

SUFFOLK, ss

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

Civil Action No. 21-2587H

HIGH BOARD LLC

and

WE GROW MICROGREENS, LLC

Plaintiffs,

v.

CITY OF BOSTON ZONING BOARD OF
APPEAL, CHRISTINE ARAUJO, MARK
ERLICH, MARK FORTUNE, JOSEPH
RUGGIERO, ERIC ROBINSON,
SHERRY DONG, AND BETHANY
PATTEN AS THEY ARE PURPORTED
MEMBERS OF THE CITY OF BOSTON
ZONING BOARD OF APPEAL, A
BOARD OF THE CITY OF BOSTON

and

FALCUCCI PROPERTIES, LLC

Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2021 NOV 10 1P 2:49
MICHAEL JOSEPH DOHOVANY
CLERK / MAGISTRATE

COMPLAINT

Introduction

Pursuant to Section 11 of Chapter 665 of the Acts of 1956 (the "Enabling Act"), Plaintiffs bring this action seeking review of a Zoning Board of Appeal ("ZBA") decision granting variances that will allow the owner of a single parcel in the Hyde Park district of Boston, Massachusetts to construct three detached single-family homes on the parcel, where only one dwelling unit may be constructed on the parcel under applicable zoning regulations. Plaintiffs each own property

directly abutting the parcel. Due to their direct proximity to the proposed development, Plaintiffs will be harmed by the overly dense development, and therefore are aggrieved by the ZBA's decision granting the variances. The ZBA decision was an error of law because it was not in compliance with various requirements of the applicable zoning regulations. Accordingly, Plaintiffs respectfully request that this Court annul the ZBA's decision.

Parties

1. Plaintiff High Board LLC (hereinafter, "High Board") is a Massachusetts limited liability company that owns 19 Norton Street, Hyde Park, MA 02136, upon which there is one single-family house that is rented to a residential tenant, and a large open backyard that is rented to Plaintiff We Grow Microgreens, LLC. High Board's land directly abuts the proposed development parcel at 13-15-17 Norton Street, Hyde Park, MA 02136 (hereinafter, the "Property.")
2. Plaintiff We Grow Microgreens, LLC hereinafter, "WGM") is a Massachusetts limited liability company that owns 21 Norton Street, Hyde Park, MA 02136, a property that also directly abuts the Property. WGM operates a farm on their 21 Norton Street property, which consists of a greenhouse, two 'hoop houses' for growing plants, accessory buildings and substantial open space. WGM also grows plants in a portion of the backyard of High Board's adjoining 19 Norton Street property. WGM's farm is a valued community resource as noted by the City of Boston's Department of Neighborhood Development in its letter to the ZBA commenting on the Project: "The Department of Neighborhood Development wishes to voice opposition to the 13/15/17 Norton Street development in Hyde Park. It will cause periods of significant shade to the abutting urban farm during its winter growing season, which is a time when sources of locally grown,

fresh, affordable produce are quite limited. The farm is an important food security resource for the Hyde Park neighborhood and the City of Boston at large, and the City of Boston put significant resources into the creation of the farm, including nearly an acre of land appraised at almost \$200,000, and a CPA grant of \$134,700.”

3. Defendant ZBA is municipal board of the City of Boston, created pursuant to Section 8 of the Enabling Act and charged with reviewing and deciding requests for variances under applicable laws, including the Enabling Act and the Boston Zoning Code. Christine Araujo, Mark Erlich, Mark Fortune, Joseph Ruggiero, Eric Robinson, Sherry Dong, and Bethany Patten are purported members of the ZBA and are named in their official capacity. The ZBA has a principal place of business at 1010 Massachusetts Avenue, Boston, Massachusetts 02118.
4. Defendant Falcucci Properties LLC (hereinafter “Falcucci”) with an address of 15 Lunar Avenue, Braintree, MA 02184 is the owner of the Property and made application for variances to the ZBA through its agent, Jeffrey R. Drago, Esq.

Jurisdiction

5. Section 11 of the Enabling Act confers jurisdiction of this action on this Court.

The Proposed Development and Zoning Code Violations

6. The Property is a parcel of land in Boston's Hyde Park district currently containing one single-family house and identified on the attached map as 15 Norton Street. (See Exhibit 1).
7. Exhibit 1 accurately depicts the relative siting of the Property and the abutting properties of High Board (19 Norton Street) and WGM (21 Norton Street, which lies to the west of 19 Norton Street and wraps around to the north of both 15 and 19 Norton Street).
8. Falcucci proposes to construct three single-family dwellings on the Property (the

“Project”).

