

April 28, 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*

Dear Members of the Commission:

With respect to the above-referenced matter, I respectfully provide for your review a Memorandum regarding the Harbor View Hotel's Application for Modification and Extension of DRI #614-M7 which has been referred to you by the Edgartown Zoning Board of Appeals.

Thank you for your kind attention to this matter

Sincerely,

Kevin O'Flaherty

Kevin P. O'Flaherty

Enclosures

cc: C. Dylan Sanders, Esq. (w/enc via email)
Alessandra Wingerter, Esq. (w/enc via email)
Marilyn H. Vukota, Esq. (w/enc via email)
Mr. Adam Turner (w/enc via email)
Ms. Lucy Morrison (w/enc via email)
Mr. Alex Elvin (w/enc via email)

memorandum

to: The Martha's Vineyard Commission

from: Kevin P. O'Flaherty, Esq. *KPOF*
Counsel for the Harbor View Hotel

re: Application for Modification of DRI # 614 – M7

date: April 27, 2021

Introduction

This Memorandum is respectfully submitted on behalf of The Harbor View Hotel (the "Hotel") in connection with its Application for Modification and Extension (the "Application") of DRI #614, as last modified by action of this Commission in 2018.

Mr. Bernard Chiu, the principal of the entity that owns the Hotel, has asked me to address some issues (the "Extraneous Matters") that have been raised by certain parties (the "Opponents") and their counsel. The Extraneous Matters are not part of the pending Application. They have not been referred to the Commission by any municipal permit granting authority, nor are they, as the Opponents themselves admit, addressed in or part of DRI #614 as amended. Accordingly, the Commission lacks jurisdiction over the Extraneous Matters and should not take any action with respect to them as more fully explained below.

This is especially the case with the Opponents' request that this Commission take action against the Hotel's pool bar. Service of food and beverages in the entirety of the Hotel's pool area has been allowed and on-going since 1992. Many years ago, a free-standing pool bar structure was constructed at the east end of the pool area to facilitate service of food and beverages in the pool area. The original pool bar structure included a grill where food was actually prepared for service in the pool area. Two years ago, the Edgartown Zoning Board

approved the relocation of the pool bar structure in a 2019 special permit (the “2019 Special Permit”). The Edgartown ZBA did not refer the 2019 Special Permit Application to the Commission, and there are no conditions or restrictions in DRI #614 that relate to the pool bar. Certain of the Opponents challenged the 2019 Special Permit in several lawsuits and in administrative appeals to the Edgartown ZBA and building inspector.¹ In none of those actions and appeals did the Opponents ever assert or raise their newly minted claim that the 2019 Special Permit should have been referred to this Commission. Indeed, only now, two years later, in a proceeding which has nothing to do with the pool bar, do the Opponents for the first time raise this claim.

Pursuant to the 2019 Special Permit the pool bar structure was moved from one end of the pool area to the other—a distance of about 120 feet. Pursuant to that duly issued 2019 Special Permit that was not referred to this Board and is not part of DDI #614 as modified, a prior pool bar structure at the east end of the pool was removed and a new pool bar structure was legally built at the west end of the pool area. As noted, the prior pool bar had operated in the pool area for decades. The new pool bar structure has operated in the Hotel’s pool area for about the last two years.

The Opponents challenged the 2019 Special Permit in three lawsuits, alleging in those cases the same baseless claims they have repeated here. Three different Massachusetts Superior

¹ The lawsuits and administrative appeals were filed on behalf of seven individuals. Most of those individuals, on information and belief, are seasonal occupants of properties located in the neighborhood of the Hotel, including James Swartz, Lynn Allegaert, Richard Zannino, and Geoff Caraboolad. The properties occupied by or connected to these seasonal residents are for the most part located hundreds of feet from the relocated pool bar and are screened and buffered from the relocated pool bar by distance, intervening buildings, privacy fences, public ways and substantial mature vegetation.

Court judges dismissed each of those lawsuits, upholding the 2019 Special Permit and the Hotel's rights under the 2019 Special Permit. Those rights, upheld by three separate Court judgments, have vested.²

The Opponents' demand that this Commission take action now with respect to the pool bar invites this Commission not only to exceed its jurisdiction and authority, but urges this Commission to overrule the decisions of three separate Superior Court judges. This Commission cannot overrule decisions of the Superior Court. This Commission cannot adversely affect the Hotel's vested rights in the 2019 Special Permit when those rights have been confirmed and upheld by the Court and where the Hotel has exercised and perfected those rights two years ago when it relocated the pool bar and continued to operate it. This Commission should reject the Opponents' invitation to involve itself in matters that have been resolved by relevant municipal officials and by the Courts. This Commission should refuse the Opponents' demand that the Commission interfere with and negate the Hotel's vested rights under the 2019 Special Permit.

But because the Opponents already have injected these irrelevant matters into this proceeding and made misleading and false statements in doing so, the Hotel is compelled to address the Extraneous Matters to correct the record. Accordingly, while the Extraneous Matters are outside of the jurisdiction of the Commission, and while the Commission should take no action with respect to them, the Hotel must, once again, set the record straight.

² The Opponents' undue and unexplainable delay in raising the claim that the 2019 Special Permit application should have been referred to this Commission is reason alone to reject their request that this Commission insert itself now into matters the Court and town officials resolved 2 years ago. Principles of waiver and estoppel preclude such belated and patently prejudicial attempts to undo the actions of the Court and local officials.

