

**COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
DEPARTMENT OF TRIAL COURT**

WORCESTER, ss.

C.A. NO.

LAURA SCOTT,

**Plaintiff,
v.**

**THE TOWN OF SOUTHBOROUGH, THE
SOUTHBOROUGH ZONING BOARD OF
APPEALS, and DAVID WILLIAMS,
DEBORAH DEMURIA, PAUL DREPANOS,
MICHAEL ROBBINS, DORIS CAHILL, as
they are MEMBERS OF THE BOARD,**

and

JINYUN HIAN and DESHING JIANG,

Defendants.

COMPLAINT

NATURE OF THE ACTION

1. This is an appeal, pursuant to G.L. 40A, § 17, of the decision of the Town of Southborough Zoning Board of Appeals (“the Board”) relative to a building permit issued for the construction of a commercial grade building at 35 Presidential Drive in Southborough, MA (“the Site”), owned by defendants Hian and Deshing Jiang (“the Private Defendants”).
2. The Plaintiff, Laura Scott, resides at 37 Presidential Drive, directly abutting the Site.
3. The Board’s decision, filed with the Southborough Town Clerk on August 3, 2021, unanimously denied Ms. Scott’s appeal of the building permit and requested that the Board revoke the building permit (the “Decision”). The Decision is attached hereto as Exhibit A.

4. The Plaintiff asserts that the Board's Decision was error, in excess of its legal authority, an abuse of discretion, arbitrary and capricious, and that the Board acted with gross negligence and in bad faith.

PARTIES

5. The Plaintiff, Laura Scott ("Plaintiff"), is the owner of property located at 37 Presidential Drive Southborough, Massachusetts (the "Plaintiff's Property").

6. The Town of Southborough is a municipality organized under the laws of the Commonwealth of Massachusetts with its principal office located at 17 Common Street, Southborough, Massachusetts 01772 ("the Town").

7. The Zoning Board of Appeals of the Town of Southborough ("The Board") is a duly constituted agency of the Town of Southborough, with its principal office located at 9 Cordaville Road, Southborough, Massachusetts 01772.

8. David Williams is a member of the Board and resides at 25 Meadow Lane Southborough, Massachusetts 01772.

9. Deborah DeMuria is a member of the Board and on information and belief resides at 58 Flagg Rd., Southborough, Massachusetts 01772.

10. Paul Drepanos is a member of the Board and resides at 29 East Main St., Southborough, Massachusetts 01772.

11. Michael Robbins is a member of the Board and resides at 47 Dearfoot Road Southborough, Massachusetts 01772.

12. Doris Cahill is a member of the Board and resides 29 Overlook Drive, Southborough, Massachusetts 01772.

13. Defendants Hian and Deshing Jiang (“the Private Defendants”) own the property located at 35 Presidential Drive Southborough Massachusetts, 01772.

STATEMENT OF THE FACTS

14. The Plaintiff owns 37 Presidential Drive, where she has resided with her family since approximately 1997.

15. The Private Defendants’ own the abutting 35 Presidential Drive but do not reside there.

16. 37 and 35 Presidential Drive share a common driveway.

17. Presidential Drive is located in a Residence A District under the Southborough Zoning By Law (“ZBL”).

18. The Private Defendants purchased 35 Presidential in or about May of 2020.

19. On information and belief, the Private Defendants have minor children who attend the Fay School, a private school in Southborough.

20. The residence on 35 was originally constructed as a four bedroom residence.

21. In or around 2009, the prior owners of 35 Presidential Drive finished the basement of the residence, adding a fifth bedroom, a full kitchen, a walk-in wine-cellar, a full bathroom, and a game/entertainment room.

22. No modifications were made to the septic system when the fifth bedroom was added.

23. On or about April 2, 2021, the Southborough Building Commissioner, Laurie A. Livoli (“Building Commissioner”), issued building permit BP-21-92 which purported to allow the Private Defendants to construct a “Sports Barn” as an “addition” to the single-family residence.

24. As currently proposed, the Sports Barn will house a basketball court, a locker room, a *guest* locker room, a “lounge,” bathroom facilities, mechanical facilities, storage space, and pool equipment facilities.

