



Town of West Boylston
140 Worcester Street, West Boylston, Massachusetts 01583

[Zoning Board of Appeals] Meeting Minutes

Date / Time / Location of Meeting

Thursday, August 17, 2023/7:00 p.m./THIS MEETING WAS HYBRID, HELD IN PERSON AND HELD REMOTELY VIA ZOOM.

Members Present

Christopher Olson (Chair), John Benson (Vice-Chair)(Chair for Gabriel Continued Public Hearing, as Mr. Olson recused himself), David Femia (Clerk) (PARTICIPATED REMOTELY), Nathaniel Orciani (PARTICIPATED REMOTELY), Barur Rajeshkumar, Christopher Mitchell (Associate Member) and Secretary Toby Goldstein

Members NOT Present

Andrew Feland and Mark Wyatt (Associate Members)

Invited Guests

Jennifer Kurzon (Attorney for Petitioner, PARTICIPATED REMOTELY) and George Tignor (Building Inspector)

Welcome – Call to Order

Time: 7:03 p.m.

Approval of Previous Minutes July 20, 2023

Motion Originator: David Femia

Motion Seconded: John Benson

Treasurer – Financial Report Not discussed at this meeting.

Motion to Accept N/A

Seconded N/A

Mr. Olson called the meeting to order at 7:03 p.m. He announced the names of the five board members that were present, in-person and on Zoom.

Minutes of July 20, 2023 Meeting: After review of the draft minutes prior to the meeting, Mr. Femia made a motion to accept the minutes as written. Mr. Benson seconded. Mr. Olson took a voice vote:

Mr. Orciani – “yes”

Mr. Femia – “yes”
Mr. Rajeshkumar – “yes”
Mr. Benson – “yes”
Mr. Olson – “abstain” (not present at that meeting)

The vote was 4 “yes”, 0 “no”, 1 “abstain”, therefore the minutes were accepted as written.

Continued Public Hearing, to act on the petition of Carol McAdam, General Manager, CAM Hospitality, LLC, for Special Permit, 181 West Boylston Street:

(Attorney Jennifer Kurzon represented, via Zoom). Mr. Olson explained that at the last continuation of the public hearing, the public hearing was continued to this evening to allow time for the petitioner to apply with Planning Board for Site Plan Review, which was previously discussed as being required under the Zoning Bylaws. He asked Ms. Kurzon to update the board on the current status of the petition. Ms. Kurzon stated that she represented the applicant and they submitted to Planning Board for Site Plan Review. She explained that they had an informal hearing last night with Planning Board, and Planning Board resubmitted the information to the Building Inspector, George Tignor, for an interpretation on zoning. Ms. Kurzon said, since the applicant met last with ZBA in February, the client decided to change their plan to single use instead of dual use; they would only submit for Site Plan Review plans for a drive-through instead of a restaurant and drive-through, and revised the site plan and traffic plan. She said that they are set for final review by Planning Board at their next meeting on September 13, depending on the results of Mr. Tignor’s review. She added that they have nothing new before ZBA now, and are waiting for final approval by Planning board, and will submit what is approved by Planning Board. Ms. Kurzon asked the board for any questions that they might have. Mr. Olson verified that the original request for Special Permit dealt with the drive-through and restaurant, but is amended for only use as a drive-through, and asked if the petitioner will still need ZBA relief? Ms. Kurzon replied that this was a correct statement and requested that the petitioner be allowed to continue the continued public hearing with ZBA to September 21, as they will meet with Planning Board on the 13th and will hopefully have a decision from them which they can submit to ZBA at least a week before the ZBA meeting on September 21.

Mr. Olson asked the board if they had any questions? Mr. Femia asked if that would give the board enough time to review the materials from Planning Board since there is a change taking place? Ms. Kurzon replied that the petitioner will submit site, building and traffic plans that are hopefully approved by Planning Board on September 13, the week before the ZBA meeting. Mr. Femia asked if the petitioner is sure that they will be approved? Mr. Olson responded that it sounded as if the Building Inspector and Planning Board will look at it between now and the time the ZBA meets, and he assumed at that point they will at least have more information. Mr. Tignor added that they are waiting for information from the applicant. Mr. Olson continued that the original uses given for the proposed work were for both restaurant and drive-through, and calculations for parking triggered the need for Site Plan Review. He asked Ms. Kurzon if she believed that the requirement for Site Plan Review will still be needed because of the change to one use? Ms. Kurzon replied that this might be the case but that it is up to Planning Board. She explained that the traffic plan was changed to just reflect the drive-through, and they will wait to see if they need informal or formal Site Plan Review; she said that this was not really stated at yesterday’s Planning Board meeting, but she asserted that everything needed to be submitted has been submitted.

