

Dear Jared,

I'm writing to you as the Chair of the Planning & Development committee of the City Council.

I am a Newburyport citizen residing at 189-191 High Street. I am concerned about two issues concerning process integrity and transparency within City Hall. My concerns are associated with matters in front of the ZBA and the MA Land Court relating to an Application for Special Permit by 193 High Street.

Ultimately, my experience dealing with resources within City Hall – namely the Planning & Development department and the ZBA - range from what appears to be simple cronyism to mismanagement to possibly illegal activities to negate a decision by the ZBA.

My immediate concern is that the City plans to ask the MA Land Court to remand a Decision back to the ZBA based on weak and/or manufactured grievances by the Applicant/Plaintiff's attorney which are not sufficient to warrant a request from the City to remand the Decision.

This letter separates my concerns into (2) sections:

1. The City's intent to request a remand of the Decision back to the ZBA.
2. Mismanagement, factual inaccuracies, and possible criminal activity is coming out of the Planning & Development department.

1. The City's intent to request a remand of the Decision back to the ZBA.

The issues begin with an application for a Special Permit for Non-Conformities filed by Hebbelinck Realty, LLC at 193 High Street. The Applicant's attorney is Lisa Mead.

I am a direct-abutter. I am also the president of the *189-191 High Street Condominium Trust*, and in total, I represent (4) directly abutting households in the ZBA public hearings.

In the first iteration of the Application for a Special Permit, Hebbelinck Realty, LLC (Applicant) sought to create a 50+ paved parking lot at the rear of the property as well as construct an oversized garage. The ZBA bifurcated the Application in late March, and the Board denied the request to create a paved parking area for the funeral business (over an existing, unpermitted and unprotected parking area). A suit was filed by the Applicant in Land Court to appeal the Decision on the parking lot. **The Applicant submitted the appeal late, and the grievances within the complaint focus on improprieties with the ZBA process.**

Multiple abutters have learned that the Decision is at-risk as the City plans to request that the Land Court remand the Decision back to the ZBA.

Attorney Mead's Land Court complaint offers (5) counts as the Cause for Action. I am not an attorney; however, I have provided my perspective and commentary for each count for the causes for action. As you will see, none of the counts are substantive in terms of conveying any negligence or malfeasance by the City towards the Applicant. The procedural lapses the Applicant decries in the complaint – executed or merely discussed - were for the benefit of the Applicant.

Cause of Action - Count I

Paragraph #48 - *"General Laws c. 231A, § 1, authorizes "binding declarations of right, duty, status and other legal relations sought thereby ... in any case in which an actual controversy has arisen." An actual controversy exists between the plaintiff and the Board because the Board, without authority, 1) unilaterally bifurcated the Application for the Project and 2) issued the Decision while the public hearing was still open."*

Ms. Mead is mistaken in her claim. My recollection and that of other attendees is that the Applicant's attorney gladly accepted the bifurcation of the Application. Such an approach was likely the only way for Ms. Mead to keep the application 'alive' for her client. Ms. Mead seemed visibly shaken and flustered by the Board's discovery of the illegal use of a gravel lot for the funeral business (which the Aois documented in the Application). If voted on as a single decision, the entirety of the Application would likely have been denied.

There are attendees, including multiple City councilors, at that ZBA meeting that witnessed Ms. Mead's acceptance of Mr. Ramsdell's proposal to bifurcate the Application. Certainly the Board must dispute this claim. The meeting minutes relate no protestations from the Applicant's attorney during the process of bifurcation.

The claim is also stated earlier in the Land Court complaint:

Paragraph #32 - *"The Board voted to bifurcate the Application. The relate assent [sic] of the Applicant was neither sought nor given."*

Rather than capitulate and annul the Decision, the City must aggressively dispute Ms. Mead's claim here as mistaken and factually incorrect. If Ms. Mead believes the Board did not possess the power to bifurcate the Application, then her reticence and inaction regarding the bifurcation is the source of harm to her client.

Ms. Mead's Land Court complaint also states:

Paragraph #31 - *"Chair Edward Ramsdell expressed his discomfort with separating the Application and voting solely on the garage."*

Based on my recollection, and the recollection of others, Ms. Mead's claims are mistaken. While Mr. Ciampetti made the motion to bifurcate the Application, Mr. Ramsdell was the first on the Board to present the procedural option. Mr. Ramsdell was pleased to pursue bifurcation and never argued against it. Mr. Ramsdell, like the other Board members, was uncomfortable voting on the garage because there was no real attention paid to it in the arguments by the Applicant or the abutters as the paved parking lot was a significant point of consternation across all attendees. The minutes of the meeting captured this incorrectly.

