



**MINUTES OF THE ZONING BOARD OF APPEALS
ANDOVER, MASSACHUSETTS
Virtual Meeting Broadcast by:
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May 6, 2021**

Participating remotely via WebEx were: Elizabeth Oltman, Chair; Carol McDonough, Clerk; Kathy Faulk and Ellen Keller, Members; Michael Novaria, David Guerette and Ralph Arabian, Associate Members; Barbara Burke, Zoning Administrative Secretary.

The meeting opened at 6:33 p.m. Chair Oltman gave an overview of the meeting procedure, announced the names of the members participating and provided the call-in number and email address for the public to submit comments, questions or concerns during the hearings.

Petition Number: Z-21-37
Premises Affected: 161 Andover Street
Petitioner: Town of Andover
Relief requested: variances from Art. VIII, §4.2.2 to install a transformer that won't meet the minimum front or side yard depth requirements
Members Sitting: Oltman, Faulk, Arabian, Guerette

This is a continued deliberation. There being no changes to the decision as drafted, Guerette made a motion to approve the decision as written. Arabian seconded the motion and the Board voted by roll call: Faulk – yes, Guerette – yes, Arabian – yes, Oltman – yes.

Petition Number: Z-21-38
Premises Affected: 107 Main Street
Petitioner: Channel Realty
Relief requested: special permits under Art. VIII, §§7.6.2 & 3.1.3.F.10, variances from Art. VIII, §§ 3.1.3.C.15, 3.1.3.F.3, 3.1.3.F.5. & 10.0 &/or a modification of Decision #798 to convert a medical home office & apt to a limited business office & apt that won't meet the Table of Use Regulations or Definitions
Members Sitting: Oltman, Faulk, Keller, Guerette, Arabian

This is a continued deliberation. There being no changes to the decision as drafted, Keller made a motion to approve the decision as written. Guerette seconded the motion and the Board voted by roll call: Faulk – yes, Keller – yes, Arabian – yes, Guerette – yes, Oltman – yes.

Clerk McDonough stepped away from the meeting temporarily.

Petition Number: Z-20-194 & Z-21-36
Premises Affected: 32 Park Street
Petitioner: Montalto
Relief requested: Party Aggrieved for review of the Inspector of Building's determination &/or for a special permit under Art, VIII, §5.2.5.1 for the continued use of an internally illuminated sign –and- variances from Art. VIII, §5.2.5.1, 5.2.5.4, 5.2.5.5 for the continued use of an internally illuminated & backlit by other than white light attached sign.

Members Sitting: Oltman, McDonough, Keller, Faulk, Novaria, Guerette, Lopez

This is a continued public hearing. Attorneys Nicholas Di Mauro represented the petitioner, Lillian Montalto, who also participated virtually by WebEx. Member Kathy Faulk disclosed that she and her husband sold a house for which Ms. Montalto represented the buyer 20 + years ago. No one objected to her participation. Attorney Di Mauro summarized the previously submitted expert letter attesting that the sign is not backlit. He argued that the bylaw is outdated. Oltman read Andy Rouse’s letter objecting to the sign and noted that Town Counsel also submitted a memo to the Board. Attorney Thomas Urbelis suggested that the Board rely upon his memo & made no further comments. Clerk McDonough rejoined the meeting. Attorney Di Mauro pointed out the mistake in Mr. Rouse’s letter in which he alleges that the building has been there for many years. There being no other comments or questions from the Board or the public, Guerette made a motion to waive a site view & to close the public hearing. Keller seconded the motion & the Board voted by roll call: Faulk – yes, Guerette – yes, Keller – yes, McDonough – yes, Oltman – yes. The Board then proceeded to deliberate. In deliberation, Chair Oltman designated the following members to sit on the case: McDonough, Faulk, Keller, Guerette (for Novaria), and Oltman with Arabian as an alternate. Keller felt that there is an obvious bylaw violation in that the sign is internally illuminated by other than white light & the lack of a compelling reason for a variance. Faulk agreed adding that the sign bylaw has not caught up with the technology, but the letters are internally illuminated & she understands the reason for the purple light. McDonough agreed voicing concern with the color, which is not consistent with the branding of the town. Guerette agreed noting that the light color is the clearest issue/violation, with the back lighting / internal illumination potentially being either with no substantial hardship for a variance. Arabian agreed with the other Board Members. Oltman agreed noting that upon viewing the sign, it is internally illuminated. Keller made a motion to deny the request as a Party Aggrieved & to uphold the decision of the Inspector of Buildings. Arabian seconded the motion and the Board voted by roll call: Faulk – yes, McDonough – yes, Keller – yes, Guerette – yes, Oltman – yes, Arabian – yes. Oltman volunteered to draft the decision.

