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Ruthanne Fuller
Mayor

ZONING BOARD OF APPEALS

Adrianna Henriquez, Board Clerk

#02-19

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Detailed Record of Proceeding and Decision

Petition #02-19 Deborah Bing (“Ms. Bing”) and Jonathan Hurwitz (“Mr. Hurwitz”) (collectively, “Petitioners”), 60 Crescent Avenue, Newton, Massachusetts, pursuant to M.G.L. c. 40A, § 8, and 15, appealing an interpretation by the Commissioner of Inspectional Services relating to the Petitioners’ unenclosed covered entry located at 24 Moreland Avenue, Newton, Massachusetts. The subject property consists of a 7,092 square foot lot in a Single Residence (SR-2) district.

The Zoning Board of Appeals held a public hearing on the above-entitled proceeding on Wednesday, March 27, 2019 at 7:00 p.m., in the Council Chambers at City Hall, Newton, Massachusetts.

The following members of the Board were present:

Brooke Lipsitt (Chairman)

Stuart Snyder

Barbara Huggins Carboni

Michael Rossi

Lei Reilley

The petition was filed on March 8, 2019.

Due notice of the public hearing was given by mail, postage prepaid, to all “parties in interest” in accordance with M.G.L. c. 40A, § 11 and by publication in the *Newton TAB*, a newspaper of general circulation in Newton, Massachusetts, on March 13, 2019 and March 20, 2019.

Submitted in support of the Appeal were the following documents:

- 1. Appeal of Decision of the Commissioner with accompanying documents, received March 8, 2019
- 2. Supplemental documentation from Petitioners to the Zoning Board of Appeals, received March 19, 2019

FACTS

- 1. According to Petitioners' Application for Administrative Appeal, in October 2018, the Petitioners' builder sought a building permit and was informed by Anthony Ciccariello, the Deputy Commissioner of the Inspectional Services Department, that the unenclosed front "porch" in Petitioners' plans would be counted toward the floor area of the property and would cause Petitioners to exceed the permissible floor area ratio ("FAR").
- 2. On November 1, 2018, Commissioner of the Inspectional Services Department John Lojek ("Commissioner Lojek") sent an email to Petitioners' architect, Richard Levey, RBL Architects, 30 Jacobs Terrace, Newton MA 02459 ("Mr. Levey"). In that email, Commissioner Lojek stated that, upon review of the Petitioners' plans, the proposed structure does not meet the definition of a porch for the purposes of FAR. Commissioner Lojek referred to Section 8.3 of the Newton Zoning Ordinance, which states, "a porch may share no more than two exterior walls with the residential structure," and concluded the Petitioners did not meet the code requirement.
- 3. To avoid exceeding the permissible FAR, the Petitioners modified their plans to include a pergola over a portion of the "porch" and were issued a building permit for the construction of a new single-family home on November 7, 2018. Thereafter, the construction of the home began.
- 4. On February 11, 2019, Petitioner Mr. Hurwitz sent an email to Commissioner Lojek. In relevant part, Mr. Hurwitz stated that when Petitioners had sought a building permit, Deputy

Commissioner Ciccariello said that the “unenclosed front porch” should be counted in the FAR calculation. In his email, Mr. Hurwitz explained that the Petitioners disagreed and were looking forward to Commissioner Lojek’s determination.

5. On February 25, 2019, Petitioners sent a follow-up email to Commissioner Lojek regarding the Commissioner’s determination.
6. On February 27, 2019, Mr. Hurwitz sent an email to Commissioner Lojek explaining that he met with Deputy Commissioner Ciccariello that morning, and Deputy Commissioner Ciccariello had again explained why according to the Inspectional Services Department the “porch” counted toward the FAR calculation.
7. On February 27, 2019, Commissioner Lojek sent an email to Mr. Hurwitz. In it, Commissioner Lojek disagreed with Petitioners’ interpretation of section 1.5.5 of the Newton Zoning Ordinance and stated, “For the purposes of FAR, we have counted areas such as the area in question when it meets the parameters of the ‘porch’ definition: “more than 60 percent enclosed by impermeable walls, attached to and accessible from the primary structure, and not heated or air conditioned.” Commissioner Lojek informed Petitioners that they may file for an Appeal of the Interpretation of the Commissioner to the Zoning Board of Appeals and that they may also apply for a Special Permit for relief of FAR.

THE PUBLIC HEARING

Before addressing the substance of the appeal, Chairman Lipsitt inquired whether the matter was properly before the Board. Specifically, Chairman Lipsitt asked why the Board should address the appeal, which was filed more than 30 days after the building permit was issued. Petitioner Mr. Hurwitz was present and explained that the Petitioners were appealing from the final ruling of Commissioner Lojek received on February 27, 2019. Mr. Hurwitz acknowledged that the building permit as revised by the Petitioners had been approved but maintained that the rules allow for appeal from Commissioner Lojek’s formal February 27, 2019 decision. Chairman Lipsitt asked Mr. Hurwitz to explain what decision Commissioner Lojek had made in February 2019 and how that was different from the issuance of the permit. Mr. Hurwitz explained that he believed that, at the

time of the issuance of the permit, Commissioner Lojek did not consider the specific issues of the “porch” or the particular argument that the Petitioners were making.

