

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

C.A. NO. 21-1877E

CHARLES McGILVRAY,

Plaintiff,

v.

LMC CICCOLO REALTY, LLC, D & G TOWING, INC.,
and CHRISTINE ARAUJO, MARK FORTUNE, MARK
ERLICH, JOSEPH RUGGIERO, ERIC ROBINSON,
KOSTA LIGRIS, and SHERRY DONG, in their capacity
as members of the CITY OF BOSTON BOARD OF
APPEAL,

Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2021 AUG 17 12:41
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

COMPLAINT

This action is brought pursuant to Chapter 665 of the Acts of 1956 (the "Enabling Act"), Section 11, to appeal a decision of the City of Boston Board of Appeal (the "BOA") granting permission to operate a vehicle impound lot and construct ten-foot-high (10') fencing. The BOA exceeded its authority by granting permission because the site is not "an appropriate location for such use" as required by Article 6 of the Boston Zoning Code (the "Code") and would adversely affect the neighborhood. Specifically, the proposed use will result in unlawful use of Department of Conservation and Recreation roads, is not consistent with the prior permitted uses at the property, and will result in significant harm to plaintiff Charles McGilvray's legal and property rights. Additionally, the lot fails to meet the requirements under Section 9 of the Enabling Act for the BOA to grant variance. The BOA's decision is not supported by the evidence, exceeds its discretion and authority, is arbitrary or capricious, and should be annulled.

PARTIES

1. Plaintiff Charles McGilvray (the “Abutter”) is an individual who resides at 237-239 Parsons Street, Brighton, Massachusetts 02135.
2. Defendant LMC Ciccolo Realty, LLC (the “Applicant”) is a Massachusetts limited liability company with a principal place of business at 61 North Beacon Street, Boston, Massachusetts 02134.
3. Defendant D & G Towing, Inc., is a Massachusetts corporation with a principal place of business at 2 Emery Road, Allston, Massachusetts 02134.
4. Defendants Christine Araujo, Mark Fortune, Mark Erlich, Joseph Ruggiero, Eric Robinson, Kosta Ligris, and Sherry Dong comprise the City of Boston Board of Appeal (the “BOA”), a municipal body with an address of 1010 Massachusetts Avenue, Boston, Massachusetts 02118.

FACTS

5. The Abutter has a legal interest in and resides at the real property located at 237-239 Parsons Street, Brighton, Massachusetts 02135 (the “Abutter’s Property”).
6. The Applicant has a legal interest in the real property located at 372 North Beacon Street, Ward 22, Brighton, Massachusetts 02135 (the “Lot”).
7. The Abutter’s Property abuts a parcel property owned by the Commonwealth of Massachusetts, which abuts the Lot.
8. The Abutter’s Property is within three hundred (300) feet of the Lot.
9. The Lot is located within the Community Commercial 1 (“CC1”) Subdistrict of the Allston/Brighton Neighborhood District, which is governed by Article 51 of the Boston Zoning Code (the “Code”).

10. Pursuant to Article 51, Section 16 of the Code, parking lots are permitted within the CC1 Subdistrict only if a Conditional Use Permit is granted by the BOA.

11. The Lot, which is approximately 19,000 square feet, contains a small two-story commercial building, and the remaining area is a vacant lot.

12. The most recent lawful use of the Lot was for a pizzeria restaurant pursuant to a permit granted in 1974. The pizzeria subsequently burned down and the remains were demolished.

13. Since then, the Lot has been vacant except for its occasional unlawful use as a storage area for construction equipment and the sporadic and unlawful parking of vehicles.¹

14. The Lot has never been lawfully used as a parking lot.

15. On November 18, 2020, the Applicant applied to the City of Boston Inspectional Services Department (“ISD”) for a Long Form/Alteration Permit seeking to operate a vehicle impound lot on the Lot (the “Proposed Tow Lot”) and to construct ten-foot-high (10’) fencing around the Lot (the “Fencing”).

16. ISD denied the Application on the grounds that the impound lot required a Conditional Use Permit and variances for the height and located of a proposed fence.

17. The Applicant filed an appeal to the BOA seeking the relief required (Appeal No. BOA-1163050) (the “Appeal”).

18. On February 22, 2021, an Abutter’s Meeting was held, at which concerned neighbors, including the Abutter, stated their opposition to the Proposed Tow Lot.

19. At the Abutter’s Meeting, defendant D & G Towing, Inc. (“D & G”) stated numerous times that Parsons Street would not be used to access the Proposed Tow Lot.

¹ At some point, a small commercial building was constructed on an adjoining parcel which has since merged with the Lot, but the vast majority of the approximately 19,000-foot parcel consists of a long vacant lot.