Mr. Rajeshkumar responded that Planning Board did meet and had an informal discussion about this, and after hearing the plan they decided to send it back to Mr. Tignor for interpretation as to whether they needed Site Plan Review. He noted that, if they need Site Plan Review, they will need a Public Hearing and that takes time, but they do not know yet what will happen. Mr. Olson responded that it seemed as though a couple of developments will take place between now and the September meeting; the Building Inspector will look over the information and Planning Board will meet in early September and discuss the issue, but the ZBA might not be able to make a final decision at the September 21 meeting. Mr. Rajeshkumar and Mr. Olson agreed that, if Site Plan Review is required, the process may take more time. Mr. Femia asked Mr. Olson if it might be advantageous to continue the continued public hearing to the October 19, 2023 meeting, as Planning Board will meet the week before the ZBA in September and in October? Mr. Olson responded, suggesting to Ms. Kurzon that, realistically, it would probably be better to continue to October in case there are outstanding matters after meeting with Planning Board in September. He said to Ms. Kurzon that if she was comfortable with October 19 at 7:05 p.m., he would be open to a motion from the board. Ms. Kurzon responded that the applicant would be agreeable to that. In response to

Mr. Rajeshkumar, Mr. Olson replied that the board needs a request in writing for the extension and will email Ms. Kurzon to ask her for that. With no further comments by the board, Mr. Rajeshkumar made a motion to continue the continued public hearing to October 19, 2023, at 7:05 p.m., for the petition of CAM Hospitality, LLC, for Special Permit, 181 West Boylston Street. Mr. Femia seconded the motion. With no other comments, Mr. Olson took a voice vote:

Mr. Orciani – “yes”
Mr. Femia – “yes”
Mr. Rajeshkumar – “yes”
Mr. Benson – “yes”
Mr. Olson – “yes”

The vote was 5 “yes”, 0 “no”, therefore the continued public hearing was continued to October 19, 2023, at 7:05 p.m.

Continued Public Hearing, to act upon the petition of Justin Gabriel for Administrative Appeal of an Enforcement Order issued by the Building Inspector, George Tignor, ordering the petitioner to fully demolish and remove the garage structure on his property at 57 Goodale Street, West Boylston, MA:

(Thomas Orr represented for the petitioner). (Mr. Rajeshkumar had called a recess following the end of the previous discussion until 7:30, the advertised time for this continued public hearing). As an abutter, Mr. Olson recused himself from this discussion and Mr. Benson took his place as Chair, and Mr. Mitchell sat on the board. Mr. Benson called the meeting to order at 7:30 and read the subject of the continued public hearing. He also stated the names of the members that would be voting, and that Mr. Orr was present to represent the petitioner. Mr. Benson explained that the public hearing was continued from the July 20 meeting for the petitioner to submit some additional information. He explained that, as the board already heard from the public at the previous meeting, he wanted to start off with Mr. Orr’s summary on the applicant’s position.

Mr. Orr thanked the board, and wanted to discuss information that was sent by email to the board this afternoon, which he asserted was clarification of what was discussed before. He explained that the attachments included the trial court decision from Judge Piper, the letter from the Building Inspector to Mr. Gabriel, dated 4/27/2023, and excerpts from the Land Court matter. He opined that the fundamental issue was to determine what would be fair and equitable, and that there were two components. First was the Town’s authority to compel Mr. Gabriel to demolish his garage structure (discussed at the previous meeting), and second was the question of it being fair in light of the history of how they got to this point. Mr. Orr noted that Mr. Tignor confirmed that Mr. Gabriel assured him that the garage was only for personal use. Mr. Orr gave a recap of their argument, that they believed the time to litigate this matter was in Land Court, adding that reasons for that belief included parities, saving of resources for the legal system and to address the issues all at once; he asserted that, in the email of today, that he gave the chronology of when things were done over time.

Mr. Benson instructed Mr. Orr to identify what he thought should be highlighted. Mr. Orr began by asserting that Mr. Gabriel started construction of the structure based on the first building permit (issued in June of 2018), and the first building permit was not appealed. The Interim Building Inspector thought that construction should go forward, and Building Inspector Chris Lund asked Mr. Gabriel to scale back the garage. He asserted that Mr. Gabriel complied and submitted new plans. Present Building Inspector Tignor issued a second building permit in October of 2018, reminding Mr. Gabriel that the structure was only for personal use but any business or commercial use would not be in zoning compliance. Mr. Gabriel began construction shortly after, and was not expecting appeal of the second building permit as there was no appeal of the first building permit, and he started to build the framing. Mr. Orr then mentioned that, in December 2018, the ZBA voted to withdraw the second building permit, and subsequently litigation took place in Housing Court to assure the structure was safe. Mr. Orr believed that this addresses the concerns raised by the board at the July, 2023 ZBA meeting. Mr. Orr opined that Mr. and Mrs. Gabriel were not doing anything wrong, that they acted based on building permits issued by the Town and opined that the board needs to balance removal of the structure with unfair burden to the Gabriels. Mr. Orr opined that this is how Land Court would see it and case law would say this in Appeals Court; therefore, he asked that the administrative appeal be granted.

