



City of Somerville

# **ZONING BOARD OF APPEALS**

City Hall 3<sup>rd</sup> Floor, 93 Highland Avenue, Somerville MA 02143

**TO:** Zoning Board of Appeals  
**FROM:** Planning, Preservation, & Zoning (PPZ) Staff  
**SUBJECT:** 620 Broadway, P&Z 23-055  
**POSTED:** October 27, 2023

**RECOMMENDATION:** Uphold ISD's Decision (Administrative Appeal)  
Determine Variance Equitably Tolled

Staff memos are used to communicate background information, analysis, responses to public comments, review of statutory requirements and other information from the PPZ staff to the Review Board members.

This memo summarizes the administrative appeal submitted for 620 Broadway and provides analysis or feedback as necessary. The application was deemed complete on August 29, 2023, and is scheduled for a public hearing on October 4, 2023. Any Staff recommended findings, conditions, and decisions in this memo are based on the information available to date prior to any public comment at the scheduled public hearing.

## **LEGAL NOTICE**

620 Broadway, LLC seeks an administrative appeal of the Building Official's determination that the dimensional Variance for the subject property (P&Z 21-140) has not been exercised, and/or a determination that said Variance is equitably tolled and is in full force and effect.

## **SUMMARY OF APPLICATION, GROUNDS FOR APPEAL/REQUEST**

This application consists of both an administrative appeal and a request for a determination from the Zoning Board of Appeals (hereafter referred to as the "ZBA"). In the administrative appeal, 620 Broadway, LLC (hereafter referred to as the "Applicant") is challenging the Building Official's determination that Variance # P&Z 21-140 has not been exercised. The Applicant contends that the Variance has been exercised.

In the request for a determination, the Applicant is requesting that the Zoning Board of Appeals determine that, due to the ongoing action to receive all required permits for the property, the Variance is equitably tolled, and is in full force and effect.

Approval of the administrative appeal or a positive determination that the Variance has been equitably tolled would mean that Variance # P&Z 21-140 remains valid for the property, and the Applicant would not be required to apply for and receive a new Variance prior to seeking a Building Permit.

## BACKGROUND

An Administrative Appeal is a petition to rectify a failure to act, denial of a permit, decision made, or enforcement action taken by the Building Official or Director of Planning, Preservation & Zoning in an administrative development review case when an alleged error or misinterpretation has been made in the enforcement or application of the provisions of this Ordinance. The Zoning Board of Appeals is the decision-making authority for all administrative appeals. A concurring vote of four (4) members of the board is necessary to reverse the decision of the Building Official.

### **Subject Property and History**

620 Broadway is located in the 0.25mi Transit Area in the Commercial Core 5 (CC-5) zoning district in the Magoun Square neighborhood represented by Ward 5 Councilor Beatriz Gomez-Mouakad.

The Applicant is currently pursuing permits to develop a new, one (1)-story building for Cannabis Retail Sales use. New construction of a principal building in the CC-5 zoning district requires Site Plan Approval from the Planning Board. Cannabis Retail Sales uses in the CC-5 zoning district requires a Special Permit from the Planning Board.

On December 15, 2021, the Applicant received a Variance from the minimum number of stories in the Commercial Core 5 (CC-5) district. On December 15, 2022, the Applicant received an extension for the approved Variance.

Briefly, a general activity timeline for the project at 620 Broadway, including all related applications, is as follows:

<b>November 19, 2021</b>	620 Broadway, LLC submits a Variance application for relief from the minimum number of stories required in the CC-5 zoning district.
<b>December 15, 2021</b>	ZBA renders decision of Conditional Approval for the Variance.
<b>January-July 2022</b>	620 Broadway, LLC completes pre-application steps – including pre-submittal meeting, neighborhood meetings, and design review – for a Site Plan Approval/Special Permit application (under Planning Board jurisdiction).
<b>October 27, 2022</b>	620 Broadway, LLC submits a request to extend the Variance.
<b>December 14, 2022</b>	ZBA renders decision of Approval for the Variance extension. The new expiration date of the Variance is June 15, 2023.

**January 5, 2023**

620 Broadway, LLC submits a complete application for Site Plan Approval and a use Special Permit for Cannabis Retail Sales with the Planning Board (P&Z 21-145).

