

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPT
DOCKET NO. 21-1122 A

3377 WASHINGTON STREET, LLC,
Plaintiff,

v.

CITY OF BOSTON ZONING BOARD OF
APPEALS, and NEW ATLANTIC
DEVELOPMENT LLC, JAMAICA PLAIN
DEVELOPMENT CORPORATION AND
3371 WASHINGTON DEVELOPER LLC
Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2021 MAY 13 P 3:31
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

COMPLAINT

INTRODUCTION

The Plaintiff, 3377 Washington, LLC ("Plaintiff") appeals a Decision rendered by the City of Boston Zoning Board of Appeals ("Board") pursuant to Chapter 665 of the Acts of 1956, as amended, Section 11, which Decision granted a Variance from the provisions of the Boston Zoning Code for a project located at 3371 - 3375 Washington Street, Ward 11, Boston, MA ("the Project"). The Variance granted by the Board gives approval to Defendants to allow construction of a five-story mixed-use building which will create 39 elderly apartments, in addition to approximately 770 square feet commercial space on the ground floor. The Project has no parking or loading area. The Project is in an area currently zoned as Local Industrial ("LI") and required several zoning variances including use, FAR (floor area ratios), height, rear

setback, parking and loading zones. The Project constitutes a Small Project pursuant to Article 80 of the Boston Zoning Code. The Article 80 process may, but is not limited to review, a project's impact on transportation and parking, the public realm, the environment, urban design and historic resources. Additionally, Article 55 of the Boston Zoning Code established the zoning regulations for a neighborhood plan for the Jamaica Plain Neighborhood Development; Washington Street was established as a LI Sub district. (Section 55-19). The purpose of Article 55 is to protect the established residential areas, direct growth to areas that can accommodate it, provide affordable and marketable housing, protect open space and the environment, promote the public safety, health and welfare of the people of Boston. In short, this Project is too big, too close to its neighbors, and does not provide parking or loading areas sufficient to serve the Project.

The Plaintiff contends that the Board exceeded its authority and made a decision that was arbitrary and capricious which did not meet the legal standard for a variance.

Parties

1. Plaintiff, 3377 Washington Street, LLC, is a Massachusetts limited company with a business address of 302 Shawmut Street, Boston, MA 02118.
2. Defendant Board is a municipal body with a business office at 1010 Massachusetts Avenue, Boston, MA.
3. Defendant, New Atlantic Development LLC ("New Atlantic") is a corporation organized under the laws of the Commonwealth with an address at 236 Huntington Avenue, Suite 314, Boston, MA 02115.

4. Defendant, Jamaica Plain Neighborhood Development Corporation (“JPNDC”) is a corporation organized under the laws of the Commonwealth with an address at 31 Germania Street, Boston, MA 02130.
5. 3371 Washington Developer LLC (“3371 Washington”) is a corporation organized under the laws of the Commonwealth with an address at 31 Germania Street, Boston, MA 02130.
6. Defendants New Atlantic and JPNDC through 3371 Washington, a joint venture entity developer, have proposed to construct a new 5-story building at 3371 – 3375 Washington Street, Jamaica Plain (the “Project”). New Atlantic, JPNDC and 3371 Washington may at times be jointly referred to as the “Developer”.
7. This Court has jurisdiction pursuant to Section 11 of the Acts of 1956, Chapter 664, as amended.
8. Plaintiff is a direct abutter and person aggrieved by the decision of the Defendant Board and has the requisite standing to bring this action.

Facts

9. Plaintiff is the owner of 3377 Washington Street, Boston, MA (“Plaintiff’s Property”).
10. The Plaintiff’s Property is leased to Turtle Swamp Brewery (TSB”), a business engaged as a brewery which has 21 employees as well as customers who rely on street parking, as well as an extremely small parking lot.
11. The Plaintiff’s Property and TSB are a direct abutter to the south of the Project; TSB operates a brewing facility, taproom and patio for customers which operates on a daily basis.

