

October 18, 2018

Kelli E. Gunagan, Assistant Attorney General
By-Law Coordinator, Municipal Law Unit
Office of the Attorney General Maura Healey
Ten Mechanic Street, Suite 301
Worcester, MA 01608

Re: Southborough Special Town Meeting, May 22, 2018, Warrant Article 1

Dear Attorney Gunagan,

We acknowledge receipt of Attorney Kremer's October 4, 2018 correspondence to your office. Please note that I am counsel of record for the Zoning Board of Appeals in the principal case of Huang et al v. Southborough ZBA et al and as such, voluntarily decided not to render legal opinions at the Town Meeting on the petitioned Warrant Article advanced and supported at the Meeting by several of the party plaintiffs in that case, both presently and previously.

In that regard, we deferred to our highly competent Special Counsel, Jay Talerman, who addressed the issue at the Town Meeting and subsequently with your Division and we advise of our full deference to Attorney Talerman's analysis.

In that Attorney Kremer has now intertwined the pending litigation, by some of her clients, with this Warrant Article, we are now free to advise your office of why we believe the attempted by-law change is incorrect and the inaccuracies in her correspondence.

Overall, Attorney Kremer attempts to cite the same legal argument utilized by the Plaintiff's litigation counsels and misinterpreting in the Town Code's Section 249-3 which is not a by-law, general or zoning, nor it is any other kind of legislative enactment, but simply the posting and incorporation into the Town Code of Rules and Regulations properly promulgated by the Southborough Zoning Board of Appeals under M.G.L. c.40A, Section 12. As such, these administrative rules and regulations, not being a by-law, do not require nor should they have a Town Meeting vote. These regulations are inserted into the Town Code as Chapter 249 for convenience purposes as part of the General Code Book which contains general by-laws; zoning by-laws; acceptance of the general laws of the Commonwealth and enactment of Special Acts as petitioned by the Town together with Rules and Regulations of the Planning Board, Zoning Board of Appeals and the Board of Selectmen.

The entire deficiency of this suggested procedure is an attempt to grant a Town Meeting or the voters or in this case, i.e. the abutters Party Plaintiffs in pending litigation, the ability to

participate in rulemaking of the Zoning Board of Appeals. As such, we state unequivocally, that rule making authority under Chapter 40A of the Massachusetts General Laws, Comprehensive Zoning Act, is vested solely and exclusively with a Zoning Board of Appeals as the statutory administrative agency empowered to grant zoning relief.

If the General Court had intended for some form of Town Meeting intervention or City Council intervention in this process, they would have so specified which would have worked an unwieldy result in legislative intervention into the administrative procedure of a Zoning Board.

In January, 2007, the Zoning Board of Appeals enacted new rules and regulations pursuant to c.40A, Section 12 which superseded all prior rules and regulations of the Zoning Board of Appeals. These were the rules and regulations operative during the grant of the Chapter 40B Comprehensive Permit for the Park Central Affordable Housing Project which is the subject of appeal in the Worcester Superior Court. These zoning rules and regulations do not contain a quorum provision as enacted by the Zoning Board of Appeals and subsequently duly filed with the Town Clerk's office. This has been verified and is the subject of at least three supportive affidavits including the current Town Clerk who had researched his records.

Without getting too deeply into the legal issues facing the Superior Court in this regard, we have attached the Zoning Board of Appeals' Emergency Motion and Memorandum for Leave to Clarify and Advance Facts and Legal Argument on the Quorum Issue together with one of the three statements in support thereof, this being the one by the then current Chairman of the Zoning Board of Appeals, Attorney Andrew R. Dennington, a distinguished counsel in the firm of Conn Kavanaugh.

Without the necessity of a further long narrative, these two documents, duly filed with the Superior Court, are the reason, in part, why this Warrant Article was submitted particularly when Plaintiff's counsel realized that their interpretation of the Southborough Code, based upon these new filings, was incorrect.

Attorney Kremer has cited an initial finding in this matter, but has failed to inform you that a subsequent determination by the Court has allowed the new factual assertions to be served on Plaintiffs pursuant to Rule 9A so that the pending matter could be scheduled for further hearing on a renewed Motion for Summary Judgment as the session calendar permits. See Judge Freniere Order attached.

In that regard, we note that a status conference before the Court on this subject is scheduled in mid-November, 2018.

In further summary, since the 1974 Regulations were enacted pursuant to Chapter 40A, Section 12, the 2007 Regulations also enacted pursuant to said Section superseded the prior regulations and now control for the Zoning Relief which is the subject of litigation. The fact that the Town's ministerial process did not update Chapter 249 in the Code Book, for informational purposes, is immaterial and it does not change the underlying legal reality that the regulations set forth therein were no longer applicable after January, 2007.

Attorney Kremer goes on to cite my opinion relative to how many members of the Zoning Board can act on a continuance. To be accurate about addressing that question, the issue raised was

could three members of a five member board act upon the ministerial request for a continuance. As we all know, under parliamentary procedure, a majority of five member board is three and three may act or even two of the three as the majority of the quorum for ministerial purposes. That advice has nothing substantively to do with the pending litigation or the Warrant Article before your Division.

Attorney Kremer then questions the so-called nullity of the prior regulations. As indicated above, she is wrong about the subsequent enactment of the regulations as addressed in detail in the Andrew Dennington's Declaration attached hereto. Attorney Kremer questioned why had there never been a public meeting to discuss, let alone repeal, this requirement. Any time the Zoning Board of Appeals acts on amending its regulations, it is done in a public meeting and such was the case here.

Relative to the issue of curing the status of procedural rules and regulations in pending litigation, when you find an administrative error that needs to be cured, as you are a Town Counsel, you are compelled to advise your client of the deficiency. You do not discuss the litigation aspect of the affect of that cure; you simply file the appropriate supplemental pleadings in the jurisdictional Court for consideration.

Attorney Kremer goes on to cite the 1986 case of Town of Amherst v. Attorney General for the principle that in order to be struck down as inconsistent with State law, a local enactment must actually prevent the achievement of a clearly identifiable purpose of State legislation. This is exactly the case as to the insufficiency of Article 1, the petitioned article, which attempts to intervene and otherwise interfere in the rulemaking authority of the Zoning Board of Appeals which, under the Comprehensive Zoning Act, was clearly intended to be the exclusive jurisdiction of that administrative agency.

Finally, Attorney Kremer suggests in a footnote that our Special Counsel's opinion was issued in order to gain an advantage in pending litigation. That was not the case. It was simply intended to give the Town officials' viewpoint on an article not advanced by the Town. If anyone is attempting to gain an advantage in the litigation, it is the litigation counsels for the Plaintiffs, many of who were the petitioners for this Article and who voted on the petition who together with Attorney Kremer, although not counsel of record in the litigation, is clearly advancing their litigation agenda.

Respectfully submitted,




Aldo A. Cipriano, Esq.
Town Counsel

AAC/fc

Enclosures

Cc: Mark Purple, Town Administrator
Jay Talerman, Esq.

CLERK'S NOTICE	DOCKET NUMBER 1685CV01359	Trial Court of Massachusetts The Superior Court 
	Dennis P. McManus, Clerk of Courts	
CASE NAME: Yan Huang et al vs. Leo F. Bartolini Jr. In Official Capacity As a Member of the Town of Southborough Zoning Board of Appeals et al		COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608
<p>You are hereby notified that on 01/24/2018 the following entry was made on the above referenced docket:</p> <p>Endorsement on Motion for Short Order of Notice on Defendants' Emergency Motion for Leave to Clarify and Advance Facts and Legal Argument on the Quorum Issue (#24.0): DENIED</p> <p>However, in light of the factual assertions herein, the court will require the defendants to serve this motion pursuant to Rule 9A and this matter will be scheduled for further hearing on the renewed motion for summary judgment, if any as the session calendar permits, to be heard by any judge sitting in this session. This court will take no action on pending docket numbers 22 & 22.2, the plaintiff's motion for summary judgment and the defendant's counterclaim.</p> <p>Notices mailed 1/24/18</p> <p>Judge: Freniere, Hon Diane</p>		
DATE ISSUED 01/24/2018	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon Diane Freniere	SESSION PHONE# (508)831-2364

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS.

