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**TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS**

Special Permit

***Melissa Gale/The Cookie Monstah Company
1257 Highland Avenue
Map 53, Parcel 3***

(Filed during the Municipal Relief Legislation, Chapter 53 of the Acts 2020)

March 18, 2021

Melissa Gale/The Cookie Monstah Company, applicant, applied to the Board of Appeals for a Special Permit under Sections 3.2.2, 5.1.1.5, 5.1.2, 5.1.3 7.5.2 and any other applicable Sections of the Zoning By-Law for a take-out counter accessory to a food retail establishment; for retail sales of ice cream, frozen yogurt and similar products for consumption on or off premises; for more than one non-residential use on a lot; and to waive strict adherence to parking requirements. The subject property is located at **1257 Highland Avenue, Needham MA** in the Business District. A public hearing was held remotely on Zoom on Thursday, March 18, 2021 at 7:45 p.m.

Documents of Record:

- Application for Hearing, Clerk stamped February 22, 2021.
- Letter from George Giunta, Jr., dated February 22, 2021.
- Floor Plan prepared by Main Street Architecture, dated January 21, 2021.
- ALTA/ACSM Land Title Survey prepared by O'Driscoll Land Surveying Co., dated January 20, 2017.
- Memorandum of Support of Application prepared by George Giunta, dated March 9, 2021.
- Parking Demand Study prepared by Shaun P. Kelly, Vanasse & Associates, dated February 25, 2021.
- Photos of Proposed Walk Up Window.
- Letter prepared by Melissa Gale, dated January 25, 2021.
- Email from George Giunta, Jr. dated March 17, 2021. Re: Walk-up Window Withdrawal.
- Email from Chief John Schlittler, dated March 1, 2021.
- Letter from Dave Roche, Building Commissioner, dated March 9, 2021.
- Email from Dave Roche, Building Commissioner, dated March 17, 2021.
- Email from Tara Gurge, Assistant Public Health Director, dated March 9, 2021.

- Email from Dennis Condon, Chief of Department, Needham Fire Department, dated March 1, 2021.
- Letter from Thomas A. Ryder, Assistant Town Engineer, dated March 11, 2021.
- Letter from Lee Newman, Director of Planning and Community Development, dated March 16, 2021.

March 18, 2021

The Board held this meeting virtually as allowed under “Order Suspending Certain Provisions of the Open Meeting Law G.L. c. 30A, S20.”

The Board included Jon D. Schneider, Chair; Jonathan D. Tamkin, Vice-Chair and Howard S. Goldman, Member. Also participating were Kathy Lind Berardi and Peter Friedenberg, Associate Members. Mr. Schneider opened the hearing at 8:10 p.m. by reading the public notice.

George Giunta, Jr., attorney representing the applicant, introduced the team: Melissa and Scott Gale, business owners; Shaun Kelly, the traffic engineer; and Paul Dawson, representing the property owner.

Mr. Giunta noted that Melissa Gale has a background in food services and baking. She is the former owner of a bakery in Downtown Crossing. In 2012, the Gales launched a food truck business called the Cookie Monstah which sells fresh baked cookies made from scratch. The business has been successful and received positive press coverage. In 2017, they opened a brick and mortar store in Danvers, followed by two more sites in Swampscott and Burlington. The business currently has a fleet of six trucks. The trucks can be found selling at SoWa, the Common, and the Greenway.

The Special Permit sought is for retail sales of ice-cream and for a take-out establishment engaged in dispensing prepared foods for consumption elsewhere.

The business’ main product is cookies. The cookies are also sold with ice cream as ice cream sandwiches or with a side dish of ice cream. The menu includes blended shakes of cookie and ice-cream, and frozen cookie dough for at home baking.

