

Submitted by Rachel Orr
for the
Tisbury Planning Board and Tisbury Select Board Joint Meeting

4:30 pm May 22, 2023
Katharine Cornell Theater

Unregulated Industrial Expansion within the Town

Tisbury's Zoning Bylaw states it is to be "restrictive and not permissive"¹, so if a use is not mentioned in the bylaw, it is not permitted by right. Despite this, in the last five years Tisbury has seen a marked expansion of industrial uses not mentioned in the Tisbury Zoning Bylaw. This increase is a symptom of the Island-wide need for space to accommodate the following activities: landscaping and contractor storage, staging and commercial vehicle parking; energy generation for peak load demand; container storage; boat storage; bulk material storage; space for businesses that don't require a primary structure; and mining and excavation.

Much of this industrial expansion has been in the B2 District on parcels bordering Residential Districts. All of it has occurred within Environmental Justice blocks as determined in 2022 by the Commonwealth of Massachusetts based upon updated 2020 US Census data². Some of this expansion has occurred within the Groundwater Protection District for the Sanborn and Manter wells, a district that requires a special permit for some uses³. Some of it is on Town-owned property, or private property where the Town has easement rights and other property rights.

¹ *10.04.03 Interpretation:*

The Zoning Bylaws of the Town of Tisbury are to be interpreted restrictive and not permissive.

² As defined by Chapter 8 of the Acts of 2021, in Massachusetts an environmental justice population is a neighborhood where one or more of the following criteria are true:

- the annual median household income is 65 percent or less of the statewide annual median household income
- minorities make up 40 percent or more of the population
- 25 percent or more of households identify as speaking English less than "very well"
- minorities make up 25 percent or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150 percent of the statewide annual median household income.

³ *09.11 GROUNDWATER PROTECTION DISTRICT 06. USE REGULATIONS*

06.03 Uses and Activities Requiring a Special Permit

The following uses and activities are permitted only upon the issuance of a Special Permit by the Special Permit Granting Authority (SPGA) under such conditions as they may require:

- a. enlargement or alteration of existing uses that do not conform to the Groundwater Protection District;
- b. those activities that involve the handling of toxic or hazardous materials in quantities greater than those associated with normal household use, permitted in the underlying zoning (except as prohibited under Section .02). Such activities shall require a Special Permit to prevent contamination of groundwater;
- c. any use that will render impervious more than 15% or 2,500 square feet of any lot, whichever is greater. A system for groundwater recharge must be provided which does not degrade groundwater quality. For non-residential uses, recharge shall be by storm water infiltration basins or similar system covered with natural vegetation, and dry wells shall be used only where other methods are unfeasible. For all non-residential uses, all such basins and wells shall be preceded by oil, grease, and sediment traps to facilitate removal of contamination. Any and all recharge areas shall be permanently maintained in full working order by the owner.

In the B2 Commercial District, the closest defined uses in the Zoning Bylaw to the industrial uses that have recently proliferated are light manufacturing, lumberyards and other production shop type work, and automotive parts and junkyards⁴, though the expanding uses do not neatly fit any of these categories. Regarding the general Zoning Bylaw, the regulations pertaining to toxic or hazardous material⁵, excavation and topographic alteration⁶, mining⁷ and parking⁸ bear on these types of industrial uses.

The issue of industrial activities not defined or regulated in the Zoning Bylaw needs to be addressed within the Tisbury Master Plan and within the upcoming Zoning Bylaw review. In the meantime, time is a factor in preserving certain rights to regulate uses and to enforce deed restrictions held by the Town, and to determine what oversight currently exists within the Bylaw that may have been overlooked. As an example of what has been happening, below is a timeline of the industrial expansion of the B2 district in the Bare Hill section of town. This area is part of a designated Environmental Justice block that qualifies

⁴5.21.04 *Uses permitted (B2)*

Light manufacturing (free of excessive sound, light, odor, vibration, commotion or other noxious disturbance) where all materials are stored indoors, or screened from public view, provided shipping and receiving activities take place on the reverse side (rear) of the structure so as to be away from public entrances.

05.22 *Uses Requiring a Permit from the Board of Appeals (B2)*

.01 Lumber yard, wood milling shop, sheet metal shop, automotive vehicular sales and/or services (includes all forms of automotive repair and service, body work and painting; does not include stores selling parts and packaged materials only).

.02 Activities regularly involving welding, spray painting, toxic chemicals or hazardous materials.

.07 Automobile dismantling, used yard parts, salvage (junk) yard.

The Board of Appeals may grant a Special Permit provided:

- the site, as enclosed and screened, is at least 150 feet from a principal way, road, or street;
- the distance from ground surface to ground water is determined and found to be not less than twenty (20) feet;
- impervious raised pads rimmed and provided for the storage of chemicals (including petroleum products) and heavy metals;
- all federal, state and local regulations applicable to hazardous materials/wastes are complied with;
- no materials of any kind shall be disposed of subsurface; and,
- the site is secured against unauthorized entry use.