CIVIL ACTION NO. 16-1359B

YAN HUANG, et al.)
Plaintiffs)
)
v.)
)
LEO F. BARTOLINI, JR., DAVID EAGLE, AND)
PAUL DREPANOS, as members of the TOWN OF)
SOUTHBOROUGH BOARD OF APPEALS, and)
PARK CENTRAL, LLC AND WILLIAM A.)
DEPIETRI,)
Defendants)

**DEFENDANTS TOWN OF SOUTHBOROUGH BOARD APPEALS, PARK CENTRAL,
LLC AND WILLIAM A. DEPIETRI'S EMERGENCY MOTION and MEMORANDUM
FOR LEAVE TO CLARIFY AND ADVANCE FACTS AND LEGAL ARGUMENT ON
QUORUM ISSUE**

Now come the Defendants, Town of Southborough Board of Appeals, Park Central, LLC and William A. Depietri (collectively the "Defendants") and hereby move for leave to clarify the record on Summary Judgment and advance facts and legal argument on the "quorum" issue previously presented to the Court and argued on January 11, 2018. In support hereof the Defendants submit the Declaration of Andrew R. Dennington and the Affidavit of Leo F. Bartolini Jr. and further state as follows:

1. The materials submitted by all parties to date including points made at oral argument on the parties' cross-motions for summary judgment failed to advance or focus on critical facts necessary and material to a just determination of the quorum issue.
2. The Plaintiffs' reliance on Chapter 249 (more specifically c. 249-3(B)) of the Town Code ostensibly requiring a four-person quorum is unsustainable and unenforceable in that the neither Chapter 249 of the Town Code nor the Town Code in its entirety is a "Bylaw" and accordingly does not carry the weight of a Bylaw which has been approved by Town Meeting.
3. Chapter 249, as available on the Town website, (and as relied on by the Plaintiffs as Joint Exhibit 5) *only contains* the Rules and Regulations of the Board enacted pursuant to c. 40A Section 12 *in 1974* but fails to set forth the **amendments to the**

Rules and Regulations of the Board enacted pursuant to c.40A Section 12 in 2007, 2011 and 2017¹. Significantly the 2007 revision (also relied upon the Plaintiffs as Joint Exhibit 3) ***replaced and supersedes*** the 1974 Rules and Regulations and does not contain a quorum requirement. ***Since 2007 the Board had no applicable quorum requirement.*** Section III-Meetings, Hearings and Decisions of the 2007 Rules and Regulations (Exhibit 3) which directs that the Board “conduct its affairs, meetings and hearings ... according to the requirements of the Town Zoning Bylaw (the “By-Law), the Town Code (the “Town Code”) and General Laws of the Commonwealth of Massachusetts...” presupposes the validity of those requirements. As Chapter 249 of the Town Code does not contain the updated and applicable Rules and Regulations of the Board, adherence to that directive is legally impossible.

4. The Southborough “Town Code” is nothing more than a compilation of previously enacted Bylaws and various rules, regulations, practices and policies which have been assembled in one common resource identified as the “Town Code”. The chapters of the Town Code are separated into divisions. Only Chapters 1 – 174 of the Town Code entitled “Town Meeting Enactments” and have the legal force and effect of a Bylaw. “Chapter 249” is not a Bylaw and only sets out the Rules and Regulations of the Board of Appeals which, as stated, were *enacted* in 1974 pursuant to M.G. L. c. 40A Section 12. Chapter 249 listed under “Division 4” of the Town Code entitled “Miscellaneous” and is clearly grouped with other provisions that are not Bylaws and which do not have legal significance or control except to the extent that the each respective Chapter contains material that has been properly promulgated.
5. Chapter 174 of the Town Code is the Southborough Zoning Bylaw enacted by the Town Meeting in April 1984 and was last amended by Special Town Meeting on April 27, 2017. Section 25 of Chapter 174 entitled “Board of Appeals” (relied upon by the Plaintiffs as Joint Exhibit 4) deals with general Board of Appeals administration and ***directs*** the Board to “adopt and file with the Town Clerk rules consistent with requirements of the General Laws c.40A and with this chapter”. Chapter 174 does not establish a quorum requirement.
6. On or about January 26, 2007, the Rules & Regulations governing the Board of Appeals were enacted by the Board in compliance with “Chapter 40A, Section 12 and Chapter 174, Article VI, Section 174-25 of the Town Zoning Code” and superseded “any and all previous regulations of the Board.” The Rules and Regulations as revised in 2007, 2011 and, most recently 2017; do not include a quorum requirement.

¹ Inexplicably Chapter 249 of the Town Code as maintained by the Town Clerk, which does reference the 2011 amendment (dealing only with the term of the chairman), does not reference the 2007 or 2017 amendments.

7. The Board of Appeals' 2007, 2011 and 2017 enactment of the Rules and Regulations are based on permissible construction of and are consistent with the intent of M.G.L. c. 40B governing publicly subsidized housing.
8. The Rules and Regulations recited in Chapter 249 were rendered obsolete by the enactment of the Rules and Regulations in 2007. A Four-person board is not required for a quorum in the Town of Southborough. The failure of the Town Clerk to correctly and properly update Chapter 249 is unfortunate but it does not operate to nullify the properly enacted Rules and Regulations of the Board which were unquestionably in effect during Park Central's Comprehensive Permit hearing process.²

ARGUMENT

Notwithstanding the Defendants' continued position that the this Court is without subject matter jurisdiction to adjudicate Plaintiffs' substantive challenge to the August 24, 2016 Comprehensive Permit due to a lack of standing, Defendants are both mindful of the Court's obvious focus on the Plaintiff's quorum claim and on the reality that within the materials already submitted and arguments made by the parties the Defendants have failed to fully address and succinctly bring to the Court's attention important facts of which the Court must made aware and which need be part of the record in order for the quorum issue to be properly and fully adjudicated. Following the January 11, 2018 hearing before this Court Defendants, concerned that they had not made sufficiently clear the underlying contention that Chapter 249 of the Town Code upon which Plaintiffs' entire quorum argument is predicated is outdated and does not properly set forth applicable amendments to the Board's Rules and Regulations which clearly disposed of the quorum requirement in 2007. Accordingly the Affidavit of Leo F. Bartolini Jr. who served as Chairman of the Board throughout most of Park Central's hearings and the Declaration of Attorney Andrew R. Dennington, the current chair of the Board need be made part of the record notwithstanding the conceded lateness of the submission. Both Mr. Bartolini and Mr. Dennington provide important information bearing directly on the action of the Board and the decision to proceed with three members. Given that this Court has only recently considered the summary judgment claims made by the parties and given that the Plaintiffs reasonably³ relied on deficient town records that have not been updated, allowing clarification of

² Town Counsel has requested that the Town Clerk remedy this oversight by submitting the applicable current Rules and Regulations for inclusion in Chapter 249 of the Town Code.

³ As noted above, Chapter 249 of the Town Code as available on the Town website (the version attached by Plaintiffs to their initial filing as Joint Exhibit 5) does not include any of the amendments to the Board's Rules and Regulations promulgated after 1974. Reliance on records as downloaded to the website is understandable as such research is common place.

the record is decidedly in the interest of justice and will not prejudice Plaintiffs as the Court can also provide appropriate time for opposition or response.

Based on all of the materials presented to the Court as supplemented hereby, the Defendants respectfully maintain that the Plaintiffs argument is without merit as the 1974 Rules and Regulations which are compiled in Chapter 249 of the Town Code are not operative and have been superseded. There is no quorum requirement for the Board of Appeals in Southborough.

