



Department of Municipal Licenses and Inspections

Zoning Board of Appeals

90 Pond Street – Braintree, Massachusetts 02184

Joseph C. Sullivan
Mayor

Meeting Minutes

January 8, 2014

IN ATTENDANCE: Stephen Karll, Chairman
Michael Calder, Member
Michael Ford, Member
Richard McDonough

ALSO PRESENT: Russell Forsberg, Inspector of Buildings
Carolyn Murray, Town Solicitor

Mr. Karll called the meeting to order at 7:00pm.

OLD BUSINESS:

1) Petition Number 13-44

Matthew McIntyre, Christine McIntyre, Joseph Murphy, Jane Murphy, Tony Monaco, Melissa Monoco, Cynthia Manganello

RE: 38 Myrtle Street

Present: Matthew McIntyre, Christine McIntyre, Joseph Murphy, Jane Murphy, Tony Monaco, Melissa Monoco, Cynthia Manganello-petitioners

This is a petition filed by Matthew and Christine McIntyre of 2 Spruce Street in Braintree, Joseph and Jane Murphy of 37 Myrtle Street in Braintree, Tony and Melissa Monaco of 86 Middle Street in Braintree, and Cynthia Manganello of 23 Vine Street in Braintree regarding the property located at 0 Myrtle Street, Braintree, MA, which is also referred to as 38 Myrtle Street. The petitioners filed this appeal pursuant to Zoning By-law requirements under Chapter 135-202 and M.G.L. c. 40A, §8, requesting that the Board revoke a building permit issued by the Building Inspector to construct a single family home at the subject property. The property is located in a Residence B Zoning District and contains +/- 6,608 SF of land, as shown on Assessors' Map No. 2001, Plot 9A.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was held on November 26, 2013 and was continued to January 8, 2014 before the Zoning Board of Appeals at 7 p.m. at

Braintree Town Hall, One J.F.K. Memorial Drive, Braintree, MA. Sitting on this petition was Chairman, Steve Karll, and members Michael Calder and Michael Ford, with alternate, Richard McDonough.

Evidence

Mr. McIntyre, one of the appellants and an attorney, served as one of the spokespersons for this appeal. Mr. McIntyre explained to the Board that the basis for seeking the revocation of the building permit was due to the alleged lapse of a variance creating the subject property. By way of background, in 1986, Henry and Ellen Anderson, owners of 30 Myrtle Street, which contained 18,308 SF of area, applied to the Zoning Board of Appeals for a variance to subdivide their lot, which contained an existing single family home into two lots: one lot on which the single family home is located and containing approximately 11,558 SF of area and 92 feet of lot width and a second, vacant lot containing approximately 6,750 SF and 50 feet of lot width. According to the Zoning Board's 1986 decision, the Andersons' intention for subdividing the lot into two lots was to sell the larger lot with the existing dwelling and to build a smaller home for them on the smaller lot. The Anderson property was and continues to be located in a Residence B Zoning District. In 1986, the Town's Zoning By-law required a minimum lot size of 15,000 SF and minimum lot width of 100 feet in a Residence B Zoning District. According to the application submitted by the Andersons, a variance was needed for relief from the minimum lot size and lot width for both lots. At a meeting held on April 23, 1986, the Zoning Board of Appeals granted the request to subdivide the lot into two lots as shown on the plan presented. Subsequently, on September 23, 1986, the Andersons obtained the endorsement of the Braintree Planning Board to their "Approval Under the Subdivision Control Law Not Required" plan ("ANR Plan"). The variance decision was filed with the Norfolk County Registry of Deeds on February 4, 1987 at Book 7435, Page 275, and the plan was recorded as Plan No. 115 of 1987.

On September 29, 1994, the vacant lot (referred to in the deed as Lot 2) was conveyed by Ellen Anderson to Joyce Anderson and Ellen Covell by a deed recorded with the Norfolk County Registry of Deeds Book 10679, Page 218. A confirmatory deed correcting the reference to the lot conveyed to Joyce Anderson and Ellen Covell to reflect Lot B (as opposed to Lot 2) to be consistent with the plan filed with the ZBA decision was filed on August 3, 2009 at Book 26951, Page 376. On the same date that the confirmatory deed was filed with respect to Lot B, the lot containing the house, referred to as Lot A, was conveyed by Ellen Anderson to Christopher and Jane Barney and recorded at Book 26951, Page 377. Both the deed to Joyce Anderson and Ellen Covell and the deed to Christopher and Jane Barney clearly describe the land being conveyed as one of the two lots shown on Plan No. 115 of 1987 filed with the Braintree Board of Appeals decision allowing a subdivision.

