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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT
CIVIL ACTION NO.

2373CV0328C

-----X
 JOSEPH BRAGA, as the Building Commissioner)
 of the Town of Dartmouth,)
 DARTMOUTH SELECT BOARD and)
 DARTMOUTH PLANNING BOARD)
)
 PLAINTIFFS,)
)
 v.)
)
 MICHAEL MEDEIROS, HALIM CHOUBAH and)
 ALVIN YOUMAN, as they are members of the)
 DARTMOUTH ZONING BOARD OF APPEALS,)
 and Claudia Arsenio)
)
 DEFENDANTS.)
 -----X

BRISTOL,SS SUPERIOR COURT
FILED

MAY 24 2023

JENNIFER A. SULLIVAN, ESQ.
CLERK / MAGISTRATE

COMPLAINT

Jurisdiction

1. This is an appeal, pursuant to Massachusetts General Laws, Chapter 40A, Section 17, from the decision of the Dartmouth Zoning Board of Appeals granting a use variance for the real property in the Town of Dartmouth ("Town") that is commonly known as 155 Old Fall River Road and that is referenced as Lot 16 on Dartmouth Assessor's Map 68 ("Locus"), and which decision was filed with the Dartmouth Town Clerk on May 8, 2023 ("Decision").
2. A certified copy of the Decision is attached hereto as **Exhibit A**.

Parties

3. The Plaintiff Joseph Braga is the Building Commissioner of the Town, with an address of

- Town Hall, 400 Slocum Road, Dartmouth, Massachusetts 02747. (“Plaintiff Braga”).
4. The Plaintiff Dartmouth Select Board is the chief executive multi-member body of the municipal government of the Town, with an address of Town Hall, 400 Slocum Road, Dartmouth, Massachusetts 02747 (“Plaintiff Select Board”).
 5. The Plaintiff Dartmouth Planning Board is a multi-member body of the municipal government of the Town, with an address of Town Hall, 400 Slocum Road, Dartmouth, Massachusetts 02747 (“Plaintiff Planning Board”).
 6. The Defendants Michael Medeiros, Halim Choubah and Alvin Youman are residents of the Town, and are the duly appointed members of the Dartmouth Zoning Board of Appeals who voted on the Decision (collectively “Defendant ZBA”).
 7. The personal addresses of the members of the Defendant ZBA are as follows: Michael Medeiros: 521 Chase Road, Dartmouth, Massachusetts 02747; Halim Choubah: 2 Purple Wing Lane, Dartmouth, Massachusetts 02747; and Alvin Youman: 40 Beechwood Drive, Dartmouth, Massachusetts 02748.
 8. The Defendant Claudia Arsenio is the owner of the Locus and the applicant for the use variance granted by the Decision, and has an address of 155 Old Fall River Road, Dartmouth, Massachusetts 02747 (“Defendant Arsenio”).

Standing

9. Plaintiff Braga is the zoning enforcement officer of the Town, whose zoning duties include enforcement and interpretation of the Zoning Bylaw of the Town (“Zoning Bylaw”), and he therefore has automatic standing to appeal any zoning decision pursuant to Massachusetts General Law, Chapter 40A, Section 17.

10. The Plaintiff Select Board has zoning duties that include formulating zoning policy for the Town, appointing the Defendant ZBA, enforcing the Zoning Bylaw in the absence of a zoning enforcement officer, proposing Zoning Bylaw amendments, and acting as the special permit granting authority for the installation of wind turbines, and it therefore has automatic standing to appeal any zoning decision pursuant to Massachusetts General Law, Chapter 40A, Section 17.
11. The Plaintiff Planning Board has zoning duties that include drafting and reviewing proposed Zoning Bylaw amendments for submission to the Dartmouth Town Meeting, and acting as the special permit granting authority for various uses under the Zoning Bylaw, including for all commercial and medical cannabis facilities and operations within the Town, and it therefore has automatic standing to appeal any zoning decision pursuant to Massachusetts General Law, Chapter 40A, Section 17.