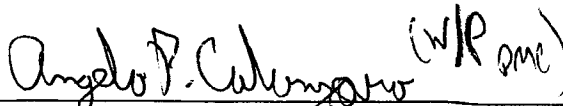
Wherefore the Defendants pray this Honorable Court as follows:

1. Issue an Order of Notice for February 8, 2018 or some other date convenient to the Court for hearing on Defendant's motion; or alternatively
2. Enter an Order giving Plaintiffs sufficient time to respond to Defendants' motion; and
3. Grant Defendants' Emergency Motion for Leave to Clarify and Advance Facts and Legal Argument on Quorum Issue with or without hearing; and
4. Assuming the Court first determines that the Plaintiffs have standing, Enter an Order denying Plaintiff's Motion for Summary Judgment on the Quorum issue; and
5. Enter such further Orders as the Court deems appropriate and just.

Date: January 23, 2018

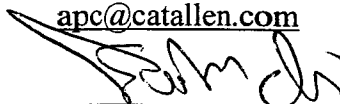


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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS.

CIVIL ACTION NO. 16-1359B

YAN HUANG, et al.)
Plaintiffs)
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LEO F. BARTOLINI, JR., DAVID EAGLE, AND)
PAUL DREPANOS, as members of the TOWN OF)
SOUTHBOROUGH BOARD OF APPEALS, and)
PARK CENTRAL, LLC AND WILLIAM A.)
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Defendants)

**DEFENDANTS TOWN OF SOUTHBOROUGH BOARD APPEALS, PARK CENTRAL,
LLC AND WILLIAM A. DEPIETRI'S EMERGENCY MOTION and MEMORANDUM
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1. The materials submitted by all parties to date including points made at oral argument on the parties' cross-motions for summary judgment failed to advance or focus on critical facts necessary and material to a just determination of the quorum issue.
2. The Plaintiffs' reliance on Chapter 249 (more specifically c. 249-3(B)) of the Town Code ostensibly requiring a four-person quorum is unsustainable and unenforceable in that the neither Chapter 249 of the Town Code nor the Town Code in its entirety is a "Bylaw" and accordingly does not carry the weight of a Bylaw which has been approved by Town Meeting.
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Rules and Regulations of the Board enacted pursuant to c.40A Section 12 in 2007, 2011 and 2017¹. Significantly the 2007 revision (also relied upon the Plaintiffs as Joint Exhibit 3) ***replaced and supersedes*** the 1974 Rules and Regulations and does not contain a quorum requirement. ***Since 2007 the Board had no applicable quorum requirement.*** Section III-Meetings, Hearings and Decisions of the 2007 Rules and Regulations (Exhibit 3) which directs that the Board “conduct its affairs, meetings and hearings ... according to the requirements of the Town Zoning Bylaw (the “By-Law), the Town Code (the “Town Code”) and General Laws of the Commonwealth of Massachusetts...” presupposes the validity of those requirements. As Chapter 249 of the Town Code does not contain the updated and applicable Rules and Regulations of the Board, adherence to that directive is legally impossible.

4. The Southborough “Town Code” is nothing more than a compilation of previously enacted Bylaws and various rules, regulations, practices and policies which have been assembled in one common resource identified as the “Town Code”. The chapters of the Town Code are separated into divisions. Only Chapters 1 – 174 of the Town Code entitled “Town Meeting Enactments” and have the legal force and effect of a Bylaw. “Chapter 249” is not a Bylaw and only sets out the Rules and Regulations of the Board of Appeals which, as stated, were *enacted* in 1974 pursuant to M.G. L. c. 40A Section 12. Chapter 249 listed under “Division 4” of the Town Code entitled “Miscellaneous” and is clearly grouped with other provisions that are not Bylaws and which do not have legal significance or control except to the extent that the each respective Chapter contains material that has been properly promulgated.
5. Chapter 174 of the Town Code is the Southborough Zoning Bylaw enacted by the Town Meeting in April 1984 and was last amended by Special Town Meeting on April 27, 2017. Section 25 of Chapter 174 entitled “Board of Appeals” (relied upon by the Plaintiffs as Joint Exhibit 4) deals with general Board of Appeals administration and ***directs*** the Board to “adopt and file with the Town Clerk rules consistent with requirements of the General Laws c.40A and with this chapter”. Chapter 174 does not establish a quorum requirement.
6. On or about January 26, 2007, the Rules & Regulations governing the Board of Appeals were enacted by the Board in compliance with “Chapter 40A, Section 12 and Chapter 174, Article VI, Section 174-25 of the Town Zoning Code” and superseded “any and all previous regulations of the Board.” The Rules and Regulations as revised in 2007, 2011 and, most recently 2017; do not include a quorum requirement.

¹ Inexplicably Chapter 249 of the Town Code as maintained by the Town Clerk, which does reference the 2011 amendment (dealing only with the term of the chairman), does not reference the 2007 or 2017 amendments.

7. The Board of Appeals' 2007, 2011 and 2017 enactment of the Rules and Regulations are based on permissible construction of and are consistent with the intent of M.G.L. c. 40B governing publicly subsidized housing.
8. The Rules and Regulations recited in Chapter 249 were rendered obsolete by the enactment of the Rules and Regulations in 2007. A Four-person board is not required for a quorum in the Town of Southborough. The failure of the Town Clerk to correctly and properly update Chapter 249 is unfortunate but it does not operate to nullify the properly enacted Rules and Regulations of the Board which were unquestionably in effect during Park Central's Comprehensive Permit hearing process.²

ARGUMENT

Notwithstanding the Defendants' continued position that the this Court is without subject matter jurisdiction to adjudicate Plaintiffs' substantive challenge to the August 24, 2016 Comprehensive Permit due to a lack of standing, Defendants are both mindful of the Court's obvious focus on the Plaintiff's quorum claim and on the reality that within the materials already submitted and arguments made by the parties the Defendants have failed to fully address and succinctly bring to the Court's attention important facts of which the Court must made aware and which need be part of the record in order for the quorum issue to be properly and fully adjudicated. Following the January 11, 2018 hearing before this Court Defendants, concerned that they had not made sufficiently clear the underlying contention that Chapter 249 of the Town Code upon which Plaintiffs' entire quorum argument is predicated is outdated and does not properly set forth applicable amendments to the Board's Rules and Regulations which clearly disposed of the quorum requirement in 2007. Accordingly the Affidavit of Leo F. Bartolini Jr. who served as Chairman of the Board throughout most of Park Central's hearings and the Declaration of Attorney Andrew R. Dennington, the current chair of the Board need be made part of the record notwithstanding the conceded lateness of the submission. Both Mr. Bartolini and Mr. Dennington provide important information bearing directly on the action of the Board and the decision to proceed with three members. Given that this Court has only recently considered the summary judgment claims made by the parties and given that the Plaintiffs reasonably³ relied on deficient town records that have not been updated, allowing clarification of

² Town Counsel has requested that the Town Clerk remedy this oversight by submitting the applicable current Rules and Regulations for inclusion in Chapter 249 of the Town Code.

³ As noted above, Chapter 249 of the Town Code as available on the Town website (the version attached by Plaintiffs to their initial filing as Joint Exhibit 5) does not include any of the amendments to the Board's Rules and Regulations promulgated after 1974. Reliance on records as downloaded to the website is understandable as such research is common place.


the record is decidedly in the interest of justice and will not prejudice Plaintiffs as the Court can also provide appropriate time for opposition or response.

Based on all of the materials presented to the Court as supplemented hereby, the Defendants respectfully maintain that the Plaintiffs argument is without merit as the 1974 Rules and Regulations which are compiled in Chapter 249 of the Town Code are not operative and have been superseded. There is no quorum requirement for the Board of Appeals in Southborough.

Wherefore the Defendants pray this Honorable Court as follows:

1. Issue an Order of Notice for February 8, 2018 or some other date convenient to the Court for hearing on Defendant's motion; or alternatively
2. Enter an Order giving Plaintiffs sufficient time to respond to Defendants' motion; and
3. Grant Defendants' Emergency Motion for Leave to Clarify and Advance Facts and Legal Argument on Quorum Issue with or without hearing; and
4. Assuming the Court first determines that the Plaintiffs have standing, Enter an Order denying Plaintiff's Motion for Summary Judgment on the Quorum issue; and
5. Enter such further Orders as the Court deems appropriate and just.

