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2023 AUG 29 A 10:52

August 28, 2023

CITY CLERK'S OFFICE
SOMERVILLE, MA

Orsola Susan Fontano, Chair
Zoning Board of Appeals
City of Somerville
City Hall - 93 Highland Avenue
Somerville, Massachusetts 02143

Re: Appeal of ISD Determination - Exercise of Hardship Variance
Hardship Variance (P&Z 21-140) as Extended (P&Z 22-138)
620 Broadway, 620 Broadway, LLC

Dear Chair Fontano and Members of the Zoning Board of Appeals:

Please note that the undersigned represents 620 Broadway, LLC (Applicant) in connection with the redevelopment (Project) of 620 Broadway (Property).

This is an appeal of the Inspectional Services Department's (ISD) incorrect interpretation that the captioned Hardship Variance, which was unanimously granted and extended by the Board, has not been exercised and/or equitably tolled as defined under Section 10 of M.G.L. c. 40A (Zoning Act) and the rulings of our courts (ISD Memo).

For the reasons set forth below, we respectfully ask the Board to annul the ISD Memo, to reverse the ISD interpretation and to find that the Hardship Variance has been exercised and/or equitably tolled, has not lapsed and is in full force and effect.

A. BOARD JURISDICTION

The Board has authority to hear and to rule on the subject matter of this appeal pursuant to Somerville Zoning Ordinance (SZO) Sections 15.4.3(e) and 15.5.2., subject to Zoning Act, §§ 8, 14 and 15.

B. BACKGROUND

1. On December 15, 2021, the Hardship Variance was granted duly and unanimously by the Board to permit the Project to construct a one-story building; but only if the Project subsequently obtained a Special Permit for use and a Site Plan Approval from the Planning Board as required under the SZO (Project PB Approvals).

2. As recited in the March 10, 2023 OSPCD Staff Memorandum respecting the required Project PB Approvals, throughout 2022 and into early 2023, the Applicant duly engaged the City's

comprehensive pre-filing process under SZO Article 15 (and ancillary Submittal Manual) in order to qualify to file applications for the Project PB Approvals.

3. Pursuant to the SZO, acceptable applications for the Project PB Approvals necessitated the employment of architects, various engineers, lawyers and certain consultants to prepare plans, reports and related materials reflecting the one-story building authorized under the Hardship Variance, as well as other applicable SZO submittal requirements.

4. As further noted in the March 10, 2023 OSPCD Staff Memorandum, the Applicant entered into a Host Community Agreement with the City on April 26, 2021, which was revised, and reaffirmed by the City, expressly to permit a one-story building when it became clear that a 3-5 story building was not viable at the locus.

5. The public hearing relative to the Project PB Approvals commenced April 6, 2023, and is ongoing, with the latest public-hearing session occurring July 20, 2023. At present, the public hearing is continued to September 7, 2023.

6. The Applicant timely filed an application to extend the Hardship Variance, which the Board granted unanimously on December 14, 2022. The Hardship Variance extension decision was recorded timely with the Registry of Deeds on February 6, 2023.

7. On May 19, 2023, the Applicant timely filed an application to further extend the Variance.[1]

8. On July 25, 2023, in accordance with SZO Section 15.4.3, a request for a written interpretation regarding the captioned matter was filed with ISD, supported by a comprehensive legal analysis (Applicant Brief). For the Board's consideration, that request and the Applicant Brief are affixed hereto under Tab A. This letter and the Applicant Brief sets forth the applicable and binding legal test required by the Zoning Act and our courts regarding when the Hardship Variance is exercised and/or equitably tolled (Exercise Test).

9. On August 14, 2023, the ISD Memo was provided to the Applicant. The ISD Memo is affixed hereto under Tab B. Curiously, as the Board will see, the ISD Memo does not acknowledge the Exercise Test as required by the Zoning Act and our courts. Instead, the ISD Memo mistakenly rests on a single decision, and in fact misconstrues and misapplies that decision in this case. Accordingly, the ISD Memo's conclusions are faulty regarding the exercise of the Hardship Variance, such that affirming the ISD Memo would be contrary to the Zoning Act.

10. Tab C hereto contains a newspaper article providing a common-sense, layperson's view of the Applicant's circumstances relative to the Hardship Variance. As will be discussed, our courts also

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[1] The City, through its planning department, conveyed to us that M.G.L. c. 40A, § 10 forbids a board of appeals from granting more than one variance extension. We know of no decisional law supporting that assertion, and we have personal experience with municipal boards of appeals that entertain and grant multiple variance extensions in appropriate cases. See Woods v. Newton, 351 Mass. 98 (1966) (where a legal impediment exists to the use of a benefit - here the Project PB Approvals – relief from otherwise applicable time limitations is permissible and should be given). See "Handbook of Massachusetts Land Use and Planning Law," 5th Edition, M. Bobrowski, Wolters Kluwer, § 10.10, p. 10-37, fn. 185.

largely embrace a common-sense approach to evaluating when a variance should be deemed exercised and/or equitably tolled, a standard of fairness that should apply in this case.

C. QUESTION PRESENTED; SHORT ANSWER; DISCUSSION

Question Presented

Whether under the Zoning Act, the Hardship Variance has been exercised and/or equitably tolled, has not lapsed and is in full force and effect?

Short Answer

For the following reasons, the Hardship Variance has been exercised and/or equitably tolled, has not lapsed and is in full force and effect.

Discussion

While we provide a thorough discussion of the controlling Exercise Test here, we also remind the Board that the Applicant Brief provided to ISD is affixed under Tab A hereto.

As a preliminary matter, please recall that the relief granted under the Hardship Variance was dimensional in nature – permitting the Project to construct a one-story building – and not a permit for a Project use. As such, the Hardship Variance by its terms does not authorize a particular use of the Property, that is, the Hardship Variance does not address the occupancy or use of the Property, only the height of the building to be constructed, but only after a Project use and a specific Site Plan subsequently is approved under the SZO.

The Hardship Variance alone does not authorize the construction of the Project building, because the SZO requires Site Plan Approval from the Planning Board prior to the construction of any new building on the Property. Moreover, according to OSPCD staff, pursuant to the SZO the Hardship Variance was a prerequisite and a precondition to the filing of applications for the Project PB Approvals. It follows, that in order to derive any benefit from the Hardship Variance, the Applicant subsequently had to seek and obtain the Project PB Approvals.

Accordingly, as a matter of common-sense and fairness, until the Project PB Approvals are granted there exists "a legal impediment" and an "equally real practical impediment" that precludes the Applicant from receiving a building permit from ISD to construct the one-story building permitted by the Hardship Variance.[2] In circumstances such as these, the controlling cases set forth in Footnote 2 hold that

[2] See generally, Belfer v. Building Comm'r of Boston, 363 Mass. 439 (1973) (court applies a common-sense solution that such legal or practical impediments warrant the equitable tolling of a variance pending just resolution of the impediments). See also Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 894 (2009) (affirming the Appeals Court, 72 Mass. App. Ct. 390, 394 (2008)) ([D]elays in fulfilling the prerequisites for obtaining a building permit under a variance may occur notwithstanding the variance holder's diligence. In those circumstances, the period in which a variance holder must exercise the variance may be equitably tolled provided the variance duly was recorded, all extensions sought and the variance holder's conduct was reasonable in the circumstances).

the Hardship Variance should be considered "equitably tolled," that is the usual time for its expiration are suspended or frozen while the Project PB Approvals process is ongoing.

Exercise Test

Zoning Act § 10 provides, in pertinent part:

> If the rights authorized by a variance are not exercised within one year of the date of grant of such variance (as extended) such rights shall lapse . . .
>
> *[Emphasis and parenthetical provided]*

The corollary to the quoted language from Zoning Act § 10 is: A variance that is timely exercised shall not lapse.

"Exercise" under the Zoning Act means to "bring into play; make effective in action . . . bring to bear," and that "[a] variance need not be fully carried out for rights to be 'exercised'."[3] Under said Exercise Test as, the Applicant here only must take steps necessary to achieve the purpose for which the Hardship Variance was granted or must substantially change its position in reliance upon the Hardship Variance.[4] It is plain that the Exercise Test pronounced by the courts is particular to each case in that the "exercise" of a variance, like the Hardship Variance, relates explicitly to the "purpose for which" the Hardship Variance was granted, and whether there has been "reliance upon" the Hardship Variance by the Applicant.

Despite the fact that the SZO prohibits the Applicant from constructing the building allowed by the Hardship Variance until the PB Approvals are granted, the ISD Memo erroneously states that the Hardship Variance has not been exercised because the "[A]pplicant has neither obtained a building permit nor conveyed one of the lots." At this point, the Board may be wondering why the ISD Memo discusses a conveyance of "one of the lots" when the purpose of the Hardship Variance concerns the height of the building the Applicant wants to construct, but does not concern in any form or fashion the sale or conveyance of the Property?

The answer, it seems clear, is that the ISD Memo, in stark violation of the Zoning Act, ignores the explicit requirement of the Exercise Test to evaluate the specific purpose of each variance. As a result, the ISD Memo wrongly concludes that the individual facts of a single case [Cornell] apply to every variance case in Somerville, and apparently across the Commonwealth, no matter the dissimilarity of the circumstances and purposes of the variances in other cases. Here, the Board should know that the purpose of the variance involved in Cornell[5] was a frontage dimensional variance that enabled the applicant to create two lots with less than the required frontage. So, in that case, where the Exercise Test was applied properly, conveying a lot or obtaining a building permit for either lot would have been an exercise of the variance, in that case, because the purpose of that variance was to create buildable lots. Plainly, the

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[3] Green v. Zoning Board of Appeals of Southborough, 96 Mass. App. Ct. 126, 131, *review denied*, 483 Mass. 1106 (2019) (Quoting Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 891 (2009)). Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 891 (2009).

[4] Cornell, 453 Mass. at 893.

[5] Cornell, 453 Mass. at 888.

conveyance of the Property here is irrelevant to the Hardship Variance, so the ISD Memo misconstrues the entire legal structure of the Exercise Test under the Zoning Act.

The ISD Memo is similarly off beam in concluding that a building permit is required to exercise the Hardship Variance. In a case decided after Cornell, the Supreme Judicial Court, our highest court, applied the Exercise Test to a frontage dimensional variance, the same variance as Cornell, and found that the applicant there had exercised the variance by hiring a surveyor, an architect, and other consultants and contractors, in order to develop building plans before the building permit was issued.[6] Plainly, the high court held that the Zoning Act requires a finding that a variance has not lapsed if the variance holder has exercised its variance, based on its purpose and the applicable circumstances of that case. Obtaining a building permit is not necessary.

If ISD had followed the Exercise Test, it could not have concluded lawfully, logically or reasonably that obtaining a building permit or conveying the Property were required to exercise the Hardship Variance, given the purpose of that variance is to permit the construction of a shorter building after the Project PB Approvals are granted, but not related in any way to the creation of buildable lots or the sale of the Property. Regarding the necessity to consider the specific purpose of each variance to determine if it has been exercised under the Zoning Act, please see reference to the Hogan case, Footnote 12.

The following have been recognized by our courts as among the acts necessary to bring a variance into play, make it effective in action, bring it to bear, take necessary steps, or substantially rely on the variance:

- Seeking other and subsequent municipal approvals for the same project[7]
- Engaging consultants, architects, engineers, lawyers, or otherwise taking on debt or obligations[8]

A quick reference to Section B – Background of this letter demonstrates that the Applicant's actions in reliance upon the Hardship Variance to bring the Hardship Variance into play are precisely those kinds of acts deemed by our courts to satisfy the Exercise Test. Accordingly, the Hardship Variance has been exercised and/or equitably tolled under the Zoning Act.

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[6] Grady v. Zoning Board of Appeals of Peabody, 465 Mass. 725, 727, 731-732 (2013) (The Supreme Judicial Court found that the applicant exercised its frontage dimensional variance by hiring a surveyor, and architect, and other consultants and contractors, and incurring debt in that regard in connection with developing construction plans before the building permit was issued).

[7] Green, 96 Mass. App. Ct. at 131-132. Smith v. City of Waltham, 12 LCR 268 (2004). See Footnote 6, Grady, 465 Mass. at 727, 731-732 (In this frontage dimensional variance case, the Supreme Judicial Court found that the hiring of surveyor, an architect, and other consultants and contractors, and incurring debt in that regard before the building permit was issued were the types of reliance actions that established that the dimensional variance duly was exercised by the applicant). Here, pursuant to the SZO, the one-story building authorized by the Hardship Variance cannot be constructed without a building permit, which cannot be issued without the Project PB Approvals, particularly Site Plan Approval, which cannot be obtained without engaging architects, engineers, other consultants, and lawyers to pursue those approvals.

[8] Grady, 465 Mass. at 731-732. Green, 96 Mass. App. Ct. at 131-132.

In this regard, the ISD Memo again misrepresents the Exercise Test. The ISD Memo asserts:

> The Applicant has noted that they have engaged various specialists to prepare the materials necessary for Site Plan Approval and the Special Permit under the Variance. However, the Courts have only considered these actions as exercise of a *use* variance, not exercise of a *dimensional* variance as in Cornell.[7] Therefore, it is ISD's interpretation that the Applicant has not exercised the rights of the Variance at this time.

In an apparent attempt to justify this dubious claim, ISD seems to rely on an appeals court case called Green v. Board of Appeals of Southborough (see Footnote 3 for citation). However, we note that the Green case is only an appeals court case, not a Supreme Judicial Court case, our highest appeals court, and our Supreme Judicial Court has held unequivocally in the Cornell case and other cases that the Exercise Test applies to dimensional variances. The ISD Memo not only is incorrect to assert that an appeals court case controls whether the Exercise Test applies to dimensional variances, the ISD Memo also mischaracterizes the Cornell decision itself, the case ISD is supposedly relying on.

In fact, the first line of the Cornell case is[9]:

> This zoning case requires us to decide the actions a variance holder must take to "exercise" a dimensional variance under G.L. c. 40A, § 10 to prevent it from lapsing.
>
> *[Emphasis provided]*

The court writes further[10]:

> "Exercise" means "to bring into play: make effective in action . . . bring to bear."

That is, the Supreme Judicial Court in Cornell explicitly has adopted the Exercise Test for dimensional variances, completely negating the ISD Memo.

Added evidence that dimensional variances are subject to the Exercise Test, the Cornell court methodically applies the Exercise Test to the dimensional variance in that case and concludes that the applicant, in the particular circumstances there, had not sufficiently exercised the dimensional variance at issue.[11]

> [C]ornell did not utilize the variance, or "make [it] effective in action," because he did not undertake any action . . . necessitating the variance.

As the Applicant has done here, if the applicant in Cornell did "undertake" any "action" relative to the dimensional variance in the circumstances of that case, the court in applying the Exercise Test would have concluded the variance had not lapsed. A subsequent Supreme Judicial Court case reinforces Cornell and further demonstrates the failure of the ISD Memo to follow the Zoning Act. In Grady, our highest appeals court once again applied the Exercise Test to a dimensional variance and found that the applicant there had exercised its frontage dimensional variance by hiring a surveyor and an architect, and

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[9] Cornell, 453 Mass. at 888.

[10] Cornell, 453 Mass. at 891.

[11] Cornell, 453 Mass. at 892.

other consultants and contractors, in order to develop building plans before the building permit was issued (see Footnote 6). See also Footnote 12, where the appeals court applied the Exercise Test to a dimensional variance.

The important point is that the ISD Memo got it wrong, that reliance on the ISD Memo would be misplaced and contrary to the Zoning Act, and that ISD's interpretation should be reversed by the Board. The Exercise Test does apply to dimensional variances, and if applied here as required by the Zoning Act, the lawful, logical, reasonable and common-sense conclusion is that the Hardship Variance has been exercised, has not lapsed and is in full force and effect.

Conclusion and Prayer for Relief

We know that under the SZO, a hardship variance is a precondition for the issuance of Site Plan Approval for any development project in the City, and that Site Plan Approval is a precondition to the issuance of a building permit. Here, because the construction of the one-story building allowed under the Hardship Variance is reliant on the Project PB Approvals, which are preconditions to a building permit, duly pursuing the Project PB Approvals constitutes an exercise, or the equitable tolling, of the Hardship Variance under the Exercise Test.[12]

As evidenced by the City's own records, the Applicant timely and duly engaged with the City's comprehensive application process for seeking and obtaining the Project PB Approvals. That engagement included retaining architects, engineers, lawyers and other relevant consultants to design, study, depict and propose the one-story building on the materials submitted for the Project PB Approvals. Moreover, the Applicant timely applied for extensions to the Hardship Variance.

The Applicant also engaged with the City relative to the Host Community Agreement to obtain the reaffirmation of that Agreement acknowledging the one-story building, subsequently approved by the Board under the Hardship Variance.

For the reasons set forth, we respectfully request that the Board, in applying the Zoning Act and the SZO to the Hardship Variance in the circumstances of this case, vote to (i) annul the ISD Memo, (ii) reverse ISD's interpretation set forth in the ISD Memo and (iii) deem the Hardship Variance exercised and/or equitably tolled, not lapsed and in full force and effect.

Thank you for your consideration and we look forward to appearing before the Board on this matter.

Very truly yours,

Bill Proia

William J. Proia

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[12] Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985) (In this dimensional variance case, even though the variance had not been "fully" carried out by actual construction the court found it "sufficiently (and irrevocably) exercised" by other conduct of the holder in reliance upon the variance given the circumstances of the case and the purpose of the variance).

TABS

A Applicant Brief submitted to ISD

B ISD Memo

C Newspaper Article

D Case Appendix

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Tab A

Applicant Brief submitted to ISD

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RIEMER | BRAUNSTEIN

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July 24, 2023

Via Email: isdzoning@somervillema.gov

Inspectional Services Department
City of Somerville
1 Franey Road
Somerville, Massachusetts 02145

Re: Request for Interpretation – 620 Broadway, LLC, Botanica, LLC
P&Z 21-140 [Hardship Variance], P&Z 22-138 [Extension] - 620 Broadway
Related Applications
P&Z 21-145 [Special Permit/Site Plan Approval] Pending public hearing]

Good Day:

We represent the owners and applicants in connection with the captioned matters, variously before the Zoning Board of Appeals (ZBA) and the Planning Board [Project].

A. AUTHORITY

The Inspectional Services Department (ISD) of the City of Somerville has the authority and responsibility to provide an interpretation on the question presented here pursuant to Somerville Zoning Ordinance (SZO) Section 15.4.3 and M.G.L. c. 40A, § 7.[1] M.G.L. c. 40A, referred to herein as the "Zoning Act."

B. FACTS

1. On December 15, 2021, a hardship variance (Variance) was granted duly by the ZBA to permit the Project to construct a one-story building; provided the Project subsequently obtained a Special Permit for use and a Site Plan Approval from the Planning Board pursuant to the SZO (Project PB Approvals). Following the expiration of the applicable appeal period, the Variance was recorded timely at the Registry of Deeds on February 4, 2022. Please refer to Tab A affixed hereto for germane documents.

2. As recited in the March 10, 2023 OSPCD Staff Memorandum respecting the required Project PB Approvals, throughout 2022 and into early 2023, the Applicant duly engaged the City's comprehensive pre-filing process under SZO Article 15 (and ancillary Submittal Manual) in order to qualify to file applications for the Project PB Approvals. Please refer to Tab B affixed hereto for germane

[1] Wyman v. Zoning Bd. of Appeals of Grafton, 47 Mass. App. Ct. 635, 637 (1999) (variances and special permits are subsumed in the provisions of M.G.L. c. 40A and the ordinances or bylaws under which they are promulgated, and are part of the zoning law to be enforced).

documents. Please refer to https://www.somervillema.gov/departments/ospcd/planning-and-zoning/reports-and-decisions for further material posted by OSPCD staff.

3. Pursuant to the SZO, acceptable applications for the Project PB Approvals necessitated the employment of architects, various engineers, lawyers and certain consultants to prepare plans, reports and related materials reflecting the one-story building authorized under the Variance, as well as other applicable SZO submittal requirements.

4. As further noted in the March 10, 2023 OSPCD Staff Memorandum, the Applicant entered into a Host Community Agreement with the City on April 26, 2021, which was revised, and reaffirmed by the City, expressly to permit a one-story building when it became clear that a 3-5 story building was not viable at the locus.

5. The public hearing relative to the Project PB Approvals commenced April 6, 2023 and is ongoing, with the latest public-hearing session occurring July 20, 2023.

6. The Applicant timely filed an application to extend the Variance, which the ZBA granted on December 14, 2022. The Variance extension decision was recorded timely with the Registry of Deeds on February 6, 2023. Please refer to Tab A affixed hereto for germane documents.

7. On May 19, 2023, the Applicant timely filed an application to further extend the Variance.[2] Please refer to Tab A affixed hereto for germane documents.

B. QUESTION PRESENTED; DISCUSSION

Question Presented

Whether under the Zoning Act the Variance has been exercised and/or equitably tolled, has not lapsed and is in full force and effect?

Short Answer

For the following reasons, the Variance has been exercised and/or equitably tolled, has not lapsed and is in full force and effect. The Zoning Board of Appeals in this case, pursuant to its inherent equitable power, may grant a further extension of the Variance.