I. The Commission Lacks Jurisdiction to Consider the Extraneous Matters.

In their written submissions and their statements to the Commission at public hearing, the Opponents and their counsel have raised a number of Extraneous Matters which have not been referred to the Commission, are not within the jurisdiction of this Commission, and which are not within the scope of the Project reviewed, approved and conditioned by DRI #614 as amended. The Commission's staff report summarizes those Extraneous Matters as concerns regarding effects or impacts from certain Hotel activities, such as the Hotel's duly permitted poolside bar, horse and carriage rides, bicycle and golf cart uses, and the Hotel's alleged use of and activities at property at 119 North Water Street. None of these matters have been referred to the Commission by any municipal permit granting authority and the matters are not addressed in or part of the Commission's approval of the Project in 2008 DRI #614, as amended in 2018. Accordingly, the Commission lacks jurisdiction over these Extraneous Matters and should not consider them or take any action with respect to them.

Pursuant to Section 13 of the Martha's Vineyard Commission's enabling legislation, Chapter 831 of the Acts of 1977 (the "Enabling Act"), the Commission can exercise jurisdiction over matters that have been referred to it by a local permit granting authority. The Enabling Act also allows the Commission to enforce conditions or restrictions set forth in a prior approved DRI. Those are the jurisdictional bases for Commission action. The Extraneous Matters present neither of these bases for Commission jurisdiction.

With regard to referrals, Section 13 of the Enabling Act provides as follows:

The governmental agency within each municipality which has responsibility for issuing a development permit shall in accordance with the standards and criteria approved pursuant

to section seven determine whether or not a proposed development, for which application for a development permit has been made, is one of regional impact; if so, it shall refer the application for the development permit to the commission.

The Supreme Judicial Court has held that Commission's referral jurisdiction arises only in this manner: "Within each municipality, the government agency responsible for issuing development permits must determine...whether a proposed development is one of regional impact, and, if so, it must refer the application to the Commission for approval." *Woods Hole Martha's Vineyard & Nantucket S.S. Authority v. Martha's Vineyard Commission*, 380 Mass 785, 791 (1980).

Accordingly, the determination as to whether a permit application must be referred to the Commission is made in the first instance by the relevant local permit granting authority. The Commission does not make this determination.

In this case, the Hotel made application for the 2019 Special Permit to the Edgartown ZBA. The Hotel also sought and obtained the approval of the proposed work from the Edgartown Historic District Commission. The application showed exactly what the Hotel proposed to do, including the relocation of the pool bar structure, the extension of the pool deck/patio in and around the relocated pool bar and into what previously had been a small patch of grass within the pool area, and the introduction of seating areas and fire pits in that extended pool patio area. Contrary to the Opponents' suggestion, the Hotel did not "disregard" the local approval process or somehow sneak this project past local officials. The Edgartown ZBA (and the Historic District Commission) clearly made the determination that the relocation of the pool bar structure within the pool area where it would continue to function as the prior pool bar had functioned for decades and the other improvements shown on the Hotel's plans did not require a

referral to the Commission.³ As set forth in more detail below, food and beverage service has been allowed in the Hotel's pool area under a special permit granted to the Hotel in 1992. The 2019 Special Permit application did not seek to expand or change that. For 30 years, the hours of service of food and beverage in the pool area have been 10 a.m. until 9 p.m. The 2019 Special Permit application did not seek to change that. The Hotel's addition to the pool apron and pool patio, all as shown on the plans that accompanied the 2019 Special Permit application, was something the Hotel could have done irrespective of the relocation of the pool bar structure.⁴ Under these circumstances, the Edgartown ZBA and the Historic District Commission properly exercised their discretion to determine that the 2019 Special Permit application did not require a referral to the Commission.

The Commission only has jurisdiction over the substance of the Application which the Edgartown Zoning Board of Appeals has referred to it. The Application does not refer any of the Extraneous Matters to the Commission. Therefore, the Commission has no "referral" jurisdiction to consider or act upon them. If the Hotel is in violation of any of its municipal permits or any municipal ordinances, that is a matter for municipal boards and officials, not this Commission. Indeed, the Opponents have lodged complaints with numerous Edgartown officials and bodies. As the Opponents themselves well know, those are the proper parties to consider the

³ The approval that the Hotel sought and received from the Edgartown Historic District Commission would also constitute a "Development Permit" under Section 6 of the Commission's Enabling Act. The Opponents make no claim that the Historic District Commission improperly failed to refer the matter to the Commission.

⁴ The Opponents suggest that the 2019 Special Permit somehow allowed food and beverage service in a manner that greatly expanded or changed the area where food and beverages could be served. That is not the case. The area where food and beverage service is allowed was established under a 1992 special permit. That area of food and beverage service, the Hotel's pool area, was unchanged by the 2019 Special Permit. The relocation of the pool bar structure did not change or increase the area where food and beverages may be served.

various Extraneous Matters the Opponents seek to inject into this proceeding. To the extent the Opponents claim the Hotel is in violation of any municipal permit, approval or ordinance, it is for the municipal boards and officials to determine, not this Commission. Indeed, as will be set forth below, the Opponents already and unsuccessfully have asserted a number of claims against the Hotel with municipal boards and officials and also with the Superior Court. In any event, the Extraneous Matters have not been referred to the Commission and, therefore, there is no “referral” for this Commission to address, much less to act upon.