Petition Number: Z-21-49

Premises Affected: 6 Furnari Farm Ln

Petitioner: Kelly

Relief requested: special permit 3.1.3.F.4 to create a Family Dwelling Unit

Members Sitting: Oltman, Faulk, Keller, Lopez, Guerette, Arabian (alternate)

Charles & Alyssa Kelly represented themselves. They wish to convert an existing study to a kitchen & add onto the rear of their home to include a bedroom for Mr. Kelly’s mother, Aase Kelly. Oltman reviewed the standard conditions regarding 5-year renewal, removal of the kitchen cooktop once Aase Kelly no longer resides in the unit. There being no other questions or comments from the Board or the public, Keller made a motion to waive a site view & to close the public hearing. Guerette seconded the motion & the Board voted by roll call: Keller – yes, Faulk – yes, Lopez – yes, Guerette – yes, Oltman – yes. The Board then proceeded to deliberate. In deliberation, the Board agreed that a special permit is appropriate with the usual conditions. Keller made a motion to approve the special permit with the standard conditions and to continue the deliberation for the purpose of drafting the written decision. Guerette seconded the motion and the Board voted by roll call: Faulk – yes, Keller – yes, Lopez – yes, Guerette – yes, Oltman – yes, Arabian - yes. Keller volunteered to draft the decision.

Member Faulk recused herself from the following hearing and left the meeting for the duration of the public hearing on 148 Argilla Road.

Petition Number: Z-21-54

Premises Affected: 148 Argilla Road

Petitioner: Nolan

Relief requested: special permit 3.1.3.F.4 to create a Family Dwelling Unit

Members Sitting: Oltman, Keller, Guerette, Arabian, McDonough, Lopez (alternate)

Cheri Nolan, owner, represented herself informing the Board that it is not her intent to have an in-law apt. She bought the house from her 82 yr. old mother so that she can be there for her mother. Therefore, she is adding on an addition by way of a hallway connecting the original / main house that has only one bathroom to a new master bedroom & bathroom. There will be no kitchen. She included an exterior door so that she can take her dog outside without going into her mother's portion of the house. She is unsure why she was sent to the ZBA. Inspector of Buildings Chris Clemente explained that the original permit application had a Family Dwelling Unit (FDU) with a separate kitchen and entry. Therefore, he denied the permit until she obtained a special permit for the FDU. The building permit was issued for the addition without the kitchen when the contractor & owner asked how to proceed without an FDU. He thought that she wanted an FDU. Ms. Nolan explained that a stove was never proposed or the addition, just a wet back with a sink. Oltman asked whether she wants a kitchen. Ms. Nolan stated that she does not want a kitchen. Oltman asked Clemente if the second door is acceptable. Clemente confirmed that a second door is acceptable. Nolan explained that she wants the private door for some separation. Oltman asked Clemente to confirm that no zoning approval is required if the addition does not have a full kitchen. Clemente confirmed that zoning relief is not required if no full kitchen is included in the addition. Oltman suggested that Ms. Nolan could withdraw her application without prejudice. Keller agreed, but voiced concern over the side setback. Clemente stated that it is conforming at 15' due to the age of the house. Ms. Nolan requested to withdraw her application without prejudice. Guerette made a motion to allow the withdrawal without prejudice. McDonough seconded the motion and the Board voted by roll call: McDonough – yes, Keller – yes, Guerette – yes, Arabian – yes, Lopez – yes.

Petition Number: Z-21-51

Premises Affected: 1 Meadowbrook Drive

Petitioner: Blumenstock Girrell

Relief requested: Party Aggrieved for review of a decision made by the Inspector of Buildings, &/or for variances from Art. VIII, §3.1 & 3.2 &/or for a special permit under Art. VIII, §10.1 to allow the continued use of a room as an Airbnb unit

Members Sitting: Oltman, Faulk, Keller, McDonough, Lopez, Arabian (alternate)