Date: January 23, 2018



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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
Docket No. WOCV2016-01359-B

YAN HUANG, et al.,

Plaintiffs,

v.

LEO F. BARTOLINI, JR., et al.,

Defendants.

DECLARATION OF ANDREW R. DENNINGTON

I, Andrew R. Dennington, hereby declare under oath that the statements set forth below are true and accurate to the best of my knowledge and belief:

1. I am the current Chairman of the Zoning Board of Appeals ("ZBA" or the "Board") of the Town of Southborough (the "Town"). I first was appointed as an alternate member of the ZBA on July, 2014. I was appointed as a regular member of the ZBA in May, 2015. In August, 2016, I was appointed to replace Leo F. Bartolini, Jr. as Chairman of the ZBA.

2. Since 2006, I also have been a member in good standing of the Massachusetts Bar, practicing litigation at a firm in Boston.

3. I have spent considerable time researching and familiarizing myself with the provisions of the Massachusetts General Laws, Southborough Town Code, and ZBA Rules and Regulations that govern the ZBA. For the reasons set forth below, Chapter 249 of the Southborough Town Code has long been a nullity, it lacks the force of a by-law duly enacted by Town Meeting, and never has governed public hearings before the ZBA during my four years on the Board.

4. By way of background, I did not sit as a member of the ZBA on any of the hearings to consider Park Central's application for a comprehensive permit under G.L. c. 40B. By the time I was appointed as an alternate member in July, 2015, my understanding is that the ZBA already had held at least two meetings to consider that application. My understanding at that time was that I could not be appointed to sit as a member of the ZBA for that hearing because of the so-called "Mullins Rule."

5. In or about the time that I was appointed Chairman in August, 2016, I researched what rules and regulations governed the Board. Specifically, I researched what rules the ZBA had approved and filed with the Town Clerk pursuant to G.L. c. 40A, § 12 and Chapter 174-25 of the Southborough Town Code (as discussed below).

6. After researching this issue in 2016, I concluded that the ZBA was governed by a set of rules and regulations that had been approved by the ZBA on January 24, 2007, and filed with the Town Clerk on January 26, 2007, as modified by a very minor amendment in 2011. Attached at **Tab A** is a copy of an attested-to copy of the 2007 rules and regulations. Attached at **Tab B** is an attested-to copy of the amendment approved by the ZBA on September 28, 2011, and filed with the Town Clerk on October 11, 2011. (That 2011 amendment clarified that the ZBA Chairman's term ran from July 1 through June 30, not from September 1 through August 31, and made one other minor change to Section II.) Collectively, I herein refer to the 2007 rules and regulations, as modified by the 2011 amendment, as the "ZBA 2007 Rules and Regulations."

7. The 2007 ZBA Rules and Regulations do not contain any quorum requirement.

The 2007 ZBA Rules and Regulations also stated at Section A that: "These Rules and Regulations supercede any and all previous regulations of the Board."

8. My clear understanding always has been that the ZBA's adoption and filing of the 2007 ZBA Rules and Regulations rendered any prior version of those rules a nullity.

9. Based upon my research, I also concluded that Chapter 249 of the Town Code confusingly contains a series of long-outdated rules and regulations that the ZBA adopted on March 12, 1974. (The on-line version of Chapter 249 of the Town Code, attached at **Tab C**, contains the notation: "HISTORY: Adopted by the Zoning Board of Appeals of the Town of Southborough 3-12-1974. Amendments noted where applicable.") Because the 2007 ZBA Rules and Regulations so clearly superceded the 1974 rules and regulations reflected in Chapter 249 of the Town Code, I never have treated Chapter 249 as effective or having any legal validity.

10. I might have taken a different view if Chapter 249 of the Town Code had been duly enacted by Town Meeting at some point, but I have never seen any such evidence.

11. The structure of the Town Code points to the fact that Chapter 249 is not a Town Meeting enactment. "Division 1" of the Town Code is titled "Town Meeting Enactment" and contains Chapters 1-174. Chapter 249 is not contained within "Division 1." Instead, it is contained within "Division 4", titled "Miscellaneous." The "Preface" to the Town Code, attached at **Tab D**, further clarifies that the Town Code does not consist solely of by-laws (i.e. legislative enactments at Town Meeting) but also contains "certain rules, regulations and/or bylaws, adopted by various boards, commissions, departments, and/or agencies . . . , " such as those in Divisions 2-4 of Southborough's Town Code.

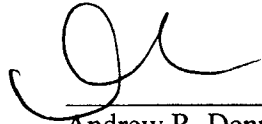
12. Another reason why I have never believed that Chapter 249 of the Town Code governed the ZBA during the relevant time period is that Chapter 174-25 of the Town Code also governs the ZBA's administration, speaks to the same subject matter as Chapter 249, does not contain any quorum requirement, and was (according to the historical annotations in the Town

Code) adopted at Southborough Town Meeting in April, 1984. Thus, Chapter 174-25 was enacted after Chapter 249 and by a higher level of legal authority (a legislative body of municipal government rather than a quasi-judicial/administrative body of municipal government). A copy of Chapter 174-25 of the Town Code is attached at **Tab E**. Section A of Chapter 174-25 of the Town Code states: "The Board of Appeals shall adopt and file with the Town Clerk rules consistent with the requirements of the General Laws, Chapter 40A, and with this chapter." That is exactly what the ZBA did when it adopted and filed with the Town Clerk its 2007 ZBA Rules and Regulations.

13. Nonetheless, for reasons I never have understood, no one has ever taken the appropriate action to either: (a) remove Chapter 249 from the Town Code entirely; or (b) replace the 1974 ZBA rules and regulations in Chapter 249 with the operative version of those same rules and regulations. In my view, the failure to take such action has generated understandable confusion among citizens of the Town.

14. At some point a few months after I became Chairman of the ZBA in August, 2016, I realized this issue and undertook to clear up this confusion. After researching these issues, I drafted a consolidated set of proposed ZBA rules and regulations and presented them to the ZBA for a vote in early, 2017. These rules and regulations mirrored the 2007 ZBA Rules and Regulations already in place. On February 15, 2017, the ZBA voted 5-0 to adopt the revised set of rules and regulations attached at **Tab F**. Pursuant to G.L. c. 40A, § 12, I then sent these revised ZBA rules to the Town Clerk for filing on February 21, 2017. A copy of my letter to the Town Clerk on that topic also is attached at Tab F. In that same February 21, 2017 letter, I instructed the Town Clerk to strike Chapter 249 from the Town Code because it is outdated.

Signed under the pains and penalties of perjury this 22nd day of January, 2018.



Andrew R. Dennington

TAB A

Town of Southborough
BOARD OF APPEALS
SOUTHBOROUGH, MASSACHUSETTS 01772

Paul J. Berry
Paul J. Berry
Town Clerk

17 COMMON STREET
SOUTHBOROUGH, MASSACHUSETTS 01772-1662
508-485-0717 ext. 1

January 26, 2007

Paul J. Berry, Town Clerk
Town of Southborough
Town House
Southborough, MA 01772

NOTICE OF DECISION

The Southborough Zoning Board of Appeals'
Revised Rules and Regulations

The Board of Appeals of the Town of Southborough held a public meeting in the Meeting Room of the Southborough Town House on January 24, 2007 and discussed the revised Rules and Regulations governing the application process for public hearings before the ZBA.

Sitting as a Board: Salvatore M. Giorlandino, Chairman
Sam R. Stivers
Regina McAuliffe
Peter Norden
Justin Lundberg

Also Present: Edward Estella

Chairman Giorlandino motioned to adopt the Rules and Regulations as presented in the draft of December 20, 2006 with the following recommended changes from Town Counsel, Aldo Cipriano:

1. In Section 1(A) at the end, add the phrase "and Chapter 174 Article VI Section 174-25 of the Town Zoning Code".
2. In Section II (A) on the third line change "succeeding" to "subsequent" and in the same Section at the third bullet point, after the word "sub-committees" add the phrase: "To the extent permissible pursuant to applicable law".
3. In Section IV, last paragraph, delete "to zoning" and insert in place thereof "to a zoning matter".

