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

The BEVILACQUA CO., INC., Plaintiff,

v.

Paul LUNDBERG, Melissa Cox, Jen Holmgren, James W. O'Hara, Jr., R. Scott Nemhard, Kenneth Hecht, Steven G. LeBlanc, Jr., Valerie H. Gilman, and Sean P. Nelson, as they are the members of the Gloucester City Council, Defendants.

MISCELLANEOUS CASE
No. 19 MISC 000516 (HPS)
|
Dated: November 2, 2020

DECISION

Howard P. Speicher, Justice

***1** The property at the center of this action is itself at the center of a neighborhood that exemplifies what makes the city of Gloucester a unique and special place. The East Gloucester neighborhood contains an eclectic mix of single-family residential (mostly nonconforming) and small multi-family residential uses, as well as commercial and marine uses, including boatyards and marinas, along Gloucester's Inner Harbor. The neighborhood functions as a vital link in the stretch of Gloucester's waterfront from Stage Fort Park in the west, to the downtown waterfront, with its beautiful harborside beach along Stacy Boulevard (and including the "cut bridge" entrance to the Annisquam River), to the mix of marine-dependent businesses and quirky houses on small lots and the recent addition of a waterfront hotel in the Fort neighborhood, to the famous mix of art galleries, theaters and waterfront homes and restaurants in Rocky Neck along the shores of Smith Cove further east and south, all the way to the Paint Factory, where the bottom paint that protects ships' hulls from deterioration was first manufactured in the 19th century, and which stands as a monument to the historic working waterfront of Gloucester. Further south and east are the mansions of Eastern Point, in the early 18th century the launching site of New England's first schooners, now completing the distinct and varied horseshoe-shaped landscape and cityscape of Gloucester Harbor, Housing, as well as the supporting commercial uses, are the key elements that complement and secure the dominant character of this East Gloucester neighborhood as a hub of marine uses along the Inner Harbor waterfront.

This case was originally scheduled for trial in April, 2020, but was rescheduled twice due to the COVID-19 pandemic. Pursuant to orders issued by the Supreme Judicial Court and the Land Court providing procedures for the conduct of cases during the pandemic, the case was rescheduled for trial by videoconference. A view was held on August 3, 2020, and the case was tried before me, by videoconference, on August 4 and 5, 2020. Following the submission of post-trial briefs, I took the case under advisement on September 25, 2020.

Where, as here, the Gloucester City Council has denied an application for special permits to construct housing for reasons that do not address, in any credible fashion, the factors required to be considered by the Gloucester Zoning Ordinance, the City Council's decision must be annulled, and the special permits, under the circumstances present here, will be ordered to be issued.

FACTS

Based on the facts stipulated by parties, the documentary and testimonial evidence admitted at trial, my view of the subject property, and my assessment as trier of fact of the credibility, weight, and inferences reasonably to be drawn from the evidence admitted at trial, I make factual findings as follows:[1]

The Property and the Neighborhood.

1. The property at 116 East Main Street in the East Gloucester neighborhood of Gloucester (the "Property") is owned by Son, LLC. The Property is under agreement to be sold to plaintiff, The Bevilacqua Co., Inc. ("Bevilacqua").

***2** 2. The Property is a 30,474 square foot parcel on the east, or inland, side of East Main Street. The Property has 122.15 feet of frontage on East Main Street, and is located at the base of Pilot's Hill.[2] Properties on the same side of

East Main Street as the Property generally back onto Pilot's Hill, which slopes steeply upward for several hundred feet of mostly undeveloped wooded terrain before encountering the nearest abutting developed properties at the top of the hill.[3] The fronts of the properties on the east side of East Main Street face generally west, with the Gloucester Inner Harbor across the street behind the buildings on the west, or waterfront, side of East Main Street.

3. The Property is improved by an unoccupied building that was formerly occupied by a restaurant and one residential unit. No restaurant has operated on the site for several years, and more than one restaurant has failed at the site. The building is presently vacant and is surrounded by a chain link fence. The front of the Property is entirely paved, and there is a gravel parking lot in the rear. The building, located toward the front of the Property (29.3 feet from the front lot line), is 21 feet in height and has a footprint of 4,404 square feet.[4]

4. The Property is in a Neighborhood Business District under the Gloucester Zoning Ordinance ("Ordinance"), in which multi-family dwellings are allowed by special permit. The Neighborhood Business District in which the Property lies is a small island surrounded by a vastly larger R-10 Residential District covering all of the neighborhood on the east side of East Main Street, except for one other small island of Neighborhood Business District zoning.[5] Virtually the entire waterfront, across the street on the west side of East Main Street, is zoned Marine Industrial.[6]

5. Abutting the Property to the northeast is a three and one-half or four-story (the first story appears to be partially below grade) multi-family dwelling with five dwelling units, with a tower component that may have once been a church steeple.[7] Abutting the Property to the west is a gasoline station and convenience store. To the west of the gasoline station, across a narrow and short dead end street named Caledonia Place, is a building owned by the Gloucester Writers Center. These buildings, like all buildings along this stretch of East Main Street up to about Caledonia Place, back onto the base of Pilot's Hill, so that one standing across East Main Street looking toward Pilot's Hill sees buildings of various heights, with the base and steep ascending slope of the hill behind them. No buildings are located behind these buildings generally for several hundred feet.

6. Across the street from the Property, in the Marine Industrial District, is a one-story garage. Across from the garage on another narrow dead end street named Montgomery Place, and also across East Main Street from the gas station and diagonally across from the Property, is a house at 139 East Main Street that appears to be a single-family dwelling. There are other houses along this stretch of the waterfront side of East Main Street, all of which are presumably nonconforming, as dwellings are prohibited in the Marine Industrial District.[8]

7. Montgomery Place is also diagonally across the street from the Property. It runs downhill from East Main Street toward the harbor. Montgomery Place provides access to Brown's Yacht Yard, which occupies most of the land behind the garage and other buildings on East Main Street across from the Property. Brown's Yacht Yard is a commercial boatyard that stores, services and repairs boats and boat engines, and also has a small marina and fueling station.

***3** 8. Brown's is located along the Inner Harbor section of Gloucester Harbor, less than a quarter mile from the entrance to Smith's Cove and Rocky Neck. The Inner Harbor is mostly still a "working waterfront," occupied by commercial boatyards, with moorings and slips for commercial fishing boats, as well as for recreational boats.

The Proposed Development and Special Permit Application.

