CLERK'S NOTICE	DOCKET NUMBER 1181CV04633	Trial Court of Massachusetts The Superior Court

CASE NAME:
Nancy Iappini et al vs. City Of Somerville Zoning Board Of Appeals et al

Michael A. Sullivan, Clerk of Court
Middlesex County

TO:
David P Shapiro, Esq.
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You are hereby notified that on 12/09/2015 the following entry was made on the above referenced docket:

Findings of Fact and Rulings of Law:

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER REGARDING ENTRY OF JUDGMENT: (which see pgs. 1-15) ORDER:
Plaintiffs' appeal is hereby DENIED. The decision by the Board approving the special permit with conditions is AFFIRMED. Judgment
shall enter for defendants. (Peter B. Krupp, Justice) Dated 12/8/15 and copies mailed 12/9/15

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
12/09/2015	**Hon. Peter B Krupp**	**(781)939-2760**

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 11-4633-D

NANCY IAPPINI, & others[1]
Plaintiffs

vs.

CITY OF SOMERVILLE ZONING BOARD OF APPEALS, & others[2]
Defendants

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER REGARDING ENTRY OF JUDGMENT

After protracted development efforts,[3] on June 30, 2011, defendant Strategic Capital Group LLC ("Strategic") applied to the City of Somerville Zoning Board of Appeals ("the Board") for a special permit to develop parcels at 343-349 and 351 Summer Street in Somerville (together, the "property").[4] After a number of hearings, the Board issued a decision on December 9, 2011 ("the Decision"), granting the special permit and authorizing a mixed-use building with 29 residential units and a new home for the George Dilboy Veterans of Foreign Wars Post #529 ("the VFW Post"), which now operates at 371 Summer Street. The special

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1 Angela Laramie and George O'Shea.

2 Herbert F. Foster, Jr., Orsola Susan Fontano, Richard Rossetti, T.F. Scott Darling, III, Danielle Evans, Elaine Severino and Josh Safdie, each in their capacity as a member of the City of Somerville Zoning Board of Appeals; Strategic Capital Group LLC; and George Dilboy Veterans of Foreign Wars Post #529.

3 See, e.g., Iappini v. The Dakota Partners, LLC, 85 Mass. App. Ct. 1103, 2015 WL 522721 (Jan. 30, 2015) (Rule 1:28 decision).

4 All streets referred to herein are in Somerville, Massachusetts, unless otherwise indicated.

permit, which had more than 75 conditions,[5] approved project plans dated November 18, 2011, but mandated certain changes to them.[6]

Plaintiffs Nancy Iappini ("Iappini"), Angela Laramie ("Laramie") and George O'Shea ("O'Shea"), who own residential parcels abutting the property, appeal the special permit under G.L. c. 40A, § 17. Proceeding pro se, they contend the special permit impermissibly allowed the merger of lots; allows a drinking establishment in a RA zone in violation of the dimensional requirements in sections 8.5.B and 8.5.E of the City's Zoning Ordinance ("the Ordinance" or "SZO"); severs parking from 371 Summer Street, rendering that lot nonconforming; used the wrong standard to calculate the amount of parking needed and improperly uses a parcel in an RA zone for access and for parking for commercial use; fails to abide by dimensional requirements; and was not supported by adequate factual findings.

The case came before me for a jury-waived trial over four days. I heard testimony from nine witnesses and received more than 20 exhibits. Based on the preponderance of the credible evidence, I find the following facts and rule as follows:

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[5] See Tebo v. Bd. of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 621-622 (1986) ("detailed conditions imposed by the zoning board do double duty as findings that the special permit applied for might be exercised in harmony with the general purpose and intent of the zoning by-law").

[6] For example, Condition #23 in the Decision requires Strategic to move a wall of the VFW Post portion of the structure back two feet to provide adequate visibility for cars exiting the underground parking provided for the residential units.

