

**RE: 38 Main Street, Tisbury, MA**

Dear Paul, Christina, Linda and other Land Use Planning Committee Members of the Martha's Vineyard Commission:

I am writing to bring to your attention for your interpretation or clarification issues I have been having with the Tisbury Building Department in seemingly arbitrary interpretation of a few sections of the checklist. On all issues discussed herein, I reserve all rights.

Having served for ten years on the Commission, during the period of time when a couple of these checklist items were drafted, I was rather frustrated to learn how the Towns could possibly stretch the original intent to cover completely different scenarios.

These all arose in respect to a proposal that was originally brought to the Town in the early 1990's for 38 Main Street in downtown Tisbury. The building is across from the Bowl and Board and next to the bookstore and contains Alley Cat and Jaba's print gallery. There are three retail units, one office and one apartment in the building that have been there for many years.

Summary of details of current proposal for 38 Main St Tisbury (Assessor's Map 7N Parcel 6):

- Add three story el in rear.
- First floor addition to existing retail unit 485 sf
- Second floor addition to existing office 485 sf.
- Thus combined floor area addition of commercial space 970 sf.
  
- Third floor in el and extended new third floor (all attic used for storage only - thus not part of "floor area" definition 2.18 of MVC DRI Checklist) across top of existing two story portion of building and connecting to third story portion of existing apartment. Total new attic= 1700 sf
- Renovate existing apartment.
- Additional floor area for residential hallway on third floor 28.5 sf.
- NO NEW UNITS CREATED. No increase in wastewater flow. No new parking required.

CONCERNS:

Tisbury Building Inspector, after reviewing these revised plans has indicated he plans to refer to MVC under Checklist §§ 3.301(b); 3.301 (e); and 3.401(d).

These read as follows:

3.3 Commercial Business and Industrial Development

3.301 Any development of commercial, storage, office and/or industrial lands or building(s), or any private educational facility that has:b) new construction of addition(s) or auxiliary building(s) totaling 1,000 square feet or more of floor area, such square footage

resulting in a total square footage of 2,000 feet or more; or e) any change of use, or increase in intensity of use (including conversion of basements, storage space or other exempt floor space to active floor space) with the concurrence of the Martha's Vineyard Commission

3.401 Any development, including the expansion of an existing development, which proposes to create or accommodate: d) four (4) or more premises which mix residential with business, office or industrial uses.

Let me take these in order.

3.3

3.301 (b): The Tisbury Building Inspector refuses to use the MVC definition 2.18 of "floor area" in calculating the total amount of new floor area. He has calculated that the "floor area" by "HIS" measure, exceeds 1000 sf. The definition specifically excludes attic used just for storage. Applying this definition, the total new space is 970 sf of new commercial space and 28.5sf of residential space. The project, as noted below, was modified so as to keep the total new amount of "Floor Area" at below 1000 sf so as to NOT come within MVC purview under 3.301 (b).

Definitions

2.18 Floor Area: The total area of a building measured by taking the outside dimensions of the building at each floor level intended for occupancy. Basement or attic space used in connection with a principal or accessory use shall be counted in the calculation of floor area unless such space is used exclusively for storage or has a ceiling height of less than 54 inches.

COMMENT: Clearly, the Tisbury Building Dept. is departing from the very definitions the MVC has adopted. 3.301 (b) does not apply, and any referral of such a proposal under this checklist item should be returned with a directive that calculation.

The heading of 3.3 implies that the figures apply only to commercial, business and industrial development. In the past, during most of my time on the MVC, the square footage calculation of the floor area was limited to the floor area designated for commercial, business and industrial use. It has been repeatedly suggested to me by LUPC members that this is still the case.

However, Mr. Barwick had argued on the earlier proposal (which called for changing the layout of the existing apartment to make a new apartment as well as to add another new apartment in the area now designated as attic just for storage - adding two new apartment units and adding some 1400 sf of new residential space - 1200 of it in the new one bedroom in the rear and 200 sf of residential hallway access), after approximately six weeks of consultation with MVC staff and the Executive Director on interpreting 3.401c and d, and suggestion by the MVC folks, that additions of residential square footage onto commercial buildings, are to be calculated as part of floor area for purposes of calculating 3.301 a and b. Such an interpretation would be

a re-interpretation from my ten years on the MVC of how one calculates the floor area under 3.301. Such re-interpretation is BAD POLICY as it leaves the MVC opened to charges of arbitrariness. Changes in interpretation should only occur when the language is clarified or a regulation is changed for prospective applicants only.