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[2] The City, through its planning department, conveyed to us that M.G.L. c. 40A, § 10 forbids a board of appeals from granting more than one variance extension. We know of no decisional law supporting that assertion, and we have personal experience with municipal boards of appeals that entertain and grant multiple variance extensions in appropriate cases. See Woods v. Newton, 351 Mass. 98 (1966) (where a legal impediment exists to the use of a benefit - here the Project PB Approvals – relief from otherwise applicable time limitations is permissible and should be given).See "Handbook of Massachusetts Land Use and Planning Law," 5th Edition, M. Bobrowski, Wolters Kluwer, § 10.10, p. 10-37, fn. 185.

Discussion

As a preliminary matter, please recall that the relief granted under the Variance was dimensional in nature – permitting the Project to utilize a one-story building – and not a permit for a Project use. As such, the Variance by its terms does not authorize a particular use of the locus, that is, the Variance does not address the occupancy or use of the locus, only the height of the building to be constructed and used, but only after a Project use is approved pursuant to the SZO. Moreover, the Variance alone does not authorize the construction of the Project building, because the SZO requires Site Plan Approval from the Planning Board prior to the construction of any new building on the locus. Accordingly, until the Project PB Approvals are granted there exists here "a legal impediment" or an "equally real practical impediment" that precludes the Applicant from receiving a Project building permit from ISD.[3]

Zoning Act § 10 provides, in pertinent part:

> If the rights authorized by a variance are not exercised within one year of the date of grant of such variance (as extended) such rights shall lapse . . .
>
> *(Emphasis and parenthetical provided)*

Exercise under the Zoning Act means to "bring into play; make effective in action . . . bring to bear," and that "[a] variance need not be fully carried out for rights to be 'exercised'."[4] To exercise a variance the applicant only must take steps necessary to achieve the purpose for which it was granted or must substantially change his position in reliance upon the variance.[5] It is plain, that the forgoing standards pronounced by the courts are particular to each case in that the "exercise" of a variance relates explicitly to the "purpose for which" that variance was granted, and whether there was "reliance upon" the object variance.

The following have been recognized by our courts as among the acts necessary to: bring a variance into play, make it effective in action, bring it to bear, take necessary steps, or substantially rely on the variance:

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[3] According to OSPCD staff, under the SZO the Variance was a prerequisite and a precondition to the filing of the Project PB Approvals. It follows, that in order to derive any benefit from the Variance, the Applicant subsequently had to seek and obtain the Project PB Approvals. See generally, Belfer v. Building Comm'r of Boston, 363 Mass. 439 (1973) (court applies a common-sense solution that such legal or practical impediments warrant the equitable tolling of a variance pending just resolution of the impediments). See also Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 894 (2009) (affirming the Appeals Court, 72 Mass. App. Ct. 390, 394 (2008)) ([D]elays in fulfilling the prerequisites for obtaining a building permit under a variance may occur notwithstanding the variance holder's diligence. In those circumstances, the period in which a variance holder must exercise the variance may be equitably tolled provided the variance duly was recorded, all extensions sought and the variance holder's conduct was reasonable in the circumstances).

[4] Green v. Zoning Board of Appeals of Southborough, 96 Mass. App. Ct. 126, 131, *review denied*, 483 Mass. 1106 (2019) (Quoting Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 891 (2009)).

[5] Cornell, 453 Mass. at 893.

- Seeking other and subsequent municipal approvals for the same project[6]
- Engaging consultants, architects, engineers, lawyers, or otherwise taking on debt or obligations[7]

Based on the Facts and the legal standard, the Variance has been exercised and/or equitably tolled under the Zoning Act.

We know that under the SZO, a dimensional variance where applicable, is a precondition for the issuance of Site Plan Approval for any development project in the City, and that Site Plan Approval is a precondition to the issuance of a building permit. Here, because the construction of the one-story building allowed under the Variance is reliant on the Project PB Approvals, which are preconditions to a building permit, duly pursuing the Project PB Approvals constitutes an exercise, or the equitable tolling, of the Variance.[8]

As evidenced by the City's own records, the Applicant timely and duly engaged with the City's comprehensive application process for seeking and obtaining the Project PB Approvals. That engagement included retaining architects, engineers, lawyers and other relevant consultants to design, study, depict and propose the one-story building on the materials submitted for the Project PB Approvals. Moreover, the Applicant timely applied for extensions to the Variance.

The Applicant also engaged with the City relative to the Host Community Agreement to obtain the reaffirmation of that Agreement acknowledging the one-story building, subsequently approved under the Variance.

C. CONCLUSION

For the reasons set forth, under the Zoning Act the Variance has been exercised and/or equitably tolled, has not lapsed and is in full force and effect, and we would request that you make that determination. Moreover, the Zoning Board of Appeals pursuant to its inherent equitable power, in this case has the authority to grant a further extension of the Variance, based on the application for same filed on May 19, 2023, and we would request that you make that determination.

As the Project BP Approvals public hearing has been continued to August 3, at least in part, pending this determination, we would appreciate receiving your response as soon as practicable, hopefully

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[6] Green, 96 Mass. App. Ct. at 131-132. Smith v. City of Waltham, 12 LCR 268 (2004). Grady v. Zoning Board of Appeals of Peabody, 465 Mass. 725, 731-732 (2013). Here, the one-story building authorized by the Variance cannot be constructed without a building permit, which cannot be issued without the Project PB Approvals, particularly Site Plan Approval.

[7] Grady, 465 Mass. at 731-732. Green, 96 Mass. App. Ct. at 131-132.

[8] Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985) (even though the variance had not been "fully" carried out by actual construction, the court found it "sufficiently (and irrevocably) exercised" by other conduct of the holder in reliance upon the variance given the circumstances of the case and the purpose of the variance).

prior to August 3. In any case, Zoning Act § 7 suggests a response time of fourteen (14) days, so we thank you for your efforts to issue a response within that time frame, if not sooner.

Very truly yours,

William J. Proia

Tabs

A Select Variance and Extension Documentation

B OSPCD Materials

Tab A

Select Variance and Extension Documentation

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Middlesex South Registry of Deeds

Electronically Recorded Document

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Recording Information

Document Number	: 19279
Document Type	: DECIS
Recorded Date	: February 04, 2022
Recorded Time	: 08:04:54 AM
Recorded Book and Page	: 79641 / 251
Number of Pages(including cover sheet)	: 4
Receipt Number	: 2779717
Recording Fee	: $105.00

Middlesex South Registry of Deeds
Maria C. Curtatone, Register
208 Cambridge Street
Cambridge, MA 02141
617-679-6300
www.middlesexsouthregistry.com

City of Somerville

ZONING BOARD OF APPEALS

City Hall 3rd Floor, 93 Highland Avenue, Somerville, MA 02143

2021 DEC 23 P 3:48

DECISION

CITY CLERK'S OFFICE
SOMERVILLE, MA

Book 69469
Page 490

PROPERTY ADDRESS:	**620 Broadway**
CASE NUMBER:	P&Z#21-140
OWNER:	620 Broadway, LLC
OWNER ADDRESS:	741 Broadway, Somerville, MA 02144
DECISION:	Approved with Conditions (Hardship Variances)
DECISION DATE:	December 15, 2021

This decision summarizes the findings made by the Zoning Board of Appeals (the "Board") regarding the development review application submitted for 620 Broadway.

LEGAL NOTICE

620 Broadway, LLC seeks a variance from the minimum number of stories in the Commercial Core 5 district.

RECORD OF PROCEEDINGS

On December 15, 2021, the Zoning Board of Appeals held a public hearing advertised in accordance with M.G.L. 40A and the Somerville Zoning Ordinance. Present and sitting at the public hearing were Board Members Chair Susan Fontano, Acting Clerk Katherine Garavaglia, Elaine Severino, Anne Brockelman, and Ann Fullerton. The Applicant provided an overview of their proposal and their argument for each of the require criteria for granting a Hardship Variance.

HARDSHIP VARIANCE FINDINGS

In accordance with M.G.L. 40A and the Somerville Zoning Ordinance, the Board may grant a hardship variance only upon finding all of the following for each hardship variance:

1. Special circumstances exist relating to the soil conditions, shape, or topography of a parcel of land or the unusual character of an existing structure but not affecting generally the Commercial Core zoning district in which the land or structure is located.

The Board finds that special circumstances exist relating to the shape of the parcel that does not generally affect parcels in the Commercial Core district. The parcel is a triangular lot that abuts the MBTA tracks on the long edge with a significant grade change and the contaminated soil is under the purview of the Department of Environmental Protection.

2. Literal enforcement of the provision of this Ordinance for the district where the subject land or structure is located would involve substantial

A TRUE COPY ATTEST:
CITY CLERK

hardship, financial or otherwise, to the petitioner or appellant, 620 Broadway, LLC, due to said special circumstances.

The Board finds that literal enforcement of the Ordinance would involve substantial hardship to the petitioners due to the deed restriction on future uses from the previous contaminated use. The soil types on this property, as outlined in the geo-technical report are not suitable for structural support of a three-story building, the minimum height required by zoning.

3. Desirable relief could be granted without causing substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Commercial Core district in this Ordinance or the Ordinance in general.

The Board finds that approving a one-story building on this property will not cause a substantial detriment to the public good or nullify or substantially derogate from the intent and purpose of the district or Ordinance in general.

DECISION

Following public testimony, review of the submitted plans, and discussion of the statutorily required considerations, Acting-Clerk Garavaglia moved to approve the Hardship Variance from the number of stories with the conditions included in the staff memo. Elaine Severino seconded. The Board voted **5-0** to approve the permit, subject to the following conditions:

Perpetual

1. This Decision must be recorded with the Middlesex County Registry of Deeds.

Prior to Certificate of Zoning Compliance

2. A copy of the Recorded Decision stamped by the Middlesex South Registry of Deeds must submitted for the public record.
3. Physical copies of all submittal materials as permitted by the Review Boards must be submitted for the public record in accordance with the document format standards of the ISD/PB/ZBA Submittal Requirements.

Attest, by the Zoning Board of Appeals:

Orsola Susan Fontano, *Chair*
Katherine Garavaglia, *Acting Clerk*
Elaine Severino
Anne Brockelman
Ann Fullerton

Sarah Lewis, Director of Planning, Preservation & Zoning
Office of Strategic Planning & Community Development

A TRUE COPY ATTEST:
CITY CLERK

CLERK'S CERTIFICATE

Any appeal of this decision must be filed within twenty days after the date this notice is filed in the Office of the City Clerk, and must be filed in accordance with M.G.L. c. 40A, sec. 17 and SZO sec. 15.5.3.

In accordance with M.G.L. c. 40 A, sec. 11, no variance shall take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

Also in accordance with M.G.L. c. 40 A, sec. 11, a special permit shall not take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and either that no appeal has been filed or the appeal has been filed within such time, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed Special Permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone.

The owner or applicant shall pay the fee for recording or registering. Furthermore, a permit from the Division of Inspectional Services shall be required in order to proceed with any project favorably decided upon by this decision, and upon request, the Applicant shall present evidence to the Building Official that this decision is properly recorded.

This is a true and correct copy of the decision filed on December 23 2021 in the Office of the City Clerk, and twenty days have elapsed, and

FOR VARIANCE(S) WITHIN
_____ there have been no appeals filed in the Office of the City Clerk, or
_____ any appeals that were filed have been finally dismissed or denied.

FOR SPECIAL PERMIT(S) WITHIN
_____ there have been no appeals filed in the Office of the City Clerk, or
_____ there has been an appeal filed.

FOR SITE PLAN APPROVAL(S) WITHIN
_____ there have been no appeals filed in the Office of the City Clerk, or
_____ there has been an appeal filed.

Signed _____ City Clerk Date February 3 2022

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CITY CLERK

Middlesex South Registry of Deeds

Electronically Recorded Document

This is the first page of the document - Do not remove

Recording Information

Document Number	: 12936
Document Type	: DECIS
Recorded Date	: February 06, 2023
Recorded Time	: 09:47:41 AM
Recorded Book and Page	: 81227 / 1
Number of Pages(including cover sheet)	: 5
Receipt Number	: 2888636
Recording Fee	: $105.00

Middlesex South Registry of Deeds
Maria C. Curtatone, Register
208 Cambridge Street
Cambridge, MA 02141
617-679-6300
www.middlesexsouthregistry.com

City of Somerville

PLANNING, PRESERVATION & ZONING

City Hall 3rd Floor, 93 Highland Avenue, Somerville MA 02143

TO: Kimberly Wells, City Clerk
FROM: Planning, Preservation & Zoning Division Staff
DATE: January 26, 2023
SUBJECT: Correction of Scrivener's Errors

2023 JAN 26 P 5:03
CITY CLERK'S OFFICE
SOMERVILLE, MA

Address: 620 Broadway, P&Z 22-138

Date of Decision: December 14, 2022

Date Filed with City Clerk: December 15, 2022

This decision for this property filed in the City Clerk's Office on the date referenced above contained the following scrivener's errors:

- On page 1, the owner is listed as "Capital Equity Partners"; the owner is actually "620 Broadway, LLC"
- On page 1, the owner's address is listed as "31 Rogers Ave, Somerville, MA 02144"; the owner's address is actually "C/O Brian O'Donovan 31 Rogers Avenue, Somerville, MA 02144"

This memo serves as the correction of these scrivener's errors. Decision Recorded February 4 2022 Book 79641 Page 251

A TRUE COPY ATTEST:
CITY CLERK

City of Somerville

ZONING BOARD OF APPEALS

City Hall 3rd Floor, 93 Highland Avenue, Somerville MA 02143

2022 DEC 16 A 7:45

CITY CLERK'S OFFICE
SOMERVILLE, MA

DECISION

PROPERTY ADDRESS:	**620 Broadway**
CASE NUMBER:	P&Z 22-138
OWNER:	Capital Equity Partners
OWNER ADDRESS:	31 Rogers Ave, Somerville, MA 02144
DECISION:	Approved
DATE OF VOTE:	December 14, 2022
DECISION ISSUED:	December 15, 2022

This decision summarizes the findings made by the Zoning Board of Appeals (the "Board") regarding the Hardship Variance extension application submitted for 620 Broadway.

LEGAL NOTICE

620 Broadway, LLC requests an extension to a previously approved Variance (P&Z 21-140).

RECORD OF PROCEEDINGS

On December 14, 2022, the Zoning Board of Appeals held a public hearing advertised in accordance with M.G.L. 40A and the Somerville Zoning Ordinance. Present and sitting at the public hearing were the following Board Members: Chair Susan Fontano, Clerk Katherine Garavaglia, Ann Fullerton, Anne Brockelman, and Alternate Brian Cook. William Proia, representing the Applicant, appeared to explain the request describe how the process they must pursue requires multiple permits. After the presentation by the Applicant, Chair Fontano opened the floor to public testimony, and none was given related to the Application.

After the close of the public testimony section of the hearing, the Board went into discussion. The Board was supportive of the Applicant's request for this extension of six (6) months and expressed no concerns. All conditions from any original or previous approvals related to the Application remain valid.

PLANS & DOCUMENTS

Application plans, documents, and supporting materials submitted and reviewed are identified below.

Document	Pages	Prepared By	Date	Revision Date
Narrative by Applicant	1	William J. Proia, Riemer & Braunstein LLP, 700 District Ave, 11th Floor, Burlington, MA 01803	Oct. 20, 2022	N/A

A TRUE COPY ATTEST:

CITY CLERK

DECISION

Following public testimony, review of the submitted plans, and discussion of the statutorily required considerations, Clerk Garavaglia moved to approve the extension to the previously approved Variance (P&Z 21-140), based on the discussion during the meeting. Ms. Brockelman seconded. The Board voted **5-0** to approve the extension.

Attest, by the Zoning Board of Appeals:

Orsola Susan Fontano, *Chair*
Katherine Garavaglia, *Clerk*
Anne Brockelman
Ann Fullerton
Brian Cook, *Alternate*

Sarah Lewis, Director of Planning, Preservation, & Zoning
Office of Strategic Planning & Community Development

A TRUE COPY ATTEST:
CITY CLERK

P&Z 22-138 620 Broadway

CLERK'S CERTIFICATE

Any appeal of this decision must be filed within twenty days after the date this notice is filed in the Office of the City Clerk, and must be filed in accordance with M.G.L. c. 40A, sec. 17 and SZO sec. 16.5.3.

In accordance with M.G.L. c. 40 A, sec. 11, no variance shall take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

Also in accordance with M.G.L. c. 40 A, sec. 11, a special permit shall not take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and either that no appeal has been filed or the appeal has been filed within such time, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed Special Permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone.

The owner or applicant shall pay the fee for recording or registering. Furthermore, a permit from the Division of Inspectional Services shall be required in order to proceed with any project favorably decided upon by this decision, and upon request, the Applicant shall present evidence to the Building Official that this decision is properly recorded.

This is a true and correct copy of the decision filed on December 16, 2022 in the Office of the City Clerk, and twenty days have elapsed, and

FOR VARIANCE(S) WITHIN
__X__ **there have been no appeals filed in the Office of the City Clerk, or**
_____ **any appeals that were filed have been finally dismissed or denied.**

FOR SPECIAL PERMIT(S) WITHIN
_____ there have been no appeals filed in the Office of the City Clerk, or
_____ there has been an appeal filed.

FOR SITE PLAN APPROVAL(S) WITHIN
_____ there have been no appeals filed in the Office of the City Clerk, or
_____ there has been an appeal filed.

Signed _____ City Clerk Date January 31, 2023

A TRUE COPY ATTEST:
CITY CLERK

Jaclyn Fraser

From: William J Proia
Sent: Saturday, May 20, 2023 10:13 AM
To: Jaclyn Fraser; Melissa M Cushing
Subject: Fwd: Confirmation - Application for Plan/Permit Revision

Begin forwarded message:

From: Smartsheet Forms <forms@app.smartsheet.com>
Date: May 19, 2023 at 3:16:52 PM EDT
To: William J Proia <WProia@riemerlaw.com>
Subject: Confirmation - Application for Plan/Permit Revision

CITY OF SOMERVILLE
Planning & Zoning

Thank you for submitting your application. A copy is included below for your records.

Application for Plan/Permit Revision

Applicant	620 Broadway, LLC c/o William J. Proia, Esquire Riemer & Braunstein LLP
Applicant Address	700 District Ave, 11th Floor, Burlington, MA 01803
Owner	620 Broadway, LLC
Owner Address	31 Rogers Ave, Somerville, MA 02144
Primary Point of Contact Email	wproia@riemerlaw.com
Additional Contact Emails	bodonovan6@gmail.com
Street Address	620 Broadway
Related Case Tracking Number	P&Z #21-140 (Hardship Variance) P&Z 22-138 (6 Month Extension)

Submission Type	Extend Permit Validity
Development Activity Narrative	On December 15, 2021, a dimensional Hardship Variance was granted in this case. On December 14, 2022, an extension of time to exercise the Hardship Variance was granted, as other necessary Project permits were in process, but not yet issued. Due to the ongoing Planning Board public hearings related to the Project, the Applicant respectfully requests the Board to grant a six-month extension of time to exercise the Hardship Variance, in order to permit the Planning Board and Staff ample time to discharge its review obligations.

File Attachments

620 Broadway Hardship Variance Extension Request.pdf (5360k)

RIEMER | BRAUNSTEIN

William J. Proia
wproia@riemerlaw.com
(617) 880-3462 direct
(617) 692-3462 fax

May 18, 2023

Orsola Susan Fontano, Chair
Zoning Board of Appeals
City Hall
93 Highland Avenue
Somerville, Massachusetts 02143

Re: Extend Permit Validity/Development Narrative
Hardship Variance (P&Z 21-140)
Hardship Variance six-month Extension (P&Z 22-138)
620 Broadway, 620 Broadway, LLC

Dear Chair and Members of the Zoning Board of Appeals:

Please note that the undersigned represents 620 Broadway, LLC ("Applicant") in connection with the redevelopment ("Project") of 620 Broadway ("Property").

This Board duly granted a dimensional Hardship Variance on December 15, 2021 related to the Project. On December 14, 2022, the Board granted a six-month extension of time to exercise the Hardship Variance, as other necessary Project permits were in process, but not yet issued. Due to the ongoing Planning Board public hearings related to the Project, the Applicant hereby respectfully requests the Board to grant a six-month extension of time to exercise the Hardship Variance, in order to permit the Planning Board and Staff ample time to discharge its review obligations.

This matter to be further discussed at the public hearing, as needed. Not waiving and reserving all rights relative to the question of whether the Hardship Variance lawfully has been exercised.

Thank you for your consideration and we look forward to appearing before the Board on this matter.

Very truly yours,

William J. Proia

WJP:mmc

3600101.1

FORM: POA (08-2020)
Discontinue Prior Editions

CITY OF SOMERVILLE

Office of Strategic Planning & Community Development

DEVELOPMENT REVIEW • PROPERTY OWNER AUTORIZATION

Property Address: 620 Broadway, Somerville, MA		
Zoning District: CC5	Ward: 5	MBL: 27/L/2
Applicant: 620 Broadway, LLC		
Address: C/O Brian O'Donovan 31 Rogers Avenue, Somerville, MA 02144		
Phone: 617-285-9786	Email: bodonovan6@gmail.com	
Property Owner: 620 Broadway, LLC		
Address: C/O Brian O'Donovan 31 Rogers Avenue, Somerville, MA 02144		
Phone: 617-285-9786	Email: bodonovan6@gmail.com	
Agent: William J. Proia, Esquire Riemer & Braunstein LLP 700 District Avenue, 11th Floor, Burlington, MA 01803		
Phone: 617-880-3462	Email: wproia@riemerlaw.com	

As the **Applicant**, I make the following representations:

1. I understand that an application for development review is not complete until all necessary information has been submitted and all fees have been paid
2. I understand that an incomplete application will not be reviewed, will not be publicly noticed, and will not be scheduled for a public hearing, as applicable.
3. I certify that the information supplied on and with this form is accurate to the best of my knowledge.
4. I certify that the agent listed on this application form is authorized to represent me before City staff and review boards as it relates to the development of this property.