The Extraneous Matters also do not implicate a violation of any condition or restriction in DRI # 614 as amended, and the Opponents do not assert that they do. In fact, the Opponents admit that the 2008 DRI #614 “does not mention the pool bar” and that “no subsequent modification” of DR # 614 “mentions the pool bar.” See Letter from Dylan Sanders to the Commission dated April 26, 2021 at page 3-4. Therefore, by the Opponents’ own admission, the pool bar is not within the scope of any condition or restriction contained in DRI #614 as amended. As the Opponents concede, the pool bar is not even mentioned. Accordingly, there is no restriction or condition in DRI #614 that relates to the pool bar and no jurisdictional basis for this Commission to enforce a non-existent condition or restriction with respect to the 2019 Special Permit that allowed the Hotel to relocate the pool bar structure and continue to operate the pool bar in the Hotel’s pool area as it had been doing for decade prior. Likewise, the other Extraneous Matters also have not been referred to this Commission and were not part of or addressed in the Commission’s prior actions with respect to DRI #614. Accordingly, there is no basis for this Commission to consider or address the Extraneous Matters or to take any enforcement action with respect to them.

For all these reasons then, the Commission should not consider or act upon the Extraneous Matters which the Opponents have improperly attempted to inject into the Commission's consideration of the Application.

II. Setting the Record Straight

For the reasons stated, this Commission should not consider or take any action with respect to the Extraneous Matters. However, because the Opponents have placed in the record certain misstatements and misleading or incomplete information, the Hotel is compelled to respond and set the record straight.

A. The Pool Bar

The Opponents have complained about the Hotel's pool bar. It is undisputed that a pool bar has operated in the Hotel's pool area for many, many years. In 1992 the Edgartown Zoning Board granted the Hotel a special permit that allowed service of food and drink in the pool area from 10 a.m. until 9 p.m. That same special permit also allowed the Hotel to hold receptions and other large gatherings (with service of food and drink) on the lawn area to the west of the pool area (the "Great Lawn"). The Hotel was allowed 3 evening events and 3 daytime events in that area per week. Events on the "Great Lawn" were allowed to run until 11:00 p.m., and could provide tents with lighting for events. No amplified music was allowed in the pool area or the Great Lawn area. The 1992 Special Permit is attached hereto **Exhibit A**.

Shortly after the issuance of the 1992 Special Permit, the prior owner of the Hotel constructed a 225 sf, covered, free-standing bar at the eastern end of the pool area. Photographs of that pool bar are attached as **Exhibit B**. As shown in those photographs, there were about a dozen seats at that bar, with room for several more. As shown in the photographs, the bar was free-standing and not "attached" to the back of the Hotel building, as the Opponents incorrectly

claim. The photographs also show that the pool bar served patrons throughout the pool area, including at several tables and seating areas that were located throughout the entire pool area, east to west, north to south.

At the time of the 1992 Special Permit, and as is currently the case, the pool area is clearly defined. Attached hereto as **Exhibit C**, are aerials that show the pool area before and after the pool bar was relocated. As shown in those aerials, the Hotel's pool area runs on the north from the rear of the main hotel building to the west. It is bordered entirely on the north by the Mayhew Building. From the southwest corner of the Mayhew building a picket fence runs to the south, enclosing the pool area and dividing it from the Great Lawn. The fence then turns to the east, and runs back to the Hotel building. The pool area is in the center of the Hotel property, tucked behind two large, multi-story structures, the main Hotel Building and the Mayhew Building. It is buffered and screened from its neighbors by those structures, by distance, by public ways and by significant mature vegetation. On the other side of the pool area is the Great Lawn where evening and daytime receptions and events are staged.⁵

The 1992 special permit was not referred by the Edgartown ZBA to this Commission. At that time, the Edgartown ZBA clearly determined that allowing the service of food and drink in the pool area was not a Development of Regional Impact. No one complained about that. And when the prior pool bar structure was later introduced and for many years facilitated service of beverages and food in the pool area, no one claimed that the pool bar structure should have come before this Commission.

⁵ Under DRI #614 as amended in 2018, a new cottage, the Pease Cottage, was approved for an area at the western edge of the Great Lawn. Once the Pease Cottage is built, it will further buffer the Great Lawn and Hotel pool area from the surrounding neighborhood.

In the spring of 2019, the Hotel decided to relocate the pool bar structure to the other side of the pool area—a distance of about 120 feet. The Hotel wanted to improve the pool bar structure’s design and appearance to better fit with the improvements that were being made to the rest of the Hotel.

The relocated pool bar structure is approximately 175 sf, a bit smaller in size than the original pool bar structure. At the same time, the Hotel decided to extend the pool apron/patio into a small grassy area that always had always been part of the pool area, and also to place higher grade outdoor furniture in that area around fire pits. The expansion of the pool apron/patio area, improved outdoor furniture, and the installation of the fire pits did not require any zoning relief or special permits, but they are depicted on the plans that were filed with the 2019 Special Permit application.⁶ The special permit was required only for the relocation of the pool bar structure from one end of the pool area to the other. The relocated pool bar would continue to operate between the hours of 10 a.m. and 9 p.m., just as the prior pool bar had operated. Like the prior pool bar, and consistent with the 1992 special permit, the relocated pool bar would not have any amplified sound. One difference between the prior pool bar structure and the relocated pool bar structure is that the relocated pool bar structure would not have facilities for preparing food. The prior pool bar structure contained a grill where food was actually prepared. For the relocated pool bar, food would be prepared in and served from the Hotel’s kitchen. As the relocated pool bar structure does not have facilities to prepare food, it hardly qualifies as a “restaurant.”

⁶ See Exhibit 38 submitted by the Opponents.

