

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss

LAND COURT DEPARTMENT
Docket No.

TRUC ORIENT EXPRESS, INC, TRAI
THI DUONG, and TRUC N. NGUYEN,

Plaintiffs

vs.

DANA BIXBY, SUSAN COXON,
GUNNAR GUDMUNDSON, ANDREW
FUDGE, and SARAH THORNE, as they
are members of the WEST STOCKBRIDGE
PLANNING BOARD, and TWO HARRIS
ST., LLC,

Defendants

COMPLAINT

1. This is an action pursuant to MGL c. 40A s. 17 to review a decision by the Planning Board of the Town of West Stockbridge, County of Berkshire, Massachusetts (the "Planning Board") to grant a Special Permit for the operation of a multidisciplinary performing arts venue.

Plaintiffs

2. Plaintiff Truc Orient Express, Inc. ("TOE") owns a building and operates two businesses at 3 Harris St., West Stockbridge, MA. TOE is a direct abutter to the business which has been granted a special permit.
3. Plaintiff Trai Thi Duong owns a residence at 1 Harris St., West Stockbridge, MA, and is a direct abutter to the business which has been granted a special permit.
4. Plaintiff Truc N. Nguyen resides at the residence at 1 Harris St., West Stockbridge, MA, and is an abutter to the business which has been granted a special permit.

Defendants

5. Four of the defendants are members of the West Stockbridge Planning Board, and participated in the decision in question. A fifth is an Associate Member of the said Planning Board, and also participated in the decision in question. Their business addresses are as follows:
 - a. Defendant Dana Bixby, c/o West Stockbridge Town Hall, 21 State Line Road, P.O. Box 163, West Stockbridge, MA 01266.
 - b. Defendant Susan Coxon, c/o West Stockbridge Town Hall, 21 State Line Road, P.O. Box 163, West Stockbridge, MA 01266.

- c. Defendant Gunnar Gudmundson, c/o West Stockbridge Town Hall, 21 State Line Road, P.O. Box 163, West Stockbridge, MA 01266.
 - d. Defendant Andrew Fudge, c/o West Stockbridge Town Hall, 21 State Line Road, P.O. Box 163, West Stockbridge, MA 01266.
 - e. Defendant Sarah Thorne (the Associate Member), c/o West Stockbridge Town Hall, 21 State Line Road, P.O. Box 163, West Stockbridge, MA 01266..
6. Defendant TWO-HARRIS ST., LLC ("Two Harris") is a Massachusetts Limited Liability Company, and is the applicant for the Special Permit. Two Harris's record address is 2 Harris Street, West Stockbridge, MA 01266.

The Application

- 7. On or about October 7, 2022, TWO HARRIS ST., LLC filed with West Stockbridge town officials an application to the Planning Board ("the Board") for a Special Permit under Sec. 4.11.1.20 of the Zoning Bylaw ("Commercial Amusement") for the operation of a multidisciplinary performing arts venue.
- 8. The uses sought to be permitted are a continuation of uses under a prior one-year Special Permit, which prior uses had caused many problems and significant detriment to plaintiffs.
- 9. The application sought permission to allow music both outdoors and indoors (the indoor music being audible outdoors).

Detrimental Effect on Plaintiffs

- 10. Plaintiff Truc Orient Express, Inc. ("TOE"), operates a restaurant about fifty feet away from the building housing the performing arts venue.
- 11. The proposed music, some of which includes amplified bass and drums, is audible and can be physically felt within the restaurant and on the deck outside it, which is used for dining, and is thus extremely detrimental to TOE's business.
- 12. The house owned by plaintiff Duong and resided in by herself and plaintiff Nguyen is also about fifty feet from the music source. The music is heard and felt there as well, and seriously interferes with their general peace and quiet and ability to work from home, and their sleep.

The Decision

- 13. On or about December 8, 2022, the Planning Board filed with the West Stockbridge Town Clerk a Notice of Decision stating that said Special Permit had been granted. A copy of said Notice (which contains the decision itself), certified by the West Stockbridge Town Clerk, is appended hereto as Exhibit A and expressly made a part hereof.
- 14. The findings required by the Zoning Bylaw, Sec. 6.3.4, which were made by the Planning Board, are unsupported by the evidence and are arbitrary and capricious, in particular the Board's findings relative to:

- a. **Subsection 6.3.4 c** - that the proposed use “will not be detrimental to adjacent uses or to the established or future character of the neighborhood”; and
 - b. **Subsection 6.3.4 e** - that the proposed use “will not overload any . . . municipal facility to such an extent that the proposed use or any existing use in the immediate . . . will be unduly subjected to hazards affecting public health, safety, or general welfare.”
15. Although the Decision contained conditions which may ameliorate to some extent the detriment to plaintiffs, they do not effectively do so.
 16. In addition, several of the conditions are not practical or enforceable, including, but not limited to, portions of Condition 6 (Monitoring Protocol).

