CITY OF WALTHAM

ZONING BOARD OF APPEALS

October 16, 2018

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, October 16, 2018, in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA.

In attendance were Acting Chair John Sergi, and members Sarah Hankins, Glenna Gelineau, Mark Hickernell and Mark Rudnick.

Mr. Sergi: So tonight there are a number of cases on the agenda. The first case is Case Number 2017-45, 2016-45 and Case Number 2018-20. These are all cases that have been here before and we are also going to hear the Alliance Case, Case Number 2015-25.

The first Item that I would like to open up with is the acceptance of the minutes September 11, 2018, September 18, 2018 minutes, October 3, 2018 minutes and Executive Session of October 9, 2018, minutes and the minutes of our meeting of October 9, 2018. Can I have a motion to accept the minutes.

On motion of Ms. Hankins, seconded by Mr. Rudnick, the board voted to accept the minutes. noted above.

Mr. Sergi: Tonight we will start with two continued cases. We'll start with Case 2017-45 that is here. If counsel will step up from Kimco Realty Corp. Would you like to read your notice.

William J. Proia, Esquire, Riemer Braustein, Burlington office, came forward and read his letter dated September 21, 2018, into the record on Case No. 2017-45, Kimco Realty Corp, 49-53 Linden Street, requesting the board to grant a six month extension of the for the Petitioner to exercise the ZBA decision.

Mr. Sergi: Are there any questions from the board?

Ms. Hankins: What are the unforeseen circumstances?

Mr. Proia: The budget. We expect to begin in the spring or summer but not before January which was when the decision was filed. Just to be sure, we wanted to come in early and let you know and ask for that relief.

I would like to make one offer. If you remember part of the decision and part of the original presentation was there's an existing sign there which is coming down. And because we are on a more accelerated schedule before this happened we were going to wait until we built the sign to take this down. It's an eyesore and the building department would like it down and so I would like to make the offer that the decision if the extension is granted that it be contingent on getting this removed. I would say by the time we should have exercised the right.

Mr. Sergi: You want to make that a condition.

Mr. Proia: Yes.

Mr. Sergi: Before the extension.

Mr. Proia: Yes.

Mr. Sergi: Okay.

Any other questions from the board?

(There were no questions.)

Mr. Sergi: This is your second time here for extensions?

Mr. Proia: It's the first time.

Mr. Sergi: Do I have a motion?

On motion of Mr. Hickernell seconded by Ms. Gelineau the board voted to extend this case to August 1, 2019.

Mr. Sergi: Does that work for you, Counsellor?

Mr. Proia: Yes.

Mr. Sergi: The next case is Case number 2016-45. A similar extension of time for the Waverley Oaks Road project?

Mr. Proia: Yes.

Mr. Sergi: Do you want to read this one into the record?

Mr. Proia: This will be the second time for this one.

Mr. Proia read his letter of September 21, 2018, into the record requesting the board to grant a six month extension of time for petitioner to exercise the ZBA decision.

Mr. Sergi: I must drive by this location almost daily. So it was funny because for a period of time they had it all fenced in and it was closed. It looked like you were doing some stuff. Then all of a sudden, magically, the fence has disappeared and you were back open for business. What happened?

Mr. Proia: We expected all the permits to be granted before the end of last year. There was an intervening election. Our panel had changed so we had to withdraw and we came before this board in April, I think it was, it was Spring and got the extension until this month. and then we had to refile our other application. In May we filed we had our hearing but it hasn't been resolved completely yet. So, in the meantime we didn't want to lose business. We have customers, people relied on us. There's a bunch of businesses in that area that were really eager for us to establish service again. So we just restarted based on the existing permits. It didn't reflect any of the permit this board granted or Board of Survey and Planning or any of the other permits for the project. That's what happened.

Mr. Sergi: So, realistically do you think you will have it resolved within the next six months?

Mr. Proia: One way or another, it will have to be. Yes. So I do not think I will be back here asking for another extension.

Mr. Sergi: Any questions from the board?

Mr. Rudnick: Mr. Proia, didn't you also have the project at the gas station at Main Street and it crosses Route 20 and 117? Did that one get off the ground?

Mr. Proia: We were here before the board for 65 Main Street for a reconstruction of that site but we withdrew that application.

Mr. Rudnick: Weren't you also here for the one at the corner of South Street and Main and Weston?