TRUE ATTEST COPY
James F. Hegarty
JAMES F. HEGARTY, TOWN CLERK

4. In General Information for Applications in Section 12, change statement to read as a question. "Is it necessary for an applicant to be represented by an advisor (e.g. a contractor, a registered engineer, an architect, etc.) or an attorney to support an application to the Board?"
5. To be consistent with the Town Bylaws and State Statute in Section 4.1.1 delete the word "lawyer" and inset in place the phrase "Town Counsel and/or such Special Counsel as authorized by the Board of Selectmen".

Mrs. McAuliffe seconded the motion to approve the Rules and Regulations as proposed on December 20, 2006 and with suggested changes from Town Counsel, Aldo Cipriano.

The Board unanimously voted 5-0 to accept the Rules and Regulations as proposed on December 20, 2006 and with suggested changes from Town Counsel, Aldo Cipriano.

A handwritten signature in black ink, appearing to read "Salvatore M. Giorlandino", written over a horizontal line.

Salvatore M. Giorlandino, Chairman
Southborough Zoning Board of Appeals



BOARD OF APPEALS—TOWN OF SOUTHBOROUGH RULES AND REGULATIONS

SECTION I—AUTHORITY AND EFFECTIVE DATE

A. The following "Rules and Regulations" are adopted by the Town of Southborough (the "Town") Zoning Board of Appeals (the "Board") under the authority of, and in compliance with, the General Laws of the Commonwealth of Massachusetts (the "General Laws"), Chapter 40A, Section 12 and Chapter 174, Article VI, Section 174-25 of the Town Zoning Code.

B. These Rules and Regulations shall be filed with the Town Clerk, and after such filing are effective as of January 26, 2007. These Rules and Regulations supercede any and all previous regulations of the Board.

C. These Rules and Regulations may be amended at any time by a vote of four of the five then-sitting members of the Board. Any such amendments shall be filed with the Town Clerk in the same manner in which these Rules and Regulations were so filed and will be effective as of such filing date (or other later date as specified as part of such filing).

SECTION II—OFFICERS AND DUTIES

A. Chairman: A Chairman shall be elected annually no later than August 31 by majority vote of the Full Members of the Board and will serve for a twelve (12) month term from September 1 through the subsequent August 31. Should a new Chairman not be elected by August 31 of a particular year, the then-current Chairman shall continue to serve as Chairman until a successor is elected. The Chairman shall be responsible for the overall conduct of the Board's activities, including but not limited to:

- calling meetings;
- presiding at meetings and regulating their conduct;
- appointing sub-committees, to the extent permissible pursuant to applicable law, as he/she deems necessary, to review Board administrative issues and make recommendations to the Board for consideration and approval; and
- authorizing purchase orders for expenditures by the Board.

The Chairman may, at his/her discretion, designate another Board member to fulfill certain of these duties.

B. Acting Chairman: If the Chairman is absent from a meeting or unable to fulfill his/her duties for a period of time, he/she may appoint an Acting Chairman to fulfill the Chairman's duties for a particular meeting or for a specified period of time. If the Chairman has not appointed an Acting Chairman to serve during such absence, the senior member present, in point of service, shall be Acting Chairman during such absence.

SECTION III—MEETINGS, HEARINGS AND DECISIONS

The Board shall conduct its affairs, meetings and hearings and render its decisions according to the requirements of the Town Zoning By-Law (the "By-Law"), the Town Code (the "Town Code") and the General Laws of the Commonwealth of Massachusetts (the "General Laws"), as applicable.



SECTION IV—PETITIONS AND APPEALS

A. Process for Petitions and Appeals

The Board's process for considering and disposing of petitions and appeals shall be according to the requirements of the By-Law, the Town Code and the General Laws, as applicable. The Board may establish related administrative processes not inconsistent with the By-Law, the Town Code and the General Laws as it deems necessary, and such administrative processes may be modified from time to time by a vote of four of the five then-sitting members of the Board.

B. Forms and Instructions for Petitions and Appeals

All petitions and appeals to the Board shall be presented on forms to be supplied by the Board, according to the instructions provided with these forms. Such forms and instructions may be modified from time to time as the Board deems necessary, by a vote of four of the five then-sitting members of the Board,

If there is any conflict between these Rules and Regulations and the By-Law, the Town Code and the General Laws pertaining to a zoning matter, then the order of precedence for resolution of such conflict shall be first, the General Laws, then second the Town Code (including the By-Law) and then third, these Rules and Regulations.

Attested

Board of Appeals

Full Members:

Salvatore M. Giorlandino, Chairman
Regina McAuliffe
Peter C. Norden
Sam R. Stivers

Alternate Members:

Edward D. Estella
Justin E. Lundberg

TAB B

RECEIVED
TOWN CLERK'S OFFICE

2011 OCT 11 P 12:48

SOUTHBOROUGH, MA *JS*



MEMO

To: Southborough Town Clerk
From: Jeanne Survell, Administrative Assistant *JS*
Date: October 11, 2011
Subject: Zoning Board of Appeals, Rules and Regulations

Please substitute the attached Section II article under the Zoning Board of Appeals Rules and Regulations regarding the election of the Zoning Board Chairman. The Board voted at its September 28, 2011 meeting to accept this revision. Sitting as a Board were, Chairman Matt Hurley, Regina McAuliffe, Edward Estella, Thomas Bhisitkul and Lee Bartolini. The Board voted 5-0 to accept the revision.

Please contact me if you need additional information.

Thank you

A True Copy
Attest:

Jane F. Hurley

Town Clerk, Southborough

2011 OCT 11 P 12:49

SECTION II – OFFICERS AND DUTIES

OK SOUTHBOROUGH

A. **Chairman**: A Chairman shall be elected annually no later than June 30 by majority vote of the Full Members of the Board and will serve for a twelve (12) month term from July 1 through the subsequent June 30. Should a new Chairman not be elected by June 30 of a particular year, the then-current Chairman shall continue to serve as Chairman until a successor is elected. The Chairman shall be responsible for the overall conduct of the Board's activities, including but not limited to:

- calling meetings;
- presiding at meetings and regulating their conduct; and
- authorizing purchase orders for expenditures by the Board.

The Chairman may, at his/her discretion, designate another Board member to fulfill certain of these duties.

2011 OCT 11 P 12:49

W. SOUTHBOROUGH

SECTION II - OFFICERS AND DUTIES

A. Chairman: A Chairman shall be elected annually no later than ~~August 31~~ June 30 by majority vote of the Full Members of the Board and will serve for a twelve (12) month term from ~~September~~ July 1 through the subsequent ~~August 31~~ June 30. Should a new Chairman not be elected by ~~August 31~~ June 30 of a particular year, the then-current Chairman shall continue to serve as Chairman until a successor is elected. The Chairman shall be responsible for the overall conduct of the Board's activities, including but not limited to:

- calling meetings;
- presiding at meetings and regulating their conduct; and
- ~~appointing sub-committees, to the extent permissible pursuant to applicable law, as he/she deems necessary, to review Board administrative issues and make recommendations to the Board for consideration and approval; and~~
- authorizing purchase orders for expenditures by the Board.

The Chairman may, at his/her discretion, designate another Board member to fulfill certain of these duties.

TAB C

Town of Southborough, MA
Monday, January 22, 2018

Chapter 249. Zoning Board of Appeals

[HISTORY: Adopted by the Zoning Board of Appeals of the Town of Southborough 3-12-1974. Amendments noted where applicable.]

GENERAL REFERENCES

Zoning — See Ch. 174.

§ 249-1. Authority; amendments.

- A. The following rules and regulations are adopted by the Southborough Zoning Board of Appeals under the authority of, and in compliance with, MGL c. 40A, § 12. These rules and regulations shall become effective upon the filing of the same with the Town Clerk for the Town of Southborough.
- B. These rules and regulations may be amended at any time by the Zoning Board of Appeals. Any such amendments shall be filed with the Town Clerk in the same manner in which these rules and regulations were so filed. Such amendments shall take effect upon being filed with the Town Clerk.
- C. These rules and regulations supersede any and all previous regulations of the Zoning Board of Appeals.