**March 15, 2023 – present**

Application P&Z 21-145 is in Public Hearing at the Planning Board for the aforementioned Site Plan Approval and use Special Permit.

620 Broadway, LLC continues to respond to the Planning Board's questions and provide additional information related to the application.

The Planning Board has not yet rendered a decision for P&Z 21-145; the application for Site Plan Approval and a use Special Permit is still under consideration.

**May 2023**

620 Broadway, LLC expresses the intent to file a second extension application for Hardship Variance # P&Z 21-140 and begins application process. City Staff inform the Applicant that only one extension of a Variance is permitted under state law.

**July 25, 2023**

620 Broadway, LLC files a request with the Inspectional Services Department for a determination that (1) the Variance P&Z 21-140 has been exercised and/or equitably tolled, and is in full force and effect, and (2) that the ZBA has the authority to grant a further extension of this Variance. (This full request can be seen on pages 9-14 of the application.)

**August 10, 2023**

ISD issues a formal interpretation regarding the aforementioned request. The interpretation includes the following information:

1. A second extension of the Variance is not permitted.
2. The Variance has not been exercised.
3. ISD cannot determine whether the Variance has been equitably tolled, as such a determination is within the authority of the ZBA.

(This interpretation can be seen on pages 47-50 of the application.)

**August 29, 2023**

620 Broadway, LLC files this application for an administrative appeal of the Building Official's

determination that the Variance for the subject has not been exercised, and/or a determination that said Variance is equitably tolled.

### **Information Provided in the Application**

The application was provided as a single, complete PDF file. The key documents/information are shown on the following pages:

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|--|--------------------|
| • <b>Application Narrative</b>             | <b>Pages 1-8</b>   |
| • Interpretation Request to ISD            |                    |
| ○ Request Narrative                        | Pages 9-14         |
| ○ Supporting documents                     | Pages 15-44        |
| • <b>ISD Interpretation</b>                | <b>Pages 45-50</b> |
| • Newspaper article related to application | Pages 51-54        |
| • Appendix: Cited case law                 | Pages 55-104       |

### **ANALYSIS**

Two matters are before the ZBA within this application:

1. To approve or deny the application for an administrative appeal, which would, respectively, uphold or overturn the Building Official's interpretation that the Variance has not been exercised.
2. To determine whether the Variance has or has not been equitably tolled.

Each of these matters is addressed in this section individually. Please note that the interpretation issued by ISD was completed in consultation with the Somerville Law Department.

### **Administrative Appeal**

Pages 2-3 of ISD's interpretation (pages 49-50 in the Application materials) includes ISD's argument that the Variance has not been exercised, and cites case law, including *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009). ISD argues that the Variance has not yet been exercised because the Applicant has neither obtained a building permit or conveyed a lot in reliance on the variance, and has only applied for additional relief (a Special Permit for Cannabis Retail Sales) and Site Plan Approval, neither of which confer the right to use the Variance on the Applicant. Additionally, while the Applicant has noted that they have engaged various specialists to prepare the application materials for the Site Plan Approval and Special Permit under the Variance, ISD argues that the Courts have, to date, only considered these actions as exercise of a use variance, whereas the Variance in question is a dimensional variance.

In the submitted narrative, the Applicant contends that the Building Official's interpretation is incorrect, and that the Variance has been exercised. The Applicant argues that ISD erroneously applied the Exercise Test by considering a strict interpretation of case law, rather than applying case law in the context of the type of Variance and additional permits and due diligence required for the project. The

Applicant argues that the Exercise Test “is particular to each case in that the “exercise” of a variance, like the Hardship Variance, relates explicitly to the “purpose for which” the Hardship Variance was granted, and whether there has been “reliance upon” the Hardship Variance by the Applicant.”

The Applicant states that ISD did not evaluate the specific purpose of the Variance when applying the Exercise Test. They review related case law and argue that an appropriate application of the Exercise Test would have considered whether the Applicant undertook any action relative to the dimensional variance, and that seeking other municipal approvals for the same project (such as Site Plan Approval and a Special Permit for the use) and engaging professionals or otherwise “taking on debt or obligations” qualify as actions that exercise the dimensional Variance.