The business will occupy the 1,428 square feet space vacated in 2020 by Stacey’s Juice Bar (“Stacey’s”) The proposed business will have 18 seats and two cash registers. The business is located in a larger commercial plaza containing two buildings - 1257 Highland Avenue which houses Bertucci’s, Needham Wine and Liquors and the current vacant space and 1189 Highland Avenue leased by Mathnasium, Needham Nails and Spa, Super Cuts and Pure Hockey Store.

In previous special permits sought by tenants of the plaza the main issue has been parking. Unlike many of the previous special permits sought for full-service restaurants with the associated high parking demand, the applicant’s business will have a less intensive demand for parking.

The business will be open seven days a week from 10:30 a.m. to 11:30 p.m. The site will be staffed by two to four employees. Half of the day will be staffed by two employees, with the

peak half-day to be staffed by four employees. The peak period is different at each of the existing three brick-and-mortar locations. The peak period for the Needham location will be determined as the business evolves. The staffing is a step-down from Stacey's which had an up to six employees.

Mr. Giunta noted that the parking lot located in the middle of the plaza has 88 parking spaces. There are another 40 spaces on the street within walking distance of the location. There is a total of 128 available parking spaces.

As required under the By-Law, the applicant is seeking parking relief. The proposed business will have 18 seats with two cash registers. The second cash register was proposed in association with a proposed walk-up window. After evaluating the challenges in creating a take-out window and safety concerns, the proposed walk-up window was withdrawn. However, they would like to maintain the two cash registers to provide more efficient customer service. Experience with two cash registers at the other locations has demonstrated that two cash registers speeds-up check-out. A more efficient check-out experience will result in the reduction of parking demand. The applicant may submit a future application for a walk-up window when the issues regarding the walk-up window are resolved.

Under Section 5.1.2 of the By-Law, each cash register is regarded as a take-out station requiring ten parking spaces together with one space per three seats. The total parking spaces required under the By-Law for the applicant based on two take-out counters and 18 seats is 26. Mr. Giunta thought the By-Law parking requirements for a take-out services station were arbitrary and illogical. Based on the calculations by Vanasse & Associates, Inc. using the Institute of Transportation Engineers (ITE) Land Use Code for Fast-Food Restaurant without Drive Through Window, the peak parking demand for the proposed project would amount to 11 vehicles, well below the 20 spaces required. Mr. Giunta contended that a cash register is not a realistic indicator of parking demand and in this case he believed that the additional cash register would speed the response time servicing the customers and the turn-over and availability of parking spaces.

In 2015 when considering a special permit for Mathnasium, the Board calculated a parking requirement of 124 spaces under the By-law for the entire plaza. The current proposal would increase the required parking spaces by ten spaces to 134 spaces based on the introduction of the additional cash register. Mr. Giunta noted that there is a secondary supply of on-street parking on Highland Avenue, and that some potential customers will not require parking such as the high school students and customers from other businesses in the plaza who already have a parking spot. The Parking Study for the proposal indicated an availability of 78 spaces during peak parking usage, which is the weekday evening period. Mr. Giunta thought there was sufficient parking at the plaza since the current tenants have shifted away from full-service restaurants.

Shaun Kelly, transportation engineer, reported that Vanasse Associates Inc. has conducted parking studies at the plaza over the decade including the Parking Demand Assessment for the applicant. Mr. Kelly noted that study encompassed 88 off-street parking spaces in the plaza lot and the 26 on-street parking along the western and eastern sides of Highland Avenue within one-minute walk of the proposed site. The study evaluated three peak periods – the weekday morning period from 7:00 a.m. to 9:00 a.m.; the weekday midday period from 11:00 a.m. to 1:00 p.m.; and the weekday evening period from 4:00 p.m. to 6:00 p.m. The available

parking spaces at the weekday morning peak was 91 spaces; at weekday midday peak was 72 spaces; and weekday evening peak was 62 spaces. He concluded that parking lot could accommodate the demand without the on-street parking.

