

Massachusetts Land Court.  
Department of the Trial Court, Worcester County.  
Roger PEPIN, Plaintiff

v.

Joe BELROSE, Gary Jolicoeur, Paul Marvelle, Wendy Miller, and Jim Pitler, as they are the members of the Town of Blackstone Zoning Board of Appeals, and Paul Bruyere, as trustee of The Bruyere Realty Trust, Defendants.

No. 06 MISC. 328868 KFS.

June 21, 2007.

## **DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT & DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

[KARYN F. SCHEIER](#), Chief Justice.

\*1 In this action, filed August 31, 2006, Roger Pepin (Pepin) appeals, pursuant to [G.L. c. 40A, § 17](#), from a decision of the Town of Blackstone (Blackstone) Zoning Board of Appeals (Board). In its decision, the Board refused to require the Blackstone Municipal Inspector (Building Inspector) to issue a cease and desist order to Defendant Paul Bruyere (Bruyere) related to Bruyere's use of the premises located at 43 Main Street (Locus). Pepin had requested enforcement of Blackstone's parking regulations, alleging that Bruyere is using Locus for a woodworking shop without sufficient parking under the applicable zoning provisions of the Blackstone Code (Bylaw). By way of his complaint, Pepin requests that this court: 1) vacate and annul the Board's decision; 2) enter an order declaring and adjudging that Bruyere's use of Locus is in violation of the Bylaw; 3) enter an order declaring the number of off-street parking spaces required under the Bylaw for the current use of Locus; and 4) issue an order enjoining Bruyere from the continuation of his current use of Locus.

On March 5, 2007, Pepin filed a motion for summary judgment along with documents in compliance with [Land Court Rule 4](#). Bruyere responded on March 19, 2007, by filing a cross-motion for summary judgment, together with his opposition to Pepin's motion.<sup>[FN1](#)</sup> On April 10, 2007, Pepin filed a memorandum in reply to Bruyere's cross-motion for summary judgment. The parties appeared for oral argument on May 30, 2007. In addition to the motions and supporting documents, the summary judgment record consists of the exhibits attached thereto, the pleadings, and Pepin's affidavit.

[FN1](#). On April 20, 2007, the Board filed its request to adopt Bruyere's opposition to Pepin's motion for summary judgment and Bruyere's cross-motion for summary judgment, which was allowed.

A motion for summary judgment may be granted only where there are no genuine issues of material fact in dispute that would preclude disposition of the case as a matter of law. See [Community Nat'l Bank v. Dawes](#), 369 Mass. 550, 553-56 (1976). The moving party bears the burden of affirmatively showing that there is no triable issue of fact. See [Ng Bros. Constr., Inc. v. Cranney](#), 436 Mass 638, 643-44 (2002). As an initial matter, this

court finds that the relevant material facts are undisputed and the case therefore is ripe for disposition based on the summary judgment record. Based on the following undisputed facts provided by the parties, and for the reasons set forth below, this court finds and rules that Pepin's motion for summary judgment should be **ALLOWED** and Bruyere's motion for summary judgment in which the Board joins should be **DENIED**:

1. Locus consists of property located in Blackstone at 43 Main Street in a commercial zone and is improved with a 10,000 square foot building.<sup>FN2</sup>

<sup>FN2</sup>. In its decision, the Board stated that Locus is also located within the “Village Overlay District,” but the agreed facts did not address that issue, and this court does not have a complete copy of the Bylaw to confirm that fact.

2. Pepin resides at property located at 47 Main Street, which is adjacent to Locus.

3. Prior to 1987, Locus was held in common ownership with a parcel located across the street that was utilized by Locus as a parking lot (Parking Lot). The Parking Lot was located less than three hundred and fifty (350) feet from the building entrance on Locus. The street separating Locus from the Parking Lot was less than sixty (60) feet wide. In 1987, by virtue of a conveyance, the common ownership of Locus and the Parking Lot was severed.

\*2 4. Bruyere is the trustee of the Bruyere Realty and, on October 24, 2001, he purchased Locus. In the building on Locus, Bruyere operates a woodworking shop called “Island Cabinet and Millwork,” where he and his son are the only employees (Island Cabinet). There is one parking space located on Locus for use by Island Cabinet. At the inception of this action, Bruyere did not own any off-street parking spaces within three hundred fifty (350) feet of Locus.