Factual Background

12. The Locus is a historical farm, inclusive of a farmhouse, with several hundred years of agricultural history, and consists of approximately 22.52 acres.
13. Several other farms are located in the same area that are in active use.
14. The Locus is located partially in the Limited Industrial Zoning District and partially in the Single Residence B Zoning District.
15. Section 375-4.3 of the Zoning Bylaw only allows commercial cannabis facilities and operations to be located within the Marijuana Establishments Overlay District (as described in § 375-4.2 of the Zoning Bylaw), and then only upon the grant of a special permit by the Plaintiff Planning Board.
16. The Locus is not located within the Marijuana Establishments Overlay District.

17. The Locus is therefore not zoned for commercial cannabis facilities and operations.
18. Section 375-43.3 of the Zoning Bylaw prohibits the granting of use variances within the Single Residence B Zoning District.
19. The Decision purports to grant a use variance with respect to §§ 375-4.2 and 375-4.3 of the Zoning Bylaw, in order to allow the construction of an 80 foot by 100 foot structure for the commercial indoor growing of cannabis on the portion of the Locus that is located in the Limited Industrial Zoning District.
20. While the Decision never uses the term “commercial” in the context of the proposed cannabis growing facility, nothing in the Decision indicates an intent to authorize a medical cannabis growing facility, and the Decision only references the need to override the provisions of Article 4 of the Zoning Bylaw, dealing with the restrictions of commercial cannabis facilities and operations to the Marijuana Establishments Overlay District, as opposed to the provisions of Article 3 of the Zoning Bylaw, dealing with restrictions on medical cannabis facilities and operations.
21. There is already a commercial cannabis growing facility in the Town, located at 757 State Road, and operated by Apotho Therapeutics.
22. On March 20, 2006, in Book 8051, Page 169 of the Bristol County (S.D.) Registry of Deeds, the Plaintiff Select Board recorded a Notice of Exercise of Right of First Refusal, in order to purchase the Locus pursuant to Massachusetts General Laws, Chapter 61A, Section 14 and prevent the farmland from being sold and developed.
23. On June 29, 2006, as originally authorized by the June 2006 Dartmouth Annual Town Meeting and subsequently confirmed by the June 2011 Dartmouth Annual Town Meeting, the Town spent \$850,000.00 of Chapter 44B Community Preservation Funds to acquire the

- Locus for the purpose of preserving this historical property for agricultural purposes, and the deed for which purchase is in the Bristol County (S.D.) Registry of Deeds in Book 8224, Page 23.
24. The June 2008 Dartmouth Annual Town Meeting, as subsequently confirmed by the June 2011 Dartmouth Annual Town Meeting, appropriated an additional \$25,000.00 of Chapter 44B Community Preservation Funds to replace the septic system for the homestead residence at the Locus in order to preserve the resident-farmer agricultural heritage of the Town.
 25. On January 28, 2013, the Town granted an agricultural preservation restriction (“APR”) on the Locus to the Farm Bureau Agricultural Preservation Corporation for \$1.00, and which APR was recorded on May 3, 2013 in the Bristol County (S.D.) Registry of Deeds in Book 10765, Page 268.
 26. On October 7, 2013, the Town sold the Locus to Defendant Arsenio and her then-partner Adrian Fulk for \$80,000.00, resulting in a net loss to the Town of approximately \$795,000.00 in preserving the property for agricultural uses, the deed for which sale was recorded on November 7, 2013 in Book 10946, Page 1 of the Bristol County (S.D.) Registry of Deeds.
 27. The current assessed value of the Locus is \$443,300.
 28. Adrian Fulk ceased to be involved in agricultural operations on the Locus in 2022, deeding his interest in the locus to Defendant Arsenio on February 10, 2022, said deed being recorded on March 21, 2022 in Book 14270, Page 167 of the Bristol County (S.D.) Registry of Deeds.
 29. Defendant Arsenio applied for the use variance at issue on January 24, 2022, a mere 17 days prior to obtaining sole ownership of the Locus.
 30. That Defendant Arsenio applied for the use variance without Adrian Fulk being a co-applicant is indicative of her understanding at that time that she would shortly be obtaining

sole ownership of the Locus and that Adrian Fulk would not be continuing with agricultural operations on the Locus.

31. Commercial cannabis was legalized as an industry in the Commonwealth of Massachusetts on November 8, 2016.
32. At all times from the acquisition of the Locus by the Town to the sale of the Locus by the Town, commercial cannabis was not a legal industry within the Commonwealth of Massachusetts.