9. Bevilacqua has proposed to raze the existing vacant restaurant building and to redevelop the Property by the construction of two, three-story multi-family townhouse-style buildings with four dwelling units each, for a total of eight dwelling units on the Property. Four of the units would have three bedrooms and four would have two bedrooms. Each unit would have a two-car garage, and there would be a total of 23 off-street parking spaces provided. One of the units would be a deed-restricted affordable unit. The two buildings would be set back from the front property line by 68.4 feet and 105.5 feet, respectively, both considerably farther from the front of the lot than the present restaurant structure. The new buildings would be 28 and 29 feet in height, respectively, arising from a finish grade elevation of 100 feet, compared to 21 feet in height from a finish grade elevation of 96 feet for the present restaurant building.[9]

10. Unlike the Property as currently developed, which allows unrestricted sheet flow of stormwater runoff into the street,

and consequent icing problems in winter, the proposed development would collect roof and pavement stormwater runoff and direct it into a subsurface water infiltration system before releasing it into the city's stormwater system.[10]

11. East Main Street is a state arterial road, with public water, public sewer, electric, gas, and storm drains available for connection to the proposed development and of sufficient size and capacity to adequately service the proposed development.[11]

12. The proposed development of the Property for two buildings, with four dwelling units each, required variances from the side and rear setback requirements of the Ordinance. These were granted by the Gloucester Zoning Board of Appeals in a decision filed with the Gloucester city clerk on October 2, 2018. An appeal to this court by neighbors was dismissed on June 20, 2019 by reason of the neighbors' inability to show that they were aggrieved by the granting of the variances.[12]

13. The proposed development also requires special permits, with the Gloucester City Council as the special permit granting authority, with respect to four other provisions of the Ordinance. A special permit is required for a multi-family dwelling of seven or more units pursuant to Section 2.3.1(8) of the Ordinance; a special permit is required for a reduction in the required distance between the principal buildings on the Property pursuant to Section 3.2.2, fn. e; a special permit is required for the proposed lot area per dwelling unit pursuant to Section 3.2.2, fn. a; and finally, a special permit is required for the proposed open space per dwelling unit, also pursuant to Section 3.2.2, fn. a.

14. With respect to the special permits for reduction in lot area per dwelling unit and open space per dwelling unit, Bevilacqua seeks a reduction in lot area per dwelling unit from 5,000 square feet to 3,809 square feet; and a reduction in open space per dwelling unit from a requirement of 3,500 square feet to 1,479.5 square feet for the proposed project.[13]

***4** 15. As for distance between principal buildings on a lot, Bevilacqua seeks a special permit for a reduction from 57 feet between the two proposed buildings (the sum of the heights of 28 feet and 29 feet) to 16.9 feet.[14]

16. The City Council held a public hearing on Bevilacqua's proposed development of the Property on August 27, 2019. On October 8, 2019, by a decision filed with the City Clerk on October 10, 2019, the City Council denied Bevilacqua's application for special permits.[15] The City Council vote was 3 in favor of granting the special permits, 5 opposed, and 1 absent, thus leaving the proposal three votes short of the required two thirds vote required by G. L. c. 40A, § 9 for a nine-member city council.[16]

17. In its decision, the City Council made a finding, one way or the other, with respect to only one of the factors required to be considered by Sections 1.8.3, 3.2.2, fn. a and 3.2.2, fn. e of the Ordinance, Specifically, the only finding that the City Council made with respect to any of the factors to be considered as set forth in Sections 1.8.3, 3.2.2, fn. a or 3.2.2, fn. e, of the Ordinance was the following: "This Special Council (sic) Permit is in harmony with the intent and purpose of the Zoning Ordinance." The next sentence in the decision was: "The Special Permit is denied."[17]

18. The City Council made no other explicit findings with respect to any of the required factors in the body of its decision. However, the City Council noted in its decision, "The Council discussed the need for increased housing in the City."[18]

19. The City Council also explicitly "incorporated into this Decision" the minutes of the hearing before the City Council and "all documents and testimony received during the meetings and the hearings...."[19]

DISCUSSION

Bevilacqua appeals from the City Council's denial of its application for a special permit with respect to four provisions in the Gloucester Zoning Ordinance. General Laws 40A, § 17 provides that "any person aggrieved by the decision of ... any special permit granting authority ... may appeal to the land court department...." The court's inquiry in reviewing the decision of a board of appeals or a special permit granting authority is a hybrid requiring the court to find the facts de novo, and, based on the facts found by the court, to affirm the decision of the board "unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). This involves two distinct inquiries, the first of which looks to whether the special permit granting authority's decision applied incorrect standards or criteria. See *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003).

***5** Only after determining that the decision was not based on a legally untenable ground does the court then proceed to the second, more deferential inquiry, in which "the [special permit granting authority]'s discretionary power of denial extends up to those rarely encountered points where no rational view of the facts the court has found supports the [special permit granting authority]'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 74-75. Those "rarely encountered points" include those occasions where there are no facts to support a special permit granting authority's conclusion that one or more of the factors required to be considered by the local bylaw or ordinance have not been met. Moreover, a special permit granting authority "may not conclude the proposed use is not in harmony [with the intent of the bylaw] in the absence of credible evidence." *Tresca Brothers Sand and Gravel, Inc. v. Bd. of Appeals of Wilmington*, 97 Mass. App. Ct. 1128 (July 8, 2020) slip op. at 6 (Rule 1:28 Unpublished Decision); see also *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, 461 Mass. 469, 485 (2012) (board must apply its own criteria rationally and may not deny special permit for expansion of nonconforming use "in the absence of credible evidence").

A special permit granting authority is required to make detailed findings in support of its decision. *MacGibbon v. Bd. of Appeals of Duxbury*, 347 Mass. 690, 692 (1964) (board's decision must contain "definite statement of rational causes and motives, founded upon adequate findings"), citing *Prusik v. Bd. of Appeal of Boston*, 262 Mass. 451, 458 (1928). Notwithstanding the requirement for detailed findings in general, perhaps somewhat paradoxically, "the refusal of a board to grant a special permit ... does not require detailed findings by the board." *Schiffone v. Zoning Bd. of Appeals of Walpole*, 28 Mass. App. Ct. 981, 984 (1990). But this does not mean that the special permit granting authority is relieved of the requirement to state its reasons for the denial. Rather, it means that in the case of a denial of a special permit, "the requirement that the [special permit granting authority] provide reasons supporting its decision, is less demanding than if the [special permit granting authority] had acted affirmatively." *Bd. of Aldermen of Newton v. Maniace*, 429 Mass. 726, 732 (1999). See also *Gamache v. Town of Acushnet*, 14 Mass. App. Ct. 215, 220 (1982) (less rigorous findings required when denying relief).

When the reasons given by a special permit authority in support of a denial are merely conclusory, that is, "[w]hen a decision contains conclusions that do nothing more than repeat regulatory phrases, and are unsupported by any facts in the record, [the court is] constrained to conclude that the decision is 'unreasonable, whimsical, capricious or arbitrary,' and therefore invalid." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, 454 Mass. 374, 386 (2009).

