

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK. SS.

SUPERIOR COURT
C. A. NO. 23-25871

HAMILTON CLEVELAND CIRCLE, LLC,)
)
Plaintiff,)
)
v.)
)
SHERRY DONG, NORM STEMBRIDGE,)
GIOVANNY VALENCIA, HANSY BETTER)
BARRAZA, RAHEEM SHEPARD, ALAN)
LANGHAM and KATIE WHEWELL, in their)
capacities as members of the CITY OF BOSTON)
BOARD OF APPEAL,)
)
and)
)
HVV MASSACHUSETTS, INC., d/b/a)
HAPPY VALLEY,)
)
Defendants.)

2023 NOV 13 P 2:35
 JOHN E. POWERS III
 ACTING CLERK MAGISTRATE
 SUFFOLK SUPERIOR COURT
 CIVIL CLERK'S OFFICE

VERIFIED COMPLAINT

Introduction

This action is an appeal of a decision of the City of Boston Board of Appeal (the "Board") pursuant to the Boston Zoning Enabling Act, St. 1956, c. 665. § 11, as amended by St. 1994, c. 461. On October 24, 2023, the Board issued a zoning decision under application BOA #1416018 (the "Decision,") in which it granted certain zoning relief to HVV Massachusetts, Inc., d/b/a Happy Valley ("HVV") for a proposed cannabis establishment (the "Project") at 1955 Beacon Street, Boston, Massachusetts (the "HVV Property"). Hamilton Cleveland Circle, LLC ("Hamilton,") owner of the property directly abutting the HVV Property, hereby appeals the Decision of the Board on grounds that it is legally insufficient, based on legally and factually untenable grounds, lacks the required findings, exceeds the Board's authority, and must therefore be annulled.

Parties

1. Plaintiff Hamilton Cleveland Circle, LLC (“Hamilton”), is a Massachusetts limited liability company with a principal office located at 39 Brighton Avenue, Allston, MA 02134. The Hamilton Company, Inc., a domestic corporation, is the Manager of Hamilton.

2. Hamilton owns the real property and buildings thereon located at 392-398 Chestnut Hill Avenue, also known as 2001 Beacon Street, Boston, MA (the “Hamilton Property”). The Hamilton Property directly abuts the HVV Property.

3. Defendant HVV Massachusetts, Inc., d/b/a Happy Valley is a Massachusetts corporation with a principal office located at 39 Country Club Way, Ipswich, MA 01938.

4. Defendants Sherry Dong, Norm Stembridge, Giovanni Valencia, Hansy Better Barraza, Raheem Shepard, Alan Langham and Katie Whewell are individuals who are named in their capacities as members of the Board.

Factual Allegations

5. The HVV Property is located within a Neighborhood Shopping Zoning Subdistrict in the Allston Brighton Neighborhood District, and is governed by Article 51 of the Boston Zoning Code (the “Code”).

6. HVV has signed a lease to occupy and use the HVV Property.

7. The Project proposes to redevelop the HVV Property from its prior use as a Dunkin Donuts to a cannabis establishment that will operate as a medical and recreational marijuana dispensary.

8. The Hamilton Property abuts and is directly adjacent to the HVV Property and the Project.

9. The improvements on the Hamilton Property include an office building and parking garage that are available exclusively to the individuals and customers who visit and patronize the Hamilton Property. This parking garage is one of the only such parking garages in the immediate vicinity of the Project.

10. The Hamilton Property contains a number of office and medical tenants, including but not limited to (i) The Boston Evening Therapy Associates, LLC who offers, among other things, cognitive and behavioral therapy; (ii) The National Tay-Sachs & Allied Diseases Association Inc. who conducts research to find treatments and therapies for diseases; and (iii) The American Physicians Fellowship. The practices at the Hamilton Property involve delicate operations and the patients tend to be already nervous when they visit.

11. Many of the tenants, customers and patients who patronize the Hamilton Property utilize the parking garage to which Hamilton and other invitees of Hamilton have exclusive use.

12. Hamilton has previously announced its opposition to the Project at community meetings held for Project. Hamilton also submitted a letter of opposition to the Board on September 1, 2023, setting forth its objections to the Project and reasons why HVV failed to establish sufficient grounds for the zoning relief required for the Project.

**The Board's Decision grants HVV
Certain Conditional Use Permits for the Project**

13. On October 27, 2023, the Board filed the Decision granting certain zoning relief for the Project with the City of Boston Inspectional Services Department ("ISD"). The Board's Decision is attached hereto as Exhibit A.

14. The Decision grants HVV certain conditional use permits purportedly necessary for the creation and operation of a co-located medical and recreational marijuana retail establishment at the HVV Property.

15. HVV and the Board acknowledge in the Decision that the Project is not an allowed use in any area of the City of Boston or under any section of the Code.

16. HVV and the Board also acknowledge in the Decision that the proposed Project requires zoning relief from applicable zoning restrictions in the form of conditional use permits and variances in order to proceed.

