



# TOWN OF NORTHBOROUGH Zoning Board of Appeals

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## DECISION

**ZBA CASE NO. 20-04**

**PROPERTY LOCATION: 5 Bearfoot Road**

**PETITIONER and PROPERTY OWNER: Berlin Landing Realty Trust**

**Recorded with the Worcester District Registry of Deeds: Bk: 54488, Pg: 22**

This document is the **DECISION** of the Northborough Zoning Board of Appeals on the **Appeal** of Berlin Landing Realty Trust from a decision of the Building Inspector regarding a proposal to build a daycare center, with an associated parking lot, which would be leased to an appropriately licensed, non-profit entity, on the property located at 5 Bearfoot Road, shown on Assessors' Map 30 as Parcel 33, in the Industrial District (the "Property").

The matter is before the Board by way of an appeal from the December 20, 2019 decision of the Building Inspector that he could not apply the provisions in section 3 of the state Zoning Act (G.L. c. 40A) so as to exempt the proposed facility from the Industrial District setback requirement in section 7-06-030.C(4)(b) of the Zoning Bylaw, specifically "In the Industrial District, the minimum setback along the lot line adjacent to a residential or business district shall be one hundred (100) feet from a residential district and fifty (50) feet from a business district. When the residential zoning district boundary is located in or at a street, the setback may be reduced by the width of the street which is in the residential zone".

Pursuant to Governor Baker's March 12, 2020 Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §18, and the Governor's March 15, 2020 Order imposing strict limitations on the number of people that may gather in one place, the meetings of the Northborough Zoning Board of Appeals on this appeal were conducted via remote participation.

## APPLICATION

1. **On January 21, 2020**, the Applicant filed with the Town Clerk an **Appeal** of Berlin Landing Realty Trust from the December 20, 2019 decision of the Building Inspector regarding the proposed construction of a daycare center, with an associated parking lot, which would be leased to an appropriately licensed, non-profit entity, on the property located at 5 Bearfoot Road, shown on Assessors' Map 30 as Parcel 33, in the Industrial District and the Residential C District.
2. Notice of the public hearing was duly published in "THE WORCESTER TELEGRAM & GAZETTE" on February 10, 2020; and February 17, 2020; and was mailed to abutters and other parties in interest on February 6, 2020. Because the agenda for the Board's meeting was not posted, the February 25<sup>th</sup>, 2020 meeting was canceled, and the hearing was rescheduled to March 24, 2020.
3. Notice of the public hearing for March 24, 2020 was duly published in "THE WORCESTER TELEGRAM & GAZETTE" on March 9, 2020 and March 16, 2020; and was mailed to abutters and other parties in interest on February 27, 2020.

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4. The public hearing scheduled for March 24, 2020 was cancelled due to the outbreak of the coronavirus.
5. The public hearing was rescheduled to July 1, 2020. Notice of the public hearing was duly published in "THE WORCESTER TELEGRAM & GAZETTE" on June 16, 2020 and June 23, 2020; and was mailed to abutters and other parties in interest on June 11, 2020.
6. The public hearing began on July 1, 2020 and was continued to July 28, 2020, August 25, 2020, September 22, 2020 and September 29, 2020, at which time the hearing was closed.

## **EXHIBITS**

Submitted for the Board's consideration were the following exhibits:

1. Application for Hearing before the Zoning Board of Appeals, with January 21, 2020 letter of the Applicant's counsel, Nisha A. Koshy, and including:
  - A. A Zoning Interpretation Request Form for 5 Bearfoot Road, signed by Robert J. Frederico, Inspector of Buildings/Zoning Enforcement Officer;
  - B. A certified abutters list for parcels 300 feet from 5 Bearfoot Road, Northborough, MA, signed by Megan Hennessy, for the Town of Northborough Board of Assessors, and a GIS Viewer Map of the site, both dated 1/14/2020;
  - C. A Massachusetts Quitclaim Deed for 5 Bearfoot Road, Northborough, MA 01532; recorded at the Worcester District Registry of Deeds on 10/27/2013; Bk: 54488, Pg: 22;
  - D. A document entitled "**EXHIBITS**" including the following:

**Exhibit A:** A three-page letter to Mr. Robert Frederico, Inspector of Buildings, from Mark. L. Donahue, Esq.; Fletcher Tilton, Attorney at Law; dated June 5, 2019, RE: Proposed Daycare Facility for 5 Bearfoot Road, Northborough, MA;

