

May 20, 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:

As you know, I represent the Harbor View Hotel (the "Hotel"). At a recent hearing, counsel for certain neighbors of the Hotel made several inaccurate statements to which the Hotel is compelled to respond. This letter also will respond to a letter from Lynn Allegaert, which mistakenly contends that the Hotel is in breach of an agreement Ms. Allegaert made in 2008 with Scout Realty, a predecessor to the Hotel's current owner, and which, in any event, this Commission has no jurisdiction to consider or review. Finally, this letter restates the Hotel's view that just as is the case with the referenced 2008 Agreement, the Commission also lacks jurisdiction to act on certain extraneous matters that the neighbors improperly have sought to inject into this matter.

1. The Inaccurate Statements of the Neighbors' Counsel.

Counsel for the neighbors stated at a recent hearing that no court has considered the "merits" of the neighbors' complaints regarding the pool bar. That is false. As set forth at p. 12 of my April 28, 2021 Memorandum to the Commission, Superior Court Judge David Ricciardone did indeed consider the merits of the neighbors' complaints with respect to the pool bar and Judge Ricciardone rejected those complaints after considering them on the merits. He did this when, after taking his own view of the Hotel's pool area, he denied the neighbors' request for an injunction to prohibit the Hotel from relocating and continuing to operate the pool bar. In his decision, which is attached as Exhibit E to the Memorandum I submitted to the Commission, Judge Ricciardone expressly found that the neighbors had "failed to show a likelihood of success on the **merits** of this case," (emphasis supplied), and that the neighbors had "misstate[d] the actual siting of the new bar as infringing on the 'great lawn' adjacent to the pool area, and/or being visible from the [neighbors'] properties." Judge Ricciardone went on to

hold that the neighbors “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.” Accordingly, the Court did reach and consider the merits of the neighbors’ complaints and soundly rejected those complaints on the “merits.”

During a recent hearing, Commission Kim asked if the Hotel’s relocated and current pool bar had ever been cited for any noise or other violation by any Edgartown official. I responded that the Hotel had not received any such citation. Thereafter, the neighbors’ counsel identified an occasion in 2019 when the Edgartown Building Inspector advised the Hotel that it should instruct the real estate agent who marketed the property at 119 N. Water Street to cease from advertising that renters of that property would be able to use Hotel facilities. This, of course, had nothing to do with the pool bar or Commission Kim’s question or my response to Commissioner Kim’s question. Moreover, the Hotel did as the Building Inspector had requested. Several weeks ago, the neighbors brought that same, two year old complaint to the Edgartown Select Board. At that time, the Hotel’s counsel advised the Select Board that 119 N. Water street is a private residence; is not owned by the Hotel; and is not used or marketed as an adjunct to the Hotel. The Select Board took no action on the neighbors’ complaint. The Hotel again confirms that in the two years it has been operating the pool bar in its current location the Hotel’s pool bar’s operation has not been cited by any Edgartown official as being in violation of any Edgartown law or ordinance—including but not limited to the Edgartown noise ordinance.

At hearing, counsel for the neighbors suggested that the reason there has been no noise or other citations of the Hotel is because the neighbors are not the type of people who complain about things. That is false. The neighbors have initiated and lost 3 Superior Court lawsuits brought against the Hotel’s pool bar. The neighbors have initiated and lost 2 appeals to the Edgartown ZBA with respect to the Hotel’s pool bar. The neighbors also have requested, without success, that the Building Inspector take an enforcement action against the Hotel’s pool bar. Finally, the neighbors have twice requested that the Edgartown Select Board take action against the Hotel, including with respect to the pool bar. The neighbors and their team of lawyers are without question the type of people who more than willing to lodge complaints. As this Commission knows, they have done so here. While it is certainly the neighbors’ prerogative to continue to lodge complaints, to date no court and no town official has found reason to take any action on those complaints.

2. The 2008 Agreement Between Ms. Allegaert and Scout.

In 2008, Ms. Allegaert and Scout Harbor View Property I, LLC (a prior owner of the Hotel) entered into an agreement (the “Agreement”) in light of Scout’s plan to undertake a substantial project at the Hotel, including the construction of several cottages. That plan, approved by this Commission in 2008, never went forward.