25. The Sports Barn is 35 feet high.
26. The current proposal includes seven new parking spaces.
27. The Sports Barn has steel framing.
28. The Sports Barn was originally proposed as a stand-alone “accessory” building.
29. The ZBL sets the maximum height for accessory buildings at 17 feet.
30. The plans were revised in or around March of 2021 to include a connection between the Sports Barn and the existing three-vehicle garage.
31. Specifically, an entry door in the third garage bay was added.
32. This plan revision was designed to circumvent the restrictions applicable to accessory buildings.
33. Both 35 and 37 Presidential are comprised of rectangular lots that are long and narrow.
34. In order to preserve privacy, the original developer of Presidential Drive off-set the locations of the abutting homes.
35. Due to the off-set referenced in the preceding paragraph, the residence at 35 Presidential is sited closer to the front of its lot than the Plaintiff’s residence.
36. Relative to the frontage of both lots on Presidential Drive, the Sports Barn is being erected on the same area of the lot on 35 Presidential as the location of the residence on 37 Presidential.
37. Due to the topography, the lot at 37 Presidential is approximately 10 feet below the grade of the lot at 35 Presidential.
38. As a result, the Sports Barn is approximately 45 feet above the grade of the lot at 37 Presidential.

39. During the winter of 2021, Mr. Jiang's contractor clear cut the rear of the lot at 37 Presidential.
40. Mr. Jiang's contractor stated to the Plaintiff that he knew the Southborough Building Commissioner.
41. In early April, the Building Commissioner issued the building permit for the Sports Barn.
42. The permit was issued without any review of the plans by any Town Board.
43. Construction began immediately after the permit was issued.
44. Even prior to the issuance of the building permit, heavy equipment was brought on site and substantial earth removal activities took place.
45. Earth removal activities included weeks of rock removal and jack hammering/rock crushing.
46. During the weeks of jackhammering/rock crushing, the Building Commissioner was completely indifferent to the disturbance and the property damage that those activities were causing abutters.
47. When abutters contacted the Building Commissioner to report that the activities at 35 Presidential were causing their homes to shake resulting in visible cracks forming, she advised them to contact their insurance companies and did nothing to ensure the construction activities were not harming abutting homes.
48. When abutters contacted the Southborough Town Administrator about the disturbance, he told them to call the police and file a noise complaint.
49. After the building permit was issued, construction began immediately.
50. Within days after the building permit was issued, the Plaintiff contacted the Building Department and requested documents necessary to file an appeal of the building permit.

51. Rather than simply providing her with the relevant documents, Building Department staff directed the Plaintiff to file a public records requests and wait for responsive documents.
52. The Plaintiff filed a public records request, requesting of “all documents (ALL Permits including Building Permit/Plans/Correspondence providing guidance and approvals) related to the current Construction Project at 35 Presidential Drive (1/1/2020 to year to date).”
53. The ZBA and Building Commissioner failed to provide the Plaintiff with all responsive documents, including emails between the Building Commissioner and the Private Defendant’s agents, in violation of the Public Records Law.
54. The Plaintiff filed her appeal with the ZBA on or about April 30, 2021.
55. Despite the fact that the building permit had been appealed, the Private Defendants continued construction of the Sports Barn.
56. Construction after an appeal of a building permit has been filed takes place at the permit holder’s own risk that the permit will ultimately be found to have been improperly issued.
57. The view from the master bedroom of the Plaintiff’s home is now dominated by the Sports Barn.
58. The ZBA failed to hold a hearing on the Plaintiff’s appeal until July 21, 2021.
59. Prior to the ZBA hearing, the Plaintiff’s counsel submitted to the ZBA a memorandum of law asserting that the permits was improperly issued because the Sports Barn violated provisions of the Southborough Zoning By Law.
60. The Private Defendants did not submit any written legal argument for the ZBA’s review.
61. Despite the long delay between the filing of the appeal on April 30 and the hearing on July 21, the ZBA did not consult with Town Counsel prior to the hearing about the violations the Plaintiff’s counsel had raised.