5. Pursuant to Bylaw § 123-11, “Use Schedule,” uses categorized as “industrial” include “[l]ight manufacturing for on-site sales” where “more than half of the volume [is] sold at retail on the premises” and “[o]ther light manufacturing, research or development.” Accordingly, Bruyere's use of Locus, which includes the production and sale of products, is an industrial use.<sup>FN3</sup> Such use is allowed in the commercial zone.<sup>FN4</sup>

<sup>FN3</sup>. Further, when Bruyere applied for a building permit on April 22, 2002, for the relocation of his woodworking shop into the building on Locus, he also characterized the proposed use as industrial.

<sup>FN4</sup>. The industrial use characterized as “other light manufacturing, research or development” is allowed in the commercial zone by special permit only.

6. Bylaw § 123-15, “Off-street parking,” ¶ A, “Number of spaces,” provides:

“Adequate off-street parking must be provided to service all increases in parking demand created by new structures or additions or created by change of use. The number of parking spaces must be as required in Section 123-15B, unless in performing site plan

review the Planning Board, or in acting on a Special Permit the special permit granting authority, determines that a lesser provision would be adequate for all parking needs because of such special circumstances as shared parking for uses having peak parking demands at different times, unusual age or other characteristics of site users, company-sponsored car-pooling, or other measures reducing parking demand.

Required spaces must be on the same lot as the use they serve, except that spaces on a separate lot in the same ownership may be credited if not further than three hundred fifty (350) feet from the building entrance of the activity they serve, and are not separated from it by a street having right-of-way width of sixty (60) feet or more.”

7. Bylaw § 123-15, ¶ B, “Table of Requirements,” set for the following parking space requirements:

<b>USE</b>	<b>PARKING SPACE REQUIREMENT</b>
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“Retail sales or service”	”[O]ne (1) space per two hundred (200) s.f. leaseable floor area, but not fewer than three (3) spaces per separate enterprise.”
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“Industrial, wholesale, or warehouse”	”[O]ne (1) space per one and one-fourth (1 1/4) employees per shift, but not less than one (1) space per one thousand (1,000) square feet of storage area plus one space per four hundred (400) square feet of production area plus one (1) space per one hundred eighty (180) square feet of office area.”
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“Other uses”	”[I]ndividually determined by the
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Building  
Inspector, except  
that determination  
will be by the  
Planning Board in  
cases referred to  
that Board by the  
Building Inspector  
for site plan  
review.”

8. On or about April 26, 2006, Pepin requested the Building Inspector to enforce the parking space requirements contained in Bylaw § 123-15, ¶ B, against Bruyere with respect to his industrial use of Locus with only one parking space (Enforcement Request).

\*3 9. By letter dated May 12, 2006, the Building Inspector responded to Pepin's Enforcement Request. The letter provided, in relevant part, that the Building Inspector had “forwarded [the] mat[er] to the Planning Board for further review.”

10. On or about June 9, 2006, Pepin appealed from the Building Inspector's written response to the Board (Appeal). By way of his Appeal, Pepin, “assert [ed] that since there is no off-street parking available to [Locus], [Bruyere] does not satisfy the off-street parking requirement of Section 123-15 of the [Bylaw],” and “request[ed] that the [Board] require the Municipal Inspector issue a cease and desist order to [Bruyere].”

11. A public hearing was held on the Appeal on July 19, 2006. The five (5) Board members in attendance voted unanimously against requiring the Building Inspector to issue a cease and desist order to Bruyere.

12. The Board issued a written decision denying the Appeal and filed a copy of the decision with the Blackstone Town Clerk on August 23, 2006 (Decision). In the Decision, the Board made the following findings:

“There are no new structures or additions to existing structures that increase parking demands at [Locus].”

There is no evidence of any increase on the parking demands for [Locus] as a result of the change in use of [Locus].

The existing building was used as a business prior to dedication to its current use.

There are only two employees present at Locus on a regular basis.

The [Locus] is in the Village Overlay District, and the current use of [Locus] is consistent with the purposes of said District i.e., to facilitate new investment within the district, to serve entrepreneurial interests of Blackstone residents, and to protect and enhance the

village heritage.