Among other things, that Agreement obligated Scout (and any successor) to install and maintain a landscaped buffer along the property line between the Hotel property and that of Ms. Allegaert. After

acquiring the Hotel, Mr. Chiu installed and continues to maintain a dense vegetative buffer between Ms. Allegaert's property and the Hotel's. That vegetative buffer is clearly shown on photographs that I provided with my April 28th Memo and which were earlier submitted to the Commission by Ms. Eugenia Revson. This is the only part of the 2008 Agreement that purports to be binding on successors and assigns. As the pictures that the Hotel has submitted attest, the Hotel is in full compliance with the part of the Agreement that requires the Hotel to install and maintain vegetative screening along its property line and that of Ms. Allegaert.

As noted, while that is the only part of the Agreement which purports to bind successors like Mr. Chiu, the Hotel also is in compliance with other aspects of the Agreement. For example, the Agreement between Scout and Ms. Allegaert requires that Scout comply with the provisions of the 1992 Special Permit with respect to entertainment on the Great Lawn and the provisions that prohibit amplified sound on the Hotel property. While that part of the Agreement is between Ms. Allegaert and Scout only, the Hotel complies those provisions. The Agreement says nothing about the pool bar or its operation or the service of food and beverages in the pool area. And, in any event, the Hotel is in full compliance with the 2019 Special Permit issued to the Hotel and which allowed the Hotel to relocate the pool bar structure and continue to operate the pool bar in the pool area. That 2019 Special Permit was not referred to this Commission and is not before the Commission now. The neighbors brought 3 lawsuits to challenge that 2019 Special Permit. All three of those lawsuits have been dismissed. The neighbors also asked the Dukes County Superior Court to issue an injunction against the construction and operation of the relocated pool bar. Pursuant to that 2019 Special Permit the Hotel constructed and for two years has operated the relocated pool bar.

Finally, and in any event, the Agreement requires that if there is any dispute between the parties with respect to the Agreement, such dispute is to be resolved in a binding mediation under the District Court's mediation program. This Commission has no role to play with respect to the private Agreement and Ms. Allegaert's suggestion that this is a matter for the Commission to review or consider is as improper as it is baseless.

3. The Commission Has No Jurisdiction Over and Should Take No Action with Respect to the Extraneous Matters Presented by the Neighbors and their Counsel.

As noted in my April 28th Memorandum to the Commission, the neighbors and their counsel have raised in this proceeding several matters (the "Extraneous Matters") related to Hotel operations (the Hotel's pool bar, the Hotel's six-passenger electric golf cart, a private residence at 119 N. Water Street, and the bicycles the Hotel makes available to its guests). These Extraneous Matters have not been referred to the Commission and this Commission has no jurisdiction to take any action with respect to them.

As the Commission knows, there are two bases for this Commission's jurisdiction. The first is referral jurisdiction. The Commission has jurisdiction over matters referred to it by a local permit granting body. The Extraneous Matters have not been referred to the Commission by any permit granting body. The second basis for the Commission's jurisdiction is enforcement jurisdiction—that is, the Commission has the power to enforce conditions of a previously issued DRI. The DRI approved by the Commission for the Hotel, as amended, does not contain any conditions with respect to the Extraneous Matters. Indeed, the neighbors' counsel admitted as much with respect to the pool bar which, he acknowledged, DIR #614 as amended does not even mention.

The Commission has requested that the Hotel respond to certain questions that relate to the Extraneous Matters. As a courtesy to the Commission, the Hotel's counsel, the late Attorney Sean Murphy, and his law partner, Attorney Marilyn Vukota, have responded to the Commission's questions. But the Hotel wishes to make clear that by responding to the Commission's questions on the Extraneous Matters, the Hotel is not suggesting that the Commission has any jurisdiction to take any action with respect to them.

Thank you for your kind attention to this matter

Sincerely,



Kevin P. O'Flaherty

cc: C. Dylan Sanders, Esq. (via email)
Alessandra Wingerter, Esq. (via email)
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