9. The three single-family dwellings would be sited on the Property as depicted in Exhibit 2.

10. Each of the three dwellings would have a two-car garage incorporated into the building.

An additional surface parking space is provided for guests and other visitors.

Zoning Code Violations

11. The Property is in a One-Family Residential Subdistrict of the Hyde Park Neighborhood District which has been designated as “1F-6000” on Boston Zoning Map 12.

12. High Board's neighboring property also lies within this 1F-6000 residential subdistrict, according to Boston Zoning Map 12.

13. WGM's neighboring property lies within a Conservation Preservation Subdistrict, according to Boston Zoning Map 12. See also Article 69-16 of the Boston Zoning Code.

14. The 1F-6000 designation indicates that only single-family residences having a minimum lot size of 6000 square feet are permitted. See Articles 69-7, 69-8, 69-9 of the Boston Zoning Code.

15. Pursuant to Article 69-30.12 of the Boston Zoning Code “A Dwelling shall not be built to the rear of another Dwelling,” Falcucci's proposed development of three dwellings on the Property would violate this provision of Article 69-30.12.

16. Pursuant to Article 69-9.2 and Table C to Article 69 of the Boston Zoning Code, in the 1F-6000 zone the minimum lot frontage (i. e., the length of the lot at its border with the street) is 60 feet for each dwelling unit on the lot. Falcucci's proposed development of three dwellings on the Property will violate Article 69-9.2 and Table C to Article 69 of the Boston Zoning Code because the lot frontage of the Property on Norton Street is only 100 feet.

17. Pursuant to Article 69-30.1 of the Boston Zoning Code, where “there exist two or more

Buildings fronting on the same side of the same Street...the minimum Front Yard depth shall be in conformity with the Existing Building Alignment of the Block.”

18. There exist several buildings in a line and fronting on the same side of Norton Street as the Property creating an Existing Building Alignment (see Exhibit 1). Therefore, the front yard depth (i.e., the undeveloped area between the street and the building) must be no less than that of other buildings on the same side of the street. Falcucci's proposed development of the Property will violate Article 69-30.1 because it would place one of the dwellings closer to Norton Street than the other buildings in the same block.

19. Pursuant to Article 69-60.9 and Table C to Article 69 of the Boston Zoning Code, each dwelling built in the 1F-6000 zone must have a rear yard of at least 40 feet in depth. Falcucci's proposed development of three dwellings on the Property will violate Article 69-60.9 and Table C to Article 69 of the Boston Zoning Code because the proposed dwelling numbered as 15 Norton Street (See Exhibit 2) will have a rear yard of only about 20 feet.

20. When Falcucci applied to the Inspectional Services Department of the Defendant City of Boston (hereinafter “ISD”) for building permits for the three proposed dwellings on the Property, ISD denied each building permit and issued the Zone Code Refusal letters attached as Exhibit 3.

Proceedings Before the ZBA

21. On or about March 2, 2021 Falcucci filed appeals with the ZBA seeking relief from ISD's refusal to issue building permits for the three dwellings. See Exhibit 4.

22. Section 9 of the Enabling Act states that the ZBA

may authorize with respect to a particular parcel of land or to an existing building thereon a variance from the terms of such zoning regulation where, owing to conditions especially affecting such parcel or such building, but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of such zoning regulation would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment

to the public good and without nullifying or substantially derogating from the intent and purpose of such zoning regulation, but not otherwise.

23. Article 7-3 of the Boston Zoning Code sets forth the criteria for granting a variance:

The Board of Appeal shall grant a variance only if it finds that all of the following conditions are met:

(a) That there are special circumstances or conditions, fully described in the findings, applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure;

(b) That, for reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose;

(c) That the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare;

...

In determining its findings, the Board of Appeal shall take into account:

(1) the number of persons residing or working upon such land or in such structure;

(2) the character and use of adjoining lots and those in the neighborhood; and

(3) traffic conditions in the neighborhood.

