

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

IN THE MATTER OF: Village Realty Trust
Petitioner

Property Owner: Jay Abend
45 Hopkinton Rd.
Westborough, MA 01581

OPINION OF THE BOARD

REQUEST FOR SPECIAL PERMIT
67 Village St.

Hearing: August 3, 2011
Decision: September 21, 2011

MEMBERS PRESENT: Joseph F. Musmanno, Chairman
David Cole
Anthony Biocchi
Carol Gould

THE WRITTEN OPINION WAS DELIVERED ON SEPTEMBER 21, 2011

RECEIVED

SEP 22 2011

TOWN CLERK

Qu 12, 2011

TOWN OF MEDWAY

BOARD OF APPEALS

DECISION ON APPLICATION OF VILLAGE REALTY TRUST FOR A SPECIAL PERMIT IN RESPECT OF 67 VILLAGE STREET

This is the Decision of the Zoning Board of Appeals of the Town of Medway (“the Board”) on an application of Village Realty Trust for a Special Permit under Section III.D of the Zoning ByLaw in respect of 67 Village Street. After full consideration by the Board, *the requested special permit is granted subject to conditions hereinafter set forth.*

Summary of Fact

The subject lot is pre-existing, non-conforming, having been used for an industrial use for many years by Castronics, Inc., who manufactured metal castings on the premises. Some years ago, the demand for metal castings declined such that Castronics no longer needed the whole premises. On July 21, 2004, the Board held a hearing on an application by Castronics for a Special Permit to enable Paul Shuker, the operator and owner of Mohawk Painting, to lease part of the space for storage of industrial painting supplies and an office. It was further proposed that Mr. Shuker sublease space to Ralph Prettman Joline, the owner of J.E. Corp., a hardware floor contractor, with the intention that J.E. Corp. would establish a woodworking shop and an office separate from that of Mohawk Painting. The Board denied the Special Permit on the grounds that, since the previous use was industrial and the proposed use was also industrial, so no change of use was proposed, and hence there was no enlargement or change of use requiring the issuance of a Special Permit.

Subsequently, Castronics vacated the premises and (according to the uncontroverted testimony of Mr. Jay Abend at the hearing discussed below) the premises were used for some time for an internet sales business. This business later moved out and unsuccessful attempts were made to sell the building. The building was then leased to Arcadio Gonzalez, who operated a contractor’s company. On May 18, following an inspection of the premises, the Zoning Enforcement Officer cited Mr. Abend for a violation of Section D-1 of the Zoning ByLaw, namely a change of use to a Contractor’s Quarters, and ordered Mr. Abend to obtain a Special Permit for this change of use.

Accordingly, the present application was filed and a hearing on the application was held on July 20, 2011.

At the hearing, Mr. Jay Abend, of 45 Hopkinton Road, Westboro MA appeared on behalf of the applicant, Village Realty Trust. As previously noted, Mr. Abend stated that the internet sales business which had previously occupied the premises moved out about a year ago, and since efforts to sell the property had failed, it was now leased to two businesses. Mr. Abend argued that the general nature of the business for which the violation was alleged was similar to that (a painting business) which previously occupied the site, both being industrial, so that no special permit should be required. Gardening tools are presently stored in an outside tent.

At the same hearing, the Building Inspector argued that this was a new use which required a special permit. There was some rather inconclusive discussion between members of the Board and the Building Inspector regarding what criteria should be used to determine whether any new use is sufficiently similar to a previous use that no special permit should be required, the Building Inspector in effect stating that this should be left to his judgment.

Members of the public who spoke at the hearing raised concerns about the number of vehicles parked at the site (especially outside normal working hours) and environmental problems. It was noted that the building is in the 100 year flood zone of the Charles River, which flows along the south side of the lot. Photographs were submitted showing flood waters inundating a trailer and a truck on the lot. No one spoke in favor of the application, and several members of the public spoke against it.

In response to questions from the Board, Mr. Abend stated that if a special permit were granted, he would not object to the Board limiting the hours of operation of the business, and would not object to limitations on signs. There would also be no objection to limiting the number of employees to (say) 15. The applicant would not object to a limitation of one unregistered vehicle on the lot, and there should be no vehicle repairing. The building should not be used as a showroom but the applicant felt that banning all sales on the premises would be going too far.

Grounds of Decision

Change of use of a pre-existing non-conforming use of a building is governed by Section V.D.1 of the Zoning ByLaw, which provides:

Any lawful building or structure or use of a building, structure or premises existing at the time this Bylaw is adopted, even if not in conformity with its provisions may be continued, rebuilt if damaged or destroyed and, if authorized by the Board of Appeals, may be enlarged or changed to a specific new use.