Mr. Proia: No, I was here for Linden Plaza. There was a proposed BJ's gas station.

Mr. Rudnick: Maybe it wasn't you but it was Colbea.

What is this panel that you are referring that changed?

Mr. Proia: The City council election. So there were some councillors who had first heard our petition, but before a decision was granted the election intervened and we lost a couple of our panel members.

Mr. Sergi: I need a motion to extend this.

On motion of Mr. Hickernell, seconded by Ms. Gelineau, the board voted to grant the request for a six month extension to April 6, 2019.

Ms. Hankins stepped down and the members sitting on the remaining cases were Mr. Sergi, Mr. Hickernell, Ms. Gelineau and Mr. Rudnick.

The next case is Case Number 2018-20, Petitioner, Mark Resnick, Trustee, 70 Hall Street Realty Trust.

The clerk read the petition of The case that was before the board was the Petition of Marc Resnick, Trustee, Seventy Hall Street Realty Trust in an appeal from the Decision of Inspector of Buildings. The locus consists of a parcel containing +/- 169 acres of land, with two buildings located on it Petitioner is appealing a Cease and Desist Order from the Inspector of Buildings wherein the Inspector alleges a violation of City of Waltham Zoning Ordinance, Article 7, Section 7.41 & 7.431. Location and Zoning District: 64-70 Hall Street; Residence B Zoning District.

Mr. Sergi: May we hear from counsel.

Good evening. Michelle Baratta on behalf of the petitioner. My address is at 138 Harvard Avenue in Allston, Massachusetts.

As you may recall we continued this case from the August hearing because there was not enough board members and partly so that we have a chance to sit down with Mr. Forte to see if we could maybe resolve this on our own. We did, in fact, meet with him and we are making good progress now on some revised plans for the building but he will likely require us to file a petition for zoning relief for a variance. However they are plans that he would sort of support and depending on the resolution of that we would withdraw our appeal. So I think we are very close to that. We are working on some plans. Architect requested to go back out to the property this week and then they should be marking up some plans for us and then I will be sitting down with Mr. Forte again one last time and then filing here with those.

Mr. Sergi: That's encouraging. That's good.

Ms. Baratta: We're pretty happy about that. So we would like to for maybe another sixty days just to give us a little time, we'll probably file for a variance incorporating these plans and withdraw our appeal.

Mr. Sergi: Are there any questions from the board.

Do we have a motion to extend this case to December 18th?

Mr. Hickernell: We'll need to extend the hundred days as well.

Mr. Sergi: May I have a motion to extend this case until December 18, 2018.

On motion of Mr. Hickernell, seconded by Mr. Rudnick, the board voted to extend this case until December 18, 2018.

Mr. Hickernell: To extend the hundred days to act on this case to January 30, 2019.

On motion of Mr. Hickernell, seconded by Mr. Rudnick, the board voted to extend the time to act on this case until January 30, 2019.

Mr. Sergi: Okay. Last case for the evening. Case No. 2015-25, Petitioner Alliance Realty LLC.

The Petitioner, Alliance Realty Partners LLC, applied, pursuant to Massachusetts General Laws, Chapter 40 B, Section 20 through 23, as amended, for the issuance of a Comprehensive Permit permitting the applicant to construct 195 apartment style rental units, with associated parking and relating utilities on the approximately 77,879 +/-square feet parcel of land located at 341 Second Avenue. Location and Zoning District: 341 Second Avenue Commercial Zoning District. Said property is shown on the City of Waltham Atlas - Atlas Page R039, Block 001, Lot 0016.

Mr. Michael Bourjoulian, Alliance Realty LLC came forward.

Mr. Bourjoulian: I have a proposal. Just to recap a little history of today which may be redundant, I apologize. We did, in fact, submit a draft and a memorandum that we hope is responsive to the board at roughly mid day today and I understand that at some time mid afternoon a response draft from the law department was issued, roughly three o'clock or so.

So we did not have a chance to respond to that draft formerly yet to the board. However, we did bring hard copies. I think the short story is between our draft at roughly mid day and the law department's draft mid afternoon the law department accepted candidly the majority of our comments with a handful outstanding and then we were able to accept, I think, the majority of the law department's comments in that subsequent draft.

