



City of Somerville

ZONING BOARD OF APPEALS

City Hall 3rd Floor, 93 Highland Avenue, Somerville MA 02143

NOVEMBER 4, 2020 MEETING MINUTES

This meeting was conducted via remote participation on GoToWebinar.

NAME	TITLE	STATUS	ARRIVED
Susan Fontano	Chair	<i>Present</i>	
Danielle Evans	Clerk	<i>Present</i>	
Josh Safdie	Member	<i>Present</i>	
Anne Brockelman	Member	<i>Present</i>	
Elaine Severino	Member	<i>Present</i>	

City staff present: Charlotte Leis (Planning & Zoning), Daniel Bartman (Planning & Zoning), Rebecca Cooper (Planning & Zoning), Sarah Lewis (Director of Planning & Zoning)

The meeting was called to order at 6:04pm and adjourned at 10:20pm.

GENERAL BUSINESS: Meeting Minutes Approval

The Board approved the October 14, 2020 minutes.

PUBLIC HEARING: 15 McGrath Highway

(Continued from September 30, 2020)

The Applicant submitted a written request prior to the agenda being posted requesting a continuance to November 18, 2020.

Following a motion by Clerk Evans, seconded by Ms. Severino, the Board voted unanimously (5-0) to continue the hearing to November 18, 2020.

RESULT: CONTINUED TO 11/18/2020

PUBLIC HEARING: 120-132 Middlesex Avenue

Ms. Lewis briefly explained why Staff supported the variance request to not provide Civic Space at this location as it is so close to high volume thoroughfares that create air pollution. She noted that Staff is considering proposing a zoning amendment regarding this topic, and the City is working on a civic space study and an Assembly Square plan update.

Joe Hanley (Brickyard at Assembly LLC), Brad Hall (Capital Hall Partners), Peter Bartash (Capital Hall Partners), Christos Kuliopulos (Capital Hall Partners), Edward Doherty (Kems Real Estate) and Kyle Greaves (VHB) from the application team were present and gave an overview of their argument for the requested variance. The property is a little more than an acre in size, is boarded by Middlesex Ave, the Fellsway, and Route I-93. The site is approximately 175' from the Fellsway and 350' from I-93 which causes very poor air quality in the area and makes the site a poor location for a high-quality civic space. The team is proposing to provide a payment-in-lieu rather than provide 25% of the site as civic space. The payment-in-lieu will allow them to build a lab building on the site more easily, which is a permitted use in the district.

The applicant team said the site is a unique location within Assembly Square as it is directly adjacent to I-93 and the Fellsway which will cause negative public health impacts in outdoor spaces. Providing a civic space would be inconsistent with long-term goals for the area and with feedback from residents. The team argued that making a payment-in-lieu according to Section 12.3.3 would achieve the same results for the public, and would not require a variance if the project was in a different district.

The Board asked what landscaping will be provided. Ms. Lewis said there will be on-site improvements to Middlesex Ave and that the site will have some open space but not the designated civic space. Zoning distinguishes between open space and civic space. The variance request is for providing the required civic space. If a payment-in-lieu is provided, it would fund the creation of other open or civic spaces in the Assembly Square area.

The Board asked what the payment-in-lieu would be. Ms. Lewis said multiple City Divisions are working together to determine the amount; she noted that the team had voluntarily offered the payment-in-lieu.

Chair Fontano opened public comment. No one indicated they wished to speak. Chair Fontano left public comment open.

The Board asked about distinction between open and civic space. Ms. Lewis said open space is incidental space around a building while civic space is specifically dedicated to the public.

Ms. Lewis reminded the Board that the variance criteria must be considered on their own, and the offer for a payment-in-lieu cannot be considered.

Chair Fontano asked about landscape buffering around the building. Ms. Lewis said the applicant is working with the Mobility Division to determine what an improved cross section for Middlesex Ave would be, including regarding landscaping and bicycle infrastructure.