Where the special permit granting authority fails to give any reasons at all in its decision, but offers reasons at trial, or offers reasons at trial that are different than those offered in its decision, the court is "not obliged to search for facts in the record to support a rationale that the board did not itself provide. On review, the judge's role is to determine 'whether the reasons given' by the board, 'had a substantial basis in fact, or were, on the contrary, mere pretexts for arbitrary action or veils for reasons not related to the purposes of the zoning law' ... [W]here no such reasons are given ... a reviewing court cannot be satisfied that a board's actions are not arbitrary, a pretext, or otherwise impermissible." *Id.* at 387, quoting in part, *Vazza Properties, Inc. v. City Council of Woburn*, 1 Mass. App. Ct. 308, 312 (1973). In fact, a court need not entertain a board's efforts "to defend its denial of the special permits at trial based on grounds it had never articulated before." *Cumberland Farms, Inc. v. Bd. of Appeals of Wellfleet*, 90 Mass. App. Ct. 1118 (2016) slip op. at 2 (Rule 1:28 Unpublished Decision).

I. THE CITY COUNCIL'S DECISION WAS LEGALLY UNTENABLE.

A. The City Council Made Only One Singular Finding in the Affirmative, and Made No Other Findings, and Gave No Reasons for Its Denial.

***6** Turning to the first inquiry, a decision is based on legally untenable grounds when premised "on a standard, criterion or consideration not permitted by the applicable statutes or by-laws. Here, the approach is deferential only to the extent that the court gives 'some measure of deference' to the local board's interpretation of its own zoning by-law. In the main, though, the court determines the content and meaning of statutes and by-laws and then decides whether the board has chosen from those sources the proper criteria and standards to use in deciding to, grant or to deny the variance or special permit application." *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 73 (internal citations omitted).

Section 1.8.3 of the Ordinance provides the standard required for the issuance of special permits:

> A Special Permit granted pursuant to this section shall be granted only upon a written determination by the SPGA that the proposed use will be in harmony with the general purpose and intent of the ordinance, and that it will not adversely affect the neighborhood, the zoning district or the City to such an extent as to outweigh the beneficial effects of said use.

The section further provides that in assessing whether the foregoing standard is met, the City Council, as special permit granting authority, "shall consider, but not be limited to, the following six factors: (a) The social, economic, and community needs that will be served by the proposed use; (b) Traffic flow and safety, (c) Adequacy of utilities; (d) Neighborhood character and social structure; (e) Qualities of the natural environment; (f) Potential fiscal impact."[20]

With respect to the three dimensional special permits, the Ordinance provides that the City Council may grant the special permits for reductions in lot area per dwelling unit and open space per dwelling unit if it finds "that such lesser lot area or open space is in keeping with neighborhood character and structural density."[21] A special permit for reduction in the otherwise required distance between principal buildings on a lot may be granted "upon a finding that such reduction is not detrimental because of view obstruction, overshadowing, service access or visual crowding."[22]

In its decision, the City Council acknowledged "the need for increased housing in the City," and found affirmatively that the first of the required criteria in Section 1.8.3 had been met, by finding that, "This Special Council (sic) Permit is in harmony with the intent and purpose of the Zoning Ordinance." In the next sentence, the Council denied the application for the four special permits, without addressing the other criteria quoted above.[23] Thus, the Council, to the extent it addressed any of the criteria required to be considered, found that the proposed use met the criteria, but then inexplicably went on to deny the special permits without addressing the remaining criteria, affirmatively or negatively, and without further explanation other than perhaps to implicitly suggest that other reasons could be gleaned from the minutes of the City Council's hearings, which it incorporated into its decision.

The minutes of the City Council's discussion of the project do not offer any help upon which the court can rely definitively, as the comments of individual city councilors were not explicitly adopted by the Council as a whole, although the incorporation of the minutes into the Council's decision suggests that the Council may have intended to adopt those reasons in support of its decision. However, their comments at the very least explain the votes of individual councilors, and the minutes reveal that at least two councilors gave legally unsupportable or factually incorrect reasons for their votes to deny approval to the project. City Council President Lundberg explained that he was voting against the multi-family housing proposal because other uses could be made of the property without the need for relief under the Ordinance.[24] This is more akin to the standard for the granting of a variance, and does not reflect a consideration of the criteria required to be considered in assessing whether to grant a special permit. Councilor Gilman indicated that her negative vote was based on her conclusion that East Gloucester was "at capacity," and cited the Gloucester Housing Production Plan as the source of her information.[25] The Housing Production Plan does not support the councilor's statement. The Housing Production Plan notes that East Gloucester may have some capacity limitations by reason of areas that are not sewered and which may have potential wetland constraints.[26] There is no dispute that municipal sewer is available for development of the Property and there is no evidence suggested of wetlands constraints with respect to the ability to provide sewer or other utilities to the site.

***7** Thus, the City Council's decision, for the reason that the City Council made no findings in support of its denial, and gave no reasons for its denial, was legally untenable. To the extent that the reasons for denial given by Councilors Lundgren and Gilman are considered adopted by the whole Council by reason of its incorporation by reference of the minutes into its decision, those reasons, too, support the court's finding that the City Council's decision was legally untenable.

B. The City Council's Denial of the Special Permits Was Pretextual or Otherwise Arbitrary.

As noted above, where a special permit granting authority gives only conclusory reasons for a denial, or gives no reasons at all, "a reviewing court cannot be satisfied that a board's actions are not arbitrary, a pretext, or otherwise impermissible." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, supra, 454 Mass, at 386. Although I need not draw any conclusion as to what the Council's real reason for denial was, I do draw the conclusion

that the Council's reason for denial was not the one it gave, because it gave no reason at all.

Under the circumstances present here, I also conclude and find that the decision of the Council was for a pretextual reason it was not willing to commit to paper. However, in an effort to explain the Council's decision, since it did not do so explicitly, the court may draw inferences from the minutes of the meeting at which the Council voted to deny the special permits, especially where, as here, the Council explicitly incorporated the minutes into its decision.[27] See *Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington*, 399 Mass. 771, 779 (1987) (court could draw inference of town's improper intent in eminent domain taking by undisputed evidence of actions of town meeting).

At the public hearing on the plaintiff's application, the City Council took a poll of those attending to determine the extent of public support or opposition to the proposed project. The City Council noted in the minutes that, "[a] poll of the audience by show of hands resulted in 9 in favor, 49 opposed to the project."[28] While statements of opposition or support by members of the public are appropriate and are among the proper purposes of a public hearing on a development proposal, the special permit granting authority has an obligation to base its decision on the standards that the Ordinance requires it to consider, and not on whether the proposed project is simply unpopular. I find on all the evidence that the City Council based its decision on the fact that a vast majority of those appearing at the hearing were against the project. This was a legally untenable basis for the City Council's decision.