Attorney Mark Corner represented the petitioners, who were also participating virtually. Attorney Corner reviewed the letter that he submitted yesterday outlining his clients' position emphasizing that the zoning bylaw does not address Airbnb type uses, which are a newer use type. He noted that there are 10 other Airbnb listings in Andover. His clients' home is a single-family house in which they use one room within the house rented to guests. No meals are served, but coffee & bagels are available. Parking is provided in the driveway and the room is only rented when the owners are home. Attorney Corner pointed out that other home based businesses are allowed that are far more intrusive. He considers this an accessory use, as of right, explaining that one of the complaints alleged that the owners were not home. A family friend had a large party that created a regrettable situation. The use is not a boarding or lodging house. Attorney Corner argued that the cases cited by the abutters are not analogous since his clients do not rent out their entire house. He asked the Board to overturn the Inspector's decision. Associate Member Guerette recused himself from the case as he realized that he & Attorney Corner work for the same law firm. The Board discussed that the owners do rent rooms for monetary compensation to people who are not members of their family. Guests use the main entry door & access shared areas of the home (including a bathroom). The petitioners state that they host Airbnb guests for 1/3 of the year, excluding wintertime, and are present when guests stay in their home. Oltman summarized a letter from multiple abutters, which the Board received by email, in which they allege that the petitioners rent rooms 18 nights/month, including long term, transient guests as a commercial business registered as a Bed & Breakfast with the state. The abutters' letter notes their opposition due to public safety concerns, negative effects on the community and overall well-being of the neighborhood. Administrative Secretary Barbara Burke informed the Board of a phone call from Susan Weger of 2 Meadowbrook Dr. in which she stated that the owners rent more than one room. An email was received from S. Bat, abutter, stating that rentals occur year round. The owners

explained the situation with their friend's son's party that was not related to Airbnb. They understand that it should not have happened emphasizing that all the complaints stem from that party. They only rent one bedroom, have only one entrance to their home and rarely have more than 1-2 guests. Furthermore, they followed the MA travel mandate during the pandemic. They would agree to a maximum of three guests. Inspector of Buildings Chris Clemente asked the applicants to reconcile the Airbnb rental in their home when they are exceeding the Zoning Bylaw's definition of a family (up to 5 unrelated people) since their own family still occupies the home, thereby exceeding the maximum of five unrelated individuals. Attorney Corner argued that the resident family plus guests occupy the home. Clemente disagreed that it conforms to the definition of a family emphasizing that the Certificate of Occupancy was issued for a single family dwelling, not 'with rentals'. Town Counsel Attorney Thomas Urbelis acknowledged receipt of Attorney Corner's letter on 5/5/21 making the following comments:

1. In the Andover Zoning Bylaw, unless the use is allowed, it is prohibited (and he sees no provision cited that it is allowed);
2. Since it is not allowed, they argue that it is incidental under the umbrella of an accessory use of a single-family residence. This argument that it is an incidental use that qualifies as an accessory use, they quote the case *Harvard v Baksin* (?) 'When addressing uses which in general tend to become deleterious to a neighborhood of homes, it would seem that the most liberal test open to us must be whether the use is one that is so necessary in connection with a one-family detached house or so commonly to be expected to be with such a house that it cannot be supposed that the ordinance was intended to prevent it.' This very same quote was in the *Stiller* decision used by the court in the *Harvard* case and was followed by this sentence: "Mr. Stiller's frequent rentals of his residence intended as a substantial supplemental source of income are not such an incidental use." The court added that homes are expected to be used as residences, not for profit. The test under the case cited by the landowner for this Board is whether this Airbnb is so necessary in connection with a one family detached house or is so commonly expected with such a house that it can't be supposed the bylaw was intended to prevent it.
3. In Attorney Corner's letter, there were citations to a few various cases relating to general principles of zoning law. However, the *Stiller* case held that the Airbnb rentals violated the town's zoning bylaw for the reasons stated in points 1 & 2 above. Corner's letter did not include one citation to any Massachusetts case, which held that the use here is incidental through a single family home, which would qualify the use as an accessory use. The only case cited in the letter, *Stiller*, in which the court found it wasn't an accessory use because it wasn't incidental. It wasn't so necessary in connection with a one family detached house or so common to be expected with such a house.

