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CHARLES BORSTEL
COMMISSIONER, DIVISION OF
PROFESSIONAL LICENSURE

THOMAS HOPKINS
EXECUTIVE DIRECTOR

Docket No. V15-282

In re)
)
Gym (AirCraft Aerial Arts, Tenant))
JWF, LLC (Property Owner))
14 Tyler Street)
Somerville)
)

BOARD DECISION

Procedural History

This matter originally came before the Architectural Access Board (“Board”) as a variance application received on October 30, 2015, pursuant to 521 CMR 4.00, and submitted by Thomas Connery, property manager for JWF, LLC, the building owner (“Petitioner”). The application sought a two-year time variance to study the requirement to provide vertical access to the second-floor tenant space in a three-story building.

On November 16, 2015, during the Board’s administrative review of the matter, it voted to deny the requested variance and to order that a plan for vertical access and permits for the building back to 1975 be submitted no later than December 31, 2015. On November 18, 2015, notice was sent to all parties concerned of a hearing scheduled for January 25, 2016.

The hearing was held in accordance with M.G.L. c. 30A, §§ 10 and 11; 801 CMR 1.02 *et seq.*; and 521 CMR 4.00.¹ All interested parties were provided with an opportunity to testify and present evidence to the Board. Mr. Connery appeared for the Petitioner. Jill Maio, owner of AirCraft Aerial Arts, appeared on her own behalf. The Chairman swore them both in. During the hearing Claudia Murrow, a property abutter, appeared and was also sworn in.

At the conclusion of the hearing and in a written decision, dated February 18, 2016, the Board voted to grant a time variance allowing until August 1, 2017 for the installation of a fully compliant elevator, inspected by a state inspector and readily available to the public for access to the second and third floors of 14 Tyler Street. The Petitioner was ordered to provide progress reports of the ongoing work to be submitted to the Board every six months beginning on August 1, 2016. It also ordered that a registered architect perform a full 521 CMR

¹ As was the subsequent hearing held on April 10, 2017.

compliance review of the building to determine any areas of noncompliance and for the submission of that report to the Board by June 1, 2016. The Petitioner was ordered to submit all building permits issued since 2010 for all buildings on the property (once an industrial park²) owned by JWF, LLC to be submitted no later than June 1, 2016. It was also determined that the tenant, Aircraft Aerial Arts, would be permitted to remain in business at its current leased space.

The Board received the Petitioner's status report on July 28, 2016. It included a 'Compliance Report Code Review' (see AAB 34-59) that noted that construction costs over the previous 36 months were approximately \$410,783 or 27.30% of the full and fair cash value of the space. Based on that, it concluded that the Board's jurisdiction, pursuant to 521 CMR 3.3.2, was not triggered. That claim conflicted with the analysis of the Board's staff, which voted to reject the Petitioner's analysis as inaccurate and to notify the Petitioner that there was a high likelihood that full compliance was required under 521 CMR.

Additionally in that decision, dated November 15, 2016 (and amended on December 13, 2016), the Board required submission of a full compliance analysis by a registered architect, with an understanding of the jurisdiction triggers, within 60 days of the decision. It also voted to accept the status report regarding the elevator as meeting the requirements of the Board's previous order, and required that the reports continue in accordance with its original decision. It additionally voted to require submission of a copy of the deposit check, shop drawings from the elevator company, and architectural drawings for the elevator insertion within 60 days.

The Petitioner thereafter challenged the determination regarding jurisdiction and the manner in which it was made (AAB 8-21). In order to resolve the matter, the determination was stayed and a hearing was scheduled for April 10, 2017. At that time, the Petitioner, through its attorney Robert McLaughlin, stipulated that total spending had triggered full compliance for 14 Tyler Street as well as for other public and common use spaces at the site. It therefore agreed to comply with the Board's order³ to grant the Petitioner until August 1, 2017 to perform a full compliance analysis by a registered design professional with respect to 28 Dane Street and 8-10 Tyler Street (additional properties owned by the Petitioner at the location) and that a plan for compliance, a completed variance application or some combination thereof be provided at that time.

The instant decision updates and amends the Board's determinations to respond to the additional evidence adduced at the last hearing as well as to memorialize the stipulations made at that time.

Applicable Laws & Regulations

Pursuant to 521 CMR 3.3.2, "[i]f the work performed, including the exempted work, amounts to 30% or more of the *full and fair cash value* (see **521 CMR 5[]**) of the *building* the entire *building* is required to comply with 521 CMR."

521 CMR 3.4 states that, "[w]hen the use of a *building* changes from a private use to one that is open to and used by the public, an *accessible entrance* must be provided, even if no work is being performed. When a portion of a *building* changes use from a private use to one that is open to and used by the public, then an *accessible route* must be provided from an *accessible entrance* even if no work is being performed."