Ms. Brockelman asked about the City's overall plan regarding civic space near highways. Ms. Lewis said staff is working on a zoning amendment to provide all properties within a set distance of highly traveled roadways to have an option to provide a payment-in-lieu of civic space. More open & civic space is an important priority of the City and a focus of the current update to the Assembly Square Neighborhood Plan, but we need to balance quality and quantity – we want more civic spaces, but want to make sure the new spaces are safe for active recreation and not within zones of pollution.

Mr. Hanley said the variance request has merit regardless of possibility of payment-in-lieu due to the combination of the district not permitting payment-in-lieu by right, the site's location within Assembly Square, and the particulate matter pollution generated by the roadways.

Ms. Severino wanted to ensure that any greenery on the edge of the property is maintained. Mr. Hanley said the master plan will have requirements about landscape maintenance. Ms. Lewis said the applicant has to apply for the variance before moving forward with the Master Plan Special Permit which the Public Space & Urban Forestry Division will be involved in reviewing.

Mr. Safdie said this is similar to the variance request at 345 Medford St – if the zoning needs to be changed to address an overall issue, he would prefer to see the zoning changed rather than approving a variance. He's not sure how a literal enforcement of zoning would cause a hardship.

Ms. Lewis said this is a matter of everything happening at the same time. The Assembly Square neighborhood plan kickoff is the beginning of December, and it will give frameworks and optimal locations for civic space in Assembly Square and will account for numerous sites in the area, including this one.

Mr. Safdie said his understanding is that the City is looking at modifying the zoning so that this project wouldn't need a variance in first place.

Clerk Evans said the request seems like it meets the variance criteria, but she understands the point about an imminent zoning change, although zoning changes take a long time and are not guaranteed. She feels able to make the required findings but doesn't have strong feelings either way. She likes the idea of a payment-in-lieu that could produce better open space elsewhere; why put open space where it's not a good spot just because it's required? Clerk Evans would be in favor of granting variance.

Chair Fontano said if the Board approves the variance this evening things can keep moving; if they don't approve and the ordinance changes, the applicant will have lost time and money for the same result. The fact that city is moving in this direction to correct zoning supports the feeling that the variance should be approved. Ms. Lewis said that staff has language written for an amendment, and that the question before the Board tonight is whether this location meets the variance criteria.

Ms. Brockelman said she couldn't make the required findings without the background information in the staff memo. She doesn't think the shape of the lot precludes creating a civic space, but is more convinced by the argument about pollution on site and the creation of a low-quality civic space.

Mr. Safdie understands the pollution concerns but doesn't have enough information to make a financial hardship case; the narrative is vague and not convincing. He's supportive of not having a civic space in a high pollution area and believes that a civic space requires a well thought-out plan, but is not supportive of granting variances when a zoning amendment and neighborhood plan is in the works.

Mr. Hanley said the variance standard is the sum of three criteria, not each one individually. They could build residential and provide the 25% civic space requirement, but a residential use is not supported by the neighborhood (they have already tried it). He said the shape of the site is relevant because it puts the civic space within the emission zone. He said that denying the variance would put the project into jeopardy.

Chair Fontano asked for public comment.

Joe Tagliente (Tage Capital Partners, owns ground lease next door) is in favor of the development and supports the variance.

Wig Zamore (13 Highland Ave) is glad to see mixed use, great use of site. He started the pollution group at Tufts. These are ultrafine particulate matter; very fresh & tiny, mostly from transportation sources, which have very negative health impacts. There is quite a significant decrease in particulate matter even 100yds away from the source.

Chair Fontano closed the public comment portion of the hearing.

Mr. Safdie said there seems to be 4 votes in support and he is fine with approving it.

Chair Fontano said this case can't be a sacrificial lamb and if staff supports it, she is willing to support it.

Clerk Evans asked about conditions. She wants a condition requiring payment-in-lieu. Ms. Lewis said a condition related to that will be on the Master Plan Special Permit, not on the variance. Since the project still has to go through the Master Plan Special Permit and Site Plan Approval processes, a lot more public input will be involved.

Mr. Hanley said they committed to a voluntary payment-in-lieu according to the same calculation provided in the SZO.