So if you are following me and I will stop if you're not, it might make sense to start from the redline from the law department's draft. We were able to, Mr. Rudnick, with your direction, stick with the law department's draft. We were able to redline that and have a clean one and also prepare a brief memo, brief, candidly because, I think, because there's very, very few items left. So we're happy to go through the machinations of everything before. However if the board were willing to accept the law department's acceptance changes and then comments following on that. It might make sense just to start at that point.

Mr. Sergi: That makes sense.

Mr. Hickernell: So the law department did accept a number of your redlines and we'll just go from there.

Mr. Bourjoulian: Right. So we actually have a draft that might help us walk through that tonight. We could issue and with notes. Certainly if the board needed a recess or if the law department needed a recess to review that, I think it's short enough that it would be relatively quick or we can just do it in your time. Whatever the board would prefer.

Mr. Hickernell: So you're saying you got something that was response to the law department draft this afternoon?

Mr. Bourjoulian: Right.

Mr. Sergi: Do you have enough copies for everyone?

Mr. Bourjoulian: We do.

Mr. Sergi: It doesn't sound like it's heavy lifting so maybe we can do it in real time.

Mr. Bourjoulian: We'll try it and if it doesn't work we can always break I guess.

Mr. Cosimi: We prepared a redline against the law department's draft from this afternoon but then we also rather than putting it together in a letter and memo, appears to

be now and just put a bullet point after each point that you summarized and saying either accepted or accepted with these comments.

Mr. Bourjoulian: It's right there. We didn't have the time to make a nice memo. I apologize. We were a little jammed. But we though it was kind of in the spirit of the cover memo and the long sided draft.

(Copies were distributed to each member.)

Mr. Bourjoulian: On the draft circulated today, this should incorporate all the points the law department accepted from my draft and that we've accepted from that following draft. And this spills out what's remaining.

Mr. Hickernell: Almost all this says accepted.

Mr. Bourjoulian: It's a pretty clean draft.

The best way to do this, Mr. Chairman, is to turn the pages as we go. The stuff that's left that's not white and black---

I'm on page 3 of the redlined draft and this corresponds about two-thirds of the way down with comment number one. So there are a number of changes to the lower half of this paragraph and with the last change, the law department suggested we ran that by separate counsel that typically works on appeals with us and just added that we'd be more specific as specifically using the words "Interlocutory Order issued by Housing Appeals Committee".

I'm also going to try to make this a cleaner motion as possible.

So that was 1.

Michelle Learned, Attorney, City of Waltham Law Department: I am okay with that language. After the words that are indeed in the double line, I will add dated and whatever the date it issued.

Mr. Bourjoulian: There's only been one Interlocutory order issued by Housing Appeals Committee so ---

Mr. Hickernell: It could also say in this case and we could skip the date.

Ms. Learned: That's fine.

Mr. Sergi: You all agree to that? So we'll check number 1 off. Right?

Mr. Bourjoulian: Right. So this is on the same page, Item number two is on the same page, three at the bottom. I believe we just tried, again, Mr. Rudnick, this was more in the spirit sort of that you had asked us to respond to this draft to leave the things that haven't been accepted. So we just left the removed newly added first sentence redline to show that that was what was struck and we were accepting that. However, I think we had asked and Greg correct me if I am wrong, is this the same item?

Mr. Cosimi: The same item. There was a sentence that does not show up in this draft because it is removed in Michelle's draft.

Mr. Bourjoulian: So prior to the "applicant provided there was a sentence. We've accepted that.

And Item 3 begins at the very bottom of the same page and goes on to page 4.

So we had just added, this was a request by the law department for Ms. Learned to add precisely where the evidence of the interest in the property how it was evidenced on the record. it was a portion of our application, Section six of our project application to this board, so we just added that note to assure the law department it was on the record and it has been evidenced.

Mr. Sergi: So that's number three.

Mr. Cosimi: It's actually three and four.

Mr. Bourjoulian: So, five, the finances, successors and assigns, we accepted this one. I just want to get the exact page.

Mr. Cosimi: It's after the waivers on page four.

Mr. Bourjoulian: So this is at the bottom of page four under the heading Waivers and Conditions to the Comprehensive Permit.

Ms. Learned: And I did take your edit of changing project and development.

Mr. Cosimi: Okay.