C. The Potential Fiscal Impact of an Increase in the Number of Children in the Public Schools Is a Legally Untenable Reason for Denial.

At trial, the City Council offered a reason for denial of the proposed development that it had not even suggested as a basis for denial of the application in its written decision. I need not consider such reasons offered for the first time at trial. *Cumberland Farms, Inc. v. Bd. of Appeals of Wellfleet*, supra, 90 Mass. App. Ct. 1118 at slip op. at 2.1 do so because of the importance of addressing the particular rationale offered for its denial by the City Council at trial.

***8** The City Council presented evidence at trial that it was entitled to, and did, deny the plaintiff's application for special permits to construct eight units of multi-family housing because if the project were approved and built, it likely would add children to the Gloucester public schools, and the cost of educating these children would not be adequately supported by the taxes likely to be generated by the project. The City Council argued at trial that this justification for denial was addressed to the "fiscal impact" of the proposed project, a factor specifically included as among those to be considered in Section 1.8.3 of the Ordinance.[29] For the reasons stated below, the City Council failed to factually support its contention with admissible evidence, resulting in only speculation and conjecture that the feared fiscal impact would result from construction of the project. More importantly though, even had the City Council (1) stated this as a reason for denial in its decision (which, of course, it failed to do) and (2) factually supported the premise of its denial that children living at the Property would place a financial burden on the Gloucester public schools obligated to educate them, that would not be a legally tenable ground for denial.

No Massachusetts court has addressed the question whether the negative fiscal impact of additional housing on a public school system is a legally tenable ground that may be considered by a municipal authority in deciding whether to approve a housing proposal. In *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, the Appeals Court found a town's argument that a proposed expansion of a trailer park would place an undue fiscal burden on the town's school system was "speculative at best," and so did not decide "whether impacts on the town's tax burden or school system are proper criteria for denial of a special permit for expansion of a nonconforming use." 78 Mass. App. Ct. 19, 22, fn. 8 (2010).

The injunction in the Massachusetts Constitution, Pt. II, c. 5, § 2, providing that it is "the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially ... public schools and grammar schools in the towns ..." h a s been called the "education clause" of the Constitution. *Hancock v. Comm'r of Education*, 443 Mass. 428, 430 (2005) (Marshall, C.J., concurring). The education clause "impose[s] an enforceable duty on 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 the Executive Office of Educ.*, 415 Mass. 545, 621 (1993) (emphasis added).

Generally, a municipality may not condition the availability of fundamental public services, such as fire protection, on the ability of any particular member of the public to pay taxes sufficient to support those services. *Emerson College v. City of Boston*, 391 Mass. 415 (1984) (city may not charge "augmented fire services availability" fee for fire protection for properties requiring additional protection). That prohibition against denying members of the public the right to fundamental public services based on ability to pay is especially applicable when it comes to the right to a public education mandated and guaranteed by the Massachusetts Constitution.

Claimed injuries to the value of abutters' properties as a source of aggrievement must give way when the objections are to affordable housing proposals under G. L. c. 40B, because of the public policy encouraging the construction of affordable housing embedded in that chapter of the General Laws. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006). Likewise, public policy considerations guaranteeing the right to a public education, enshrined in the Massachusetts Constitution, take precedence over local zoning preferences when considering a special permit application.

Therefore, notwithstanding the fiscal impact to a municipality from the construction of housing that may result from the obligation to educate children in the public schools, fiscal impact, as a reason for denying permits to construct housing, must give way when it runs afoul of the constitutional obligation of Massachusetts municipalities to provide a public education to all children. Since a public school education must be provided to children "without regard to the fiscal capacity of the community," it would be anomalous to countenance the denial of a special permit based on a reason that contravenes that constitutional obligation.

***9** To deny a special permit to build housing because the occupants of that housing might include children who will attend public schools is to deny those children their constitutional right under the Massachusetts Constitution to a public education. Accordingly, I find and rule that the City Council's denial of the special permits on the basis of the potential fiscal impact of the proposed development on the Gloucester public schools was legally untenable.

II. THE CITY COUNCIL'S DECISION WAS NOT RATIONALLY SUPPORTED BY THE FACTS.

Having established that the standard utilized by the City Council was not legally tenable, I need not consider whether any rational view of the facts supports the City Council's conclusions. See *Sedell v. Zoning Bd. of Appeals of Carver*, 74 Mass. App. Ct. 450, 454 (2009). However, even under this more deferential part of the court's inquiry, the City Council's decision does not withstand scrutiny. This inquiry looks to "whether the [City Council] has denied the application by applying those criteria and standards in an 'unreasonable, whimsical, capricious or arbitrary' manner." *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 74. The refusal to grant a special permit does not require detailed findings. See *Brockton Pub. Mkt., Inc. v. Bd. of Appeals of Sharon*, 357 Mass. 783, 783 (1970). "Where a board denies a special permit, it is likely 'a matter of considerable difficulty, especially for laymen, to state in detail all possible factors the nonexistence of which resulted in the denial of the application.' " *Bd. of Aldermen of Newton v. Maniace*, supra, 429 Mass. at 732, quoting *Cefalo v. Bd. of Appeal of Boston*, 332 Mass. 178, 181 (1955). Accordingly, "the requirement that the board provide reasons supporting its decision, is less demanding than if the board had acted affirmatively," *Id.* Moreover, "[t]he board, in the proper exercise of its discretion, is free to deny a special permit even if the facts show that such a permit could be lawfully granted." *Pioneer Home Sponsors, Inc. v. Bd. of Appeals of Northampton*, 1 Mass. App. Ct. 830, 830 (1973).

However, even applying this standard, I find that the City Council's denial was not rationally supported by the facts proven at trial. Where, as here, there is no credible evidence to support a finding that the factors for issuance of a special permit were not met, the special permit granting authority's denial must be annulled. See *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, supra, 461 Mass. at 485.

The City Council was required, under Section 1.8.3 of the Ordinance, to determine "whether the proposed use will be in harmony with the general purpose and intent of this ordinance, and that it will not adversely affect the neighborhood, the zoning district or the City to such an extent as to outweigh the beneficial effects of said use." The Council explicitly found that the proposal did in fact meet the first of these requirements, finding in its decision: "This Special Council (sic) Permit is in harmony with the intent and purpose of the Zoning Ordinance."[30]

It was then left for the City Council to consider whether the proposal would adversely affect the neighborhood, the

zoning district or the City to such an extent as to outweigh the beneficial effects of the proposed multi-family use. In doing so, it could consider the following factors: "(a) The social, economic, and community needs that will be served by the proposed use; (b) Traffic flow and safety; (c) Adequacy of utilities; (d) Neighborhood character and social structure; (e) Qualities of the natural environment; (f) Potential fiscal impact." Ordinance, Section 1.8.3.[31]

***10** As discussed above, the City Council's decision was entirely devoid of even a single negative finding on any of the six required factors,[32] and so its denial is unsupported, and is arbitrary, for this reason alone. But considering, as I need not do, the reasons for denial offered by the City Council at trial, those too are unsupported by any credible evidence.