The Board and staff discussed a payment in lieu condition. Ms. Lewis said the Board cannot legally require them to provide a payment-in-lieu, and that a payment-in-lieu is a separate issue from the granting of a hardship variance.

Mr. Hanley said the payment is mitigation in line with the third variance criteria. Clerk Evans said without a payment-in-lieu she doesn't think it meets the variance criteria.

Ms. Lewis said she doesn't want to lead the Board down a path and propose a condition that does not work. She asked to consult with the Legal Department regarding condition language and have the Board continue the hearing to November 18th. Mr. Hanley agreed with that suggestion.

Following a motion by Clerk Evans, seconded by Ms. Severino, the Board voted unanimously (5-0) to continue the hearing to November 18, 2020.

RESULT:

CONTINUED TO 11/18/2020

The Board went into recess at 7:27pm and reconvened at 7:35pm.

PUBLIC HEARING: 9 Clifton Street

Sherri Geldersma (applicant) presented an overview of the request. The project received a Special Permit with Site Plan Review approval in August 2019 to build a second structure on the property. She went through the design process and put the project out to bid for construction. Based on the bids she received, she was unable to afford to finance the project as approved; she believes that the only way to finance the project is to use a special tax method that allows her to sell the existing house and use the money to build the new house. To do that she needs to split the lot, which requires a variance since it would be creating a nonconforming lot and requires a second variance because the resulting empty lot is too shallow for any building type. She said the new house she plans to build on the vacant lot would meet all setback requirements but wouldn't meet the lot depth requirements (both lots will be 50'x60'). She said the design of the house is basically the same as what was originally approved with only minor changes to meet new zoning requirements.

Chair Fontano opened the public comment portion of the hearing.

The Board noted that the applicant had sent them comments that had been submitted as part of the previous approval process from the following individuals: Cassie Arnaud (142 Morrison Avenue), Steve White (138 Morrison Ave), Sara Rosenfeld (address unknown), Brian and Katia Green (140 Morrison Avenue), Nancy Kafka (828 East Avenue, Red Wing, Minnesota), John Amodeo (address unknown), Celia Halstead & Bonnie Walz (215 Morrison Avenue), Penny Snyder (address unknown), Tod Rasmussen (68 Prichard Ave), Beth Galston and Jerry Lerman (address unknown), Anne Thomas (address unknown), Kate Gilbert (address unknown), and M. Lisa Tam (136 Morrison Ave).

The Board also received written public comment regarding the current proposal from the following individuals: Hill Snellings (130 Liberty Road), Anna and Paul Radvany (159 Morrison Ave), Carol Powers (address unknown).

Hill Snellings (130 Liberty Road) said he would like the conditions previously imposed on the old approval to remain in place. Also because the lot will be smaller, he wants a special permit to erect an 8' fence.

The Board confirmed with Staff that they can impose conditions on variance approvals.

Paul Radvany (159 Morrison Ave) asked about the setbacks of the new building and constrains on the size of a possible porch on the building. Also had a question about plantings regarding maintenance & not having them too close to the fence; doesn't want trees/plantings to compromise existing fence.

Chair Fontano asked Ms. Geldersma whether the new house is to age in place for herself; Ms. Geldersma said it was. Chair Fontano asked why an 8' fence is required; Ms. Geldersma said the way landscaping on the site works a 6' fence wouldn't provide privacy to the neighbor, so they are requesting an 8' fence.

Mr. Bartman said only items before the Board are variances for dividing the property and determining what is permitted on the new lot. If the Board only permits the lot split, nothing can be built on the new lot. He is working with the applicant to make small adjustments to the originally approved design to have it meet requirements of new code and be a conforming building type.

Ms. Brockelman noted that she remembers the original proposal which received a lot of public support. Mr. Bartman said the old proposal can meet the cottage or detached house building type; if a variance is granted to permit either one of those to be built, the building would still need to meet all other requirements of zoning. Ms. Brockelman asked whether the final massing would likely be smaller than what was originally proposed. Mr. Bartman said nothing larger than originally proposed was being discussed, but the Board could add a condition limiting the massing if desired.

Ms. Brockelman said since the Board approved the proposal before and the only change is a lot split she doesn't see any issues with that.