Mr. Hurwitz further explained that Petitioners did not have time to formally appeal around October 2018 when Deputy Commissioner Ciccariello made the determination that the “porch” would be considered toward the FAR. At that time, Petitioners also did not want to delay construction any longer while they explored their options. Chairman Lipsitt referred to Petitioners’ exhibit D, a February 27, 2019 email from Commissioner Lojek affirming that the Inspectional Services Department will count the porch in the FAR calculation. Chairman Lipsitt explained that her understanding of the documents was that it had already been determined that the “porch” would count toward FAR, which was why the Petitioners redesigned the project to have an open roof. Mr. Hurwitz stated that he did not think Commissioner Lojek issued an opinion to the Petitioners that reached that conclusion. Mr. Hurwitz also noted there had been a relatively quick exchange between Petitioners’ architect, Mr. Levey, and the Department to figure out a way to proceed.

Michael Rossi (“Mr. Rossi”) asked Mr. Hurwitz to identify specifically what information the Petitioners received in February regarding what they were able to build which the Petitioners did not have in October. Mr. Hurwitz took the position that in February 2019 the Petitioners received a final opinion of Commissioner Lojek, which considered the Petitioners’ argument that ISD’s interpretation of the Zoning Ordinance was incorrect. Mr. Hurwitz reiterated that the Petitioners did not push the issue at the time of the issuance of the permit, as it was suggested that the Petitioners accept a compromise. Mr. Hurwitz believed that Commissioner Lojek would consider their argument at a later date and that the Petitioners did not have a final opinion from Commissioner Lojek.

Mr. Hurwitz then noted that if the Zoning Board of Appeals were to conclude that the Petitioners should have properly appealed when the building permit was issued, the Petitioners would like to resubmit their building plans with the covered roof. Chairman Lipsitt explained that the Zoning Board of Appeals does not have the authority to revise the building permit. She further stated she believes that Petitioners have been advised that they can apply to the City Council for a Special Permit for expanding the FAR of the building, but the issue of redesigning and approving a new design is not properly in front of the Zoning Board of Appeals.

Mr. Hurwitz explained that he believed the decision of Deputy Commissioner Ciccariello was not an “appealable order.” He maintained that the Petitioners are not appealing the issuance of the building permit but rather the subsequent decision of the Commissioner.

Stuart Snyder (“Mr. Snyder”) asked whether Petitioners had sought and been denied a permit for the plans that did not include a pergola. Mr. Hurwitz explained that he was unable to answer the question, that he was not personally involved in the conversation that took place, as the Petitioners’ builder had presented the plans. He also noted that when Petitioners’ plans were presented, the roof and the FAR were questioned by the Inspectional Services Department. Because of this, the Petitioners’ architect, Mr. Levey, reached out to the Department to try to work out a compromise. Mr. Snyder asked if revisions were made and the building permit was issued based upon those revisions. Mr. Hurwitz stated that that was correct.

Commissioner Lojek spoke on behalf of the Inspectional Services Department. Commissioner Lojek stated that when he receives emails, he responds. He clarified that his February 27, 2019 email response to Petitioner was not a decision, but merely a further explanation of the decision made months before. When the Petitioners encountered an issue with the FAR and the definition of “porch,” the Petitioners’ builder and architect came in to speak to Deputy Commissioner Ciccariello. Deputy Commissioner Ciccariello had explained that Petitioners could “not do it this way and not have [the “porch”] count under FAR.” Deputy Commissioner Ciccariello asked Commissioner Lojek about the project, Commissioner Lojek agreed with Deputy Commissioner Ciccariello, and that was the stance of the Inspectional Services Department.

Commissioner Lojek further explained that he authorizes staff to process paperwork and to make decisions on behalf of the Department, so when the Department issues building permits, technically they are all issued by him. At the end of October and beginning of November 2018, the Petitioners wanted their permit and Deputy Commissioner Ciccariello told Commissioner Lojek that he (Deputy Commissioner Ciccariello) told the Petitioners what they could do, but explained they could not do what they originally proposed. Deputy Commissioner Ciccariello informed Commissioner Lojek that the Petitioners agreed to put in a pergola and not the roof over the entryway. Commissioner Lojek reiterated that the permit was issued based on the Petitioners’

revised plans in compliance with the zoning code and the building code.

Mr. Snyder asked Commissioner Lojek whether, in the usual course, if someone applies for a permit and the plans do not meet the requirements, there is an informal discussion or a formal decision is provided. Commissioner Lojek explained that a decision is provided, and the decision is either the issuance of a building permit or the formal denial of a building permit. Mr. Snyder then asked, assuming Petitioners submitted their original plans and had not agreed to revise their plans, whether the Petitioners would have received a denial, which would be a decision they could appeal.

Commissioner Lojek confirmed this.