Procedural Deficiencies

17. The Decision of the Planning Board was based in part on significant material which was either:
 - a. not introduced at the public hearing or made part of record prior to the closure of the hearing; or
 - b. introduced at the final session of the public hearing, too late to allow meaningful public review and comment.
18. The Decision was based in part on deliberation of the Board outside the public hearing, in contravention of the Open Meeting Law.
19. The Associate Member, Sarah Thorne, who participated fully in the hearing and deliberation and voted on the Special Permit, had a conflict which should have prevented her from participating and voting. Associate Member Thorne was asked prior to the beginning of the hearing to recuse herself and declined to do so.

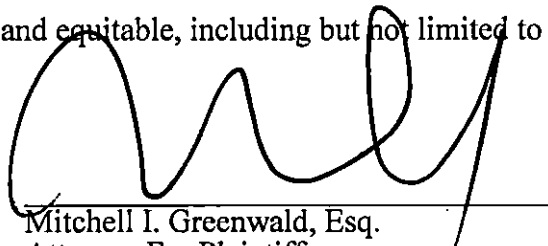
Claims

20. The granting of the Special Permit exceeded the authority of the Planning Board for at least the following reasons:
 - a. The granting of the Special Permit was not justified in light of the substantive requirements of the Zoning Bylaw, was arbitrary and capricious, and was unsupported by substantial evidence.
 - b. The participation of Associate Member Thorne was not appropriate for the reasons stated above.
 - c. The public hearing was procedurally irregular.

WHEREFORE PLAINTIFFS PRAY:

1. That the Court annul the decision of the West Stockbridge Planning Board in granting the Special Permit.

2. For such other relief as may be just and equitable, including but not limited to modification of the Special Permit.

A handwritten signature in black ink, appearing to read 'Mitchell I. Greenwald', is written over a horizontal line.

Mitchell I. Greenwald, Esq.
Attorney For Plaintiffs
Law Office of Mitchell I. Greenwald
29 Wendell Avenue, Suite #2
Pittsfield, MA 01201
(413) 344-0022
BBO# 542032

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Date Filed with ^{Asst.} Town Clerk 12/8/22 ^{Asst.} Town Clerk Marilyn Ryan

**TOWN OF WEST STOCKBRIDGE, MASSACHUSETTS
PLANNING BOARD**

NOTICE OF DECISION ON A SPECIAL PERMIT

Date: December 5, 2022

Applicant: 2 Harris St LLC
2 Harris St
West Stockbridge, MA 01266
Attn: Amy Brentano

Premises Affected: 2 Harris St
West Stockbridge, Ma 01266

Written Application was made to the Planning Board on October 7, 2022 for a "Commercial Amusement" Special Permit, pursuant to Section 4.11.1.20 of the West Stockbridge Zoning Bylaw, to operate a multi-disciplinary performing arts venue known as "The Foundry" on the property at 2 Harris St in West Stockbridge. The permitted use and the locations of the use on the property are more particularly defined and set forth in the Application and materials submitted by the Applicant in support thereof, all of which are incorporated herein and on which the Board relied in making its findings and votes.

The Board opened a public hearing on the Application on Nov 1, 2022, and held continued sessions of the public hearing on: 11/7/22, 11/14/22, 11/28/22, and 12/5/22. At the hearing on 12/5/22, the Planning Board closed the public hearing, voted to establish conditions, grant related parking special permits, and make the required findings, and thereafter **VOTED TO GRANT** the requested special permit for "Commercial Amusement" per sec. 4.11.1.20 including, but not limited to, educational workshops, live music of all genres, dance, comedy, and community-based events, subject to the Conditions and Incorporated Special Permits for parking, and based upon the Findings, set forth herein.

The following Board members and alternate attended each session of the public hearing and made the votes of the Board as set forth herein:

Dana Bixby, Chair
Susan Coxon, Member
Gunnar Gudmundson, Member
Andrew Fudge, Member
Sarah Thorne, Alternate

At the commencement of the hearing the Chair appointed Sarah Thorne to sit as a member of the Board to hear and decide the Application in place of Board member Ryan Beattie, who had recused himself from participation.

Conditions

Condition 1

The Foundry may present the same range of programming that it has been programming for the last three years including, but not limited to, educational workshops, live music of all genres, dance, comedy, and community-based events.

Condition 2

The Merritt Way public easement road shall be kept open at all times.

Conditions, cont'd

Condition 3

indoor entertainment is permitted provided that:

- a) Maximum Sound Pressure levels at the property line shall be as per Condition 6.
- b) The Monitoring Protocol established by Condition 6 is carried out.
- c) Performances are allowed 7 days per week and all amplified music shall all end no later than 10 pm.