Signature: _____

William J. Proia, Esquire on behalf of the Applicant

As the **Owner**, I make the following representations:

1. I certify that I am the owner of the property identified on this property owner authorization form.
2. I certify that the applicant named on this application form is authorized to apply for development review for the property identified and for the purposes indicated by the submitted documentation.
3. I certify that the agent listed on this application form is authorized to represent me before City staff and review boards as it relates to the development of this property.
4. I permit City staff to conduct site visits on my property.
5. If the ownership of this property changes before the development review is completed, I will provide updated information and new copies of this form.

Signature: _____

William J. Proia, Esquire on behalf of the Property Owner

Tab B

OSPCD Materials

Please refer to https://www.somervillema.gov/departments/ospcd/planning-and-zoning/reports-and-decisions for additional material posted by OSPCD staff.

[page blank – see following]

City of Somerville

PLANNING BOARD

City Hall 3rd Floor, 93 Highland Avenue, Somerville MA 02143

TO: Planning Board
FROM: OSPCD Staff
SUBJECT: 620 Broadway, P&Z 21-145
POSTED: March 10, 2023

RECOMMENDATION: Approve with Conditions (SP for Cannabis Retail Sales)
Approve with Conditions (SPA)

Staff memos are used to communicate background information, analysis, responses to public comments, review of statutory requirements, and other information from Planning, Preservation, & Zoning Staff to the Review Board members.

This memo summarizes the development review application submitted for 620 Broadway, identifies any additional discretionary or administrative development review that is required by the Somerville Zoning Ordinance, and provides related analysis or feedback as necessary. The application was deemed complete on January 5, 2023, and is scheduled for a public hearing on March 15, 2023. Any Staff recommended findings, conditions, and decisions in this memo are based on the information available to date prior to any public comment at the scheduled public hearing.

LEGAL NOTICE

620 Broadway, LLC proposes to develop a one (1) story Commercial Building and establish a Cannabis Retail Sales use in the Commercial Core 5 (CC-5) district, which requires Site Plan Approval and a Special Permit.

SUMMARY OF PROPOSAL

620 Broadway, LLC is proposing to construct a 1-story Commercial Building. The proposed development will produce 6,961 square feet of commercial space, 0 motor vehicle parking spaces, 12 long-term bicycle parking spaces, 16 short-term bicycle parking spaces, and the proposed landscape will earn a Green Score of 0.28.

Although not named as part of the Applicant team, Botanica, LLC is the applicant for the Cannabis Retail Use Special Permit.

BACKGROUND

620 Broadway is located in the 0.25mi Transit Area in the Commercial Core 5 (CC-5) zoning district in the Magoun Square neighborhood represented by Ward 5 Councilor Beatriz Gomez-Mouakad. Establishing a Commercial Building in the CC-5 district requires Site Plan Approval. Site Plan Approval is the administrative review and approval of conforming development to address any potential impacts as necessary.

Establishing a Cannabis Retail Sales use requires a Special Permit. The Planning Board is the decision-making authority for all (non-variance) discretionary or administrative permits required for the CC-5 zoning district.

As part of their third round of reviews, the Mayor's Marijuana Advisory Committee (MAC) issued a recommendation on this proposal which Mayor Curtatone accepted.[1] Botanica executed a Host Community Agreement with the City on April 26, 2021. After Botanica revised their proposal from including a new 3-5 story building to including a new 1 story building, the MAC reaffirmed their recommendation.[2]

The property was issued a Hardship Variance in 2021 to permit the building to be one (1) story, rather than the required minimum of three (3) stories; the variance was extended in 2022.

NEIGHBORHOOD MEETINGS

The first neighborhood meeting was hosted by Ward 5 Councilor Beatriz Gomez-Mouakad and the applicant on March 7, 2022, via the Zoom meeting platform.

The second neighborhood meeting was hosted by Ward 5 Councilor Beatriz Gomez-Mouakad and the applicant on June 29, 2022, via the Zoom meeting platform.

DESIGN REVIEW

The proposal was reviewed by Somerville Urban Design Commission via the GoToWebinar meeting platform on March 22, 2022. The Commission provided its official recommendation on April 6, 2022.

ANALYSIS

While the proposed building and cannabis retail use have been conceptualized and often presented as one package throughout the development review process, they are distinct requests to the Board and will be discussed separately.

620 Broadway, LLC is listed in the application as the only applicant for both the building and the proposed Cannabis Retail Sales use, but the retail store will be operated by Botanica, a separate entity.

Proposed 1-story building

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[1] The MAC's Round 3 Recommendation can be found here: https://s3.amazonaws.com/ifa.somervillema.gov/documents/planning/Round%203%20MAC%20Recommendation%20%282021.03.01%29.pdf

[2] The reaffirmed recommendation can be found here: https://s3.amazonaws.com/ifa.somervillema.gov/documents/planning/MAC%20Recommendation%20regarding%20Botanica.pdf

ISD Staff identified a few compliance issues that were shared with the Applicant on February 17th; the Applicant submitted updated drawings on March 6th, but as of the writing of this memo Staff have not had time to review and confirm that the drawings address the comments (primarily concerning the location of the transformer and the height of the storefront).

Beyond the items previously shared with the Applicant that must be addressed, Staff do not have any concerns about the building itself, as it appears to comply with zoning and there are no significant impacts anticipated from replacing an existing 1-story building and on-site parking with a larger 1-story building. However, Staff do have concerns about the mobility-related aspects of this building, and have included conditions to address these concerns.

First, the Applicant has not indicated where loading will occur: the Transportation Impact Study (TIS) states that "[t]here will be a site-specific driveway on the northeast part of the site along Broadway"[3] but that driveway is not shown in the Transportation Access Plan (TAP), and is unlikely to be permitted given the protected bike lane directly in front of this property. Presumably, loading will occur on-street, but there is no obvious location along the frontage of this property that would allow loading without requiring vehicles to block a travel lane (either bike or vehicular). Additional coordination with Staff is required to identify a loading plan that is sufficient to serve the proposed uses.

Second, and more broadly, the Applicant commits to various transportation mitigation strategies in their TIS that, while generally supported by Staff, will require significantly more development of the specifics before they can be implemented. For example, the Applicant commits to "[n]ew ADA-compliant sidewalk along site frontage" but doesn't provide detailed information about what is proposed. Any changes to the public realm will require approval by relevant City Divisions, and will need to account for existing City assets (like street trees or an on-street bike lane) and other changes the City has planned for the surrounding area.

Proposed cannabis retail sales use

Cannabis Retail Sales is permitted by Special Permit in the CC-5 district. The Applicant is eligible to apply for a Special Permit for Cannabis Retail Sales because Botanica, LLC has received a Host Community Agreement for a recreational cannabis retail establishment at 620 Broadway.

A Special Permit is required to enable review boards to address concerns related to the suitability of the site for this use. Throughout the various neighborhood meetings and public hearings this application has been discussed at, Staff have not heard any significant or proposal-specific concerns regarding the proposed cannabis retail use from the public.

[3] Page 2 of the TIS dated May 7, 2021 prepared by Wayne Keefner of DCI; the existence of an "on-site loading zone" is referenced multiple times throughout the TIS.

The Mobility Division has reviewed the submitted Transportation Impact Statement (TIS) and Transportation Access Plan (TAP) and has recommended a number of conditions to address their concerns; a memo from that Division is attached at the end of this memo.

CONSIDERATIONS & FINDINGS

The Planning Board is required by the Somerville Zoning Ordinance to deliberate each of the following considerations at the public hearing. The Board must discuss and draw conclusions for each consideration, but may make additional findings beyond this minimum statutory requirement.

Site Plan Approval Considerations

1. The comprehensive plan and existing policy plans and standards established by the City.
2. The intent of the zoning district where the property is located.
3. Mitigation proposed to alleviate any impacts attributable to the proposed development.

Special Permit Considerations for a Cannabis Retail Sales Use

1. The comprehensive plan and existing policy plans and standards established by the City.
2. The intent of the zoning district where the property is located.
3. Capacity of the local thoroughfare network providing access to the site and impact on pedestrian, bicycle, and vehicular traffic and circulation patterns in the neighborhood.
4. Location, visibility, and design of the principal entrance.

Information relative to the required considerations is provided below:

<u>Site Plan Approval and Special Permit</u>

1. *The comprehensive plan and existing policy plans and standards established by the City.*

Staff believes that this project supports the goals laid out in SomerVision 2040, the City's Comprehensive Master Plan, including the following:

- Creates new commercial and ACE spaces to house new businesses and ACE uses.
- Has no on-site motor vehicle parking.

2. *The intent of the zoning district where the property is located.*

The intent of the CC zoning district is, in part: "To create, maintain, and enhance areas appropriate for moderately-scaled single- and multi-use commercial buildings;

neighborhood-, community-, and region-serving uses; and a wide variety of employment opportunities."

The intent of the Zoning Ordinance as a whole includes the following:

- To increase commercial tax base in support of the fiscal health of the City
- To increase accessibility to diverse employment opportunities within Somerville.
- To capture a fiscal return on investments made in transportation infrastructure by locating [...] employment opportunities, and a broad mix of uses along major corridors and within walking distance of transit stops.

Site Plan Approval Specific

3. *Mitigation proposed to alleviate any impacts attributable to the proposed development.*

Staff believes there are no negative impacts directly attributable to the proposed development of a 1-story building.

Cannabis Retail Sales Use Special Permit Specific

4. *Capacity of the local thoroughfare network providing access to the site and impact on pedestrian, bicycle, and vehicular traffic and circulation patterns in the neighborhood.*

The location is within a Transit Area (it is less than 500 feet from the Ball Square Green Line Station). The property does not have any motor vehicle parking, but will be providing 12 long-term and 16 short-term bicycle parking spaces. Botanica, LLC will also need to identify an on-street loading zone that can serve the use without conflicting with the bike lane.

As conditioned, the proposal is not anticipated to have negative impacts on the traffic and circulation patterns in the surrounding neighborhood beyond the normal impacts expected for any commercial use.

5. *Location, visibility, and design of the principal entrance.*

The principal entrance is on the left side of the façade and will have separate entrances and exits. The sales floor will be hidden from the street through the use of a display window and entrance/exit vestibules.

PERMIT CONDITIONS

Should the Board approve the required Special Permit to establish a Cannabis Retail Sales use, Planning, Preservation & Zoning Staff recommends the following conditions:

Mobility

- Botanica, LLC shall commit to annual monitoring and reporting of the appointment-only recreational marijuana operations model. Data collection shall include statistically valid travel surveys of employees and customers, and a status update on the implementation of TDM measures.
- Any change to the means of sales requires a new Transportation Impact Study (TIS). The scope of the TIS must be approved by the Director of Mobility.
- Botanica, LLC shall post information about non-vehicular services available in the area on the website and in materials posted at the store.
- Botanica, LLC shall provide a TransitScreen (or its substantial equivalent) displaying real time MBTA and bike share information within the commercial space in a location that is visible to customers.
- Botanica, LLC shall provide incentives to customers who take non-vehicular or public transportation modes to the site.
- Botanica, LLC shall provide employees 100% subsidized Bluebikes public bikeshare memberships, subject to annual rate increases.
- Botanica, LLC shall provide employees 100% subsidized MBTA passes, or up to the federal maximum Qualified Transportation Fringe benefits per current U.S. Internal Revenue Code ($270 per month in 2021), subject to annual increases.
- Retail sales to walk-in customers are prohibited. Customer visits must be by appointment only.
- As voluntarily committed to in the Transportation Access Plan, the Applicant shall provide a minimum of twelve (12) long-term bicycle parking spaces.
- Botanica, LLC, shall direct all deliveries to occur outside of 7:30am to 9:30am on weekdays; 4:30pm to 6:30pm on weekdays; and 11am to 1pm on Saturdays to every extent practicable.
- The Applicant shall develop and implement a sign and pavement markings plan for Broadway between the Broadway bridge deck and the crosswalk at Winchester Street that enhances safety conditions and protection for people bicycling and reduces opportunities for illegal curbside parking and loading. Final design must be approved by relevant City Departments.

Permit Validity

- Approval is limited to Botanica, LLC and is not transferable to any successor in interest.
- This permit is valid subject to Botanica, LLC having a fully executed and active Host Community Agreement with the City of Somerville.
- This Decision must be recorded with the Middlesex South Registry of Deeds.
- A written narrative or descriptive checklist identifying the completion or compliance with permit conditions must be provided to the Inspectional Services Department at least ten (10) working days in advance of a request for a final inspection.

Public Record

- One (1) digital copy of all required application materials reflecting any physical changes required by the Board, if applicable, must be submitted to the Planning, Preservation & Zoning Division for the public record. Materials must be submitted

in accordance with the document format standards of relevant Submittal Requirements.
- A copy of the recorded Decision stamped by the Middlesex South Registry of Deeds must submitted to the Planning, Preservation & Zoning Division for the public record.

Should the Board approve the required Site Plan Approval for the 1-story Commercial Building, Planning, Preservation & Zoning Staff recommends the following conditions:

Construction Documents
- Construction documents must be substantially equivalent to the approved plans and other materials submitted for development review.
- Material specifications from suppliers must be submitted to confirm fenestration glazing is compliant with the VLT and VLR ratings required by the Somerville Zoning Ordinance.
- An outdoor lighting plan and supplier cut sheet specifications of chosen lighting fixtures must be submitted to confirm compliance with Section 10.7 Outdoor Lighting of the Somerville Zoning Ordinance. The site photometric plan must include a keyed site plan identifying the location of all luminaires; total site lumen limit table (calculations from the SZO); lighting fixture schedule indicating the fixture type, description, lamp type, lumens, color temperature, color rendering index, BUG rating, mounting height, and wattage of all luminaires; and notation of any timing devices used to control the hours set for illumination.

Mobility
- Botanica, LLC shall submit an updated Transportation Access Plan (TAP), subject to review and approval by the Director of Mobility, which identifies a loading zone within three hundred (300) feet of 620 Broadway sufficient to serve the largest delivery vehicle type anticipated for this use.

Permit Validity
- This Decision must be recorded with the Middlesex South Registry of Deeds.

Public Improvements
- Modifications to any public thoroughfares require approval by appropriate City departments.

Public Record
- One (1) digital copy of all required application materials reflecting any physical changes required by the Board, if applicable, must be submitted to the Planning, Preservation & Zoning Division for the public record. Materials must be submitted in accordance with the document format standards of relevant Submittal Requirements.
- A copy of the recorded Decision stamped by the Middlesex South Registry of Deeds must submitted to the Planning, Preservation & Zoning Division for the public record.

Site & Building Design
- Utility meters are not permitted on any facade or within the frontage area of the lot.

Trees

- The removal of any public shade trees or private trees is subject to the Tree Preservation Ordinance (Chapter 12, Article VI) of the Somerville Code of Ordinances.
- Detailed plans for protecting street trees intended to remain during construction must be submitted to the City Arborist for review and approval.
- The Project design, including the location of the transformer, must not preclude integration between the proposed open space on the west side of the site and the adjacent parcel of land currently owned by the MBTA (MBL 27-L-1).

Subject: 620 Broadway TIS and TAP Review

This memo outlines preliminary comments from the Mobility Division regarding the applicant's Transportation Impact Study (TIS) and Transportation Access Plan (TAP) for the above-referenced property.

Transportation Impact Study

Public Transportation, Walking and Bicycling

The property is approximately 0.1 miles from both the Ball Square Green Line station and 0.8 miles from the Davis Square Red Line Station. The property is approximately 0.1 miles from bus stops for the 80, 89, and 93 bus routes, 0.3 miles from stops for the 101 bus route, and 0.4 miles from stops for the 94 and 96 bus routes. The City works closely with the MBTA to preserve and enhance bus service and relies on businesses to help make transit an easy choice for employees and customers.

In 2022, the intersection of Broadway and Winchester/Albion was reconstructed to extend the sidewalk and create a curbed bumpout. This improved pedestrian safety by bending the Albion Street approach for vehicles into Winchester Street and significantly reducing the crossing distance across Winchester Street. The crosswalk across Broadway at Winchester Street was also updated to include a pedestrian refuge island.

Additional pedestrian safety improvements are being planned and implemented in coordination with the new Ball Square station. Planned improvements that will be constructed include:

- New crosswalk with curb bumpout on the western side of the intersection of Broadway and Boston Ave.
- New and retimed signal equipment at Broadway at Boston Ave. and Broadway at Willow Ave./Bristol Road.
- Reconstruction of the eastern part of the intersection of Broadway at Boston Ave. to close the existing right turn slip lane from Boston Ave. onto Broadway and to create additional accessible sidewalk area.

In addition to enhanced pedestrian conditions, the reconstructed Broadway Bridge has buffered bike lanes. Recently, the bike connection between Broadway at Winchester/Albion and Cedar was restriped to create sections of parking protected curbside bike lane and buffered bike lane for enhanced safety and mobility for cyclists. The property is approximately 0.1 miles from a Bluebikes bike share station in Ball Square and 0.2 miles from a Bluebikes station at Trum Field.

The businesses in the Ball Square area are uniquely positioned to benefit from recent and forthcoming transit, bicycle, and pedestrian enhancements in the square. All of this, combined with the recommended conditions, should reduce auto-dependence among the Applicant's customers and workforce.

Motor Vehicle Parking

The proposed project is not constructing any on-site vehicle parking. Given the proximity to transit, bicycling, and walking infrastructure, the Mobility Division agrees with not constructing new parking for customers or employees. A lack of dedicated parking has been proven to be the most effective measure to encourage the use of alternative modes of transportation.

Traffic Data and Modelling

The Applicant uses a background growth rate of 0.25%. This is the same growth rate that has been approved for use in the transportation impact analysis of other recently approved cannabis retail developments. The Mobility Division maintains historical databases of motor vehicle volumes for many streets in Somerville. Recent data collection has indicated stable (or declining) background traffic at nearby study sites. As a result, the applicant's inclusion of a modest growth rate of 0.25% per year should be considered extremely conservative.

The Applicant collected data in April of 2022; this is within the Mobility Division's approved timeframe for data collection for TIS analyses.

Trip Generation and Transportation Demand Management

The Applicant's TIS states that the proposed facility's operating hours will begin at 10:00am on weekdays. Although this restriction on business hours is not explicitly described as a Transportation Demand Management (TDM) measure, it will offer some similar benefits by reducing the number of site-generated trips during peak morning commute times on weekdays.

The TIS describes that the proposed facility will initially operate as an "appointment only" facility that effectively limits customers to 48 per hour. The TIS assumes that 50% of customers and employees will arrive by private motor vehicle, with four daily service/delivery trips. Based on the customer, employee, and service/delivery trips, the facility is expected to generate zero (0) vehicle-trips during the Weekday AM peak hour, 48 vehicle-trips during the Weekday PM peak hour, and approximately 504 vehicle-trips on an average weekday.

Although not explicitly described as a Transportation Demand Management measure, the appointment-only operating model will serve to limit traffic and parking impacts of the proposed facility. Additionally, given the operating hours of the proposed facility, there is anticipated to be zero employee or service/delivery vehicle trips during peak hours. The Mobility Division applauds the applicant's proposed appointment only operating strategy and recommends that detailed data be collected during any startup period to help evaluate effectiveness of this model.

The Mobility Division notes that in the case that the applicant would like to change the operating model to walk-in, the impact analysis in the current TIS is not sufficient to account for, understand, and mitigate potential impacts to the roadway network and traffic safety in the neighborhood. If the applicant wants to switch to a walk-in model, the Mobility Division will review a revised TIS submittal presenting data from the first period of operation and accounting for the additional trips and impact on the roadway network under the proposed new operations model.

The property will also have a Café and Arts Space. Based on the ITE trip generation rates, combined with the census data and taking credit for pass-by trips, it is estimated that the Café and Arts Space will

generate approximately 56 vehicle-trips during the Weekday AM peak hour, 20 vehicle-trips during the Weekday PM peak hour, and 34 vehicle-trips during the Saturday Midday peak hour.

Transportation Demand Management

The Applicant's TIS states that all full-time Botanica employees of the proposed facility will be provided a 100% subsidy for MBTA transit passes. The Mobility Division applauds this commitment to workforce mobility and recommends extending a 100% subsidy for MBTA transit passes to all employees of the facility. Transit benefits are recognized as a legitimate and effective TDM measure. Other TDM measures committed to in the TIS include:

- New ADA-compliant sidewalk along site frontage.
- New short-term bicycle parking in front of the site.
- New long-term bicycle parking for employees.
- Posting real time transit information.
- Annual Travel Surveys as defined in the Mobility Management Plan submittal requirements set forth by the City of Somerville.

Transportation Access Plan

Bicycle Parking

The TAP states that the Applicant will provide twelve short-term bicycle parking spaces with four bicycle racks located on the sidewalk along Broadway, two bicycle racks (one space each) located at the front of the site on the east side of the building, and two bicycle racks (one space each) located at the front of the site on the west side of the building.

The TAP also indicates that there will be twelve long-term bicycle parking spaces located at the rear the building. However, the spacing of the long-term bicycle parking as shown in the TAP does not fit twelve bike parking spaces. The Applicant will need to reconfigure the long-term bike parking to fit all spaces. The Applicant will also need to demonstrate how this long-term bicycle parking will comply with the requirements in the City of Somerville Zoning Ordinance, as this is not described in the TAP.

