



KIMBERLEY DRISCOLL
MAYOR

2020 MAY 18 PM 1:34
CITY OF SALEM, MASSACHUSETTS
BOARD OF APPEALS

CITY CLERK
SALEM, MASS

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May 18, 2020

Decision

City of Salem Board of Appeals

Petition of KEVIN MCCAFFERTY for variances per Section 4.1.1 *Table of Dimensional Requirements* of the Salem Zoning Ordinance from maximum height of buildings (stories), minimum lot area, minimum lot area per dwelling unit, minimum depth of front yard, and minimum width of side yard and a variance from Section 5.1 *Off-Street Parking* to provide less than the required amount of parking to construct a three-story, three-family dwelling with four parking spots on the vacant lot at 9 BOSTON STREET (Map 25, Lot 39) (B1 and ECOD Zoning Districts).

A public hearing on the above Petition was opened on November 20, 2019 pursuant to M.G.L. Ch. 40A, § 11. No testimony was heard on this petition in the November 20 meeting. The hearing was continued to December 18, 2019; January 15, 2020 (during which no testimony was heard); February 19, 2020 (during which no testimony was heard); March 18, 2020 (during which no testimony was heard); and April 15, 2020, and closed on April 15, 2020, with the following Salem Board of Appeals members present: Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, Steven Smalley, and Paul Viccica.

At the November 20, 2019 meeting, Peter A. Copelas, Mike Duffy (Chair), and Rosa Ordaz were present; Carly McClain and Steven Smalley were not yet members of the Board; Jimmy Tsitsinos and Paul Viccica were absent. At the December 18, 2019 meeting, Peter A. Copelas, Mike Duffy (Chair), Carly McClain, Rosa Ordaz, and Jimmy Tsitsinos were present; Steven Smalley was not yet a member of the Board and Paul Viccica was absent. At the January 15, 2020 meeting, Peter A. Copelas, Mike Duffy (Chair), Carly McClain, Rosa Ordaz, Jimmy Tsitsinos, and Paul Viccica were present; Steven Smalley was not yet a member of the Board. At the February 19, 2020 meeting, Peter A. Copelas, Rosa Ordaz, Jimmy Tsitsinos, and Paul Viccica were present; Mike Duffy (Chair) and Carly McClain were absent, and Steven Smalley was not yet a member. At the March 18, 2020 meeting, Peter A. Copelas, Mike Duffy (Chair), Carly McClain, Rosa Ordaz, and Steven Smalley were present; Jimmy Tsitsinos and Paul Viccica were absent. At the April 15, 2020 meeting, Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, Steven Smalley, and Paul Viccica were present, as noted above; Carly McClain and Jimmy Tsitsinos were absent.

The petitioner seeks variances per Section 4.1.1 *Table of Dimensional Requirements* of the Salem Zoning Ordinance from maximum height of buildings (stories), minimum lot area, minimum lot area per dwelling unit, minimum depth of front yard, and minimum width of side yard and a variance from Section 5.1 *Off-Street Parking* to provide less than the required amount of parking to construct a three-story, three-family dwelling with four parking spots on the vacant lot at 9 Boston Street.

Statements of Fact:

