

June 19, 2013

BY HAND DELIVERY

Derek Tipton, Chairman
Oak Bluffs Zoning Board of Appeals
Oak Bluffs Town Hall
Oak Bluffs, MA 02557

Re: New Construction at Rental Property Located at 43-47 East Chop Drive
(Assessors Map 3, Parcel 1) Proposed by William Giniewicz, Jr., Trustee
("Applicant")

Dear Chairman Tipton and Members of the Board:

We are submitting this letter on behalf of our clients Stephanie Phillipps and George Murray (the "Murrays"), owners of the property at 209 Massachusetts Avenue, located directly across the street from the proposed new construction (the "Project"). The Project would add additional habitable space to the existing commercial rental property (the "Units") at 43-47 East Chop Drive. As summarized below, the Murrays strongly oppose approval of the Project and request referral to the Martha's Vineyard Commission and resubmission to the Conservation Commission.

(i) The existing nonconforming use of the property already raises serious public safety, parking and environmental concerns. The Project will significantly expand the habitable commercial space and the size, height and mass of the proposed structure; increase traffic and parking needs due to the creation of more habitable space; impose heavier demands on the environment; and diminish the visual and physical connection between the Harbor and the surrounding properties and public ways. Increasing the intensity of use at this site will only aggravate an already hazardous situation and have a significant detrimental effect on the surrounding residential neighborhood. The Murrays in particular will suffer unique and substantial harm as the Project will take away their view of the inner Harbor and cause further damage to their property from more congestion and more parked vehicles associated with Applicant's nonconforming use.

(ii) Located directly on Oak Bluffs Harbor, the Project is in the middle of an environmentally and ecologically fragile area. According to the Application, subject to the Oak Bluffs Harbor District of Critical Planning Concern and it borders the Copeland District, also a District of Critical Planning Concern. Further, it is located in a federal Flood Plain area and is subject to Flood Plain and Harbor District regulations, and the property is adjacent to the Coastal District. The Application for the Project fails to give adequate information to fully determine its potential adverse impact on the area and the residential community under the applicable Regulations.

(iii) The Project has changed materially from the plans that were previously submitted to and conditionally approved by the Conservation Commission. The Project must be resubmitted to the Commission for further review.

In addition, the Murrays respectfully request that the Board refer the Project to the Martha's Vineyard Commission for its concurrence as required by Section 5.3 of the DRI Checklist, because the Project proposes the creation of new commercial facilities, the expansion of existing facilities or a change in the intensity of use, related to the use of a pier. The Project also implicates the discretionary referral criteria in Section 1.1 and Attachment B of the DRI Checklist because it is in a flood plain, in an area that has significant traffic and safety issues and will have a negative visual impact on the neighborhood and on views. We discuss further some of the reasons for the Murrays objections and requests below.

1. The Project will aggravate existing problems of its own creation and will be a further detriment to the community. Applicant operates a commercial enterprise (short-term seasonal rentals) in a residential zone. There is a pier expanding into the Harbor that is attached to the property. The existing buildings on the property do not conform to the applicable side yard setback requirements. The fundamental problem here is that Applicant's reserved parking for renters, workers and guests consumes the bulk of the paved roadway in front of the Units that would otherwise allow sufficient space for two-way vehicular, bicycle and pedestrian traffic. During the summer months, vehicles associated with the Units are literally parked in the middle of the street in front of the Units. These are the only designated parking spaces Applicant has available. Due to a shortage of available parking, Applicant's renters, workers and guests also regularly park on the grass and natural vegetation on the opposite side of the street that borders the Murrays' property. This creates an extremely congested and narrow path for two-way vehicular traffic on East Chop Drive. When pedestrians (including many children), runners, cyclists and walking dogs going to and from the Town Beach in a constant stream are added, the parked vehicles of Applicant's renters, workers and visitors create a

clear public safety hazard.¹ In addition, these parked vehicles have destroyed the natural vegetation on the north (Murrays') side of the street, and new vegetation near the Murrays' property line is dying. These vehicles leave oil and other automotive residue which leaks into the soil. The Murrays believe that this leaking has to be of concern in an area that is so close to the Harbor, so environmentally sensitive and which suffers from flooding and run-off even during moderately heavy rains.

