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Massachusetts Land Court,
Department of the Trial Court,.
Essex County.

160 MOULTON DRIVE LLC, Plaintiff,
v.
Brian SHAFFER, John Fallon, Anders Youngren, Eric Chisholm, and Anthony Moccia, as Members of the Town of Lynnfield Zoning Board of Appeals, the Town of Lynnfield Zoning Board of Appeals, and the Town of Lynnfield, Defendants.

MISCELLANEOUS CASE
NO. 18 MISC 000688 (RBF)
|
Dated: December 11, 2020

DECISION

Robert B. Foster, Justice

Introduction

***1** Private businesses that serve the public can sometimes become cherished places, institutions that are associated with family history and local lore. Ballparks, for example, are often civic edifices larger in the public memory than even their owners might realize. Other gathering places, such as restaurants, can also become more than a business, but a fond site of family gatherings and remembrances. But not all these cherished institutions endure. For every Fenway Park or Wrigley Field standing today as quasi-public monuments, there is a Shibe Park in Philadelphia or Ebbets Field in Brooklyn, cherished at one time but abandoned and dismantled decades ago. Times change, tastes change, and seemingly permanent institutions pass into memory.

The Bali Hai restaurant in Lynnfield seems to have been such a cherished restaurant. From its start sometime in the 1950s, it was a place for family dinners, first dates, or a fast meal after a little league game at the neighboring park. Its large exotic sign, visible from Interstate 95, was a landmark to passers-by both on the highway and the local roads. Whether it was a decline in quality or the effect of a sound barrier on I-95 that blocked its sign, the Bali Hai saw less and less business until it finally closed its doors on New Year's Eve 2018.

The Bali Hai was there so long that it was a lawful nonconforming use. The new owner of the Bali Hai property, plaintiff 160 Moulton Drive LLC (LLC), seeks to use the property for a different nonconforming use—a 23-unit market rate apartment building. This case is the LLC's appeal of the Town of Lynnfield Zoning Board of Appeals' (Board) denial of its application for a special permit for a change in lawful nonconforming use. The case was tried before me. Based on the evidence, and applying the applicable standard, I find that the Board erred in denying the application for special permit. The proposed apartment building may not be the Bali Hai, but it will not be substantially more detrimental to the neighborhood than the Bali Hai was or a new restaurant would be.

Like Shibe Park, the Bali Hai "had its time, and then its time was over. In some more time it will be forgotten. It is good to remember it as long as we can; but we cannot expect to remember forever." Bruce Kuklick, To Every Thing a Season: Shibe Park and Urban Philadelphia 1909-1976 196 (1991). That the restaurant is gone, and would be replaced by an apartment building, is simply part of the change that all towns experience. The Bali Hai may be fondly remembered, but the use of the property on which it stood must change, and go on.

Procedural History

The LLC filed its Complaint (Complaint) on December 21, 2018, naming as defendants the Board and its members, Brian Shaffer, Anthony Moccia, Anders Youngren, Eric Chisholm, and John Fallon, and the Town of Lynnfield (collectively, the Town). The Complaint has two counts: Count I, Judicial Review pursuant to G.L. c. 40A, § 17, and Count II, Declaratory Judgment pursuant to G.L. c. 231A, § 8. On February 4, 2019, the Town filed its Answer. The case management conference was held on February 11, 2019.

***2** The pre-trial conference was held on September 11, 2019. The court took a view on January 28, 2020. Trial was held on January 28, 29, and 30, 2020. Exhibits 1-47 were admitted. Testimony was heard from Matthew Palumbo, Peter Ogren,

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Stephen Sousa, Mohammed Saeed, James Emmanuel, Mark Fougere, Jeffrey Dirk, Jane Tremblay, and Arthur Bourque. The Plaintiff's Post-Trial Brief was filed on May 28, 2020. The Defendants' Post-Trial Brief was filed on May 29, 2020. The court heard closing arguments on June 5, 2020 by video conference, and took the case under advisement. This decision follows.

Findings of Fact

Based on the view[1], the undisputed facts, the exhibits, the testimony at trial, and my assessment of credibility, I make the following findings of fact:

1. The LLC is a Massachusetts limited liability company with a primary address of 33 Maple Street, Malden, MA 02148. Exh. 1.

2. The Town of Lynnfield is a town located in Essex County, Massachusetts, which was incorporated as a town in 1814, with an address of Lynnfield Town Hall, 55 Summer Street, Lynnfield, MA 01940. Exh. 1.

3. The Board is the board of appeals and special permit granting authority in and for the Town of Lynnfield, with an address of Lynnfield Town Hall, 55 Summer Street, Lynnfield, MA 01940. Exh. 1.

4. The Board is a three-person body with three regular members (including one chairperson) and two alternates. Exh. 1.

5. Brian Shaffer, Anthony Moccia, Anders Youngren, Eric Chisholm, and John Fallon are and were at all times relevant to this action regular or alternate members of the Board and residents of the Town of Lynnfield. Exh. 1.

6. The LLC is the owner of the property located at 160 Moulton Drive, Lynnfield, MA 01940 (property). The LLC agreed to purchase the property for $600,000 pursuant to a purchase and sale agreement dated May 22, 2018, by and between the LLC, as buyer, and the James W. Yee Revocable Trust u/d/t June 24, 1996 and the Lillie Yee Revocable Trust u/d/t June 24, 1996, as sellers (Yees), which authorized the LLC to engage in the permitting process that is the subject of this action on behalf of the Yees. The LLC took title to the property in December 2018 by a deed was recorded in the Southern Essex District Registry of Deeds in Book 37243, Page 518. Exhs. 1, 27.

7. The property is a lot of approximately 80,000 square feet. It is bound on the south by Moulton Drive, on the north by Newhall Park, and on the west by Oak Street. Just to the north of Newhall Park is Suntaug Lake. Moulton Drive runs east-west between Route 1 on the east and Summer Street on the west. Moulton Drive runs parallel to Interstate 95, which sits just south, almost abutting Moulton Drive. View; Exh. 30, pg. 2.

8. The property was originally the site of the Suntaug Lake Inn around the turn of the 20th century. Most recently, the site was home to the Bali Hai restaurant, which has existed since at least the 1950s. The current building, now quite dilapidated, was built in the 1970s after a fire destroyed the previous building. Once a bustling, busy restaurant, the quality of the establishment decreased over the past several decades, and the number of patrons steadily decreased. Witnesses disagreed as to whether the decline was a result of decreasing food quality or the construction of an acoustic barrier along I-95 that blocked the view of the restaurant from the highway. Whatever the reason, the Bali Hai restaurant closed and ceased business on December 31, 2018. Tr. 1-27: 16-23, 1-29: 12-14, 1-46: 18-20, 1-47: 1-5, 1-68: 4-8, 2-9: 3-19, 2-10: 11-17, 3-13: 4-17, 3-14: 19-24, 3-29: 13-25, 3-30: 1-15, 3-31: 1-8, Exh. 1, Exh. 3 pg. 2, Exh. 36, View.