FINDINGS OF FACT[7]

A. The Parties

The property in question is on Summer Street, close to the corner of Cutter Avenue. Behind the property is a row of houses which front on Hawthorne Street. Plaintiffs own homes on Hawthorne Street, abutting the back lot line of the property. Iappini and O'Shea reside at 36 Hawthorne Street directly abutting the northern (rear) lot line of 343-349 Summer Street. A deciduous catalpa tree is planted in the rear of 36 Hawthorne Street close to the rear lot line toward the west. Laramie resides at 46 Hawthorne Street, directly abutting the northern (rear) lot line of 351 Summer Street. She contends that if the project is built, it will cast a shadow on her property during much of the year.

The VFW Post is a fraternal organization, which owns and operates its place of business at 371 Summer Street. The VFW Post also owns and operates 351 Summer Street, which contains a parking lot now used to support the activities of the VFW Post.

Roberto Arista is the sole owner of Strategic, which he founded to develop the project at issue. Strategic's rights derive from Dakota Partners LLC ("Dakota"). Dakota, which is not a party to this action, owns the property at 343-349 Summer Street. On or about January 8, 2010, the VFW Post and Dakota entered into a Real Estate Development Agreement pursuant to which Dakota would develop the parcels at 343-349 and 351 Summer Street to include a new function facility for the VFW Post and residential condominiums. Under the agreement, Dakota would transfer the real estate to the VFW Post, which would hold title to 343-349 and 351 Summer Street. Dakota would lease from the VFW Post the condominium structure. Once the project is

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[7] In addition to the facts set forth herein, I also rely on the agreed facts in the Joint Proposed Findings of Fact and the content of the agreed exhibits, including the Decision admitted as Exhibit 2. Familiarity with the conditions set forth in the Decision by the Board is assumed so they are not set forth herein.

completed, the VFW Post will convey 371 Summer Street to Dakota. Under the contractual agreements, as amended, Dakota or the condominium association would hold a 99-year lease to the land below the structural footprint. Dakota has assigned its rights under the Real Estate Development Agreement, as amended, to Strategic.

The Board is the body within the city authorized to interpret and enforce the Ordinance.

B. The Existing and Proposed Uses of the Property

The lots located at 343, 345, 349, 351 and 371 Summer Street are contiguous lots on the northern side of Summer Street, running toward the west in ascending order. They occupy a transitional location between the Davis Square commercial business district to the west and two- and three-story residences to the east.

In 2002, the Massachusetts Bay Transportation Authority ("the MBTA") sold the lots at 343, 345 and 349 Summer Street to Dakota, which merged them for development purposes. This merged parcel, referred to herein as the "Shaft Site," contains an MBTA Red Line air vent shaft and emergency escape hatches. The MBTA has certain easements on the Shaft Site, and ultimately will have a right to review the proposed construction and impact of the project.[8] The Shaft Site is zoned for residential uses and lies within an RA Residence District under the Ordinance.

To the immediate west of the Shaft Site is 351 Summer Street and then 371 Summer Street. Both are zoned for commercial uses and both lie within the Central Business District

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[8] Although the proposed design does not appear to interfere with the MBTA's subsurface, emergency egress, utilities and access easement by using the Shaft Site largely for access and parking, the issue will have to be addressed by the MBTA. Condition 30 of the Decision acknowledges that the MBTA will have to review the proposed design and requires that "[a]ny substantive modifications to the design (those not deemed de minimus) to address MBTA concerns must be approved by the [Board], per the SZO."

("CBD") under the Ordinance. 351 Summer Street is currently used by the VFW Post for parking.

To the north, east and south, the property is surrounded by one-, two- and three-family residential structures approximately 2 ½ stories in height, as well as a few commercial structures across Summer Street. To the west of the property is the core commercial area around Davis Square.