1. In the petition date-stamped September 25, 2019, the petitioner requested variances per Section 4.1.1 *Table of Dimensional Requirements* of the Salem Zoning Ordinance from maximum height of buildings (stories), minimum “lot size,” and “minimum depth of front/side yard.”
2. 9 Boston Street is owned by Eba Inc.
3. 9 Boston Street is a vacant lot located in the Business Neighborhood (B1) zoning district and the Entrance Corridor Overlay District (ECOD).
4. The lot area is 4,903 square feet, which is less than the minimum lot area of 6,000 square feet in the B1 district. As such, constructing a building on the property triggers the need for a variance.
5. The proposal is to construct a three-family dwelling with four parking spots. The three-family use is allowed in the B1 district. The proposed structure requires variances from dimensional requirements including the aforementioned lot area, front yard setback, and side yard setback.
6. Although the initial application included a request for relief from maximum height of buildings (stories), there is no such requirement in the B1 district. The only height requirement in the B1 district is maximum height of buildings (feet): 30 feet. The proposal is for the structure to be 29.5 feet in height, so no relief is required.
7. Per Section 5.1 *Off-Street Parking*, the requirement is “One and a half (1½) spaces per dwelling unit, with a minimum of two (2) spaces, plus one (1) space for each home occupation.” As such, for the proposed three dwelling units, five off-street parking spaces would be required. With the original proposal of four spaces, a variance from Section 5.1 *Off-Street Parking* would be required to provide less than the required amount of parking.
8. On November 8, 2019, planner Brennan Corrison emailed petitioner Kevin McCafferty asking him to confirm an additional request for relief from off-street parking requirements (Section 5.1 *Off-Street Parking* of the Zoning Ordinance) would also be required. Mr. McCafferty confirmed via an email back to Mr. Corrison on November 8, 2019.
9. The requested relief, if granted, would allow the petitioner to construct a three-story, three-family dwelling with four parking spots on the vacant lot at 9 Boston Street.
10. At the November 20, 2019 meeting of the Board of Appeals, only three Board members were in attendance: Peter Copelas, Mike Duffy (Chair), and Rosa Ordaz. Having three members in attendance out of the five-member Board constitutes a quorum (enough members to hold a meeting). However, per the Zoning Board of Appeals’ Rules and Regulations, “[t]he concurring vote of at least four (4) members of the Zoning Board of Appeals shall be necessary in any action taken by the Board.” As such, the Board could not vote to approve any petitions in the November 20 meeting, and all petitions were continued to the next regularly scheduled meeting. In the meeting, the Board voted three (3) in favor (Peter Copelas, Mike Duffy (Chair), and Rosa Ordaz) and none (0) opposed to approve the motion to continue to the next regularly scheduled meeting, December 18, 2019.
11. At the December 18, 2019 meeting of the Board of Appeals, petitioner Kevin McCafferty discussed the petition. Mr. McCafferty noted that the lot is not maintained, is considered a nuisance, and is often used as a cut-through from Boston Street to May Street. Mr. McCafferty explained that the proposal is similar to nearby buildings and that the lot is currently underutilized. He noted that the plan requires two curb cuts. He stated that the intent is to make the units affordable for working class families, and that it only makes sense financially with three units.

12. At the December 18, 2019 public hearing, project architect Lee Dearborn explained that the building is situated at the front of this corner lot to keep the building in line with the neighborhood context. This location requires variances from front and side yard setbacks. He noted that providing one less parking spot than required is reasonable considering the site restrictions and small size. Mr. McCafferty explained that the setback variances allow for parking on the site (for which there would not be space if the building were situated differently on the lot).
13. At the December 18, 2019 public hearing, members of the Board raised questions about the project. Rosa Ordaz asked the petitioner to discuss the units being affordable. Mr. McCafferty stated that he hoped the units would be in the \$400,000 range, with each unit containing two bedrooms and 2.5 bathrooms. Ms. Ordaz clarified that by “affordable” the petitioner meant “market rate” as opposed to “luxury,” and Mr. McCafferty agreed. Peter Copelas noted that he did not see how the lot demonstrates adequate hardship; he stated that while an irregular shape or topography issue may trigger a hardship, a small lot size does not. He noted that a three-family building may make the project more attractive, but that several of the variances requested are due to the proposal to build a three-family, three-story property rather than a two-family property. Chair Duffy stated that the only variance that seems unavoidable is relating to minimum lot area.
14. At the December 18, 2019 public hearing, there was more discussion about the grounds for the variances. Mr. Copelas indicated that the property itself does not appear to be unique in the area. Chair Duffy noted that there was a representation being made that there is an economic reason for the third unit, which generates the need for the parking variance. Chair Duffy noted that the Board has been reluctant to ask for pro forma-type information to evaluate whether there is a genuine economic hardship. He noted that he was not sure whether additional information would change his or Mr. Copelas’ opinion, but it could help. Ms. Ordaz offers that more information about the economics might help her as well. Mr. McCafferty discussed the acquisition and buildout costs and noted that building three units is the only way building the property makes economic sense. The Board asked Mr. McCafferty to provide more information on costs and economic justification, as well as the City Solicitor’s guidance regarding acceptable grounds for variances.
15. At the December 18, 2019 public hearing, no (0) members of the public spoke in favor of or in opposition to the petition.
16. At the December 18, 2019 public hearing, Mr. McCafferty indicated he would like to request a continuance. The Board voted five (5) in favor (Carly McClain, Jimmy Tsitsinos, Rosa Ordaz, Mike Duffy (Chair), and Peter A. Copelas) and none (0) opposed to continue the petition to the next regularly scheduled meeting on January 15, 2020.
17. Prior to the January 15, 2020 meeting, on January 7, 2020, petitioner Kevin McCafferty submitted a written request to continue the hearing from January 15 to February 19, 2020. This request was duly filed with the City Clerk on January 8, 2020.
18. At the January 15, 2020 meeting of the Board of Appeals, Paul Viccica certified that he had examined all evidence pertaining to 9 Boston Street which was distributed at the single missed session on December 18, 2019, which evidence included an audio recording of the missed session. As such, Mr. Viccica was eligible to participate in future hearings and votes on the matter.
19. At the January 15, 2020 meeting of the Board of Appeals, the Board voted five (5) in favor (Paul Viccica, Jimmy Tsitsinos, Rosa Ordaz, Mike Duffy (Chair), and Peter A. Copelas) and none (0) opposed to continue the petition for 9 Boston Street to the next regularly scheduled meeting on February 19, 2020.