***3** 9. The property is located in the Single Residence A (RA) zoning district pursuant to § 2.0 of the Lynnfield Zoning Bylaw (Bylaw). Exh. 1.

10. The only principal uses allowed as of right in the RA zoning district are single-family residential, various governmental/municipal/community uses, and uses protected by the Dover Amendment. Most commercial/business uses (including restaurants/bars) and all industrial uses are forbidden in the RA zoning district. Exh. 1.

11. The Bali Hai and its predecessor restaurants were a lawful, pre-existing, nonconforming use subject to the protections of G.L. c. 40A, § 6 and § 5.0 of the Bylaw; the Bali Hai building is a lawful, pre-existing nonconforming structure subject to the same protections. Exh. 1.

The Application

12. The LLC seeks to construct a 23-unit market-rate apartment building on the property (project). On July 10,

2018, the LLC filed an application with the Board for a special permit pursuant to § 5.2 of the Bylaw (application), to authorize a change in the pre-existing, nonconforming use of the property from commercial (restaurant/bar) to multifamily residential based upon a finding pursuant to G.L. c. 40A, § 6 and § 5.2 of the Bylaw that such change would "not be substantially more detrimental than the existing nonconforming use to the neighborhood" (finding), as well as site plan approval of the project pursuant to § 10.6 of the Bylaw (site plan approval.) Exh. 1.

13. Section 5.2 of the Bylaw states as follows: "The Zoning Board of Appeals may award a special permit to change a nonconforming use in accordance with this section only if it determines that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." Exh. 25, 260:15, § 5.2.

14. Section 5.2.1 of the Bylaw states: "The following types of changes to nonconforming uses may be considered by the Zoning Board of Appeals: 1. Change or substantial extension of the use; 2. Change from one nonconforming use to another, less detrimental, nonconforming use." Exh. 25, 260:15, § 5.2.1.

15. Section 10.5.2 of the Bylaw provides that special permits shall be granted by the special permit granting authority "only upon its written determination that the adverse effects of the proposed use will not outweigh its beneficial impacts to the Town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site." Further, the determination shall include consideration of "1. Social, economic, or community needs which are served by the proposal; 2. Traffic flow and safety, including parking and loading; 3. Adequacy of utilities and other public services; 4. Impacts on neighborhood character; 5. Impacts on the natural environment; and 6. Potential fiscal impact on Town services, tax base, and employment taking into account any proposed mitigation." Exh. 25, 260:90, § 10.5.2.

16. General Laws c. 40A, § 6, provides in relevant part: "Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." A change of use from one nonconforming use to another nonconforming use constitutes a "change" within the meaning of G.L. c. 40A, § 6. Exh. 1; Exh. 31, Admission 33.

***4** 17. Mr. Shaffer, Mr. Moccia, and Mr. Youngren were the members of the Board who presided over the application. Exh. 1.

18. On August 7, 2018, after due notice had been provided as required by G.L. c. 40A, the Board opened the public hearing on the application. Exh. 1.

19. The original application called for a three-story building with 32 apartments units. On September 10, 2018, the LLC modified its application and submitted its revised site plans to the Board. The amended plan reduced the number of proposed units from 32 to 23, the number of parking spaces from 83 to 72, reduced impervious surface areas by 2,901 square feet, reduced the building height from three stories (34 feet) to two stories (23 feet), removed a proposed curb cut on Oak Street, and modified the drainage system to direct runoff to a drainage system in Newhall Park instead of Oak Street. Tr. 1-33: 19-25, 1-83: 1-25, 1-84: 1-25, 1-85, Exh. 9, Exh. 13, Exh. 14.

20. Continued hearings of the Board's public hearing on the application were held on September 11, 2018, September 25, 2018, and November 20, 2018. Exh. 1.

21. At the November 20, 2018 continued public hearing, the Board voted by a margin of 2-1 to grant the LLC's application. This resulted in denial of the application, because a unanimous vote was required to approve the special permit. The Board declined to act on the request for site plan approval, deeming such request to be moot. The Board's decision in Case No. 18-18 (Decision) denying the LLC's application for the special permit was issued and filed with the Lynnfield Town Clerk on December 3, 2018. Exh. 1, Exh. 23.

22. The legal standard applied by the Board in the Decision was whether the project would be "substantially more detrimental than the existing nonconforming use to the neighborhood." Exh. 1; Exh. 31, Admission 36.

23. In its Decision, the Board stated that the two members who voted in favor of granting the special permit did so because the proposed change in use was to a residential use in a residential district and therefore not substantially

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more detrimental to the neighborhood. The member who voted against granting the Special Permit found that the proposed use "would be substantially more detrimental to the neighborhood than the existing restaurant use." That member considered that the Town of Lynnfield only allowed apartment buildings to be constructed for several proposals under G.L. c. 40B and as a development under G.L. c. 40R where "the Town went through extensive negotiations with the developer that resulted in a package of benefits for the town" that outweighed potential harms of the residences, but that this project's "zoning change" was requested "without the same benefits to the Town." The member also considered the testimony that (a) the increased tax revenue would not offset the extra cost of educating the school-age children predicted to be added to the school system, (b) increased police and fire calls were anticipated as a result of the change, (c) an "overwhelming majority" abutters and audience members in attendance at the November 20, 2018 hearing were opposed because they felt it would change the character of the neighborhood and not fit in with the surrounding properties, (d) the LLC could not guarantee parking spaces for use by the public attending little league baseball games at the adjacent Newhall Park, and (e) the "massing that [would] be a result of having a larger building in the vicinity of the smaller homes in the neighborhood and in close proximity to the baseball park." Exh. 23.

***5** 24. The Board's Decision did not reference any concerns about traffic created by the project, nor did it define or describe the "neighborhood" that the Board considered to encompass the property. Exh. 23.

The Property and its Prior Use

25. The property is approximately 80,000 square feet, more than five times the 15,000 square-foot minimum lot area in the RA district. Exh. 1; Tr. 1-72: 14-21.

26. While the Bali Hai restaurant has closed, the restaurant building and its signs remain on the property. The existing restaurant building is one story and 115 feet by 70 feet. It is dimensionally nonconforming pursuant to § 4.0 of the Bylaw--specifically, the building violates the applicable setback requirements. Exh. 1; Exh. 31, Admission 4; Tr. 1-44: 24-25, 1-45: 1-3; 1-72: 14-25; 1-73: 1-10; Exh 2; Exh. 29; view.