Loading and Deliveries

Recent pavement marking changes in front of the property required the Applicant to remove their originally proposed loading zone from the TAP. The Applicant must work with Mobility to identify loading and delivery needs and relocate the loading zone appropriately, prior to issuance of any Certificate of Occupancy.

Recommended Conditions

Based on the above analysis, in order to mitigate transportation impacts, the Mobility Division recommends the following conditions for the development proposed at 620 Broadway.

- Retail sales to walk-in customers are prohibited. Customer visits must be by appointment only.

- Deliveries must be scheduled during non-peak hours when there is less street activity.
- Provide all employees 100% subsidized MBTA passes, or up to the federal maximum Qualified Transportation Fringe benefits per current U.S. Internal Revenue Code ($270 per month in 2021), subject to any increases.
- Provide all employees 100% subsidized bike share memberships, subject to any rate increases.
- Information on available non-vehicular services in the area will be posted on the website and available in materials posted at the store.
- Provide discounts or other incentives to customers who take non-vehicular or public transportation modes to the site. Identify incentives and discounts to the Director of Mobility prior to the issuance of any Certificate of Occupancy,
- The Applicant shall work with the Mobility Division to identify a loading zone location prior to the issuance of any Certificate of Occupancy.
- The Applicant shall revise their bicycle parking plan to accommodate twelve long-term bicycle parking spaces that meet Somerville Zoning Ordinance requirements, as described in the Applicant's TAP narrative, prior to the receipt of any building permit.
- The Applicant shall provide real time transit information consisting of a connected TransitScreen display (or equivalent service) in the building lobby displaying real time MBTA and bike share information.
- Prior to the issuance of any Certificate of Occupancy, the Applicant will develop and implement a sign and pavement markings plan for Broadway between the Broadway bridge deck and the crosswalk at Winchester Street that enhances safety conditions and protection for people bicycling and reduces opportunities for illegal curbside parking and loading. The plan must be approved by the Director of Mobility.
- The Project design, including the location of the transformer, shall not prohibit possible future integration between the proposed open space on the west side of the site and the adjacent parcel of land currently owned by the MBTA.
- The Applicant shall commit to annual monitoring and reporting of the appointment-only recreational marijuana operations model. Data collection shall include statistically valid travel surveys of employees and customers, and a status update on the implementation of TDM measures.

City of Somerville

OFFICE OF STRATEGIC PLANNING & COMMUNITY DEVELOPMENT

City Hall 3rd Floor, 93 Highland Avenue, Somerville MA 02143

TO: Mayor Curtatone
FROM: Charlotte Leis, MAC Liaison
DATE: July 27, 2021
RE: Botanica, 620 Broadway, Application Revision

The Marijuana Advisory Committee (MAC) reviewed a proposed revision to Botanica's application which had previously been recommended for a Host Community Agreement (HCA) and subsequently offered one. The MAC's thoughts on their review of the proposed revision to this application are below.

Botanica, 620 Broadway

Botanica submitted an application for a Host Community Agreement in October 2019 and was recommended for an HCA as part of Round 3. Botanica's proposal included redeveloping the existing gas station into a new multi-story building with the cannabis retail sales use occupying the first floor of the new building, and office space on the upper stories. The MAC gave this application a score of 13 out of 15 possible points.

Since Botanica was recommended for and received their HCA they have been investigating the feasibility of constructing the building. They have discovered that, due in part to the COVID-19 pandemic, they are unable to find institutions to financially back the construction of office space on the upper stories of the proposed building or to assist in finding prospective tenants for the space, were it to be built. They have submitted to the MAC letters from two institutions attesting that office uses are not viable at this location at this time.

Therefore, Botanica is proposing a phased approach to their multi-story development. The first phase would be a one-story building for the cannabis retail sales use; the one-story building would be designed to support the future addition of upper stories with only limited renovations to the ground floor. The second phase, to be done once financing becomes available for the proposal, would be to add two or more stories of office space on top of the existing first floor cannabis retail sales use.

The applicant has assured the MAC that this proposal is viable from a zoning perspective without the need for Hardship Variances but the MAC does not evaluate zoning matters beyond confirming that the category of cannabis use proposed is permitted in the zoning district. A phased approach to development does not change the aspects of the proposal that the MAC considers, and so this change does not affect the MAC's opinion on the proposal.

The MAC reaffirms its recommendation for Botanica's proposal for the reasons identified in the Round 3 recommendation.

City of Somerville

PLANNING BOARD

City Hall 3rd Floor, 93 Highland Avenue, Somerville MA 02143

TO: Planning Board
FROM: OSPCD Staff
SUBJECT: 620 Broadway, P&Z 21-145
POSTED: July 13, 2023

RECOMMENDATION: No change

This memo is supplemental to the PPZ Staff Memo dated March 10 and May 26, 2023.

This Staff Memo provides supplemental information about the loading and pavement marking plans for the proposed development and recommends the removal of one proposed condition.

BACKGROUND

This application for Site Plan Approval and a Special Permit (SPA/SP) for Cannabis Retail Sales was reviewed by the Planning Board on April 6, May 4, and June 1, 2023. At previous meetings, additional information was requested related to the loading plan and sustainability elements. Since June 1st, the Applicant has collaborated with Mobility Staff to develop an acceptable concept plan for loading and pavement markings.

The Applicant is returning to the Planning Board to present their Conceptual Marking Plan, which includes loading facilities, along with a letter/memorandum with additional information on sustainability measures. Staff have reviewed the Conceptual Marking Plan, with comments provided below. The letter describing sustainability measures was submitted on July 13, 2023, and has not received Staff review, and is not reviewed in this Memo.

ANALYSIS

The submitted Conceptual Marking Plan was submitted in response to detailed discussion with Mobility on the streetscape and marking elements that will be necessary to serve the site and area. Mobility Staff have completed review of the Plan, and have provided the following feedback to the Applicant, to apply when completing final construction documents:

- The proposed striping should match to the existing striping on the east end of the project area, as is shown for the west end of the project area.
- The level of detail shown for the sidewalk and curb lines should match what was included in the Application's Transportation Elements Plan (e.g. location of tree pits, proposed bicycle parking, callouts for existing hydrants and signs, etc., as well as proposed building frontage).
- The 35-foot travel lane taper at the east end of the project area should be lengthened, which can likely be done without impacting parking by extending the east end of the taper closer to the crossing island.

- The 5-foot buffer behind the ADA parking space should be removed, and the loading zone shifted east, to gain an additional parking space.

Mobility Staff have noted that these changes and the level of detail requested are appropriate for plans that would be submitted at the Streetscape Construction Permit application stage. Streetscape design details will then be finalized prior to issuance of the permit. All improvements proposed for the public Right-of-Way require a Streetscape Construction Permit from the Engineering Division.

The proposed permit conditions described in the Staff Memos dated March 10 and May 26, 2023, will remain applicable, with the exception of one condition noted below, which Staff recommend not applying to the project, as it is no longer applicable.

PERMIT CONDITIONS

Should the Board approve the required Site Plan Approval for the 1-story Commercial Building, PPZ Staff recommends the following condition be removed:

- Botanica, LLC shall submit an updated Transportation Access Plan (TAP), subject to review and approval by the Director of Mobility, which identifies a loading zone within three hundred (300) feet of 620 Broadway sufficient to serve the largest delivery vehicle type anticipated for this use.

Tab B

ISD Memo

Page Blank – See Following

William J Proia

From: Nicholas Antanavica <nantanavica@somervillema.gov>
Sent: Monday, August 14, 2023 10:53 AM
To: William J Proia
Cc: Emily Hutchings; Matthew Zaino; Daniel Bartman; Jennifer Price; ISD Zoning
Subject: 620 Broadway Interpretation Response RE: Please see case reference below
Attachments: 620 BROADWAY INTERPRETATION MEMO FINAL.pdf

Good morning Mr. Proia,

Please see the attached response.

Best,
Nick

From: William J Proia <WProia@riemerlaw.com>
Sent: Tuesday, July 25, 2023 11:05 AM
To: ISD Zoning <isdzoning@somervillema.gov>
Cc: Emily Hutchings <ehutchings@somervillema.gov>
Subject: Please see case reference below

Good Morning:

Hope all are faring well. Regarding the matter captioned below, we've been informed that this address would be the place to submit a request for interpretation/determination regarding an on-going development case, for your review.

Please see attached for your consideration, which has also been overnighted to ISD office.

Thank you.

Best

Bill

Request for Interpretation – 620 Broadway, I
P&Z 21-140 [Hardship Variance], P&Z 22-1
Related Applications
P&Z 21-145 [Special Permit/Site Plan Apprc

William J Proia, Esq.
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WProia@riemerlaw.com | www.riemerlaw.com

CITY OF SOMERVILLE, MASSACHUSETTS
INSPECTIONAL SERVICES DEPARTMENT
KATJANA BALLANTYNE - MAYOR

Somerville Zoning Ordinance (SZO) Interpretation

FROM: Nicholas Antanavica, Director, Inspectional Services Department (ISD)
TO: William J. Proia, representing Applicant 620 Broadway, LLC
RE: 620 Broadway Hardship Variance Validity (P&Z 21-140)
DATE: August 10, 2023

This is a formal interpretation regarding application of the SZO towards hardship variances and their validity. This interpretation is being issued by ISD pursuant to SZO 15.4.3, following a formal request for a written zoning interpretation by 620 Broadway, LLC. through its attorney William J. Proia, regarding their pending application for a special permit and site plan approval, application number P&Z 21-145, and the validity of their hardship variance P&Z 21-140. A copy of the formal request is attached to this interpretation.

Application P&Z 21-145 is regarding proposed development of the address known as 620 Broadway (MBL 27-L-2), referred to hereon as the "Project." The Project is in a Commercial Core 5 (CC5) zoning district.

The Zoning Board of Appeals (ZBA) granted 620 Broadway, LLC (the "Applicant") a hardship variance (the "Variance") from the minimum number of stories in the CC5 district on 12/15/2021 in order to build a one-story building. The decision was then timely recorded by the Applicant with the Middlesex County Registry of Deeds on 2/4/2022. The Applicant later requested to extend the Variance by six (6) months, which was granted on 12/14/2022, and recorded with the Middlesex County Registry of Deeds on 2/6/2023. The Applicant then filed a second application to extend their variance by six (6) months on 5/19/2023.

At the highest level, the Applicant's request for interpretation asks whether the variance has not lapsed and is in full effect. A formal response to this hinges on three distinct questions: 1) whether the Applicant can be granted a second extension, 2) whether they have exercised the Variance, and, barring these, 3) whether the Variance has been equitably tolled.

<u>Can a Second Extension Be Granted?</u>
Although the Applicant does not explicitly ask for interpretation regarding a second extension of the Variance, the Applicant's counsel has noted that they have had experience with other municipal boards of appeals which grant more than one variance extension.

It is ISD's interpretation that a second extension of six (6) months is not permitted in the case of the Project. Pursuant to SZO 15.2.3.h.ii, the ZBA has the power to "extend the time period that a

Hardship Variance remains valid for up to six (6) months." While the SZO does not further indicate a deadline by which an applicant must file an application for a variance extension, SZO 15.2.3 is related to M.G.L c40A §10. Said section gives the permit granting authority, in this case, the ZBA, the power to extend the validity of the variance, provided that "the application for such extension is filed ... prior to expiration of such one-year period," that is, one year after the variance was granted. Although the Applicant filed for a second extension before the first extension to the Variance expired, the application was submitted five (5) months after the expiration of the one-year period.

Furthermore, the Massachusetts Supreme Judicial Court states that an application for an extension to a hardship variance must be filed "before the expiration of one year from the date the variance was granted." Cornell v. Board of Appeals, 453 Mass. 888, 890 n.3 (2009). Thus, it is ISD's interpretation that for an extension to a Hardship Variance to be granted under the SZO, an application must be filed within one year of the variance being granted.[1]

Nevertheless, it is ISD's understanding that the power to grant or deny extensions to the Variance rests within the authority of the ZBA, pursuant to SZO 15.2.3.h.ii.[2] Therefore, as the application for extension has already been filed with the ZBA, this subject matter falls within the jurisdiction of the ZBA.

Has the Applicant Exercised the Variance?

An application for a building permit for the Project is not currently before Inspectional Services.[3] However, the formal request for interpretation asks ISD to determine whether the Variance has been exercised under the SZO, and so we are responding as if such an application for permit is before us.[4]

It is ISD's position that the dimensional variance has not been exercised. In Cornell, the Supreme Judicial Court held that "a prerequisite to getting a building permit," such as the plaintiff's ANR indorsement did not constitute an exercise of the dimensional variance, as it did not provide the plaintiff with the right to use the variance.[5] Cornell further states that the plaintiff must have "obtain[ed] a building permit or convey[ed] one of the lots in reliance on the variance" to exercise it, since taking said actions on the lot would require the dimensional variance.[6]

At this time, the Applicant has neither obtained a building permit nor conveyed one of the lots in reliance on the variance. The Applicant has only applied for additional relief (i.e., the Cannabis Retail

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[1] *Cf.* Hadley v. Casper, 2002 Mass. Super. Lexis 299, at *3. "Under G.L.c. 40A, § 10, if a variance is not exercised within one year, or eighteen months including the extension, the variance lapses and the entity must file for a new variance."

[2] *See also id.* at *10, *quoting* Hunters Brook Realty Corp v. Zoning Bd. Of Appeals, 14 Mass. App. Ct. 76, 79 n.6 (1982). "[T]he discretion contemplated by the variance power is vested in the board alone."

[3] A building official may decide whether a variance has been exercised upon application for a building permit. *See* Bonfiglioli v. Walsh, No. 00-845, 2002 Mass. Super. LEXIS 481, at *33 (Dec. 30, 2002). *See also* Sweeney v. Pace, 30 LCR 480, 481 (Mass. Land Ct. 2022) and Grady v. Langone, 19 LCR 380, 381 (Mass. Land Ct. 2011), the latter aff'd by Grady v. Zoning Bd. of Appeals, 465 Mass. 725 (2013).

[4] Whether a variance may have been exercised and/or lapsed may also be decided by a building official upon a formal request as to whether a building permit might be issued. *See* Belfer v. Building Comm'r of Boston, 363 Mass. 439, 441 (1973).

[5] 7 Cynthia M. Barr et al., Massachusetts Zoning Manual, in Chapter 10 Procedures for Obtaining Variances and Special Permits, 10-57, *referencing* Cornell at 892.

[6] *See id.*

Sales Special Permit) and Site Plan Approval, neither of which confer the right to use the Variance on the Applicant.

The Applicant has noted that they have engaged various specialists to prepare the materials necessary for Site Plan Approval and the Special Permit under the Variance. However, the Courts have only considered these actions as exercise of a *use* variance, not exercise of a *dimensional* variance as in Cornell.[7] Therefore, it is ISD's interpretation that the Applicant has not exercised the rights of the Variance at this time.

Can the Variance Be Equitably Tolled?

ISD has been asked to determine whether the Variance has been equitably tolled, and thus has not lapsed. However, it is ISD's understanding that such a determination is not within our authority, but the authority of the ZBA.

In Hadley v. Casper, the Court ruled that the ZBA had the power to decide, within its discretion, to toll the use of a variance, as "the discretion contemplated by the variance power is vested in the board alone." *See* Hadley v. Casper, 2002 Mass. Super. Lexis 299, at *10, quoting Hunters Brook Realty Corp v. Zoning Bd. Of Appeals, 14 Mass. App. Ct. 76, 79 n.6 (1982). As opposed to circumstances in which a variance is tolled by right, equitable tolling is a discretionary decision.[8] Consequently, the Applicant's question as to whether the Variance has been equitably tolled must be posed to the ZBA, and thereby ruled upon.

[7] Barr et. al at 10-58, *referencing* Cornell at 894 n.9; *see also* 10-59 - 10-60, *referencing* Green v. Board of Appeals of Southborough, 96 Mass. App. Ct. 126 (2019), where the developer had exercised their use variance by "engag[ing]...professionals to redesign and modify the development plan."

[8] *See also* Pendergast v. Board of Appeals, 331 Mass. 555, 560 (1954). On the question of whether a variance might be granted at the discretion of the permit granting authority: "An administrative question upon which reasonable persons might differ."

Tab C

Newspaper Article

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Pot shop Botanica is caught in regulatory maze trying to open doors in Somerville's Ball Square

By Austin Clementi
Monday, July 31, 2023

A rendering of what the cannabis shop Botania might look like in Ball Square, Somerville. (Image: Peter Quinn Architects via Planning Board)

A proposed cannabis retail shop called Botanica has once again hit a snag in Somerville's municipal process. In May, the application for the dispensary at 620 Broadway, Ball Square, was continued by the Planning Board due to the city restriping the street near the site, complicating the business' plans for a required loading zone. While the developer has since worked with the city to create a more comprehensive loading plan, on July 20 the board again continued the application due to an expired zoning variance.

The developer, 620 Broadway LLC, got a hardship variance in 2021 to build a one-story building in a location zoned for three stories. Hardship variances in Massachusetts are issued when zoning laws make conditions difficult for a developer to reasonably use their property.

The developer got an extension on the variance in 2022 and applied for a second before the first one expired in June, city planner Emily Hutchings said. But Planning, Preservation and Zoning are of the opinion the city can extend a variance only once. Now the developer may need to start over and apply for a second one, if it can't extend the variance from 2021.

Still, "no final determination has been provided" to the developer on how they should proceed, Hutchings said.

Having followed the city's processes and without a determination on the validity of the hardship variance, the project now sits in a legal gray area. "The applicant could make the argument that they have exercised their rights under the existing hardship variance," and the current building plans comply, Hutchings said.

Bill Proia, the attorney representing the applicant, agreed, saying their presence before the board meant they were still within rights outlined by the variance. Under normal circumstances, a project that does not have the proper variances would not even get before the board; this project, however, appeared before the board before the variance expired.

Hutchings said the board could move forward with the site plan approval and special permit for the project. Without a variance, though, the developer would be unable to get a building permit even if the board approved the project. Chair Michael Capuano cited this as he cautioned against discussing the project during the meeting.

Any testimony and the planning board's approval could be invalidated by a negative decision for the new hardship variance, Capuano said, and "I would like [the new information] to be presented to the board at such a time where we have been told that we actually have the authority to vote on some of these issues."

Members voted unanimously in agreement with Capuano and continued the application to Thursday.

Medford Street housing approved

Tab D

Case Appendix
[In order of Citation]

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BASIL K. WOODS & others vs. CITY OF NEWTON & others.

351 Mass. 98

May 5, 1966 - June 8, 1966

Middlesex County

Present: WILKINS, C.J., SPALDING, WHITTEMORE, KIRK, & REARDON, JJ.

A rezoning ordinance, adopted by the board of aldermen of a city after a committee of the board and the planning board had held a joint hearing on the proposed rezoning, was not invalid under G. L. c. 40A, Section 6, by reason of such joint hearing where it appeared that a notice of the two hearings at the same time and place was so published as to comply with the statutory requirements respecting each hearing, and that the two bodies sat separately at the joint hearing and kept separate minutes and after the hearing separated for their deliberations. [100-102]

Where an essential scheme of the zoning ordinance of a city was to maintain a relation between the area of lots and the bulk of buildings thereon and at the same time to provide flexibility to adapt buildings to particular

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sites and for particular uses, a provision of the ordinance that no building or structure should exceed forty feet in height "unless otherwise provided by the board of aldermen in accordance with" procedures respecting exceptions was proper under G. L. c. 40A, Section 4, and the board validly granted a special permit for the erection on a lot of a motel to a height in excess of forty feet. [102-103]

A provision of a section of a revised zoning ordinance of a city, that the board of aldermen might extend the time for exercising rights under any special permit granted by it "under this section, whether or not such . . . time . . . [had] expired," without further public hearing, related to a procedural matter and authorized the board to extend the time, after the expiration thereof, for exercise of rights under a special permit granted under the corresponding section of the former ordinance, which provided a similar power to extend a time but did not expressly make the power applicable after the expiration of the time. [103-104]

Where it appeared that immediately after the board of aldermen of a city granted a special permit under its zoning ordinance for construction of a motel the construction was enjoined in a suit in equity in which the validity of the special permit was in issue, and that long after expiration of the time limited for exercise of rights under the special permit it was adjudged that

the special permit had been validly granted, the final decree in the suit properly ordered the building inspector to issue a building permit for construction of the motel. [104]

BILL IN EQUITY filed in the Superior Court on December 17, 1963.

The suit was heard by Tomasello, J.

Lawrence H. Adler (Fred B. Wilcon with him) for the plaintiffs.

Gael Mahony (Richard W. Renehan & Joseph D. Steinfield with him) for Marriott Motor Hotels of Newton, Inc. & others; Matt B. Jones, City Solicitor, for the City of Newton & another, also with him.

WHITTEMORE, J. These are appeals by the plaintiffs and the defendants from a declaratory decree of the Superior Court of December 10, 1965. The decree, in paragraphs 1 and 2 respectively, declared the validity of the rezoning by the Newton board of aldermen, on November 4, 1963, of nine and three-quarters acres of land in Norumbega Park (the locus) from Residence C to Business AA, and of the exception granted by the board on November 18, 1963, subject to nine conditions, and to site plan approval, to permit the construction of a motel on the locus. The decree also (par. 3) ordered the public building commissioner to issue

Page 100

to the defendant Marriott Motor Hotels of Newton, Inc. (Marriott) a permit to construct the motel "subject to the conditions and permissive exceptions and site plan approval and the height restriction of 40 feet unless otherwise varied by proper proceedings and authorities"; (par. 4) granted Marriott the right to seek a variance for a height increase; and (par. 5) dismissed the bill of complaint in other respects. Our opinion sustaining demurrers in this case, but with leave to amend, is reported at 349 Mass. 373. The points now at issue, and related facts, are stated below in the course of the opinion.