The Board and Mr. Bartman discussed whether the second variance involved a self-imposed hardship, and the role that financial concerns played in the variances. Granting the lot split variance would only create one new nonconforming lot, not two, as the existing lot is already nonconforming.

Ms. Severino said the only thing that's changed is zoning and asked why the applicant can't age in place in the existing house. Ms. Geldersma said the house was built in the 1980s and was not constructed as one floor; the new house will have a sloped walkway into house, a residential lift to the second floor bedroom, and will be built with materials that won't cause dust problems. She said the existing house is high maintenance and not architecturally appropriate to age in.

Ms. Brockelman said the variance was acceptable; the existing lot is very large, and the new split lots would be more similar in size to nearby lots.

Chair Fontano asked staff about the original conditions. Mr. Bartman said the original concerns were really about keeping both buildings at 1 unit each, and that the majority of other conditions were related to existing policies that the Board doesn't need to condition compliance with for compliance to be required. The original proposal was to build 2 buildings on 1 lot, the new proposal is to build 2 buildings on 2 lots; it's the same proposal just with an additional lot line. The existing trees on the lot are protected by Tree Preservation Ordinance and that ordinance would need to be complied with. He drafted a condition requiring that PSUF be consulted about new trees near the property line.

Clerk Evans said she had technical issues during a portion of the discussion so she's abstaining from the vote.

Following a motion by Clerk Evans, seconded by Ms. Severino, the Board voted unanimously (4-0-1) to grant a variance to split existing lot and create a nonconforming lot, with Clerk Evans abstaining.

Following a motion by Clerk Evans, seconded by Ms. Severino, the Board voted unanimously (4-0-1) to grant a variance to allow for the construction of a permitted building type on the resulting nonconforming lot, with Clerk Evans abstaining.

RESULT:

APPROVED WITH CONDITIONS

PUBLIC HEARING: 200 North Street

Mouhab Rizkallah (LaCourt Realty) appeared before the Board and gave an overview of the request. Building is nonconforming to setbacks and so required special permit under old zoning code. Prior to starting work for special permit did not know that brickwork existed behind stucco; decided to keep bricks rather than install HardiPlank as

approved. He reviewed some of the other changes made to the approved plans during construction. Disagreed with staff report recommendation; believes that existing false windows are higher level of craftsmanship than the original proposal.

Chair Fontano opened the public comment portion of the hearing.

The Board noted that they received written public comment from the following individuals: Meredith Porter (104 Josephine Ave), Maida Tilchen (301 Lowell St #12), Ward 7 Councilor Katjana Ballantyne, George Hudgins (198 North St), Allison McIntyre (Dsavis Square), Alan Moore (23 Cherry St.), Tristan Harward (46 Josephine Ave. #1), Blyss Cleveland (Ward 6), Jim McGinnis (26 Bow St), Amy Slaughter (73 Josephine Ave), Ulysses Lateiner (15 Chandler Street), Jonathan Wolfe (22 Billingham), Thane Hale (LaCourt Tenants Union), Leah Smith (6 Bailey St.), Nicholas Watter (Ward 2), Nate Krinsky (23 Harold St), Garret Chani (Ward 5), Hugh Lippincott (32 Curtis Street), Shane Woolley (23 Harold St), and Councilor at Large Bill White, and Councilor at Large Wilfred Mbah.

Ms. Leis reminded the public that the Board can only consider the facts of the specific case before the Board. The applicant is requesting to revise a special permit issued under the previous zoning ordinance, and the request must be evaluated as required by that previous zoning ordinance. The question before the Board is does the proposed revision meet the requirements for approval. The fact that the applicant is requesting approval of changes they have already made is not within the purview of the ZBA. Enforcement of the zoning ordinance, including fines for noncompliance, is the sole jurisdiction of the Superintendent of Inspectional Services.

Aji Sjamsu (10 Whipple St) noted that the applicant has not followed the required procedure for getting approval before making changes. He has only asked for forgiveness after he has been called out on his actions, as opposed to asking permission to change his plans.