ADDITIONAL ISSUE: Section 3.301 indicates it applies to "commercial, storage, office and/or industrial lands or building(s)." It does NOT apply to either mixed use or residential buildings, or residential portions of buildings. But, what are "commercial, storage, office and/or industrial lands?" This is without a definition and is extremely ambiguous and vague. If a B-1 zone allows residences, and B-1 zoned parcel is vacant....what type of land is it? The "lands" definition needs to be worked up. I suspect that the current or prospective use of the land where no building is involved was what had been originally intended. If this is so, the 3,301 language should be altered. Until such time, the "lands" portion is so indecipherable that it should have no application. Further, "storage" is also vague. Is parking a form of "storage?"

3.301 (e) [Change of use/increase in intensity of use] is a discretionary referral, that has been rarely used. There is a very good reason. If one were to strictly read and apply this section, it would catch EVERYTHING and makes no sense.

#### Definitions

2.12 Change Of Use: A change of use from one use category to another use category, such as a change from residential to commercial; wholesale to retail; commercial to industrial; semi-public/municipal to any other category; retail to food service; sit-down restaurant to take-out or fast food restaurant; or addition of take-out to a sit-down restaurant. Note: A change in ownership does not necessarily mean a change in use. However, if a change in ownership entails an increase in the intensity of use (see definition below) or a change in the type of use, or if it triggers any item on this checklist, then the project should be referred to the Commission. If the referring board or official is uncertain about whether or not to refer a change in ownership or a change in use, call the Executive Director for assistance.

2.19 Increase In Intensity Of Use: Any anticipated increase in anyone of the following: a.) Vehicle and/or pedestrian traffic; b) parking requirements c) lot coverage percentage; d) products or services offered; e) hours of operation; f) water usage; g) wastewater flow; h) energy use; i) marine traffic

The project does not propose to change any use. There is no increase in the number of units, wastewater flow and no new parking is required. But, because the building is having a new wing and a new section of attic, even though below the 1000 sf threshold for mandatory review, the lot coverage ratio is being changed. This DOES mean there might be an increase in the intensity of use, pursuant to section 2.19 defining what might be an increase in the intensity of use. Thus, any increase in the size of any building on commercial

land, if one were to strictly interpret this section, would require a concurrence type review by the MVC. A tool shed or even a piece of trimboard that sticks out further than the piece it replaced on a commercial property, or even a larger light fixture (more energy used) would require review, at least concurrence review. If everything that should be sent under this section, if it is to be read so strictly, is sent, the MVC would be totally clogged with concurrence reviews. Thankfully, local building inspectors USUALLY apply some common sense. This section should NOT be so strictly interpreted. If the MVC is to be even handed, if I am to be reviewed for concurrence under this scenario, every bay window on a commercial building should be referred as well. To handle this, I suggest that the thresholds of each item on the addendum must be performance based - set percentages or wastewater flows, etc.

3.401 Any development, including the expansion of an existing development, which proposes to create or accommodate: d) four (4) or more premises which mix residential with business, office or industrial uses.

"Premises" are not defined. Vague, and should be defined, though, without waiving my objection and position, will consider it synonymous with "units."

"Accommodate" is likewise not defined and too vague. Arguably these would have to be new "premises" even if within the existing structure. I was on the MVC when this was inserted in the checklist. While I did not agree with it and was out voted, largely because of the poor definitions, the intention was to have some sort of review where a large building was being broken up into multiple units to create a shopping center or office complex, for e.g. The Whale Building on Beach Road was a cited example. The term "premises" was used and intended to include situations where multiple shared offices were set up within one unit. As such I argued it was unenforceable and impractical. The number four was intended to mean four NEW premises and NOT where there were five and fewer than four were added. Such situations, if review at the local level was wanted were thought to be sent by the discretionary review (fka as "cross town").

