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Date: August 6, 2018 at 10:51:39 AM EDT
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Cc: Robert Dolan <rdolan@town.lynnfield.ma.us>, Bob Curtin <bcurtin@town.lynnfield.ma.us>
Subject: **160 Moulton Drive Special Permit and Site Plan Review Application**

Brian:

Your Board has received legal arguments from proponents and opponents of the proposal to replace the Bali Hai restaurant with an apartment building. As I understand it, the proposal would replace one nonconforming use with another and would eliminate existing dimensional nonconformities. You have asked me to write to your Board as to (a) the power of a special permit granting authority to approve such a proposal, (b) the factors which may be taken into account and (c) the meaning of "neighborhood" as that term is used in our applicable Zoning Bylaw.

a. Under Section 5.2 of the Zoning Bylaws, the Zoning Board of Appeals "may award a special permit to change a nonconforming use ... only if it determines that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." Allowable changes include a "[c]hange from one nonconforming use to another, less detrimental, nonconforming use." Section 5.2.1.2. Our Zoning Bylaws are consistent in this respect with G.L. c. 40A, s. 6, which has been held in Blasco v. Bd. of Appeals of Winchendon, 31 Mass. App. Ct. 32 (1991) to permit a local special permit granting authority to allow a change from one nonconforming use to another if, but only if, the local zoning bylaw specifically permits it. Since our Zoning Bylaw explicitly allows the ZBA to approve such a change by special permit, the ZBA may but need not approve requested changes from one nonconforming use to another.

I do not believe that our ZBA's authority to act in a case such as this under Section 5.2.1.2 is undercut by the decision in Harrison v. Chatham ZBA, 2012 Mass. LCR Lexis 71. In that case, the Land Court forbade a proposed change from one nonconforming use to another, but did so in the context of a proposal that would have resulted in multiple dimensional nonconformities. The Court held that without a variance for the dimensional nonconformities, the change could not be approved. Here, the project involves no dimensional nonconformities, and is therefore distinguishable from Harrison. In other words, Harrison stands for the proposition that where the applicant proposes the replacement of a nonconforming structure with a new, nonconforming structure, local authorities may not act absent a variance for the new dimensional nonconformities -- a holding that has no application here.

b. Our Section 5.2.1.2 does not offer any guidance concerning how to determine detriment to the neighborhood. I suggest one framework might be to consider the bylaw at issue in Harrison, which instructed the special permit granting authority to weigh the following factors:

1. Adequacy of the size of the site including, but not limited to, maximum lot or building coverage or setbacks.

2. Compatibility of the size of the proposed structure with neighboring properties;

3. Extent of proposed increase in nonconforming nature of the structure or use;

4. Suitability of the site, including but not limited to, impact on neighboring properties or on the natural environment, including slopes, vegetation, wetlands, groundwater, water bodies and storm water runoff;

5. Impact of scale, siting and mass on neighborhood visual character, including views, vistas and streetscapes;

6. Compatibility of the proposed use with neighboring uses;

7. Adequacy of method of sewage disposal, source of water and drainage;

8. Impact on traffic flow and safety;

9. Noise and litter; and

10. Adequacy of utilities and other public services.

11. Visual impact on the neighborhood and neighboring uses of any formula business establishment.

c. Courts generally defer to local boards in the determination of what constitutes a "neighborhood."

The flexibility of the term "neighborhood" as used in G. L. c. 40, § 6, ... facilitates the exercise of the wide discretion which reviewing courts accord zoning authorities when they consider and balance localized interests of whatever kind or character (so long as such interests are relevant to the legitimate purposes of zoning) that may be affected by any proposed alteration in an existing nonconforming structure or use.

Davis. v. Zoning Board of Chatham, 52 Mass. App. Ct. 349, 361-362 (2001). It is clear that the term is not synonymous with "zoning district," and may even include properties in other zoning districts that are in proximity to the lot at issue. See, e.g., Paradigm Properties, LLC v. ZBA of Somerville, 15 LCR 7 (2007). Of course, a "neighborhood" may also be a sub-part of a zoning district. In Giurleo v. McCusker, 18 LCR 197 (2010), the Court accepted witnesses' testimony in support of the ZBA's conclusion that the "neighborhood" in question consisted of properties located on several adjacent streets typically consisting of small lots with small side yards, and distinguished it from the plaintiff's home which was on a different street marked by larger lots and homes. The Court also noted that the plaintiff's street was "busier" than the streets in the "neighborhood" in question.

I recommend that your Board feel free to define the relevant "neighborhood" in any reasonable way the Board may deem appropriate, taking into account the size and character of structures and lots, the extent of traffic on the streets and the extent to which the areas deemed part of the neighborhood are physically contiguous.

I hope this is helpful. As always, please feel free to call me.

Tom