning Board of Appeals of the town of Edgartown, hereby certify that the following is a detailed record of proceedings pertaining to the request of the Harborview Hotel for a special permit under section 11.9 (f) to allow the construction of a 176 sq. ft. replacement pool bar on property located at 131 North Water Street, Assr. Pcl. 20B-107 in the R-5 Residential District.

1. On 10 April 2019 the application, a true copy of which is marked "A," was presented to the Town Clerk.
2. In addition, an advertisement, a true copy of which is marked "B," was published in the Vineyard Gazette on April 12th and April 19th 2019.
3. Notice of the hearing, a copy of which is marked "C," was mailed, postage prepaid, to the petitioners; the abutters - owners of land adjacent to the subject property within 300 feet of the property lines - all as they appear on the most recent, applicable, certified tax list; and to all the proper town boards and departments.

On Wednesday, 1 May 2019 at 7:00 p.m. the public hearing was held in the Town Hall. The following board members were sitting for this hearing: Martin Tomassian - Chairman, Richard Knight, Nancy Whipple, Carol Grant, and John Magnuson.

Attorney Sean Murphy was present for the applicant. Mr. Murphy explained that the project involves replacing an existing 225 sq. ft. pool bar located on the east side of the property with a 176 sq. ft. pool bar to be located on the west side of the property. A 1992 permit was issued that allows the outdoor sale of food and beverages. This request is just for the new structure, as the inn itself is a nonconforming use in the R-5 Residential District.

The roof on the new bar will be made of copper and approximately 300 sq. ft. - in order to overhang the seating. The structure will be 14-feet by 21-feet. There will be a net gain of approximately two seats.

Mr. Tomassian asked if there were any letters from town boards or departments. There were none. There was no one in the audience who wished to comment on the proposal and no letters from abutters.

Mr. Tomassian then closed the public portion of the hearing for discussion by the board.

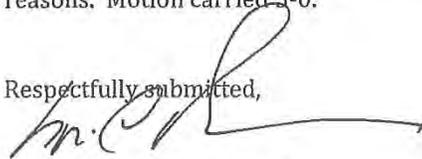
Mr. Knight said he had no concerns.

Mr. Magnuson made a motion to grant the special permit saying he found the proposal to be in harmony with the bylaw. He noted that there is no change in use, and that new bar will be smaller than the old bar with a negligible net gain of two seats. He said he found the new location to be appropriate and did not believe that the change would have a negative effect on the neighborhood.

Ms. Whipple seconded the motion and voted to grant the special permit for the same reasons.

Ms. Grant, Mr. Knight, and Mr. Tomassian also voted to grant the special permit for the same reasons. Motion carried 5-0.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa C. Morrison", written over the typed name below.

Lisa C. Morrison, Assistant

EXHIBIT 40

2012 WL 716297

Only the Westlaw citation is currently available.
Massachusetts Land Court.
Department of the Trial Court, Dukes County.

Karyn CALIRI, Trustee of
Jasper Realty Trust, Plaintiff,

v.

Richard KNIGHT, Carol Grant, John
Magnuson, Nancy Whipple, and Nancy
Kelly as they are Members of the Town of
Edgartown Zoning Board of Appeals; Patrick
Courtney and Thomas Courtney, Defendants.

Nos. 11 MISC 448373(GHP), 11 MISC 449416(GHP).
|
March 2, 2012.

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT and GRANTING PARTIAL
SUMMARY JUDGMENT TO DEFENDANTS**

PIPER, J.

*1 This is an appeal filed pursuant to [G.L. c. 40A, § 17](#) by plaintiff Karyn Caliri ("Plaintiff") from a decision ("Decision") of the Town of Edgartown Zoning Board of Appeals ("Board"), whose members are defendants, granting a special permit ("Special Permit") to defendants Patrick and Thomas Courtney ("Private Defendants"). The Special Permit approves the Private Defendants' plan to operate a restaurant (now, following modification, with 49 seats) at 6 South Water Street in Edgartown.