The Hotel sought the 2019 Special Permit from the Edgartown ZBA to relocate and continue to operate the pool bar. The plans filed with the application showed that the Hotel also would extend the hard scape pool apron into the small grassed area that has always been part of the pool area and that it would place patio furniture and other improvements in that area. As was the case in 1992, the Edgartown ZBA did not refer the 2019 Special Permit application to the Commission.

It was not the Hotel's obligation to seek MVC review as the Opponents suggest. As the MVC Enabling Act provides, it was for the Edgartown ZBA (and the Historic District Commission) to determine if the application should be referred to the Commission. The ZBA (and Historic District Commission) clearly determined that the relocation of the pool bar structure and other improvements the Hotel proposed were not a Development of Regional Impact and were not a part of DRI #614 as amended. Accordingly, the ZBA (and the Historic District Commission) did not refer the Hotel's 2019 Special Permit application to the Commission. The Historic District Commission approved the work and the ZBA granted the special permit on May 3, 2019. A copy of that special permit is attached as **Exhibit D**. Later in May, a building permit was issued and construction of the new pool bar structure commenced.

At that point, several seasonal neighbors to the Hotel, who are Opponents in this matter, appealed the 2019 Special Permit to Superior Court. Those seasonal neighbors sued the Edgartown ZBA and the Hotel. In that heavily litigated appeal, the Opponents did not claim that the ZBA (or the Historic District Commission) should have referred the 2019 Special Permit application to this Commission. They only claimed that the relocated pool bar and its operation would harm them and that the special permit should be annulled.

The Opponents were represented in that appeal by two lawyers, Vineyard attorney Daniel Larkosh and attorney Felicia Ellsworth of the Boston firm Wilmer Hale. Neither of these attorneys claimed that the 2019 Special Permit should have been referred to the Commission.⁷

As construction proceeded, the neighbors asked the Superior Court for an injunction to stop the construction and prevent the relocated pool bar from operating. Once again, in seeking the injunction, neither the Opponents nor their lawyers made any claim that the 2019 Special Permit should have been referred to the Commission.

Superior Court Judge David Ricciardone heard that motion for an injunction and denied it. A copy of the Court's decision denying an injunction is attached as **Exhibit E**. In his decision, Judge Ricciardone found that the neighbors "failed to show a likelihood of success on the merits of this case," and "misstate the actual siting of the new bar as infringing on the 'great lawn' adjacent to the pool area, and/or being visible from the plaintiffs' properties. They also

⁷ These facts and others distinguish this case from the situation addressed by the Land Court in *Caliri v. Knight*, 2012 WL 716297 (Nos. 11 MISC 448373 and 449416) (Mass. Land Court, March 2, 2012 (Piper, J.) where plaintiffs asked the Land Court to require a project to be referred to the Commission. Here, the Opponents, though represented throughout by counsel, never asserted in Court that the 2019 Special Permit application should have been referred to the Commission. Judge Piper also notes that an action in the nature of mandamus could have been brought to compel the Commission or perhaps the ZBA to refer the matter. That also did not happen in this case and the time for making such a claim is long past. In *Caliri*, Judge Piper also noted that the Commission was aware of the subject project but did not act to require the ZBA to refer the matter. Here the Opponents' lawsuits against the pool bar and the 2019 Special Permit issued to the Hotel were front page news in the *Vineyard Times* and *Vineyard Gazette*. Despite the widespread publication of the matter, neither the Commission nor the Edgartown ZBA nor the Edgartown Historic District Commission nor any other party made the claim that the matter should have been referred to the Commission. While the Commission may initiate a conversation with a local Zoning Board or other permitting body or Building Inspector when the Commission believes that a project under local review should be referred, that also did not happen in this case. As noted, the 2019 Special Permit was granted and has been upheld and affirmed in three different Superior Court rulings. To the extent there was a time for anyone to claim the 2019 Special Permit should have been referred to the Commission, that time is long past.

present no actual evidence as to the feared increased noise and disturbance regarding the new structure which is actually smaller than the previous one, and subject to the same limitations on use that have been in place since the special permits of 1990 and 1992.”⁸ Thereafter, on the Hotel’s motion, Judge Ricciardone dismissed the neighbors’ lawsuit in its entirety and upheld the 2019 Special Permit.

The Hotel went forward with construction and opened the pool bar in July 2019. Photographs of the relocated pool bar, the pool area and the adjacent Great Lawn area are attached hereto as **Exhibit F**.

While the Opponents’ were losing their challenge to the 2019 Special Permit and pool bar in Court, they also appealed the Building Permit for the pool bar to the Edgartown ZBA. The ZBA denied that appeal. The Opponents then filed a second lawsuit in Superior Court to appeal the ZBA’s decision. Again, the Opponents and their lawyers did not raise a claim that the 2019 Special Permit should have been referred to the Commission. On the Hotel’s motion, that lawsuit was dismissed by Superior Court Robert Judge Rufo.

Undeterred by two Court dismissals and a failed ZBA challenge, the neighbors next petitioned Edgartown building inspector Leonard Jason to take a zoning enforcement action against the pool bar, which they claimed was a restaurant that had not been properly permitted—a claim they have repeated in submissions to this Commission.⁹ Mr. Jason rejected that gambit.

⁸ Despite two years of pool bar operations, none of that has changed. The neighbors continue to misstate the actual location of the pool bar and the impacts of the operations of the pool bar. They also fail to present any actual evidence that the pool bar has exceeded any noise ordinances, nor do they provide anything more than naked and unsupported claims regarding increased traffic and public use of the pool bar. And the characterization of a bar that closes at 9 p.m. as a “night club” is absurd on its face.