Aliza Arzt (104 Josephine Ave) has been following this project since the very beginning. She feels very strongly that the applicant did not follow procedure to have requested changes approved prior to implementing the changes. She hopes that the Board rejects this request in fairness to all.

Garrett Laws (22 Cherry St) noted that there are procedures set in place that this developer routinely dismisses & side-steps. He requests that this gets continued until the Planning Department can confirm that the applicant followed the correct procedures regarding de minimis changes.

Ms. Leis explained that under the old Zoning Code, at any time after a Special Permit has been issued and before a Certificate of Occupancy has been granted on a project, an applicant can request changes to that approval. The changes can be de minimis (which are approved by staff) if they meet all four specific criteria. If the changes do not meet all four items, they need to seek approval from the ZBA.

Garrett Laws noted that he understands that, but is concerned about the rest of the project.

Kamilla Anderson (142 North St) thinks the new building is much better than the old structure in the space. She is in favor of approval.

Kimberley Warsett (118 Morrison Ave) asks that you reject the approval of this project. What was built was not what was proposed. Approving the project will set a dangerous precedent that developers are above the law. She asks that if the project is approved, that they require that one unit be permanently made into an affordable housing unit at the Tier 1 level.

Ms. Leis noted that under the old Zoning Code, this building did not fall under the inclusionary housing requirements. Thus, the ZBA cannot require the developer to make one of the units a Tier 1 unit. The ZBA can only consider the revision request presented on its own details and merits.

Lori Segall (25 Cherry St) echoes the other public comments. This sets a very dangerous precedent that allows developers to submit plans for one thing, do another, and then ask for permission retroactively.

Meredith Porter (104 Josephine Ave) has been concerned about affordable housing in the city for years. This developer has been a constant problem. He spoke about another site (Cherry St) that this developer proposed one thing and then built something quite different. This violates the entire process. The developer claimed that in their opinion the final product is better. He noted that what was built doesn't even match the plans they are requesting approval on. The ZBA must deny this request and the developer must be held accountable.

Nicholas Spinosa (40 Hamilton St, Medford) grew up in Somerville. He feels this project is a positive one. He is pleased with the details of the building and thinks the revisions should be approved.

Alan Moore (23 Cherry St) requests that the Board deny this request. Developments have to be built as planned and the rules have to be enforced.

Councilor Ballantyne noted that the project was originally 11 bedrooms in 4 units, now 10 bedrooms in 4 units. She disagrees that the proposed changes are more compatible with the neighborhood than the original proposal. False windows are not compatible with neighborhood. Concerned that basement storage be turned into bedrooms; requests that condition be added stating that a maximum of 2 bedrooms are permitted in the basement and that the 4 storage rooms cannot be used as bedrooms. She said many councilors are working with ISD to better manage permitting, oversight, and enforcement of conditions. She understands the public's concerns about the process and agrees that it's not ideal.

Chair Fontano closed the public comment portion of the hearing.

Chair Fontano asked staff what happens if the Board denies the request. Ms. Leis explained that if the request is denied tonight, the applicant will be required to build according to the original plans. If they do not, it is likely they will incur fines by ISD.

Mr. Safdie asked staff to speak to Councilor Ballantyne's comments on the potential change in the number of bedrooms and how that might affect parking. Ms. Leis explained that in the original approval, the applicant was required to provide 8 parking spaces, but was only proposing to provide 6 spaces. The Board granted relief of 2 parking spaces. The bedroom count has gone down, so the applicant would be requesting less relief than was originally granted. ISD will perform an inspection to verify the number of bedrooms.

Mr. Safdie said he understands and sympathizes with the broader concerns of the public, and thinks that it would be inappropriate for the Board to consider any monetary cost of their decision. The applicant, whether after the fact or not, started by asking if the changes are de minimis, then brought it back to the Board for approval. It shouldn't matter to the Board if the work has already been done or if the changes are just on paper. The applicant has been building at risk, but it is important to understand that what is happening is within the parameters of the system that has been set up.