In 2013, the smaller, vacant lot, now referred to as 38 Myrtle Street, was sold to Mento Enterprises, Inc. and then transferred to JJM Myrtle St Corporation. John Mento is an officer in both corporations. Mr. Mento was granted a building permit to construct a single family house on the vacant lot on August 13, 2013. The appellant filed their appeal seeking revocation of the building permit on September 27, 2013.

The appellants rely upon Cornell v. Board of Appeals of Dracut, 453 Mass. 888 (2009) as the basis for concluding that the variance granted to the Andersons in 1986 lapsed by their failure to either obtain a building permit or to convey one of the lots within one year of the grant of the variance. The appellants also rely upon DelPrete v. Building Inspector of Rockland, 21 LCR 320 (2013) and request that the Town, acting by and through the Zoning Board of Appeals, enforce the Zoning By-laws, notwithstanding that the Building Inspector issued a building permit. The appellants assert that the vacant lot lacks the requisite area and lot width, and therefore does not comply with the Zoning By-law.

The property owner, represented by Attorneys T.J Recupero and Lisa Berch, insist that the appeal was not timely filed, and therefore, the Zoning Board of Appeals lacks jurisdiction to even hear the appeal. See, e.g., Connors v. Annino, 460 Mass. 790 (2011). The building permit was issued on August 13, 2013, so the 30 day appeal period under G.L. c. 40A, §15 required the appeal to have been filed by September 12, 2013. The appellants filed their appeal within 45 days of the issuance of the building permit in reliance upon information provided by the Building Inspector, who in turn relied upon G.L. c. 143, §100 and 780 CMR 122.1. However, the 45-day appeal period pertains to appeals arising under the State Building Code, rather than appeals arising under the Zoning Act, Chapter 40A. While the Building Inspector may have provided an incorrect deadline to the appellants, the attorneys for the property owner cite case law where courts have held that counsel has an obligation to determine the date on which an appeal is due, as it is not reasonable to rely upon a statement made by a local official. See, e.g., O’Blenes v. Zoning Board of Appeals of Lynn, 397 Mass. 555 (1986) and Burke v. Planning Board of Leicester, 74 Mass. App, Ct. 1110 (2009).

Joseph Murphy, another appellant, reiterated that the Town has an obligation to enforce the Zoning By-laws. Mr. Murphy also insisted the lot was not buildable, and the owner should have done his due diligence to determine this prior to purchasing the property. Martine and Rick Murphy, abutters, and District Councilor John Mullaney also spoke in support of revocation of the building permit.

The Chair questioned if the variance lapsed with respect to the subject lot, had the variance also lapsed with respect to the other lot containing the fully-finished house? In response to this question, Attorney McIntyre asserted that the statute of limitations for enforcing a zoning violation against the lot containing the finished house expired 10 years after the variance was granted, pursuant to G.L. c. 40A, §10. The Chair noted that if the statute of limitations had expired for the fully-finished house lot, then the statute of limitations had in all likelihood run on the subject lot.

No one else spoke in favor of or opposition to the petition. The Planning Board offered no recommendation on the petition.

The petitioners submitted a packet of materials entitled “38 Myrtle Street Timeline of Events” with cases cited, and the property owner submitted a document entitled “Brief of Mento Enterprises, Inc. in Opposition to Appellants’ Request for Revocation of Building Permit No. B 13-735”.

Findings

The Board found that the appellants failed to file an appeal of the issuance of the building permit within 30 days as required by G.L. c. 40A, §15. The Board also found that the appellants’ failure to timely file the appeal was not excused by reliance upon misinformation provided by a town official, as case law clearly places the burden of ascertaining the correct deadline on the appellants. Finding that the appellants failed to file this appeal within the time established by statute, the Board found that they lacked jurisdiction to hear this appeal, and therefore, the Board did not consider the substance of the appeal with respect to the lapse of the variance.

Decision

On motion made by Mr. Karll and seconded by Mr. Calder, it was unanimously voted 3-0 to deny the requested relief for failure to timely file the appeal.

2) Petition Number 13-48

Sean Martin

RE: 71 Arborway Drive

Present: Sean Martin, petitioner; Attorney Tom Cavanaugh representing the petitioner and Steve DeRoche, Surveyor.