With respect to 521 CMR 28.1, "[i]n all multi-story *buildings* and *facilities*, each level including *mezzanines*, shall be served by a passenger elevator. If more than one elevator is provided, each elevator shall

² See Finding of Fact #2, *infra*.

³ Stay of which was accordingly lifted.

comply with 521 CMR 28. *Accessible* elevators shall be on an *accessible route* and located within the *space* with which it is intended to serve”

Exhibits

The following documents were entered into evidence:

- Exhibit 1: Board Packets AAB1-73 (entered for “Gym” at the January 25, 2016 hearing); AAB1-141 (entered for “14 Tyler Street” at the January 25, 2016 hearing), including the Application for Variance, correspondence, and plans; and AAB1-146 (entered for “14 Tyler Street” at the April 10, 2017 hearing).
- Exhibit 2: Copy of the parking location plan, submitted electronically by Mr. Connery, dated 10 April 2017.
- Exhibit 3: City of Somerville Treasury Department Real Estate Tax Bill for FY2016.

Factual Findings

The following findings of fact and conclusions of law are supported by substantial evidence, based on the credited testimony of the witnesses, documents admitted into evidence and AAB records. M.G.L. c. 30A, § 11(2), § 14(7).

- 1) The property in question includes a three-story industrial building with the first floor being used as industrial space, the second floor being used as industrial space and a public use gym (formerly an employee-only gym), and a third floor used as office space. The building is a total of 22,761 ft² with approximately 7,587 ft² per floor. Exhibit 1, Testimony of Mr. Connery.
- 2) The building was previously part of an industrial park including 16 buildings over 7.2 acres of land. The Ames Business Park went out of business in 2010 and JWF, LLC bought the property in order to repurpose the space for commercial tenants. Mr. Connery has been the property manager since 2012. The other buildings at the park are one story structures and include: 24, 28 and 30 Dane Street; 8-10 and 12 Tyler Street; 12-14, 24, 28, 30, 40 Park Street; and 15, 17, 19, 21 and 29 Properzi Way. Exhibit 1, Testimony of Mr. Connery and Ms. Murrow.
- 3) AirCraft Aerial Arts has been in the current second floor space since before the current ownership and has been in operation for six years. The business was issued its first certificate of occupancy on January 29, 2014. Due to the type of classes (aerial silks and trapeze) that are given, a certain roof structure is required. The tenant has not found any other spaces that would be feasible both structurally and financially for the business. Exhibit 1, Testimony of Ms. Maio.
- 4) The first floor of the building contains various commercial establishments, including: Aeronaut Brewery, Barismo, and Somerville Chocolate. The second floor contains the gym in question (i.e. AirCraft Aerial Arts) and additional space that is currently vacant. The third floor contains a law firm (Joseph J. Goldberg-Giuliano, Esq.) and Dell Realty Associates, Inc. Exhibit 1, Testimony of Mr. Connery and Ms. Murrow.
- 5) The Petitioner had sought a 24-month time variance for the addition of an accessible elevator, lobby, and new electrical work to create access to the second floor tenant space and the third floor office space. The estimated cost of construction is over \$500,000. Although the original application stated that a 24-month time variance was requested to submit a study regarding the required access, the Petitioner ultimately proposed that work to create access to the second and third floors of 14 Tyler Street would be completed by the end of the 24-month period. The proposed new elevator lobby will occupy a space in between 30 Park Street and 14 Tyler Street, currently located at the top of the entrance ramp to 14 Tyler Street. Exhibit 1, Testimony of Mr. Connery.

Discussion

The Board's jurisdiction was originally established pursuant to 521 CMR 3.4, which requires that, "[w]hen the use of a *building* changes from a private use to one that is open to and used by the public, an *accessible entrance* must be provided, even if no work is being performed. When a portion of a *building* changes use from a private use to one that is open to and used by the public, then an *accessible route* must be provided from an *accessible entrance* even if no work is being performed." This was based on that fact that AirCRAFT Aerial Arts, a school for aerial arts, occupies a second floor space that was previously not open to the public. That space had previously been a gym used by employees of the Ames Business Park that was not open to the general public.

The original application indicated that the total value of the building is \$1,050,000. The Petitioner had argued that, because the costs of installing an elevator along with the necessary electrical work and other changes would be over \$500,000, it would not be financially reasonable to do so and, accordingly, it requested a 24 month time variance to study and evaluate the matter, including architectural, engineering and budgetary issues. The Board denied the request.