Condition 4

The patio bar, as shown on the plans, is allowed to have music provided that:

- a) Maximum Sound Pressure levels at the property line shall be as per Condition 6.
- b) The Monitoring Protocol established by Condition 6 is carried out.
- c) live music on the patio bar shall end no later than 9 PM.
- d) two performers maximum
- e) no amplified drums or bass permitted
- f) all setup of sound equipment outdoors shall be done so that sound is directed away from residential neighbors and arranged for reflection of sound to be away from residential neighbors.
- g) live performers are allowed only on days when there are no other mainstream events.
- h) the patio bar may have recorded background music when there are no live performers.

Condition 5

During the months of April through October up to four non-consecutive 1-day outdoor events may be held on the Foundry Green provided that:

- a) An Entertainment License has been granted by the Selectboard for the event.
- b) Sound Pressure levels at the property line shall be limited as per the following:
 - maximum SPL of 70 dB (A) at the nearest property line.
 - maximum C weighted sound pressure level as per Condition 6 at the nearest property line.
- c) The Monitoring Protocol established by Condition 6 is carried out.
- d) Events may only between the hours of 10 am and dusk
- e) All setup of sound equipment outdoors shall be done so that sound is directed away from residential neighbors and arranged for reflection of sound to be away from residential neighbors.

Condition 6

Monitoring Protocol

- a) The Applicant shall provide sound monitoring for the duration of all performances that shows that the Sound Pressure Level (SPL) limits set by Condition 6g of this permit have not been exceeded, except as allowed by Condition 6g.
- b) The applicant shall take outdoor sound measurements at the Harris St property line using both A and C weighted scales for the duration of amplified performances.
- c) The Applicant's sound measuring equipment shall be installed at the Harris St property line, facing the Foundry building, and approximately 16' from the west end of the Foundry building.
- d) Sound measuring equipment used by the Applicant shall be "logging" type meters, for both A and C weighted scales, that produce an electronic record that can be reviewed by the Zoning Enforcement Officer (ZEO). The equipment used by the Applicant must be approved by the ZEO.
- e) Sound measuring equipment used by the Applicant shall be calibrated as required by the equipment manufacturer, and evidence of this calibration must be submitted and approved by the Zoning Enforcement Officer (ZOE) upon request. Review of calibration shall be made annually.
- f) Supervision and management of this Sound Monitoring Protocol shall be done by the ZEO, with the assistance of a sound engineer consultant hired by the Town, if the ZEO requests.
- g) Maximum Sound Pressure Levels (SPLs) shall be as follows:
 - The A weighted SPL at the property line shall not exceed 60dB(A), except for outdoor events as allowed by condition #5.
 - The C weighted SPL at the property line shall not exceed 65dB(C).

Condition 6, cont'd

- h) SPLs shall be measured with an integration time of 1 second, and a sampling rate between 2-5 seconds. SPLs may exceed stated maximums for bursts of 30 sec, with no more than 2 minutes of sound over the maximum during a performance.
- i) The Zoning Enforcement Officer, if notified of an alleged violation of the maximum sound level conditions of this permit, shall request and be given the written measurements from the Foundry's measuring protocol within 48 hours of a request to the Applicant.
- j) Failure to monitor shall be deemed failure to comply and shall be subject to the maximum fine. Failure to provide a record of the performance sound levels shall be deemed failure to comply and shall be subject to the maximum fine.

Condition 7

The Foundry is allowed to continue to donate the use of the land known as the "Foundry Green" to the West Stockbridge Farmer's Market one time per week, in the afternoon, April to October, with outdoor amplified music similar to the same extent as what has existed at the Farmer's Market previously. The Foundry is not responsible for management of music at the Farmer's Market.

Condition 8

Take reasonable steps to control parking and prevent parking trespass on neighboring property. "Reasonable steps" shall mean:

- a) Notification of ticket buyers electronically when they buy tickets about where to park (Foundry parking and municipal parking) and where not to park (neighbor's property) This notification shall include a graphic parking map showing locations of onsite and municipal parking, and locations of private parking where Foundry parking is not allowed.
 - b) Staff patrol of parking with directing of people to proper parking locations
 - c) Informing patrons a second time when they arrive about parking limits and advising them that they may be fined or towed if they do not park in the proper locations.
- It is recognized that the Foundry cannot 100% control the behavior of people and that this condition is limited to the Foundry taking "reasonable steps", as outlined above, to manage parking.

Condition 9

Comply with applicable regulations and laws, and any future sound bylaw that the town may enact.

Condition 10

This special permit shall apply only to the "Foundry" venue as operated by the Applicant and shall terminate if the 2 Harris St property is sold.