The VFW Post operates a VFW club at 371 Summer Street. It has a bar for members in the basement and a function space for rent on the first floor. It has a liquor license. Its capacity varies depending on the nature of the function. Generally, the VFW Post is not open to the public. The VFW Post sponsors fundraisers and other functions throughout the year, including fundraisers for elderly members, events for the women's auxiliary, and events on Memorial Day, Veterans Day, and other military-related events. The VFW Post usually is open to members Monday to Saturday from 11 a.m. to 1 a.m. and on Sundays from noon to 1 a.m. The VFW Post also rents its function space 3-4 times per month usually for four hours at a time per event. Events at the VFW club have sometimes involved large numbers of people, with amplified music that can last until 1 a.m.[9] On many occasions, plaintiffs hear noise from the existing VFW Post function hall and have observed loud parties and people drinking outside. Iappini has made noise complaints on three occasions to the police. Laramie has also been awakened by noises associated with the current use of the VFW Post function hall, and by people in the parking lot now at 351 Summer Street.

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[9] The VFW post has agreed to comply with the conditions set out in the Decision, which will limit the type of events it can host.

The project for the property, as approved by the Board, would involve the construction of a new, mixed-use 2 to 3 story building consisting of 29 residential units and a two-story, approximately 8,300 square foot VFW Post, containing a private club for members only and a function hall primarily for club-specific activities. The Decision limits the occupancy of the first floor of the VFW Post to 125 people with tables and chairs, except that it authorizes the VFW Post to hold up to four events per year with a standing capacity of 190.

As George Proakis testified,[10] the conclusion that the VFW Post was a club for zoning purposes, and not a bar or nightclub, was amply supported by the evidence and consistent with the treatment of similar organizations in other towns. The occasional rental of the facility is properly considered an ancillary use.

The proposed structure on the property would be almost entirely on 351 Summer Street (i.e. in the CBD zone). It consists of a building, with residential units on the first, second and third floors, and with the VFW Post in a two-story portion of the building closest to the Shaft Site and to Summer Street, with its entrance on the east side of the building abutting the Shaft Site. No portion of the VFW Post portion of the building would be in the RA zone. Parking is provided on the Shaft Site and on 351 Summer Street under a portion of the structure. Access to the parking areas and to enter the VFW Post is through a curb cut onto the Shaft Site in the RA zone. A portion of the proposed structure would be in the RA district (i.e. on the Shaft Site rather than on 351 Summer Street). Specifically, about five feet of the residential portion of the structure would be in the RA district at the rear of the property, narrowing to about 3.5 feet toward the front (the Summer Street side) of the residential portion of the proposed building. The portion of the residential part of the structure that protrudes on the RA district into the rear

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[10] I found Mr. Proakis' testimony credible.

setback is an architectural element known as a bay under section 2.2.16 of the Ordinance.[11] It protrudes back into the rear setback on the RA parcel approximately 4 feet as permitted under section 8.6.14 of the Ordinance.[12]

The rear roof line of the residential portion of the structure in the CBD zone is proposed to have a mansard roof. The project design was changed to this roof profile to provide less height to the structure and to mitigate to some extent the shadow of the building. The height of the building is considerably lower than structures permitted as of right in the CBD zone. The roof line in the RA zone changes to reduce the building height further. There was no credible evidence presented to suggest that the proposed structure exceeded the permissible height in the RA zone.

In its proposal and as approved in the Decision, the Board required substantial steps to mitigate adverse impacts on abutters, including from sound, stationary artificial light, and vehicular headlights.[13] See, e.g., Condition #13 ("on-site lighting shall be downward directed and shall not illuminate adjacent residential parcels or the night sky"), 17 (installation of eight-foot high wood fence along the rear of the property), 18 ("professionally designed sound mitigation on the parking lot side of the rear fence. . . in the form of an acoustic fence or fence attachment"), 22 ("sound-resistant wall system"), 57 (same), 58 (limiting sound from the second-

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[11] SZO § 2.2.16 defines a "bay" as a "building element, consisting of the space between two (2) vertical structural members, extending down to the foundation and often projecting beyond the wall line of the building."

[12] SZO § 8.6.14 states, in relevant part: "Bays . . . may project into a required rear yard up to one-fourth (1/4) of the required setback, but in no case within ten (10) feet of a rear lot line."

[13] I found the testimony of Benjamin Markham credible.

floor), 66 (clearing patrons from parking area after events), 67 ("No outdoor Post events are allowed").

