

PLYMOUTH, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
NO.

JOHN FOGG, Plaintiff)
)
)
v.)
)
TOWN OF HANOVER and Matthew Perkins,)
Frederick Adami, David Connelly, and Christopher)
Bernard, as they are Members of the HANOVER)
ZONING BOARD OF APPEALS, Defendants)

NOTICE OF APPEAL


TO: Town of Hanover and Hanover Zoning Board of Appeals

Re: ZBA Case # 23-2

Please take notice that an appeal of the decision in the above case has been filed this date with the Plymouth County Superior Court pursuant to MGL c. 40A, s. 17. (See attached).

Dated: May 22, 2023

JOHN FOGG, Plaintiff,
By his attorney,


Thomas J. Callahan
BBO #544058
427 Columbia Road
Hanover, MA 02339
781-826-8822 x212
tjcesq1@gmail.com

TOWN OF HANOVER
2023 MAY 22 PM 2:10
TOWN CLERK

5/22/23

COMMONWEALTH OF MASSACHUSETTS
PLYMOUTH, ss. SUPERIOR COURT
NO. 2883 CV 00407

JOHN FOGG, Plaintiff

v.

TOWN OF HANOVER and Matthew Perkins,
Frederick Adami, David Connelly, and Christopher
Bernard, as they are Members of the HANOVER
ZONING BOARD OF APPEALS, Defendants

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COMPLAINT

1. The Plaintiff, John Fogg, is a resident of Hanover, Plymouth County, Massachusetts.
2. The Defendant Town of Hanover is a body politic with a principle place of business located in Hanover, Plymouth County, Massachusetts.
3. The Defendant Hanover Zoning Board of Appeals is a duly appointed body of the Town of Hanover. The four individual Defendants are the members of said Board who voted in the matter at issue. All are residents of Hanover, Plymouth County, Massachusetts.
4. This action is an appeal of a decision of said Zoning Board of Appeals made pursuant to MGL c. 40A, s. 17; said decision dated 4/25/23 and filed with the Town Clerk on 5/4/23. (See attached).
5. The decision affected the use of a parcel of Town-owned land located on King Street in Hanover, known as Forge Pond Park.
6. Plaintiff is an abutted to this Town-owned parcel.

7. The decision at issue granted modification of an earlier-issued special permit (dating from 2009) which would allow the installation of lights at six ballfields on the subject parcel and thus consequent use of the fields at night until 10 PM.

8. On information and belief, funding exists at present for only two of the six fields, but one of those is in close proximity to Plaintiff's property.

9. The earlier 2009 decision was when construction of the fields was first permitted, framed as use of "recreational complex".

10. The Town-owned parcel is in the Residence A zoning district.

11. The 2009 decision relied upon Section 6.020(D) of the Zoning Bylaw, which on information and belief, is unchanged to this day. That section allows only "museums and playgrounds" in this District and not allow a "recreational complex". That latter term is not used at all.

12. Plaintiff appealed that 2009 decision (Plymouth Superior Court case #PLCV2009-00935B). Among his points of challenge was that a "recreational complex" was not an allowed use, and that construction of six athletic fields was not a use within the meaning of the only stated allowed uses - "museums and playgrounds".

13. That lawsuit was dismissed with prejudice. However, that dismissal was agreed to in consideration of mitigation measures to be performed by the Town, which never have been made. Plaintiff herein asserts that a) the dismissal with prejudice is negated by the failure of the consideration that led to and was part and parcel of it and b) that neither settlement of that lawsuit or now approx. 13 years use of as a "recreational complex" can allow a use which is not permitted under the Zoning Bylaw. Any claim of rights gained by adverse use is negated insofar as the requisite period of "open and hostile" use has not yet been met.

14. In addition to the use issue, the current decision fails in that the noise, the lights, and the use any day of the week until 10 PM is “substantially more detrimental to the neighborhood” and thus does not meet the standard of a grant of a special permit.

WHEREFORE, Plaintiff seeks:

A. Nullification of the decision of the Hanover Zoning Board of Appeals dated 4/25/23.

B. A declaration that the decision exceeds the authority of the Hanover Zoning Board of Appeals insofar as the use is not allowed under the Zoning Bylaw.

C. A declaration that the decision does not comport with the Hanover Zoning Bylaw.

D. A declaration that the use in general and as proposed with lights and use until 10 PM is “substantially more detrimental to the neighborhood”.

