

**BOARD OF APPEALS**  
**OF THE**  
**CITY OF WALTHAM**

**Case No. 2020-11**

**June 23, 2020**

**BRIEF**  
**OF**  
**DCB I, INC**

The subject matter of this application is a large parcel of land on Waverley Oaks Road. The parcel contains 7.28 acres of land. The locus parcel is known and numbered as 411 Waverley Oaks Road. A large multi-tenant commercial building is situated on the locus parcel.

The locus is situated in a Commercial Zoning District according to the Zoning District Map for the City of Waltham. East and Northeast of the locus are similar multi-tenant buildings containing retail, office and/or warehouse spaces. South of the locus parcel is a medical office building presently used by Mount Auburn Hospital. West of the locus, across Waverley Oaks Road, are single and two family residential properties.

The Petitioner, DBC I, Inc., (hereafter the “Petitioner”) is a Massachusetts corporation with a usual place of business at 411 Waverley Oaks Road, Suite 340, Waltham, Massachusetts. DBC I, Inc., is a corporate entity related to and affiliated with Duffy Bros. Construction, Inc. the original builder of the buildings on the locus.

With the addition of The Mighty Squirrel Brewery at the Locus in 2018 the Petitioner improved the façade of the building on the north end. This portion of the building is referred to by the Petitioner as Building A. The Petitioner is now proposing to construct, use and maintain a similar improved façade to the middle third of the building (“Building C” ) and eventually to the south end of the building ( “Building B”) where the City Streets restaurant is now situated. The proposed renovations shall include the replacing of the existing exterior wall to create the new façade. In so doing the Petitioner will be adding a gross floor area to the building of 60 square feet for the middle part of the Building and 150 square feet for the final third of the building.

In order to accomplish this, the Petitioner needs the following zoning relief.

(1) § 3.72251 states that existing nonconforming commercial structures may be altered or rehabilitated as a matter of right if said alteration does not exceed the floor area ratio (FAR) of the existing structure. The Petitioners are proposing to construct, use and maintain a renovated façade to a portion of the existing structure. The removing and replacing of the existing exterior wall with the new façade wall will increase the floor area of the structure by 60 square feet in the middle third of the existing building and 150+/- square feet to the final third of the building. The minimal increase in floor area shall not increase the FAR of the building.

(2) § 3.7222 allows a pre-existing nonconforming structure to be altered in that use to an extent not exceeding 10 % of the ground floor area of the building when a special permit is issued for such alteration. The Petitioners are proposing to construct, use and maintain a renovated façade to a portion of the existing structure. The removing and replacing of the existing exterior wall with the new façade wall will increase the floor area of the structure by 60 square feet in the middle third of the existing building. This is Phase 2 of the exterior wall renovation. Phase 1 was completed with the construction of the Mighty Squirrel brewery. In a final phase (Phase 3), the Petitioner intends to renovate the final third of the building by removing and replacing the existing exterior wall with a new facade. This final phase of the renovation of the exterior wall of the structure shall add approximately 150 square feet of floor area. The combined increase of floor area, 210 square feet, is less than 10 % of the ground floor area of the building (103,426 square feet) or 0.2 %.

(3) § 3.7222 and Massachusetts General Laws, Chapter 40A § 6 allow a pre-existing nonconforming use or structure to be altered when a special permit is issued for such alteration. The Petitioners are proposing to construct, use and maintain a renovated façade to a portion of the existing structure. The removing and replacing of the existing exterior wall with the new façade wall will increase the floor area of the structure by 60 square feet in the middle third of the building and 150 +/- square feet in the final third of the building. One parking space is required for each 300 square feet of floor area. Here, we are adding 210 +/- square feet of floor area. The locus presently has 472 parking spaces which does not meet the current requirements under the Ordinance and is therefore considered a nonconforming parking lot. No additional parking is proposed.

(4) In the Notice of Decision decided on October 27, 2015, Case #2015-20, the Zoning Board of Appeals granted certain zoning relief for the locus property at 411 Waverly Oaks Road. The granting of a special permit also contained certain conditions on the construction and use of the locus. Case # 2015-20 was previously amended in Case # 2018-20. The Petitioners now seek to amend so much of the Decision in Case #2015-20 by adding the Site Plan filed herewith. The construction and use of the middle third and final third of the building shall be as shown therein. The parking plan referenced in Case #2018-02 shall remain unchanged.

(5) In the Notice of Decision decided on March 20, 2018, Case #2018-02, the Zoning Board of Appeals granted certain zoning relief for the locus property at 411

Waverly Oaks Road. The granting of a special permit also contained certain conditions on the construction and use of the locus. The Petitioners now seek to amend so much of the Decision in Case #2018-02 by adding the Site Plan filed herewith. The construction and use of the middle third and final third of the building shall be as shown therein. The parking plan referenced in Case #2018-02 shall remain unchanged.