1. The plaintiffs contend that the rezoning ordinance was invalid because the planning board and the committee of the board of aldermen held a joint hearing. We disagree.

General Laws c. 40A, Section 6, provides in part: "No zoning ordinance or by-law originally establishing the boundaries of the districts or the regulations and restrictions to be enforced therein, and no such ordinance or by-law changing the

same as aforesaid, shall be adopted until after the planning board . . . has held a public hearing thereon, first causing notice of the time and place of such hearing and of the subject matter, sufficient for identification, to be published in . . . [a manner prescribed], and has submitted a final report with recommendations to the city council or town meeting, or until twenty days shall have elapsed after such hearing without the submission of such report . . . . In a city no such ordinance as proposed to be originally established or changed as aforesaid shall be adopted until after the city council or a committee designated or appointed for the purpose by it has held a public hearing thereon, at which all interested persons shall be given an opportunity to be heard. Notice of the time and place of such hearing before the city council or committee thereof and of the subject matter, sufficient for identification, shall be published in . . . [a manner prescribed]. After such notice, hearings and report, or lapse of time without report, a city council or town meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law."

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A notice of two hearings at the same time and place was so published as to comply with the statutory requirements as to time and means of publication and statement of the subject matter of the hearings. [Note 1] On August 12 the members of the committee sat in their customary seats in the aldermen's chamber. The members of the planning board sat at a separate table. An alderman presided and invited members of the planning board to question the speakers. All persons who desired to do so were permitted to speak. The committee and the planning board kept separate minutes and after the hearing the committee and the planning board separated for their deliberations.

The statute makes plain that the purpose of the planning board hearing is to enable it to be informed of the proposal and of citizens' views thereon and to report its recommendations if it wishes to do so. Inasmuch as the ordinance can be enacted in the absence of any report from the planning board, there is no force in the contention that the statute intends that the hearing before the enacting body or its committee be held in the light of a report from the planning board. The statute contemplates that the enacting body will act in the light of a report from the planning board, if any such is submitted (Caires v. Building Commr. of Hingham, 323 Mass. 589, 595), as well as of its knowledge of citizens' views and other

pertinent information obtained at the public hearing held by it or its committee. Nothing in this statutory scheme is disserved by the joint hearing, nothing in the statute bars it, and public convenience and advantage may result. We see nothing in the suggestion that the language, "After such notice, hearings [emphasis supplied] and report, or lapse of time without report, a city council . . . may . . . [act]" shows a legislative intent that the board and the committee meet separately. For all purposes of the statute, there was a planning board hearing

and a committee hearing. On this point, this is the opinion of the majority of the court.

2. The board of aldermen on December 16, 1963, modified its permission for a motel to allow it to be built to a height of fifty-eight feet. The final decree in effect rules this action invalid and remits Marriott to an application for a variance. In this aspect the decree was in error.

The statute (G. L. c. 40A, Section 4) provides in part: "A zoning ordinance or by-law may provide that exceptions may be allowed to the regulations and restrictions contained therein, which shall be applicable to all of the districts of a particular class and of a character set forth in such ordinance or by-law. Such exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law and may be subject to general or specific rules therein contained. The board of appeals established under section fourteen of such city or town, or the city council of such city or the selectmen of such town, as such ordinance or by-law may provide, may, in appropriate cases and subject to appropriate conditions and safeguards, grant to an applicant a special permit to make use of his land or to erect and maintain buildings or other structures thereon in accordance with such an exception." The ordinance (Section 25-8 [c] [8]) provided: "No building or structure shall exceed forty feet in height unless otherwise provided by the board of aldermen in accordance with the procedure provided in section 25-26." Section 25-26 provides appropriate procedures for applying for and granting exceptions. Other provisions of Section 25-8 of the ordinance require that in a Business AA district the ground floor cannot exceed in area one fourth of the area of the lot and that the "ratio of the gross floor area of all buildings on one lot to the total area of the lot shall not

exceed one." Hence the total floor area of the buildings, whatever the height, cannot exceed the area of the lot.

Thus there is an appropriate limitation in respect of the power to extend the height of a building, whereby the essential scheme of the ordinance for a relation between area and bulk is maintained and at the same time flexibility to adapt

buildings to particular sites and for particular uses is secured. The ordinance was a proper exercise of power under c. 40A, Section 4, and the permission could not have been given as a variance. Russell v. Zoning Bd. of Appeals of Brookline, 349 Mass. 532, 536-537. See Rathkopf, The Law of Zoning and Planning (3d ed.) c. 54. There is nothing to the contrary in Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87, 89-90, or Tambone v. Board of Appeal of Stoneham, 348 Mass. 359, 363-364. The record does not suggest that the discretion of the board was improperly exercised.

3. The board of aldermen on December 16, 1963, extended to November 20, 1964, the order of November 18, 1963, giving permission for a motel. There has been no further extension. An injunction preventing construction on the locus has been in force since December 17, 1963.

In 1963 the ordinance (Section 23.20 [b]) provided: "The rights under any permission . . . shall be exercised within such period of time as may be specified by the board of aldermen . . . or if no period is . . . specified, within six months, or such permission shall be null and void. The board of aldermen may extend the period of time for exercising rights under any permission granted by it as herein provided without the necessity of a further public hearing thereon unless such board or its committee on claims and rules shall vote to require such a public hearing." At the present time the provision (Section 25-26 [b]) is substantially the same except that the right to extend a permit after expiration of the existing period is made express: "The board of aldermen may extend the period of time for exercising rights under any permission granted under this section, whether or not such period of time shall have expired, without the necessity of a further public hearing thereon unless the board or its committee on claims and rules shall vote to require such a public hearing."

The defendants rightly construe the final decree as ruling that the board may now extend the permit for a motel. We construe the new section (25-26 [b]) to apply to permits

under the former section. The amendment clarified a procedural step. For this matter of procedure a permit granted under Section 23.20 (b) is to be construed as a permit "granted under this section" within the meaning of Section 25-26 (b) notwithstanding the adoption of a new ordinance. We are not concerned with a case where because of lapse of time it would be unreasonable to allow extension without a further public hearing. The delay through litigation and an injunction should not prejudice parties who, as it now turns out, had a right to proceed immediately under legal permits.

4. It was not error to decree that the public building commissioner, upon application by Marriott, issue a building permit. The parties were in agreement that, when the bill was filed, Marriott intended to seek and the public building commissioner, notwithstanding the request of the plaintiffs that he not do so, intended to grant a building permit for the construction of a motel on the locus "in accordance with the permissive use and site plan approval granted on November 18, 1963, as amended by the orders on December 16, 1963." The primary point at issue in the controversy now resolved is whether Marriott is entitled to that permit. The requirement of the decree that the permit be subject to "conditions" and "site plan approval" obviously refers to the action of the board of aldermen in imposing nine conditions and to the requirement of the ordinance for site plan approval. As noted in point 3 of this opinion, the permit for an exception must be made current.

5. No basis for a reversal is shown in the rulings on the evidence to which the plaintiffs briefly refer.

6. The final decree is modified by striking therefrom paragraphs 4 and 5 and the last clause of paragraph 3 reading, "and the height restriction of 40 feet unless otherwise varied by proper proceedings and authorities," and substituting in place thereof the words, "and the permissive exception to construct the motel to a height of fifty-eight feet," and as modified is affirmed.

So ordered.

FOOTNOTES

[Note 1] Over the signature of the city clerk it gave notice of a hearing before the committee on claims and rules of the board of aldermen on Monday, August 12, 1963, at 7:45 P.M. at the City Hall. Below the clerk's signature, and in the name of the city engineer and clerk of the planning board, appeared the following: "Notice is hereby given by the Planning Board that it will hold public hearing on the above petitions as described in the foregoing notice at the same time and place."

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ARTHUR B. BELFER & others vs. BUILDING COMMISSIONER OF BOSTON.

363 Mass. 439

March 8, 1973 - April 4, 1973

Suffolk County

Present: TAURO, C.J., REARDON, QUIRICO, HENNESSEY, & KAPLAN, JJ.

Where a plaintiff sought declaratory relief to determine whether the building commissioner of Boston ought to be compelled, after his announced intention to refuse, to issue a building permit should the variances granted the plaintiff by the board of appeal withstand a court challenge, there was an actual controversy as required by G. L. c. 231A, Section 1. [441-442]

Where an appeal from a decision of a board of appeal granting a zoning variance was not collusively made for the purpose of extending the life of the variance, the period of limitations regarding the use of the variance was tolled during the pendency of the appeal. [442-445]

BILL IN EQUITY filed in the Supreme Judicial Court for the county of Suffolk on September 28, 1972.

The suit was reserved and reported by Hennessey, J.

The case was submitted on a brief.

Peter Van, Robert F. Sylvia & Frederick F. Schauer for the plaintiffs.

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HENNESSEY, J. This is a bill for declaratory relief pursuant to G. L. c. 231A brought in the county court. A single justice of this court reserved and reported the matter without decision to the full court. The plaintiffs are the general partners of Devonshire Associates, a Massachusetts limited partnership. By direction of the single justice, Paul R. Devin, Domenic DeLuca and Fidelity Management & Research Company, plaintiffs in a separate but related action pending in the Superior Court, were ordered to file appearances as interveners.

We summarize the facts as agreed by the parties. On March 10, 1970, the plaintiffs acquired title to certain premises located at 228-256 Washington Street, Boston (the locus). Prior to this, on March 21, 1969, Carol Management Company (Carol) filed an application for a building permit relative to the locus, with the knowledge and approval of the plaintiffs' predecessor in title to the locus. The application requested permission to erect a thirty-three story building. On March 24, 1969, the defendant denied the application for a building permit on the grounds that the building which Carol proposed to erect violated the provisions of the Boston Zoning Code for a business district in respect to floor area ratio, parapet setback, and off-street loading facilities.

Carol filed an appeal with the board of appeal of the city of Boston seeking variances from those sections of the zoning code which the proposed building would violate. On September 22, 1970, the board of appeal granted the variances and filed its decision in the office of the defendant on September 29, 1970. Various persons claiming to be aggrieved by the granting of the variances filed an appeal under St. 1956, c. 665, Section 11, in the Superior Court sitting in Suffolk County. This zoning appeal remains pending in the Superior Court. The appellants in the zoning appeal are the interveners in the instant case. These interveners and the plaintiffs in the instant suit entered into a contract which provides for the dismissal of the zoning appeal upon the happening of certain contingencies.

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On September 22, 1972, the plaintiffs wrote to the defendant asking whether he would issue a building permit consistent with the variances granted if the application for the permit was made concurrently with the dismissal of the zoning appeal, but subsequent to September 28, 1972. The defendant replied on September 26, 1972, that he would not issue a building permit consistent with the variances granted, on the ground that the variances granted by the board of appeal would lapse and become null and void subsequent to September 28, 1972, pursuant to Section 7-1 of the Boston Zoning Code. [Note 1]

Section 7-1 of the Boston Zoning Code was enacted pursuant to St. 1956, c. 665, which in its main features corresponds to G. L. c. 40A but applies to the city of Boston only. Section 7-1, as set out in the margin, [Note 2] provides in substance

that variances from zoning regulations granted by the board of appeal expire if not used within two years of the date the variance is filed in the office of the building commissioner. Since the decision granting the variances in the instant case was filed on September 29, 1970, the defendant would not issue a building permit after September 28, 1972. Consequently, the plaintiffs brought this bill for declaratory relief, asking that the court declare that the filing of the appeal in the Superior Court from the granting of the variances by the board acted to stay the two year time limitation of Section 7-1 of the Boston Zoning Code.

1. That there is an actual controversy, as required by G. L. c. 231A, Section 1, is clear. The plaintiffs claim they

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have a right to a building permit despite the lapse of two years. The defendant denies this and has expressed his intention not to grant a permit subsequent to the two year limitation. It is not necessary actually to apply for and be denied a permit, as long as the granting authority had unequivocally stated that he will refuse to grant a permit. See School Comm. of Cambridge v. Superintendent of Schs. of Cambridge, 320 Mass. 516, 518; New Bedford v. New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Authy. 329 Mass. 243, 247. It is true that declaratory relief in this case will not terminate the dispute over the validity of the variances, but it will terminate the uncertainty of whether a building permit will issue if the variances are adjudged valid in the suit involving them. Under his present position, the defendant will not issue a permit even if the variances are held to be valid. See Travelers Ins. Co. v. Graye, 358 Mass. 238, 240.

2. As to the merits, the plaintiffs argue that since the zoning variances, as a practical matter, could not be used during the pendency of the appeal from the granting of the variances, the appeal tolled the running of the two year period during which the variances had to be used. Though the plaintiffs have brought no Massachusetts case in point to our attention, they cite Tantimonaco v. Zoning Bd. of Review of Johnston, 102 R. I. 594, 599-600, as supportive of their position. In that case, the court held that where the validity of a building permit was the subject of litigation, the local zoning ordinance providing for the expiration of a permit if not acted upon within six months was stayed during the litigation. The court relied on

the common sense practical consideration that the holder of a permit under attack would be more reluctant to incur obligations in using the permit than he otherwise would be.

The plaintiffs also argue that, by analogy, the case of Woods v. Newton, 351 Mass. 98, 103-104, supports their contention. In that case, a building permit had expired, the board of aldermen gave no further extension and an

injunction preventing construction on the locus was in effect during litigation. We held that the board could extend the permit since it was not unreasonable to allow an extension without a further public hearing and since the delay caused by litigation and an injunction should not prejudice parties who, as it turned out, had valid permits. This result, however, turned on the interpretation of an ordinance expressly granting the city of Newton the right to extend the period of time for exercising rights under a building permit, and hence, while helpful, is clearly distinguishable from the instant case. Moreover, in the Woods case, the holder of the permit was legally unable to use it because of the outstanding injunction. In the instant case, although the appeal from the decision granting variances created practical obstacles to their use, in that construction could proceed only at a legal risk caused by the appeal, the plaintiffs were entitled as of right to a building permit consistent with the variances for a period of two years.

The plaintiffs also analogize the instant case to cases from other jurisdictions relating to the tolling of a statute of limitations pending an appeal. The rule the plaintiffs ask us to adopt is that stated in Dillon v. Board of Pension Commrs. of Los Angeles, 18 Cal. 2d 427, 431. In that case, where an administrative remedy prevented the commencement of a civil action for a pension, the court said: "[T]he running of the statute of limitations is suspended during any period in which the plaintiff is *legally* prevented from taking action to protect his rights" (emphasis added). We need not decide whether this is the rule in the Commonwealth, since even if it were, it does not help the plaintiffs. As in the Woods case, supra, this rule applies when the plaintiff is legally prevented from acting. No such legal disability attended the circumstances in the instant case.

Two other considerations can be argued in opposition to the plaintiffs' position. The first argument arises out of St. 1956, c. 665, Section 11, which provides that parties who appeal to the Superior Court in Suffolk County from decisions

of the board of appeal must file a surety bond, approved by the court, to indemnify and save harmless the person or persons in whose favor the decision was rendered from all damages and costs which he or they may sustain in case the decision of the board is affirmed. See Begley v. Board of Appeal of Boston, 349 Mass. 458, 460; McNeely v. Board of Appeal of Boston, 358 Mass. 94, 106. Thus it is urged that a person who refrains from using a permit because of an appeal may recover secured damages including the value of an expired variance. The argument is not convincing. Such damages in many instances would provide a poor substitute for the right of a person to build under a variance, without the risks inherent in a pending appeal. We have in mind here, also, that there are limits to the amount of the bond which the judge may properly order. See Damaskos v. Board of Appeal of Boston, 359 Mass. 55, 63-64. Broderick v. Board of Appeal of Boston, 361 Mass. 472, 474, 475.

It can also be argued that, if an appeal tolls the expiration date of a variance, a collusive and nonadversary appeal can be used to toll the time limitation of a variance, perhaps to allow the owner more time to speculate on the value of the property interest which is the subject of the variance. We are not faced with that issue in this case, because there is no suggestion that the Superior Court appeal here is not bona fide. Nor do we suggest that the time limitation would necessarily be tolled during the pendency of a collusive and nonadversary appeal. We observe also that the board of appeal, as a defendant in the Superior Court, can press for an early trial and disposition of any appeal which appears to be collusive. In sum, we are not persuaded that the argument concerning the possibility of collusive appeals is controlling here.

We conclude that the relief from time limitations given in cases such as Woods v. Newton, 351 Mass. 98, supra, where a legal impediment exists to the use of a benefit, should also be given where an appeal from the granting of the variance

creates equally real practical impediments to the use of a benefit. Otherwise a variance which was

lawfully awarded can be frustrated by the delay inherent in an appeal. Unless an appeal tolls the time period, many variances would be meaningless.

We hold that, in the instant case where there is no contention or showing that the appeal was collusively made for the purpose of extending the life of the variance, the period of limitations regarding the use of a variance set forth in Section 7-1 of the Boston Zoning Code is tolled during the appeal from the decision of the board granting the variance under St. 1956, c. 665, Section 11.

3. The case is remanded to the county court for the entry of a decree consistent with this opinion.

So ordered.

FOOTNOTES

[Note 1] Although it is not crucial to the issues of this case, we observe that the defendant apparently was in error by one day, even as to the position he asserted.

[Note 2] "Section 7-1. Authorization for Variance. As provided for in Section 9 of Chapter 665 of the Acts of 1956, as now in force or hereafter amended, and subject to the provisions of Sections 7-2, 7-3 and 7-4, the Board of Appeal may, in a specific case after public notice and hearing, grant a variance from the terms of this code; provided, however, that such grant shall lapse and become null and void unless such variance is used within two years after the record of said Board's proceedings pertaining thereto is filed in the office of the Building Commissioner pursuant to Section 8 of said Chapter 665."

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PAUL CORNELL vs. BOARD OF APPEALS OF DRACUT & another. [Note 1]

453 Mass. 888

March 5, 2009. - May 22, 2009.

Present: MARSHALL, C.J., IRELAND, SPINA, CORDY, BOTSFORD, & GANTS, JJ.

Related Cases:

- 72 Mass. App. Ct. 390

Zoning, Variance, Lapse of variance, Building permit. Statute, Construction. Words, "Exercised."

CIVIL ACTION commenced in the Land Court Department on December 15, 2003.

The case was heard by Alexander H. Sands, J., on motions for summary judgment, and a motion to alter or amend the judgment was heard by him.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Justin Perrotta for the plaintiff.

James P. Hall (Raymond T. Weicker with him) for the defendants.

Ilana M. Quirk, for Massachusetts Chapter of the American Planning Association, amicus curiae, submitted a brief.

SPINA, J. This zoning case requires us to decide the actions a variance holder must take to "exercise" a dimensional variance under G. L. c. 40A, § 10, to prevent it from lapsing. [Note 2]

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The plaintiff, Paul Cornell, owns a fourteen-acre lot in Dracut. He proposed a plan to divide the property into two parcels, with the intention of erecting a home on the smaller of the two parcels. Because the frontage on that parcel was twenty-five feet less than the minimum frontage required by the Dracut zoning bylaws, a variance

was necessary. On March 7, 2002, the board of appeals of Dracut granted Cornell a variance. The certificate granting Cornell a variance contained an advisement stating that G. L. c. 40A, § 11, provides that the variance shall not take effect until it is recorded in the registry of deeds for the county and district in which the land is located.

Cornell belatedly set out to obtain approvals from the planning board, the board of health, and the conservation commission, all of which were prerequisites for a building permit. To this end, Cornell hired a registered land surveyor to prepare an "approval not required" plan (ANR), see G. L. c. 41, § 81P, which subsequently was filed with the planning board, and approved and indorsed on August 14, 2002. Cornell then retained Norse Environmental Services, Inc. (Norse), to prepare septic and wetlands delineation plans. Norse began testing the soil in November, 2002, and submitted a septic plan to the board of health on February 14, 2003. At some point in early 2003, Cornell applied for an order of conditions from the conservation commission. By March 7, 2003, the anniversary of the issuance of his variance, the board of health and the conservation commission continued proceedings concerning Cornell's applications several times, and had not issued any decision concerning Cornell's applications.

On May 7, 2003, the conservation commission issued an order of conditions, and on June 12 the board of health approved Cornell's septic plan. By this time, Cornell had expended more than $15,000 in seeking all three approvals. In the same month, Cornell applied for a building permit, but was told by the defendant, Frank Polak, a building inspector, that his application would be denied on the ground that the variance had lapsed due to Cornell's failure to apply for a building permit within one year of the grant of the variance. Polak told Cornell that he either had to seek an extension of the variance or reapply for the variance in order to obtain a building permit. On June 16, 2003, Cornell requested an extension from the board of appeals, which was

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denied as untimely. [Note 3] Cornell then reapplied for a variance. His application was denied on November 13. In December, Cornell commenced the present action

in the Land Court seeking, inter alia, [Note 4] a declaratory judgment that the original variance never had lapsed.

Cornell recorded the variance, which allegedly had lapsed, on January 16, 2004, in the Middlesex County northern district registry of deeds. See G. L. c. 40A, § 11, fifth par.

