

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
DOCKET NO. 21-118 14

TURTLE SWAMP BREWING LLC,
Plaintiff,

v.

CITY OF BOSTON ZONING BOARD OF
APPEALS, 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 2:09
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

COMPLAINT

In accordance with Section 11 of Chapter 665 of the Acts of 1956, as amended, Plaintiff Turtle Swamp Brewing LLC (“Plaintiff” or “Turtle Swamp Brewing”) hereby appeals a decision by the City of Boston Zoning Board of Appeals (“Board of Appeals”) (the “Decision”) which granted multiple variances from requirements of the Boston Zoning Code for a project located at 3371-3375 Washington Street in Boston (the “Project”). The developer Defendants have proposed a five story mixed-used development, including senior rental units and a restaurant, that cannot comply with City requirements on use, parking, floor area, building height, rear yard setbacks, and loading zones, under Sections 19, 20 and 40 of Article 55 of the City’s code (the “Code”). In short, this development is too big, too close to its neighbors, and does not provide parking or loading areas sufficient to serve the Project. These Code provisions are intended to protect neighboring land uses and the sheer number of variances needed, and granted, amounts to a complete re-zoning of the Project parcel in violation of Massachusetts law.

As set forth below, Plaintiff contends that the Board of Appeals exceeded its authority in granting these variances and that its decision was arbitrary and capricious and did not meet the applicable legal standards.

PARTIES

1. Plaintiff Turtle Swamp Brewing LLC is a Massachusetts LLC with a place of business at 19 Kenton Road, Jamaica Plain, MA.

2. Defendant Board of Appeals 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.

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.

5. Defendant 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. Defendants New Atlantic, JPNDC, and 3371 Washington shall be referred to as the “Developers.”

JURISDICTION

6. This Court has jurisdiction pursuant to Section 11 of Chapter 665 of Acts of 1956, as amended, and/or M.G.L. c. 185, § 3A.

7. Turtle Swamp Brewing operates a commercial brewery and tasting room on property located at 3377 Washington Street, which directly abuts the Project site (“Plaintiff’s”

Property”), and which is leased from 337 Washington, LLC.

8. 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 Plaintiff’s business. The development will adversely impact Plaintiff’s utility service and post-construction traffic and parking impacts will interfere with Plaintiff’s customers, the use of Plaintiff’s Property, and will harm Plaintiff’s commercial operations causing it to suffer harm and damages due to the construction and operation of the project.

9. These injuries are specific and particular to the Plaintiff, and will not be suffered by the community generally. These injuries also represent the type of harm the City of Boston Code was enacted to prevent.

10. 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.

FACTS

The Plaintiff’s Property and the Developers’ Proposal

11. Turtle Swamp Brewing operates a brewery, taproom and patio area with more than 20 employees and has operated at its present location since May of 2017.

12. Brewing operations take place in a structure immediately adjacent to the rear portion of the Project property with regular truck traffic delivering materials and loading and transporting final product.

13. Turtle Swamp Brewing also operates inside and outside service to customers on-site in its taproom and on its patio. The outdoor service is located immediately adjacent to the

front portion of the Project property.

14. 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.

15. There is parking on-site for Plaintiff's employees and vehicles but most customers utilize on-street parking.

16. Both Turtle Swamp Brewing and the Project are located in the Local Industrial Sub district ("LI District").

17. As set forth in Section 55-18 of the Code, the purpose of the LI District,

...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.

18. The purpose of the LI District does not include development of housing, senior housing, or low income housing. Indeed, all residential uses are "forbidden" in the LI District, as are hotels, bed and breakfasts, and other habitation uses. Such residential use is prohibited because it is incompatible with the permitted uses in an industrial zoning district.

19. Development in the LI District is subject to limits on building height, floor area, and lot coverage. The purpose of these performance standards is to ensure that new development does not unreasonably and adversely impact abutting and existing land uses.

20. Development in the LI District is also subject to parking and loading area requirements. These standards require new development 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.

21. The Developers have proposed to construct a new five story structure with 39 residential units for senior citizens and a 770 square foot restaurant. No parking or loading areas

are provided as part of the design of the Project, and the Project will require three existing on-street parking spaces to be converted for use as the Project's "loading zone."

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. Specifically, the Code caps the height of the Project at 35 feet, but the Project is proposed at more than 56 feet, or a 54% increase in the permitted height. At this height the Project will more than triple the permitted maximum floor area. The Code required 8 new on-site parking spaces and the Developers are not proposing a single new space; and are actually removing 3 existing parking spaces for use as a loading zone.

25. Even though the Project violated numerous requirements of the Code designed to protect existing and abutting uses, Developers filed an application for Small Project Review for the Project pursuant to Article 80, Section 80E, of the Code on September 18, 2020. The Developers also filed an application for a building permit to construct the Project. A copy of Developers application for Small Project Review is attached hereto at Exhibit "A."

26. The City Building Inspector issued a Zoning Code Refusal letter dated November 23, 2020, denying a permit for the Project on the grounds that it violated numerous Code provisions including, as noted above, elderly housing as a forbidden use; floor area ratio excessive; building height excessive; rear yard setback insufficient, and insufficient off-street parking and loading. A copy of the Zoning Code Refusal letter is attached at Exhibit "B."

