



MEMORANDUM

To: Town of Dover Planning Board

cc: Gino Carlucci, Dover Town Planner

From: Nina Pickering-Cook
ANDERSON & KREIGER LLP

Re: Off-Street Parking Requirements under the Dover Zoning Bylaw

Date: April 7, 2016

The Town has received an application from David Harrington and John Duffy seeking Site Plan review and approval to locate a Dunkin' Donuts franchise (the "Applicants" or "Application") in an existing building at 14 Dedham Street in Dover (the "Site"). Through the Town Planner, Gino Carlucci, you have asked for advice on the Town Zoning Bylaw §185-34(A) governing off-street parking requirements as it applies to the Application.¹

In brief, the off-street parking requirements may be difficult to enforce in the Application, and a site plan decision requiring compliance with those requirements would be susceptible to a legal challenge for the reasons described below. I base this conclusion on the Application materials received from the Planning Department (including the site plan dated February 3, 2016 by GLM Engineering Consultants), the prior site plan decisions for this Site and other commercial uses in Town, photos of the Site, the Bylaw language and applicable case law.

DISCUSSION

The Bylaw Requirement and Proposed Use.

The Dover Zoning Bylaw §185-34(A) requires the following:

Minimum parking requirements. **There shall be provided at the time of erection or enlargement, change of use or conversion of any building** intended for a use other than a residential use and permitted in the Business District, Medical-Professional District and the Manufacturing District, **permanent off-street parking and loading spaces** with adequate ingress and egress for motor vehicles, **either on the same lot or on an adjoining lot under the same ownership or control, with at least 1 parking space of**

¹ The analysis in this memorandum is limited to this issue. I have not reviewed and, therefore, offer no opinion as to the Application's compliance with other zoning or applicable local or state requirements.

300 square feet for every 100 square feet of gross floor area intended for such use, excluding inactive storage rooms, closets, stairwells, fireplaces, chimneys, hallways and utilities, and, in addition, there shall be provided 2 such parking spaces for each one-family dwelling in such building. [Amended ATM 5-14-1979 by Art. 14] (emphasis added).

The Application proposes to use 1,059 sq. ft. of the building on the Site for a Dunkin' Donuts franchise location (coffee shop).² This is the former location of the Taffy Café. The Site has two (2) parking spaces. It is adjacent to a municipal parking lot that has 29 parking spaces. It is my understanding that, historically, the businesses occupying the Site have used that municipal lot to provide the required off-street parking. According to the Town Planner, there are approximately 20 spaces open for use at any time in that lot.

If Zoning Bylaw §184-34(A) applies to the Application (*see below*), the Applicants would need to show that it has 11 parking spaces (1 for every 100 sq. ft. of the proposed 1,059 sq. ft. of space used as a Dunkin' Donuts) on the Site or within its control on an adjoining lot. Unless the Applicant can show that it “controls” nine (9) parking spaces in the adjoining municipal lot –through a lease, license or other permission from the Town, the Application does not appear to strictly comply with Zoning Bylaw §185-34(A).

Prior Uses at the Site and Applicability of Zoning Bylaw §185-34(A) to Other Locations.

It is my understanding that Taffy Café occupied a similar square footage at the Site as proposed by the Applicant. The Site Plan Approval Decision for Taffy Café, dated January 28, 2013, found that “(6) Parking for the proposed use is available in the adjacent municipal parking lot as well as nearby on-street spaces”. There is no indication in the Site Plan Approval Decision for Taffy Café that it was required to comply with the parking requirements of Zoning Bylaw §185-34(A) by obtaining formal “control” over the spaces in the municipal lot. It is my understanding that Taffy Café never obtained a lease, license or permission from the Board of Selectmen to use the municipal lot. Furthermore, based on information provided to me by the Town, Taffy Café’s use of the municipal lot has never been prohibited, nor has the Town taken any enforcement action against Taffy Café under Zoning Bylaw §185-34(A).

With respect to the Site and based on all information obtained to date, it appears that the adjoining municipal parking lot and environs have customarily been used as public parking and for public access. Not only have tenants of the Site used and continue to use the municipal lot for their required off-street parking, the lot is also used by the First Parish Church, attendants at events at the Charles River School³ and the general public without explicit permission from the Board of Selectmen. Based on the information available, these groups have used the municipal

² The entire building on the Site is estimated, for parking requirement purposes, to be approximately 2,500 sq. ft.

³ According to the Chief of Police, the Charles River School does seek his permission to use the municipal lot during certain events.

lot without being required to obtain permission from the Town (the Board of Selectmen) in the form of a lease, license or other grant from the Board of Selectmen.