On Cornell's motion for summary judgment, a judge in the Land Court ruled that the variance did never "take effect," G. L. c. 40A, § 11, fifth par., because it was not timely recorded. Consequently, he reasoned, the variance could not be exercised under G. L. c. 40A, § 10, to prevent it from lapsing. The judge further concluded that, in any event, Cornell had failed to demonstrate that he exercised the variance by March, 2003, because he had neither acquired a building permit nor conveyed one of the lots in reliance on the variance. After judgment entered for the defendants, Cornell moved to alter or amend the judgment, arguing, among other things, that G. L. c. 40A, § 11, did not require a variance holder to record the variance in order to exercise it under G. L. c. 40A, § 10. That motion was denied, and Cornell appealed. The Appeals Court affirmed. See Cornell v. Board of Appeals of Dracut, 72 Mass. App. Ct. 390 (2008). We granted Cornell's application for further appellate review and affirm the judgment.

We conclude that Cornell did not exercise his variance under G. L. c. 40A, § 10, within one year of its issuance. General Laws c. 40A, § 10, provides, in relevant part: "If the rights authorized by a variance are not exercised within one year of the date of grant of such variance, such rights shall lapse . . . ." [Note 5] This section, intended "to eliminate to some degree the current confusion

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regarding status of land within municipalities," 1973 House Doc. No. 6200, at 20; see Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne, 14 Mass. App. Ct. 76, 81-83 (1982) (outlining legislative history of G. L. c. 40A, § 10), ensures the prompt utilization of duly granted variances.

The statute does not define "exercised." Where a statute does not define a particular word, "the natural import of words according to the ordinary and approved usage of the language when applied to the subject matter of the act, is to

be considered as expressing the intention of the Legislature." Boston & Me. R.R. v. Billerica, 262 Mass. 439, 444 (1928). "Exercise" means "to bring into play: make effective in action . . . bring to bear." Webster's Third New Int'l Dictionary 795 (1993).

We agree with the Land Court judge that under G. L. c. 40A, § 11, fifth par., which is set out in relevant part in the margin, [Note 6] a variance does not "take effect" until it is recorded and that the recording of a variance within one year of its grant is necessary to "exercise" it. The ordinary meaning of the phrase "take effect" is "to become operative." Webster's Third New Int'l Dictionary, supra at 2331. Thus, the variance could not become operative, and by implication, could not be exercised, until it was recorded. Here, despite the advisement on the certificate granting him a variance, Cornell failed to record the variance within one year of its grant, and thereby caused the variance to lapse. [Note 7]

Even if the variance had been recorded timely, we would nonetheless conclude that Cornell's actions fell short of "exercising" the variance. We agree with the Land Court judge and the

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Appeals Court, that at the very least, in addition to recording the variance, Cornell needed to obtain a building permit or convey one of the lots in reliance on the variance. Cornell v. Board of Appeals of Dracut, 72 Mass. App. Ct. 390, 393 (2008), citing Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985). Without a building permit or a conveyance of one of the lots, Cornell did not utilize the variance, or "make [it] effective in action," because he did not undertake any action on the lot necessitating the variance.

Cornell contends that because the variance was a prerequisite for the ANR indorsement, [Note 8] he "exercised" the variance. We disagree. The ANR indorsement conferred no right on Cornell to use the variance. The ANR indorsement serves merely to permit the plan to be recorded, see Cricones v. Planning Bd. of Dracut, 39 Mass. App. Ct. 264, 268 (1995), and is not an attestation of compliance with zoning requirements. See Hamilton v. Planning Bd. of Beverly, 35 Mass. App. Ct. 386, 389 (1993); Smalley v. Planning Bd. of Harwich,

10 Mass. App. Ct. 599, 603 (1980). An ANR indorsement, like an approval from a board of health, conservation commission, or similar entity, is, in this

case, essentially preliminary to the issuance of a building permit or a conveyance. Cf. Smith v. Board of Appeals of Brookline, 366 Mass. 197, 201 (1974) (not every expenditure of time, effort, and money is enough to qualify as construction for purposes of exercising special permit). A building permit, in contrast, authorizes a variance holder, such as Cornell, to build on the nonconforming lot and thus is the culmination of the permitting process that allows him to utilize that lot in a way that otherwise does not conform with the applicable zoning provisions. Our conclusion gains support from the fact that a building permit is needed to grandfather this variance against a subsequent zoning change. See G. L. c. 40A, § 6, first par. With respect to a conveyance of less than the original parcel, i.e., a conveyance of one of these lots, an ANR indorsed plan is a prerequisite to recording a deed. See G. L. c. 183, § 6A. Therefore, it was necessary for Cornell to have obtained a building permit or convey one of the lots to realize the benefits of the variance.

Circumstances beyond a variance holder's control may make obtaining a building permit within one year of the grant of a variance impossible and thus warrant equitable tolling of the one-year period. However, reasonably avoidable impediments to obtaining a building permit will preclude equitable tolling. See Smith v. Board of Appeals of Brookline, supra at 202 (statutory six-month period to begin construction not tolled where owner who ultimately abandoned special permit could have resolved litigation over special permit earlier). In order to demonstrate that equitable tolling is warranted, a variance holder must show that the holder has timely sought an extension of the variance, see G. L. c. 40A, § 10, third par., and that delays clearly attributable to others have hampered the holder's efforts to obtain a building permit. Cf. Belfer v. Building Comm'r of Boston, 363 Mass. 439, 444 (1973) (two-year period in which variance had to be used under zoning code tolled where appeal from granting of variance created "real practical impediments to use of a [variance]"). Cf. also Smith v. Board of Appeals of Brookline, supra at 201 ("real practical impediments" caused by litigation may toll six-month statutory period to begin construction pursuant to special permit).

Cornell has not demonstrated that equitable tolling would be

appropriate in this case. Cornell did not seek an extension of the variance until several months after the expiration of the one-year period. He has also failed to establish that the delays in obtaining the approvals necessary for a building permit were not reasonably avoidable. Although the board of health and the conservation commission continued proceedings concerning Cornell's applications several times, nothing in the record on appeal explains why Cornell waited until after he received the ANR indorsement in August, 2002, to hire Norse to prepare a septic plan and a wetlands delineation plan. Nothing prevented Cornell from simultaneously seeking all three approvals immediately after, and in some cases before, the variance was granted. Furthermore, while it is unclear when Cornell submitted his request for an order of conditions to the conservation commission in 2003, he did not submit the septic plan to the board of health until February 14, 2003. He could not have reasonably expected the board of health to review and approve his application in a mere three weeks' time. In these circumstances, Cornell's expenditures in seeking the requisite approvals for a building permit do not offset his unexplained delay in seeking those approvals.

In sum, at the very least, Cornell should have recorded the variance and obtained a building permit within one year of being granted the variance to prevent it from lapsing. [Note 9] We recognize that delays in fulfilling the prerequisites for a building permit may occur notwithstanding a variance holder's diligence. In those circumstances, the one-year period in which a variance holder must "exercise" the variance may be equitably tolled if, in addition to establishing that such delays were not reasonably avoidable, the variance holder seeks an extension of the variance in a

timely fashion. See G. L. c. 40A, § 10, third par. However, variances are generally disfavored, see Planning Bd. of Nantucket v. Board of Appeals of Nantucket, 15 Mass. App. Ct. 733, 738 (1983), and where, as here, a variance holder has not timely applied for an extension of the variance and failed to provide a reason for

not diligently pursuing the approvals necessary for a building permit, the one-year period is not tolled.

Judgment affirmed.

FOOTNOTES

[Note 1] Building inspector of Dracut.

[Note 2] We acknowledge the amicus brief submitted in support of the defendants by the Massachusetts Chapter of the American Planning Association.

[Note 3] General Laws c. 40A, § 10, third par., authorizes the board of appeals, in its discretion, to extend by not more than six months the time in which to exercise a variance, provided the application therefor is filed before the expiration of one year from the date the variance was granted.

[Note 4] Cornell also sought review of the denial of his second application for a variance, see G. L. c. 40A, § 17, but failed to pursue that claim below and does not raise it now.

[Note 5] We note that G. L. c. 40A, § 9, fourteenth par., states that special permits "shall lapse [after expiration of the period of time set forth in the ordinance or bylaw] if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause."

[Note 6] Section 11, fifth par., provides, in relevant part: "No variance, or any extension, modification or renewal thereof, *shall take effect* until a copy of the decision bearing the certification of the city or town clerk that twenty days have elapsed after the decision has been filed in the office of the city or town clerk and no appeal has been filed . . ." (emphasis added).

[Note 7] We leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied. Cf. McDermott v. Board of Appeals of Melrose, 59 Mass. App. Ct. 457 (2003) (failure to record special permit not fatal where plaintiff substantially used special permit). Here, Cornell did not substantially rely on the variance because he did not sell either lot or engage in construction on the lot for which the variance was granted.

[Note 8] An "approval not required" (ANR) indorsement "shall not be withheld unless such plan shows a subdivision." G. L. c. 41, § 81P. A "subdivision" is:

"[T]he division of a tract of land into two or more lots . . . provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a

subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. *Such frontage shall be of at least such distance as is then required by zoning or other ordinance or by-law,* if any, of said city or town for erection of a building on such lot, and if no distance is so required, such frontage shall be of at least twenty feet" (emphasis added).

G. L. c. 41, § 81L.

[Note 9] This decision is not intended to resolve all questions concerning timely exercise of a variance. For example, a "use" variance may not require any construction or excavation, and a building permit may not be necessary to exercise such a variance. Evidence of "use" within one year of issuance of the variance may be sufficient to exercise such a variance. Here, construction of a house on a nonconforming lot was sought, hence the need for a building permit. Cf. G. L. c. 40A, § 9, fourteenth par. (relating to special permits). We note that unlike G. L. c. 40A, § 9, fourteenth par., which requires the commencement of construction to prevent a special permit from lapsing, the Legislature has not required commencement of construction as a prerequisite for "exercise" of a variance.

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JONATHAN GREEN vs. ZONING BOARD OF APPEALS OF SOUTHBOROUGH & another. [Note 1]

96 Mass. App. Ct. 126

June 5, 2019 - September 19, 2019

Court Below: Superior Court, Worcester County

Present: Wolohojian, Milkey, & Hand, JJ.

Zoning, Variance, Lapse of variance, Comprehensive permit. Words, "Exercised."

In the circumstances of a proposed residential housing development that had been granted a use variance by the defendant zoning board of appeals (board), subject to a condition that the variance would become effective only after board approval of a comprehensive permit, which came almost fifteen months later, the use variance did not lapse for failure to exercise the rights authorized by it within one year, as required by G. L. c. 40A, § 10, where the record did not suggest that the delay in issuance of a comprehensive permit was chargeable to the developer, and where the undisputed facts indicated that the developer took actions short of construction in reliance on the use variance such that it could be said to have exercised its rights under the use variance within one year [129-132]; further, the plaintiff's assertion of "disputed" as to the developer's actions was not sufficient to create a genuine issue of material fact [132-133].

CIVIL ACTION commenced in the Superior Court Department on December 6, 2016.

The case was heard by Susan E. Sullivan, J., on motions for summary judgment.

Daniel J. Pasquarello (Donald J. O'Neil also present) for the plaintiff.

Angelo P. Catanzaro for Park Central, LLC.

Aldo A. Cipriano for zoning board of appeals of Southborough.

WOLOHOJIAN, J. At issue is whether a use variance lapsed pursuant to G. L. c. 40A, § 10, which requires that variances be exercised within one year of their grant. On the parties' cross motions for summary judgment, a Superior Court judge

entered judgment in favor of the defendants on the ground that the plaintiff, Jonathan Green, had failed to exhaust his administrative remedies. We affirm, but on different grounds.

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Background. The essential facts are undisputed. On February 12, 2014, Park Central, LLC (Park Central), filed an application for a comprehensive permit to construct 180 units of affordable housing on a 101.25-acre parcel of land in Southborough (town). Park Central also proposed the construction of 158 townhouse units on another portion of the land, which were to be sold at market rate. There was local opposition to the entire development as originally proposed. During the comprehensive permit hearing process, Park Central and several direct abutters -- with the help of a consultant engaged by the town zoning board of appeals (board) -- negotiated a settlement agreement (agreement) that resulted in significant changes to the development and therefore had the general support of the neighborhood. Among other things, the agreement changed the type of affordable housing units from individual ownership to rental units (which would result in the town's affordable housing inventory far exceeding for decades to come the ten percent baseline required under G. L. c. 40B, § 20), relocated the affordable housing units away from the neighboring residential community, and provided for a permanent conservation restriction on a portion of the land. The changes set forth in the agreement were incorporated into a concept plan finalized on April 8, 2015.

Because the development was to be located in three zoning districts ("Industrial Park," "Industrial," and "Residential A") that did not permit use of the land for the development as of right, Park Central applied for a use variance on April 13, 2015. The board granted the use variance on May 27, 2015, subject to sixteen conditions, the second of which (condition no. 2) is central to this appeal:

"The [v]ariance is GRANTED subject to, and the project shall be constructed in substantial conformance with the conditions hereinafter set forth which are incorporated herein and made a part of this [d]ecision.

". . .

"2. The [v]ariance shall be effective only following final [b]oard approval of [Park Central's] c. 40B [c]omprehensive [p]ermit [a]pplication for a 180 unit rental affordable housing project with buildings and infrastructure located in substantial compliance with the April 8, 2015 concept [p]lan and which approval shall be final with all appeals have [sic] expired.

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[Park Central] shall amend and modify its pending [c]omprehensive [p]ermit [a]pplication to reflect this change."

Notably, no one appealed the board's decision, and the use variance was recorded in the registry of deeds on July 27, 2015.

The following year, on August 23, 2016, Karen Shimkus, a town resident who lived approximately one mile from the development, wrote to the town building inspector asking that he declare that the use variance had lapsed because the rights authorized under it had not been exercised within one year, as required by G. L. c. 40A, § 10. [Note 2] The building inspector denied Shimkus's request the same day. The following day, August 24, 2016, the board approved Park Central's comprehensive permit application.

Shimkus timely appealed the building inspector's decision to the board, see G. L. c. 40A, §§ 8, 15, which held a public hearing on November 3, 2016. That same day, Jonathan Green, an abutter to an abutter to the proposed development, submitted what he styled a "Request for Formal Opinion" to both the building inspector and the board. In essence, Green's submission sought the same relief Shimkus sought: namely, a declaration that the use variance had lapsed. The board denied Shimkus's appeal. Neither the building inspector nor the board made any response to, or acted on, Green's request.

Green then joined Shimkus as a plaintiff in bringing the underlying Superior Court action pursuant to G. L. c. 40A, § 17, seeking review of the board's decision denying Shimkus's request for relief. Shimkus subsequently voluntarily dismissed her claim with prejudice, leaving Green as the sole plaintiff. On cross motions for summary judgment, the judge concluded that Green had failed to exhaust his

administrative remedies, and judgment entered for the defendants. This appeal followed.

Discussion. On appeal, the parties raise various threshold issues before reaching the merits. First, Green contends that under G. L. c. 40A, § 17, he is entitled to appeal the board's decision even though he had not joined Shimkus's appeal to the board. It is Green's position that under the plain language of the statute,

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"[a]ny person aggrieved by a decision of the board of appeals" [Note 3] may appeal that decision "whether or not previously a party to the proceeding." G. L. c. 40A, § 17. Thus, he contends, it does not matter that he did not join Shimkus in her appeal to the board, and he did not need to exhaust administrative remedies himself in order to appeal the board's decision pertaining to Shimkus. Second, Green contends that requiring him to seek further administrative relief would be futile given that the board and the building inspector denied Shimkus the same relief. The defendants, in addition to countering Green's arguments, argue that Green, having failed to appeal the issuance of the use variance, is not aggrieved by the board's decision and thus lacks standing. Because these various threshold issues are not outcome determinative we need not, and do not, resolve them. [Note 4] See Mostyn v. Department of Envtl. Protection, 83 Mass. App. Ct. 788, 792 & n.12 (2013). The merits were fully briefed below and here, and our review is de novo, without deference to the judge's decision. See DeWolfe v. Hingham Ctr., Ltd., 464 Mass. 795, 799 (2013). "It is well established that, on appeal, we may consider any ground apparent on the record that supports the result reached in the lower court." Gabbidon v. King, 414 Mass. 685, 686 (1993). For all of these reasons, we turn directly to the merits.

Green argues first that, as a matter of law, because the use variance expired before it became effective, there was never a time when Park Central could exercise the use variance. This argument rests upon (1) G. L. c. 40A, § 10, which provides that "[i]f the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse," (2) condition no. 2, which states that the use variance would become effective only upon approval of the comprehensive permit,

and (3) the fact that the comprehensive permit was not approved until August 24, 2016, fifteen months after the use variance was granted. Taking these together, Green maintains that the use variance did not become effective until after it had already lapsed, and therefore no rights under it could be exercised. We disagree.

The granting of variances is governed by G. L. c. 40A, § 10, which, among other things, authorizes permit-granting authorities to "impose conditions, safeguards and limitations both of time and of use" on variances -- but speaks neither of "effectiveness" nor confers authority over legal effectiveness of a variance to local bodies. By contrast, legal effectiveness is statutorily pegged to the recording of the variance. A variance becomes legally effective when it is recorded with the registry of deeds pursuant to G. L. c. 40A, § 11, which provides that "[n]o variance . . . shall take effect until a copy of the decision . . . is recorded in the registry of deeds for the county and district in which the land is located." It is undisputed that the use variance at issue here was properly recorded on July 27, 2015. And that is when it thus became legally effective. See Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 891 (2009) ("variance could not become operative, and by implication, could not be exercised, until it was recorded"). Contrary to Green's view, legal effectiveness of the use variance is not controlled by condition no. 2.

What then does condition no. 2 mean when it states that the use variance shall become "effective" only once the comprehensive permit is approved? In context, it means nothing more than that approval of the comprehensive permit is a condition of the use variance. We think this conclusion flows naturally from the language of the use variance itself: the language appears in a section titled "Conditions," is prefaced (as we set out above) with language identifying it as a condition, and appears with no special demarcation among a lengthy list of sixteen conditions. See Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 205-206 (2005) (interpreting language of variance in context). Thus, the use variance itself gives no reason to think that the board intended condition no. 2 to be anything other than what it was called: a condition to which the use variance was subject, rather than a predicate to legal effectiveness.

We note further that Green's reading of condition no. 2 would, as a practical matter, render this particular use variance illusory since the timing of the comprehensive permit lay in the board's

hands -- not Park Central's. See Belfer v. Building Comm'r of Boston, 363 Mass. 439, 444-445 (1973) (tolling limitations period to avoid rendering variance meaningless by delay inherent in appeal). There is nothing to suggest that the board intended to grant the use variance with one hand while invalidating it with the other by delaying action on the comprehensive permit. This is especially so given that the comprehensive permit application had been submitted, heard, and changes to the development had been negotiated to the satisfaction of the neighborhood and town -- all before the board approved the use variance. The record gives no insight into why the board did not grant the comprehensive permit within one year of the use variance but, in any event, there is nothing to suggest that the timing was in any way chargeable to Park Central. See Cornell, 453 Mass. at 893 ("Circumstances beyond a variance holder's control may make obtaining a building permit within one year of the grant of a variance impossible and thus warrant equitable tolling of the one-year period"). In this context, it is clear that condition no. 2 makes issuance of the comprehensive permit a condition of the use variance, rather than a mechanism by which the use variance could lapse.

Even were we to conclude that condition no. 2 meant that the use variance did not become legally effective until the board issued the comprehensive permit, it does not follow that Park Central was foreclosed from exercising rights under the use variance before then. "[T]he language and intent of G. L. c. 40A, §§ 10 and 11, do not mandate that actions taken to exercise a variance, such as obtaining a building permit in good faith, must be undertaken only after the variance has been recorded [i.e. has become legally effective]." Grady v. Zoning Bd. of Appeals of Peabody, 465 Mass. 725, 730 n.10 (2013). If rights under a variance can be exercised before it becomes legally effective pursuant to statute, there is no reason the same would not also be true where "effectiveness" is conditioned by a local board.

Thus we reach Green's final argument that disputed issues of fact exist as to whether Park Central exercised its rights under the use variance within one year.

"Exercise" for these purposes "means 'to bring into play: make effective in action . . . bring to bear.'" Cornell, 453 Mass. at 891, quoting Webster's Third New Int'l Dictionary 795 (1993). A variance need not be fully carried out for rights to be "exercised" within the meaning of G. L. c. 40A, § 10. See Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985). "[A] 'use' variance may not require any construction or

excavation, and a building permit may not be necessary to exercise such a variance. Evidence of 'use' within one year of issuance of the variance may be sufficient to exercise such a variance." Cornell, supra at 894 n.9.

In addition to showing that it timely recorded the use variance and that it pursued approval of the comprehensive permit (a condition of the use variance), Park Central included in its summary judgment materials an affidavit of its manager, William DePietri, detailing various steps Park Central took after approval of the use variance and in reliance on it. The affidavit was made on personal knowledge and was supported by numerous invoices. In summary, DePietri averred that, in reliance on the issuance of the use variance, he engaged engineers, wetland specialists, and other professionals to redesign and modify the development plan to comply with the requirements and conditions of the use variance and that he expended more than $696,000 in that effort, as well more than $85,000 in consulting fees on behalf of the town. These efforts and expenditures appear to have been made in connection with the reformulation of the development required by the agreement and the resulting revised concept plan required to obtain the comprehensive permit which, as we have noted above, was a condition of the use variance. In other words, they were taken -- at least in part -- to satisfy a condition of the use variance.