27. The existing restaurant building at the property is not fully compliant with the lighting requirements of § 6.4 of the Bylaw. Exh. 1; Exh. 31, Admission 5.

28. Doctor Mohammed Saeed, who has lived on Oak Street (the street abutting the property to its west) for 41 years, testified as to the condition of the Bali Hai property. His home is next to Suntaug Lake, across the street from Newhall Park, and he can see the back of the restaurant building from his home. Dr. Saeed testified that on occasion patrons of the Bali Hai would walk down Oak Street to Suntaug Lake and cause disturbances, throwing bottles and leaving litter behind. Tr. 2-4: 25, 2-5: 1-7, 2-7: 10-17, 2-12: 10-25, 2-13: 1-25; view.

29. When asked if, based upon his 41 years of living next to the Bali Hai, the restaurant had a detrimental effect on his neighborhood, Dr. Saeed responded "Yes, of course." Patrons would drink outside and cause disturbances. Dr. Saeed noted that he and his wife sometimes had to call the police when they heard fighting, but they were also fearful of property damage in retaliation for calling the police, as he had had lights in front of his house broken before. He also complained of the smell of Chinese food, and testified he could smell it from his home. He has had his property appraised several times, and the existence of the Bali Hai across the street has decreased his home's value. I credit Dr. Saeed's testimony. Tr. 2-13: 23-25, 2-14: 1-25, 2-15: 1-25, 2-17: 20-25, 2-18: 1-25, 1-19: 1-8, 13-19.

The Neighborhood

30. In terms of its size/layout/development and street access, the property is materially different from the majority of properties located in the Sherwood Forest, Greenhurst, and Wardhurst Park neighborhoods, as defined in the Complaint. Exh. 1; Exh. 31, Admission 39; view.

31. There are no other nonconforming commercially used properties located within a radius of 700 feet from the property. Exh. 1; Exh. 31, Admission 42; view.

32. Matthew Palumbo, a manager of the LLC and a 25-year resident of Lynnfield, described the property as being in South Lynnfield, an area comprising the southern half of the Town, with mixed residential and commercial uses near I-95. He described the property as being outside of the "Sherwood Forest" neighborhood, a "residential dense neighborhood" with small lots sizes and winding roads. I credit his testimony. Tr. 1-39: 14-25, 1-24: 6-9, 1-37: 6-24; view.

***6** 33. Dr. Saeed testified that the Bali Hai is the only commercial property in his neighborhood, and that his

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neighborhood was only composed of residences. I credit his testimony. Tr. 2-5: 1-7, 2-8: 3-7; view.

34. Arthur Bourque, a lifelong resident of Lynnfield, testified that the Bali Hai neighborhood is not made up primarily of single-family homes, but that there are a considerable number of multifamily projects in South Lynnfield. Tr. 3-33: 10-25, 3-34: 1-4, 3-35: 21-24; view.

35. Stephen Sousa testified that generally, single-family homes are between 26 and 32 feet tall. Tr. 1-132: 24-25, 1-133: 1-3.

Restaurant Use

36. Mr. Palumbo testified that if the project is not approved, the property will be used for a new restaurant, a sports bar with 350 seats that would serve food from 11:30 in the morning until 1:00 am. The LLC still retains the (now expired) common victualer's license, which permits the serving of alcohol on the premises until 1:00 am, and an entertainment license, which permits the restaurant to have a jukebox, pool tables, big-screen TVs, karaoke, and televisions. Tr. 1-41: 4-25, 1-42: 1-17, 1-47: 11-15; Exh. 16, Exh. 17.

37. The project would result in the elimination of the existing restaurant and alcohol service and on-site entertainment. Exh. 1; Exh. 31, Admission 25.

38. Insofar as it proposes the elimination of all existing alcoholic, food service, and entertainment licenses applicable to the property, the project would represent a use of land that is more consistent with surrounding residential uses. Exh. 1; Exh. 31, Admission 25.

Environmental Benefits of the Project

39. The property contains no mapped Natural Heritage Endangered Species Program (NHESP) protected species habitats or mapped MassDEP wetlands resources. Exh. 1; Exh. 31, Admissions 16, 17.

40. The property currently has 58,534 square feet of impervious surface area, or 72 percent of the total lot. In comparison, the project would have only 41,584 square feet of impervious surface area, or 51 percent of the lot, which is a reduction of 16,950 square feet of impervious surface. The reduction in impervious area will reduce both the volume and rate of runoff from the site. Exh. 2, Tr. 1-76: 18-25, 1-77: 1-10, 1-85: 25, 1-86: 1-10; view.

41. In order to manage stormwater runoff, the project includes adding a deep sump catch basin, a particle separator, and a level spreader to remove particulate matter in the runoff and dissipate the flow over a larger area. Ultimately, the project will reduce the total runoff and produce a cleaner runoff. Tr. 1-87: 2-16, 21-25; 1-88: 1-9.

42. Solely insofar as it would be subject to the requirements of compliance with MassDEP stormwater management standards and the Lynnfield Stormwater Management Bylaw, the project would represent an improvement of the existing condition of the property in terms of stormwater management. The property currently does not have any stormwater management, in contravention of the zoning codes, and stormwater currently flows untreated to Newhall Park. Exh. 1; Exh. 31, Admission 13. Tr. 1-78: 21-25, 1-79: 1-13.

43. The property currently has an outdated septic system that lies within 400 feet of Suntaug Lake, which supplies the City of Peabody with drinking water. The project involves installing a new septic system located beyond the 400-foot setback line, which would discharge at less than half the rate of the current septic system. Tr. 1-79: 14-25, 1-80: 1-25, 1-94: 1-22, Exh. 2.

***7** 44. The property currently has spotlights that do not comport with zoning. The project will have “dark-sky” compliant lighting, which will reduce the light pollution affecting surrounding neighbors and comply with zoning requirements. Tr. 1-78: 5-19, 1-134: 14-18, 1-138: 17-25, 1-139: 1-2, Exh. 3 pg. 3.

Dimensional Conformity of the Project

45. Under the application for the project, the dimensionally-nonconforming Bali Hai restaurant/bar building (as well as the existing 107-space parking lot, signs, lighting poles, and septic system) would be razed and replaced with a new 23-unit residential apartment building, as shown on the engineering site plans and architectural plans submitted in support of the application (proposed building). Exh. 1, Exhs 2-4, Exh. 9, Exh. 13; Tr. 1-74: 14-17, 1-31: 15-25, 1-32: 1-23, 1-34: 12-16.