20. Among the concerns raised by the Abutter and others was the use of Parsons Street, which is a residential street, as a means of access for tow trucks using the Proposed Tow Lot.

21. On May 4, 2021, the BOA held a public hearing to consider the Appeal.

22. The Applicant and D & G appeared with counsel before the BOA regarding the application to operate the Proposed Tow Lot.

23. At the BOA hearing, several people spoke in opposition to the Proposed Tow Lot including a representative of Boston City Councilor Breadon who expressed the Councilor's concerns as to the maneuverability of the Lot, the dangers presented to pedestrians and cyclists by the Proposed Tow Lot, and the difficulties of accessing the Lot without utilizing residential streets including Parsons Street. Additionally, a representative of City Councilor, At Large, Michelle Wu spoke in opposition to the Proposed Tow Lot.

24. Additionally, neighbors submitted four letters of opposition to the BOA.

25. In an effort to quell concerns regarding the use of residential streets, the Applicant made vague representations that residential streets, specifically Parsons Street, would not be utilized in the operation of the Proposed Tow Lot. The Applicant's counsel also represented that a vehicle impound lot had operated on Parsons Street in the past, but this is not true.

26. Additionally, a representative of the Office of Neighborhood Services stated that the Applicant would do its best to avoid using Parsons Street and other residential streets to access the Proposed Tow Lot.

27. The fact is, however, that there are no other streets, other than Parsons Street, which the Applicant can lawfully use to reach and access the Proposed Tow Lot.

28. The only other streets that could be used to reach and access the Proposed Tow Lot are Nonantum Road, North Beacon Street, and Soldier's Field Road, all of which are, in relevant

part, parkways (the “Parkways”) governed and regulated by the Department of Conservation and Recreation (“DCR”).

29. Pursuant to DCR regulations, certain roads within its jurisdiction, including the Parkways that the Applicant would have to use to access the Proposed Tow Lot, are designated for use by “Pleasure Traffic” only. See Appendix D: National Register Nomination and Metro-Boston Historic Parkways Matrix (the “Matrix”), attached hereto as Exhibit 1 and incorporated herein by reference, and DCR Parkway Restrictions Map (the “DCR Map”), attached hereto as Exhibit 2 and incorporated herein by reference.

30. Pursuant to the DCR Regulations:

No person shall operate a truck, bus, camper, trailer or mobile home or any vehicle with a seating capacity of more than 12 persons upon any road, driveway, parkway, boulevard or bridge under the jurisdiction of the Department of Conservation and Recreation which is restricted to pleasure vehicles only, provided, however, that "pickup trucks," so-called, having a gross vehicle weight of 5,000 pounds or less and a maximum overall height of seven feet or less are permitted. Those vehicles which are prohibited may gain access to a destination situated on, or only accessible by the use of a restricted roadway, by entering from the nearest roadway and exiting in the same manner; provided, however, that in no case shall a person operate a vehicle having a gross vehicle weight in excess of ten tons upon any roadway of the Department of Conservation and Recreation except by express written consent of said Department of Conservation and Recreation.

See 700 CMR 5.401, a copy of which is attached hereto as Exhibit 3 and incorporated herein by reference.

31. The Proposed Tow Lot does not qualify for the limited exception contained within the regulation because it not accessible only from the prohibited Parkways; it is also accessible from Parsons Street, which means that Parsons Street is the only lawful means of access.

32. The only other means by which tow trucks could physically access the proposed Tow Lot would be to unlawfully drive over the island separating Leo M. Birmingham Parkway and North Beacon Street in front of the Lot, which again means that that Parsons Street is the only lawful means of access to the Proposed Tow Lot.

33. Despite these facts, on July 21, 2021, the BOA issued a written decision approving the Applicant's request for a Conditional Use Permit to operate the Proposed Tow Lot and granting two variances to construct Fencing around the Lot (the "Decision"). The Decision was filed with the Office of the Commissioner of ISD on July 28, 2021. A true and accurate copy of the Decision, which is incorporated herein by reference, is attached hereto as Exhibit 4.

34. The Decision granted a Conditional Use Permit allowing the operation of a parking lot pursuant to Article 51, Section 16, and granted two variances varying the provisions of Article 51, Sections 53 and 57.3, and allowing the construction of the Fencing around the Lot.

The Decision Failed to Demonstrate Facts Necessary to Meet the Variance Standard

35. Pursuant to Chapter 665 of the Acts of 1956, Section 9, the Board may grant a variance only 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.

36. The Applicant does not have a legal right to a variance.

37. In Massachusetts, variances are to be granted sparingly with undue frequency or liberality; if not, then zoning regulations can become a matter of administrative whim.