Mr. Benson then asserted that Mr. Orr raised two arguments and that one must come before the other. First is the authority of the Town to compel demolition of the structure, which Mr. Orr claims they cannot do as

they failed to raise the question in Land Court. Mr. Benson explained that he understood the equity argument of the demolition, but if the Town does not have the authority to compel the demolition, it doesn't even reach the equity of the facts that Mr. Orr laid out of when the Building Permits were issued and when the actions were taken. Mr. Benson suggested that Mr. Orr believed that by the Town's failure to address the demolition at Land Court the Town lost its opportunity and is now stopped from issuing that order and therefore the board cannot vote to uphold the Building Inspector's Enforcement Order. Mr. Orr agreed. Mr. Benson opined that Mr. Orr opined that there was an independent equity argument but he opines that there's a threshold issue with authority and his concern is that Mr. Gabriel appealed the board's decision, and the Land Court matter was the decision to revoke the building permit; he pointed out that the Town was not seeking action but was the defendant and Land Court was hearing an appeal by Mr. Gabriel of the Town's decision, and since the Town was not the petitioner why would they have brought up demolition before the Land Court? Mr. Orr responded that he believed that the Town had the opportunity to pursue that, and noted that the last page of his email of today to ZBA has an excerpt from the trial transcripts where the judge mentioned that the court may be required to impose that (demolition) as a solution; Mr. Orr claimed that, based on this and other opportunities, the Town had the opportunity to make that demolition request. Mr. Benson opined that the applicant needed to exhaust the administrative remedies before it can be appealed to the court. Mr. Benson did not see the equities weighing against the petitioner because he is putting his administrative appeal of the Building Inspector before this board and then he has the potential right to go to court to appeal the ZBA decision if necessary.

Mr. Orr responded, opining that it is inequitable that his client has to come back for a further appeal, given that there was supposedly the opportunity to do this in Land Court. He asserted that Mr. Gabriel was working pursuant to the first and second building permits, and now the Town is asking him to demolish the structure years later and they had the opportunity by virtue of the Land Court action to do it before. He opined that it would have been more efficient and equitable to litigate everything in Land Court rather than by the piece meal approach. Mr. Femia then expressed concern that Mr. Orr submitted his information that is being discussed at 5:07 pm, and opined that the board did not have time to review it. But he also said that he heard Mr. Orr's comments that the Town is not authorized to ask for demolition and asked if he was correct?

Mr. Benson then continued that he was going to summarize, and opined that Mr. Orr made two intertwined arguments. First that the demolition should have been handled at the court level, as it would have been more efficient and that it would be inequitable to make the petitioner come back twice, it would be an additional burden to him and that it intertwined the argument that equity should have been handled at that level, so the board should not enforce the demolition order today. Second, Mr. Orr opined that Mr. Gabriel did nothing wrong and acted in good faith, so he should not have to demolish the structure. Mr. Benson asserted that these were related but distinct arguments. Mr. Orr responded, opining that they are intertwined but with a different chronology as was outlined in his aforementioned letter. Mr. Femia responded, opining that if the board does not approve the appeal, it seems as though the applicant will go back to court and they will make the court decide if they have to demolish the structure. Mr. Benson agreed that going to court to appeal would be the next step for the applicant.

Mr. Rajeshkumar continued, stating that one comment that he had was that a large part of the structure was built during the appeal period for the building permit, even before the public hearing with ZBA was scheduled; he asserted that most of it was built in one weekend and he opined that the petitioner took a risk in doing this. Mr. Mitchell continued, that regarding equities, did the petitioner reasonably rely on the Building Inspector's decision, or was it unreasonable to build during the appeals period? He asked, if the board orders demolition later on, is it unfair or undue hardship? He opined that this basically relates to Mr. Rajeshkumar's statement. Mr. Benson continued that, in his opinion, there is a reason for the appeal period, explaining that if someone begins construction during that appeal period, he/she assumes the risk of an appeal occurring; in this case, the building permit was revoked. Mr. Benson opined that the equities argument is not insignificant, but risk is assumed by commencing building during the appeal period.

Mr. Orr responded that he heard what the members said, but opined that some of it is impractical, because others involved in the building process such as the general contractor and builders could only be expected to wait for so long and have schedules to consider, and then appeals and litigation might also take place to cause delays. Mr. Benson responded that the appeal period is 30 days. (Mr. Benson then opened the hearing to public comment).