The Developers' Appeal

27. The Developers then appealed the denial to the Board of Appeals seeking a variance from all seven (7) Code violations.

28. In its submittal, the Developers merely repeated the details of the project and offered conclusory statements regarding compliance with the standards for the granting of the requested variances. A copy of the Developers summary appeal is attached at Exhibit "C."

29. The Developers appeal was heard by the Board of Appeal on February 23, 2021.

30. Plaintiff participated in the Board of Appeals hearing and raised numerous objections to the granting of the sought variances.

31. Plaintiff noted that the size, height, and proximity of the proposed Project would prevent operation of Plaintiff's business. Plaintiff 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 Plaintiff's business.

32. Plaintiff 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 Plaintiff's business, would obstruct access to Plaintiff's operations.

33. In sum, Plaintiff argued 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.

34. Section 9 of Chapter 665 of the Acts of 1956, as amended, provides that the Board of Appeals 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 the 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 [Developers], 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.

35. Article 7, Section 7-3 of the Code required the Board of Appeals, in granting each of the Developers variances, to find that there are “special conditions” unique to the Project property, such as “exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof.”

36. The Code also required the Board of Appeals to find that each variance was necessary to permit “reasonable use” of the Project property and that the variance as granted is the minimum necessary to permit such reasonable use.

37. The Board was also required to determine that the granting of the variances ensured that the Project would still be “in harmony with the general purpose and intent” of the Code and would not “be injurious to the neighborhood or otherwise detrimental to the public welfare.”

38. At the close of the February 23rd hearing the Board of Appeals voted to grant all requested variances.

39. The Board of Appeals decision was then issued on April 20, 2021, and entered in the Inspectional Services Department on April 23, 2021. A copy of the Notice of Decision and Decision are attached hereto at Exhibit “D.”

40. As with the Developers’ submittal, the Decision did not identify what specific factors associated with the Project property were “special,” or any factual findings to support its

apparent conclusion that the Developers would suffer “practical difficulty” or “demonstrable and substantial hardship” if the variances were not granted.

41. Nor did the Board of Appeals issue any specific findings as to why the granted variances were the “minimum necessary” to permit the reasonable use of the Project property.

42. Indeed, 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.”

43. The Developers are 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 Developers’ lot.

44. Nor does the Board of Appeals explain how permitting a structure too large for its 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 Code requirements and not “injurious” to the neighborhood.

45. In granting a variance to the building height limits, floor area restrictions, and rear yard requirements, the Board of Appeals 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.

46. In granting a variance to waive the parking and off-street loading requirements, the Board of Appeals authorized a Project that will overwhelm the ability of on-street parking to serve existing businesses.

COUNT I/Violation of Section 8 of Chapter 665 of the Acts of 1956

47. The Plaintiff hereby repeats and realleges paragraphs 1-46 above as if fully set forth herein.

48. Section 8 of Chapter 665 of the Acts of 1956, as amended, requires the Board of Appeals, in granting any requested variance, to issue a detailed record of its decision including the reasons for the decision.

49. The Board of Appeals' Decision includes only conclusory statements regarding Developers alleged compliance with the Code's variance standards and fails to provide adequate factual findings to support its determination that the Developers met their burden of showing compliance with the applicable standards.

50. Plaintiff is aggrieved by the Board of Appeals failure to comply with Section 8.

COUNT II/Abuse of Discretion, Arbitrary and Capricious, and Errors of Law

51. The Plaintiff hereby repeats and realleges paragraphs 1-50 above as if fully set forth herein.

52. No person has a right to a variance and they are to be granted sparingly, so as not to become a matter of administrative whim.

53. The granting of seven variances for the Project constitutes an abuse of the Board of Appeals' discretion in interpreting and applying the standards for variances set forth in the Code and Chapter 665 of the Acts of 1956, as amended.

54. The Board of Appeals' interpretations of the variance standards constitutes multiple errors of law.

55. The Board of Appeals failed to provide any sufficient basis for finding that the requested variances complied with the applicable standards and, as such, its Decision was arbitrary and capricious.

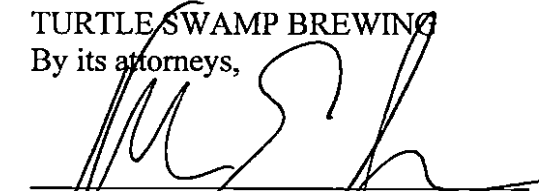
56. Plaintiff is aggrieved by the Board of Appeals Decision issued in violation of legal requirements.

WHEREFORE, the Plaintiff respectfully requests that the Court:

- A. Review all relevant evidence in evaluating the issues raised herein;
- B. Find that the Board of Appeals failed to issue sufficient findings in support of its Decision;
- C. Find that the Board of Appeals abused its discretion, made errors of law, and acted in an arbitrary and capricious manner when it approved the variances requested by the Developers;
- D. Vacate the Decision by the Board of Appeals granting the requested variances;
- E. Award the Plaintiff costs and attorneys fees incurred in this action; and
- F. Grant any additional relief the Court deems just.

Date: May 13, 2021

TURTLE SWAMP BREWING
By its attorneys,



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