Initially, I note that the plaintiff offered uncontested evidence, which I credit, showing that the proposed development would improve traffic flow and traffic safety at the site over the current configuration of the Property, by providing for adequate off-street parking, by eliminating the undefined cross-flow of traffic with the gas station next door, and by replacing the undefined curb cut at the Property with defined driveways and traffic islands that would better regulate the entry and exit of vehicles to and from the site, and which would prevent the backing out of vehicles onto the roadway.[33] Furthermore, the plaintiff presented evidence that the proposed development would be adequately served by public utilities, including water and sewer, which are available in East Main Street and are adequately sized to serve the needs of the proposed development.[34] The City Council presented no evidence to contradict this evidence on improved traffic flow and safety and adequacy of utilities, and indeed, does not appear to dispute this evidence. Accordingly, I find that the proposed development will provide for safe and adequate traffic flow and traffic safety and will be adequately served by public utilities.

Instead, the City Council argues that it was justified in denying the requested special permits on the basis of evidence it offered to show that the proposed development violated four of the factors to be considered in assessing an application for a special permit. The City Council argues that the proposal is not in keeping with "neighborhood character and social structure," the proposal will violate the "structural density" of the neighborhood, the proposal will have an undue fiscal impact on the city's schools, and finally, the City Council argues that the proposal will cause view obstruction due to a reduction in the distance between the two principal buildings to be constructed on the Property. Each of these reasons for denial is considered below.

A. There Was No Credible Evidence that the Proposed Development Will Not Be In Keeping With Neighborhood Character or Social Structure.

In arguing that the City Council could have been justified m finding that the proposed development would not be in keeping with "neighborhood character or social structure," one of the factors to be considered under Section 1.8.3 (although the City Council actually made no such finding), the City Council contends that an eight-unit development is not in keeping with the character of a neighborhood that features "primarily single and two-family residences."[35] In making this argument, the City Council mis-defines the "neighborhood," mischaracterizes the character of the neighborhood, and mischaracterizes the proposed development.

First, the City Council impermissibly equates "neighborhood" with those properties within three hundred feet of the Property.[36] G. L. c. 40A, § 11 defines "parties in interest" entitled to notice of public hearings as abutters, those who own property directly across a street, and abutters to abutters within three hundred feet, but there is nothing in G. L. c. 40A or in the Ordinance equating the scope of notice to parties in interest with "neighborhood."

***11** "Neighborhood" is a term left undefined in the Ordinance. Where a word is undefined in a local zoning bylaw or ordinance, it is "to be construed in accordance with common understanding and usage." *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349, 361, fn. 16 (2001). A local board's own interpretation of its bylaw is not to be disregarded by the court unless the board's interpretation is unreasonable. *Tanner v. Bd. of Appeals of Boxford*, 61 Mass. App. Ct. 647, 649 (2004). Deference to a local board's interpretation is given only when that interpretation is reasonable. *Pelullo v. Croft*, 86 Mass. App. Ct. 908, 909 (2014). An unreasonable or incorrect interpretation of a bylaw is not entitled to deference. *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, supra, 461 Mass. at 475.

"The broad meaning commonly attributed to 'neighborhood' is the 'quality or state of being immediately adjacent or relatively near to something' (Webster's Third New Intl. Dictionary 1514 [1993]), or '[t]he immediate vicinity; the

area near or next to a specified place' (Black's Law Dictionary 1060 [7th ed.1999]). Cf. *School Comm. of Springfield v. Bd. of Educ.*, 362 Mass. 417, 439 (1972) ('[t]he word 'neighborhood,' as used in every day conversation ... will sometimes, but not always, be defined by natural or other physical boundaries or by an electoral or a zoning district ... [but a]t the very least ... the word signifies nearness, as opposed to remoteness from' a locus)." *Davis v. Zoning Bd. of Chatham*, supra, 52 Mass. App. Ct. at 361, fn. 16.

Here, the City Council's apparent interpretation of "neighborhood" as consisting of the properties within three hundred feet of the proposed development is not in accord with common understanding and usage, and therefore is unreasonable. The City Council's adoption of the 300-foot radius around the property as the definition of the "neighborhood" is certainly narrow and immediate, but it is artificially and unduly so. It imposes an artificial boundary that does not exist in the Ordinance, and more importantly, it ignores the physical nature of the neighborhood surrounding the property. The City Council's apparent reliance on the G. L. c. 40A, § 11 "parties in interest" determination to set the boundaries of the neighborhood is both over-inclusive and under-inclusive, in that it ignores the physical topography and natural and built boundaries of the area in the vicinity of the Property.

The Ordinance itself defines the residential "R-10" zoning district surrounding the Property far more broadly than is suggested by a 300-foot radius, and the Marine Industrial District immediately across the street extends far beyond a 300-foot radius from the Property, with no rational physical distinction to be drawn at the point where both districts extend beyond three hundred feet from the Property along East Main Street, As the farther reaches of the boundaries of the R-10 and Marine Industrial zoning districts surrounding the Property suggest, the "neighborhood" includes the entire stretch of waterfront across the street for at least several blocks in both directions, and all of the properties along the inland side of East Main Street extending for several blocks in either direction from the Property.[37] As the zoning map recognizes by its broader definition of these two districts surrounding the Property, and as I observed on the view just prior to trial, the East Gloucester neighborhood in the immediate vicinity of the Property, for several blocks in each direction along East Main Street, is a uniquely eclectic collection of marine industrial uses, commercial uses, and a varied mix of residential uses, including single-family, two-family and multi-family uses.

***12** At the same time, the arbitrary 300-foot distinction is over-inclusive in that it includes properties far up Pilot's Hill, which, though within three hundred feet of the Property on a map, are far removed from East Main Street in elevation, are separated from the Property by hundreds of feet of undeveloped, wooded hillside, and feature single-family homes on far larger lots than the homes and other properties along East Main Street. Because these properties, far up Pilot's Hill, are in an area that is geographically and functionally distinct from the East Main Street vicinity of the Property, they cannot fairly or reasonably be characterized as part of the waterfront neighborhood to which the Property belongs.