**Exhibit B:** Letter dated July 29, 2019 from Applicant's Counsel to the Building Inspector in furtherance of a requested Zoning Interpretation; including: 1. Proposed Site Plan; and 2. A 17-page Order of Conditions issued by the Northborough Conservation Commission for 5 Bearfoot Road, Assessors' Map 30, Parcel 33; DEP #247-1161, for Applicant Berlin Landing Realty Trust;

**Exhibit C:** Building Inspector's Decision dated December 20, 2019 which quotes section 7-06-030.C(4)(b) of the Zoning Bylaw: "*In the Industrial District, the minimum setback along the lot line adjacent to a residential or business district shall be one hundred (100) feet from a residential district and fifty (50) feet from a business district. When the residential zoning district boundary is located in or at a street, the setback may be reduced by the width of the street which is in the residential zone;* and states: "This is the situation at 5 Bearfoot, as the lot abuts a Residential C zoning district. This regulation has been in the Northborough Zoning By-laws for at least 10 years; and it was approved at Town Meeting by town residents. I see this as a 'reasonable regulation' and would reject a building permit application on this basis."

- E. A black and white 8" x 11" document identified as 5 Bearfoot Road, Northborough, MA, showing the proposed site plan of 5 Bearfoot Road; by Goddard Consulting LLC, and dated 5/9/2019.

Additional Documents:

1. A memo to Mark L. Donahue, Esq., Fletcher Tilton PC; from Robert Frederico, CBO; CBO Inspector of Buildings; Zoning Enforcement Officer; dated July 16, 2019 RE: 5 Bearfoot Road, Northborough – Daycare-Dover Amendment;
2. A three-page letter to the Zoning Board of Appeals from Mark L. Donahue, Esq., Fletcher Tilton PC dated July 21, 2020.
3. An 8" x 11" colored architectural drawing identified as "Drawing A.1, dated September 29, 2017; prepared by KFP Architects, Inc., and showing, among others, the Site Plan, the Floor Plan, the Industrial Zoning area, the Residential C Zoning area, and the North Elevation;
4. A 24" by 36" black and white plan identified as "Existing Conditions Plan", 5 Bearfoot Road, Northborough, MA"; prepared for "Berlin Landing Realty Trust; by Cabco Consult, Land and Environmental Consulting Services; dated 11/13/15, Sheet 1 of 1; showing Lot 1; Lot 101 and Lot 102; signed and stamped by C.A. Budnick, Professional Land Surveyor, and dated November 13, 2015, and revised on November 24, 2015 and December 14, 2015;
5. An "APPROVAL NOT REQUIRED" (ANR) Plan identified as "Plan of Land in Northborough, Mass; Owned by Julian J. & Joel A. Leavitt, Trustees; Survey by MacCarthy & Sullivan Engineering Inc., Natick, Mass; Recorded at the Worcester District Registry of Deeds-Worcester MA; Plan Book 455, Plan 30; Received Sep 7 1978;
6. A set of five 24"x36" black and white sheets entitled "Proposed Site Plan of 5 Bearfoot Road, Northborough, MA"; with plan sheets identified as: **Sheet 1 of 5**, Cover Sheet/Existing Conditions Plan,; 3/6/2019-Conservation Commission Review; 6/6/2019-Remove Retaining Wall; **Sheet 2 of 5**, Cover Sheet/Existing Conditions Plan, 3/6/2019-Conservation Commission Review; 6/6/2019-Remove Retaining Wall; **Sheet 3 of 5**, Erosion Control Plan of Day Care Center; **Sheet 4 of 5**, Construction Details; and **Sheet 5 of 5**, Construction Details; all sheets dated January 15, 2019; Property Owner: Berlin Land Realty Trust; prepared by Connorstone Engineering Inc.; signed and stamped by Vito Colonna, Registered Professional Engineer, on 6.6.19;
7. A letter from Christopher Egan, President, Ten Bear LLC, 116 Flanders Road, Suite 2000, Westborough, MA 01581, and a resident of 10 Bearfoot Road, to Board Chairman, Northborough Board of Appeals, stating the following: "*We are the owners of 10 Bearfoot Road, Northborough. We support Berlin Landing Realty Trust for an Appeal to build a daycare center. It will be a welcome addition to the neighborhood. We respectfully request our support of this project, be read into the minutes of the meeting*"; and
8. An eleven-page letter to the Zoning Board of Appeals, from Mary E. Bassett, Attorney at Law, of counsel to McWalter, Barron, & Boisvert PC, dated March 24, 2020, RE: 5 Bearfoot Road, Appeal of Building Inspector's Zoning Interpretation.
9. A four-page letter to the Zoning Board of Appeals from Mary E. Bassett, Attorney at Law, of counsel to McWalter, Barron & Boisvert PC dated July 27,