This project proposes no new units at all. None are being "created." An existing development of five units is being expanded, but only three units have any expansion. Two commercial units in the rear are being expanded (by 485 sf each) and the apartment is going to have a new hallway totaling 28.5sf.

The ZBA has reviewed the original proposal described below and set conditions. They loved the original proposal. I will have to go back to them to modify construction timing related conditions and a reduction in the scope of the plan. If my concerns raised above can be addressed as I noted, I might revive the original proposal.

QUERY: Does the MVC have a written policy or regulation on the procedure to confirm "no MVC action required" in the case of an erroneous referral? I believe there is no written policy but the precedent has been for the Executive Director, after consultation with

the Chairs of the MVC and LUPC, to return the referral indicating, in writing, that the application does NOT trigger the check list item, and would not otherwise require MVC DRI action, whether discretionary or otherwise. There should be tracking and history maintained on each of these. A "Referral #" or "Inquiry #" should be attached to each referral and inquiry for interpretation. The "referral #" could then become a DRI # if correct, and would simply retain the Ref # if returned to the Town. Inquiries on interpretation should also get a filing or Inquiry # and the MVC should issue a "ruling #" or "Interpretation #". All should be denoted as a note or footnote attached to the DRI checklist to create a legislative or quasi-judicial history as guideline for future rulings. This would eliminate claims of arbitrary interpretation and favoritism.

#### HISTORY

In the early 1990's, on two occasions, special permits and (on one occasion, when the special permit was used) a building permit were issued to add an "el" onto the rear of the building at the back of what has become known as "Push Cart Alley". The earlier proposals called for a new addition of a two story el connected to the rear of the building with a new storefront facing Main St. which would be occupied by expanded existing businesses in the building. Thus, no new units were then proposed. Each of the two new floors would be 475 sf, totaling 950 sf. The existing interior of the building would also be modified to rebuild the core of the building for a common set of stairs, a handicap lift, and handicapped bathrooms. The single existing apartment upstairs that runs from the second to the third floor was also to be renovated. (The third floor exists only in the front 40% of the building.) The retaining walls and slab for the el were constructed, but, for a variety of different reasons, the rest of the project was never then completed. Not once was MVC referral ever made.

#### PROCESSING OF APPLICATION

In 2004, these older plans were revised to make the el a three story addition with a new third floor added from where the existing third floor ends, so that the entire structure would be three floors. The 2003 plan included taking the third floor and making the old section a new separate three bedroom apartment and the rear new section a large one bedroom apartment. The building inspector told me I needed to go to the ZBA for a special permit, and that was all before I could return to him for the building permit. The ZBA, in Oct/Nov '04, embraced the plan but limited the construction period to the off-season so as to not interrupt business activities in the downtown. Unfortunately, the permit did not go firm (the appeal period expiring) until after Christmas, making construction for the 2005 winter impossible. A modified special permit was sought to enable construction to start in late October 2005 and be largely done by May 2006. In June, 2005, I sat with the building inspector to review what specific plans he would need to issue the building permit. We met again in August to make see if certain plans, like electrical engineered plans, could be given after the building permit was issued. This list of needed plans etc. was submitted in September, 2005. The only issue of concern regarding possible MVC referral from these plans

was, as Mr. Barwick stated, "the issue of four premises being accommodated" since we were adding two new apartments under this original proposal was raised by Mr. Barwick (3.401). He was not sure how to interpret it. He asked the MVC to please divine an answer. Nearly six weeks later, the answer came back, after much debate within the MVC, and no strict vote on interpretation and no consensus. This checklist item 3.401 c and d would be interpreted to mean that if the number of units to be added pushed the total to be 4 or more, MVC review was mandated. As I noted above, this is a new interpretation. In light of this, and seeking to get the project started, I determined to remove the new apartment units so that 3.401 would NOT be triggered (i.e. No new premises or units), since this was the only trigger he said he saw.

New plans were submitted to Mr. Barwick in December eliminating the two new apartments. In early February, Mr. Barwick informed me that, despite the elimination of the new units, he would be referring the project to the MVC under yet newfound criteria as I have cited at the top hereof. Each of these bases is new and it seems arbitrary to keep trying to raise roadblocks.

I would like to meet with you to review these concerns. Thank you for your attention. Please advise.

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