The Board discussed with the petitioners, their counsel, Town Counsel, and Inspector of Buildings the definition of a family, whether rental of a room is allowed or a lodging house, and having more than 5 guests at the house. Chair Oltman relayed more emails from abutters, all of whom are opposed to the use. Keller asked the Inspector if there are safety codes to protect renters if the house were a legitimate hotel/motel. Clemente confirmed that there are various life safety measures that would have to be followed. The Board waived a site view. Attorney Corner noted that multiple abutter comments are factually inaccurate and that if the Board is relying on them for factual information, his clients want to respond. If not, then the complaints do not determine whether the use is allowed. Oltman stated that the Board is aware that it is the use in question. Faulk reminded the Board that there is a request for a special permit; therefore, the neighbors' input may go toward consideration of a special permit. Keller added that neighbor input is always taken seriously noting that the case is before the Board because of the neighbors. Corner agreed that more time to digest & respond to the neighbors' comments is appropriate. Chair Oltman suggested keeping the public hearing open & continuing it to 6/3/21. Associate Member Lopez ask for data on the number of days that the property was occupied Airbnb rentals over the past year. Oltman asked how long they have operated with Airbnb. They have been Airbnb hosts for over 4 years. Attorney Corner asked how other Airbnb's in town have special permits. Clemente stated that he is unaware of any. Zoning Administrative Secretary relayed opposition from a neighbor received by phone during the hearing. Arabian made a motion to continue the public hearing to June 3rd. McDonough seconded the motion. The Board voted by roll call to continue the public hearing to 6/3/21: McDonough – yes, Keller – yes, Faulk – yes, Lopez – yes, Arabian – yes, Oltman – yes.

Petition Number: Z-21-46

Premises Affected: 1-3 Elm Ct. and 32-34 Elm St.

Petitioner: PSJ Realty, LLC

Relief requested: special permits under Art. VIII, §§3.3.3 &/or 3.3.5, variances from Art. VIII, §§ 3.3.4 &/or 4.1 (Table 2) to subdivide a non-conforming lot into 2 non-conforming lots

Members Sitting: Oltman, Faulk, Keller, McDonough, Guerette, Arabian (alternate)

Keller disclosed that she is a neighbor of the Joe Wadland and knows Mr. Wadland's son, Sean, who is participating in the hearing. She also manages the building where Joe Wadland is a business tenant. She feels that she can participate impartially. Attorney Casper, nor anyone else objected to her participation. Attorney Dan Casper represented PSJ Realty, LLC. Also present was Sean Wadland, property manager for PSJ Realty. They seek to subdivide a non-conforming lot at the corner of Elm St and Elm Court. The lot is located in the SRA zoning district and currently has two 2-family residences on it. Attorney Casper explained that 32-34 Elm Street had parking in the front yard area that is now lawn. The owners have an agreement with the church across the street that allows tenants to park in the church lot. The request is not a subdivision under the subdivision control law because the two buildings are standing on the same lot already. Petitioners have spoken with the Director of Planning, Paul Materazzo, who instructed them to seek zoning relief first and then submit to the Planning Board to affirm the subdivision. Casper noted that the houses were built in 1906 and 1921 and the lot is characteristically small in a neighborhood of small lots. They have spoken with the abutters and none of them voiced any concern or opposition. Keller asked for clarification that the only new non-conformity would be the rear setback at 32-34 Elm St. Casper confirmed, it will be 8.4'. Faulk asked why they believe the property is eligible for a special permit or a variance. Casper explained that special permits under Section 3.3.5 are for 1-2 families while a variance would be for the 4-family. There being no other questions from the Board and none from the public, Guerette made a motion to waive the site view and to close the public hearing. Faulk seconded the motion and the Board voted by roll call to waive the site view & close the hearing: McDonough – yes, Keller – yes, Faulk – yes, Guerette – yes, Lopez – yes, Arabian – yes, Oltman – yes. The Board then proceeded to deliberate. In deliberation, the Board had no issues with the request. Oltman suggested that they could grant a special permit for the 2-family and a variance for the 4-family building. Faulk suggested a variance could cover both buildings. There being no other discussion, Guerette made a motion to approve the variances from Sections 3.3.4 and 4.1 for a subdivision from one non-conforming lot into two non-conforming lots as shown on the plan dated April 7, 2021 with the condition that the plan shall be approved by the Planning Board and to deny the special permit as moot and to continue deliberation for the purpose of drafting a decision. Keller seconded the motion and the Board voted by roll call: McDonough – yes, Keller – yes, Faulk –yes, Guerette – yes, Oltman – yes, Lopez – yes, Arabian – yes. Guerette will draft the decision.