38. In this matter, the Decision fails to establish the facts necessary to meet the legal standard for the variances granted.

39. Rather, the Decision merely recites the requirements of the Code and erroneously declares that the Applicant has satisfied the conditions without sufficient explanation or reasoning.

The Decision Fails to State How the Property is Unique and that these Unique Conditions Do Not Generally Affect the Neighborhood

40. The characteristics of the Lot have nothing to do with the issuance of the variances.

41. In fact, in the Decision, the BOA asserts that the “Property is unique, in that the subject commercial building and ample parking lot have been used for purposes similar to the Appellant’s Project for many years.”

42. The existence of a commercial building and ample parking do not, however, make a parcel of land “unique” for the purposes of granting variances.

43. Furthermore, there is nothing about the shape, topography, or any other characteristics of the Lot that would prevent the Applicant from its reasonable use of the land for other lawful uses.

44. Accordingly, the conditions of the Lot are common characteristics of the zoning district and are not unique such that a variance is appropriate or justified.

The Decision Fails to Cite any Specific Practical Difficulty or Demonstrable and Substantial Hardship Such that a Reasonable Use of the Property Requires a Variance

45. In the Decision, the Board baldly states “[t]hat 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.”

46. However, the Decision is conspicuously silent as to any reasoning to support the BOA’s conclusion that the Applicant would suffer substantial hardship if not for the variances.

The Decision Fails to State How the Variances are in Harmony with the Code and not Injurious to the Neighborhood.

47. Article 51, Section 1 of the Code states that the purpose for establishing the Allston/Brighton District is:

to provide adequate density controls that protect established residential areas and direct growth to areas where it can be accommodated ... to provide for the well-planned development of institutions to enhance their public service and economic development role in the neighborhood; to preserve, enhance and create open space; to protect the environment and improve the quality of life; to promote the most desirable use of land in accordance with the Allston-Brighton Neighborhood Plan; and to promote the public safety, health, and welfare of the people of Boston.

48. Once again, the Decision is conspicuously silent as to any reasoning why the Proposed Tow Lot will not be injurious to the purpose of the Allston/Brighton District.

49. The Proposed Tow Lot and Fencing directly undermine the Code's goals to "protect established residential areas ... provide for well-planned development of institutions to enhance their public service and economic development in the neighborhood ... to promote the most desirable use of land in accordance with the Allston-Brighton Neighborhood Plan; and to promote the public safety, health, and welfare of the people of Boston."

50. In fact, the Proposed Tow Lot and the Fencing create dangers for pedestrians, cyclists, and motorist by obstructing views at the busy intersection adjacent to the Lot.

51. Specifically, the BOA granted variances to install ten-foot (10') high fences directly abutting the borders of a corner lot at a very busy intersection.

52. Due to its location on the corner of Parsons and North Beacon Streets, the Fencing at the Proposed Tow Lot will exacerbate the dangers to pedestrians, cyclists, and motorists already associated with the intersection by making seriously limited visibility.

53. Moreover, as explained above, the only way to lawfully access the Proposed Town Lot is by using Parsons Street, which is a residential street. Such a use of a residential street is not in harmony with the Code and is injurious to the Abutter and the neighborhood.

The Board Exceed its Authority by Granting the Conditional Use Permit Because the Lot is not an Appropriate Location for Such Use

54. The Decision states, in relevant part: “The specific site is an appropriate location for such use,” and suggests that the Applicant’s proposed use “is consistent with the prior permitted uses at the Property itself, as the Property was previously used to park, most recently, construction equipment...”

55. The Decision relies heavily on the alleged previous use of the Lot as a parking lot in its issuance of the Conditional Use Permit.

56. In fact, the Lot has never been lawfully used as a parking lot.

57. The last lawful use of the Lot was in 1974 for the operation of a pizzeria.

58. Since then, the Lot has been vacant except for its occasional unlawful use as a storage area for construction equipment and the sporadic and unlawful parking of vehicles.

59. Such unlawful uses cannot be the basis of a Conditional Use Permit for a vehicle impound lot.

60. Moreover, there is both a qualitative and quantitative difference between a parking lot and a vehicle impound lot. A vehicle impound lot necessarily involves a large volume of tow trucks frequently moving in and out, thereby creating an amount of street traffic and activity which is substantially greater than that created by a relatively passive parking lot.

61. The traffic created by the Proposed Tow Lot will also be exacerbated because, as was noted at the BOA hearing, there is limited maneuverability in the Lot which means that tow

trucks would have to line up on Parsons Street waiting for their turn to access the Lot and unload their vehicles.

