

ZONING BOARD OF APPEALS

OF THE

CITY OF WALTHAM

Case No. 2020-21

August 18, 2020

MEMORANDUM OF LAW

I. Introduction

The subject property of this application is a parcel of land known as 200 Smith Street, Waltham.

The parcel contains a recently renovated office building and access drive (hereinafter the locus).

The locus is situated in a Limited Commercial Zoning District according to the Zoning District Map of the City of Waltham.

The Petitioner is Boston Dynamics, Inc. (BD). BD has recently become a tenant in the building and intends to occupy the building as its new Waltham Headquarters. The building has recently undergone a complete renovation to accommodate its expanding work force.

The Owner of the locus is Healthpeak Properties, Inc, which joins in and supports the request for this variance.

In order to further identify the property, BD proposes to construct, use and maintain a secondary sign at the locus.

The proposed sign requires certain zoning relief.

II. Relief Requested

The zoning relief requested is as follows:

Section 6.52 of the Waltham Zoning ordinance states that each business which abuts at least one exterior wall of the building may have one secondary wall sign provided that it does not exceed eighteen (18) square feet. Here, the Petitioner proposed wall sign on the south wall of the building shall be an unlit 8 foot by 26.5 foot wall sign totaling 212 square feet.

III. Petitioner and Locus

BD is a rapidly growing robotics company and employs approximately 300 people in Waltham. They anticipate adding additional employees next year in Waltham.

The locus consists of approximately 35 acres of land with a 400,000 sq foot building. The Locus lot is bounded by Route 128 and Trapelo Road to the South and West. Smith St to the East and another office building in the Town of Lexington to the North. Smith Street provides access to the Locus lot off of Trapelo Road at two entry and exit points on the land.

The building is bounded by undeveloped wooded and wetland areas to the South and West and primarily with woods also along the Eastern and Northern boundaries.

IV. Jurisdiction

Massachusetts General Laws, Chapter 40A, Secs.10 and 14 authorize the Board of Appeals to grant variances so long as they are not for a use prohibited by the Zoning Ordinance. The use in this instance is for a business office use as defined under the Zoning Ordinance at 3.224. The business office use is a permitted by right use in the Limited Commercial Zoning District. Section 6.52 provides that each business or establishment which abuts at least one exterior wall of the building in which it is located may have one secondary wall sign provided that it shall not exceed 18 square feet. The variance requested pertains to the size of the sign only, the Board of Appeals has the authority to grant the Variance.

Article VII, 7.2 of the Zoning Ordinance authorizes the Board of Appeals to utilize all of the powers granted to it by the Massachusetts General Laws and the Ordinances of the City of Waltham. Therefore, in that the Board of Appeals has the power and authority to grant variances, the Petitioner respectfully request that their application be granted.

V. Statutory Circumstances for Variance

Massachusetts General Laws, Chapter 40A 10 states, in pertinent part, that variances may be granted . . . where such permit granting authority specifically finds that owing to circumstances relating to soil conditions, shape or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located

Therefore, in order to obtain a variance, it must first be shown that there are unique circumstances relating to soil conditions, shape, topography, or structures which especially affects this locus, but do not generally affect other lots in the Limited

Commercial Zoning District. In this instance, the shape of the lot, the topography and the soil conditions thereon are unique circumstances which especially affect this locus but do not generally affect other properties in the zoning district.

The shape of this locus is a unique circumstance in this instance. The locus is over 35 acres of land with multiple lot lines. The perimeter lot lines include disparate courses along Interstate 95 or Route 128. These courses follow along the sideline of Interstate 95, Smith Street and the City of Waltham/Town of Lexington boundary line. The shape is also affected by the entrance/exit drives and the Town of Lexington boundary.

An irregularly shaped lot is a basis for a finding of a unique circumstance.

There are several cases in which an odd layout of a lot supported the granting of a variance. See *Paulding v. Bruin*, 18 Mass App Ct. 707 (1984), *Josephs v. Board of Appeals of Brookline*, 362 Mass. 291, 293 (1972), and *Wolfman v. Board of Appeals of Brookline*, 15 Mass App Ct 112 (1982).

The soil conditions at the locus are also a unique circumstance. As shown on the site plan from the City of Waltham website, you will see significant wetlands on the south and west sides of the locus. These wetland areas create unique soil conditions through a large swath of the locus parcel.

In *Wolfman v. Board of Appeals of Brookline*, 15 Mass. App. Ct. 712, 444 N.E.2d 942 (1983) the Court of Appeals stated: the locus contains an irregular pattern of subsurface soil conditions and intervals at varying levels of elevation . . . and these soil conditions show the locus to be unique as to compared to other lots (in the District.) See also *O Brian vs. Board of Appeals of Brockton*, 3 Mass App. Ct 740 (1975), and *Rodenstein v. Board of Appeal of Boston*, 337 Mass. 333 (1958).

