Notify

COMMONWEALTH OF MASSACHUSETTS

6.19

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 03-0340C

MORDECAI DANESH AND SIEON SANIEOFF, as TRUSTEES OF 1318 COMMONWEALTH AVENUE CONDOMINIUM TRUST

vs.

BOARD OF APPEAL of CITY OF BOSTON and 1316 COMMONWEALTH AVENUE INC., d/b/a TONIC

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs Mordecai Danesh and Sieon Sanieoff brought this action against defendants Tonic and the Board of Appeal of the City of Boston (the "Board") to appeal the Board's decision to grant a variance to Tonic. Defendants have moved for summary judgment. Plaintiffs have filed a cross-motion for summary judgment on the grounds that the Board's decision violated the notice and hearing requirements of G.L. c. 40A, §§9 and 11. For the following reasons, the Defendants' motion for summary judgment is *DENIED* and the Plaintiffs' motion for summary judgment is *ALLOWED*.

SUMMARY JUDGMENT RECORD

Plaintiffs are the trustees of both the 1318 Commonwealth Avenue Trust and the 1318 Commonwealth Avenue Condominium Trust. The 1318 Commonwealth Avenue Trust is the owner of twenty-three of the twenty-six units in the 1318 Commonwealth Avenue Condominium, which property abuts the property at 1316-1316A Commonwealth Avenue in Brighton. 1316 Commonwealth Avenue Inc., or Tonic, is a

Massachusetts corporation and has its offices at 1316 Commonwealth Avenue in Brighton.

On January 7, 2002, Tonic filed an application with the Boston Inspectional Services ("ISD") for a permit to "[c]hange [o]ccupancy [at 1316 Commonwealth Avenue] to include Live Entertainment in restaurant after 10:30 p.m." On May 23, 2002, ISD denied the application pursuant to Article 51-16 of the Allston/Brighton Neighborhood District of the Boston Zoning Code which provides that a restaurant with live entertainment after 10:30 p.m. is a forbidden use. On May 30, 2002, Tonic filed an appeal to the Board of Appeal seeking:

> permission to change the legal use and occupancy of the premises from restaurant to restaurant with live entertainment after 10:30 p.m. (use item 38).

The appeal did not specify the form of relief being sought.

A public hearing was held before the Board on September 10, 2002. Notice of the hearing was mailed by the Board to the Plaintiffs and to the owners of all property deemed by the Board to be affected by the requested change. The hearing was also advertised by the Board in the Boston Herald on August 20, 2002. Both the notice mailed to the Plaintiffs and the newspaper advertisement listed the form of the relief requested as a variance. Both the Plaintiffs and the Defendants attended the hearing.

At the hearing, Tonic presented evidence that the property had been used as a restaurant with live entertainment after 10:30 p.m. for a number of years prior and that such prior use had been licensed for live entertainment after 10:30 p.m. After the hearing, the Board voted to approve Tonic's appeal seeking to change the legal use and occupancy of the premises from a restaurant to a restaurant with live entertainment after 10:30 p.m. A written decision; drafted by Tonic as required by the Massachusetts Zoning Enabling Act, was submitted to the Board for its approval. The decision was signed on December 17, 2002 and filed with the ISD on January 9, 2003. The decision

listed the form of relief granted as a variance.

Plaintiffs filed the current action appealing the Board's grant of relief on January 23, 2003. On November 12, 2003, Tonic's attorney delivered a letter to the Board of Appeals requesting that the Board substitute a "corrected decision" for the decision filed January 9, 2003. Notice of this request was not simultaneously sent to the Plaintiffs or their attorney. On November 13, 2003, the Board signed a "corrected decision" which changed the form of relief granted from a variance to a conditional use permit. This decision was based on a finding by the Board that the use requested by Tonic was a prior nonconforming use as defined by Article 2(34) of the Enabling Act. No hearing was held by the Board before the "corrected decision" was signed and no notice of the "corrected decision" or the request for a "corrected decision" was given to the Plaintiffs or their attorney until after the decision was signed. The Plaintiffs and their attorney did not receive such notice until November 20, 2003.