⁹ As she did before the Edgartown Board of Selectmen and ZBA, Ms. Allegaert has submitted

The neighbors appealed Mr. Jason's refusal of their enforcement request to the Edgartown ZBA. The ZBA once again rejected the neighbors' attempt to collaterally attack the 2019 Special Permit. The neighbors appealed the ZBA's action in a third lawsuit to Superior Court. This time they sued the ZBA, Mr. Jason and the Hotel. A third superior court Judge, Judge Brian Davis, dismissed that lawsuit.

The neighbors then went to the Edgartown Selectmen, arguing that the operation of the relocated pool bar violated the Hotel's liquor license. They urged the Selectmen to revoke the Hotel's liquor license. The Selectmen refused to do that. The Selectmen did purport to set a new closing time for the pool bar--6 p.m. as opposed to the 9 p.m. limit established by the 1992 Special Permit. The Hotel appealed that time limit to the Alcoholic Beverages Control Commission, and the ABCC struck the limit down. Accordingly, the pool bar's hours remain 10 a.m. to 9 p.m., just as they have been since 1992.

The foregoing history is accurate and incontrovertible. It shows that the Opponents' specious complaints about the relocated pool bar structure have been dealt with and dismissed by the Court and by relevant Edgartown officials. This Commission should resist the Opponents' invitation to insert itself into something which is not before it and which the Court and municipal officials have reviewed and resolved in the Hotel's favor multiple times over the last two years.

videos to this Commission which she claims show the operations of the pool bar and which, she also claims, support her view that the pool bar is a noisy "restaurant and night club." The videos actually show evening receptions on the Great Lawn area which are specifically allowed under the 1992 Special Permit until 11:30 p.m. Service from the pool bar ends at 9 p.m. As noted, a 9 p.m. closing time is hardly the closing time of a night club. Finally, the individuals who would be most disturbed by noisy pool bar operations would be those guests of the Hotel whose rooms are literally steps from the pool bar. The Hotel has no interest in creating or maintaining a noisy operation that would annoy or bother its guests who are paying significant amounts for rooms near and around the pool area.

The 2019 Special Permit has been upheld by the Court and the Hotel's rights under the 2019 Special Permit have vested and have been exercised. This Commission should reject the Opponents' demand that the Commission act to reverse Court decisions and divest the Hotel of its rights under the judicially affirmed 2019 Special Permit. The Opponents are attempting to lure this Commission into an action that is beyond this Commission's power and which would constitute an unconstitutional and illegal taking of the Hotel's property and an illegal interference with the Hotel's vested rights. The Commission should reject the Opponents' invitation to engage in these illegal actions.¹⁰

B. 119 Water Street

The Opponents have alleged that a private residence at 119 Water Street and the private dock which is part of that property are being operated as an adjunct to the Hotel to provide Hotel accommodations, chartered yacht rentals and jet ski rentals. Again, the Commission has no jurisdiction to consider these baseless claims—and they are baseless, as the Opponents well know.

¹⁰ The Opponents' also note that a ZBA or Building Inspector can compel a party who has constructed an improvement without obtaining required permits to remove the offending improvements. If a ZBA or Building Inspector has such power, the Opponents assert that the Commission must as well. But the Edgartown Building Inspector expressly refused to exercise this power with respect to the pool bar. His refusal to do so was upheld by the Edgartown ZBA and, thereafter, by the Superior Court. Second, the Commission does not have such power under its Enabling Act. The Commission would need to seek such relief from Court, the same Superior Court that has 3 times upheld the 2019 Special Permit and refused to issue an injunction to prevent the construction and operation of the relocated pool bar. There is a further problem with the Opponents' argument. The Hotel did not construct and operate the pool bar without permits. The Hotel was granted the 2019 Special Permit and a Building Permit. The Opponents brought three lawsuits and two administrative actions to challenge those permits. The Opponents lost all five of those challenges. The permits for the relocated pool bar have been judicially affirmed and the Hotel's rights under them have been vested and exercised.

About a week ago, the Opponents brought these claims to the Edgartown Board of Selectmen. At that time, the owner of 119 Water Street presented evidence that the Water Street house is a private residence, in separate ownership from the Hotel, and that is not booked or used as an adjunct to the Hotel. The owner of 119 Water Street also presented evidence that the charter boats referenced by the Opponents operated from Memorial Wharf, not from the dock of 119 Water Street, as misrepresented by the Opponents. There also are no jet ski rentals from the 119 Water Street dock. The owner of the Water Street house has two jet skis which he keeps at the dock. Those jet skis are for the owner's personal use. Those jet skis are not rented to the public or provided to Hotel guests. After hearing these matters, the Selectmen took no action. They simply requested that the owner of 119 Water Street consult with the Edgartown Conservation Commission and the Edgartown Building Inspector to clarify and confirm how the owner of 119 Water Street is using and may continue to use the dock. The owner, through counsel, has done so.