2020 RE: 5 Bearfoot Road, Appeal of Building Inspector's Zoning Interpretation;

10. A two-page letter to the Zoning Board of Appeals from Mary E. Bassett, Attorney at Law, of counsel to McWalter, Barron & Boisvert PC dated July 27, 2020 RE: 5 Bearfoot Road, Appeal of Building Inspector's Zoning Interpretation;
11. A six-page memorandum to the Zoning Board of Appeals from town counsel David J. Doneski, Esq. KP Law dated September 29, 2020 RE: Appeal of Berlin Landing Realty Trust from Decision of Building Inspector Regarding Proposed Construction of Child Care Facility at 5 Bearfoot Road

## HEARING

Scott Goddard, Trustee of Berlin Landing Realty Trust (present July 1, 2020, July 28, 2020, September 29, 2020); Mark L. Donahue, Esq. (present July 1, 2020) and Nisha A. Koshy, Esq. (present July 28, 2020, September 29, 2020), Fletcher Tilton; and Vito Colonna (present July 1, 2020), Connorstone Engineering, presented the Application. The Application is an Appeal of the Building Inspector's zoning determination that although the proposed use of the Property for a daycare facility is subject to some exemptions by virtue of the so-called Dover Amendment in G.L. c. 40A, § 3, it is not exempt from section 7-06-030.C(4)(b) of the Zoning Bylaw, as outlined in the Building Inspector's letter dated December 20, 2019.

Participating Board members were Fran Bakstran, Chairman; Brad Blanchette, Richard Rand, Mark Rutan, Paul Tagliaferri; and Alternate members Leslie Harrison, and Jeffery Leland, and voting members were Fran Bakstran Chairman; Brad Blanchette, Richard Rand, Mark Rutan, and Paul Tagliaferri. Attorney David Doneski, KP Law, was also present for part of the September 29, 2020 hearing session to assist the Board members.

The Property is in the Industrial Zone and is adjacent to the Residential C (RC) Zone. The lot was created in 1978 and complies with the current dimensional regulations of the Northborough Zoning Bylaw for a lot in the Industrial District. The lot is irregular in shape and contains wetlands.

In accordance with section 7-06-030.C(4)(b), in the Industrial District the minimum setback along the lot line adjacent to a residential or business district is one hundred (100) feet from a residential district. The Building Inspector has stated this is a reasonable regulation and the Applicant states while the 100-foot setback requirement may on its face be reasonable, the issue for the analysis of how the Dover Amendment applies is whether when applying the setback requirement to this specific project it becomes unreasonable. The Applicant agreed that the Town is permitted to apply reasonable dimensional regulations but contended that if the Applicant is to comply with the wetland regulation requirements for development of the Property and the 100-foot setback, it essentially cannot build on this Property. The Applicant's representatives stated they were not looking for relief from all zoning requirements but were simply asking to be exempt from the 100-foot setback requirement; and further stated that, once the wetland buffer zone is applied, there remains only a very small portion of the Property that can be built on.

Mr. Rand pointed out the ZBA denied a use variance and a dimensional variance in 2007 for this Property. In ZBA Case No. 17-07 the applicant requested a variance to allow for the application of Residential C District setback regulations in the Industrial District and a variance to allow for the application of the minimum lot area and minimum lot frontage required in a Residential C District. In 2007 the applicant's attorney stated the dimensional regulations of the Industrial District and the wetland resource buffer zone requirements for the site made it difficult to do anything with the Property.

The Applicant purchased the Property at 5 Bearfoot Road for \$10,000.00, on 10/27/2015.

The Applicant's representatives stated when the Application was originally filed, it was intended for the proposed facility to be leased to a nonprofit daycare center operator but it now appears likely that it will be leased to a for-profit entity.

In response to a question from Mr. Rand about the proposed square footage of the building, Mr. Goddard noted that the exact architectural design is still in process, but the building will have a footprint of approximately 3,000 square feet and will be two stories high. Mr. Rand discussed the intention for the building to be leased and asked what would happen if the applicant were unable to find a tenant for the daycare use either now or in the future. Mr. Goddard explained that he would need to look for another use that would fit within the Dover Amendment or he would have a problem. Mr. Rand asked how the issue would be resolved were it to arise, and Mr. Goddard mentioned that the goal is not to have the situation occur. Attorney Koshy commented that it would be difficult to know what would happen and, though changes in circumstances might occur, the Applicant would be required to stay within the confines of the Dover Amendment.