But even giving deference to the City Council and accepting its unduly narrow definition of "neighborhood," the City Council's characterization of the neighborhood as being one of primarily one- and two-family homes does not withstand scrutiny. Immediately abutting the Property are a five-unit multi-family dwelling, a gas station, a commercial garage directly across the street, and a working boatyard behind the garage. Next to the gas station is a commercial building owned by the Gloucester Writers Center. Despite the wide range of uses in the vicinity of the Property, the City Council looks only to two single-family dwellings, across the street from the Property, both of them nonconforming uses in the Marine Industrial zoning district in which they are located, as defining the character of the neighborhood. However, these two single-family homes in the midst of this eclectic neighborhood can under no rational interpretation be said to "define" the character of this immediate neighborhood. To find more single-family homes, the City Council points to those on a narrow side street, Chapel Street, off of East Main Street, ignoring the different nature of any narrow, residential side street from a main thoroughfare.

Finally, in arguing that the proposed eight-unit development does not fit the character of the neighborhood because there are no other multi-family buildings in the neighborhood exceeding five dwelling units, the City Council mischaracterizes the proposed development itself. While the proposed development will add eight units of housing to the neighborhood, it will do so by the construction of two four-unit buildings on a property that is more than 30,000 square feet in size. The proposed two buildings will be next door to a five-unit rental property on a lot smaller than 7,000 square feet in size.[38] Thus, the proposal for construction of two

four-unit buildings is in keeping with the character of the neighborhood, even as defined by the City Council.

B. There Was No Credible Evidence that the Proposed Development, by Reason of Reduction In Open Space and Lot Area Per Dwelling Unit, Would Not Be In Keeping With Neighborhood Character or Structural Density.

The City Council next argues that the "structural density" of the proposed development is not in keeping with the neighborhood. Two of the special permits sought by the plaintiff were for a reduction in the required lot area per dwelling unit, and a reduction in the required open space per dwelling unit. The Ordinance provides that these special permits for reduction in specific dimensional requirements may be granted if the City Council finds "that such lesser lot area or open space is in keeping with neighborhood character and structural density."[39] The plaintiff presented evidence at trial that the proposed development was in keeping with these density-related characteristics of the neighborhood, pointing out that the proposed development was for a total of eight dwelling units on a lot in excess of thirty thousand square feet, while the five-unit building next door was on a lot less than one-quarter the size of the Property.[40]

***13** The City Council presented no admissible evidence related to the relative open space per dwelling between the proposed development, on the one hand, and other properties in the neighborhood on the other hand.[41] As for lot area per dwelling unit, the City Council relied at trial on a comparison from assessor's field cards purporting to show that a "majority" of residential properties within three hundred feet of the Property had more lot area per dwelling unit than the 3,809 square feet per unit proposed for the Property.[42] Thus, the City Council suggests that any residential property with a lot area per dwelling unit below the median, is not in character with the structural density of the neighborhood, and it does so, impermissibly, by comparing lot area per dwelling unit as proposed for the Property, with the lot area per dwelling unit for single-family homes as well as for two-family dwellings, three-family dwellings and multi-family dwellings within three hundred feet of the Property. However, lot area per dwelling unit for One-, two- and three-family homes is treated separately and distinctly in the Ordinance from the way lot area per dwelling unit is treated for multi-family homes, with different requirements in each zoning district for the different uses. Indeed, open space per dwelling unit is not a requirement at all for one-, two- and three-family homes.[43]

Accordingly, the comparison relied on by the City Council was an impermissible apples to oranges comparison. Using the City Council's own data on Exhibit 5, the proposed development will offer more lot area per dwelling unit than the other multi-family uses within three hundred feet of the Property. Even when two- and three-family homes, as well as other multi-family homes, are included in the comparison, excluding only single-family homes, the proposed development offers more lot area per dwelling unit than twelve other properties, and less than only four, placing it well above the median lot area per dwelling unit. Therefore, utilizing the City Council's own apparent yardstick of measuring against the median, the proposed development is well within the acceptable "structural density" of the neighborhood.

Similarly, the City Council points to percentage of lot area occupied by structures as an appropriate measure of density, even though, again, the City Council made no such finding in its decision, and even though the Ordinance does not purport to regulate the percentage of lot area occupied by structures on a lot in its dimensional requirements for multi-family dwellings or as a factor in the granting of a special permit for multi-family dwellings. While Section 3.2.1 of the Ordinance, the table providing dimensional regulations for one- to three-family dwellings, regulates maximum lot coverage for structures where the principal use on the property is a one-, two or three-family dwelling, Section 3.2.2 of the Ordinance, the table providing dimensional regulations for multi-family dwellings, includes no such regulation of lot coverage by structures for multi-family dwellings.[44] Where the Ordinance does not regulate percentage of lot coverage, and therefore no other properties improved by multi-family dwellings are subject to this requirement, it was impermissible for the City Council to arbitrarily impose such a requirement as a measure of "structural density." See *Fieldstone Meadows Dev. Corp. v. Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 268 (2004) (denial of order of conditions by conservation commission based on unwritten policy annulled as incapable of uniform application and therefore arbitrary).

C. There Was No Credible, Non-Speculative Evidence that the Proposed Development Would Have a Negative Fiscal Impact on the City.

***14** For the reasons stated above, the asserted negative fiscal impact on the public school system of children living in the dwelling units to be constructed at the Property is not a legally tenable ground for denial of a special permit. Nevertheless, even if it had been a lawful ground for denial, and even if the City Council had given this as a reason for its denial in its decision (which, again, it did not), the evidence offered by the City Council at trial does not support such a finding.

There are three pillars to the City Council's argument that the proposed development would have an undue fiscal impact on the Gloucester public schools: (1) there likely would be five or six children living in the eight units of the proposed development; (2) these children would be new to the Gloucester public schools; and (3) the cost of educating these children would not be covered by the real estate taxes likely to be generated by the proposed development. The evidence offered in support of these conclusions was, at best, speculative, and in the case of the second required pillar, nonexistent.

i. *Estimated Number of School-Age Children.*

The City Council offered the testimony of Dr. Richard Safier, the recently retired superintendent of the Gloucester public schools, to provide his opinion that there likely would be five or six school-age children living at the proposed development. Dr. Safier, who is not a demographer, reasoned that the proposed eight-unit development would have a total of twenty bedrooms; estimating that eight bedrooms would be occupied by the owners or heads of households, and that half the remaining twelve bedrooms would be occupied by school-age children.[45]

Dr. Safier supported this estimate by extrapolating from the number of school-age children living at a single other multi-family dwelling in Gloucester. The multi-family dwelling he used for extrapolation purposes was a 34-unit building with a total of 68 bedrooms, located in West Gloucester, several miles away from the Property and in an entirely different neighborhood on the other side of the Annisquam River from the rest of Gloucester.[46] Dr. Safier offered no explanation as to why it was appropriate to draw a conclusion for extrapolation purposes from the occupancy of just one other multi-family dwelling, and further, one that is several times the size of the proposed development and is located on the other side of Gloucester, miles away from the proposed development. He could not explain why this particular building was chosen for comparison purposes other than to offer that it was "one of the larger ones,"[47] an explanation that actually refutes its usefulness for comparison to a wholly dissimilar proposed development with less than one quarter the number of dwelling units. He also could not explain why no comparison was made to the five-unit multi-family dwelling next door to the proposed development. Most significantly, Dr. Safier offered no explanation as to why a statistically significant number of other buildings was not looked at for extrapolation purposes. Nor could he explain why he was making this sort of extrapolation of the fiscal impact of a single proposed multi-family dwelling, when a similar comparison was not being made with respect to a much larger multi-family dwelling that is currently under construction on Main Street in downtown Gloucester.[48]

One does not need to be an expert statistician or demographer to know that cherry-picking one building from which to extrapolate instead of relying on a statistically significant number of similarly situated other buildings from which to draw a conclusion will not lend itself to a reliable result For these reasons, and because I do not find him otherwise qualified to offer an expert opinion on the subject on which he was asked to testify, I do not credit Dr. Safier's testimony.

