

November 2, 2020

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Planning Board
Tisbury Town Hall
P.O. Box 1239
Tisbury, MA 02568

Re: 75 Main Street

Dear Members of the Planning Board:

You have requested an opinion as to whether a proposed development at the above-referenced property may be approved by the Planning Board and, if so, whether any dimensional limitations apply to the development. You have also asked whether the Board may approve the proposed outdoor swimming pool depicted on the plans submitted by the applicant. In my opinion, for the reasons set forth below, the Planning Board has the authority to approve the proposed project by special permit, provided that the Board determines that the project (either as currently proposed or as it may be amended by the applicant) does not include first floor residential use in any existing “business structure.” In my further opinion, the Planning Board has broad discretion whether to approve the project and to impose reasonable conditions, including reasonable dimensional requirements with respect to the project. Finally, it is my opinion that the proposed outdoor swimming pool may not be approved as part of the project.

It is my understanding that the proposed project will include nine residential units in existing and newly constructed structures. At a meeting of the Planning Board, the applicant committed that the existing structure along the property’s frontage with Main Street, previously used as a bank, will be used for commercial purposes. However, it does seem that the proposal includes two residential units in the back portion of that frontage structure. The Planning Board has not yet commenced a public hearing on the application, due to questions the Board has regarding the permissibility of the project.

A. Permissibility of the Use

As a threshold matter, the Board has inquired whether it has the authority to approve the project. In my opinion, the answer to this question depends upon whether the Board determines that the proposal includes residential uses on the first floor of any “business structure.”

The subject property is located in the Business 1 (B1) Zoning District. Sections 05.10 - 05.14 of the Zoning Bylaw govern the use of land in the B1 District. Specifically, Section 05.11 lists uses allowed by right; Section 05.12 lists uses allowed by special permit from the Zoning Board of Appeals (ZBA); Section 05.13 lists uses allowed by special permit from the Planning Board; and Section 05.14 contains miscellaneous requirements applicable to uses in the B1 District. The first use listed as allowed by special permit from the ZBA under Section 05.12 is “Private dwelling use and apartments provided that” such use must comply with six listed limitations as follows:

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- no private dwelling or apartment use sited in a business structure shall be permitted on the first (1st) floor of any structure where such use did not exist during the proceeding [sic] two (2) years;
- there are two separate exits to the outside;
- each sleeping room has at least one window on each of two different outside walls;
- the Board of Health and the Fire Department approve; such approval may be conditional;
- hazardous materials and commercial inventories of foodstuffs are not kept on a floor, or floor level used for habitation purposes;
- commercial processes creating hazardous (toxic, flammable or explosive) vapors shall not take place in any structure, or on any lot where there is a habitation use;
- all commercial uses shall occur at a floor, or level, below habitation uses.

In my opinion, this use category clearly indicates that the ZBA has the authority to issue special permits for residential uses in the B1 District, subject to compliance with the enumerated criteria. Here, I note that the Planning Board would be the special permit granting authority, pursuant to Section 05.14(3), which provides for consolidated review before the Planning Board whenever relief is required from both boards.

The Board has inquired regarding the meaning of the first bulleted limitation contained in Section 05.12.01, that: “no private dwelling or apartment use sited in a business structure shall be permitted on the first (1st) floor of any structure where such use did not exist during the [preceding] two (2) years.” In my opinion, this provision does not create a requirement that all residential uses be located in commercial structures. Rather, it prohibits residential units “sited in a business structure” to be located on the first floor, unless the first floor of such a structure has been used for residential purposes within the past two years. This does beg the question of what constitutes a “business structure.” In opinion, this is a determination to be made by the special permit granting authority.

Since the project as proposed would include use of certain existing buildings for residential purposes, the Planning Board will need to evaluate whether to consider each such structure to be a “business structure.” Any structure that the Board determines to constitute a business structure could not be used for residential purposes on the first floor, which may require revisions to the applicant’s plan. I would be happy to consult with the Board to assist it in making this determination.

B. Dimensional Controls

Section 05.14.01 of the Zoning Bylaw provides that, for uses in the B1 District, “[l]ot size, setbacks and heights shall conform to the requirements set forth in Schedule A of this Bylaw.” Schedule A, Section 13.02.02, governs residential uses in the business districts. The first

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column provides dimensional requirements for single-family uses in both the B1 and B2; the second column provides dimensional requirements for multi-unit residential uses, but only for land in the B2 District; and the third column relates to hotel and motel uses in both districts. In my opinion, the lack of specific dimensional controls governing multi-unit residential uses in the B2 indicates that such controls are left to the discretion of the special permit granting authority.

C. Proposed Swimming Pool

The plan submitted by the applicant includes an outdoor swimming pool for use by residents of the project. In my opinion, if the Board determines to approve the project as a whole, the swimming pool component of the project could not be approved.

Pursuant to Section 05.12.06, one swimming pool is permitted on a lot in the B1 District, “provided the pool is located indoors and meets the requirements of Section 04.02.10.” Section 04.02.10, in turn, permits a “non-permanent pool less than two (2) feet deep and with surface area not in excess of two hundred and fifty (250) square feet.” Though this requirement is a bit idiosyncratic, it is clear on its face: only a temporary, indoor pool that is less than two feet deep and less than 250 s.f. in area may be permitted in the B1 District.

I do note that Section 04.03.10 of the Bylaw allows swimming pools in the residential districts by special permit from the ZBA, provided the plans show compliance with applicable setbacks and are stamped by a registered professional engineer. It is possible that the intent of Section 05.12.06 was to import these requirements (and not the requirements of Section 04.02.10). In any case, since the project plans here depict an outdoor swimming pool, and since Section 05.12.06 clearly prohibits outdoor swimming pools, this component of the proposed project could not be approved by the Board.

Please do not hesitate to contact me should you have any further questions in connection with this matter.

Very truly yours,



Jonathan M. Silverstein