17. In its Decision, the Board granted HVV multiple conditional use permits pursuant to Section 6-3 of the Code for the Project.

The Board's Decision is Legally Insufficient and Must be Annulled

18. The Board's Decision to grant conditional use permits for the Project is legally insufficient, based on legally and factually untenable grounds, lacks the required findings, exceeds the Board's authority, and must be annulled.

19. The pertinent standards for granting a conditional use permit under Section 6-3 of the Code are as follows:

The Board of Appeal shall grant any such appeal only if it finds that all of the following conditions are met:

- (a) the specific site is an appropriate location for such use or, in the case of a substitute nonconforming use under Section 9-2, such substitute nonconforming use will not be more objectionable nor more detrimental to the neighborhood than the nonconforming use for which it is being substituted;
- (b) the use will not adversely affect the neighborhood;
- (c) there will be no serious hazard to vehicles or pedestrians from the use;
- (d) no nuisance will be created by the use; [and]
- (e) adequate and appropriate facilities will be provided for the proper operation of the use[.]

20. The HVV Property is not an appropriate location for the Project.

21. The Project will adversely affect the neighborhood.
22. The Project will create and exacerbate serious hazards to vehicles and pedestrians.
23. The Project will create a nuisance.
24. Adequate and appropriate facilities will not be provided for the proper operation of the Project or its use.

25. The HVV Property is not appropriate for the Project's proposed use for a variety of reasons. The HVV Property is located directly across the street from the Cassidy Playground and Reilly Memorial Recreation Center where a number of youth sports occur, including but not limited to Allston Brighton Youth Hockey. Because the HVV Property is within such close proximity to a popular recreation center, the Project will attract youth customers and negatively impact the youth and other members of the public. Moreover, the Project will create and promote an environment within the Cleveland Circle neighborhood, a neighborhood which includes thousands of high school and college students, that encourages and makes available the sale of cannabis products.

26. The HVV Property is extremely visible to any vehicle, pedestrian and users of public transportation in the neighborhood. The visibility of the HVV Property will create substantial vehicle traffic and will attract visitors from outside the neighborhood. The Project is likely to attract thousands of customers on a daily, weekly, and monthly basis to the HVV Property, which has a very small parking lot. The Project's patrons will be required to navigate the already congested area of Cleveland Circle but will now need to do so while dealing with the significant increase in vehicle and pedestrian traffic the Project is certain to cause. It is virtually certain that traffic jams, accidents or near accidents, and unauthorized use of the Hamilton Property's private parking garage will occur as a consequence of the Project being allowed to proceed.

27. The Project will negatively impact patients visiting the Hamilton Property. The Hamilton Property includes a private parking garage that is available exclusively to the individuals and tenants who visit and patronize the Hamilton Property. This private parking garage is one of the only such private parking garages in the immediate vicinity of the HVV Property. Many of the people who patronize the Hamilton Property utilize the private parking garage attached to the Hamilton Property, a parking garage to which the Hamilton Property, its tenants and other invitees have exclusive use. Many of the people who patronize the private parking garage at the Hamilton Property unfortunately suffer from medical conditions which necessitate their visit to the Hamilton Property in the first place. Moreover, these customers may require assistance entering and exiting the Hamilton Property, whether via the private parking garage or otherwise. Any restriction or impediment those customers face to accessing and using the Hamilton Property will cause a significant nuisance and pose a serious hazard.

28. The Project will create health and safety concerns in the Allston Brighton Neighborhood for a number of reasons. The HVV Property is within close proximity to an already busy public transportation system. Approving the Project will attract more visitors from outside the neighborhood. Vehicular accidents will likely increase due to the size of the HVV Property, its location, and the increased traffic. Because the HVV Property is not large enough to properly secure and screen off customers visiting the Project, customers will be required to gather outside on the already-busy Beacon Street sidewalks and surrounding areas.

29. The proposed use of the HVV Property will create and exacerbate serious hazards to vehicles and pedestrians, and interfere with Hamilton's use of the Hamilton Property.

30. The Project will also pose a significant health and safety concern to members of the public, including but not limited to the thousands of students who live and attend high school and college in the immediate vicinity of the HVV Property.

HVV Failed to Obtain all Necessary Zoning Relief for the Project

31. HVV did not obtain all necessary zoning relief required under the Code for the Project.

32. HVV currently owns an existing cannabis establishment located at 1937 Beacon Street, Boston, MA, a short distance from the HVV Property.

33. Thus, locating an additional cannabis establishment at the HVV Property would violate the “Buffer Zone” requirements set forth in Article 8 of the Code, which provides that “any cannabis establishment shall be sited at least one-half mile or 2,640 feet from another existing cannabis establishment.” Code, Article 8, Use Item No. 39B.

34. Section 1.05 of the Boston Cannabis Board Rules and Regulations (the “BCB Rules”) provides in pertinent part:

A. Overview: The Boston Zoning Code Article 8 specifically states that “any cannabis establishment shall be sited at least one half mile or 2,640 feet from another existing cannabis establishment.” For purposes of the licensure of cannabis establishments in the City of Boston this creates a buffer zone between cannabis establishments (the “Buffer Zone”).