[Pepin] did not establish sufficient factual bases concerning increased parking demands to warrant an order of the Board to shut down a site-suitable business.

There was no evidence presented that the Municipal Inspector had or had not acted on [Pepin's] enforcement request pursuant to G.L. c40A, s. 7.” [FN5](#)

[FN5](#). Notwithstanding the Board's finding regarding whether the Building Inspector had acted on the Enforcement Request, the Board retained jurisdiction over the Appeal and reached its merits in the Decision.

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Before reaching the merits of Pepin's appeal under [G.L. c. 40A, § 17](#), this court must first decide a question broached by Bruyere-whether the Board lacked jurisdiction to hear Pepin's Appeal, pursuant to [G.L. c. 40A, § 8](#), given the nature of the Building Inspector's response to Pepin's Enforcement Request. Despite the fact that the Board decided the Appeal before it, the question remains a viable one because “[w]here there is a lack of jurisdiction, waiver or consent cannot confer it.” [Second Bank-State St. Trust Co. v. Linsley, 341 Mass. 113, 116 \(1960\)](#). “[S]ubject matter jurisdiction may be challenged at any stage of a proceeding.” [General Acc. Ins. Co. of Am. V. Bank of New England-West, N.A., 403 Mass. 473, 474 \(1988\)](#).

Pursuant to [G.L. c. 40A, § 7](#), “a person may make a written request to the officer to enforce the zoning ordinance.” [Elio v. Zoning Bd. of Appeals of Barnstable, 55 Mass.App.Ct. 424, 427 \(2002\)](#). See [G.L. c. 40A, § 7](#). [G.L. c. 40A, § 8](#) provides that “[a]n appeal to the permit granting authority ... may be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer under the provisions of this chapter.” Any such appeal must “be taken within thirty days from the date of the order or decision which is being appealed.” [G.L. c. 40A, § 15](#). “[U]nder [G.L. c. 40A, § 7](#), a written decision from a building inspector [is] the operative event for purposes of an aggrieved person's right of appeal....” [Elio, 55 Mass.App.Ct. at 429](#).

\*4 Bruyere argues that the Board “lacked jurisdiction to entertain Pepin's [A]ppeal in the absence of a clear, written denial of his [E]nforcement [R]equest.” He further contends that “[w]here the matter was not properly before the [Board], this court has no authority to consider Pepin's claims.” It is the substance of the Building Inspector's written response to Pepin's Enforcement Request and whether it constitutes an “order or decision” under [G.L. c. 40A, § 15](#), that is at the heart of the jurisdictional issue. There is no question that the Building Inspector's response does not explicitly and unequivocally deny Pepin's Enforcement Request. Nonetheless, the Building Inspector responded in writing that he had decided to refer the matter to the Blackstone Planning Board (Planning Board), and this court finds that his action was sufficiently definitive to

constitute an “order or decision,” tantamount to a refusal to enforce the Bylaw. Therefore, this court finds that it was appealable under [G.L. c. 40A, § § 7, 8](#). Where Pepin thereafter appealed the Building Inspector's response within thirty days, the Board had the authority to consider the Appeal, which it did, despite its articulated concern that it might not have jurisdiction. Consequently, this court has jurisdiction under [G.L. c. 40A, § 17](#).

In addition to raising the jurisdictional issue, Bruyere maintains that Pepin's claim is barred by the doctrine of res judicata because the claim “could have been and should have been raised in ... earlier actions, which addressed other alleged zoning violations.” The earlier actions referred to by Bruyere include an action filed in the Worcester County Housing Court (Case No. 06-CV-21) and a prior action filed in the Land Court (Misc. Case No. 326023).<sup>FN6</sup> Both of these actions brought by Pepin involve other alleged zoning violations occurring at Locus.

[FN6](#). On January 25, 2007, this court held a hearing on cross-motions for summary judgment in Misc. Case No. 326023, which involves the same parties as in the instant action, and determined that the issues were the same as those in Housing Court Case No. 06-CV-21, which had not yet been adjudicated, but which was a prior pending action. As a result, Misc. Case No. 326023 was transferred to the Worcester County Housing Court.