PPZ Staff recommend that the ZBA upholds ISD’s decision (interpretation) that the Variance has not been exercised and denies the Administrative Appeal. ISD’s decision was issued in consultation with the Law Department, and PPZ Staff support the reasoning stated in the interpretation. ISD notes that the *Cornell* case established that the pursuit of other preliminary permits and approvals (such as Site Plan Approvals or Special Permits) and engaging professionals to conduct work for those preliminary permits are not sufficient to exercise a dimensional variance, and that the Courts have only considered those actions sufficient to exercise a use variance. Regardless of action on preliminary permits or approvals, because the Applicant did not obtain a building permit or convey the lot in reliance of the variance, they did not exercise the rights of the dimensional Variance.

#### **Determination Whether Variance is Equitably Tolled**

ISD’s interpretation does not provide an opinion on whether the Variance is equitably tolled, and thus has not lapsed but remains in full force and effect (active). ISD states that such a determination is not within their authority but is within the authority of the ZBA, and that the question should be posed to the ZBA rather than ISD. The interpretation (page 3) references *Hadley v. Casper*, 2002 Mass. Super. Lexis 299, at \*10, quoting *Hunters Brook Realty Corp v. Zoning Bd. Of Appeals*, 14 Mass. App. Ct. 76, 79 n.6 (1982), and states that equitable tolling is a discretionary decision that is the responsibility of the ZBA alone.

Equitable tolling is a judicial or quasi-judicial entity’s (such as a Zoning Board of Appeals) ability, under certain circumstances, to extend a deadline, provided when an applicant was prevented from complying with the deadline despite good faith and legitimate efforts to do so.

It is PPZ Staff’s opinion that circumstances beyond the Applicant’s reasonable control have prevented them from exercising the Variance, and that the ZBA should determine that the Variance is equitably tolled. The Applicant has made reasonable efforts to complete the Site Plan Approval and Special Permit processes and provide additional information for Planning Board and staff consideration. Additional time beyond what may have been reasonably anticipated has been required to complete these processes,

the required preliminary permits have not been issued (or denied). The Applicant has sought the necessary extension of the Variance and has been unable to obtain a building permit due to legitimate delays in obtaining all other permits and approvals that are required prior to a building permit. In a 2010 Massachusetts Lawyers Journal article by Thomas Bhisitkul<sup>1</sup> (provided in additional documents), Bhisitkul describes how the Court establishes these procedures for relief in *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009).

If the ZBA determines that the Variance is equitably tolled, PPZ Staff recommend the ZBA determine the toll time limit, establishing the period of time for which the Variance continues to be equitably tolled and when the Variance will expire. When determining the time limit, the ZBA should consider the actual period of delay incurred by the Applicant. A tolling period of six (6) months would set the Variance to expire on December 15, 2023. A tolling period of twelve (12) months would set the Variance to expire on June 15, 2023.

## CONSIDERATIONS & FINDINGS

M.G.L. ch.40A, Section 15 states that, when making its decision, the Zoning Board of Appeals (ZBA) should clearly set forth the reason for its decision and of its official actions. Whether the ZBA votes to uphold or overturn the Building Official's interpretation that the Variance has not been exercised, the ZBA should clearly state its reasoning within any motion. The ZBA should consider the facts of the case and legal arguments made by the Applicant and ISD in their respective interpretations.

In the same manner, whether the ZBA votes to determine the Variance has or has not been equitably tolled, the ZBA should clearly state its reasoning within any motion. The ZBA should consider the facts of the case and legal arguments made by the Applicant. The ZBA should note that ISD has not made an official interpretation regarding whether the Variance is equitably tolled, and stated in their interpretation that such a determination should be issued by the ZBA.

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<sup>1</sup> Bhisitkul, T. (2010). Developers get guidance on variance lapses. *Massachusetts Law Journal*, April 2010, 17. [https://www.hinckleyallen.com/wp-content/uploads/2011/12/Bhisitkul\\_mlj\\_april2010v2-1.pdf](https://www.hinckleyallen.com/wp-content/uploads/2011/12/Bhisitkul_mlj_april2010v2-1.pdf)