C. Golf Carts, Carriage Rides and Bicycles

The Opponents' counsel, in what even for a lawyer is a flight of hyperbole, claims that the Hotel is "barraging" its neighbors with the "din of horse and buggy rides, golf carts and a fleet of bicycles." Again, these claims are baseless, but even if there was a shred of truth to them, this Commission has no jurisdiction to consider or address them. These again are matters that the Opponents should address to municipal officials or boards instead of attempting to insert them in this proceeding where such claims have absolutely no business. And, as stated, the claims are baseless. The hotel has a number of bicycles that it makes available to guests so that they do not have to take a car into town or to the beach. This is a good thing for the environment, the guests and the Hotel's neighbors. The guests' use of the bicycles do not create

a “din,” and are much less impactful than motorized vehicles would be in every respect. Moreover, there is no law or ordinance that would prevent every guest in the hotel from bringing his or her own bicycle to use when they come to stay at the Hotel. The Hotel also does not have a fleet of golf carts as the Opponents suggest. The Hotel has a single, six-passenger, electric golf cart that it uses to shuttle guests to town or its employees to a Park and Ride parking lot. It is a quiet, electric vehicle which is more much environmentally friendly than a gasoline-powered car or van would be. Finally, the Hotel has partnered with a Vineyard Haven based company that offers horse and carriage rides, but only during the off season, when traffic is substantially reduced on the island and most of the seasonal residents, like most of the Opponents, have departed. The company is duly licensed to provide this service.

Conclusion

The Harbor View Hotel has been a fixture in Edgartown since 1891. A few seasonal neighbors, all of whom came to the neighborhood long after the Hotel was established, have decided to wage all-out war against the Hotel because they now object to the legally pre-existing commercial use they choose to live next to during the summer season. Under Mr. Chiu’s ownership, the Hotel has been returned to its prior 5-star status and has improved, not harmed, the neighborhood. The significant upgrades to the Hotel and its grounds have only improved the values of the properties that surround it, and have brought back to prominence and former glory a beloved and important Edgartown business.

The Commission should not be drawn into the campaign of a few neighbors who seem determined to harass Mr. Chiu with unwarranted and vexatious litigation and legal maneuvering. In particular, the Commission must respect the decision of the Edgartown ZBA not to refer to the Commission the Hotel’s 2019 Special Permit request to relocate and continue to operate the pool

bar and the Edgartown ZBA's decision to grant the 2019 Special Permit. The Commission must also respect the fact that three different Superior Court judges have heard the neighbors' complaints about the pool bar and have dismissed those complaints, upholding the validity of the 2019 Special Permit and confirming the Hotel's vested rights with respect to it. The Commission should reject the Opponents' request that it attempt to overrule decisions of the Superior Court and relevant municipal officials and boards and illegally interfere with the Hotel's vested rights under the 2019 Special Permit. The Commission should confine itself to the Application that is before it and over which it has jurisdiction. The Commission should not act upon or consider the Extraneous Matters over which it has no jurisdiction.

EXHIBIT A



Town of Edgartown
Office of
Zoning Board of Appeals
Edgartown, Massachusetts
02539

Edgartown, Mass.
Town Clerk's Office

April 16 1992
Rec'd For Record
ATK/HVZM AM

Case No: 18-92
Date Filed: March 6, 1992

**DECISION OF THE ZONING BOARD OF APPEALS
ON THE APPLICATION OF
HARBORVIEW HOTEL, M.V. ASSOCIATES**

At a public hearing held in the Selectmen's Meeting Room, Town Hall, Main Street on April 8, 1992 at 7:30 p.m. the Edgartown Zoning Board of Appeals voted (5-0) to grant a special permit to continue to serve food and beverages in the pool area and further to serve food and beverages on "The Green". The following conditions were placed on this permit: 1) There will be no serving of food and beverages on the porch, although the consumption of food and beverages on the porch is permitted. 2) The outdoor service of food and beverages will be permitted in the pool area. 3) Service and entertainment on the green will cease no later than 10:30 p.m. 4) The green area will be cleared of guests and lights will be out no later than 11:00 p.m. 5) There will be no lighting of the green, lights will be in the tents only. 6) There will be no more than three night functions per week on the green. 7) There will be no more than three daytime functions per week on the green. 8) There will be no amplification of any kind on the grounds of the Harborview. 9) This permit will be reviewed in October of 1992.

The decision of the Board of Appeals, together with each Board member's reasons for the decision and a record of all proceedings, are on file in the Office of the Town Clerk, Town Hall under Case No. 18-92.

Board of Appeals,

Pamela M. Dolby, Assistant

Note: This decision was filed in the Office of the Town Clerk together with the reasons for the decision, on April 16, 1992. Appeals, if any, should be made pursuant to Section 17 of Chapter 40A of the Massachusetts General Laws and should be filed within 20 days of the filing of this decision in the Office of the Town Clerk.