⁵ 02.89 *Toxic or Hazardous Material:*

Any substance or mixture of physical, chemical, or infectious characteristics posing a significant, actual or potential hazard to water supplies or other hazards to human health if such substance or mixture were discharged to land, water or air of the Town of Tisbury. Toxic or hazardous materials include, without limitation, synthetic organic chemicals, petroleum products, heavy metals, radioactive or infectious wastes, acids and alkalis, and all substances defined as Toxic or Hazardous under Massachusetts General Laws (MGL) Chapter 21C and 21E and 310 CMR 30.00, and also include such products as solvents and thinners in quantities greater than normal household use.

⁶ 07.12 *EXCAVATION AND TOPOGRAPHIC ALTERATION*

When planned or intended construction would require permits, or other authorizations, no excavation, removal or relocation of topsoil shall occur prior to the granting of all permits, or authorizations, necessary to complete the construction.

The provisions of this section shall not apply to:

- activities related to locating, installing or testing a water supply well;
- the construction of a single minimum width, un-improved and un-surfaced access road;

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⁷ 02.45 *Mining:*

The removal or relocation of geological materials such as sand, gravel, metallic ores or bedrock.

⁸ 07.07 *PARKING REGULATIONS:*

.01 General Requirements All Off-street Parking shall be accessory to a permitted use.

Applications for permits requiring twenty (20) or more parking spaces, shall be accompanied by a parking plan of the lot and be referred forthwith to the Planning Board for their review and written advisory report; and no permits for construction shall be issued prior to the receipt of said report unless thirty (30) days have elapsed from the date of referral.

Plans subject to Site Plan Review by the Planning Board shall show existing and proposed topography, water, sanitary sewerage and storm drainage, and response to criteria for safety provisions and for landscaping.

.03 Business District II

All increase in parking demand created by new structures or uses, additions to existing structures or uses, and change of use in existing structures, shall be accommodated on the premises entirely off-street.

for both income and minority population reasons. The median household income in the block is \$48,382; minorities make up 29.5% of the population and 15.4% of the households have language isolation. The area has many overlapping public uses. Part of it is within the Groundwater Protection District established to protect the Sanborn well. Of additional concern, there is potential for the Town to lose by inaction certain rights and privileges currently held in this area. The need to clarify Town goals and regulations is critical.

Bare Hill Timeline:

1998 — Purchase of Duart properties (AP 21-B-34, 34.1, 34.2) by the Town of Tisbury and the Land Bank. The Town-acquired portion of the property was taken by eminent domain for “protection of the aquifer zone 1 and zone 2 of a public water supply well (Sanborn), acquisition of open space and potential municipal use.”⁹ The deal included a 10’ wide public trail easement over the Town Land at 21-B-34 to connect Edgartown Road to Bare Hill Preserve and beyond.

2011 — Connector Road easement and land trade with Island Realty Trust. Tisbury received an easement over Island Realty Trust property (AP 21-B-31, 31.1 and 31.2) in exchange for a portion of the former Duart property. The area conveyed to Island Realty Trust included a section of the 10-foot public trail easement and a portion of the Connector Road easement. The deed contained a restriction on use, stipulating that the land should be used for the construction and operation of a Title V septic system to support by right development of the abutting Island Realty Trust property.

2019 — Island Realty Trust cleared and leveled the forested portion of 21-B-31.2, including the land acquired from the Town and restricted to septic system purposes. The excavation of Bare Hill resulted in an abrupt grade change at the border of the Land Bank’s Bare Hill Preserve, disrupting the 10’ wide public trail easement. Stairs had to be installed to correct an unsafe condition for users of the trail easement.

2020 to date — the area of the Island Realty Trust property acquired from the town now has a landscaping/construction company operating on it. This commercial use is not defined in the zoning by-laws. The remainder of the cleared area of the property is a parking area for large commercial vehicles, trailers and for outdoor materials storage.

Power Line Corridor Timeline:

1941 — Cape and Vineyard Electric Co. was granted easements for transmission and distribution lines within a 100-foot swath running from Vineyard Sound to the Edgartown Road. The easements included rights to maintain the system and its fixtures, to clear vegetation to the full 100’ width and to pass through the easement area with utility vehicles. There was no clause regarding on-site energy generation in the easements. The grantors reserved rights to cultivate between and under the poles and lines so long as it did not interfere with the power lines.

2005 — Portion of Town Property under Power lines on Bare Hill cleared for parking and used sporadically.

2012-2014 — Tisbury installed a solar field and NSTAR created a staging area under the power lines adjacent to the solar field within the Groundwater Protection District.

2017 — Parking area on Town property on Bare Hill expanded and used consistently.

2021 — Eversource power cable failed; extra generators to meet energy demands are located on staging area under power lines (this staging area had previously been used from time to time to address peak demand by portable diesel generators). RAP material (consisting of waste asphalt from the Airport runway repaving project) placed under the power lines across Town property within the Groundwater Protection District.

2022-23 — Eversource relocates the portable diesel generators to top of Bare Hill under the power lines closer to the Sanborn Well and Residential Districts and expands use of area under the power lines to stage sub-contractors and other activities.

⁹ Order of Taking and Award of Damages, Dukes County Registry of Deeds Book 749, Page 135, following Article 18 of the Town Meeting held on April 8, 1998.