62. The ZBA received no written legal guidance from Town Counsel prior to the hearing.
63. Town Counsel was not present at the hearing.
64. By the time of the ZBA hearing, the exterior of the Sports Barn was substantially complete, with the foundation, steel frame, wood panels, roof risers, and a majority of the roof installed.
65. At the hearing, Board member discussed the Private Defendants' expenditure on the Sports Barn as a basis for rejecting the Plaintiff's appeal.
66. No Board member acknowledged that the Private Defendants had proceeded at their own risk on a building permit that had been appealed.
67. No Board member acknowledged that hearing took place nearly three months after the Plaintiff has filed her appeal.
68. At the hearing, counsel for the Defendant's asserted that Sports Barns are "customary" accessory uses even though:
- a. They presented no evidence that there are commercial grade sport facilities in any residentially zoned district in Southborough that are 35 feet tall;
 - b. They presented no evidence that that there are sport facilities in any residentially zoned district of Southborough that have as much square footage as the proposed Sports Barn;
 - c. They presented no evidence that there are any sport facilities in a residentially zoned district in Southborough that had home and guest locker facilities; and
 - d. They presented no evidence that there are any sport facilities in a residentially zoned district in Southborough that have seven parking spaces.

69. Counsel for the Private Defendants cited the residence at 13 Presidential Drive as a “comparable” accessory use, but that residence is a single structure that, at one time, had only a basketball hoop in a large preexisting family room.

70. That large preexisting area where a basketball hoop once hung is approximately 1,500 square feet and is adjacent to the kitchen at 13 Presidential Drive.

71. The home at 13 Presidential Drive is 10,500 square feet, so the 1,500 square foot area is approximately 10% of the square feet of the residence.

72. In this case, the residence at 35 Presidential Drive is two stories and approximately 4,500 square feet, and the proposed single story Sports Barn will “add” approximately 3,500 square feet.

73. The Private Defendants’ original plans depicted the Sports Barn as an accessory building with two exterior entryways.

74. When the plans were revised to connect the Sports Barn to the residence so that it could be classified as an “addition” to the residence, the entry door that was added into the garage became the third means of entry/egress into the Sports Barn.

75. During the ZBA hearing, when the seven additional parking spaces were discussed, counsel for the Private Defendants stated that they should never should have depicted the additional parking spaces in the plans, or words substantially to that effect.

76. During their deliberations, ZBA members recognized that the Sports Barn is “out of scale” with the house.

77. During their deliberations, ZBA members recognized that the Sports Barn would set a bad precedent in Southborough.

78. During their deliberations, a member of the ZBA stated that it was not the Board's role to "second guess" the building inspector.

79. No member of the Board corrected the statement that it was not the Board's role to second guess the building inspector.

80. Board members were apparently unaware that it is their responsibility to review whether the building inspector's issuance of a building permit was proper.

81. During their deliberations, a member of the ZBA stated that denying the Plaintiff's appeal would allow Mr. Jiang to "run a mac truck through the zoning by law."

82. The ZBA voted unanimously to deny the Plaintiff's appeal.

83. The Plaintiff is aggrieved by the Decision.

COUNT I
G.L. c. 40A, § 17 APPEAL OF THE BOARD'S DECISION

84. The Plaintiff realleges the facts contained in the preceding paragraphs, and incorporates same by reference herein.

85. The Board's decision does not comply with the ZBL.

86. Pursuant to ZBL § 174-2.B, an ACCESSORY BUILDING OR USE is defined as a "building, structure or use customarily incidental and subordinate to the principal permitted use of the building or land, located on the same lot as the principal permitted building or use, and not prohibited by this chapter."

87. Pursuant to ZBL § 174-2.B, a DWELLING UNIT Living quarters for a single family."

88. Pursuant to ZBL § 174-8.C(2), "Not more than one principal permitted use shall be located on any lot, provided that a multiple occupancy building used for the same category of use . . . shall be deemed to be in a single permitted use."

89. The ZBA may, by special permit, allow several different uses if those uses are otherwise permitted in the district, or several buildings on the same lot if such uses or buildings are deemed to be compatible, meet the requirements of § 174-9 and result in improved circulation and land use patterns.

90. Pursuant to ZBL § 174-8.2, “Construction of private garage or private parking for not more than three vehicles, that is accessory to a permitted principal use and on the same lot as such use” is allowed.