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33. The Plaintiff repeats and incorporates by reference paragraphs 1-32.
34. The statutory power of the Defendant ZBA to issue a use variance is designed to alleviate inequitable outcomes due to the imposition of use restrictions by the Zoning Bylaw, yet the Defendant ZBA instead sought to alleviate what it perceived to be an inequitable outcome due to the imposition of use restrictions by the APR.
35. The Decision exceeds the authority of the Defendant ZBA, failing to satisfy any of the statutory standards for the issuance of a variance, any one of which failures independently would be fatal to the validity of the Decision.

A. Soil, Shape and Topography Standard

36. There are many uses that are allowed by right or special permit at the Locus under the Zoning Bylaw besides non-cannabis agriculture, including, but limited to: laboratories, manufacturing, office buildings, cell towers, conference centers, health clubs, stables, and electricity and steam power production (Limited Industrial); and single-family dwellings,

accessory apartments, home occupations, home arts education, stables, bed-and-breakfast lodging houses and cell towers (Single Residence B).

37. And in fact, the Locus is already being utilized as a single-family dwelling by Defendant Arsenio.
38. The Decision makes no attempt to argue that there are unique circumstances relating to soil, shape or topography at the Locus that would render impossible or even just impractical these various uses that are allowed and permitted for the Locus under the Zoning Bylaw.
39. The Defendant ZBA improperly relied upon the existence of the APR in determining that there are purported unique circumstances relating to the soil of the Locus that justified the issuance of a use variance.
40. That a recorded APR limits the uses of the Locus does not mean that the Zoning Bylaw limits the uses of the Locus.
41. Even focusing on agricultural use alone, and even disregarding the long history of successful agricultural use of the Locus and surrounding parcels, the Decision improperly assumes that the purported unique circumstances relating to the soil of the Locus preclude any agricultural use of the Locus other than indoor cannabis cultivation, when there are other potential agricultural uses that do not require a use variance and that would not be dependent upon site soils, such as raising farm animals, growing non-cannabis crops in the proposed indoor facility, or stabling and training draft animals.
42. At best, the Defendant ZBA's focus on purported soils issues is only relevant to a discussion of indoor versus outdoor agricultural activities, and not to the question of what is grown indoors.

43. The Decision makes no attempt to evaluate whether such other non-soils-based agriculture would be possible on the Locus, but rather simply presumes that Defendant Arsenio should be entitled to undertake an indoor growing operation of the only crop that is separately regulated and restricted by both the Commonwealth of Massachusetts and the Zoning Bylaw.

B. Substantial Hardship Standard

44. The Decision makes no attempt to argue that, absent the existence of the APR, the Zoning Bylaw has caused any substantial hardship to Defendant Arsenio.

45. Defendant Arsenio knowingly and willingly purchased an APR-bound property, and any recourse she has in avoiding the attendant use restrictions is with the APR holder and not with the Defendant ZBA.

46. As part of the purchase process for an APR-bound property, Defendant Arsenio had the ability to conduct due diligence regarding the farming viability of the Locus.

47. In a 2016 interview, Defendant Arsenio explained that she got into farming because of Adrian Fulk, stating that “[h]e became slightly obsessed with farming, constantly reading and researching, then someone offered him land to rent and before I had a chance to stop him, we were farmers”.

48. In that same interview, Defendant Arsenio further explained that she had “a love hate relationship” with farming, and that it requires “a lot of sacrifices as a family”.

49. Defendant Arsenio was capable of farming the Locus with Adrian Fulk, and her claims of unviable farming soils only arose after he ceased to be involved in the farm in 2022, leading to the reasonable inference that she, on her own, simply does not want to farm the Locus and sees commercial cannabis growing as a more profitable and less taxing venture.