According to Mr. Kelly, the study used the most conservative ITE land use code - Fast-Food Restaurant without Drive through Window – when analyzing the proposed business which was increased by 80% to capture the walk-up window demand. The calculation resulted in a parking demand of eleven spaces.

He recognized that there was a decrease in the parking demand due to Covid19. A previous study conducted prior to Covid19 indicated 64 vehicles during weekday evening peak instead of 50 for the current study. Even considering a delta of 14 vehicles, the available parking was plentiful.

Mr. Tamkin noted that prior to Covid19 Bertucci's was a big user of the lot on weekend nights. He wanted to know the Covid19 impact on the complex and when was the study conducted. Mr. Kelly responded that the study was conducted in February 2021. They compared the current use with the use from a previous pre-Covid19 study. The peak demand was 50 spaces versus 64 spaces for the pre-Covid19 period. The 62 available parking spaces can easily accommodate the extra 14 spaces during the pre-Covid19 period. He said that all the businesses would have to double their demand to use up all the available spaces and he did not foresee that level of demand for any of the tenants besides Bertucci's.

Mr. Goldman inquired whether staff would be parking in the lot. Mr. Kelly thought there was adequate parking in the lot to accommodate the employees and customers at the peak demand period. Mr. Giunta thought there would be an issue to require parking of employee's on-street where there was two-hour parking limit. Mr. Giunta did not believe there were any lot restrictions for employees in previous decisions.

Mr. Giunta concluded that the applicant was a good complimentary fit and use for the complex and that there was adequate parking at the site to accommodate its demand.

Comments received:

- Planning Board had no comment.
- Building Department indicated that the application did not address outdoor seating though the applicant had discussed outdoor seating with the Commissioner. He was concerned about the safety of pedestrian traffic walking across the parking lot and State ADA access requirements for the walk-up window. He recommended that the applicant seek professional architectural advice for a walk-up window. He thought the walk-up window should be only from the sidewalk and blocked from the parking lot side. The crossing should be lined with yellow paint
- Fire Department had no comment.
- Police had no issue.
- Health Department requested that the applicant submit an online Public Health Division Food Permit Plan; submit a detailed interior and exterior seating plan; the proposal meet interior and exterior Covid19 state requirements for seat spacing and occupancy requirements; permits may be required for additional food trucks prior to use; the establishment have proper, sufficient and accessible trash and recycling dumpsters located on site and that they be put on a sufficient service schedule to

prevent pests; and proper safety barriers for outdoor seating proposals be installed which also meet Building and Fire standards.

- Engineering had no comment.

Mr. Schneider noted that, if a walk-up window is proposed in the future, the ADA and pedestrian safety concerns must be addressed.

Mr. Giunta stated that outdoor seating was not addressed in the application, but the applicant anticipates seeking temporary outdoor seating through the Town Manager's Office. With the walk-up window removed from the proposal, the applicant may provide stand-up tables without seats for customers to eat outside like Stacey's. Mr. Schneider noted that the Board was not providing any relief regarding outdoor seating.

Mr. Friedenbergh questioned whether the applicant needed relief for a walk-up window. Mr. Schneider suggested that the decision include a condition that the applicant must seek Board approval for a walk-up window. Mr. Giunta responded that the Building Commissioner would be reticent to authorize a building permit for a walk up window without Board approval. The Commissioner requires Board approval when there are changes to plans approved under a Special Permit. The current plan does not include a walk-up window.

The hearing was open to public comments. There were no comments from the public.

Mr. Tamkin inquired if the applicant had a problem if similar conditions in the Stacey's decision were imposed. Mr. Giunta had no issue.