62. Accordingly, the Lot is not an appropriate location for the proposed use.

The Board Exceed its Authority by Granting the Conditional Use Permit Because the Proposed Tow Lot will Adversely Affect the Neighborhood and Will Present Serious Hazard to Vehicles or Pedestrians

63. The Decision also fails to consider the dangers to pedestrians, cyclists, and motorists that will result from ten-foot-high (10') fencing erected at the intersection of North Beacon Street and Parsons Street.

64. Moreover, given the noted lack of maneuverability, operation of the Proposed Tow Lot will result in congestion of the area by tow trucks waiting to enter and exit the Lot.

65. The Decision also fails to consider the fact that Parsons Street is the only lawful means by which tow trucks can access the Proposed Tow Lot.

66. Accordingly, the BOA did not meet its burden in proving that the Proposed Tow Lot meets the requirements of Article 6 of the Code.

The Proposed Tow Lot Will Uniquely and Significantly Harm the Abutter

67. The Abutter is aggrieved by the Decision.

68. The Abutter's Property, which is located on Parsons Street, is less than three hundred (300) feet from the Proposed Tow Lot.

69. The driveway of the Abutter's Property can only be accessed from Parsons Street.

70. At the end of Parsons Street, directly adjacent to the Proposed Tow Lot there is a traffic light that controls vehicles exiting and entering Parsons Street. The line of traffic stopped at this light often blocks access to the Abutter's driveway.

71. The use of Parsons Street by numerous tow trucks (with vehicles in tow) accessing the Proposed Tow Lot will exacerbate the traffic at this light, and on Parsons Street generally, which will directly interfere with the ability of the Abutter to access his driveway.

72. Contrary to assertions made by the Applicant and its counsel, the tow trucks cannot lawfully be diverted to other streets. Parsons Street is the only lawful way to access the Proposed Tow Lot and the use of this busy, residential street for such purposes will cause direct harm to the Abutter which is different from the concerns of the rest of the community.

73. Furthermore, the Applicant has stated that it intends to install lamp posts to light the Proposed Tow Lot at night. Such posts will directly harm the Abutter because they will shine into the second floor of his house including his kitchen, which directly faces the Proposed Tow Lot and the lights to be installed thereon.

COUNT I

(Appeal from Grant of Variances – Chapter 665 of the Acts of 1956, Section 11)

74. The Abutter repeats and incorporates herein by reference the allegations set forth in paragraphs 1 through 71 hereof.

75. The Proposed Tow Lot violates Sections 51-53 of the Code (Screening and Buffering Requirements) and Sections 51-57.3 of the Code (Traffic Visibility Across Corner).

76. The Applicant has not met any of the standards imposed by the Chapter 665 of the Acts of 1956, Section 9, for the granting of a variance.

77. The Board's stated justifications for the variances are unsupported, unreasonable, whimsical, capricious, arbitrary, and based on legally untenable grounds.

78. The Abutter is aggrieved by the Decision and will suffer significant harm if the improperly granted variances are upheld including interference with his ability to access his

driveway from Parsons Street and increased light pollution from the lamp posts to be installed by the Applicant.

COUNT II
**(Appeal from Grant of Conditional Use Permit –
Chapter 665 of the Acts of 1956, Section 11)**

79. The Abutter repeats and incorporates herein by reference the allegations set forth in paragraphs 1 through 76 hereof.

80. The Proposed Tow Lot requires a Conditional Use Permit pursuant to Section 51-16 of the Code.

81. The Applicant has not met any of the standards imposed by the Section 6-3 of the Code, for the granting of a Conditional Use Permit.

82. The Board's stated justifications for the Conditional Use Permit are unsupported, unreasonable, whimsical, capricious, arbitrary, and based on legally untenable grounds.

83. The Abutter is aggrieved by the Decision and will suffer significant harm if the improperly granted Conditional Use Permit is upheld including interference with his ability to access his driveway from Parsons Street and increased light pollution from the lamp posts to be installed by the Applicant.

JURY DEMAND

The Abutter hereby demands a trial by jury on all claims so triable.

PRAYER FOR RELIEF

WHEREFORE, the Abutter requests that this Court enter judgment:

- A. annulling the Decision of the Board of Appeal;
- B. awarding attorneys' fees and costs to the Abutter; and
- C. awarding such other relief as the Court deems just and proper.

Respectfully submitted,

CHARLES MCGILVRAY,

By his attorneys,

A handwritten signature in black ink, appearing to read "Timothy N. Schofield", written over a horizontal line.

Timothy N. Schofield (BBO No. 645179)

Shain P. Roche (BBO No. 707662)

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