Mr. Bourjoulian: So we are going to skip ahead and deeper into the conditions I believe to number 15, on page 12, three quarters of the way down. So we accepted part of this. There were two comments made here by the law department. The first was again to

change the "provide to make available". This is something we discussed in previous hearings meetings including on Thursday and I think the board had said they were satisfied with this language. We're more comfortable with "make available" than "provide". We think there are other ways you could read into the word provide. Again that language was what was in the previous drafts that I think that the board had said they were comfortable with.

That said, the second portion of this is the law department asked that the marketing materials specifically identify that we that we have spaces available free of charge for affordable units, so we just wanted to clarify that this is for affordable units. So we weren't advertising to market their units that their spaces were free as well.

Mr. Sergi: That makes sense.

Ms. Learned: Again, the way they phrased your affordable units assign, it gives me cause for concern about using the words "make available". There was great disagreement between what the board thinks make available means and what the applicant believed it meant. And it is true that on the record they stated that their definition ultimately would be an alignment with yours. But when decisions are drafted and there's any ambiguity, the ambiguity is against the drafter of the decision which would be the city. I really strongly suggest that a clearer definition of "make available" is included to specifically reference the board's intent so that the disagreement you had at the last meeting is not repeated to the building inspector when the building inspector needs to enforce this. I thought that using the word "provide" solves that problem. It is curious to me as to why the word "provide" did not work for you and it's the law department's strong advice to the board that we shore up exactly what "make available" means to match the board's intent.

Mr. Hickernell: My concern with that is we have been using the term "make available" throughout including the discussions of it and there's on the record statements about its meaning. If we have a change in the last draft that record will not necessarily be bound as applied to the new language. That's my thought on that. I appreciate what you are trying to do is to secure these spots but that's my thought.

Mr. Sergi: That's a point. We have spoken in length and I think that both of these words are the same and have the same meaning to me. You will provide a free space to the one bedroom units or two bedroom units if requested whether it's one parking space or two.

Mr. Bourjoulian: Well I think the if requested is precisely part of what we were struggling with on this one and we spent quite a bit of time talking about the difference

between these two today. The difference between provide and make available is if someone doesn't have a car and wants a space, provide means we still have to give it to them. So that was really the difference. We will certainly make sure that one space is available for anyone that needs them within this condition but provides means that they are required to take it even if they don't want it. So just from a legal perspective, when you think these words feel different---

Ms. Learned: I think perhaps if we meet to a resolution would be shall provide if requested or upon request of the affordable tenant.

Mr. Bourjoulian: I think that's functionally the same. I think provide and make available is different to us. I think make available is the same as provide as requested. It just seems more cumbersome, Again this is pretty well trodden territory. We revisited this and the other condition that mirrors it numerous times.

Mr. Hickernell Do you want to discuss this with counsel on that?

Mr. Bourjoulian: I don't. We know our position on this one.

Mr. Hickernell: Well, I understand that. Do you think the provide, you said provide upon request is the same thing.

Mr. Bourjoulian: I'd like to leave it up to the board if they think that's materially different. I think make available has satisfied the board a number of times. This is a big condition. We are on the record what we mean to do and - - -

Mr. Sergi: Again, I am worried about Mr. Rudnick's comment. I think it carries some merit.

Ms. Learned: Respectfully, Mr. Sergi, this is part of the record. It will be fine and if the applicant things that the words mean the same thing and the law department does not think that that means the same thing then there could be if he thinks it means the same thing that he should just say, yes, I agree to it.

Mr. Bourjoulian: I don't think they're the same thing. That's precisely what I'm saying. I think that provide does not, if a unit doesn't have a car or want a space - - -

Ms. Learned: Provides - - -

Mr. Hickernell: You should direct all comments to the board.

Mr. Rudnick: I am in favor of "make available". I think there's been substantial discussion about it. I don't really see why provide upon request is not acceptable but I am inclined to stick with make available.

Ms. Learned: If I could just mention, Mark, it might be hearings backward. You don't look to the record for codification of your condition. It has to be reduced to writing. The building inspector wouldn't be able to go and say, oh, this is what they talked about and this is what they meant. And so all I'm asking is that we make sure that the affordable housing tenants have the ability to request and then it shall be provided. Otherwise the misunderstanding that initially existed with, oh, we are going to make it available without the reservation when they want them available will perpetuate. It will continue that misunderstanding and then in the law when something is unfair the drafted language goes against the ambiguity will go against the drafter which that ambiguity can be solved by adding the words "upon request".

Mr. Hickernell: How do you feel about "make available upon request".