24. Section 8 of the Enabling Act requires the ZBA to maintain a detailed record and set forth the reasons for its decision.

25. When Sections 8 and 9 of the Enabling Act and Article 7-3 of the Boston Zoning Code are read together, they require the ZBA to fully describe the “special circumstances,” and “demonstrable and substantial hardship” that form the basis for its decision as well as provide reasons why “the variance is necessary for the reasonable use of the land,” and why the variance is “the minimum variance that will accomplish” a reasonable use of the land.
26. On October 5, 2021, after two deferrals, the ZBA held a hearing concerning Falcucci's appeals.
27. On October 19, 2021 the ZBA issued written decisions on Falcucci's appeals (the “13 Norton Decision,” the “15 Norton Decision,” and the “17 Norton Decision”, collectively, the “Decisions”).
28. Attached as Exhibits 5, 6, and 7 are true and accurate copies of the Decisions.
29. On October 22, 2021 the Decisions were entered with the Inspectional Services Department of the City of Boston. See Exhibit 8.
30. In the Decisions the ZBA made no specific findings of fact concerning any of the criteria set forth in Articles 7-3(a) and 7-3(b) of the Boston Zoning Code, although required to do so under Section 8 of the Enabling Act.
31. In the Decisions, ZBA did not provide any reasons or facts to support its determination that the criteria set forth in Articles 7-3(a) and 7-3(b) of the Boston Zoning Code were met. For its finding the ZBA merely copy/pasted Articles 7-3(a) and 7-3(b) into its decision.
32. Although section 8 of the Enabling Act requires the ZBA to set forth the reasons for its decisions, the ZBA did not.
33. In the Decisions, the ZBA did not fully describe special circumstances or conditions

affecting the Property although required to do so under Article 7-3(a) of the Boston Zoning Code.

34. In the Decisions the ZBA did not fully describe the reasons of practical difficulty and demonstrable and substantial hardship requiring the granting of a variance for the reasonable use of the Property although required to do so under Article 7-3(b) . The ZBA did not describe any reasons supporting this requirement in the Decisions.

35. Article 7-3 (b) of the Boston Zoning Code also requires that the ZBA find the variance to be the “minimum variance” that will accomplish a reasonable use of the Property. The ZBA gave no reason or support for this finding and the record before the ZBA contained no information supporting this finding.

Harm to Plaintiffs

36. Plaintiffs are specially and particularly harmed by the ZBA's decision because, as the owners of properties directly abutting the Property, they will be directly and negatively impacted by aspects of the project for which variances were granted.

37. The Plaintiffs and Falcucci each own property governed by the provisions of the Boston Zoning Code, and, as such, all of them are restricted (or at least ought to be) in the use of their land pursuant to zoning regulation. Each of them are entitled to the benefits of a well-planned community under the zoning regulations as well. A constitutionally sound zoning structure requires this equal sharing of the benefits and burdens of zoning regulation. Plaintiffs are harmed by the decision of the ZBA because it unlawfully deprives them of the benefits of zoning, especially protection from the imposition of overly dense and out of character development, while leaving their properties burdened with zoning restrictions.

Access to Light

38. WGM will be harmed by shadows the proposed buildings will cast on its open space, on its greenhouse and on the backyard of 19 Norton Street which it rents from High Board. The shadows will reduce light hours which are key to WGM's ability to grow vegetables and other plants, reducing WGM's income and negatively impacting the farm's economic viability. Translucent solar panels are mounted on WGM's greenhouse. The shadows cast by the Project will reduce the performance of the solar panels which provide electricity to WGM's greenhouse, reduce WGM's electricity expense and lower the farm's carbon footprint.
39. High Board will also be harmed by the shadows cast by the Project's structures, especially since the shadows will reduce both the sale value and the rental value of both the residential and open space portions of its property.
40. The extent of the shadows that would be cast by the Project is depicted in the attached document "13-17 Norton Shadow Analysis." (See Exhibit 9)
41. Access to light is an interest protected under Article 1-2 of the Boston Zoning Code which lists the provision of "adequate light and air" as one of the purposes of the Boston Zoning Code.