Green disputed DePietri's affidavit in the sense that he responded "Disputed" to Park Central's statement, pursuant to Rule 9A of the Rules of the Superior Court (2017), of material fact setting forth the expenditures, and claimed that no further response was required because the allegations were conclusions of law. This, however, falls far short of creating a genuine issue of material fact sufficient to survive summary judgment. Green offered no information -- let alone admissible evidence -- on summary judgment to counter DePietri's affidavit, whether by way

of affidavit or otherwise. See Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"); Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014). " [M]erely responding 'disputed' to a proposed statement of fact does not establish a genuine dispute over a material fact. Rather, the party opposing summary judgment

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must adduce competent evidence sufficient to show a genuine issue for trial." Jenkins v. Bakst, 95 Mass. App. Ct. 654, 660 n.9 (2019). "While a judge should view the evidence with an indulgence in the [opposing party's] favor, . . . the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment" (quotations omitted). LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

Judgment affirmed.

FOOTNOTES

[Note 1] Park Central, LLC.

[Note 2] The statute provides in relevant part that "[i]f the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse" unless an extension is given by the permit-granting authority. G. L. c. 40A, § 10.

[Note 3] As an abutter to an abutter, Green asserts he has presumptive standing and is a person aggrieved. See G. L. c. 40A, § 11.

[Note 4] Although the failure to exhaust administrative remedies has been said to be jurisdictional, in certain circumstances the failure to exhaust administrative remedies may not preclude reaching the merits on appeal. "Exceptions to the exhaustion requirement have been made when the administrative remedy is inadequate, 'when important novel, or recurrent issues are at stake, when the decision has public significance, or when the case reduces to a question of law.'" Hingham v. Department of Hous. & Community Dev., 451 Mass. 501, 509 (2008), quoting Luchini v. Commissioner of Revenue, 436 Mass. 403, 405 (2002). In addition, the exhaustion

requirement may be suspended where "resort to the administrative remedy would be futile," which is what Green contends here. Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination, 463 Mass. 472, 480 (2012).

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MARY E. GRADY [Note 1] vs. ZONING BOARD OF APPEALS OF PEABODY & others. [Note 2]

465 Mass. 725

March 5, 2013 - July 10, 2013

Court Below: Land Court Department, Suffolk

Present: IRELAND, C.J., SPINA, CORDY, BOTSFORD, GANTS, DUFFLY, & LENK, JJ.

Related Cases:

- 19 LCR 380

Records And Briefs:

(1) SJC-11267 01 Appellant Grady Brief
(2) SJC-11267 02 Appellees Langone Brief

Oral Arguments

Zoning, Variance, Lapse of variance.

This court concluded that in circumstances in which the holders of a variance were issued a building permit and took substantial steps in reliance on the otherwise valid variance within the one-year period prescribed by G. L. c. 40A, § 10, but recorded the variance eleven days after the one-year lapse period, the variance had nonetheless taken effect under G. L. c.40A, § 11, given the absence of any prejudice caused by the de minimis delay to any abutters or potential purchasers, and given the holders' substantial reliance on the variance. [728-732]

CIVIL ACTION commenced in the Land Court Department on December 28, 2009.

The case was heard by Keith C. Long, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

William R. DiMento (Debora T. Newman with him) for the plaintiff.

Louis J. Muggeo for Arthur Stefanidis & another.

DUFFLY, J. This case presents the question whether a properly-granted zoning variance may be deemed to have "taken effect" pursuant to G. L. c. 40A, § 11, where it was not recorded with the registry of deeds within the one-year lapse period set forth in G. L. c. 40A, § 10, but was recorded eleven days thereafter, and where the holders have substantially relied upon it. The question whether a variance will take effect if the holders have substantially relied upon it was left open in Cornell v. Board of

Appeals of Dracut, 453 Mass. 888, 891 n.7 (2009) (Cornell). In the unusual circumstances of this case, we conclude that the variance has taken effect, and has not lapsed.

Background. We recite the facts as found by a Land Court judge following a jury-waived trial. [Note 3] Arthur and Irene Stefanidis, trustees of the A & I Trust, owned a single large lot in the city of Peabody (city), on which there was an existing structure. They divided this parcel into Lot A, the front portion of the parcel containing the structure, and Lot B, the undeveloped portion at the rear of the parcel that did not have street frontage. They reserved an easement in favor of Lot B over the driveway and parking area of Lot A. They then deeded the lot to the Central Gardens Condominium Trust and converted the building on Lot A into three condominium units. A & I Trust retained Lot B after the condominium trust declined to purchase it.

The Stefanidises subsequently planned to build a two-family house on Lot B, and applied for a variance from the zoning board of appeals of Peabody (board) to allow them to build despite the lack of street frontage. The variance was approved, with conditions requiring the Stefanidises to, inter alia, comply with setback and height restrictions; build only one structure; prepare a drainage plan; and, if necessary, obtain a revised easement over Lot A. The variance was filed in the city clerk's office on June 23, 2008.

The plaintiff, Mary E. Grady, serves as trustee of the Central Gardens Condominium Trust and lives in one of the units on Lot A. Grady makes no claim that she did not receive notice of the Stefanidises' variance application as required by G. L. c. 40A; [Note 4] however, neither she nor any other abutter appealed from the decision of

the board granting the variance. On July 22, the city clerk's office issued to the Stefanidises a certification stating that the grant of the variance had not been appealed.

The decision granting the variance contained notice to the

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recipients that they were responsible for recording the decision in the Essex County registry of deeds, and stated that proof of recording had to be presented before the city building commissioner would issue a building permit. [Note 5] The decision specified also that "[t]his variance as granted is applicable for one (1) year only." The Stefanidises nonetheless failed to record the variance; the Land Court judge found that they simply forgot to do so. The Stefanidises applied for a building permit from the city building commissioner without submitting proof of recording. On February 24, 2009, a building permit issued to the Stefanidises to build a "new duplex [with] 3 bedrooms each." Between February 24 and June 15, 2009, the Stefanidises hired a general contractor and, at the city's request, a supervising architect who was to prepare periodic reports for the city. [Note 6] As the judge found, "issuance of the building permit was relied upon to obtain [a construction loan secured by a mortgage on Lot B], to incur the personal financial obligation to repay that loan, and to commence construction activities." The Stefanidises drew significant amounts from the loan to fund construction activities, and in June, 2009, they began to clear and prepare the site.

On June 29, 2009, approximately one week after the one-year anniversary of the grant of the Stefanidises' variance, Grady made a written request to the building commissioner that he revoke the building permit on the ground that the Stefanidises had failed to record the variance within one year, see G. L. c. 40A, § 10, [Note 7] and thus that it had not become effective. See G. L. c. 40A, § 11 (requiring variance be recorded before it can "take effect"). [Note 8] Notified by the building commissioner, the

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Stefanidises recorded the variance on July 3, 2009, eleven days after the expiration of the one-year lapse period set forth in G. L. c. 40A, § 10.

The building commissioner denied Grady's request on the grounds that the "rights authorized by the variance have been exercised within one year"; work had commenced pursuant to a building permit; and the Stefanidises had complied with the conditions specified in the variance. On August 26, 2009, a Superior Court judge denied Grady's motion for a temporary injunction to halt work on the site, noting that Grady had not yet exhausted her administrative appeals. On December 10, 2009, after a hearing, the board upheld the building commissioner's denial of the request to revoke the building permit, [Note 9] and Grady thereafter filed a complaint in the Land Court pursuant to G. L. c. 40A, § 17.

Following a jury-waived trial, a judge of the Land Court determined that the variance had not lapsed because the Stefanidises had taken substantial steps in reliance upon it, and had recorded it within a short period of time after the expiration of the lapse period. Grady appealed to the Appeals Court, and we transferred the case to this court on our own motion.

Standards of review. In reviewing the decision of a municipal board under G. L. c. 40A, the Land Court "shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision . . . or make such other decree as justice and equity may require." G. L. c. 40A, § 17. On appellate review, we defer to the factual findings of the trial judge unless they are clearly erroneous. Wendy's Old Fashioned

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Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 383 (2009), quoting DiGiovanni v. Board of Appeals of Rockport, 19 Mass. App. Ct. 339, 343 (1985). We review the judge's determinations of law, including interpretations of zoning bylaws, de novo, Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012), but we remain "highly deferential" to a board's interpretation of its own ordinances. Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, supra, quoting Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 74 (2003).

We construe statutes "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language,

considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934).

Substantial reliance. Our decision in Cornell, supra at 891 n.7, touched on, but was not required to resolve, the question whether a variance that is not recorded within the one-year statutory period prescribed by G. L. c. 40A, § 10, will become effective if its holders have substantially relied upon it within that period. See G. L. c. 40A, § 11. In this case, we are confronted squarely with the question not reached in Cornell, supra. We conclude that, in the unusual circumstances here, the Stefanidises' variance had become effective, notwithstanding the failure to record within the one-year period. We reach this conclusion where the holders of the variance were issued a building permit and took substantial steps within the one-year period in reliance upon an otherwise valid variance; there was no apparent harm to any interested parties, including the plaintiff, other than any harm resulting from the original, uncontested grant of the variance; and the variance was recorded less than two weeks after the expiration of the one-year period.

The Land Court judge determined that " 'substantial reliance' by a late-recording variance holder is sufficient to uphold a variance, at least (as here) one recorded within days after the

year expired." In Cornell, supra at 891, we interpreted G. L. c. 40A, §§ 10 and 11, as requiring both timely recording and exercise of the rights granted by a variance to prevent its lapse. The holder of the variance in that case had neither exercised the variance nor recorded it, nearly two years after it had been issued. Affirming the conclusion of the Land Court judge that the variance had never taken effect, we stated that "the variance could not become operative, and by implication, could not be exercised, until it was recorded." [Note 10] Id. However, while noting that "at the very least, [the variance holder] should have recorded the variance and obtained a building permit within one year of being granted the variance to prevent it from lapsing," id. at 894, we recognized that our decision did not "resolve all

questions concerning timely exercise of a variance," id. at 894 n.9, and reserved consideration of whether "failure to record a variance may void a variance on which a variance holder has substantially relied." Id. at 891 n.7. See McDermott v. Board of Appeals of Melrose, 59 Mass. App. Ct. 457, 460-461 (2003) (special permit did not lapse for failure to record under G. L. c. 40A, § 11, where it was substantially used).

General Laws c. 40A, §§ 10 and 11, were both part of a comprehensive 1975 revision of G. L. c. 40A intended to rein in the abuse of discretion by local zoning boards, as well as to eliminate difficulties in the prior version such as the lack of a provision "for the loss of variance rights by the failure to exercise them, or a delay in doing so." See Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne, 14 Mass. App. Ct. 76, 81 (1982); 1972 House Doc. No. 5009, at 62-63. The 1975 revisions

imposed "standardized procedures for the administration . . . of municipal zoning laws." See St. 1975, c. 808, § 2A.

Prior to the 1975 revisions, variances did not expire and could be exercised years after they had been granted; because recording was required only for conditional variances, subsequent purchasers were likely to be unaware that a variance applied to abutting land. See G. L. c. 40A, § 18, as amended through St. 1971, c. 1018. See also St. 1975, c. 808, § 3. The lapse provision at issue here was intended to "eliminate to some degree the current confusion regarding status of land within municipalities." 1973 House Doc. No. 6200, at 20 (Department of Community Affairs interim report recommending revisions to 40A). The recording requirement in G. L. c. 40A, § 11, serves the same goal by requiring the existence of "reliable records regarding the status of land within a community." Id. at 25. It expanded the preexisting requirement that conditional variances and special permits be recorded, a provision that was introduced in 1960 in response to concerns that subsequent purchasers of properties that benefited from time-limited and conditional variances were being harmed by the unexpected expiration of such variances. See St. 1960, c. 326; Thirty-Fifth Report of the Judicial Council of Massachusetts, 44 Mass. L.Q. 4, 68-69 (1959). The legislative history of these

statutes indicates that the purpose of requiring recording to prevent lapse is to ensure that recording occurs in a timely fashion and that subsequent purchasers and others with an interest in the status of the land have notice of the grant to a land owner of a limited right to deviate from the requirements of the zoning code.

The Land Court judge found that the Stefanidises acted in good faith to comply with the requirements of G. L. c. 40A, § 10, and recorded the variance immediately after their oversight in failing to record was brought to their attention, a mere eleven days after the expiration of the one-year period. The Stefanidises did not postpone recording in order to avoid community opposition or for other strategic reasons; the judge found that they simply forgot to record, and, when reminded to do so, they immediately rectified their omission. Nothing in the record suggests that anyone, including Grady, any other abutters, or any

potential purchasers, suffered prejudice as a consequence of this de minimis recording delay.

The judge concluded also that the Stefanidises substantially relied on the issuance of the variance. They obtained a building permit, took on significant debt to finance the building project, hired a specialist requested by the city, and began construction operations, all within a year of the grant of the variance. Cf. Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985) (actions that may constitute "exercis[ing]" variance include sale of lot). Contrast Cornell, supra at 892 (variance not exercised where variance holder neither obtained building permit nor conveyed lot).

Grady, whose condominium unit overlooked the driveway that the Stefanidises used to access Lot B, does not contest that she was notified of the Stefanidises' application for a variance, but did not appeal from its grant; she was likewise aware of the preliminary construction activities. The easement over Grady's driveway to Lot B was included in Grady's deed; it was the burden of this easement that Grady sought to escape. Cf. Hogan v. Hayes, supra (variance determined not to have lapsed, in part because plaintiffs' position was "intrinsically inequitable").

The board's decision to deny Grady's request to revoke the building permit did not derogate from the purpose and intent of the recording requirement of G. L. c. 40A,

§ 11. We agree, on the facts of this case, that the variance had become effective and had not lapsed.

Judgment affirmed.

FOOTNOTES

[Note 1] Individually and as trustee of the Central Gardens Condominium Trust.

[Note 2] Arthur Stefanidis and Irene Stefanidis, as trustees of A & I Trust; and building commissioner of the city of Peabody.

[Note 3] The parties have not challenged the judge's factual findings.

[Note 4] General Laws c. 40A, § 10, requires a permit granting authority to hold a public hearing on any application for a variance and to give notice "by publication and posting" and "by mailing to all parties in interest." Parties in interest include "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner." G. L. c. 40A, § 11.

[Note 5] The requirement that an applicant present a recorded variance in order to obtain a building permit appears to be an administrative requirement of the city of Peabody (city). It is not reflected in Massachusetts statutory law, and neither party has identified an applicable city ordinance mandating the recording of a variance prior to issuance of a related building permit.

[Note 6] The Stefanidises had already hired a surveyor and an architect before being issued the building permit.

[Note 7] General laws c. 40A, § 10, provides in relevant part:

"If the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse . . . ."

[Note 8] General laws c. 40A, § 11, provides, in relevant part:

"No variance, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the city or town clerk that twenty days have elapsed after the decision has been filed in the office of the city or town clerk and no appeal has been filed . . . is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record . . . ."

[Note 9] In its review of the building commissioner's decision, the zoning board of appeals of Peabody (board) agreed that the conditions set forth in the variance had been met; the board noted that a copy of the original easement over Lot A was "produced showing allowance of petitioners to pass onto abutter's property."

[Note 10] We note that our decision in Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 891 (2009), could be read as requiring variance holders to record their variances prior to exercising any of their rights thereunder. Under such a reading, even had the Stefanidises recorded the variance on the day before the expiration of the one-year lapse period, having obtained the building permit prior to recording, their variance would nonetheless have lapsed. Such a reading would not be justified. Although it is preferable to record a variance with the appropriate registry of deeds before exercising one's rights thereunder, and while recording may be required by a particular municipality as a prerequisite to the exercise of certain rights granted by a variance, as reflected in the city's administrative requirements, see note 5, supra, the language and intent of G. L. c. 40A, §§ 10 and 11, do not mandate that actions taken to exercise a variance, such as obtaining a building permit in good faith, must be undertaken only after the variance has been recorded.

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JOHN H. SMITH, Individually and as Trustee of the 1560 TRAPELO ROAD REALTY TRUST, and CORNERSTONE CORPORATION

v.

CITY OF WALTHAM, RALPH GAUDET, as he is the Building Commissioner of the CITY OF WALTHAM, and PAUL J. BRASCO, DAVID H. MARCOU, JR., PATRICK J. O'BRIEN, JAMES E. REGAN, THOMAS M. STANLEY, ROBERT J. STANTON, ROBERT S. KELLY, EDMUND P. TARALLO, MICHAEL R. SQUILLANTE, MICHAEL J. O'HALLORAN, GARY M. MARCHESE, KENNETH B. DOUCETTE, JOSEPH M. GIORDANO, JR., KEVIN M. RITCEY, and ROBERT G. LOGAN as they are Members of THE CITY COUNCIL OF THE CITY OF WALTHAM

Misc. Case No. 289944

July 1, 2004
Leon J. Lombardi, Justice

Special Permit-Extension Pending Appeals—Where the City Council of Waltham had issued a special permit for a commercial project requiring an additional special permit be obtained from the zoning board for issues relating to zoning nonconformities, the appeal of the zoning board's special permit by project opponents tolled the one-year project commencement requirement imposed by the City Council in its special permit, and the landowner would have one year from the day the Land Court docketed the rescript of the final action of the appellate courts to commence construction.

DECISION

On December 27, 2000, John H. Smith (Smith), individually and as trustee of the 1560 Trapelo Road Realty Trust (trust), and Cornerstone Corporation (Cornerstone) (collectively, plaintiffs) commenced the instant action by filing an unverified complaint (complaint) in Middlesex superior court. The single count complaint appealed the refusal of the City Council of Waltham (City Council) to extend the time for commencement of work under a special permit that it granted to plaintiffs in December 1999, which required that an additional special permit be obtained from the Waltham Board of Appeals (appeals board).[1]

Plaintiffs filed a motion to amend the complaint (motion to amend) and a proposed amended complaint on May 12, 2003, seeking to add the City of Waltham (Waltham) and Ralph E. Gaudet (Gaudet), the Building Commissioner of Waltham. In pertinent part, the motion to amend stated that the City Council

> "has opposed the Complaint herein on the basis, inter alia, that (a) it is the wrong Defendant party to this action to determine the issue of tolling . . . and (b) that that issue is not amenable to resolution in this Court by Declaratory Relief under G. L. c. 231A, but is amenable to a determination under G. L. c. 240, § 14[A,] by the Land Court."

The amended complaint made few changes from the complaint other than adding the additional party defendants. In particular, the amended complaint added no additional counts and made no reference to G. L. c. 240, § 14A. In conjunction with the motion to amend, plaintiffs filed Plaintiffs' Motion that the Court Request Transfer of the Case to the Land Court (motion to transfer).

On May 14, 2003, the court (Fabricant, J.) allowed the motion to amend and the motion to transfer. Following receipt of the case from the superior court, the action was entered in this court as Miscellaneous Case No. 289944.

The City Council answered the amended complaint on July 24, 2003. Gaudet and Waltham filed on August 11, 2003, their answer to the amended complaint.

Plaintiffs on August 27, 2003, filed Plaintiffs' Motion After Transfer for Summary Judgment (summary judgment motion) and a supporting memorandum.[2] On November 7, 2003, the City Council filed an opposition to the summary judgment motion, while Gaudet and Waltham filed a separate opposition.

The parties argued the summary judgment motion on November 14, 2003.[3] Following oral argument, I took the matter under advisement.

The following facts are not in dispute:

1. Smith is a resident of Brookline and serves as trustee of the trust. Cornerstone is a Massachusetts corporation that maintains its usual place of business in Norwood.

2. At all times relevant to this action, Paul J. Brosco, David H. Marcou, Jr., Patrick J. O'Brien, James E. Regan, Thomas M. Stanley, Robert J. Stanton, Robert S. Kelly, Edmund P. Tarallo, Michael R. Squillante, Michael J. O'Halloran, Gary J. Marchese, Kenneth B. Doucette, Joseph M. Giordano, Jr., Kevin M. Ritcey, and Robert G. Logan were members of the City Council and residents of Waltham.

3. Waltham is a duly constituted municipal corporation with its principal offices located in Waltham City Hall.

1. Although it did not cite any statute for jurisdiction, the complaint arose largely under G. L. c. 40A, § 17. Additionally, the complaint requested judgment enter (as if brought under G. L. c. 231A) that plaintiffs have the benefit of an extended period of time to commence work.

2. The record also contains the affidavits of Bernard F. Shadrawy, Jr. and Edward Rabinovitz, attorneys for plaintiffs. Those affidavits were filed in connection with an earlier summary judgment motion brought, but never heard, in the superior court.

3. During oral argument, Waltham and Gaudet admitted that tolling has occurred. Waltham and Gaudet, however, expressed uncertainty as to the length of time remaining to plaintiffs to commence work once tolling ends.

4. As the Waltham Building Commissioner, Gaudet is the official charged with the enforcement of the Zoning Ordinance of the City of Waltham (Waltham ordinance).

5. The trust holds record title to a parcel of land (locus) consisting of approximately two and seventy-eight hundredths acres located at 1560 Trapelo Road.

6. Plaintiffs sought to raze and reconstruct an office building on locus (project), which required a special permit from the City Council.

7. On December 13, 1999, the City Council issued Order Number 28918 (Order 28918) granting plaintiffs a special permit for the project (1999 special permit). No party appealed the 1999 special permit.