The property at 371 Summer Street, which currently houses the VFW Post's function space, was not part of the application for the special permit at issue here. The Board, however, imposed conditions on that property in light of the fact that the project would render 351 Summer Street no longer available as a parking area for members and guests of the VFW Post at 371 Summer Street. Specifically, the Board required that upon completion of the project the VFW Post would surrender its certificate of occupancy to 371 Summer Street and that any future use of 371 Summer Street that requires more than 15 parking spaces would have to seek relief through the appropriate permit-granting authority.

C. Plaintiffs' Challenges

The Board's Decision is comprehensive and thorough. It addresses each of the topics which must be addressed for issuance of a special permit under section 5.2.5 of the Ordinance, either finding them satisfied or imposing conditions to mitigate or eliminate their impacts. I need not address those aspects that are not addressed by plaintiffs. Plaintiffs marshal a number of arguments to attack the Decision. I address each of plaintiffs' arguments in turn, making those additional factual findings necessary to address them.

1. A Single Lot

Plaintiffs argue the property cannot be considered a single lot because of Dakota's long-term lease of the property. They argue that the option to renew a 99-year lease essentially renders Dakota a fee owner and therefore the property is owned in part by Dakota and in part by the VFW Post. Under the Ordinance, a "lot" is a "single parcel of land under one (1) ownership and undivided by a street a public way, with definite boundaries as indicated by recorded deed or

plan and used or set aside and available for use as the site of one (1) or more principal and accessory uses." SZO § 2.2.85 (emphasis added). If ownership is divided, the property is not a single lot. Much turns on this question. For example, under the Ordinance, density and dimensional requirements depend on the size of the single lot. SZO § 8.5. Thus, plaintiffs also complain that the project impermissibly combines lots with different ownership structures to circumvent the density restrictions and dimensional requirements in section 8.5 of the Ordinance.

The project is predicated upon a single owner of the property. Under the project as structured, all of the land would be owned by the VFW Post, with Strategic leasing the land beneath the condominium building. Although initially configured as a renewable 100-year lease, in the Fifth Amendment to Real Estate Development Agreement dated May 23, 2012, the parties agreed that the lease would be for 99 years.[14] The Board further mandated that the property would have to remain in common ownership. Specifically, Condition #70 states: "the lots at 343, 345, 349, and 351 Summer Street shall become permanently merged for zoning purposes upon the closing combining these lots[.] No building permit shall be issued until the Applicant provides evidence that all land is in common control. The Applicant shall establish a deed restriction indicating that the parcels cannot be sold independently and the control of the land shall remain with a single legal entity. This restriction shall be reviewed and approved by the Law Office and OSPCD." Where Strategic both represented that the property would be owned by a single owner and would be merged for purposes of the development, and where the Decision is expressly predicated on such a condition, the Board did not abuse its discretion in treating the property as a single lot under one ownership.

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[14] A 99-year lease, even if renewable, does not constitute fee ownership as a matter of law. See, e.g., Burnham v. Burnham, 81 Mass. App. Ct. 1118, 2012 WL 694386 at * 1 (Mar. 6, 2012) (Rule 1:28 decision). Cf. G.L. c. 186, § 1A (leasehold of 100 years effectively conveys ownership in fee simple).

2. The Use of the Property

Plaintiffs contend the Decision allows a bar or entertainment venue (i.e. the VFW Post) in a RA zone in violation of the dimensional requirements of sections 8.5.B and 8.5.E of the Ordinance. The Board was not arbitrary or capricious in treating the VFW Post as a private non-profit club for members only with less than 10,000 square feet under SZO § 7.11.5.B.6, rather than a bar or entertainment venue that is not allowed in an RA district under SZO § 7.11.10.2.6. The VFW Post is generally open only to members or hosts events sponsored by the VFW Post or its members. During those instances in which the VFW Post will be authorized under the Decision to rent its facilities, those uses will be ancillary to the principal purpose for which the VFW Post is used. The proposed VFW Post would contain no more than 8,300 square feet,[15] which is a size permitted in a CBD or RA zone. See SZO § 7.11.5.B.6.[16]

Moreover, to the extent there were questions raised about the VFW Post's prior use of its facility at 371 Summer Street, the Decision makes clear the VFW Post shall be used as a private club. Condition #49 states: "The VFW Post use shall be restricted to members, auxiliary members and guests of members," and that "[s]ponsored events including non-members are not allowed on the second floor." Condition #50 requires that "all events shall be sponsored by the VFW Post or one of its members." Finally, to the extent the VFW Post or a member is

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[15] In light of Condition #23, the square footage of the VFW Post will be less than 8,300 square feet.