***15** Accordingly, I find and rule that the evidence offered by the City Council with respect to the number of school-age children that could be expected to reside in the proposed development was speculative at best, and was insufficient to support a finding that any particular number of school-age children would be likely to reside at the proposed development.

ii. *Assumption that Children Residing at the Proposed Development Would Be New to the Gloucester Public Schools and that They Would Add to the Cost of Operating the Schools.*

Notwithstanding the above, even assuming that up to six school-age children would reside at the proposed development, the City Council offered no evidence to suggest that any of these children would be new to the Gloucester public schools rather than children who were already enrolled in the Gloucester public schools. Further, even if all of the City Council's other evidence was accepted, the City Council offered no evidence from which it reasonably could be concluded that these children would negatively impact the school budget.

The court is not prepared to make a finding, without evidence to support what is ultimately no more than an assumption, that any children moving into the proposed development would be new to the Gloucester public schools. If assumptions are to be made (and they are not), a more reasonable assumption would be that at least some, if not all, of the children moving into the proposed development after it is constructed, would already be residents of Gloucester, and would already be enrolled in the Gloucester public schools.[49] Students relocating from elsewhere in Gloucester would, of course, not add to the cost of running the Gloucester public schools simply by virtue of moving into the proposed development.

Furthermore, even if there were as many as six children residing in the proposed development, and even if they were all new to the Gloucester public schools, it is speculative to conclude that these hypothetical six children would have any negative impact on the cost of operating the schools, where, as Dr. Safier testified, the number of students in the Gloucester public schools fluctuates by as much as 100 students per year.[50] In a year when the number of students otherwise fluctuates downward by as much as 100 students, there could be no negative fiscal impact from the presence of six new students. The City Council offered no evidence to explain why this would not be the case.

iii. *Expected Tax Revenue from the Proposed Development.*

Dr. Safier testified that the cost of educating children in the Gloucester public schools is "a shade over $17,000" per pupil per year.[51] The City Council, based on its unsupported assumption that five or six school-age children would live at the proposed development, contends that the tax revenue generated by the proposed development would be insufficient to cover the $102,000.00 cost of educating these six children. To support this contention, the City Council presented the testimony of the city assessor, Nancy Papows. Ms. Papows testified that the Property, currently improved by a vacant restaurant with one residential unit in the building, has an assessed value of $561,000.00, and that in fiscal year 2020, the total real estate tax for the Property was $7,114.14.[52]

***16** Since the value of the Property for tax purposes, like all real property in Massachusetts, must be determined annually pursuant to G. L. c. 59, § 2A, and will in any case be re-assessed upon the completion of the proposed development, the tax revenue generated by the Property as currently improved with a vacant restaurant building is completely irrelevant to a determination whether it would generate enough tax revenue to offset the cost of six children living in the new multi-family development proposed to be constructed on the Property. The City Council offered no evidence concerning the projected assessed value of the Property once the two four-unit buildings were completed and placed into operation, either as condominiums or as an eight-unit rental. Without such evidence, it is impossible to estimate even on a speculative basis whether the proposed development would generate enough tax revenue, as developed, to offset the cost of educating up to six children in the public schools. Thus, the City Council's contention that there would be an undue fiscal impact from the construction of the proposed development was speculative, at best, in this respect as well.

D. There Was No Credible Evidence that the Proposed Development Would Obstruct Views or Result in Visual Crowding By Reason of the Distance Between Principal Buildings on the Property.

The special permit for a reduction in the distance "between principal buildings" on the same lot may be authorized "upon a finding that such reduction is not detrimental because of view obstruction, overshadowing, service access or visual crowding."[53] The plaintiff sought a reduction for the distance between the two principal buildings to be constructed on the Property to 16.9 feet. The City Council offered (again, for the first time at trial, and not in its decision) two bases for its denial of this dimensional special permit. First, through the city assessor, Ms. Papows, the City Council offered evidence, presumably to suggest visual crowding, that the 16.9-foot distance proposed between the two buildings to be constructed on the Property was less than the median distance between buildings *on separate lots* within three hundred feet of the Property.[54] The City Council offered no evidence to suggest that the proposed distance was below the median or otherwise out of character with respect to distance between buildings "on the same site" as required by Section 3.2.2, fn. e, of the Ordinance.

The City Council also offered no evidence to rebut the plaintiff's evidence, which I credit, that the proposed distance between the buildings would not impact service access or cause overshadowing on any other properties.[55] The City Council did, however, offer evidence to suggest that the reduced distance between the two buildings would cause view obstruction. In support of this contention, the City Council offered the testimony of a single, lay witness, Alberta M. Hill.

Ms. Hill testified that she lives at 139 East Main Street, in a single-family home diagonally across the street from the Property and that the proposed development would block her view of Pilot's Hill.

Initially, I find that Ms. Hill was less than truthful with respect to where she actually lives, and I do not credit her testimony that she lives at 139 East Main Street.[56] I also find that an insufficient foundation was laid at trial from which to conclude that Ms. Hill was competent to testify about whether her view of Pilot's Hill from 139 East Main Street would be blocked based on the proposed distance between two buildings not yet constructed, as she failed to demonstrate a sufficient understanding of the proposed location of the new buildings.

***17** More importantly, I find, contrary to Ms. Hill's testimony, that there will be no "view obstruction" of the base of Pilot's Hill from 139 East Main Street as a result of the construction of the proposed development. The dwelling at 139 East Main Street is not located directly across the street from the Property at 116 East Main Street. Rather, it is situated diagonally across from the Property. It is directly across from Caledonia Place, and from the gas station next door to the Property. Further, the house at 139 East Main Street is set back about 20 feet from the street, and its line of sight to the Property is already partially blocked by the garage across Montgomery Place, which is not set back from the street, and by the canopy and building at the gas station across the street. With the new buildings proposed to be constructed at the Property set back respectively 68 feet and 105 feet, both considerably farther back than the present restaurant building, the view of the new buildings and the space between the buildings from 139 East Main Street is likely to, and I find will, be blocked from view by both the garage and the gas station.[57] The view of Pilot's Hill would not be blocked any more than it already is by the garage, the gas station and the existing restaurant building. Accordingly, as Ms. Hill's testimony was the only evidence offered by the City Council to suggest that there would be "view obstruction" as a result of the proposed development, the City Council has failed to offer any credible evidence on this issue.