The Board filed its Decision with the Town Clerk on April 21, 2011; the complaint was filed here on May 10, 2011 and docketed as Land Court Miscellaneous Case No. 11 MISC 448373. On June 2, 2011, the Board filed with the Town Clerk a decision on a request for modification ("Modification Decision") of the initial Special Permit. Plaintiff appealed the Modification Decision pursuant to [G.L. c. 40A, § 17](#); the complaint challenging the Modification Decision was filed with this court on June 21, 2011 and docketed as Land Court Miscellaneous Case No. 11 MISC 449416. In an order issued July 8, 2011, the court remanded these cases to the Board. The

two cases were consolidated July 21, 2011. The Board filed its decision on remand on August 26, 2011, and the pleadings have been amended to have the remand decision also subject to review by the court under [G.L. c. 40A, § 17](#).

These cases now are before the court on a motion for partial summary judgment filed by the plaintiff. In that motion, she asked for a ruling that the Board acted in legal error when it granted the Private Defendants the Special Permit (as modified by later proceedings before the Board), because, plaintiff says, the Private Defendants' project authorized by the Board was required to be referred by the Board to the Martha's Vineyard Commission ("Commission") for a determination whether or not the project constitutes a development of regional impact ("DRI") under the Commission's enabling legislation, Chapter 831 of the Acts of 1977, as amended. Plaintiff submits that the grant of the Special Permit without making the referral to the Commission renders the Board's approval of the revised Special Permit improper, and she seeks judgment to that effect.

Defendants oppose this request for partial summary judgment, and urge the court to award partial summary judgment to them on this issue. The court held a hearing on the partial summary judgment request (and related motions to strike) on February 14, 2012. All parties' counsel attended and argued. At the conclusion of the hearing, the court invited counsel to consider whether some or all of their clients would be amenable to seeking a written statement from the Commission or its staff (to be submitted to the court) about whether or not the Commission was of the view that this project ought be referred to the Commission for evaluation whether or not it constituted a DRI. The parties unanimously rebuffed this proposal by the court; on February 16, 2012, all counsel joined in a letter to the court advising it that no party would request such a statement from the Commission. The court now decides the pending motions.

* * *

*2 "Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643-644 (2002); *Mass. R. Civ. P. 56(c)*. "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." *Ng Bros.*, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See

Attorney General v. Bailey, 386 Mass. 367, 371, cert. den. sub nom. *Bailey v. Bellotti*, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and “an adverse party may not manufacture disputes by conclusory factual assertions.” See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986); *Ng Bros.*, 436 Mass. at 648. “Summary judgment, when appropriate, may be rendered against the moving party.” *Mass. R. Civ. P. 56(c)*.

After review of the summary judgment record, including all of the facts properly before the court pursuant to *Mass. R. Civ. P. 56(c)*, and upon consideration of the moving and opposing papers, and the arguments presented at the hearings, the court concludes that the uncontested facts and the governing law call for denial of the plaintiff's motion for partial summary judgment, and for award of partial summary judgment in defendants' favor on the issue now pressed by the parties.

The court rules as it does substantially for the reasons supplied in the memoranda of law submitted by the Board and the Private Defendants. Without limiting the breadth of those reasons, the court decides that the following reasons, stated briefly, justify the conclusion that the Decision may not be annulled or modified based on the Board's failure to refer the Private Defendants' restaurant project to the Commission for consideration as a possible DRI:

1) Under the comprehensive statutory scheme set out in the Act, as now in effect, a private party abutter challenging a grant of a special permit does not have standing to obtain, in a *G.L. c. 40A, § 17* appeal, judicial review of a local zoning board's determination that a project does not constitute a DRI, and thus does not require referral to the Commission. Although the Act uses local zoning boards as receptors for projects which should be brought to the Commission's attention if they trigger the need for Commission DRI review (and even though the Act uses provisions embedded in the local zoning bylaws to require referral of those projects to the Commission), these procedures are not matters of local zoning, do not give vest local zoning rights in neighbors, and do not give rise to a zoning appeal right under *G.L. c. 40A, § 17*. This is so notwithstanding that the abutter may in other respects be aggrieved by the board's grant of a special permit or other zoning approval for the project, and so be entitled otherwise to de novo judicial review of that permit.

*3 2) It is the Commission alone which under the Act has responsibility for seeing to it that projects which do or

may constitute DRIs are brought before the Commission for review under the Act and the Commission's implementing rules. The Commission has ample power to compel a project proponent to submit to review by the Commission. If an abutter such as the plaintiff in this case had the right, through the roundabout process of a zoning appeal under *G.L. c. 40A, § 17*, to force a referral absent a Commission request to have the project come before it, the court would be in the awkward position of requiring referral to a Commission that was indifferent or opposed to DRI review for the project.