After a presentation was provided to the Board by Attorney Cavanaugh, and after individuals spoke both in favor and in opposition to the petition, Chairman Karll recommended to the petitioner, Sean Martin, that he consider withdrawing his petition without prejudice.

After reconsideration of his petition, Mr. Martin requested to withdraw the petition without prejudice.

On a motion made by Mr. Ford and seconded by Mr. Calder the Board voted unanimously to grant the requested to withdraw the petition without prejudice.

3) Petition Number 13-49
Brian Kablik, Planet Fitness/Core Fitness of Braintree, LLC
RE: 747 Granite Street

Present: Brian Kablik, Planet Fitness

This is a petition filed by Core Fitness of Braintree, LLC d/b/a Planet Fitness regarding the property located at 747 Granite Street, Braintree, MA. The petitioner seeks relief from the Zoning By-law requirements under Chapter 135, Sections 403, 407, and 904.2 to install a wall sign over the main entrance, all in accordance with the plans submitted. The property is located in a Highway Business Watershed Protection Zoning District and contains +/- 13.13 acres of land, as shown on Assessors' Map No. 2048, Plot 32 and Map np. 1032, Plots 2M, 2H, 1, 1G, 1M, 1L and 1H.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was scheduled for November 26, 2013 and continued to January 8, 2014 before the Zoning Board of Appeals at 7 p.m. at Braintree Town Hall, One J.F.K. Memorial Drive, Braintree, MA. Sitting on this petition was Chairman, Steve Karll, and members Michael Calder and Richard McDonough, with alternate, Michael Ford.

Evidence

The petition was presented by Brian Kablik for Planet Fitness, who explained to the Board that the new gym is locating in the plaza on Granite Street and will be occupying a unit located within the "elbow" of the plaza. The stores are setback a significant distance, more than 500 feet, from Granite Street, and with the gym tucked into the building's elbow, signage that exceeds the dimensions allowed under the Zoning By-law are necessary to identify the business and to safely direct the travelling public to the site.

The petitioner requests a wall sign to be located over the main entrance to the gym, stating "Planet Fitness" on two lines of text with a "thumbs up" company logo. Mr. Kablik explained that the signage is consistent with the corporate brand. The proposed sign measures 63 ½ inches in height and 17 feet 4 13/16 inches in length, for a total area of 92.08 SF. The sign will be internally lit with white LED lights.

Section 135-904.2(A)(5)(b) of the Zoning By-law limits the height of a wall sign to four feet; therefore a variance is required. As grounds for the variances, the petitioner noted the setback of the retail store within this shopping center in relation to the main access road, Granite Street. The petitioner also noted that Planet Fitness will be tucked in the corner of the plaza with limited visibility. Allowing a modest increase to the height of the

sign will increase visibility of the gym, alert the public to the presence of Planet Fitness within this plaza and safely direct the public to this location.

No one else spoke in favor of or opposition to the petition. By a vote of 5-0-0, the Planning Board recommended favorable action on the petition.

The petitioner submitted a color photograph depicting the proposed wall with a narrative entitled "Amendment to Petition for Appeal Case #13-49" prepared by Core development and management, an independent franchisee of Planet Fitness.

Findings

The Board found that the petitioner had demonstrated the need for relief from the Zoning By-law. Specifically, the Board found that the proposed signage was warranted based on the location of the business within the retail plaza, the setback of the plaza from the main access road, and the fact that Planet Fitness will have limited visibility from the main access road. The Board further found that the proposed signage was necessary to identify the business and to safely direct the public traveling to the site, which, in turn would lead to safer traffic conditions and greater public convenience. The Board also concluded that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On motion made by Mr. Calder and seconded by Mr. McDonough, it was unanimously voted 3-0 to grant the requested relief, subject to the plans presented, with the condition that the lights for the sign be shut off one hour after closing, provided the business is not permitted to be open 24 hours per day.

NEW BUSINESS:

- 4) Petition Number 13-52**
Robert Gibson
RE: 691 Washington Street

Present: Robert Gibson, petitioner

This is a petition filed by Robert D. Gibson, owner of the property located at 691 Washington Street, Braintree, MA regarding the same property, in which the applicant is seeking relief from the Town of Braintree Zoning By-laws under Chapter 135, Sections 135-403, 407, and 701. The applicant seeks a permit, variance and/or finding to install a deck to the rear of two existing residential units, all in accordance with the plans of record. The property is located within a Residence C Zoning District as shown on Assessors' Map 1015, Plot 53, which contains a land area of +/- 18,493 Sq. Ft.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was held on January 8, 2014 before the Zoning Board of Appeals at 7 p.m. at Braintree Town Hall, One J.F.K. Memorial Drive, Braintree, MA. Sitting on this petition was Chairman, Steve Karll, and members Michael Calder and Michael Ford, with alternate, Richard McDonough.