Petition Number: Z-21-53

Premises Affected: 300 Minuteman Road

Petitioner:

Relief requested: variances from Art. VIII, §§5.1.5, 5.1.9 to permit a reduction in the number of parking spaces

Members Sitting: Oltman, Faulk, Keller, McDonough, Arabian, Guerette & Lopez (alternates)

Associate Member Arabian disclosed that Attorney Johnson assisted him in purchasing a property several years ago. He feels that he can be impartial. Attorney Johnson asked Mr. Arabian to recuse himself so that no one can second-guess any votes that he may take. Oltman appointed Associate Member Lopez to sit in place of Arabian. Attorney Johnson pointed out that Planning Director Paul Materazzo submitted a memo of support. Johnson reviewed the proposal and the site. It is the last undeveloped lot left in the area. Christian Coates, Asset Manager of Minuteman Park from Spear Street Capital, presented the overview of the proposed cGMP use that will support other business uses in the area, allowing a shorter supply chain. The Board discussed that this particular use is not in the Table of Use Regulations and the requested variance. Johnson informed the Board

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that the Inspector of Buildings determined that it is an allowed use. However, under the Zoning Bylaw, 750 parking spaces are required. Yet much fewer spaces are needed (1/300 sf or 2/1,000 sf). Section 5.1.9 allows the Planning Board to reduce the off-street parking with an on-site reserve parking area, or remote parking. Scott Doty, of John Crowe Associates, reviewed the site. Johnson noted that as part of the ongoing zoning bylaw review, it has been determined that the onsite parking requirements are outdated and the parking bylaw is confusing. McDonough asked if there is a tenant under contract requiring less parking and what would happen if a tenant requiring more parking were the lessee. There is no tenant yet, as typically a tenant will not commit until the last minute once the facility is completely built. It is a highly specialized building; it will not be an office building. Keller asked if they cannot find a tenant, would they come back to the Board since the variance runs with the land, not the building. Johnson informed the Board that they expect the variance to be conditioned that it be this specific use. Faulk asked for a copy of the PowerPoint presentation, the number of parking spaces shown on the site plan and if there is room to construct more parking. Keller asked for a better articulation of the hardship argument. Johnson argued that the zoning bylaw does not anticipate such a use with less parking and that there is no need for up to 750 parking spaces. The building would either shrink or leave little green space if all of the required spaces were built out with 300 parking spaces that would never be used. Since the proposed use is the only use proposed and since the Planning Board will have to conduct a Site Plan Review and make the ultimate decision as to whether the proposed parking is sufficient, approving the requested relief would allow the lot to be developed with an economic benefit to the owner and the Town. Faulk asked Johnson to tie the hardship argument to the soil conditions, shape or topography of the land. Scott Doty argued that the shape, size and topography create an economic hardship; if there was more land they'd be able to build the parking spaces on site. For this type of use, tenants expect 100,000 square feet minimum of area for the building. Johnson noted that there are wetlands and a brook on the lot as well. They have requested relief from the Conservation Commission. Chair Oltman noted Director of Planning Paul Materazzo's memo in support. There being no other questions or comments from the Board, the applicant or the public, Lopez made a motion to waive the site view & close the public hearing. Keller seconded the motion & the Board voted by roll call: McDonough – yes, Faulk – yes, Keller – yes, Lopez – yes, Guerette – yes, Oltman – yes. The Board then proceeded to deliberate. Regarding the variance from Section 5.1.9 (parking) authorizing the Planning Board to grant a special permit to reduce the parking would relieve the applicant from the requirement of sufficient on-site reserve parking. The Board felt that it is prudent to give the Planning Board more flexibility to consider more of the finer details of the proposal. Keller suggested placing the condition to restrict the use to CGMP and that the Planning Board agrees to a lesser number of spaces under Section 5.1.9. Keller made a motion to grant the variance from Section 5.1.9 to reduce the number of parking spaces with the conditions as stated for the CGMP use and the Planning Board agreement for a lesser number of parking spaces. Faulk seconded the motion and the Board voted by roll call to grant the variance with conditions: McDonough – yes, Faulk – yes, Keller – yes, Lopez – yes, Oltman – yes, Guerette – yes. Faulk volunteered to draft the decision.

Discussion Item:

Chair Oltman reminded the Board to look at their Ethics Course certificates, which needs to be renewed every 2 years.

There being no other business, Keller made a motion to adjourn the meeting. McDonough seconded the motion and the Board voted unanimously to adjourn the meeting at 9:43 p.m.

Respectfully submitted,
Barbara Burke, Zoning Administrative Secretary