46. The current building--the Bali Hai restaurant-- is 27 feet tall from its highest point to the ground. The proposed building would be 26 feet tall, a reduction of one foot, and two stories as opposed to just one. The proposed building would have 23 units, 9 one-bedroom and 14 two-bedroom, for a total

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of 37 bedrooms, and would total 28,000 square feet of floor area. Tr. 1-73: 12-15, 1-113: 23-25, 1-123: 3-6, 1-126: 5-11, 1-136: 5-12, Exh. 3 pg. 8.

47. The October 16, 2017, recodification of the Bylaw, at § 4.1.2, does not contain any dimensional requirements with respect to building height. Exh. 1; Exh. 31, Admission 40.

48. The dimensions of the proposed building are roughly 184 by 90 feet, whereas the Bali Hai building is 110 by 70 feet. The "lot coverage," or ratio of the lot occupied by a structure, would increase from 9.8 percent to 17 percent. In the RA district, a lot coverage of up to 35 percent is permitted. Tr. 1-101: 16-24, 1-103: 18-25, 1-104: 1-5, 1-108: 9-12, 1-114: 1-13, Exh. 2, Exh. 4.

49. The proposed building would fully comply with (1) all dimensional requirements under § 4.0 of the Bylaw, including lot area, lot frontage, lot coverage, distance to street center lines, front/side/rear setbacks/yards, and height; (2) all parking requirements under § 6.2 of the Bylaw; (3) all access requirements under § 6.3 of the Bylaw; and (4) all lighting requirements under § 6.4 of the Bylaw. Exh. 1, ¶ 28; Exh. 31, Admission 6; Tr. 1-127: 18-25.

50. A building identical in size, location, and dimensions to the proposed building would, if used as a single-family residence, fully comply with §§ 4.0, 3.1, and Appendix X of the Bylaw, and thus would be allowed as a matter of right under these sections. Exh. 1; Exh. 31, Admission 7.

51. The project would therefore result in the elimination of the existing, dimensionally nonconforming building at the property. Exh. 1; Exh. 31, Admissions 4 and 6, Tr. 1-128: 4-7.

Aesthetics and Screening

52. The existing property has an open, expansive paved area and little vegetation, with the exception of the trees at the rear and eastern property boundary, and some scrub vegetation bordering the parking lot along Oak Street. Tr. 2-36: 12-25, 2-38: 6-16, Exh. 3 pg. 2, View.

53. The property currently has three signs that will be removed as part of the project. The largest sign is 23 feet tall, and 137 square feet, and was described by an abutter as "very old, "half broken and rusted," "never cleaned," and "very shabby looking." The project would have a granite block sign, three feet tall and six feet wide, much smaller than the existing signage. Tr. 1-77: 17-25, 1-78: 1-4, 1-137: 8-21, 2-11: 1-4, Exh. 3 pg. 6, View.

***8** 54. The proposed building would be located 71 feet back, or east, from the existing location of the Bali Hai from Oak Street in order to create additional buffer between the proposed building and the residences on Oak Street. Tr. 1-129: 3-19.

55. The existing restaurant building is a 1970s-era commercial building with "no relationship to the existing neighborhood" in terms of its architectural elements and is in poor repair. The proposed building, in contrast, is designed with "residential materials": clapboard, asphalt shingles, Tuscan columns, a porch or portico, and a mansard roof to give it a "residential flavor." Tr. 1-126: 15-25, 1-127: 1-17, 1-128: 17-23, Exh. 3 pg. 6, View.

56. In designing the proposed building, Stephen Sousa incorporated a "mansard roof" with dormers that comes down to 13 feet above the ground, shielding the second story to lower the "massing" impacts and to bring the scale down to fit in with the single family homes in the neighborhood. Additionally, the proposed building is not a rectangle, but has 12-foot bays that serve to break up the building horizontally. In other words, the bays and projections mask the massing of the proposed building horizontally, and the dormers mask the massing vertically. I credit his testimony. Tr. 1-124: 2-25, 1-125: 1-19, Tr. 1-135: 17-25, 1-151: 13-25, 1-152: 1-24, Exh. 3 pg. 2-6.

57. The project will add a row of deciduous trees and shrub plantings along Moulton Drive on a lawn area between the road and the parking lot, leaving a gap around the driveway for visibility. A row of shrubs will be added along the eastern boundary of the parking lot to "naturalize" the border with the property to the east. Tr. 2-44: 13-25, 2-45: 13-24, 2-48: 15-25, Exh. 4.

58. The project will remove the scrub vegetation along Oak Street and replace it with an evergreen screen and an opaque 6-foot fence, to provide increased screening to the properties on Oak Street year-round. Evergreens will also be added to the western end of the northern boundary of the property, to screen the parking lot further from the properties along Oak Street. Tr. 2-46: 3-25, 2-47: 1-20, 2-48: 3-6, Exh. 4; View.

59. The project will also add a live grass perimeter around the parking lot and around the proposed building. The proposed

building itself will also be screened somewhat by additional deciduous trees and shrubs to help blend the building into the residential neighborhood. Tr. 2-50: 2-18, 2-56: 1-15, Exh. 4.

60. The abutting property to the east as well as Newhall Park to the north would be shielded by existing trees running along the property's northern and eastern boundaries that would remain if the proposed building is constructed. The abutter to the east is also uphill from the property; the 12-foot grade will provide some buffer. Tr. 1-58: 14-25, 1-59: 1-9, 1-129: 11-15, 2-40: 19-23, Exh. 4.

61. James Emmanuel, the landscape architect, testified that once the proposed trees will mature, the proposed building will be "subordinate" to the trees, because the building will be shorter. He also testified that the landscape plan, originally designed for the initially proposed three-story building, would be adequate and sufficient to screen even a three-story building. I credit his testimony. Tr. 2-54: 4-16, 2-57: 20-25, 2-58: 1-16, Exh. 13.

Traffic and Parking

***9** 62. The property currently has three curb cuts, two on Moulton Drive and one on Oak Street. The Project would reduce that number to only one, on Moulton Drive. Expert witness Jeffrey Dirk testified that the reduction in curb cuts is a benefit, because it reduces the number of "conflict points," or the potential for motor vehicle accidents. I credit his testimony. Tr. 1-81: 16-25, 1-82: 1-2, 1-85: 1-19, 2-114: 6-25, 2-115: 1-7; View.

