

City of Malden

Massachusetts
Board of Appeal
110 Pleasant St.
Malden, Massachusetts 02148

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MALDEN, MASS.

BOARD OF APPEAL DECISION

June 20, 2018 Hearing

Petition of:

Bay State Commons LLC requests a variance of Section 300.3.2.6, Chapter 12, of the Revised Ordinances of 1991 as Amended of the City of Malden (Dwelling, Multi Family) for the property known as and numbered 368 Pleasant Street, Malden, Massachusetts, and also know by City Assessor's Parcel ID# 030-134-416.

Findings of Fact

Bay State Commons LLC seeks a variance for a multi-family dwelling unit to be located at 368 Pleasant Street, which is located in the Residential Office ("RO") zoning district. The unit would consist of four stories, which would make it an impermissible use under Section 300.3.2.6.

Attorney Roberto Di Marco, on behalf of Bay State Commons LLC, appeared before the Board of Appeal on June 20, 2018 and represented that the building was a co-housing project that would consist of residential, owner-occupied condominium units. Several of the people who intended to live in this co-housing unit spoke in favor of this development and expressed the benefits that this project would have for the City of Malden. Bay State Commons LLC argued that Section 300.3.2.6 improperly made a dimension control a use restriction.

Building Commissioner Nelson Miller appeared and stated that under Section 300.3.2.6, a multi-family dwelling unit more than three stories but not exceeding six stories was not allowed in the RO district. City Planner Michelle Romero appeared and similarly stated that this ordinance did not permit this requested use.

The Board introduced into the record several letters in support of the project, and heard from several residents who spoke about the value that co-housing would have to the community.

The Board heard from several opponents of the project who raised concerns over the size of this dwelling unit, and the unfairness of allowing a project that directly conflicts with the zoning ordinance.

The Board introduced into the record a June 20, 2018 email from City Solicitor Kathryn Fallon regarding Bay State's petition. Solicitor Fallon represented that the matter before the Board was incorrectly characterized as a variance, because both state law and the City's zoning ordinance provided no right to request a variance for a property's use. Rather, this petition was an administrative appeal, seeking review of the Building Commissioner's determination that the proposed use of 368 Pleasant Street is not permitted in the RO district.

Findings of Law

The Board agrees that Bay State Commons LLC's petition is an administrative appeal of the Building Commissioner's decision, and not a request for a variance. Here, the petition seeks review of the intended *use* of 368 Pleasant Street, and the Board has no authority to grant a variance on this matter. G.L. c. 40A, § 10 ("Except where local ordinances or by-laws shall expressly permit variances for use, no variance may authorize a use or activity not otherwise permitted in the district in which the land or structure is located . . .").

It is undisputed that 368 Pleasant Street is in the RO district, and that Bay State Commons LLC's request is for a use that Section 300.3.2.6 expressly prohibits. The Board finds no reason to overturn the Building Commissioner's decision on this point. The Board similarly lacks authority to review the legality of this zoning ordinance as a use restriction. *Bearce v. Zoning Board of Appeals*, 351 Mass. 316, 319 (1966) (holding that a zoning board does not have the "power to nullify acts of the local legislative body which is charged under G. L. c. 40A, § 6, with the adoption and amendment of zoning ordinances.").

Conclusion

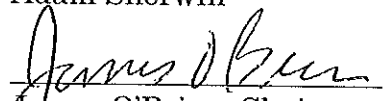
Upon motion by Michael Steele, which was seconded by Adam Sherwin, the Board voted unanimously to deny Bay State Commons LLC's petition.

Bay State Commons LLC's administrative appeal is DENIED. Bay State Commons LLC's request for a variance is DENIED WITHOUT PREJUDICE, as the Board only addressed Petitioner's administrative appeal, and not a request for a variance.

Members of the Board Voting:

James O'Brien

John King
Michael Steene
William Sullivan
Adam Sherwin


James O'Brien, Chairman