§ 249-2. Chairman; disqualification of members.

- A. Chairman: A Chairman shall be elected annually no later than June 30 by majority vote of the Full Members of the Board and will serve for a twelve-month term from July 1 through the subsequent June 30. Should a new Chairman not be elected by June 30 of a particular year, the then-current Chairman shall continue to serve as Chairman until a successor is elected. The Chairman shall be responsible for the overall conduct of the Board's activities, including but not limited to:
[Amended 9-28-2011]
 - (1) Calling meetings;
 - (2) Presiding at meetings and regulating their conduct; and
 - (3) Authorizing purchase orders for expenditures by the Board.
The Chairman may, at his/her discretion, designate another Board member to fulfill certain of these duties.
- B. Members. Members and alternates shall be responsible for disqualifying themselves from participation in the deciding of any case coming before the Board where the member or alternate has any substantial conflict of interest pertaining to the subject matter of the particular case.

§ 249-3. Meetings; hearings.

- A. Five members of the Board shall be present at every hearing. Four members may hold a hearing and act on the matter before the Board, provided that the interested parties assent thereto before the hearing opens. Any hearing may be adjourned for any reason by the Board, or by any member in case of the absence of a quorum, to a later date by a statement to that effect at the hearing, and the hearing as so adjourned from

time to time may be held without any further notice, unless the Board shall vote that such notice shall be given.

- B. The Board will hold public hearings on all applications submitted to it. A quorum shall consist of four members or their alternates. No member shall appear or represent any person in any matter pending before the Board. No member shall hear or decide an appeal in which he is directly or indirectly interested in a personal or financial sense.
- C. The hearings will proceed as follows:
 - (1) The Chairman will call the meeting to order and read the notice of hearing as it appeared in the paper.
 - (2) The applicant or his representative shall present the case to the Board.
 - (3) The abutters to the property present at the hearing may be heard and duly recorded.
 - (4) Any other interested parties present at the hearing may be heard.
 - (5) Town representatives may be heard (Planning Board, Selectmen, other boards, etc.).
 - (6) The Chairman shall inform those present at the hearing as to the time requirements, under MGL c. 40A, § 21,^[1] for appealing the decision of the Board.
[1] *Editor's Note: See MGL c. 40A, § 17, Judicial Review.*
- D. Hearings before the Board:
 - (1) All hearings of the Board shall be open to the public.
 - (2) The transcript of each hearing shall state the members of the Board present and other persons who speak at the hearing and shall contain a summary of the evidence given.
 - (3) The transcript shall be signed by the Secretary or Acting Secretary.
- E. Rules governing appeals and petitions.
 - (1) Forms for appeals and petitions. All appeals and petitions to the Board of Appeals shall be presented on forms to be supplied by the Board and obtained through the office of the Inspector of Buildings, the Selectmen's office or from the Secretary of the Board of Appeals.
 - (2) Filing. Appeals and petitions to the Board of Appeals shall be filed with the Secretary of the Board, together with the filing fee, and a copy shall be filed with the Town Clerk.
 - (3) Filing fee. The applicant shall pay a fee of \$50 to the Secretary of the Board of Appeals, the check to be made payable to the Town of Southborough.
 - (4) Limitation of time in certain appeals. Appeals from an order of the Inspector of Buildings or other administrative officers or boards or from a refusal by any board to issue a license or permit shall be filed within 30 days of such order or refusal.
 - (5) Notice of hearings. Notice of public hearing will be given in accordance with applicable sections of Chapter 10A of the General Laws of the Commonwealth of Massachusetts.
 - (6) Hearings. Hearings of the Board of Appeals shall be held at the Town Hall or at such other place within the Town as may be designated by the Board.
 - (7) Appearance. At a hearing before the Board, any party may appear in person or by agent or attorney. Every such agent or attorney shall file with the Secretary his full name, address and the name of the party he represents.
- F. Decision of Board.
 - (1) The record of the meetings of the Board shall show the vote of each member present upon each question, the names of those members absent or failing to vote and shall set forth clearly the reason or

reasons for its decisions and of its other official actions, copies of all of which shall be filed in the office of the Town Clerk of Southborough and shall be a public record.

- (2) Upon the granting of a limited or conditional zoning variance or special permit, the Board shall issue to the owner of the land involved a notice, certified by the Chairman or Acting Chairman, Clerk or Secretary, containing the name and address of the landowner, identifying the land affected and stating that a limited or conditional variance or special permit has been granted which is set forth in the decision of the Board on file in the office of the Town Clerk of Southborough. No such variance or permit shall take effect until such notice is recorded in the registry of deeds for the County of Worcester by the owner, who shall be responsible for such recording and for paying any fees in connection therewith.
- (3) If there is any conflict between these rules and regulations or the Zoning Bylaw of the Town of Southborough and the General Laws of the Commonwealth of Massachusetts pertaining to zoning, then the laws of the Commonwealth of Massachusetts shall govern in all such cases.

TAB D

PREFACE

The Town of Southborough has, over the years, passed through a process of legislative change common to many American communities. While only a few simple laws were necessary at the time of the establishment of the Town, subsequent growth of the community, together with the complexity of modern life, has created the need for new and more detailed legislation for the proper function and government of the Town. The recording of local law is an aspect of municipal history, and as the community develops and changes, review and revision of old laws and consideration of new laws, in the light of current trends, must keep pace. The orderly collection of these records is an important step in this ever-continuing process. Legislation must be more than mere chronological enactments reposing in the pages of old records. It must be available and logically arranged for convenient use and must be kept up-to-date. It was with thoughts such as these in mind that the Town ordered the following codification of the Town's legislation.

Contents of Code

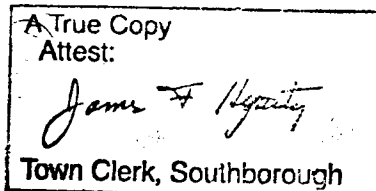
The various chapters of the Code contain all currently effective legislation of a general and permanent nature enacted by the Town Meeting, the Board of Selectmen and the Board of Health of the Town of Southborough, as well as certain rules, regulations and/or bylaws, adopted by various boards, commissions, departments and/or agencies, which were deemed to be general and permanent in nature and appropriate for inclusion in the volume.

Organization of the Publication

This publication is divided into four major parts, known as "Divisions." Division I contains the bylaws adopted by the Town Meeting. This Division is further broken down into Parts I and II. Part I, Administrative Legislation, contains all bylaws of an administrative nature, namely, those dealing with the administration of government, those establishing or regulating municipal departments and those affecting officers and employees of the municipal government and its departments. Part II, General Legislation, contains all bylaws of a regulatory nature. Bylaws in this part generally impose penalties for violation of their provisions, whereas those in Part I do not. Division 2 contains the regulations adopted by the Board of Selectmen. Division 3 contains the regulations promulgated by the Board of Health. Division 4 contains other miscellaneous regulations, such as those adopted by the Planning Board.

Table of Contents and Grouping of Legislation

The Table of Contents details the arrangement of material alphabetically by chapter as a means of identifying specific areas of legislation. Wherever two or more items of legislation have been combined by the editor into a single chapter, the use of article designations has preserved the identity of the individual enactments, and the titles of the articles are listed beneath the chapter title in order to facilitate location of the individual enactments.



SOUTHBOROUGH CODE

Reserved Chapters

Unassigned chapter numbers do not appear in the Table of Contents but are available for assignment to new enactments. In this manner, new subject matter can be included alphabetically.

Pagination

A unique page-numbering system has been used in which each chapter forms an autonomous unit. The first page of each chapter is the number of that chapter followed by a colon and the numeral "1." Thus, Chapter 6 would begin on page 6:1. By use of this system, it is possible to add or to change pages in any chapter, or add new chapters, without affecting the sequence of subsequent pages.