Mr. Ramsdell is the Chair of the Board, with significant tenure on the Board, and would not likely be dissuaded by the other Board members if he opposed the motion. Many abutters seemed angry with Mr. Ramsdell as he worked to salvage some form of a positive outcome on behalf of the Applicant and Ms. Mead when he offered bifurcation.

In Paragraph #37, Ms. Mead writes, *"The Board never voted to issue two separate decisions for the one Application before it."*

The bifurcation of the Application into (2) discrete applications made the intent to issue (2) decisions implicit. Ms. Mead suggests that the correct process after bifurcation is to 'bundle' separate decisions into a single decision once both decisions are final. This suggestion is not only illogical; it is unfair to whichever side a decision favors because it effectively lengthens the time for an appeal. Ms. Mead's recommended process, which lacks a reference to the NZO or MA General Law to support the assertion, extends her client's time to appeal from 20 days to over 100 days. That's because the second Application is still open for public hearings and the next ZBA meeting is on July 9th – with no guarantee there will not be additional continuances. July 9th is 106 days from the Board's Decision to deny the Applicant's request for a Special Permit to create a commercial parking lot.

Bottomline: *Ms. Mead agreed to the bifurcation of her client's Application. The claim is false and should not move the City to remand the Decision back to the ZBA.*

Moreover, Ms. Mead's claim does not cite the provenance of her argument that procedural lapses occurred or that the ZBA is not empowered to do such. The lack of any referenceable ordinance, law, or City documentation about the ZBA bifurcation should not cause the City to pursue a remand.

There appears to be sufficient case law showing that a lack of adherence to civil procedures is not enough to extend the period for appeal.

NB. At a Planning & Development committee meeting, Ms. Mead proactively suggested a bifurcated approach to a decision relating to 102-104 High Street LLC.

https://www.cityofnewburyport.com/sites/newburyportma/files/minutes/pb_04-04-18_1.pdf

Cause of Action - Count II

Paragraph #54 - *"The Board's denial of the special permit upon vocal opposition by the City Council member, notwithstanding his status as an abutter, constitutes bias, partiality, and/ or prejudgment in violation of Article 29 of the Declaration of Rights and deprived the Plaintiff of due process."*

In my opinion, the councilor's conversations, as an abutter, does not represent an appeal to any adjudicatory powers in the matters in front of the ZBA.

Ironically, we abutters can point to conferences with the Chair of the ZBA outside of a public hearing.

Bottomline: *The official(s) do not possess quasi-adjudicatory powers in ZBA business. This argument is a distraction as the initial letters of support from City officials were logical fallacies presented to support the Application. The letters offered were 'Appeals to False Authority' as the City officials are not experts on traffic analysis patterns or what qualities of a paved lot make a property 'safer.' Seemingly every property within the City would be made safer if the City outlawed backyard lawns in favor of paved lots for improved access by emergency vehicles.*

Cause of Action - Count III

Paragraph #56 – *“The Chair of the Board, Mr. Ramsdell, acknowledged that the Decision issued in error and that the Decision would be withdrawn.”*

Paragraph #57 – *“The Plaintiff, in reliance, did not appeal the April 2nd, 2019 Decision, believing that said Decision was a nullity.”*

Paragraph #58 – *“It is unjust and unreasonable for the Board to recognize and enforce a Decision that 1) never should have issued, and 2) was to be withdrawn. WHEREFORE this Honorable Court is requested to annul the Board's Decision on the basis that the Board is estopped from recognizing and enforcing a decision that issued in error, **where the Plaintiff relied on the Chair of the Board's representation that the Decision would be withdrawn.**”*

Also earlier in the complaint, Paragraph #41 it is stated: *“Mr. Ramsdell confirmed that counsel was correct, that the Decision had improperly issued, and that he would ensure that the Decision was withdrawn.”*

Mr. Ramsdell’s ad hoc opinion that the Board’s vote was ‘improper’ does not mean the vote or Decision is improper. Mr. Ramsdell has no right or power to have the Decision withdrawn outside of a public hearing. Ms. Mead, as a former mayor and as the area’s pre-eminent land use attorney with considerable business in front of the City, likely understands that Mr. Ramsdell has no such power to withdraw the Decision without a public hearing. These appear to be crocodile tears.