### **JURISDICTION**

Massachusetts General Laws, c. 40A §6 states that pre-existing non-conforming structures and uses may be extended or altered by the special permit granting authority upon a finding that the proposed alteration shall not be substantially more detrimental than the existing non-conforming use to the neighborhood.

§14 of the Massachusetts General Laws empowers the Board of Appeals to decide applications for special permits upon which the Board is empowered to act by the Ordinance. §3.7222 of the Zoning Ordinance provides that non-conforming structures, buildings and land may be altered when a Special Permit has been granted by the Board of Appeals for such alterations or enlargements.

The Board is also authorized to modify a decision, provided the required procedures of the statute are followed. In Huntington vs. Zoning Board of Appeals of Hadley, 12 Mass. App. 710, the Court stated, “ The Board may not make a substantive amendment which changes the result of an original deliberate decision, or which grants relief different from that originally granted, without compliance with the relevant notice and hearing requirements.”

§7.2 of the Ordinance authorizes the Board of Appeals to exercise all the powers vested in it by the Ordinances and the General Laws.

Therefore, in that this Board of Appeals has both the power and authority to grant a Special Permit to alter a non-conforming use, structure, or land; and the authority to amend an existing decision of the Board, the Petitioner respectfully requests that their application be granted for the reasons herein.

### **ORDINANCE - § 3.72251**

§ 3.72251 provides that existing nonconforming structures used for commercial purposes may be altered or rehabilitated as a matter of right if said alteration or rehabilitation does not exceed the floor area ratio (FAR) of the existing structure, if said rehabilitation does not include removal of exterior walls and if such alteration does not increase the nonconforming nature of said structure. If the rehabilitation does include the removal of exterior walls, the criteria of Section 3.72241 shall apply.

The Petitioner's proposed alteration or rehabilitation is a new façade to the exterior of the building. The new façade shall replicate that portion of the building already renovated with the construction of the Mighty Squirrel Brewery. To install the new façade the existing exterior wall shall be removed and replaced with the glass façade as shown on the plan and as existing at the brewery end of the building. In replacing the exterior wall we will be adding 60 square feet of floor area in the middle third of the building and approximately 150 square feet in the final third of the building. We are only adding inches to the building to construct the facade, but across the length of the building it adds up to 210 square feet approximately.

The proposed use at the building shall remain the same as it will be retail, office, a brewery and other commercial space. No new “use” is proposed. The floor area of the building will increase, although only by 210 square feet or a .0007 FAR, which we believe is a de minimus increase. It will not affect the FAR as recognized by the City of Waltham Zoning Ordinance. Because the Petitioner is “removing an exterior wall” and because this shall exceed the existing FAR of the building, we cannot rehabilitate the commercial structure as a matter of right as contemplated under § 3.72251. We also cannot proceed, as a matter of right, under §3. 72241, because the proposed alteration shall exceed the FAR of the prior structure. The Petitioner is therefore requesting a special permit under §3.7222 to alter a nonconforming structure.

#### **THE STATUTE**

Massachusetts General Laws, Chapter 40A, §6 provides that a non-conforming structure or use may be altered provided that there is a finding by the permit granting authority that such alteration shall not be substantially more detrimental than the existing non-conforming use to the neighborhood.

#### **ZONING ORDINANCE - §§ 3.722 and 3.7222**

§ 3.722 sets out the rights of non-conforming structures, uses, buildings, and land. It provides that any nonconforming structure, including structures and buildings with a valid building permit or occupancy permit issued prior to December 28, 1987, that are presently conforming as to use but have an FAR above the FAR allowed by right in the district may be altered or enlarged pursuant to § 3.7222. § 3.7222 provides that non-conforming structures, uses, buildings and land that are presently conforming as to use

but have an FAR (floor area ratio) above the FAR allowed by right may be altered or enlarged in that use to an extent not exceeding 10% of the ground floor area of the building when a special permit has been granted by the Board of Appeals for such alteration or enlargement.

1. *The structure at the locus is a non-conforming structure as to the FAR now permitted in the Zoning District.*

The current City of Waltham Zoning Ordinance was adapted by the City Council on December 22, 1952, but it was amended in its entirety on December 27, 1988. Subsequent amendments are noted in the text of the current Ordinance.

The Building on the locus was constructed pursuant to a building permit issued on June 26, 1973. The Ordinance in effect at that time was the 1969 Zoning Ordinance.