Clerk Evans said the Board cannot act with prejudice about what he's done at other developments. Thinks the new design is better than what was originally proposed, and would have approved it if it had come before Board without being constructed. The false windows are not noticeable; the Board has occasionally approved them before and thinks they are reasonable in some situations.

Mr. Rizkallah said one neighbor was not able to speak, but he would have agreed with Clerk Evans. Feels that the project was caught in a massive time warp because of Covid-19; he has reached out to all City departments and hasn't gotten responses for months at a time.

Clerk Evans asked whether Board has purview over basement and parking. Ms. Leis said this special permit was granted under the old ordinance so the considerations from the old ordinance are relevant.

Chair Fontano asked for clarification on the window wells in the basement.

Mr. Rizkallah said the basement storage units have non-code compliant window wells, but they already existed within the wall structure, so it made sense to open them up again. He said once the Certificate of Occupancy is for the building nothing should prevent him from adding bedrooms to the basement.

Ms. Brockelman said she was frustrated with the process; she's not impressed with the design and thinks it's very different from what originally approved. She feels like there's nothing they can do, as it doesn't feel right to require that the applicant rip up everything that's been built and install clapboard and siding. She feels like they don't legally have the means to make as strong a comment as they wish to so she's doing it verbally instead. She understands that things happen during construction, but nothing prevents an applicant from requesting approval prior to making changes. The changes are pronounced even to an untrained eye. She would like to abstain from the vote, as she cannot avoid being influenced by the developer's history.

There was much discussion regarding the applicant's history in Somerville. Mr. Rizkallah said that staff was unresponsive and when the Board asked why he didn't contact his Ward Councilor for help he said he hadn't thought to do that.

Ms. Severino said she can identify with not getting answers back from the City; Covid has hampered many areas of communication. She said if the applicant had asked for approval rather than forgiveness it would've been granted; thinks the project looks great but wishes that he had followed protocol for making changes. It feels almost foolish to go back to original design.

Chair Fontano noted that this developer has bad reputation in the past, but has done several projects in Somerville and has been very generous.

Mr. Safdie said he doesn't approve of all requested changes.

Councilor Ballantyne said she was surprised that Mr. Rizkallah didn't reach out to her; developers often reach out when they have difficulty reaching staff, especially during this time. She said Mr. Rizkallah has reached out to her on other issues in the past so she was surprised that this went so far without her knowing about it. She said that the staff memo includes findings regarding site & area compatibility; she understands it's very subjective, but since it was used as a rationale and argument for changes by Mr. Rizkallah, she felt that it was relevant to comment on it. There has been a tremendous amount of discussion about 4 unrelated adults in Ward 7 due to Tufts' rising enrollment and students living in the neighborhood, so bedroom count is always a concern in this area; she doesn't want other rooms to be converted to bedrooms, so still requests a condition regarding basement bedroom count.

Mr. Rizkallah said the finding standard is not the Board's aesthetic preference, it's whether it is more detrimental, and he hasn't heard the Board say that the changes are more detrimental.

Chair Fontano asked the Board if they want to see anything altered. Mr. Safdie objected to the blank wall on right side of the Hamilton St façade; the other facades are much more balanced, and he wants to see windows added to the last bay on that façade which match the rest of the windows. He is willing to approve the revision with a condition that windows be added there like in every other bay. He doesn't care about the interior layout of the space, but does care about the public realm. He doesn't want faux windows on first floor, but is fine with them on second floor.

Clerk Evans said if they were reviewing this request and nothing had been built, they would require windows on that right bay. Mr. Rizkallah said he is willing to add a window there but feels like it doesn't need it.

The Board decided to remove condition #2 from the staff memo and add a new condition requiring that new operable windows be installed on the right side of the Hamilton St façade; the location of the kitchen may change to accommodate windows but must be approved by staff.

The Board discussed whether a condition should be put in place regarding the number of bedrooms in the basement. The Board ultimately decided against imposing a condition regarding bedroom count.

Following a motion by Clerk Evans, seconded by Ms. Severino, the Board voted unanimously (4-0-1) to approve the revision as conditioned, with Ms. Brockelman abstaining.

RESULT:

APPROVED WITH CONDITIONS