Ms. Mead’s complaint is late because she relied on Mr. Ramsdell in an ad hoc conversation, outside of a public hearing, and accepted his inappropriate assurances to withdraw the Decision. The injury to the Applicant is a belated appeal.

Bottom line: *The Applicant's dissatisfaction with Mr. Ramsdell’s inability to circumvent City processes and the laws of the Commonwealth are not the predicate which compels the City to remand the Decision back to the ZBA. The abutters and the citizens of Newburyport are the injured parties to these backchannel communications and conferences.*

Cause of Action - Count IV

Paragraph #60. *“The Decision incorrectly identifies the Application as a petition for a Dimensional Variance, incorrectly cites G. L. c. 40A, § 10, relative to variances as the Board's authority for denying the Application, and incorrectly identifies the zoning district in which the property is located as the R2 district, when in fact the property is located in the HSR-B district. WHEREFORE, this Honorable Court is asked to annul the Board's Decision denying the Plaintiff a special permit to construct a formal paved parking lot on its property as the Decision is ambiguous and erroneous.”*

Bottom line:

A scrivener’s error seems insufficient grounds for the Land Court to annul the Decision or for the City to seek a remand. Please note, the scrivener’s error cited in the Applicant's complaint about identifying the

zoning district as 'R2' instead of 'HSR-B' was also made by Ms. Mead throughout numerous iterations of the Application for a Special Permit to the City.

NB. Ms. Mead identified a scrivener's error in a previously granted Special Permit relating to a mixed-use property at 114-118 Merrimac Street. There was no argument by Ms. Mead, or her opposition, to annul the Special Permit because of the error.

https://www.cityofnewburyport.com/sites/newburyportma/files/minutes/minutes-file/zba_minutes_02-23-16.pdf

Cause of Action – Count V

Paragraph #62 – *“The Board's denial of a special permit as to the parking lot provides as the sole basis therefor abutters' concerns regarding vehicular lights and the impact on abutting properties, despite the fact that the abutters produced no evidence reflecting the proposed conditions that they would be harmed by light pollution and failed to rebut Mr. Sawyer's evidence that the proposed 6-foot high solid panel fence would block vehicle headlights from shining onto abutting properties.”*

Paragraph #63 – *“The Decision provides that "evidence was presented" that the proposed parking lot was not in conformity with the neighborhood and that the change would be substantially more detrimental to the neighborhood, without any explanation whatsoever in the Decision as to what evidence the Board considered in making its finding.”*

Paragraph #64 – *“The Board's denial of a special permit for the construction of a formal paved parking lot and its ground(s) therefor are unreasonable, arbitrary and capricious, erroneous, unsupported by substantial evidence, and beyond its authority. WHEREFORE, this Honorable Court is asked to annul the Board's Decision denying the Plaintiff a special permit to construct a formal paved parking lot on its property and order that the Board approve the parking lot as proposed.”*

Bottom line: *These arguments do not present the entirety of the Board's Decision. The Board stated confidently (unanimously) in the public hearing that it found that a large paved commercial lot was injurious to the intent and guidance of the HSR-B district. The Board also cited, in the ZBA meetings and meeting minutes, that the existence of the **unpermitted** gravel lot used for parking for attendees of funeral services also did not allow them to support the paved commercial parking lot. Once the ZBA made this Decision, I requested zoning enforcement for the use of the lot for parking for the funeral business. The City found that the use is illegal.*

Closing - The Applicant's (5) causes for action lack the substance to cause the City to fear an adverse decision. There are no counts which compel the City to request that the Decision be remanded back to the ZBA.

My perception is that the City's stated goal to remand the Decision back to the ZBA is not a preventative action to avoid having the Land Court choose the same outcome. **I believe the Land Court, if allowed, would deny the appeal based on its late filing.**

I sent an email to my councilor Heather Shand and (2) At-Large councilors (Vogel and Khan) where I voice these concerns about the process and a potential remand of the Decision. Ms. Shand was

responsive (as she always is). Neither Vogel or Khan responded to my email. However, Councilor Vogel did send my email to the Mayor. The Mayor responded directly to me with:

"In regards to the High St. situation, I have played NO role in any decisions that have been. My understanding is they were procedural errors, problems with timelines and notice as well as errors inadvertently included in the ZBA decision. The City DID NOT reverse any decision. The attorney for the funeral home filed in land court and will state whatever arguments he/she believes are the strongest for their client. We have seen the land court remand cases back to the appropriate Board when there are these types of errors. Our city solicitor believed the land court would do so and moved forward to essentially get the procedure(s) correct by a remand to the ZBA."