Attached hereto is a copy of a portion of the Street Card, at Exhibit A, the Building Permit at Exhibit B and the Certificate of Occupancy issued for the existing commercial building on the locus, at Exhibit C.

Since 1973 the locus building has been used as a multi-tenant building with various uses permitted in a “commercial” zoning district as well as light manufacturing.

The “Street Card” for the locus property is 15 large index cards, covered on both sides with numerous and varied permits, uses, and approved occupancies.

Retail, commercial, office, warehouse, light manufacturing, general manufacturing, taverns and restaurants are permitted by right uses in the Commercial Zoning District. Numerous stores and uses have occupied the locus building over the years since 1975.

Under the current Zoning Ordinance a structure in a Commercial District may have a FAR (floor area ratio) of 0.40 for commercial uses, but no more than 0.28 for retail uses. The existing FAR at the locus is 0.65. See Exhibit D, Beals + Thomas , Calculation Summary attached hereto. The existing FAR exceeds that permitted by right. All uses in the existing building are by right uses in a Commercial Zoning District.

The site plan submitted with the application, shows the existing footprint of the structure in black ink. The proposed alterations are shown in red ink.

2. *The proposed alteration shall replace the existing exterior wall with a new glass façade to the building. The proposed alteration shall not exceed 10 % of the ground floor area of the building.*

The Petitioner shall be removing the existing exterior wall of the building as it faces Waverley Oaks Road and replacing it with a glass façade wall. The façade shall replicate the existing glass façade on the north end of the building. This is simply Phase 2 and 3 of the modernization of the structure. With the addition of the glass façade the building is extending beyond the existing footprint by inches. Over the length of the building of the middle third of the building, Building C, and the south third of the building, Building B, which are combined about 300 feet, the inches add up.

The ground floor area of the existing building is 103,426 square feet. In the aggregate of the proposed alteration the Petitioner shall be adding approximately 210 square feet of gross floor area. Under the Ordinance we are permitted an increase in floor area up to 10 % or 10,342.60 square feet. Here, the Petitioner is proposing to add 210 square feet which is only 0.20 % of the existing ground floor area. This is less than 1 %.

3. *The proposed alteration of the new façade shall not be substantially more detrimental to the neighborhood from the existing exterior wall.*

The building on the locus has many different tenants, and many different types of uses. The new and improved look to the building will allow the Petitioner to continue to attract new tenants and new industries to the site.

The proposed alteration shall improve the locus by adding a glass façade to an existing building. This will add a modern look to the almost 50 year old structure. The new and improved look will be an aesthetic improvement to the locus.

The existing parking spaces on the locus, as recently improved, have served the locus property without being a substantial detriment to the neighborhood. One more parking space will not affect parking at the site.

### **AMENDMENT**

Massachusetts General Laws, Chapter 40A, §10, provides that "...The permit granting authority may impose conditions, safeguards and limitations of both time and use, . . .". As with most approved Zoning Board of Appeals decisions, the Board imposed a condition in Case no. 2015-20. It stated at Condition No. 2 that the approved construction and use of the premises needed to conform to the plans filed therewith. In

Case No. 2015-20 a special permit was granted to allow the petitioner to add eight parking spaces at the site by converting standard spaces into compact spaces. This was done for the outdoor patio at City Streets. In Case No. 2018-02 a special permit was granted to allow the petitioner to modify and add compact parking spaces to accommodate the Mighty Squirrel Brewery and its associated Tap Room. Our modified plans simply allow the alteration of the glass façade to the existing exterior wall of the building. No other site work or parking designs are proposed. We are seeking to amend the prior plans to show the new façade. The existing parking plan as approved in Case 2018-02 shall remain unchanged. We contend that these changes will improve the site without any detrimental effect to the locus or the neighborhood. The net effect of the proposed change shall increase the FAR of the locus by 0.0007. This increase does not affect the recognized FAR of the site of 0.65.

As required by any Zoning Board of Appeals case, this petition has been advertised and noticed to all abutters within 300 feet of the property, as well as posted on municipal posting boards. The proposed change does not change the intent or effect of the decisions in Case No. 2015-20 or Case No. 2018-02.

Thus having met all of the requirements of the Ordinance to allow the alterations, a new façade wall, to the non-conforming structure, the Petitioner respectfully requests that this Board of Appeals to grant the Special Permit and requested amendments to existing decisions relevant thereto.

DBC I, Inc.  
By its Attorney,

/s/ Joseph M Connors, Jr.

Joseph M. Connors, Jr., Esq

BBO# 548622

Law Office of Joseph M. Connors, Jr., P.C.

404 Main Street

Waltham, Massachusetts 02452

(781) 893-8200