DISCUSSION

Summary Judgment Standard

A court should grant summary judgment where the record, including pleadings, depositions, answers to interrogatories, admissions on file and affidavits, shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); McGuinness v. Cotter, 412 Mass. 617, 620 (1992). The court must construe facts in the light most favorable to the nonmoving party. *Id.* The moving party bears the burden of demonstrating the absence of a triable issue, and that the moving party is entitled to have questions of law resolved in its favor. Mass. R. Civ. P. 56(c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the non-moving party's case or by showing

02/04/2010 4:03PM (GMT-05:00)

that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. *Id.* at 716.

Analysis

The Board of Appeals has limited authority to issue an amended decision without notice and a hearing:

> The law is clear that the board has the inherent power, without holding a further public hearing, to correct an inadvertent or clerical error in its decision so that the record reflects its true intention . . . so long as the correction does not constitute a "reversal of a conscious decision" . . . does not grant relief different from that originally sought, and does not change the result of the original decision . . . and so long as no one relying on the original decision has been prejudiced by the correction . . .

Board of Selectmen of Stockbridge v. Monument Inn, Inc., 8 Mass.App.Ct. 158, 164 (citations omitted). Any amended decision issued that does not comport with these standards must comply with the notice and hearing requirements of G.L. c. 40A, §§ 9 and 11.

A prior nonconforming use is defined as "a use of a structure or lot that does not conform to a regulation prescribed by the [Boston Building Code] for the district in which it is located; provided that such use was lawfully in existence on the effective date of [the] code or, in the case of a use made nonconforming by an amendment of [the] code, on the effective date of such amendment." Boston Zoning Code, Article 2(34). A nonconforming use need not comply with the requirements of a zoning change and may lawfully remain in existence after the change as a matter of right. G. L. C. 40A, §6.

A prior nonconforming use "is distinct from a use permitted by a variance." Barron Chevrolet, Inc., v. Danvers, 419 Mass. 404, 408 (1995). "Variance procedures presuppose the prohibition of the use sought . . ." Mendes. v. Board of Appeals of Barnstable, 28 Mass.App.Ct. 527, 531 (1990). A use permitted by a variance, by definition, is not a use that is allowed as a matter of right and, therefore, cannot be a

010

02/04/2010 18:08 FAX

02/04/2010 4:03PM (GMT-05:00)

prior nonconforming use. Barron, at 408. Accordingly, a variance cannot be sought in relation to the continuance or extension of a prior noncomforming use which must have *lawfully* existed before the zoning change took place. *Id.*

The standards for granting a variance are far more stringent than those for granting a conditional use permit, Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 153 (1976). A variance is a "disfavored form of relief" that is to be granted "sparingly." Guiragossian v. Board of Appeals of Watertown, 21 Mass.App.Ct. 111 (citations omitted). Each of the discrete statutory requirements must be met before a variance can be issued and failure to establish any of them is fatal.[1] *Id.* at 115. Conditional use permits, in contrast, are a common form of relief. The standards under which they are granted are more broad and are applied more flexibly.[2] *Id.*

---

[1] Under Section 7-3 of the Boston Zoning Code, the Board of Appeal shall grant a variance only if it finds that all of the following conditions are met:

(a) That there are special circumstances or conditions, fully described in the findings, applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure;

(b) That, for reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose;

(c) That the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and . . .

In determining its findings, the Board of Appeal shall take into account: (1) the number of persons residing or working upon such land or in such structure; (2) the character and use of adjoining lots and those in the neighborhood; and (3) traffic conditions in the neighborhood.

[2] Under Section 6-3 of the Boston Zoning Code, the Board of Appeal shall grant [an appeal for a conditional use permit] only if it finds that all of the following conditions are met:

(a) the specific site is an appropriate location for such use or, in the case of a substitute nonconforming use under Section 9-2, such substitute nonconforming use will not be more

02/04/2010 18:08 FAX 011

The "corrected decision" issued in the present case changed the form of relief granted from a variance to a conditional use permit for a prior nonconforming use. A variance, by definition, is a different form of relief than that based on a prior nonconforming use. Therefore, the "corrected decision" was not the correction of a clerical error but was a "grant [of] relief different from that originally sought." Board of Selectmen of Stockbridge, 8 Mass.App.Ct. at 164. As such, the "corrected decision" was improper because it failed to comport with the hearing and notice requirements of G.L. c. 40A, §§9 and 11.