I hope that KP Law can provide to you examples of such procedural errors resulting in a remand. I don't believe they have done so.

When I requested to see the copy of the KP Law opinion shared with the ZBA, Jennifer Blanchet told me that the KP Law opinion would not be shared with the public. I believe that the public has a right to access legal opinions issued to persons within municipal government and that these opinions would be filed with the Planning & Development department and/or the City Clerk's office.

The City may wish to protect against legal action from the Applicant relating to procedural lapses. That is an understandable concern but the City should not annul the Decision thinking that the annulment will obviate the threat of litigation. We abutters can prove real harm, which is documented in the Land Court claim. We can point to inappropriate communication, concerted efforts by City employees to misinform us about the Decision, and, the removal of the Decision from the office of the City Clerk (see Section 2 of this letter).

Requested action(s) to the Planning & Development committee - The City must abandon any pursuit to have the Decision remanded to the ZBA and request a motion to dismiss the Applicant's appeal based on the lateness of the submission.

2. Mismanagement, factual inaccuracies and possible criminal activity coming out of the Planning & Development department

I have visited the Planning and Development Department no fewer than (6) times since the first ZBA meeting for this Application (December 2018). I engaged the department to check on any additions to the master folder relating to the Application and to discuss a zoning enforcement request pertaining to the Applicant's illegal use of their backyard for parking for the business (the City decided in favor of my request for enforcement). The only way to describe my experience with the Planning & Development department is 'disenfranchising'.

Issue 1 - Paragraph #44 of the Land Court Complaint, Ms. Mead states *"On May 1st, 2019, counsel received an electronic mail message from Ms. Boisvert in which she acknowledged that she tried to pull the Decision, but was informed that she could not do so as it had already been stamped as received by the Clerk's Office."*

On April 25th, 2019, I visited the City Clerk to get a copy of the first Decision of the bifurcated Application. There was no Decision on file in the City Clerk's office. I was told if a Decision is not in the

Clerk's office, a Decision was likely never written or filed. I was advised by the City Clerk's office to visit the Planning department. When I asked for a copy of the ZBA decision in the Planning Department, I was told by Jen Blanchet and Diane Boisvert that the letter of Decision I received in the mail - received on April 2nd, 2019 - was sent to abutters in error. Ms. Blanchet and Ms. Boisvert told me that the Board never intended to issue (2) Decisions (one for each Application after the bifurcation). Later that day, disappointed and shocked, I sent an email to Ms. Boisvert (text in red are the actual emails):

From: cmsmailer@civicplus.com [mailto:cmsmailer@civicplus.com]

Sent: April 25, 2019 12:25 PM

To: Dianne Boisvert

Subject: [Newburyport MA] Notes from the ZBA meeting held on 3/26/2019 (Sent by Eric Goodness, ERIC.GOODNESS@Gmail.com)

Hi Diane,

Thanks for your time today.

The revelation that the ZBA has not filed a decision even after:

1. Splitting the Application for a special permit from 193 High Street
2. Voting on one of the split applications and then voting to continue the other newly split Application; and,
3. Receiving a letter from the City telling (some of) the abutters that the first Application was denied.

I'd have (2) requests:

1. I'd like to get a copy of the notes from the ZBA meeting held on 3/26/2019 relating to 193 High Street. This is for our review and for our attorney. If I need to come in to get copies I am happy to do so. Let me the process to get this information.
2. I'd like a copy of the document that provides the authority for, and governs, how the Board is able to split an application for a special permit and defer filing a decision after a Board vote and an announcement to abutters. If this source document is available online, please provide the special sections where I can find the relevant information.