63. Mr. Dirk prepared a Transportation Impact Assessment for the project. He found that Moulton Drive accommodates 1,456 vehicles per day, and 105 vehicles per hour during the morning peak traffic hours and 129 per hour during the evening peak hours, which he characterized as being a "very low volume" for the type of roadway. I credit his testimony. Tr. 2-107: 4-19, 2-127: 9-25, 2-128: 1-4, 2-134: 11-17, Exh. 5 pg. 9.

64. Mr. Dirk testified that the project will produce no more than ten vehicles at any point on the roadway over a one-hour period, or one additional vehicle every six minutes, which is effectively imperceptible. The project, Mr. Dirk found, would not change the level of service and queuing at the nearby intersections, and even during peak hours, the delay on Moulton Drive would be less than one second. Because the traffic volumes on Moulton Drive are so low, even resuming the restaurant use would not change the level of service at nearby intersections. However, the residential use at the driveway will be an improvement over the restaurant, due to the lower number of trips during peak evening hours. I credit his testimony. Tr. 2-163: 8-19, 2-164: 1-9, 2-167: 18-25, 2-168:1-25, 2-170: 12-25, 2-177: Exh. 5 pg. 17, 20-21, Exh. 42.

65. As part of the Transportation Impact Assessment, Mr. Dirk estimated the amount of traffic that would be generated by the project and its impact on existing traffic patterns. He estimated that the number of total trips added per day would be 134, 67 into the driveway and 67 out. During peak morning hours, he estimated there would be 9 vehicles exiting and 3 entering the property, and during peak evening hours, there would be 10 vehicles entering and 6 exiting. That is, during a peak morning hour, the project would generate 12 vehicle trips, and 16 trips during a peak evening hour. In comparison, he estimated that the prior restaurant use, if continued, would generate 876 vehicle trips per day, or 742 more trips than the proposed use. During peak morning hours, there would be no trips at a restaurant that does not serve breakfast, so the project would have 12 additional trips during peak morning hours. However, during the evening peak hours the restaurant would generate 76 trips, or 60 more trips per hour than the proposed development. Thus, the restaurant use would have much more of an impact on the transportation infrastructure in the area, whereas the proposed apartment use would significantly reduce traffic in the neighborhood. I credit his testimony. Tr. 2-150: 13-24, 2-154: 3-7, 2-155: 1-23, 2-158: 16-25, 2-159: 1-25, 2-160: 1-25, 2-161: 1-7, 2-179: 5-8, Exh. 5 pg. 15-16.

66. In accordance with the methodologies of the Institute of Transportation Engineers, the development of the property with 23 residential apartments would have a lesser traffic impact than a 350-seat restaurant. According to Mr. Dirk, there is no restaurant use he could find of any size that would generate less traffic than a 23-unit residential community. I credit his testimony. Exh. 1; Exh. 31, Admission 14, Tr. 2-188: 22-24.

***10** 67. The project contains a total of 72 parking spaces, 56 for the apartment tenants and their guests and 16 for little league games at Newhall Park. The property currently contains 105 spaces, below the minimum number required for the restaurant. The property is, therefore, currently non-compliant with respect to parking spaces. The proposed use has no parking requirements under the bylaws. Tr. 1-56: 3-25, 1-57: 1-3, 1-89: 1-25, 2-115: 17-25, 2-116: 1-2, Exh. 5 pg. 5.

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68. The total number of parking spaces for the project is adequate to serve a project of this type. Tr. 2-115: 19-25, 2-116: 1-5.

69. At present there is no law, regulation, agreement, or any other basis for any claim of a public right to use any portion of the property for Newhall Park parking. The project nonetheless includes 16 parking spaces in a designated parking area to provide overflow parking to Newhall Park for little league baseball during the baseball season, which would serve as additional parking for the building's residents and guests during the off-season. Exh. 1; Exh. 31, Admission 20; Tr. 1-34: 23-25, 1-35: 1-19.

Fiscal Impacts: School-Aged Children, Police and Fire, Employment

70. Mr. Palumbo estimates that the project's apartments will rent for $2,300/month for 1-bedroom units, and $2,800/month for the 2-bedroom units. Tr. 1-59: 16-18.

71. Expert witness Mark Fougere analyzed the tax revenues of the Bali Hai restaurant and compared them with the tax revenue that is likely to be generated by the project. He found that the Bali Hai generated $26,945 per year. The 23-unit apartment project would generate $63,296 per year, for an increase of $36,351. I credit his testimony. Tr. 2-73: 23-25, 2-74: 1-23, 2-75: 8-25, 2-76: 1-11, 2-91: 2-4, Exh. 11.

72. Mr. Fougere also ran an analysis to estimate the project's impact on schools. Analyzing the number of children in comparable market-rate units, he estimated that the number of children per two-bedroom unit is .161. Generally, one-bedroom units don't generate school-aged children. Using that ratio, the project would likely generate three children, but as a "conservative" estimate, Mr. Fougere estimates it would result in four school-aged children. I credit his testimony. Tr. 2-76: 12-14, 2-77: 1-16, 2-79: 2-4 & 9-22, 2-80: 20-25, 2-81: 1-6 & 21-25, 2-82: 1-3. Exh. 10.

73. An analysis extrapolating the rate of school-aged children from affordable housing units and applying it to market-rate units is inaccurate, because the number of school-aged children in affordable housing units can be "four to six times higher" than that for market-rate units, according to Mr. Fougere. I credit his testimony. Tr. 76: 25, 2-77: 1-4, 2-79: 24-25, 2-80: 1-10.

74. Of the four school-aged children Mr. Fougere estimates the project would generate, he estimates that two would attend the elementary schools in Lynnfield, and the other two would be in middle or high school. I credit his testimony. Tr. 2-82: 4-23.

75. If students were to live at the project, the elementary school they would attend would be the Huckleberry Hill School. Tr. 2-87: 6-18, 2-199: 12-17.

76. Mr. Fougere analyzed the current number of students at the Huckleberry Hill School, and while he noted that the school enrollments have been increasing, he also testified that two additional students will not bring the school over capacity. All the classrooms are above the "optimum" student-teacher ratio, but none of them are above the maximum recommended size. I credit his testimony. Tr. 2-87: 6-25, 2-88: 1-24.

***11** 77. According to expert witness Jane Tremblay, the Superintendent of Lynnfield Public Schools, the enrollment at the Huckleberry Hill School has "skyrocketed" in recent years, from 405 students in 2015 to 431 in the 2018-2019 school year. At the time of trial, there were 462 students enrolled at the Huckleberry Hill School. I credit, however, the evidence that even at that time, there were 40 total open spaces at the Huckleberry Hill School, and none of the grades were at capacity under the Town's own guidelines. The remaining schools in the district, the Summer Street Elementary School, the middle school, and the high school, have not had capacity issues. Tr. 2-201: 14-18, 2-217: 8-12, 2-218: 2-25, 2-219: 1-7, 2-220: 10-25, 2-221: 1-25, 2-222: 1-23, Exh. 44, Exh. 45.