91. “Private garage or parking for more than three vehicles” requires a special permit from this Board pursuant to ZBL § 174-9.

92. “Any nonresidential development that results in an increase in on-site parking” requires site plan approval under ZBL § 174-10.

93. The Board’s decision fails to address the legal issues the Plaintiff raised in her memorandum of law submitted prior to the Board’s hearing.

94. The Board was negligent in that it failed to seek legal guidance from Town Counsel before voting to reject the Plaintiff’s appeal.

95. The Building Commissioner was negligent in that she failed to seek legal guidance from Town Counsel before issuing the building permit.

96. The Board’s decision was error, in excess of the Board’s legal authority, an abuse of discretion, and arbitrary and capricious.

97. The Board and the Building Commissioner acted with gross negligence and in bad faith.

WHEREFORE, the Plaintiff requests that the Court annul the Board’s decision, order revocation of the Building Permit, and order the Private Defendants to remove the Sports Barn from the property.

RELIEF REQUESTED

For the above reasons, the Plaintiff respectfully requests that this Honorable Court grant him the following relief:

- a. Annul the decision of the Board;
- b. Determine that the issuance of the building was improper and order that the building permit be revoked;
- c. Find that the Board's decision was in error, in excess of the Board's legal authority, an abuse of discretion, and arbitrary and capricious.
- d. Find that Town officials and Board members acted with gross negligence and in bad faith.
- e. Issue an order requiring removal of the Sports Barn.
- f. Enter an award of attorney's fees and costs to the Plaintiff pursuant to G.L. c. 40A, § 17; and
- g. Enter such other relief as is just and appropriate.

PLAINTIFF,

Laura Scott,
By her attorneys,
Ginny S. Kremer

DATE: August 16, 2021

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Christopher J. Alphen, BBO #691813
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Town of Southborough
BOARD OF APPEALS
SOUTHBOROUGH, MASSACHUSETTS 01772

9 CORDAVILLE ROAD
SOUTHBOROUGH, MASSACHUSETTS 01772-1662
508-485-0717 ext. 1

James F. Hegarty
Town Clerk
Town House
17 Common Street
Southborough, Massachusetts 01772

August 3, 2021

Notice of Decision of an Appeal

Property Address: 35 Presidential Drive; Recorded Worcester Registry of Deeds Book 62447, Page 253

Appellants: Laura Scott, 37 Presidential Drive, Southborough, MA

Application Filed: April 30, 2021

Public Hearing: July 21, 2021 at 7:00 P.M.
Virtual meeting through Zoom

Sitting as a Board: David Williams, Chair
Deborah DeMuria
Paul Drepanos
Michael Robbins
Doris Cahill

For the Appellants: Laura Scott, Applicant
35 Presidential Drive
Southborough, MA 01772

Ginny Sinkel Kremer, Esq, Blatman, Bobrowski & Haverty, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742

Procedural History:

1. An application for an appeal was filed in the Office of the Southborough Building Department on April 30, 2021.
2. The application for the appeal is to request an administrative review of the project at 35 Presidential Drive as approved through the issuance of building permit BP-21-92 for an addition of a sports barn with connector off the garage in the Residence A District.

3. A document was provided to the Board by Attorney Kremer, representing the appellate, asking for the revocation of building permit BP-21-92 describing requirements not met under §174-2 (B), definition of “accessory building or use” and stating the addition is prohibited under §174-8.C (2), “prohibited uses” to include a sports barn.
4. The record owner of the subject property is Ms. Jinyun Hian and Mr. Desheng Jiang, 35 Presidential Drive, Southborough, MA.
5. A public hearing before the Zoning Board of Appeals was duly noticed in the MetroWest Daily News on Wednesday July 7, 2021 and Wednesday July 14, 2021.
6. The applicants were heard at the July 22, 2021 Zoning Board of Appeals meeting after describing that the proposed addition is a fully independent building and use as described under the definition of “accessory buildings” in §174-2 (B) and is prohibited under §174-8.2 (C) “prohibited uses.” Additionally, Ms. Kremer stated the permit is illegal as it does not comply with 174-8 (C) (2) “principal permitted uses.”
7. The public hearing opened on July 22, 2021 and closed the same evening.