EXHIBIT B



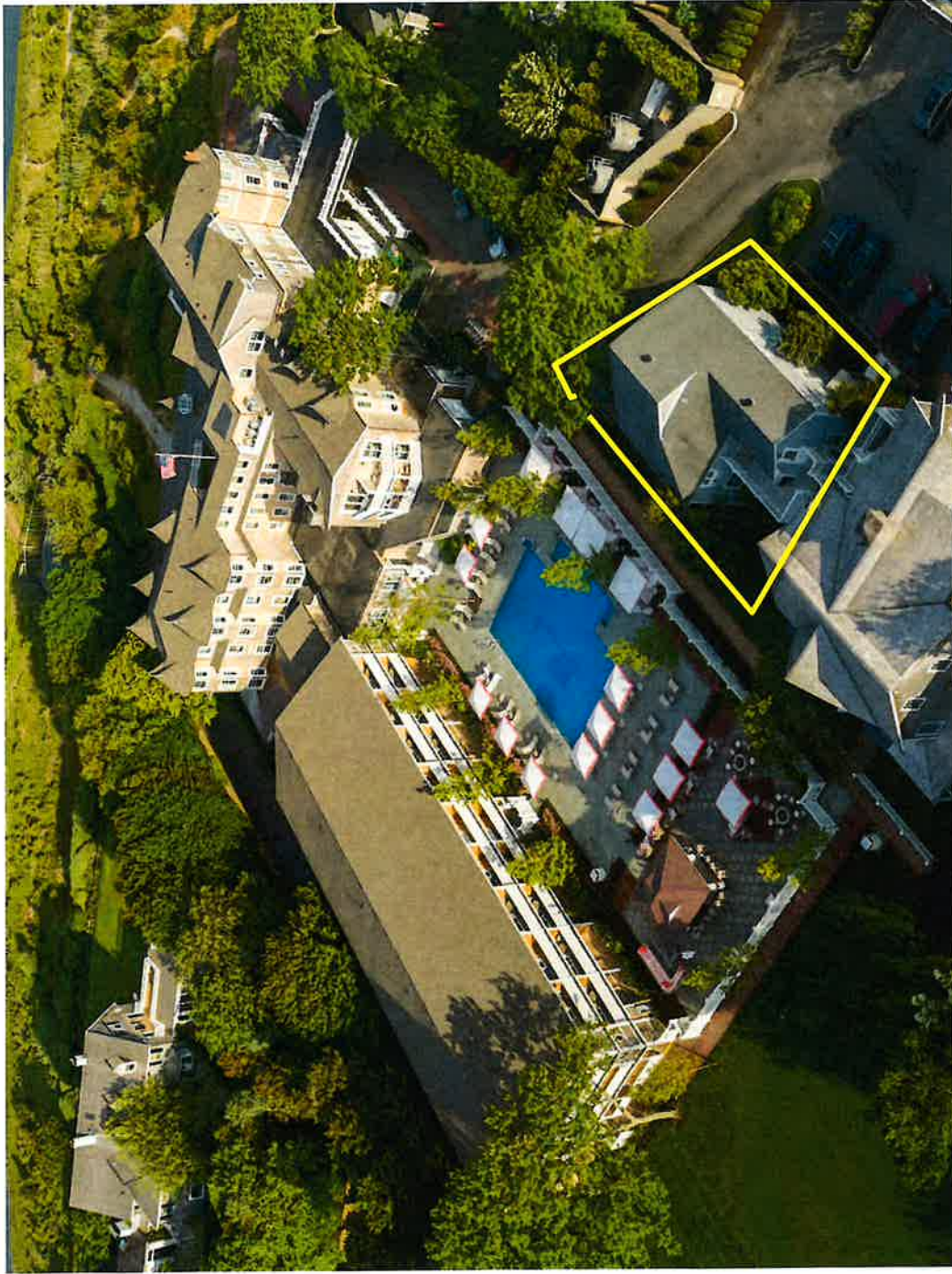


EXHIBIT C





Proposed Building Location



131 NORTH WATER STREET
EDGARTOWN, MASSACHUSETTS 02539
HARBOR-VIEW.COM

EXHIBIT D



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

Telephone
508-627-6760
Fax
508-627-6729
Case # 14-2019
Date Filed: 10 April 2019

Edgartown, Mass
Town Clerk's Office
MAY 3, 2019
Rec'd for Record
AT 3:17 PM

**DECISION OF THE ZONING BOARD OF APPEALS
ON THE REQUEST FOR A SPECIAL PERMIT**

**Applicant/Owner: Harborview Hotel Owner LLC
Book 1484 Page 46**

At a meeting held in the Selectmen's Room, Town Hall, on Wednesday, 1 May 2019, the Edgartown Zoning Board of Appeals voted unanimously (5-0) to grant a special permit under section 11.9 (f) of the zoning bylaw to permit the construction of a replacement pool bar at the Harborview Hotel located at 131 North Water Street, Assr. Pcl. 20B-107 in the R-5 Residential District - all according to the plans and elevations submitted by Beacon Architectural Associates dated 29 March 2019 and 5 March 2019.

1. The proposal conforms to the requirements of the bylaw and will not be more detrimental to the neighborhood than the existing pool bar. The new pool bar will be smaller in size than the existing pool bar and located on the opposite side of the pool area.
2. The Harborview was granted a special permit in 1992 (Case No. 18-92) to serve food and beverages in the pool area.
3. A special permit is required because the construction of the pool bar constitutes a change or alteration of a nonconforming use (commercial) in a residential neighborhood. The board finds that the increase of two seats at the bar will not result in a significant intensification in the use of the structure or have any appreciable impact on town services.
4. No abutters, town board or departments, or members of the general public had any objection to the project.

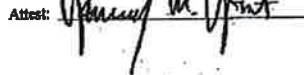
This decision of the Board of Appeals and a record of proceedings are on file in the Zoning Board office and in the office of the Town Clerk, Town Hall under Case No: 14-2019.

Board of Appeals,

Lisa C. Morrison, Assistant

Note: This decision was filed in the office of the Town Clerk on 3 May 2019. Appeals, if any, should be made pursuant to Section 17 of Chapter 40A of the Massachusetts General Laws and should be filed within 20 days of the filing of this decision in the office of the Town Clerk.

I hereby certify that no appeal has been filed in the twenty-day period following the date of filing this decision.

Attest: 


- JUN 19, 2019
TRUE COPY ATTEST

**TOWN CLERK OF
EDGARTOWN, MA.**

EXHIBIT E

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1974CV00021

LYNN ALLEGAERT, et al.,¹

vs.