8. The 1999 special permit contained a number of special conditions. Two of those conditions were as follows:

> "1. Pursuant to Massachusetts General Laws Chapter 40A Section 9[,] all necessary permits shall be issued and construction commenced and completed in accordance with Section 3.551[.] of the Ordinance.
>
> 2. Pursuant to Massachusetts General Laws Chapter 40A, Section 6, the Petitioner shall obtain a Special Permit to enlarge a pre-existing non-conforming use from the [appeals board] prior to any implementation of this special permit."

9. In August 2000, plaintiffs filed a petition with the appeals board for certain zoning relief (2000 petition). Plaintiffs requested in the 2000 petition a special permit under sections 3.722. and 3.7222. pertaining to altering or enlarging an existing nonconforming building. The 2000 petition also sought a modification of an existing variance granted in 1960.

10. On October 19, 2000, the appeals board issued a decision granting the zoning relief sought in the 2000 petition (board decision), which was filed on October 30, 2000, with the Waltham City Clerk.

11. Subsequently, certain individuals challenged the board decision by filing an appeal in this court captioned *Butler* v. *City of Waltham*, Land Court Misc. Case No. 267793 (November 17, 2000).

12. In *Butler*, the court (Kilborn, C.J.) issued two decisions regarding standing on December 12, 2001, and August 12, 2002. A notice of appeal was filed on September 9, 2002 (*Butler* appeal), and entered in the Appeals Court on November 12, 2002 (Docket No. 02-P-1512). The Appeals Court heard oral argument on January 7, 2004, and has the *Butler* appeal presently under advisement.

13. Section 3.551. of the Waltham ordinance provides that:

> "Work shall commence within one year of the date of City Council approval of a special permit; provided, however, that in instances where an appeal consistent with MGLA c. 40A, Section 17 is in process, work shall commence within one year after the date that all appeals have been terminated. Failure to commence work within the time period specified or failure to complete the work within two years after the date of commencement shall cause the special permit to lapse. The City Council may, upon written application of the grantee of said special permit, grant extensions of time of any such date by a 2/3 vote of the entire membership of the City Council for good cause shown. Each such extension shall not exceed an additional 12 months."[4]

14. On or about November 24, 2000, plaintiffs submitted a written request to the City Council for a one-year extension of the 1999 special permit (extension request).[5]

15. The City Council voted to deny the extension request on December 11, 2000 (extension denial).

* * *

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr., Inc.* v. *Cranney*, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56 (c). The issue to decide is a question of law and is ripe for disposition on summary judgment.

In pertinent part, G. L. c. 240, § 14A (§ 14A), provides that:

> "[t]he owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated . . . for determination as to the validity of a municipal ordinance . . . passed or adopted under the provisions of chapter forty A . . . , which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon, including alterations or repairs, or for determination of the extent to which any such municipal ordinance . . . affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise as set forth in such petition. . . . The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not."

With the filing of the amended complaint, Waltham is the sole party defendant required under § 14A, to permit me to interpret the Waltham ordinance and determine the extent to which that ordinance affects the proposed project. Although the amended complaint does not contain a separate count under § 14A, I find that Waltham was afforded fair notice of plaintiffs' claims in the amended complaint and was able to adequately argue the summary judgment motion. *See* Mass. R. Civ. P. 8 (f).

In issuing Order 28918, the City Council required plaintiffs to obtain a special permit from the appeals board as a precondition to the implementation of the 1999 special permit. *See* section 10.A.2. of the 1999 special permit (section A.2.) recited in paragraph 8 above. Citing G. L. c. 40A, §11 (§11), plaintiffs contend that the 1999 special permit cannot be considered "obtained" un-

4. The record does not include a full copy of the Waltham ordinance. During oral argument, I was informed that the Waltham ordinance does not define "work."

5. In their opposition to the summary judgment motion, Gaudet and Waltham claim plaintiffs amended the extension request on December 4, 2000, seeking such additional period of time as necessary to resolve the *Butler* appeal.

less there is no appeal from the grant thereof, or any appeal has been denied.

In pertinent part, § 11 provides that

> "[n]o . . . special permit, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the city . . . clerk that twenty days have elapsed after the decision has been filed in the office of the city . . . clerk and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied . . . ."

Cf. Cohasset Heights, Ltd. v. *Zoning Bd. of Appeals of Cohasset*, 53 Mass. App. Ct. 116, 118 (2001).

The requirement of Section 3.551. of the Waltham ordinance that work must commence within one year from the date the City Council approves a special permit is modified by the following proviso: "provided, however, that in instances where an appeal consistent with MGLA c. 40A, Section 17, is in process, work shall commence within one year after the date that all appeals have been terminated."

"[R]elief from time limitations given in cases . . . where a legal impediment exists to the use of a benefit, should also be given where an appeal from the granting of a [special permit] creates equally real practicable impediments to the use of a benefit." *Belfer* v. *Building Comm'r of Boston*, 363 Mass. 439, 444 (1973). Significantly, other courts have followed *Belfer* to find tolling of applicable construction periods where a party has been unable to proceed under one permit while appeals were pending on related permits or approvals. *See, e.g., Hadley* v. *Casper*, 15 Mass. L. Rptr. No. 5, 109 (September 16, 2002) (finding the appeals of three special permits and an order of conditions frustrated development under a variance not appealed); *Neilson* v. *Planning Bd. of Walpole*, 9 LCR 57, 59 (2001) (Misc. Case No. 253156) (recognizing failure to use a special permit was the result of an appeal of an order of conditions).

In the instant action, the City Council structured Order 28918 so as to make the additional special permit under the jurisdiction of the appeals board an integral part of the 1999 special permit. Thus, the pending appeal of the board decision at the Appeals Court creates a "real practical impediment[] to the use of [the 1999 special permit]." *Belfer*, 363 Mass. at 444. Consequently, I find and rule that, if plaintiffs prevail at the termination of all appeals, work on the project under the 1999 special permit shall commence within one year thereafter. In such instance, the one-year period shall be measured from the day this court dockets the rescript of the final action of the Appeals Court or, in the case of further appellate review, the Supreme Judicial Court.

Having ruled plaintiffs are entitled to a one-year period to commence work as discussed above, the remainder of the amended complaint concerning the extension denial is moot.

Based upon the foregoing, I allow the summary judgment motion. Judgment shall enter accordingly.

Edward Rabinovitz, Esq.
Shadrawy & Rabinovitz
15 Broad Street, 5th Floor
Boston, MA 02109
Appears for Plaintiff

Howard J. Rock, Esq.
Patricia Azadi, Esq.
City Solicitor's Office
Waltham Law Department
119 School Street
Waltham, MA 02451
Appear for Defendant

* * * * * *

PRISM REALTY L.C., by and through WILLIAM G. HOLT

v.

JANICE McGRANE, Clerk for the TOWN OF GEORGETOWN, CHARLES BRETT, Building Inspector for the TOWN OF GEORGETOWN, and STEVEN EPSTEIN, Chairman, ZONING BOARD OF APPEALS, TOWN OF GEORGETOWN

Misc. Case No. 288791

July 2, 2004
Charles W. Trombly, Jr., Justice

Special Permit-Constructive Grant-Unilateral Continuance of Hearing by Board—The Georgetown zoning board did not violate the rule of "Milton Commons" in declining to consider an applicant's package of materials at a continued public hearing, nor was the board required to execute a written continuance or secure the petitioner's assent in order to continue the hearing.

DECISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND DENYING DEFENDANTS' MOTION FOR AWARD OF COSTS AND ATTORNEYS' FEES UNDER G. L. C. 231, § 6F

This case, filed in this court on April 1, 2003, pursuant to G. L. c. 231A, arises out of an application/petition filed with the Georgetown Zoning Board of Appeals ("Board") on June 14, 2002. Prism Realty L.C. ("Plaintiff" or "Prism") sought a special permit to construct three multi-family residences with four units each on one lot in an RA district. The property is located at 6 and 6R Railroad Avenue in Georgetown ("Town"). In its two count[1] complaint, Plaintiff contends that its application for a special permit (the "Application") has been constructively approved

FRANK H. HOGAN & another [Note 1] vs. ROBERT P. HAYES & others. [Note 2]

19 Mass. App. Ct. 399

November 8, 1984 - February 22, 1985

Norfolk County

Present: GRANT, KAPLAN, & KASS, JJ.

Although, under G. L. c. 40A, Sections 7 & 8, parties claiming to be aggrieved by a municipal building inspector's issuance of a permit were required to make a protest to the building inspector and obtain his written response thereto before seeking administrative review by the board of appeals, omission of this procedural step was not fatal to their action for judicial review of the board of appeals' decision upholding the permit, where opposing parties did not raise the issue. [402-403]

Where a zoning variance with respect to a parcel of land was granted in 1974 and was exercised in 1975 by the division of the parcel into two lots, each of which would be in violation of the city's zoning ordinance were it not for the variance, and by the conveyance of one of the lots with the buildings thereon, the issuance in 1983 of a building permit for a dwelling on the unimproved lot presented no issue as to any retroactive effect of provisions in G. L. c. 40A, Section 10, which took effect in the city on June 30, 1978, that a variance shall lapse if it is not exercised within one year after the date it is granted. [403-405]

Where the record in an action for judicial review of the issuance of a building permit did not reveal the building inspector's basis for concluding under G. L. c. 41, Section 81Y, that municipal subdivision requirements were satisfied, the judgment upholding the permit was reversed, but with leave to the permit holders to supplement their pleadings and proof after taking any steps they deemed necessary to fulfil Section 81Y. [405]

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CIVIL ACTION commenced in the Superior Court Department on January 31, 1983.

The case was heard by George N. Hurd, Jr., J., on a motion for summary judgment.

Robert L. Marzelli for the plaintiffs.

Robert W. Langlois for the defendants.

KAPLAN, J. The plaintiffs Frank and Katherine Hogan own a lot on a private way in Quincy, called Patrick Road, and the two-story house and detached garage thereon. The lot is rectangular, has an area of 5,000 square feet, and a width of 50 feet fronting on the way. The defendants Robert and Mary Hayes own a contiguous lot, similar in shape and area, and with a similar 50 foot frontage on the way. Their lot is vacant. The object of the present (consolidated) action was to prevent the Hayeses from building on their lot. On cross motions for summary judgment, aided by a statement of agreed facts, a judge of the Superior Court gave judgment for all the defendants, who included, aside from Mr. and Mrs. Hayes, the Quincy building inspector, the board of appeals, and the planning board. On the main issue, we, too, support the defendants, but there is a complication that stands in the way of an affirmance, as will appear.

We abbreviate the facts as far as feasible. By 1949, Margaret Stanton and her husband were owners by the entirety of both lots, [Note 3] a combined area of 10,000 square feet with the house and garage thereon, and a frontage of 100 feet. In April, 1974, after the death of her husband, Mrs. Stanton applied to the board of appeals for a variance to allow her to divide her ownership so that she could sell the lot with the existing house and garage, and build a small residence on the other lot. There was need for a variance because the zoning provisions then (and still) applicable in this residential district specified a minimum lot size of 7,650 square feet, minimum lot frontage and width each of 85 feet, and minimum side yard depths of

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thirteen feet. [Note 4] On a determination that "a literal enforcement of the provisions of the Zoning Ordinance would involve substantial hardship to [Mrs. Stanton]," and so forth, the board of appeals granted a variance "to subdivide the premises . . . and erect a single-family dwelling on the vacant lot created." Mrs. Stanton did not at that time ask the planning board to give or dispense with approval under the Subdivision Control Law. See Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802 (1981).

In 1975 Mrs. Stanton sold the lot with house and garage to the plaintiff's predecessor in title. The other lot remained vacant at the time. Subsequently, the

defendants Robert and Mary Hayes purchased that lot from Mrs. Stanton, and, about that time, on December 14, 1982, they applied to the building inspector for a building permit for a one-story, single family dwelling. The permit issued on January 14, 1983. On April 7, 1983, the planning board gave the defendants an endorsement of "approval not required" under the Subdivision Control Law.

The plaintiffs have attacked in a number of ways. On January 24, 1983, ten days after the issuance of the building permit, they filed a written protest with the building inspector. Failing any response on his part, the plaintiffs, on February 28, 1983, filed an administrative appeal with the board of appeals. That board denied relief on June 24, 1983. [Note 5] As early as January 31, 1983, however, the plaintiffs had instituted an action in the Superior Court against all the defendants named above. Their complaint, as finally amended on May 11, 1983, and amplified by the statement of agreed facts, asserted as a main proposition that the variance had "lapsed," thus destroying the

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basis for the building permit. If that contention were to be rejected, then the plaintiffs would assert that the permit was invalid because it was not preceded by satisfaction of the Subdivision Control Law (whether, as we may suppose, by approval of a subdivision or by endorsement of "approval not required"); and, further, that the necessary conditions did not exist for the endorsement given by the planning board. Perhaps to fortify themselves procedurally, the plaintiffs on July 12, 1983, commenced a second action in the Superior Court attacking specifically on the ground of "lapse" the ruling of the board of appeals of June 24, 1983, which had refused to disturb the allowance of the building permit. The two actions were ordered consolidated, and the summary judgment appears to have been intended to dispose of both actions. [Note 6]

1. There is a possible difficulty -- not raised by the defendants -- which threatens to frustrate the plaintiffs' appeal. According to the case of Vokes v. Avery W. Lovell, Inc., 18 Mass. App. Ct. 471, 479 (1984), decided after the decision below, the triggering event for an application for administrative review of the action of the building inspector would be a written response by him to the plaintiffs' protest; but in the present case he has made no such response voluntarily or by compulsion.

See G. L. c. 40A, Sections 7 & 8. [Note 7] We think, however, that the plaintiffs can escape this abyss. The defect, although it may be spoken of as "jurisdictional," appears not to be of such significance that a court must take notice of it even if the opposing party fails to press it, cf. Mass.R.Civ.P. 12(h)(3), 365 Mass. 757 (1974) (subject matter defect); rather, like a defect of "personal" jurisdiction, it may be overlooked if not timely objected to, cf. Mass.R.Civ.P. 12(h)(1), no365 Mass.

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757 (1974). Accordingly, the plaintiffs' appeal is not destroyed and we consider it. [Note 8]

2. On the main question of the claimed lapse of the rights granted by the variance, the plaintiffs would have to concede that under The Zoning Enabling Act which antedated the present The Zoning Act, G. L. c. 40A (effective in Quincy on June 30, 1978), a variance once validly allowed could continue in force without limit of time although not exercised. [Note 9] Nor was a time limit set on the instant variance, either by the ordinance or by the actual text of the variance as allowed. The plaintiffs contend, however, that the new statute, G. L. c. 40A, Section 10, quoted in the margin, [Note 10] does establish a limit of one year, and that this (or possibly the policy expressed by it) applies not only to variances granted after the effective date of the statute, but retroactively to variances granted theretofore. The plaintiffs do not spell out convincingly the extent or detail of this claimed retroactivity, but they assert that the instant variance, unexercised, as they claim, through 1982 and beyond, was extinguished and could not furnish a lawful foundation for the building permit.

The notion that variances more than one year old, and remaining unexercised by the effective date of the new statute, are destroyed wholesale by a retroactive application of Section 10, would appear quite drastic, and hardly matches the text of that provision. A milder contention might take the form that Section 10 should extend to cancel variances, granted well before the effective date of the new statute, which have not been exercised within a year after that date. Even that proposition might put a great and insupportable strain on the statutory language. (See

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the reading of Section 10 in Knott v. Zoning Bd. of Appeals of Natick, 12 Mass. App. Ct. 1002, 1004 [1981].)

But we need not and should not attempt to rule on the broad issue of retroactivity. We are prepared to say that, so far as Section 10 may conceivably bear on the past variance at bar, there was a sufficient exercise of it not later than the time when Mrs. Stanton sold the lot and buildings to the plaintiffs' predecessor in 1975. As indicated (see note 4, supra), the predecessor at that point (and, indeed, the plaintiffs today) would be in multiple violation of the zoning ordinance were it not for the variance. So also, after disposing of the plaintiffs' lot in reliance on the variance, Mrs. Stanton retained a lot which, except for the variance, could not have been developed and would have lost value. Even though the variance had not been fully carried out by actually building, we think it was sufficiently (and irrevocably) exercised. Cf. Dimitrov v. Carlson, 138 N.J. Super. 52, 59 (1975); Hill Homeowners Assn. v. Passaic, 156 N.J. Super. 505, 512 (1978); Nuckles v. Allen, 250 S.C. 123, 130 (1967). [Note 11] Moreover, the plaintiffs' position is so intrinsically inequitable that it should not prevail. They take advantage of so much of the variance as is needed to enable them to hold their property lawfully but seek at the same time to escape from its coincident burden upon them. See Ellen M. Gifford Sheltering Home Corp. v. Board of Appeals of Wayland, 349 Mass. 292, 295 (1965); Skipjack Cove Marina, Inc. v. County Commrs. for Cecil County, 252 Md. 440, 450-452 (1969). Cf. Selectmen of Stockbridge v. Monument Inn, Inc., 14 Mass. App. Ct. 957, 958-959 (1982).

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In holding that the variance at bar did not lapse but on the contrary has been sufficiently availed of, we do not mean to reflect in any way upon a possibility that an old variance, long unexercised, may lose its force by reason of radically changed conditions at the locus, including changes brought about by revisions of a zoning ordinance or by-law. See Dimitrov v. Carlson, supra; Ambrosio v. Zoning Bd. of Appeals of Huntington, 196 Misc. 1005, 1008-1009 (N.Y. Sup. Ct. 1949). No such claim can be made here.

3. Like too many zoning cases, this one is beset by a procedural difficulty, here arising upon the plaintiffs' objection, already adverted to, that the issuance of the

building permit was not preceded by satisfaction of subdivision requirements. More particularly, the plaintiffs point to G. L. c. 41, Section 81Y, second par. (as appearing in St. 1953, c. 674, Section 7), which states that a building inspector may not issue his permit "until first satisfied that the lot . . . is not within a subdivision, or that a way furnishing the access to such lot as required by the subdivision control law is shown on a plan recorded or entitled to be recorded under [Section 81X]," etc. We do not know on what basis the building inspector acted. The planning board's "approval not required" endorsement would be a proper basis, but that came too late for the purpose. The plaintiffs' grievance seems minor at best: although asserting that the planning board's endorsement of "approval not required" was improper, the plaintiffs do not provide any solid support for the assertion. See Haynes v. Grasso, 353 Mass. 731 (1968); Adams v. Board of Appeals of Concord, 356 Mass. 709 (1970).

Having lost their point that the variance has lapsed, the plaintiffs may see little profit in persisting with this litigation. Strictly, however, they are entitled to a reversal of the judgment, but with leave to the defendants to supplement their pleadings and proof with respect to compliance with G. L. c. 41, Section 81Y (having reapplied so far as they may deem necessary to the building inspector or planning board to attain compliance); the action to proceed further in the Superior Court as occasion may require.

So ordered.

FOOTNOTES

[Note 1] Katherine A. Hogan, his wife.

[Note 2] Mary A. Hayes, his wife, the inspector of buildings of Quincy, the board of appeals of Quincy, and the planning board of Quincy. As indicated below, this action was consolidated with another brought by the same plaintiffs and naming as defendant only the board of appeals of Quincy.

[Note 3] The lots were originally laid out as part of a plan recorded in 1902. By the late 1940's, the two lots came to be separately owned. The Stantons bought one of the lots in 1948 and the other in 1949.

[Note 4] Without the variance, the division proposed by Mrs. Stanton would have put the built-on lot in manifest violation of the lot area and minimum frontage and width

provisions. There would be a violation, also, of the side yard provision because a lot line bounding the vacant lot would run within four feet of the existing house. Mrs. Stanton's plan put the proposed house within ten feet of a lot line.

[Note 5] The board indicated that the "lapse" question, mentioned immediately below, would have to be finally decided by the court in the plaintiffs' action commenced on January 31, 1983.

[Note 6] We read the notice of appeal as being addressed to the consolidated action although nominally lodged only in the first action.

[Note 7] As to the administrative route that must be traveled before judicial review is sought, see Neuhaus v. Building Inspector of Marlborough, 11 Mass. App. Ct. 230, 235 (1981); McDonald's Corp. v. Seekonk, 12 Mass. App. Ct. 351, 353 (1981); and note Banquer Realty Co. v. Acting Bldg. Commr. of Boston, 389 Mass. 565, 574-575 (1983).

[Note 8] It may be observed that the building inspector is joined in the present action and is aligned as a defendant.

[Note 9] See, however, the reference below to the possible supersession of an unexercised variance by reason of a severe change of conditions.

[Note 10] Section 10, as amended by St. 1977, c. 829, Section 4B, provides: "If the rights authorized by a variance are not exercised within one year of the date of grant of such variance they shall lapse, and may be reestablished only after notice and a new hearing pursuant to this section."

[Note 11] We decide that the exercise of rights herein would be sufficient to prevent a lapse of the variance even on the plaintiffs' hypothesized interpretation of Section 10. We do not attempt a definition of "exercise" under Section 10 in its prospective sense. Cf. Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne, 14 Mass. App. Ct. 76 (1982).

Unlike Section 10, some zoning provisions have carried definitions of use or exercise. See Roy v. Kurtz, 357 So.2d 1354, 1356 (La. Ct. App.), writ denied, 359 So.2d 1307 (La. 1978); 230 Tenants Corp. v. Board of Standards & Appeals of New York, 101 A.D. 2d 53, 54 (N.Y. 1984); In re Appeal of Newton Racquetball Associates, 76 Pa. Commw. 238, 242 (1983).

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