Kind regards,
EFG

Eric F. Goodness
189 High Street
Newburyport, MA 01950
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Ms. Boisvert responded:

Dianne Boisvert <DBoisvert@cityofnewburyport.com>

Apr 25, 2019, 3:06 PM
to ERIC.GOODNESS@Gmail.com

Hi Eric,

As I mentioned to you earlier, I mailed out the "notification of decision" prematurely to abutters as a matter of routine right after the meeting. The form letter indicated that a written decision was on file with the Clerk's office, which was misleading as the Board has not yet issued it yet. A written decision has not been filed, just the "notification of decision". It was to let the abutters know that that portion of the hearing would no longer be discussed at the continued public hearings. I apologize for the confusion this has caused. It's the Board's intention to issue one decision that encompasses both requests once the public hearing is closed.

I don't believe a document exists that provides the Board with authority to bifurcate an application, though I'm not sure a specific document is legally necessary or if it's just an ability of law.

Attached are the minutes from the hearing on 3/26. I will be out of the office until Monday morning if you have any questions.

Dianne Boisvert
Office Coordinator
Office of Planning and Development
60 Pleasant Street
Newburyport, MA 01950
978-465-4400

Based on the Land Court claim, it seems that Ms. Boisvert was not truthful to me in-person or in-writing. No citizen can expect to conduct proper due diligence to protect their interests if City resources are not trustworthy. The Applicant's Land Court complaint states that Ms. Boisvert attempted to pull the Decision but that she was unsuccessful. However, **someone was successful** because the physical copy of the certified Decision was missing from both the City Clerk's office and the Planning & Development department on April 25th. In the Mayor's response to me that I cited earlier, the following statement is made about the missing Decision:

"In regards to the original decision and scrivener's error, the employee was trying to correct the mistake but there are errors and concern regarding the employee's judgment and actions and the city is conducting a personnel investigation."

The attempted removal of a ZBA Decision is more than a personnel issue. Additionally, the successful removal of the Decision, by whomever, is likely a criminal act for which there has been no satisfactory explanation or communication to the abutters. There hasn't been an explanation about the false narrative from the Planning & Development department employees about the Decision, and, we've had no explanation of how the Decision was removed and who removed it. I reached out to Andy Port with an email seeking answers for our unanswered questions, and he has not responded to my inquiry.

After reading Paragraph #44 that relates Ms. Boisvert's attempt to pull the Decision, and because of the actual disappearance of the Decision from City Hall files, I believe that the abutters deserve to know:

- Who directed Ms. Boisvert to pull the Decision from the Clerk's office?
- Who did pull the Decision from the Clerk's office?
- Why was a story fabricated that the Decision letter sent to abutters was sent in error, and that the ZBA never intended to issue (2) Decisions for the bifurcated SP application?
- Who directed the story be told to abutters?

I hope your committee can investigate and find the answers to these questions.

Issue 2 - The Planning & Development department no longer feels like a trusted entity to steward the remaining Application through the ZBA process.

Paragraph #41 – “Mr. Ramsdell informed counsel that he had been confused and that he should not have issued the Decision. Counsel pointed out that the Decision could not issue as the public hearing was still open and no vote had occurred to issue two separate decisions, and, further, that the Decision was wrong in regard to its references to a variance. Mr. Ramsdell confirmed that counsel was correct, that the Decision had improperly issued, and that he would ensure that the Decision was withdrawn.”

I sent an email to Andy Port about Mr. Ramsdell's communications with Ms. Mead. Similarly, he never responded to those questions.

There have been other impediments dealing with the Planning & Development department. When another abutter and I went into the department to check on a request for zoning enforcement, Ms. Blanchet admonished us for 'wasting City resources' by pursuing zoning enforcement. Unless I'm mistaken, zoning enforcement requests is her *raison d'être* within the department. For the other abutter and me, such a comment created a hostile and biased environment. *If* Paragraph #41 is true, then there should be serious discussions within City Hall regarding the appropriateness of any communications with quasi-adjudicatory personnel with *any interested parties* outside of public hearings. Similarly, serious consideration of the actions of staff within the Planning & Development department with continued access to files for this Application.

A final word - I did not want to write this letter. However, circumstances have forced us to reach out to you and our representatives. I hope you agree that disturbing events have occurred within the Planning & Development department and the ZBA. I hope you and your committee can convey my concerns, and the interests of other abutters, to the Department and the broader City Council to seek answers and remedy the situation. **I also hope that you recognize that the Decision should not be remanded back to the ZBA.**

Thanks for your attention to these matters. I have also reached out to the other Planning & Development committee members.

Kind regards,
 Eric Goodness
 189 High Street
 +1 (978) 289-0829
 cc:
 Heather Shand
 Larry Giunta