78. Mr. Fougere ran an analysis to estimate the difference in emergency calls to the Bali Hai restaurant and what would likely be generated by the project. He estimated that the Bali Hai averaged 12 police calls per year, and that the project would likely generate 8.4 calls per year. I credit his testimony. Tr. 2-69: 25, 2-70: 1-25, 2-71: 1-25, 2-72: 1-2 & 12-25, 2-73: 1-22, Exh. 12.

79. The property currently has no fire hydrants on the site. The project would have two. Tr. 1-81: 13-15, 1-91: 2-6.

80. Mr. Palumbo testified that the proposed apartment building would likely employ five to six people full-time. He could not estimate the number employed by a restaurant, but guessed it would likely be a higher number. Tr. 1-48: 10-25.

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Discussion

Legal Standard
The denial of a special permit by a local zoning board is reviewed under a two-part framework, involving "a combination of de novo and deferential analyses." *Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 461 Mass. 469, 474 (2012). The first step involves determining "whether the board's decision was based on 'a legally untenable ground' or ... on a standard, criterion or consideration not permitted by the applicable statutes or by-laws." *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003), quoting *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). A judge must give "substantial deference" to the board's interpretation of its bylaws and uphold a reasonable construction of the board, due to its "special knowledge" of the history and purpose of the bylaws. *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 381 (2009) (internal citations omitted).

If the board has used proper criteria and standards in making its decision, the second step for the court is to determine, "on the basis of the facts it has found for itself," whether the denial of the special permit was unreasonable, whimsical, capricious or arbitrary. *Britton*, 59 Mass. App. Ct. at 74. This step is highly deferential and the board's decision may only be overturned if "no rational view of the facts the court has found supports the board's conclusion that the applicant failed to meet one or more of the relevant criteria found in the governing statute or by-law." *Id.* at 75.

The Board's Interpretation
The first step, then, is to determine whether the Board's interpretation of the Bylaw was "legally untenable." General Laws c. 40A, § 6, provides that "[p]re-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority [...] that such change, extension or alteration *shall not be substantially more detrimental than the existing nonconforming use to the neighborhood*" (emphasis added). While § 5.2 of the Bylaw incorporates this standard for changes or extensions to preexisting nonconforming uses, § 5.2.1.2 and the special permit criteria of § 10.5.2 seem to require an additional finding by the Board that a new nonconforming use is "less detrimental" or has more of a potential beneficial impact than the preexisting nonconforming use. The Town argues that this stricter "less detrimental" standard is the one to be used in evaluating the Decision. However, the standard actually applied by the Board, as stipulated by the parties, was the "substantially more detrimental to the neighborhood" standard of G.L. c. 40A, § 6, and not the more stringent one of Bylaw §§ 5.2.1.2 and 10.5.2. See Exh. 1, ¶ 39; Exh. 31, Request 36. The "substantial deference" owed to the Board is to the reasonable construction of the Bylaw it used when it was considering the application. *Wendy's Old Fashioned Hamburgers of N.Y., Inc.*, 454 Mass. at 381-382. It appears that the Board, facing a conflict in the Bylaw between the "substantially more detrimental" standard of § 5.2 and the more stringent standard of §§ 5.2.1.2 and 10.5.2, chose to apply the § 5.2 standard in the Decision. It is that interpretation that I analyze with deference to the Board.

***12** The Board's interpretation of the Bylaw has not been shown to be "legally untenable." The Board's interpretation of the Bylaw as not placing any additional restriction above and beyond the requirements of G.L. c. 40A, § 6, is reasonable. The oft-cited principle is that G.L. c. 40A, § 6, " 'sets the floor' throughout the Commonwealth for the appropriate protections from local zoning bylaws to be afforded properties and structures protected under that statute." *Bellalta v. Zoning Bd. of Appeals of Brookline*, 481 Mass. 372, 386 (2019), quoting *Rourke v. Rothman*, 448 Mass. 190, 191 n.5 (2007). In *Bellalta*, issued just last year, the Supreme Judicial Court upheld the Brookline Zoning Board of Appeals' determination that its bylaws required no more than the statutory "finding of no substantial detriment" when considering issuing a permit to extend a preexisting nonconforming use, although its bylaws otherwise would require a variance to make such a modification. *Id.* This holding puts in question an earlier Appeals Court decision that towns may place additional restrictions on changes from one nonconforming use to another nonconforming use. See *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32, 38-39 (1991). In light of this caselaw, it was reasonable for the Board, which knows its Bylaw best, to apply § 5.2's incorporation of the standard under G.L. c. 40A, § 6.

Having found that the Board's Decision was not based upon a "legally untenable" standard, but that it was entitled to interpret its Bylaw as simply requiring a finding of no substantial detriment to the neighborhood, the next question is, "on the basis of the facts [the court] has found for itself," whether the denial of the special permit was "unreasonable,

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whimsical, capricious or arbitrary." *Britton*, 59 Mass. App. Ct. at 74. If "any reason on which the board can fairly be said to have relied has a basis in the trial judge's findings" and could support a rational Board's denial of the permit, the Decision must be sustained. *S. Volpe & Co. v. Board of Appeals of Wareham*, 4 Mass. App. Ct. 357, 360 (1976). This analysis is "highly deferential," such that only in those "rarely encountered points where no rational view of the facts" found by the court could support the denial of the permit should the decision be overturned. *Britton*, 59 Mass. App. Ct. at 74-75.

Under the Board's interpretation of the Bylaw, the special permit should issue upon a finding that the change in the nonconforming use "shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." G.L. c. 40A, § 6. The question, then, is whether any rational view of the facts before me at trial could support a finding that the project, a nonconforming multifamily use, would be substantially more detrimental to the neighborhood than the lawful nonconforming restaurant use.

The first step in this analysis is to define the terms "substantially," "detrimental," and "neighborhood." The term "substantial" is not extensively defined in caselaw, nor is it defined in § 6. Statutory words and phrases are to be "construed according to the common and approved usage of the language." G.L. c. 4, § 6. Of course, the meanings must be consistent with the statutory purpose. See *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369 (1977); *Commonwealth v. Gove*, 366 Mass. 351, 354 (1974). Merriam Webster's Dictionary defines "substantial" as "consisting of or relating to substance," "not imaginary or illusory," or "important, essential." *Substantial*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/substantial (last visited, Dec. 1, 2020). Next, "detrimental" is defined by Merriam Webster's Dictionary as "obviously harmful" or "damaging." *Detrimental, Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/detrimental (last visited Dec. 1, 2020). To be "substantially more detrimental," then, there must be evidence of more than a minor increase in harm or damage; there must be a detriment that is more than de minimis or perceptible, bearing in mind that the policy behind the statute is to eventually eliminate nonconforming uses. See *Blasco*, 31 Mass. App. Ct. at 39.