Evidence

The property owner, representing himself, explained that the property is currently improved with a two-family dwelling, in a townhouse-style, with respective rear stoops, which are deteriorating. The petitioner wishes to replace these stoops with a single deck measuring 10 feet deep by 22 feet wide. The deck will serve as a second means of egress from the dwellings and will be located 21.8 feet from the side lot line, while the Zoning By-law requires a side yard setback of 30 feet; therefore, a variance is required.

The petitioner's lot is nonconforming. The lot contains only 18,493 SF of area, while the Zoning By-law requires a minimum lot size of one acre. The lot also lacks the required lot width, as the lot is only 85 feet wide, while the Zoning By-law requires a minimum lot width of 100 feet. The lot contains two residential units, attached in a townhouse-style; the orientation of the units are sideways on the lot, such that the rear of the dwellings face the side yard lot line.

As grounds for the variance, the petitioner noted the insufficient width of the lot and the location of the existing dwelling units placed sideways on the lot. The petitioner also noted that the existing units are located 31.8 feet from the side lot line, making it impossible to construct a second, rear egress from the units without violating the side yard setback. The petitioner also noted that a commercial garage abutting his property is located one foot from this lot line, and a building on Academy Road, which abuts his property to the rear, is located 2 feet from the lot line.

The Planning Board voted 4-0-0 to recommend favorable action on the relief as requested.

The petitioner submitted a plan entitled "Plan of Land in Braintree, Massachusetts, 691 Washington Street," dated October 23, 2013, prepared by C.S. Kelley, Land Surveyors of Pembroke, MA.

No one else spoke in favor of or opposition to the petition.

Findings

The Board found that the petitioner had substantiated a hardship owing to the shape, soil and topography of the lot. Specifically, the Board found that the lot was undersized in total area, as well as lot width. The Board also found that the sideways placement of the existing dwellings on the lot and the natural interior configuration of the units flow in such a way that the logical location for a secondary egress is the rear of the units, which encroaches into the side yard setback. Finally, the Board found that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On a motion made by Mr. Ford and seconded by Mr. Calder, it was unanimously voted to grant the requested relief, subject to the plan presented.

5) Petition Number 13-53

Thomas Fitzgerald representing property owner Scott Palmer
RE: 7-11 Independence Avenue

Present: Thomas Fitzgerald, petitioner; Attorney John Garland representing the petitioner; Arthur Choo, Architect and Steve DeRoche, Surveyor

A presentation was provided to the Board by Attorney Garland, Mr. Choo and Mr. DeRoche regarding the petition.

Chairman Karll inquired as to the status of the appeal for relief granted by the Quincy Zoning Board of Appeals. Attorney Garland advised that he felt that matter would be resolved within the next 30 days.

Given the uncertainty of the resolution of the appeal in Quincy, Chairman Karll expressed reservations about going forward with the balance of this petition hearing, and recommended that this matter be deferred until the February Zoning Board of Appeals meeting.

Mr. Bob Graham and Mr. Patrick Barry, abutters expressed their concerns about the relative size of the proposed project.

After reconsideration of the matter, the petitioner requested a 30 day deferral of the petition.

On a motion made by Mr. Ford and seconded by Mr. Calder, the Board voted unanimously to grant a 30 day deferral of the petition to be heard at the Zoning Board of Appeal meeting on February 25, 2014.

**6) Petition Number 13-54
Gary Gabriel
RE: 100 River Street**

Mr. Karll advised the Board that the petitioner has submitted a request for a 90 day deferral of the petition.

On a motion made by Mr. Calder and seconded by Mr. McDonough, the Board voted unanimously to grant the request for a 90 day deferral of the petition to be heard at the Zoning Board of Appeal meeting on April 22, 2014.

APPROVAL OF MINUTES:

On a motion made by Mr. Calder and seconded by Mr. Ford, the Board voted unanimously to accept the meeting minutes of November 26, 2013.

The Board adjourned the meeting at 9:10 pm.