The Board thereafter found that it was likely that 30% of the assessed value of the building had been spent (including work performed by tenants) and, therefore, full compliance under the Board's jurisdiction was triggered per 521 CMR 3.3.2 which states that, if "the work performed, including the exempted work, amounts to 30% or more of the *full and fair cash value* ... of the *building* the entire *building* is required to comply with 521 CMR." This was based on detailed documentation submitted by Ms. Murrow as well as witness testimony and other materials subsequently provided.

Mr. Connery attested that the Petitioner proposed to create a new elevator lobby entrance, with a three-stop elevator to be installed in the existing space between 14 Tyler Street and 30 Park Street. The Petitioner sought 24 months to complete this proposed work. However, the Petitioner did not agree that full compliance was triggered.

In its July 28, 2016 status report, including a full compliance analysis (see AAB 34-59) prepared and stamped by Robert Luchetti, RA, the Petitioner determined that 14 Tyler Street was valued at \$1,504,861. It noted that the spending over the last 36 months was approximately \$410,783. Based on this data, the spending on 14 Tyler Street was only 27.30% of the full and fair cash value of the space. Therefore, it concluded, the Board's jurisdiction pursuant to 521 CMR 3.3.2 was not triggered.

However, a subsequent review of this analysis by the Board's staff determined that the it was derived from incorrect information based on the permits drawn on the buildings (see AAB 60-146, summary at AAB 26) and the property cards (see AAB 27-33). Particularly, the Board's compliance officer, William Joyce, laid out the reasoning in a memo, dated June 21, 2016 (AAB 25). At the Board's August 8, 2016 administrative discussion, Mr. Joyce testified that the 30% threshold was in fact triggered, attesting that he had reviewed the property card (PID 782) which established that the overall square footage of the buildings was actually 132,041 ft² (rather than the asserted 92,056 ft²). The value of 14 Tyler Street was \$1,117,795.14. Therefore, the noted spending of \$410,783 was more than 30% (i.e. more than \$335,338.54) of the value of the building. He added that work performed with respect to 'Tasting Table' (a separate tenant at the property) was \$348,657, based on the work permit (#B-15-000069), resulting in more than 30% of the value of the space for that work alone. In light of this, full compliance was required by the owner for all public and common use spaces per 521 CMR 3.3.2.

Based on Mr. Joyce's evidence, the Board voted to require full compliance, rejecting the Petitioner's analysis. However, because the above testimony was adduced at a hearing at which the Petitioner was not

present, this portion of the full decision was stayed and the Board scheduled a hearing for April 10, 2017 to provide it an opportunity to rebut any of the assertions that Mr. Joyce had made; it did not stay its other orders.

Thereafter, Mr. McLaughlin appeared at the April 10, 2017 hearing on the Petitioner's behalf. At that time, the Petitioner stipulated to Mr. Joyce's analysis of the 521 CMR 3.3.2 threshold and agreed to comply with the Board's order to grant the Petitioner until August 1, 2017 to perform a full compliance analysis by a registered design professional with respect to 28 Dane Street and 8-10 Tyler Street and that a plan for compliance, a completed variance application or some combination thereof be provided to the Board at that time. In light of this, the Board's prior stay was lifted.

Conclusion and Order

In light of all of the foregoing, the Board voted as follows:

- **GRANT** a time variance allowing until *August 1, 2017* for a fully compliant elevator (521 CMR 28.1) to be installed, inspected by a State Elevator Inspector and readily available to the public for access to the second and third floors of 14 Tyler Street. Progress reports of the ongoing work are required to be submitted to the Board *every six (6) months*, with the first report having been submitted to the Board by *August 1, 2016*.
- **REQUIRE** a full compliance analysis by a registered design professional to be completed for 28 Dane Street and 8-10 Tyler Street.
- **REQUIRE** that the Petitioner submit a plan for full compliance, a completed variance application, or some combination thereof to be submitted to the Board by August 1, 2017.

A true copy attest, dated: May 31, 2017

ARCHITECTURAL ACCESS BOARD

By:



Walter White, Chair



Diane McLeod, Vice Chair



Raymond Glazier, Executive Office of Elder Affairs Designee



Jeff Dougan, Massachusetts Office on Disability Designee

Andrew Bedar, Member (Not Present)

George Delegas, Member (Not Present)



Dawn Guarriello, Member



Jane Hardin, Member



Patricia Mendez, Member

A complete administrative record is on file at the office of the Architectural Access Board.

This constitutes a final order of the Architectural Access Board. In accordance with M.G.L. c. 30A, §14 and M.G.L. c. 22, §13A, any person aggrieved by this decision may appeal to the Superior Court of the Commonwealth of Massachusetts within thirty (30) days of receipt of this decision.