The court expresses no view as to whether a private party might in an action sounding in mandamus, presumably to be brought in the Superior Court Department, be able to compel the Commission to require a project to come before the Commission for DRI review. But the court is convinced that such a result cannot be achieved through a zoning appeal under *G.L. c. 40A, § 17*.

3) The Land Court lacks jurisdiction to hear appeals from decisions of the Commission. The Act, in section 18, leaves that solely to the Superior Court Department—in marked contrast to the sibling act which established and governs the Cape Cod Commission, where the legislature conferred jurisdiction concurrently on this court and the Superior Court. This makes it all the more improper for this court to grant plaintiff the relief she requests in her motion. If this court lacks jurisdiction to review decisionmaking by the Commission, the court ought not use the zoning statutes to take onto itself the authority to compel the referral of a project to the Commission, when doing so would require this court to construe the meaning of the Act and the Commission's implementing regulations. If the legislature thought it improper to have the Land Court pass judgment on the meaning of the Commission's regulations (including those which define whether or not a project constitutes a DRI) when the Commission itself acts or declines to act on a project, it is most doubtful that the legislature wanted this court to adjudicate the same question when presented in a zoning appeal.

4) On the proper uncontested record facts, there is no doubt that the Commission is fully aware of the Private Defendants' restaurant project. The Jason affidavit, and other parts of the record, show, at a minimum, that this project was brought to the attention of several Commission members and officials. There is objection from plaintiff to the Jason evidence, and plaintiff is correct that it ought not to be considered for the

truth of the legal conclusions members of the Commission or its Compliance Committee may have drawn about whether or not the Courtneys' project triggers the need for Commission DRJ review. But this evidence is proper to show that the details of the restaurant project were amply communicated to a number of members of the Commission and the committee, and to Commission staff. The only reasonable inference is that the Commission knows plenty about the project, and (so far at least), has taken no action to insist that the project submit to DRI review. For this reason, granting the relief plaintiff seeks—returning this case to the Board with the direction that it make referral to the Commission—would be an unnecessary action for the court to take, even were it to conclude it had that authority. This is not an instance where a project has escaped the Commission's notice, and a referral by the Board would be the only way to make the Commission aware.

*4 5) Even were the court to engage in the interpretation of the Commission's regulatory standards and criteria for the identification of DRIs—something which the court concludes it lacks authority to do—the court would determine that the Courtneys' project, as last modified, does not trigger DRI review. The standards and criteria which control are those of Section 3.2(d) of the DRI Checklist, which specifically address “[a] public restaurant in a duly established B-1 Zoning District which is designed or proposes to accommodate fifty (50) or more seats....” This specific criterion places the Courtney restaurant, now purposefully limited to 49 seats, just below the threshold which would require DRI review. The specific standard is the one which applies, not the other more general parts of the DRI Checklist which catch otherwise unaddressed uses. Plaintiff's contention that even a small restaurant, with seating well below the fifty seats set out in Section 3.2(d), would require DRI review because it constituted a change in use or an increase in intensity of use under Section 3.1, would render the specific standard of Section 3.2(d) of little independent

regulatory value. It is the specific standard which controls. Were the court able to interpret and apply the Commission's standards and criteria, the court would conclude that the restaurant project as currently constituted does not trigger DRI review.

* * * *

The court rules that plaintiff's partial summary judgment request cannot be granted, and that on the issue presented by that motion, partial summary judgment is to be awarded, in the absence of any material disputed facts, as matter of law, to defendants. The court DENIES all motions to strike parts of the record, but would have reached the same legal conclusion on partial summary judgment even if the plaintiff's motions to strike had been allowed.

As a result of the ruling made in this Order, the court will not in this action modify or annul the Board's Decision, or grant any other relief, on grounds that the Board was required to have made referral of the Private Defendants' project to the Commission for consideration as a possible DRI. Because the pending motions address only this issue, the case is not ready to proceed to judgment. The court still must hear the evidence de novo to decide the remaining aspects of plaintiff's appeal from the Decision. It is

ORDERED that in these consolidated cases, Miscellaneous Cases Nos. 11 MISC 448373 and 11 MISC 449416, plaintiff's motion for partial summary judgment is DENIED, and partial summary judgment is GRANTED to defendants.

So Ordered.

All Citations

Not Reported in N.E.2d, 2012 WL 716297