“The guiding principle in determining whether to allow defensive use of collateral estoppel <sup>FN7</sup> is whether the party against whom it is asserted ‘lacked full and fair opportunity to litigate the issue in the first action or [whether] other circumstances justify affording him an opportunity to relitigate the issue.’ “ [Martin v. Ring, 401 Mass. 59, 62 \(1987\)](#), quoting [Fidler v. E.M. Parker Co., 394 Mass. 534, 541 \(1985\)](#). This court finds that Pepin's most recent claims, although involving the same parties and property implicated in his earlier actions, are not barred by the doctrine of res judicata where they allege a wholly different zoning violation and zoning relief. As distinct from this case involving an alleged parking violation, the prior two cases concern the issuance of a variance to Bruyere for the erection of a staircase at Locus that violated setback requirements.

[FN7](#). The terms “collateral estoppel” and “res judicata” are used interchangeably.

Having found that the instant action is properly here, this court must now decide whether the Board's Decision refusing to require the Building Inspector to issue a cease and desist order to Bruyere should be upheld. The parties agree that the use of Locus is currently “industrial” under the Bylaw, and is an allowed use. Their views diverge, however, on the number of parking spaces that are required to service that use. Pepin argues that Bruyere's use of Locus for a woodworking shop from which he sells products requires substantially more parking spaces under the Bylaw than are currently available. Bruyere, citing the Bylaw, maintains that the parking requirements, delineated in Bylaw § 123-15, ¶ B, “take effect *only* if there is *an increase* ‘in parking demand created by new structures or additions or created by change of use.’ “ Because no new structures or additions have been built on Locus and where the use of Locus has always been industrial in nature, Bruyere argues that the provisions of Bylaw § 123-15, ¶ B do not apply.

\*5 The parties oral argument agreed that the building on Locus was previously used as a potato chip factory and later a plumbing supply company-both industrial uses. They also agreed, however, that the building was vacant for some period of time, immediately prior to Bruyere's purchase thereof. <sup>FN8</sup> This court finds that there has been a change of use on Locus. First, a change from a vacant building to any industrial use is a “change of use.” Even if the vacancy period was not long enough to constitute an abandonment of the prior use, the change from a plumbing supply company to a woodworking shop would also constitute a change of use, even though both uses are “industrial.” Consistent with the provisions of Bylaw § 123-15 ¶ B, parking requirements attendant to each of these industrial uses might well vary depending on how much of the building was designated for storage, production or office area. Each time the underlying activity in the building changed, despite retaining the “industrial” moniker, it was subject to at least review by the Planning Board or special permit granting authority (SPGA) <sup>FN9</sup> to determine whether there was an “increas[e] in parking demand” under Bylaw § 123-15, ¶ A, which was not done in this case.

<sup>FN8</sup>. The agreed facts do not indicate how long the building had been vacant, which could have an impact on the analysis under [G.L. c. 40A, § 6](#), or the Bylaw.

<sup>FN9</sup>. The record does not establish which board is the SPGA, having the authority to grant special permits.

Given the fact that Bruyere has not received any relief from the parking requirements from either the Planning Board or the SPGA, the Building Inspector should have issued a cease and desist order. The Planning Board and SPGA may authorize fewer parking spaces if “a lesser provision would be adequate for all parking needs because of such *special circumstances* as shared parking for uses having peak parking demands at different times, unusual age or characteristics of site users, company-sponsored car-pooling, or other measures reducing parking demand.” Bylaw § 123-15, ¶ A. Such authority is vested in the Planning Board in the site plan review context and in the SPGA's discretion in the context of a special permit. While the Board's findings in the Decision clearly take into account the special circumstances quoted above, neither site plan review nor a special permit were before the Board when it issued its Decision. Therefore, the Board exceeded its authority in denying Pepin's Appeal.

Taking into consideration the fact that relief from the parking requirements contained in Bylaw § 123-15, ¶ ¶ A, and B, is available if the “special circumstances” are present, this court's decision shall not prejudice Bruyere's right to pursue such relief. This court has also been informed by the parties that Blackstone is in the process of considering a change in the Bylaw that would allow owners engaged in allowed industrial uses to provide off-street parking on nearby properties in separate ownership. Accordingly, a judgment will enter but will be stayed for a period to allow Bruyere to apply for relief from either the Planning Board or the SPGA.