Plans/Documents:

1. Letter from Laura Scott to the Zoning Board of Appeals.
2. Revised Appeal Application from Laura Scott.
3. Certified Copy of Abutters List from the Town of Southborough, MA.
4. Building Permit PB-21-92 issued by the Town of Southborough Building Commissioner on April 2, 2021.
5. Email correspondence between Katie Barry, Principal Assistant to the Zoning Board of Appeals and Laura Scott.
6. Proposed site plan dated March 10, 2021, 35 Presidential Drive, Southborough, MA.
7. Proposed addition plan dated March 12, 2021, 35 Presidential Drive, Southborough, MA.
8. Proposed height calculation dated March 31, 2021, 35 Presidential Drive, Southborough, MA.
9. Schematic master plan dated December 15, 2020, 35 Presidential Drive, Southborough, MA.
10. Proposed site plan dated March 10, 2021, 35 Presidential Drive, Southborough, MA.
11. Jiang Addition proposal as prepared by Latitude Architects, LLC, stamped March 22, 2021.
12. Four current pictures of the property at 35 Presidential Drive, Southborough, MA.
13. Letter and exhibits to the Board from Ginny Sinkel Kremer, Esq. of Blatman, Bobrowski & Havery, LLC received July 21, 2021.

Findings:

1. The property is located in the Residence A Zoning District.

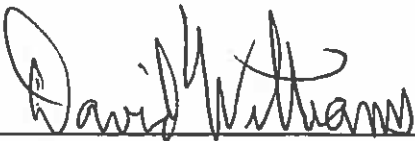
2. The applicant is proposing the appeal and revocation of building permit BP-21-92 at 35 Presidential Drive to construct an attached sports barn.
3. The proposal and evidence presented does not meet the criteria required to grant the appeal:
 - a. The Town of Southborough Zoning bylaw §174-2 (B) does not apply to the proposed sports barn at 35 Presidential Drive as the addition is connected to the primary residence and therefore is not considered an accessory building.
 - b. The Town of Southborough Zoning bylaw §174-8 (C) (2) does not apply to the proposed sports barn at 35 Presidential Drive as the addition is connected to the primary residence and therefore is not a multiple occupancy use or building and is considered residential.
 - c. The Town of Southborough Zoning bylaw §174-8.2 (C) does not apply to the proposed sports barn at 35 Presidential Drive as the addition is connected to the primary residence and therefore is a residential extension of the allowed one-family home.
 - d. An administrative error in issuing BP-21-92 was not identified.
 - e. The proposed use is customarily accessory and incidental to the use of the property for residential purposes. It is customary for residential homes to have exercise and recreational facilities incorporated therein. Facilities for "half-court" basketball facilities are not uncommon. That this facility is covered does not change the fact that the use is common in both nature and scope. Other similarly sized recreational facilities include swimming pools, tennis courts, winter hockey rinks and the like.
4. The Board was satisfied that the proposed addition meets the conditions and requirements set forth in the applicable Town of Southborough Zoning Code §174-8.2 (D) and is therefore a legal building permit.

Decision and Vote of the Board:

At its meeting on July 21, 2021 the Zoning Board of Appeals voted unanimously (5-0-0) to deny the appeal of BP-21-92 as it was legally granted pursuant to §174-8.2 (D) to allow Ms. Jinyun and Mr. Desheng a connected sports barn addition.

After review of all evidence and facts presented at this hearing, and after deliberation of the same, the Board voted unanimously (5-0-0) on a motion made by Mr. Drepanos and seconded by Ms. Cahill, with members voting by roll call as follows to deny the requested appeal:

David Williams	Aye
Deborah DeMuria	Aye
Paul Drepanos	Aye
Michael Robbins	Aye
Doris Cahill	Aye



David Williams, Chair

Signing on behalf of the Zoning Board of Appeals

**** NOT VALID FOR RECORDING UNTIL CERTIFIED BY THE TOWN CLERK OF SOUTHBOROUGH****

In accordance with Sec. 11 of Ch. 40A of Massachusetts General Law, I hereby certify that twenty (20) days have elapsed after the within decision was filed in the office of the Southborough Town Clerk, and that no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied.

Attest: _____

Date: _____

James F. Hegarty, Town Clerk
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