50. That Defendant Arsenio has been unsuccessful as a farmer on land that has been successfully farmed for hundreds of years, or that she simply does not want to deal with the realities and difficulties of farming life, is not a zoning concern.
51. The Defendant ZBA has no jurisdiction or authority to assist Defendant Arsenio in circumventing, or otherwise obtaining financial relief from the consequences of, recorded use restrictions that are unrelated to the Zoning Bylaw.
52. The existence of the APR on the Locus, which Defendant Arsenio accepted in purchasing the Locus, is nothing more than a self-created hardship by Defendant Arsenio.
53. Under the reasoning of the Defendant ZBA in the Decision, any landowner could convey to an abutter a restriction preventing the landowner from utilizing their land for all allowed or permitted purposes under the Zoning Bylaw, and thereafter demand a variance for a use that is not allowed or permitted under the Zoning Bylaw on the grounds that the restriction prevents them from undertaking any use allowed or permitted under the Zoning Bylaw.
54. Concurrently, Defendant Arsenio reaped a significant savings in purchasing the Locus with an APR on it, and for the Decision to assert that the APR results in her substantial financial hardship is a blatant disregard of the finances of that transaction.
55. Rather than being a substantial hardship, the APR represents a substantial financial windfall to Defendant Arsenio, obtaining a historical farm of over 22 acres, inclusive of a homestead, for only \$80,000.00 at a net cost to the Town of approximately \$795,000.00.
56. If nothing else, Defendant Arsenio may continue to utilize the Locus as a residence, which is a viable use of the Locus under the Zoning Bylaw.
57. Most people do not utilize their land for income-generating purposes, and Defendant Arsenio is not required to farm the Locus in order to continue to live on it.

C. Public Good Standard

58. The Decision has a detrimental impact on the public good insofar as it allows commercial cannabis growing to occur on a property that the taxpayers of the Town spent a significant sum preserving for agricultural use with no contemplation that commercial cannabis growing would eventually occur there.
59. The Decision also has a detrimental impact on the public good insofar as it precludes the farmer from living on site, in contravention of the intent of the Town in its preservation of the Locus.
60. The Decision also has a detrimental impact on the public good insofar as it locates a commercial industry growing facility in the middle of a historical traditional homestead farming area of the Town.

D. Intent and Purpose Standard

61. The Decision nullifies or substantially derogates from the intent and purpose of the Zoning Bylaw insofar as it converts a special permit use into an as-of-right use, thereby circumventing and usurping the authority and decision-making of the Plaintiff Planning Board, including its ability to impose conditions to mitigate against potential harms from the commercial cannabis industry.
62. The Decision also nullifies or substantially derogates from the intent and purpose of the Zoning Bylaw insofar as it exceeds the number of commercial cannabis growing facilities (one) that is authorized by § 375-4.4A(7) of the Zoning Bylaw, thereby contravening the purpose of the Zoning Bylaw to limit the overall number of commercial cannabis facilities to the extent allowed by statute, per § 375-4.1B(4).

63. The Decision fails even to acknowledge that this limiting of the number of such facilities is an explicit purpose of the Zoning Bylaw.
64. The Decision also nullifies or substantially derogates from the intent and purpose of the Zoning Bylaw insofar as it requires the existing farm residence to remain vacant, thereby causing commercial cannabis to negatively impact a residential use, which negative impact the Marijuana Establishments Overlay District was designed to minimize, per § 375-4.1B(3).
65. The Decision also nullifies or substantially derogates from the intent and purpose of the Zoning Bylaw insofar as it fails to include the required conditions for all commercial cannabis facilities and operations that are found in § 375-4.5 of the Zoning Bylaw.
66. The Decision also nullifies or substantially derogates from the intent and purpose of the Zoning Bylaw insofar as it fails to require adherence to the parking and fencing requirements of § 375-4.4A(4), (5) of the Zoning Bylaw.
67. Defendant Arsenio did not apply for a dimensional variance from § 375-4A(3) of the Zoning Bylaw, the hearing notice for her application did not reference a proposed variance from § 375-4A(3) of the Zoning Bylaw, and the Decision does not reference any granted dimensional variance from § 375-4A(3) of the Zoning Bylaw.
68. That the Decision requires the residence at the Locus to remain vacant does not obviate its status as a residence under the Zoning Bylaw.
69. By allowing a commercial cannabis operation to occur within 500 feet of a residence, the Decision violates § 375-4A(3) of the Zoning Bylaw without granting a dimensional variance from the same.

WHEREFORE, the Plaintiff respectfully prays as to Count I:

1. That the Decision be annulled;

2. That it be determined that the proposed commercial indoor cannabis growing facility and operation at the Locus cannot meet the standards for a use variance, and that the application for the same be and is denied; and
3. For such other relief as the Court may determine is just and equitable.

Respectfully submitted,
The Plaintiffs,
By their attorneys,



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Dated: May 24, 2023