20. On February 6, 2020, petitioner Kevin McCafferty submitted a written request to continue the hearing from February 19 to March 18, 2020. This request was duly filed with the City Clerk on February 6, 2020.
21. On February 6, 2020, Kevin McCafferty confirmed via email to planner Brennan Corrison that he had “engaged Bill Quinn as legal representation to help with the process of moving this project forward.”
22. On February 10, 2020, Attorney William Quinn, on behalf of Mr. McCafferty, stated via email to Mr. Corrison “that despite the letter previously sent to you by Kevin to continue to the March meeting, we now have decided to go forward with out [sic] presentation next Wednesday, evening, Feb. 19, 2020, as scheduled.” Mr. Quinn also noted “that we have revised our plans to provide five (5) rather than four (4) on-site parking spaces in compliance with the requirement of the Ordinance, so no variance for number of spaces being sought,” and “we no longer request a variance for height in number of stories, as there is actually no height maximum in stories in the B-1 district, and the new structure will be less that [sic] 30 feet in height as allowed by the Ordinance.”
23. Revised and updated materials were submitted to the Board of Appeals, including revised plans dated February 11, 2020, a revised Statement of Grounds, and a pro forma.
24. The revised plans show five (5) legally conforming parking spaces.
25. In advance of the February 19, 2020 meeting, petitioners were informed that there would only be four members in attendance. With four members in attendance, the positive vote of all members is required to grant a special permit or variance. In these situations, petitioners are afforded the opportunity to request to continue to a future meeting in which five members might be in attendance. Attorney William Quinn submitted a written request to continue from February 19, 2020 to March 18, 2020. This request was duly filed with the City Clerk on February 19, 2020.
26. Due to the ongoing COVID-19 pandemic and related precautions and Governor Baker’s March 12, 2020 Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §18, and the Governor’s March 15, 2020 Order imposing strict limitations on the number of people that may gather in one place, the March 18, 2020 meeting of the Board of Appeals was slated to take place via conference call, with a public call-in option. However, it was determined that the meeting as planned would not meet the temporary requirements of the partially suspended Open Meeting Law, and as such, no testimony should be heard. As such, the meeting was held for the sole purpose of continuing all matters before the Board.
27. Prior to the March 18, 2020 meeting, Board member Steven Smalley certified that he had examined all evidence pertaining to 9 Boston Street which was distributed at the single missed session on December 18, 2019, which evidence included an audio recording of the missed session. As such, Mr. Smalley was eligible to participate in future hearings and votes on the matter.
28. In the March 18, 2020 meeting of the Board of Appeals, held remotely via public conference call, Chair Duffy described each application before the Board and noted that due to the unique circumstances, he would entertain a motion to continue all matters until the next regularly scheduled meeting on April 15, 2020. The vote was four (4) in favor (Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, and Steven Smalley) and none (0) opposed.
29. The April 15, 2020 meeting of the Board of Appeals was held remotely using the web conference platform Zoom. The meeting was also accessible via public conference call and Salem Access TV.

30. At the April 15, 2020 public hearing, Attorney William Quinn discussed the petition. He noted that issues discussed at the first hearing were the building design itself, the lack of adequate legal parking, and the question of financial hardship. Attorney Quinn reviewed what had changed since the Board first saw the project, noting that they have gone back to a flat-roof building design; he noted that there is no story limit for a multifamily building in the B1 zone, and the building meets height in feet requirements. He described other flat-roofed, multi-story buildings in the neighborhood. He noted that this is a mixed-use neighborhood. He stated that the building will be an improvement over its current use as a dirt parking lot. Attorney Quinn noted that revised plans show five conforming parking spaces on the site. The traffic flows one way, coming in from Boston Street, going behind (and to the side of) the building where the parking is located, and exiting out onto May Street. There is no backing out onto Boston Street.
31. At the April 15, 2020 public hearing, Attorney Quinn also discussed the financial situation. He noted that the lot is a little under 5,000 square feet, so it is not grandfathered as a one-family, 5,000 square foot lot, and most buildings nearby are not single-family. The proposed multifamily use is legal in the B1 district. Attorney Quinn noted that they submitted a pro forma email, which showed that given the cost of the land, plus construction costs where doing “nothing fancy” costs \$175 per square foot, a two-family building does not work: it either loses money or has minimum profits, so it could not be financed. He stated that you have to go to the three-family to make 10-12% on the investment. Attorney Quinn stated that where hardship can be based on financial hardship, we have documented that there is a financial hardship for the property—that there is no feasible economic use of this property as a residence without going to multifamily. He stated that they could have maybe asked for four-family if they could have fit more parking, but this is a reasonable application for the situation and the site.
32. At the April 15, 2020 public hearing, Board member Peter A. Copelas noted that a couple of problems from earlier meetings have been addressed, including removing the need for the parking variance. He stated that regarding the variances being sought for setbacks, he does not think anyone wants to see a building set in the middle of the lot because it would not make sense; siting it at the street is perfectly appropriate with the rest of the neighborhood. He stated that the question of two-family versus three-family has been addressed by the pro forma: it appears that there is not a reasonable likelihood that anyone could go forward with a two-unit building, so the lot density issue falls under hardship. Board member Rosa Ordaz stated that she would agree: she had asked for more of an explanation, and they have done a wonderful job with the pro forma. She stated that the parking and her other concerns have been answered.
33. At the April 15, 2020 public hearing, one (1) member of the public spoke in favor and no (0) members of the public spoke in opposition to the petition.
34. At the April 15, 2020 public hearing, Chair Duffy reviewed the variance criteria.
35. At the April 15, 2020 public hearing, Brennan Corriston confirmed that the previously requested variances from maximum height of buildings (stories) and off-street parking are no longer required under the current plan.