Attorney Koshy noted how the setback requirement interplays with the Dover Amendment. She noted that, while the 100-foot setback requirement may on its face be reasonable, the issue for the analysis of how the Dover Amendment applies is whether when applying the setback requirement to this specific project it becomes unreasonable. She agreed that the Town is permitted to apply reasonable dimensional regulations, but it was her contention that if the Applicant is to comply with the wetland requirements and the 100-foot setback, it essentially cannot build on this Property. She emphasized that the Applicant is not looking for relief from all zoning requirements but is simply asking to be exempt from the 100-foot setback requirement. She also explained that, once the wetland buffer zone is applied, there remains only a very small portion of the Property that can be built on.

Ms. Joubert asked if the Applicant had applied for any waivers or variances from the Conservation Commission to allow encroachment into or fill of any of the wetlands in order to meet the 100-foot zoning setback. Mr. Goddard indicated that he did not and suggested that it would be a difficult proposal for the Conservation Commission to allow. He stated that the plan as proposed provides the best location from a conservation perspective while maintaining a reasonable distance from nearby residences. Ms. Joubert mentioned that there is limited filling allowed and asked if the Applicant had explored the option in order to get somewhere between the 20-foot and 100-foot setbacks, perhaps with a building orientation along Bearfoot Road. Mr. Goddard stated that this would not be feasible and he would still be limited as to where the building would fit. Mr. Rand questioned the location of the building, being only 20 feet from the property line, and the parking lot, which is proposed to be built on the property line with no buffer between the residential uses and Residential District and the Industrial District.

Residents Mary Bassett, 3A Pond View Way; Mitch Blasko, 18 Pond View Way; Bill Donovan, 3B Pond View Way; Rick MacWilliams, 5B Pond View Way; Jean Coyne, 1 Pond View Way; Richard Harnet, 1A Pond View Way; Phyllis Samara, 1C Pond View Way; and Cary Weber, 7D Pond View Way spoke in opposition to the Application. Three letters were received from Attorney Mary Bassett as noted in the Exhibits section of this Decision. Several residents expressed frustration with the proposal seeking a reduction in the setback that protects their residential property from the Industrial District.

Bret O'Brien, 111 Brigham Street spoke in favor of the Application and a letter in support of the Application was received from Ten Bear LLC.

The hearing was closed on September 29, 2020.

## **FINDINGS OF FACT**

1. The subject property at 5 Bearfoot Road is located in the Industrial District.
2. Per section 3 of the state Zoning Act (G.L. c. 40A) "No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term "childcare facility" shall mean a childcare center or a school-aged childcare program, as defined in section 1A of chapter 15D."
3. Whether the use of a childcare facility in the Industrial District is allowed is not in dispute. The proposed use of the Property for a childcare facility is exempt from Northborough's Zoning Bylaw pursuant to the Dover Amendment, as contained in G.L. c. 40A, § 3.
4. The matter is before the Board by way of an appeal from the December 20, 2019 decision of the Building Inspector that he could not apply the provisions in section 3 of the state Zoning Act (G.L. c. 40A) so as to exempt the proposed facility from the Industrial District setback requirement in section 7-06-030.C(4)(b) of the Zoning Bylaw.
5. Section 7-06-030.C(4)(b) of the Zoning Bylaw states: "In the Industrial District, the minimum setback along the lot line adjacent to a residential or business district shall be one hundred (100) feet from a residential district and fifty (50) feet from a business district. When the residential zoning district boundary is in or at a street, the setback may be reduced by the width of the street which is in the residential zone."
6. The Board has received memoranda from counsel for the Applicant and an attorney who is a residential abutter to the subject Property, objecting to the Application on her own behalf and on behalf of her neighbors. Both attorneys cite, among other cases, Rogers v. Town of Norfolk, 432 Mass. 374 (2000) in support of their arguments regarding the extent of statutory protection for childcare facilities.
7. The Board finds the Building Inspector correctly applied section 7-06-030.C(4)(b) of the Zoning Bylaw and that the facility must comply with the required setback for the Industrial District, so that the child care facility must be one hundred (100) feet from the adjacent Residential District.

## **DECISION**

1. **On September 29, 2020**, after due consideration of the **Appeal**, the Board voted unanimously to deny the Applicant's appeal and to support the Building Inspector's determination that he could not apply the provisions in section 3 of the state Zoning Act (G.L. c. 40A) so as to exempt the proposed facility from the Industrial District setback requirement section 7-06-030.C(4)(b) of the Zoning Bylaw.

**TOWN OF NORTHBOROUGH, MASSACHUSETTS  
ZONING BOARD OF APPEALS**



**FRAN BAKSTRAN, CHAIRMAN**