E. A declaration that the decision was made arbitrarily and capriciously without sufficiently supporting findings.

F. A declaration that the dismissal with prejudice of the 2009 appeal is nullified by the failure of the Town of Hanover to execute the mitigation measures upon which said settlement was based.

G. A declaration that the Town of Hanover and the Hanover Zoning Board of Appeals must comply with the Zoning Bylaw absent a grant of variance.

Dated: May 22, 2023

JOHN FOGG, Plaintiff,
By his attorney,



Thomas J. Callahan
BBO #544058
427 Columbia Road
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TOWN OF HANOVER ZONING BOARD OF APPEALS

550 HANOVER STREET
HANOVER, MA 02339

781-826-7641

Written Record Decision
ZBA Case: ZBA 23-2
253 King Street/Forge Pond Park-lights
Hanover, MA 02339

April 25, 2023

TOWN OF HANOVER
TOWN CLERK
2023 MAY -4 AM 10:31

Name of Applicant:

Hanover Parks & Recreation Department
550 Hanover Street
Hanover, MA 02339

Application for:

The applicants are requesting a Major Modification of a previously approved Special Permit (Case #2009-7SP) to modify condition #7 of said decision to allow for use of the park at night and installation of lights at six of the ball fields for such after-hours use at the recreational complex.

Property Location:

King Street, Hanover, Massachusetts 02339
Plan 67 Assessors Map, Lot 1, Residence A District

Date of Hearings:

April 12, 2023 & April 24, 2023

Plans and Accompanying Documents:

"Proposed Sports Field Lighting at Forge Pond Park – Site Plan" dated 2/9/23 stamped by Patrick G. Brennan (RPE #41489) of PGB Engineering – 1 sheet

"EPH Forge Park Fields Project #2101485r3 Sports Lighting Plan" dated 1/24/2023 no stamp- prepared by Cooper Lighting Solutions (3 sheets total =1.AGI, 2.AGI & B.AGI)

A TRUE COPY, ATTEST
Catherine H. D.
TOWN CLERK, HANOVER

Board Conducting Hearing and Rendering Decision:

Matthew Perkins Frederick Adami David Connelly Christopher Bernard

Decision:

Grants a Modified Special Permit pursuant to ZBL Section 6.020 & Section 13.00

Vote of the Board: (4:0)

Matthew Perkins (Y) Frederick Adami (Y) David Connelly (Y) Christopher Bernard (Y)



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FINDINGS:

In accordance with the Hanover Zoning Bylaw, Section 6.020 & Section 13.00, the Board finds for the proposed Major Modification of the original Special Permit (Case 2009-7SP) modifying condition #7 to allow after hours use and installation of lighting per the approved plan around the ballfields, parking areas and driveway within the playground and recreational facility as follows:

1. the proposed modification for after-hours use with illumination does not derogate from the intent of the Zoning Bylaw; The Board finds the use, allowed by Special Permit, has been existing and operational for over ten (10) years as a playground/ recreational complex;
2. the proposed modified use for after hours and illumination will not interfere with the safety and privacy of adjoining properties; safe guards in special conditions to allow illumination until 10PM during specified months of the year, shield from glare on abutting properties and if fields are not in use the lights are not to be turned on. The Board finds no substantial detrimental impact to the neighborhood;
3. the proposed modification for after-hours use and illumination will not cause an immediate or potential devaluation of property values of adjoining properties and the general area.

This matter came before the Zoning Board of Appeals for a hearing on April 12, 2023, in addition a posted site visit on April 19, 2023 at the site and the continued the public hearing on April 24, 2023. On April 12, 2023, the petitioner's representatives presented a detailed site plan as well as the testimony of a registered engineer and a lighting solution company testimony and a photovoltaic plan demonstrated the overall luminated watts of lighting to be expected based the proposed light fixtures. To the extent abutters objected to the proposed project, the abutters did not present any expert engineering, or other studies.

The petitioner established that the existing playground/recreational use has been well established for over thirteen (13) years since the original Special Permit issuance in 2009. As to the petitioner's application to Modify the original Special Permit, the Board finds that the existing use of the Forge Pond Park provides safe ingress and egress from King Street. The property is bordered by Forge Pond and one residential structure located at #231 King Street to the north. The property to the south is bordered by two residential properties #269 & 313 King Street. The neighborhood itself is not densely populated and the structures are spread out along King Street. The Board finds that the existing use of the project as a recreational/sports facility is consistent with the residential district as it maintains open space with minimal impact to the abutting properties.