The locus also has unique topography. You will see from the GIS plan attached that the locus overlooks Route 128. Elevations throughout the locus vary depending on the specific soil conditions, as the wetland areas are lower than the developed areas. Thus, the Petitioners contend that they have met the first requirement for the granting of variances in that there are conditions which especially affect this locus, but which do not generally affect other lots in the Limited Commercial Zoning District.

VII. A LITERAL ENFORCEMENT OF THE PROVISION OF THE ORDINANCE WOULD INVOLVE SUBSTANTIAL HARDSHIP

Not only does this locus have conditions that do not generally affect the other lots in the Limited Commercial Zoning District, but their differences create a substantial hardship, financial or otherwise, for the Petitioners.

Hardship is not being reasonably able to use the locus property for the purposes allowed under the Zoning Ordinance due to circumstances particularly affecting the locus. Many factors may contribute to hardship. No one factor determines the question of what is practical difficulty or unnecessary hardship, but all relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be reasonably put to a conforming use . . . Brackett v. Board of Appeals of Boston, 311 Mass. 52, at 60 (1942). When a dimensional variance is involved, as we have here, even a relatively minor hardship can justify a variance. See Marashlian v. Zoning Board of Appeals of Newburyport, 421 Mass. 719 (1996).

Identifying the premises and the proposed use and business at the premises is important to the business. Visitors, employees and vendors will frequently be visiting the site and a proper sized sign to identify the locus as the corporate office of BD is important to serve these purposes. The sites proximity to Route 128 is also important to this Petitioner. Visibility of the Boston Dynamics name is important to the growing company. A secondary sign, of adequate size, will draw visitors down to the building site. The secondary sign shall be situated on the southern wall. The size of the sign was chosen to adequately identify the building entry from a distance. The locus lot is over 35 acres and set a significant distance off of all abutting roads especially to the South and West. Despite the larger lot size, there is no provision in the Ordinance to increase the size of the sign. We are limited in square feet regardless of the fact that this locus lot is almost 6X the size of the minimum lot size for the district.

The variance requested is intended to identify the use at the locus which is a permitted and by right use at the locus. The secondary sign will identify the company at this locus on a scale large enough to be seen from distances and/or when traveling a high speed on the Interstate. The size and location are intended to clearly identify the company in a place that will be seen by thousands of travelers on the Interstate daily. The hardship associated with this sign, is not particular to this Petitioner but would be experienced by anyone attempting to make reasonable and permitted use of the locus.

Thus, this Petitioner respectfully contends that all of the above represents practical hardships to them as required under the statute.

VI. Effect of the Granting of the Variances

The final issue is whether the granting of the variances requested will result in a substantial detriment to the public good or nullify or substantially derogate from the intent or purpose of the Ordinance.

The statute states that there must be a substantial detriment to the public good, or the Ordinance must be nullified or substantially derogated from.

To satisfy the statutory requirement that the variance be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of . . . the Ordinance, a finding must be made as to . . . the overall effect of the proposed use of the locus upon other property within the same district, a necessary element in determining whether the statutory standard has been met. *Planning Bd of Framingham v. Zoning Board of Appeals of Framingham*, 5 Mass. App. Ct. 789, 789-798 (1977).

In this instance the proposed secondary sign will not be detrimental to the public good but shall provide a need to the public. The primary sign shall clearly mark and identify the locus property as the location of Boston Dynamics. The new sign is designed to serve a need to identify the property. This sign shall eliminate confusion for travelers looking for BD as they exit Route 128, Trapelo Road and onto Smith Street.

A leading case on this issue is *Cavanaugh v. DiFlumera*, 9 Mass. App. Ct. 396 (1980), which states in pertinent part, . . . unless the (granting of the variance) significantly detracts from the zoning plan for the district, the local discretionary grant of the variance . . . must be upheld.

The requested relief here will not nullify or substantially derogate from the intent or purpose of the Ordinance. The variance requested relates solely to the size of the sign. The sign proposed is designed to adequately announce or identify Boston Dynamics consistent with the intent of the Ordinance. A substantial derogation from the intent of the Ordinance has not occurred because the Ordinance allows a secondary sign for the allowed use in the Limited Commercial Zoning District.

A purpose of the Ordinance is . . . to encourage the most appropriate use of the land throughout the City This proposal shall enhance the intended business office use at the locus. The signage will be both an aesthetic benefit to the area and an effective identification of the Boston Dynamics which shall benefit visitors to the area. Thus, the Petitioner, having met all the legal requirements for the granting of the variances requested respectfully request that its Petition be granted.

Boston Dynamics, Inc.

By their Attorney,

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