The clear purpose of the hearing and notice requirements of the zoning law is "to ensure that zoning authorities act on [variance and conditional use permit] applications only after the opposing interests have had a fair opportunity to be heard." Tenneco Oil Co. v. City Council of Springfield, 406 Mass. 658, 660 (1990). Plaintiffs were repeatedly denied that opportunity. Having received notice that a variance was being sought at the first hearing, a form of relief inapplicable to the continuation or extension of a prior nonconforming use, Plaintiffs were denied an opportunity to present evidence that "a restaurant with live entertainment after 10:30 p.m." was not a lawful pre-existing nonconforming use. When a conditional use permit was eventually granted by the Board in its "corrected decision," based on a finding that the requested use was a prior nonconforming use, Plaintiffs were once again denied their right to be heard on this issue when the decision was issued without notice and without a hearing.

This second denial of due process is particularly troubling for the court as the "corrected decision" was issued only after a private request from Tonic's counsel to the Board. This kind of

---

objectionable nor more detrimental to the neighborhood than the nonconforming use for which it is being substituted;

(b) the use will not adversely affect the neighborhood;

(c) there will be no serious hazard to vehicles or pedestrians from the use;

(d) no nuisance will be created by the use;

(e) adequate and appropriate facilities will be provided for the proper operation of the use

informal lobbying, absent any notice to the plaintiff, frustrates the fairness and openness behind G.L. c. 40A, §§9 and 11. Tenneco Oil Co., 406 Mass. AT 660. It "does not appear to comport with due process" and is "neither proper nor authorized by law." See Bonetti v. Dennis, 1998 Mass. Super. LEXIS 456 (Lauriat, P).

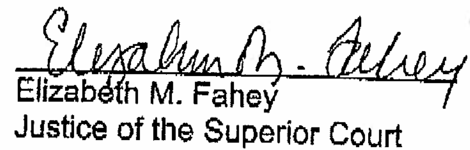
The defendants argue that this 'private request' was not improper because it was a communication between two defendants exercising their right to mount a joint defense. While the joint defense privilege has been recognized in Massachusetts at the trial court level, see American Automobile Ins. v. J.P. Noonan Transportation, Inc., 12 Mass.L.Rptr 493 (Middlesex Super. Ct. November 16, 2000)(McHugh, J.), it has not yet been recognized at any appellate level. In any event, even assuming arguendo that the privilege has been recognized in Massachusetts, it is not applicable in the present case. The joint defense privilege is a "device designed to prevent waiver of the attorney-client privilege when discrete parties face the same legal claim." *Id.* The joint defense privilege, therefore, like the attorney-client privilege, protects only those communications that are made in furtherance of an ongoing and joint defense strategy. *Id.* The request to the Board that it issue a "corrected decision" was not such a communication. While a discussion between the Board and Tonic about the effect that a request for a "corrected decision" might have on their case might qualify as a communication in furtherance of an ongoing joint defense strategy, the actual request to the Board for such a decision does not. The issuance of a decision, "corrected" or not, is an action taken by the Board as a public body, not as a joint defendant. Tonic's request to the Board to change the form of relief granted without notice and a hearing violated G.L. c. 40A, §§9 and 11 and the Defendants' status as joint defendants does nothing to mitigate that infraction.

For the foregoing reasons, the court finds, as a matter of law, that the Board of Appeal improperly issued a "corrected decision" on November 13, 2003 by failing to meet the public notice and hearing requirements of G.L. c. 40A, §§9 and 11. Accordingly, the defendant's motion for summary judgment is denied and the plaintiff's

cross-motion for summary judgment is allowed.

ORDER

For the reasons stated herein, the defendant's motion for summary judgment is **DENIED**; the plaintiff's cross-motion for summary judgment is **ALLOWED**. It is further **ORDERED** that judgment be entered in favor of the plaintiffs and the final decision of the Board of Appeal of the City of Boston, dated November 13, 2003 be hereby **ANNULLED.**



Elizabeth M. Fahey
Justice of the Superior Court

DATED: June 14, 2004