[16] Even if the VFW Post was a bar or entertainment facility, it is located entirely within the CBD zone. Where, as here, the single lot spans two zoning districts, it is permitted to use the RA portion for access and parking for the use in the CBD zone. As set out in section 7.4 of the Ordinance: "Land in a more restrictive zoning district may supply space for a use permitted in a less restricted zoning district if the use of the land in the more restrictive district satisfies space and passive use requirements (such as setbacks, landscaping or parking) that are not prohibited in the more restrictive district." It simply was not arbitrary or capricious for the Board to authorize the use of the Shaft Site in the RA district for parking and access to the VFW Post located in a CBD.

authorized under the Decision to sponsor an event involving non-members, the Board did not err because under section 7.11.1 of the Ordinance an "[a]ccessory use[ ] . . . customarily associated with a given principal use shall be permitted by right in conjunction with such permitted principal use." The Board did not err in considering events to which non-members are invited to be an accessory use of the club.

3. The Effects on 371 Summer Street

Plaintiffs contend that by employing all of the available parking on the property for the project, the effect of the Decision is to leave 371 Summer Street without off-street parking and therefore a non-conforming use. The VFW Post at 371 Summer Street currently uses the parking available at 351 Summer Street. That parking will not be available to 371 Summer Street once the property is developed in accordance with the Decision. The Decision, however, requires the VFW Post to surrender its certificate of occupancy to 371 Summer Street and that any future use of 371 Summer Street that requires more than 15 parking spaces must obtain approvals from the appropriate permit granting body. Specifically, Condition #69 states:

> The Applicant shall establish adequate parking for any future use of the existing Post building at 371 Summer Street, and shall not use the site as a function facility. Upon completion of the new Post, the Post shall surrender the Certificate of Occupancy on the current Post site, and shall establish through a covenant with the City that any use requiring more than fifteen parking spaces shall seek relief from parking requirements through the appropriate permit granting authorities.

Moreover, under section 9.2 of the Ordinance, no new certificate of occupancy could be issued for the property if it was to be for a different use unless off-street parking spaces and other relevant facilities are provided in accordance with Article 9 of the Ordinance.[17]

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[17] Plaintiffs contend that the principle of "infectious invalidity" invalidates the Decision because it effectively leaves 371 Summer Street without adequate parking. The

4. Parking Requirements

Based on their contention that the VFW Post should be considered a bar or entertainment venue, plaintiffs argue the Board abused its discretion by failing to calculate the number of necessary parking spaces at "0.75 per employee, plus 1 per 4 persons based on building design capacity" under SZO § 9.5.10.f, which is applicable to a "[n]ightclub, bar/tavern with dance floor or staging area"; rather than the "1 per 6 seats in the main auditorium or assembly area, based on design occupancy" under SZO § 9.5.5.d, which applies to a "club." Based on my finding that the Board did not err in concluding that the VFW Post was a "club," it also was not arbitrary or capricious for the Board to apply the parking standards set out in SZO § 9.5.5.d. The parties agree that the development proposal includes a total of 108 parking spaces. Of those spaces, 57 are for the VFW Post's use, of which 33 are in the open air parking area and 24 are in the ground-level covered parking area. Given the occupancy of the VFW Post, the parking available for the approved project is well within the requirements of § 9.5.5.d.