***13** "Neighborhood" is "an elastic, comprehensive term the specific meaning of which will depend on the facts and circumstances of each particular situation," but "generally refers to the immediate environs of the subject property." *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349, 362 n.16 (2001), citing Bobrowski, Massachusetts Land Use and Planning Law § 6.3.2., at 232 n.11 (1993). In *School Committee of Springfield v. Board of Education*, 362 Mass. 417 (1972), the Supreme Judicial Court had the opportunity to define the term in the context of a school de-segregation law:

> The word 'neighborhood,' as used in every day conversation, suggests a section of a city or town, identifiable as such by its history or geography, where people are generally known to each other or where they live in some proximity to each other. It will sometimes, but not always, be defined by natural or other physical boundaries or by an electoral or a zoning district. At the very least, however, the word signifies nearness, as opposed to remoteness, from home.

Id. at 439. In its Decision, the Board failed to define the "neighborhood" in which the Bali Hai restaurant sits. From its face, it is impossible to ascertain what boundaries the Board considered to constitute the "neighborhood." I cannot defer to an interpretation that was not made, nor will I attempt to draw boundaries as to the true neighborhood of the Bali Hai restaurant. However, in considering the evidence presented at trial, it is clear which impacts could be considered to have an effect upon the neighborhood, and which are effects not upon the neighborhood, but upon the town as a whole. Those effects that are felt by proximal neighbors are those that are an impact upon the neighborhood.

Finally, the statutory standard requires that the proposed use be compared with the *existing* nonconforming use. While there was a great deal of evidence heard at trial regarding the Bali Hai restaurant, it is important to note that the relevant comparison is not with the Bali Hai in particular, but with the restaurant use generally. Altogether, then, the Board's denial of the special permit must be upheld if the facts could be rationally interpreted to show that the project would be perceptibly more harmful to the immediate environs and close neighbors of the property than the restaurant use was or will be.

Application to Facts

The Town has advanced a number of reasons that it argues the Board "can fairly be said to have relied" upon in denying the special permit. *S. Volpe & Co.*, 4 Mass. App. Ct. at 360. In reviewing the argued detriments, it is important to bear in mind that "it is 'the board's evaluation of the seriousness of

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the problem, not the judge's, which is controlling.' " *Britton*, 59 Mass. App. Ct. at 76 (internal citations omitted).

In its post-trial brief, the Town argues that the following aspects of the project are detrimental: (1) the financial impact on the town and the schools would be detrimental, due to the projected increase in the school-aged children produced by the Project; (2) the aesthetic qualities of the community would be impacted by having a larger building near the smaller homes in the neighborhood and impact neighborhood character; (3) the apartment use would impact the lot density on the Property; (4) the removal of the restaurant use would remove a "neighborhood amenity"; (5) the Project would employ fewer people than a restaurant use; and (6) traffic in the morning hours will be increased. I consider each argument in turn.

Financial Impact of School-Aged Children

***14** The Town argued both at trial and in its post-trial brief that the financial impact on the Town of educating the number of school-aged children projected to live in the project's apartments would be greater than the increased tax revenue, thus making the apartment use "substantially more detrimental" than the existing restaurant use. As the basis for considering this impact, the Town points to § 10.5.2 of the Bylaw, which requires the Board to consider the "[p]otential fiscal impact on Town services [and] tax base" before approving a special permit. Exh. 25, 260:90. I find this argument unconvincing for several reasons.

First, the cost of educating the school-aged children predicted to be added to the school system by the project is not an interest under G.L. c. 40A or the Bylaw that can justify denying a finding of no substantial detriment. While fiscal impact may be a consideration in the Bylaw, there is no requirement that an applicant seeking a special permit must prove that its development will not increase the number of school children or pay for itself in terms of tax revenue. The Town cannot deny a permit on the grounds that its own property tax scheme is insufficient to provide for the needs of its inhabitants. Whether the Town has enough funds to provide public education for its school-aged children is simply not a matter for the Board to consider in reviewing special permit applications.

Only just last month, the Land Court had an opportunity to address this same argument in the context of a denial of a special permit to construct an eight-unit multi-family building in Gloucester, Massachusetts. See *Bevilacqua Co., Inc. v. Lundberg*, Land Court 19 Misc. Case No. 000516, 2020 WL 6439581 (November 2, 2020). Citing the "education clause" of the Massachusetts Constitution, the court held that basing the denial of the permit on the potential fiscal impacts of educating the predicted number of school-aged children in the condominium would deny those children their constitutional right to a public education, and therefore could not be a valid basis to deny a special permit. *Id.*, 2020 WL 6439581, *8-9. I agree. The Massachusetts Constitution Pt. II, c. 5, § 2 imposes "an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live." *McDuffy v. Secretary of Executive Office of Educ.*, 415 Mass. 545, 621 (1993). Denial of a special permit on the grounds that increased tax revenue would not support the education of the children living therein is tantamount to conditioning the availability of public services on the ability of the residents to pay for them, which I find to be unreasonable and arbitrary. See *Emerson College v. City of Boston*, 391 Mass. 415 (1984).

Second, the alleged impact upon the school system is not a neighborhood impact. Town fiscal policy and capacity concerns in the elementary schools are an impact upon the Town as a whole, not any particular neighborhood. The Town describes the area served by the Huckleberry Hill School as "South Lynnfield." South Lynnfield is not a neighborhood—it is half of the Town. There was no evidence at trial defining geography or zoning or neighborhood character that would justify defining "South Lynnfield" as the neighborhood in which the property is located. Neither Mr. Bourque, who claimed to be in the neighborhood of the Bali Hai restaurant, nor Dr. Saeed testified as to the impacts upon the immediate environs of the Bali Hai should school-aged children living in the project attend the Huckleberry Hill School. On the record before me, I cannot find that the apartment use would be "substantially more detrimental to the neighborhood" because of the school children living there, because there is simply not enough evidence that anyone in the neighborhood would perceive any such detriment.