Density

42. Through construction of three one-family dwellings on a single parcel the Project will introduce a housing typology that is inappropriate in a single family zoning subdistrict and which is expressly forbidden by Article 69-30-12 of the Boston Zoning Code.
43. Defendant City of Boston's own planning agency, popularly known as the Boston Planning and Development Agency, noted this in its recommendation to the ZBA

regarding the Project: “The Boston Planning and Development Agency recommends **DENIAL WITHOUT PREJUDICE**. Proposal contemplates building typology that is not contextually appropriate.”¹ [emphasis in the original] See Exhibit 10.

44. Having three dwellings on the Property would result in development that is not of the same character as other properties in the vicinity and would lead to density impacts from more residents, more visitors, more deliveries, more commotion, more noise, more activity and more traffic than a zoning-compliant project.
45. These density impacts would directly and negatively impact Plaintiff s’ enjoyment of their adjoining properties and diminish the rental and resale values of their properties.
46. Zoning regulations applicable to the area protect Plaintiffs from dense development. Article 1-2 of the Boston Zoning Code states that the code is established to “prevent overcrowding of land and buildings...to lessen congestion in the streets; to avoid undue concentrations of population, to provide adequate light and air” among other purposes. Article 69-1 states that “[t]he objectives of this Article are to provide adequate density controls that protect established residential areas” and “to preserve, maintain and create open space.” Article 69-7 states that “[t]he purpose of the Residential Subdistricts [in Hyde Park] is to maintain, enhance, and promote the character of the residential neighborhoods in terms of density, housing type, and design; to provide for ... housing appropriate to the existing built environment; and to encourage appropriate development which enhances the Residential Subdistricts while preventing overdevelopment.” Many requirements in the Boston Zoning Code address and limit density, including those establishing minimum lot areas, minimum lot widths, minimum lot frontage, limits on the

¹ Articles 69-30.12 and 6-2 of the Boston Zoning Code specifically call on the BPDA (also known as the Boston Redevelopment Authority) to furnish “a report with recommendations, together with material, maps or plans to aid the Board of Appeal in judging the appeal” whenever there is a proposal to erect two or more dwellings on one parcel in a residential subdistrict of Hyde Park.

ratio of floor to lot area, minimum usable open space requirements, and minimum depths for front yards, side yards and rear yards.

Neighborhood Character

47. Article 69-7 of the Boston Zoning Code establishes residential subdistricts in Hyde Park to “promote the character of the residential neighborhoods in terms of ... design,” to provide “housing appropriate to the existing built environment” and “to encourage appropriate development which enhances the Residential Subdistricts.” These goals are carried out in part by requiring buildings to be no closer to the street than others on the same side of the street (See Article 69-30.1) and by limiting the number of dwellings on a parcel to one (See Article 69-30.12).
48. The Project would be out of compliance with both of these requirements; there would be three dwellings instead of one, and 15 Norton Street would be constructed closer to the street than the other houses on the same side of the street, which are all in a line and provide the sense of an orderly, attractive and well-planned residential area.
49. WGM built the greenhouse on its property in 2019 precisely in line with the front face of the other buildings from 1 Norton Street to 19 Norton Street, in compliance with Article 69-30.1 and in harmony with the existing character of the area.
50. Owners of neighboring properties such as Plaintiffs are the primary intended beneficiaries of Articles 69-30.1 and 69-30.12; they are the people who will spend their time in the area and whose property values will be enhanced by the well-planned residential character resulting from compliance with these zoning articles.

Privacy

51. More dwellings, resulting in more people residing at, servicing and visiting the Property

will result in a greater loss of privacy to Plaintiffs than a zoning-compliant building.

52. Privacy is an interest protected by the Boston Zoning Code which provides standing.

See, *Van Buren v. South Boston New Housing*, 18 Mass.L.Rptr. 703 (2005).

Diminution in Property Value

53. Conserving the value of land and buildings is one of the stated purposes of the Boston Zoning Code. See Article 1-2 of the Boston Zoning Code.

54. The cumulative impact of the various harms to be suffered by Plaintiffs from the construction of three dwellings on an abutting property – loss of light, development that is out of character with the existing fabric of the neighborhood, loss of privacy and excess residents, visitors, deliveries, commotion, noise and traffic – will result in a reduction in the rental and sale value of High Board's property and in the sale value of WGM's farm.