12. Given the multitude of variances and the fact that the proposed Project is a “zero setback lot line structure,” the Project will result in adverse impacts to Plaintiff’s Property during construction resulting in harm to the operation of TSB’s business. The development will adversely impact Plaintiff and TSB’s utility service and after construction traffic and parking impacts will harm TSB’s operations.
13. These injuries are specific and particular to the Plaintiff, and are not suffered by the community generally.
14. As such, and as a direct abutter to the Project, Plaintiff is a person aggrieved, per Section 11 of Chapter 665 of the Acts of 1956 and M.G.L. c. 40A, § 17, by the Decision of the Board of Appeals and has standing to bring this appeal.
15. The Developer filed an appeal with the Board to issue a Variance for the Project.
16. The Project is currently home to two (2) small businesses and falls under the purview of the Boston Zoning Code, but is located in a LI Zoning Sub district, See Exhibit “A”.
17. The current structure of the neighborhood in which the Project is located has no buildings more than 4 stories and most are 2 to 3 stories.
18. The Project will have no parking spaces or loading area; three (3) public parking spaces in front of the Project will be converted for short-term parking to be used for resident pickup/dropoff, small deliveries and emergency vehicles.
19. Utility service to the brewing operation is located underground and is served by a gas meter located on the property line dividing Plaintiff’s Property and the Project property.
20. The Plaintiffs Property as previously stated is a direct abutter to the Project.

21. Development in the LI District is also subject to parking and loading area requirements. These standards require new developments to provide on-site space for parking and loading and unloading of service vehicles, again, to ensure that the new development does not unreasonably and adversely impact existing and abutting uses.
22. The Project will be developed as a “zero setback” structure, meaning it will be constructed and located immediately on the shared property boundary with the Plaintiff. The Developers have no right to use Plaintiff’s Property during construction, and no right to render any portion of Plaintiff’s Property unusable during construction or at any other time.
23. The Project will exceed the height limits, rear yard setbacks, floor area ratio, parking and loading zone requirements of the LI District.
24. The Project is controlled by Article 55 of the Zoning Code which establishes the regulations for the Jamaica Plain Neighborhood District and Section 55-19 establishes it as a Local Industrial Sub district (LI).
25. JPNDC submitted an application for Small Project Review pursuant to Article 80, Section 80E, of the Boston Zoning Code for the Project on September 18, 2020. A copy of the letter accompanying the Application is attached hereto as Exhibit “B”.
26. The Application sought to build a 5 story mixed use building with 39 low income elderly residential units and 770 sq. feet of restaurant space (previously defined as the “Project”).
27. The Project falls under the purview of Article 80 of the code and requires “project review” if it adds more than 20,000 square feet of gross floor area and more than 15 units. The Project fits into this category.

28. The review requirements in Article 80 are established to protect and enhance the public realm, to mitigate the impacts of development projects on the community and on the city resources, to ensure compliance with the intent and purpose of the code and promote efficiency in its administration, and to promote the public health, safety, convenience and welfare.
29. Pursuant to Article 80, a variance is required and may be granted to promote city planning and economic development purposes, including affordable housing, subject to the requirement that the planned project will not generate significant adverse impacts on the neighborhood and community at large.
30. The Article 80 variance requirements must also comply with the zoning regulations specific to the area (Article 55); the purpose of Article 55 is to establish the zoning regulations for a neighborhood plan for the Jamaica Plain Neighborhood District as required by the provisions of the Jamaica Plain Interim Planning Overlay District, Article 27J of the Boston Zoning Code.
31. Article 55-18 which includes Washington Street, Jamaica Plain, is currently zoned as LI; the purpose of LI is to encourage the preservation of the existing manufacturing and industrial base in a manner that is sensitive to and preserves the quality of life of the surrounding neighborhoods, and to encourage the development of new job opportunities within the Jamaica Plain Neighborhood District.
32. Article 55 establishes the zoning regulations for a neighborhood plan for the Jamaica Plain Neighborhood District including to provide adequate density controls, protect established residential growth to areas that can accommodate, provide affordable and

market rent housing, protect open space and environment, to protect the public safety, health and welfare of the people of Boston.

33. Article 55 at Table C sets forth the Permitted Uses. Table C is attached as Exhibit "C".

34. Article 55 at Table H sets forth the Dimensional Requirements. Table H is attached as Exhibit "D".

35. Article 55 was developed to include the role of the community participating in determining the appropriate use and zoning of projects as critical to the success of any development plan.

36. The Project will come right up to the Plaintiff's Property line and TSB has expressed the concern and belief that construction of the Project will put TSB out of business including that operation of the existing patio in the parking lot that goes up to the property line would be impossible for safety reasons.

37. Additionally, 18 wheel trucks deliver supplies to the brewery and currently pull up where JPNDC intends to put the three (3) spaces in front of the building.