No specific guidance is given in the Zoning ByLaw as to the criteria which the Board of Appeals should apply to determine when a change of a non-conforming use has occurred, and if so whether the Board should issue a permit for a specific new use; the general criteria for issuance of special permits set out in Section III.J of the Zoning ByLaw do not furnish any material assistance in either determination.

However, the wording of Section V.D.1 quoted above leads naturally to a two-part test, namely (a) has there been an enlargement or change of use sufficient to trigger the application of Section V.D.1; and (b) if the answer to (a) is in the affirmative, should the Board permit the proposed new use.

Despite considerable discussion with the Building Inspector during the aforementioned hearing, and lengthy consideration of the matter during their subsequent deliberations, the Board were unable to reach a consensus regarding point (a). The Building Inspector proposed that the necessary determination be left to his sound discretion. This appears unsatisfactory, since when (as in the present case) the owner of a building, having a non-conforming use and apparently unsuitable for conversion to a conforming use, is seeking a new tenant, the owner should be able to have a general idea of what other uses will be permitted without constant reference to the Building Inspector. The Board's previous decision of July 21, 2004 in relation to the subject lot might be held to imply that a change from one non-conforming industrial use to a different non-conforming industrial use is not a change sufficient to trigger the need for a special permit under Section V.D.1, but the Board declines to adopt such a rule; it is not difficult to imagine changes from one industrial use to another which would greatly increase the burden which the non-conforming use places upon the neighboring lots.

Fortunately the present case can be decided without requiring a definite resolution of this question. The Building Inspector held, in his letter of May 18, 2011,

that the present use of the subject lot was that of a Contractor's Quarters, as that term is defined in Section II of the Zoning ByLaw, and that decision is manifestly correct. The ByLaw itself draws a significant distinction between use as a Contractor's Quarters, and general industrial uses; for example, Industrial Districts II and III both permit general industrial uses but do not permit Contractor's Quarters. Since the ByLaw draws such a distinction between Contractor's Quarters and general industrial uses, the Board is compelled to hold that a change from a general industrial use to a Contractor's Quarters is a change sufficient to trigger the application of Section V.D.1.

The question then arises as to whether the Board should permit this change. It is readily apparent that the subject lot is of peculiar environmental sensitivity, in that it borders the Charles River and is located within a flood zone; indeed, as noted by members of the public at the hearing, the lot has been completely submerged within the last two years, and the danger of having vehicles parked on the lot and leaking fluids into flood waters is readily apparent. On the other hand, in this respect it is appropriate to draw a distinction between the surface of the lot and the building thereon; the building is constructed such that the floor level is elevated approximately one storey above the lot surface such that the floor level is not at significant risk of flooding.

This matter is not easy, but it is the considered judgment of the Board that a special permit for use as a Contractor's Quarters may be issued subject to stringent conditions necessary in view of the peculiar environmental sensitivity of the subject lot. The Board appreciates that the conditions hereinafter set forth may impose substantial burdens upon the use as a Contractor's Quarters, but considers all these conditions necessary in view of the peculiar conditions of the subject lot, and the close proximity of residences affected by the use sought.

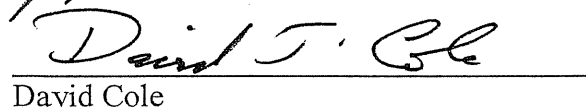
Accordingly, the Board hereby grants a special permit to Village Realty Trust for use of 67 Village Street as a Contractor's Quarters, subject to the following terms and conditions:

1. There shall be no outside use or storage.
2. Only one unregistered motor vehicle shall be permitted on the lot at any time.
3. No additional exterior lighting shall be installed.
4. No servicing of equipment (including vehicles) shall be conducted outside the building.
5. Vehicles must be parked only on impervious surfaces.
6. No showroom is permitted in the building.
7. Hours of operation shall be 7 am to 7 pm.

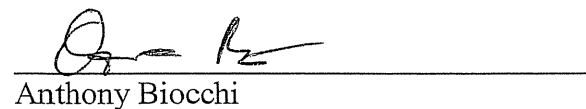
The Board hereby makes a detailed record of its findings and proceedings relative to this application, sets forth its reasons for its findings and decision, directs that this decision be filed in the office of the Town Clerk and be made a public record and that notice and copies of its decision be made forthwith to all parties or persons interested.



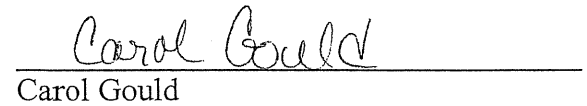
Joseph E. Musmanno, Chairman



David Cole



Anthony Biocchi



Carol Gould