

City of Malden RECEIVED

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2018 DEC 11 P 12:17

Board of Appeal
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Malden, Massachusetts 02148

MALDEN, MASS.

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BOARD OF APPEAL DECISION

November 28, 2018 Hearing

Petition of:

Bay State Commons LLC seeks a variance of Section 500.2.2, Chapter 12, of the Revised Ordinances as Amended of the City of Malden, Namely, General Off Street Parking Requirements and Section 400.1.2.5 Chapter 12, of the Revised Ordinances of 1991 as Amended of the City of Malden, Dwelling, Multifamily Dimensional Controls As per plans, at the property known as and numbered 368 Pleasant Street, Malden, MA, and also known by City Assessor's Parcel ID #030-134-416

Findings of Fact

Petitioner is attempting to build a co-housing unit at 368 Pleasant Street and seeks variances related to the proposed project's parking (Section 500.2.2), front set back requirement (Section 400.1.2.5), lot coverage (Section 400.1.2.5), and density (Section 400.1.2.5). Petitioner previously appeared before the Board on June 22, 2018 seeking an administrative appeal on its prior proposed project for this location, which the Board denied.

Petitioner represents that this proposed project is a co-housing unit that will contain thirty residential units, along with common area space. The occupants would be individual owners of each of the units. Petitioner represented that these variances are necessary because, without them, Petitioner would be unable to develop this project as intended.

Petitioner represented that this project was substantially different than the project it proposed in June 2018. The prior, proposed project was a four-story building; this proposed project is a three-story building, with parking available underneath the building.

Numerous people spoke in favor of this proposal, including several members of the City Council. The Board read into the record many letters in support of this project. No one spoke in opposition.

Findings of Law

Approval to Hear Petitioner's Variance Requests

As Petitioner appeared before the Board in June 2018, the Board needed to find that the present proposal had "specific and material changes in the conditions upon which the previous unfavorable action was based . . ." G.L. c. 40A, § 16. The Board finds that the present proposal is significantly different than the prior proposal, as this project is a different height than the prior proposal, with a new layout for parking.

VariANCES

To grant a variance, the Board must find that (1) owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, (2) a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that (3) desirable relief may be granted without substantial detriment to the public good and (4) without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law. G.L. c. 40A, § 10A. "[A] decision of the board of appeals granting a variance cannot stand unless the board specifically finds that each statutory requirement has been met." *Planning Bd. of Springfield v. Bd. of Appeals of Springfield*, 355 Mass. 460, 462 (1969).

Petitioner fails to satisfy the first requirement of this test. No evidence was presented that 368 Pleasant Street has peculiar soils, shape, or topography that is unique for the zoning district where this property is located. Petitioner's basis for these variances entirely concern its desired building, and not the property itself. *Sheppard v. Zoning Bd. of Appeal of Boston*, 81 Mass. App. Ct. 394 (2012) (holding that the desire for a larger home is not a hardship). Petitioner's argument of financial hardship has no bearing on this first requirement for a variance, and the Board is not aware of any case law or authority that allows the granting of a variance for this reason alone.

There is an important rationale for this first variance requirement. If a property like 368 Pleasant Street is no different than the other properties in its respective zoning district, it is reasonable to conclude that the City of Malden took this into consideration when enacting its zoning ordinance. Allowing a variance without a showing of some uniqueness for the underlining property would turn the Board into a quasi-legislative board, rather than its intended role as a quasi-judicial board. "If variances (or exceptions, unless bestowed fairly in accordance with ascertainable standards properly stated in the zoning provisions) are granted with undue frequency or liberality, and without strict compliance with the prescribed statutory criteria, zoning regulations can

become a matter of administrative whim. The intended uniformity of rule may be destroyed." *Damaskos v. Board of Appeal*, 359 Mass. 55, 62 (1971).


Conclusion


Upon motion by William Sullivan, which was seconded by Kathryn Bilgen, members James O'Brien, William Sullivan, and Kathryn Bilgen voted in favor of the variances, with Adam Sherwin and John King voting against them.

Bay State Commons LLC's variance requests for 368 Pleasant Street are DENIED.

Members of the Board Voting:

James O'Brien
John King
William Sullivan
Kathryn Bilgen
Adam Sherwin


James O'Brien, Chairman


Adam T. Sherwin, Esq.
Legal Member