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Secondly, per the proposed plan, the project itself will not impact the safety or privacy of adjoining properties. There are adequate conservation and/or buffer areas surrounding the playing fields to protect the privacy of the neighboring properties. To the extent the abutters assert that the modifications of the project will increase traffic impact and safety these objections, as set forth, were not supported by credible testimony.

Finally, the Board finds that the modification of the existing recreational areas with installed lighting will not devalue the property in the adjoining area. Rather, the facility will improve property values for the entire Town as it will provide the Town's residents with a first class, public, recreational facility available for extended seasonal use in preferred weather conditions.

If substantial use of the rights authorized by this Modified Special Permit are not commenced pursuant to Section 13.00 of the Hanover Zoning Bylaws within one (1) year of the date on which a copy of this decision is filed with the Town Clerk, the special permit shall expire. If requested thirty (30) days prior to expiration, the Board may grant an extension of time for good cause to be determined by the Board.

The Special Conditions of the modified request for the original Special Permit, set forth below, will further serve to minimize any impact from the modification request to the abutting properties.

Special Conditions:

1. Attached is the original Special Permit issued in 2009 (Case #2009-7SP) the conditions of the ZBA approval shall remain enforceable as to the use of the property with the addition of the Major Modification conditions incorporated here within.
2. Modification of condition #7 (2009-7SP), shall allow Forge Pond Park after hours "usage season" from April 1st to October 31st for the recreational fields that will be illuminated with night time lighting. Any modification of the "usage season" of the fields beyond the identified dates shall require review and approval by the Zoning Board of Appeals.
3. Modification of condition #7 (2009-7SP) shall allow for the installation of lighting in accordance with the approved plans. The first two poles located at the southerly property line of the property shall be installed and operational with box shields and/or diffusers to prevent light spread onto the abutting residential properties. All of the proposed lighting shall be dark sky compliant and operational with timing mechanisms shutting lights off at 10 PM.



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4. Modification of condition #7 (2009-7SP) modified the after-hours use for the "season of usage" to be from April 1st to October 31st night time lighting shall be turned off during the remaining months of the year. Lighting during the "usage season" season is permissible seven days a week but shall be shut off by 10 PM daily. If there is no game or practice scheduled for the fields the lights shall be turned off.
5. Modification of condition #7 (2009-7SP) to allow night time use, shall be monitored by the Town's Public Safety Divisions and it will be their discretion if the existing gate should be closed and locked for increase security beyond the routine patrol of the park as occurs presently.
6. Modification of condition #7 (2009-7SP) once operational after first "first season of usage" the applicants shall provide the Zoning Board of Appeals with a report from Police and Fire as to the number of calls to Forge Pond park between daily closing at dusk and 10:00 PM.

Based on the testimony, evidence presented to Board by the abutters in favor, engineers and the plans the Zoning Board of Appeals finds that proposed use as modified by conditions of the Board is not more substantially detrimental to the neighborhood than currently exists.

The Zoning Board of Appeals by a vote taken by each of the voting members at a posted meeting held at the Hanover Town Hall on March 24, 2023 **GRANTS** the requested Major Modification of the Special Permit (Case 2009-7SP) Zoning Bylaw Section 6.020 and Section 13.00 to modify the after hours use of Forge Pond Park and allow the installation of lightening for such use until 10pm.

Any person aggrieved by this decision may appeal to the Superior Court, or the Land Court, or to the District Court Departments of Plymouth County, Massachusetts praying that the decision of the Zoning Board of Appeals be annulled. Appeals shall be made pursuant to Section 17, Chapter 40A, Massachusetts General Laws, and shall be filed within twenty (20) days after the date this decision was filed with the Town Clerk.



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A true copy of this decision will be filed with the Town Clerk, Zoning Board, and Building Inspector of the Town of Hanover, Massachusetts.

Town Clerk Certification:

I hereby certify that 20 days have elapsed from the date this decision was issued and that no appeal has been filed with this office.

A TRUE COPY

Catherine Harder-Bernier,
Town Clerk
Date:



TOWN OF HANOVER
ZONING BOARD OF APPEALS

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Written Record Decision
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April 24, 2023

A TRUE COPY, ATTEST
Cathie M. [Signature]
TOWN CLERK, HANOVER

ZONING BOARD OF APPEALS

[Signature]
Matthew Perkins

[Signature]
David Connolly

[Signature]
Brian Gallow

[Signature]
Frederick Adams

[Signature]
Christopher Bernard