***15** Third and finally, even if I did accept that the effect upon school enrollment in the Huckleberry Hill School was a proper consideration for the Board in considering the application, there is insufficient evidence that there would be any perceptible cost increase of educating the school-aged children predicted to be added to the school system. The LLC's expert, Mr. Fougere, estimated that there would be

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up to four school-aged children living in the project. Even assuming that all four would be *added* to the school system, as opposed to moving within it, two would be added to the Huckleberry Hill School, and the other two would likely be in the middle school and high school. The Huckleberry Hill School, the only school in Lynnfield's Public School alleged to have capacity issues, has room in every grade level for at least two students. Exh. 45. Seeing as there is no evidence before me as to how much that slight increase would actually cost the school system, I cannot find it to be "substantial." There is no credible evidence before me that such a minor increase would lead to any detriment to the neighborhood.

Aesthetic Qualities of the *Neighborhood*

Next, the Town argues that the Board could reasonably have denied the permit due to concerns about a "larger building in the vicinity of the smaller homes in the neighborhood and in close proximity to the baseball park." Exh. 23, pg. 3. It would "loom" over the neighborhood, the Town argues, and cover a larger portion of the lot area.

This argument also fails. First, it has been stipulated and conceded that a "building identical in size, location, and dimensions to the project would, if used as a single-family residence, fully comply" with the Bylaw. Exh. 1. In contrast, the existing Bali Hai building actually does violate the setback requirements. I find it arbitrary to deny a special permit for a change in *use* on the basis that the *structure* would have an impact upon the neighborhood. This situation is easily distinguishable from *Britton*, where the application was for the extension of a nonconforming structure by increasing its height and expanding it into the setback area, which would increase its structural nonconformity. *Britton*, 59 Mass. App. Ct. at 72. Here, the proposed building would be fully compliant with the dimensional requirements of the Bylaw and therefore bring the property into compliance in that respect. Having failed to articulate how a building that is fully compliant with Town's Bylaw can be more detrimental, much less substantially more detrimental, than the existing nonconforming building to the neighborhood, I reject this justification as a basis for the Board's Decision.

Impact on Density

The Town next makes the argument that the Board was entitled to reject the application on the basis that it would increase the residential density above the three units per acre ceiling set by the Bylaw for the RA district. Exh. 25, 260:11. This argument, in light of the evidence heard at trial, also fails to establish that the proposed use would be "substantially more detrimental to the neighborhood" than the existing restaurant use, which by definition is also in violation of the Bylaw. The Town failed once again to introduce any evidence at trial that the "density" of the apartment use would be "substantially more detrimental" than that of the existing restaurant use. The restaurant use permits 350 seats. Tr. 1-41, 42. The project will have 23 apartments. There is simply not enough evidence before me to conclude that the density of the residents of 23 one and two-bedroom apartments will cause the project to be substantially more detrimental than the density of the existing restaurant use. "The board is obligated to apply its own standards rationally. It may not conclude that an expansion will be substantially more detrimental to the neighborhood in the absence of credible evidence." *Shirley Wayside Ltd. P'ship*, 461 Mass. at 485.

The Board cannot deny a permit on the basis that a use is not permitted under the Bylaw—otherwise, the Board could circumvent G.L. c. 40A, § 6, and its own Bylaw by fiat. When a bylaw, as here, "permits expansion of nonconforming uses, it 'unequivocally rejects the concept that nonconforming uses or structures must either fade away or remain static.' " *Shirley Wayside Ltd. P'ship*, 461 Mass. at 484-85, citing *Titcomb v. Board of Appeals of Sandwich*, 64 Mass. App. Ct. 725, 730 (2005). Thus, the Board's concerns about density and the Bylaw's prohibition against market-rate apartment housing are unavailing without evidence of detriment caused by such density.

Loss of a Neighborhood Amenity

***16** Next, the Town argues that the Board was within its power to reject the application because the restaurant played a "useful role" in the neighborhood. It is clear that the Bali Hai was once a bustling restaurant. Once again, however, the Town has failed to identify the ways in which the proposed use would be "substantially more detrimental." Detriment means "harm," not just "less useful." Before the court is plenty of evidence relating to the detriments of the Bali Hai, but none concerning detriments of the apartment use in comparison. For the Board to base its decision on what is essentially a preference for a sports bar is arbitrary and capricious.

Employment

The Town also cites the impact upon employment as a reason to deny the special permit, pursuant to § 10.5.2 of the Bylaw. Exh. 25, 260:90. The only evidence available about the comparative employment created by the apartment use versus

a restaurant was some speculation by Mr. Palumbo that a restaurant use would likely employ more people than the five to six people the project will likely employ. Tr. 1-48: 10-25. There was no evidence presented as to the number of people employed by the Bali Hai, where those employees resided, or whether that employment was a benefit or detriment to the Town, let alone the neighborhood. Based on the facts that I have found after trial, there is simply not enough evidence to consider that the speculated impact upon employment will cause the project to be "substantially more detrimental to the neighborhood."

Traffic

Finally, the Town argues that the projected morning rush-hour traffic generated by the project, estimated to be a peak of 12 vehicles per hour, causes the project to be substantially more detrimental to the neighborhood. I disagree. As Mr. Dirk explained at trial, even during peak hours, the traffic produced by the project will be imperceptible. Exh. 5 pg. 15-17, 20-21, Exh. 42. During all other hours of the day, in fact, the project will produce substantially *less* traffic than the existing use. *Id.* Having failed to produce any evidence that the traffic produced by the project will cause *any* detriment to the neighborhood, this final argument fails.

Conclusion

After reviewing all the evidence presented at trial, I find that this case is indeed one of those "rarely encountered points where no rational view of the facts" could support the denial of the permit by the Board. *Britton*, 59 Mass. App. Ct. at 74-75. The Board's finding in the Decision that the project would be substantially more detrimental to the neighborhood than the restaurant use was unreasonable and arbitrary and capricious. The Decision must be annulled, and the special permit requested by the LLC issued.

Judgment shall enter annulling the decision, declaring that the project has met the requisite findings under G.L. c. 40A, § 6 and § 5.2 of the Bylaw, and ordering that the Board issue the special permit requested in the application. The LLC shall have the right to appear before the Board for a site plan approval and for final approval of any other matters not addressed, and the Board will be ordered to approve such matters promptly.

Judgment Accordingly.

All Citations

Not Reported in N.E. Rptr., 2020 WL 7319366

Footnotes

1 A view "inevitably has the effect of evidence, and information properly acquired upon a view may properly be treated as evidence in the case." *Talmo v. Zoning Bd. of Appeals of Framingham*, 93 Mass. App. Ct. 626, 629 n.5 (2018) (internal citations and quotations omitted); see also *Martha's Vineyard Land Bank Comm'n v. Taylor*, No. 17-P-1277 (Mass. App. Ct. June 22, 2018) (Rule 1:28 decision).

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