Mr. Goldman moved to grant a Special Permit under Sections 3.2.2, 5.1.1.5, 5.12, 5.13 and 7.5.2 of the By-Law to allow a take-out counter accessory to a food retail establishment; for retail sales of ice cream, frozen yogurt and similar products for consumption on or off premises; for more than one non-residential use on a lot; and to waive strict adherence to parking requirements conditioned that

- there be no walk-up window;
- staff be limited to no more than four staff on site at any time;
- the hours of operation be limited to 10:30 a.m. to 11:30 p.m., seven days a week;
- the conditions imposed on Stacy's be included in this decision;
- the business will have 18 seats

Mr. Friedenbergh proposed that the Special Permit be non-transferable and personal to the applicant. Mr. Schneider disagreed. Based on advice received from counsel when discussing the decision for Stacey's, such imposition would require formal hearings to approve a transfer. He thought that such a condition should be limited to situations where there are special problems. Mr. Tamkin added that the Board agreed at the time of the Stacy's application that such an imposition made sense if liquor and a full-service restaurant was involved which Stacey's did not. Mr. Friedenbergh was concerned that the approval is based on the particular applicant's use and its fit with the location and that another use may not be so well suited. Mr. Schneider argued a different use would require the new applicant to seek a permit. Mr. Friedenbergh thought any take-out use could possibly be allowed. Mr. Schneider believed the products would be limited in this case and a potential full-service restaurant would require Board approval. Mr. Schneider did not want to burden future applicants or Boards with matters that require public hearings. Mr. Friedenbergh deferred to the deciding

Board members.

Mr. Tamkin seconded the motion. The motion was unanimously approved.

The meeting adjourned at 9:00 p.m.

Findings:

On the basis of the evidence presented at the hearing, the Board makes the following findings:

1. The applicant proposes to open a retail food store selling cookies, ice cream, frozen yogurt and similar products for consumption on and off the premises with 18 seats for eat-in and a takeout counter in Unit 1 of 1257 Highland Avenue located in the Business District.
2. The space was most recently occupied from 2013 until 2020 by Stacy's which had 18 seats and a take-out counter. The applicant's layout will be substantially similar to the layout of Stacy's. In its application, the applicant proposed to construct a take-out window on Highland Avenue but has withdrawn the request.
3. The applicant operates similar retail stores in Danvers, Burlington and Swampscott as well as six food trucks selling the same products.
4. The applicant proposes to operate 11:00 a.m. until 10:00 p.m. seven days a week, but request permission to be open from 10:30 a.m. until 11:00 p.m. The applicant will have two to four employees depending upon demand.
5. The retail food store is allowed of right in this District, but the sale of ice cream and the take-out operation require Special Permits. The proposed use is consistent with the purposes of the By-Law and appropriate under Section 7.5.2.
6. The building at 1257 Highland Avenue in which the operation is to be located has two other tenants: a restaurant and a liquor store. The building shares a parking lot with 1299 Highland Avenue where there are additional retail tenants. The buildings at 1257 and 1299 Highland Avenue have previously been viewed as one property. The applicant requests a Special Permit for more than one non-residential use. The proposed use by the applicant is consistent with the various other uses at the property are the uses are not detrimental to each other.
7. The applicant proposes to have two cash registers which are considered as two take-out stations. The previous tenant had only one. As a result, the By-law requires ten more parking than the previous tenant. Section 5.1.1.3 indicates that a mixed-use property must comply with all the parking requirements in the By-Law when a new tenant increases the required parking unless the new tenant obtains a waiver of the required number of parking spaces and a waiver of the design requirements for parking.
8. There are 88 spaces in the parking lot. The Board calculated that the By-law required 119 spaces for the plaza in 2013 when it approved a special permit for Stacy's that had

one take out station. The Board calculated the parking requirement to be 124 spaces in 2015 when it considered a special permit for Mathnasium. The applicant's second take out station will raise the By-Law requirement by 10 spaces to 134.