HARBOR VIEW HOTEL OWNER LLC, et al.,²

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

The plaintiffs seek a preliminary injunction prohibiting the “defendant Harbor View Hotel Owners LLC d/b/a Harbor View Hotel [Harbor View] (including its agents, contractors, employees and hired laborers) from constructing, occupying and operating, marketing and promoting the poolside bar approved by the Zoning Board of Appeals [ZBA] for the town of Edgartown on May 3, 2019 and, for which, the Harborview was issued a building permit by the Edgartown building inspector on May 31, 2019”.

In support, the plaintiffs contend that their appeal of the ZBA’s decision pursuant to G.L. c. 40A §§ 15 and 17 is timely filed despite the strict 20 day deadline for such appeals, because as aggrieved abutters, they were never notified of the ZBA hearing and decision on Harbor View’s application as required by G.L. c. 40A §11. This, they argue, results in a 90 day deadline which was met here. G.L. c. 49A §17.

As to the merits of the appeal, the plaintiffs claim that if they were notified and given an opportunity to be heard at hearing on the special permit, they all would have argued to the ZBA that this change in a pre-existing nonconforming structure would be substantially more detrimental to the neighborhood than the existing nonconforming use and is therefore prohibited by G.L. 40A §6 and Article X Section 11.9(f) of the Edgartown Zoning Bylaws. The plaintiffs aver that the new pool side bar “will have a detrimental impact on their use and enjoyment of

¹ “James Swartz, Joseph Smith, Louise Neuhoff, Geoff Caraboolad, Richard Zannino, and Edwin Brooks, Inc.”

² “Town of Edgartown, Leonard In his/her capacity as Building Inspector and Zoning Enforcement Officer for the Town of Edgartown”, and six named members of the Edgartown Zoning Board of Appeals.

[their] property”; counsel refers to it in this motion (somewhat more colorfully) as a “shocking commercial blight” and derides it as a “tiki bar”.³

“A party seeking a preliminary injunction must show that (1) success is likely on the merits; (2) irreparable harm will result from denial of the injunction; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party.” *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 357 (2006), citing *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980).

Despite their protestations, the plaintiffs have failed to show a likelihood of success on the merits of this case. Their bare assertions as to a total lack of notice sent “to any address” carries no more weight, and arguably less,⁴ than the detailed affidavit of Lisa Morrison. The long-term administrative assistant to the ZBA averred in detail her full compliance with G.L. c. 40A §11 through mailing same to each of the realty trust and LIC off-island addresses listed in town records as actual owners.⁵ Further, the plaintiffs show no evidence to refute the asserted publication of such notice in the *Vincyard Gazette* and the Town Hall, the two other forms of notice required by the statute.

Moreover, the plaintiffs appear to misstate the actual siting of the new bar as infringing on the “great lawn” adjacent to the pool area, and/or being visible from the plaintiffs’ properties. They also present no actual evidence as to the feared increased noise and disturbance regarding the new structure which is actually smaller than the previous one, and subject to the same limitations on use that have been in place since the special permits of 1990 and 1992 (e.g., a closing time of 9:30 pm). While this motion for injunctive relief does not require adjudication of this matter, these points pose a legal impediment to the plaintiffs’ contention that they have a likelihood of success on the issue of whether the new structure is more detrimental to the neighborhood than the old one.

³ While the court acknowledges that a bar’s beauty is in the eye of the beholder, the term “tiki bar” connotes an image of a woven palm frond hut with a thatched roof as a backdrop for Polynesian dance shows. The plaintiffs, who encouraged the undersigned to take an informal view of the area, must concede that the construction here competes in a different league from that image. Again, architectural taste be subjective, but it could be argued, as Harbor View does, that the new structure is generally consistent with the improvements made last year (which resulted in no objections from the neighborhood).

⁴ The plaintiffs’ affidavits all use substantially the same conclusory terms: “the permitted structure and activities will have a detrimental impact on my use and enjoyment of my property... Before learning of the construction, I state that I have never received any written notice of any kind whatsoever at any address.”

⁵ An exception appears to be with Plaintiff Brooks, Inc. which the Town argues does not come within the definition of “parties in interest” under G.L. c. 40A §11.

The plaintiffs fare no better in consideration of irreparable harm. The plaintiffs are anxious of generalized, future diminution in the use and enjoyment of their homes based on operation of the relocated pool bar that has yet to begin. The court cannot grant injunctive relief based merely on anticipated harm. See *Shaw v. Harding*, 306 Mass. 441, 449-450 (1940) (“One . . . is not entitled to seek [injunctive] relief unless the apprehended danger is so near as at least to be reasonably imminent”); *American Fed’n of State, County & Mun. Employees, Council 93, AFL-CIO, Local 419 v. Rouse*, 2002 WL 1584583 at *2 (Mass. Super. 2002), quoting *Sierra Club v. Larson*, 769 F. Supp. 420, 422 (D. Mass. 1991) (“In order for plaintiff to show irreparable harm, plaintiff must establish ‘injury that is not remote or speculative, but is actual and imminent.’”).

In addition, the plaintiffs’ claim for monetary damages, without considering its merits, belies its stance that any harm here is irreparable. Irreparable harm is injury for which money damages are not adequate compensation. *Sierra Club v. Larson, id.*, at 422. Stated another way, “the degree to which money can soothe the injury is a principal indicator of the irreparability”, *Westinghouse Broadcasting Company, Inc. v. New England Patriots Football Club, Inc.*, 10 Mass. App. Ct. 70, 72 (1980). Here, the tort claim for money damages implicitly argues that the plaintiff’s injuries can be addressed by those damages.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the plaintiffs’ motion for preliminary injunction is **DENIED**.



David Ricciardone
Justice of the Superior Court

DATED: July 25, 2019

EXHIBIT F