38. The Developer applied to the City of Boston Inspectional Services Department ("ISD") seeking a building permit to construct the Project. The application was noted by ISD as Permit Number ER1120164.

39. The Building Inspector issued a Zoning Code Refusal letter dated November 23, 2020, which denied the Developer's application citing the application required relief from the Board of Appeals as same would be in violation of the Boston Zoning Code. The Zoning Code Refusal Letter is attached hereto as Exhibit "E".

40. The Building Inspector issued a Zoning Code Refusal letter which cited seven (7) violations of the Boston Zoning Code, including but not limited to, elderly housing is a forbidden use; floor area ratio is excessive; height requirement is excessive; minimum rear yard setback requirement is insufficient, off-street parking and loading insufficient.
41. The Developer filed an Appeal with the ZBA and provided Additional Sheets of Appeal setting for the Reasons for the Appeal, which simply restated the statutory conditions without any specific applicability to the Project. A copy of the Additional Sheets for Appeal is attached hereto as Exhibit "F".
42. The Zoning Board of Appeal held a hearing on the issuance of the variance on February 23, 2021.
43. TSB participated in the Board of Appeals hearing and raised numerous objections that impact TSB and Plaintiff with reference to the granting of the sought variance.
44. TSB noted that the size, height, and proximity of the proposed Project would prevent operation of TSB's business. TSB raised objections to the proximity of the rear yard amenities that, due to the lack of compliance with setbacks, would be located in close proximity to an industrial/commercial operation, interfering with TSB's business.
45. TSB also noted that the lack of parking and loading areas would exacerbate the existing parking challenges in the neighborhood and the use of existing off-site parking for the Project loading area, immediately adjacent to TSB's business, would obstruct access to TSB's operations.

46. In sum, Plaintiff and TSB assert that the sheer number of sought variances was an indication that the proposed Project was too large for the chosen site and could not be constructed as proposed without interfering with abutters' use of their property.
47. The ZBA issued a Notice of Decision and Decision ("Decision") dated April 20, 2021 which was entered in the Inspectional Services Department on April 23, 202. A copy of the Notice of Decision and Decision are jointly attached hereto as Exhibit "G".
48. The Decision granted the requested variance stating that all conditions had been met and that the requested relief is appropriate and will have no adverse or negative effects on the neighborhood.
49. The Decision found the following conditions were met with respect to:
- a. That there are special circumstances or conditions that are such that provisions of the zoning code would deprive the appellant of the reasonable use of the land or structure;
 - b. That for reasons of practical difficulty and substantial hardship the granting of a variance is necessary for the reasonable use of the land or structure and that the variance issued is the minimum variance that will accomplish the purpose; and
 - c. That the granting of the variance will be in harmony with the general purpose and intent of the Zoning Code and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
50. The Decision cites to the standards for giving a zoning variance, but such references are merely boilerplate and in no way specifically relate to the Project.

51. The Decision filed by the ZBA failed to cite to any specific hardship that the Developer would endure without the granting of the requested variances.
52. The Decision failed to cite to any special circumstances or conditions especially affecting the Project which were unique to it and not the zoning district, which would cause the Developer to be deprived of reasonable use of the land.
53. The Board failed to issue any specific findings as to why the granted variances were the “minimum necessary” to permit the reasonable use of the Project property.
54. There is nothing unique about the Project property that warrants the granting of these variances. Inadequate size does not satisfy the statutory requirement and “shape” of the lot does not mean “size.”
55. The Developer is seeking these variances, not to make “reasonable” use of the Project property, but instead to maximize their return on investment by constructing a project that vastly exceeds what is permitted in this zoning district and what can safely and reasonably fit within the Developer’s lot.
56. The Board fails to explain how permitting a structure too large for the lot, with no parking and no loading area and constructed in violation of setback requirements—a project that requires not one, but seven variances—is somehow “in harmony” with the Zoning Code requirements and not “injurious” to the neighborhood.
57. In granting a variance to the building height limits, floor area restrictions, and rear yard requirements, the Board authorized the construction of a structure of such size and magnitude that the Project will render a portion of Plaintiff’s Property unsafe and unusable during construction.