It is unclear whether other commercial uses in Dover to which it applies have complied with the off-street parking requirements in Zoning Bylaw §185-34(A). For example, in a memorandum from Bob Homer (Town Engineer) to Dave Everett (former Town Planner), dated March 26, 2002 concerning the Dover Market site plan application, Mr. Homer states that “It’s impossible to comply with the provisions for off street parking in Article VI, para. 185-34A of the Dover Code.” Yet the Dover Market obtained site plan approval from the Planning Board.⁴

Enforceability of Zoning Bylaw §185-34(A).

The Planning Board has a number of issues to consider in reviewing the off-street parking requirements for the Application. First, it should determine if those requirements apply. Second, if they do, the Planning Board should to determine whether the “control” requirement in that section is satisfied. And third, if it is not satisfied, it should determine whether that requirement should be waived given the history of compliance with that Bylaw section and the potential difficulty of enforcing such a requirement.

In rendering its decision on the Application, the Planning Board should decide, as an initial matter, whether the requirements of Zoning Bylaw § 185-34(A) are triggered. For those requirements to be triggered, the Planning Board must find that there is a “change of use” or “conversion” of the Site. Zoning Bylaw § 185-34(A). Zoning Bylaw § 185-46.1(E)(2) defines a “change in use” for the purposes of site plan review. If Taffy Café was a “restaurant or other place for serving food” (the same use as the proposed Dunkin’ Donuts) and closed very recently, then there is an argument that the off-street parking requirements in §185-34(A) are not triggered and, thus, do not apply to the Application. That conclusion, however, depends on relevant fact finding by the Planning Board.

If the Planning Board finds that Zoning Bylaw §185-34(A) applies to the Application, the Applicant is required to have 11 parking spaces available for its use on the Site or adjoining lot in its “control.” There are more than 20 parking spaces routinely available for use by occupants of the Site in the adjacent municipal lot. Where it appears there is sufficient parking for the proposed use, the only remaining question is whether that lot is within the Applicant’s “control.” Under the typical legal definition of “control,” it is not - there is no lease, license or permission from the Town for the Applicant’s customers and employees to use that parking lot. Nevertheless, the Planning Board may have the discretion to find adequate “control” based on factual evidence that there is sufficient public parking available (if it finds such facts).⁵

⁴ With respect to a recent site plan application for Needham Bank, I do not have sufficient information about whether that site plan decision required compliance with Zoning Bylaw § 185-34(A), nor, if it did, whether the application complied. If the off-street parking requirement was triggered and the Planning Board required Needham Bank to comply, such facts maybe relevant to the Planning Board’s determination of whether requiring compliance by the Applicants here is justifiable and enforceable.

Or, the Planning Board may choose to waive the “control” requirement. Where, as described above, it is not clear that any other commercial use has been required to comply with the off-street parking requirements of this Bylaw section, conditioning this site plan approval on obtaining such “control,” despite evidence of sufficient parking, could be viewed by the Applicants and the courts as an unenforceable abuse of discretion or selective enforcement. See *Colangelo v. Board of Appeals of Lexington*, 407 Mass. 242 (1990) (finding that a ZBA decision to deny special permit based on “imperceptible” traffic concerns, when “immediately before and after denying the plaintiffs' request, projects which added significantly more traffic” were approved, is an abuse of discretion). Therefore, requiring strict compliance with the off-street parking requirements in this case may be challenged as an abuse of discretion, arbitrary and capricious, or discriminatory.

In general, zoning “must be based on permissible land use planning objectives” that further a public purpose. *National Amusements Inc. v. City of Boston*, 29 Mass. App. Ct. 305, 313 (1990); see also *McLeod v. Town of Swampscott*, 2014 WL 869538, at *2 (Mass. Land Ct. Mar. 4, 2014). Local boards are typically entitled to deference in their interpretation of their local zoning bylaws, but that deference has limits. “[T]he board’s discretionary power of denial is not limitless. Reversal is called for when the board’s decision is based on a legally untenable ground, or an unreasonable, whimsical, capricious, or arbitrary exercise of its judgment.” *GTO Realty, LLC v. Zoning Board of Appeals of Taunton*, 81 Mass. App. Ct. 1114, 1114 (2012) (Rule 1:28) (overturning the local board’s denial of a building permit for a Dunkin’ Donuts) (citing *Wendy’s Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeals of Billerica*, 454 Mass. 374, 383 (2009)).⁶