Numbering of Sections

A chapter-related section-numbering system is employed in which the section number indicates the number of the chapter and the location of the section within that chapter. Thus, the first section of Chapter 30 would be § 30-1, while the sixth section of Chapter 57 would be § 57-6.

Scheme

The scheme is the list of section titles that precedes the text of each chapter. These titles are carefully written so that, taken together, they may be considered as a summary of the content of the chapter. Taken separately, each describes the content of a particular section. For ease and precision of reference, the scheme titles are repeated as section headings in the text.

Histories

At the end of the Scheme (list of section titles) in each chapter is located the legislative history for that chapter. This History indicates the specific legislative source from which the chapter was derived, including the enactment number, if pertinent, and the date of adoption. In the case of chapters containing parts or articles derived from more than one item of legislation, the source of each part or article is indicated in the text, under its title. Amendments to individual sections or subsections are indicated by histories where appropriate in the text.

General References; Editor's Notes

In each chapter containing material related to other chapters in the Code, a table of General References is included to direct the reader's attention to such related chapters. Editor's Notes are used in the text to provide supplementary information and cross-references to related provisions in other chapters.

PREFACE

Appendix

Certain forms of local legislation are not of a nature suitable for inclusion in the main body of the Code but are of such significance that their application is community-wide or their provisions are germane to the conduct of municipal government. The Appendix of this publication is reserved for such legislation and for any other material that the community may wish to include.

Disposition List

The Disposition List is a chronological listing of legislation, indicating its inclusion in the publication or the reason for its exclusion. The Disposition List will be updated with each supplement to the Code to include the legislation reviewed with said supplement.

Index

The Index is a guide to information. Since it is likely that this publication will be used by persons without formal legal training, the Index has been formulated to enable such persons to locate a particular section quickly. Each section of each chapter has been indexed. The Index will be supplemented and revised from time to time as new legislation is added.

Instructions for Amending the Code

All changes to the Code, whether they are amendments, deletions or additions, should be adopted as amendments to the Code. In doing so, existing material that is not being substantively altered should not be renumbered.

Adding new sections. Where new sections are to be added to a chapter, they can be added at the end of the existing material (continuing the numbering sequence) or inserted between existing sections as decimal numbers (e.g., a new section between §§ 65-5 and 65-6 should be designated § 65-5.1).

Adding new chapters. New chapters should be added in the proper alphabetical sequence in the appropriate division or part (e.g., Part I, Administrative Legislation, or Part II, General Legislation), utilizing the reserved chapter numbers. New chapter titles should begin with the key word for the alphabetical listing (e.g., new legislation on abandoned vehicles should be titled "Vehicles, Abandoned" under "V" in the Table of Contents, and a new enactment on coin-operated amusement devices should be "Amusement Devices" or "Amusement Devices, Coin-Operated" under "A" in the Table of Contents). Where a reserved number is not available, an "A" chapter should be used (e.g., a new chapter to be included between Chapters 166 and 167 should be designated Chapter 166A).

Adding new articles. New articles may be inserted between existing articles in a chapter (e.g., adding a new district to the Zoning Regulations) by the use of "A" articles (e.g., a new article to be included between Articles XVI and XVII should be designated Article XVIA). The section numbers would be as indicated above (e.g., if the new Article XVIA contains six sections and existing Article XVI ends with § 166-30 and Article XVII begins with § 166-31, Article XVIA should contain §§ 166-30.1 through 166-30.6).

SOUTHBOROUGH CODE

Supplementation

Supplementation of the Code will follow the adoption of new legislation. New legislation or amendments to existing legislation will be included and repeals will be indicated as soon as possible after passage. Supplemental pages should be inserted as soon as they are received and old pages removed, in accordance with the Instruction Page which accompanies each supplement.

TAB E

Town of Southborough, MA
Monday, January 22, 2018

Chapter 174. Zoning

Article VI. Administration

§ 174-25. Board of Appeals.

- A. The Board of Selectmen shall appoint a Board of Appeals of five members, who shall serve five-year terms, such that the term of one member shall end each year. The Board of Selectmen shall also appoint two associate members of the Board of Appeals, who shall be designated by the Chairman of the Board of Appeals to act when a member is absent or unable to participate for any reason. The Board of Appeals shall adopt and file with the Town Clerk rules consistent with the requirements of the General Laws, Chapter 40A, and with this chapter. The Board of Appeals shall act on the following classes of matters, and no zoning or building permit shall be issued that is inconsistent with a decision of the Board of Appeals or on any matter within the jurisdiction of or before the Board of Appeals until it has filed its decision thereon:
- (1) Appeals. Any person aggrieved by any order, decision or failure to act, believed to be in violation of the State Zoning Act or this chapter, including the action of the Board of Selectmen relative to a zoning permit or a site plan, may appeal such action or failure to act to the Board of Appeals, as provided by MGL c. 40A, §§ 8, 14 and 15, and the Board of Appeals may reverse or affirm, wholly or in part, any such action or decision. The Board of Appeals shall to that end have all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.
 - (2) Special permits. Unless otherwise designated by this chapter, the Board of Appeals shall be the special permit granting authority and shall hear and decide requests for special permits as provided in §§ 174-8B, 174-9 and other sections of this chapter and in accordance with MGL c. 40A, §§ 9, 11, 14, et al. Uses accessory to activities necessary for permitted scientific research and development may be authorized by special permit, whether or not on the same parcel as the principal use, provided that the Board of Appeals finds that such accessory use meets the general requirements of § 174-9.
 - (3) Variances. The Board of Appeals shall have the power to grant, upon appeal or upon petition, variances from the terms of this chapter, not including use variances, where the Board finds that, due to circumstances relating to soil conditions, topography or shape of land or structures and especially affecting such land or structures but not affecting generally the zoning district in which they are located, literal enforcement of this chapter would involve substantial hardship to the appellant or petitioner and that the desired relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of this chapter. The Board of Appeals may impose conditions, limitations and safeguards not based on the continued ownership by the applicant, petitioner or any owner. If the rights authorized by a variance are not exercised within one year from the date of grant thereof, they shall lapse, and a new petition, notice and hearing will be required for their reestablishment.
[Amended 10-18-2016 STM by Art. 6]
 - (4) Comprehensive permits. The Board of Appeals may issue comprehensive permits for publicly subsidized housing, as provided in MGL c. 40B, § 21.
- B. Before acting on any appeal or application for a special or comprehensive permit or a variance, the Board of Appeals shall hold a public hearing, after publishing notices thereof twice in a newspaper of general circulation in Southborough and sending notices to abutters, all as provided in the General Laws, Chapter 40A. The Board of Appeals shall conform to time limits for its notices, public hearings, decisions and filing

thereof as required by said Chapter 40A. The Board shall establish within its rules and may from time to time change by vote and file with the Town Clerk reasonable application fees to cover the costs of notices and hearings.

**BOARD OF APPEALS—TOWN OF SOUTHBOROUGH
RULES AND REGULATIONS**

SECTION I—AUTHORITY AND EFFECTIVE DATE

A. The following “Rules and Regulations” are adopted by the Town of Southborough (the “Town”) Zoning Board of Appeals (the “Board”) under the authority of, and in compliance with, the General Laws of the Commonwealth of Massachusetts (the “General Laws”), Chapter 40A, Section 12 and Chapter 174, Article VI, Section 174-25 of the Town Zoning Code.

B. These Rules and Regulations shall be filed with the Town Clerk, and after such filing are effective as of February 21, 2017. These Rules and Regulations supersede any and all previous regulations of the Board.

C. These Rules and Regulations may be amended at any time by a vote of four of the five then sitting members of the Board. Any such amendments shall be filed with the Town Clerk in the same manner in which these Rules and Regulations were so filed and will be effective as of such filing date (or other later date as specified as part of such filing).

SECTION II—OFFICERS AND DUTIES

A. Chairman: A Chairman shall be elected annually no later than June 30 by majority vote of the Full Members of the Board and will serve for a twelve (12) month term from July 1 through the subsequent June 30. Should a new Chairman not be elected by June 30 of a particular year, the then-current Chairman shall continue to serve as Chairman until a successor is elected. The Chairman shall be responsible for the overall conduct of the Board’s activities, including but not limited to:

- calling meetings;
- presiding at meetings and regulating their conduct;
- appointing sub-committees, to the extent permissible pursuant to applicable law, as he/she deems necessary, to review Board administrative issues and make recommendations to the Board for consideration and approval; and
- authorizing purchase orders for expenditures by the Board.