Lei Reilley referred to Commissioner Lojek's email to the Petitioners dated February 27, 2019, in which he stated that, "If you want to appeal [the] decision you may do so by filing for an Appeal of the interpretation of the Commissioner to the Zoning Board of Appeals" and noted that Commissioner Lojek seemed to be inviting the Petitioners to appeal. Commissioner Lojek explained that the language in his email was "boiler plate" language that is cut and pasted in many emails.

Chairman Lipsitt then reiterated that the question in front of the Board is whether the appeal was filed timely and asked whether there were any comments or motions from the Board.

Mr. Rossi commented that while there was a little bit of ambiguity, he did not see any change in circumstances between October and February. He further stated that the Petitioners were in no different position with respect to the information that the Department was providing in February as compared to November. Mr. Rossi also noted that the Petitioners seemed to agree with that, and the only distinction the Petitioners were making is that the information received in October 2018 came from Deputy Commissioner Ciccariello whereas the information received in February 2019 came from Commissioner Lojek. Mr. Rossi concluded this was not a distinction with a difference and that he was inclined to find that the appeal was untimely.

Barbara Huggins Carboni ("Ms. Huggins Carboni") commented that this appeal is not just a question of untimeliness but also whether the Board has the authority redesign a project. The Petitioners received a building permit based on a compromise concerning what would count and

what would not count toward FAR. As they were building the project, the Petitioners came to the conclusion that they did not like the result and wanted a redesign or another opinion from the Department that would allow them the design they desired. Ms. Huggins Carboni noted that if what the Petitioners wanted was the enclosed porch, and the Department told the Petitioners that their project exceeds the FAR, the Petitioners were advised they could go to the City Council to seek a special permit to increase the FAR permitted. Ms. Huggins Carboni concluded that not only is the appeal untimely, the appeal also seems to raise an issue that is for the City Council to decide, not the Board.

Ms. Huggins Carboni further explained her concerns for the Department, noting that they must get a lot of calls and emails after a building permit has been issued. Ms. Huggins Carboni explained that it is not correct or helpful to Commissioner Lojek if, subsequent to the issuance of a permit, every phone call or email the Department receives is considered a decision subject to appeal.

Mr. Snyder agreed that each email cannot constitute a decision. Mr. Snyder referred to Mr. Rossi's point that the time from which an appeal would have properly been taken was either the issuance of a building permit or a denial. On that basis, Mr. Snyder would be inclined to make a motion to reject the appeal as untimely.

Mr. Hurwitz explained that this process is difficult as a resident of the City. He reiterated that the Petitioners agreed to a change in plans as a result of a quick discussion between their architect Mr. Levey and Deputy Commissioner Ciccariello. The Petitioners accepted that but maintained that they were still able to ask for an actual, formal ruling from the Department. Mr. Hurwitz also noted the Petitioners would not have filed the appeal had Commissioner Lojek not specifically invited them to do so. He also noted it was not right for the Board to avoid the substance of the matter with this question of timeliness.

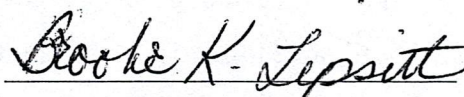
Chairman Lipsitt explained to the Petitioner that the Zoning Board of Appeals has limits to its authority and discretion. She explained that the City and the Board accept decisions from Commissioner Lojek's office as coming from Commissioner Lojek himself.

FINDINGS AND DETERMINATION

A motion was made by Mr. Snyder to deny the Petitioners' Application for Administrative Appeal of an interpretation by the Commissioner of Inspectional Services addressing the petitioners' intent to construct a front porch on the basis that the appeal was not timely filed with the Board. The motion was duly seconded by Mr. Rossi and passed five in favor, zero opposed.

Accordingly, the Board makes the following findings:

1. In October 2018, Deputy Commissioner Ciccariello determined the unenclosed, covered entry in Petitioners' plans would count toward the FAR calculation and Petitioner would be in excess of the permissible FAR. On November 1, 2018, Commissioner Lojek determined that the unenclosed, covered entry was not a "porch" for the purposes of FAR and would count toward the FAR calculation. Petitioners revised their plans and on November 7, 2018, were issued a building permit based upon their revised plans.
2. Petitioners did not file an appeal within the 30-day time period required per G.L. c. 40A §15.
3. Commissioner Lojek's email dated February 27, 2019 is not an "order or decision" for the purposes of filing an appeal pursuant to G.L. c.40A, §8.
4. Therefore, Petitioners' appeal dated March 8, 2019 was untimely. Accordingly, the Board lacks jurisdiction to entertain Petitioners' March 8, 2019 appeal.



Brooke K. Lipsitt, Chairman

AYES: Brooke K. Lipsitt (Chair)
Barbara Huggins Carboni
Michael Rossi
Lei Reilley
Stuart Snyder

Copies of this decision and all plans referenced in this decision have been filed with the Planning and Development Department, the ZBA and the City Clerk.

The decision was filed with the City Clerk on _____.

The City Clerk certified that all statutory requirements have been complied with and that 20 days have lapsed since the date of filing of this decision and no appeal, pursuant to Section 17, Chapter 40A or Section 21 of Chapter 40B has been filed.

David A. Olson, City Clerk