A town cannot deny zoning approval “merely because it would prefer a different use of the property.” *Cafua Management Co., LLC v. Sherman*, 2016 WL 1178352 *8 (Mass. Land Ct., March 28, 2016) (upholding the local board’s decision denying a special permit for a drive-through window for a Dunkin’ Donuts) (citing *Cumberland Farms of Conn., Inc. v. Zoning Bd. of Appeals of N. Attleboro*, 359 Mass. 68, 75 (1971)). In reviewing a challenge to a local board’s decision, the court will “determine whether the reasons given by the [board] has a substantial basis in fact, or were, on the contrary, mere pretexts for arbitrary action or veils for reasons not related to the purposes of the zoning law.” *Id.*; see also *Vazza Props., Inc. v. City Council of Woburn*, 1 Mass. App. Ct. 308, 312 (1973); *Wendy’s*, 454 Mass. at 387 (denial of special permit for a second entrance for a chain restaurant was arbitrary and capricious because no reasons for

⁵ Please note that a court may not find deem this to be sufficient “control” under the law, if challenged. But there is an argument that use of routinely open public parking spaces that are not routinely used for any other use is sufficient “control.” If it seeks to base its site plan decision on this criteria, the Planning Board should make finding of those facts explicit.

⁶ Please note, many of these cases concern the grant of a building permit or special permit granting authority under G.L. c. 40A. Here, the Planning Board is conducting site plan review, not deciding a special permit application, which does not involve the exercise of as much discretion by the board. See below on the Planning Board’s role in site plan review.

denial were given in the decision, and the reason proffered in court – traffic – appeared to be a pretext where another local business was permitted an entrance along the same street).

A town cannot be estopped from enforcing its zoning bylaw solely because the bylaw had not been uniformly enforced in the past. *E.g., Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157 (1977). However, a party may be able to successfully claim selective enforcement (essentially an unequal treatment claim) if it can show that the town intentionally treated it differently than others similarly situated, even if there was no ill will. *See M. Bobrowski, Massachusetts Land Use and Planning Law*, §2.05 (2nd Ed. 2002); B.C. Levey, *Massachusetts Zoning and Land Use Law*, §7–22 at 195, 196 (1996) (“the general deference afforded actions of a local [special permit granting authority] may yield to a court’s sense of fairness” when it appears that special permit granting authority has applied “dramatically different standards to similarly situated applicants”); *but see* 4 A.L.R.4th 462 (same, but only if the court finds intentional discrimination against the applicant).

Therefore, if the Planning Board determines that there is adequate parking on the Site and adjacent municipal lot, but nevertheless votes to deny the site plan approval for failure to comply with the “control” requirement in Zoning Bylaw §185-34(A), such a decision must be supported by facts related to the legitimate planning concern requiring such control. Failing that, the decision would be vulnerable on appeal.

Finally, as an aside to the parking issue, it is my understanding that a concern has been raised about the dumpster for the proposed Dunkin’ Donuts’ being accessible only through the adjacent municipal lot. As I understand the site plan, this dumpster are located within the Site, but can be hauled away only if the trucks access them through the municipal lot. Again, the facts reviewed above suggest that the general public is permitted to use this municipal lot freely, the space can accommodate heavy, large trucks like those used by the Highway Department, and the trash hauling is an incidental weekly use of the Site and parking lot. Thus, prohibiting Dunkin’ Donuts trash haulers access to the dumpster on the Site may be viewed as discriminatory and lacking a proper public purpose. A condition prohibiting such access may be difficult to enforce if challenged, particularly if the sole purpose of the condition is to deny the proposed use as a chain coffee shop/restaurant without a tether to legitimate planning objectives.

Clarification of the Planning Board’s Role in Site Plan Review.

Site plan review is “a *regulation* of use, rather than a *prohibition* of use.” Zoning Bylaw §185-46.1(C) (emphasis added). If the criteria stated in the Bylaw are satisfied, “the board [does] not have discretionary power to deny ... [approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use.” *Muldoon v. Planning Bd. of Marblehead*, 72 Mass. App. Ct. 372, 373-374 (2008). Considerations of appropriate parking, access, operating hours and the like are within the scope of the Planning Board’s jurisdiction in reviewing site plan applications. But its aim should be to craft conditions that address those legitimate planning

concerns rather than erect roadblocks to prevent the proposed use. It is, however, the Building Inspector's role to enforce the Zoning Bylaws. Zoning Bylaw §185-47.

CONCLUSION

Based on the facts and the law presented in this memorandum, the Town should exercise caution in requiring that the Application comply with Zoning Bylaw §185-34(A). Given the relevant circumstances of this Application (as described above), unless the Planning Board can show that Dunkin' Donuts would create a substantially greater parking demand than similarly situated uses (meaning the available parking would not be sufficient) or some other legitimate reason to enforce the "control" requirement of §185-34(A) that has not previously been enforced, a denial of the Application may be difficult to defend in court.