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principle of "infectious invalidity" applies "when an applicant creates a buildable lot at the expense of another lot, rendering the latter nonconforming by the creation of the former, this nonconformity infects the otherwise conforming lot and forecloses the applicant's right to develop that lot." DelTorchio v. Movali, 2009 WL 391623 at * 13 n.72 (Mass. Land Ct. Feb. 19, 2009) (and cases cited). Although "infectious invalidity" traditionally involves expanding one lot by reducing the other lot in violation of zoning by-laws, "division" is not necessary to trigger this principle. Alley v. Building Inspector of Danvers, 354 Mass. 6, 7-8 (1968). In Planning Bd. of Nantucket v. Bd. of Appeals of Nantucket, 15 Mass. App. Ct. 733 (1983), the issue was whether the Board of Appeals' allowance of a special permit to build a commercial structure on a severed parcel with a specified number of parking spaces, was an approval of the proposed commercial structure on the severed parcel, if the effect was to leave the pre-existing structure on the remaining property non-conforming in terms of ground area coverage ratio. Id. at 735. The Appeals Court held the Board of Appeals improperly found that it did, but made clear the landowner could have obtained the relief by seeking a variance from the appropriate permit granting authority in the first place. Id. at 737-738. For similar reasons, here, the Board had the authority to grant the special permit by conditioning the future use of 371 Summer Street on appropriate review of the parking available to support the proposed use.

5. Dimensional Requirements

In addition to the dimensional challenges already addressed above, the plaintiffs contend that the project impinges on the applicable 20-foot rear yard setback requirement in an RA zone for the small number of feet the residential portion of the structure crosses over from the CBD zone into the RA zone. As described above, the building falls within the 20 foot rear yard setback only insofar as a bay protrudes approximately four feet into that area, which is permitted under section SZO § 8.6.14. Similarly, there is no violation with respect to the height of the structure.

6. Adequacy of Board Findings

Plaintiffs contend the Board did not make adequate findings supported by the evidence. I need not review every one of the findings as I find them adequate. Plaintiffs' principal contention is that the Board failed in its conclusion in paragraph 18 of the Decision that "[t]he Applicant has taken care to address adverse impacts." Specifically, plaintiffs point to adverse impacts on them of undue shadowing, artificial light, automobile headlights, and noise from the proposed project. Plaintiffs introduce no expert testimony to suggest or quantify any impacts on them from the proposed project. The Board was not unreasonable, whimsical, arbitrary or capricious in making its finding where the project as proposed, and with the additional conditions required by the Board, substantially mitigated the impacts of the project on abutters in terms of shadow, by requiring changes to the height and profile of the building; in terms of light mitigation, by requiring particular surface lighting and fencing at the rear of the property; and in terms of sound, by imposing substantial limitations on the use of the building and requiring a sound-resistant wall system, windows that do not open in the rear of the property, and sound

Judicial Court has written in upholding a Land Court decision overturning a zoning board's denial of a special permit:

> This stage of judicial review "involves a highly deferential bow to local control over community planning." . . . The board is entitled to deny a permit even "if the facts found by the court would support its issuance." . . . The judge nonetheless should overturn a board's decision when "no rational view of the facts the court has found supports the board's conclusion." . . . Deference is not appropriate when the reasons given by the board lacked "substantial basis in fact" and were in reality "mere pretexts for arbitrary action or veils for reasons not related to the purposes of the zoning law."

Shirley Wayside Limited Partnership v. Bd. of Appeals of Shirley, 461 Mass. 469, 474-475 (2012) (citations omitted).

I must give "substantial deference" to the Board's reasonable interpretations of the Ordinance because it is charged with enforcing the Ordinance. Wendy's Old Fashioned Hamburgers of New York v. Bd. of Appeals of Billerica, 454 Mass. 374, 381 (2009); APT Asset Management, Inc. v. Bd. of Appeals of Melrose, 50 Mass. App. Ct. 133, 138 (2000).

Based on my findings of fact and the facts agreed to by the parties, and applying the standards of review set forth above, I find no reason to overturn the decision of the Board.

ORDER

Plaintiffs' appeal is hereby **DENIED**. The decision by the Board approving the special permit with conditions is **AFFIRMED**. Judgment shall enter for defendants.

Dated: December 8, 2015

Peter B. Krupp
Justice of the Superior Court