First to speak was Tim Shea of 55 Goodale Street. He asked if the decision to make the structure safe was made at one of the courts? Mr. Benson replied that while the appeal was pending was the issue to partially complete the structure for safety purposes brought up, because of concerns about the structure falling during the winter if it was not completed; but the ultimate issue as to whether the board's decision should be upheld was not brought up. Mr. Shea asked, if the structure is not demolished, what will happen? Mr. Benson asked Mr. Orr where that would leave them, and could the structure be used for its intended purpose or just be left vacant and unused? Mr. Orr recommended granting the appeal and letting the parties sit down and have a mediation to discuss what to do with it. He claimed that case law supports it and that it would be an efficient way to handle it, saving time and resources for all involved. Mr. Benson asked how it would save time and resources? He asserted that if there is mediation, the parties may not vote in favor of the client having a structure that he can use, or the structure will remain unused. Mr. Orr replied that the issue before the board is demolition and that compliance was litigated already; he believed that there is an opportunity to have a productive conversation and reach an amicable resolution. Mr. Benson responded that he has concern for the public that, if the building is used as intended, it has been a waste of time and money for five years. He asked, if the structure is left unused and unoccupied, will it be maintained? He opined that the owner would have little incentive to maintain it and it could then become a health and safety issue. Mr. Orr claimed that Mr. Gabriel has maintained it well and opined that they should have the opportunity to figure something out so that everyone can put this matter behind them. He also believed that the equities weigh in their favor.

With no further comments by the public, Mr. Rajeshkumar made a motion to close the public hearing. Mr. Femia seconded. Mr. Benson took a voice vote:

Mr. Orciani – “yes”
Mr. Femia – “yes”
Mr. Mitchell – “yes”
Mr. Rajeshkumar – “yes”
Mr. Benson – “yes”

The vote was 5 “yes”, 0 “no”, therefore the public hearing was closed.

Mr. Benson then commented, regarding the matter of authority, that he believed that the Town has the authority to order demolition. He understood the argument of it being equitable to have resolved this in Land Court, but believed it was not compelling. He believed that asking for demolition at Land Court when it was not yet ordered from the Building Inspector was premature and not ripe. Mr. Benson believed that, even though Land Court might have taken it up, this does not affect the Town's authority to do so now.

Mr. Benson continued that they had two administrative processes, one for the original building permit, and now again regarding the demolition order, and to protect the petitioner's rights the opportunity to litigate is protected. As to whether to enforce the Building Inspector's order, he thinks the board should. He explained that the board decided to withdraw the building permit, and the Land Court decision in the file was proper and the board's decision was not incidental; and the decision that the structure was disproportionate to the property and not consistent with the neighborhood was not incidental. He said that Land Court agreed that the board was allowed to make its determination then and it is true today. Mr. Benson opined that it was not an academic exercise to go to Land Court and that the outcome was logical to take the building down; he opined that the structure should not exist and not remain unused and unoccupied. He added that the Town gave due consideration in deciding that the structure should not have been built and expended resources to defend that decision, and opined that the next logical step would be to uphold the Building Inspector's decision to demolish the structure. He also opined that part of what the board is doing involves consideration of the neighbors, and failure to uphold the Building Inspector's order would leave the neighbors in the same position as when they brought the appeal. Mr. Orciani, Mr. Femia and Mr. Mitchell agreed; Mr. Rajeshkumar opined that this decision was reasonable and well-founded on facts.

With no further comments by the board members, Mr. Rajeshkumar made a motion to approve the Enforcement Order of the Building Inspector. Mr. Femia seconded. Mr. Benson took a voice vote (noting that a “yes” vote upholds the Enforcement Order issued by George Tignor, Building Inspector, for 57 Goodale Street, West Boylston, MA:

Mr. Femia – “yes”
Mr. Orciani – “yes”
Mr. Mitchell – “yes”
Mr. Rajeshkumar – “yes”
Mr. Benson – “yes”

The vote was unanimous, 5 “yes” to 0 “no”, therefore the Enforcement Order of the Building Inspector was upheld. Mr. Benson thanked all parties involved, and stated that a written decision was forthcoming.

Other Business:

ZBA Treasurer’s Report – Mr. Benson suggested that the board save this topic until the September meeting.

Miscellaneous Mail and Paperwork Needing Signatures/Future Agenda Items/ZBA Reports:

Next Scheduled ZBA Meeting – Thursday, September 21, 2023

With no further business to discuss, Mr. Rajeshkumar made a motion to adjourn the meeting at 8:14 p.m. Mr. Femia seconded. A voice vote was taken by Mr. Benson:

Mr. Femia – “yes”
Mr. Orciani – “yes”
Mr. Mitchell – “yes”
Mr. Rajeshkumar – “yes”
Mr. Benson – “yes”

The vote was 5 “yes”, 0 “no”, and the board adjourned at 8:14 p.m.

Submitted by: _____

Date: _____

Reviewed by: _____