2. The Project fails to provide adequate information to determine whether it meets applicable legal requirements. This is a significant and important Project that is located in an environmentally sensitive area which is already under severe pressure. In addition to the common issues to be evaluated by the Board on an application for Special Permit, the Project is subject to the Harbor District Regulations (Section XVIII.E) and the Flood Plain Overlay District By-Law (Section 8.1). The potential of this Project to do further damage to the Harbor area and its surrounding communities must be carefully evaluated. However, the Application for the Project lacks critical dimensional details, including but not limited to, the height of the new structure and the height of the existing structures; the square footage of each floor; the total square footage of the new structure; and the measurements of the side yards and setbacks both before and after construction. Further, the few dimensions and elevations shown on the skeletal drawings are inconsistent with those indicated in the notes and calculations. In light of the problems described above, perhaps the most glaring omission is that the application contains no parking or environmental impact analyses. Consideration of this Project and a determination of its detrimental effect on the neighborhood, the public welfare and other interests protected by the Harbor and Flood Plain Regulations cannot be made without full and complete plans and consistent dimensional information.

3. The Project is essentially a new structure and is not an alteration of a preexisting nonconforming structure for which a Special Use Permit can be granted. In *Schiffenhaus v. Kline*, 79 Mass. App. Court 600 (2011), the Massachusetts Appeals Court found that an alteration of a preexisting nonconforming structure under a similar by-law definition² was "an entirely new building in a different location, which is also completely different in appearance and more than four times the size of its predecessor,

¹ At one point several years ago, in recognition of the parking and safety problems in front of the Units, the Town had erected "No Parking" signs. However, those signs were inexplicably and suddenly taken down and vehicle parking by Applicant's renters, workers and guests has resumed.

² Section 11.0 of the Oak Bluffs By-Laws defines alterations as applied to a building or structure as "a change or rearrangement in the structural parts or in the exit facilities, or an enlargement whether by extending on a side or increasing the height, or the moving from one (1) location or position to another."

cannot correctly be deemed an ‘alteration’ of the original.” Similarly, the proposed Project adds substantial height and mass and entirely changes the appearance of the existing one-story garage/shed. The Project is not an alteration of a preexisting nonconforming structure for which a special permit can be granted.

4. The Project should be returned to the Conservation Commission for further review of material changes. It is our understanding that the Conservation Commission has not been formally apprised on the record of the material changes made to the Project since earlier Commission review. Although not an exhaustive list of changes from the plans submitted to the Commission, the Application and plans filed with the Board appear to show that the footprint of the existing, unattached garage will be expanded by a greater amount than was presented to the Conservation Commission; that the habitable space and number of bathrooms and amount of kitchen facilities will be increased; and that the finished structure will be attached to the main building. Further, the driveway will be enlarged. The proposed revisions raise issues that are not *de minimis*, including whether the entire set of buildings must be made compliant with Flood Plain regulations, 310 CMR 10.00, *et seq.* Accordingly, the Project should be resubmitted for further Conservation Commission review.

5. The Murrays request that the Board refer the Project to the Martha’s Vineyard Commission (MVC) for its concurrence as required by Section 5.3 of the DRI Checklist and/or make a discretionary referral under Section 1.1.³ The MVC has jurisdiction over this Project because the Project has a boat pier that extends into the Harbor and is adjacent to the only public landing that provides boat access to the Harbor from land. Because the Project proposes to construct a new structure or expand an existing one and change the intensity of use related to the use of a pier, it is subject to MVC concurrence. The Project will increase the number of habitable units and people that have access to the pier which thereby increases the intensity of use of the pier. Further, the MVC has potential jurisdiction over the Project under section 1.1 (Discretionary Referral) because it is in a flood plain, in an area that has significant traffic and safety issues and will have a negative visual impact on the neighborhood and on views and under and Section 8 (within a District of Critical Planning Concern). This brings the Project within the applicable DRI review criteria.

³ Section 5.3 provides: “Any commercial development located on the landward portion of the property on which a pier is located that proposes: a) The creation of new commercial facilities related to the use of a pier; or b) The expansion of existing commercial facilities related to the use of a pier; or c) A change of use or a change in the intensity of use related to the use of a pier -- with MVC concurrence.”

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This letter discusses some of the key issues the Murrays have been able to identify to date. We expect there will be additional issues that will be raised by any more detailed Project information Applicant may submit. We reserve the right to raise additional issues in future hearings on this matter.

We are available to answer any questions you or the Board may have or to provide further information. Thank you very much for your consideration of the issues in this letter.

Sincerely,

Ellen B. Kaplan