Errors of Law By the ZBA in the Decisions

55. The ZBA committed errors of law by issuing Decisions purporting to grant variances for violations of Article 69-30.12 without finding that “open space for all occupants, and light and air for all rooms designed for human occupancy, will not be less than would be provided if the requirements of Section 69-30.12 were met.”

56. The ZBA committed errors of law in finding that “there are special circumstances or conditions,...applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood,” where the record before it contained no facts to support the findings and no reasons for the findings were provided in the Decisions.

57. The ZBA committed errors of law in finding that circumstances or conditions effecting the Property are such that the application of the provisions of the Boston Zoning Code would deprive the owners of the reasonable use of their land where the record before it contained no facts to support the findings and no reasons for the findings were provided in the Decisions.
58. The ZBA committed errors of law in finding that for reasons of practical difficulty and demonstrable and substantial hardship the granting of the variances are necessary for the reasonable use of the Property where the record before it contained no facts to support the findings and no reasons for the findings were provided in the Decisions.
59. The ZBA committed errors of law in finding that the variances it granted were the minimum variances that will provide for reasonable use of the Property, where the record before it contained no facts to support the findings and no reasons for the findings were provided in the Decisions.
60. The ZBA committed errors of law by merely recited the regulatory requirements in the Decisions, rather than providing reasoned findings as required under Section 8 of the Enabling Act.
61. The ZBA committed errors of law by issuing decisions on 15 Norton Street and 17 Norton Street which ordered the Building Commissioner to issue building permits when all of the variances required for the issuance of permits had not been granted. Article 69-9.2 of the Boston Zoning Code requires that each dwelling on the Property have a minimum frontage on a street not less than 60 feet. The frontage of the proposed 13 Norton Street dwelling is 27.5 feet, the frontage of the proposed 15 Norton Street dwelling is 55.0 feet, and frontage of the proposed 17 Norton Street dwelling is 27.5 feet.

A variance for violation of the minimum frontage requirement was not requested by or granted to the 15 Norton Street dwelling or the 17 Norton Street dwelling.²

62. The ZBA committed errors of law by issuing decisions that had not been voted upon and signed by duly appointed members of the ZBA. The terms of six of the seven members of the ZBA who voted to approve Falcucci's appeal on October 19, 2021 and signed the Decisions on October 22, 2021 had expired on July 1, 2021.³ Section 8 of the Enabling Act states: "Appointments of members and alternate members of said board shall be for terms of three years." While Section 8 also authorizes the ZBA to enact "rules and regulations for its own procedures not inconsistent with this act" any rule or regulation permitting board members to serve beyond the three term limit set by the legislature would be inconsistent with the act, and thus void and of no effect.

COUNT I

Annulment of the ZBA's Decision

63. Plaintiffs repeat and re-allege the allegations of paragraphs 1 through 62 above as though fully set forth herein.

64. Plaintiffs are aggrieved parties with standing to bring this suit under Section 11 of the Enabling Act.

65. The Decisions must be annulled in accordance with said Section 11 because the ZBA committed errors of law therein, and in the process of rendering the Decisions.

2 The 15 Norton Decision and 17 Norton Decision each state the appellant seeks relief from the "aforementioned section[s] of the Boston Zoning Code" but neither decision contained a prior reference to "Art. 69 Sec. 09 Dimensional Reg. Lot frontage is insufficient" as was contained in the decision on 13 Norton Decision.

3 The members whose terms expired on July 1, 2021 are Christine Araujo, Mark Fortune, Joseph Ruggiero, Eric Robinson, Sherry Dong, and Bethany Patten.

Prayer for Relief

WHEREFORE, Plaintiffs request that this honorable Court award the following relief:

- A.** Permanently restrain, enjoin, and annul each of the Decisions;
- B.** Enjoin the City of Boston from issuing any building permits for the Project based on any one or all of the Decisions;
- C.** Award the Plaintiffs their reasonable costs in accordance with Section 11 of the Act and reasonable attorneys' fees to the extent permitted by law; and
- D.** Grant such other and further relief as justice and equity may require.

Respectfully submitted,
HIGH BOARD LLC and
WE GROW MICROGREENS LLC
By their attorney,



Michael A. Waryasz BBO #663311
Power House at the Schrafft's Center
529 Main Street, Suite P200
Charlestown, MA 02129
(857)445-0100

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