The Salem Board of Appeals, after careful consideration of the evidence presented at the public hearings, and after thorough review of the petition, including the application narrative and plans, makes the following **findings** that the proposed project meets the provisions of the City of Salem Zoning Ordinance:

Variance Findings:

1. Special conditions and circumstances especially affect the land, building, or structure involved, generally not affecting other lands, buildings, and structures in the same district, including the size and shape of the lot and the lot's location as a corner lot. As noted below, without relief, the lot could not be developed residentially at all. This situation affects this particular lot of undeveloped land, but generally does not affect other lands in the district as there are other multifamily structures already in existence.
2. Literal enforcement of the provisions of the Ordinance would involve substantial hardship to the applicant: Enforcement of the dimensional and lot area per dwelling unit requirements would prevent any residential development of the property whatsoever. Enforcing the requirement would lead to an economic hardship for the development of the property.
3. Desirable relief may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent of the district or the purpose of the ordinance. The design is consistent with the size of buildings in the area. The location of the building on the site is consistent with other development on the street.

On the basis of the above statements of fact and findings, the Salem Board of Appeals voted five (5) in favor (Paul Viccica, Steven Smalley, Rosa Ordaz, Mike Duffy (Chair), and Peter A. Copelas) and none (0) opposed to grant the requested Variances per Section 4.1.1 *Table of Dimensional Requirements* of the Salem Zoning Ordinance from minimum lot area, minimum lot area per dwelling unit, minimum depth of front yard, and minimum width of side yard to construct a three-story, three-family dwelling with five parking spots on the vacant lot at **9 Boston Street**, subject to the following **terms, conditions, and safeguards**:

Standard Conditions:

1. Petitioner shall comply with all city and state statutes, ordinances, codes and regulations.
2. All construction shall be done as per the plans and dimensions submitted to and approved by the building commissioner.
3. All requirements of the Salem Fire Department relative to smoke and fire safety shall be strictly adhered to.
4. Petitioner shall obtain a building permit prior to beginning any construction.
5. A Certificate of Occupancy is to be obtained.
6. Petitioner shall obtain street numbering from the City of Salem Assessor's Office and shall display said number so as to be visible from the street.
7. Petitioner is to obtain approval from any City Board or Commission having jurisdiction including, but not limited to, the Planning Board.
8. All construction shall be done per the plans and dimensions submitted to and approved by this Board. No change, extension, material corrections, additions, substitutions, alterations, and/or modification to an approval by this Board shall be permitted without the approval of this Board, unless such change has been deemed a minor field change by the Building Commissioner in consultation with the Chair of the Board of Appeals.

Mike Duffy / BTC

Mike Duffy, Chair
Board of Appeals

A COPY OF THIS DECISION HAS BEEN FILED WITH THE PLANNING BOARD AND THE CITY CLERK.

Appeal from this decision, if any, shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A, and shall be filed within 20 days of filing of this decision in the office of the City Clerk. Pursuant to the Massachusetts General Laws Chapter 40A, Section 11, the Variance or Special Permit granted herein shall not take effect until a copy of the decision bearing the certificate of the City Clerk has been filed with the Essex South Registry of Deeds.

This notice posted on "Official Bulletin Board"
City Hall, Salem, Mass. on *May 18, 2020*
at *1:34 pm* in accordance with MGL Chap. 30A,
Sections 18-25.