58. In granting a variance to waive the parking and off-street loading requirements, the Board authorized a Project that will overwhelm the ability of on-street parking to serve existing businesses.
59. The granting of the variance by the Board exceeded the authority of the Board and was an abuse of discretion.
60. The Board exceeded its authority and acted arbitrary and capriciously because it approved a multitude of residential units in a zoning district, which is limited to LI , thereby making it unduly dense and in violation of the spirit and intent of the applicable section of the code, i.e. Article 55.
61. The Plaintiff is a person aggrieved, within the meaning of M.G.L. c. 40A, § 17, by the decision of the Board of Appeals to approve the application numbered
62. The Board exceeded its authority and acted arbitrary and capriciously because the approval of the variance will cause substantial harm to the Plaintiff and the surrounding neighborhood by causing congestion.
63. The Board exceeded its authority by not thoroughly vetting issues related to the impact on abutters and parking which will necessarily flow as a result of the Project.
64. The Decision of the Board to approve the Developer's Appeal exceeded the authority of the Board, as set out in Chapter 665 of the Acts of 1956, and failed to set forth the particular reasons for its Decisions, as those reasons related specifically to several zoning violations.

COUNT I – ABUSE OF DISCRETION

65. The Plaintiff hereby repeats and re-alleges paragraphs 1-64 above as if fully set forth herein.

66. The Board abused its discretion as a result of the granting of the variance to the Developer.
67. The Board acted arbitrary and capricious and exceeded its authority in its granting of the variance to the Developer without due regard or consideration for the standards to be considered and applied in the granting of a variance.
68. The Board used an incorrect interpretation of the Zoning Code.
69. The Board failed to set forth any rational view of the facts to support the Board's conclusion.
70. The Board failed to set forth the alleged hardship to the Developer.
71. The Board failed to set forth the inability to use the property for another purpose.
72. The Board failed to adequately address the building and parking concerns.
73. The Board failed to properly balance the harm to the neighborhood and community.
74. The Plaintiff is a person aggrieved as a result.

COUNT II – ARBITRARY AND CAPRICIOUS

75. The Plaintiff hereby repeats and re-alleges paragraphs 1-74 above as if fully set forth herein.
76. The Board's Decision is unreasonable, whimsical, arbitrary and capricious.
77. The Board's Decision does not rest upon legally tenable grounds and fails to designate specific findings or citations to specific provisions of the Boston Zoning Code.
78. The reasons given by the Board were not related to the purposes of the Zoning Code or were merely pretext for an arbitrary action.
79. The Board's Decision must be reserved based upon the foregoing.

COUNT III – FAILURE TO COMPLY WITH THE BOSTON ZONING CODE

80. The Plaintiff hereby repeats and re-alleges paragraphs 1-79 above as if fully set forth herein.

81. The Appeal and Decision fails to comply with the City of Boston Zoning Code because it does not refer to the specific provisions of the Code involved or set forth the interpretation that is claimed.

82. The Appeal and Decision is defective and must fail on account of the foregoing.

**COUNT IV – FAILURE TO COMPLY WITH CHAPTER 666
OF THE ACTS OF 1956**

83. The Plaintiff hereby repeats and re-alleges paragraphs 1-82 above as if fully set forth herein.

84. The Board failed to include in its Notice of Decision a detailed record of the proceedings, setting forth the reasons for its decision.

85. The Board exceeded its authority granted by Chapter 666 of the Acts of 1956, Section 8 and its Notice of Decision must be annulled.

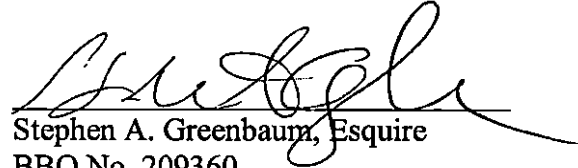
WHEREFORE, the Plaintiff respectfully requests this honorable Court:

1. Hear all pertinent evidence and determine the facts;
2. Determine and adjudge that the Board's Decision granting the variance at issue was an abuse of discretion;
3. Determine and adjudge that the Board's Decision granting the variance at issue was made in error as matter of law and fact and that the Board acted arbitrary and capriciously;
4. Determine and adjudge that the Board's Decision failed to comply with the Boston Zoning Code;

5. Determine and adjudge that the Board's Decision failed to comply with Chapter 666 of the Acts of 1956;
6. Annul the decisions of the Board of Appeals;
7. Award the Plaintiff its costs in this action, including but not limited to attorney's fees; and
8. Grant such further relief as justice and relief as this Court deems just and proper.

Date: 5/13/2021

Respectfully submitted,
3377 Washington, LLC
By its attorneys,



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