* * *

C. Applications within the Buffer Zone: The BCB may, in its discretion, accept and hold a hearing on a complete application in accordance with these Rules and Regulations regardless of whether a Buffer Zone conflict exists. *Should the BCB vote to grant a License to an Applicant with a Buffer Zone conflict, the grant of the License shall be conditional and shall require the Applicant obtain a variance from the Zoning Board of Appeals within one (1) year of the issuance of the BCB’s written decision.* Should the Applicant fail

to obtain a variance within one (1) year, the conditional grant of a License shall be rescinded at the BCB's discretion.

(Emphasis added).

35. The Decision recites on page 4 that HVV appeared as an Applicant before the BCB in connection with the Project on July 12, 2023:

Based on the Ordinance, applicants seeking to create a cannabis establishment need to appear before and obtain approval from the BCB prior to executing a Host Community Agreement with the City of Boston and appearing before the Zoning Board of Appeal. The BCB found that granting a license to the Applicant at the proposed premises would be appropriate in time, place and manner, and adhered to the spirit of the Ordinance. *The BCB voted to grant a license to the Applicant conditionally pending zoning relief for buffer zone variances and surrender[sic] the current HCA at 1937 Beacon Street if granted a variance by the ZBA.*

(Emphasis added).

36. As set forth in the Decision, HVV has only received a conditional license from the BCB, pending receipt of a variance from the Code in light of the Project's violation of the Buffer Zone requirements.

37. The Decision acknowledges HVV's need for a variance from the Buffer Zone requirements of the Code on Page 2, in which it references the cannabis establishment as a "forbidden use."

38. Accordingly, HVV requires a variance from the Code's Buffer Zone requirements in connection with the Project, and HVV's application to the Board should have requested relief under Article 7 of the Code.

39. The standards required for the granting of a variance under Section 7-3 of the Code are as follows:

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[.]

40. The Decision makes no mention of the standards required for a variance under the Code, and does not set forth any specific findings made by the Board that HVV has met the standards for a variance under Section 7-3.

41. The only zoning relief granted by the Board to HVV in the Decision is for conditional use permits under Article 6 of the Code.

42. Accordingly, HVV has not obtained all necessary zoning relief for the Project, and cannot be issued a permit from ISD for the Project under the Code.

Hamilton has Standing to Bring this Appeal

43. Hamilton is an abutter to the HVV Property and is a party in interest.

44. Hamilton and the Hamilton Property will be harmed by the Project and by the Decision and zoning relief that purportedly authorizes the Project.

45. Among other things, the Project and the Decision and zoning relief that purportedly authorizes the Project will have a significant adverse impact on Hamilton and the Hamilton Property by, *inter alia*:

- a. increasing traffic and congestion, and creating and exacerbating hazards to vehicles and pedestrians, and parking problems on Beacon Street, affronting and that serves the Hamilton Property;
- b. adversely affecting the neighborhood in which the Hamilton Property is located;
- c. reducing open space adjacent to the Hamilton Property;
- d. reducing privacy available to the members of the public who patronize the Hamilton Property; and
- e. harming and reducing the value of the Hamilton Property.

46. Hamilton is aggrieved by the Decision and the zoning relief that purportedly authorizes the Project, and has standing to bring and maintain this zoning appeal.

CAUSES OF ACTION

COUNT I

Appeal of the Board's Decision Pursuant to St. 1956, c. 665, § 11

47. Hamilton reasserts and incorporates the above Paragraphs as if fully set forth herein.

48. The Decision and the zoning relief it grants are legally insufficient, are based on legally and factually untenable grounds, lack the required findings, and exceed the Board's authority.

49. The Decision to grant the zoning relief exceeds the Board's authority and must be annulled.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- a. enter judgment for the Plaintiff on all counts of the Complaint;
- b. annul the Decision of the Board;
- c. award Plaintiff its costs; and
- d. order such other and further relief as the Court deems appropriate.

Respectfully submitted,

THE HAMILTON COMPANY, INC.

By its attorney,

/s/ Michael A. Burkett

Michael A. Burkett (BBO #661294)

Rubin and Rudman LLP

53 State Street

Boston, MA 02109

(617) 330-7000

Dated: November 13, 2023

VERIFICATION

I, Jameson Brown, being duly sworn, say and affirm that I am the President of The Hamilton Company, Inc., manager of Hamilton Cleveland Circle, LLC, and I have reviewed the allegations of the Verified Complaint and state, based upon personal knowledge, that the allegations are true and correct, except only to the extent that allegations are made upon information and belief, in which case I believe them to be true.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS ____ DAY OF NOVEMBER, 2023.

HAMILTON CLEVELAND CIRCLE, LLC

By: The Hamilton Company, Inc., its Manager

By: 

Name: Jameson Brown

Title: President