Mr. Bourjoulian: That's fine. Whatever the board wants. I'm trying to simplify this and make this cleaner.

Right now we are required, I don't think there was a disagreement between us and the board. We've talked about this one at length. I mean we need to have a space available if an affordable housing unit needs one per these conditions. And if it's a three bed we have to make sure we have two available free of charge. If we don't, we are in violation of this condition. I don't know what's the disagreement there. If we don't have one available we just broke number 15 and I believe number 26. That's bad. We don't do that. Just trying to make a clean draft here with a few changes. I think this is up to the board.

Ms. Learned: Mr. Hickernell, I am fine with that.

Mr. Sergi: The applicant shall upon request make available or shall make available upon request, okay.

Mr. Rudnick: I'm fine with that too Mr. Hickernell.

Mr. Bourjoulian: That was the last one. There were some other changes made in a handful of items that were in yellow on the previous draft but won't show up here because they were all accepted.

Mr. Sergi: Comments from the board?

Mr. Rudnick: The only other big change I had from Attorney Learned was number 17. In 17, it was rather small it was, working from memory, but it was shall provide no less than forty-four hundred and thirty-four rather than shall provide approximately.

Ms. Gelineau: It said shall provide at a minimum.

Mr. Rudnick: Oh, I'm sorry it's on your redline. You adopted tha.

Mr. Rudnick: That sounds great so what we didn't do here is give the board an opportunity to accept all of the changes that you made that Attorney Learned also accepted already, but we haven't actually accepted. So they are not the controversial ones but and I've read them through and they are fine with me but I want the board to have the chance to recognize all the changes that were made not just the ones that were in controversy between the two law offices.

So did everyone have a chance to take a look at all those changes, those are changes like including traffic rules and regulations and these all appear in the redline version. We've just discussed a half dozen of them that were controversial is my guess but there are another two dozen that hearing no one on the board say that they are uncomfortable with.

Mr. Hickernell: I think its important to point that out for the record there were other changes from the last draft and I think that you reviewed the changes and none of them are problematic to me.

Mr. Rudnick: Me too.

Mr. Sergi: Michelle, these seem to be exactly what you requested.

Ms. Learned: Yes.

Mr. Rudnick: Do you want to hear any last statements from the applicant or attorney?

Mr. Sergi: Do you want to hear any last comments or do you think we are ready for a vote.

Mr. Hickernell: I've got a copy of the decision which was the copy you just provided the redline with the yellow line, I believe, which I've just incorporated all the changes we have made and they are also in the minutes.

Ms. Cosimi: I've got a clean copy of the redline with the changes that the board made if the board wants to see them.

Mr. Rudnick: Let's take a look at it.

Ms. Gelineau: I just wanted to note and thank the applicant for raising their donation to \$100,000 to the Affordable Housing Trust. Thank you.

Mr. Bourjoulian: You're welcome.

Mr. Sergi: Thank you for that.

Ms. Gelineau: It's duly noted.

(Our attorney and the board looked over the final document.)

On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted to take a short recess at 7:40 P.M., to allow Attorney Learned time to go over the final draft.

The board reconvened at 7:45.

Mr. Sergi: We are open up for any questions but I do want to remind the petitioner that there will be four votes tonight because Barbara obviously is not here. So if you are okay to proceed with the four, we are ready to go to the next step.

Mr. Bourjoulian: Yes.

Mr. Hickernell: Attorney Learned was this consistent with the changes that has been reviewed with everybody?

Ms. Learned: It is consistent, yes.

Mr. Sergi: May I hear a motion to grant the comprehensive permit, as amended, in this draft and on the record.

Mr. Hickernell: I move that the 40B Application be granted by the Zoning Board as reflected in the record before the Zoning Board in this case and as that record is reflected in the copy provided to the board tonight with the final modifications that were made tonight including all waivers and conditions.

Mr. Rudnick seconded the motion.

Roll call: Mr. Rudnick, yes; Ms. Gelineau, yes; Mr. Hickernell, yes and Mr. Sergi, yes.

Mr. Sergi: So it is granted. Congratulations.

Mr. Bourjoulian: I want to thank you guys. That was a lot of effort.

Mr. Sergi: And we thank you too.

One more motion is in order.

On motion of Mr. Hickernell, seconded by Ms. Gelineau, the board voted to adjourn at $8:30\ P.M.$