9. According to a parking study by Vanasse & Associates dated February 25, 2021, there is adequate parking. In addition to the 88 on-site spaces, there are 40 spaces on Highland Avenue within close proximity. Vanasse observed parking at 9:00 am, 1:00 pm and 4:45 pm. The maximum number of vehicles was 50 including 33 on-site and 17 on the street in the evening. This study indicates a substantial surplus of spaces at the busiest time.
10. Vanasse acknowledges that parking demand may be depressed by the current covid pandemic. Vanasse has conducted several prior studies during more normal times and found that the parking was adequate. In addition, Vanasse examined industry standards for a fast food restaurant with a takeout window and found that required parking would be 11 spaces for the applicant business which is substantially less than the 26 required by the By-Law.
11. The Board finds that the parking is adequate and that special circumstances exist to waive the required number of parking spaces.
12. The applicant proposes no expansion of the existing structures or changes to the parking lot. It would not be possible to comply with design requirements without a substantial reduction in the number of spaces. The Board finds that there are special circumstances that justify waiver of design requirements.

Decision:

On the basis of the foregoing findings, following motion duly made and seconded, after open deliberation, the Board by unanimous vote grants the applicant 1) a Special Permit under Section 3.2.2 for the use of the premises as a food retail store selling ice cream, yogurt and similar products with accessory eat- in and take- out service, 2) a Special Permit under Section 3.2.2 for more than one non-residential use, 3) a Special Permit under Section 5.1.1.3 waiving the requirements of Section 5.1.2 (Required Parking), and 4) a Special Permit under Section 5.1.1.3 waiving design requirements under Section 5.1.3 (Parking Plan and Design Requirements) subject to the following:

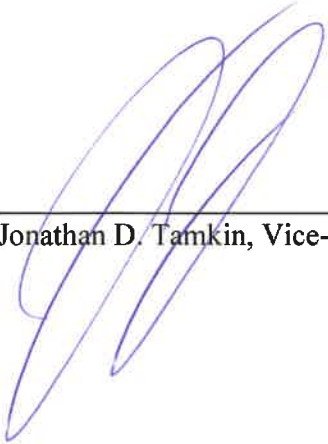
- a. the applicant will have the right to use the 88 off-street space parking spaces on the premises in common with other tenants;
- b. the operation will have a maximum seating capacity of eighteen seats to be laid out substantially in accordance with the plans presented with the application and a maximum of two cash registers;
- c. this Decision does not authorize any outdoor seating, but the applicant may seek outdoor seating under any rules or regulations of the Town or by amendment of this Decision;
- d. hours of operation will not exceed 10:30 a.m. until 11:00 p.m. seven days a week;

- e. no more than four (4) employees may work at the site at one time;
- f. there will be no take-out window;
- g. all waste generated by the business will be controlled and stored in dumpsters with timely removal by private contractors. All dumpster shall be located to the rear of the building. The outside area and surrounding neighborhood shall be kept free of trash and garbage. The dumpster shall be cleaned and operated in accordance with all regulations of the Board of Health;
- h. there shall be periodic pest and vermin inspections with treatment as necessary;
- i. all deliveries shall be made to the rear of the building in which the premises are located and shall occur only between the hours of 7:00 a.m. and 11:00 a.m. Deliveries shall be timed and otherwise arranged so as to minimize interference by delivery trucks with the use of and circulation through the parking area;
- j. no noxious odors shall emit from the premises or any dumpsters used in the applicant's business; and
- k. failure to comply with each and any of the foregoing conditions at any time may constitute cause for the revocation of these Special Permits by the Board after hearing with notice to the applicant and with such other notice as the Board, in its sole and exclusive discretion, shall deem due and sufficient.

SIGNATORY PAGE – 1257 HIGHLAND AVENUE

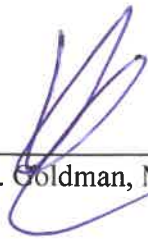

Jon D. Schneider, Chair

SIGNATORY PAGE – 1257 HIGHLAND AVENUE



Jonathan D. Tamkin, Vice-Chair

SIGNATORY PAGE – 1257 HIGHLAND AVENUE



Howard S. Goldman, Member