The Chairman may, at his/her discretion, designate another Board member to fulfill certain of these duties.

B. Acting Chairman: If the Chairman is absent from a meeting or unable to fulfill his/her duties for a period of time, he/she may appoint an Acting Chairman to fulfill the Chairman’s duties for a particular meeting or for a specified period of time. If the Chairman has not appointed an Acting Chairman to serve during such absence, the senior member present, in point of service, shall be Acting Chairman during such absence.

SECTION III—MEETINGS, HEARINGS AND DECISIONS

The Board shall conduct its affairs, meetings and hearings and render its decisions according to the requirements of the Town Zoning By-Law (the “By-Law”), the Town Code (the “Town Code”) and the General Laws of the Commonwealth of Massachusetts (the “General Laws”), as applicable.

SECTION IV—PETITIONS AND APPEALS

A. Process for Petitions and Appeals

The Board’s process for considering and disposing of petitions and appeals shall be according to the requirements of the By-Law, the Town Code and the General Laws, as applicable. The Board may establish related administrative processes not inconsistent with the By-Law, the Town Code and the General Laws as it deems necessary, and such administrative processes may be modified from time to time by a vote of four of the five then-sitting members of the Board.

B. Forms and Instructions for Petitions and Appeals

All petitions and appeals to the Board shall be presented on forms to be supplied by the Board, according to the instructions provided with these forms. Such forms and instructions may be modified from time to time as the Board deems necessary, by a vote of four of the five then sitting members of the Board.

If there is any conflict between these Rules and Regulations and the By-Law, the Town Code and the General Laws pertaining to a zoning matter, then the order of precedence for resolution of such conflict shall be first, the General Laws, then second the Town Code (including the By-Law) and then third, these Rules and Regulations.

Town of Southborough
BOARD OF APPEALS

SOUTHBOROUGH, MASSACHUSETTS 01772

February 21, 2017

17 COMMON STREET
SOUTHBOROUGH, MASSACHUSETTS 01772-1662
508-485-0717 ext 1

By E-Mail

Mr. James F. Hegarty
Southborough Town Clerk
17 Common Street
Southborough, MA 01772

Re: ZBA Rules and Regulations

Dear Jim:

At our February 15, 2017 meeting, the ZBA unanimously voted (5-0) to adopt the attached amended Rules and Regulations for our Board. Please accept these Rules and Regulations for filing as of this date. These Rules and Regulations supersede the most recent set of ZBA Rules and Regulations, which were filed with the Town Clerk on January 26, 2007.

I also write to bring to your attention that Chapter 249 of the Town Code, titled "Zoning Board of Appeals," contains an outdated set of Rules and Regulations that were adopted by the Southborough ZBA on March 12, 1974. Chapter 249 is no longer effective, and should be stricken from the Town Code, both because it does not have the force of a bylaw, and because it has been superseded by the amended Rules and Regulations that we are filing today. You may wish to consult with Town Counsel concerning how this should be accomplished.

Please do not hesitate to call me if you have any questions concerning this matter.

Very truly yours,



Andrew R. Dennington
Chairman
Southborough Zoning Board of Appeals

cc: Aldo A. Cipriano, Esq. (by e-mail)

1472074.1 09569-001

TAB F

Town of Southborough

BOARD OF APPEALS

SOUTHBOROUGH, MASSACHUSETTS 01772

RECEIVED
TOWN CLERK'S OFFICE

2017 FEB 21 P 12:32

SOUTHBOROUGH, MA - FY

February 21, 2017

17 COMMON STREET
SOUTHBOROUGH, MASSACHUSETTS 01772-1662
508-485-0717 ext. 1

By E-Mail

Mr. James F. Hegarty
Southborough Town Clerk
17 Common Street
Southborough, MA 01772

Re: ZBA Rules and Regulations

Dear Jim:

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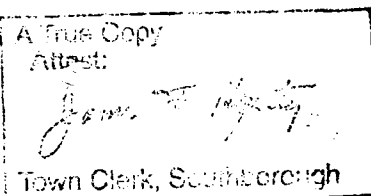
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Andrew R. Dennington
Chairman
Southborough Zoning Board of Appeals

cc: Aldo A. Cipriano, Esq. (by e-mail)

1472074.1 09569-001



2017 FEB 21 P 12:33

SOUTHBOROUGH, MA

Revised February 21, 2017 JFR

**BOARD OF APPEALS—TOWN OF SOUTHBOROUGH
RULES AND REGULATIONS**

SECTION I—AUTHORITY AND EFFECTIVE DATE

A. The following “Rules and Regulations” are adopted by the Town of Southborough (the “Town”) Zoning Board of Appeals (the “Board”) under the authority of, and in compliance with, the General Laws of the Commonwealth of Massachusetts (the “General Laws”), Chapter 40A, Section 12 and Chapter 174, Article VI, Section 174-25 of the Town Zoning Code.

B. These Rules and Regulations shall be filed with the Town Clerk, and after such filing are effective as of February 21, 2017. These Rules and Regulations supersede any and all previous regulations of the Board.

C. These Rules and Regulations may be amended at any time by a vote of four of the five then sitting members of the Board. Any such amendments shall be filed with the Town Clerk in the same manner in which these Rules and Regulations were so filed and will be effective as of such filing date (or other later date as specified as part of such filing).

SECTION II—OFFICERS AND DUTIES

A. Chairman: A Chairman shall be elected annually no later than June 30 by majority vote of the Full Members of the Board and will serve for a twelve (12) month term from July 1 through the subsequent June 30. Should a new Chairman not be elected by June 30 of a particular year, the then-current Chairman shall continue to serve as Chairman until a successor is elected. The Chairman shall be responsible for the overall conduct of the Board’s activities, including but not limited to:

- calling meetings;
- presiding at meetings and regulating their conduct;
- appointing sub-committees, to the extent permissible pursuant to applicable law, as he/she deems necessary, to review Board administrative issues and make recommendations to the Board for consideration and approval; and
- authorizing purchase orders for expenditures by the Board.

The Chairman may, at his/her discretion, designate another Board member to fulfill certain of these duties.

B. Acting Chairman: If the Chairman is absent from a meeting or unable to fulfill his/her duties for a period of time, he/she may appoint an Acting Chairman to fulfill the Chairman’s duties for a particular meeting or for a specified period of time. If the Chairman has not appointed an Acting Chairman to serve during such absence, the senior member present, in point of service, shall be Acting Chairman during such absence.

SECTION III—MEETINGS, HEARINGS AND DECISIONS

The Board shall conduct its affairs, meetings and hearings and render its decisions according to the requirements of the Town Zoning By-Law (the “By-Law”), the Town Code (the “Town Code”) and the General Laws of the Commonwealth of Massachusetts (the “General Laws”), as applicable.

SECTION IV—PETITIONS AND APPEALS

A. Process for Petitions and Appeals

The Board’s process for considering and disposing of petitions and appeals shall be according to the requirements of the By-Law, the Town Code and the General Laws, as applicable. The Board may establish related administrative processes not inconsistent with the By-Law, the Town Code and the General Laws as it deems necessary, and such administrative processes may be modified from time to time by a vote of four of the five then-sitting members of the Board.

B. Forms and Instructions for Petitions and Appeals

All petitions and appeals to the Board shall be presented on forms to be supplied by the Board, according to the instructions provided with these forms. Such forms and instructions may be modified from time to time as the Board deems necessary, by a vote of four of the five then sitting members of the Board.

If there is any conflict between these Rules and Regulations and the By-Law, the Town Code and the General Laws pertaining to a zoning matter, then the order of precedence for resolution of such conflict shall be first, the General Laws, then second the Town Code (including the By-Law) and then third, these Rules and Regulations.