The Board made the following findings, in accordance with Section 6.3.4 of the Zoning Bylaws, with respect to the special permits granted:

A) Is in compliance with all provisions and requirements of this bylaw, and in harmony with its general intent and purpose:

- The applicant generates economic activity for the village center that supports and enhances the tax base, thus supporting the intent of the zoning in ensuring the value of property.
- Parking requirements have been met, based on conditions.

Findings, cont'd

B) is essential or desirable to the public convenience or welfare at the proposed location;

Many letters of support have been received, from abutters, residents and non residents attesting to the value of the Foundry to the community, to the life of the village center, to the economy of the village center, and to Berkshire County cultural life.

C) Will not be detrimental to adjacent uses or to the established or future character of the neighborhood;

- The proposal is consistent with the established character of the neighborhood, as evidenced by the record regarding the history and current status of music venues in the Village Center.
- The proposal enhances and supports the future character of the Village Center because of the support it gives to the economy, cultural life, and identity of the Village Center, as evidenced by the letters of support from abutters who are business owners in the Village Center
- One abutter, the owner of #1 and #3 Harris St, has objected to the proposed use based on sound and parking detriment. 2 abutters have objected based on detriment to 1 & 3 Harris St. 9 Abutters, and 5 residents renting abutters' property have given written evidence or spoken at the hearing in favor of the proposed use including giving evidence of significant benefit to the Village Center and the Town.
- The conditions of the permit, and in particular the conditions relating to sound and parking, adequately mitigate potential detriment to the nearest adjacent uses consistent with existing uses and the intent of the Zoning Bylaw as demonstrated by the uses allowed in the underlying district.

D) Will not create undue traffic congestion, or unduly impair pedestrian safety;

- The applicant has in the past and continues to propose management and control of parking and avoidance of parking trespass on neighboring property. There is abundant municipal parking within 300' of The Foundry. Events mostly occur in the evening where there is minimal other concurrent demand on municipal parking

E) Will not overload any public water, drainage, or sewer system or any other municipal facility to such an extent that the proposed use or any existing use in the immediate area or in any other area of the Town will be unduly subjected to hazards affecting public health, safety, or general welfare.

- The applicant supplied documentation of sewer load and comparison of that load as less than that of a single family residence.
- A Monitoring Protocol is required of the Applicant relative to sound limits so as to complement the capacities of the inspection facilities of the Town so that the inspection facilities of the Town are not overloaded.

Incorporated Special Permits

Within the primary Special Permit issued for Commercial Amusement, which triggered application of parking requirements set forth in Section 6.2.2 of the Zoning Bylaw, the Board voted to grant two additional Special Permits for relief from otherwise applicable parking requirements, as follows:

Incorporated Special Permit 1a

Based on an off-site parking requirement of 37 spaces, per the calculations provided by the Applicant, and the parking drawing provided by the Applicant showing 20 parking spaces on site, the Board voted to grant a Special Permit pursuant to Section 6.2.2.b to allow shared parking on municipal spaces for 17 of the required 37 spaces. The Planning Board finds that 59 municipal parking spaces are available within 300' of the lot line.

VOTE: The Board voted unanimously (5-0) to grant this special permit.

Incorporated Special Permits, cont'd

Incorporated Special Permit 1b

For outdoor events on the Foundry Green, as provided for under Condition 5, without parking on the Foundry Green, available parking on site is reduced to 8 spaces. The Board voted to grant a Special Permit under Sections 6.2.2.f and 6.2.7 to reduce required onsite parking to 8 spaces and to allow up to 29 spaces on municipal parking for outdoor events per Condition 5.

VOTE: The Board voted unanimously (5-0) to grant this special permit.

Final Decision:

On 12/5/22 the Planning Board **VOTED TO GRANT** the requested special permit for "Commercial Amusement" per sec. 4.11.1.20 including, but not limited to, educational workshops, live music of all genres, dance, comedy, and community-based events, subject to the Conditions and Incorporated Special Permits for parking, and based upon the Findings, all as set forth herein.

VOTE: The Board voted unanimously (5-0) to grant this special permit.

Record of proceeding

A detailed record of the proceedings and all written submissions made in support thereof or opposition thereto, including the "Notice for Recording", is on file at the office of the Town Clerk at the Town Hall.

West Stockbridge Planning Board



Dana Bixby, Chair

A True copy Attest:

Marie J Ryan, MMC
Asst. Town Clerk

IMPORTANT: Any appeal from the decision of the Planning Board can be made only to the Court and must be pursuant to Section 17, Chapter 40A (G.L.) as amended, and must be filed within twenty (20) days after the date of filing of the decision with the Town Clerk.

CERTIFICATE BY THE TOWN CLERK FOR FILING OF THE DECISION IN THE REGISTRY

This is to certify that twenty (20) days have elapsed since filing of the above decision with this office and
☐ no appeal has been filed, or
☐ an appeal has been filed pursuant to notice filed with his office on _____.

Town Clerk

date