CONCLUSION

For the foregoing reasons, I find and rule that the City Council's decision denying the requested special permits was legally untenable, arbitrary, capricious, unreasonable, and otherwise beyond the proper exercise of the City Council's lawful authority. The decision of the City Council is therefore ANNULLED.

Furthermore, this being one of "those rarely encountered points where no rational view of the facts the court has found supports the [special permit granting authority]'s conclusion that the applicant failed to meet one or more of the relevant criteria found in the governing statute or bylaw," *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 74-75, an order requiring the issuance of the requested special permits is appropriate. An order for the issuance of a special permit is "appropriate where remand is futile or would postpone an inevitable result." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, supra, 454 Mass. 374 at 388. See also *Shirley Wayside Limited Partnership v. Bd. of Appeals of Shirley*, supra, 461 Mass, at 474, 485.

Judgment will enter annulling the decision of the City Council and ordering the issuance of the requested special permits.

All Citations

Not Reported in N.E. Rptr., 2020 WL 6439581

Footnotes

1 Additional findings of fact are contained in the discussion section, *infra.*
2 Exh. 14.
3 Exh. 3.
4 Exh. 14.
5 Exhs. 12, 13.
6 Id.
7 Alberta M. Hill, a witness for the City Council, testified that the five-unit building at 114 East Main Street was formerly a church. Tr. Vol. I, p. 135.
8 Exh. 2, p. II:8.

9 Exhs. 1, 14.
10 Tr. Vol. I, p. 62.
11 Tr. Vol. I, pp. 64-65.
12 *The Gloucester Writers Center, Inc. and Pamela Steele v. City of Gloucester Zoning Board of Appeals*, Case No. 18 MISC 000556 (Mass. Land Ct. June 20, 2019) (Speicher, J.).
13 Exh. 1, pp. 13-15; Exh. 11.
14 Exh. l, p. 12; Exh. 14, p. 5.
15 Exh. 11.
16 Exh. 15, p. 20.
17 Exh. 11.
18 Id.
19 Id.
20 Exh. 2, p. 1:20.
21 Exh. 2. p. III:9.
22 Exh. 2, p. III:10.
23 Exh. 11, p. 4.
24 Exh. 15, p. 19.
25 Id. at 20.
26 Exh. 16, p. 60.
27 Exh. 11, p. 4: “The minutes of ... the City Council public hearings ... are incorporated into this Decision.”
28 Exh. 15, p. 17.
29 Exh. 2, p. 1:20.
30 Exh. 11, p. 4.
31 Exh. 2, p. 1:20.
32 Exh. 11, pp. 3-4.
33 Tr. Vol. I, pp. 61-64.
34 Tr. Vol, I, pp. 64-65.
35 City Council's Post-Trial Brief, pp. 7-9.
36 The City Council actually made no finding or explicit assertion, even at trial, that the “neighborhood” consisted of those properties within 300 feet of the Property. It at best implicitly made such an assertion by presenting the testimony of city assessor Papows, who compared the dimensional characteristics of the proposed development with those of properties within 300 feet, but with no explanation of how she determined this to be the appropriate distance or limit of the “neighborhood.” Tr. Vol. I, p. 102; Exh. 5.
37 Exhs. 12, 13.
38 Exhs. 5, 14.
39 Exh. 2, p. III:9.
40 Exhs. 5, 7.
41 The City Council offered evidence on this issue, but it was excluded on the ground that the offered comparison of open space per dwelling unit was based on a definition of open space different than the definition of open space in the Ordinance. See Tr. Vol. I, p. 107-112; Exh. 2, p. VI:8. Thus, the last column of Exhibit 5, suggesting such a comparison, was excluded.
42 Tr. Vol. I, p. 105.
43 Section 3.2.2 of the Ordinance, the source of these requirements, is titled, “Dimensional Requirements for Multi-family Dwellings and Their Accessory Uses.” Section 3.2.1, the dimensional table providing the requirements for single-, two-, and three-family dwellings, has different requirements for minimum lot area per dwelling unit requirements, and no minimum requirements for open space per dwelling unit. See Exh. 2, pp. III:6 – III:9.
44 In Section 3.1.8, the Ordinance defines “lot coverage” as “Percentage of lot area covered by structures of any kind, or otherwise roofed,” and then includes regulation of such lot coverage in Section 3.2.1, which provides dimensional regulations for one-, two- and three-family dwellings, but does not regulate lot coverage in Section 3.2.2, which provides the dimensional requirements for multi-family dwellings. See Exh. 2, pp. III:3, 6-9.
45 Tr. Vol. II, p. 13.

46 Tr. Vol. II, pp. 13-16.
47 Tr. Vol. II, p. 23.
48 Tr. Vol. II, p. 24.
49 One of the units is proposed to be an income-restricted affordable unit. Typically, the residents of such units are chosen by lottery by the municipality from among income-qualified residents.
50 Tr. Vol. II, p. 7. “The number of students, that fluctuates between 2,900 and 3,000.”
51 Tr. Vol. II, p. 9.
52 Tr. Vol. I, p. 116.
53 Exh, 2, p. III:10.
54 Tr. Vol. I, pp. 113-115; Exh. 7, 9.
55 Tr. Vol. I, pp. 69-70.
56 Tr. Vol. I, p. 131. After testifying that she “currently live[s]” at 139 East Main Street, Ms. Hill then became quite equivocal: “Well, I grew up here – I lived – we moved here in 1968, and I was married in 1979, moved out for a while, moved back in here and there. And the past three years Eve been in and but, the past year very much in. My mom lived here, and I came in to help her.” Indeed, at the hearing on the proposed development before the City Council, Ms. Hill gave her address as 236 East Main Street, an address farther down East Main Street and on the same side of East Main Street as the proposed development. Exh. 15, p. 16. See also Tr. Vol. I, p. 133: “[236 East Main Street] is still my home. I don't live there, but, I mean, I live with my mother, so ... I've lived there since 2003 ...” I also take judicial notice that the Gloucester assessor's database lists Ms. Hill and Cedric Hill as the owners of 236 East Main Street.
57 1 base this finding on the plans for the proposed development, Exh. 14, the assessor's map of the immediate area, Exh. 7, and as confirmed by the view I took of the Property and the surrounding area.

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